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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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CONSENT AND PAID SEX

By Aastha Jain
From Gauhati University (Dhubri Law College)

Amongst the criminal set, one of the rising dangers in this arena is the concern related to paid sex. Paid sex which is also known as prostitution has gained importance in the last few decades having approximately 42 million engaged in its cobweb. It has extended its arms not only to the paid ones but also to the extent of forced sex. When sex is freely offered by one and the same is accepted by other against some monetary consideration, it gives rise to prostitution. Prostitution is now also recognized in the eyes of law. But as soon as the consent for having sex is obtained by a person through the manner of force or say it is not free at the end of another, such forced action paramount to sex without free consent, i.e. rape. Here, the question arises is what is sex? Sex means any kind of sexual activity or any kind of sexual intercourse in which two persons or animals are engaged with their stimulated reproductive organs in order to satisfy their needs of pleasure.

However, when any such kind of sexual activity/ intercourse is undertaken in exchange of some payment, it gets wrapped in the plastic game of so called prostitution. It is not incorrect to name the business of prostitution as a plastic game because just like plastic, the prostitution is constantly degrading the human societal status and making it no less than difficult to stop such crime. In like manner to that of plastic, the business of prostitution is highly increasing polluting the human environment as well as humanity. Often referred to as one of the oldest profession, around 42 million people are engaged in prostitution directly or indirectly generating revenue of over $100 billion. However, there is a streamlined difference between prostitution and forced sex (sexual harassment, adultery, rape) and the thin line that separated the former and latter is consent. Now, the question arises is: what is consent? In literal terms, consent means permission for something to happen or agreement to do something. Consent, although not defined anywhere in the Indian Penal Code, section 90 states the circumstances when consent is not free. The cases when consent is not said to be free is when it is given by a person under fear of injury, misconception of fact, by a child under 12 years of age, person of unsound mind or by an intoxicated person. Precisely, it can be said that consent is free when the permission is given by person without any fear, of a legal age having appropriate thinking and acting capacity and when he/she is in natural state of mind. This portrays a crystal clear image that when the consent is not free, sex business cannot be a legal which amounts to be sexual harassment, voyeurism or rape.

Sexual harassment is a situation where one person forcefully attempts to make physical contact, favors for it, shows pornography against the concern of the person or makes

1 Wikipedia data
2 wiki dictionary
3 Indian penal code, 1860
4 Fraud and misrepresentation
5 As per rules of different countries
6 Not idiot or lunatic
7 Not intoxicated, drugs, alcohol or any such
8 Legality varies as per countries
9 Section 354, IPC

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any kind of sexual colored remarks. Pornography (often abbreviated porn) is the portrayal of sexual subject matter for the exclusive purpose of sexual arousal. 10 it is the visual representation or presentation of process of sex through cyber means which includes various videos and photographs as well. The offence of Sexual harassment is punishable under law with or without fine.

Another prominent discussion which should not be left untouched in the matter of sex without consent is voyeurism11. Voyeurism is a state of gaining happiness or deriving pleasure simply by seeing a scene of any kind of sexual activity. It means a situation where a person enjoys, watches or captures the image of another person engaged in any private act, the former is said to have committed an offence. The circulation of such images or any records also comes under severe crime and is punishable under law on first conviction. Here, private act includes “an act which is taking place in an area which is considered to be private and where victims’ genitals are exposed or covered only with not so sufficient clothing materials for a public appearance.”

The most dreading and alarming danger of present not-so-civilized world of inhumanity is rape12. The fear of the word ‘rape’ is enough to tear one’s soul apart. Rape includes any inhuman act by a person against another. It includes Penetration of a man’s sexual organ (penis) into a woman’s mouth, vagina, urethra or anus or making her do so with him or someone else or inserting any object, not the penis, into a woman’s vagina, urethra or anus or making

10 wikipedia
11 Section 354-c, IPC
12 Section 375, IPC
13 Punishment for rape- Section 376, IPC

The whole plot gets twisted when consent is given to have sexual pleasure in exchange of money and gets packed in the name of prostitution. As described earlier, prostitution is a give and take business relationship, legal in some countries and illegal in few others. Prostitution is an
activity where sex is freely offered by one person, accepted by another in lieu of some consideration giving rise to an agreement, An agreement not enforceable by law, but by lust. The person working in the field of prostitution is often referred to as prostitute, sex worker, harlot or whore. Prostitution and its akin pornography, sexual misleading is all part of one of the oldest and ever growing industry, the sex industry.

However prostitution is also associated with some common problems such as trafficking of minors, tax evasion and the wages of societal economic conditions along with health issues arising from it. When in some countries prostitution is considered to be an illegal activity, where in some boundaries it is still considered to be a legal one. But its legality varies according to the work. The prostitutes are considered to be legal whereas the clients who are availing this offer are considered to be illegal. It can be clearly mentioned about European countries, namely Netherlands, Germany, Austria, Switzerland, Greece, Turkey, Hungry where the business of prostitution is considered to be legal and regulated.

Prostitution is considered to be one of the oldest and fastest growing businesses in the world where more than millions of people are getting engaged in it despite of all the Oceans and rules prohibiting it. The reasons of thriving of this business can be sorted out in various reasons which include immigration, human trafficking, child trafficking, survival sex, violence and others. Among these, one of the infamous reasons for prostitution is the survival sex where one people get involved in the business of sex just to earn his or her living wage or sustain his or her daily livelihood. It is simply a form of aiding the survival needs, countering the problem of unemployment through the societal virus which after sometimes get turned into a cancer for the whole world of humanity and also for the person itself engaged in it. Human trafficking is defined as an action or practice of illegally transferring a person from one country to another or within the same political boundaries of selling them for the purpose of forced labor or commercial sexual exploitation. It is considered to be one of the foremost reasons of prostitution. It is the violation of human rights where people are not allowed to leave the place. According to the terms and condition, the forced sex workers cannot exercise their rights and duties and are forced into the work of prostitution or any other filed of legal sexual activities. Paid sex and human trafficking goes in round and round. Prostitution increases human trafficking also aids prostitution. They are proportionally connected to each other.

Apart from all these, various social and health issues are also associated with the business of paid sex. Prostitution, one of the most disrespected and evil job is not accepted by the society in any end. The paid sex workers are not able to enjoy equal societal status as well as the needed freedom. They are seen as a curse to the society and one of the only reasons of crippling the society. Sexually transmitted diseases and various other diseases like bacterial infections, candidiasis, chancroid, skin lesions, vaginal bleeding are some of
the common diseases which infects the paid workers as well as the customers. Unwanted pregnancies and the children born out of such are the worst sufferers of this scenario. The children born out of prostitution are in a way or other pushed into this disrespectful business.

It has become very essential to educate people about sex and forced sex, paid sex, rape, and pornography and clarify the clear cut distinction between them. Special Education to children and adequate information to the immigrants and all others can successfully prove to be a helping hand in combating the growing and unstoppable problem of prostitution. Another important and most effective means to stop and prevent the problem of paid sex is the involvement of social groups i.e. NGOs. These organizations can successfully come up with their innovative ideas in order to bringing out the people indulged in the cobweb of this prostitution. Government should come forward with strict rules and legislation in order to gain control over it and prevent from spreading it further. Creating mass employment opportunities for the youth shall help the people to drift away from such immoral activity as most of the people indulge in the business of prostitution for earning their basic livelihood. In addition to it, a woman who is indulged in the business of prostitution for a longer period of time finds it difficult to come out of it. Hence, there should be proper arrangement for her rehab through rehabilitations centers. Guidance and psychological consultation may also form an important part of measure of dealing with prostitution.

Considering all the above facts, the burning conclusion arises is that having bundles of defects and problems associated with it, is prostitution is still needed? Is there still a need for the developed countries to accept its legality? Bringing the workers offering such duty as well as the ones availing this are brought down to the lowest rank, is prostitution is still the need of hour? The straight answer is no. This evil, not only destroys a person or two, but slowly it shall the digest all the cells of this society. Strict laws are needed to be framed as a protection against prostitution, rape, pornographies, to differentiate between consent and force.
CHILD MARRIAGE: A VIOLATION OF RIGHTS

By Akanksha Dash and Ananya Sharma
From National Law University Odisha

ABSTRACT

Child marriage is considered to be a violation of human rights because of its negative repercussions on the parties getting married and especially the girl child involved. Marriage at a young age fetters her activities and ambitions. A girl is subjected to non-consensual physical intercourse which can have negative impacts on her physically, mentally, and emotionally. To top it, sexual intercourse at young age also leads to a number of complications in pregnancy. Such young brides are even deprived of proper medical or health services which also have led to higher infant mortality rates. Marriage at a young age also shatters the desire of a girl to seek education and vests on her young husband the responsibilities to support their family. By way of this paper we will discuss the major cause and repercussions of child marriage on young children. We’ll also list the rights infringed and analyse legislations related to the mal practice. Through this paper we will aim to highlight the various rights the young children are entitled to but do not get as a result of marriage.

INTRODUCTION

Preponderance of child marriage in India and other African as well as other Middle East Countries like Nigeria, Yemen, Chad and Kenya has been able to draw attention of various International Human Rights organizations because of its negative impact on a child’s rights. Over 60 million women worldwide have been made victim of child marriage. Being recognized as a human rights violation, this practice has somewhat deceased globally over the past few years. Despite the global decline, it remains ubiquitous in South Asia. Prevalence data from the prior decade indicate that approximately 30-70% of married young women in South Asian nations (i.e., Bangladesh, Nepal, India and Pakistan) are married prior to age 18 years. This practice hampers the growth of a part of the younger generation, lowering the national development. It results in increase in poor maternal and infant health, lack of educational and sexual exploitation, unemployment and other issues. As of now, United Nations (UN) prioritizes issue of maternal health, infant mortality and women empowerment. They are included in the UN Millennium Development Goals. It is essential to remove child marriage to reduce the maternal health issues and infant health, especially within South Asia where these rates are high. Apart from medical issues, child marriage is a blatant violation of basic rights of a child. UN has tried to incorporate the illegality of this practice through conventions, some of which India has adopted through legislation. But, the implementation and effectiveness of the legislation remains a concern.

1. MAJOR REASONS

This rigidness and loyalty towards the practice can be owed to certain factors which broadly include the inherent patriarchal system, poor economic conditions, and illiteracy. They are just few of the many reasons of the continuation of this practice.

Also, ‘Child Marriage in Nepal Research Report’18, a testimony by a girl Rita stated her eloping with her lover at age 14 and giving birth at 15. In light of this, the aforementioned report mentioned that a girl child is deprived of any sort of love and affection right from infancy, and when someone, even a stranger, displays any sort of love and affection towards her, she is easily attracted and attached to the said person.

As per the societal norms, marriage is considered to be compulsory; the parents prefer to do away with this responsibility early on to avoid complications later. The said complications are - sexual desire and illicit sexual intercourse; chance of elopement; having a love affair with someone, especially if he is from a different caste; fear of exorbitant dowry later. All of the complications are associated with the presumption that girls are to protect the honor of the family.

In an interview of the residents of a village in Bangladesh, they talked about the fear of use of sorcery to call evil spirits for preventing a girl’s marriage. A resident Salma says, ‘I do not want to marry off my daughter at an early age. I want to give her an education. But I may have to marry her off young for fear that somebody might use sorcery to prevent my daughter’s marriage.’19 As per Demographic and Health Surveys which have provided the country-level data for child marriages, the said practice is most ubiquitous in world’s poorest nations.20 Through this data, it can be inferred that child marriage is directly correlated to poor economic conditions or poverty. It has been found that a girl belonging to the poorest household in Senegal is four times more likely to get married before the legal age.21 In Nigeria, 80% of the poorest girls marry before the age of 18 compared to 22% of the richest girls. Poverty leads to child marriage simply because the parents feel they are lacking in resources to provide for alternatives for their child.22 Another reason is the need to secure the economic future of the girl; the parents realize their lack of ability to provide for decent education so marriage is the only viable option.

2. REPERCUSSIONS OF CHILD MARRIAGE

Child marriage can be inferred as violation of basic human rights as it has adverse effects on a girl child’s health, emotions and

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21 ibid p 9

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mental state. A girl child is affected much more through such marriages as compared to a male child. A girl getting married below the age of 18 to a man much older to her is often subjected to sexual abuse and domestic violence. In this paper, I will be elucidating on the various physical and mental issues a girl faces when she gets married at a tender age.

2.1. **HEALTH ISSUES:**

2.1.1. **MATERNITY HEALTH AND INFANT MORTALITY RATE**

The moment a girl is married off, she faces tremendous pressure from her in-laws to bear them a child. Hence the most important issue among young brides which needs to be addressed is pregnancy at a tender age when their bodies are not ready to take the strain and pregnancy with fewer intervals. Hence early marriage is associated with early child bearing and this early child bearing leads to increased infant mortality rate. As per the WHO report of 29 countries, it was found that girls getting pregnant in the age of 16 or less were exposed to greater risks of caesarean delivery, eclampsia where the mother can get cardiac arrest or cerebral damage during delivery and various kinds of infections. A prominent infection among such young mothers is obstetrics Fistula where the woman faces involuntary urine and feces leakage.

Since they have little or no knowledge of maternal health, these young mothers are forced to give birth in unhygienic conditions. These lead to delivery complications, low infant birth weight, increased maternal and infant mortality rate and also malnutrition among the new born kids. It is extremely important that an adolescent gets proper food and nourishment during his/her growing years. But this is not the case of adolescent brides who are on the contrary deprived of proper care and nourishment and it has been observed that every other girl getting married and bearing child at such tender age suffered from anemia and low BMI. Moreover through a comparative study between pregnant and non-pregnant girls of the same age group in Bangladesh, it has been observed that pregnancy and lactation restricts the linear growth of the girl, leads to weight loss and reduction of essential fats as well as nutrients from the body.

2.1.2. **RISK OF SEXUALLY TRANSMITTED DISEASES**

Early pregnancy among adolescent brides is a result of forced sexual intercourse by their spouses and lack of usage of contraceptives. To add on to the sufferings, indulgence in sexual activity at a very young age, exposes the girl child to Sexually Transmitted Diseases like HIV/AIDS. Needless to say that adolescent bride are often subjected to violence and


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sexual abuse by their partners which adversely affects their health giving rise to chronic pain, internal injury and other reproductive health issues. In fact it was only a couple of months back that sexual intercourse with a minor wife was criminalized. Earlier our IPC had an exception in section 375 which explicitly stated that sexual intercourse with a minor wife of not less than 15 years would not make the spouse liable. It is often reported that such young brides when get pregnant, they are deprived of basic medical facilities and their delivery takes place under unhygienic conditions which sometimes also results in the death of the mother. Thus it can be inferred that early marriage and pregnancy leads to maternal and infant mortality. In a lot of cases, it has also been observed that such adolescent brides are treated as slaves who are there only to serve the groom and his family.

Taking a stand on the rights of such women, we can argue that child marriage is the violation of basic human rights owing to the amount of cruelty these young brides are subjected to. Unavailability of basic medical facilities leads to violation of fundamental rights as enshrined in Constitution of India.

2.2. EMOTIONAL, MENTAL BURDEN AND EDUCATION:
These young brides face traumatizing experiences at such a tender age which later may lead to serious mental issues including isolation and depression. They are compelled to sacrifice their own happiness and desires for the sake of their husbands and in-laws. Their painful experiences cause mental agony. These young brides or grooms are not mental strong or mature enough to understand the responsibilities and duties that comes along with a bond like marriage. The girls are usually made to do the household chores and bear a child, they are not ready for it. The boys are forced to take up the responsibility of a family, he has to take care of his wife and, in some cases, also children. 80% boys who married before the age of 18 admitted that their responsibilities and workload increased.

Too much responsibility especially at a tender age subjects the child to an increased level of stress which also hampers their education. 67% males dropped out of school after marriage to support his new family.

This shows that child marriage hampers with the right to education of both the male and female child. The boy who sets out to earn without completing his education is forced to do menial jobs and may be exploited.

2.3. RIGHT TO SEXUAL CHOICE AND CONSENT:
Young girls are married off at a very young age when they do not have the capacity to question the customs or give consent for the marriage. They are forced to spend the rest of their lives with a man with whom they would not want had their consent been taken into account. It has been seen that girls who marry young are more likely to marry a much older man. In a relationship where the wife is a minor and the husband is a much older man, the wife has no say in the

28 ibid p 35

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marital matters. These older men and even their family members are easily able to dominate the young child who is not physically or mentally mature to protest; neither does she realize the basic rights that she has. This dominance may force her to have sexual intercourse with her husband even when she does not consent to it. Despite the presence of martial rape laws to protect the sexual interest of wives under 18, she is less likely to utilize her right to refuse consent owing to the lack of awareness which she suffers from due to the isolation she faces.

2.4. DOMESTIC VIOLENCE AND RIGHT TO FREE CHOICES:

In a survey where a group of women were asked if they feel beating is justified, 62% of girls married before 15 and 59% married under 18 in India felt it is okay for the husbands to beat their wives if she is unfaithful, her family doesn't give him money, she shows disrespect, she goes out without informing him, for neglecting house and children and also in case she does not cook properly. The same was asserted by 67% of girls married under 15 in Benin and 66% under 18.\(^3\)\(^0\) In the same survey, 70% of Indian girls who were married before 15 admitted to having to seek permission for even talking to outsiders.

The child is dominated and exploited to such an extent that according to her mental state it’s justified for her husband to beat her incase the food cooked by her is unsatisfactory. This state of the mind of young children is nauseating. They are living in a situation where they are deprived of their basic right to live with dignity and they do not even realize the violation. Even though legislations are enacted, they children do not have the knowledge of it. They are oblivious to the fact that they have the right to lead a better life and they can achieve it if they realize and make use of their rights.

3. HOW DOES IT VIOLATE THE RIGHTS?

The above-mentioned adverse effects of child marriage violate the basic rights a child is entitled to by virtue of being a citizen of India and simply a human being. It not only is in contravention to the Constitution of India but also International Conventions that India is a signatory of.

Child marriage is contrary to the Article 16(2) of the Universal Declaration of Human Rights.\(^3\)\(^1\) The article provides for the full consent of the parties to be received which usually is not the case in child marriage. The parties or at least one of the parties is either not matured enough to understand the impact marriage has on the life of an individual, or they are not even consulted about it.

In a case Francis Coralie v. Union Territory of Delhi,\(^3\)\(^2\) the judges gave their interpretation of Article 21.\(^3\)\(^3\) In their interpretation they said “the right to live is inclusive of right to live with human dignity and it goes with the major needs of life that are proper nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse ways.”

\(^3\)\(^1\) Universal Declaration of Human Rights, s 16(2)
\(^3\)\(^2\) 1981 AIR 746
\(^3\)\(^3\) Constitution of India Act 1950, s21
forms, mixing up with fellow human beings. It includes the right to basic necessities also the right to carry on functions and activities as constitute the bare minimum expression of human self.” The children in such a relationship do not live a life of dignity, they are subjected to violence and lack proper nutrition and healthcare. As already stated above\(^3\), these young girls, who are already not mature enough to give birth, are not given adequate pre and post natal care. This gives rise to complications and even leads to medical issues. Along with being a violation of Article 21, it also violates Article 24 of UN Convention on the Rights of the Child\(^4\) which is the right of a child to good health care.

The Article 19 of UNCRC\(^5\) states that children have a right to be protected from all forms of violence. With reference to above\(^6\) it can been seen that, contrary to the said article, the child brides are subjected to violence and domestic abuse.

The Article 34 of UNCRC\(^7\) is for protecting children against sexual exploitation. Previously\(^8\) we have talked about the negligible say of the wife when it comes to sexual intercourse. In a scenario when the girl is a young minor married to a man considerably older and more experienced that she is, the man is easily able to exert dominance on her.

The Article 21A of the Constitution of India\(^9\) and Article 28 of UNCRC\(^10\) are about the right of a child to get education. The child bride and groom both have to give on education after their marriage. It has been seen that most of them drop out of school as education and family life is hard to manage. This has already been discussed above.\(^11\)

Child marriage is in contravention with multiple clauses of Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination.\(^12\) The clauses give the right to choice of spouse, education and medical care. Similarly, it is in contravention with the Article 16 of the International Convention on the Elimination of All Forms of Discrimination against Women.\(^13\) It talks about entering into a marriage with free and full consent and right to choose a spouse. Also 12(2) states that “the betrothal and the marriage of a child have no legal effect” it also calls for necessary registration of marriage and legislation to specify minimum age for marriage.

4. PROHIBITION OF CHILD MARRIAGE ACT 2006
This act was devised in order to put a check on child marriages taking place in various parts of the country and also prohibit their solemnization. This Act is meant to be enforced in all parts of India except for Jammu and Kashmir. The Act consists of the

\(^{3}\) See (n 2) 8
\(^{35}\) UN Convention on the Rights of a Child 1990, s 24
\(^{36}\) UNCRC 1990, s 19
\(^{37}\) See (n 3) 10
\(^{38}\) UNCRC 1990, s 34
\(^{39}\) See (n 2)10

\(^{40}\) Constitution of India Act 1950, s 21A
\(^{41}\) UNCRC 1990, s 28
\(^{42}\) See (n 4) 9
\(^{43}\) International Convention on the Elimination of All Forms of Racial Discrimination 1965, s 5
\(^{44}\) International Convention on the Elimination of All Forms of Discrimination Against Women, s 16

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definition of a child as to which persons can fall under the ambit of this term. It clearly defines child as any male who has not attained the age of twenty one and any female who has not attained the age of eighteen. The Act further mentions that in order for a marriage to be a child marriage it should be solemnized between parties who fall within the ambit of the definition of child i.e below 18 years in case of female and below 21 years in case of child. This provision also mentions about a Child Marriage Prohibiting Officer who is made responsible to curb solemnization of child marriage.

. The clause 3 of the Act is the most important of this Act as it states that any marriage performed before or after the commencement of this Act shall be held voidable only at the option of the party who was a child during solemnization of marriage. The Act then also lays down certain criteria which are essential in order tonullify the marriage solemnized between children which are:

i) The petition for nullifying the marriage should be filed in a District Court only by one of the parties to the marriage.

ii) If the petitioner is a minor when he is willing to file a petition, he can do the same through his guardian or also with the assistance of the Child Marriage Prohibition Act Officer.

iii) The child who is willing to file a petition should file it within two years after attaining the age of majority.

The Act further lays down an unbiased provision which states that after nullity of marriage, the parties to marriage as well as their guardians should return to each other all the valuables including money, ornaments or other gifts which were involved during marriage.

Now the question remains that though an Act to curb Child Marriage has been proposed which proposes all the criteria to nullify child marriage, why is it still prevalent in various parts of the country.

The answer lies in the section 3 of the very Act which clearly states that marriage solemnized between parties who were minors at the time of marriage will be voidable that to only at the option of the party. Thus it can be deduced that child marriage remains valid unless a petition is filed from one of the parties of the marriage. This can be said to be a flaw in the Act. In order to deter the evil practice of child marriage, it is important that stringent laws be devised which declared such marriages void ab initio that is from the very beginning. Moreover a girl child forcefully tied in such marriage is reluctant in filing a petition to get rid of such marriages because of the fact that the society ostracizes and looks down upon such women.

Now, moving on to the other provisions of the Act, Section 9 talks of punishment for males who have attained the age of majority and engage in a marriage with a minor girl. This provision was laid down to put a check on marriages of young girls to much older men who are in a position to dominate them physically and mentally. The punishment includes rigorous imprisonment which may extend up to 2 years or fine which may go upto a lakh of rupees.

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45 Prohibition of Child Marriage Act 2006, s3

46 Prohibition of Child Marriage Act 2006, s9
The Act also makes people who assist, perform or abet the solemnization of child marriages liable with punishment of rigorous imprisonment upto 2 years or fine that may go upto a lakh rupees unless the person is able to prove his innocence that he solemnized in good faith believing the parties to be majors.

Though child marriage is voidable as per this act, there are certain criteria which declare such marriages void like:47

i) If the child is kept out of the lawful guardianship of the guardian and then married off.

ii) If the child is tricked or deluded into a marriage, or is compelled to marry and

iii) If the child is made to marry for the purpose of trafficking or selling or other immoral purposes.

Though Government has devised policies to curb social evils like child marriage, we see that it has not been well implemented on the land because of stubborn mindset of people and also lousy services on the part of the Government. The Government need to come up with a more stringent law which shall leave no scope for continuation of such marriages.

5. CONCLUSION

This project has helped us get an insight into the major problems faced by both the parties especially girls who are involved in Child Marriage. It was also important to realize and analyse the reasons which still favoured marriages at such young ages. The reasons include socio economic factors where the girl treated as a burden and the family in order to get rid of the responsibilities of the
girl marries her off. Child marriages usually turn out to be disastrous for a girl child because she is exposed to sexual intercourse at a tender age when her body is not mature enough to handle the complications which may arise from the same. Needless to say that when young girls get married, they are pressurized to bear kids which can have adverse effects on her health conditions giving rise to various delivery complications and undesired infections.

Child marriage is declared as a violation of basic human rights which includes the child’s right to consent and also fundamental rights which include the child’s right to good health with all the necessary health care and the child’s right to education. Further we have analysed the Government initiatives to curb child marriage and whether it has been a fruitful exercise. In the later parts we have also taken into account the various International Conventions that India is signatory of and the different clauses under such conventions which declare child marriage illegal because of violation of basic human rights.

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47 Prohibition of Child Marriage Act 2006, s12
CRIMINAL LIABILITY OF DIRECTORS: AN IMPORTANT FACET FOR THE DEVELOPING INDIA

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ABSTRACT

Company is an artificial person and cannot work on its own. It is the management and the employees who act as an agent and work on behalf of the company. Director are like the heads of the company who take all the major decisions on behalf of the company. They are also in a position that they have various things under their direct control which can be misused easily. Therefore, it is really important to lay down a proper framework to regulate the working of the directors in order to ensure that the position is not abused and they continue to work towards the welfare of the company.

The new Companies Act, 2013 lays down various duties and responsibilities of the directors of the company. The act has made the penalties for violation of these duties and responsibilities more stringent as compared to the old Companies Act, 1956. The Companies Act contains various provisions that put liability on the director such as the duty to disclose true and correct statements in prospectus, duty to file annual returns of the company, duty to maintain the financial books in the prescribed for, etc. There are provisions that lay down liabilities on the director in other statues also such as Income Tax Act, Negotiable Instruments Act, etc.

It is important to note that a director cannot be held liable only by the virtue of his position. It is necessary to for the director complained against to be the the officer in-charge i.e. he should be the person actually in charge of the affairs of the company and of its day to day functioning, at the time of commitment of the offence. Also, it is not necessary condition that in order to bring any charge against the directors, the company also has to be prosecuted or impeded as a party to the case.

With the increasing modernization and economic growth, India has become home to numerous foreign companies. This has made it even more important for India to take the necessary steps to make sure that the director fulfills his duties and responsibilities and works towards the benefit of the company. Therefore, it the duty of the legislation and the judiciary to ensure that appropriate provisions are set in place and that these provisions are strictly followed by the directors.

INTRODUCTION

The role of a director in a company is very significant. He is the one who has the responsibility to ensure that the business is carried out smoothly also he has the obligations of managing the routine work which the company performs. Appointment of directors are done by the shareholders and hence, owe a fiduciary duty towards them. This makes the directors open to liabilities whether Civil, requiring the director to compensate the victim or Criminal liability resulting in fines and imprisonment.

Like other jurisdictions, India is also accustomed to corporate frauds and scams. Whether it is the Satyam, NSEL or Lilliput, plentiful management or promoters driven
frauds have been exposed in India. Concern regarding the liability of directors became a question of debate after the arrests of Stefan Schlipf, the Managing Director of BMW India Financial Services and William Pickney, managing director and chief executive officer of Amway India, along with other two directors.\footnote{Resolution of Corporate Disputes Non-Compliances and Remedies, The Institute of Company Secretary of India, https://www.icsi.edu/media/webmodules/FINAL_RESOLUTION_OF_CORPORATE_DISPUTES_BOOK.pdf}

This increasing concern has led to people becoming more aware and realizing the importance of making a director personally liable. The global issue of corruption and the ever increasing risk of fraud within the company raise serious concern with respect to liability of directors. Therefore, the Companies Act, 2013\footnote{Companies Act, 2013} expressly lays down liabilities which put some amount of restrictions as well as lays down duties of the director, such as exercise of due and reasonable care, skill, diligence, etc., omission of which makes the director liable. The penalties that were insignificant under the 1956 Companies have been amplified under the new Act. Therefore, the new Companies Act by imposing stricter punishments on directors for there wrongful acts.

Three important propositions can be inferred from the Companies Act with respect to the duties and the responsibilities of the directors. They are:

1) A director is not expected to exhibit, during the performance of his duties, a greater degree of skill than may be reasonably expected from a person of his knowledge and experience.

2) Director is not duty bound to continuously look over the affairs of his company, his duties being of sporadic nature, it is to be performed periodically at board meetings or committee meetings.

3) With regard to the duties that under reasonable circumstances can be delegated to someone else and same is not prohibited under the Articles of Association, a director is justified in trusting that official to perform such duties honestly, in the absence of any ground for suspicion.

WHO CAN BE HELD RESPONSIBLE?

Under the old 1956 Companies Act, certain key managerial personnel like chief executive officer and chief financial officer could not be made personally liable for their fraudulent conduct as they did not fall under the ambit of the term “officer who is in default”. The new 2013 Act has removed this irregularity and has significantly widened the scope of the term “officer in default” so as to include:

1. Any person, who has the right to manage the whole, or substantially the whole, of the goings-on of the company, under the superintendence, control, and direction of the board of directors;
2. Any person, the board of director is accustomed to work under the advice, direction or instructions of, expect any person who is giving the advice under a professional capacity; and
3. Every director who has the knowledge of the wrongdoing by the way of being a part of the Board of directors and does nothing to stop or object it.

\footnote{Resolution of Corporate Disputes Non-Compliances and Remedies, The Institute of Company Secretary of India, https://www.icsi.edu/media/webmodules/FINAL_RESOLUTION_OF_CORPORATE_DISPUTES_BOOK.pdf}
It is important to understand that no one can not be held responsible merely on the ground of his position in the company. No presumption can be legally made against a person by virtue of the fact that he holds a key managerial position in the company. In order to hold a person liable, it is necessary for that person to fulfil the legal requirements of being a personal who is responsible under law to the company for carrying out its operations, at the time of commitment of the offence.\(^{50}\)

The Supreme Court of India in the cases Nat’l Small Indus. Corp. Ltd. v. Harmeet Singh Paintal & Anr\(^{51}\) and K.K. Ahuja v. V.K. Vora\(^{52}\), has held that a managing director can be held liable for the wrongs committed by the company as is prima facie responsible for the company’s business. But only those officers of the company who fall under the ambit of the meaning of the phrase “officer who is in default” will be covered.\(^{53}\)

**VICARIOUS LIABILITY OF DIRECTORS**

The concept of vicarious liability of the corporate officials has evolved considerably over the past few years. It is worth noting that it has become a general practice to include senior officials as a party to a case against the company. This is done to exert pressure on the company forcing them to settle. But various judicial decisions have held that no complaint can be filed against a person until unless a clear case is spelt out against him.\(^{53}\)

A three judge bench of the Supreme Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation and others,\(^{54}\) laid down that a director can only be charged for an offence if it can be proved that he had an active role in the act, coupled with criminal intention. Another important aspect to hold director liable is that there should be an express statutory provision which makes the director vicariously liable for the wrongs committed by a corporate. The Supreme Court categorically laid down that, "When the company is the offender, vicarious liability of the directors cannot be imputed automatically, in the absence of any statutory provision to that effect." \(^{55}\)

Therefore, in simple words a director can be made vicariously liable only if provision exists in this regard in the statue. Same was reiterated by the Apex Court in the case of Maksud Saiyed v. State of Gujarat &Ors.\(^{56}\) and S.K. Alagh v. State of UP &Ors.\(^{57}\).

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\(^{52}\)K.K. Ahuja v. V.K. Vora, (2009) 10 SCC 48


\(^{54}\)Sunil Bharti Mittal v. Central Bureau of Investigation and others, Criminal Appeal No. 35 of 2015

\(^{55}\)Ibid

\(^{56}\)MaksudSaiyed v. State of Gujrat &Ors, Criminal Appeal No. 1248 of 2007


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In *N.K. Wahi v. Shekhar Singh & Ors.*\(^{58}\), the Apex court further laid down that it has to be clearly and unambiguously proved before the court as to how the director was in actually in-charge and responsible for the conduct of company. It is although not necessary that precise words from the provisions are reproduced and the court has the liberty to interpret it on a case to case basis. But still, in the absence of any specific evidence, the court will not entertain any complaint.

Additionally, some previous division bench judgments of the Apex Court of India such as *J.K Industries Limited and Others v. Chief Inspector of Factories and Boilers and Others*\(^{59}\) and *P.C Agarwala v. Payment of Wages Inspector, M.P and Others*\(^{60}\) have held that, the responsibility for that activities of the company would be deemed to be of the person to is in actual charge of it, in case of vicarious liability under the strict liability statutes.

Another question of debate under the Companies Act, 2013 with respect to director’s liability is whether a director or officer of a company can be prosecuted without arraigning the company itself as an accused and can company and the director be simultaneously prosecuted? Over the period of time, Indian judiciary has had divergent view point on the issue.

Hon’ble Supreme Court in *State of Madras v. CV Parekh*,\(^{61}\) dealt with a similar issue under the Essential Commodities Act, 1955 and held that person in charge can only be held liable only when a wrong is committed by the company and if the company is not prosecuted, the person in charge could not be fastened with any liability. Subsequently, in the case of *Sheoratan Agarwal v. State of Madhya Pradesh*,\(^{62}\) Supreme Court had a contracting view to the earlier decision and held that the company alone or the person in charge alone can be prosecuted alone for the wrongs committed by the company as there is no statutory provision that mandates that no individual can be prosecuted without the company being arraigned as an accused alongside him. Thereafter, in the case of *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.*,\(^{63}\) Supreme Court adjudicated the same issue under the Negotiable Instruments Act, 1881 ruled that it is a necessary condition for person in charge or person responsible for the conduct of its business to be held liable that the company is also prosecuted alongside.

This issue was finally settled by the Competition Commission of India (CCI) in a recent judgment of *Ministry of Agriculture v. Mayhco Monsanto Biotech (India) Limited*,\(^{64}\) in which the CCI dealt with same issue under Section 48 of the Competition Act, 2002. The commission held that a company and person in charge can be simultaneously prosecuted and further, it is

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60P.C Agarwala v. Payment of Wages Inspector, M.P and Others, (2005) 8 SCC 104
61State of Madras v. CV Parekh, (1970) 3 SCC 491
63Aneeta Hada v. Godfather Travel and Tours, (2008) 85 SCL 56
64Ministry of Agriculture v. Mayhco Monsanto Biotech (India) Limited, (2016) 137 SCL 373
not necessary to first record a conviction against the company in order to make the director liable. Also, it laid down that vicarious liability can be put on a person in charge by fiction of law even if he may or may not be directly responsible for the commission of the fraudulent act.

Under Indian Law, there are various provisions that put vicarious liability on directors or key managerial personnel. But in order to protect these key managerial personnel of a company from any kind of malicious prosecution and to protect the interest of the managers, these provisions come with an exception which states that no director shall be held vicariously liable for the acts of the company if he can prove that the given act was committed without his knowledge and negligence and that he exercised due diligence to do everything to prevent the commission of the offence. Therefore, a balance is maintained to make directors liable when they commit an offence and protects them from malicious charges.65

STATUTORY LIABILITIES OF DIRECTORS UNDER COMPANIES ACT
The new Company Act, 2013 lays down various liabilities on the directors which can not be deviated from under any circumstances. The penal provisions under the new act have been made more stringent and provide for higher penalties as compared to the old 1956 Act.66

Directors owe a duty towards the company which is laid under Section 16667 of the new Companies Act. It lays down the fiduciary duties of a director towards his company such as the duty to act in good faith, the duty to act in the best interest of the company, its employees, its shareholders and the community. The Delhi High Court in the case of Rajeev Saumitra v. Neetu Singh68 held that the director was liable to the company for any undue gains made by him by virtue of his position in the company. Section 166(5) expressly prohibits such activities and makes the director liable.

Certain provision under the act imposes only monetary fines on the defaulter whereas some impose an additional provision for imprisonment. Some provisions attract penalties which are over 1 crore and more such as:

a) Section 869 - Violation of provision relating to Not for profit organizations
b) Section 4270 - Violation of provisions relating to subscription of securities on private placement
c) Section 46(5)71 - Issue of duplicate share certificates with an intent to defraud

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67Supra Note No. 2, Section 166


69Supra Note no. 2, Section 8

70Supra Note no. 2, Section 42

71Supra Note no. 2, Section 46(5)
d) Section 74 (3)\textsuperscript{72} - Failure to repay deposits within specified time

e) Section 195 (2) \textsuperscript{73} - Contravention of provisions relating to insider trading

Most of the provisions that lays down the penalty of imprisonment are non-cognizable offences i.e. the person against whom the complaint has been file can not be arrested without an arrest warrant issued by a competent court. But there are certain grave offences that are cognizable in nature and no arrest warrant would be required. Some of these offences are:

1) Section 34 \textsuperscript{74} - Untrue or misleading statements in Prospectus

Every person who authorizes untrue or misleading statements to be published in the prospectus, so as to induce any person to invest in the company in good faith. Such person can be subjected to imprisonment for a minimum period of 6 months which can go up to 10 years.

2) Section 53\textsuperscript{75} - Issue of shares at a discount by a Company

This section bars any company to issue shares at a price lower than the par value i.e. at a discount. If a company violates this provision, it will be liable for a fine which could vary between 1 lakh to 5 Lakh and the person in-charge can be criminally held liable for imprisonment up to 6 months or fine of 1 Lakh to 5 Lakhs.

3) Section 68\textsuperscript{76} - Purchase of its own Shares by the company (Buyback)

The section lays down some rules and regulations that to kept in mind by the company during the process of buying back its own shares. Section 68(11) states the penalty for non-compliance with the section or with the guidelines laid down by SEBI, which is, imprisonment that can go up to 3 months or fine of at least 1 Lakh rupees or both for the person in-charge.

4) Section 71\textsuperscript{77} - Issue of Debentures

This provision lays down regulations to be followed by the company when issuing debentures. As per the provisions of the Companies Act, the company is required to appoint a debenture trustee to look over the rights of debenture holders. In case the company is not able to redeem the debentures when the debentures have matured, the debenture holder or its trustee has a right to file a petition before the Company Law Tribunal, praying for an order to the company asking them to repay the principle amount along with the interest. Petition can also be filed by a debenture trustee in case he has reasons to believe that the company is not in a state to return the principle amount when required, requesting for an order to bar the company from incurring any more liabilities. Failure to comply with such an order by the tribunal would make the person in-charge liable for an imprisonment up to 3 year or a fine of 2 Lakhs to 5 Lakhs or both.

5) Section 92\textsuperscript{78} - Failure to file Annual Returns

Every Company is mandated to file his annual returns before 60 days have elapsed from the date of Annual General Meeting (AGM). This section lays down the format

\textsuperscript{72} Supra Note no. 2, Section 74 (3)
\textsuperscript{73} Supra Note no. 2, Section 195(2)
\textsuperscript{74} Supra Note no. 2, Section 34
\textsuperscript{75} Supra Note no. 2, Section 53
\textsuperscript{76} Supra Note no. 2, Section 68
\textsuperscript{77} Supra Note no. 2, Section 71
\textsuperscript{78} Supra Note no. 2, Section 92
of the report and prescribes all the information that has to be included in it. Failure to file the report or any deviation from the set format will make the company liable for a fine of 50 thousand and will make the officer in default criminal liable in the form of imprisonment up to 6 months or fine of 50 thousand to 5 Lakhs or both.

6) **Section 129**<sup>79</sup> - Preparing of Financial Books in the prescribed form

It mandates the company to prepare it financial statements in the form prescribed which gives a true image of the monetary condition of the company and also ensure that it adheres to the accounting standards present. In case of any violation the MD or the CFO or officer in-charge would be held liable for imprisonment for one year or fine of not less than 50 thousand and which may go up to 5 lakhs or both.

7) **Section 185**<sup>80</sup> - Advancement of Loans to directors by the Company

This section prohibits the company from giving any amount to the director as loan represented by a book debt or to any person for whom the director is the guarantor or any security for any loan of the director, except as provided otherwise in the act. If any director or other person contravenes the section, he shall be criminally liable for imprisonment up to 6 months or a fine of 5 Lakhs which may extend to 25 Lakhs or both.

8) **Section 447**<sup>81</sup> - Fraud

This section put liability on any person of the company who does any act which causes unlawful loss to the shareholders or unlawful gains for himself. Such officer would be liable for fraud and for an imprisonment for the period of 6 months up to 10 years or fine not less than the amount of the fraud, which can go up to 3 times that amount.

9) **Section 449**<sup>82</sup> - Providing false evidence to Authorities

This section lays down the liability for providing false evidence to authorities. If any person provides false evidence in the course of the examination upon oath or in the form of deposition, affidavit or winding up process of the company, then the person can be criminally held liable for imprisonment for at least 3 years up to 10 years or fine which may go up to 10 Lakh rupees.

These are the numerous provisions of the Companies Act, 2013 under which which officer of the company or a director can be criminally held responsible for his wrongful acts. Apart from these provisions, Companies Act, 2013 under section 245, has introduced the concept of “class action suits”. Under this concept, a group of shareholder (minimum 100 shareholders or a percentage as prescribed from time to time) can bring in action against the company and/or the director on behalf of all the affected parties for the wrongful or fraudulent act on their part.<sup>83</sup>

**LIABILITY OF DIRECTORS UNDER OTHER ACTS**

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<sup>79</sup>Supra Note no. 2, Section 129  
<sup>80</sup>Supra Note no. 2, Section 185  
<sup>81</sup>Supra Note no. 2, Section 447  
<sup>82</sup>Supra Note no. 2, Section 449  
• Liability under Income Tax Act, 1961\textsuperscript{84}
  Section 179\textsuperscript{85} lays down that in a situation of winding up of a private company, if the tax assessed cannot be recovered from the company, then each individual who held the position of the director of the company would be severely and jointly liable to pay the tax amount. In the case of *GurudasmHazra v. P.K. Chowdhury*,\textsuperscript{86} the bank account of the director of a private company was frozen in order to recover the tax amount of the company. The court held that the only defense available to the director is to show that the default committed by the company was in no way attributed to an act of breach of trust by him. In of *Peter J. R. Prabhu v. Asstt Commissioner of Commercial Taxes*,\textsuperscript{87} the court laid down that arrears of the tax amount can not be recovered from the directors of the company from their personal assets, unless a provision of a taxing statute provides for it.

• Liability under Indian Penal Code (IPC)\textsuperscript{1881}\textsuperscript{92}
  Supreme Court of India in the case of *HDFC Securities Ltd &Ors. v. State of Maharashtra &Anr.* \textsuperscript{89}, relying on the judgment of S.K. Alagh \textsuperscript{90} and Maksud Saiyed\textsuperscript{91} held that there is provision for vicarious liability of directors under IPC. To make the director liable express provision is required fixing such liability, as no such provision in present in IPC, hence, a director can not be held liable for the companies act under IPC.

• Liability under Negotiable Instruments Act, 1881\textsuperscript{92}
  Section 138\textsuperscript{93} of the Act lays down the offence of Cheque bounce. Section 141\textsuperscript{94} further, lays down the liability of the director or the person in-charge of the affairs of the company liable in a case of Cheque bounce. In the case of *SMS Pharmaceuticals v. Neeta Bhalla & Anr.*,\textsuperscript{95} the court held that in order to make a director liable, it is mandatory to prove that the director was indeed in-charge of the company when the Cheque was issued and furthermore, only the person who signed the Cheque i.e. the signatory is responsible and can be held liable.

**CONCLUSION**

More than 27 years have passed from the time when India ushered into a fresh phase of liberalization and globalization. This gradual opening of the economy by India has led to a great influx of foreign capital into India. But this economic growth has brought with it various problems like corporate frauds and scams. With India now being a global country and having large number of foreign companies making place in the Indian market alongside

\textsuperscript{84} Income Tax Act, 1961
\textsuperscript{85} Ibid, Section 179
\textsuperscript{86} *GurudasmHazra v. P.K. Chowdhury*, 2002 109 CompCas 530 Cal
\textsuperscript{87} *Peter J R Prabhu v. Asstt Commissioner of Commercial Taxes*, 2001 105 CompCas 247 Kar, ILR 2001 KAR 1045
\textsuperscript{88} Indian Penal Code, 1860
\textsuperscript{89} *HDFC Securities Ltd &Ors. v. State of Maharashtra &Anr.*, Criminal Appeal No. 1213 of 2016
\textsuperscript{90} Supra Note no. 10
\textsuperscript{91} Supra Note no. 9
\textsuperscript{92} Negotiable Instruments Act, 1881
\textsuperscript{93} Ibid, Section 138
\textsuperscript{94} Ibid, Section 141
\textsuperscript{95} *SMS Pharmaceuticals v. Neeta Bhalla & Anr.*, 2005 8 SCC 89

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millions of Indian companies, it is of utmost importance to have a clearly laid down duties and responsibilities of the director.

Company is an artificial person with no mind of its own. It is run through its agents namely, the management and employees. It is the management who takes all the decisions in a Company and hence, it is very important that the directors fulfill his duties and obligations to ensure prosperity of the company. Also, directors being agents of the company, are in fiduciary relationship and hence, obligated to work towards the best interest of the company.

Thus, this shows that director occupies a very significant position in a company and has the power to make or break it. One wrong act of the director can have a huge impact on the company, which might take the company years to recover from. Therefore, accountability is an important element in the working of the company.

The current legislation framework confers a lot of duties and liabilities on the directors. Enhanced punishment under the new Companies Act shows how important regulating the functions of a director are. The legislation framework is set right and it is the continues duty of the court now to ensure that these provisions are applied in a way so as to reduce and eventually stop the malpractices undertaken by the directors.

In applying the general equitable principles to company directors four separate rules have emerged. They are (1) director must act in good faith and do what they believe to be in the best interest of the company (2) they should refrain from using the powers conferred on them for any purpose other than for which they were conferred (3) that they should not place themselves in such a position where there are changes of a conflict between their personal interest and their duties towards the company, without the express consent of the company.  

With the increasing global interest in Indian Companies, new players will enter the market on regular basis unaware of the possible consequences. In the light of which, director indemnification clause which is a part of the agreement between the shareholder and the director should be vigilant and meticulously read and negotiated. Additionally, Director’s and Officer’s liability insurance is also a mechanism that is becoming immensely prevalent in India. Rapidly modernizing on director liability requires full attention not only by lawyers and corporate directors but by the masses.

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96 Soma Dhawal, Director’s Liability in India, Legal Services India, http://www.legalservicesindia.com/articles/dl.htm

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HOPE IN DISSERT

By Anmol Dhindsa
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The Aadhaar judgement is a rushed and ill-thought one, and leaves many issues unsettled and unclear.

For a case that has been litigated over the last six years, involving 38 days of final hearings, two references to constitution benches, and has finally ended in three judgments totalling 3.5 lakh words, the Supreme Court’s final verdict on the validity of Aadhaar settles too few questions on the matter.

The majority judgment (by Justice A K Sikri, on behalf of himself, Chief Justice of India [CJI] Dipak Misra and Justice A M Khanwilkar) has a feeling of incompleteness writ large through it. There are placeholders in the text where entire sections of the judgment were supposed to be, which suggests that this was a rush job given CJI Misra’s approaching retirement date. Apart from this, the reasons afforded to support the conclusions arrived at do not hold up to scrutiny. One gets the sense that the conclusions of the judgment were predetermined and the reasons for them were worked out so as to fit into the conclusions.

To take just one example, in addressing arguments raised about Aadhaar affecting the constitutional idea of a limited government, the majority judgment makes no effort at all to engage with the argument, or to try and understand how Aadhaar might affect or attack it. Instead, the whole notion is dismissed on the basis of the Court’s past judgment in Binoy Viswam v Union of India, without any real attempt at answering the many issues raised by the counsel for the petitioners. In the Binoy Viswam case, the Court was only concerned with one use of Aadhaar (in the context of income tax), but in the present case the scope of the challenge was different, with the Court having been called upon to see the entire Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 and all its myriad uses as being destructive for the idea of limited government. Yet, the majority judgment does not address this argument at all, simply brushing it aside by pointing out the odd provision or two it had already struck down.

The unwillingness to seriously engage with the arguments of either side is especially frustrating in what should be a landmark judgment. Here is an issue that has consumed much public discourse, has a tangible effect on people’s lives, and has great impact on governance in India, and, yet, the majority judgment of the Supreme Court is simply unable to give well-reasoned answers to the questions before it. Just as aggravating is the fact that the three opinions rendered in the case (including Justice D Y Chandrachud’s dissenting and Justice Ashok Bhushan’s concurring judgments) do not engage with each other at all. It is almost as if the three judgments were written in parallel, and the dissenting voice seems to have had no

bearing on the majority and concurring judgments of the Court.

This is a pity as it contrasts with the clarity of thought that informed six concurring opinions in the judgment of the nine-judge bench in the very same case where the Supreme Court had upheld the right to privacy in clear and unambiguous terms, against intervention by both state and private actors. The clear formulation and articulation of the nature and scope of the right in *K S Puttaswamy v Union of India* has been cited on multiple occasions by the Supreme Court itself, not least in the striking down of Sections 377 and 497 of the Indian Penal Code in two separate cases. Yet, ironically enough, when it comes to applying the right to privacy to Aadhaar itself, the majority of judges cannot seem to bring themselves to do it. The differences in the terms “compelling state interest,” “legitimate state interest,” and “public interest” as they occur in the various opinions in the Puttaswamy judgment are picked apart to find just the right phrases needed to justify their predetermined conclusions on the validity of the Aadhaar law.

Amidst this, Justice Chandrachud’s minority opinion is a breath of fresh air. It is detailed, well-reasoned, and unafraid in arriving at its conclusions. His judgment goes to the heart of what the fundamental problems with Aadhaar are: invasion of privacy, all-pervasive state control, and exclusion. Justice Chandrachud also has no doubt that passing the Aadhaar Act as a money bill was a “fraud on the constitution.” On this reason alone he could have struck down the entire law, but he has also gone into the problematic provisions of the act in depth to ensure that any future laws also stay within the confines of constitutionality. Justice Chandrachud’s judgment strikes down many more provisions of the Aadhaar Act and its regulations, finding them to be in violation of the right to privacy among other fundamental rights.

India’s Supreme Court has had a history of the minority opinions in important fundamental rights cases getting recognised much later as having been right all along. Justice Fazl Ali’s minority opinion in *A K Gopalan v State of Madras*100, Justice Subba Rao’s in *Kharak Singh v State of Punjab*101 and Justice H R Khanna’s dissent in *ADM Jabalpur v Shiv Kant Shukla*102 are, perhaps, the most famous examples (or as Justice Rohinton Fali Nariman calls them, “the three great dissents”). Will Justice Chandrachud’s dissent join this acclaimed pantheon? With the many still-unsettled questions about Aadhaar, one cannot rule out this possibility in the near future.

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1001950 AIR 27, 1950 SCR 88  
1011963 AIR 1295, 1964 SCR (1) 332  
1021976 AIR 1207, 1976 SCR 172
PROPERTY RIGHTS OF WOMEN UNDER HINDU LAW: FROM VEDAS TO HINDU SUCCESSION (AMENDMENT) ACT 2005

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ABSTRACT

Property rights refer to the theoretical and legal ownership of specific property by individuals and the ability to determine how much property is used. In many countries, individuals generally exercise private property rights—the rights of private persons to accumulate, hold, delegate, rent or sell their property. Inheritance is the practice of passing on property, titles, debts, rights and obligations upon the death of an individual. The rules of inheritance differ between societies and have changed over time. The property rights have differed as states above on several factors, religions, ideologies, customs, beliefs, traditions.

The Hindu traditional law also has certain structured and defined property rights and rights of inheritance that has been explained in detail through various Vedas, Smritis, Commentaries, Digests, Customs. The degree of gender equality followed by Vedic societies was high in all spheres of life especially in imparting education. The Shrutis, frequently referred to as the Vedas, contain significant number of phrases that emphasize on the importance of respecting and treating women appropriately. However, this situation did not persist, as more and more thinkers and sages interpreted the Vedas the status of women and their property rights as well gradually differed from that of the Vedas. Analyzing the Dharma Shastras, reveal that daughters who had brothers did not inherit property that is they were completely excluded from inheriting any share in their paternal property. Further emerged the concept of Stridhana and parental obligations to give Stridhana.

As years passed there was statutory interventions into the realm of property rights and inheritance rights. The property rights of women have been reformed and enhanced under several statutes during the 19th century. Such statutory reformations included the Married Women’s Property Act 1872, Hindu Law of Inheritance Act 1929, Hindu Succession Act 1986 and Hindu Succession (Amendment) Act 2005. These laws were all enacted to structure inheritance laws and to reduce biases and inequality to a great extent. The concluding portion of the research deals with the effectiveness of the statutory reformations in terms of women’s wealth. It includes the status of women’s access to capital in the country. Further provides recommendation to improve the strength of women’s property rights.

KEYWORDS

Historical Analysis of status of women and their property rights

Vedic age is dated back to the time almost 8000-10000 years ago. In the early Vedic age, women enjoyed equal rights and privileges in the society. The degree of gender equality followed by Vedic societies was high in all spheres of life especially in
imparting education. The Shrutis, frequently referred to as the Vedas, contain significant number of phrases that emphasize on the importance of respecting and treating women appropriately. For instance, in Rigveda there are several hymns which preach the importance of begetting heroic sons while birth of a girl child is never considered inauspicious, celebrations and rituals were conducted in the same way for a girl child as well. Twin daughters have been compared to heaven and earth in the Veda. During this age studies usually began after a thread ceremony known as the “Upnayana Samskara”. Several women also underwent the “Upnayana Samskara” indicating the importance given to education girl children equally. The status of women was that of reverence and privileges and never one of subjugation or inferiority. A man was considered incomplete without his wife. Wife was given the status of “Ardhanagini”. A man was not allowed to perform rituals without his wife for he was not considered complete without her. Coming to the property rights of women, Rigveda speaks about individual proprietorship, sons divite the father’s property after his death. The right of unmarried daughters living in the father’s house at the time of his death is also recognized. Inheritance rights are hence explicit given to unmarried daughters and married daughters who do not have brothers. Daughters were allowed to perform the last rites of her father if she had no brothers which substantiate the reason for her right to inheritance.

Analyzing the Dharmashastras, reveal that daughters who had brothers did not inherit property that is they were completely excluded from inheriting any share in their paternal property. Further husband and wife are considered joint owners of the house and associated property. This status which was conferred on the wife helped her secure minor rights which included enjoying the wealth along with the husband and claiming proper maintenance. However there was no absolute equality with the husband in the ownership in the property which effectively made a woman devoid of any property rights. Interestingly there was another prominent concept which held strong foot in Vedic times that is the concept of “Stridhan”. Rigvedic society considered the following things to be included in Stridhan: Gifts from parents and brothers, Gifts before nuptial fire, Gifts in the bridal procession, Earning by mechanical arts. To this list there has been references to share that a daughter growing old in her father’s home is entitled to and also a widow’s share in the husband’s property in certain situations. The above mentioned gifts would become part of the women’s property over which she would have absolute control and dominion even after marriage. In the Vedic age the concept of Stridhan was followed in its strict sense, where the women held the property independently and effectively. The women also had a rights to alienate a property and use it for her benefits or for her wants. As a general rule widows were not allowed to inherit any property from her husband’s estate but a childless widow was entitled to succeed her husband’s property. Here it is to be noted that during the vedic age there was a custom known as...

103 Rigveda 11, 17, 7
104 Dr Lila Samantani, Status of women in vedic times (August 12, 2018, 8:30am)
105 Baudhyayanadharmastra II 2.3.46
106 Apastambadharmashastra II 6.14.2-3
“niyoga” which was very common. Niyoga means appointment of a wife or widow to procreate a son on an appointed male preferably her younger brother in law or any sapinda relation. Effectively there were very few widows without children. As law evolved there arose the concept of private property and significane of property rights which gradually became institutionalized, women gradually lost her status. Women’s physical weakness and incompetency to perform rituals were cited as reasons to assign her an inferior status. This was particularly true in the case of Baudhyayana the reputed founder of one of the schools of Yajurveda he excluded a Hindu woman from inheriting any property. He based his arguments for this stance on the authority if Sruti which says “women are considered to be destitute if power and strength” and further stated that Vedas hence declared that there is no inheritance to women. Such interpretation which places women in a completely inferior pedestal as compared to their men did lead to contrary thoughts by several scholars. Prof. Max Muller has completely discarded this interpretation of the Sruti text. In the middle ages, widow, mother and daughter were involved in the list of heirs thus improving her status with regard to property inheritance however this addition was done to the end of a long list which contained kin and strangers like spiritual master, teacher, pupil or a priest. There was another interesting view about women’s inheritance to property. It was suggested that a women was entitled to inheritance so long as she is chaste. She did not have full authority over the property, she could spend it only with the permission of her son and in his absence the King. If she had an unchaste life she was entitled to maintenance only. Another writer stated that a women who led an unchaste life must be deprived of all her rights, left to remain dirty, despised and sleep over dirty floor. If a widow according to customs and subject to the restriction inherits any property did not become absolutely the owner of the property but only took what was called the “widow’s estate” in the property. Further the schools of Hindu law emerged of the era of commentaries and digests. The two main schools of Hindu law are: Mitakshara and Dayabhaga or Bengal school. Two men whose interpretation have determined the practice as regards the inheritance and right to property of different members of the joint Hindu family were Vijnaneshwar from Andhra Pradesh and Jeemuthavahana from Bengal. Vijnaneshwar wrote a commentary on the Yajnavalkya Smriti. This commentary was called Mitakshara meaning “measured words”. Jeemuthavahana wrote on inheritance only. His book Dayabhaga (“division of inherited property”) has been an authority in Bengal and Bihar.

In Mitakshara school, Vijnaneswar held that there were two kinds of property that a man could hold. Firstly, a man could give away to whom he willed his self-earned property while in the case of ancestral property the principle of janmasvatvavada which means “principle of ownership by birth” would be applicable. The doctrine son’s right by birth in the joint family property was a unique contribution to Hindu jurisprudence by this school. Under

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107 Sacred books of the east, Volume 14 (1882)
108 Katyayana quoted in Mitakshara, Chap II S II,2
109 Yajnavalkya 1,70

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Dayabhaga school Jeemuthavahana propounded the concept of *uparamasvatvavada*. Uparama means death, svatva means ownership and vada means principle. The whole expression hence means “the principle of ownership by death”. It means right to ancestral property accrue only after the death of the person in whose possession the property was. So as long as the father lives he has complete autonomy and control over the property and it cannot be partitioned however this is not the scenario under the principle of *janmasvatvavada*. In respect to the law of succession, the Mitakshara school based its law of inheritance on the principle of propinquity(nearness of blood relation or community of blood) while the Dayabhaga school based its law of succession on the principle of consanguinity. The Mitakshara school however did not give full effect to the principle it propounded and limited its application subject to two rules: 1. exclusion of female from inheritance and 2. preference of agnates over cognates. Vijnaneswara used the age old word sapindya and gave it a novel meaning or interpretation, sapinda were those who shared common body particles. On this principle the rights of son, grandson was established as immediate successors to the property. Jeemuthavahana said that the property of a dead person would go to the one who brought greatest spiritual benefit when he was offered pinda on certain days by the Hindu ritual Shraddha. Those who had a right to offer pinda had a right to inherit property as well. A shraddha could be performed by a widow for her husband and daughter could offer pinda if her father had no sons. Hence the rights of a widow and daughter were established through the principle of pinda offering by Jeemuthavahana. Dayabhaga followed Katyayana and declared that the property obtained by a woman by mechanical arts and gifts received from strangers were not disposable by her without her husband’s permission or consent. Mitakshara however did not say anything expressly on this point. The sub schools of Mitakshara, the Bombay and Banaras schools though admitted such property as Stridhana but did not assign her absolute power over such property. The commentaries such as Viramitrodaya and Mayukha enumerated that a woman was incompetent to dispose off her property. However she could have the power to do so only with a certain category of Stridhan known as Saudayaka and the gifts received from strangers and her separate property cannot be alienated by her without the consent of her husband. Both the commentators relied on Manusmriti to propound this principle of property right of woman. Mithila sub school on the other hand did not make any distinction in Stridhana but did not assign her absolute control over such property. Madras school conferred absolute dominion of women over Saudayaka Stridhan and the husband’s gift of immovable property. Such absolute control was however not absolute in the real sense, for validating any act of alienation of such property, husband’s consent was necessary and further in a time of distress it was open to husband to have recourse. This right was restricted to her husband and could not be availed by others even if they are the creditors of her husband. Neither husband nor any other person is

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110 BABOO PROSONNO COMMAR, VIVIDA CHINTAMANI 256-63
111 Smriti Chandrika Chap 9 sec II.12

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authorized to misappropriate the property of a woman’s Stridhana. The non Saudayaka Stridhana was always subject to the husband’s control. The husband was entitled to use it at his pleasure even at times of absence of any distress. This rule did not apply when the spouses were not living together and the husband has not control over the wife. During widowhood a Hindu female was given absolute power of disposal over every kind of Stridhana whether acquired before or after husband’s death. With regard to a daughter’s right in the property of her father, Mitakshara made no restriction on it. Daughter had an independent individual character and her right in no way was linked to her son possible or actual.

Moving on to analyze women’s property rights from different perspective, let’s examine the concept as established under the Arthashastra. Kautilya’s Arthashastra is an excellent treatise on statecraft, economic policy and military strategy. It is said to have been written by Kautilya, also known by the name Chanakya or Vishnugupta, the prime minister of India’s first great emperor, Chandragupta Maurya. In Arthashastra, Kautilya mixes the harsh pragmatism for which he is famed with compassion for the poor, for slaves, and for women. He reveals the imagination of a romancer in imagining all manner of scenarios which can hardly have been commonplace in real life. Hindu sociology had to be protected from demagogues who have no regard for reason and from ideologues who twist facts to justify their distorted notions and mischievous objectives. By insisting on authorization by parents especially by fathers, Arthashastra tried to protect the interest of girk’s lest they should be kept as only concubines or treated as slaves by their husbands. All agreements are economic contracts. Marriage too is an economic contract. The father of the bride had to adorn her with ornaments. These belonged to her exclusively and were later declared to be inherited only be her daughters. Stridhan thus constituted to be a permanent asset inheritable only by her daughters while what was gifted to her or inherited by her husband became his property and was inheritable only by his sons and by his kinsmen. Even if some immovable property was given to the bride it was treated as Stridhan. Laws protected Stridhan against misappropriation.

Statutory Reformations

The property rights of women have been reformed and enhanced under several statutes during the 19th century. Married Women’s property Act 1872 was one of the foremost acts to recognize and give effect to the strong concept of Stridhan. The Act included the following in the list of properties in Stridhan:1121. Wages, earnings got as a result of occupation, employment or trade.2. Savings from investment made using the above-mentioned earnings.3. Cash acquired through literary, artistic and scientific skill.4. Insurance policy effected by her for herself. This Act was instrumental in increasing the width of property types that fell under the concept of “Stridhan”.

The Hindu Law of Inheritance(Amendment) Act, 1929 extended to whole of India except the then Part B states. Part B was formed by the princely states or groups of princely

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112Department of sociology, University of Jammu, Property Acts of Hindu women
states governed by Rajpramukh. The Act altered the order of intestate succession under Mitakshara law with a view to prefer certain near cognates to distant agnates in the matter of succession to the property of Hindu male who dies without leaving any male issue. It laid down that a son’s daughter, daughter’s daughter, sister and sister’s son shall in that order be entitled to rank in the order of succession next after paternal grandfather and before paternal uncle. This was an obvious half hearted attempt. It omitted several near relations like son’s daughter’s son. Next came the Hindu women’s right to property Act 1937. It was one of the most important enactments to give better rights to women in respect to property. The Act also extended to whole of India except Part B states and was applicable to a Hindu dying intestate notwithstanding any rule of Hindu law or custom to the contrary. According to its provisions a widow was entitled to the same share which a son received in the case of the property in respect of which he died intestate. The Act made mitakshara widow succeed to coparcenary interest of her husband in the portable of the joint family and along with the male issue in all cases. As for the self acquired property, the wife, daughter and the mother were usually recognised as heirs. In respect of separate property of a Mitakshara Hindu and in respect of all properties of a Dayabhaga Hindu, the Act introduced three widows which are intestate’s own widow, his son’s widow and his son’s son’s widow as heirs along with the son, grandson and great grandson. The widow took an equal share of a son. This Act conferred better rights on the above mentioned widows in the devolution of property of the deceased dying intestate as well as in the joint family property in which the deceased had an interest at the time of his death. Hence new rights of inheritance had been conferred on women through the 1937 which could not be challenged by virtue of any prevailing Hindu law or custom.

The further move to reform property rights was the Hindu code of 1948. It was introduced in the constituent assembly on 9 April 1948 and its main provisions regarding women’s right to property and inheritance consisted of the following changes:

1. Adapted Dayabhaga rule of coparcenary which conferred absolute ownership rights to heir male or female.
2. Succession was based on blood relation and not cognatic or agnatic relationship.
3. Widow of deceased, daughter, son’s widow were given same rank as a son in matters of inheritance.
4. A large number of female heirs was introduced compared to the existing Mitakshara or Dayabhaga schools.
5. Abolition of all conditionalities in the inheritance of female heirs in practice earlier such as their marital or economic status. They were to inherit by the virtue of being heirs.

The major move after Independence to overhaul existing practices and to structure the Hindu laws regarding inheritance and succession was the enactment of the Hindu Succession Act, 1956\(^\text{113}\). Different schools of Hindu law laid down different ordered of succession with regard to the Hindu

\(^{113}\) Prakash Chand Jain, *Women’s property rights under traditional Hindu law and Hindu succession Act*

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woman’s position. The Act was enacted to provide a just and proper solution to these and other problems. It did not merely codify the existing law of succession but in reformatory spirit made fundamental changes. The Act is famously referred to as Hindu female’s magna carta of property rights. It removes the distinction between Mitakshara and Dayabhaga rules of inheritance and lays down a uniform, comprehensive system of inheritance which applies to all those governed by Mitakshara and Dayabhaga in addition to those parts in southern India that followed Marumakkattayam, Aliyasantana and Nambudri system. It further removes the divergent categories of Stridhana and rules relating to succession. It abolishes the fundamental principle that female takes only a limited estate and provides that whatever property is inherited by a woman whether it be from male or female, from now she will be the absolute owner over such property. The Act removes the distinction between son and daughter in the matter of the right to inheritance the property. Widow is entitled to succeed not only to intestate’s separate property but also his interest in the coparcenary property. Since the widow has been conferred with absolute power to own such property her rights will not vanish after her remarriage, adopting a son will also not disqualify her from her right to such property. Further conversion of a Hindu female to another religion during the lifetime of the deceased is not recognized as a disqualification for inheritance.

Hence it can be concluded that Hindu Succession Act has made vast changes in the previous law and it is also clear that it has to some extent satisfied the zeal to emancipate the Hindu woman and to some extent realized the guarantee of equality as enshrined in the Constitution. The Act has in effect given a deathblow to the whole concept of joint family property of the Mitakshara school which was widely followed in a majority of the states throughout the nation.

The latest reform that took place in the arena of Hindu women’s property rights is the Hindu Succession (Amendment) Act 2005. Section 6 of the principal Act which deals with the interest of female coparcener and rule of survivorship is recasted and modified. From the commencement of the Hindu Succession (Amendment) Act 2005 with reference to the joint family governed by Mitakshara Law, the daughter becomes coparcener by birth and has all rights in the same manner as the son. She has the same rights and liabilities in the said coparcener property as that of the son. Now, reference to a Mitakshara coparcener will be deemed to include reference to a daughter of a coparcener. However this section will not affect any disposition or alienation including any partition or testamentary disposition of property that took place before 20th December 2004. The incidence of coparcenership shall automatically follow. It was also provided that after the commencement of the amendment, If a Hindu dies having interest in the joint family property governed by Mitakshara Law. It shall devolve by testamentary or intestate succession under this Act and not by survivorship or coparcenary property shall be deemed to have been divided as if the partition had been taken place and the daughter is allotted the same share as allotted to a son. The share of predeceased
son or predeceased daughter as they would have got. Had they been alive at the time of partition shall be allotted to the surviving child of such predeceased son or such predeceased daughter. Thus, complete justice is sought to be extended in so far as daughter is concerned as heir. Further agricultural land was kept out of the purview of the provisions of the principal act under Section4(2)\textsuperscript{114}, this provision was however repealed by the Amendment Act.

The Amendment Act was subjected to judicial interpretation several times since its enactment. Recent clarifications that were given by the Supreme court with respect to right of daughters will inevitably include the judgement of Prakash vs Phulavati.\textsuperscript{115} The judgement in effect stated that the law which gave equal rights to daughter in ancestral property under the Hindu Succession Act is prospectively enforceable and not retrospectively. The Apex court held that the rights under Hindu Succession Act 2005 are applicable to living daughters of living coparceners as on September 20, 2005 irrespective of whether such daughters were born or not. The text of the amendment itself clearly provides that the right conferred on a “daughter of a coparcener” is “on and from the commencement” of the Hindu Succession(Amendment) Act 2005”. The court said “In the view of plain language of the statute there is no scope of a different interpretation than the one suggested by the text of the amendment”.

Further there was a debate on if women born before the enactment of the principal act is entitled to get the rights under the Act or not. This issue was settled by the Apex court in the case of Danamma vs Amar\textsuperscript{116}. The Supreme court held that the daughter born before the enactment of Hindu succession Act 1956 are entitled to equal share as son in the ancestral property. The ruling was given out in an appeal filed by the daughters challenging a decree in partition suit which excluded them from partition. The court said that the courts below it erred in holding that the daughter were not entitled to partition because they were born before 1956. It was held that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class 1 of the Schedule to the Act which includes a daughter his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener by survivorship but upon his heirs by intestate succession. Therefore, the interest of the deceased coparcener would devolve by intestate succession on his heirs which included his daughters.

**Effect of Statutory Reformations on Women’s Access to Capital**

Women’s agency has a strategic role in promoting inclusive growth and gender parity in distribution of resources. Recent policy discussions on building economic power of rural communities have been drawn attention to two facts: 1. Access to and control and ownership of certain assets such as land, housing, livestock, common property resource, business, health and finance are leveraging factors in pursuing women’s empowerment and gender equality.

\textsuperscript{114} Section 4(2), Hindu Succession Act 1986

\textsuperscript{115}Prakash v. Phulavati (2016) 2 SCC 36

\textsuperscript{116}Danamma vs Amar Civil Appeal nos. 188-189 of 2018
and for bringing more equitable change to institutions and society at large. 2. Women constitute a significant majority of small scale farmers and food producers. Hence strengthening women’s rights to property land and related productive assets and developing their capacity are central to overcoming poverty and inequality. Women allocate a greater portion of their savings to family sustenance than do men from their earnings. As women’s own earnings have a positive effect on their status within the family, the status of woman has a significant power on status of family. Women’s lack of ownership and control rights over land and productive assets is increasingly being linked to negative development outcomes. There does exist positive correlation between women’s ownership of specific assets and reduced vulnerability to experiencing access to productivity increasing technologies. Lack of control over assets also results in women’s lower wages and cripples their economic agency and decision-making power over assets.

The Hindu Succession Act 1956 that covers inheritance and succession of property of Hindus, Sikhs, Buddhists and Jains comprising 84% of the Indian population was amended in 2005 to grant rights to women to inherit agricultural land of the parents by virtue of Section 6 and Section 4 of the amendment. Empirical research on the arena of inheritance rights is rare. The only researches made during the past decade are Roy(2008) and Deininger (2010) quantitatively assess the impact of inheritance law in the context of India. Later the world bank came up with a study to analyze the impact of the amendment of the Hindu Succession Act in the urban context. The survey contained detailed information on the timing of key life events such as birth, death and marriage and the level of education as well as assets received from parents by male and female individuals. One of the findings of the research are 0.301 lower than that received by males. Further a research by Landesa, an institute for rural development institute in the context of Women Agricultural Producers of Andhra Pradesh, Bihar and Madhya Pradesh. Certain shocking average statistics that was arrived at by the research are the following:1) Women’s inheritance from parents- 15.33% 2) Women wishing to inherit- 12.66% 3) Women who do not know of Hindu Succession Act- 40.33%.

Ways to improve women’s access to capital:

1. Paralegal programs should be instituted to pro-actively assist the women to claim and pursue their rights to inherit land.

2. Legal literacy on Hundi Succession Amendment Act and related issue in combination with other legal rights of women should be packaged as a program for the Self-help group and federations.

3. To overcome social barriers and complicated administrative procedures the revenue department must conduct village level camp courts specially to ensure women’s rights to agricultural land. This will help hundreds of thousands of widows and single women to come forward and claim their rights.

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117 World Bank, 2008

118 World Bank United States of America, Does inheritance Law reform improve women’s access to capital?
4. District Legal Services Authority should include Hindu Succession Act as one of their listed topics of legal advice, legal literacy campaigns and fighting cases of women’s land rights.

5. The Gram Panchayat and Block Panchayat must be informed on the provisions of the Hindu Succession Act and of their responsibilities in this regard in particular on equality of women’s land rights under inheritance.

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FREEDOM OF RELIGION V. INDIVIDUAL RIGHTS: STRIKING A BALANCE BETWEEN RELIGIOUS RIGHTS AND RIGHTS OF LGBT COMMUNITY IN A CONSTITUTIONAL STATE

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ABSTRACT
Social morality has always dominated individual morality all throughout the history. The rights of the minority are not a matter of concern for a majority ruled state. However in a constitutional state the constitutional morality should be the supreme and the social morality should always be in tune with it. The morality of the Indian Constitution lies in four major provisions. The trio being commonly called as the Golden Triangle which includes Article 14, Article 19 and Article 21 and, Article 32 which is known as the heart and soul of the constitution.

When there is a conflict between the majority and minority, a matter of doubt arises in the minds of everyone as to whose rights and interests are to be protected. Some scholars opine that the morality envisaged in the religion is the morality of the majority and hence that should be the law. Even though this logic may hold true for a primitive state, it doesn’t have any relevance in a constitutional state where the rights and liberties of the minorities are no less important.

Thus a provision or any law which perpetuates subordinate status to the sexual is something that has to be immediately reconsidered. Applying the rule laid down by the Honorable Supreme Court in Justice Puttuswamy\textsuperscript{119}, the law has no right to enter into the bedroom of an individual, and such an act of the state affects dignity and sexual autonomy of an individual. One has to realize that such laws are based on the gender stereotypes which was brought into our nation through the Victorian laws.

The recent judgment of Supreme Court in Navjet Singh Johar v. Union of India\textsuperscript{120} is a great appreciable step to free the Indian laws from the influences of Canon laws. The laws against the LGBT community has its roots in the biblical laws, however it is interesting to note that the Great Britian who was the author of this law did away with it long before India. On contrast in India, all the religious group stood together and opposed the removal the archaic law against the sexual minorities on the basis of conjectures. The India Supreme Court however rightly showed to the world and reminded each of Indian citizens that the state has no business to put itself into the personal affairs of an individual. Homophobic attitudes imparted into the social morality by various religious groups from time immemorial have made it impossible for the victims to access justice. It is the duty of the constitution to transform the society in accordance with its moral values of justice, liberty, equality and fraternity. If not, the state can no longer be a constitutional state. In a constitutional state

\textsuperscript{119} Justice K S Puttuswamy v. Union of India, 2017 (10) SCC 1.
\textsuperscript{120} Navjet Singh Johar and Others v. Union of India, 2018 Indlaw SC 786.

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the rights of the LGBT community should be defended by the state. India has always tried to correct itself and move away from the earlier wrongs that it had committed. Since the main agenda of the constitutional state is to inculcate constitutional values, the religious interference with the rights of LGBT community will be a huge violation of the supreme constitutional morality. This paper addresses this conflict between constitutional morality and social morality and attempts to find a balance between religious freedom and individual rights of LGBT community.

Keywords: Morality, LGBT, Constitution, Rights, Judiciary, Society, State, Minority, Gender.

Evolution of Sexual Rights of LGBT Community: A Tussle between Constitutional Morality and Social Morality
Even when the society is becoming more and more aware about the human rights, the rights of the sexual minorities namely the LGBT community are still been neglected. This was the situation even in past, it will be highly paradoxical to view that the democratic societies even now follow the same attitude. Penal law criminalizing homosexual activity even between consenting adults was one of the best example to prove the above argument. However the recent efforts made from the part of the Honorable Supreme Court interfered with this generally observed pattern. To understand the high influence of morality which interfered with the sexual rights of LGBT community, it is necessary to look into the history of the penal law which criminalized the same.

History: Section 377 an Sodomy Law
Same sex loving men and women are sexual minorities around the world, they are commonly referred to as LGBT community. The condition of this community was really bad; they faced huge discrimination from society and also from the part of law. Section 377 which is also commonly called as the sodomy law had its origin from the old testament of the Holly Bible which is considered to be the spiritual text of Christians. Leviticus Chapter 20 verse 13 provides the basis and punishment for the same. It provides that any person who engages in a sexual activity against the order of the nature shall be punished with death penalty. Thus Section 377 found its way into IPC through British imposition of Victorian morality way back during 1880’s.

Religious majority v. Sexual minority
Thus India was following a law that took away the basic human rights of LGBT community, for about two centuries on the basis of religious morality. The democratic values and the basic freedoms guaranteed under the Indian Constitution however comfortably closed its eyes towards them. When the issue was brought before the Court various religious groups joined their hands against the decriminalization of Section 377. The only major argument of all these groups where that the decriminalization of Section 377 would affect the morality of the society. This argument was based on the narrow concept that sexual union between two individuals is only for the purpose of procreation as observed by most of the religions.

This raises a major question as to the extent to which morality can be allowed to
interfere with the rights of the individual. As observed by the famous philosopher John Stuart Mill “an individual must be sovereign over his own body and mind”. The famous Jurist Bentham observes that “if a punishment does more harm than good, then the matter should be left to individual ethics”. Thus there exist as jurisprudential wrestle with regard to Section 377, one contestant being social morality influenced by religion and other being Constitutional morality.

The International Convention on Civil and Political Rights recognized the need for abolition of sodomy laws, interestingly India is a signatory to this convention. Article 21 of the Indian Constitution guarantees one the right to life and personal liberty and as stated by Supreme Court right to life does not mean mere animal existence but it means the right to live with dignity. The addition made to Article 21 through Justice Puttaswamy case further strengthen the constitutional morality that stand as a strong advocate against Section 377.

**The wakeup call**

It is highly possible for one to think that political and civil rights are more important than the sexual rights of an individual. The critics should realize that right against discrimination is a civil and political right, and it is also the very foundation of our democracy. However it will be interesting to observe that the legislature in India have not made a single attempt at least to discuss the grievances of LGBT community, due to which the court was forced to step into and strike down the law.

The recent judgment of the Supreme Court in Navjot Singh Johar overruled its own previous judgment that struck down the Delhi High Court Judgment in Naz Foundation v. Govt. of NCT of Delhi. Honorable Justice D.Y Chandrachud have rightly observed that “the choice of a partner, the desire for personal intimacy and the yearning to find love and fulfillment in human life have a universal application”.

Regardless of the huge opposition from the religious majority the Supreme Court finally did justice to the LGBT community. Borrowing T.S Elliot’s words “if we can never be right, it is better that we should from time to time, change our way of being wrong”. Thus one’s right to sexual choice cannot be subjected to conjectures. As said by Honorable Justice D.Y Chandrachud in the recent case of Joseph Shine v. Union of India to be human involves the ability to sexual intercourse in pursuit of happiness”.

**Constitutional Morality in Indian Constitution**

The term ‘Constitutional morality’ is a term that attempts to immortalize the very ideals, aspirations, and visions of the future that

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122 Ibid.
123 Supra note 6.
124 Supra note 4.
126 Naz Foundation v. Govt. of NCT of Delhi, 2009 (160) DLT 277.
127 Joseph Shine v. Union of India, 2018 Indlaw SC 899.
were held dear and immutable by the Constituent Assembly.  

Constitutional morality, apart from its own intrinsic importance, is a subject on which B R Ambedkar spoke with insight and eloquence in the Constituent Assembly. Rightly or wrongly, he felt the lack of a living democratic tradition in India. Indian society was a society of castes and communities. It was not a society of citizens based on the equal consideration of individuals without regard for caste, creed or gender. To transform a society of castes and communities into one of citizens would be no easy task. The Constitution would at best provide a legal framework, a necessary but not sufficient condition for such a transformation. It could not by itself conjure into existence the attitudes, dispositions and sentiments without which the transformation could hardly be effective.

To be effective, constitutional laws have to rest on a substratum of constitutional morality. Could the presence of such a morality be taken for granted in our country? Ambedkar was deeply concerned over the question. ‘Constitutional morality’. He said,” is not a natural sentiment. It has to be cultivated. We must realize that people are yet to learn it. Democracy in India is only a top dressing on an Indian soil, which is essentially undemocratic”

Defining constitutional morality while determining the rights of sexual minorities
The judgment delivered by the Delhi High Court in Naz Foundation case has sought to provide a legal right not to be unfairly criminalized by invoking the notion of constitutional morality. The policy of criminalization, according to this judgment, has to conform to constitutional morality. No conduct can be made/ or remain criminal if it is not wrongfully harmful—wrongful harm defined in consonance with the spirit of constitutional principles, guided by the norms of constitutional morality. This re-formulation of policy of criminalization by reading into it the constitutional norms introduced a new form of judicial activism. Naz has completely transformed the concept of constitutional morality in an adept fashion by de-historicizing the same in order to serve a larger social purpose. By the scheme of this judgment, “harm” has to be conceptualized in accordance with the normative framework of constitutional morality (which includes specific rights and their interpretations) rather than public morality.

In Naz, the court draws on the notion of constitutional morality and in the context of sexual orientation rights affirms: The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to...

130 ibid.
be the privilege of the few. The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality. Interestingly the court juxtaposes the idea of respect for and celebration of diversity with the notion of constitutional morality.

Here the court relates the claim of decriminalization of homosexuality with constitutional value of diversity. It questions the hetero-normative foundations of the penalization of homosexuality and introduces the idea of different sexual orientation as a value which strengthens the diversity of Indian society and thereby fosters constitutional morality.

The Judges go on to state,

Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality.132

The five-judge bench of the Supreme Court of India, in Navtej Singh Johar 133, deployed this framework of constitutional morality to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

One of the central themes of the court’s decision in Johar is that the aim of the Constitution is to transform society, not to entrench and preserve the pre-existing values of the majority. In other words, though a majority of people in India may be heterosexuals, though the prevalent “social morality” in India might even dictate sexual intercourse only between a man and a woman, it is “constitutional morality” which must prevail. 134

The Court also observed that, “…the interpretation of the Constitution needs to be pragmatic, because of the dynamic nature of a Constitution, and also the legal policy of a particular epoch must be in consonance with the current and the present needs of the society, which are sensible in the prevalent times and at the same time easy to apply.

This also gives birth to an equally important role of the State to implement the constitutional rights effectively. It includes all the three organs, that is, the legislature, the executive as well as the judiciary. The State has to show concerned commitment which would result in concrete action. The State has an obligation to take appropriate measures for the progressive realization of economic, social and cultural rights.

The doctrine of progressive realization of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. The doctrine of non-retrogression sets forth that the State should not take measures or steps.

132 Supra note 11.
133 Supra note 5.
that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.

The aforesaid two doctrines leads to the irresistible conclusion that if we were to accept the law enunciated in Suresh Koushal’s, it would definitely tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.”

Finally the Court came to the conclusion that, Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

The concept of constitutional morality will aid judges in the search for constitutional meaning and in cases wherein the words of the constitutional clause can be read in different ways, this concept can help in the meaningful interpretation of the clause. Constitutional laws should always rest on the substratum of constitutional morality to be effective. It is only then every single person could thrive in a pluralistic country like India and contribute to the development of the nation as envisaged by the Constitution.

Imbibition of Minority Rights in the Society
As India has came up with a new phase of liberal thinking by partial striking down of Sec 377 IPC, the question which comes next is how the society reacts to this ideology proposed by the judgment. By the latest judgment of Navtej Singh Johar, we can see mixed reaction and criticism among the people. But how long the country had to travel to accept the LGBT rights has to be understood by analyzing the cases from Naz foundation to Navtej Singh Johar.

Societal approach to sexual minorities; from Naz Foundation to Navtej Singh Johar
There was inhibition by some sections of the society which shows why India had to wait to get a liberal platform and have a transformative constitutionalism, 71 years after independence when the Supreme Court had thought of accepting these sexual minorities as part of the society. Sec 377 IPC being incorporated by Lord Macaulay in the year 1861 has criminalized sexual activities against the order of the nature. In 2001, Delhi based non-profit Naz foundation, with the support of The Lawyers Collective, challenged section 377 in the

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135 Suresh Kumar Koushal and another v NAZ Foundation and others, (2014) 1 SCC 1.
136 Supra note 5.
137 Supra note 5.
Delhi high court. This was among the first few petitions in India’s fight to decriminalise homosexuality. The NGO was later supported by a strong coalition. But in 2003, the Indian Government said that legalising homosexuality would "open the floodgates of delinquent behavior". Since the government represents the will of the people in India, holistically it can be said that at that time, the nature of the society was not broad enough to accept this liberal ideology. The court also feared that accepting the sexual minority would not be in par with the constitutional and social morality and also the religious groups will create havoc if the sexual minorities were given an acceptance in the country. However, it took another six years before the Delhi high court, in 2009, to go with the changing notions of the world, stating that consensual and private sex between two adults will not be prosecuted.

But later on 23 February 2012, the Ministry of Home Affairs expressed its opposition to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as immoral.\(^{138}\) Later, in 28 February 2012, Central Government reversed its stance asserting that there was no legal error in decriminalizing homosexual activity. This shift in stance resulted in two judges of the Supreme Court reprimanding the Central Government for frequently changing its approach to the issue. Thus in 2013, the country’s LGBTQ community was taken aback when the Supreme Court overturned this 2009 order by Delhi high court that sought to legalize gay sex.

Later, on 28 January 2014, the Supreme Court of India dismissed the review petition filed by the Central Government, the Naz Foundation and several others against its verdict on Section 377.\(^{139}\) The bench explained the ruling by claiming that "…the High Court overlooked that a minuscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgender people... less than 200 persons have been prosecuted for committing offence under Section 377, and this cannot be made a sound basis for declaring that section ultra vires Articles 14, 15 and 21."\(^{140}\) On February 2016, the Supreme Court decided to review the criminalization of homosexual activity. The next year, the Supreme Court made its historic verdict that the right to individual privacy is an intrinsic and fundamental right under the Indian Constitution.\(^{141}\) The Court also ruled that a person’s sexual orientation is a privacy issue, giving hopes to LGBT activists.\(^{142}\) In January 2018, the Supreme Court agreed to refer the question of the provision’s validity to a large bench,\(^{143}\) and heard

\(^{138}\) Supreme Court pulls up Centre for flip-flop on Homosexuality, The Indian Express, 28 February 2012.

\(^{139}\) Supreme Court refuses overruling its Verdict on Section 377 and Homosexuality, Biharprabha News, 28 January 2014.

\(^{140}\) Venkatesan, Supreme Court sets aside Delhi HC verdict decriminalising gay sex, The Hindu, December 12, 2013.

\(^{141}\) Supra note 4.


\(^{143}\) Caroline Mortimer, India’s supreme court could be about to decriminalise gay sex in major victory for LGBT rights, (Oct 8, 2018, 6:00PM), https://www.independent.co.uk/news/world/asia/india-homosexuality-legalise-law-gay-lgbt-couples-supreme-court-ruling-a8148896.html.
several petitions. In response to the court’s request for its position on the petitions, the Government announced that it would leave the case "to the wisdom of the court". Activists view the case as the most significant and "greatest breakthrough for gay rights since the country's independence".

Finally on September 2018, the Supreme Court issued its verdict overturning the 2013 judgment unanimously viewing that Section 377 is unconstitutional as it infringed the fundamental rights of autonomy, intimacy and identity, thus legalizing homosexuality in India.

Recognizing the rights of minority in a majoritarian society
It can be said that by decriminalizing section 377 the ideals of a Utilitarian Approach is been ensured in the country. In order to get completeness to this judgment, it must be also accepted by all sects of people. But, in reality, even when people say that they are whole heartedly accepting the verdict it doesn’t turn out to be so. A law is made for the peaceful conduct and living of the people and to ensure justice in the society. For this, the law must be dynamic, understanding the needs and necessities of the people and this cannot be limited to a section of people whether minority or majority. With this approach of ensuring justice as embodied in the preamble of the constitution, and to ensure like, liberty equality and fraternity, the verdict stands right and with this approach the people have to look forward to the verdict. Moreover, the society is taken with a feeling that the rights are imposed upon them by the judiciary rather that adopting them. With this idea a society can’t develop in its true sense. The recent verdict of 377 was wholeheartedly welcomed by only certain section of the society. The majority is still reluctant to accept the far reaching consequences of this judgment. Most took a stand that partial decriminalization of Sec 377 IPC will interfere with their basic rights and personal autonomy. “I am what I am, so take me as I am” if people are with this notion, the verdict gets full acceptance in the country.

Conclusion
The society has gone through major changes by the various judgments on Mutalaq, privacy, adultery and the recent Shabarimala Shrine verdict. The people has to start thinking that the morality aspect has to perceived in a wider approach were people of any race, “sex”, caste or creed can be incorporated with the ideas and morals of the value system wherein, the people have to open up for a new age of societal revolution whereby the concept of Utilitarianism and Social Engineering theory will get the right interpretation.

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144 Adam Withhall, India on brink of biggest gay rights victory as Supreme Court prepares to rule on gay sex ban, (Oct 8, 2018, 6:00 PM), https://www.independent.co.uk/news/world/asia/india-gay-rights-lgbt-homosexuality-supreme-court-decision-section-377-a8447361.html.
145 ibid.
146 Supra note 5.
149 Supra note 12.

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SEPARATION OF POWERS: IS IT A DOUBLE EDGES SWORD

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ABSTRACT

Recent politico legal developments in India have now, initiated a new debate upon the Independence of Judiciary. Though the question is not new but the epoch is a new era. There are indications of colorable readings of law by the administrative authorities in the judicial foyers coupled with the efforts by the Parliamentarians to reign in the raging horse of justice jockeyed by the activist Judges. The episodes of Justice Kehar upholding the judicial hail by defunctioning the National Judicial appointment commission(NJAC) Act and the recent one of 4 Judges citing autocracy of the Judicial administration ask for fresh constitutional Harmony. But how to achieve that is a key question. There is conflict of Article 368, the Basic structure Fabric and Parliamentary Supremacy to legislate under Article 248 which needs to be resolved. The paper proposes to delve into the passages of harmony amongst conflict.

INTRODUCTION

There should be government by law rather than the wills & whim of the official. Our constitution under certain provisions clearly recognizes three co-equal branches of the government. It is true that all the three branches are supreme within their own respective spheres & it is also true that no democracy & no constitution give absolute power to legislature or judiciary. It is a well-recognized premise that the consolidation power by one branch of government is anathematic to the very idea of democracy. We’ll be dealing with case laws, as in many of the situations there are conflict between the Judiciary and Legislature as they try to give the judgment or legislations which are not in the purview of each other’s jurisdiction which it is deleterious to our democracy.

Parliament’s Powers and Privileges

Legislative Powers- Parliament enacts laws, exercises oversight over the Executive, sanctions government expenditure and represents citizens. It also has the power to amend the Constitution. Note that Parliament has the power to legislate on matters related to the Judiciary such as its powers, jurisdiction, organization and service conditions of judges. It also has the power to remove judges on grounds of proved misbehavior or incapacity.

Immunity from court proceedings- To grant Parliament autonomy in its functioning, the Constitution guarantees certain protections to parliamentary proceedings and those participating in them. It bars the courts from examining validity of parliamentary proceedings on grounds of irregularity of procedure. The courts also cannot hold any person liable for any material that is published under the authority of Parliament.

Judiciary’s Responsibilities and Powers

Judiciary Powers:- The Judiciary adjudicates disputes and administers justice under criminal law. In addition, the
higher judiciary acts as the custodian of the Constitution because it is responsible for its interpretation and enforcement. The higher judiciary also has the power to strike down laws of Parliament and actions of the Executive as invalid, if they violate the Constitution.

Judicial independence: - The Constitution creates a structure to protect judges from being influenced by Parliament and the Executive. Further, a higher court judge can only be removed by Parliament on grounds of proved misbehavior or incapacity during his term of office. Similarly, Parliament’s power to fix judges’ conditions of service is limited to the extent that they cannot be reduced after his appointment.

Legislature and Judiciary the Story of Conflict

Legislature is not merely a law making body. Lawmaking is but one of the functions of the legislature, primary being the delivery of Justice through fair legal policies being the prime representative of the people. In most democracies, legislatures are losing central place due to nepotism and colorable policies. On the other hand Judiciary is the arm of government which ensures delivery of justice to people through judicial review of legislative and executive misconduct. Justice delivery needs to be fair for which the judiciary has been given independence from other organs. The constitution empowers the Judiciary with a great degree of Independence and envisions Supreme Court to be protector of constitution.

For analyzing that how the Judiciary and legislature intersperse in each other’s operation, we first need to acknowledge the wrangle between both of them. We’ll get know the main toiling done by them which deduce that Parliament is a law making body and Judiciary interpret and apply the rules. The muddle which we postulate in milieu of India is that, they are interrupting in each other’s drudgery.

Judicial activism was basically introduced by Justice P.N Bhagwati which observed that judicial activism means that instead of judicial restraint, the Supreme Court and other lower courts become activists and compel the authority to act and sometimes also direct the government and government policies and also administration.

When we see the previous Judgments and case law we get to know that the dividing line between the legislature and judiciary is getting blurred. Discussing the case of Vishaka vs. State of Rajasthan, the Supreme Court framed guidelines on how sexual harassment at the workplace needs to be addressed by employers. In another case, the court gave directions to state governments to set up various authorities to decide appointments, transfers and complaints related to police. In 2011 the court directed that a law on hawking and street vending be made by June of that year for Delhi. In the year 2016, the Supreme Court also imposed a cess on the registration of diesel vehicles in the National Capital Region. Note that the Constitution mandates a tax may be imposed only by a


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law framed by Parliament. The Judiciary has generally issued such directions under Articles 32 and 142 of the Constitution. These provisions empower the Judiciary to protect fundamental rights and issue any order to do complete justice.

In Shankari Prasad v. Union of India, 1951 Parliament has absolute power to amend the Constitution including fundamental right provisions under Article 368 of the Constitution. In Golak Nath v. State of Punjab, 1967 earlier decision reversed to say that power to amend the Constitution has limitations, and fundamental rights cannot be taken away or abridged. 24th Constitutional Amendment Act, 1971 Parliament amends Article 368 to provide that Parliament has constituent power to amend any provision of the Constitution, by way of addition, variation or repeal. In Keshavnanda Bharati v. State of Kerala, 1973, 24th Constitutional Amendment Act held as valid. Parliament has power to amend any provision including fundamental rights, but this power is subject to inherent limitations. Parliament cannot use this power to change the basic structure or framework of the Constitution. In Indira Gandhi vs Raj Narain, 1975 After Allahabad High Court invalidated Ms. Indira Gandhi’s election on grounds of corrupt practices, the 39th Constitutional Amendment Act, 1975 was enacted to exclude judicial review in election disputes involving the Prime Minister. SC held that power of judicial review cannot be taken away as it is key to democracy. 42nd Constitutional Amendment Act, 1976 Parliament amends Article 368 to bar courts from exercising judicial review over constitutional amendments, and provide that there will be no limitations on power to amend. Minerva Mills vs Union of India,


5 Gainda Ram vs Municipal Corporation of Delhi, Supreme Court, Writ Petition (Civil) No. 1699 of 1987, October 8, 2010.

6 MC Mehta vs Union of India, Supreme Court, Writ Petition (Civil) No. 13029 of 1985, August 12, 2016.

7 Article 265, Constitution of India.

8 Shankari Prasad vs Union of India AIR 1951 SC 458.


11 Indira Gandhi vs Raj Narain AIR 1975 SC 2299.

1980, 42nd Constitutional Amendment Act held invalid. Power of judicial review and a limited amending power are basic features of the Constitution. Seeking the above mentioned case laws we deduce that to amend the constitution we need Parliament, in the case of Vishaka v. State of Rajasthan the Supreme Court
court give guidelines but giving guidelines is the work of Parliament, also in many other cases, acknowledged above the court got involved in the jurisdiction of Parliament by enunciating that they can do it under the power of judicial activism. But the court got involved in the ambit of legislature in some cases because they were violating the basic structure of the constitution and Supreme Court being the guardian of the Constitution cannot let this happen due to which it have to interrupt in the working of Parliament. In the case of Indira Gandhi vs. Raj Narain, the parliament introduced a bill which was regarding the removal of Judicial review but if this bill was passed then the legislature can make whatever law which they want to make but it was not appropriate and the Supreme court quashed the bill by saying that this is a clear violation of the basic structure of the constitution.

Present Scenario of Politico-Legal Fiasco

In the case of Salim Khan v. State of Maharashtra (Salman Khan hit and run case) it was clearly visible that the verdict given by the judge will be against Salman Khan. Later just in a day presiding judge was given transfer orders and the case was given to some other judge through political approach. This was clear violation of the law because, as per the law prior notice of transfer should be given and proper transfer procedure should be followed. This is construed as serious violation of Article 222. Also NJAC was declared unconstitutional by Supreme Court as there was rock-bottom pellucidity in the appointment of Judges and the old collegium system was implemented. Sometimes legislature has to pass certain bills and make certain laws which may be different from the strict guidelines of the legal values and the constitution, but morally correct for the welfare of the people at that period of time. In such cases, the judiciary deals with the legislature in a strict way and questions the socialistic manner of government and reaction of legislature towards the judicial interpretations of the constitution. The clash here emerges when the judiciary experiences a need for a new law and legislature is reluctant to it. The judicial attitude towards the legislative privilege, legislature enjoys the privilege of law making and the judiciary has to follow and protect those laws, whether they are in favor or not. Also the legislature thinks that they should be true arbitrator of the constitution because they have the power to amend the constitution. That is why the legislature feels greater urge to amend the constitution to nullify the effects of some judicial decisions.

CONCLUSION

The historical discourse reveals the Supreme Court as an institution that gained strength and emerged powerful post emergency, a period during which image of the Indian State including the judiciary was tarnished. This fractional epoch displayed that political interference
can impose infamy and loss of faith on the constitutional watch dog. Apart from this the legislative and executive apathy are other two naked truths which cannot be ignored. As a testimony to that we have social rights jurisprudence developed post emergency by the Hon’ble Supreme Court. This reposes the faith of common man in the last knight of Indian Constitution. In the light of above it can be ascertained that reformation of Judicial setup must be devoid of any political agenda which of course can happen by providing a better competitive environments in the legal field and removing the political involvements in appointments of legal importance at State level and National Level. Especially the alleviation of counsels in high courts and supreme courts which presently is the root cause of nepotism in the Judiciary.

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ADOPTION RIGHTS OF SEXUAL MINORITIES

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‘He is my son’; No he is mine’. Hearing both the women, the King said, ‘Divide the living child into two, and give half to one and half to the other’.

This was the decision held by the King Solomon to find the real mother of the child, in an incident where two women were fighting over a child. Hearing the King’s decision, one woman started crying and requested the King not to cut the child but give it to the other woman. Thus the King gave the child to the woman who requested him not to cut the child as he identified her as the real mother. Though this is a story which sets out King’s wisdom, such disputes have become a reality in modern times. The problem of childlessness is in fact having a great impact on the life of the couples. After the failure of going through all the available medical procedures of having a child, option of child adoption arises.

Adoption is the act of lawfully assuming the parental rights and responsibilities of a child under the age of 18 years. The legally adopted parents are having the same rights and responsibilities as that of the child’s natural parents. Adoption can be traced out from ancient times itself. It was there for more than 4000 years, since the Babylonian code of Hammurabi in 2285 B.C. Earliest known adoption can be found out in the Bible, which describes adoption of Moses by the Pharaoh’s daughter. Adoption is also mentioned in the Hindu Laws of Manu.

The institution of adoption is a dynamic concept which is influenced by the changes in the society. The concept of adoption, its past and how it is now perceived in the society depends on certain social, economic and political factors. Each country has its own adoption laws which helped the childlessness couples and individuals to fulfill their desire to have a child of their own. In the present scenario, the sexual minorities in our society are facing certain problems because of this mechanism. Though LGBT communities are tied together with homogeneity, they are diverse. Each letter constitutes a wide range of people of different identities, races, ethnicities and socio economic status. What sticks them together as social and sexual minorities are their common experience of discrimination, the tussle of living at the juncture of different cultural backgrounds and trying to be a part of each.

This paper identifies various political and societal factors that deny LGBT population’s right to adoption and to have a family while examining ways to mitigate the discriminatory policies and practices they face in India comparing with other countries.

ADOPTION BY SEXUAL MINORITIES

Adoption by sexual minorities generally means the adoption of children by lesbian, gay, bisexual and
transgender (LGBT) people. This includes joint adoption by same-sex couples, adoption by one partner of same-sex couples and adoption by a single LGBT person. Joint adoption by same-sex couples is legal in many countries and in some sub-national territories. Even though same-sex relationships is not a new concept and have existed throughout history, adoption of children by them is still relatively a new concept. Adoption rights of LGBT community cannot be traced out from constitutions and statutes, but they are often determined with judicial decisions.

Great injustice has been felt with the LGBT community regarding marriage and adoption. This community faces many social and economic injustice related with their adoption rights. Even in this modern world the likeliness of accepting adoption of children by LGBT individuals is rare than that of an opposite-sex couples. There are still procedures and practices that can obstruct adoption by them. It is important for discrimination and prejudice to be eliminated from LGBT adoption decisions. It is necessary to recognize the social and economic issues involved in LGBT adoption and advocate for change on macro, mezzo and micro.

A study shows that if a same-sex couple appears too deviant from gender norms, they are less likely to be approved to adopt. Ross et al. writes, “Lesbians (and by extension, gay men) must present themselves as similar to, or indeed the same as, heterosexual applicants… lesbian couples were also evaluated more favorably if they complied with traditional gender role stereotypes about care giving (one partner would participate in paid work while the other stayed at home with the child)” (2008). Therefore, even if an agency does not noticeably show favoritism towards heterosexual couples, the influence of societal norms may still be present in their decisions. Although gender and family norms are different than they were in the past, the idea of a traditional and nuclear family seem to be hard to let go of in our society.

It is important to address the root causes for the social and economic injustices surrounding LGBT individuals and couples. Our society is very heterocentric, meaning that heterosexuality is fully accepted and practiced in our norms, traditions, behaviors and feelings (Appleby, 2011). This means that any deviant behavior, or same-sex desire, caused a feeling of unease in some people. This feeling of homophobia goes beyond the fear of LGBT people and toward the hatred or discrimination of them. Although there are still many social and economic problems surrounding the LGBT community, there are people, groups and organizations that are fighting for LGBT rights every day.

Adoption of children by LGBT people is an issue of active debate. Supporters of LGBT adoption suggest that many children are in

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153 Kristen Roberts. ‘The LGBT Population and the Fight for Adoption Rights’ The College at Brockport, krobe3@brockport.edu 3 (2016)

154 Id

155 Id

156 Id at 10
need of homes and claim that since parenting ability is unrelated to sexual orientation, the law should allow them to adopt children. Opponents, on the other hand, suggest that the alleged greater prevalence of depression, drug use, promiscuity and suicide among homosexuals (and alleged greater prevalence of domestic violence) might affect children or that the absence of male and female role models during a child's development could cause maladjustment.

The following arguments are made in support of adoption by LGBT parents:

- The right of a child to have a family, guardians or people who can take care of their wellbeing.
- Human rights – child’s and parent’s right to have a family.
- There are little or no differences between children raised by same-sex or straight couples. For that reason, sexual orientation of the parents has no relevance when it comes to raising a child.
- Evidence confirming that, despite the claims of those opposed to LGBT+ parenting, same-sex couples can provide good conditions to raise a child.
- For the children, adoption is a better alternative to orphanage.
- Less formalities for step-parents in everyday life, as well as the situation of a death of a biological parent of a child.
- In some countries single LGBT people can adopt, therefore banning LGBT parenting (especially adoption) is artificial. Because they actively choose and had to work hard to be parents, LGBT parents can be more motivated, involved, and committed than some heterosexual parents.
- Children that grow up in LGBT households are more sympathetic to differences and more likely to believe in equality for all.
- Children raised in same-sex households are proven to be more open minded about different lifestyles and relationships than children who are raised in traditional opposite-sex households.
- Children of gay parents report they felt less hindered by gender stereotypes than other children.

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157 Charlotte Patterson, et. al, "Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health", pg. 2 retrieved on 9th October 2018
160 Mark Joseph Stern (1 August 2014), "Conservatives want to keep gay couples from adopting or fostering kids", Slate Magazine. Retrieved 9 October 2018
161 "What are children's rights?" Retrieved 9 October 2018
163 "Homoseksualni rodzice – wywiad z psychologiem" [Homosexual parents - interview with a psychologist] (in Polish). Retrieved 8 October 2018
they might have been if raised in a heterosexual household.

- There is a shortage of adoptive parents. A loving adoptive family — gay or straight — is better than the foster care system.

- Same-sex relationships have been proven to be more stable than many heterosexual relationships, providing a better example of a healthy relationship for the child involved.

- If having parents of the same gender is disadvantageous to children in any way, it has nothing to do with their parent's gender and everything to do with society's reaction to the family.

- Affection and nurturing qualities are more common with peers amongst children who have been raised in same-sex households, in comparison to children who grew up in heterosexual households.

- Children with gay adoptive parents are more apt to think outside of the societal box.

- Because gay parents have likely had to face difficulties and discrimination in their lives, they are usually better able to appreciate when their child has his or her own problems.

- Gay parents will naturally be more open minded when it comes to accepting their child’s lifestyle choices.

- Children raised in same-sex households may have a better ability to overcome huge obstacles, stand firm in the face of adversity, and make decisions based on emotion and love rather than firm facts.\(^{165}\)

\(^{165}\) ‘Lifelong Adoption Advantages’ available at www.lifelongadoptions.com

INTERNATIONAL SCENARIO ON ADOPTION RIGHTS OF SEXUAL MINORITIES

Adoption of children by sexual minorities in almost every country is still at the sprouting stage. But in some countries adoption by same-sex couples have legalized. Also countries such as Estonia, Italy, Slovenia and Switzerland permit step-child adoption in which the partner in a relationship can adopt the natural and the adopted child of his or her partner.

SOUTH AFRICA

South Africa is the only African country to legalize joint adoption by same-sex couples. The decision of the Constitutional Court in the case of Du Toit v. Minister of Welfare and Population Development\(^{166}\) led to the amendment of the Child Care Act, 1983 to permit both joint adoption and step-parent adoption by "permanent same-sex life partners". The Child Care Act, 1983 was then replaced by the Children's Act, 2005, which permits joint adoption by "partners in a permanent domestic life-partnership", whether same- or opposite-sex, and step-parent adoption by a person who is the "permanent domestic life-partner" of the child's current parent\(^{167}\). Thus since 2006, same-sex marriage has been legal in South Africa, and is equivalent to opposite-sex marriage for all purposes, which includes adoption.

UNITED STATES

\(^{166}\) 2002 ZACC 20
Adoption laws in United States were widely different in every state before the rulings of Supreme Court of United States. Some states permitted full adoption rights to same-sex couples, while some others prohibited it entirely or partially by permitting the partner in a same-sex relationship to adopt the biological child of the other partner.

All bans on same-sex marriage were struck down by the Supreme Court in US only on June 26, 2015 and ordered all states of US to treat same-sex couples equally to opposite-sex couples in the issuance of birth certificates. Thus adoption by same-sex couples became legal in all fifty states.

GERMANY

In Germany, same-sex marriage has been legal since 1 October 2017. In 2005, same-sex step child adoption became legal and was expanded in 2013 to permit one partner in a same-sex relationship to adopt a child already adopted by their partner.

AUSTRALIA

In Australia, since April 2018, same-sex adoption is legal in all its states and territories.

NEW ZEALAND

In Newzealand, same-sex marriage and joint adoption of same-sex couples were legalized through the Marriage (Definition of Marriage) Amendment Act, 2013 which came into force on 19 August 2013. Thus at present in Newzealand, there are no barriers prohibiting an LGBT individual from adoption, except that a male individual cannot adopt a female child.

INDIAN PERSPECTIVE ON THE ADOPTION RIGHTS OF SEXUAL MINORITIES

In India there are many social and economic injustices that surround the adoption of children by lesbian, gay, bisexual and transgender (LGBT) individuals. Same-sex relationships have existed throughout the history of India, however the adoption of children by one or more LGBT person is relatively a new concept in our country. There are no specific legislations for the same, but by holding upon the two landmark judgments by Supreme Court of India which recognized transgender as third gender and which decriminalized homosexuality, chances for enabling such rights is not too far.

On 15th April 2014, the Supreme Court of India declared that socially and economically backward transgender people is entitled to reservations in education and jobs, and also directed Union and State government to frame welfare schemes for them. The Court ruled that transgender people have their fundamental constitutional rights.

168 James Obergefell v. Richard Hodges (135 S. Ct. 2584; 192 L. Ed. 2d 609)
170 Reuters”German court expands adoption rights of gay couples”. 19 February 2013. Retrieved 8 October 2018

171 National Legal Services Authority v. Union of India. [(2014) 5 SCC 438]
172 Navtej Singh Johar v. Union of India ( (2018) 1 SCC 791)
173 "Supreme Court’s Third Gender Status to Transgenders is a landmark". IANS. news.biharprabha.com. Retrieved 9 October 2018.
right to change their gender without any sort of surgery, and directed the Government to ensure equal treatment for them. The Court also held that the Indian Constitution mandates the recognition of a third gender on official documents. On the basis of this landmark decision the Transgender Persons (Protection of Rights) Bill, 2016, which was initially introduced to Parliament in August 2016, was re-introduced to Parliament in late 2017. Some transgender activists have opposed the bill because it does not address issues such as marriage, adoption and divorce for transgender people.

On 6th September 2018, the Supreme Court of India decriminalised homosexuality by declaring Section 377 of the Indian Penal Code unconstitutional. The Court unanimously ruled that individual autonomy, intimacy, and identity are protected fundamental rights. Furthermore, it ruled that any discrimination on the basis of sexual orientation is a violation of the Indian Constitution. Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression. The Supreme Court also directed the Government to take all measures to properly broadcast the fact that homosexuality is not a criminal offence, to create public awareness and eliminate the stigma members of the LGBT community face, and to give the police force periodic training to sensitise them about the issue.

It was the first step towards guaranteeing the full range of fundamental rights to LGBTI persons in India and boost efforts to eliminate stigma and discrimination against LGBTI persons in all areas of social, economic, cultural and political activity, thereby ensuring a truly inclusive society. Even though the judgment was historic, same-sex couples still have an uphill task ahead of them. While the verdict has now opened the doors for several changes to be introduced to marriage, adoption and inheritance laws for same-sex couples, it does not automatically translate into a seamless transition to equality for the lesbian gay bisexual transgender queer (LBGTQ) community. The government now needs to act on this and frame laws to allow same-sex marriages or adoption by LBGTQ couples. Although the onus is on the government to formulate legislation permitting LGBTQ couples to marry, adopt and inherit their spouse’s property, this verdict lays down the legal basis for the formulation of such legislation. At the same time, individuals who face discrimination...
because of their sexual orientation can now mount a challenge in a court of law. Legal experts have urged the Government to pass legislation reflecting the decision, and frame laws to allow same-sex marriage, adoption by same-sex couples and inheritance rights. However, as for marriage or adoption, if there are any pending petitions, they can be considered on the basis of this verdict. There are currently several same-sex marriage petitions pending with the courts.

Gowri Sawant, a Transgender women and a social activist living in Mumbai adopted a girl child Gayatri by saving her from trafficked in to the sex industry in Kolkata, after the young girl’s natural mother who was a sex worker, died of AIDS. A recent advertisement by Vicks tells her story, and how she destroyed the idea that transgender people can’t be parents.

Existing provisions for adoption in India

Rules regarding adoption in India are regulated as per the Hindu Adoption and Maintenance Act, 1956, Juvenile Justice (Care and Protection of Children) Act, 2000 and Guardian and Wards Act of 1890. Under The Hindu Adoption and Maintenance Act, 1956, any male Hindu (including Buddhist, Jain or Sikh by religion) who is of sound mind, not a minor and is eligible to adopt a son or a daughter and “any female Hindu (including Buddhist, Jain or Sikh by religion) who is not married, or if married, whose husband is not alive or her marriage has been dissolved or her husband has been declared incompetent by the court has the capacity to take a son or daughter in adoption”1. In August 2014, while considering amendments to the Juvenile Justice (Care and Protection of Children) Act, 2000, the Union cabinet, decided to obstruct same-sex couples from adoption. After the Central Adoption Resource Authority (CARA) issued strict guidelines for adoption, even single persons and unmarried couples have found it increasingly difficult to adopt. Foreign citizens, NRIs, and those Indian nationals who are Muslims, Parsis, Christians or Jews are subject to the Guardian and Wards Act of 1890.

Thus it is clear from these existing provisions that the laws assume the norms of patrilineal and patrilocal, heterosexual society and within none of these is there any explicit or implicit mention of rights of adoption for the sexual minorities of the country. And this is clear violation of gender equality provided under Articles 14 and 15 of the Constitution of India. The Supreme Court has held that discrimination on the basis of sexual orientation is in violation of Indian Constitution. Individuals who face discrimination because of their sexual orientation can now mount a challenge in a court.


180 Id

181 Ss. 7 & 8, The Hindu Adoption and Maintenance Act, 1956

182 Nayantara Ravichandran Legal Recognition of Same-sex Relationships in India from http://docs.manupatra.in accessed on 9th oct 2018

183 Mahapatra, Dhananjay; Choudhary, Amit Anand (7 September 2018), “SC decriminalises Section 377, calls 2013 ruling ‘arbitrary and retrograde’”. The Times of India accessed on 9th October 2018
court of law. But as long as no specific law on the rights of sexual minorities are made, their rights cannot be protected in a strictly manner. Thus a new legislation on the rights of sexual minorities including adoption rights has to be made and enacted.

CONCLUSION

By holding upon the recent landmark judgments regarding the recognition of LGBT community in India, there is a hope that there is an immense possibility for all LGBT individuals to have equal rights in the near future. However, there is a challenging road ahead and injustices that need to be addressed. Primarily, we as a country need both the LGBT population and all straight allies to advocate for change in their local, state and central governments. Peaceful parades and protests are helpful and make the society realize that LGBT individuals are fighting for their equality in the society. Making local representatives also aware could be very helpful as well. Although most states are progressive and accepting, issues of prejudice and discrimination against sexual minorities are still present throughout the entire country. Also the importance of education on topics such as acceptance and diversity cannot be stressed enough. These issues can be covered in schooling curriculum, from the young age itself. The role of media in representing LGBT individuals and families is also very important.

Our country had taken large steps forward towards the acceptance of diversity, but more needs to be done. Hopefully within the next few years, LGBT adoption policies can be fully changed for the better. Both individuals in an LGBT relationship should be given complete social and economic justice when it regards to the rights of themselves and their children. However, when such laws come in to place, there will still be issues of prejudice and discrimination that we need to be aware of. Whether legal or not, the LGBT community will continue to face oppression until their fundamental human rights are completely acknowledged by all. As our nation progresses in terms of acceptance of diversity, it is critical that we not only allow, but fight and advocate for the human rights of the LGBT population.

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IMPACT OF NARCO-TERRORISM ON INDIA’S SECURITY

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ABSTRACT

Objectives:
The objective of the paper is to analyse the phenomenon of Narco-terrorism. Trafficking of narcotics by terrorist groups as a quid pro quo for the funds which are utilized to create terror in the form of assassination, extortion, hijacking, bombing, kidnapping and the general disruption of the government to divert attention from illicit drug operations can be described as “Narco-terrorism”. Drug trafficking facilitates other organised criminal enterprises such as human trafficking and gun running, all of which use the same networks and routes to smuggle people, arms and contraband.

Methodology:
The paper analyses the trends and patterns of drug trafficking in India as well as traces the routes through which drugs are trafficked from across the borders. Given the vulnerability of the borders, the paper also critically assesses the measures adopted by India to better secure its borders.

Results:
The trends and patterns of drug trafficking in the country demonstrates that there is a gradual shift from traditional/natural drugs towards synthetic drugs that are being trafficked and consumed in the country.

Enactment of stringent anti-drug laws, and strengthening the physical security of its borders by various means, seeking the cooperation of its neighbours and other countries through several bilateral and multilateral agreements. These efforts have only been partially successful in dealing with the problem.

Implications:
The paper provides an insight into the modus operandi of cross border drugs smuggling network. It presents the socio-economic costs of the drug problem as well as analysis of the impacts on corruption, public order and state authority. It argues that illicit drug trade should be a greater national security agenda in the upcoming years.

Key References:
- Annual Reports-various years, Narcotics Control Bureau
- World drug reports

Key Words:
Narcotics, drug, criminal networks, Narco-terrorism

Introduction
India is rapidly growing nation with a population of more than a billion. This has led to shifts in culture, social values, and demographics within a short span of time thus having significant impact on the people. Commonly used drugs in the country are Cannabis, heroin, opium and hashish.

Over the previous three decades India has become transit hub as well as the final destination for both heroin and marijuana produced in the regions which is commonly referred to as the Golden triangle and
Golden crescent. Furthermore, psychotropic and pharmaceutical preparations and precursor chemicals produced domestically as well as in various parts of the world are also being freely trafficked across the country. This free flow of drugs is not only a public health hazard but also poses grave threat to national security. The Link between organised criminal syndicate and drug smuggling is well known and documented. But it’s the nexus between criminal gangs, drug traffickers and terrorists which is potent enough to cause instability in the nation. World over astronomical profits being generated through drug trade is being used to fund various terrorist and militant organisations. It has been estimated that the income generated through drug trade has accounted for 15% of finances of militants operating in Jammu and Kashmir. Similarly various insurgents operating in the north east like Nationalist Socialist Council of Nagaland (Isak-Muivah) [NSCN (IM)] are known to channelize income generated through narcotics to fund their operations. Powerful criminal syndicates like the D company who have been blamed for carrying out the devastating Mumbai blast of 1993, have become deeply entrenched in the planning as well as logistic end of carrying out anti-state activities. Thus networks originally designed for smooth facilitation of drugs trade is being used to move explosives. As was seen during the Mumbai blasts of 1993 that the explosives used for the attack were smuggled into the country using the same routes through which drugs and contraband were traditionally smuggled by the D company. Even presently it is a source of illegal smuggling of weapons and explosives. Keeping in mind the prevalent scenario, the paper analyses the modus operandi of drug traffickers as well as the popular routes through which drugs are trafficked, which includes routes from across the border. Given the fact that the whole border is not fenced, the paper assesses the vulnerability of the border and the measures adopted to circumvent them. Narco-terrorism is terrorism which is funded by drug money. The free flow of narcotics contributes to a major chunk of terrorism funds. All terrorist groups use this money to fund their activities and the problem has become extremely deep-rooted.

Basic pattern and routes of Drug trafficking
India has long been known as a consumer of opium and various derivatives obtained from cannabis. These substances were basically consumed for medicinal purpose and for recreation during religious and social ceremonies. Most of the demand for these narcotics are met locally. Since India has had a long tradition of consuming hashish often as part of religious celebration. Demand was fairly low and the demand got met through smuggling from Nepal and Pakistan. This did not evince any alarm. However from the early 1980’s reports of

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heroin smuggling started doing the rounds. The flow of heroine was widespread and came with disastrous consequences. But in recent years, the widespread availability of synthetic and pharmaceutical drugs and their subsequent overdose have added a new dimension to the ever growing concerns about drug trafficking.

Global experience with respect to the flow of illegal drugs reveals us that drugs like heroin and cocaine are often trafficked for long distances, whereas drugs like hashish are trafficked for relatively shorter distance and marijuana and psychotropic substances like Amphetamine Type Stimulants are consumed locally and travel the least distance. Most of the narcotics nearly 70% of it are smuggled over land using various modes of transportation. This makes the countries border the first point of contact for drug smugglers. India shares its land border with multiple nations. Each of these borders have varied topography which varies from desert to thick forest. Thus different ways to traffic drugs can be observed depending upon the border.1

Border between India and Pakistan
The fat that India-Pakistan border is situated close to the ‘Golden Crescent”, which is a term signifying the largest producer of opium and cannabis, this has made it particularly vulnerable to smuggling of heroin and hashish. However, this is not the only reason, there existed other reason as well which led to exponential rise in smuggling of heroine through the country’s borders. One of the factor which led to the rerouting of drugs through India was the closing of the Balkan route due to Iran-Iraq war which started in 1980 and went on till 1988. Another major factor was pre-existent network of bullion smugglers who existed along the regions closed to the border add to this involvement of criminal networks in drug smuggling in the mid-1980 who further provided impetus to smuggling of drugs. Insurgency like the Sikh militancy and one in Jammu and Kashmir also led to increase in smuggling of drugs as the insurgents often relied on it to generate funds to carry out their activities.

It has been observed that there has been astronomical rise in trafficking of heroin from the “Golden Crescent” since 1983. This can be gauged from the huge amount of heroine seizures by various law enforcement agencies. It can be conclusively said that the Golden crescent has been the primary source of narcotics due to the fact that majority of heroin and hashish seized has been found to be of South West Asian origin. However drug seizures have registered a decline since the 1990’s, the share of heroine seized of south west Asian origin have declined. The sharp decline of heroine of this specific origin have been attribute to the strong build up along the border following the waves of terror attacks on India which were allegedly planned and executed from Pakistan. An interesting fact that needs to be noted is that the figures of seizure reported by the Narcotics control bureau for heroin, hashish an opium have surprisingly remained constant.

Various reports published by the United Nations, the USState Department, Australian

Crime Commission, etc. have pointed out that India has become major hub for the transshipment of heroin which were produced in the Afghanistan-Pakistan region to the other parts of the world. Various surveys have time and again pointed out that consumption of narcotics has increased in many states which are bordering Pakistan like Jammu and Kashmir and Punjab. This could mean that drugs like narcotics are still being smuggled across the border, under reporting by the relevant authorities could be a possible reason for the above situation. 

Heroin that was smuggled into India originated from the border towns of Sahiwal, Rahimyar Khan, Sukkur and Khokhrapar in Pakistan and from there the consignments crossed the border to various receiving towns such as Churu, Sikar, Kishangarh, Ramgarh, Barmer, Jaisalmer, and Anupgarh in Rajasthan from where they were subsequently transported to Delhi and Mumbai. 

Heroin and hashish are smuggled in from across the border on camel backs and once the consignment reaches the collection center, it is transported to other major cities by vehicles.

Heroin continues to be smuggled through these routes in Rajasthan. In addition, the Thar Express plying between Khokrapar and Munabao has been reported to have become a major carrier of drugs from Pakistan since its inauguration in 2005. Punjab became a major route for drug trafficking with the rise of the Sikh militancy in the state. During the 1980s, the most favoured route for trafficking was the Lahore-Fazilka-Bhatinda-Delhi route. Another frequently used route was the Attari-Wagah route. This route is still being exploited for trafficking drugs. The Samjhauta Express has alleged to have become a major carrier of illicit drugs from across the border. As a result, Amritsar has emerged as a major center for heroin trade in Punjab.

Border towns of Ajnala and Gurdaspur have also become prominent heroin collection centres. Agricultural land across the fence, good

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network of roads and rails right up to the borders and several riverine stretches along the border, all facilitate trafficking of drugs in these sectors. Despite militancy having died in the state, Punjab continues to be a transit point as well as destination for the heroin manufactured in the Afghanistan-Pakistan region. Heroin smuggled in through Punjab and Rajasthan are shipped to Mumbai and Tamil Nadu from where it is trafficked to international markets. The rise of militancy in Jammu and Kashmir also resulted in an increase in heroin trafficking through the state since 1995. Heroin was mainly smuggled into the state through Ranbir Singh Pura, Samba and Akhnor. Lately, most of the heroin which reaches the mainland is being routed through the Jammu sector. The heroin consignment enters India through Sunderbani and Rajouri and reaches Jammu by the Poonch-Jammu highway. From there the route taken to traffic the consignments is Pathankot-Gurdaspur-Amritsar-Faridkot-Jaisalmer-Barmer-Ahmedabad and finally Mumbai. Acetic anhydride, a precursor for manufacturing heroin, flows through the same route but in the reverse direction, i.e. from India to Pakistan and Afghanistan. 

Significantly, the drug trafficking routes along the Indo-Pakistan border has shifted from being land based to sea based because heightened vigil and fencing along the land border have forced drug traffickers to look towards the sea as an alternative route. As a result, the marsh lands and creeks of Gujarat are increasingly used to smuggle heroin from Afghanistan-Pakistan region. Heroin is smuggled into the Rann of Kutch from Karachi in various country-made boats. These marshlands with their numerous interconnected creeks, sand bars and mangroves provide ideal hideaways for drug traffickers. Seizures of numerous consignments of heroin and hashish in Kutch, the latest being the seizure of 21 kg of hashish in 2009, support this fact. Trafficking of heroin along the India-Pakistan border is largely carried on by ab array of cartels such as the D-Company, the Nigerian, the Afghan and the Kenyan syndicates who work in conjunction with each other. In a typical case, heroin is smuggled into India through Pakistan by the land or air routes by Afghan couriers. In many instances, farmers, villagers and passengers are also induced to function as couriers for trafficking heroin into India. Once the consignment reaches Amritsar, Jaipur or Delhi, it is handed over to the Nigerian or Kenyan syndicate, who then traffic it out of the country through the air routes to international markets like the USA, Canada and Europe. These syndicates also


198 “Peddlers Nabbed With Heroin Worth 4.25Cr - Times Of India” (The Times of India, 2017) <https://timesofindia.indiatimes.com/city/delhi/Peddlers-nabbed-with-heroin-worth-4-
use the courier and postal services to smuggle heroin out of the countries.

**India-Nepal Border and India-Bhutan border**

Hashish and marijuana/ganja are the two cannabis derivatives that have been traditionally trafficked from Nepal into India. Lately, a growing demand for Nepalese and Bhutanese cannabis in India and a corresponding demand for codeine based pharmaceutical preparations as well as low-grade heroin in Nepal and Bhutan have resulted in two way smuggling of narcotics and drugs through the India-Nepal and India-Bhutan borders. Well-developed road networks as well as open and poorly guarded borders have facilitated large scale trafficking of drugs through these borders.

Hashish and marijuana/ganja are smuggled from Nepal, pharmaceutical preparations containing psychotropic substances prescribed as painkillers and anti-anxiety drugs such as diazepam, alprazolam, nitrazepam, lorazepam, propranolol, buprenorphine, etc. are trafficked from India to Nepal and Bhutan. Seizures of codeine based tablets and syrups originating from India have been reported periodically from both countries. Low grade heroin, also known as brown sugar, produced in India by diverting opium from licit cultivation as well as procuring it through illicit cultivation is also trafficked to Nepal and Bhutan.

It may be noted that the Single Convention Narcotics Drugs of 1961 recognises India as a licit producer of opium and the only producer of opium gum for medicinal and scientific purposes for domestic need as well as for international market. In India, poppy is cultivated under license in 22 districts in the states of Madhya Pradesh, Uttar Pradesh and Rajasthan. Though cultivation is carried out under strict licensing, it is speculated that 10 to 30 per cent of the licit produce is diverted for the manufacturing of low grade heroin in the country. Poppy is also illicitly cultivated in different parts of the country mostly in remote and hilly terrains for manufacturing law grade heroin. Poppy is grown illicitly in the states of Jammu and Kashmir (417.65 acres), Himachal Pradesh, Uttarakhand, Bihar, Jharkhand, West Bengal, Manipur and Arunachal Pradesh. In 2011, more than 11,000 acres of illicit poppy crop have been destroyed, of which 7,000 acres were in West Bengal. In 2010, the Central Bureau of Narcotics (CBN) had destroyed 390 acres of illicit poppy cultivation in the country. The NCB together with law enforcement agencies have also destroyed a number of illicit laboratories manufacturing brown sugar. The fact that since 1998, the share of ‘local/unknown source’ heroin is showing an increasing trend further reinforces the argument that India is fast emerging as a producer of low grade heroin.

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200 Annual Report 2010, the International Narcotics Control Board.

The India-Myanmar Border
Proximity of the India-Myanmar border to the ‘Golden Triangle’, growing demand for drugs among the local population in the Northeastern states, political instability and insecurity brought about by numerous insurgencies in the region as well as a porous and poorly guarded border provided a proliferating environment for traffickers to smuggle heroin and psychotropic substances into the country through the India-Myanmar border. Existence of strong trans-border ethnic linkages, criminal networks, and inauguration of formal trade through Moreh in 1994 have further facilitated the unhindered and, therefore, increased illegal flow of drugs to the Northeast.\textsuperscript{202}

Besides heroin, a significant rise in the use of psychotropic substances and medicinal preparations containing codeine among addicts of the region has been observed since late 1990. Stringent anti-drug laws and the rising prices of heroin were reasons responsible for this shift, especially towards methamphetamine, which is produced in large quantities in Myanmar. Seizure figures also support this observation. For instance, in 1999, 2,000 tablets of methamphetamine were seized in Moreh\textsuperscript{203}, in the following year 3 kg of methamphetamine was seized, which jumped to 91 kg in 2004 before declining to 40 kg in 2009. Precursor chemicals such as ephedrine, pseudo-ephedrine and acetic anhydride from India are trafficked into Myanmar to cater to the demands of numerous mobile laboratories manufacturing heroin and amphetamine type stimulants (ATS). Seizures of ephedrine and pseudo-ephedrine indicate an increasing trend of trafficking of these chemicals from India to Myanmar. For instance, in 1999 1,421 kg of ephedrine was seized, which increased to 2,304 kg in 2003 and then dipped to 1,244 kg in 2009. It is reported that a majority of these seizures is related to consignments destined for Myanmar. In addition, large consignments of pharmaceutical preparations such as corex, phensedyl, buprenorphine, spasmoporyxvon are trafficked overland from India to Myanmar.\textsuperscript{204}

India-Bangladesh Border
The India-Bangladesh border has been susceptible to smuggling of various kinds of drugs ranging from heroin, marijuana/ganja, hashish, brown sugar, cough syrups, etc. High demand for codeine based cough syrups in Bangladesh, a highly porous border, dense settlement along the border, and strong trans-border ethnic ties contribute towards drug trafficking along the India-Bangladesh border. A well-developed railroad and river network, large volume of both formal and informal trade, and existence of criminal networks are other enabling factors for trafficking drugs along the India-Bangladesh border. Given its large pharmaceutical industrial base, India produces a large number of prescription drugs. Most of these pharmaceutical preparations containing dextropropoxyphene


and codeine are trafficked to the neighbouring countries. Phensedyl, a codeine-based cough syrup in particular, has become the chief item for smuggling into Bangladesh. Truckloads of phensedyl bottles from the factory are diverted to the Northeast and West Bengal by distributors and stockists for this purpose. In addition, empty phensedyl bottles are refilled with higher narcotic content and repackaged as ‘phensedylplus’ and smuggled back into Bangladesh. Bulk of phensedyl bottles are smuggled into Bangladesh through the Kailashar (Tripura) and the Cachar-Karimganj (Assam) borders. Law enforcement authorities, in both countries, continue to seize large consignments of phensedyl. For instance in 2009, Bangladesh seized 58,875 bottles of phensedyl. In the same year, India’s Border Security Force (BSF) seized 4, 18,788 bottles along the Indo-Bangladesh border. In 2010, Indian law enforcement officials seized 39,000 bottles of phensedyl destined for Bangladesh in Karimganj district of Assam. 205 Similarly in 2011, the BSF seized phensedyl bottles worth about Rs 10,50 lakh. Large scale seizures of marijuana/ganja by the BSF and other law enforcement authorities along the border indicate a growing trend of marijuana/ganja trafficking from India to Bangladesh. Besides Manipur and Mizoram, marijuana/ganja is increasingly being grown by farmers in Tripura for better returns compared to traditional crops. Heroin sourced from Myanmar has been smuggled into Bangladesh through Mizoram for long. More lately, it is observed that heroin from the ‘Golden Crescent’ is also smuggled from India into Bangladesh. The seizure of large quantities of South West Asian origin heroin from Lucknow and Kolkata indicates that a new heroin trafficking route through the India-Bangladesh border has been established. In addition, brown sugar and pseudo-ephedrine manufactured in India are also trafficked to Bangladesh. Drugs along the India-Bangladesh border are usually smuggled by individual carriers. Large number of children and women are employed by the drug lords and unscrupulous traders to ferry phensedyl bottles, brown sugar and heroin. These couriers carry these drugs in person when they are crossing the border to avoid detection by the border guarding forces.

Measures to deal with this menace

The fact that 70 per cent of the drugs are transported over land makes the land borders corridors, through which drugs are trafficked into the country. Their vulnerability can be assessed by the fact that 70 per cent of the heroin and 40 per cent of opium that are being trafficked are seized from states along the borders. Easy availability of drugs in the border areas makes their abuse rampant among the local populace as is evident from drug consumption trends and patterns in Manipur, Mizoram, Punjab and Rajasthan. Besides border districts, consumption of narcotics and synthetic drugs is widely prevalent in the rest of the country as well creating huge demands.

According to the World Drug Report of 2010, there were 871,000 heroin user and

674,000 opium users in India in 2008. In a survey conducted by the Ministry of Social Justice and Empowerment, in 2001, there were 2 million opium users and 8.7 million cannabis users. However, trends and patterns of narcotics and drugs consumption over the years have shown significant shifts. For instances, while the component of opium use among the drug addicts has been decreasing from 23.1 per cent in 1997 to 9.2 per cent in 2000, the share of cannabis has been increasing incrementally from 5.7 per cent to 9.4 per cent. The share of heroin has also witnessed increase from 12.7 in 1997 to 18.5 per cent in 1999. Most interestingly, the component of other psychotropic drugs has increased from 16.2 per cent to 23.2 per cent between 1997 and 2000.86

Exploitation of the trafficking routes with the help of well entrenched criminal networks by terrorists to infiltrate with arms and explosives adds a critical dimension to the security of the borders. Composite seizures of drugs and arms by security forces at the borders especially along the borders with Pakistan demonstrate a close nexus between drug traffickers and anti-national elements. For instances, in 2009, the BSF seized 23 kg of heroin along with 12 pistols and several rounds of ammunition in Punjab. In the same year, consignments of 58 kg of heroin, 10 kg of hashish as well as pistols and RDX were seized by the BSF along Rajasthan border.87

In April 2010, the Punjab Police apprehended two smugglers with six kg of heroin along with an AK 47 rifle and 100 live cartridges.88 In April 2011, a Manipuri insurgent belonging to the Kanglaipak Communist Party (KCP) was arrested for trafficking 200 kg of ephedrine. Investigation revealed that the money generated from the sale of the chemical was to be used for financing the activities of the insurgent group.206

For reducing the supply and demand for drugs into the country, the government deemed it necessary to enact domestic laws that would be stringent enough to deter the organised gangs of drug smugglers; that would allow concerned agencies to investigate and prosecute drug related offences; that would strengthen the existing cartel control over drug abuse and; that would enable India to fulfil its obligations towards international treaties and conventions that it has signed against narcotic drugs and their trafficking. Accordingly, the Narcotics Drugs and Psychotropic Substances Act (NDPS) was enacted in 1985. Under this act, cultivation, manufacturing, transportation, export and import of all narcotics drugs and psychotropic substances is prohibited except for medicinal and scientific purposes and as authorised by the government. The Act provides for rigorous punishment for any person violating this act and if a person is caught peddling drugs for the second time, death penalty could be awarded to the offender. The act also provides for the detention of any person for more than two years in areas categorised by it as ‘highly vulnerable’. The NDPS Act also provides for forfeiture of property acquired through illicit trafficking of drugs. The enactment of this legislation has indeed provided the government with the means to achieve the

twin goals of reduction in drug supply and demand. While many drug traffickers have been prosecuted and sentenced under the NDPS Act, drug trafficking has contradictorily, registered an increasing trend. It shows that mere enactment of laws is not enough. For combating drug trafficking, it is necessary to successfully investigate and prosecute all drug related offences. Furthermore, proper licensing and strict vigilance is required to ascertain that there is neither illegal cultivation of poppy nor any diversion of opium to manufacture heroin.

Physical security of the borders and coasts
Considering that India has been a transit hub as well as a destination for drug trafficking, emphasis has been laid upon ensuring the security of the borders by preventing the easy ingress and egress of the drug traffickers along with their consignments through the borders. In this respect, the most visible measure that was undertaken was the building of border fences. Border fences were erected first along the border with Pakistan, beginning in the mid-1980s, when large numbers of terrorists as well as huge quantities of drug from Pakistan began to enter India. In later years, fences were built along the India- Bangladesh border primarily to prevent illegal migration, but these fences also acted as a barrier to the free movement of drug traffickers. That the construction of fences has reduced the inflow of drugs from across the borders substantially is corroborated by the reduced seizure figures as well as the increased use of sea routes by the traffickers to smuggle in drugs into the country. Strengthening surveillance along the borders by deploying adequate numbers of border guarding personnel is another measure undertaken to ensure security of the borders. Regular patrolling and electronic surveillance is carried out for detecting suspicious movements along the borders as well as to gather intelligence to effectively deal with drug trafficking.

Cooperation with Neighbours
Realising the importance of a cooperative framework for the prevention of illicit trafficking of drugs and chemicals, India has entered into bilateral and multilateral agreements with several countries including Neighbours.109 Bilateral agreements were signed with Afghanistan (1990), Bangladesh (2006), Bhutan (2009), Myanmar (1993), and Pakistan (2011). These agreements have been instrumental in establishing a mechanism for mutual exchange of information, of operational and technical experience, cooperation for joint investigations and other assistance ‘to identify, suppress and prevent criminal activities of the international syndicates engaged in the illicit traffick of narcotics drugs, psychotropic substances and precursor chemicals’. Additionally, there are several other bilateral institutional mechanisms, which facilitate interactions between India and its neighbours to discuss the problem of drug trafficking. These interactions are held at national, sectoral and local levels on annual, bi-annual and quarterly basis involving the Home Ministers and Home Secretaries, the heads of apex Drug Law Enforcement agencies and Director Generals of the Border Guarding Forces of India and its neighbours.

Conclusion:

www.supremoamicus.org
Considering India to be a transit hub as well as a destination for drug trafficking, the emphasis has been largely on ensuring the security of the borders by preventing the easy ingress and egress of the drug trafficker along with their consignments through the borders. In this respect, the most important measure undertaken by India was the construction of border fences. Border fences were erected first along the borders with Pakistan. This process began in the mid-1980s, when large numbers of terrorists as well as huge quantities of drug from Pakistan began to enter India. In later years, fences were built along the India-Bangladesh border in order to prevent illegal migration. These fences also acted as a barrier to the free movement of drug traffickers. The positive feature of the construction of such fences is that it has reduced the inflow of drugs from across the borders.

Strengthen surveillance system along the borders by deploying adequate numbers of border guarding personnel. Another measure undertaken to ensure security of the borders is to regular patrolling and electronic surveillance is carried out for detecting suspicious movements along the borders as well as to gather intelligence to effectively deal with drug trafficking. In addition to border guards, various central bodies such as the Customs, the Directorate of Revenue Intelligence, the Narcotics Control Bureau, and the Central Bureau of Narcotics as well as state organisations such as state police, state excise and state forest are there to prevent drug consignments along the borders. India has also entered into bilateral and multilateral agreements with several countries including neighbours. Bilateral agreements have been signed with Afghanistan (1990), Bangladesh (2006), Bhutan (2009), Myanmar (1993), and Pakistan (2011). These agreements have been instrumental in establishing a mechanism for mutual exchange of information, of operational and technical experience, cooperation for joint investigations and other assistance “to identify, suppress and prevent criminal activities of the international syndicates engaged in the illicit traffick of narcotics drugs, psychotropic substances and precursor chemicals”. Besides these measures, there are several other bilateral institutional mechanisms, which facilitate interactions between India and its neighbours to discuss the problem of drug trafficking. These interactions are held at national, sectoral and local levels on annual, bi-annual and quarterly basis involving the Home Ministers and Home Secretaries, the heads of apex Drug Law Enforcement agencies and Director Generals of the Border Guarding Forces of India and its neighbours. For instance, in February 2011, the Drug Law enforcement officials of India and Bhutan discussed avenues to strengthen cooperation for combating drug trafficking. Similarly, during the 18th sectoral level talks between India and Myanmar in 2011, specific problems associated with drug trafficking were discussed. The Director Generals level talks between BSF and BGB (Border Guard Bangladesh) in 2010 also was an important in combating drug trafficking across the borders.

As for multilateral agreements with neighbours, India is a signatory to the SAARC Convention on Narcotics Drugs and Psychotropic substances, 1993. The convention provides for regular meetings of
Home Ministers and Home Secretaries of the member countries as well as for interactions among the members of SAARC Conference on Cooperation in police matters. India has also signed the BIMSTEC Convention on Cooperation in Combating International Terrorism, Transnational Organised Crime and Illicit Drug Trafficking in 2009. It provided a legal framework to all the member countries to counter drug trafficking and organised crime. India is also a party to the Pent lateral Cooperation on Drug Control, which focuses on the prevention of illicit trade of precursor and other chemicals used for the manufacture of heroin. India has been enduring the scourge of drug trafficking for three decades. The country’s proximity to two of the world’s largest illicit opium growing areas as well as various external and internal factors have contributed to it becoming a transit, source and a destination for drugs. The trends and patterns of drug trafficking in the country demonstrates that there is a gradual shift from traditional/natural drugs towards synthetic drugs that are being trafficked and consumed in the country. In the 1980s, a large quantity of heroin and hashish was smuggled in from the source areas into the country through various borders. Though these drugs are trafficked, in fewer quantities, the share of synthetic drugs such as ATS and codeine based pharmaceutical preparations has gone up. Various studies and newspaper reports indicate that drug consumption and trafficking are in fact showing an increasing trend. To deal with the problem of drug trafficking and to protect the country’s borders against such infringements, India has employed a mix of measures. On the one hand, it has enacted stringent antidrug laws, co-opted various voluntary organisations and sought to strengthen the physical security of its borders by various means and on the other hand it has been seeking the cooperation of its neighbours and other countries through several bilateral and multilateral agreements. These efforts have only been partially successful in dealing with the problem.

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LEGALISING PROSTITUTION IN INDIA

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PROSTITUTION IN INDIA
Everything which is in existence today has a background of its own, and so does prostitution in India. India which is claimed to be a standout amongst the most ancient civilizations of the world exhibits a broad record of the existence and development of prostitution. Though prostitution might have changed over time from ancient and medieval to modern India but it still remains as an unpleasant truth before the society. It is a reality which has existed since ages and dispensing it away is practically not possible.

By prostitution one generally refers to commercial sex, the business or practice of exchange of sexual activity in return for money or some other consideration as settled between the parties. The legality of prostitution is different in different countries, it being legal in some and illegal in others. Some of the countries which have legalized prostitution are Canada, Germany, Belgium, New Zealand, Austria, Australia, Brazil, Denmark, France, etc. The law in India is rather ambiguous and not clear as to the legality of prostitution.

Prostitution is practiced widely in India, it being a billion dollar industry with millions of prostitutes in different areas of the country. These areas are often referred to as the red light areas. The prominent red light areas in India are Sonagachi Kolkata, with the title of being Asia’s largest red light area, Kamathipura Mumbai, Budhwar Peth Pune, Meerjung Allahabad, G.B road Delhi, Chaturbhujsthan Muzaffarpur, Itwari Nagpur and Shivdaspur Varanasi. In India prostitution is considered to be a wellspring of degradation to the society and is often condemned. The people of India and furthermore the government turn a blind eye towards prostitution pretending it does not exist in the society and accordingly emerges no compelling reason to address the same.

The people adopt a very discriminatory approach towards the sex workers, looking down upon them and not the buyers of such services. The buyers are the ones who contend for criminalization of prostitution referring it to be filthy and amoral in the daylight and enjoy such services in the moonlight. Human rights infringement is widespread throughout India, and the same can likewise be found in the lives sex workers. Prostitution isn’t dealt with as work, yet an indecent act undermining the general public. This results in the denial of essential rights to both sex workers and their families. Women engaged in prostitution cannot access basic healthcare services and are made subject to abuse, violence, harassment and exploitation not only by the pimps and brothel runners but also by police and government authorities.

Navratre, a nine day celebration dedicated to Maa Durga, is one the most imperative celebration in India. Amid the celebration, the people worship the deity of Maa Durga, made of eighteen soils, taken from eighteen different places, one of which is from a prostitute’s doorstep. The incongruity lies here that the mud from a prostitute’s
doorstep is called 'punyamati', which means the pure soil, yet they themselves are called evil.

IS PROSTITUTION A CHOICE?
Women do not voluntarily enter into this profession; it is the circumstances that force them. There are very few, precisely negligible percentage of these women who willingly take up this profession. Many thousands of young girls who are minors and women are abducted, lured and sold into forced prostitution. Women are constrained into prostitution by poverty, abandonment, sexual and verbal abuse, lack of education, gender discrimination, etc.

Majority of the girls are forced into it before they have attained the age of majority, with most of them having been sexually and physically abused as children. Some in the state of utter poverty see it as a means of funds for their own and family’s survival. A lady who is unable to get any beneficial work and who has no supporter should either starve to death or gain her livelihood through prostitution. Some are the victims of rape, they are stigmatized by the society and when not accepted by anyone then left with no option other than turning to prostitution to survive. Thousands of girls are abducted at a tender age by the traffickers and forced into selling sex. Some are simply sold by their families and husbands, and the children of these prostitutes end up entering prostitution with no choice available to them.

PLIGHT OF THE PROSTITUTES
HEALTHCARE- The health of the sex workers and their children suffer the most owing to the marginalization and stigma that exists in the society. Lack of education, obliviousness and dread of abuse by medical establishments make it troublesome for ladies to get to healthcare services along these lines they are unlikely to look for either preventive or curative care, bringing about lower levels of wellbeing. The life expectancy of these women is very low.

NO SECURITY- Individuals in sex work are at a higher risk of violence, as well as less inclined to get protection from the police as most of the time they themselves are exceptionally culprits of this brutality against sex workers. Since society regards women in sex work to be amoral, they are assumed guilty therefore "deserving" of any violence against them. There have been numerous instances when the sex workers manage to escape the confinements and seek protection from the police but the police officers in turn sexually assault these women, rape them and perpetrate violence against them. Such violence is the consequence of the discrimination and vulnerability of these women.

STIGMATIZATION- Women are denied rights which are ordinarily enjoyed by all the citizens; they are treated with disrespect and are ostracized from the rest of the society. The society looks upon them as criminals charged with the offence of carrying out immoral acts which infect the society.

HIV/AIDS- Sex workers have been considered outcasts by the society infecting with their unethical and compromised morals and now as the carriers of HIV. Sex workers are at a greater risk of HIV as compared to the general population owing to
the economic vulnerability, inability to insist on consistent condom use, violence and marginalization. They even face barriers in accessing the HIV prevention programmes due to stigmatization.

DENAIL OF LABOUR RIGHTS- A safe working environment through standard labour protection laws continue to be denied to the sex workers as they do not fall within the ambit of labour laws. This includes legal redressal to grievances at work, health and safety regulations and other benefits.

MISERABLE LIVING CONDITION- The women are trapped in shady brothels, live under inhuman conditions in an extreme state of confinement where they do not even see the rising sun or feel the fresh air. They are denied basic necessities like proper food, sanitation, education, rights which are associated with every citizen like the right to vote, have an identity, equality, equal protection under law, dignity etc. Anyone who tries to escape these prisons are forced back and tortured even more severely. They not only get infected with STDs but also psychological disorders, cervical cancer, traumatic brain injury etc.

LAWS GOVERNING PROSTITUTION IN INDIA
The Immoral Traffic Prevention Act 1986 which was an amendment to the Immoral Traffic Suppression Act 1956 governs prostitution in India. As per the law the prostitutes can carry out their trade in private but not in open. The prostitutes can be arrested for soliciting their services or seducing others. Pimping, pandering, owning and running a brothel and kerb crawling which are intrinsic to this profession are illegal. Any person who consorts with prostitutes within 200 yards of a designated area and a person who indulges in any such activity with someone who is under 18 years of age shall be punished. The law in India is vague and ambiguous when it comes to dealing with prostitution. This leaves the prostitutes at the whims of the police and other officials who bring charges against them. Different sections are used to bring charges against sex workers of public nuisance and public indecency under the Indian Penal Code 1860.

NEED TO LEGALIZE PROSTITUTION
PROTECT RIGHTS - Sex workers are also human beings and entitled to all the human rights of which they are deprived by the society. Apart from being censured and judged by the people they are always viewed as culprits, criminals and offenders of public nuisance. They are deprived of the right to dignity on unrealistic moral grounds. The rights enshrined in the constitution should be made available to them without discriminating them on the grounds of the profession they are into.

CURB FORCED PROSTITUTION-
Millions of children are forced into this industry; legalizing prostitution will regulate the industry and bring down the exploitation of the minors to a great extent. Regulating it through laws would ensure that those who voluntarily take up this trade would carry on the trade with proper licenses without facing any harassment by the society and the officials. At the same time regulation would ensure that no one forced into this trade thus protecting their rights and confirming their safety.

SAFE WORKING CONDITIONS- Proper regulations would ensure healthy and safer
working conditions. Regular medical checkups of the sex workers would reduce the risk of transmitting sexually transmitted diseases. The codified statute will provide proper guidelines as the requirements of hygiene, cleanliness, working conditions and health of the workers which will be beneficial for both the parties.

REMOVAL OF PIMPS- Removal of pimps and middlemen will be brought into effect by proper licensing of the sex workers. This would end the consistent harassment and the exploitation of the sex workers. The workers will get due wages for the service they would provide.

REVENUE GENERATION- It is a known fact that the prostitution industry is a billion dollar industry in India and regulating it would enable government to impose taxes on the proceeds. This would add to the revenue of the government and would also provide funds which could be effectively utilized for the welfare of these prostitutes. The workers will also be enabled to demand minimum wages or proper wages for their work.

LEGAL FORUM- The regulation of the industry by law would provide the sex workers with a legal forum to voice their grievances. They will be entitled to approach the court under the statute and get their rights enforced. This will also prevent the atrocities committed by the police officials on these workers because of the ambiguity that the present law provides.

REGULATE INDUSTRY- The basic purpose of any law is to regulate human conduct. When prostitution has existed in the Indian society since time immemorial and has continued even today then why not regulate the practice? The implementation of laws in the required manner would do away with the wrong practices associated with this trade and ensure safe and healthy practices.

EXPOSE REAL CRIMINALS- The traffickers manage to carry on their business because the sex industry works clandestinely, legalizing it would help in breaking the trafficking groups. Prostitutes would feel secure to approach police, coming out of the shadows as their act will not be illegitimate. The police will also be able to concentrate their resources and time on the real criminals.

ACCEPTANCE IN SOCIETY- The sex workers face discrimination primarily due to the attitude adopted by the society, legalizing it would bring about at least some change in the mindset of the people. It is the need of the hour that prostitution should be accepted as just another profession. The people should have the honesty to accept that the services of these prostitutes are needed by many and denying this would only worsen the situation.

FATE OF THEIR CHILDREN- The children of these prostitutes face discrimination, stigma and marginalization. The female children are labeled as prostitutes right from their childhood. They are denied education and other rights and verbally abused for being the offspring of prostitutes. They are left with no choice but to end up entering into this trade.

CONCLUSION
It has become imperative today to regulate the prostitution industry, denying or refusing to acknowledge its pervasiveness will do no good instead it would exacerbate the conditions prevailing. The stealthy nature of prostitution assists the exploitation of the vulnerable sex workers. Legalizing it would ensure benefits to all the parties involved in the trade. Most importantly the rights of the sex workers will be protected and they would be allowed to carry on an ordinary life like any other normal person.

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PROBLEMS AND SAFEGUARDS OF THE RESERVATION POLICY IN INDIA

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Introduction
The concept of reservation came strongly after the independence of the country and also some provisions regarding it are included in the constitution. The framers of the constitution made the reservation system to uplift the people who were not given equal opportunities and respect in the society so the concept of reservation came into existence.

Reservation in simple words is an act of reserving the seats for particular people. “Reservation” in English means “An arrangement by which some provisions are, secured in advance” or “The act of keeping back or withholding”\textsuperscript{207}. If the same word is uttered in India it creates a widespread debate, heated conversations, and divides the society between who supports reservation and who are against it. Reservation is provided to the particular class of people like schedule caste, schedule tribes or other backward class and also to the women and physically challenged people.

There were some leaders like Dr. Ambedkar who wanted to help people of backward class. He demanded the reservation for just 10 years only but still it is the part of the system. In earlier times our society was divided in people from different castes like Brahmin, kshtriyas, vaishyas and shudras. People known as ‘bhagis’ and ‘harijans’ were not given respect or opportunity to work and were discriminated on basis of their caste.

Reservation system was included in the constitution because the framers of the constitution believed that, people from backward class who belong to particular caste were denied respect and equal opportunity in the society. To provide them the equal opportunity and respect, reservation system was introduced so that every person in the society was treated equally without any discrimination. Reservation was the need at that time to change the thinking of people to uplift the socially and economically backward people, and to bring the caste in mainstream.

History:
Reservation system found its roots from 19th century when the hunter commission appointed. It is divided in two parts:
- Pre independence
- Post independence

Pre Independence
Mahatma Jyotirao Phule, a social reformer from the lower caste demanded free and compulsory education and representation in the government jobs.
In 1909, Indian Councils act 1909 came into existence which is also known as Morley Minto Reforms. It was on the basis of religion and aimed to divide the society into different religions rather that uplifting the backward people\textsuperscript{208}.

\textsuperscript{207} https://knowledgeofindia.com/quota-or-reservation-system-in-india/

\textsuperscript{208} supra1
In 1914, after the first world started, British government was in need of support and they started considering bringing constitutional reforms to get the support from the people of India. British government also appointed the Simon commission who recommended the need to protect the minorities, socially and politically depressed class of people.

In 1933, Communal Award was introduced by the Prime Minister Macdonald where Separate representations for Muslims, Sikhs, Christians, Anglo-Indians, European and Dalit. It was opposed by Gandhiji and supported by Dr Ambedkar.

In 1932, Poona pact came and brought single general electorate for each of the seats of British India and new central legislatures. The Act was finally stamped in 1935 where seats were reserved for the depressed class. The word Schedule caste was first used in The Government of India Act 1935.  

Dr Ambedkar became the member of Viceroy Executive council and demanded reservation not only in legislative seats but also in Education and Government employment and the demand was accepted.

Post Independence
In 1947, when India obtained independence, Dr Ambedkar was appointed as a chairman of drafting committee of Indian Constitution.

India’s first Prime Minister Mr. Jawaharlal Nehru while addressing the Constituent Assembly in May 1949 said "I try to look upon the problem not in the sense of religious minority, but rather in the sense of helping backward groups in the country. I do not look at it from a religious point of view or a caste point of view, but from a caste point of view that a backward class ought to be helped, and I am glad that this reservation will be limited to ten years".  

In December 1946, Constituent Assembly came into existence. The Framers of the constitution thought to set up a welfare society. According to Minority committee’s report representation in legislature, Higher Education and in Government Jobs was demanded and also the reservation on the basis of religion was asked for but it was not accepted.

In 1953, Kelakar committee came and recommended that caste should be the basis for the backward class but the report was not accepted.

In 1963, there was a case M R Balaji v State of Mysore also known as Mandal Commission case. In this case backward class was defined by the court and it upheld the validity of reservation and also said that reservation cannot exceed more than 50 %. It was also held by the court that not only caste but also their social and economical status matters to decide the backwardness.

In 1979, 2nd Backward Class Commission was made by The Mandal Commission and they recommended that caste should be the basis for that reservation and there should be 27% reservation in central and state services, public undertakings and educational institutions.

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209 https://blog.ipleaders.in/reservation-policy-india/
210 Supra 1
211 1963 AIR 649, 1962
Beneficiaries of reservation scheme

Reserved category............. percentage
- Schedule caste (SC)............ 15%
- Schedule tribe (ST)............. 7.5%
- Other backward class (OBC).... 27%
- General category.................. 10%

Schedule caste (SC)............. 15%
The term schedule caste was introduced by the Simon commission in 1927. Dr. Ambedkar called it as a depressed class and Gandhi ji called them the Harijans. Schedule caste means the people who belong to poor family or the people who are socially and ritually tainted. The class of people who were treated differently in the society in 1935 when government of India came it referred as schedule caste and also referred as dalits. In earlier time the criteria to identify this class of people was on basis of rituals but now the criteria is that people should be socially, economically and educationally backward and that untouchability should be the reason for that. The person who is claiming sc should be from Hindu Sikh or Buddhist religion. It is defined under section 341 of the Indian constitution.

Schedule tribe (ST).............. 7.5%
The framers of the Constitution took note of the fact that certain communities in the country were suffering from extreme social, educational and economic backwardness on account of the primitive agricultural practices, lack of infrastructure facilities and geographical isolation. The Constitution of India in Article 366 (25) prescribe that the Scheduled Tribes means such tribes or tribal communities as are deemed under Article 342 of the Constitution to be Scheduled Tribes. The words and the phrase ‘tribes or tribal communities or part of or groups within tribes or tribal communities” in Article 342 have to be understood in terms of their historical background of backwardness. Primitiveness, geographical isolation, shyness and social, educational & economic backwardness due to these reasons are the traits that distinguish Scheduled Tribe communities of our country from other communities.

Other backward class (OBC).... 27%
The term ‘backward classes’, as originally used around 1919 by political leaders, referred to a section of population which was backward in a socio-economic sense. It did not limit itself to the matrix of caste. The term ‘backward classes’ encompassed the depressed classes, the aboriginal tribes and other backward classes (OBCs).

Even the Constitution is not clear about the OBCs. While the constitution clearly says that special provisions must be made for the SCs and STs, it does not mention the OBCs. It only refers to “social and educationally backward classes of citizens, in addition to the scheduled castes and scheduled tribes”.

General category.................. 10%
Recently in the amendment of the constitution 10% reservation was passed in lok sabha to the people of general category whose household income is below 8 lakh. Government sources said the 10 per cent

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212 https://indiantribalheritage.org/?p=21438
Safeguard of the policy
Constitutional Provisions are the safeguards of the policy

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

“equal protection of laws”, which is rather a corollary of the first expression, and is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution, directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. It is a more positive concept implying equality of treatment in the equal circumstances.

Under this article every person has a right to be treated equally and no one should be treated differently on any kind of basis. However, the current reservation system is violating the equality rights. People from the General category are not able to get the admission or job with higher merit and justice should be done to them.

Article 15
Prohibition on discrimination
Article 15 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Under this article no person should be discriminated on any basis of caste, religion, sex or birth. Reservation system was made to provide equal opportunities and respect to the backward class and to uplift them but now the reservation is misused by the people from the reserved category.

The right guaranteed in clause (1) is conferred on a citizen as an individual and is available against his being subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen generally.

Art. 15, clauses (4) and (5) of the Constitution provides reservation of seats to SCs, STs and Backward Classes in educational institutions. Even the private aided and unaided institution must also reserve certain seats to the students belonging to these groups. Right to education has also provided reservation to these communities.

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215 https://indiankanoon.org/doc/367586/
216 https://www.legalbites.in/law-notes-constitution-right-to-equality-under-article-14-of-constitution/
218 Supra 7
Article 15(4) was added by the 1st constitution amendment 1951 under which state has power to make any special law for socially and educationally backward class of people and for schedule caste and schedule tribes. Every state has made laws for SC, ST, and OBC but because of this reservation, people of the general category who are actually socially and economically backward are not able to get the benefit and the people from the reserved category who are not backward are getting the benefit. So the government should not make more reservation but they should help the people whether they are from any class.

Article 15 (5) was added by the 93rd constitutional amendment under which state has power to make laws for the SC, ST and socially and educationally backward classes of the citizens. State has power to make laws in the matter of admission to educational institutes including private educational institutes.

Article 16
Equal opportunity in the public employment
Article 16 (1) & (2) says that every person who is citizen has a right to equal opportunity in public employment or appointment. No person should be denied to get the employment on the basis of caste, sex or religion and also discrimination should not be done to them on any basis. Every person should be provided equal opportunity is right given to the citizen of the country by the constitution.

Article 16(4) is the second exception to the general rule embodied in Articles 16(1) and (2). It empowers the state to make special provision for the reservation in appointments of posts in favour of any backward class of citizens which in the opinion of the State are not adequately represented in the services under the State. The 16(4A) was added by 77th constitutional amendment which permits the reservation in promotion to the schedule caste and schedule tribe.

In a case of Dr. N.T.R. University of Health Sciences v. Dubbasi Praveen Kumar, the division of the Andhra Pradesh & Telangana high court held:

“There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the constitutional mandate enshrined in Article 16(4).”

Article 330 and 332
The above article of the Indian Constitution provides reservation to SCs and STs both in Lok Sabha and State Legislative Assembly respectively

Article 335
The above article claims reservation for SCs and STs in Public Service both in Central and State Governments.

103rd constitutional amendment
Article 15(6) was added by this amendment where 10% reservation is provided to the people who are economically weak and belong to the general category. It belongs to

220 https://thewire.in/law/reservation-law-india-sc-st-obc
the people who are economically weak from upper caste. It provides reservation in government jobs as well as admission in government educational institute and private higher education institutions. The main object behind this amendment was to provide reservation to the people from general categories that are excluded from getting higher education or jobs because of their financial situation.

This amendment exceeds the limit ob reservation which is 50% and it was stated in the case of M R Balaji vs. state of Mysore.221

Concept
Reservation based on caste
The current system of reservation is based on the caste and it is the biggest social evil which led to the discrimination amongst the people of the country. Caste based reservation was made because there were some people who belonged to a particular caste who were economically weak but after the implementation of the caste based reservation people from the backward class are no more backward in economical status. Now it is the time to make changes in the policy because people from the general category who are having proper merit and qualification are not able to get the admission or job though and people from reserved category that are not having proper merit or qualification easily get the admission or job. So the people from the reserved category are using the reservation policy and taking advantage of that even if there is no need.
Caste is being used as a means to classify people. The classification is being made to extend certain benefits – in educational institutions, in public services and also to become members and the representatives of the people. Thus, caste is being used for extending all such benefits which leads to emphasizing caste which the Constitution makers sought to avoid. The classification for extension of benefits should be on a secular i.e. “non-discriminatory, non-communal and non-caste” basis and any person who satisfy such secular conditions of classification should be eligible for such benefits. The assumption of the backwardness limited to certain castes is wholly fallacious and should not be allowed.

221 Supra5

On the basis of caste, backwardness cannot be decided. There was a time when a particular caste of people was termed as the backward class or underprivileged people but it is not so today and in the privet sectors no one will be given job on basis of their caste but they are given job on basis of their qualification and ability to work.

There is no reservation in the two fields
- Sports
- Armed forces

If there is no reservation in the sports and army then why do we need reservation in the other fields? This 2 particular fields don’t have any reservation because in this most strongest and the best people are needed.

Free Education should be provided to the every person of country so that every person can get admission or job on the basis of


www.supremoamicus.org
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merit and there will be no need of reserving seats for any person.

Types of reservation policy in India
Reservation is provide by the government in the following categories

- **Reservation in the legislative bodies**
  Reservation is provided to the schedule caste and schedule tribes people in the loksabha and in legislative assemblies according to their population in the particular state. The purpose behind this was to make presence of minimum representative in the in the legislative bodies. This type of reservation in not given to the other backward class.

- **Reservation in the Educational Institutions**
  Reservation is provided to the schedule caste, schedule tribes and other backward class in the educational institute whether private or not and also provided reservation in the higher education.

- **Reservation in the Public Employment**
  Reservation is given to the schedule caste schedule tribes and other backward class in the public employment under the article 16 of constitution.

Problems

**Biggest hurdles in our progress**
Reservation system is creating hatred among the people of country because the less qualified people are getting admission and jobs. Moreover, by giving admission and jobs to the people who are less qualified from the reserved category country is leading in the wrong direction.

**Equality**

The reservation system came into existence so that discrimination can be avoided between backward class and the upper caste and they also have right to be treated equally. this days purpose is being not served for what reservation system was made. Injustice is being done to the people from the general category. Even if the people from general category are having higher merit or qualification not able to get the admission or job and reserved category people with less qualification or merit easily get that job or admission.

**Vote bank politics**
Reservation system was introduced to uplift the backward class and adopted for 10 years only but it still prevailing in the system because of the politicians. Political parties are using reservation to get the votes not to support the needy or backward class people. For example, recent amendment in the constitution which is 10% reservation for the people of general category who are socially and economically weak.

**Discourage performers**
When People who are having higher merit and qualification are unable to get the admission or job because of the reservation policy, they feel disheartened. Current reservation is used by the people from reserved category and because of that people who are from general category feels discouraged.

**Used for benefit**
People from the reserved category are misusing this policy even though they are not socially or economically backward. Reservation policy is being misused by reserved people with a lesser merit and
qualification to get the admission in institutes and in public employment. Reserved category people don’t want to work hard because they know they will get the job anyway.

Migration of merit
Individuals who don’t get the opportunity to work though they are qualified migrate themselves in another country work for them to earn more. The people of our country prefer to work in another country because they were not given the opportunity in our country. They like to go there for the higher studies and jobs.

Equal opportunity
Reservation system came so that equal opportunity can be provided to every person and no discrimination on the basis of caste, sex or religion can be done. If the people are not selected on the basis of merit and qualified people cannot get that job or admission than their opportunity is taken away from them and it violates their right of equality and equal opportunity.

Internal partitions
Reservation system is dividing our society and internal partition is being done amongst the people because of the caste system. Dr Ambedkar framer of the constitution came up with the reservation concept so that every person treated with respect and provided equality in the society but the concept is bringing internal partition because of the caste.

Conclusion
The reservation policy was adopted with aim to uplift the socially and economically backward class. It was adopted by Dr Ambedkar the framers of the constitution for 10 years only but it is still prevailing because of the politicians. Reservation policy was adopted with a purpose and the purpose is not being served to the people for whom the reservation policy was made.

People of the country are demanding more and more reservation. They want their caste to be included in the OBC and SC, ST. For example, Patels from Gujarat wanted to be included in the OBC category.

May be India is the only country where people want them to be called as backward class. People should not fight for reservation but there should demand the more opportunities and the free education. Otherwise there will be time when every caste will demand there different reservation or to include them in OBC quota.

The reservation policy is good till the point some deserving candidate is not missing upon his opportunity because of the prevalent reservation system. I find no reason for giving admissions to undeserving students over deserving students. If these classes of people have been denied opportunities in past, then the scenario is being repeated with the general class in the present. The undeserving should not reap the fruits of the labour of the deserving.

Instead of giving reservation to the people,
➢ Education should be made compulsory for everyone so that no one will be educationally backward

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- Free education should be provided to the people in need so that every person can get the education and no person will be discriminated from getting education.

- Admission and jobs should be given on the basis of merit only so that we can get the best persons in every field and development can be done.

- Provide more job opportunities in different sectors so that no person will be unemployed in the country.

- If reservation is there it should be economical status of the person.

- Reservation can be used by only one generation and not by the others because till that time the family was given opportunity to work and uplift their family.

- Student should be provided opportunity to work and earn.

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JUVENILE JUSTICE

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INTRODUCTION

India is home to the largest child population within the world. The Constitution of India ensures basic Rights to any or all children within the nation and empowers the State to create special provisions for children. The Directive Principles of State Policy expressly guide the State to protect children from abuse and ensuring that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.224

Juvenile may be outlined as a child who has not accomplished an exact age at which he, like an adult person beneath the law of the land, may be command to blame for his criminal acts. The juvenile is a child who is purported to have committed /violated some law that declares the act or omission on a part of the kid as an offence.

Juvenile offenders have identical set of constitutional guarantees as an adult, such as a fair trial. However fairly often, adult wrongdoers are able to secure bail quicker than a juvenile offender, simply because the juvenile isn't fined, it will in no means deduct his/her constitutional guarantees of liberty. The sole distinction is that, in contrast to adult offenders, the state should defend, and ultimately assimilate, juvenile offenders. However, protection cannot become custody. Also, the statute stresses on privacy as a right for the juvenile wrongdoer. The statute focuses on necessary infrastructure with a major involvement of informal systems, specifically the family, voluntary organizations, and also the community, to produce a system become independent from the criminal justice system.

In modern scientific thought pervaded with predominant cultural positions, childhood and adolescence are perceived as being indisputably completely different from adulthood, notably in terms of their biological, psychological, and social aspects. From the first of human civilization, dynamic social circumstances have continuously had a major impact on the method of a child’s psychological development, that mostly depend on specific social settings and also the underlying cultural angle to kids and youth.

Understanding this state of the Juvenile Justice System in India needs recourse to the history. The JJS in India originated throughout British rule. Before British regime in India, juveniles were treated by the family and society generally. The institutional treatment of juvenile wasn't visibly witnessed. Therefore, JJS and punitive live was the direct consequence of western philosophy and development of jail modifications.

The culture of crimes by Juvenile wrongdoer is as recent because the society as a result of doli incapex and adventurous perspective, the youth typically come in conflict with law and indulged in crimes. Gone are those stormy days when the issues of Juvenile weren't thought of as a separate
system. It can be witnessed from the past that; the children were thrown into prison without trial. They were locked in the jail along with hardened criminals. In the nineteenth century penologists prescribed equal punishment for both adult and Juveniles. History reveals that, juveniles were hanged, transported and imprisoned like adult criminals. The records reveal that, in 1833, death sentence was passed on nine years of child for stealing goods worth two pence. Hanging, whipping and torture of the pillory were common practices for petty offences. The punishments were commonly made before public as a method of deterrence.

Gradually the problem of youth offender was given separate treatment. Some leading penologists have suggested for correctional measure in place of penal measures. India got independence in 1947. It became the party to UDHR 1948. Being a party to the UNO, India has adopted measures as per the international standard. The constitution makers of India provided a separate treatment for children and women. In this article an attempt is made to analyse the special treatment adopted by India for Juveniles in the light of its constitutional philosophy and the international conventions.

Considering the magnitude of the problem and the issues involved, analysis indicates that the number of factors for neglect and delinquency are mostly common and interrelated, based on socio-economic and psychological reasons. The neglect of children by their parents, family, society and the nation create detrimental effect on their physical, mental growth and overall development. Needless to say, that most of the factors causing delinquency are in plenty in the Indian context and any attempt to prevent and control them can be fruitful for society.

**MEANING AND CONCEPT**

The Juvenile Justice system (JJS) relies on principles of promoting, protecting and safeguarding the rights of children. It was enacted by the Indian Parliament in 1986. In the year 2000, the Act was comprehensively revised based on the United Nations Convention on the Rights of the Child (CRC), which India had ratified in 1992. The Act is based on the provisions of Indian Constitution and the four broad rights defined by the UN CRC:

- Right to Survival
- Right to Protection
- Right to Development
- Right to Participation

Juvenile Justice System is a system coming within the area of criminal law administration of justice. This is a system adopted for the young person not old enough to be held responsible for criminal acts. It is adopted as correctional measures for Juvenile delinquency. The term ‘Delinquency’ connotes ‘failure to observe norms of society or omission of duty, involving with crime or doing any wrong. The term ‘Justice’ means ‘concern for justice, fairness, equitableness’ or a concern for peace and genuine respect for people. It is a principle of moral rightness in the
pursuits of fair treatment against unfair behavior. The term ‘Juvenile Justice’ means what is just, fair and equitable to the child or young persons in shaping their personality in the society.

‘Juvenile Justice System’ means a process to deal with the problem concerned with children and society. The main purpose of JJS is to insulate children by resorting to appropriate treatment and create an environment to develop a positive human personality. JJS is socio-legal measure to create an atmosphere for the treatment of delinquent juveniles. Almost all countries of the civilized world have adopted Juvenile Justice Law to treat the young offender in the most equitable manner, so that they can lead a peaceful moral and democratic life.

Juvenile Justice is administered through a Juvenile court, a court which is child friendly in nature. The main goal of this System is to adopt rehabilitative measure rather than punitive measures. If a child commits or any wrong young person turns delinquent, the Juvenile court takes measures for foster care and soft treatment through special institutions. So that Juvenile offender can find a path to lead a decent life.

The main aim of this system is to change the overall mind-set and personality of the child and to give him an impression about the wrongs that are being committed by him rather than just punishing him and not making him realize the depth or the consequences of his act.

Within the post-independence period; the government of India was taken over of the problems among others, of juvenile justice significantly within the centrally administered union territories. This is often what led to the children Act.1960. The law was in full force altogether the UTs, but the states, not having juvenile legislation, were free to adopt it. As would be expected, at this stage, juvenile justice within the country was uneven and had varied standards, norms and practices. These issues were sought-after to be removed through the Juvenile Justice Act 1986. The law was operative throughout the country.

The Second United Nations Congress on prevention of Crime and Treatment of Offenders in 1960 expressed that delinquency ought to be understood because the commission of an act, that when committed by an adult higher than a prescribed age would represent an offence in law. The Sixth united nations Congress on the prevention of Crime and Treatment of Offenders held in Venezuela in 1980 discussed further and thoroughly the matter of juvenile delinquency. They decided that there ought to be the standard Minimum Rules for the Administration of Juvenile Justice. Each child has its human rights and that they shouldn't be denied thereto by anybody. Hence, the same that there ought to be laws to guard the proper of the kids. Consequent thereto, it absolutely was accepted that special attention ought to be the first step to be initiated to stop delinquency among children and conjointly to homeless and street children within the urban setting. The necessity for giving special attention to youth criminality was conjointly given due importance and emphasis.

Development of JJS
The Juvenile Justice System developed throughout the world with a conception that,
children are not mature like adult. They failed to understand the nature and consequence of their acts. This idea is based on the legal ‘principle of doli incapax’ i.e. child do not have capacity to form criminal intention. Therefore, a child cannot be made liable for acts which are illegal. An adult is commonly understood to mean a person who has reached maturity of mind. In the psychological perception, a person is mature ‘who possesses certain skills that are the product of both cognitive development and the nature of the person’s interactions with his or her environment.”

The Juvenile Justice Act of 2000 is replaced by the JJ Act of 2015, with a view to update JJS in accordance with the International conventions and present social development. The new Act under lying following basic principles:

1. Presumption of innocence.
3. Principles of participation with due regard to maturity.
5. Principles of family responsibility to take care.
7. Positive measures for wellbeing and development of child.
8. Principles of non-accusatory or non-stigmatizing semantics.
11. Principles of right to privacy and confidentiality.
12. Principles of institutionalization should be last resort.
15. Principles of diversion (without resorting to judicial proceedings)

The introduction of The New Juvenile Justice (care and Protection of children), 2015, has introduced a number of the exceptional changes within the existing Juvenile Law. One in every of such major changes is, juvenile archaic cluster of sixteen to eighteen are to be tried like adult. Also, the one who has earned the age of twenty one whereas in sentence are send to the jail for remainder of the time span.

This paper has highlighted on varied polemical problems regard to new Juvenile Justice Act with special reference to the views of various activists.

Judicial Efforts
From time to time many trends have been made over the juvenile justice system in India as by different judgment by various courts and legislations and some out of that are as follows:

The Supreme Court of India in Laxmikant Pandey v. State the Hon’ble Court of India observed that every juvenile has a

right to proper care and assistance and affection and of morality and proper security and this is only claimable only when the juveniles will be brought up in proper family and good environment.

In Subramanian Swamy v. Raju Thr. Member, Juvenile Justice Board229. Some incidence becomes milestone that shook the psyche of the society or nation. One of such is the case of the Delhi gang rape as where the 5, 6 persons rape a girl though brutally and killing her by putting rod in private part and the justice system is as such the juvenile involve in it is to be released after small imprisonment. In the particular case Dr. Subramaniam Swami a senior lawyer of Supreme Court moved to the Supreme Court of India requesting the court for an order restraining the release the set juvenile from special home. The Supreme Court of India maintain that they are unable for the same as due to the law made for it not tend to do son and affirm him to move to parliament and make proper law for it. Here, it would not be out of context to mention that set juvenile was kept in a special home along with an accused Delhi Blast Case. Thus, one can easily imagine the influence of the blast case accused on the sad juvenile and vice versa. It has further been observed that juvenile released from observation home and special home were found to commit a more heinous crime. Thus, a question naturally arises whether this reformatory home is capable serving the objectives for which these homes were established. Section 16 of the JJ Act lays down requirements for orders that may be passed regarding a juvenile, wherein the maximum penalty a juvenile has to pay is to remain in the observation home for three years or till he attains the age of twenty-one. Arnit Das v. State of Bihar230 has been a highly controversial case and has been criticized to the core but the court seems have to have taken a contrary view from the earlier case because it is known to have taken same set of persons which evolve juvenile justice action till they turn 50 years of age. The problem with this decision was that it set the same yardstick for everyone – whether a serial criminal or a petty offender so, an amendment in the existing act is definitely necessary in order to thwart any attack on the nation.

Apart from terrorists taking advantage of the omission in the system, serious crimes like rapes and murders also go unpunished with the offender wearing the garb of juvenility. The legislators of the country have their task cut up as they need to work out a middle path that takes the country’s and society interest into account but does not go to extremes like in the case of Arnit Das.

A 3 judge Bench call of Supreme Court just in case of Umesh Chandra vs. State of Rajasthan231, said that: “As regards the final relevancy of the Act, we tend to are clearly of the read that the relevant date for the relevancy of the Act is that the date on that the offence takes place. Juveniles Act was enacted to shield young kids from the implications of their criminal acts on the footing that their mind at that age couldn’t be aforementioned to be mature for imputing men’s space as within the case of associate.

adult. This being the intendment of the Act, a transparent finding has got to be recorded that the relevant date for relevancy of the Act is that the date on that the offence takes place...We are clearly of the read that the relevant date for relevancy of the Act up to now as age of the defendant, United Nations agency claims to be a toddler, worries, is that the date of the prevalence and not the date of the trial.”

In case of Pratap Singh Vs. State of Jharkhand 232 and it absolutely was control that: - “The reckoning date for the determination of the age of the juvenile is that the date of the offence and not the date once he's made before the authority or within the court”.

In Sheela Barse v. Secretary, children Aid Society, 233 The Supreme Court commented upon setting up dedicated juvenile courts and special juvenile court officials and the proper provision of care and protection of children in observation Homes.

In Vishal Jeet v Union of India, 234 The Supreme Court issued appropriate directions on a PIL to the state Governments and all Union Territories for eradicating the evil of child prostitution and for evolving programmes for the care, protection, treatment, development and rehabilitation of the young fallen victims.

**Conclusion**

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In India, social legislations are always proved abortive due to improper infrastructure and coordination. 235 Different homes prescribed, does not have an environment of home. These clogs of JJS need to be resorted to. Juvenile Justice System is based on the principle of social welfare and rights of the child. 236 The prime focus of the JJS is reformation and rehabilitation. It is to create opportunity to the child to develop his personality. The goal after all, is to proceed ahead to create an egalitarian society of high order. Children are the future resources of the country. They must be transformed from negative to positive personality. However, looking in the past experience, we have to bridge the wide gap between theory and practice. In this process, we have to build a good infrastructure and efficient Juvenile Justice Administration. The new legislation carry the dreams, we need to make the dream reality.

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235The objective and reasons of JJ Act 2015.
236Constitution of India – 1950 (preamble, fundamental right and DPSP of part VI).
LEGAL DEFINITION OF ARTIFICIAL INTELLIGENCE

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ABSTRACT
In the physical world, we make a person liable for something when a certain loss has been caused due to his activities. However, this has been possible because there was an existing definition of both, the offense committed and the liability to be fulfilled. In the present topic, no specific boundary can be drawn including specific items as a part of Artificial Intelligence and excluding the others. We live in an era where an Artificial Intelligence program asks a human working on the computer to prove that he is not a robot by punching in specific characters.

Artificial Intelligence is everywhere in the 21st century. The 1980 New York Times headline “A Robot is after your job” could just as easily appear in September 2018. The field of Artificial Intelligence dates back to the 1950s, and the concepts underlying Artificial Intelligence go back generations earlier to the ideas of Charles Babbage. Without doubt, there have been significant developments and refinements, and yet, even today we lack a proper definition of the term ‘Artificial Intelligence’.

Defining Artificial Intelligence is not an easy task. Most of the definitions that do exist tend to define Artificial Intelligence in terms of “creating a computer process that acts intelligently” or “creating a computer process that can mimic human behaviour. Other definitions refer to “rational behaviour” or “doing things that are hard for a computer to do” and are equally unhelpful in this aspect.

Artificial Intelligence may be defined as “creating a computer process that acts in a manner that an ordinary person would deem intelligent”, and consideration is given to some of the various types of Artificial Intelligence and Artificial Intelligence technologies that might be of concern to people in the digital forensics community. Because legal systems do not have an exact definition of artificial intelligence yet, we have to examine what could be considered as Artificial Intelligence in philosophy and science.

According to the Oxford computer science explanatory vocabulary, artificial intelligence is that part of information technology which deals with creating programs capable to solve problems requiring human intelligence.

Keeping all such definitions in mind, a legal definition had to be brought up which can include within itself, the changes to come in the future as well as the findings of the past. An analysis of all the existing definitions and their drawbacks shall be done and a legal definition may be introduced with all the essential elements for the definition to be sustainable.

INTRODUCTION
Various groups of ascertainable individuals have been granted the status of “persons” under law, while that status has been denied
to other groups. One of such groups is Artificial Intelligence or Intelligence Machines. However, before the task of granting the status of person to Artificial Intelligence, it is the need of the hour to have a legal definition of the word Artificial Intelligence itself, as there is no proper uniform legal definition of AI in present legal arena.

The “AI technology” definition essentially asks whether a given task, if performed by a human, would require human mental processes. A medical diagnosis program, for example, would by this definition, be AI per se. AI, seen as a purely pragmatic undertaking to demonstrate intelligent behaviour, has been easily demonstrated by many computers.

“AI simulation” calls for a program to duplicate the internal state of a human brain engaging in the same task. This, of course, presupposes an understanding of the internal state of a human brain. Adoption of this view would make AI definitional impossible to demonstrate until human brain states are understood sufficiently to be effectively copied.

“AI modelling” requires the computer to mimic the outward behaviour of a human engaging in the same task. A successful computer would pass the “Turing test” (named after the English writer who proposed it in 1950): an interrogator: separated from the person (or machine) being interrogated and communicating only by teletype, would be unable to tell for certain whether a person or a machine is replying. Essentially, this definition forces the evaluator of the computer to use the same test for evaluating the intelligence of the machine as a person would use for evaluating the intelligence of any person. Of course, it also makes the definition highly subjective.

The “AI theory” definition is best, stated as a set of two goals: to make computers more useful, and to understand the principles which make intelligence possible. The second goal implicitly assumes that the trait of intelligence not only has principles, but that those principles can be understood. Demonstration of AI would occur when a useful human trait was selected, analyzed and duplicated—within a machine.

GENERAL PHILOSOPHICAL BACKGROUND OF ARTIFICIAL INTELLIGENCE

The rapid development of information technology has given birth to many phenomena in recent decades that have shaped fundamentally the arrangements of human society. Good examples are digitalization of books, acceleration of communication, and the development of information society in general. There is no doubt that one of the most astounding phenomena is the function of artificial intelligence (AI), which has inspired many futurologists, authors, and artists. Software that includes AI functions is not just a simple tool in the hands of humanity

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238 ibid

239 ibid

240 ibid

241 ibid
anymore. They make individual decisions in the context of the tasks, which they were written for.\textsuperscript{242}

As of now legal systems do not know exactly the definition of artificial intelligence, we have to examine what can be considered as AI in philosophy and science.

According to the Oxford computer science explanatory vocabulary, “\textit{artificial intelligence is that part of information technology which deals with creating programs capable to solve problems requiring human intelligence}”.\textsuperscript{243}

Stuart Russel and Peter Norvig distinguished between four approaches in terms of AI development’s philosophical concept:\textsuperscript{243}
1) \textit{System thinking as human}: This trend considers such systems AI that model the functions of human mind and cognition.
2) \textit{System acting as human}: This approach is linked to the British mathematician Alan Matheson Turing, who claimed in his famous Turing-test that the criteria and purpose of AI is human-like acting.
3) \textit{Rationally thinking system}: This viewpoint considers the purpose of AI in developing more rational or perfect systems than human cognition.
4) \textit{Rationally acting system}: This approach is of modern information technology sciences. It does not aim its purpose to create systems that think or imitate human-like behaviour just to behave rational (for example to clearly diagnose diseases, predict natural disasters etc.).

\textbf{ASPECTS OF ARTIFICIAL INTELLIGENCE}

\textit{(a) AI as an entity:}
It is clear that the behaviour of AI reaches a critical point when communication takes place between the software and human beings or things. It usually takes place when the Artificial Intelligence software and the controlled hardware (a computer or a robot) change somehow the real/physical world, for instance when it helps to assemble a car in a factory. In such cases the physical manifestation of Artificial Intelligence takes place, the software ’exits’ from cyberspace. The question is that who should bear the legal responsibility for the actions of synthetic beings?

\textit{(b) AI as software:}
We have to keep in mind at first instance when classifying AIs by current legal regulation that they are computer programs; software. In scientific literature, parallel definitions of the legal classification and concept of software can be found. From the information technology perspective software means computer programs, processes and possibly documents and data related to operation of the information system. From another point of view, software consists of algorithms, its computerized representation and programs\textsuperscript{244}.

\textbf{ATTEMPTS TO DEFINE THE LEGAL CONCEPTS OF AI}
The term itself has become degraded to the point where it is freely deployed to describe

\textsuperscript{242} Daniel Eszteri, Liability for Operation and Damages Caused by Artificial Intelligence - With a Short Outlook to Online Games, 153 Studia Iuridica Auctoritate Universitatis Pecs Publicata 57 (2015)
\textsuperscript{244} Supra (footnote 7)
virtually any programming challenge as yet unconquered' or to promote new software products with its eye-catching allure. The expression originated at a research conference in 1956 to denote early efforts aimed at producing a "thinking machine." Although a concise definition of AI is impossible and a catalogue of its current directions would quickly grow obsolete, the objectives of AI scientists may be grouped into two broad categories: the development of computer-based models of intelligent behaviour, and the pursuit of machines capable of solving problems normally thought to require human intelligence.

Defining Artificial Intelligence is not simple. There is no one clear definition of AI. Most of the definitions that do exist tend to define AI in terms of "creating a computer process that acts intelligently" (but what is intelligence?) or "creating a computer process that can mimic human behaviour" (do humans always act intelligently, what happens if a computer can normally perform better than a human being?).

Before stretching upon the definition of artificial intelligence as whole, it is pertinent to define terms involved to constitute AI. The word Artificial means something, which is made by human beings, especially in imitation of something natural or something created by the human skill. The intelligence that the ability to acquire and apply knowledge and skills.

The words Artificial Intelligence itself makes the picture clear as to what it requires to call or term an entity or software or device as artificial intelligence. In a very abstract sense, it can be referred as something, which functions on similar intelligence which human possess. Thus, artificial intelligence attempts to emulate the mental steps of human beings. Therefore, defining AI can be as difficult as defining a human being comprising of the numerous unique characteristics or features which separate it from other creatures. The difficulty lies in the fact that AI consist the fundamental feature of human mental process which distinguish it from other organisms. The definition as existing today can be summarised as follows:

In words of Philip Jackson: Artificial intelligence is defined as "the ability of machines to do things that people would say require intelligence."

Maruerite E. Gerstner in his article refers AI as any artificially created intelligence, i.e. a software system that simulates human thinking on a computer or other devices: e.g. home management systems integrated into household appliances; robots; autonomous cars; unmanned aerial vehicles, etc. Something that some decades ago was only science fiction, such as software systems dealing with various issues and replicating thinking processes of humans by means of hardware.

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248 Philip C. Jackson, Jr., Introduction to Artificial Intelligence (Dover Publ'n, Inc., 2nd edition 1985)
and other technology, has become the reality of science today.²⁴⁹

In terms of the above definitions, it is clear that AI is different from conventional computer algorithms. The aim of the development of Artificial Intelligence is at making it self-training (the ability to accumulate personal experience) or machine learning. This one and unique characteristic enables AI to act differently in the similar or identical situations, based on the actions previously performed. This is very similar to human behaviour. Cognitive modelling and rational thinking techniques give more flexibility and allow for the creation of programs that can “understand,” i.e. that have the traits of a prudent person.²⁵⁰

ATTEMPT TO DEFINE ARTIFICIAL INTELLIGENCE WITH REFERENCE TO TORTIOUS LIABILITY

Artificial Intelligence in Tort law can be said to be a set of techniques used by humans or any other beings for some aspects through machines. If this use of techniques results in damage to another party then what is the liability and who will be liable is the question which arises. To answer certain questions it has to be made clear as to what is Artificial Intelligence under tort law.²⁵¹

Now, the concept of Strict Liability and Vicarious liability is prevalent under tort law from a very long time for knowing the liability. If any tort is committed by an AI then these concepts will apply and will make the owner of such AI to be liable. But then the question arises as to up to what extent can owner be made liable. Is it always, that the owner of AI can be made liable for torts committed by AI or else a method or different mechanism has to come into play is a major question which can be posted.

A single definition of AI is also not possible as it will lead to basic question and matter of debate over ‘intelligence’. Question may arise as to whether an individual who uses a defective product in the provision of a service should be held to strict liability. Then the issue of remoteness of damages may arise where it relates to limits of liability for damages resulting from a negligent act.

²⁵⁰ Paulius Cerka, Jurgita Grigiene, Gintare Sirbikyt, Liability for Damages Caused by Artificial Intelligence, Computer Law & Security Review
²⁵¹ George S. Cole, Tort Liability for Artificial Intelligence and Expert Systems, 10 Computer/L.J. 127 (1990)

ATTEMPT TO DEFINE ARTIFICIAL INTELLIGENCE WITH REFERENCE TO CRIMINAL LIABILITY

Intelligence is perhaps the most impenetrable term used in Crime Analysis, as proposed by the International Association of Crime Analysis (2014). With the technology available in the hands of toddlers today, the potential available to offenders in terms of mobility or IT resources allow them to commit numerous crimes with great effect and minimal risk of getting caught. Thus, with the rise of Artificial Intelligence comes forward the question about legal responsibility for crimes committed by an AI as the AI acts autonomously with limited control from humans. This study aims to define AI for legal purposes and analyze whom to hold liable when an AI commits a crime de lege lata (the law as it exists).

Criminal Artificial Intelligence may be defined as a concept that gives priority to
both- Investigation as well as public safety. The aim in the first part is to analyze individuals or groups involved in crime and in the second part; the aim is focused towards preventing the occurrence of the crime.

There must be a defined legal duty for the defendant when the AI acts autonomously and the defendant omits to intervene in the situation. The defendant cannot shrug off his legal responsibility by saying that the use of an AI always constitutes a serious risk for harm. Limited foreseeability and unpredictability of the AI’s actions will however constrain criminal liability. The actor cannot be expected to avoid harms that he could not have possibly foreseen from his/her position and neither can he/she be held liable for the harms that he did not cause. AI can also be used as an agent to prevent or perpetrate a crime. However, the challenging features of AI persist.

AI is so axiomatic that the scientists over the world have not yet reached a consensus about the definition of AI. The law has also not been provided with a legal definition of AI yet since the legislators instead of looking at the present or the future, tend to regulate occasions that have already occurred.

The English word artificial is synonym with words like factitious, synthetic and unnatural. A thing that is artificial is man-made or constructed by humans, usually to appear like a thing that is natural. The Swedish word for artificial, artificiell, and the French artificiel have equivalent synonyms. The Latin precedent artificialis origins from artificium, meaning handicraft or theory.

The word intelligence is more complex to define as most of the definitions relate to the human intellect. In English, as well as in Swedish and in French, the word has many meanings. Intelligence is explained as the ‘faculty of understanding’, ‘the action or fact of mentally apprehending something’ or simply as ‘intellect’.

Thus, artificial intelligence might lexically be understood as an unnatural or synthetic intellect yet, AI represents more than this literal explanation. Words, as trivial parts of a sentence, give the sentence a practical meaning.

The computer scientist Nils J. Nilsson provided the debate with a broad and important definition of AI a few years ago: ‘Artificial intelligence is that activity devoted to make machines intelligent, and intelligence is that quality that enables an


entity to function appropriately and with foresight in its environment.’

According to this definition, both virtual assistants and a human brain are intelligent. The definition includes both narrow and general AI technology. The assistant is performing tasks on command, and the assistant tells the user when it cannot perform the task or assist the human otherwise.

Although Norvig and Russell’s taxonomy is broad, it serves with different attributes of a potential AI, rather than a clear definition. The taxonomy is also targeting extremely developed and advanced general AI, which do not exist yet.²⁵⁶ It will consequently leave narrow AI systems that already exist out of the scope.²⁵⁷ Narrow AI systems are intelligent when solving a specific problem, but would not pass general intelligence tests such as the Turing Test.²⁵⁸ However, Nilsson’s definition doesn’t relate to any definitions of Human Intelligence. This definition is also neutral and evolution resistant as they include AIs of today (SIRI, autonomous cars and search engine algorithms) as well as tomorrow (human-like robots and autonomous weapon systems).

Evidently, there are many different kinds of AI that already exist or will exist in the near future. Common to all kinds is that most of the AIs were created with a good intention, irrespective of how they were used after that.

Below are the key features that are common to all kinds of Artificial Intelligence.²⁵⁹

- Autonomy-Humans are only limitedly involved or in the future not involved at all in the AIs decision-making. The autonomy varies between the different fields of AI, from autopilot mode in autonomous cars where the driver is required to stay in charge of the car, to the high frequency trading algorithms that function without humans engaging in their activity.

- Unpredictability- Like us humans, you can never know for sure how anyone else than yourself will react to something. An AI lacks cognition and may react totally different than a human facing exactly the same situation. In addition, most AIs discussed here are self-learning, i.e. they learn from mistakes and by processing a large amount of data. The outcome of the AI’s conduct is unpredictable, when the conduct is not a result of an instruction from the programmer, but a self-learned strategy.

²⁵⁶ John Frank Weaver, Robots Are People Too: How SIRI, Google Car and Artificial Intelligence Will Force Us to Change Our Laws (Prager 2014).
²⁵⁷ John P Holdren and Megan Smith, Preparing for the Future of Artificial Intelligence (Executive Office of the President of the United States, National Science and Technology Council, Committee on Technology, 2016).
Unaccountability. As long as AIs lack legal personality, they can behave in a way that for a human would have given legal consequences. The situation with accountability is comparable with the ones concerning animals. For example, a dog can bite a human to death, but will never be held legally accountable for their actions. As a consequence, we need to find a principal for the crime to hold liable.

Increased autonomy equals decreased human control. Still, criminal law regulates human conduct. The general basis for criminal liability is usually the actus reus. The possible definitions in different fields which lead to variation and change from time to time.

So, it is clear from the detailed study that the existing definitions of Artificial Intelligence are non-exhaustive. A single concise definition still lacks due to the philosophical debate as to what ‘intelligence’ is and how it can be determined.

Therefore on the basis of above attempts by different scholars it can be said that “Artificial Intelligence may be a person or software or entity or an algorithm which functions on the same considerations such as experience, past behaviours, interactions with someone or something which determines the mental process of human beings”. The definition in this form is precise and an attempt made by the researchers of this project to give it an exhaustive form.

The possible definitions in different fields can be met with separately as per the intention of the legislations. For example, AI

260 The law as it exists
can have different definitions in different laws, such as an AI definition of crime different from an AI definition of torts. The major aspects and components involved of an AI describe the nature of formation of a definition. The ingredients of definition should include all the aspects to deal with the issues of non-compliance and this in practicality not possible as observed in the research study.

Therefore, concluding on a brighter side it has been observed that so far the attempts made with the definitive part of AI are not in vague as it has dealt with a lot of issues. The focus would be to cope upon the change in the definitions with the change in the technology and science.
PATERNITY LEAVE: A HUMAN RIGHT

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“One father is more than a hundred school masters”
-George Herbert

We overemphasize and talk a lot about a mother’s role in a child’s life. But then the reality is the father is the pillar of the home and actually plays a very important role in a child’s life. So, then it is mandatory that he spends maximum time from the birth of his child to the earlier few months. A good foundation leads to a good upbringing! That is why paternity leave is not only a human right but an urgent requirement.

One of the main differences between a man and a woman is the amount to time they spend at home, specially taking care of their children. This is the reason behind women not being employed, or financially independent in most parts of the world. The only way to correct this difference is by equally dividing responsibilities at home.

According to the studies, when a father is present within the child, he or she grow up as healthier and happier individual apart from the presence of mother with the infant. A UNICEF report suggests that the when a child have healthier relationships with his or her father, a child is more likely to grow up with better mental health, self-esteem, and are more satisfied with their lives, as they grow up. The father of a child always plays a secondary role in taking care of a new born child because it is always believed that a child needs the mother the most, but actually it needs a father too.

One way to begin is to ensure that from a child’s birth the parents are equally responsible for the care of the child. Mothers should not only be offered leave to take care of the child, but fathers should also be offered leave. It should be as normal for a father as for a mother to care of the child. It should be a human right for men to be able to take paternity leave.

The examination of whether paternity leave is a human right starts with exploring the main instrument of women's human rights: The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This thesis will explore whether such a right can be found in CEDAW. The thesis then continues to examine whether a right is provided for under other international instruments and whether the concept 'paternity leave' is supported in the work for women's equality in the world. The examination of all the different relevant documents reveals that the right to paternity leave can be claimed under Article 26 of the International Covenant on Civil and Political Rights. This right can be claimed if a national law or policy discriminates against a man if such a leave is only offered to women. A right to paternity leave should

262 https://www.researchgate.net/publication/41784723_Paternity_Leave_as_a_Human_Right_The_Right_to_Paternity_Leave_Parental_Leave_for_the_Father_as_a_Way_to_Actual_Gender_Equality_in_the_View_of_CEDAW_and_other_International_Instruments
also be possible for a father to claim under Article 11 of CEDAW. This right may be claimed when a denial of paternity leave leads to discrimination against him that may affect the mother of his child as well as. The examination of all the different documents also reveals that there is good reason for concluding that non-discrimination as to sex is a customary international law.  

How did paternity leave come into existence?

Gary Ackerman, a very different man who was a teacher by profession was the one to initiate this unique concept almost 49 years ago. He was from New York City and had a daughter in late 1969. When Gary’s daughter was 10 months old, he had applied for paternity leave (without pay). The principal did not recommend the law suit and so did the superintendent. He was told that the childcare policies of the Board of Education are only for female employees. Gary went AWOL from his job and filed a suit of discrimination with Federal Equal Employment Opportunity and sued the U.S. District Court board.

Gary went AWOL and filed a complain with his wife of discrimination with Federal Equal Employment Opportunity Commission and sued the U.S. District Court Board.

Their argument: granting child-care leaves only to women is an invasion of privacy because it forces mothers to be housekeepers and child rearers and prevents husbands and wives from dividing up family responsibilities as they see fit.” In 1973, the Equal Employment Opportunity Commission, “found that the mothers-only rule ‘discriminates against male teachers as a class.’ As a result, the board says it will reword its bylaws to ensure equal rights for fathers.” That autumn, the relevant section of the Board of Ed bylaws was amended so that it no longer referred to an affected teacher as “her” or relied on the timing of the teacher’s pregnancy, thus expanding its relevancy to fathers and to adoptive parents. The determination is widely regarded as the ground-breaking first step toward paternity leave’s existence.

Just how ground-breaking was it? Ackerman’s motion to have a lawsuit he filed against the Board of Ed (separate from the EEOC case) considered as a class-action suit was denied because, though 40% of the Board of Ed’s teachers were men, he was the first male teacher ever—and one of two in total—to apply for childcare leave before that 1973 change. According to a New York Times article about the EEOC’s decision, at the time about 2,000 to 3,000 female teachers took a maternity leave in the city each year.

Eventually Gary Ackerman was denied of compensation as he had stopped teaching.

Paid Paternity Leave by UNICEF

UNICEF has proposed a 16-week paid paternity leave. This was earlier for four weeks. UNICEF is the first UN agency to extend this kind of leave for more than four weeks. The objective behind this was to foster the relationship between fathers and infants.

263Ibid.

264time.com/3916437/paternity-leave-gary-ackerman/

265Ibid.

www.supremoamicus.org

97
According to Henrietta Fore, UNICEF Executive Director, positive and meaningful interaction with mothers and fathers from the very beginning helps shape children's brain growth and development for life, making them healthier and happier, and increasing their ability to learn. It's all of our responsibility to enable them to fill this role.\textsuperscript{266}

According to a new analysis by UNICEF, India is among the 90 countries in the entire world who have not prescribed any national policy for the new fathers to bond with their babies with paid leave.

In fact, according to the report, 90 million tiny humans, as soon as they are born, doesn't avail the presence of their fathers to spend time with them.

Father's presence affects mental health and self-esteem of a child in a positive manner.

\textbf{Provisions under CEDAW}
The Convention on the Elimination of All Forms of Discrimination Against Women does not emphasize or focus on paternity leave. But its travaux préparatoires and General Recommendations support gender equality and the shared responsibilities at home.

Travaux préparatoires in CEDAW puts some light on the idea of men being involved in childcare. This was suggested by some fathers of some countries who stated that they should be offered parental leave. During the initial discussions the was no agreement among the countries regarding paternity or parental leave.

Preamble includes four major Conventions that give equal rights to women without any discrimination. The Conventions are:
- UN Charter – United Nations Charter
- ICCPR – International Covenant on Civil and Political Rights
- ICESCR - International Covenant on Economic, Social and Cultural Rights
- UDHR – Universal Declaration of Human Rights

Also, the preamble states the social significance of parents being a part of upbringing of a child and that the responsibility should be equally shared. A change is needed in the traditional role plays of the men and women in family and society. Throughout the travaux préparatoires discussions this was the major factor that the stereotypes regarding the roles of men and women needs a transformation.

Suggestions were given by Benin, Indonesia and the All African Women’s Conference that preamble should include equality in law and in fact.

Article 2 states the ways to combat discrimination. Some delegates were in a view that equality would not come while focusing exclusively on women, the perception of men’s role needs to be changed.

Article 5(a) emphasizes the importance of eliminating sex role stereotyping and prejudices. Discussions were also held under Article 5(b) concerning the common responsibility for men and women in the upbringing of their children. Several

\textsuperscript{266}Supra Note 1.
countries stated that it was important to get men more involved in this, and that prejudicial practices involving women and men’s roles should be abandoned.267

In Article 11, it is provided for equal pay and equal opportunities in employment for men and women. Article 11(2)(b) calls on States Parties to introduce maternity leave. In the preparatory discussions, the talk focused on women and their situation. Some countries representatives emphatically argued for the importance of men to be given the same opportunity to assume responsibility regarding their children. The idea of enabling men to share in the care for their children was suggested; however, it did not at time gain any great response. The provision also emphasize that parents should be given support to be able to combine work with family responsibilities.268

Article 16 provides for equality in the family and the delegates of the travaux préparatoires were of very different opinions of what this provision should say. Women’s rights in the family was a very sensitive area. This Article is still one of the more controversial in the Convention, which is reflected in the number of reservations to the Article. However an overwhelming majority, 152 out of 185 States Parties has not made a reservation against it.250 The Committee has stated that there the uneven burden on women concerning the care of the home needs to be corrected. It is also provided that men and women have the same rights and responsibilities as parents and the interest of children shall be paramount in all cases. In General Recommendation No. 21 the Committee stated that to consider the children’s best interests is a principle of almost universal acceptance. The Committee considers this Article and Article 2 to be of utmost importance and a reservation against any of them goes against the object and purpose of the Convention.269

There has not been any case concerning parental leave or paternity leave in the case-law of the Committee’s decisions on individual complaints under the Optional Protocol. The Committee has furthermore neither decided on a where a complaint has been submitted by a man. The ordinary meaning of the provisions has been considered, and the travaux préparatoires along with the General Comments have been used as an aid to discern the context as well as the object and purpose of the provisions. There is no provision in the Convention that explicitly state that paternity or parental leave should be provided, however there are Articles providing for States to take measures to discrimination against women, eliminate stereotyped gender roles as well as equal opportunities in employment. Implicit in the context and in the object and purpose of the whole Convention is the actual realization of gender equality and the elimination of discrimination against women. It is several times stated in the travaux préparatoires that gender equality cannot be realized until men and women equally take part in work within the family and in society at large. It is possible that an argument that men should be accorded paternity leave under Articles 5(b) and/or

267https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1558449&fileOId=1564657
268Ibid.
269Ibid.

www.supremoamicus.org
11(2)(b) in conjunction with Article 2 would be accepted.\textsuperscript{270}

**The International Labour Organization**

There are Conventions by International Labour Organization which mainly gives the equal opportunities for men and women in employment sector without any kind of discrimination. There are a lot of issues which need to be put right in this sector. Some of the issues arise due to inequality, unequal pay and prejudice on basis of gender.

The conventions major aim is to ensure that women are at par with men. In 1981, the Convention on Family Responsibilities was based on two major points. They are:

- Development of child care facilities.
- Importance of changing traditional roles.

This gave the facility to parents of tale leave of absence after the maternity leave is over.

In 2000, there was another convention on maternity protection. This gave 14 weeks of leave after the child birth. The Recommendation on the above provides a benefit of parental leave after the maternity leave expires.

In 2014, a report by ILO discussed the application of maternal, paternal and other child-giver leaves. In the document, it was also observed that “Compulsory paternity leave helps to ensure that fathers share childcare responsibility with mothers and allows for greater involvement of men in the critical early stages of an infant’s development.”\textsuperscript{271}

There are basically two kinds of spheres: the private and the public. The private sphere is one where a child is raised along with parents and family members. Public sphere is one where the society at large is involved. There should be actual gender equality in both the spheres. There is currently a lot of imbalance in these spheres.

With an ability to work and earn money one not only becomes independent, it also builds one’s self-esteem. This is equally necessary for men and women.

**European Union and the Council of Europe**

The European Union or EU is a political and economic union. It consists of 28-member states, primarily located in Europe. There has been a commendable improvement in Europe regarding gender equality. Many of the countries offer maternity, paternity and parental leave. The European Union has adopted legislation to reduce discrimination on gender basis. It has also adopted various methods within its labour laws. The only objective was gender equality.

Till 90s the European Court of Justice was criticized for passing judgments which were supporting the generalized idea of gender. In 1996, a directive on parental leave obligations made it compulsory to allow a minimum of three months leave. This leave would be non-transferable parental leave for men and women workers.

This was adopted by the Council of Europe. The Recommendations aimed at the following:

\textsuperscript{270}Ibid.
\textsuperscript{271}https://mediaindia.eu/social-vibes/paternity-leave-provided-by-some-firms-in-india/
“The fathers of newly born children should also be allowed a short period of leave to be with their families. In addition, both the father and the mother should have the right to take parental leave during a period to be determined by the national authorities without losing either their employment or any related rights provided for in social protection or employment regulations. The possibility should exist for such parental leave to be taken part-time and to be shared between parents.”

In 1994, the Committee of Ministers were in a view that men should share equal responsibility at home. The main objective of the Recommendation was on the role of fathers. It stated:

“The Family must be a place where equality, including legal equality, between women and men is especially promoted by sharing responsibility for running the home and looking after the children, and, more specifically, by ensuring that mother and father take turns and compliment each other in carrying out their respective roles.”

In 2001, the European Ministers had a debate about the role of men and boys. It was concluded that measures should be made to encourage men so that they understand their role in supporting the family life.

Recently, there was a new protocol to ECHR. This gave an independent right which does not have to be bound with the Convention. Yet, it would have the same effect as Article 26 of ICCPR.

Article 26 states

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The awareness of such measures is on the move. Encouraging men as well as women in sharing their duties at home and child care is much needed. True gender equality is not an easy task. It will definitely take a long time.

Policies in India

In 2017, After the Maternity Benefit (Amendment) Act, 2017, a new bill is known as Paternity Benefit Bill had been proposed by Rajeev Satav, MP from Maharashtra, in the Lok Sabha in September for the benefits of fathers of new-borns. The bill states that all workers, including those in the unorganised and private sector, get paternity leave of fifteen days extendable up to three months. It emphasized on equal parental benefits for both the mother and the father. According to his words, “Child care is the joint responsibility of both parents. They must devote time to the new born to ensure its proper well-being”.

272 Recommendation of the Committee of Ministers to Member States on Reconciling Work and family life, Rec(96)5E, 19 June 1996.
273 Recommendation of the Committee of Ministers on Coherent and Integrated Family Policies, Rec(94)14E, 22 November 1994, Appendix Principle 4
275 https://blog.ipleaders.in/paternity-leave-india/
The main aim of this bill is to provide benefit to natural parent, adoptive parent, or a person acting in loco parentis to the relevant child. If it is enacted by the Parliament, it will benefit the population of 32 crore men in the labour force (NSSO, 2012 data), including those in the unorganised sector. Introduction of paternity leave will ensure that the mother gets some support from the father during and after childbirth, who is not forced to return to the workforce in order to generate income. At present, the Central employees under the All India and Central Civil Services Rules can avail a paid fifteen-day paternity leave which puts India in the top fourteen countries to provide the highest maternity leave and by providing fifteen days paid paternity leave to all the sectors, India will be in top thirteen countries to provide the highest paternity leave and other associated benefits.\(^{276}\)

Although there is no legal law for paternity leave for private sector employees, there is a small clause for central government employees. The rule states that a central civil service officer (including an apprentice) is entitled to a fixed period of 15 days paid leave. Here are the rules for paternity leave for government sector employees:\(^{277}\)

- The fixed 15 days paid leave is applicable only on the birth of first and second child.
- This leave can be availed anytime within six months of the childbirth.
- If the leave is not taken within the prescribed time, it shall be considered lapsed.
- The pay calculation for leave days will be calculated on the basis of the last salary drawn before proceeding on leave.
- The paternity leave is free to get combined with any other kind of leave.
- If a civil servant wants to adopt a child, he will be entitled to the paternity leave. However, this clause is not available for private sector male employees. They do not get paid paternity leave at the time of childbirth or adoption of a child.

Despite the Indian law not including ‘paternity leave’ as a mandate in private workplaces, there are a few provisions for government employees and a gradual shift is being done voluntarily in the private sector. Multinational Corporations such as Microsoft and IKEA have been leading the way in India in providing men with ‘paternity’ leaves, recognising the importance and necessity of a father’s role after childbirth as well as in child rearing.\(^{278}\)

In the year 2009, in Chander Mohan Jain v. N.K Bagrodia Public School, Chandermohan Jain, a private school teacher moved to the High Court of Delhi challenging the rejection of his paternity leave application and deduction of his salary by N K Bagrodia Public School for taking leave to take care of his wife and the newly born child. Despite there being no legislation, New Delhi High Court in this case held that all male employees of unaided recognised private schools were entitled to paternity leave. The court then directed the school to refund the deducted amount to

\(^{276}\)Ibid.


\(^{278}\)Supra Note 11.
Chandermohan Jain. Therefore, providing relief to private sector teachers.\footnote{Supra Note 15.}

Paternity leave around the world
India comes among 92 countries in the world without any national provisions for paid paternity leave. Nonetheless having the most infant mortality rate, countries like India, Nigeria, China don’t have any provisions of paternity leave to entitle any benefit to fathers. Comparatively, countries with higher infant population like Brazil and most of the European countries have the best parental leave policies.\footnote{Supra Note 15.}

Norway: The statutory parental leave is either 49 weeks at 100% salary or 59 weeks at 80% salary to be divided between both parents but with some constraints. The father is entitled to take 2 weeks paid leave when the child is born and must take additional 14 weeks of paid leave before the child turns 3 years of age. The remaining weeks to use are up to the parents how they want to use it.

Iceland: Both the parents have an independent right to parental leave of three months and also have a joint right to three additional months, which may be either taken by one of the parents or equally divided between them.

Sweden: Parents are provided the policy of getting 480 days (16 months) of paid parental leave at 80% of their salary. They are also entitled to 180 bonus days in case of twins. Swedish fathers must take at least three of those 16 months. The days do not expire till the time the child reaches age of 8.

Spain: Fathers are entitled to 30 days paid leave to do justice with fatherhood and bond with the new born child at 100% of covered pay.

There is a landmark case where the court was in favour the new father. Call worker Madasar Ali wanted to care for his new daughter Yasmin after his wife was diagnosed with post-natal depression but was told by employer Capita his pay would fall to the statutory minimum after two weeks. Women at the company are entitled to 14 weeks full pay. Domino’s driver was ‘suspended’ over filthy car used to transport food. It is believed to be the first time a man has won a tribunal of this kind in England since 2015 Government legislation allowed parents to share pay and leave.\footnote{https://metro.co.uk/2017/06/11/man-threatened-with-pay-cut-for-taking-paternity-leave-wins-sex-discrimination-case-6702106/}

The tribunal heard that an ‘unnecessarily long and drawn out grievance process’ ended with Mr Ali being told he was not entitled to the same rate as a woman. The decision was contrary to the Equality Act 2010 which states an employer must not discriminate against an employee by not affording access to ‘promotion, transfer, training or for receiving any other benefit, facility, or service.’ The tribunal also found the decision went against the shared parental leave regulations introduced in April 2015 which allow parents to share up to 50 weeks of leave and 37 weeks of pay. The firm, which won an outsourcing deal to run a Telefonica call centre in Leeds in 2013,
unsuccessfully cited European work directives to defend its decision.\textsuperscript{282}

Employment Judge Rogerson said: ‘It was accepted that he was denied that benefit and was deterred from taking the leave and was less favourably treated as a man. ‘Either parent can perform the role of caring for their baby in its first year depending on the circumstances and choices made by the parents. Teenager shot dead in the street outside north London cinema ‘Inevitably more mothers will take primary responsibility from birth and immediately afterwards but that does not necessarily follow. ‘There may be circumstances where different choices are made to suit the parents and their particular circumstances, like the choice the claimant wanted to make because of his wife’s postnatal depression.’ The tribunal also found in favour of Mr Ali on victimisation claims into the handling of his request. This included Mr Ali having his role changed without adequate justification, being coerced into signing gagging documents to ensure he would not discuss the tribunal and threatened with disciplinary action if he took leave to look after his child. Mugshots released as Britain First leaders are both jailed Mr Ali, who still works for the firm and lives in Leeds, said: ‘I am over the moon with the outcome. ‘The judgement proved that I did definitely have the right to take it as far as I did. I am just so happy to have got it all sorted.’ A remedy hearing to decide on compensation is set to take place.\textsuperscript{283}

Paternity leave benefits

There are few relevant points from a Swedish campaign which supports the positive benefits from active fatherhood.\textsuperscript{284}

- You need to know your own child. The deepest contact between parent and child is developed during the child’s first months of life, when it is little and helpless. You cannot have that time back again.
- You will train your fathering instinct. Through taking care of the baby alone, you become attentive to its needs, you get to know its signals and develop a close relationship with your child. It increases your self-confidence as a parent.
- You will gain your child’s confidence…. If you show you are able to take care of the child, the child will go to you later with its worries and its joys.
- You get to watch your child develop and not just hear about it second hand. Everyday something new and fantastic happens.
- You will become closer to your child’s mother. You can share experiences and responsibilities with each other.
- You will develop your social competence. Being with a child places completely different demands on you than being with an adult.
- You will develop new skills because you are obliged to solve problems which you perhaps did not know existed.
- You will have fun. To take care of small children is very demanding but also gives a great deal back to you. You will come to feel appreciated loved as never before.


\textsuperscript{282}\textit{Ibid.}

\textsuperscript{283}\textit{Ibid.}
You will never regret that you took this unique opportunity to gain a deep, close and meaningful relationship with your child from the beginning.

(From Haas and Hwang 1999 translation of The Swedish Social Insurance Agency (Försäkringskassan) 1997)

Paternal time spent caring for children alone is qualitatively different from time spent together mediated by the presence of the mother and may be particularly relevant to father-child relations. Many fathers spend minimal time alone with their children. Indeed, it is still commonly referred to as ‘babysitting’. 285

Conclusion
Men and women should be treated equally, this is a fundamental right. Family life and work life are interrelated and have an effect on each other. So, it becomes very important to have a balance between the two. This can be done when the work is divided equally at home.

The right to paternity leave is making a progress in many parts of the world. However, they have not been specifically stated. Most of the statements and documents only state that there should be gender equality and a shared responsibility at home.

There are many countries who have paternity leaves and support the time which fathers want to spend in the initial years of their children. Those countries who have ratified the Optional Protocols of CEDAW or ICCPR, can take the advantage of this right. The countries who have failed to sing the above Conventions need to make national laws regarding the total gender equality in keeping with paternity leave.

The main focus is childcare but it will also be beneficial for the mothers and shared responsibility at home. This would lead to division of work and improve the bond between father and child. It would put an end to sex stereotyping of men and women’s traditionally accepted roles. When men and women share work equally at home it would help them enhance career as well as gain independence in their individual lives.

A strong nation is built on the foundation of a strong society. And a society is built with strong and stable families. For this the father and mother have to play an equal role in the initial months. This not only gives rise to a good individual but also enhances the women’s career and the man’s role as a father. As Anne Hathaway (Global Goodwill Ambassador, UN Women) rightly said “to liberate women, we need to liberate men”. This liberation means liberation from the usual thought that mothers are home-makers and fathers are the bread winner.

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THE CORRELATIVE NOTION OF DHARMA AS DUTIES IN HINDU LAW

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Abstract:

Hindus were the natives of a fertile valley of River Indus i.e. modern day Punjab. They were considered to be disciples of eternal energy which they termed as Rita in their religious texts. Later on, the Vedic concept of the Rita became Dharma in the Puranic age and the devotees of were called as Hindus. The very core of Dharma was a function of cosmic order. It was believed by the Hindus of that age that the cosmic structure is the reason behind the formation of societal structure and it is bound to contribute to the cosmos. Texts of Hindu society were the result of two fundamental senses of human being i.e. hearing or Shrutis and remembering or Smritis. Shrutis formed the basis of the four Vedas of ancient Hindu literature and perhaps the oldest text of human history. Smritis of multiple rishis or sages became a source of the eighteen Puranas, the Ramayana and the Mahabharata. The epic of Mahabharata and the Ramayana majorly reflects a picture of war and dharma as a duty, Arjuna and Rama followed their Dharma and set the emblem of obedience. The very instinct of war or to fight was curbed through the teachings of Dharma and the same has been mentioned in the Vedas also, Dharma preaches defensive mechanism for warfare instead of offensive. The flow of Dharma is natural to the natives of India, they treat as their basic duty to be obeyed and it is therefore can be seen in their day to day life as inner spirituality.

Introduction: The purpose of this article is to examine the concept of Dharma as duties keeping mind a picture of Hindu law and to examine its relevancy in the modern-day criminal justice system. This article will begin with an introduction to Dharma and Hinduism outlining Shruti and Smriti as the basics of Hindu texts. It will be followed by a concise analysis of Shruti and Smriti and the literature it gave rise to. Next, there will be the inclusion of tales of the Ramayana, the Mahabharata, king Ellalan from Amuradi puram and civil disobedience movement of Mahatma Gandhi, it depicts how these religious and social leaders followed the path of Dharma in different at distinct times and parts of India. In doing so, it will explore the contributions of the Vedas and Puranas in Dharma and Hindu law.

Dharma: The abysmal history of India is an intricate system of Dharma and religious scriptures. Dharma carves for a continual search for balance between day to day work and inner spirituality and it must be embedded with allegiance for enlightenment, various scholars have termed dharma as a duty. In the past, natives of prolific valleys along the banks of the River Indus, the modern day Punjab, were called Hindus, they are considered to be disciples of eternal energy called Rita as per their religious texts. The later Vedic concept of the Rita became Dharma in the Puranic age and the devotees of Dharma known as Hindus. Dharma as mentioned by Koller's *used in a legal sense ... refers to the laws and traditions governing society, informing every citizen of the rules
governing social life’. He explains that 'Dharma is usually classified according to the requirements of one's position in society and stage in life, for these represent the main factors of time, place and circumstance that determine one's own specific dharma’.

The core of the concept of Dharma lies in the cosmic energy. The cosmos is believed to have a structure and order to generate an individual’s identity, society is a mere extension of cosmic order its rules and regulation are desired to serve the cosmic order. Society is not a self-propagating phenomenon by an accidental conglomeration of tribal migration rather it is the corresponding picture of cosmic changes having animal and angels on eitherside. Society being a child of cosmos is not free in itself to regulate its own set of guiding principles, but it is bound to obey its life in such a way that it can contribute to the cosmic order as well. It would be foul to acknowledge society as a slave of cosmic order or divine purpose, but it is a part of the larger framework and thus its behavior should not cause unnecessary disruption to living, nonliving or heavenly realms.

Shruti and Smriti and Hindu literature: The Hindu scriptures were from nearly eight millennia ago, they paddled by way of ‘Shruti’ and ‘Smriti’ i.e. hearing and remembering became footing of religious scriptures respectively. Ample knowledge on almost every accepted area of study of past can be easily found in the Hindu scriptures. As Barth said, “India has not only preserved for us in her Vedas the most ancient and complete documents for the study of the old religious beliefs founded on nature-worship, which in an extremely remote past, were common to all the branches of the Indo-European family; she is also the only country where these beliefs, in spite of many changes both in form and fortune, continue to subsist up to the present time”. Since time immemorial the Hindus has a philosophy to foster ideas harmony and fraternity, the same has been quoted by Bowes, here is a verse in the Atharva Veda (VII.52) which suggests that the Vedic scholars meant to include people other than themselves in their thoughts since, in their opinion, the divine spirit within the strangers and themselves was the same.

The Vedas and Upanishads serve as a primary source of Shruti (lit. what is heard), the fundamentals of these texts are eternal (Nitya) and beyond human knowledge (Apauruseya) therefore these are considered to be unquestionable since time being. These are considered as roots of Dharma, the Vedas or books of knowledge suggests an individual’s social, religious, ethical and legal duties. The four Vedas, namely, the Rig Veda, the Sama Veda, the Yajurveda, and the Atharva Veda are the predominant sources of Hindu law system. But as per Shrimad- Bhagwatgita initially

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286 John M. Koller, the Indian Way- An Introduction to the Philosophies & Religions of India, Pg. 62, 2nd edition 1982.
287 Ibid 1.
288 Paul Younger, Introduction to Indian Religious Thought, Pg. 35-36, 1972.
289 A. Barth, the Religions of India, translation by Rev. J. Wood, 1969.

www.supremoamicus.org
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there was only one Veda. These texts are based narrations of the God herd by the sages or rishis from heaven, and therefore belongs to Shruti genre. The Shruti is considered to be the spirit of the law in Hinduism. It is mostly concerned with the Hindu way of life in the East, translated by George Buhler, 1886.

The epic of Ramayana and Mahabharata, Dharma Shastra and Artha Shastrabelong to the second category called Smriti (lit. what is remembered). Also, the narratives of Puran were manuscript by way of Smriti. The Smritis include eighteen Puranas, some of them are more comprehensive in respective areas—most of the Puritans dialects rights and wrongs of all living entities on the planet earth. Manu in about 880 BC made an analytical study of public and private Hindu laws under title Manusmriti or Code of Manu. Since the remaining Smritis were manuscript at least, two or three centuries prior to Manusmriti, they emulate the tradition and rituals of the respective era and it is to be noted that Smritis of later age can be seen reflection the same tradition and rituals. These Smritis were able to influence the concurrent statutes of India as well as Nepal, they served as a measure of interpersonal relations. It was because of the efforts of Adi Shankaracharya and other such saints, who were destined to rejuvenate and blend the creed of Hinduism to the extent that they are more in balance with the change in time. Thus one must refer to the Smritis while conceiving rule of Hindu law on any particular subject.

Dharma and life: The Hindu scriptures preach Ahimsa or non-violence as the highest goal, yet the scriptures allowed the use of force under certain unavoidable circumstances, the shift from established principle has been possible in the Hindu scripture. The Hindus acknowledged that it is necessary to have a system of codes and customs in human society, which are not ideal. It was necessary to make compromises for the sake of army, police, and prisons. The concept of fair and just war as per the norms of laws of war was in order to attain Dharma and justice instead of rampant war to disperse another faith. The Vedic control of war as an instinct in man was brought under control by the Rita or as moral law, Dharma had a hermetic impact on the system of warfare. The Puritans had mentioned war as a solution to threats but solely as a defensive mechanism and not a voluntary one.

The epic poem Ramayana of ancient India depicts the clash of almighty prince Ram salvage of his wife Sita from the demon king Ravana of Lanka. It reflects a picture of war and duties where Rama had to

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292 Sloka 19 of Chapter 4 of Canto 1 of the Srimad-Bhagatam.
293 F. Harold Smith, Outline of Hinduism, Pg. 9, 1934.
decide the fate of Ravana, who had no
weapon at hand. As per rules of war, Rama
had the power to bow down his enemy. But
Rama thought otherwise, he said, “war must
be fair play, I should not fight my adversary
if he is unevenly matched, it is my duty to
not harm an unarmed man though powerful
and dangerous enemy he may be”.

The epic of Mahabharata is in itself
literature, it denotes a way of life, teachings
of social and moral relations, and envisions
the fundamental problems of humans in
societal structure. But primarily its
acceptance is cloaked in the wordings of
Bhagwagita (lit the Song of the Lord).\footnote{K.M. Munshi in his 'Foreword' to Kamala
Subramaniam's Mahabharata, 1977.} It is in Gita that Lord Krishna asserts merits of
war and asks his devotee, Arjun, to be a part
of the war. Arjun intends not to put harm to
any of his kin, Krishna reminds him a
Kshatriya should engage in war for religious
principles,\footnote{A.C. Bhaktivedanta Swami Prabhupada, The Gita,
Pg. 115-116, English translation of the Gita, 1986.} death because of religious
principles cannot be termed as violence. A
Kshatriya's duty is to protect the innocent
from any possible threat and while doing he
has reasons to use force or cause violence at
times. Further, Krishna says that Arjun
would not be harming the eternal soul of the
deceased because it is immortal. Therefore
he should defeat the army of hostile kings
and let the religious principles should rule
the world.\footnote{Sloka 19 of Chapter 4 of Canto 1 of the Srimad-
Bhagatam.}

In another chronicle from Sri Lanka,
king Ellalan from Anuradhapuram who
reigned entire country for around 44 years.

There was a battle called from the side of
the Vassal king of south India. The king
knew he was old and that he could not stand
against the young price of the Vassal as well
an army of his enemy could easily defeat
him. He thought it is his cardinal duty to
protect his nation and the innocent folks, let
the war should not affect his nation. The
king agreed for a face to face fight in order
to prevent mass damage and misery that the
war may cause, by fate he lost his life in the
battelfield. Fascinated by his greatness king
Dutugemunu, his adversary built the Ellalan
Sohana or a tomb for Ellalan.\footnote{Ibid 12.}

1922, under the rule of the British
crown, Mahatma Gandhi, dissatisfied by the
actions of governance called for nation wide
civil disobedience against the British rule in
India, the protest was indeed peaceful to
British police open fired on marchers.
Agitated by this action of police a few
marchers turned hostile to the peaceful
intentions of Mahatma Gandhi and set a fire
in the enactment also killed some station
officers; Gandhi immediately dissipated the
march. He said that it was his duty to induce
a peaceful march- “those who seek equity
must go with clean hands”.\footnote{Ibid 12.} Breach into the
police station was against the moral
principles of Mahatma Gandhi who was an
ardent follower of Dharma, this action of
protestors seemed to be violative of Dharma
and therefore Mahatma Gandhi had to quit
the movement.

Conclusion: In the current scenario
it becomes essential to acutely appraise
these episodes, one can capture the
fundamental picture of Hindu scriptures or
more precisely Dharma. The Dharma can be correlated with duty. An individual is born with some obligations or duties to be performed through his life – the very essence of life. In the epic Mahabharata, Yudhishtira said that a true king must perform his duty for the fate of his disciples. Artha Shastra of Kautilya and Dharma Shastra of Manu equally repeat the notion of duties to be performed by the mighty. Therefore Rama performed his duty by retreating Ravana, Arjun being a Kshatriya had a duty to take part in war whenever religious principles are at stake, and Ellalan followed Dharma by disavowing war and misery. Gandhi was conscious of his actions by abandoning peaceful march and choose not to accede philosophy “end justifying the means”.  

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303Ibid 12.
INTER-LINKING OF RIVERS: UNREALISTIC EXPECTATIONS

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Introduction
In a country that worships and reveres its rivers, it would be logical to imagine pure, serene waters flowing freely. The true picture, however, is quite different. Not only are the rivers amongst the most polluted ones in the world, but also their flow is going to be controlled and modified according to human wishes, through the government’s initiative-interlinking of rivers.

This article speaks about the chronological development of this idea-when and why it originated and how it has changed over the years. It includes the basic outline of how the project is going to be implemented and also the pros and cons of this project, while highlighting the impacts it will have on the environment, economy, people, legal framework etc. The article also focuses on similar projects that have been carried out in other parts of the world, how those have affected the river’s ecosystem and what lessons we can learn from them. There is also a discussion on the benefits of the project but whether and how sustainable those are capable of being. Finally, there are a few suggestions as to how we can maximize the good effects of river interlinking while not causing too much harm to the environment.

Rivers have been lifelines to human beings since ancient times- starting from the Indus valley civilization, Mesopotamian civilization, etc. to the modern day industrial and agricultural hubs. Altering of the course of a river has huge impacts on the ecosystem that survives on it, to the extent that it has been the cause of the decline of certain civilizations and the rise of others.

The interlinking of rivers in India has come up in the news recently in the wake of the recent floods that hit the country. This concept, however, has been around for about 150 years now.

In the nineteenth century, Sir Arthur Cotton, a British engineer suggested this process of interlinking the Indian rivers so that imports and exports could be carried out through the rivers. It was also believed that this interlinking of rivers could solve the problem of the cycle of droughts and floods in the country. Dr. K.L.Rao, an Indian engineer and politician, in 1972, suggested that the Ganga and the Kaveri be linked. His idea was supported again a few years later in 1977 by Captain Dastur, a pilot, who said that there is a contour which could be used to connect the Himalayan rivers and the Peninsular rivers. Though this plan was never carried out, it kept resurfacing now and then.

Captain Dastur’s plan was revived during the 1980s. Under Indira Gandhi’s regime, the National Water Development Agency (NWDA) was constituted which comprised of nominated experts and was entrusted with the responsibility of coming up with reports on the feasibility of interlinking of rivers. This idea once again

http://www.livelaw.in/interlinking-of-rivers-violation-international-environmental-law/
gained wind when in 2002 a PIL was filed in the Supreme Court. It ruled that the planning of this project was to be completed by 2006 and the project itself was to be executed by 2016. Needless to say it could not be executed within this impractical deadline and lost its enthusiasm midway.

Outline of the Plan

The Ministry of Water Resources in 1980 published a report titled “National Perspectives for Water Resources Development”. In this report a rough plan of this project was sketched out.

The project was to be composed of two components-

- The Himalayan component
- The Peninsular component

The Himalayan component comprised of mainly connecting the Ganga and Brahmaputra rivers. This includes connecting their principal tributaries like Kosi, Gandak etc. The Peninsular component comprised of connecting the five main rivers of Southern India, that is, Mahanadi, Godavari, Krishna, Pennar and Kaveri.

Aims of the project

The project is based on the hopes of constituting India into a grid of interconnected rivers where the surplus of one river would feed the dearth of another, thereby solving India’s eternal problem of floods and droughts. However ambitious these objectives may sound, we need to look into the feasibility of this gargantuan plan, to see whether this will end the water related issues of the country or push it into further woes.

Environmental Issues

Since we are talking about joining rivers, the first issue to take into consideration is its environmental consequences. The first step in connecting rivers is the building of dams and canals and thereby diverting the water from its natural course through an artificial channel in another direction. When we build a dam on a river, we obstruct its natural flow and store a certain quantity of its water, allowing the remaining water to flow. The area around a river bed is so fertile and abundant in water and excellent for agriculture because of the presence of aquifers (an underground layer of water). Now when we build dams across a river and divert the water from its original course to some other channel, less water can permeate into the underground aquifers, which ultimately results in slowly drying up of the previous basin at the downstream of the dam.

Another problem with dams occurs when the rivers keep depositing silt at the bottom of the reservoirs. This reduces the height of the dam and ultimately they become redundant. So if we change the entire grid of water in the country and create a completely new grid and this new grid becomes non functional after some time (owing to the silting up of the dams), this would ultimately leave the water resources of the country in a completely messed up situation. This could also result in the desertification of the entire country.

Legal Issues

One major issue with the interlinking of Himalayan rivers is that whether or not it violates the Ganges Water Sharing Treaty 1996 between India and Bangladesh.

This treaty mandates that India and Bangladesh are supposed to share international waters in a “fair and equitable” manner. Through the construction of the Farakka Barrage, the provisions of the treaty have already been violated. And now with the interlinking of rivers, there is immense apprehension that there will be further violations of the treaty. Bangladesh is an agrarian economy and very much prone to natural disasters. Through the interlinking of rivers, if we divert any of the water it was previously receiving; it will hit the economy hard, and also cause severe damage to the fisheries of the country as well as the Sunderbans which serve as the home to many endangered species.

Under the Constitution of India, water is a state subject, vide List II of the Seventh Schedule. While mentioning the subjects over which the states have jurisdiction, under Entry 17 the following are included- “water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power”.

However, our Constitution also mentions that inter-state rivers or waters are within the jurisdiction of the centre. That is why under Entry 56 of the Union List the following are included- “regulation and

control of inter-state rivers and river valleys”.

Given the inter-state and centre-state political situation in our own country, next we have to think about whether or not this project would be possible to implement. To connect the rivers the pre-requisite is that there should be complete cooperation between the state governments and the central government and also amongst the state governments themselves. It is, however, quite unlikely that such cooperation may take place. On the other hand every state will most probably try to prove that it is itself water deficient and thus oppose any diversion of water from its territory.

There are already numerous such instances where states have been involved in disputes regarding sharing of river water. The first that is to be mentioned in this respect is the Cauvery water dispute between Tamil Nadu, Karnataka, Pondicherry and Kerala. This dispute has been going on since 1892 when the first agreement was signed between the Madras presidency and the princely state of Mysore. The disagreement had reached such heights that a separate tribunal (Cauvery Water Dispute Tribunal) had to be created. There were similar disputes regarding the waters of Godavari, Krishna, Damodar, Narmada, Vansadhara and many others.

Another problem that we have to encounter in executing this project is the issue of land acquisition. In order to build the required number of dams and reservoirs and canals, a

306 http://wrmin.nic.in/writereaddata/06_Inter-Linking%20of%20Rivers%20and%20legal%20aspects_APratap.pdf
large number of people will have to be displaced from their homes. According to a report by Upali Amarasinghe,\textsuperscript{307} almost half a million people will lose their homes and grounds for this project to be implemented. With the already enormous costs of the project and the population pressure of India, it would be very difficult to get those people rehabilitated and compensated. If they lose their homes and their livelihoods, they will ultimately end up in slums in the cities.

**Economic Issues**

The next important issue to be considered is whether this project will be economically feasible.

In 1977, Captain Dastur estimated that the cost for carrying out the project would be Rs. 24,095 crores, but an expert committed estimated the cost to be about Rs. 12 million crores, which at 2002 price level would be a whopping Rs. 70 million crores \textsuperscript{[2]}. This cost is however the primary amount required in carrying out the project and does not include the subsidiary costs like that of compensation to people who will be displaced or restoration of the ecosystems harmed in the process. Now the question is where will the government be able to procure that amount of money and even if it does, will it be cost-effective?

Yes, this project promises that a huge amount of hydro-electricity will be produced, a large area of irrigated land will be created but all these claims are subject to doubts. These cost advantages will not be enough to compensate for the project establishment costs as well as the running costs. Also, we need to think whether this is sustainable in the long run or not. Dams, which are necessary for this project, have a finite lifespan of about 50-100 years. After that time, due to various reasons like concrete cracks, failing buttresses and other structural wear and tear, the dams start deteriorating. In addition to these, there is a major concern which significantly reduces the life of a dam. That is sedimentation by the river, which deposits sand and silt at the bottom of the reservoir, thus slowly reducing its capacity.\textsuperscript{308} This problem has been worsening because of deforestation in the upstream region, which accelerates soil erosion and which in turn accelerates the silting up of the dam. Even if the river network the project is carried out, there is no guarantee as to how long that will be properly functional. So we need to consider the long term effects and sustainability of this plan instead of relying merely on the short term benefits.

**Geographical Barriers**

The concept of linking the flood-prone Himalayan rivers with the peninsular rivers to provide water to the drought-prone Deccan plateau may not be possible because of the presence of the Vindhya mountains. It will not only be very difficult to lift the water from the northern plains and bring it to the Deccan plateau over the Vindhya mountains, but it will be extremely expensive. It is highly doubted whether incurring of such enormous costs is at all necessary.

Meanwhile China has been discreetly implementing its river interlinking project for almost a decade now, and since they are

\textsuperscript{307} https://cgspace.cgiar.org/bitstream/handle/10568/3776/PN48_IWMI_Project%20Report_Aug09_final.pdf?sequence=1

\textsuperscript{308} https://www.teachengineering.org/lessons/view/cub_dams_lesson08
not bound by any water sharing treaty as an upper riparian state, it can divert the water of the Brahmaputra. In that case India might also have to rethink the Himalayan component of the project which involves the Brahmaputra.309

**Ecological Dilemma**

The basic idea on which this project is based is that through inter-basin river linking, the water from a surplus basin will be diverted to a dry basin. But more or less all the rivers in our country flood at the same time, that is, during the monsoons. When there is surplus water in the rivers of the northern plains, simultaneously there is enough water in the rivers of the Deccan plateau. Therefore, it would be of no use if the water is diverted at that time. Also, during the dry season, both the regions face the same situation. So if water is diverted from an apparently ‘surplus’ basin to a recipient basin in the dry season, then though the recipient basin will benefit, the donor basin will suffer.310

For example, there is a plan to divert some of the water from the “surplus” Godavari basin to the “deficient” Krishna basin, but this will harm the Godavari basin tremendously. This is because the Marathwada region in Maharashtra is one of the worst drought-stricken regions in India and it belongs to the Godavari basin. So diverting water from the Godavari will worsen the situation further.

One of the primary objectives of this project is to facilitate irrigation and boost agriculture. The main water source for agricultural purposes, however, is not river water. It is underground water. The bulk of the water used for drinking and industrial purposes as well comes from underground water. So if we want to help our farmers in times of drought, or help those places which suffer from lack of drinking water, we need to make sure that the underground water is adequately replenished. Inter-connecting rivers would not be of much help in that respect. In fact, this would do quite the opposite.

Again, since these underground aquifers are not being adequately recharged, another problem emerges. That is concentration of Arsenic and Iron salts in underground water. This poses a severe threat to public health.

With the inter-linking of rivers, we aim to stop the floods but what we forget is that they are not completely bad for the environment. Firstly, floods help spread fertile alluvial soil which helps agriculture. Secondly, the excess water of the flood goes into aquifers, thus replenishing the water that we regularly draw out. Flooding is essential for the floodplains and deltas. If not for the occasional floods, sea water would get into the aquifers and ground water would become unsuitable for drinking.

Another opinion is that the presence of more fresh water in the delta actually helps in bringing the monsoon rainfall to the country. If we artificially stop the natural flooding of our rivers, this could ultimately lead to desertification and desiccation.

**The desiccation of the Aral Sea**

The gradual drying up of the Aral Sea in Central Asia can be cited as an

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310 [http://www.indiawaterportal.org/articles/link-or-not-link-debate](http://www.indiawaterportal.org/articles/link-or-not-link-debate)
example of this phenomenon mentioned above. Until the 1970s, the Aral Sea was the fourth largest saline lake in the world. It was fed by two rivers- the Amu Darya and the Syr Darya. But things started changing when the Soviet government decided to divert the course of the rivers, so that water could be provided to the desert region surrounding the Aral Sea. The incidents that followed could very well taken as a warning as to what might happen if we decide to carry out this feat in India.

Since the waters that would feed the Aral Sea had been diverted away, the first consequence was that the water content of the Aral Sea went down by 23 meters. Also since the water content was reduced considerably, the salt content increased from 10g/litre to 100g/litre. The water reduced so much that the Sea got separated into two parts. All of this in turn resulted in melting of glaciers, increase of sea surface temperature, frequent dust storms and salinization of the soil. The subsoil dried up and the ground water level also declined significantly. The area ultimately suffered extreme desiccation and desertification. The plants died as a result of increased salinity and vegetation was reduced by 40%. Six million hectares of agricultural land was destroyed.\textsuperscript{311}

\textbf{Fate of the Kissimmee river}

Another example can be drawn from what happened to the Kissimmee river in Florida. In 1947, a massive hurricane hit Florida and caused the Kissimmee river to flood. This caused a lot of damages and the citizens there requested the government to take steps so that such floods do not occur in future. Thus the government channelized the river. This has since then damaged the river and its basin. Its floodplain has dried out, the level of pollution in the river and the number of fishes and birds dwindled having lost their natural habitat.\textsuperscript{312}

\textbf{Ecosystem will be affected}

A river is not just a pipeline of water. It is an ecosystem in itself, containing aquatic animals and plants. There is also different flora and fauna throughout the course of the river, and which are completely dependent on the river for their existence. There are forests that are fed by the river water, there are animals and birds along the course. Where will they go? We think about the rehabilitation of the people who will be displaced if we artificially change the course of a river but how do we provide the same for the flora and fauna who will be losing their natural habitat?

According to a study by a team of scientists from the Indian Institute of Technology, Bombay and Madras, there is a high possibility that the dry areas of India are going to receive more rainfall while the comparatively wetter areas will receive lesser rainfall. They have also said that the water yield in previously surplus rivers is decreasing while that in deficient rivers is increasing. If that is the case, then inter-linking of rivers will not be of much use.

\textbf{Ken-Betwa Link}

Among the 30 proposed links between rivers, the first that is being implemented is the Ken-Betwa link in Madhya Pradesh and parts of Uttar Pradesh. This project proposes to divert some of the surplus water from the Ken river (also known as the Karnavati) to the Betwa,
which will irrigate an area of over seven lakh hectares in the drought prone Bundelkhand. The major portion of the project will be implemented in three years. Though it is agreed that the successful implementation of the Ken-Betwa link will benefit the people of Bundelkhand region by solving their water problems, ecologists however expressed concern over the impacts of this project on the environment. Yes, it will relieve the people who have been facing severe scarcity of water for a very long time, but the question is whether that benefit will be sustainable. The Ken-Betwa link will invade the core area of the Panna Tiger Reserve. Not only will it submerge more than 4000 hectares of the tiger reserve and a total of 9000 hectares of the forest land, but it will also cause loss of habitat to the vultures and the fish-eating crocodile gharial. A total of seven lakh trees will be submerged due to this project.

Now moving on to the economic aspect of this particular link, it has been estimated that ninety percent of the expenses that will be required for this project are going to be well over Rs. 18000 crores. Since this project involves the states of Uttar Pradesh and Madhya Pradesh, both of these states were naturally wary of the huge costs this is going to incur. Previously it was agreed that 60 percent of the funding will be coming from the centre while 40 percent will be provided by the states. After further discussions, however, it has been decided that the expenses will be distributed between the centre and the states in 90 (centre): 10 (state) pattern. This linking will also necessitate the removal of almost 2000 families from 10 villages.

Benefits of Inter-linking
The supporters of this plan put forward the following argument. India receives 4000 cubic kilometers of rainfall every year, which amounts to 1 million gallons of water for each person in a year. Apparently this might give an impression that we get more than enough water but the real scenario is quite different. This is because 85 percent of the total rainfall is concentrated over a small area- the Western Ghats, the North-Eastern part of India, and some parts of the Gangetic plains. Moreover the precipitation does not happen gradually throughout the year. It happens mostly during the monsoons, which is usually just three months- July, August and September. The rest of the year is more or less dry. There are also some regions of the country, like the Deccan plateau and Western India, which receive extremely scanty rainfall even during the monsoon months. Since there is such a stark difference between the distribution of rainfall in different parts of India, the networking of rivers will be quite beneficial for the people, especially the farmers.

The Northern plains of India have forty four percent of the country’s population but use sixty percent of the water resources. On the other hand, the Deccan plateau has seventeen percent of the population but use only six percent of the total water resources. This unequal distribution of water resource utilization calls for the interlinking of rivers, which will

provide water to the deprived people of Southern India.

Moreover, India is mostly an agrarian economy. Seventy percent of the country’s population lives in rural areas and are completely dependent on agriculture. In this scenario irrigation is extremely important. Our farmers suffer a lot due to the floods as well as the droughts. So if the interlinking of rivers can stop this cycle, it is very much welcome. There is an increasing concern expressed by people that the “donor” basins will become dry but the project proposes that only the excess flood water will be diverted and not the main water of the rivers.

This project will not only facilitate agriculture but also produce a lot of electricity- approximately thirty four thousand megawatts of hydro-electric power. Construction of a large number of dams will facilitate production of this electricity.

**Conclusion**

Interlinking of rivers can be both a boon and a bane to the country. On one hand it poses many threats to the environment and on the other, it may prove to be a blessing for all the places suffering from floods and droughts every year. However, there remains a question as to why such an extravagant affair is being taken upon before trying the many other easier mechanisms of water conservation and irrigation.

One of the easiest and most effective methods of water conservation is the creation of ponds. Apart from being an excellent mechanism for rainwater harvesting, a pond is an ecological unit in itself, and is very good for biodiversity. Ponds support aquatic life as well as terrestrial species like insects and small animals; they provide drinking water during the dry season and nurture the plants in its surroundings. Thus it would be advisable that adequate number of ponds be set up in villages to hold rainwater. Not only ponds, all other methods of rainwater harvesting should be applied.

Most of our rivers are extremely polluted. The number of polluted rivers in India has risen from 121 in 2009 to 275 in 2015. In spite of the mythological significance of rivers in our country, we have not been able to maintain their purity and cleanliness. The Yamuna is the most polluted river in India and among the top ten most polluted rivers in the world. The holy Ganges is not far behind, with 32 drains emptying their sewage into the river. The other rivers also face similar situations. Under these circumstances, would it be wise to join a more polluted river to a less polluted one? Or should we first try to restore the health of our rivers before experimenting with them?

Before we go about with such a gigantic project, it would be wise to carry it out at a smaller level, that is, intra-basin river networking. We should observe how that impacts the environment and if circumstances show positive results, we can implement the national river interlinking project with more certainty and confidence.

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RIGHT OR WRONG: ANALYSIS OF JURISPRUDENCE & LEGAL FRAMEWORK MORAL RIGHTS IN THE ARENA OF FILM INDUSTRY

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The concept of copyright protection exists to not only reward the creator of the work for his intellect but also to serve as an incentive for more people to create work which may eventually be for the benefit of the society. The rewards of this Intellectual property Right can be reaped in monetary forms where in the owner has the right to exploit the copyrighted work by way of selling, lease, license etc. Another form of rights inherently attached to the copyrighted work is moral rights. Moral rights are those set of rights which ensure due attribution of the copyrighted work when it is exploited by the user. These rights are justified in the sense that the author of the work who is also the first owner may give up the ownership of the copyright but the fact that he is the creator of the work should not be forgotten. Thus while one exploits the copyrighted work, he has to give due credit to the author of the work for his creation. Moral rights are also significant for preservation of culture of a nation. Film industry of a country is not only a vital source of revenue but also the reservoir of plethora of creative content. The stakeholders in the film industry who are eligible to get copyright protection include the musicians, performers, lyricists, producers of sound, art directors etc. Thus the emphasis on moral rights in the film industry becomes all the more important since every stake holder has to be attributed due credit for his work. This paper thus seeks to evaluate the growing importance of moral rights in the film industry & comparatively analyze the scenario with regard to moral right in the U.S., U.K. and Indian jurisdictions, the legal framework of the same along with certain relevant case studies, to emphasize on the rationale and need to grant moral rights in the copyright arena specially the film industry.

Key words- Moral Rights, Copyright, Author, Owner, Film Industry.

MORAL RIGHTS: THE CONCEPT

The creation of an artist is an expression of his idea or opinion. This idea can be expressed in many tangible forms, for instance in words, pictures, music or photos. This unique expression of the idea that carries a certain amount of originality deserves protection. The author is also given the right, over his work, to sell it off or share it with a prospective buyer or user. Even when this happens, there are certain rights over his work that the author never loses. Such rights are moral rights. These rights represent social values with regard to the fact that the creation of the author was a result of a lot of effort and labor and thus his creativity is not merely to earn a livelihood but something beyond that and should be appropriately valued and protected.

Moral rights were first recognized by the French courts in the early nineteenth century. In the first half of the twentieth century, the concept was gradually

introduced into the copyright laws of European countries with a civil law tradition. The rationale for granting moral rights exists in the personality of the author or creator that his creation reflects. Economic rights are more than necessary to keep the body and soul combined but moral rights give due respect to the creator and his creation. His work is seen as a service to the society and thus should be protected even when he does not remain the user of copyright. The recognition of these aspects, moral rights bring about cultural focus to copyright law.

Films are a huge part of the 21st century, almost inseparable. The film industry of a country contributes to its economy and if the industry is as huge as the US, India or UK, then it is one of the most important revenue generating systems over which the economy of the nation depends to a certain extent. Motion pictures are widely admired as an original expression of art form of the 21st century. Films are a mixture of a number of artistic expressions, words, images, drama, music and the thread that puts these elements together - technology. The complex nature of this form of art presents a challenge to the image of the artist as individual, whose work reflects a unified artistic concept, embodied in a doctrine of moral rights. Authors, be it of dramatic work, literary work, artistic or musical work and films have moral rights over their creation even though the ownership of the copyright may not rest with them. Moral rights grant the right to an author to be respectfully attributed for his work since the work is reflective of his personality.

DIFFERENT KINDS OF MORAL RIGHTS

The Right of Attribution (“Paternity”) Also known as “right of paternity”, is the right by which authors, even when he is no more the owner of the copyright of his creation, can still claim authorship over the same. This right determines fixating the same of the author to this creation so that he is attributed for the same at any point of time when anyone uses his creation. Simultaneously it also bestows the right of anonymity if the author seeks the same.

ii. The Right to Integrity

This right emanates from the rationale that “the work of art is an expression of the artist’s personality so distortion, dismemberment or misrepresentation of the work mistreats an expression of the artist’s personality, affects his artistic identity, personality and honor, and thus impairs a legally protected personality interest.” This right guarantees a general protection against any sort of distortion or modification of the work.

iii. Other Subsidiary Rights

Apart from the above mentioned, to cover additional circumstances, there exist certain subsidiary rights which include rights such as to create, publish, withdrawal of published work from sale, the right to prevent “excessive” criticism of a work, and the right to prevent any other violation of the author’s personality.

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MORAL RIGHTS AND FILMS

Films are the most complicated form of art. It’s a tremendous process of transforming one idea to various forms and expressions. It includes every aspect of art i.e. music, words, literary work, and drama. Singularly, however complicated these components be, when intertwined in one, they become all the more complex and spectacular in nature. By the virtue of this complex nature, the final outcome or a film requires moral rights protection. United States being a notable exception, moral rights in this medium are recognized in most countries of the world.

The practical relevance of these rights especially in the cinematography arena is without an iota of doubt. The nature of creation involves abundance of copyright and thus moral rights form an integral part of the same. Many international cases have arisen in the past over the issue of granting moral rights to authors and even performers who contribute to films in one way or the other. The advancement of technology in the 21st century has transformed the world of cinemas giving a new dimension to this art form. Digital images of personalities can be altered to re-create characters from any point of time to any point in time. The communication of movies via the platform of internet is another ease that technology has provided us with. Technology has brought the industry under one big umbrella making access and sharing easy and beneficial to everyone. India for instance has surpassed US, now being the world’s largest film maker. But unlike US, India has welcomed moral rights with an open arm. In fact, it is this acceptance of moral rights that has helped to keep alive a cultural discussion around movies. All these things contribute to the question of moral rights and why is it necessary to have the same in a film industry.

US SCENARIO AND CASE STUDIES

In USA, moral rights have been existing since 1948. Shostakovich v. Twentieth Century-Fox Film Corp, was a copyright lawsuit regarding moral rights jurisprudence. The movie titled The Iron Curtain, which was based on a soviet spy. Twentieth Century Fox has utilized compositions as background music of composers who happened to be the citizens of the Soviet Union. The name of the composers, Shostakovich was also used in the picture when one of the characters incidentally referred him in appreciative way. American Judges expressed that there is possibility that Moral Rights of integrity of composer has been violated as the work was mistreated ad also due to the music having been in public domain couldn’t be claimed copyright over. The court faced the challenge of how to enforce and prove these moral rights. The Judges also faced the difficulty while finding an appropriate standard and placing the moral rights of another with members of society. Thus, looking for a remedy in such a situation was a herculean task. The Court however concluded that “the association of work with discourse and political views was not in itself to qualify violation of integrity. In the

317 Most Western European countries, including France, Germany, Italy, Austria, Spain and Belgium have special provisions on moral rights in films.

absence of copyright, others may use the names of the authors in copyrighting, publishing or compiling their works.”

In particular when USA joined Berne convention, one requirement to be adhered to was protection of moral rights of the author of the work. USA became concerned regarding implementation in its law and there are possibly three methods of satisfying the commitments

1) General reform of US copyright act (which was not adopted).
2) Passing special legislation (specially confined for protecting the Moral rights of artist of visual right).
3) Case precedents

In post Berne era case law was only basis for deciding moral rights. But it met with limited success.

INDIAN SCENARIO AND CASE STUDIES

India, in 1952 got its first copyright Act and changes were made to the same to provide for moral rights in 1994. Ever since moral rights have been frequently a matter of legal dispute. The leading case in this regard Amar Nath Sehgal V. Union of India &Anr, was the very first in the trail of cases regarding moral rights. It questioned the existence of moral rights over a mural that was created by the author even when the copyright over the same was assigned to Union of India.

The Court took help from national and the international laws for protection of the moral rights of the Author and held that nothing prejudicial to the work, which is of such nature that it hampers the reputation of the author, shall be done so as to violate moral rights.

Pradeep Nandrajog J. ruled: “mural whatever be its form today is too precious to be reduced to scrap and languish in the warehouse of the Government of India. It is only Mr. Sehgal who has the right to recreate his work and therefore has the right to receive the broken down mural. He also has the right to be compensated for the loss of reputation, honor and mental injury due to the offending acts of UOI”.

The Courts interpreting moral rights act with the intention of broadening the horizon of protection of copyright for the authors of various copyrighted works. Under the Indian copyright laws, there are two rights covered under the ambit of moral rights namely the right of integrity and right of paternity. Even so, the courts have always acted progressively to stretch the protection through wider interpretations of the existing laws.

UK SCENARIO AND CASE STUDIES

In UK, the landmark judgment came in Confetti Records & Others v Warner Music UK Ltd. The Claimants were copyright holder of track. The Defendant offered to use the track, and there negotiations for the same. A fax was sent, that contained the terms and

319 2005 (30) PTC 253.

“subject to contract” conditions. The Claimants agreed to the offer. But, before the payment and contract had not been concluded, Claimants informed to renegotiate so that the track should not to be used until negotiations are complete. But the Defendant had already used it. The Claimants initiated action to restrain the defendant from using it. The originator (the third claimant) of track also brought action for “derogatory treatment” of the work relying on sec.80 (2) (b) CDPA 1988. On the issue of whether defendant’s addition of a rap to the track constituted derogatory treatment under s.80 (2) (b) CDPA 1988, the court held that “derogatory treatment of work is committed when it had prejudiced the author’s reputation. The know meaning of “rap” expert evidence is required. It had not been proved nor any evidence that concluded prejudice to the originator’s reputation so the claim for derogatory treatment is invalid.”

COMPARATIVE STUDY OF S.A., U.K. AND INDIA

Legal Framework of the United Stated

Moral rights differ from one nation to another, but, at a global stage, the Berne Convention bestows upon the author of the copyrighted work two kinds of moral rights namely the right of paternity that is the right to claim authorship of their work (right of paternity) and to stop any modification of it that would be harmful to their reputation (right of integrity). The U.S. is a member of Berne Convention but it does not provide for moral rights. The Visual Artists Rights Act of 1990 (VARA) in America is single law that talks of some moral rights in film industry, but it does not include works which are created as “works made for hire”. VARA is the first act to provide protection for the moral rights of visual artists all over the country, it does not protect artists in the film industry. Works made for hire, such as films, are excluded from VARA’s definition of visual art.

A number of court decisions have been laid down that enforce the concept of moral rights, beginning with Fairbanks v Winik. Here, Fairbanks rise to fame increased his value. One Majestic studio having the ownership of copyright of his films sold the same to one Triangle Film Corporation. The same was tried to be sold in 1922 for re-editing, then, in 1922, even sans copyright, Fairbanks, filed an injunction suit to stop Triangle’s action contending that the modification of his films to two-reel, serial format would be “detrimental to (his) standing in his profession, in that he has never appeared in a two-reel picture, but has only appeared in feature pictures of five or more reels”.

The court thoroughly went through Fairbanks’s contract with Majestic, which gave the right to Fairbanks to review the final cut of his films. Thus the decision of the court was in favor of Fairbanks, protecting his moral rights as an artist. Due to the lack of protection of moral rights the

most pressing problem is of colorization of old black and white motion pictures. It is alterations to works are an infringement of moral rights of directors, screenplay writers and artists. In turn it also affects the economic rights of producer. “There is a conflict between the personal moral rights of the artists and the property rights of the producers. As Profs Patterson and Lindberg point out “property is a favored child of the common law, whereas personal rights, a stepchild. When there is a conflict between the two, the property rights almost invariably prevail.”324

Legal Framework of the United Kingdom

In UK Copyright regime, Designs and Patents Act (CDPA) 1988, recognizes the author of a work as the first owner of copyright and it also mentions about the position of authors and performers but the exceptions to the rule. The employer or the crown is the first owner of any copyright work ‘made in the course of employment’ subject to agreement between them or in the course of his duties respectively. The ambiguity is in the wording of ‘in the course of employment’. In order to determine this Court of Appeal in Stephenson Jordan & Harrison Ltd v MacDonald325 adopted the “skill, labor, and judgment test on the basis of justice and common sense”.

In Noah v Shuba326 it was held: “where an employee performs work beyond the employment contract, namely a contract of service; the employee will become the first owner of the copyright work”.

The categorization of “employee or self-employed” is essential to determine ‘copyright ownership’ where there is need of subsequent exploitation. This concept is dicey depends on its facts of each case, Cooke J in a case in 1969 mentioned “the more the degree of individual obligation the worker has in his art, the greater the possibility that worker is an independent contractor.”

In case of Griggs Group v Ross Evans327 it was held that “exclusive license would not be enough for the business work, the court was ready to imply a beneficial assignment of copyright to the commissioner of artwork in order to give business efficiency to the commissioning arrangement.”

In this case, the court gave wide interpretation to beneficial ownership and thus included commissioned works within its purview, and further held “section 11 CDPA 1988 subject to a non-statutory exception in the case of works made by independent contractors”. The impact of such decision was that:

1) It snatched the shield conferred on authors thus no opportunity to say whether they wish to transfer their rights so tacit inducement is there.

2) In conditions where such works have unexplored applications, author of commissioned works have to face problems if he desires to further exploit these works with the commissioner's competitors. This is apparent in cases where licenses relating to software and architectural plans.

In joint authorship each will have their own individual rights against


327 (No.1) [2005] EWCA Civ 11

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infringement, they can assign individually but the whole work can be licensed without the consent of co-owners.

Pre CDPA 1988 era, moral rights and their remedies for infringement fall under contract and defamation so torts law, passing off and obligation created by contract were only remedies.

After CDPA 1988 came into force moral rights are directly given to authors and directors of copyright literacy, dramatic, musical and artistic works and copyright films, these moral rights are followings:

1. The right to be identified as author (in section 77(1) i.e. Paternity Rights).
2. The right to object to a derogatory treatment of work (Integrity Right).
3. The right not to have work falsely attributed (False Attribution Rights).
4. The right of privacy to certain photographs and films (Privacy Right).

Performers' Right in the UK

The Performances (Moral rights, etc) Regulations 2006, there are two moral rights granted to:

1) Performers
2) Authors

These regulation are under part II of the CDPA 1988, confers the paternity right and the integrity right. A performer is now granted:

1) A right to be identified as performer in his live aural performances and any performances fixed in phonograms,
2) Under section 205F part II CDPA 1988, a performer is provided an integrity right in his performance.

Legal Framework of India

Moral rights are the rights of attribution and integrity over the works performed\(^{328}\). There have been various case laws that support moral rights in the film industry in India.

In the case of Indian Performing Rights Society Limited v. Eastern India Motion Pictures Associations\(^{329}\), Justice Krishna Iyer opined-

“Artists enjoy protection in the music work while the producer enjoys protection for the work as a whole. This shows that the work of actor has not been mentioned as such by the judicial precedents. Actors mainly depend on the producers in order to get their royalty and fix their morality rights. However, the morality rights itself does not give adequate protection to the actors. Manisha Koirala’s work in the movie was distorted in such a way that it could hamper the reputation of the actress and so there was a need of addressing the plights of the actors in films”.\(^{328}\)

The Copyright Act in India has does not provide any specific provision relating to ‘acting’. The question remains unanswered as to whether acting comes within the scope of ‘work’ or not as defined under Section 2(y) of the act. In the case of Fortune Films v. Dev Anand\(^{330}\), the Division Bench of Bombay High Court held :

“acting does not come within the purview of


\(^{329}\) (1977) AIR SC 1443.

\(^{330}\) In the High Court of Bombay,(1079 AIR Bom 17.
a ‘work’ and so cannot be entitled to claim copyright protections. Actors are considered as performers under Section 2 (qq) of the Copyright Act, 1957.”

**Copyright Amendment Act, 2012**

The Copyright act has been amended to include a new provision, i.e. Section 38B (b), which specifically mentions “the performer of a performance shall, independently of his right after assignment, either wholly or partially of his rights, have the right to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation”. Thus, the copyright scope of protection has been widened to include performance in a cinematograph film. Even so, an important question to answer at this point of time is regarding section 2(q) of the Copyright Amendment Act 2012, which defines a performance as “a performance is any visual or acoustic presentation made live by one or more performers”. Whether this definition is broad enough to take under its ambit the performance of actors in a movie and if so, will moral rights to the actors be granted in the same respect?

Moral rights as per the Indian Copyright Act 1957 have been given to only to the authors and not to the actors (Sec 57). The WPPT has expressly denied ‘moral rights’ to audio-visual performers such as actors, partly due to India’s insistence during negotiations, leading several commentators to opine that this was due to the powerful producer’s lobby in both Hollywood as well as Bollywood which seeks to deny actors any rights. The purpose behind conferring moral rights on authors is to rationalize their creativity and not just the economic interests. In same way actors use their “own skill and labor” in order to bring creativity element in the movie.

**WAVIER OF MORAL RIGHTS**

Under Section 57 of the Indian Copyright Act even if the work is assigned either wholly or partially, the special Rights continue to vest in an author, held in Smt. Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr. After the death of author the right to integrity is inherited by the legal representatives of the author but under Sec57 of Indian copyright act following does not amount to infringement:

1) Failing to display a work or in manner which satisfies author.
2) Lawful possession of a copy of computer programmes.
3) Backup copies for temporary protection.

Justice Pradeep Nandrajog in Amar Nath Shegal v. Union of India “In the material world, laws are geared to protect the right to equitable remuneration. But life is beyond the material. It is temporal as well. Many of us believe in the soul. Moral Rights of the author are the soul of his works. The author has a right to preserve, protect and nurture his creations through his moral rights.”

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333 “AIR 1987 Delhi 13.”
334 2002(2)ARBLR130(Delhi); 2005(30)PTC253(Del).

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The Special Rights cannot be assigned but the position as to its waiver under Indian law is still doubtful. Thus it can be inferred that moral rights are legal rights, and may be waived. But it still unanswered whether the same apply to arena of copyright. In the United States under Visual Artists Rights Act (VARA) of 1990, it is expressly provided for waiver of moral rights but it can be waived in following manner:

1) It must be signed.
2) It must be on written agreement.
3) It must specifically mention the work.
4) It must mention the use to which waiver applies.

Similarly, in the UK, moral rights of the author of the copyrighted work under section 87 CDPA 1988 are barred from the following:

1) It cannot be assigned
2) There can be waiver of the moral rights by consent.
3) It must be on instrument in writing.
4) It must be signed by the authors.
5) Waiver can be specific or general,
6) It should be related to both present and future works
7) It is subjected to potential subsequent revocation.

Even though waiver is an essential second side of the coin, the existence of this flexible waiver has had many negative impacts for instance exercising undue economic pressure during bargain i.e. when the copyrighted work has to be attributed to the author of the work, the author remains in the position to claim economic benefits owing solely to the fact that he is the author and his work being used by anyone has to be duly credited to him. The author also has to be more cautious because he has to anticipate terms of contract for his self protection against future exploitation of work. Another shortcoming of the Copyright law of the UK is that the low threshold of originality to determine copyright eligibility criteria can lead to multiple claims from multiple authors for moral rights. In such a scenario what benefits do moral rights accrue for the author who has put in labor to create work.

CONCLUSION

Moral rights form an integral part of any creative work as they provide a certain amount of protection to the work even when it does not remain in the hands of the author. Such rights prove to be necessary considering that the next owner of copyright, who is not the creator, may hamper the work and subsequently the reputation of the author. Such an act will run contrary to the intention of the author with which he created the work, if it is to be used carrying its essence. Even though the stand of a motion picture is not sufficiently clear I the digital era. Directors ad screenwriters, receive little solace from copyright law’s numerous protections as copyright primarily benefits the copyright owners. 335 Even though may contradictions exist in the statute and there may not be sufficient laws to promote healthy moral rights regime, the spirit would always be bent in favor of giving a beneficial interpretation to the contributors, be it in any form. In such a scenario a set of concrete laws or guidelines

to the copyright regime is the need of the hour and thus appropriate legislative measures should be taken to bring about the needed changes.

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ABSTRACT

“While studying the biological, sociological, psychological and criminological details about the victim, victimology brings into focus the victim-offender relationship and role played by victim.” By- E.A.Fattah.

The present research paper attempts to understand the presentation of crime into various spheres in 21st century. There has been considerable increment in crime rate with the economic growth due to individual’s greed for wealth and other luxuries of life, people resort to unlawful means to satisfy other wants and desires, thereby end up in committing crime. The objective behind this research is to have deep understanding of victimology. It also focuses upon various types of crime due to injury caused to a person or property, victim of environmental offences and victim of abuse of power. The UN General Assembly has given the declaration of ‘basic principles of justice for victims and abuse of power’. It is an attempt to understand that the victims need legal aid and the dual role of judiciary is not only to punish the guilty but also to compensate the victim. The key concepts in victimology are theoretically defined the problems inherent in eradicating the abuse of power are discussed in the paper. The author in depth tries to understand various dimensions of crime categorized as: legal, political, social, cyber and miscellaneous.

There are two sides of coin, one is where we are trying to reduce the crime rate and on other we are separating the victims from society by not giving them their rights. Therefore, victimological approach towards crime is necessary as it is the rights of victim to have assistance, restitution, compensation and access to justice and fair treatment.

Key words: - Abuse of power, Compensation, Criminal Justice, Victimology.

INTRODUCTION

Most forms of violence are not unique incidents but are ongoing, and continuing from decades, because of the sensitivity of the subject, but crimes are not reported absolutely. The research paper covers the entire area of criminal justice system including the scenario of 21st century. The collection spans a broad range of research topics, including: criminology and victimology which affects i.e. women, child, elderly and men too, including various crimes which affects the victim i.e. injury caused to person and property, victim of environmental offences, abuse of power. Generally, the ways of committing crimes are common across the world but their punishment depends upon the rules and laws which differ from country to country. And accordingly the victims of crime also get protected and compensated. This paper is an attempt to understand the attitude of Indian society and criminal justice system of India towards the victim and is supported by various statistics which is carried out between 2013 December to 2017 December.

And also some famous cases and landmark
judgments which shows the ways how justice has been provided to victims of crime in India. The objective behind this paper is to develop the victim logical approach towards crime, in order to understand their (victim) prospective.

For Example- If A has murdered B and B’s wife has filed a suit against A. And the court has also provided the punishment to the guilty according to the penal code but what about B’s wife? Don’t you think she is also a victim? And is justice has been done in terms of that victim? All these are the question which needs to be answered.

The authors of the paper has also suggested some ways and basic rights of the victims that needs to be implemented in order to give them justice and fair treatment.

CRIMES

What is a crime?
Crime is an action or omission which constitutes an offence and is punishable by law i.e. it is any act, which breaks the law or fails to obey some requirement of the law. Crimes are of various types; sometimes petty misconduct may also cause a crime. i.e., anyone who smokes in a bus or breaks a traffic regulation is guilty of committing a crime. These minor crimes are called misdemeanours.

But in Indian Penal Code 1860 uses the word ‘offence’ in place of ‘crime’. Section 40 of IPC 1860 defines offence i.e. an act punishable by the code.

INCREMENT IN CRIME RATE- 21st CENTURY SCENARIO

India is one of the most progressive nations in terms of knowledge and availability of resources. But unfortunately the nation is also known for its tremendous increase in crime rate. As, in this technological era people are using new ways of committing crime like cyber crime, enmity between groups, offences against state, counterfeiting etc And the affected victims are more than the crime rate. Because, when a crime happen with a particular individual it affects the society also, either directly or indirectly.

According to National Crime Record Bureau (NCRB), the crime rate in India is increasing rapidly. There could be variety of reasons behind the growth of crime in India. And the most Common reason is the individual’s greed for wealth and other luxuries of life, due to which People resort to unlawful means to satisfy their wants and desires, thereby end up in committing crime.

In 2015, as per NRCB report Uttar Pradesh records most crimes than any other state in India. And Kerala and Tamil Nadu were 2nd and 3rd respectively in crime recorded. On the other hand Bihar and Jharkhand reported as lower crime rated states.336

Apart from this, the other way to analyse the increment in crime rate is by positioning the Concern towards the victim who is the ultimate sufferers of harm which include physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.

Victim Jurisprudence also called as Compensatory Jurisprudence because it’s a recognised principle of law to provide compensation to victims. But to understand this term first we need to understand who victims are?

The UN Convention on Justice and Support for victims of Crime and Abuse of Power defies the victims in Article 1 sub clause 1 as-

Victims means and includes all those persons who either individually or collectively suffer harm in terms of physical or mental injury, emotional suffering, economic loss, or substantial impairment of fundamental rights, through acts and omission, that are in violation of criminal laws, it include all those laws which prescribing the criminal abuse of power.

Jurisprudence is derived from Latin word “Jurisprudentia” which means “Knowledge of Law”. It brings improvement in the application of law. Because it serves the complexity of law in more rational and manageable approach. It is considered as the logical analysis of concepts which sharpens the logical techniques of a lawyer as it throws light on the fundamental principles of law.

Victim Jurisprudence is a wide term to interpret its application but in India compensation to victims is recognised as principle of law being enforced through the ordinary civil courts. In Nilabati Behera v. State of Orissa \(^{337}\), it is a landmark case which provides that the jurisprudential reasoning behind the award of damages in cases of violation of fundamental rights was elucidated in, which can truly be considered. The concept of Victim Jurisprudence has been evolved on the basis of Supreme Court’s analyses on the fact that the constitutional rights of a person are invaded and that cannot be taken away merely by the restoration of rights. So while invoking Article 32 of the Constitution the Supreme Court provided two types of monetary reliefs namely compensation and exemplary costs, by introducing compensatory jurisprudence under Article 32. After this, many landmark cases brings the compensation scheme in India. In M.C. Mehta v. Kamal Nath \(^{338}\), the Supreme Court awarded compensation to the victims of environment pollution. Some damages have been appropriated under it-

- Damages for restoration of the environment and ecology;
- Damages to those victims who may have suffered loss on account of the act of pollution;
- Exemplary damages are provided to those who are detained from causing environmental pollution.

But it totally depend on the interest of the courts whether to provide compensation to victims or not. By this we can say that the right to compensation of victims remains rudimentary to the justice delivery mechanism to victims of crimes and abuse of power. According to penologist and criminologists, compensatory justice is to be rehabilitative and restorative in nature and its tendency. They said that the right of

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Victims to get compensation is praiseworthy and elucidates the intellectual-legal-logical calisthenics of the doctrine of the rule of law with the changing modalities of management.

**VICTIMOLOGY**

Justice J.N Bhatt has defined victimology. “It is a science of suffering and resultant compensation”.

Victimology is the scientific study of victimization which includes the relationship between victim and the accuse.

**The dictionary meaning of victimology is:-**

The study of the victims of crime and psychological effect on them of their experience.

The possession of an outlook, arising from real or imagined victimization that seems to glorify or indulged the state of being a victim. As it is mentioned in the meaning, itself that it is psychology of the victim but it directly related to the behaviour of the offender or the accuse.

**Theories of victimology:-**

Victimology gives us the idea to understand that why some people are more prone than others in becoming victim.

There are 4 types of theories of victimology.

- **Victim precipitation theory:-**

  According to victim precipitation theory, some people are risk takers and may actually initiate the confrontation that eventually leads to injury or death and became a victim of it, because in our society risk takers are not appreciated. People infact always try to put them down.

- **Lifestyle theory:-**

  According to lifestyle theory, some people believe that the victim increases because there lifestyle increases their exposure to criminal offenders. Actually this theory is completely focusing upon women and modernization, but this is not so, because today also India is typically male dominating country and women as sufferers of crime.

- **Deviant place theory:-**

  According to this theory, the more often victims visit dangerous places, the more likely they will be exposed to crime and violence. As per this, victims do not encourage the crime, but are victim prone because they are residing in socially disorganized high-crime areas where they have the greatest risk of come in contact with criminal offenders, irrespective of their own behaviour or lifestyle.

- **Routine activities theory:-**

  This theory is a sub field of crime opportunity theory that focuses upon situations of crime The premise of routine activity theory is that crime is relatively unaffected by social causes such as poverty, inequality, and unemployment. So after this introduction of theory, we can assume that, there is no specific reason for committing crime, all these crimes look easy but makes big difference. And so far, without any reason people are sufferers of these crimes.

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Purpose of Victimology in India:
The purpose of study of victimology is:
• To enhance our understanding regarding victims and impact of crime upon them.
• To observe the magnitude of the victim’s problem
• To explain causes of victimization
• To develop a system of measures which helps to reduce victimization.  

CRIMINAL JUSTICE SYSTEM IN INDIA

The Criminal Justice System of India has recognised the principle of victim compensation. And therefore having various sections under Code of Criminal Procedure, 1973 regarding compensation to victims.

Section 250 authorized the magistrates to direct complaints or informants to pay compensation to people accused by them without reasonable cause.

Section 358 empowers the court to order a person to pay compensation to another person because such person has been wrongfully arrested by the police.

Section 357 it provides that the court has power to imposed a sentence in a criminal proceeding, to grant compensation to the victim and order the payment of cost of the prosecution. However, this is on the discretion of the sentencing court and is to be paid out of the fine recovered.

Committee on Reforms of Criminal Justice System- In favour of victims.

On 24th November, 2000 the Ministry of Home Affairs by its order situated the Committee of Reforms of Criminal Justice System. The main objective of this committee was “to suggest ways and means of developing synergy among the judiciary, the prosecution and the police to restore the confidence of the common man in the criminal justice system by protecting the victim and punishing unsparingly the guilty and the criminal”. The Government of India, in 2003 observed that the victims do not get the present legal rights and protection which they deserve, and now victims are just playing their role in criminal proceedings and criminal justice administration. In the case, Chairman Railway Board v. Chandrima Das, the substantial monetary compensation have been awarded against the instrumentalities of the state. After this case, the Committee Reforms has taken the guidelines from UK Report from 2001 and made the following recommendations:

• If the victim is dead, his legal representatives shall have the right to be impleaded as a party in every criminal proceedings where the charge is punishable with 7 yrs. Imprisonment or more.
• With the permission of the court an approved voluntarily organizational shall also have the right to implead in the court proceedings, in the selected cases notified by the appropriate government.
• The victim has a right to be represented by an advocate of his/her choice and is provided at the


cost of the State if the victim is not in a position to afford him.

- The victim has a right to participate in a criminal trial.
- The victim have right to appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation.

- It also has a provision for the extension of legal services to victims in selecting crimes to include psychiatric and medical help, interim compensation and protection against secondary victimization.

- The victim compensation law provide for the creation of a victim compensation fund to be administered possibly by the Legal Service Authority. The law should provide for the sale of compensation in different offences for the guidance of the Court.

This provides the current status of victims of crime in India. But here the court generally uses the word compensation in terms of ‘restitution’. The first landmark judgment where compensation to the victim ordered by the Madras High Court and upheld some modification done by the Supreme Court of India in the case **Palaniappa Gounder v. State of Tamilnadu**342, the High Court after communicating the sentence of death on the accused to one of life imprisonment imposed a fine of Rs.20,000, and directed out of this 15,000Rs. Should be given to the son and daughter of the deceased under section 357(1)(c)of Code of Criminal Procedure, 1973. But the Supreme Court observed that “the first concern of the court after recording an order of conviction ought to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and the sentence including sentence of fine must not be unduly excessive.” The Supreme Court thus reduced the fine amount from Rs.20,000 to 3,000 Rs. And directed to pay the amount to the son and daughter of the deceased who had filed the petition in High Court. So, here the Supreme Court has reduced the amount of fine and achieved a proper blending of offender rehabilitation and victim compensation. In the case **Mangilal v. State of Madhya Pradesh**343, the court held that the power of the court to award compensation to the victims under Section 357 is not ancillary to other sentences but in addition thereto. Also, observed that the imposition of fine is the basic and essential requirement, while in the latter even the absence thereof empowers the court to direct payment of compensation. This power is available to be exercised by an appellate court.

By this, we can make a conclusion that the Criminal Justice System in India, have started realizing the importance of victims and their basic need in terms of Justice of Compensation or Restitution. But the problem is that victims are not aware about their rights and do not even claim for it. Even the victims has not been notified about the court proceedings the arrest or release of the defendants. And the compensation which the victim gets is insufficient as well as unreasonable. In the case of **Bhopal Gas**

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Tragedy\textsuperscript{344}, the Supreme Court provided compensation calculated on the basis of higher number of victims. And the company Union Carbide Corporation made a settlement of US $470 million (Rs 750 Crore). The government has asked for Rs. 7,413 crore and the settlement was based on the fact that the victims are in the figure of 3,000 death and 70,000 injured but the real figures calculated are more than 5,295 deaths and 5,27,894 injured. So, the actual figured is higher than the quoted one in petition. And the injury of victims is not temporary; thousands of people are still suffering from its aftermath. This means that there is need to awareness and enforcement of the rights to the victims effectively, by both the society and the Courts.

**VARIOUS CRIMES WHICH ARE AFFECTING THE VICTIMS ARE:**

- Injury caused to person or property.
- Victim of environmental crimes.
- Victim of Abuse of Power.

**Part 1** deals with the victims suffering from personal injury. The state award Compensation and damages for personal injury inflicted by violation of the Criminal Code where any such violation is committed within Danish territory. This also applies to acts where the personal injury that occurs in connection with assistance to the police during arrest or prevention of criminal offences. If the victim dies, compensation is awarded under sections 12 to 14 and section 26 of the Liability in Damages Act.

**Part 2** deals with offences affecting the property of victims. The state award compensation for property damage caused by violation of the Criminal Code within Danish territory where such violation is committed by persons affecting victim. But no compensation is awarded to public authorities or institutions. In the case of Guruswamy v. State of Tamil Nadu\textsuperscript{346}, the accused was convicted on a charge of murder. The victims were his father and brother. While reducing the sentences, the Supreme Court held that the offence was committed during a family quarrel though the victims are the father and brother of the appellant, the extreme penalty was not called for. The accused also had been under sentence of death for a period of six years. But in reducing the death sentence to

\textsuperscript{344} Union Carbide Corporation v. Union of India, (1989) S.C.C. (2) 540 (India)

\textsuperscript{345} Anne Kristine Axelsson, State Compensation to Victims of Crime (Consolidation) Act No. 688 of June 2004.

imprisonment for life, it was held that the widow and the minor children should be compensated for the loss they have suffered by the death of the second deceased. The court imposed a fine of Rs.10,000 to the appellant and order the same to be paid
As compensation to the defendants of the victim.

Now, as per the statistics, the total number of cases reported under IPC in year 2015 is 6,25,279 as compare to 6,00,861 during 2014. As crime affecting property is increasing continuously Same is the case with crime affecting life of victims, the total number of cases reported under IPC in year 2015 is 8,57,995 as compared to the cases reported in year 2014 is 8,13,745. The crime in India is rising day by day especially its increment is traced against women, child and weaker sections of society.

2. Victim of Environmental Crimes:-

Any Illegal act which directly harms the environment is called as Environmental Crime. There are various crimes with respect to environment. It is a violation of environmental laws that are put into place to protect the environment. Such crime referred to as crime against the environment. Although all illegal acts in violation of environment legislation are environmental crimes.

According to data released by the National Crime Records Bureau (NCRB), the number of green crimes in 2015 came down to 5,156 from 5,835 in 2014. Rajasthan has contributed in large measures to the decrease with the number of green violations coming down substantially from 2,927 in 2014 to 2,074 last year. However, despite the improvement, the state still reported the highest number of such violations in the country. According to the analysis of the NCRB data, they showed that nearly 77% of the crimes were related to violations of the Indian Forest Act where the offenders were illegally cutting the trees in forest areas, encroaching upon forest land and moving forest produce without required permission.347

As per Indian Constitution The 42nd Amendment added Article 48A and 51A(g) which comes under the DPSP and Fundamental duties respectively.

Article 48A provides that it is the duty of the state to protect and improve the environment and also to safeguard the forest and wildlife of our country.

Article 51A (g) states that “imposes a duty upon every citizen of India to protect and improve the natural environment and confers right to come before the court for appropriate relief”348

The SC of India in Sachidanand Pandey v. State of West Bengal349, this case stated that the court is bound to bear in mind the above said articles whenever a case related

348 Sachin Vats, Ten Most Important Environment Law judgements In India, IPLEADERS (General), https://www.google.co.in/amp/s/blog.ipleaders.in/environment-law-judgment/amp/
to environmental problem is brought to the court.

The SC India in Damodar Rao v. S.O Municipal Corporation\textsuperscript{350}, case it was held that the environmental pollution and spoliation which is slowly poisoning and polluting the atmosphere should also be regarded as amounting to violation of Article 21 of the Indian Constitution.

Various writ petition has been filed by the activist advocate M.C. Mehta in the Supreme Court highlighting environmental pollution, one of which is the pollution of the Ganga river by the hazardous industries located on its banks. A historic judgment is given by Justice ES Venkataramiah in “M.C. Mehta vs. Union of India\textsuperscript{351}, ordering the closure of a number of polluting tanneries near Kanpur. It was observed that if an industry which cannot pay minimum wages to its workers cannot be permitted to exist, and a tannery which cannot setup a primary treatment plant cannot be allowed to continue to be in existence.

According to recent reports, Victims from air pollution crimes are:- A recent report published in Lancet, a noted medical journal, has said that indoor air pollution caused 1.24 lakh premature deaths in India.

Air Pollution Caused 6% Of Total Disease Burden In India In 2016: Lancet: the lancet report said that disease burden due to air pollution remained high in India between 1990 and 2016, as it caused cardiovascular and respiratory disease and infections.\textsuperscript{352}In the case of The Apex Court in M.C. Mehta vs. Union of India known as Trapezium Case delivered its historic judgment in 1996 giving various directions including banning the use of coal and cake and directing the industries to Compressed Natural Gas (CNG)\textsuperscript{353}

3. Victim of abuse of power
“"I believe the root of all evil is abuse of power.”” – By Patricia Cornwell.
Abuse of power is a terminology which covers a wide area. It can be called an act of using one’s position of power in an abusive way, such as taking advantage of someone, gaining access to such information which should not be accessible to the public, or just manipulating someone with the ability to punish them if they don’t comply. The UN General Assembly has given the declaration of ‘‘basic principles of justice for victims and abuse of power which are:

“Victims” means those person who individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental right, through acts or omission which do not constitute violations of national criminal laws but of

\textsuperscript{351} M.C. Mehta v. Union of India, A.I.R. 1988 S.C.R.(2) 530(India).
States should consider incorporating into the national laws norms prescribing abuses of power and providing remedies to victims. And such remedies particularly include restitution, or compensation, and necessary material, medical, psychological and social assistance and support.

States should consider negotiating multilateral international treaties relating to victims as defined in 1st paragraph.

It’s the duty of State to periodically review the existing legislation and practices for the purpose of changing circumstances, and if necessary, than to prescribe and promote the policies and mechanism for the prevention of such acts, and State should provide appropriate rights and remedies to such victims.

Victims of Abuse- is very negative and threatening situation where it involves lot of unrecorded crime and every person is someway suffering from this. There are certain crimes which became very common for all i.e.– third degree methods, custodial torture, or death, hospital victims, custodial rapes, groundless arrest, so these are the victims which suffers alot. Crimes are not divided on the basis of gender or religion but can categorize under sub heads.

Types of Abuse of Power:-
Actually, abuse of power cannot divided upon any basis but we can divide victims upon majorly 3 heads-

1. Women
2. Child
3. Elderly.

Women: -There are various types of crimes happening with women. These crimes include:- dating violence, domestic and intimate partner violence, emotional abuse, violence against women at work, female foeticide and infanticide, gender indiscrimination, domestic violence, dowry, child marriages, forced marriages, sexual offences i.e. Rape, molestation, trafficking, forced prostitution etc.

Crimes affecting women has increased continuously from 2003. A total of 3,27,394 incidents of crimes against women, both under IPC and SLL, were reported during 2015 as compared to 3,37,922 during 2014. Can we stop all these crime: -Yes, we can trace the roots of crime against women in socio-politico-economic structure in Indian society.

Child: -Violation against child can be physical and mental abuse and injury, negligent treatment, exploitation and sexual abuse in the places such as homes, schools, orphanage, residential care facilities, on the streets, in the workplace, in prison and in place of detention. The child gets affected by these crimes thus impairing their mental, physical and social development.

One of the deadliest crimes is child sexual abuse in which an adult adolescent uses a child for sexual stimulation. Child sexual is divided into 3 types: sexual assault, sexual exploitation, and sexual grooming.

We have too much laws to protect child and its rights still abuse of power and corruption is not decreasing in fact increasing day by day. In today’s scenario parents became alert and conscious for their child.
For Example: now a days it is seen that children is beaten up by teachers in schools, to such an extend that the child falls down or got sick with scratches in his/her body. This is also a part of abuse of power. So there are various incidents but to define each and every thing is not an easy task.

There are various rights of child which got affected that in 2013 National Human Right commission directed the state government to report on the number of child labourers working in the hazardous coal mines in the district and to rehabilitate them.

Elderly:- In India, while children pursue education and other career building activities and adults and middle aged engage themselves in earning livelihood, the elderly lead a retired life. The elder ones has right to get care, support and comfort from their children and grandchildren. With the advent of modernity and globalisation and, the accompanying phenomena such as industrialisation, urbanisation, the conventional living style has been undermined. Number of nuclear families has increased and elders are living alone. Because of these changes, elders feel isolated and became easy targets of criminals. In this context, Group of Economic and Social Studies (GEES), a New Delhi based NGO, as sponsored by Bureau of Police Research and Development, has conducted a study entitled – ‘Rising Crimes Against Elderly People And Responsibility of Police in Metros’, The study deemed 60 plus population as elderly. Metros covered are Chennai, Delhi, Kolkata and Mumbai.

There are certain crimes which are not registered. Old age people or senior citizens are the victims of crimes against body, crimes against property, economic crimes, and even rape. According to Delhi police, relatives, domestic helps and persons known to victims commit around 40% of heinous crime against senior citizen. Others includes professional criminals, itinerate salesman and etc.

**ROLE OF INDIAN JUDICIARY FOR BETTER TREATMENT OF VICTIMS**

Generally, for the common man the term justice means to involve prosecution, conviction and punishment of guilty in order to restore public order, security and respect for rule of law. And on the other side the victim survivors who go to the court for variety of reasons: the desire for the truth to be known, to speak for the dead, and to demand justice and accountability. The point is that both are essential and important aspect which needs to consider while giving judgment.

The police play a vital role in assistance of victims because the sufferers first pursue police when something wrong happened. Unfortunately, in India the police doesn’t stand to meet the expectations of victims. In Bhopal, the very recent, **Bhopal IAS Aspirant Gang Rape Case**[^354] here that girl, i.e. victim immediately rush to the police station to file FIR against the incident happened with her, but the police was

confused that the incident covers which jurisdiction of police station and therefore, there was delay of 11 hours to file complaint. Later, four cops were suspended. So such behaviour of police towards victims forms the basis for negative perception of the justice.

Since the last few years, Judiciary is playing a prominent role for better treatment of victims by forming different committees and commissions to improve the existing situation of victims like the affirmative action by the higher judiciary, and recent laws for protection of special category of crime. But these rules are not implemented in its full sense. We have laws for the protection of victims but the Justice System is mostly emphasized on the accuse and not on the victim. In our opinion the laws of victimology is in paper only and therefore common man is still not aware of this. We are not criticizing the judiciary for this. The police and society took victims as granted which needs to be changed. And the system should try to focus on both the sides by implementing the laws of victim and accused in its true sense.

**NEED TO CHANGE THE PARADIGMS TOWARDS VICTIMS**

Healing Begins When You Shed the ‘Victims Mentality’ - **By Linda**

Now, we know that in India we have sufficient laws in concern of victims, but the challenge is that we need to change the paradigms of society towards victims and implement the laws regarding it. Following are the measures for the victimization in India.355

- The court proceedings must be free from unreasonable delay.
- The victim must be treated with fairness, dignity and respect.
- There must be separate law for victim in India having mandatory provisions in favour of victim as there are continuous efforts going on to enact the National Law for Victim.
- The police needs to be strict towards the criminal and fair with victims, because many times victim faces problems even in registration of a criminal case as it’s dependent upon the mercy of police officer. Corruption by police officials erodes the entire system, the society and victims. So, it’s the responsibility of each and every citizen to take action against bribery and other such activities.
- There is need to bring awareness among the society and victims to raise their voice.

Because when a crime happen the investigation team look towards the number of victims who are affected by it. So, victims have to come out and claim for their right.

- The major challenge is implementation of the law, rules and regulation by government officials who are charged with the responsibility for implementations of laws when something wrong happened with the society.

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There is need to notified the victims about the court proceedings, or the arrest or release of the defendant. The agencies of the Criminal Justice System should address the needs and issues of the Victims of crime sincerely and empathetically.

CONCLUSION:-

“A judgment is incomplete if it lacks to provide justice to the Victims.”

As we have seen that people become a culprit, which vanishes humanity, we humans forget our moral and dignity. As we are seeing crimes happening in society at large, this is a complete trap where at once someone taped will never leave, which grabbed humanity. Every Indian should take effort to remove crimes from our country. India is in a shame and miserable condition that we Indians are not worthwhile to protect our mother, sister, wife, children and grandparents too. This is a bad face of India which should be corrected as soon as possible. As well as it is the duty of youth to stand against crimes and try to stop this otherwise it will destroy our beloved democracy. Women and Child Victims and Witnesses Encounter in Sexual Offenses Cases: Responds to our request for information on the particular problems that women confronted as vulnerable victims and witnesses in sexual offenses cases. Women encountered multiple challenges when they seek justice from the courts. And not only women but even environment became victim from all the offences done by humans. In this paper we had discussed dimensions of crime in depth and attempts to understand the presentation of crime into various spheres in 21st century. Majorly we have focused upon criminal justice system in India and various crimes which affect the victims i.e. injury caused to person or property, victim of environmental offences, and abuse of power. We have to bring drastic change in society and mentality of people and should focuses upon the implementation of the rights of victim which has declared by UN declaration as, access to free and fair treatment with the statement that victim should be treated with respect and compassion and given right to redressal, restitution, compensation to victims and their family and assistance.

REFERENCE:-


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ABSTRACT

Keywords: Autonomous Vessels, Manning, Onshore Control Centres, Unmanned Shipping

The modern technology of ‘unmanned shipping’ is gradually becoming the future of maritime transport due to increased navigation safety. Though the master and the crew have been traditionally considered to be vital to the safe operation of the vessel at sea, numerous concerns have been raised with regard to safe navigation of the unmanned vessel at sea which are controlled and operated largely by instantaneous communication, from remotely operated vessels to fully autonomous vessels. This gives rise to serious challenges from a regulatory perspective with respect to the line of control over the vessel and the conservative legal framework governing navigation of vessels at sea.

There exists no uniform definition for the term “ship” and “vessel” under International Maritime Conventions and though unmanned vessels may still largely fall under the scope of these maritime definitions, it is dubious to interpret unmanned vessels under the existing Conventions. Many of the International Maritime Conventions contain regulations relating to Manning and crew training but these are irrelevant to unmanned vessels. Hence, there’s a dire need to amend current regulations of Maritime Conventions and adopt new regulations with respect to training and qualification of personnel at onshore control centres, including operating technology and communication.

INTRODUCTION

In the background of unmanned shipping, the words ‘autonomous’ and ‘unmanned’ are used interchangeably. The “crew” becomes pertinent in the operation of any vessel, be it manned or unmanned but legal issues tend to arise about the “crew” in the operation of an unmanned autonomous vessel. Most Maritime Conventions use the word “seafarer” to refer to the “crew of a ship”. The term “seafarer” came into relative use only recently but most Conventions use the term “seaman”. Nevertheless, the exact definition of ‘Seaman’ is precisely not clear. The 2006 Maritime Labour Convention (MLC) states that “seafarer means any person who is employed or engaged or works in any capacity on board a ship to which the Convention applies” 356. This implies that unmanned ships will be controlled by personnel at the shore control centre who will have to be adequately qualified in seamanship and navigation. Under the 2006 definition of the MLC, the crew at the shore control centre will still be engaged in the navigation of the ship but not “on board” the ship. Unmanned ships have additional cargo capacity due to the complete absence of crew and their accommodation facilities. Operation of unmanned vessels create legal ambiguity as they aren’t recognized under any of the

existing Maritime Conventions and can cause insurmountable difficulties during Port State Control (PSC) inspection in Port States. As a result, the applicability of Maritime Conventions to unmanned vessels and their operational documentation not only creates legal dilemmas but can distort international trade market during cross trading\textsuperscript{357}. 

Though commercial unmanned shipping doesn’t exist yet, it carries the potential danger of shipwrecks due to limited situational awareness. It is impossible to exactly and consistently monitor the weather situation and nautical traffic via camera feeds as the unmanned ships have a reduced sense of natural ‘bodily feel’. While operating unmanned ships, workers at the shore control centre would tend to make errors due to plurality of ships when they are frequently loaded with too much information regarding the steering of multiple ships. There could also be communication challenges if the shore control centre has lots of cultural and linguistic variations in a geographical area. The way unmanned vessels would be operated from the shore control centre is still an open question\textsuperscript{358}. But the most beneficial approach is that unmanned vessels would be usually controlled from nearby larger ships or ports to protect them from adversaries. Unmanned vessels which undertake long voyages are monitored via satellite communication from the shore control centre. When all is said and done, operation of unmanned vessels at sea carry a plethora of legal challenges such as ship registration, line of control of the vessel, recognition of the Port State for unmanned vessel in cross trading, PSC Inspection and regulation of unmanned vessels among others. The important question to be considered is- Should the operation of these unmanned vessels require the creation of an entirely new legal framework or not? Under English Law, is it safe to assume an unmanned vessel a ship?

REGISTRATION OF UNMANNED SHIPS: Maritime Law Issues of Autonomous Ships?

Can a Craft be registered as a Ship to the Flag State?

Assuming that the flag state is UK, a basic distinction has to be made between a ‘Craft’ and a ‘Vessel’ and their connotations under Maritime Law. Under the Revised Statutes of the United States, a ‘vessel’ has been defined as “including every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation by water”\textsuperscript{359}. In other words, a vessel is any structure made to float upon water for the purpose of commerce or war, whether impelled by wind, steam or oars. It has been held by the courts that during the construction of a craft which unquestionably will be a vessel, at any specific time before its completion is not considered to be a definite vessel.

Classic Admiralty authority argues that a ship or vessel is born only when it is launched. But the essential question still remains: When does a craft become a

\textsuperscript{357}Donald R Rothwell & Tim Stephens, The International Law of the Sea (2nd edn, Bloomsbury, 2016), 49, 50

\textsuperscript{358}Ibid, p. 54

\textsuperscript{359}Revised Statutes of the United States, 1873
vessel? In *Muntz v. A Raft of Timber*[^360], a raft was held to be a vessel which was carrying a pilot, crew and a cook who lived and were sheltered during a long voyage. Similarly, a hopper which was not fitted with oars or other means of propulsion, and generally moved by towing was held to be a ship in the *Star Buck* case[^361]. Any craft engaging in, and aiding commerce upon navigable waters was sufficient for the craft to be qualified as a vessel[^362].

In the context of the 1982 United Nations Convention on the Law of the Sea [UNCLOS], there are no obstacles in considering an unmanned craft as ships and the rules of the freedom of navigation on the high seas, the Exclusive Economic Zone above the continental shelf as well as the right of innocent passage through the territorial sea will become applicable[^363]. Thus, the said craft can be registered as a ship to the flag state UK. An unmanned ship will have to fly the flag of a State in whose Ship Register it’s registered. It has been held in the *Asya* case that a ship not sailing under the flag of any State had no right to freedom of navigation.

Naturally, Article 90 of UNCLOS and Article 4 of the 1958 Convention on the High Seas [HSC] deal with the customary right of navigation open to all States[^364]. Article 94 (1) of the UNCLOS lays down that the flag state shall exercise effective jurisdiction and control in administrative, technical and social matters over ships flying its flag. Even Article 5 of the HSC states that the conditions for grant of nationality to ships and the registration of ships in its territory is exclusively that of the flag state. So, the flag state is sovereign to grant nationality to both its ships and foreign ships under its Ship Register thereby automatically making all vessels subject to its jurisdiction and laws[^365].

II. Can an Unmanned Ship be registered?

In the Law of the Sea, the term “ship” and “vessel” haven't been strictly defined and even the UNCLOS didn’t define it and uses both these terms interchangeably. Majority undoubtedly assume that unmanned vessels must be regarded as ships for the purposes of the Law of the Sea. Thus, the rule under the UNCLOS which define the rights and duties of States in international shipping equally apply to the operation of unmanned ships which enjoy established rights in International Conventions such as the right of innocent passage, freedom of high seas, etc. Under English Law, a “ship” is defined as *including every description of vessel used in navigation* but yet the term ‘navigation’ is undefined[^366]. Most commentators agree that there is no indication in the UNCLOS for the mandatory presence of a crew to be categorized as a ship.

[^360]: *Muntz v. A Raft of Timber* [C. C., E. D. La.1883] 15 F. 555
[^361]: The *Star Buck* case [61 F. 502 D. C., E. D. Penn., 1894]
[^362]: Donald R Rothwell, (n 2), 60, 61
[^364]: The Convention on the High Seas, 1958
The UK Merchant Shipping Act, 1995 defines ‘vessel’ as “any ship or boat, or any other description of vessel used in navigation”. According to the Hague Rules, a ‘ship’ means “any vessel used for the carriage of goods by sea”. The UN Convention on Conditions for the Registration of Ships defines ‘ship’ as “any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both within the exception of vessels of less than 500 gross registered tons”\(^{367}\). Having a crew on board, including a master isn’t generally regarded as an essential part of the notion of a ship under the regulatory definition of ships available to us and hence unmanned vessels can execute duties as traditional manned vessels. There is no bar in registering an unmanned vessel as a ship.

Though unmanned vessels can be qualified as a ship and enjoy navigational rights under the UNCLOS, Article 94 of the UNCLOS poses some serious problems to unmanned ships where the duties of the flag state were designed and adopted for convention ships with a crew\(^ {368} \). Unmanned ships can become illegal due to the absence of a crew with appropriate qualifications and hence the provision for the master and the crew being in charge of an unmanned ship becomes obsolete. Moreover, the term ‘Master’ is not defined under the UNCLOS although several domestic laws define the term as the individual having ‘command’ or ‘charge’ of the ship.

The biggest conundrum to unmanned vessels is Regulation 14 of the International Convention for the Safety of Life at Sea (SOLAS) which states that contracting governments should undertake that ‘each of its ship shall be both sufficiently and efficiently manned’ which are to be established by a transparent documentary procedure\(^ {369} \). This regulation might prove to be redundant in case of unmanned vessels. Unmanned vessels also directly conflict with the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) by overlooking the necessity of a qualified crew\(^ {370} \). Proving damage due to ship pollution under the International Convention for the Prevention of Pollution from Ships (MARPOL) is again difficult with unmanned vessels\(^ {371} \).

III. Can an Unmanned Ship have a Genuine Link?

Article 5 of the HSC and Article 91 of the UNCLOS provide that there must exist a “genuine link” between a ship and the State conferring nationality on the ship, known as the flag state. But the question of “genuine link” is shrouded in ambiguity as neither Convention defines or states the meaning of genuine link nor does it stipulate any consequences if genuine link doesn’t

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\(^{368}\) UNCLOS (n 8)

\(^{369}\) Part V/Regulation 14, The International Convention for the Safety of Life at Sea, 1974

\(^{370}\) The International Convention on Standards of Training, Certification & Watchkeeping for Seafarers, 1978

\(^{371}\) The International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78; MARPOL)
exist. Due to the absence of a concrete definition of genuine link, enforcement of the genuine link between the ship and the flag state has become a difficult matter. Individual States decide the requirements for satisfaction of a genuine link at their discretion.

Generally, the key elements to constitute a genuine link between a ship and the flag state are the ownership of the vessel, the nationality of the crew and the management of the ship. The formal registration of a ship is normally sufficient to establish genuine link with a State. However, it is difficult to establish genuine link with unmanned vessels due to the absence of crew on board. As Article 9 of the UN Registration Convention speaks about ‘manning of ship’. Though it can be argued that genuine link can be established solely on the ownership and management of the ship, can persons working at the shore control centre who monitor and operate unmanned vessels be called traditional crew of the unmanned vessel? If yes, is there a legal framework governing it?

The UNCLOS installed genuine link to avoid ship owners from registering their vessels in any State of their choice like the flag of convenience States. But genuine link is not comprehensive even in the case of manned shipping but ownership of the vessel and the crew’s nationality formed an important part in determining the genuine link between the ship and the State. The registration of an unmanned ship in a flag state is an implication that the property law status of the ship will be governed by the law of that State. It is highly confusing to establish a genuine link in unmanned vessels due to the absence of a proper qualified crew.

Even International Conventions like SOLAS and STCW have provisions for manning and crew training for masters and seafarers respectively which makes it difficult for unmanned vessels to fit in the ambit of existing maritime regulatory regimes. As long as unmanned ship is operated or controlled from the shore, whether the shore-based vessel operator can be regarded as the master, or more broadly, the commander of the ship and whether their colleagues are seafarers or crew members? Article 91 of the UNCLOS only talks about genuine link between the ship and the flag state but it is silent on the genuine link between an unmanned vessel and shore-based vessel operator. Can this interrelation be equated to the genuine link existing in a manned ship and a flag state? Majority suggest to modernize the UNCLOS to include unmanned shipping.

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372 Gaucci GM, ‘Is it a vessel, a ship or a boat, is it just a craft, or is it merely a contrivance?’ (2016) J Mar Law Com 47:479–531Google Scholar
373 United Nations Registration Convention, 1974
**Analysis:** In light of the above statements, it is pertinent to note that there are no obstacles under the UNCLOS in considering an unmanned craft as ship and in registering an unmanned vessel as a ship under the Law of the Sea. But unmanned vessels can bring in certain legal challenges when contested against the backdrop of HSC, MARPOL, MLC, SOLAS, STCW and the UNCLOS. Though unmanned shipping will be subject to the same Conventions as traditional ships, the traditional crew on board a ship and the shore-based personnel operating a remote-controlled vessel will have an impact on the marine legal setting. SOLAS, STCW and the MLC require some adaptations to expand the powers and duties of personnel at the shore control centre. The legal challenges of unmanned shipping can be handled by modernizing the provisions of UNCLOS to include unmanned shipping in its ambit through a negotiated multilateral agreement.

**TERRITORIAL SEA & UNMANNED SHIPPING: Fishing in Troubled Waters?**

I. Whether an unmanned ship can pass through the territorial sea of another State for delivery of goods in a third State?

Under the Law of the Sea, the “territorial sea” is a marine space up to a limit not exceeding twelve nautical miles measured from the baselines of the coastal State under its territorial sovereignty which includes the seabed and its subsoil, the adjacent waters and its airspace. It was held in the Norwegian Fisheries case that the possession of territorial waters is compulsory which isn’t optional and not dependent on the will of the State and is characterised by completeness and exclusiveness. Although the territorial sea is under the territorial sovereignty of the coastal State, the same coastal State’s sovereignty over the territorial sea can be restricted by the ‘Right of Innocent Passage’ for foreign vessels necessary to accomplish free trade under the freedom of navigation.

But it is important to note that such a right of innocent passage exists only for manned vessels and is ambiguous whether the same equally exists for unmanned vessels also. Given the majority view that unmanned vessels are recognized like any other traditional vessel under the Law of the Sea, then the right of innocent passage definitely exists for them too. It is agreed under the Law of the Sea that foreign vessels exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and generally accepted international regulations in accordance with Article 21 (4) of the UNCLOS.

The unmanned vessel can pass through the territorial sea of another State for delivery of goods in a third State by exercising the Right of Innocent Passage. The right of innocent passage is recognized under the UNCLOS to enable freedom of trade. Even if a particular State has expressed hostility towards unmanned shipping at the IMO, the right of innocent passage would allow the unmanned vessel to pass through the territorial waters of a particular State for the delivery of goods in a third State.

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377 Yoshifumi Tanaka, The International Law of the Sea (2nd edn, CUP, 2015), 85, 86
379 Tanaka, (n 22), 87
purpose of carrying on trade as the passage is not non-innocent and not prejudicial. If a State objects to the innocent passage of the unmanned vessel in its territorial sea, then Article 2 (3) of the UNCLOS comes into play as the sovereignty over the territorial sea is again subject to the UNCLOS and to other rules of International Law.\(^{380}\)

A State can object to the passage of the unmanned vessel only on grounds as specified under Article 19 (2) of the UNCLOS. Moreover, the objection against a vessel by a particular State which is on a trade purpose because of it being unmanned does not carry weight. If the manner of the passage of the unmanned vessel is innocent and is consistent with the right of innocent passage where there appears to be no violation of the coastal State’s laws, and no other activity which is in anyway detrimental to the coastal State, the unmanned vessel can pass through the territorial sea of a particular State to deliver goods in a third State.

During the passage of foreign vessels in a particular coastal State’s territorial waters, the coastal State shouldn’t hamper the innocent passage of foreign ships nor discriminate in form or in fact against the ships of any State carrying cargo according to Article 24 (1) of the UNCLOS. Further in pursuance of Article 26 of the UNCLOS, the coastal State also cannot levy any charge upon foreign ships for the passage through their territorial sea.\(^{381}\) A problematic scenario arises when the unmanned vessel enters the territorial waters of a coastal State where due to the absence of a qualified crew on board, there’s no possibility of producing on board certificates and passing the PSC inspection of that coastal State.

As a result, the shore control centre operator might face difficulty when monitoring access of the unmanned vessel if the vessel is detained due to lack of sufficient identity and failure to produce required operational documents on board. The normative basis for the right of innocent passage is the inter-dependence of States as no single State can claim to be so self-sufficient in all aspects. Ships of foreign vessels can exercise the right of innocent passage for trade and commerce in the territorial sea as long as such navigation is non-provocative.\(^{382}\) The right of innocent passage preserves the navigational freedoms of the maritime State by simultaneously protecting the naval security interests of the coastal States. Thus, innocent passage becomes a limitation on the sovereignty of a coastal State for international intercourse.

II. Whether an unmanned ship attracts legal compliances if it passes through the territorial sea of another State to deliver goods in a third State?

Assuming that the unmanned vessel is travelling through the territorial sea of a particular coastal State to its destination port in a third State to deliver goods, there’s no big difference with respect to the passage of

\(^{380}\) Tanaka, (n 22), 88


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the unmanned vessel through the territorial waters of a particular coastal State but the ship maybe required to comply with all such and regulations and other generally accepted international regulations relating to the prevention of collisions at sea in accordance with Article 21 (4) of the UNCLOS\textsuperscript{383}. If the destination port is the same coastal State itself, the right of innocent passage and the duties of the coastal State make allow the unmanned vessel to deliver its goods in the port of the coastal State.

But the right of innocent passage cannot be exercised by foreign vessels in all parts of the sea. Sometimes, the coastal State may mandate foreign ships to use sea lanes and observe traffic separation scheme in force but the schemes must take into consideration of the recommendations of the International Maritime Organization (IMO) such as density of traffic, special characteristics of ships, etc. Ordinarily, regulatory mechanisms do not apply to the design, construction, manning and equipment of ships, except in accordance with international standards. Though Article 25 of the UNCLOS suggests that violation of a ship by the rules and regulations of the coastal State renders its passage non-innocent, no preventive measure or guiding rule exists to prevent such non-innocent passages\textsuperscript{384}.

In spite of the fact that Article 19 (2) (1) and Article 21 giving the coastal State a wide latitude to characterize non-innocent passages, the legislative and enforcement powers of the coastal State are not large. Article 25 (3) of the UNCLOS allows the coastal State to suspend innocent passage in certain specified areas of the territorial sea but the same provision doesn’t mandate the coastal State to suspend innocent passage in the entirety of its territorial sea. The maximum duration of such suspension is an open question\textsuperscript{385}. In such cases, it could temporarily suspend the right of innocent passage in its territorial sea owing to its hostility towards unmanned shipping.

But such a kind of suspension would not only hinder the trade prospects of a coastal State but also hinder its future cross trading in the international market. The broader question is whether unmanned ships and their operators comply with the existing IMO regulations? In case they don’t comply, does the coastal State have a duty to detain the unmanned vessel during the passage on its territorial sea? Irrespective of the fact that whether a particular coastal State harbours hostility towards unmanned shipping, the right of innocent passage on territorial seas still looks as an alien concept to unmanned vessels due to the absence of a common consensus internationally on the definition of a “ship” by pushing unmanned vessels into unnecessary legal entanglements\textsuperscript{386}. Moreover, unmanned vessels registered under the flag of convenience creates further complications.

For instance, an unmanned vessel whose registration is in an open register of India and should deliver goods to a port in a third

\textsuperscript{383}UNCLOS, (n 8)
\textsuperscript{384}Ibid
\textsuperscript{386}Gavouneli M, “From Uniformity to Fragmentation- The ability of the UN Convention on the Law of the Sea to accommodate new uses and challenges”; Leiden, Koninklijke Brill [2006], 358
State by passing through its territorial waters will create three problems. First, whether the flag State has recognized and allowed the unmanned vessel on its ship register to be registered as a ship. Second, the liability of the unmanned vessel and the flag State in case of violation of a particular coastal State’s laws during innocent passage. Third, the legal consequences for breach of an unmanned vessel under the existing Maritime Law Conventions. Assuming the nationality of the ship owner is British and the unmanned vessel enters territorial waters of India, by innocent passage and in case of violation, the flag State India bears responsibility but the ship owner will also be liable.

In the absence of specific legal safeguards governing the operation of unmanned vessel, coastal States might claim reparations for breaches of unmanned ships. In such a scenario, innocent passage becomes helpless. Unmanned ships also have the fear of losing communications and don’t enjoy any navigational priority over manned ships. So, in order to ensure the safe operation of the unmanned vessel through the shore control operators, introduction of new standards of shipping practice with new amendments to the existing legal procedures becomes mandatory\textsuperscript{387}. In order to protect the sovereignty of territorial seas by the respective coastal States, there should be amendments for the technology and operation of unmanned ships with the shore control centre operators conferred with expanding powers.

\textit{Analysis:} It is clear that the unmanned vessel can pass through the territorial waters of a particular coastal State to deliver goods in another third State. But the unmanned vessel will be subject to the compliance of laws and regulations and other generally accepted international regulations of the coastal State under Article 21 (4) of the UNCLOS. If a particular coastal State has hostility towards unmanned shipping, the best it can do is to inspect the unmanned vessel with regard to its compliance to IMO regulations such as the operational documents, shore control centre operators, etc. Since the purpose of the unmanned vessel passing through a coastal State’s territorial waters is trade, such an innocent and non-provocative navigation of the unmanned vessel cannot be halted by the coastal State except in case of breach of its laws. There’s also no big difference if the same delivery has to be made by the unmanned vessel in the port of the coastal State itself as innocent passage applies equally.

\textbf{CONCLUSION & SUGGESTIONS}

The introduction of unmanned shipping in the shipping industry has some comparative advantages over manned ships but the legal status of unmanned vessels isn’t very clear. It is due to the fact that there has been no international consensus on the definition of a “ship” in the international community and among specialized agencies like the IMO. So, no concrete classification is possible for unmanned vessels with respect to their legal status, recognition, liabilities and duties. Despite rapid strides in technology on unmanned vessels, the legal framework governing them still looks archaic. Most of the important existing Maritime

Conventions such as the SOLAS, STCW, UNCLOS, etc. don’t even have provisions for unmanned vessels making their legality a big question of ambiguity.

Moreover, some important terms such as the ‘master’, ‘navigation’, ‘crew’, etc. needs to be incorporated into the Maritime Conventions to settle ambiguity on unmanned vessels. There haven’t been many authoritative cases on the operation and monitoring of unmanned vessels which is difficult again to establish legal precedents in this regard. Equally, all the persons acting behind the operation of unmanned vessel pose the serious question of liability, liability of the shipowner, liability of the shore control centre operator or any other person such as the master at the shore control centre? This kind of scenario creates a complicated situation owing to no legal recognition of unmanned vessels under the existing Maritime Law Conventions. So, the investment in unmanned vessels is still under consideration.

The existing regulatory regime on Maritime Conventions is problematic giving rise to the following challenges:

_ There is total absence of standards, practices and procedures with regard to unmanned ships.

_ There is insufficient international participation to establish a global forum for dialogue on unmanned shipping.

Apart from all these, the future of unmanned shipping appears to be doubtful not only due to legal loopholes but also the mode and complexity in handling the unmanned vessel from the shore control centre. This requires tremendous training for the crew to be qualified to tackle unmanned ships from the shore control centre through autonomous communication. Other issues as marine insurance, charter parties, etc. were quite easy on manned ships but unmanned shipping has the problem of security with respect to the cargo on board. Unmanned shipping might also incur huge losses in case of any unforeseen accident or failure of communication from the shore control centre operator putting the shipowner and other stakeholders involved in its operation at stake.

Additionally, no existing Maritime Convention specifies provisions for operating an unmanned vessel from the shore control centre unlike in a traditional ship and with regard to special training for the seafarers. Though some countries like Norway are on the path of deploying an autonomous vessel successfully, the legal challenges that unfolds in the near future can only be addressed by amending certain Maritime Conventions and incorporating wide regulations for the safety and operation of an unmanned vessel.

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INTRODUCTION

A joint venture (JV) is a business arrangement in which two or more parties agree to pool their resources for the purpose of accomplishing a specific task. This task can be a new project or any other business activity. In a joint venture (JV), each of the participants is responsible for profits, losses, and costs associated with it. However, the venture is its own entity, separate from the participants’ other business interests. Regardless of the legal structure used for the JV, the most important document will be the JV agreement that sets out all of the partners' rights and obligations. The objectives of the JV, the initial contributions, of the partners, the day-to-day operations, and the right to the profits and/or the responsibility for losses of the JV are all set out in this document. It is important to draft it with care, to avoid litigation down the road.388

Joint ventures are a form of cooperative strategy where firms create an alliance in order to combine their resources and capabilities. The objective is to establish a stronger competitive position. Firms can diminish the negative effects of competitive rivals by building higher barriers to entry through amalgamating financial resources, research and development, production, and distribution channels. Joint ventures increase the profitability of an industry by reducing competition in markets where both firms are present. Parties enter Joint Ventures to gain individual benefits, usually a share of the project objective. This may be to develop a product or intellectual property rather than joint or collective profits, as is the case with a general or limited partnership. A joint venture, like a general partnership is not a separate legal entity. Revenues, expenses and asset ownership usually flow through the joint venture to the participants, since the joint venture itself has no legal status. Once the Joint venture has met its goals the entity ceases to exist.


The Advantages of forming a Joint Venture
1. Provide companies with the opportunity to gain new capacity and expertise
2. Allow companies to enter related businesses or new geographic markets or gain new technological knowledge
3. Access to greater resources, including specialized staff and technology
4. Sharing of risks with a venture partner
5. Joint ventures can be flexible. For example, a joint venture can have a limited life span and only cover part of what you do, thus limiting both your commitment and the business' exposure.
6. In the era of divestiture and consolidation, JV’s offer a creative way for companies to exit from non-core businesses.
7. Companies can gradually separate a business from the rest of the organization, and eventually, sell it to the other parent company. Roughly 80% of all joint ventures end in a sale by one partner to the other.

The Disadvantages of Joint Ventures
It takes time and effort to build the right relationship and partnering with another business can be challenging. Problems are likely to arise if:
1. The objectives of the venture are not 100 per cent clear and communicated to everyone involved.
2. There is an imbalance in levels of expertise, investment or assets brought into the venture by the different partners.
3. Different cultures and management styles result in poor integration and co-operation.
4. The partners don’t provide enough leadership and support in the early stages.
5. Success in a joint venture depends on thorough research and analysis of the objectives.

A joint venture is a strategic alliance between two or more individuals or entities to engage in a specific project or undertaking. Partnerships and joint ventures can be similar but in fact can have significantly different implications for those involved. A partnership usually involves a continuing, long-term business relationship, whereas a joint venture is based on a single business project. Parties enter Joint Ventures to gain individual benefits, usually a share of the project objectives. This may be to develop a product or intellectual property rather than joint or collective profits, as is the case with a general or limited partnership.

BHARTI – WALMART JOINT VENTURE
In January 2006, the Union Cabinet approved the policy on foreign direct investment (FDI) in retail to further simplify procedures for investing in India and to avoid multiple layers of approvals required in some activities. To facilitate easier inflow, FDI up to 100% was allowed under the automatic route for cash and carry wholesale and export trading. However to protect the interests of Indian retailers, the FDI up to 51% was permitted in single brand retail only. In
2006, Wal-Mart of US entered into a 50:50 joint venture with Indian retail major, Bharti Retail to foray into the wholesale business in India. According to the deal, Bharti would handle front end retail stores while Wal-Mart would act as a wholesale and back-end partner. The partnership called Bharti Walmart Private Ltd, would operate stores called Best Price Modern Wholesale. The joint partnership planned to make investments in the retail sector to the tune of $100 million which could go up to $1.46 billion. Wal-Mart was already procuring goods from various Indian companies to the tune of $1.5 billion. Industry observers say that the Wal-Mart would benefit from Bharti’s experience in India while Bharti would benefit from Wal-Mart’s experience in overseas markets. However, after tremendous opposition from local people and political parties, the first store opened in Amritsar in late 2009. Both parties brought their own strengths to the joint venture. Walmart came with its financial strength and support, its globally recognized brand name, and its expertise in national and international retail management. It is also known for its expertise in just-in-time inventory management, retail information management, and retail transportation management. Bharti Enterprises brought to the table its familiarity with the Indian laws, culture, economy, and labor. It is also involved in agribusiness, food processing, and retailing, insurance, and telecom industries nationally and internationally.

The historic joint venture included the following terms-

1. Walmart invested $103 million in the venture. The retail shops will be owned by Bharti Enterprises under the Wal-Mart franchise. Bharti is expected to pay royalty for the cash and carry operations. It is also expected to pay various kinds of fees to Walmart such as, franchises fee, software license fee, administrative support fee, design fee, technical training fee, and documentation fee.

2. Walmart would manage Bharti’s multi brand retail convenience stores and supermarkets called easy day. It was believed that this arrangement would help Walmart to introduce its own brand in India later on.

3. The wholesale cash and carry partnership would sell a variety of products ranging from grocery to apparel and consumer electronics to retailers, offices, and organizations.

4. Since the Indian laws allow FDI in retail industry only in cities with a population of a million or more, it is not easy to find suitable real estate in these large urban areas. The partnership, therefore, planned to establish relatively small size stores compared to their larger counterparts in other countries.

A successful functioning of a joint venture requires that the partners clearly define its goals, clearly spell out their respective responsibilities to accomplish these goals, and carry out those responsibilities. A joint venture’s success or failure depends not only upon the partners accomplishing these goals and carrying out these responsibilities, but also on the socio-economic and political variables beyond their control. So when on October 9, 2012 the Walmart and Bharti announced the breakup of their dream team.
and decided to go separate ways in both retail and wholesale ventures.

There are several reasons for the breakup of this widely celebrated Indo-American partnership-

1. Corruption and Politics
   Some primary reasons for the low and slow flow of FDI in India are the Indian legal and political factors. Indian laws are considered unclear and uncertain; and their implementation is routinely marred by bureaucracy, hurdles, delays, corruption, and grafts. It is not uncommon to be first charged for taking a bribe and then let go by giving another bribe. An editorial in the The Economic Times said it like this; “No company can operate without greasing a palm here or shell ing out unaccounted amounts there.” In September 2012, the Congress Party led Indian government stated that it would allow foreign supermarket chains to take majority ownership in multi-brand retailing in India. The current BJP led government, however, opposes it. It, however, would not cancel such applications already approved. However, no global supermarket chain has been rushing to apply.

2. Sourcing Requirement Laws
   The requirement that those interested in making FDI in India’s wholesale or multi-brand retail industry should source at least 30% of their products from local small and medium size industries is problematic for them. While this condition may be met in sourcing textiles and handicrafts items, it may not be easy to comply with it in sourcing some other products such as electronics. Foreign investors also find the requirement to invest 50% of the FDI in back-end infrastructure difficult. Bharatiya Janata Party (BJP) leader Rajnath Singh is opposed to FDI in retail because multinational companies like Walmart are buying 80 per cent of their goods from countries like China. “India will become a dumping ground for Chinese goods. However, Rajan Bharti Mittal, vice-chairman and managing director of Bharti Enterprises, said that the Bharti-Walmart venture plans to source 90 to 95 per cent of the products locally. The only foreign stuff that could be sold at Walmart India would include some toys, appliances, olive oil etc. As for food items, around 98 per cent of the total is likely to be sourced from India.

3. Questionable Investment in Cedar Support Services
   In March 2010, Walmart invested $100 million in compulsory convertible debentures of Cedar Support Services (CSS). The CSS is both the parent company of Bharti Retail and the operator of the latter’s front-end retail stores. These compulsory convertible (into equity) debentures in effect amounted to Bharti Retail ceding its control and management to Walmart. However, Indian laws don’t permit FDI in front-end retail (multi-brand) stores.

4. Allegations of Corruption and Impropriety By Walmart
   Concerned by its alleged corruption and other improper practices in Mexico, Brazil, China, India and elsewhere, Walmart began a global review of its operations to assure that they are in compliance with both the U.S. Foreign Corrupt Practices Act and also the host country laws. “Its lawyers flagged India among the countries with the highest corruption risk.” With all
these allegations and challenges facing Walmart internationally, especially in India, it’s breaking up with Bharti Enterprises and taking complete control of its Indian operations appeared to be a logical thing to do. Wal-Mart has invested more than $200 million on overhauling its worldwide operations in order to assure that these are in compliance with both the U.S. and the host country anticorruption laws.

**Terms and Costs of Joint Venture Breakup**

Here are some of the main terms of the Bharti Walmart joint venture breakup. Wal-Mart will acquire Bharti Enterprises’ 50% stake in the 20 Best Price Modern Wholesale cash-and-carry stores that had been run by the Bharti Walmart joint venture. It would thus own it 100%, which is allowed under the India laws. Bharti Enterprises would acquire the compulsory convertible debentures (CCDs) worth $100 million that Walmart had invested in Cedar Support Services, the parent company of Bharti Retail that operates its Easy Day stores. Bharti Enterprises would run them by itself now. In monetary terms, Walmart spent $334 million to end its partnership with Bharti Enterprises. It paid $100 million to buy Bharti Enterprises 50% share in the partnership; and it took a $234 million loss for waiving the debt and other investments it had made in the Bharti Enterprises.

**Walmart’s Strategy to Continue Wholesale Operations in India**

Indian retail industry is expanding all over the country, both in the highly populated large cities and the less populated smaller towns. According to the Indian Brand Equity Foundation, the local retail market, with a value of about $518 billion, should grow to about $866 billion in 2015. For a comparison, the U.S. market would be about $424 billion in 2010. The organized retail sector in India, currently about 10% of the overall market, would grow up to about 20% by 2020. The Indian retail market is estimated to expand to more than $1.3 trillion by 2020. It already racks up more than $400 billion in sales each year, but is dominated by traditional markets and mom and pop shops. Walmart, logically, has chosen to continue and expand its Wholesale Best Price cash-and-carry operations in India. It also plans to continue to make important contributions toward India’s socio-economic environment. In April 2014, Walmart announced plans to open 50 wholesale stores in the next four to five years to expand its footprint in the country. It recently acquired a wholesale store in Agra from its rival Carrefour, the French mega retailer who losing money on it and who has decided to exit India due to several reasons.

**CONCLUSION**

Indian Market is a growing one and it has been predicted over the next 5-10 years it will become a huge market for foreign ventures and the retail sector will also transformed. The threat of new entrants will always be there as every marketer would like to have a piece of cake. Indian market is consumer based and the growth perspective of this venture taking consumer market as a criteria we can say that the consumer would like to have better quality products in good prices with wide variety and there Bharti Wal-Mart can get the benefit. If Bharti Wal-Mart will take care of
the better supply chain management then the suppliers would like to work with them because there is already a growing demand in consumer market. If Wal-Mart will apply its best practices for supply chain management and logistics it would benefit the alliance. But the competitive scenario will be the same, the traditional market will still give the direct competition because majority of the Indian population are still attached to them and the political parties are also possessive about the rights of domestic retailers. Indian consumers want emotional touch and to attract and retain them it is necessary to get localized otherwise the domestic retailers will take all the benefit as they know the nerves of Indian consumer.

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HUMAN RIGHTS TO ONE AND ALL

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ABSTRACT
This article generalizes all about Human Rights. What basically are they? What are the aspects on which Human Rights are based upon? A discussion about the Universal Declaration of Human Rights that is UDHR. Articles which talk about the Rights and Freedom of the citizens why they are important and what kind of significance they have in one’s life. Different landmark cases are also being discussed in the study, which are based upon the serious issues of society.

Human Rights, the fundamental rights given to people on the record of them being individuals. Each nation gives these rights regardless of a person’s color, caste, gender, creed, culture and monetary or economic wellbeing. Unfortunately, multiple times these are abused by people, gatherings or the state itself. In this way, individuals need to remain wary against any infringement of human rights. After the detestations of the Second World War, a record was composed particularly to plot and secure each and every person’s essential rights. In 1948, the United Nations Universal Declaration of Human Rights was built up to do precisely that. There are 30 rights and opportunities set out by the United Nations in the Universal Declaration of Human Rights (UDHR). They incorporate the right to shelter, the right to opportunity from torment, the right to free discourse and the right to training etc. Nobody can remove these rights and opportunities from us. They have a place with everyone. The UDHR stays central to Amnesty's work. It gives the bedrock of the vast majority of our crusading, and it encourages us to consider experts answerable when rights are mishandled.

Keywords: Human Rights, Fundamental Rights, Freedom, Opportunities, National Human Rights Commission.

INTRODUCTION
Each individual has nobility and esteem. One of the manners in which that we perceive the key worth of each individual is by recognizing and regarding their human rights. Human rights are an arrangement of standards worried about uniformity and reasonableness. They perceive our opportunity to settle on decisions about our lives and to build up our potential as individuals. They are tied in with carrying on with a real existence free from dread, provocation or separation. Human rights can extensively be characterized as various fundamental rights that individuals from around the globe have concurred are basic. These incorporate the privilege to life, the privilege to a reasonable preliminary, opportunity from torment and other remorseless and cruel treatment, the right to speak freely, opportunity of religion, and the rights to wellbeing, training and a sufficient way of life. These human rights are equivalent for all individuals all over the place – people, youthful and old, rich and poor, paying little heed to our experience, where we live, what we think or what we accept. This is the thing that makes human rights 'all inclusive'
Human rights connect us to every alternative through a shared set of rights and responsibilities. A person’s ability to relish their human rights depends on people respecting those rights. This means that human rights involve responsibility and duties towards people and also the community. Individuals have a responsibility to confirm that they exercise their rights considerately for the rights of others. For example, somebody uses their right to freedom of speech, they must do therefore while not meddlesome with somebody else’s right to privacy. Government has a specific responsibility to confirm that individuals are able to relish their rights.

They are needed to ascertain and maintain laws and services that alter individuals to relish a life during which their rights are revered and guarded. For example, the proper to education says that everybody is entitled to an honest education.

This means that governments have Associate in nursing obligation to supply smart quality education facilities and services to their individuals. Whether or not government truly do that, it’s typically accepted that this is often the government’s responsibility and folks can decision them to account if they fail to respect or protect their basic human rights.

For what reason are human rights critical? Estimations of resistance, equity and regard can help diminish grinding inside society. Putting human rights thoughts into training can encourages us make the sort of society we need to live in. In ongoing decades, there has been a gigantic development by the way we consider and apply human rights thoughts. This has had numerous positive outcomes - learning about human rights can enable people and offer answers for particular issues. Human rights are an imperative piece of how individuals collaborate with others at all dimensions in the public eye - in the family, the network, schools, the working environment, in governmental issues and in global relations. It is essential accordingly that individuals wherever should endeavor to comprehend what human rights are. At the point when individuals better comprehend human rights, it is less demanding for them to advance equity and the prosperity of society.

Could my human rights be detracted from me?
A man's human rights can't be removed. In its last Article, the Universal Declaration of Human Rights expresses that no State, gathering or individual has any privilege to take part in any action or to play out any demonstration went for the devastation of any of the rights and opportunities put forward in this'. This doesn't imply that misuses and infringement of human rights don't happen. On TV and in daily papers each day we hear unfortunate accounts of homicide, viciousness, bigotry, hunger, joblessness, destitution, misuse, vagrancy and segregation.

In any case, the Universal Declaration and other human rights arrangements are something beyond respectable goals. They are basic legitimate standards. To meet their global human rights commitments, numerous countries have joined these
standards into their very own laws. This gives a chance to people to have a
dissension settled by a court in their very
own nation. People from a few nations may
likewise have the capacity to take a
grumbling of human rights infringement to a
United Nations advisory group of
specialists, which would then give its
feeling.

Also, instruction about human rights is
similarly as vital as having laws to ensure
individuals. Long haul advancement can
extremely just be made when individuals
know about what human rights are and what
norms exist.

Human pride and human freedom are the
premise of human rights. It is by regarding
nobility that individuals regard other
individuals. By regarding a man, one
recognizes that they are vital and a piece of
the general public. Freedom guarantees that
individuals have the opportunity to do what
they need. Freedom guarantees that
everybody is allowed to express their
thoughts. This is an exceptionally supportive
apparatus against a harsh government. On
the off chance that loads of thoughts are
voiced in the public arena, the legislators
will attempt to apply these thoughts in
strategy choices. Following poise and
freedom, different rights incorporate the
privilege to nourishment, great wellbeing
and training. Human rights guarantee that
individuals carry on with a significant life.
At the point when human rights are
advanced individuals have a situation where
they can develop and accomplish their
maximum capacity. Each individual can
possibly accomplish what they need. Human
rights guarantee that the general population
has the chance to develop and do well. At
the point when individuals have a way to
take an interest in the public arena they
won't do battle. They will attempt and
resolve the issues in a law based way by
voicing their sentiments. There will be
harmony in the general public and the
general public will advance.

THE UNITED NATIONS AND HUMAN
RIGHTS

The United Nations Charter puts forward the
"intrinsic nobility" and the "equivalent and
unavoidable privileges of all individuals
from the human family." Upholding these
human rights standards as "the establishment
of opportunity, equity, and harmony on the
planet" is central to each endeavor of the
United Nations.

The UN General Assembly

The United Nations as of now involves 185
members state, all of which have a place
with the General Assembly. The General
Assembly controls the UN’s accounts,
makes non-restricting suggestions, and
administers and chooses individuals from
other UN organs It is the General Assembly
that ultimately votes to adopt human
rights declarations and conventions, which
are also called treaties or covenants. In 1948
when the UN Commission on Human Rights
had finished its draft of the Universal
Declaration of Human Rights, the General
Assembly casted a ballot to embrace the
record.

HUMAN RIGHTS IN INDIA

Human rights in India is an issue confused
by the nation’s huge size and populace, far
reaching neediness, absence of appropriate training and its different culture, despite the fact that it is the world's largest sovereign, common, majority rule republic country. The Constitution of India accommodates Fundamental rights, which incorporate opportunity of religion. Conditions likewise accommodate the right to speak freely that is Freedom of speech and in addition separation of executive and judiciary and freedom of movement inside the nation and abroad. The nation likewise has a free judiciary and well as bodies to investigate issues of human rights.

The 2016 report of Human Rights Watch express that India has "genuine human rights concerns". Common society bunches confront badgering and government pundits confront terrorizing and claims. Free discourse has gone under assault both from the state and by intrigue gatherings. Muslim and Christian minorities blame specialists for not doing what's needed to secure their rights. In any case, in the ongoing years, more accentuation is given to minority rights and freedom of speech. The government is yet to nullify laws that allow open authorities and security powers resistance from indictment for maltreatment.

NATIONAL HUMAN RIGHTS COMMISSION
National Human Rights Commission (NHRC) of India is a self-ruling open body established on 12 October 1993 under the Protection of Human Rights Ordinance of 28 September 1993. It was given a statutory premise by the Protection of Human Rights Act, 1993 (TPHRA). The NHRC is the National Human Rights Commission of India, in charge of the insurance and advancement of human rights, characterized by the Act as "rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants"

The Protection of Human Rights Act commands the NHRC to play out the various functions like proactively or responsively ask into infringement of administration of India human rights or carelessness in the avoidance of such infringement by a local official, by leave of the court, to mediate in court continuing identifying with human rights, make suggestions about giving help to the people in question and their families, audit the shields given by or under the Constitution or any law for now in power for the security of human rights and prescribe measures for their successful execution, audit the components, including demonstrations of fear based oppression that restrain the delight in human rights and prescribe fitting healing measures, to ponder arrangements and other worldwide instruments on human rights and make proposals for their viable execution, attempt and advance research in the field of human rights, take part in human rights instruction among different areas of society and advance familiarity with the shields accessible for the insurance of these rights through distributions, the media, workshops and other accessible means, such other capacity as it might think of it as fundamental for the security of human rights, demanding any open record or duplicate thereof from any court or office, by sitting and taking application and dismissing then on the essential of sex, position, salary and economic wellbeing. Obviously the NHRC has no capacity to
take any decision. It needs to rely upon different authorities like the Supreme Court or High Courts, or concerned Central and State Governments to authorize its suggestion.

It also takes the permission from the CBI to research, report and look into the matter. Notwithstanding all confinements, the NHRC has so far completed a wonderful activity in avoiding human rights infringement and securing human rights. The NHRC has viably managed infringement of human rights caused by the exercises of fear based oppression and rebellion in Punjab, Jammu and Kashmir and in North-Eastern States, custodial passing, assault, physical and mental torment, inappropriate behavior and so forth. It has made Commendable work in issues like Police and Prison changes, enhancement of Juvenile Homes, Issues of refugees and migrants and Kidnap exploitation

The NHRC comprises of A Chairperson, ought to be resigned (Chief Justice of India). One part who is, or has been, a Judge of the Supreme Court of India, One part who is, or has been, the Chief Justice of a High Court, Two individuals to be selected from among people knowing about, or reasonable involvement in, matters identifying with human rights. Also, the Chairpersons of four National Commissions (Scheduled Castes, Scheduled Tribes, Women and Minorities) fill in as ex officio individuals.

GENERAL HUMAN RIGHTS
Human rights incorporate fundamental rights that are given to each individual paying little respect to his standing, ideology, religion, sexual orientation or nationality. Here is a glance at the all inclusive human rights: Right to Life, Liberty and Personal Security

- Right to Equality: Every single individual are conceived free and rise to and ought to be dealt with a similar way, Every single individual are conceived free and equivalent in nobility and rights. They are enriched with reason and still, small voice and should act towards each other in a soul of fellowship.

- Freedom from Discrimination: Everyone can guarantee their rights paying little mind to sex, race, dialect, religion, social standing, and so forth. Everyone is entitled to the rights and opportunities put forward in this Declaration, without refinement of any sort, for example, race, shading, sex, dialect, religion, political or other feeling, national or social starting point, property, birth or different status. Moreover, no qualification will be made based on the political, jurisdictional or universal status of the nation or region to which a man has a place, regardless of whether it be free, trust, non-self-administering or under some other constraint of power.

- Freedom from Slavery: Nobody has the privilege to regard you as a slave nor should you oppress anybody, Nobody will be held in subjugation or bondage; subjection and the slave exchange will be restricted in the entirety of their structures.

- Freedom from Torture: Nobody has the privilege to torment you, Nobody will be exposed to torment or to coldblooded, barbaric or debasing treatment or discipline.
• Right to be Considered Innocent until Proven Guilty: Nobody has the right to call you guilty or a culprit until it is proven, nobody has the right to disrespect you.

• Right to Fair Public Hearing: Preliminaries ought to be open and attempted in a reasonable way by a fair-minded and free court. Everybody is qualified in full equity for a reasonable and open hearing by a free and unbiased council, in the assurance of his rights and commitments and of any criminal allegation against him.

• Freedom of Movement: You have the privilege to leave or move inside your very own nation and you ought to have the capacity to return.
  1) Everyone has the privilege to opportunity of development and living arrangement inside the outskirts of each State.
  2) Everyone has the privilege to leave any nation, including his own, and to come back to his nation.

• Freedom from Interference with Privacy, Family, Home and Correspondence: You have the privilege to security on the off chance that somebody attempted to hurt your good name, enter your home without consent or meddle with your correspondence. Nobody will be exposed to subjective obstruction with his protection, family, home or correspondence, nor to assaults upon his respect and notoriety. Everybody has the privilege to the security of the law against such impedance or assaults.

• Right to Asylum in Other Countries from Persecution: On the off chance that you are aggrieved at home, you have the privilege to look for assurance in another nation.
  1) Everyone has the privilege to look for and to appreciate in different nations refuge from mistreatment.
  2) This right may not be conjured on account of indictments truly emerging from non-political violations or from acts in opposition to the reasons and standards of the United Nations.

• Right to Nationality and Freedom to Change it: You have the privilege to have a place with a nation and have a nationality.
  1) Everyone has the privilege to a nationality.
  2) No one will be self-assertively denied of his nationality nor denied the privilege to change his nationality.

• Right to Marriage and Family: People have the privilege to marry when they are legitimately capable unbounded because of race, nationality or religion. Families ought to be ensured by the Government and the equity framework.
  1) Men and women of full age, with no restriction because of race, nationality or religion, have the privilege to marry and to establish a family. They are qualified for equivalent rights as to marriage, amid marriage and at its disintegration.
  2) The family is the regular and essential gathering unit of society and is qualified for security by society and the State.

• Right to Education: Everyone has the privilege to go to school, proceed with higher education to the extent they wish to
and learn, paying no respect to race, religion or nation of starting point. Everybody has the privilege to education. Education shall be free, in any event in the basic and principal stages. Basic education shall be obligatory. Specialized and proficient training shall be made by and large accessible and advanced education will be similarly open to all based on legitimacy.

- Right to Own Property: Everyone has the privilege to possess things. Nobody has the privilege to wrongfully take them from you. Everybody has the privilege to claim property alone and additionally in relationship with others.

- Right of Peaceful Assembly and Association: Everyone has the privilege to sort out and take an interest in tranquil gatherings. Nobody might be constrained to have a place with an affiliation.

- Right to Participate in Government and in Free Elections: Everybody has the privilege to partake in their nation's political issues and equivalent access to open administration.

- Freedom of Belief and Religion: Everybody has the privilege to uninhibitedly show their religion, to transform it and to rehearse only it or with others. Everybody has the privilege to opportunity of thought, heart and religion; this privilege incorporates opportunity to change his religion or conviction, and opportunity, either alone or in network with others and in broad daylight or private, to show his religion or confidence in instructing, practice, love and recognition.

- Freedom of Opinion and Information: Everybody has the privilege to think and say what they like and nobody ought to prohibit it. Everybody has the privilege to opportunity of sentiment and articulation; this privilege incorporates opportunity to hold conclusions without impedance and to look for get and give data and thoughts however any media and paying little respect to boondocks.

- Right to Adequate Living Standard: Everybody has the privilege to have what you require with the goal that you and your family don't go eager, destitute or fall sick. Everybody has the privilege to a way of life sufficient for the wellbeing and prosperity of himself and of his family, including nourishments, dress, lodging and restorative consideration and fundamental social administrations, and the privilege to security in case of joblessness, affliction, incapacity, widowhood, maturity or other absence of business in conditions outside his ability to control.

- Right to Participate in the Cultural Life of Community: Everyone has the privilege to share the advantages of their locale's way of life, expressions and sciences. Everyone has the privilege uninhibitedly to take part in the social existence of the network, to appreciate expressions of the human experience and to partake in logical headway and its advantages.

- Right to Social Security: Society should push people to uninhibitedly create and benefit as much as possible from all focal points offered in their nation.
• Right to Rest and Leisure: Each work day ought not be too long and everybody has the privilege to rest and take ordinary paid occasions.

• Freedom from State or Personal Interference in the Above Rights: No one, institution nor individual, should act in any way to destroy the rights enshrined in the UDHR. Nothing in this Declaration might be translated as suggesting for any State, gathering or individual any privilege to take part in any movement or to play out any demonstration went for the demolition of any of the rights and opportunities put forward thus.

CASE LAWS
The issue in this case was based on the Right to maintenance. In this petition Muslim personal law and the right of Muslim women was challenged. The supreme court controlled in the support of Shah Bano and allowed her provision which the Muslim network felt as an infringement on Muslim Sharia law. The decision of the case by supreme court prompted the arrangement of the All India Muslim Personal Law Board in 1973.

MC Mehta v. Union of India, 1986
The issue in this case was based on the Right to Life. MC Mehta filed a Public Interest Litigation for getaway of toxic gases by a plant in bhopal. the court for this situation broadened the extent of article 21 and 32 of the Constitution of India. This case is likewise popular as Bhopal gas Tragedy.

NALSA v. Union of India, 2014
The issue in this case was based on the Rights of Transgender. The court perceived privileges of the transgender as third sexual orientation. likewise, ordered government also to regard them as minorities. Reservations in occupation, education and different amenities will likewise be given to them.

Selvi v. State of Karnataka, 2010
The issue in this case was based on the Rights of Transgender. In the above case Supreme Court held that lie detector test, brain mapping, narco analysis as unconstitutional and cannot be conducted forcefully. The person should give his or her consent to conduct these tests on themselves. Also, with their consent only, the reports of these tests can be regarded as evidences during the trial of cases according to section 27 of the Evidence Act.

CONCLUSION
Every individual deserves to have fundamental human rights. They are known to be universal. At times, a number of these rights are denied, disregarded or abused by the state, people or gatherings. Government is taking measures to observe these abuses with facilitate from various non-government organizations.

Notwithstanding established order and administrative measures and legal proclamations went for assurance and authorization of human rights, India's record in such manner can't be named as upto the check. assault, snatching, grabbing, torment custodial passing, counterfeit experiences are matters of basic occurence. Incapable state hardware with its insufficient police can't adapt to it. Psychological oppression is
hitting at the specific foundation of human rights. These are hampering the happiness regarding human rights by regular man.

The components which upset the pleasure in human rights in the nation are a few. these have been recorded by the human rights commission as pursues: many (factors) identify with inquiry of good administration. the support healthy, of the vital organizations of our constitution, the honesty of the individuals who have been advantaged to lead the nation in governmental issues, in broad daylight benefit, in business and industry, in the press; the nature of the financial and social approaches we have embraced and how much they have guaranteed value and equity in our nation, the way in which we have attempted to manage antiquated societal wrongs that have for quite a long time, dispossessed the skylines of immense quantities of our comrades The Scheduled Castes and Scheduled Tribes specifically. With the approach of National Human Rights Commission, human rights insurance has taken a jump in India. The most critical feature is systematization of the human rights security process and component. In any case, a case is made out continually with respect to inadequacy of the security and multiplication process when institutional necessities are not unmistakably accentuated by the statutory order or the absence of common political will for maintaining human rights progresses toward becoming writ vast. The procedure of systematization takes a security routine near individuals and increases the value of the arrangement of administration.

There are numerous arrangements out there to keep the maltreatment of human rights. Through instruction and the media, individuals can know about the various human rights infringement occurring on the planet today and increase some information of what's happening on the planet. Associations have ejected with an end goal to ensure the privileges of those that have been abused. One association that does this is the Amnesty International. This inspires a superior world through open activity and universal solidarity. We help stop human rights maltreatment by activating our individuals and supporters to put weight on Movements, outfitted gatherings, organizations and intergovernmental bodies. Another gathering is Doctors for Borders an association made by specialists to help those in almost 60 nations undermined by viciousness, disregard, or calamity, essentially because of contention, pestilences, unhealthiness, avoidance from social insurance, or cataclysmic events. These associations mirror the effect of the Declaration of Human Rights. The revelation has prepared for individuals to understand the potential dangers of human rights misuse. I trust that the world and the general population dwelling have had enough time to perceive what has happened previously. We have to gain from our mix-ups before and never let such monstrosities, for example, the torment of the Jewish families in the inhumane imprisonments, isolation in the U.S., or the gulags in Russia happen. Nations are more taught now and all should stand firm. We are each of the one individuals living under a similar rooftop and I figure human privileges of all people ought to be secured. Being a Catholic, I hear once in a while individuals say to other
individuals "take a hike" and they react by "I'm now here." If we regarded our kindred brethren and took the time to help those in need, take of the earth we could transform this supposed hellfire into paradise ourselves.

REFERENCES
MEDIA, CENSORSHIP AND PROPAGANDA

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ABSTRACT

‘With great power comes great responsibility.’ This saying perfectly analyzes the position of media in our country considering that it is the fourth pillar of democracy. While media’s influence today is far more than the yester years it is observed that this medium of communication whether in its print form or digital is being compromised considerably. It is with this issue slowly gaining momentum that there is a need for censorship. The researchers have in this paper dealt with the influence of the political and corporate class on the media alongside other allied issues, highlighting how censorship would help in containing this phenomenon provided it is used judiciously and without subjectivity.

KEYWORDS: Media, Bias, Censorship, Political Influence, Freedom.

INTRODUCTION

In simple words media that is the plural form of medium refers to the communication channels through which we disseminate news, music, movies, education, promotional messages and other data. It includes physical and online newspapers and magazines, television, radio, billboards, telephone, the internet, and fax. The impact of media in terms of television and its exposure has only increased in the last 50 years in the country in terms of the number of people who are availing the benefits of such mass media. This rise in the viewership is one of the reasons for the advent of censorship as a concept. As per the definition given in the Oxford Dictionary censorship means “the suspension or prohibition of any parts of books, films, news, etc. that are considered obscene, politically unacceptable, or a threat to security.” The debate around media and censorship is only to bring about a balanced correlation between the two without prejudice to the freedom of speech and expression that is granted under Article 19 of the Constitution of India which serves as the grund norm for the country. As per the article the aforementioned article such freedom guaranteed under the article may only be curtailed if it is objectionable, harmful, or a threat to communal harmony. Despite the Article being fairly clear about its application and limitations governments across the globe have used religious, political and other arguments to impose censorship and therefore arbitrarily curtail the freedom guaranteed under Article 19. Another problem that is faced is that the limitations such as what is objectionable, or a threat to communal harmony is extremely subjective and cannot be given a straight jacket formula. Thus, what maybe offensive to one part of the society may not be offensive to the other and vice versa. It is in light of all the above difficulties that it

390 https://marketbusinessnews.com/financial-glossary/media-definition-meaning/
391 https://en.oxforddictionaries.com/definition/censorship
becomes imperative to strike a balance on media and censorship rights to ensure that neither of these is compromised. In the recent past, the Indian media has been witness to several films, rock bands, websites, Internet articles, events, documentaries and books restricted or totally banned under various censorship laws on superficial and unjustified grounds, and while censorship is considered an important aspect of media regulation such indiscriminate use of censorship has received severe criticism. Thus while free media is essential for India, the world's largest democracy, religious intolerance, political influence and corporate control over the media serve as critical barriers which harm the media and the freedom of expression that comes with it.

**OBJECTIVES**

1. To study the current scenario of the media and censorship.
2. To analyse the degree of censorship required.
3. To understand the impact of corporate and political influence on the media and to analyse the results of such influence on the media.
4. To compare the rights of the media in context with the freedom provided under the Constitution.
5. To suggest measures for improving the current scenario

**RESEARCH METHODOLOGY**

The researcher has conducted a doctrinal research relying on secondary data. Further, sources of data include bare acts, case laws, journals, articles and certain internet sources.

**CONSTITUTIONAL FRAMEWORK**

The freedom of speech and expression is granted under Article 19 of the Indian Constitution. The freedom that is guaranteed under the Article 19(1)(a) is not absolute and is subject to restrictions provided in the Constitution itself. These restrictions are contained in Article 19(2) of the Indian Constitution. The restrictions are as follows:

- the sovereignty and integrity of India;
- the security of the State;
- public order;
- decency or morality;
- in relation to contempt of Court;
- defamation;
- incitement to an offence.

India has a wide range of mass and media and still constraints on media have been placed from time to time whenever the need has been felt. The freedom is usually suppressed when the matter is considered to be objectionable, opposing public policy or disrupting public harmony.

**MEDIA AND CENSORSHIP**

Media derives it’s right to free speech and expression from the same right as of a citizen. It has been held by the Supreme Court of India that the freedom of media regarding speech and expression doesn’t stand on a higher footing than that of a citizen. As we have discussed above media’s

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392 Article 19, The Constitution of India.
393 Article 19(1)(a), The Constitution of India.
394 Article 19(2), The Constitution of India.
right is not absolute and it is restricted by the Constitution itself. The content portrayed by media is under strict vigilance. The content displayed by media is being monitored by various legislations, to mention a few:
1. Indian Penal Code
2. The Indecent Representation of Women (Prohibition) Act, 1986
3. The Young Persons (Harmful Publications) Act, 1956
4. The Cinematograph Act, 1952

The aforesaid legislations keep a check on the content reaching out to people. It filters exhibition of obscene content and representation of women in an indecent manner. They act as safeguards to protect the decency and morality of individuals.

Censorship in India is mainly overlooked by the Central Board of Film Certification which comes under the purview of the Ministry of Information and Broadcasting. The Board has the power to issue orders to directors to remove anything that it deems offensive or politically enticing. While the Board has the power to restrict media content it does not impose absolute restrictions. The best example of this is that the Board allows the release of films with sexually explicit content and also other controversial subject matter subject to them being labeled A-rated and being shown in restricted places so as to be viewed only by individuals who are of eighteen years or more. Similar films, documentaries etc. are also aired on television channels including on India’s public television broadcaster, Doordarshan, and with these rights being provided by the regulator itself (CBFC) what is the questionable is the kind of rage that the issue of film censorship faces. Further, censorship of films is governed by the Cinematograph Act, 1952 and it is under this Act that every film released in the country is assigned a certification as Universal, Adults, and Parental Guidance depending on the contents of the films before public exhibition.395

Media censorship is carried out on various platforms which includes press, films, music, drama, books and much more. Censorship of a film is considered desirable as well as necessary as it reaches the mass audience which comprises of different set of people with different mindset. It encourages thought and action as it has potential of motivating attention and retention at a large scale when compared to print media. It is capable of encouraging evil much more than it is capable of encouraging the good in people. It is equivalent of instilling violence and the unacceptable behaviour as it is in the case of cultivating moral values. Therefore, censorship by prior restraint is desirable as well as necessary.

But the power to censor should not be misused or be influenced by political parties. It should be carried out cautiously where the content is actually offensive, or may disrupt public order or policy or violate any of the provisions made in this regard. In this context till today we still do not have any fixed parameters as to judge what content is to be filtered and censored. If we take into consideration the most of the bans that have been effectively carried out are due the


www.supremoamicus.org
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media bias towards political parties and under the influence of political parties. Despite the fact that several checks have been created on press freedom in the country one area that still remains relatively unexplored is that of internet filtering. While the safeguards on all other forms of media content seem fairly adequate internet filtering is an area that has majorly seen only failures in this regard. The selective filtering of internet blogs and websites that has been adopted by the regulatory body has further ignited opposition from the internet service providers in particular and the public in general. Studying all these factors in consonance makes it clear that the government regulation and implementation of filtering are still evolving. One of the primary reasons for the failure of the government in this sphere is because of the fact that blocked content is quickly shifted to an alternate website which in turn makes the banned content accessible. This is basically because of lack of efficient means to simultaneously and permanently remove inappropriate content from multiple websites. Another issue here is that the government often oversteps its powers and debars content which is actually not objectionable in the real sense. Such arbitrary use of power belittles the very function that the authority exercises. The amended IT Act, absolving intermediaries from being responsible for third-party created content, could signal stronger government monitoring in the future.\textsuperscript{396}

Another issue to be addressed is whether internet filtering is absolutely indispensable. This is something that may be argued considering that a large part of the population of the country still does not have access to the internet. Also, those who have access to the content that is being spoken of (that is available on amazon, Netflix etc) is not available to all. Furthermore, the viewers who are exposed to such content are mostly those who are capable of sieving the content that they are viewing and are less prone to influence as compared to the class of people who have relatively less exposure. Going by the above what can be said is that while internet content may be regulated internet filtering is not an absolute necessity. Regulation as mentioned above, must be on websites that would severely affect the public sentiment such as child pornography, videos where the content is a threat to the sovereignty of the nation etc.

Another important aspect that should be considered while evaluating the need for internet censorship is online education. Today various methods are being used online to put forward the material to the users which should be under strict supervision. The government should look towards this side of the internet as this is creating a huge impact on the youth these days.

The idea of censorship is beneficial and an effective idea in case of younger children. On the basis of the warnings and the age ratings that are provided for the films and games the viewers can decide what they are willing to showcase to their children. As the warnings clearly mention what is being displayed in the film or what the game content comprises of, whether it be violence or sexual content, as it gives an idea as what would be suitable for the child to watch. The

\textsuperscript{396} Dewal Nath Tripathi, Censorship of Media in India, March 29, 2015, www.lexquest.in/censorship-of-media-in-india/
minds of the children are far more impressionable as when compared to that of the adults.

**MEDIA AND ITS BIAS**

While a lot of attention is given to curbing the freedom of speech and expression of the various modes of media through censorship, one aspect that is grossly overlooked is that of ‘yellow journalism’. Yellow journalism or yellow page journalism is a term frequently used to describe a situation where the media sensationalizes any piece of news and further indulges in spreading rumors. This and paid news which are common practices of journalism today are the biggest vices existing in the media fraternity which is considered the fourth pillar of any democracy. While the most trivial issues like the name of a film, name of a character in a film etc. end up being a reason of either a substantial part of the film being censored or worse still it being banned, there is no such check on the media and the news channels when it comes to keeping a check on them as regards promoting any political propaganda through their channels.

A general trait that is seen among various channels is that they are mostly mouth organs of the ruling political parties at any given point of time. This was seen at the time Congress was in power and is still seen despite the government being changed. In light of the above statement when we look at the 2014 elections of the present government what we observe is the kind of media footage and mass media support received by Mr. Modi was unparalleled. Such media presence given by various news channels and newspapers ensured that these media houses too reaped the fruits of their favours, which was through the extensive advertising campaign that did the rounds for the Hon’ble Prime Minister. This advertising campaign launched to promote him on a scale was unmatched in Indian history not only in the traditional media (print, radio, television and outdoor banners) but even more so in the new media (on internet websites, blogs and social media platforms). Just like the political class of the country has an influence on the media houses so does the corporate sector. Since the corporate sector is responsible for much of the funding received for the campaigning of the political parties who get such contributions are indebted to the such business houses. Just as the political parties the business houses too wish for assistance from the political class and hence media houses that are owned by various conglomerates are reduced to mere protagonists for the concerned political party. Taking forward the above mentioned example if we see the 2014 elections we observe that an equal amount of support was given to Mr. Modi and his party by the corporate sector. Never before have big business houses and industrial groups so openly advocated the candidature of an individual. This again may be linked to the fact that since most corporate houses own the media houses such corporates also ensured that their respective media houses gave whole hearted support to the concerned political party.

An outstanding example of this link between political parties, business houses and media houses can be seen in the fact that as soon as the elections were over the Reliance

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397 https://www.britannica.com/topic/yellow-journalism
Industries Limited controlled by Mukesh D. Ambani, which is India’s largest private corporate entity, acquired the ownership of the Network18 group which is one of the India’s biggest media houses. This coincidence was too big to go unnoticed and was also opposed by the left-wing Economic and Political Weekly which argued that this takeover marked a convergence of corporate and media interests that posed a threat to freedom of expression and media plurality. While a part of this phenomenon of paid news that is its link with external parties or factors has been discussed above, another side of this culture of paid news is that which stems from within the media houses due to increasing corruption. While this form of paid news is not as blatant as the previous one, it too curbs freedom of expression and entails media houses receiving illegal payments in cash or kind for content in publications and television channels that appear as if they have been independently-produced by unbiased and objective journalists.

A third aspect that is ancillary to ‘paid news’ is the rise in yellow journalism. As already explained above yellow journalism refers to excessive sensationalism of news. Such excessive sensationalism results in the quality of news being compromised. Though this phenomenon is not new and has existed in some form or the other its excessive use in today’s day and age where people are increasingly exposed to electronic media is detrimental to the extent that several pieces of news are often unreliable.

Thus, to put it simply, the paid news is just another kind of advertising which prevails as news. This has always been the trend since many years but this phenomenon usually comes into picture during the time of elections and that is when the democratic gets subverted.

This problem has not gone unnoticed by the regulatory bodies, and it is imperative to mention that despite the Election Commission’s best efforts, it is not easy to keep a check on ‘paid news’ or ‘paid media’. The primary and most common problem in curtailing this phenomenon is that paid news is very hard to identify. Payments made for this purpose are also made through chains difficult to trace. Most payments are made in black money and therefore there is no trail that is left behind. It is noted that “the deception involved in passing off advertisements as news entails a clandestine activity and can be established only by those involved in it, and this means that the individuals concerned would have to themselves concede that they are violating various laws of the land relating to fraud, deception and non-payment of taxes, besides the Representation of People Act.”

The Press Council of India has been established as a quasi-judicial body by the Parliament to look into these matters but lacks the statutory authority to impose punishments. Press Council of India cannot even impose fines on the defaulting party. The extent of PCI extends only up to the print media and does not cover within its ambit television, radio or internet.

The PCI also has no real teeth to enforce its findings or to penalize any individual or organization for violating its journalistic
code of ethics which is, at best, a set of recommendations of good practice.\textsuperscript{398}

In light of the above discussion the following instances testify the influence that politicians and conglomerates have on media in general, some of which have been picked from

INSTANCES:-

Some of the instances mentioned below have been taken from an article "India : The Freedom of expression in India:

- “In one particular instance in early June 2014, a young Muslim man was killed in Pune, Maharashtra, allegedly by members of a fringe group of Hindu fundamentalists after offensive morphed images of a historical figure and a political leader had appeared briefly in posts on the social media website, Facebook, though he apparently had nothing to do with their creation or dissemination.”\textsuperscript{399}

- “In another instance, individuals in Goa and Karnataka have been accused of violating provision of the Information Technology Act for posting critical comments against Prime Minister Modi. Though, the Act itself, and the rules and guidelines framed under it, have in the past been severely criticised for being arbitrary and draconian.”\textsuperscript{400}

- “Writer U.R. Ananthamurthy has been threatened and sent a one-way ticket to Pakistan after he said that he would not like to remain in India if Mr. Narendra Modi became Prime Minister, a statement he claimed he had made in an emotional moment.”\textsuperscript{401}

- “On 25 January 2012, Salman Rushdie an author par excellence was to address the Jaipur Literature Festival on his book The Midnight’s Children. However, he was unable to attend the Festival on account of threats of violence he received prior to the event. Not only this, even a video conference had to be cancelled.”\textsuperscript{402}

- “On 10 October 2011, the University of Delhi dropped from its history syllabus an essay written 24 years earlier by scholar A.K. Ramanujan entitled Three Hundred Ramayanas after representatives of hard-line Hindu groups said they were offended by his essay on the topic.”\textsuperscript{403}

- “Maqbool Fida Hussain, one of contemporary India’s greatest artists, died in exile in London on 9 June 2011. He spent the last years of his life outside India apprehending violence from fundamentalists who objected to his paintings of Hindu gods and goddesses in the nude.”\textsuperscript{404}

- “In West Bengal, the Left Front government banned Bangladesh author Taslima Nasreen’s book Dwikhandito on 23 November 2003 fearing that its sale would create communal disharmony.”\textsuperscript{405}

- “On 20 November 2012, two young women -- Shaheen Dhada and Renu Shrinivas -- from Palghar, Thane, Maharashtra were arrested over a post on the social-networking site Facebook questioning the shutdown of Mumbai city because of the cremation of Shiv Sena leader Bal Thackeray. They were..."\textsuperscript{406}

\textsuperscript{398}Paronjay Guha Thukarta, India : The Freedom of Expression in India, Heinrich Boll Stiftung, www.boell.de/en/2014/07/02/freedom-expression-media-india

\textsuperscript{399}Paronjay Guha Thukarta, India : The Freedom of Expression in India, Heinrich Boll Stiftung, www.boell.de/en/2014/07/02/freedom-expression-media-india

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sent to judicial custody, but granted bail within hours on personal bonds. In January 2013, the Supreme Court said that the arrests had a “chilling effect” and were unwarranted. This instance highlighted how the rules under the Information Technology Act could be interpreted and enforced in an arbitrary manner.**406

- “On 9 September 2012, the police arrested Aseem Trivedi, a Kanpur, Uttar Pradesh-based political cartoonist on charges of sedition for displaying cartoons depicting India’s national emblem in an allegedly derogatory manner. He was thereafter released on bail.”**407

- “On 20 March 2011, the Gujarat state assembly voted unanimously to ban Joseph Lelyveld’s book Great Soul: Mahatma Gandhi and his struggle with India after reviews claimed it portrayed Mohandas Karamchand Gandhi, the “father of the nation”, as bisexual, a claim the author denied.”**408

- An instance of unnecessary clamor and censorship is the film Udta Punjab which released in 2016 and was subject to immense backlash before it was actually allowed to be released in the theatres. However, the film was already labeled A and the controversy around the film was uncalled for.

- The name of the movie of the ‘Padmavat’ was changed from ‘Padmavati’ to Padmavat because of the religious and political influence.

- One of the most recent example is the release and exhibition of the movie ‘Accidental Prime Minister’. If Congress party had been in power the film would have never paved its way to the theatres. It can be noticed that it had been released around the time nearing elections, it is just a misuse of the media by the parties.

- Another recent example is the movie Uri – The Surgical Strike which according to many was only a smart political move in order to influence potential voters of the current government just ahead of the 2019 elections.

**SUGGESTIONS AND RECOMMENDATIONS**

On the basis of the understanding from above the authors suggest the following:

1. A close check on media should be maintained but in such a manner that the freedom of media is not hampered.
2. Media should adhere to a regulatory system as to put out the true picture of the world to the society as it owes a greater responsibility towards the society.
3. Self regulatory mechanisms should be developed by the media so as to ensure transparency in the media fraternity.
4. While censorship should not be completely done away with definite yardsticks should be laid down on what content is inappropriate, and such yardsticks shall be framed on an objective basis.
5. Internet censorship is desirable but not necessary and the choice of it should left to the users.

**CONCLUSION**

As it is understood from the discussion above the freedom of speech and expression as guaranted under our Constitution is not absolute and the State is at liberty to impose restrictions on certain reasonable grounds in interest of the State. In relation to this...
context, the press, the media and all the people in connection to it have a major responsibility towards the society and the people of this country. In the dynamically changing scenario today we go through multiple challenges of globalisation and rapid international developments, the media, the administrative machinery and the people of the society must face such situations and challenges with great sincerity.

As it has been noted that the biggest challenge is the political and religious influence on the media houses which has been considerably at large, measures should be taken to curb it down. It is and will hamper the true sense of freedom of speech and expression. Today, most of the news channels and the media houses are owned by the politicians or corporate sector top shots favouring a political party. Political parties fund the media houses so as to have the paid news aired. It is very difficult to determine which information is paid news and in the coming era the public is going to be affected at large. The media houses would be concealing the vital information which should reach the public. The media shouldn’t forget that it is the fourth pillar of the democracy and it has a responsibility towards the society.

The print media and electronic media both play a crucial role in shaping the minds of the readers as well as the viewers. In this era of technology and internet even the children today spend most of their time watching or playing online games which create a major impact on their minds as they are exposed to immoral and indecent content at times.

Our society with advancement has crossed the lines of traditional ethical values. Most of the media houses have been using indecent and objectification of women as their marketing and advertising strategy. At this point the researchers are of the belief that in such cases the censorship should come into picture rather than imposing unnecessary bans under political influence.

As we have noted above it is up to the government what they want to be aired and that is when we question the existence of laws in this regard.

At this present juncture what is needed is that without setting standards for obscenity, immorality, dignity and decency it should be left to the society to itself to impose on itself a commitment to do good for the betterment of the individuals.

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PASSPORT: AN IRREFUTABLE DOCUMENT OF IDENTITY

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ABSTRACT
Passports serve very important purposes, as they are the primary form of international travel document and also qualify as legal proof of a person's identity and Indian citizenship. Although the security features of passports have been highly developed, still forged passports are counted among the most serious security threats globally. Fake passports can be hard to spot unless one should know the secret signs that show the travel document to be genuine. This article can be useful to know what signs show a passport to be genuine or fake.

INTRODUCTION
A passport is a travel document and is being used as a proof of statehood or citizenship. An Indian passport is issued by order of the President of India to Indian citizens for the purpose of international travel. It enables the bearer to travel internationally and serves as proof of Indian citizenship as per the Passport Act (1967).

The following classes of passports issued under the Passport Act are:

1. **Official Passport**
   It is issued to individuals representing the Indian Government on official business. It is a “Type S” passport, where ‘S’ stands for Service. It has off white cover.

2. **Diplomatic Passport**
   It is issued to Indian diplomats, top ranking government officials and diplomatic couriers. It is a “Type D” passport, where D stands for Diplomatic. It has maroon cover.

3. **Ordinary Passport**
   It is issued to citizens of India for ordinary travel such as vacations and business trips. It is a “Type P” passport, where P stands for Personal. It has navy blue cover.
Other types of passports issued in India are:

- **Person of Indian Origin (PIO)**
  A Person of Indian Origin (PIO) means a foreign citizen (except a national of Pakistan, Afghanistan, Bangladesh, China, Iran, Bhutan, Sri Lanka and Nepal. It has grey cover.

- **Overseas Citizenship of India (OCI)**
  The Overseas Citizenship of India (OCI) is an immigration status permitting a foreign citizen of Indian origin to live and work in the Republic of India indefinitely. It has sky blue cover.

- **Emergency Passport**
  Emergency certificate is a one-way travel document that authorizes an Indian citizen to enter India in an emergency. It has white cover.

**PASSPORT FRAUD**
Passport fraud is an illegal means by which an individual gains citizenship in another country by forging a passport or falsifying other legal documents to obtain passport. Passport fraud crimes include:

1. Issuance by a counselling officer without authority.
2. False use of passport.
4. Safe conduct violation.
5. Fraudulent obtaining visas and other entry documents.
There are numerous ways to forge a passport to gain entry into another country, such as:

- A forger may steal passport of other person, then erase and reprint information on the same passport.
- A passport forger might also obtain a passport with a pre-printed number but no biographical information from a corrupt government official from embassy.
- A passport forger may also obtain a valid passport by using fraudulent name and other information.
- A passport forger could steal a valid passport of someone and assumes that person’s identity.

CONSEQUENCES OF PASSPORT FORGERY
Passport forgery is a serious offence that can cause penalties of imprisonment and heavy fines. In addition to charges for forgery, one can also be charged with other offences such as identity theft and fraud for using the passport to travel, as identification, or to apply for visas and other documents.

Passports are always including more and more sophisticated security features in their designs in order to ward off potential counterfeitters, fraudsters and impostors. Although the security features of Indian passports have been highly developed now, but still forged passports are counted among the most serious security threats globally. In most cases, detecting a forged passport is relatively easy but in some cases it can be challenging.

ROLE OF FORENSIC DOCUMENT EXAMINER IN CRIMINAL JUSTICE SYSTEM

A forensic document examiner refers to a person who studies all the aspects of a document to determine its authenticity, origin, handwriting, photocopies, inks and papers and helps in solving white collar crimes. The alarming rate at which crime is increasing all over the India is a matter of deep concern. To be practical, crime and criminals can never be completely be eradicated completely from the society, hence the need of a Forensic Scientist is a necessity in all cities, states and countries. In order to ensure correct justice to be passed, Forensic Scientist plays major role. They look all the parameters of crimes scene with a scientific mind and analyze pieces of evidence to help the legal system.

Forensic document examination is a complex matter requiring various areas of expertise to identify document forgeries of all kinds. Counterfeiting and forgery of value and security documents occurs on a large scale. The threats posed by fraudsters are now as broad as they are serious. To prevent the creation of fake passports, the key is to design a passport that is very difficult to copy, produce and personalize. This can be achieved by multiplying effects: combining tactile and optical features, different technologies and using material and inks which are not available in the public domain.

SECURITY FEATURES OF INDIAN PASSPORT
The security features of passport are viewed under different light source such as ultraviolet light, transmitted light, and oblique light and with the . These are given as below:
1. Physical appearance of Indian passport-
   The ordinary passport has navy blue cover with golden coloured printing. The Emblem of India is emblazoned in the centre of the front cover. The standard passport contains 36 pages.

The Bio-data page contains the following information (Figure 1):
- Type of passport
- Passport number
- Name of the holder with details
- Nationality
- Place of issue
- Date of issue
- Date of expiry
- Signature of passport holder
- Machine readable Zone at the end of the Bio-data page
- Letter Screen Image

The Demographic page at the end of the passport book contains the following information:
- Name of the father or legal guardian
- Name of the mother
- Name of spouse
- Address
- Old passport number
- File number
- Barcode

2. Barcode-
   Barcodes are the symbols that can be scanned electronically using laser or camera based systems. Barcodes present in Indian passport gives all the information of the passport owner, after being scanned (Figure 2).

3. Machine Readable Zone(MRZ)-
   The machine readable zone at the bottom of identity page in passport contains characters which are encoded in Optical Character Recognition format. The machine readable passports have greater protection against fraudulent practices and tempering. The Indian passports have a standardised machine readable zone. The presence of any characters that does not match this font exactly could indicate that the passport may be counterfeit or fake (Figure 3).

4. Security Fibres-
   The security fibres used for binding of passport booklets are the single or multicolour sewing threads made from cotton or synthetic fibres. These fibres
5. Micro printing-
Micro printing involves extremely small text, which is generally small enough to be indiscernible to the naked eyes. Micro printing is present as “GOVERNMENT OF INDIA” and “BHARAT SARKAR” in Hindi subsequently on biographical page. All the printed lines on the Visa pages of the passport are also printed as “VISA PAGE” and “VISA PRASTHA” in Hindi on remaining pages (Figure 5a & 5b).

6. Binding Thread-
The stitching of pages of passport booklet is done with the security thread with a set pattern by using reverse stitching machine that is known as Saddle Stitching. The binding thread shows fluorescence when exposed to Ultraviolet Light (Figure 6).

7. HAUV Laminated Film-
HAUV means Heat Activated Ultra Violet Laminated Film, a type of sheet with visible security features that is affixed to the bio-data page in order to protect data eateries against falsification or alteration. HAUV Laminated Film is laminated at 100° Celsius to 180° Celsius. The laminating film gives fluorescence when exposed to Ultraviolet Light and the micro printing
shows “GOVERNMENT OF INDIA” in reddish fluorescence and “BHARAT SARKAR” in greenish fluorescence (Figure 7).

**Figure 7: HAUV Laminated Film giving fluorescence under UV light**

8. **Gothic Numbering**-
   The passport number has 8 digit alphanumeric, laser-perforated conical of passport booklet through the half back part of the passport. The conicals decreases in size of the perforated holes in the successive pages of the passport booklet. The passport perforation by laser enhances security (Figure 8).

**Figure 8: Gothic numbering present on half back part of passport**

9. **Guilloche Design**-
   A Guilloche design is a pattern of computer-generated fine lines that forms a unique image. The Guilloches provides very high degree of security and it is impossible for forgers to copy the passport. The Guilloche design gives fluorescence when exposed under Ultraviolet light (Figure 9).

**Figure 9: Guilloche design visible under UV light**

10. **Page Numbering**-
    The passports are available with pages that are numbered consecutively at the bottom throughout the booklet. These numbers are incorporated within both visible and invisible design. When illuminated with ultraviolet light, the invisible page number appears (Figure 10).

**Figure 10: Invisible page numbering visible under UV light**

11. **Letter Screen Image (LSI)**-
    The Letter Screen Image is the shadow image of the passport holder, consisting of personal data such as name, address, date of birth and file number embedded
in tiny fonts. The LSI passport booklet series was launched by Ministry of External Affairs in April 2013. The details on Letter Screen Image can be viewed with the help of high resolution magnifying lens (Figure 11).

12. Watermark-
A watermark is a design formed in the paper, typically using a tonal gradation that is visible when held up to the light, or can be viewed under transmitted light. Watermark cannot be photocopied or scanned. This helps thwart those who would attempt to forge a passport (Figure 12).

13. Fluorescent Ink-

The background text on the passport is printed with the fluorescent ink. This ink gives greenish fluorescence under Ultraviolet light (Figure 13).

14. Passport Cover Page-
The cover page of passport when viewed under Ultraviolet light, it shows Ashoka Chakra in greenish fluorescence (Figure 14).
15. **Type**-
Special font and font size is also a staple security feature of modern passports. Some passport pages also include font that is so small and is not even visible with naked eye. Type is difficult security feature to replicate as they include deliberate errors (Figure 15).

**Figure 15:** Printed portion on first and last page of Passport

**DISCUSSIONS**
The threat of illegal document forgery exists and will always exist. Forged passports are counted among the most serious security threat globally. In most cases, detecting a forged passport is relatively easy but in few cases, it can be challenging. The Passport issuing authorities are using combination of security features in order to make it difficult or impossible to produce counterfeit or forged passports. This is done by combining tactile and optical features, different technologies, and using material and inks within a complex design. To prevent forgery of passport, all security elements have to be closely interlocked and integrated. The Ministry of External Affairs has plans to issue chip enabled e-passports to Indian citizens, with advanced security features including a small silicon chip on the back cover of the passport. The personal particulars of the applicants would be digitally signed and stored in the chip. This will prevent any type of tampering in the passport and will improve the quality of travel documents, facilitate quicker and smoother processing at immigration checkpoints and considerably reduce the scope of forgery of passports.

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DUPERY OVER ORDINANCE MAKING POWER

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Abstract

Article 123 and 213 of the Indian Constitution confer upon the President and the Governor of the State, respectively, the power to promulgate ordinances. This power is a temporary fix, to be used only in emergency situations, where there is urgency and the Legislature (Central or State, as the case may be) is not in session. Such an ordinance lapse after 6 weeks once the legislature comes in session. With the decline in the productivity of the Parliament the ordinances became a parallel method of legislation. For about a decade and half the state of Bihar was run on the ordinances. The law making power is vested to the legislature by the constitution and re-promulgation of such ordinances circumvents the legislature’s primacy. It was widely held that the promulgation of ordinances was not subject to judicial review, unless of course they violated the fundamental rights. This has been the position in pre-independence Indian law and continued to be so after Independence until 2017 when the practice of re-promulgation of ordinances was labelled as a fraud upon the Constitution and barring the exceptional cases re-promulgation of the ordinances would be void. The paper illuminates the background of the ordinance making power. It elucidates the necessity of the ordinance making provision under the constitution and it analyzes the extent to which the judgment succeeded in hoarding the loopholes of the previous judgment.

Introduction

In India, there is a division of powers and functions among the three organs of the Constitution. The central and state legislatures are responsible for lawmaking, the central and state executives are responsible for the implementation of laws and the judiciary (Supreme Court, High Courts, and lower courts) interpret these laws. However, practically complete separation can never be achieved and the overlapping cannot be avoided. The power to issue ordinance conferred upon the President under Article 123 and to the Governor of States under Article 213 is one such example. Chapter IV of Part VI of The Indian Constitution, titled as the “Legislative Power of The Governor”, contains the only constitutional provision, Article 213. The marginal note of 213 provides the description as the “Power of the Governor to Promulgate the Ordinances during recess of Legislature”. The lawmaking power under the constitution rests with the legislature and only legislature. However, this power has been provided to the executive in the form of the right to promulgate the ordinances whenever the urgency arises. The ordinance making power of the State Executive is in pari materia to Article 123, which is enjoyed by the Central Executive with similar powers. The ordinance making power conferred upon the Governor is subject to certain requirements. The Governor can issue an ordinance only when:
i) the legislature is not in session, and;

ii) the Governor of the State is satisfied that immediate action is needed for the existing circumstances.

The first requirement establishes the time, at which an ordinance can be promulgated:

The Governor of the State can issue an ordinance only when the legislative assembly and the legislative council, if any, i.e. both the houses are not in session and not at all, when in session. Article 174 of the Indian Constitution provides that the Governor of the State shall summon the House or Houses of the Legislature, as the case may be, from time to time and that the intervention between the last meeting and the date scheduled for the next meeting shall not be more than 6 months. The Governor cannot promulgate an ordinance during the time of the legislative session. This is because the lawmaking power is vested in the Legislature and laws can be enacted through the procedure only by the legislature and not through the ordinances while it is in session. Thus, an ordinance made when both the houses are in session is void. It may, however, be made when only one house is in session, the reason being that a law can be passed by both the Houses and not by one House alone, and thus, it cannot meet a situation calling for immediate legislation and recourse to the ordinance making power becomes necessary.

The second requirement demands the ‘satisfaction of the Governor’ regarding the persisting situation:

An Ordinance can be promulgated if the Governor is satisfied that the circumstances exist which render it necessary for him to take immediate action. The satisfaction of the Governor is not meant by mere ‘desirability’ which is distinguished from the ‘necessity’. The existence of the circumstances is an objective fact and the term ‘necessity’ coupled with ‘immediate action’ displays the sense of essentiality to promulgate an ordinance in existing circumstances. The power of the Governor to promulgate Ordinances under Article 213 has been held to be absolute, and no limitation on the legislative power of the executive can be read. The power, however, is to be used in circumstances where immediate action is necessary. Moreover, this exceptional power of ordinance making cannot be used as a substitute for the lawmaking power of the State Legislature. The power conferred upon the Governor is not in nature and does not make him a parallel lawmaking authority; this is because the lawmaking power rests in the duly elected legislatures which are the constitutional repository of the power to enact laws.

Apart from this, there are certain occasions on which the Governor cannot promulgate the ordinance without the instructions from the President.

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413 Proviso to Art. 213 (1), The Constitution of India.
Where a Bill containing the same provisions requires the earlier sanction of the President, for its introduction into the legislature;

Eg. Under Article 304 (b) of the Constitution, the State Legislature is permitted to impose reasonable restrictions on the freedom of trade commerce and intercourse with or within that state, in the public interest. The proviso requires the previous sanction of the President before the Bill or amendment for the purpose is introduced in the State Legislature.

Where a Bill containing the same provisions would be deemed necessary by the Governor for being reserved for the consideration of the President;

Eg. Under Article 200 of the Constitution, the Governor is required to reserve the Bill for the consideration of the President, which in his opinion would derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to hold if it became law; and,

Where a law enacted by the state legislature containing the same provisions would require the assent of the President, failing which it would be invalid.

Eg. Under Article 254, if any law made by the State Legislature, with respect to any matter enumerated in the Concurrent List, is repugnant to the law made by the Parliament in that matter then the state law will prevail only if and to the extent of which it has received the assent of the President.

The Ordinance passed by the executive, Article 213(2) provides, shall have the same force and effect as an Act of the Legislature of the State, however, such an ordinance necessarily needs to be laid down before the legislature when it reassembles or otherwise the ordinance ‘ceases to operate’. An Ordinance ceases to operate in three instances:

i) if the ordinance is not laid down before the legislature then, at the expiration of 6 weeks from the date of reassembly of the Legislature, (where the Houses of the Legislature of a State having Legislative Council are summoned to reassemble on different dates, the period of 6 weeks shall be reckoned from the later of those dates, for the purpose).

ii) before the expiration of that period when a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any; or'

iii) it may be withdrawn at any time by the Governor.

But there have been a number of instances where the ordinance making power has been wrongfully used by the executive bodies to enact laws, bypassing the legislature, in the name of the urgent situations. Such ordinances were promulgated and re-promulgated a number of times, neither were they laid down before the Legislature on its reassembly.

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417 Art. 213 (2) (a), The Constitution of India, 1950.
419 Ibid.
420 Art. 213 (2) (b), The Constitution of India, 1950.
therefore not transforming them into an Act nor were they withdrawn by the Governor. When these ordinances ceased to operate on expiry of 6 weeks from the date of reassembly they were re-promulgated with the changes as required or no change. Such Re-promulgation of ordinances circumvents the legislature’s primacy. The pre-independence position of the Courts continued till now, the power was held to be out of the ambit of the judicial review unless they violated any fundamental right. So does it mean that the Governor may promulgate ordinances on his ‘satisfaction’ and there is no check on his power? Does it mean that the Governor may promulgate and re-promulgate the ordinances on his discretion circumventing the legislature’s primacy and there is nothing to curb his actions? The issues by far were dealt by the Apex Court in D C Wadhwa v. State of Bihar and the loopholes were covered by the same court recently in Krishna Kumar Singh v. State of Bihar.

**Historical Background of the Ordinance Making Power**

**England**

The Law of England is divided into three parts: common law, statutory law and customs, and the proclamations of the King were held to be none of these. In the Case of Proclamations, Sir Edward Coke opined: "The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm."

Monarchs continued making Ordinances (of the unlawful kind) and enforced them too. Only with the establishment of parliamentary supremacy towards the end of the seventeenth century did the law and practice of Ordinances finally become inconsistent; from then on, it would always be a subordinate legislative power. By the close of the seventeenth century, statutes represented parliament’s ultimate authority to enact legislation whereas Ordinances, generally speaking, came to represent the executive’s more limited authority to make narrow and specific regulations.

**British India**

The British government as a ‘colonial power’ felt the need and urge to arm their chief executive with the legislative power that he could invoke in emergent situations at will without having any risk of its refusal or without having any openly to account for it in order that he may fulfill his mission with the minimum of delay of protecting British interest and reign. It was on August 1, 1861 that first time the ‘extraordinary power’ of legislation was conferred upon the Governor General to issue ordinances by Section 23, subject to

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423 In Re: The Case of Proclamation, (1611) 12 Co Rep 74.
424 Subhankar Dam, Presidential Legislation in India: The Law and Practice of Ordinances, 144, Cambridge University Press.
two conditions: (i) the power could be exercised in cases of emergency; and (ii) an Ordinance would remain in force for a period of not more than six months from its promulgation. This Act continued to be in force till December 31st, 1915 and was repealed by Government of India Act, 1915. During this period the power has been used for fifteen times.

On July 20th, 1915, the British government enacted the Government of India Act 1915. The Act came into operation on January 1st, 1916 and repealed inter alia the epoch-making British statute, the Indian Councils Act, 1861, but it re-enacted Section 23 thereof, relating to the powers of Governor General to make ordinances in case of an emergency as Section 72. The period witnessed the First World War which necessitated taking of prompt actions and various ordinances were promulgated for the purpose.

The scheme of Government of India Act, 1935 was not acceptable to the political parties and princely states and consequently the provisions vesting the ordinance making power to Governor General both, during the recess of legislature\(^426\) and at anytime with respect to certain subjects\(^427\) contained in the federal part of the Government of India Act, 1935 never came into force and therefore, could not be invoked. Instead, the Governor General continued to exercise his power, as hitherto, under Section 72 of the Government of India Act, 1915 as set out in the ninth schedule by the virtue of Section 312 read with Section 317 of the Act.

The position continued until the British Parliament passed the Indian Independence Act, 1947 and India became an Independent Dominion along with Pakistan. The Indian Constituent Assembly continued and was further empowered to enact the constitution. Meanwhile, the Government of India Act, 1935 was adopted by the India (Provisional Constitution) Order, 1947, to provide for a provisional Constitution conforming to the status of India as an Independent Dominion. The ninth schedule was omitted and with it Section 72 and the provision empowering the Governor-General to promulgate the ordinances in case of emergency during the recess of Legislature was made in Section 42 as adapted.

**Constituent Assembly**

The Union Constitution Committee was appointed by the Constituent Assembly on 30 April 1947 to report on the ‘main principles of the Constitution’. The memorandum which was prepared by B N Rau, the constitutional advisor envisaged a constitutional power for making ordinances. He acknowledged that ordinances were the subject of great criticism under colonial rule but sought to allay the apprehensions which were expressed on the ground that the President would normally act on the aid and advice of ministers responsible to

\(^426\) S. 42, The Government of India Act, 1935 (contains general power exercisable when immediate action is necessary and the legislature is not in session, with provision for the control of the power by the legislature.).

\(^427\) S. 43, The Government of India Act, 1935 (limited power exercisable at any time when immediate action is necessary to enable the Governor-General to satisfactorily discharge his functions in so far as he is in so far as under the Act required to act in his discretion or to exercise his individual judgement without any provision for the control by the legislature.).
Parliament and was not likely to abuse the ordinance making power.

Ordinances *per se* are against the spirit of democracy and not conducive of development of the best Parliamentary traditions. However, the issuance of Ordinances has been held desirable to deal with an unforeseen and urgent situation. Justifying the provision in Constituent Assembly, Dr. B. R. Ambedkar said: 428 

The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the power to promulgate a law which will enable the executive to deal with the particular situation because it cannot resort to the ordinary process of law because the legislation is not in session.

The ordinance-making power of the Governor, although, is co-extensive with the power of the Legislature to make laws and no limitation can be read into this legislative power. However, it is clear that this extraordinary power was conferred upon the Executive Head to enable, to deal with any unforeseen or urgent matters which might well include a situation created by a law being declared void by a court of law.

The power to promulgate ordinances is meant to be used sparingly and only in an emergent situation and when the State Legislature is in recess. An Ordinance has only a limited life and no ordinance can remain in force for more than 7½ months without being approved by the State Legislature and enacted into an Act. The Ordinance lapses if not passed by the Legislature within six weeks from re-assembly of the Legislature. The assembly has to meet within six months of its last session; 429 in effect, the maximum life of an ordinance can thus be seven and a half months.

**Precedents**

An Ordinance “shall have the same force and effect” as a law enacted by the state legislature indicates that in terms of its operation and consequence, the Ordinance making power is placed on the same basis as lawmaking power. So the President or the Governor is subject to the same constitutional limitations as the Parliament.

i) fundamental rights contained in Part III;

ii) distribution of legislative powers between the Union and the States, and;

iii) express constitutional limitations.

The Constitution Bench in two cases laid down the similar observations that, “there is no qualitative difference between an Ordinance issued by the President and an Act passed by Parliament” 430 and that, “the exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President.” 431

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The Governor while promulgating an Ordinance does not constitute an independent legislature, but acts on the aid and advice of the Council of Ministers under Article 163 of the Constitution of India. The Council is collectively responsible to the Legislative body.

The executive is clearly answerable to the legislature and if the President, on the aid and advice of the executive, promulgates an Ordinance in misuse or abuse of this power, the legislature can not only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional law complete control of the legislature over the executive, because if the executive misbehaves or forsets, the confidence of the legislature, it can be thrown out by the legislature and the same limitations and initations apply to the Governor, empowered under Article 213 of the Constitution.

‘Satisfaction’ of the Governor is subject to Judicial Review

An Ordinance is to be promulgated when the Governor or rather than the Executive, is satisfied that circumstances exist which render it necessary to take immediate action. Whether or not the circumstances exist, making such promulgation necessary is a matter to be decided by the Executive in its subjective satisfaction. Is that ‘satisfaction’ non-justifiable or subject to judicial review?

In various cases, the Supreme Court too far immunized ‘the satisfaction of the Governor’ while exercising the ordinance making power.

However, the court while construing the provisions of Article 356 in *S R Bommai v. Union of India* elucidated the approach of the Court when the proclamation under Article 356 of the Constitution is questioned. The standard of judicial review was formulated in the following observation:

“…..the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of malafides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud on power — cases where this power is invoked for achieving oblique ends.”

In *Indra Sawhney v. Union of India* the court observed that the extent and scope of judicial scrutiny depend upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors. Since the duty to arrive at the satisfaction rests in the President and the Governors (though it is exercisable on the aid and advice of the Council of Ministers), the Court must act with circumspection when the satisfaction under Article 123 or

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Article 213 is challenged..... it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case. However, absolute immunity from the judicial review cannot be supported as a matter of the first principle or on the basis of constitutional history.

Case Analysis

D C Wadhwa v. State of Bihar

An objectionable practice arose in the State of Bihar, of not placing the ordinances before the Legislature for approval when once they were promulgated. These ordinances were promulgated and re-promulgated word to word after the prorogation of the Legislature. This practice was aided by the fact that the Assembly always met for the period of fewer than 6 weeks and thus, the re-promulgation continued for years on a massive scale as common parlance. The State Government proceeded as if, laying down the ordinance on its' summon was a discretionary act of the Executive rather than a necessary provision. The Government by having ordinances re-promulgated from time to time by the Governor created an Ordinance Raj, surpassing the function of the State Legislature and thus, cheated upon the Constitution. This practice of mass re-promulgation of ordinances on prorogation of the session of the State Legislature continued unabated for long and was resorted to methodologically and with the sense of deliberateness.436

A writ petition was filed in the Supreme Court as a matter of Public Interest Litigation on January 16th, 1984, challenging such a practice as unconstitutional. The Court delivered its opinion in the matter in December 1986. The Court observed the following:

- Every ordinance promulgated by the Governor of a State under Article 213, must be placed before the State Legislature, and the Executive by resorting to the emergency provision cannot usurp the law-making function of the legislature.
- The power to promulgate ordinances is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to serve the political ends.
- The law-making authority is the legislature and not the executive and therefore, cannot take over the law-making procedure of the legislature by resorting to the urgencies. This would be clearly subverting the democratic process.
- The Court sets its face against the Ordinance Raj in the country.

The re-promulgation of the ordinances was held to be a colorable exercise of the power. It constitutes the fraud upon the constitution.

However, the limitation of the decision in D C Wadhwa was that having spelled out the constitutional doctrine, the Constitution Bench ended only with a "hope and trust" that lawmaking through re-promulgated ordinances would not become the norm'.

435 Ibid.

436 Supra 2, at 392.

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That trust has been belied by the succession of re-promulgated ordinances in the case of Krishna Kumar Singh v. State of Bihar437

Krishna Kumar Singh v. State of Bihar

The Governor of Bihar promulgated the first of the Ordinances providing for the taking over of four hundred and twenty-nine Sanskrit schools in the state. The services of teachers and other employees of the school were to stand transferred to the state government subject to certain conditions. The first Ordinance was followed by a succession of Ordinances. None of the Ordinances, which were issued in exercise of the power of the Governor under Article 213 of the Constitution, were placed before the state legislature as mandated. The state legislature did not enact a law in terms of the Ordinances.

The first Ordinance, called The Bihar Non-Government Sanskrit Schools (Taking over of Management and Control) Ordinance, 1989 was promulgated by the Governor of Bihar on 18 December 1989438 and was published in the Bihar Gazette Extraordinary on December 16th, 1989. The Ordinance contains a recital of the satisfaction of the Governor that:

“44….circumstances exist which render it necessary for him to take immediate action for the taking over of non-government Sanskrit schools for management and control by the State Government for improvement, better organization and development of Sanskrit education in the State of Bihar.”

The life of the First Ordinance439 was for a period of two months and two weeks since by virtue of the provisions of Article 213(2)(a) it ceased to operate at the expiration of six weeks from the reassembling of the legislature. The session of the Legislative Assembly concluded on 25 January 1990.

On 28 January 1990, the second in the succession of Ordinances was promulgated. The next session of the Legislative Assembly was held between 16 March 1990 and 30 March 1990. On 2 May 1990, the third in the succession of Ordinances 440 was promulgated. The next session of the Legislative Assembly took place between 22 June 1990 and 9 August 1990, as a result of which the life of the Ordinance was about three months. The first, second and third Ordinances were in similar terms.

On 13 August 1990, the Governor promulgated a fresh Ordinance441 with some clauses materially different from the earlier ordinances. Since the next session of the Legislative Assembly commenced on 22 November 1990 the life of the Ordinance was about four months and two weeks.

The fifth in the series of Ordinances442 was promulgated on 8 March 1991. The session

439 The Legislative Assembly was convened for its 11th session which lasted from 29 June 1989 to 3 August 1989 after the Ordinance was promulgated, the 12th Session of the Legislative Assembly commenced on 18 January 1990.
440 Ordinance 14 of 1990.
441 Ordinance 21 of 1990.
442 Ordinance 10 of 1991.
The Ordinances promulgated by the Governor followed a congruous pattern. None of the Ordinances were laid before the legislature. Each one of them lapsed with the termination of the period of six weeks after the conglomeration of the session of legislative assembly. When the previous Ordinance ceased to operate, a fresh Ordinance was issued when the legislative assembly was not in session. The legislative assembly had no occasion to consider whether any of the Ordinances should be approved or disapproved. No motion was moved by the Government in the Legislative Assembly to enact a law alongside the lines of the Ordinance. The last of the Ordinances, like its predecessors, cease to operate as a result of the constitutional limitation contained in Article 213 (2) (a).

This case came to the light barely three years after the judgement where the Supreme Court regarded such practice of promulgation and re-promulgation as a fraud on the Constitution in D C Wadhwa v. State of Bihar.\textsuperscript{445}

Writ proceedings were initiated before the Patna High Court by the staff of the Sanskrit schools for the payment of salaries. Those proceedings resulted in a judgment of the Patna High Court.

When the appeal against the decision of the High Court came up before a Bench of two judges of this Court in Krishna Kumar Singh v. State of Bihar, both the judges – Justice Sujata Manohar and Justice D P Wadhwa - agreed in holding that all the Ordinances, commencing with the second, were invalid since they promulgation was contrary to the constitutional position established in the judgment of the Constitution Bench. Justice Sujata Manohar held that the first Ordinance was also invalid being a part of the chain of Ordinances whereas Justice Wadhwa, however, held that the first Ordinance is valid and that its effect would endure until it is reversed by specific legislation. The difference of opinion between the two judges was in their assessment of the constitutional validity of the first Ordinance. Thus, the case came up before a Bench of three judges.

The case was then referred to a Bench of five judges on the ground that it raised substantial questions relating to the Constitution. However, the three decisions of Constitution Benches which have been noticed are those in Bhupendra Kumar Bose\textsuperscript{446}, T Venkata Reddy\textsuperscript{447} and, Satpal Krishna Kumar Singh

\textsuperscript{445} D C Wadhwa v. Union of India, AIR 1987 SC 579.
\textsuperscript{446} State of Orissa v. Bhupendra Kumar Bose, AIR 1962 SC 945.
Dang\textsuperscript{448} and on another hand the nine judge Bench decision in Bommai was relied upon, by counsel for the State. Thus, the matters call for hearing by a 7-Judge Bench of the Apex Court. However, the major things that have already been cleared by the judgment in D C Wadhwa, the judgment of the Court in Krishna Kumar stands important on the points on which the prior judgment left lose its ambit.

**No Justification for Re-promulgation of the Ordinance**

The Government comes up with the excuses that there were such circumstances that the executive failed to present the ordinance before the Legislature and therefore, were compelled to re-promulgate the same. The Ordinance making power does not constitute a parallel source of power in the hands of the President or the Governor as an independent legislative authority. It is mandatory requirement to lay down the ordinance before the parliament or the state legislature (as the case may be) and is not at all an optional move as the legislature needs to determine:

(a) the need for, the validity of and an expediency to promulgate an ordinance;
(b) the ordinance needs to be approved or disapproved;
(c) an Act incorporating the provisions of the ordinance needs to be enacted (with or without amendments);

The re-promulgation of the ordinance bypassing the procedure of placing the ordinance before the parliament is a serious constitutional infraction and abuse of the constitutional process. Article 213(2)(a) clearly provides that an ordinance promulgated under the said article shall “cease to operate” six weeks after the reassembling of the legislature or even earlier, if a resolution disapproving it is passed in the legislature.

The Constitution has used different expressions such as “repeal” (Articles 252, 254, 357, 372 and 395); “void” (Articles 13, 245, 255 and 276); “cease to have effect” (Articles 358 and 372); and ”cease to operate” (Articles 123, 213 and 352), each of the expression having distinct connotation. The expression “cease to operate” in Articles 123 and 213 does not mean that upon the expiry of a period of six weeks after the legislature reassembles or passes the resolution disapproving it the ordinance is rendered \textit{void ab initio} rather it stands to be ceased where it makes a provision which the Parliament would not be competent to enact (Article 123(3)) or if it makes a provision which would be invalid if enacted in the Act of legislature of the state assented to by the Governor (Article 213(3)). The framers have used two different expressions “cease to operate” and “void” separately within the same provision, are not meant to convey the same meaning. Therefore, there is no justification for the re-promulgation of the ordinances, not even the hectic schedule; as it is upon the discretion of the Governor for how long period he would opine to call the House(s) for summon. Moreover, if the ordinance is not so important to be tabled during the session then there does not seem to be any urgent situation that requires the ordinance to be re-


promulgated, therefore failing to meet the requirement of urgency. Such re-promulgation constitutes the fraud upon the constitution.

The Survival of the Rights, Obligations, Liabilities and Privileges is to be decided as a Matter of Construction.

The theory of enduring rights has been laid down in Bhupendra Kumar Bose449 and followed in T Venkata Reddy450 by the Constitutional Bench is based on the analogy of a temporary enactment. There is a basic difference between an ordinance and a temporary enactment, the prior is not a law in itself whereas the later is the proper law passed by the legislature for a particular duration or in order to meet certain measure and ceases to operate the fulfillment of the objective. These decisions do not lay down the correct position of the moreover these judgments are ruled out as ‘not a good law’ in view of the decision in S R Bommai451. There is no express provision in Article 123 and Article 213 for saving the rights, privileges, obligations and liabilities which have arisen under an ordinance which has ceased to operate. Such provisions are however specifically contained in other articles of the Constitution such as Articles 249(3), 250(2), 357(2), 358 and 359(1A). This is not conclusive and the issue is essentially one of the construction of giving content to the ‘force and effect’ clause while prescribing legislative supremacy and the rule of law; The appropriate test to be applied is the test of public interest and constitutional necessity. This would include the issue as to whether the consequences which have taken place under such an Ordinance have assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief as would be in favour of the public at large.

Conclusion

There are many laws and judicial rulings meant for the better functioning of the democratic system, however still, the system is corrupted within the roots as the implementation of those laws and rulings lack. The ordinance making power though casts a shadow over the powers of the legislature is still required and necessary as there may be and have been such situations where the legislature is not in session and legal implementations are required to be imposed in order to control the situation. However, no circumstances are so convincing that any ordinance could be re-promulgated and if there is any such situation then it would be convincing enough for tabling such ordinance before the legislation. Promulgation of the ordinance is a necessary evil but the re-promulgation of such an ordinance is a fraud upon the Constitution and a sub-version of democratic legislative processes.

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449 Supra note 38.
450 Supra 39.
451 Supra 35.
INDEPENDENCE OF JUDICIARY IN INDIA AND ITS REFERENCE IN OTHER COUNTRIES

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Abstract: Constitution of India has three organs working independent of each other. There powers are enshrined in the constitution separately. The framers of the Constitution have deliberately ensured the independence of judiciary through various articles such as Art 50, Art 121 and many more. This paper seeks to focus upon the need and meaning of independence of judiciary. It lays is emphasis upon how the Constitution of India has ensured judicial independence, what are the means of ensuring it. This paper also focuses on international aspect of independence of judiciary by a study of document of basic principles for independence of judiciary and also position of independence of judiciary in the Canada, United Kingdom and United States of America.

INTRODUCTION
WE THE PEOPLE OF INDIA…… HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION. The people of India devoted ourselves in the hands of the Constitution. The framers of the Constitution of India aimed at constituting India as a democratic power which could be achieved by the preservation of rule of law. Rule of law can be established in any nation only when the law of land or the most basic law of the nation is the supreme law. The government and the people of the country are governed by the Constitution and not the other way around.

The Constitution is the sacrosanct. It is standing high in its glory upon the three pillars, namely the legislature; one who enacts the law, the executive; one who implement the law and the judiciary; one who protects the law. Professor K.T. Shah, representative of Bihar in the constituent assembly, also member of advisory committee and sub-committee on fundamental rights proposed before the Constitutional assembly during the framing of the Constitution that for the preservation of the rule of law, the three pillars mainly the judiciary should be kept separate from each other and away from any kind of interference in the workings of each organ. For judiciary. Professor K.T. Shah envisioned a greater role in providing social transformation. In a debate on 19th day of November in the year of 1948, he said, “the judiciary is the only authority that we are going to set up in the Constitution to give effect to whatever hopes and aspirations, ambitions and desires we may have in making these laws and in laying down this Constitution”. Supremacy of the Constitution in a democratic legal order does not result from an abstract legal postulate, but rather from the importance of the Constitution has as a political Act with the corresponding democratic contents, which precisely make it the most important Act in a state. The concept of judicial activism or active judiciary is the concept enshrined by the concept of separation of powers. Judiciary acts as the guardian of the...

452 Professor P.K. Tripathi, Comparative Constitutional Law, pg 36, (Mahendra P. Singh second edition 2011).
Constitution or the protector of the basic structure of the Constitution by protecting the rights and privileges protected to its people by the Constitution. Judicial activism denotes the proactive role played by the judiciary in the protection of the rights of citizens and in the promotion of justice in the society. In other words, it implies the assertive role played by the judiciary to force the other two organs of the government namely the executive and the legislature to discharge their Constitutional duties. Professor K.T. Shah was very much adamant on his proposal that every pillar (organ) of the Constitution should be kept separate and independent of each other especially the judiciary, which is true and necessary. Judiciary came into existence and exists to deliver JUSTICE. The term justice implies the quality of being ‘just’, ‘right’ or ‘reasonable’. It is opposed to what is ‘unjust’, ‘wrong’ of ‘unreasonable’. In any democratic country justice delivered can be just, right, reasonable and fair only when judiciary is free from any coercion through any improper means. The ideals of justice can be achieved only when judiciary is independent from any higher or improper influence.

INDEPENDENCE OF JUDICIARY
The Constitution of India has created a unified and an integrated judicial system. The federal nature of the Constitution of India necessitated the establishment of the Supreme Court of India. It serves as the safeguard for the rights and privileges provided by the Constitution to its people.

Judiciary serves as a foundation and protector of law and democracy. The respect the people have for the law is dependent upon the independence of the judiciary. The provisions of the Constitution of India regarding the relations of the Supreme Court with parliament and union government indicate that the framers of the Constitution have tried their best to secure independence of the judiciary under the Constitution. The framers of the Constitution ensure that the Judges of the Supreme Court and the High Courts would be independent of the executive and the legislature. Parliament is prohibited from discussing the conduct of Judges. Judges of the Supreme Court and High Courts acting in discharge of their duties. The executive makes appointment of Judges only on the advice of chief justice of India who acts in consultation with and as per the decision taken in a collegium of Judges. Judges of the Supreme Court and high court can be removed only when an address is presented to the President of India by both the houses of parliament after following a particular procedure. The importance judiciary holds can be perceived through the quote Dr. B.R. Ambedkar once quoted that “the people of a nation may lose confidence in the legislature and executive, but, it will be an “evil day” when they lose confidence in the judiciary. This question of independence of judiciary was raised before the bench of seven Judges consisting of A. Gupta, D. Desai, E. Venkataramaiah, P. Bhagwati, R. Pathak, S.M. Ali, V. Tulzapurkar in the case of S.P. Gupta v. Union of India. In this case Bhagwati J. described independence of judiciary, like a...
living faith which must derive its inspiration from the Constitution. Widening the scope of judicial independence, he further quoted “it is necessary to remind ourselves that the concept of independence of judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices such as fearlessness of other power centers such as economic or political and freedom from prejudices acquired and nourished by the class to which the Judge belong...”. Judiciary in itself doesn’t preserve the Constitution. Ultimately it is the Judge who acts as the guardian of the Constitution. He must have the courage to decide against the judiciary.  

HOW INDEPENDENCE OF JUDICIARY IS ENSURED?
A federal Constitution of considered to be a relatively rigid Constitution in its nature. In a federal state the State and the Centre are separate from each other dealing with their own subject-matter and linked with the relationship between them through Constitution. In such circumstances, naturally there are chances of conflict. Such conflicts are dealt by the judiciary. In such cases it is necessary that judiciary remains unbiased which is possible only when in is independent from any kind of influence, higher or improper, at any stage. To ensure the independence of the judiciary certain measures are enshrined in the Constitution of India. Those measures are:

1. FIXED TENURE: Judges have fixed tenure i.e. retirement age. Judges can only be removed presenting to the President of India for the removal of the Judge by both the houses of parliament following certain procedures.

2. SALARY: Judges are provided with a handsome amount of salary and it cannot be changed for their disadvantage after their appointment. They are also provided with various kinds of remunerations for a good living.

3. JURISDICTION: Jurisdiction of court can only be increased. It can never be decreased.

4. SEPARATION FROM EXECUTIVE AND LEGISLATURE: Art 50 of the Constitution urges the state to separate the judiciary from the executive in the public service of state.

5. APPOINTMENT OF JUDGES: Judges are appointed by the executive but only after the consultation from the chief justice of India who act on par the consultation of the collegium.

6. NO DISCUSSION ABOUT CONDUCT OF JUDGES IN DISCHARGE OF THEIR DUTY: Art 121 prohibits any kind of discussion on the conduct of Judge performed in discharge of their duty. They can only be discussed at the time of discussion of removal.

INDEPENDENCE OF JUDICIARY IN INTERNATIONAL ASPECT:

One of the most prominent document in international sphere for the independence of judiciary is the “Basic Principles on the Independence of Judiciary”. It is adopted by the “Seventh United Nations Congress of the Prevention of Crime and Treatment of Offenders”. It was held in Milan from 26th August to 6th September 1985.

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This document includes various number of principles which the state parties should be taken into account and respected by their governments in their framework.

Some important principles include:

- The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.
- Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
- Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of Judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.
- The term of office of Judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
- A charge or plaint made against a Judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The Judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the Judge.

INDEPENDENCE OF JUDICIARY IN DIFFERENT COUNTRIES

Different countries deal with the concept of independence of judiciary differently. Some ensure it through different means of judicial selection of some by granting guaranteed tenure.

1. CANADA: Canada has ensured the independence of judiciary through section 96 to 100 of its CONSTITUTION ACT,1867. Through its Constitution, Canada ensures its Judges certain rights, such as right to tenure and right to salary. Canada has also faced various challenges in establishing the judicial independence. In 1982, these rights were extended only to the Judges of inferior courts dealing the jurisdiction of criminal laws only. But in 1986, in case of Valente v. The Queen, it was observed that these right are not absolute but limited. Further in year 1997, a major shift was witnessed. The Supreme Court of Canada found an unwritten

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Constitutional norm enshrined in preamble which guaranteed the judicial independence.

2. UNITED KINGDOM: There are two important conventions preserving judicial independence. The first and foremost convention is that the Parliament of United Kingdom does not comment on the judiciary or the cases which are before the court. And secondly, it is of parliamentary privileges preventing the member of parliament from conviction. The salary of Judges is selected by the independent pay review body. Also the selection process of Judges is kept separate from politics and with least political interference.

3. UNITED STATES OF AMERICA: In USA there are two classes of courts - Federal Courts and State Courts. Federal court Judges are appointed by the President with the consent of the Senate and shall hold office till death or resignation or impeachment. On other hand, Judges of State Courts also deal with independence of judiciary in many ways. Their selection process differs from state to states and sometimes within states. In some States Judges are appointed by ballot and in some States, Governor appoints the Judge.

CONCLUSION
Judiciary is among the most important organs of the Constitution. It acts as the guardian of the Constitution - the Supreme Law of Land, having the responsibility of preserving the essence of it. But ultimately it is not the judiciary but the Judge himself who acts as the guardian of the Constitution through his own conscious. There does not lies the problem of Judge’s own likes or dislikes but has the sole question of the hampering the “Constitution or its essence”. Independence of judiciary is ensured through different means such as by giving the right of tenure, by providing the Judges economic and social security. But it is also necessary to ensure that while maintaining its check upon the legislature and the executive, judiciary itself doesn’t become a tyrant or act arbitrarily. A Judge must act as a Judge. He must not have favorites nor he should entertain prejudices against certain members of bar. Possibilities of Judges being corrupt are there. Also Judges with political ambitions are likely to compromise judicial independence. In such circumstances justice can never be just or fair- justice would fail to deliver its purpose. No doubt independence of judiciary is crucial and unavoidable but such independence should also be always kept in check and ensured it is serving the purpose it is meant for and not otherwise.

GENDER IDENTITY OF LGBT AND THEIR POSITION IN INDIA

By Ragini Umrao  
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INTRODUCTION
In India, Lesbian, gay, bisexual, transgender and intersex (LGBTI) face legal and social difficulties from non-LGBTI persons. In India, LGBTI peoples have gained more and more tolerance, especially in metropolitan cities. Apart from this most of the LGBTI people remain closeted, fearing discrimination from their families in India. They might see homosexuality as shameful. In India Data has shown honor killings, attacks, beatings of members of the LGBTI community are not uncommon. LGBTI people face discrimination and ignorance from rural areas as well many urban areas. In these areas society doesn't accept them and forced for marriage to their opposite sex. They see homosexuality as a sin. Sexual activity between opposite sex people is legal, but until recently sexual activities between the same-sex couple was considered as a crime but now on 6 September 2018, the Supreme court of India decriminalized the homosexuality and declared section 377 of the Indian penal code unconstitutional.

Since 2014, in India transgender peoples have been permitted to change their gender without sex reassignment surgery, have right under the constitution that they can register themselves under the third gender. In India some of the States protect hijras, states provide welfare benefits, pension schemes, housing programmers, fee surgeries in government hospitals and other vital programmers for them. Data are showing that in India approximately 4.8 million transgender people are living.461

HISTORY OF LGBTI
The Khajuraho temples in India famous for their erotic's sculpture, contain various depictions of homosexual activities. Historians have argued that pre-colonial Indian society has not criminalized homosexuality nor did it consider this relationship as a sinful or immoral. Hijra as a third gender acknowledges by the Hindus. In the MAHABHARAT many characters had changed their gender such as Shikhandi etc. the Kama-sutra which has written in the Sanskrit language based on human sexual behavior, it contains the word TRITIYA- PRAKRITI to define men with homosexual desire and describe practices in full details. Kama-sutra also portrays lesbians such as Svarini who engage in lovemaking with other women and transgender people. In India homosexual relationship came into existence through section 377 of the Indian penal code by the British, after the independence of India, which stood for more than 70 years.462

The British Raj criminalized anal sex(heterosexuals) and oral sex (homosexuals) under Section 377 of the IPC, 1860, Code came into force on 1861. If any person to voluntarily has carnal intercourse against the order of nature, he or

462 "India decriminalizes gay sex in a landmark verdict." Al Jazeera. 6 September 2018.
she committed the offense, and they will be liable for punishment under section 377.

Protection against Discrimination under Indian constitution

Article 15 of the Indian Constitution talks about Prohibition of discrimination on the only grounds of sex, race, caste, religion, place of birth;
(1) The State shall not discriminate to any citizen on the grounds of religion, caste, sex, race, place of birth or any of them.
(2) No citizen shall, on grounds only of race, caste, religion, sex, place of birth or any of them, be subject to any liability, disability, restriction or condition about-
(a) access to shops, hotels, public restaurants, and palaces of public entertainment; or
(b) The State maintained wholly or partly out of funds or dedicated to the use of the general public such as wells, bathing ghats, tanks, roads and places of public resort.
If any persons facing discrimination because of their sexual orientation, can challenge and seek the remedy by the court of law.

LGBTI Position in Defense Service

LGBTI people are banned from joining the services in Indian Army Forces, Indian Navy, Indian Force. In December 2018, MP Jagdambika Pal who is the member of Bhartiya Janata Party (BJP), introduced a bill in Parliament for amendment of the Army Act 1950, the Navy Act, 1957 and the Air Force Act 1950 and allowed LGBTI people to serve in the Armed Forces.

Recognition of same-sex relationships by Court

Naz Foundation vs. GOVT. of Delhi

In 2009, the Delhi High Court found that section 377 of Indian penal code and other legal restrictions and prohibitions against private, adult, consensual, and non-commercial same-sex activities to be a direct violation of Fundamental rights which have given by the Indian Constitution of law. Section 377 of IPC talks about "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be liable for punishment 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," with this added explanation that: "Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section 377 under Indian Penal Code."

In India, there have been many incidents of sexual harassment of LGBTI groups by authorities under the law. The Ministry of Home Affairs was expressed their opinion on LGBTI On 23 February 2012, and opposed to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as sinful and

463 Article 15 in The Constitution Of India 1949, indianskanoon.org.
464 Dutta, Amrita (7 September 2018). "Indian Army is worried now that men can legally have sex with other men." The Print.
465 Parliament winter session Bills seek ban on non-veg food at official events, rights to LGBT to serve in armed forces. The New Indian Express. 28 December 2018.
466 160 Delhi Law Times 277
immoral. The Central Government reversed its decision on 28 February 2012 and saying that there was no legal error in decriminalizing homosexual activity. This decision was given by the two judges of the Supreme court.

Human Rights (groups protects the rights of human) given expressed concerns that the Supreme court ruling on LGBT would render same-sex couples vulnerable to police harassment and asserting that the supreme court decision is a disappointing setback for human dignity, non-discrimination and the fundamental rights to privacy.

The Naz Foundation said that it would file a petition for reviewing the decision of courts. The Supreme court has dismissed the petition for review on section 377 of Indian penal code filed by Naz Foundation and Central Government and several others on 28 January 2014, the supreme court bench said and claiming that "While reading down Section 377of IPC, the High Court has overlooked that a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender people and in the more than 150 years past, less than 200 persons have been prosecuted for committing offense under Section 377 of IPC, and it cannot be made a great basis for declaring that Section ultra vires Articles 14, 15 and 21 of the Indian constitution."

Shashi Tharoor who is a member of the Indian National Congress party introduced a bill in parliament for the repeal of section 377 of Indian Penal Code, but this bill had rejected in the house. The Supreme court has decided to review the section 377 which states that homosexual activities are a crime on 2 February 2016.

In 2017, in the case of K.S. puttaswamy vs. state of Tamilnadu, The Supreme Court has decided unanimously that the right to individual privacy is an intrinsic and fundamental right under the Indian Constitution. The Court followed this judgment and ruled that a person's sexual orientation is a privacy issue, this decision giving hopes to LGBTI people as well as activists that the Supreme Court would soon strike down Section 377. After that in January 2018, the Supreme Court agreed to refer the issue on Section 377's validity to a larger bench and heard several petitions. In response to the court's request, the Central Government announced that it would not oppose the petitions, and they would leave the case "to the wisdom of the court." A supreme court hearing began on 10 July.

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472 "India parliament blocks MP's bill to decriminalize gay sex."

473 WRIT PETITION (CIVIL) NO 494 OF 2012

474 "India on the brink of biggest gay rights victory as Supreme Court prepares to rule on gay sex ban," Independent.co.uk. 14 July 2018.
2018 with a verdict expected before October 2018.475

After that in the case of Navtej Singh Jauhar Vs. Union of India- The petition has filed by dancer Navtej Jauhar, journalist Sunil Mehra, Chef Ritu Dalmia, etc. for declaring the section 377 as illegal and unconstitutional. On 6 September 2018, the Supreme Court decided its verdict. The Court unanimously gave judgment that Section 377 is unconstitutional as it is infringing the fundamental rights under Indian constitution of autonomy, intimacy, and identity. Thus court legalizes homosexuality in India.476 The Court has explicitly overturned its 2013 judgment.477

Here I have written important para of judgment-
1-Criminalizing carnal intercourse is irrational, arbitrary and manifestly unconstitutional. By Chief Justice Dipak Mishra.477
2-History owes an apology to these LGBTI people and their families. Homosexuality is part of human sexuality. They have the right to dignity, and they are free from any discrimination. sexual consensual acts of adults are allowed for the LGBTI community by Justice Indu Malhotra.477
3-It is challenging to decide the right at wrong by history. But we can establish a course for our future. This case had involved much more than decriminalizing homosexuality. It is about peoples wanting to live with freedom and dignity by Justice D. Y. Chandrachud.478
Furthermore, it stated that any discrimination based on sexual orientation is a violation of the constitution of India.478 Sexual orientation is biological phenomena which are natural and inherent in an individual and controlled by biological and neurological factors. The science on sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination by one sexual orientation would entail a violation of the fundamental right of freedom of expression under the constitution of India. The Supreme Court had given direction the Government of India to take all necessary measures to properly broadcast the fact among the public that homosexuality is not a criminal offense, and also create public awareness and to give the police force periodic training to sensitize them about the issue which happens with LGBTI people. The supreme court judgment also included an inbuilt safeguard to ensure that it cannot be revoked again under the "Doctrine of Progressive Realization of Rights."478

Some of the Legal experts have requested the Government of India to pass legislation and makes laws to protect their rights if same-sex couples want to marry they can no one can restrain from this, adoption by same-sex couples (if they're going to adopt a

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476 “Section 377 verdict: Here are the highlights”. The Indian Express. 6 September 2018.
child they can take) and inheritance rights\textsuperscript{479}.

Non-Consensual sex (rape), Sex with minors and bestiality remain criminal offenses under section 377 of Indian Penal Code. The Supreme Court judgment may not extend to the state of Jammu and Kashmir, because Jammu and Kashmir are governed by its own state law, the Ranbir Penal Code\textsuperscript{480}.

\textbf{LGBTI Position in States}

States of Tamil Nadu and Kerala both was the first Indian states to introduced a transgender welfare policy for LGBTI Community. Transgender peoples can access free sex reassignment surgery in government hospitals, free housing program, various citizenship documents\textsuperscript{481}. Admission in government colleges with a full scholarship for higher studies, alternative sources of livelihood through the formation of self-help groups and initiating income-generation programmers by transgender welfare policy, the state of Tamil Nadu is also the first state to establish a transgender welfare board with transgender community representatives. The state of Kerala has started implementing free surgery in government hospitals In 2016. The state of Odisha has enacted welfare benefits for transgender peoples, giving them the same benefits as those living below the poverty line\textsuperscript{482}.

On October 2017, the Karnataka Government issued the "State Policy for Transgender, 2017", raised awareness of transgender people among the public within all educational institutions in the state with the aim of Educational institutions in the state will address issues of violence, abuse, and discrimination against transgender people\textsuperscript{483}.

On 28 November 2017, the Chief Minister of Andhra Pradesh, N. Chandrababu Naidu has announced the enactment of pension plans for transgender people\textsuperscript{484}. On 16 December 2017, the Andhra Pradesh Cabinet has passed the policy. According to this policy, the state government will provide an amount of 1500 per month to every transgender person above the age of 18 for social security pensions. Also, the Government will construct individual toilets in public places, like malls and cinema halls, for transgender people\textsuperscript{485}.

\begin{thebibliography}{9}
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\bibitem{481} Devasia, TK. "Why Kerala's free sex-change surgeries will offer a new lifeline for the transgender community." Scroll.in. Retrieved 2016-03-19
\bibitem{483} "Transgender policy cleared by Karnataka cabinet". The Indian Express. Press Trust of India. 27 October 2017.
\bibitem{484} ANI (2017-11-28). "CM Naidu announces pension scheme for state's transgenders." ABP Live.
\bibitem{485} Apparasu, Srinivasa Rao (17 December 2017). "Transgenders to get pension, ration and more in Andhra; govt clears welfare policy." Hindustan Times.
\end{thebibliography}
In January 2018, the Finance Minister of Kashmir had introduced a proposal to Legislative Assembly of the Jammu and Kashmir, that would grant free life and medical insurance for transgender people, and a monthly sustenance pension for those Transgender who are 60+ and registered with the Social Welfare Department. Transgender activists have criticized aspects of the bill, including its requirement to establish medical boards to issue "transgender certificates."386

SURVEY DATA: in 2016 survey question asked to the public-Should same-sex marriage be legal?
Yes (35%)
Against (35%)
Don't know (30%)

Indian public little bit unsure about the LGBTI community, in Indian public opinion regarding LGBTI rights is complicated. According to the poll conducted by International Lesbian, Gay, Bisexual, Trans, and Intersex Association, in the year 2016 that 35% people in India were in favor of legalizing the same-sex marriage, 35% were people opposed, and rest of the public did not know the answer of this issue. And another survey had done by the Varkey Foundation found that the support for same-sex marriage was higher among the 18 to 21 years old.487 According to 2017 poll conducted by international Lesbian, Gay, Bisexual, Transgender and Intersex Association, 58% Indian were agreed that Gay, Lesbian, and Bisexual people should also enjoy the same rights as straight people, while 30% Indian disagreed.488

CONCLUSION
LGBTI people, for me, are as ordinary as any other homo sapiens. They have every right to live normally and every right to love. It's shocking how our society reacts to someone being sexually different form themselves. They state it as being 'abnormal.' And it's genuinely heartbreaking how these people are treated by society. LGBTI still fighting for their rights. Gopi Shankar Madurai was youngest and also the first openly intersex and genderqueer candidate in the election, contesting a seat in the state of Tamil Nadu Legislative Assembly election, 2016.

The All India Hijra Kalyan Sabha had fought for over a decade to get their voting rights. Finally, they got their rights in 1994. Here are several examples- Kali stood for office in Patna under the then Judicial Reform Party in the year of 1996. Also, Munni ran in the elections as well for South Mumbai that year and They both lost. Two transgender people were appointed in Legal Services Authority as panel members for the local Lok Adalat by the Kolhapur District on 12 February 2017. Members of the Kolhapur legal service authority have stated: "Our main achievement is the inclusion of transgenders as a panelist in Lok Adalat. As per the judgment which had given by the Supreme Court's, transgenders must be recognized as the third gender in our country.

387 "Young people and free speech," The Economist. 15 February 2017.
In July 2017, Joyita Mondal was appointed in Lok Adalat in Islampur, who became the first transgender judge in West Bengal's. Swati Bidham Baruah first transgender who became the judge in Assam In 2018. Now law, as well as Government, has a high authority to support such things. Some countries do favor same-sex marriage while others don't.

Since the supreme court has recognized the rights of LGBTI, it is a move towards a liberal society in the modern era. However, there is a reluctance in the community towards their acceptability.
COMPETITION ACT- IMPACT ON RETAIL INDUSTRY AND ITS OVERVIEW

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ABSTRACT:

This paper provides detailed information about the Impact of competition Law on Retail Industry. It explores the role of the Government of India in the industries growth and the need for further reforms. In India the vast middle class and its almost untapped retail industry are the key attractive forces for global retail giants wanting to enter into newer markets, which in turn will help the India Retail Industry to grow faster.

INTRODUCTION:

Competition benefits everyone: businesses, consumers and the economy as a whole. It encourages businesses to compete for customers. Buyers of goods and services, from individual consumers to businesses, benefit by paying less and having more choice and better quality. Competition results in open, dynamic markets, featuring increased productivity, innovation and better value. Retail Industry plays a vital role in any Country, and especially in India. As retail industry considers as the key pillars in Indian economy, as it contribute around 10% in India’s Gross Domestic Product (GDP).

1 Indian Brand Equity Foundation, Retail Industry in India, and its overview, Last Updated: October, 2018

OBJECTIVES OF ACT

- To promote healthy competition in the market.
- To prevent those practices which are having adverse effect on competition.
- To protect the interests of concerns in a suitable manner.
- To ensure freedom of trade in Indian markets.
- To prevent abuses of dominant position in the market actively.
- Regulating the operation and activities of combinations (acquisitions, mergers and amalgamation).
- Creating awareness and imparting training about the competition Act.

IMPACT:

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and abuse. Market power is variously known in competition jurisdictions as dominant
position, monopoly power and substantial market power. The Competition Act, 2002 and amended in 2007 follows the philosophy of modern competition laws and aims at fostering competition, protecting Indian markets against anti-competitive practices by enterprises who always want market leadership to maximize benefits from the market for their progress. The Act prohibits anti-competitive agreements and abuse of dominant position by enterprises and regulates combinations which include mergers, amalgamations and acquisitions thus laying down certain practices from which enterprises shall have to keep away. Enterprises not following the law on competition will have to face penalty which will thwart activities and operation in the market.²

The Act prohibits anti-competitive agreements including cartels, abuse of dominant position, regulates combinations which includes mergers, amalgamations and acquisitions. An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements may include, but not limited to:(i) Horizontal Agreements to : (i) fix prices; (ii) limit production and/or supply;(iii) allocate markets; and (iv) bid rigging or collusive bidding.(ii) Vertical Agreements including: (i) conditional purchase/sale (tie-up arrangement);(ii) exclusive supply arrangement ;(iii) exclusive distribution arrangement; (iv) refusal to deal; and (v) re-sale price maintenance.

² Ibid;

Now when we talk about Competition Commission act, there are some criticism also attach to it, like excess control of central government, Competition Commission bound to follow the direction issued by the central government, and central government can exempt any number enterprise from the CCI. And when central or state government is involved, then there are a chance of biasness comes into play.

Retail Industry is the only industry, where in the government of India permitted 100% foreign direct investment. Having Competition commission act in India has helped the small retailers from the international competitor from all over the world.

The Act intends to curb any activity that could harm consumer welfare or freedom of any individual (or individuals) to freely and fairly compete in the market. Therefore, the three broad areas for the Competition Act to look at are: (a) cartelizing behavior of the firms, (b) abuse of dominant position, and (c) mergers and acquisition.³

When Indian Government, allow 100% Foreign Direct Investment in Retail sector, the pressure on Indian retail industries arises from multifold. As competition from internal as well as external competitors tends to rise with this step of government, thus there is an emergence need of competition act, from preserving the retail industry from malpractices adopted by some countries. Entering of Wal-Mart in India, tends to raise a competition to a very different level, thus protection of Indian retailer is necessary.

Competition Act undoubtedly promotes efficiency and accountability of the players’ ample choices for the consumer and
ultimately leading to welfare of customer and enterprise both. Retail business are now cannot charge different price from different customer, the prices need to be well settled and equal for all. Various retailers were not happy with this competition act, as earlier they were indulge in entering exclusive dealing agreement.

In the case of Ahuja vs. Snap Deal\(^4\), Ashish Ahuja used to sell various products through Snapdeal, in the process of which he used to purchase SanDisk products from open market and sell them through Snapdeal. Snapdeal eventually refused to sell these products and took them off its website. Mr Ashish Ahuja was informed that SanDisk had given a list of authorized channel partners and only such partners could sell SanDisk products through Snapdeal.

Snap Deal forcing him to sell only particular product, and refusal from Ahuja side, will going to stopping the supply of sand disk product.

Snap Deal was charged by CCI, for using his Dominant position in market for mode of the sale, thus preventing Ahuja from offering competitive prices for same product.

The famous Wal-Mart effect on retail sector, when Wal-Mart enters in India, Small retailers threatened with this entry in market due to stiff competition and chances of survival were less. Now we have to understand this thing that Retail also include E-Commerce, but not all of it, at least 10% of E-Commerce is retail\(^5\). In case of Mohit Manglani v. Flipkart\(^6\) India Private Limited & Ors, (Case No. 80/2014) the five major e-commerce portals in India namely; Flipkart, Snapdeal, Amazon, Jabong and Myntra were alleged to have contravened the provisions of the Competition Act, 2002. Here the informant alleged that the e-commerce portals entered into exclusive agreements in order to sell selected products exclusively through their portal and excluded other e-commerce portals and physical channels. He further averred that these e-portals decide upon the terms of resale, sale price, quality or service conditions, terms of payment and delivery. Moreover, all these stipulations were non-negotiable in nature for the prospective consumers. Further the informant claimed that each of these e-commerce portals were dominant as they had 100 percent market for the product they chose to exclusively deal in. It was contended here that the relevant market constitutes the market in context of that particular product and dominance is also perceived accordingly.

E-Commerce is channel of distribution to the relevant market of retail.

\(^3\) Competition Law in India: perspective, Vishwas Pingali, Faculty, Economics Area, Ahmedabad, LastUpdated: June, 2016

\(^4\) Competition Commission of India, Case No 17 of 2014.

\(^5\) Understood this thing that Retail also include E-Commerce, but not all of it, at least 10% of E-Commerce is retail.

\(^6\) Mohit Manglani v. Flipkart, India Private Limited & Ors, (Case No. 80/2014)

\(^7\) Nitin Radheshyam Agarwal vs. Competition Commission of India
any period of limitation under the act, the commission cannot refuse to order an investigation into allegation of anti-competitive agreement, but that does not

5 E-Commerce is 10% Retail, Author: Steve Denis, Forbes, Last Updated: April 9, 2018

6 Competition Commission of India, Case No.80 of 2014

7 Appeal No.108/2015, order dated 14-12-2015 (CAT)

mean that the claim would be made even after unreasonable delay., what is reasonable time depend upon case to case.

**DETECTION OF BID RIGGING OR COLLUSIVE BIDDING**

The main problem in checking the practices or arrangement of bid rigging or collusive bidding is how to detect the secret understanding between the parties in the absence of evidence. The problem becomes more acute; when the parties do not quote or bid the same rates but vary slightly with the intention that it should appear to other as if there has been no collusion. However, suspicion may be unusual bidding or something a bidder says or does certain patterns of bidding would be seen to be odds with a competitive market and suggest the possibility of collusion.8

Any agreement (in Collusion) not to respond to an initiation to tender until after discussion with other person invited to tender, is also a bid rigging offence9. Certain patterns in bids can give rise to suspicion of collusion. The competition Commission of India has identified some situation of suspicious behavior to include the following:

- The bid offered by different bidders contains same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate the designated bid winner has prepared all other bids (of losers).10
- Bid Documents contain the same corrections and alteration indicating last minute changes. A bidder submits his/her bid and also the competitor’s bid.
- A party multiple bids to a bid opening and submits his bid after coming to know who else is bidding.
- A bidder makes a statement indicating advance knowledge of the offers of the competitor. A bidder makes a statement that a bid is a ‘Complementary’ or ‘Cover’ bid.
- A bidder makes a statement that the bidders have discussed prices and reached an understanding.

8 Bid Rigging under the Competition Act, 2002.

9 Ibid;

10 Competition Act, 2002( Principles and Practices), by: Prof. Dr.V.K. Agarwal, 2nd Edition 2019

**TYPES OF BIDS**

- **Identical Bids**

Some time parties agree to put in identical
bids for every job, each bidder receive fair share.

**Cover Bids**

Bidders makes an arrangement as who shall submits the lowest bid and rest shall submit ‘cover’ bids, so that designated bid will be accepted, these are known as complementary bidding.

**Bid Suppression**

The competitor agree not to bid against each other, one or more bidder agree to refrain from bidding, or one who has agree to withdraw the submitted bid.

**Bid Rotation**

Competitors agree to designate the bid winner in advance on a rotational basis or on a geographical or customer allocation basis.

**Protection bid**

Sometime association determines which supplier it to receive the contract. The others then directed either not to bid at all, but it gives them protection that certain firm out of several quoting price for a particular customer obtains the contract.

**CASE LAW:**

Quoting Identical Price- may not be cartel

Excel corp. limited v/s Competition Commission of India

Supreme Court held companies liable for quoting identical prices, which has adverse effect on the market. Allegations of cartelization and bid rigging were also raised in this case where the issue before the Supreme Court of India was whether the four manufacturers of Aluminium Phosphide Tablets had formed a cartel by entering into anti-competitive agreements amongst themselves since these manufacturers quoted identical rates for their products. The UNCTAD Competition Glossary defines bid rigging as “bid rigging or collusive tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids”,

Union of India vs. Hindustan Devlopmnt Corporation

The Supreme Court considered the questions whether quoting identical price or near-identical price by the seller/suppliers of the product cannot itself construed as an act of cartelization/bid- rigging etc. In this case the tender committee formed an opinion that 3 big manufacturer formed a cartel by quoting the identical price.
Court held that this was only a suspicion because merely quoting the same price does not mean formation of cartel/bid-rigging, quoting same price and lower price does not mean the same, thus these suspicions are not enough to conclude that they have form the cartel.

Rail Coach Factory Kapurthala vs. Faively transport India Limited\textsuperscript{15}

In that case tribunal rejected the argument the allegation of formation of cartel by the respondent by observing the mere identity of price did not furnish the valid ground for holding the respondent liable.

We may as that in an oligopolistic market like the one in question, the identity of price quoted by the bidder is not an unusual feature. The player in the limited market are aware of the price quoted by each other, it is ordinary course of quoting the same price in response to next tender. Thus merely suspicion of quoting the same price and formation of cartel did not render it void.

\begin{itemize}
  \item \textbf{MERITS:}
  \begin{itemize}
    \item Although competition forces lessen your market share, it can also force you to become a better business.
    \item Advantage for customer It’s good to have more choices. The number competitors, the better the offer for customer.
    \item Promotes Economic Efficiency or best use of resources.
  \end{itemize}
\end{itemize}

\begin{itemize}
  \item Act protect enterprises, but from creation of monopoly in the market, with no price fixation in the market which is a very positive step in achieving a good competitive environment.
  \item Protection of small and medium enterprises, from getting dissuaded from the multinationals.
  \item Customer is benefitted due to Competition Policy.
  \item Lower prices for all, the simplest way for a company to gain a high market share is to offer a better price. In a competitive market, prices are pushed down. Not only is this good for consumers - when more people can afford to buy products, it encourages businesses to produce and boosts the economy in general.
  \item Better quality Competition also encourages businesses to improve the quality of goods and services they sell – to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better services.
  \item More choice in a competitive market, businesses will try to make their products different from the rest. This results in greater choice – so consumers can select the product that offers the right balance between price and quality.
  \item Innovation to deliver this choice, and produce better products, businesses need to be innovative – in their product concepts, design, production techniques, services etc.
  \item Better competitors in global markets Competition within the EU helps make European companies stronger outside the EU too – and able to hold their own against global competitors.
\end{itemize}

\begin{itemize}
  \item \textbf{DEMRITS:}
  \begin{itemize}
    \item Competition decreases your market share
  \end{itemize}
\end{itemize}

\textsuperscript{14} (1993) 3 SCC 499.

\textsuperscript{15} Appeal No.10/2016, order dated 17-02-2016 (CAT)
and shrinks your customer base, especially if demand for your products or services is limited from the start\textsuperscript{16}.

Competition can be hard on businesses; it may harm companies you regularly support.\textsuperscript{17}

There are no clear rules or international standards on what constitute “fair” or “unfair” trade practices. Many jurisdictions assume that collusive agreements are per se bad and hence illegal; some subject these to the rule of reason.\textsuperscript{18}

An apparent overkill: Because of the diversity of factual circumstances in a market, the impact of business practices on competition cannot usually be pre-judged.\textsuperscript{19}

Even though dominance of the market by established players tends to make it more difficult for newcomers to compete, it is not the Government’s objective to specifically favour newcomers.

- Creates uncertainty in the competitive world.
- No emphasis given without intention parallel pricing, as it sometime coincidence that multiple enterprises quoted the same pricing, without having any ill intention on their part, but due to which they have to face burden of the act, which protect parallel pricing.

\textbf{DIFFERENCE BETWEEN MRTP ACT AND COMPETIOTION ACT}\textsuperscript{20}

<table>
<thead>
<tr>
<th>BASIS</th>
<th>MRTP ACT</th>
<th>COMPETITION ACT</th>
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<tbody>
<tr>
<td><strong>Meaning</strong></td>
<td>MRTP Act, is the first competition law made in India, which covers rules and regulations relating to unfair trade practices</td>
<td>Competition Act, is implemented to promote and keep up competition in the economy and ensure freedom of business.</td>
</tr>
<tr>
<td><strong>Nature</strong></td>
<td>Reformatory</td>
<td>Punitive</td>
</tr>
<tr>
<td><strong>Dominance</strong></td>
<td>Determined by firm's size.</td>
<td>Determined by firm's structure</td>
</tr>
<tr>
<td><strong>Focuses on</strong></td>
<td>Consumer interest at large</td>
<td>Public at large</td>
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<tr>
<td><strong>Offenses against principle of</strong></td>
<td>14 offenses</td>
<td>4 offenses</td>
</tr>
</tbody>
</table>

\textsuperscript{16} Ibid;
\textsuperscript{17} Ibid;
\textsuperscript{18} Government Response, ‘Competition Policy’- The key to economic success

\textbf{SOURCES OF INQUIRY}

Inquiry into certain agreement and dominant position of enterprise

Receipt of any information, in such manner and accompanied by such fee as may be determined by regulation, from any person, consumer or their association or trade association.

A reference made by the central government or a state government or a statutory authority. Its own motion.
In short, the two acts are different in a number of contexts. MRTP Act has a number of loopholes and the Competition Act, covers all the areas which the MRTP Act lags. The MRTP Commission plays only advisory role. On the other side, Commission has a number of powers which promotes suo moto and levies punishment to those firms which affects the market in a negative way.

**CONCLUSION**

Competition Act purpose is regulate market fairly, without any fraudulent practices on the part of enterprises, it seeks to maintain market competition by regulating anti-competitive conduct by companies. Talking about retail industry, government and other institutions does not lay emphasis on this industry, while this industry contributes 10\% to total Gross Domestic Product (GDP). The specific anti-competitive practices of the retail Industry covered under Section 3 of the Act are exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance. The prohibition of cartel agreements (price fixing, output restricting, market sharing or bid rigging) between enterprises or persons is the strongest provision in the Act however the act shall not apply in case such an agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods and provision of services. Having said this it must be noted that cartels may increase efficiency but alongside may also increase prices that may be detrimental to the consumers.  

India has liberalized 100\% Foreign Direct Investment (FDI) in its single and multiple brand retail industry, which results into higher level of competition in the market, thus chances of sucking the throats of small and medium retailers, thus need for such policy is very urgent to protect the same from dying from the market. Although this has proved very beneficial to customers.  

It can now be concluded that the competition Act, 2002 is landmark legislation. The main aim of this Act is to promote competition and curb all anti-competitive agreements. This Act restricts the abuses of dominant enterprises. It can also regulate any kind of combinations beyond a particular size. Thus this Act does not curb monopolies rather it curbs abuses of monopolies.

Thus, the competition Act is expected to play a responsible role in changing the control mechanism related to monopoly and restrictive trade practices and is also
expected to protect the interest of the small and medium industries in the country besides giving consumers more powers to redress their grievances.

21 Competition Law in Retail Sector, PVX Law partners, Last Updated 20 June, 2018

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CASE COMMENTARY ON COMMON CAUSE V. UNION OF INDIA & OTHERS (1996) 1 SCC 753

By Sakshi Jhalani
From Manipal University, Jaipur

INTRODUCTION (SUBJECT-MATTER)

“Blood is an essential component of the body which provides sustenance to life. There can be no greater service to the humanity than to offer one’s blood to save the life of other fellow human-beings. At the same time blood, instead of saving life can lead to death of the person to whom the blood is given if the blood is contaminated.”

As a result of developments in medical science, it is possible to preserve and store blood after it has been collected so that it can be available in the case of need. There are blood banks which undertake the task of collecting, testing and storing the whole blood and its components and make the same available when needed. In view of the dangers inherent in supply of contaminated blood it must be ensured that the blood that is available with the blood banks for use is healthy and free from infection.

ISSUE

In this petition filed by way of Public Interest Litigation under Article 32 of the Constitution, the petitioner has high-lighted the serious deficiencies and short-comings in the matter of collection, storage and supply of blood through the various blood centers operating in the country and has prayed that and appropriate writ order or direction be issued.

LAW LEADING UP TO THE CASE

The Drugs and Cosmetics Act, 1940 was formulated by the Drug Controller General of India for the purpose of ensuring quality control on collection, testing, storage, distribution, and infusion of blood and blood components.

The Drugs and Cosmetics Rules, 1945 were also published as required by sections 12 & 13 of Drugs & Cosmetics Act, 1940.

For the purpose of regulating its collection, storage and supply, blood is treated as ‘drug’ under the Drugs and Cosmetics Act, 1940 because the blood is required in the diseased state of a human and also it is required to cure diseases such as anemia, and extreme blood loss.

SHORT COMINGS AND DEFICIENCIES IN THE BLOOD TRANSFUSION SERVICES AND WORKING OF THE BLOOD BANKS BEFORE 1996

In 1990, the Government of India, Ministry of Health entrusted M/s A.F. Ferguson & Co., a Management Consultancy Firm with the study of blood banking system in the country. In the report it was stated:-

- 616 blood banks out of 1018 were reported to be unlicensed.
- The health status of the blood sellers was not properly examined and no medical check-up was done on them.
- The mandatory tests which were required to be done were rarely conducted.

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489 Judgment Order by S.C. Agrawal, J.
490 Common Cause v Union of India & others (1996) 1 SCC 753
The blood banks were thriving on bleeding 4000-5000 regular professional donors.

Paucity of trained personnel in the blood banks.

Storage facilities in the blood banks were not satisfactory.

Blood banks were operating in an unhygienic environment and collect and store blood in dirty conditions.

7. Strengthening the existing machinery for the enforcement of the provisions of the Act and the Rules.

**ANALYSIS**

Looking at the poor and dismal state of the blood transfusion mechanism in India and the terrible history of diseases spread due to transfusion of contaminated blood in the human body, it had become very necessary to take urgent action in this regard to improve the conditions of Blood Transfusion Services in India.

There was an urgent need for the elimination of such a system which was being carried on in the name of Blood Transfusion. The lives of many innocent people were at stake. No proper care and safety was ensured earlier for the Blood Transfusion. Due to this many people became the victims of deadly diseases like AIDS, hepatitis, syphilis etc.

So, according to my view, the decision of the Supreme Court has proved to be very much beneficial because it mandated the establishment of National Council of Blood Transfusion and State Councils, the training of the personnel to be posted in the blood banks, the licensing of the blood banks and also the elimination of the professional donors.

This decision of the Supreme Court led to many amendments in the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules 1945 and also to the formulation of National Blood Policy in 2003 and also an action plan on blood safety was formulated. Voluntary Blood donation has improved gradually in India with

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491 Common Cause v Union of India & others (1996) 1 SCC 753

492 Common Cause v Union of India & others (1996) 1 SCC 753
transfusion experts and regulators enhancing awareness on the need for blood donation. The blood transfusion community is also actively working on safe blood transfusion. But still India has a long way to go for ensuring access to safe blood across its blood banks. Globally, safe blood transfusion is almost a norm. No transfusion-transmitted HIV cases have been reported in Canada since 1985. In US, the last known case of HIV transmission was in 2008. In India, patients are still getting infected during blood transfusion and at least 2,000 people were infected with HIV while getting blood transfusion.

In India, the blood transfusion industry is regulated by multiple governing bodies managing different aspects of the industry. There is a lack of a centralized national blood transfusion body to enforce policies. Blood banks on the one hand are regulated by the Drugs and Cosmetics Act, 1940 and this Act regulates blood as a drug which is controlled and managed by the Drug Controller General of India and on the other hand, the collection, storage, testing and distribution of blood and its components is regulated by the NACO but the apex body to formulate policies relating to the operation of blood donation centres is the National Blood Transfusion Council.493

**CONCLUSION**

The blood transfusion sector in India still needs improvements. A separate legislation governing Blood Transfusion Services in India shall be passed and there must be a single centralized body governing the blood transfusion.

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COMPARATIVE ANALYSIS OF THE PRACTICES OF DIFFERENT MATRILINEAL COMMUNITIES IN INDIA

By Sanjana Hooda
From Jindal Global Law School, O.P. Jindal Global University, Sonipat

INTRODUCTION TO THE MATRILINEAL SYSTEM OF INHERITANCE

Matriliny refers to the practice of tracing descent through the female line, and an individual belonging to a matrilineal community is considered to be a part of the same descent group as their mother. Under a matrilineal system of inheritance, the property passes from the mother to her children, mostly daughters (depending upon the peculiar customs of the community in question). The remarkable thing about such a system of inheritance is that it is one of the very few recorded in Western history of the country that gave women unprecedented liberty, along with the right to hold property independently, and thus becomes significant and awe-inspiring. Succession of property in India typically devolves solely upon her children, to the exclusion of the husband. Likewise, the heirs of the mother secure preference over the heirs of the father, and the heirs of the father, in turn, are given primacy over the heirs of the husband. However, despite a number of other differences, the matrilineal system is not exactly converse of the patrilineal societies. Moreover, such systems of inheritance differ across the communities within which they are in usage.

Additionally, a matriliny may be constitutive of a number of other defining features like the rule of matrilocality, which means that the husband moves into his wife’s village or household after marriage. The convention of marriage is relatively of a feeble nature in such communities, and women tend to have greater sexual autonomy, as compared to their female counterparts in patrilineal and patriarchal societies. In an archetypal matrilineal society, women represent their family, and their children carry forward the name of their clan. The matrilineal systems of inheritance in India are survived by a few communities, in varying degrees, namely the Nair community of Kerala, the Bunts of

“(a) firstly upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
(b) secondly, upon the heirs of the husband;
(c) thirdly, upon the mother and the father;
(d) fourthly, upon the heirs of the father;
(e) lastly, upon the heirs of the mother.”

Karnataka, and the Khasi, Garos and Jaintias from Meghalaya.

MARUMAKKATHAYAM AND THE MATRILINEAL NAIRS OF MALABAR REGION OF KERALA

Matriliny in Kerala appears to have developed around the eleventh century of the Common Era (CE), possibly as a result of the protracted war between the Chera and the Chola dynasties in the country, such a practice was firmly established, notably among a caste category called the Nairs in the 1500s. The Nair community constituted the third and the last of the honoured castes of Kerala who formed the chief militia in Cochin Malabar and Travancore states. The matrilineal form of succession followed by the Nairs in the Malabar region was referred to as marumakkathayam. The term’s origin can be traced from the word marumakkal, which when translated from Malayalam means “nephews and nieces”.

This system operated in the tarawad, or the matrilineal household, and was built upon women as it conferred on them autonomy and power with respect to their personal and proprietary rights. It was through women that the tarawad name was carried forward from one generation to the next. Partition of the properties in such tarawads was prohibited and they were held jointly, as all the children belonged to the mother’s family. “Each member of a tarawad acquired an interest in the tarawad properties by reason of his or her birth alone and when any member died, the interests of that member would devolve upon the other members of the tarawad.” “Household was characterized by a fluid structure, and was not spatially locatable to a particular house alone. A large tarawad would have a number of branches. It was often possible for women to establish separate branches or households as they had access to their own separate revenues and properties.” By the late eighteenth century, the senior most male member of the tarawad was endowed with the title of karnavan(one who can be held responsible or accountable), and was made the managing head of such tarawads.

The institution of marriage under marumakkathayam was quite flexible and loose, and was thus heavily criticised, as the spouses were in no way bound to each other, they continued to reside in their respective households after marriage, and the husband had no responsibility to legally maintain his wife or children. “Plural unions were customary, as polyandry was not only accepted but was the norm, but relations were forbidden with members of the same lineage; even relations with men of any lower caste were not entertained. If a woman was found guilty her tarawad was


496 Scariah, Celinamma, Two images of Matriliny: The Khasi and the Nair, North-Eastern Hill University, (2000), http://hdl.handle.net/10603/60758, last seen on 16/04/2018.

497 Id.

excommunicated until the woman was expelled from the tarawad.”

“A Nair girl had to undergo two forms of marriages – talikettukalyanam and sambandham, while the former was a pre-puberty marriage, the latter was a union that she could make after attaining maturity with a man of her own caste or higher than her. For conducting the ceremony of talikettukalyanam, the Nairs of neighbouring and adjacent villages formed a group of lineages called enangan. Every few years each lineage held a grand ceremony during which immature girls of one generation was ritually married by men drawn from their enangan lineages, and lasted four days. This ceremony assumed significance as it marked various changes in the social position of a Nair girl; she was given the status of a women.”

The ceremony of sambandham is extremely straightforward and uncomplicated, the bridegroom presents a pudava (cloth) to the woman as a gift, in the presence of the senior most lady of the tarawad. Such marriages are based on mutual consent and are thus easily dissoluble at will.

ALIYASANTANA SYSTEM OF INHERITANCE FOLLOWED BY THE BUNTS OF KARNATAK

Aliyasanta was a system of matrilineal inheritance practiced in the erstwhile South Canara region of Karnataka among the Bunts, Billavas, and some other non-Brahman communities in the country. “The Bunts are the customary inhabitants of the coastal districts of Karnataka, and are divided into matrilineal septs called Bali. Members of the same Bali did not intermarray, as marriage between the same gotrawas prohibited.” Akin to the marumakkathayam system of inheritance, the matrilineal system of succession, governing the Bunts, of aliyasantana is also inherently favourable towards acquisition and accumulation of assets by women. “The eldest member of the family was called the yajaman, the eldest female was the yajamanthi. The senior-most resident, whether male or female, was entitled to deal with issues related to therunning of the household. Children formed a part of their mother’s family, and maternal uncles were given precedence over paternal uncles in such communities.”

On marriage, the bride-groom leaves his parental home and moves into his wife’s parental home and becomes a member of that household. Till the time he is married, a man is irresponsible for managing his family property; upon marriage, he also becomes responsible for the maintenance of property held by the household of his wife (as he becomes a member of this household) and simultaneously assists in supervising and overseeing his mother’s/sisters’ properties.

“Male children do not have the right to inherit ancestral property from their parents

500 Id.
under *aliyasantana*, as all such property is inherited by the females. As per the custom, all ancestral property is owned by women and registered independently in their name. While the custom specifies that these households should live as joint/undivided families, women can choose to partition her property among her daughters and bequeath them with pieces of land on which they can build their own homes and live independently. On the death of a woman, her property will not go to her husband, but will directly go to her daughters. Such a system of matrilineal inheritance does not restrict or bar men belonging to these communities from owning/selling property at all. They are entitled to earn their own incomes and build up their own assets. This becomes their self-acquired property and it is up to them to decide whom they want to bequeath it to. Women acquiring property for themselves under *aliyasantana* is slightly unusual as their custom traditionally protects and guarantees them full rights to their ancestral property, and when they do, majority of them bequeath it to their daughters, thereby making it ancestral for subsequent generations, and ensuring that these properties devolve down the female parentage.\(^{503}\)

**MATRILINEAL INHERITANCE FOLLOWED IN THE MEGHALAYAN REGION**

Meghalaya is recognized to be the only society in India where women are known to play a more important role in the social system than men. The major tribes – *Khasi* and *Garo*, follow the matrilineal system. Women have a dominant role to play in the matrilineal society of Meghalaya. “Amongst the Khasis, descendants of a grandmother along with the *khadduh* (youngest daughter) and the ancestral house usually constitute *ling* (family). *Khadduh* is eligible to inherit the ancestral property, if she dies without a daughter surviving her, her next older sister inherits the ancestral property, and after her, the youngest daughter of that sister. Failing all daughters and the female issues, the property goes back to the mother’s sister, mother’s sister’s daughter and so on. The *khii* (eldest living brother) exercises authority in all matters. Family and clan organizations centre round the mother in which capacity she acts as the custodian of the ancestral property. The youngest daughter is not the sole heiress, but she is a mere custodian of ancestral property. Ancestral property cannot be divided, mortgaged or sold without the unanimous decision and consent of all the members of the clan or family.”\(^{504}\)

A Garo family is headed by the mother of the house but the father is responsible for providing sustenance. The daughter of the family carries the clan name throughout her life, whereas the son takes up his wife’s clan name after marriage. In Garos, one of the daughters, not necessarily the youngest, is selected as heiress to inherit the parental property. If there is no female inheritor


within the immediate family, the property passes to the daughter of the mother’s sister. Sons cannot inherit any portion of ancestral property. “The heiress is called nokna and her husband is called nokrom. Marriage is strictly exogamous among the Garos and husband and wife must belong to different septs and motherhoods. The marital customs and rituals of the Garos are based on matrilineal principles in which descent is always traced from the mother’s side. In Garo society, marriage establishes a perpetuating relation and a customary contract between the respective ma 'chongs(families) of the principal male and female of a household.”

COMPARATIVE ANALYSIS OF THE MATRILINEAL PRACTICES OF THESE COMMUNITIES

The common thread that binds the Nairs and Bunts from South India with the Meghalayan communities of Khasis and Garos is that they are all matrilineal communities in essence. However, the practices and customs followed amongst these three communities are fraught with differences.

The essential differentiation between the matrilineal practices of marumakkathayam and aliyasantana of the South is that the senior most member whether the yajaman or yajamanthi is entitled to carry on the family management in the latter, while the karnavan has the right and power to carry on the family management in the former. Likewise, self-acquired property of a female member in marumakkattayam descended to her own issues and in the absence of her issues, it devolved to her mother and her descendants. In case of males, if the property had not been disposed of during his lifetime, it would lapse to the tarawad. In aliyasantana, there is no distinction as to the devolution of property of a male or female member.506

The customs and rituals of the Garos and Khasis also differ from each other. While the principle of ultimo geniture is followed among them, (the Nairs do not follow such a principle) selection of the youngest daughter as heiress is not compulsory among the Garos, unlike in the Khasi society. “Garo practice matrilineal inheritance, matrilocal post-marital residence, a preference for cross-cousin marriage, acceptance of pre-marital sex by women, but adultery by women is punished, while the Khasi practised matrilineal inheritance, matrilocal and duolocal post-marital residence (in which the husband lives in a separate house while the wife stays at her parents’ residence), an aversion to cross-cousin marriage, and again, acceptance of pre-marital sex by women, but adultery by women is punished.” 507 Polyandry was peculiar to the Nairs. Comparably, the matrilineal Nairs from the Malabar region presented the highest degree of descent group solidarity. Among the Khasis, the property group is formed by a descent group at a shallow level, while among the Garos it

505 Shri Anjanijoti Borah, Changing Status of Matrilineal Garo Society: a case study of the Resubelpara Development Block under East Garo hills district of Meghalaya, GU 31, 82-90 (2010).


is maintained by the cooperation of two local lines.

General dissimilarities among these communities also include fission of the Khasi ling, unlike the Nair tarawads that continue to remain joint. The tarawad also did not allow the husbands of the daughters to live with them, in contrast with the Khasi and Garo. Similarly, the central position acquired by the mother in a household among the Khasi was more pronounced than in Kerala and the u Kni, the mother's brother who receives a position of authority, was rarely accused of overbearing authoritarianism unlike the karnavan. Nair matriliney is an off-shoot of the rigid caste hierarchy in Kerala, the Khasi matrilineal pattern, on the other hand, is casteless and classless.508

Due to various socio-political and economic reasons and in the face of the powerful currents of social change from the colonial rule, the matrilineal system crumbled in Kerala paving way to the formation of a patriarchal society. For the Khasi society, matriliney has been the norm since time immemorial, and even today it has been able to retain its structure despite encountering technological advancements and in the face of modernity.

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508Scariah, Celinamma, Two images of Matriliney: The Khasi and the Nair, North-Eastern Hill University, (2000), http://hdl.handle.net/10603/60758, last seen on 16/04/2018.
MENS REA ABSENTEEISM IN THE
DEFENSE OF INSANITY: A MEDICO-LEGAL ANALYSIS

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ABSTRACT
Scientific theories of the brain endanger our assumption of intent and consequentially threaten our customary practices. With the advent of modern criminal law in the country the approach for a modernized ideology has evolved, criminology is not stagnant anymore, its evolving as the human brain expands. This article dives into the depths of insanity as a defense to a crime. The authors have tried to effectuate the medical and legal aspects of insanity as a defense and the absence of mens rea in the same. The reader shall feel the implication of mens rea absenteeism in the defense of insanity. The paper primarily focuses on varied concepts of legal and medical insanity, meaning of which has evolved with time and authority. The paper takes into account the interpretation of the provisions under the Indian Penal Code, with respect to defense available to an insane accused and the implications on the same through the McNaughton’s case. The paper has been introduced through chapterization of the idea into Four aspects dealing in essentials of mens rea in criminal responsibility, insanity as a defence, relationship between mens rea and insanity and finally the hypothesis as what needs to be done to clarify this fault in the legal system, of similarity between legal and medical insanity, and their implications on incarceration of an accused.

KEY WORDS: Criminology, Insanity as a Defence, Mens Rea, Legal Insanity, Medical Insanity, Indian Penal Code, McNaughton’s case, Criminal Responsibility

INTRODUCTION
Unsoundness of mind is an absolute defence to a criminal charge. It assumes that an insane person has no mind and thus cannot have the mandatory mens rea to be held guilty of a crime.509 A mad man cannot control his will and regulate his conduct, thus is placed in an even worse condition than a child. Moreover, no court can correct the act of an insane man, being unintentional and involuntary, by way of punishment.510 At the same time, in order to protect the people from being attacked by maniacs a provision under the code of Criminal Procedure 1973 has been made for the detention and care of persons of unsound mind.511 According to medical science, unsoundness of mind or insanity is a disease of the mind, which impairs the mental faculty of man. In law, insanity implies a malady of mind which debilitates the intellectual personnel, in particular, the thinking limit of a man to such a degree as to render him unequipped for understanding the nature and outcomes of his acts. It avoided from its domain, the madness caused because of enthusiastic and volitional components. It is just craziness of

a specific kind, which is viewed as madness at law that will pardon a man from criminal obligation. The lawful idea of craziness generally varies from that of restorative idea. A number of tests were laid down from time to time for the purpose. The definition of kind and degree of insanity available as a defence to a crime has been propounded many times. However the most appreciated of all is the right and wrong test proposed through the McNaughton’s case. The principle presumed every man to be sane and to possess sufficient degree of reason to be held responsible for his criminal wrongdoings, until the contrary is proved; and to maintain a defence with insanity as the ground, it must be proved beyond doubt that, when the act was committed, the accused was harbouring such a defect of reason, from malady of the mind, as not to know the nature and the quality of the act he was doing, or of he did know it, that he did not know he was doing what was wrong.\(^{512}\)

**CHAPTER I**

**MENS REA IN CRIMINAL RESPONSIBILITY**

Section 84 of the IPC has been drafted in this regard. However, section 84 uses a more sophisticated term “unsoundness of mind” instead of “insanity” as stated by Huda: \(^{513}\)

The use of the term 'unsoundness of mind' has the benefit of getting rid of the need of characterizing craziness and of falsely bringing inside its degree different conditions and affections of the mind which conventionally don’t come within its meaning, yet which in any case remain on a similar balance with respect to exclusion from criminal liability.

Section 84 of the Indian Penal Code, 1860 (IPC) embodies two different mental conditions to claim exceptions from criminal liability namely:

1. The accused was incapable of knowing the nature of the act, owing to unsoundness of mind.
2. The accused was precluded by reason of unsoundness of mind from understanding that what he was doing was either wrong or contrary to law.

The first case embodies two situations, namely involuntary actions and mistake of fact on account of unsoundness of mind. For instance, if a mad man cuts off the head of a person, whom he found sleeping on the road, because he thinks it would be fun to watch him looking about his head when he wakes up, the act shows that he did not know the nature and quality of his act.

Further in the case of R v Holmes\(^{514}\) doctor’s opinion of insanity was upheld. The appellant committed a homicidal attack on his landlady. He then went to a police station, said that he was giving himself up for murder, and gave a fully detailed account of what he has done. He was charged upon indictment of murder. The only defence was the plea of insanity. A doctor, called to give evidence on behalf of appellant was asked in cross examination whether in his opinion the

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\(^{512}\) R v McNaughton 8 E.R. 718 (1843).

\(^{514}\) R v Holmes, (1953) 1 WLR 686.
appellant’s conduct immediately after the murder would indicate;

1. That he knew the nature of the act he was committing.
2. That the appellant knew that his conduct was contrary to the law of the land.

The doctor answered both questions in affirmative. The appellant was convicted of murder. The principle ground of appeal against his conviction was that the judge was wrong in allowing the questions put to the doctor and his answers to be admitted in evidence. It was held by the court that the questions were admissible and the appeal was dismissed.

Eric Michael Clark v. Arizona was a landmark case which laid down the principle that irresistible impulse per se is no defence to charge of a crime. In this particular case the respondent shot the station manager on the head and was thus charged with the crime of murder. Insanity as a ground of acquittal was pleaded by the accused. The medical evidence showed that he has schizoid (mental disease) personality and that at the moment of shooting, even though he knew the nature and quality of the act, did not know that the act which he was doing was wrong. Consequentially, respondent was found guilty and was sentenced to death, and his first appeal was dismissed, he appealed to the High Court of Australia, who quashed the conviction and ordered a new trial. Lord Tucker in this case said that:

“The words true operation of uncontrollable impulse as a symptom of insanity of a required kind and degree in the above passage in the High Court’s judgment implied erroneously that the law knew and recognized uncontrollable impulse as a symptom of legal insanity within the meaning of the McNaughton Rules, and that it was the judge’s duty to instruct the jury as a matter of law.

Reduced liability is a defence to a charge of murder. It diminishes the criminal liability for murder to manslaughter.

MENTAL ELEMENT IN CRIMINAL RESPONSIBILITY

Criminal responsibility as a concept is plain. Criminal wrongdoings are characterized by their "components," that dependably incorporate a precluded demonstration and as a rule, psychological express, a mensrea, for example, intent. According to the Due Process clause the prosecution must prove that all the elements defining a criminal offense beyond a reasonable doubt. Justice Jackson in Morissette v. United States established:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory”.

Mens rea is a completely different aspect than the concept of legal insanity. It shall be understood that people with mens rea are not

machines rather are individuals who act for some reason. They can be influenced by immoral and malicious beliefs and ideologies, but most of the times they do not have the requisite knowledge and the intention of what act they are doing. Therefore, it is difficult for mental disorder to negate mensrea.

CHAPTER II

INSANITY IN CRIMINAL RESPONSIBILITY

Section 84 of the Indian Penal Code states that “Nothing is an offence which is done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing, what is either wrong or contrary to law.”

The relevant maxim in this regard is “Actus non facitrem nisi mens sit rea”. The Indian rule of rationale is based on the McNaughton rules. The basic principle of Section 84 as well as McNaughton rules is that “every man is presumed to be sane.”

However, it is not applicable to a man if he is being tried under section 84. This particular exemption is based on the principle that for a crime to have been done, a guilty intention must be present, the doer not knowing the nature of the act or wrongfulness of the act or the illegality.

“Furiosus fureo suo punier” - A mad man is best punished by his own madness. This is one of the reasons jurists have given for exemption of insane people from criminal responsibility. Further, the jurists also state that considering the lack of understanding of an insane person, he is said to break the mere language of law and not the law itself. However, the major reason is that the acts of the mad man are involuntary and unintentional. It is idle to talk of his possessing mens rea as he has no control whatsoever on his mind. In this regard, for protection against his acts, the Criminal Procedure Code provides for his act is detention which is not a punishment.

The Indian Penal Code, section 84 is entirely based on the deficiency of will due to no sense of intellect- “furiosus nullavoluntest.” In this regard, the legal interpretation of insanity is poles apart from the medical interpretation in certain ways. Not every form of insanity is acknowledged and considered by the law as a valid defence. The Daniel McNaughton’s case, the judges stated that “Every man is to be presumed sane and with a sufficient degree of reason to be held responsible for crimes until the contrary is proved to the judges’ satisfaction and moreover, to constitute a valid defence of insanity, it is essential to be established that at the time of commission of the act, the accused lacked the capability to reason due to disease in a way to not know the nature of the act he was doing or he did not know he was doing what was wrong.

Earlier it was believed it was on the accused to prove his insanity during commission of the act in order to not be liable to the punishment as a sane person. However lately, in Woolmington v. Director of Public Prosecutions, 1935 now the accused only

520 8 E.R. 718 (1843).
521 A.c. 462 at p. 481 (1935).
needs adduce evidence that raises a reasonable doubt in the minds of the jury.

In Chankau v. Queen the committee stated that in instances where evidence is a possible self-defence, the onus is throughout on prosecution to prove that the accused is guilty of murder and onus never shifts to prove his defence. This is also enlisted in India in Section 105 of the Evidence Act. In accordance with Section 105(a) of Indian Evidence Act, the onus to prove Section 84 rests on the accused. The burden of proof with relation to the presence of circumstances bringing the case under section 84 of the IPC is on the accused as well. Further, section 101 of the IPC states that “the court shall presume the absence of such circumstances.” A very essential element to prove section 84 is that the insane is so impaired that he was not aware of the nature of the act done or that his action is in contradiction with law.

In Ashiruddin Ahmed v. The King Three elements were listed down by the court to establish insanity:

1. That he did not know the nature of the act charged
2. That he did not know that it was contrary to law
3. That he did not know that it was wrong

These three elements must be proved to be present when the act is committed.

FORMS OF INSANITY THAT ARE NOT EXEMPTED

Section 84 distinguishes legal test of responsibility from medical test. The absence of will arises not because of absence of maturity but also the state of the mind. This state of the mind which leads to an exemption from criminal responsibility has two different forms- medical and legal form.

Medical science says that insanity is a synonym for abnormal state of mind. An involuntary impulse forcing a man to hurt or murder is within the ambit of such abnormality. The legal conception takes a separate path from here. Legal insanity does not embrace every form of insanity. The court is always concerned with the legal aspects of insanity. In cases where a history of insanity is established, the accused must be subjected to proper medical examination and the report of such examination must be produced in the court. In the absence of this, the benefit of doubt should be given to the accused. The exact time, in order to make a decision, whether the defence can be taken or not, is the time when the offence takes place. There is danger in believing the defence of insanity based on the arguments that are derived from the character of crime. Only unsoundness can impair the cognitive faculties, which in turn can be a valid exemption. The incapacity to realise the nature of the act is the only thing recognized by the Indian law and in cases where a man’s faculties are clear, it is presumed that he was in a position to understand the consequences of his actions.

Thus, the mere absence of motive for crime cannot in the absence of proof of legal insanity, establishes a valid defence. And therefore, every person who has a
certain disease cannot be exempted from liability.  

i. The fact that an accused is conceited, odd and his brain is not alright.  

ii. The physical and mental diseases has made his intellect weak.  

iii. He gets recurring fits.  

iv. He was subject to epileptic fits but no abnormality.  

v. He committed certain weird acts  

vi. He quarrelled with his wife  

vii. The behaviour was queer.

Have been held to not be sufficient to come under section 84 of the Indian Penal Code.

SUGGESTIONS WITH RELATION TO MEDICO LEGAL ANALYSIS OF INSANITY

Although it is deemed that every person related to the field of medical sciences has knowledge about unsoundness of mind, the examination of insanity is only assigned to a specialist. However, if medical opinion states that there is a mental disease, then the accused need not be held responsible. There are certain opinions in this regard:

Professor L. Vernon Bergs states that at first the law should state that no man shall be tried who is suffering from an incurable mental disease or a chronic mental disease, or that no man shall be tried who at the time of the commission of a crime was suffering from mental disease. We have somehow got to do away with the question of responsibility, which is the root of all evil in medical testimony. It cannot be determined by physicians in hospitals for mental diseases, for if these patients are responsible, they should be taken out and tried and punished, which is never done because it is universally recognized that a patient suffering from mental disease in a hospital is not responsible for his acts. Therefore, why should a person suffering from mental disease outside of a hospital be any more responsible for his acts? If medical opinion is that a man who has broken the law or who has committed an overt act is suffering from mental disease, whether serious or not, that person should be committed to a hospital for mental diseases, and should not be tried, convicted and sentenced to prison or executed.

He has further gives an instance that – A person with dementia praecox, may have normal intelligence but abnormal emotional or affective characteristics which are registered in conduct. The person of normal affectivity does the right thing more because it is natural for him to do so than because he fears punishment. The type of dementia praecox with keen intelligence produces burglars, automobile thieves, pickpockets, counterfeiters. The unfortunate individual who is both mentally and morally defective is almost certain to break down under the stresses imposed by modern competitive living. The dementia praecox type with defective emotions often gets a reputation for bravery. They get tried with no concerns. Every attempt at correction, which in the

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528Ram Adhin v. Emperor Cr. LJ. 163(1932).
530In re RajuShethy AIR Mys. 48(1960).
531In re KandeshwamiMudali AIR mad 316(1960).
normal course is effective in inducing good behaviour as a habit, with them, is only another step downward. It does little good to hang them. The public undoubtedly expects hanging and they have little compunction about hanging one who has brutally taken a life, but we do not control this situation by hangings. The sense of security the public thus feels is wholly unwarranted. The present right and wrong test is of no practical value. It gets us nowhere in our fight for society's right to be saved. The difference between right and wrong, as obvious to the normal person as the difference between black and white, is entirely an acquired sense in the case of the mental defective-the person born without a conscience. Not much longer can we hang these degenerates and feel that we have done all that is necessary. It is possible now to identify them after the commission of a minor offense. The law will have to deal with them eventually, and the only effective way is to isolate them before they have had an opportunity to kill.

And therefore lists out how morally incorrect and ineffective trying a person with medical insanity is. It is important to notice here that the present of a criminal intention has no relevance since it will rarely be there with regard to medical insanity and scholars have further suggested broadening the definition of unsoundness of mind.\textsuperscript{533}

CHAPTER III
RELATIONSHIP BETWEEN INSANITY AND MENS REA

It is to be believed that in the general run of things, an act that is criminal in nature but lacks a criminal intent on the part of the defendant shall not constitute a crime. However, for liability to arise under criminal law the accused shall have a criminal mind. Basically, the fundamental elements of criminal sanctions are derived from the presence or absence of a given state of mind. The question arises that if mental illness or insanity affects the state of mind in a particular situation, is it necessary to have a special rule for insanity? One may perceive that this is a result of historical developments, because of the recognition that an insane person should not be held responsible for their acts, when no such distinct mental element was taken into picture. Mens rea is described as that mental state, that includes the mental activity in performing the physical act, which results in a criminal liability for the given act.

Such a connection between mental disorder of the accused and the necessary mental element to constitute a crime has been recognized in the ‘Diminished Responsibility or Subjective Liability’ doctrine in the recent years. Psychiatric evidence as to the capability of the defendant to have the required mental state is used to negate the required mens rea, instead of proving insanity. Thus, no specific rule for insanity would be necessary. Thus, an understanding of the relationship between mens rea and insanity is essential to any evaluation of bifurcation as a procedure for handling insanity pleas. Under the doctrine of subjective liability, the offender’s mental health becomes relevant with elements to keep in mind like premedication, malice or specific intent. For example, if a person is charged with assault

\textsuperscript{533}Id. At 36.
with an intent to rape or kill will be convicted only for assault, if he/she can show his/her incapacity to formulate the specific intent. However, it is often feared that the doctrine, when taken to its conclusion, might lead to a complete acquittal of the mentally defected defendants.

COEXISTENCE OF MENSREA AND INSANITY

The notion that mens rea and insanity cannot coexist comes from the belief that mens rea always includes the element of moral culpability. The term possesses moral aspects, i.e. the most frequently used term “guilty mind”. One must not forget the legal maxim, “Actus non facit reum, nisi mens sit rea” which in Blackstone’s translation means that an unwarrantable act without a vicious will is no crime at all. The blameworthiness in criminal law solely depends on the “guilty mind” or the “vicious will” to device liability. Although, the insanity tests are thought to define a group of individuals who are so different from their fellows as not to merit criminal sanctions. If those who possess mens rea are to be convicted and those who are inane are not, then the conclusion that mens rea and insanity cannot coexist becomes unavoidable.

IRRESISTIBLE IMPULSE

One of the most necessary element for a criminal liability is the presence of “free will” and where it is absent, as in the case of compulsion, there is no crime. “The compulsion arising from a diseased state of mind affecting the “emotions” and “will” of offender is known as irresistible impulse or uncontrollable impulse and is treated as a part of the law of insanity. Sometimes the impulse to kill is sudden, instantaneous, unreflecting and uncontrollable. The act of homicide is perpetrated without interest, without motive and often on person who are most fondly loved by the perpetrator. This has been called impulsive insanity.”

There have been instances where the impulses to cause criminal harm were felt and resisted. The point of discussion arises that whether such impulses can be raised in the administration of criminal justice and if the impulse was irresistible or unrevised. In a situation where a man were so irritated by a baby’s cry that it induces the desire to kill, his act would be murder: It would not be less than murder if the same irritation and desire was produced by some internal disease. Eminent legal authorities and medical writers believe that even though a person may know the nature of his/her act to be morally wrongful or contrary to law, yet he/she may find themselves unable to restrain themselves from doing the act as they have lost the power to chose between right and wrong.535 Their freedom of will is destroyed completely by the mental disease. Such a person cannot be held liable.

In England, the law of insanity is guided by the McNaughton Rules thereby making no allowance for the defence of irresistible impulse. One of the reasons given by the judges was that generally where there is sufficient intelligence to distinguish between right and wrong, the mere existence of an irresistible impulse would not excuse

534 Overholsen v. Lynch288 F2D 388 [1961].

535 Gluek, Sheldon, “Ethics psychology and criminal responsibility of insane” Cr. L.J. 208.
liability.

In India, the penal code came into existence more than a century ago. It is observed that the Section 84 of Indian Penal Code was followed into the footsteps of the celebrated M’Naghten Rules. The section, however, deals only with the type of insanity which impairs conscious faculties leaving emotions and will unaffected. Hence, in India the doctrine of Irresistible Impulse finds itself inapplicable and not in favour under the Indian law.

The courts in India have rejected this defence in cases of Queen Empress v. Lakshman Dagrus, Queen Empress v. Kadar Naryer Shah. In this case, accused neglected his house and field work and complained of frequent headaches and spoke to no one when the pain was severe. Ever since his house and property were destroyed by fire, he normally played and went about with children much more than in normal for man of his age. He was very fond of one boy in particular. Unaccountably he one day killed this boy. There was no motive for his action. However, there was proof that he observed some secrecy after committing the murder. The court held that the behaviour of the accused did not prove that he was by reason of unsoundness of mind incapable of knowing the nature of the act and thus found him guilty but recommended to the government for indulgent consideration as, in its view, the accused was suffering from some kind of mental derangement.

The mere fact that the murder was committed by the accused due to a sudden mental affliction would give rise to a plea of insanity under Section 84 of IPC.

MYTH OF ACQUITTLAL IN CASE OF CRIME BY INSANITY

An accused does not go free by the reason that he or she has been proved not guilty of an offence by virtue of the defence of insanity. Ordinarily, states have necessities for treatment or systematization after such a finding. A few states require such containment for the time span the individual would have gotten whenever indicted as a minimum, so the person may wind up investing more energy bound than if the person did not raise such a resistance. Like different aspects of the law, this differs from state to state. The insanity defence is an important aspect at the nexus of law and psychiatry.

MEDICO-LEGAL ASPECT

The absence of will arises not only from the absence of maturity of understanding but also from the state of mind, whether temporary or permanent. This morbid condition of mind, which renders an exemption from criminal responsibility, differs in the medical and legal perspective. According to medical point of view, it is more or less correct to say that every man at the time of committing the act is insane and hence needs an exemption from criminal responsibility. While according to the legal point of view, a man must be held to be sane as long as he is able to distinguish between wrong and right, a test which has been established in McNaughton’s case and incorporated in section 84 IPC. Not every mental affliction would give rise to a

536 Queen-Empress v Kader Nasyer Shah ILR 23 Cal 604(1896).

criminal obligation. All criminals are to some extent considerably mentally abnormal.

A clear distinction between medical and legal insanity exists, but the court’s concern is only limited to the legal aspects of it. An accused person may be suffering from some form of insanity in the sense in which the term is used by a medical man, but may not be suffering from unsoundness of mind as contemplated under section 84. Legal insanity cannot exist without cognitive faculty of the mind to an extent that it renders the offender incapable of knowing the nature of the act or that what the offender is committing is contrary to law. Every person who is therefore mentally unstable is not considered ipso facto exempted from criminal responsibility. The test of insanity as viewed from the legal point does not coincide with the medical idea, in many cases a man who is insane in the opinion of the medical expert cannot ‘claim the benefit of section 84 of IPC’. A court of law commonly looks for some clear and distinct proof of mental delusion or intellectual aberration existing previously to or at the time of, the perpetration of the crime, a medical man recognizes that there may be delusion, spring up in the mind suddenly and not revealed by the previous conduct or conversation of the accused. To determine medical insanity, motive for an act is primary importance while motive is not conclusive to ascertain legal insanity. The law presumes every person of the age of discretion to be sane unless the contrary is proved.


BURDEN OF PROOF
When an accused raises the plea of insanity, it is not the prosecution’s obligation to establish with certainty that the defendant was of the mental state to know the nature of the offense or of the knowledge that what he was doing was contrary to law. It is generally assumed that every person knows the consequences of his act. The prosecution in exercising its burden in the plea of insanity, has to prove a basic fact to rely upon the normal abovementioned presumptions. The accused is then called upon to rebut these presumptions and the inference in such manner as it would go with the plea. Therefore, the burden of proving that the particular case falls within the ambit of section 84 lies with the accused. However, the accused need not prove insanity beyond reasonable doubt. The Supreme Court has certain guidelines to adhere to:

The proof of insanity should be beyond reasonable doubt and it is the prosecution’s duty to prove it from the beginning. The defendant may negate it by bringing it to the judge’s notice by the presentation of evidence- oral, documentary or circumstantial.

If the accused is unable to establish his/her insanity at the time of the commission before the court, general burden of proof maintained by the evidence provided by the accused would be given consideration.

The standards to be applied, for ascertaining whether the accused was of unsound mind or not, according to the ordinary standards

adopted by a reasonable man, was able to judge if his act was right or wrong.

However, it must be kept in mind that the courts in India have been very pertinent and cautious in accepting the plea of insanity.

CHAPTER IV
DELUSIONAL INSANITY

Scientific theories of the brain endanger our assumption of intent and consequentially threaten our customary practices.

In Phillip v. Ruler case the litigants entered a Roman Catholic Church and executed a pious devotee and a minister. After the occurrence the respondents asserted that they did as such because of their convictions and hearing voices. Master proof proposed that despite the fact that their convictions are antagonistic towards the Roman Catholic, the litigants were capricious.

The inquiry on bid was that how the madness arrangements ought to be translated. The craziness barrier had two angles. The first was the standard McNaughton rule. However, the second pardoned the litigant:

“If he did the act under the influence of a delusion of such nature as to render him, in the opinion of the jury or of the court, an unfit subject for punishment of any kind in respect of such act.”

So, the issue was whether the second angle was a free test or whether the delusional state needed to fulfill the structure of McNaughton, on the grounds that for this situation the respondent unmistakably realized that what they were doing was unlawful. Their demonstration can't be supported regardless of whether the social conditions that roused them were valid.

The privy gathering chose that the silly perspective was a free test that was intended to expand the craziness resistance past McNaughton's limits.

Anyway, we have to comprehend that toward the end we should have sensibly drafted meanings of mensrea and madness which is made in meeting with prominent members of the jury. The definition ought to be adequate to make frameworks of duty in the meantime it should likewise perceive rare special cases.

Throughout the years in numerous decisions we have seen that the dialect of madness guard does not have any kind of effect to the result of craziness cases. The most essential factor that influences the judgment is the seriousness of the wrongdoer's issue.

CONCLUSION

“The possibility of commitment interfaces with our most essential emotions about human sense and pride and normal experience of fault and chastity and blame and order. Rebuffing an individual, who isn't in charge of the wrongdoing, is an infringement of the essential human rights and crucial rights under the Constitution of India. It likewise brings the fair treatment of law, if that individual isn't in a situation to guard him in the official courtroom, inspiring the rule of normal equity. The positive guard of legitimate madness applies to this crucial guideline by pardoning those rationally cluttered wrongdoers whose scatter denied them of objective comprehension of their direct at the season of the wrongdoing. Subsequently, it is by
and large conceded that insufficiency to carry out wrongdoings exempts the person from discipline. This is perceived by the enactment of the vast majority of the humanized countries. Indeed, even in India, Section 84 of Indian Penal Code (IPC) manages the "demonstration of an individual of unsound personality" and talks about madness safeguard. The current issue has raised justification for a genuine discussion among therapeutic, brain research and law experts over the globe."

Considering the idea of the evaluation and law presumes everybody is normal except if the opposite is demonstrated, it is reasonable to begin appraisal a similar way. The legitimate dialect is plainly all out in nature, either criminally capable or not capable. While a therapist is worried about restorative treatment of individual patients, courts are worried about the insurance of the general public from the conceivable peril from these patients. Mens Rea alludes to the circumstance in which the arraignment can demonstrate all the definitional components past a sensible uncertainty and the litigant neglects to build up a certifiable resistance. Under these conditions, the litigant is at last reprehensible or criminally dependable. The defendant can avoid Mens rea in this broader sense, defeating any criminal blameworthiness, either by negating any element of the crime charged or by establishing an affirmative defence, although the burden of proof lies on the accused.
IN THEORY AND PRACTISE: INDUSTRIAL DISPUTE RESOLUTION MECHANISM IN INDIA

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ABSTRACT
The problem of industrial disputes is very common and can be seen in almost every developed and developing countries of the world. Phase of Industrialisation has tended to create a hiatus between the management and workers, owing to the absence of workers ownership over means of production this gap has led to industrial friction and conflicts, which ultimately cause industrial disputes. Conflict resolution is very crucial part of any welfare state for well functioning labour market and industrial relations system. This paper highlights the legal and practical aspects of industrial disputes resolution mechanisms working in India.

Keywords- Industrial Relations, Industrial Disputes, Labour Law, ILO, ID Act, Industrial Tribunal, Disputes Resolution, Industrial tribunal, Collective Bargaining, Conciliation, Labour Court.

I. INTRODUCTION

The Industrial Disputes Act, 1947 (ID Act) is a revised version of the Trade Disputes Acts aimed at providing machinery for investigation and settlement of industrial disputes. During the first few years of the enactment, the employers had a reasonable degree of freedom to manage their affairs in their best suited manner for their organisation. Over the decades, Parliament has assumed the role of crusader of working class for no convincing reason which is evident from the staggering number and poor quality of amendments carried out in ID Act which ultimately distinguished the employer’s right to manage their personnel. Dual government both at centre and state level went about modifying, inserting and repealing various provisions with no sense which resulted in instability and confusion. With the advent of mechanical inventions came the industrial fiction and unrest. Therefore, the modern industrialisation has been blessings as well as inherent evils to society. The immediate victims of these evils are the workers employed in the industries. Their efforts to eradicate such evils lead to serious disputes and conflicts with the employers. The outbreak of such disputes and conflicts is sometimes accompanied by a stoppage in the working of some parts of economic machinery.

After World War I brought a new dimension among the working class. The prevailing economic misery was expanded and aggregated which led to emergence of feeling of class consciousness amongst the working class. Workers carried on strikes and employers retaliated by declaring lock outs. Which resulted in violence in industrial peace. Therefore, a need was felt to enact legislations and statutes that could curb the increasing difference between the employer class and the working class.

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After independence there was need that labour policy must emphasise upon self reliance on the part of workers. From independence till 1954, almost a decade till Shri V. V. Giri was the Labour Minister, all official enactment focused on self reliance of labour. An equally important and forceful approach had been preferred to put reliance upon the Government, thus, establishing the concept of ‘Tripartism’. The system was introduced which paid reliance on three party approach, namely, the trade union representing the workmen, the employers, and the Government. Later the Five-Year Plans have also placed particular emphasis on the measures for the welfare of the workers and on the industrialisation of India. The Government has accepted the establishment of a welfare state, with economic policies based on the socialist pattern of society.

This paper deals with the industrial dispute resolution mechanisms which are functioning in India. To clearly understand the topic, we have explained various chapters such as what is industrial dispute, how the mechanism has been introduced in India, what was the need, etc. Most importantly, this paper covers the critical analysis of these mechanisms with the help of various data and research. It also tries to highlight the lope hole in the functioning. We have also tried to provide some suggestions and conclusion which can be proved beneficiary for the proper adjudication.

The objective of this research paper is to critically analyse the present system of resolving mechanism and provide suggestive measures for bringing reform in industrial disputes. This examination was carried on utilizing doctrinal research. It included referring to books, case laws, various reports of commissions and committees, websites and articles. The methodology used for the project is analytical study approach with the critical analysis of the Industrial Disputes Act, 1947 and its mechanism. The project also ventures to seek the history of the emergence of trade laws in general and present a brief view on the changing notions about Industrial law.

II. LEGISLATIVE HISTORY

The importance of state in regulating trade and labour conditions are different in different society. State intervention in industrial matters has a long history in India. At the initials when British rule was prevalent, the rulers were mainly concerned with protecting the interest of employers because they were mostly Englishmen. The state policy was based of Laissez Faire police with selective intervention. However with passage of time and the growth of trade unionism in the United Kingdom, the pressure from the labour party and public opinion had influenced the government’s attitude towards the working class and their problems.

The new era began with the establishment of International Labour Organisation (ILO) in 1919, and the increasing labour problems due to unchanged wages in the face of rising prices had their influence on labour policy of many countries. The formation of All India Trade Union Congress in 1920 had a great effect on the industrial relations policy of the government which led to increasing
State intervention in the matter of industrial and labour disputes.

The Trade Disputes Act, 1920, The Factories (Amendment) Act, 1922, The Workmen’s Compensation Act, 1923, The Trade Unions Act, 1926 and the Payment of Wages Act, 1936 laid the foundation for the subsequent legislative development. The Trade Disputes Act, 1920 provided for Courts of Inquiry and Conciliation Boards and forbade strikes in public utility services without a months’ notice in writing. However, the Act did not provide any machinery for settlement of ‘Industrial Disputes’. Gradually it was repealed and replaced by Trade Dispute Act, 1929 which can be rightly stated as the commencement of ‘systematic’ state intervention in the settlement of industrial disputes. The act provided powers to government to intervene in industrial disputes.

The preamble of the Act was to provide conciliation machinery for peaceful settlement of Industrial disputes. It also provided a provision for ad hoc Conciliation Boards and Court of Inquiry. After the amendment of 1938, the act authorised the Central and Provincial Government to appoint Conciliation Officers for mediating and promoting the settlement of Industrial disputes. During the World War II, though the government made some rule under the stress of emergency but it proved an important step in development of Industrial law in country. Rule 81-A of Defence of India Rule gave powers to appropriate government to intervene in industrial disputes, appoint industrial tribunals and to enforce the awards on both sides.

Industrial Employment (Standing Orders) Act, 1946 made provision for framing and certifying of Standing Orders for service conditions. The Industrial Disputes Act, 1947\(^{541}\) was passed incorporating principles of Rule 81-A of Defence of India Rule and some provisions of Trade Disputes Act, 1929. Another development was appointment of Royal Commission of Labour in 1929 (also known as ‘Whitley Commission’) which made a comprehensive study regarding problems faced by labours in India.

Post Independence, the government appointed the National Commission on Labour in 1966 under the Chairmanship of Dr. P. B. Gajendragadkar, former Chief Justice of India with members of representatives of industry and labour. Many of its recommendations were implemented. As the Indian Constitution was introduced, the subject ‘labour’ was included in Concurrent List, which means that both centre and state can legislate regarding Industrial matters.

**III. INDUSTRIAL DISPUTES**

Industrial Disputes Act enacted in 1947 was “to make provision for the investigation and settlement of industrial disputes, and for certain other purposes.” \(^{542}\) It provides systematic institutes for prevention and settlement of disputes that arise in an industry. But we need to first understand how this act does define an industry and what is an industrial dispute? To understand

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this we turn towards the definition of these terms-

1- **Industry- Section 2(j)** of the Industrial Disputes Act of 1947 defined industry as “any business, trade, undertaking, manufacture, calling of employers, and includes any calling, service, employment, handicraft, industrial occupation or avocation of workmen.” The definition is very broad and has failed to capture all organisations that may or may not come within this category. However, through various judgements given by High courts and Supreme Court has modified the definition. The amendment of Industrial Disputes Act, 1982 has also amended the definition. It defines industry as any systematic activity carried on by cooperation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature.”

2- **Industrial Disputes- Section 2(k)** of the Industrial Disputes Act defines industrial dispute as “any dispute or difference between employer and employer, or between employers or workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person....” Normally workmen raise a claim which their employer refuses to honour. This claim comes under industrial disputes. A claim can also be raised by a works who have been fired or for some reasons have left the industry. There are cases where people get confused with collective disputes of workers against employers. But there are also cases where individual disputes are treated as industrial dispute as in Western Co. v Worker’s Union. According to this judgment, an individual disputes can be termed as industrial disputes if it is taken up by large number of workers or registered Trade unions.

### IV. VARIOUS MECHANISM OF INDUSTRIAL DISPUTES RESOLUTION IN INDIA

### IV.I Conciliation

Conciliation a form of mediation is an attempt to bring two conflicting parties to a dispute through a passive approach. The

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548 Traingular Motors Ltd. VS Bombay Automobile Employees’ Union, 2 FJR 179 (LAT).
conciliator attempts resolve the dispute between the parties by influencing them to re-evaluate the issue with a give and take strategy yet along with his or her own perspective.

The industrial dispute act provides conciliation as an alternative and can be utilized either by appointing a conciliation officer or via constitution of a board of conciliation. Time limits i.e. of 14 days for conciliation officer and 2 months in case of board of conciliation has been prescribed by the act in order to advance the proceedings. The settlement arrived upon through such proceedings is binding upon the parties for 6 months. It shall be binding upon the parties until annulled by the parties. During the pendency of the conciliation proceedings, before a Board and for seven days after the conclusion of such proceedings, the Act prohibits strike and lockout. The convention allows either party to submit a request in writing to the conciliation officer in his district, requesting the officer to start the process.550

The conciliation officers are ordinarily recruited to the state government services by way of public services examination. Section 4 of the Industrial Disputes Act, 1947551, provides for the appointment of such number of persons as is deemed fit by the appropriate government. A conciliation officer may be appointed for a specified area or for one or more specified industries. All conciliation officers are to deemed as public servants within the meaning of Section 21 of the Indian penal code. The conciliation officer relishes the power of a civil court and is expected to deliver the judgment within 14 days, which would be binding upon the parties to the dispute. The conciliation officer is empowered to inquire into the dispute and suggest possible solutions’ to bring the parties into an agreement.552 His responsibility is an effort of mediation, and in the case of the private sector, his solutions need not be accepted by the parties.553

A single judge of Orissa High Court in Kalinga Tubes Ltd v. Kalinga Tubes Mazdoor Sangh 554 has held that the conciliation officer can and should start conciliation proceedings as soon as he gets any information from any source about the existence or apprehension of an industrial dispute. There is nothing in the Act to show that the conciliation proceedings can be initiated by the conciliation officer only when he is formally moved by any of the parties. He has the jurisdiction to initiate conciliation proceedings as soon as he finds some material or information that an industrial dispute exists or is apprehended. Time limit of 14 days as prescribed by the act is rarely achieved as the strategy is to ascertain each parties’ bargain and their actual position and to suggest advisable approach in order to settle the dispute.

If conciliation efforts are deteriorated the conciliation officer may call a meeting at a

553 S. NAGARAJU, INDUSTRIAL RELATIONS SYSTEM IN INDIA 277-78 (1981).
554 1981 Lab. IC. 277 (280) (Orissa)

www.supremoamicus.org 245
later date or submit a failure report to the appropriate government. The appropriate government may make a decision to refer the dispute to a Labour court or National tribunal for adjudication. The conciliation officer is normally the additional labour commissioner, or the labour commissioner of the state.

The major advantage of conciliation is that the appropriate government has the authority to prohibit any strike during the pendency of conciliation proceedings. Employers tend to use conciliation mainly because strikes may be banned, and even if not banned, the strike that continues during the pendency of conciliation proceedings becomes an illegal strike. In an illegal strike, workers will not receive any payment; even if it is found that the strike would have otherwise been “justified” thereby permitting the workers to demand payment. However, if a settlement is reached in the course of conciliation proceedings, it is a binding settlement.

IV.II Arbitration

Arbitration is a process similar to conciliation, where just like conciliation matter is referred by the parties to a dispute to an impartial party in order to arrive at an acceptable settlement. This method is different from conciliation because the judgment is given by the third party in the former whereas parties themselves come to an agreement in the latter category.

Section 10(a) of Industrial Dispute Act provides that parties may refer a matter to arbitration at any time before the matter is referred for adjudication. The statute requires the parties to appoint an arbitrator through an agreement specifying the terms therein and the name of the arbitrator. Once the arbitration agreement is signed, the government has the power to terminate and prohibit any strikes and lockouts or the continuation of any strikes and lockouts in connection with the dispute. An arbitrator has the power to bind unions and workers who are not parties to the arbitration agreement if he is satisfied that the union represents the majority of the workers in the unit.

The arbitrators require both the parties to support their arguments in writing. After studying the case and arguments set forth by both the parties the arbitrator delivers his decision or a award. The said award is

557 Although the Act does not make any distinction between justified and unjustified strikes, subsequent cases have made such a distinction. Accordingly, a strike becomes “justified” when it occurs as a result of some illegal act by the employer, and the traditional methods of dispute settlement have proved ineffective. In such a justified strike, workers are paid for its duration. See generally 2 V. SUBRAMANIAN.
560 Generally, only one arbitrator is used. Occasionally, however, it becomes very difficult for both management and labor to agree on one neutral arbitrator. Consequently, they select two arbitrators who then select a third one to act as an “umpire.” The decision of the third arbitrator is final if the other two do not agree. Industrial Disputes (Central) Rules, 1957, reprinted in 2 V. SUBRAMANIAN.
561 Industrial Disputes Act (Act XIV of 1947) § 18, 22 INDIA A.I.R. MANUAL 590 (1979); see also P. MALIK.
required to be published in the official gazette in order to get a legal validity.  

While employers and employees may agree to resolve the dispute through an arbitrator who is a private individual, the parties cannot exercise the same freedom with conciliation. A private individual acting as a conciliation officer does not have the powers of the conciliation officer appointed by the government.

**Binding Value of an Arbitration Award**

According to Section 18 of the Industrial Disputes Act, 1947, the arbitration award becomes binding once it is enforceable on those parties who refer the disputes to the Arbitrator. An arbitration award whose notification has been issued under Section 10-A shall be binding on the parties to dispute. A settlement within the meaning of section 18(3) is binding on both the parties and continues to remain in force unless the same is altered by another settlement.

**Voluntary arbitration**

Section 10(a) of the Industrial Disputes Act, the parties may agree to refer the dispute to arbitration anytime before it is referred to adjudication. The Act provides that the parties to sign an arbitration agreement specifying the terms and agreement. Once it is signed, the Government has the power to terminate any strikes or lockouts. An arbitrator has a power to bind unions and workers who are not parties to the arbitration agreement if he is satisfied that union represents the majority of the workers in the unit.

The arbitration award is required by law to be passed to the appropriate Government. The award is then published in the official gazette thus obtaining legal validity.

**IV. III COURT OF INQUIRY**

Industrial dispute act establishes court of inquiry for the purpose of inquiring into a dispute and submit its findings to the appropriate government. The court of inquiry has powers at par to those of a civil court. Court of inquiry can be distinguished from the other forms of dispute resolution as it has certain validity and position in law and has a time limit of six months from the commencement of the inquiry within which it must submit its report to the appropriate government. The government occasionally uses the courts to buy time or to cool off hot-headedness that might arise from an industrial dispute.

A court of enquiry is different from a Board of Conciliation. While the Board’s basic objective is to promote the settlement of an industrial dispute, a court of enquiry is primarily fact-finding machinery that aims

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562 An agreement or statute is not legally valid in India until it is published in the gazette of the central or state governments. Consequently, an award issued in January may not be implemented until March because there is generally a two to three month delay in the publication process. Industrial Disputes Act (Act XIV of 1947) § 17, 22 INDIA A.I.R. MANUAL 590 (1979).
566 Although the statute provides for a fourteen day time limit within which conciliation should be affected, it is rarely enforced. In contrast, the six month time limit given to the courts of inquiry is generally always enforced. Industrial Disputes Act (Act XIV of 1947) § 10(c), 22 INDIA A.I.R. MANUAL 590 (1979).
at inquiring into and revealing the causes of an industrial dispute.

**IV.IV Labour Court**

Labour court is one of the adjudication authorities set up under the Industrial Disputes Act, 1947 which was introduced by the amendment Act of 1956. Under Section 10(c) of the Act, the appropriate Government may refer a dispute to Labour Court also for adjudication. The setting up of Labour courts is in the discretion of the Government. It is presided over by a person who has held a judicial position for not less than seven years or who has been a presiding officer of any Labour court for not less than five years with powers of civil courts. The function of Labour court is to adjudicate upon the matters referred to them which are listed in the Schedule II appended to the Act.

**IV.V Industrial Tribunal**

An Industrial Tribunal may be set up by the appropriate Government on a temporary or permanent basis for a specified dispute for industry. The tribunal consist of only one person in whole. The qualification for appointment of Presiding Officer of a Tribunal is that the candidate should have been or is judge of High Court or has held the post of Chairman or Labour Appellate Tribunal for not less than two years or he is or has been judge or Additional District judge for a period not less than three years. Generally, matters of major importance are referred to the industrial tribunals. Therefore, appropriate Government may constitute one or more tribunal for matters relating as specified in second schedule or in third schedule.

**IV.VI National Tribunal**

National Tribunal can be set up by the Central Government. The matters are adjudicated which are in opinion of the Central Government involves a question of national importance or are of such nature that the dispute may affect the industrial establishment of more than one state. The Central Government can make a reference to the National Tribunal. Where any reference has been made to National Tribunal, notwithstanding anything contained in the Act, no Labour Court or Tribunal has a jurisdiction to adjudicate it. It consists of only one person which is to be appointed by Central Government. A person who is qualified for appointment should be or has been a judge of a High Court. He has held the office of the chairman or any other member of the Labour Appellate Tribunal constituted under the Industrial Disputes Act, 1947 for a period of not less than two years.

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569 The second schedule of the Industrial Disputes Act deals only with the following matters: the propriety or legality of an order passed by the employer under the “Standing Orders”; the application and interpretation of “Standing Orders”; discharge or dismissal of workmen, including reinstatements or grants of relief to workmen wrongfully discharged.
571 The Industrial Tribunal is vested with the powers of a judge or magistrate in the civil courts.
While referring a matter for adjudication the appropriate government cannot go into the merits of the dispute. The Govt, function is only to refer such dispute for adjudication so that the industrial relations between the employers and his employees may not continue to remain disturbed and the dispute may be resolved through a judicial process as speedily as possible.\textsuperscript{573} If the appropriate Government decided that no reference is necessary, the Government cannot be compelled by issuing a writ to make a reference. The use of the word may shows that the power is discretionary and not mandatory. If in a particular case, the Government acts arbitrarily or contrary to law in refusing to refer a dispute to the Tribunal or Labour Court then such a refusal may be right ground for petition under Section 226 of the Constitution.\textsuperscript{574}

Industrial adjudication has also necessarily to be aware of the current socio-economic thought around; it must recognize that in a modern welfare state, healthy industrial relations are matters of paramount importance and its essential function is to assist the state by helping in the solution of industrial dispute, which constitute a distinct and persistent phenomenon of modern industrialized state.\textsuperscript{575} In the language of Krishna Iyer J: Industrial jurisprudence does not brook nice nuances and torture some technicalities to stand in the way of just solutions reached in a rough and ready manner. Grim and grumpy life-situations have no time for the finer manners of elegant jurisprudence.\textsuperscript{576}

V. EFFECTIVENESS

How effective has the dispute settlement machinery been? We will try to understand by taking some databases. Below mentioned tables are provided by the Labour Bureau of India and was listed in Indian Labour Statistics in the year 1976.\textsuperscript{577} Table 2 below gives incidences of strikes and man days lost for selected year until 1975.\textsuperscript{578}

\begin{table}
\caption{MAN-DAYS LOST PER 1000 WORKERS IN MANUFACTURING INDUSTRIES}
\begin{tabular}{|c|c|c|}
\hline
Year & No. of man days lost & Estimated Employment & Man days Lost Per 1000 Workers \\
\hline
1961 & 376 & 3716 & 1022 (102.0) \\
1963 & 2523 & 4146 & 609 (118.7) \\
1965 & 4756 & 4305 & 1056 (103.3) \\
1967 & 12401 & 4539 & 2732 (267.3) \\
1969 & 13297 & 4560 & 2903 (284.1) \\
1971 & 11343 & 4929 & 2301 (225.1) \\
1973 & 16152 & 5437 & 2971 (290.7) \\
1975 & 19682 & 5486 & 3588 (351.1) \\
\hline
\end{tabular}
\end{table}

Note: 1) Figures in brackets indicate the index on base 1961 = 100.
2) Again, these are conservative estimates since the number of unreported strikes is large.\textsuperscript{579}

The table above clearly emphasis that the increase in industrial conflicts has in fact

\textsuperscript{573} Western India Mass Company Ltd. Vs. Western India Mass Company Workers Union, AIR 1997 Supreme Court 2005.
\textsuperscript{574} The Govt, of India Vs. National Tobacco Company, AIR 1977 Andhra Pradesh 250.
\textsuperscript{575} State ofBombay Vs. Hospital MazdoorSabha (1960)1 LLJ 251,257 (SC).
\textsuperscript{576} Basti Sugar Mills Co. Ltd./ Vs. State of Uttar Pradesh (1978) 2 LLJ 412, 4129 (SC).
\textsuperscript{577} The information for the table was compiled in 1976 by the Labor Bureau of India and listed in INDIAN LABOR STATISTICS.
\textsuperscript{578} The information for the table was compiled in 1976 by the Labor Bureau of India and listed in INDIAN LABOR STATISTICS.
been more than proportionate to the increase in industrial employment. The data shows that the system has not been successful in preventing strikes and lockouts, although that was the intended purpose of the Indiscriminate Disputes Act.

The system has been more efficient in expeditiously terminating disputes once a strike has already broken out. The below attached table shows the percentage of strikes by durations for selected years.  

<table>
<thead>
<tr>
<th>Year</th>
<th>&gt;1 day</th>
<th>&lt;1-5 days</th>
<th>6-10 days</th>
<th>11-30 days</th>
<th>31-60 days</th>
<th>61-90 days</th>
<th>91-120 days</th>
<th>&gt;121 days</th>
<th>Total No. of Disputes Resulting In strikes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951</td>
<td>41.9</td>
<td>28.5</td>
<td>12.0</td>
<td>6.2</td>
<td>3.5</td>
<td>7.2</td>
<td>1001</td>
<td>1000</td>
<td></td>
</tr>
<tr>
<td>1955</td>
<td>41.8</td>
<td>27.7</td>
<td>10.4</td>
<td>9.4</td>
<td>3.4</td>
<td>7.2</td>
<td>723</td>
<td>720</td>
<td></td>
</tr>
<tr>
<td>1955</td>
<td>37.4</td>
<td>25.4</td>
<td>18.5</td>
<td>7.3</td>
<td>2.7</td>
<td>8.7</td>
<td>1105</td>
<td>1100</td>
<td></td>
</tr>
<tr>
<td>1957</td>
<td>36.6</td>
<td>30.9</td>
<td>12.6</td>
<td>9.3</td>
<td>4.4</td>
<td>7.1</td>
<td>1383</td>
<td>1380</td>
<td></td>
</tr>
<tr>
<td>1959</td>
<td>29.8</td>
<td>26.9</td>
<td>12.8</td>
<td>6.6</td>
<td>5.0</td>
<td>4.7</td>
<td>1490</td>
<td>1487</td>
<td></td>
</tr>
<tr>
<td>1961</td>
<td>31.2</td>
<td>32.2</td>
<td>12.5</td>
<td>10.2</td>
<td>6.0</td>
<td>2.9</td>
<td>1299</td>
<td>1297</td>
<td></td>
</tr>
<tr>
<td>1963</td>
<td>36.1</td>
<td>35.6</td>
<td>13.6</td>
<td>6.2</td>
<td>3.8</td>
<td>4.7</td>
<td>1447</td>
<td>1444</td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td>31.3</td>
<td>30.8</td>
<td>13.3</td>
<td>9.6</td>
<td>4.6</td>
<td>4.5</td>
<td>1396</td>
<td>1393</td>
<td></td>
</tr>
<tr>
<td>1967</td>
<td>26.2</td>
<td>29.0</td>
<td>19.8</td>
<td>12.2</td>
<td>6.5</td>
<td>12.3</td>
<td>2655</td>
<td>2652</td>
<td></td>
</tr>
<tr>
<td>1969</td>
<td>27.8</td>
<td>28.3</td>
<td>12.4</td>
<td>16.2</td>
<td>6.7</td>
<td>10.0</td>
<td>2491</td>
<td>2488</td>
<td></td>
</tr>
<tr>
<td>1971</td>
<td>27.6</td>
<td>25.1</td>
<td>14.8</td>
<td>13.5</td>
<td>3.8</td>
<td>13.6</td>
<td>2670</td>
<td>2667</td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>24.7</td>
<td>25.1</td>
<td>12.2</td>
<td>13.4</td>
<td>9.7</td>
<td>16.7</td>
<td>3116</td>
<td>3113</td>
<td></td>
</tr>
<tr>
<td>1975</td>
<td>22.6</td>
<td>23.0</td>
<td>13.8</td>
<td>11.0</td>
<td>6.2</td>
<td>23.4</td>
<td>1853</td>
<td>1850</td>
<td></td>
</tr>
</tbody>
</table>

The most important is whether the industrial relations machinery is capable of resolving all disputes referred to it. The below attached table lists data on dispute disposal in seven major industrial states in our country i.e. Maharashtra, West Bengal, Tamil Nadu, Bihar, Uttar Pradesh, Punjab and Haryana.

TABLE 4

<table>
<thead>
<tr>
<th>Year</th>
<th>Referred for Conciliation</th>
<th>Failed at Conciliation</th>
<th>Referred for Arbitration</th>
<th>Referred for Adjudication</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td>33989</td>
<td>6852 (20.1)</td>
<td>200 (2.9)</td>
<td>3952 (57.6)</td>
</tr>
<tr>
<td>1968</td>
<td>36422</td>
<td>7466 (20.4)</td>
<td>69 (0.9)</td>
<td>3823 (51.3)</td>
</tr>
<tr>
<td>1969</td>
<td>30385</td>
<td>7322 (24.1)</td>
<td>131 (1.7)</td>
<td>4308 (59.8)</td>
</tr>
<tr>
<td>1970</td>
<td>21512</td>
<td>6377 (29.6)</td>
<td>133 (2.0)</td>
<td>3934 (61.6)</td>
</tr>
<tr>
<td>1971</td>
<td>38450</td>
<td>8962 (23.3)</td>
<td>200 (3.1)</td>
<td>6106 (68.2)</td>
</tr>
<tr>
<td>1972</td>
<td>29279</td>
<td>9520 (23.5)</td>
<td>124 (1.3)</td>
<td>3918 (62.2)</td>
</tr>
<tr>
<td>1973</td>
<td>45203</td>
<td>11588 (25.2)</td>
<td>93 (0.8)</td>
<td>8139 (73.2)</td>
</tr>
<tr>
<td>1974</td>
<td>48023</td>
<td>12182 (25.5)</td>
<td>109 (0.8)</td>
<td>7904 (64.0)</td>
</tr>
<tr>
<td>1975</td>
<td>46452</td>
<td>13488 (29.0)</td>
<td>152 (1.1)</td>
<td>9025 (66.9)</td>
</tr>
</tbody>
</table>

From the above data, it shows that roughly thirty percent of the disputes that are referred to the department defy solution through conciliation. Arbitration seldom steps in to take over. Though adjudication is the only mechanism left to resolve these disputes at this stage, yet a substantial number are not referred. Therefore, approximately ten percent matters which came to labour department are abandoned. In absolute terms, between 3000-4000 disputes meet with this fate every year.

The explanation often given by labour authorities is that these abandoned disputes do not merit reference for adjudication.

It must be clear that the duration of strike is not an absolute indicator of the labour department’s effectiveness, because many of these strikes are solved without intervention by the labour department. And the large number of strikes lasting one day can be attributed to strikes and ‘bandhs’ called by politicians.

579 The information for the table was compiled in 1976 by the Labor Bureau of India and listed in INDIAN LABOR STATISTICS.

580 The information for the table was compiled in 1976 by the Labor Bureau of India and listed in INDIAN LABOR STATISTICS.
because they deal with inconsequential issues or because the parties to the dispute have not seriously tried to reconcile their differences on their own or through conciliation. In that case, there must be other reasons why the parties are indifferent to the reconciliation of their differences. The reason for this is partly found in the system itself. The system discourages vigorous bilateral collective bargaining because the parties tend to rely on the easily available alternative of government sponsored conciliation. The American system of mediation/compulsory arbitration has also been criticized in that it has a “narcotic effect” because parties tend to rely on third party intervention. Kannappan and Myers note that many conciliators tend to intervene too early in disputes, not giving the parties enough time to settle their differences through bipartisan negotiations. Additionally, the statutory provision of compulsory adjudication has caused labour and management to take a very legalistic view of industrial relations disputes. Consequently, there has been a “narcotic effect” leading to a marked preference for adjudication rather than bipartisan methods.

VI. SUGGESTIONS AND CONCLUSION

In the Indian Industrial relations system, the State plays a vital role in the regulation of industrial relations as a mediator and adjudicator. The Industrial Disputes Act, 1947 which provides for the legal framework for the Governments intervention in industrial disputes through conciliation and adjudication has not undergone any major changes in this regard, despite the demands of various commissions and committees and labour unions. Following are the suggestion which the authors are providing which if taken into consideration; it will make the adjudication machinery more effective and efficient and ensure speedy dispensation of justice to the parties.

1- Various commissions and committees have made recommendation for changes in the Industrial Disputes Act, 1947 which laid emphasis in use of ‘collective bargaining’. 581 A significant step was taken in 1966 by constituting a tripartite National commission which recommended for establishment of Independent Industrial Relation Commission (I.R.C.S). 582

2- The Law Commission of India in its 122nd report recommended the restructuring of Labour Courts and Industrial Tribunals on the basis of the principle of the principle of participatory justice so as to generate confidence in the disputing parties. It suggested that Labour courts should be assisted by two lay judges drawn from rank of workmen and employers. And Industrial Tribunals should be composed of retired Supreme Court or High court judges and equal number of members from trade unions.

3- The Conciliation proceedings shall be conducted and concluded within the time prescribed by law under Industrial Disputes Act, 1947 i.e. 14 days.

4- The adjudicatory authority’s i.e. Labour Courts and Tribunals shall be statutorily

empowered to grant interim relief and to make interim stay order which includes directions to the parties to observe certain conditions during the pendency of adjudication.

5- The infrastructure facilities in the Labour Courts and Industrial Tribunals should be improved by providing modern equipments, trained personnel etc.

6- The adjudicators shall strictly adhere to the prescribed time limit at every stage of adjudication.

7- The adjudicators shall make proper use of interim relief so as to prevent parties from resorting to delaying tactics.

8- There should be a time limitation for raising the Industrial disputes as the undue delay in raising the concerns will lead to stale disputes which cannot be effectively adjudicated by Courts or Tribunals due to non availability of pertinent records or evidence or death of parties etc. Therefore, a limitation of 3 years shall be prescribed.

9- The settlement through the process of collective bargaining shall be promoted to reduce burden of adjudicatory bodies and recognition of Trade Unions shall be made statutory obligations for effective collective bargaining.

10- The presiding officers of the Courts or Tribunals should also be given proper holidays as the civil court judges are given for their mental relaxation which results in effective adjudication of the case.

11- The High Courts and Supreme Court should not ordinarily grant stay order and their power should be restricted.

This article is designed to be an informative guide to the practical aspects of industrial dispute settlement in India. By providing the reader with information regarding the legal framework of industrial relations laws, this article should prove helpful to understand the reality of the effectiveness of the dispute resolution machinery. This article also demonstrates the salient weakness of Indian Labour legislation. Firstly, the legislation allows for a multiplicity of unions thereby resulting in an intense inter-union rivalry that generates a large number of industrial disputes. Second, the dispute resolution machinery has increasingly failed to bring about timely agreements and reduce the number of workdays lost due to work stoppages. Finally, there seems to be a need to encourage parties to use collective bargaining, rather than rely on third party dispute resolution.

Whether the Indian Government will introduce these changes or not is yet unknown. It is only a matter of time before the current industrial relations laws receive increased attention, since the labour relations climate also plays an important role in the decision of foreign investors to establish industries in India.

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ADVERTISEMENT: FABRICATING NEEDS AND DESIRE

By Saurabh Malik
From Gujarat National Law University, Gandhinagar

ABSTRACT
The rising scope of advertisements is increasing day by day. The literal meaning of advertisement is to turn the attention of readers or viewers or listeners towards the products or services. But due to advertisements, the consumers are influenced to buy the products at high prices. They can be misleading because false claims are made in them. Many a time the advertisers present their product in a very unethical and vulgar manner which is against the general interest of the society.

The advertisements shown are matters of grave concern at the present time. The concern requires immediate attention because nowadays the advertisements are becoming an essential part of our daily life. The author will try to analyse the current trends of advertisements, its impact on the society and law surrounding this aspect of media.

The first part of the paper shall discuss the advertisements and their relevance in this materialistic and commercial world. The second part shall deal with the legal basis of the advertisement i.e. right of the manufacturer vis-à-vis the rights of the consumer both of which are protected under the right to freedom of speech and expression. This part shall not only discuss the rules, regulations and various laws on advertisements including the Advertisement Code laid down by the Advertising Standard Council of India and various judicial pronouncements but also critically examine them. In the concluding part, the author will also be discussing the major drawbacks or disadvantages of the nature of the current trends in advertisements and the inability of the laws and regulations to face the challenges posed in the digital era by behavioural targeting.

Keywords: Advertisements, Speech & expression, Media, Law, Consumer

INTRODUCTION
We are living in times, where you open any newspaper and on the first page, hardly will you find any news. What you find is advertisement. What kind of phenomenon is advertisement, so significant that it had the power to replace news of national and international importance and push it to the later pages?

‘Advertisement’ is something (short film or a written notice) that is shown or presented to the public to help sell a product or to make an announcement. A person or a thing that shows how good or effective something is. Advertisement reflects market fluidity, and competition among the players. It is a sign of a dynamic and vibrant market, where consumer is the king.\(^{583}\)

The history of advertising is not new; it is as old as human civilisation. However, in the mid-19th century it became a major force, based primarily on newspapers and magazines. Advertising grew rapidly with new technologies in the 20\(^{th}\) century such as...

\(^{583}\) Definition of Advertisement, Merriam Webster (January 2, 2019), https://www.merriam-webster.com/dictionary/advertisement
internet, television, direct mail, mobile devices and radio.

The modern commercial advertisements in India were started when hawkers advertised their products by shouting when markets and shops started for first time. It was then that the signage, the trademarks, the press ads and the likes evolved.

The classified advertisements stated the advertising history in the true sense. Advertisements are shown for the first time in the India’s first newspaper Hickey’s Bengal Gazette. Since then, advertisements have seen a sea change in their attributes coupled with the introduction of new technology and new generations of mass media.

ROLE AND SIGNIFICANCE OF ADVERTISEMENTS

Advertising is the most influential institution of socialisation in modern society in order to critically assess the view that advertising is a central form of ideology in a capitalist society, and we need to understand the social and economic value of consumer brands. The 1950's era was the beginning of a consumerist culture, as multi-national corporations were faced with the competing ideologies of 'supply and demand'. Advertising became a universal phenomenon as it began to materialise in film and television. Thus, we all became passive consumers instead of active users. Many advertisements in the mass media


585 Ibid.

There is an urge in the members of society to show their branded things to others and that’s why the advertisers are successful in their prime objective of selling the goods at a large quantity and at higher prices. Despite various regulations under various laws, the advertisers are showing negative products in a positive manner. Nowadays the advertisements are becoming an essential part of our daily life. We only rely on any product on the basis of the advertisement and we really don’t know what the product is. They are creating a mind-set about their product. They are influencing the consumers by making their advertisements through celebrities and they are paying a huge amount for this. Loads of these huge amounts are ultimately on consumers. These advertisements are blooming under the umbrella protection provided by Article 19(1) (a) and Article

www.supremoamicus.org
19(1) (g) which protects freedom of speech and expression and freedom to practice any profession and carry out trade and business respectively.

JUDICIAL DEVELOPMENTS IN ADVERTISING LAWS

- Commercial Speech as a Fundamental Right

Advertisements are also known as commercial speech, and all kinds of speech that don’t fall under the criteria of reasonable restrictions mentioned under Article 19(2) are protected under freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution of India, 1950. However, this was not the case always. It is by means of judicial interpretation that freedom of speech and expression has been broadened so as to include even advertisements within its ambit. It was in Tata Press v. Mahanagar Telephone Nigam Ltd\textsuperscript{586} that Honourable Supreme Courts of India reversed its own decision of Hamdard Dawakhana v. Union of India\textsuperscript{587} and provided the protection to advertisements under part III of the Indian Constitution.

This dramatic but very significant development took 35 years. In Hamdard Dawakhana\textsuperscript{588}, the Supreme Court held that although an advertisement was a form of speech, it ceased to fall within the concept of ‘free speech’ when it took the form of a commercial advertisement seeking to promote trade or commerce. The case arose out of a challenge to the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 whose object was to prevent self-medication and advertisements that offended morality and decency. Rejecting the plea that advertisements fall within the scope of article 19(1)(a), the supreme court observed: “Freedom of speech goes to the heart of the natural right of an organised freedom loving society to ‘impart and acquire information but the common interest’. If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Article 19(1) (a). But if all it does is that it deprives trader from commending his wares, it would not fall within that term.”\textsuperscript{589}

“The reasoning that commercial advertising being primarily for commercial gain was not entitled to protection under Article 19(1) (a) was obviously flawed. If traders and businessman advertise for commercial gain, so are newspapers and broadcasting media run as commercial, profit making enterprise. This is precisely why they enjoy no special status or immunity and are subject to the general laws of land, including those relating to taxation. The conclusion, therefore, that those who advertise for commercial gain are not entitled to enjoyment of fundamental right to free speech under Article 19(1) (a) has no justification” \textsuperscript{590}. In Indian Express Newspaper, the Supreme Court observed on the conclusions of Hamdard Dawakhana: “In the above said case the Court was principally dealing with the right to advertise prohibited drugs, to prevent self-

\begin{itemize}
  \item Hamdard Dawakhana v. Union of India, (1960) AIR 554
  \item Supra 5
\end{itemize}

\textsuperscript{589} Ibid.

\textsuperscript{590} Madhavi Goradia Diwan, Facets of Media Law 187-188 (1st ed. 2006)
medication and self-treatment. That was the main issue in the case. It is no doubt true that some of the observations referred to above go beyond the needs of the case and tend to affect the right to publish all commercial advertisements……we feel that the observations made in the Hamdard Davakhana case are too broadly stated and the government cannot draw much support from it. We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the constitution merely because they are issued by businessmen. “

The issue was also discussed in Sakal Papers (P) Limited. That case arose out of a constitutional challenge to the validity of the Newspaper (Price and Page) Act, 1956 which empowered the government to regulate the prices of newspapers in relation their pages and size and to regulate allocation of space for advertisements. The court held that their curtailment of advertisement would be hit by Article 19 (1) (a) since it would have a direct impact on the circulation of newspaper.

“Again, section 3(1) of the Act in so far as it permits the allocation of space to advertisements also directly affects freedom of circulation. If the area for advertisement is curtailed the price of the newspaper will be forced up. If that happens, the circulation will inevitably go down. This would be no remote, but a direct consequence of curtailment of advertisements……

If, on the other hand, the space for advertisements is reduced, the earnings of newspaper would go down or raise its price. The aim of the Act in regulating the space for advertisements is stated to be to prevent unfair competition. It is thus directed against circulation of a newspaper. When a law is intended to bring about this result there would be a direct interference with the right to freedom of speech and expression guaranteed under article 19(1) (a) of the constitution.

Thus, the highest court of the country has finally acknowledged the importance of advertisements and recognised that commercial speech must be protected so as to economically sustain the press. Again, in Bennett Coleman & Co., the Supreme Court recognised that advertisements were an essential factor affecting circulation and any restraint on advertisements would affect the fundamental right of propagation, publication and circulation under Article 19(1) (a). Since the decision in Hamdard Davakhana, there has been a sea-change in the economy and advertising has come to acquire a vital role not only in shaping public choices but also in influencing the economy as a whole. In the present economy, where new product continues to flood the market every day and generate cut throat competition, the importance of advertising which may give one product and edge over another, has grown by leaps and bounds. Also, it is advertising which effectively sustains the media, whether it be the print media or broadcasting. Other forms of entertainment such as sports events and

591 Indian Express Newspapers v. Union of India, (1986) AIR 515
592 Sakal Papers (P) Limited v. Union of India, (1962) AIR SC 305
593 Ibid.
594 Bennett Coleman & Co. v. Union of India, 595 Supra 5
Advertising is considered to be the keystone of our economic system. Low prices for consumers dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent on advertising. Apart from the lifeline of the free economy in a democratic country, advertising can be viewed as life blood of free media, paying the costs and thus making the media widely available. The newspaper industry obtains 60-80% of its revenue from advertisement. Advertising pays a large portion of the costs supplying the public with newspaper. For a democratic press the advertising subsidy is important. Without advertising, the resources available for expenditure on the ‘news’ would decline which may lead to an erosion of quantity and quality. The cost of the ‘news’ to the public world increase, thereby restricting its ‘democratic availability’.  

Undoubtedly, advertisements are indispensable not just to the newspapers but also to other forms of media, as mass media and various channels of communication have just one major source of revenue that is advertisements. However, commercial speech receives multi-faceted protection, not just under freedom of speech or freedom of trade and commerce, but also under right to information. Just as any manufacturer has the right to advertise and market its products; must not the consumer have the right to know various products available in the market so as to allow him to exercise his choice?

- Advertising and the right to information: Consumer Perspective

A vital aspect of advertising that makes it part of Article 19(1)(a) is that it facilitates the dissemination of information about who is selling what product and at what price. Advertising enables the citizens to make well informed and intelligent economic choices. More important than the right of the recipient to the information when he receives from the advertisement. The Supreme Court observed in Tata Press v. Mahanagar Telephone Nigam Ltd (1995) AIR 2438:

Examined from a different angle the public at large has a right to receive the “commercial speech” Article 19(1) (a) not only guarantees freedom of speech and expression, it also save the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfilment has to be guided by information disseminated through the advertisements. The protection of Article 19(1) (a) is available to the speaker as well as recipient of the speech. The recipient of “commercial speech” may be having much deeper interest in the

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596 Madhavi Goradia Diwan, Facets of Media Law 187-188 (1st ed. 2006)
600 Supra 15a
advertisement giving information regarding a lifesaving drug may of much more importance to general public than to the advertiser who may be having purely a business consideration.\footnote{ibid.}

**LAW IS A REGULATOR, NOT MERELY A PROTECTOR OR PROMOTOR**

- Why do we need to regulate advertisements?

On one side, we live in free market times, which mean that each product or brand, no matter how big or small, has the right to be noticed (read: advertised). Still, many countries practice democratic free speech, and some people think this should extend to businesses. On the different side, not all products and services are equal. Some are neutral, while others might have a negative impact on our health, safety, and overall well-being. Now the question is, should neutral and potentially harmful products have equal advertising rights?\footnote{Oksana Tunikova, Should Advertising Be (More) Regulate?Stop Ad Blog (January 10, 2019), https://stopad.io/blog/advertising-laws.}

- What is wrong with recent advertisements?

Significance of advertisement is undisputable. However, with growing competition in the market and the world just a click away, the field of advertisement has been directly affected, adverse effect raising serious concern, which is clearly evident by the recent trends. In light of growing competition, the advertisers are going to any extent possible not just market their products, but also degrade their competitor’s product and moreover try to manipulate the consumer crippling him in exercising his freedom of choice, whereby although he himself consents to buy the products, his consent is either uninformed or misinformed.

In the present times some advertisers show that they can make the skin of any person whiter and glower by using their product for some days. This is nothing but they are showing racism and they are showing that white skin is better than dark skin. There are certain advertisements in the market which are showing that girls are attracted by applying their deodorants. These advertisements may have a bad impact on the children. Similarly, advertisers lead to various malpractices like surrogate advertisements, advertising products that are not permitted to be advertised in the guise of other products. The next section of the paper deals with some recent trends in the advertising and the judicial opinion about them.

Problems with advertising in the present scenario

Surrogate Advertising: “Merriam Webster defines a Surrogate as a ’substitute’\footnote{Definition of Surrogate, Merriam Webster (January 12, 2019), https://www.merriam-webster.com/dictionary/surrogate.}. And surrogate advertisements are just that. A surrogate advertisement can be stated as an advertisement that duplicates the brand image of one product to promote another product of the same brand. The surrogate or substitute could either resemble the original product or could be a different product altogether but it is marketed under the established brand name of the original product. Surrogate advertisements are used to promote and advertise products of brands
Manufacturing Consent: The basic idea put onward here is that consumption is a mechanism of control. By creating an environment where consumption is equated with good, people get sucked into the cycle of making money to spend money. The point of life converts to acquire things, which makes people more controllable. And how do you keep people trapped in this cycle? By fabricating desire, so there are always more things to strive to buy. Advertising, in different ways, is the profession of manufacturing consent. The goal is to make people want (or think they need) whatever product you are selling, and to make your particular brand of product more desirable than that of competitors.

Promoting Objectification of Human Body: Many commercial advertisement featuring deodorants, inner wears have been banned in India as those couldn’t fulfill with the ASCI codes. India has much been exposed to the westernized and modernised world after liberalizing trade after the crisis of 1991. Hence forth many western products have been brought to the Indian markets and the advertisement featuring these products started flourishing in the Indian markets. But all sections of the society weren’t ready & are not yet ready to accept the westernized outlook. Most of the brands which are western have been banned from featuring their products in the commercial advertisement, referring them as obscene, but these products had a very high demand in the world market and their outlook towards marketing their products in the world market especially in the western world is quite different from that of a conservative country like India. But anyways, India needs to come out of its conservative mindset and have a much broader outlook towards judging any content as obscene.

604 Sarbani Raut, India: Surrogate Advertisements in India, Modaq Connection and Knowledge (January 20, 2019), http://www.mondaq.com/india/x/606974/advertising +marketing+branding/CROSS+BORDER+INSOLVENCY+A+NEW+REGIME


There are different laws in India that relate to advertising. A short brief of some of these enactments is provided hereunder-

- Consumer Protection Act 1986, Section 6 of the Act give consumers the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to save the consumer against unfair trade practices. Section 2(r) of the same Act, under the definition of the word "unfair trade practice", covers the extent of false advertisements including misrepresentations or false allurements.

- Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003, Section 5 of this Act, restricts both direct and indirect ads of tobacco products in all kind of forms audio, visual and print media;

- Cable Television Networks (Regulations) Act1995, and Cable Television Networks (Amendment) Rules 2006, Section 6 of the Cable Television Networks (Regulations) Act 1995, states that no person shall transmit or re-transmit through a cable service any advertisement unless such advertisement is in conformity with the advertisement code prescribed under the aforementioned rules. However, the aforesaid provision does not follow to programmes of foreign satellite channels which can be received without the use of any specialized gadgets or decoder. Rule 7 of the aforementioned rules lays down the “Advertising Code" for cable services which are formulated to conform to the laws of the country and to ensure that advertisements do not insult morality, decency and religious susceptibilities of the subscribers;

- Doordarshan and All India Radio (AIR) Advertisement Code: Doordarshan and AIR, both under the control of Prasar Bharati (a statutory autonomous body recognized under the Prasar Bharati Act), follow a comprehensive code for commercial advertisements which regulate the content and nature of advertisements that can be relayed over the agencies;

- Drug and Magic Remedies (Objectable Advertisement) Act 1954: This Act objects to regulate the advertisements of drugs in certain cases and to prohibit the advertising for certain purposes of remedies alleged to have magic qualities and to provide for matters connected therewith;

- Drugs and Cosmetics Act 1940: Section 29 of the Act executes penalty upon whoever uses any report of a test or analysis made by the Central Drugs Laboratory or by a Government researcher, or any extract from such report, for the purpose of advertising any drug. The punishment stated for such an offence is a fine which may extend up to five hundred rupees and/ or imprisonment up to ten years upon subsequent conviction;

- Food Safety and Standards Act 2006: Section 53 of this Act states a penalty of up to Rs. 10 lakhs for false and misleading ads relating to the description, nature, substance or quality of any food;

- Indecent Representation of Women (Prohibition) Act 1986: The object of the act is to prohibiting indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and the matters
connected therewith or incidental thereto (Section 3 and 4 of the Act).

- Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994: Advertisement in any manner regarding facilities of pre-natal determination of sex available at any genetic counselling centre, laboratory, clinic or any other place is barred under this Act and has been made a punishable offence under the Act (Section 22);

- Young Persons (Harmful Publications) Act 1956: Section 3 of the Act, imposes penalty for advertising or making known by any means whatsoever that any harmful publication (as defined in the Act) can be obtained from or through any person;

- Indian Penal Code 1806: The IPC, prohibits obscene, defamatory publication, publication of a lottery and/ or statements creating or promoting disharmony/enmity in society.\(^\text{608}\)

CRITICAL APPRAISAL

Advertising is influential enough to give society cause for concern. While making a critical assessment of advertisement role the critics focus more on its social role, while defenders present economic argument.

‘Trust in Advertising’ study by Nielsen shows that consumer trust in advertising is not 100%. Public discussion of advertisement tends to focus on its alleged influence to societal problems. Nielsen conducted a survey with over 25,000 consumers across 50 countries in 2007 to provide a better understanding of consumer perceptions of the benefits of advertising.

The study reveals that a bignumber of consumers see advertising as playing a key role in the economy: 80% of the world’s consumers believe that advertising helps create jobs and 72% say advertising contributes to economic growth. About 68% of the respondents to the survey believes that it helps to reduce prices by stimulating competition. A clear majority of consumers across all markets also appreciate the importance of advertisement and sponsorship as a critical source of funding for sports, the arts and the media.

1. Noise: It is just that much advertising gets lost in the noise of competing brands, and some advertising hardly get adds to the noise.

2. It promotes materialism: It creates the want and taste for new products which are not actually required or necessities of life and income of consumers will not let them enjoy. It inspires people to buy things they do not need. Industry says that it is generally an fight against capitalist approach to marketing.

3. Advertising is harmful to children: Children cannot make informed choice or cannot differentiate between real life and the reel life in the world of advertisement. Industry says that they target the suitable audiences and they do not encourage irresponsible behaviour. Advertisement targeting children are released even before the claims are verified like Complain.

About some years back, a young man had jumped from a building attempting to copy

Akshay Kumar’s dare-devilry stunts shown in Thumbs Up’s ad. In September, 2010, an eleven-year-old child killed himself allegedly under the influence of an ad done by a Heinz India drink, ‘Complain’, claimed to make children ‘taller’.

4. Advertising reinforces stereotypes: It reduces people or objects into classes based on implications that are made from an individual or social context, like “all professors are absent-minded”, “all blonds are dumb”, etc. Industry says that they merely reflect society’s attitudes. Evidence proposes that advertising generally lags behind social trends rather than shaping them. The portrayal of working women has been shown too late.

5. The misleading advertisement: According to K V Thomas, Minister Govt. of India, Primal Healthcare ad, ‘getting complete energy in 8 days or money back’ and advertisement of Airtel Digital TV on ‘Free Regional Pack for life’ and ‘fair skin’ by FMCG producers were confusing and misleading. Drugs and Magic Remedies (Objectionable Advertisements) Act and the Cable Television Network Regulation Act have unsuccessful to stop misleading advertisement.

6. Advertising has subliminal power: It works at subconscious level and convinces people to purchase goods that they would otherwise not buy. Drink Coke and Eat Popcorn in a cinema hall, Gilbey’s London Dry Gin which embedded the word “SEX” into the ice cubes to provoke feelings of sexuality, romance and excitement among the ad readers.

The Food Safety Agency of England, specifies that anything more than 12.5 grams of sugar for every 100 grams of an item is unhealthy. The Kellogg’s Choco label claims to hold nearly double that amount, at 23.3 grams per 100 grams of cereal. And according to Ahmadabad based Consumer Education & Research Centre, that chocolates contains even more than 32.8 grams. But who informs the customers in ads?

7. Advertising increases the cost of goods and services: Critics say that advertisement increases the cost and poorer quality of goods is introduced in the market to deceive the consumers. Price is set by the market forces of which advertising is one of them, but often not an important one. The study made by Office of Fair Trading 1983, came to the finding that prices weakened when advertisement was introduced in U.K. Optical market.

8. Advertising helps to sell bad and fake products: Often miracle products that claim they can cure overnight everything from baldness to bad breath are heavily advertised. Consumer’s choice is greatly injured by the advertisement. Advertisement limits the competition among the products. Big industrialists and manufacturers may exercise their anticompetitive control over the market with the help of advertisement technique which is always against the public interest.

9. Advertisement dictates media choices: It is accused of corrupting media, leading them to make editorials that favour and gain the advertisers rather than the public, case of tobacco or oil companies are clear pointers. The media denies any type of self-censorship.

10. Advertising is too pervasive: In electronic advertising, the viewers are forced to see number of advertisements to which they can’t save themselves. Although this
mess from advertisement is less offensive in the print media as the reader may easily ignore the ads. At times consumers may want to see ads for knowledgeable decision-making.\textsuperscript{609}

**CONCLUSION**

Even though we have laws that regulate advertisements, it has become very difficult to control or regulate the content of advertisement. Also, advertisement being part of commercial speech protected under Art 19, it is not advisable to provide stringent regulations in order to contain and curtail the malpractices involved in the current trends. The researches provide a twofold suggestion. First at the advertiser’s end i.e. a strong self-regulatory mechanism. Self-regulatory mechanism is not so binding because it is formed by them. They can change it according to their needs. Secondly, consumer activism, Consumers must be aware of their rights so that they exercise their freedom of choice in an informed way rather than being manipulated, and if were fooled can redress their grievance to the dynamic self-regulatory authority authorised and powerful enough to put sanctions on the advertisers.

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\textsuperscript{609} Sam Malhotra, Important disadvantages of advertising – Explained, SHARE YOUR ESSAYS (January 18, 2019), 0www.shareyouressays.com/.../11-important-disadvantages-of-advertising.../112831
ADOPTION, CUSTODY AND PARENTING

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Abstract

This particular paper would be dealing with the concepts of Adoption, custody and parenting. Adoption, Custody and Parenting are three different concepts but very well related to each other. The three have become a need for the time. The reason for this nowadays is that many physical problems occur in both men and women. Reason why we need adoption. Adoption is a procedure where a “A parent legally takes another child and make him or her as his own”. Moving forward to what custody and parenting mean, Custody means “the protective care or guardianship of someone”, on the other hand Parenting means “is way parents deals with their child”. All of these seem to go hand in hand. “Society” is something which is a stake to all the three concept. Any person living in the society when adopts has to go through all the stakes which the society give. A male and a female when they adopt they are questioned either on their physical condition or may be their love. Later on custody too is questioned on different ground. Years and years when the child grows up his/her parenting is questioned as to where have they come from and also about their caste, race etc. This happens specially in India where adopted child are usually questioned. Not with the society, at first, our own families are responsible. They are always first in questioning and suggesting. This paper will be dealing with the facts as to where does this start from and how do we tend to stop them as only or initial steps will help all of these to stop.

Introduction

“Let parents bequeath to their children not riches, but the spirit of revenue”. Parenting is a feeling which every man and women when they are married they want to feel. This is one of the beautiful feeling that exists in this entire world. Some kind of happiness which one can have after he has received all the kinds of happiness in the world. It is one of the most beautiful form of love.

In today’s world some of them are deprived of this beautiful feeling. This may be because of many physical issues which have been taking place. This may be because of female infertility or male infertility. It may be anything due to which a person may not be able to reproduce and have a baby due to which they may take a decision to adopt.

To adopt generally means “to take by choice into a relationship”. A person may take a child to make his own child. Mostly in cases of a couple which may not have a child can adopt one from orphanage. It is a legal way of making a child his/her own. Not necessarily a child can be adopted. In facts adults over the age of 18 may also be adopted but certainly they have different procedures for the same. For parents who adopt a child may be the only hope they have of becoming a family and a process of which they are to be forever grateful. For
birth parents, adoption may give them the chance to pursue their own hopes and dreams while still giving their child the best opportunity possible. For children who have been adopted, it would be a chance of their self-identity, life and the opportunities which would come up. Even an adopted child may feel the same love which his/her birthly mother would be able to give. If parents give the same the same kind of love then their love will not come to a lend where you need to compare. 

Custody refers to the fact of “Physical Custody” which means that a parent has the right to have a child live with him or her. A child can have joint physical custody in case where the child wants to live with both the parents. Joint physical custody works best if parents live relatively close to each other as it allows them to maintain a normal routine. In other case a child may live with one parent and he/she visits the other parent but with the one the custody has will have most of the right of visitation or parenting time with his or her child.

Legal custody of a child means having the right and obligation to make decisions about a child’s upbringing. A person who holds the custody will have the right to make the decision for his child for e.g.; schooling or anything.

Sole custody means even one parent can have the custody. For a few of them even the single parent is enough for providing the kind of parenting a child needs but in most of the cases the court has stopped providing for the same. But even a sole parent can take care of the child very well. It goes without saying that there may be animosity between you and your soon to be ex spouse. The reason why one can have sole custody because the other person can take away your own child from yourself.

Custody is one thing the court should decide and should keep a check on the person if he is capable for that particular custody or not. 

Moving on to parenting we will deal with it in all the terms possible.

Parents are among the most important people in the lives of young or for that matter even the grown ups. From the time of birth a child rules on their parents for everything. Once they are left to live independently then it becomes difficult to manage. Therefore, parenting is needed all around. Parenting means the rights and duties parents apply on their children. They impose some rules and regulations to maintain their moral values. Parents are the only one who can provide you with proper knowledge, schooling and everything. Likewise, the adopted child also requires the same and when they are adopted it is the duty of the parents who have adopted him/her to provide them with the same kind of parenting which they would give their own child.

In short, when parents and other caregivers are able to support young children, their lives are enriched, and society is advantaged by such contributions.

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610 https://www.americanadoptions.com/adoptive/adoptive-definition

Reasons why Adoption, Custody and Parenting is needed

Adoption

Adoption is very personal decision which parents take and there may be several reasons why adoption is needed. There are few reasons to adopt a child:
1. Due to infertility, some couples cannot have a biological child.
2. Some women are facing medical conditions that make it difficult to carry pregnancy.
3. Some parents don’t want to pass down some genetic disorder or disease to their child.
4. Single parent may want to start a family.
5. Even same sex couple want to become parents.
6. A lonely child can also have a loving home.
7. They can adopt in order to help their family members who are unable to have their own child or adopt.
8. Some can also raise a child older than an infant.
9. Adoption has more potential for success than treatment for infertility.\[612\]
10. Some want parents but are unable to have one. Like that way they help balance population growth.
11. Some may just want to adopt.

Custody

Custody depends upon Parental needs. There are a few reasons as to why custody of a child is needed:
1. A child always needs a parents emotional and physical stability.
2. Child’s academic, economic and physical needs are other aspects why parents ask for custody.
3. Child’s preference as to with which parent does he/she wants to live with and is comfortable with.
4. Child needs to stay away from any kind of abusive and violent situation so that his/her upbringing isn’t affected in any way.\[5613\]

Parenting

Parenting has discussed above is one of the most important thing you need in your life. There are reasons for that too:
1. A person can learn his moral values which will help him/her to adopt good values for future.
2. Parents can provide with financial support.
3. They can provide with better education.
4. Parents are best at providing with good health to their children.
5. Parents give you with your own identity i.e., your name, surname, personal identity, parental identity, family etc.

Laws relating to the various aspects

Adoption

Adoption in English Law

\[612\]https://www.americanadoptions.com/adopt/why-people-adopt
The English Law started recognizing adoption during the latter half of the nineteen century. Legal existence came up during 1926. The purpose of this act was to prevent the biological parents from claiming back their children. The final act had come up in 1958.

English law is quiet similar to that of the Hindu law in case of the adopted child.

Adoption in India

The custom and practice of adoption in India dates back to the ancient times. Although the act of adoption remains the same, the objective with which this act is carried out is differed. Adoption is not permitted in the personal laws like Muslims, Christians, Parsis and Jews in India. Hence, they opt for guardianship of a child through the Guardians and Wards Act, 1890.

Indian citizens who are Hindus, Jains, Sikhs, or Buddhists are allowed to formally adopt a child. The adoption is under the Hindu Adoption and Maintainance Act of 1956 that was enacted in India as part of Hindu Code Bills.6

Hindu Law

Hindu law is the only law in India which treats an adopted child as being equivalent to a natural born child. Under the old Hindu law, only a male could be adopted and an orphan could not be adopted. The restrictions have always been based on the Gotras and the Castes. A female child could not be adopted under the Hindu law. Also, only a male was supposed to adopt a child with the consent and dissent of his wife.

Such restrictions have changed with the due course of time and new laws have now come up.

Hindu Adoption and Maintainance Act,1956

The Act to some extent reflect the principles of equality and social justice by removing several gender based discriminatory provisions.

Capacity to Adopt:

A male of sound mind can adopt a child. If the man is married the consent of the wife is important. Likewise, a woman of sound mind can adopt a child if she is:

- Unmarried
- Divorced
- Widowed
- Her husband suffers from certain disabilities
- Ceased to be a Hindu
- Has renounced the world
- Has been declared to be of unsound mind by the court

Section 9 of this act deals with the fact that only the mother or the guardian can make a decision to the decision of giving child in adoption. The father can give the child in adoption only if the mother gives the consent for the same. The mother can give the child in adoption if the father is dead or has completely renounced the world.

Guardians and Wards Act,1890

This act became the only non-religious universal law regarding the guardianship of

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the child, applicable to all India except the state of Jammu and Kashmir. This law is particularly outlined for Muslims, Christians, Parsis, Jews and other personal laws which does not support adoption.

It was stated that any child below the age of 18 is a minor and to adopt certain procedures were required after the completion of which the child could be adopted. The procedure would start only after an application has been placed. The application would deal with all kinds of information about the guardianship. After the submission of the application the court fixes a date of hearing. The court would then consider the evidence before making the decision.

Muslim law

Adoption is a little different under the Islamic law. The word used for the same is kafala.

Rules under the concept of Adoption:
1. Adoptive child has to retain his adoptive name and not his or her biological name.
2. He/she inherits from his adoptive parent and not his/her adoptive parent automatically.
3. If he has got the property from his biological parents then his adoptive parents have to take care of the same.

Intercountry Adoption
This is a process of adoption by which you:
1. Adopt a child from a country other than your own through permanent legal means.
2. Bring that child to your country of residence to live with you permanently

Inter country adoption is the same as that of the domestic adoption. Both consists of legal transfer of parental rights and responsibilities from child’s birth parents or other guardian to a new parent or parents.615

Custody

1. Physical Custody - The parent who has been granted physical custody is usually the primary guardian and the child lives the parent.
2. Legal Custody - Either the parent can make decisions which affect the welfare of the child such as medical treatment, religious practice and education. Both parents continue to share the legal child custody until he reaches the age of 18.
3. Joint Custody - Both the parents have been given the legal and the physical custody of the child.7616

The Guardians and Wards Act, 1890

Here the court must work in the interest of the minor taking into consideration sex, age, religion, the character of the guardian, death of a parent(s) and the relation of the child and the guardian. The minor’s preference may be taken into consideration. The welfare of the child is taken into paramount consideration.


http://legodesk.com/blog/child-custody-laws/
Child Custody under the Hindu law-Hindu Minority and Guardianship Act 1956

Under this act custody of all children under 5 years of age is given to the mother. The custody of boys and unmarried daughter is given to the father. Custody of illegitimate children is given to the mother first and then the father while the guardianship of a married girl is given to her husband.

Child Custody under the Muslim Law

The concept of custody is called “Hiznat”. In this case the custody is given solely to a mother unless she is seen as an unfit guardian.

Child Custody under the Christian Law

As there is no such mention in the The Indian Divorce Act,1869 the custody rights becomes applicable for all matters pertaining to Christian Children and their guardianship.

Child Custody under the Parsi Law

Under this act also as there is no mention, the court has to pass an order within 60 days related to custody of Parsi children and their guardianship.

Guidelines for Adoption of child by CARA (Central Adoption Resource Authority)

Citizens in a living in relationship cannot adopt. Single parent can adopt child with same gender. Eligibility criteria for prospective adoptive parents

1. The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.

2. Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following, namely:-

A. The consent of both the spouses for the adoption shall be registered, in case of a married couple.

B. A single female can adopt a child of any gender

C. A single male shall not be eligible to adopt a girl child

3. No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.

4. In case of couple, the composite age of prospective adoptive parents shall be counted.

5. The minimum age difference between the child and either of the prospective adoptive parents shall not be less than 25 years.

6. The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parent.

7. Couples with 3 or more children shall not be considered for adoption except in case of special need children as defined in sub-regulation (21) of registration 2 hard to place children as mentioned in regulation 50 in case of relative adoption by step-parent.617

Parenting

617http://cara.nic.in/Parents/eg_ri.html
Parents have the knowledge about the fact as to how their child should come up with their own personality but at times they too lack them because of which their children may be at a loss in case of the kind of personality they should hold. The task of ensuring children’s healthy development does not solely depend upon the parents but also the government/community which may provide programs and services to support parents and families. Society benefits socially and economically from providing future generations of parents with the support they need to raise healthy children.

Parenting is always defined as a mechanism of socialization that is to prepare children to meet the demands of their environment and take advantage of opportunities within the environment. Parents usually train their children for socially accepted physical, economic and psychological situation in which they are going to survive and thrive. All young children gain attachment from their parents and usually learn what their parents teach them. In any case they aren’t attached then they may not listen to them and follow the wrong path but most parents handle this situation very wisely because they have been much more experienced.

Parents possess different levels and quality of access to knowledge that can formation of their parenting attitudes and practices. Even if a child has been adopted or a single parent has him/her as custody the parent can adopt the same kind of parenting as they would have adopted for their own child. They would still provide their adopted child with the same kind of parenting. Parenting knowledge, attitudes and practices are shaped in part by parent’s own experiences and circumstances, expectations, and practices learned from others or may be family friends.

Parenting can not only affect children but also parents. For instance when a child is not behaving well anywhere or lacks at any point of time parents are questioned on their parenting and at times both of them are questioned at the same point of time.

Cases
Every legal research should be related with cases. There are few cases which defined adoption and custody in different aspects.

Supreme Court in Pawan Kumar Pathak vs. Mohan Prasad has reiterated that an adopted son is no less than natural son, when it comes to claiming the right to inherit the properties of his father. Division bench comprising of Justice A.K Sikri and R.K Agarwal made this observation in appeal arising out of suit filed by an adopted son, claiming his right to inherit properties which belonged to his father, who died intestate. Another relative suit claiming that the appellant is not the son hence the latter filed an application to bring on record adoption deed registered around forty years ago. The Trial court dismissed the application holding it as an inadmissible evidence and the High Court also refused to interfere with that order. Thereafter the adopted son approached the Apex court.

The court referred to Section 3(57) of the General Clauses Act,1897 which says that “son” in the case of anyone whose personal law permits adoption shall include an adopted son. The Bench added “Once the
law recognizes adopted son to be known as...son, will fail to understand why it was necessary for the appellant to plead that he was the adopted son. His averment to the effect that he was the only son, according to us, would be sufficient to lay the claim of inheritance on that basis”. 10618

The Supreme Court had stayed an order of the Gujarat High Court asking a mother to take her eight-year-old son to the United Kingdom, because of a judicial order passed there in a custody battle initiated by her estranged husband. Under the Indian law maximum importance is given to the best interests to the child and so either parent does not have clear primacy to be granted the custody of the child.

A Supreme Court bench headed by Justice Vikramjit Sen had ruled that an unwed mother does not have to take consent from the biological father of the child, or reveal his identity for sole guardianship of the child.

The court is 'parenpatiae’ or ultimate guardian of the child. 11619

Societal Impacts of Adoption & Child Custody
1. Lack of Trust: In case of adoption, often it is seen that people are against the idea of adoption. The major reason behind it is that they lack sufficient knowledge regarding the concept of adoption. They would rather choose to be ignorant. Also, there aren't much resources that would actually prove the purity and originality of child adoption centres. Moreover, it is easy to convince the public that adoption should not be practiced rather than making them aware of the proper facts and laws relating the same.

In the case of child custody, trust lacks in every possible aspect on can look onto. One parent does not trust the other when it comes to taking care of their child. The child do not trust one of the parent or even refuse to have recognized them. The court do not trust that divorce will end up any future problems for the child.

2. Following The Ancestral Path: Ancient India had the tradition of female foeticide and infanticide. When the couple suffered from 'girl child curse', i.e., giving birth to only girl child, their last resort was adoption. Couples would adopt a male kid to make him their successor. The ancestors started a trend that is still prevailing in the present times that is to treat the girl child as a burden. Every now then there are news of abandoning girl child, right after their birth. Most common place to abandon an infant is the dustbin. So much for a 'progressive' country!

Since the times immemorial, society has believed that a wife is supposed to be there for her husband in his good and bad. And the gates of heaven would not open for her if she ever defies her husband or decided to leave him. Divorce was never an option back then. So no matter how hard the situation was, the lady was supposed to adjust and child was supposed to learn the same.12620

618https://www.livelaw.in/adopted-son-no-less-natural-son-inherit-fathers-properties-reiterates-sc/ 
619https://yourstory.com/2016/05/custody-rights-divorce/ 
620http://marripedia.org/effects_of_adoption_on_the_child_s_social_adjustment

www.supremoamicus.org
271
3. Uncompromising Outlook of The Modern India: Our country has a history of discriminating against castes, which apparently is still prevailing. The majority is follower of Hinduism, hence while adopting the first though that comes to their mind is, to which caste the child they are going to adopt, belongs to? How will they know whether the child adopted is even Hindu? Apparently, people also believe that adopting a child means pitying for him, sympathize with a kid with no family. Instead of making the child believe that he is just a charity case, people need to show more love to him. Just because he is adopted does not mean there shall lie any difference in the definition of parenting.

In child custody scenario, it is often believed that if the mother isn't earning then the custody should be transferred to the father. What could possibly a mother can do? How is she supposed to work and take care of the child at the same time? Well, the actual question that people should ask, when the custody is handed over to either of the parent, are they able enough to fulfil the duties of both mother and father?

4. Maintenance of Secrecy: No matter how much the country is advancing, how much it is developing, the rigidity in thinking or beliefs are ever present. We follow the system of closed adoption, which means there is absolutely no communication between the biological and adoptive parents of the child. It is very uncomfortable of the adoptive parents to tell their child that they are adopted. Reason behind the issue is the fear of being hated by their child. When a couple is going through a marital crisis, the rest of the family try to keep it a secret from the child. The reason to maintain such secrecy is the fear that his childhood will be tarnished. In such a scenario, every phase of the child is equally at stake. If he is still a child, he might get involved in school related problems or will be subject to victimization. If he is a teenager, he might suffer from anxiety, depression or bullying. 13

5. Social Behaviour: It is often believed that the adopted child is more violent and aggressive that the non-adopted child and it will be the same in future. Classic Indian paranoia. Reason behind such an uncanny belief might be the fact that before adoption he was raised in a different environment. It is not the case always. There are kids who can easily adjust and learn to live the way the adoptive family teaches him to. But if by any chance the uncanny belief is true it should not mean that child will retain the same aggressive nature forever. The more understanding the adoptive mother is, the more educated the family is, the more quickly the adopted child learns to control the aggression.

Child Custody becomes important for the child who has witnessed the hostile environment at home. such environments might have different impacts. First possibility is that he cannot concentrate at school, resulting in poor grades. Secondly, when the child will be unable to seek equal amount of love, care and support from both the parents, he will look for methods that could bring him peace and hence that would inculcate the habit of substance abuse. 14

621https://www.researchgate.net/publication/236005514_Adoption_in_India_the_PastPresent_and_the_Future_Trends
Parental Psychology

Adoption disclosure is an important indicator of the healthy development and psychological well-being of adopted children. Parents under a survey have shown up some concern.

The results showed that while while many of the parents had talked openly about their adoption to their immediate families (95.3%) and others of their social network (88.4%), they were hesitant in telling their child. Only 12.8% of Indian parents had told their child about adoption, and 31.4% were planning to tell. The results of the logistic regression analysis who were above 6 months at adoption were more likely to have disclosures from their parents about their adoption. Some of the parents were about to tell their children about them. Not letting the child know about adoption and also letting the child know about adoption can affect the child and the parent both. Some don’t just let their children know about adoption because they feel their child may not accept them or may just try living alone. The child after growing up may also react to the same by just taking much time or feeling that what must have happened to their birth parents. The parents now highly need to deal with the adoption disclosure. 15

Conclusion

Before dealing with the problems related to adoption, child custody and parenting the citizens first need to deal with the problem of lack of awareness. The couples without a child should be given proper support. The child without parents should be showered with love. It is high time for people to change their thinking. Even the legal system of India allows such change. It is okay to welcome such good change. Maintaining such a rigid thinking forever is the last thing our country wants.

Society as mentioned is the first stake but before that comes our own family. Family members are the first one to deny adoption. They don’t want the couples to adopt and secondly, when the couples adopt they look down upon them on the basis of their caste, race, religion or anything. Families don’t allow them to pass inheritance to the adopted child. Mostly this happens in rural areas. If our own family does not support this system then how do we expect the society to do the same. We should now start accepting the fact that every child is precious and it is not the child’s fault that he or she is born as orphan or is the reason for marital crisis between the parents or any other reason for that matter. It is not wise on the part of society to be judgmental on every cause. They aren’t going to be present when a child is being adopted or being raised or even taken into custody for that matter. Society should not decide the fact that if a couple is adopting, it is only because they are unable to have their own child. Nobody knows the back story of it, the couple may have gone through some other medical issue or anything for that matter. Rather being judgmental, the society should broaden their horizon.

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DUTY OR DURESS: MARITAL RAPE LAW

By Shambhvi Mansingh, Vidhi Baid and Yamini Thakur
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“The husband should give to his wife her conjugal rights, and likewise the wife to her husband. For the wife does not have authority over her own body, but the husband does.”
- First Corinthians 7:1-5, Verses 3-5

The institution of marriage has always been taken as license to legal sex. There are certain circumstances in marriage, when the wife is subjected to sexual intercourse cloaked as being her duty. However, despite being socially approved, the question as to consent still remains shrouded in mystery, especially when the sexual intercourse is being performed under social obligations and not something that she consents to.

The husband generally sees sex as a solution to all matrimonial problems as well as the source of validation for masculine identity; this might also lead to problem of toxic masculinity in society. The individuality of women is lost in social pressure. Stereotypes mislead men into believing, that they should ignore a woman’s cry for protest. These stereotypes also mislead women into believing that they are bad wives for not enjoying sexual encounters or that they are bad wives for not enjoying sex against their will.

This sexual act includes intercourse, anal or oral, forced sexual behavior with the other spouse, which is considered by the victim as degrading, humiliating, painful and unwanted - this is known as spousal rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused. Percentage of women who have experienced intimate partner sexual violence at least once in their lifetime, stands at 60-67% in Asia alone. The situation in the developed countries relatively fair better with North America at 20-30% and Europe at 20-40%.624

The marital rape exemption can be traced to statements by Sir Matthew Hale, Chief Justice in England, during 1600s. He wrote, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband whom she cannot retract." Not surprisingly, thus married women were never the subject of rape law. Laws bestowed an absolute immunity on the husband in respect of his wife solely on the basis of marital relation.625 This ‘Implied Consent Theory of Sir Hale’ found its way into the legal system of all former British colonies that adopted the common law system.

Sexual violence in marriage has been a part of the institution of marriage since the conceptualization of the institution itself. Marital rape, like the other forms of sexual assault, has however been linked to the problems faced by the millennial generation.

The rape laws of the pre-modern times defined any type of sexual assaults as a

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624 Unstats.un.org - unsd gender
625 Indian law journal - article by Priyanka Rath - Marital Rape and the Indian Legal Scenario
property crime against the husband or father whose wife or daughter was “defiled”, thereby labelling all female relatives as the property of the male members of the family. Under this legal framework marital rape was considered to be an oxymoron, since a wife had been legally defined as a husband’s sexual property, in the pre-modern laws. When the rape laws were first defined in the 17th century— from British common law to the Qing dynasty in China (Ng, 1987) – sanctioned rape, it was considered to be a violation of a woman’s purity or chastity; again, not possible in the context of marriage, as women were considered to be the property of their husbands.

This ideology of permanent, irrevocable consent pervaded legal and cultural conceptualizations of marriage and forced sex within it. And this ideology has global resonance, not because people on many continents were influenced by Lord Hale, but because control of women’s bodies through marriage is foundational to patriarchy. Until 1993, rape laws across the US included a “spousal exemption” that specifically excluded husbands from rape prosecution.626

In the United States, marital rape has been outlawed in all 50 states, however, there have been times when these laws have failed the Americans. Many officials carry certain assumptions and biases that more often than not cloud their judgment. The major assumption being- if a person is married to another that they love, then the person is expected to give the other partner sex. How can one be raped when they’re supposed to have sex with them out of marital obligation and duty?

This assumption can be seen in a number of laws. For example, according to the Daily Beast, 8 states still have laws differentiating general rape and marital rape, some of which even carry exemptions under certain situations. A local newspaper from Ohio had even stated that a victim "isn't protected from attacks involving rape drugs and other types of impairment when the perpetrator is her spouse." In Oklahoma, marital rape has to be shown that the case can only be considered rape if the victim was violently coerced. If intercourse occurs while the victim is sleeping, it can also be considered rape, as long as the perpetrator isn’t the victim's spouse.627

The Marion Superior Court Judge who originally presided over David Wise, a man who had drugged his wife for a period of 12 years then raped her, had let Wise go without so much as any prison time. The most astounding fact regarding the entire case was that, the Judge presiding over the case asked the wife of Wise to forgive him for his acts of the past 12 years. Fortunately, this sentenced was reversed when Wise violated the terms of his home detention, and as of now must spend five years in the Department of Correction. He will also have to register as a sex offender for 10 years.

The first country to begin the process criminalizing marital rape was Poland with its Criminal Code of 1932. A concrete change in the interpretation was brought with the amendment in 1969- that protected

626 Marital rape in a global context: from 17th century to today- Kersti Yliõ

627 How the United States Treats Marital Rape- Robin Goodfellow

www.supremoamicus.org

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the sexual freedom of married women in the same way as the sexual freedom of anyone else. The words that are used to describe rape do not exclude anyone from the possible range of victims or offenders, hence, it can be inferred that spouses also can commit the offence or be its victims. Later, following the example of their European counterpart, the Scandinavian countries of Sweden, Norway, Denmark passed laws penalizing marital rape in the 1950s. Soon, they were followed by the Communist Bloc countries of former Soviet Union and Czechoslovakia.

Australia, under the impact of the second wave of feminism which focused on increasing equality for women by gaining more than enfranchisement became the first common law country to pass reforms in 1976 that made rape in marriage a criminal offence. Since the 1980s, many common law countries like South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, and Israel have legislatively abolished the marital rape immunity.

Following the European Parliament’s Resolution on Violence against Women in 1986, many nations like France, Germany, the Netherlands, Belgium and Luxembourg called for criminalization of spousal rape. In 1991, the 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. The possibility of condemning a husband for raping his wife was fully accepted in England, in 1992 after a House of Lords decision known as R vs. R.

The journey of women’s rights from being considered as the property of her husband or other male relatives to having an individual identity of her own, has been riddled with innumerable hurdles. Despite the ‘first-world countries’ being developed in the economic and political spheres, it failed to establish a progressive and inclusive (of women) human society. What one can understand from the statistics available, even the most developed countries failed to recognize the rights of women ‘behind closed doors.’

In India marital rape exists de facto but not de jure. Where, in other countries either marital rape has been criminalized or the judiciary has been playing an active role in recognizing it as an offence, in India however, the judiciary seems to be unsure how marital rape will be perceived, given the diversity of patriarchy in India.

The peculiarity of Indian law is in adoption of the principle of primacy and supremacy of husband’s right over that of the wife, even when she is well below the legal age of marriage.628

Until 1890, thirty years’ post-enactment of the Indian Penal Code (IPC),1860, rape laws continued to be unchanged. It was only after the landmark case of Queen Empress vs Haree Mythee629 rape of child wife was severely criticized and the Court held that the husband did not have the right to enjoy the person of his wife without any regard to the safety and consent of his wife. It was

628 Marital Rape - Exemption under Indian Penal Code: Quest for Recognition and Liability-Dr. Vandana
629 1891 ILR 18 Cal 49
only after this ruling, that the age of consent was raised to 12 from 10. This was the very first time that the judiciary recognized marital rape as a crime in India.

Despite the recommendation of the Law Commission in its 42nd Report, to include sexual intercourse of a man with his minor wife as an offence, the Joint Committee dismissed the recommendation. The Committee had argued that a husband could not be found guilty of raping his wife whatever may be her age. When a man marries a woman, sex is a part of the package. Clearly, the government was not very keen on enacting a radical legislation which was the need of an evolving society. Even when the lawmakers of the nation shelved the concept of marital rape altogether, the Indian Judiciary recognized the concept of marital rape, irrespective of its diverging views.

In Bodhisattwa Gautam vs. Subhra Chakraborty, the Supreme Court held that, rape is a crime against basic human rights namely, the right to life enshrined in Article 21 of the Indian Constitution. Yet, it negates the very guarantee by not recognizing marital rape. Despite the developments in women rights, it has mainly been confined to physical rather sexual abuse.

In State of Maharashtra vs. Madhkar Narayanan the Supreme Court held that every woman is entitled to her sexual privacy and it is not open for any and every person to violate her privacy as and when he wished. In Vishakha vs. State of Rajasthan the Court extended the right of privacy in working environments also. Further, along a similar line we can translate that, there exists a right of privacy to go into a sexual relationship even in a marriage. Subsequently, decriminalizing rape in a marriage, the marital exception teaching, damages this right of privacy of a wedded lady and is consequently illegal.

In Sree Kumar vs Pearly Karun the Kerala High Court observed that, the offence under section 376-A IPC won’t be pulled in as the spouse is not living independently from her husband under a declaration of partition or any custom or use. Regardless of the possibility that she’s liable to sex by her better-half without wanting to and without her consent. In this situation, the spouse was forced to copulate against her will by her husband when she cohabitated with him as a result of settlement of separation procedures sub judice. Subsequently, the spouse was not found to be guilty of raping his wife though he was de facto guilty of doing or committing the crime.

The Judiciary’s stance on criminalizing spousal rape has only been minuscule so far because it can only interpret laws and not enact them. The lawmakers of the nation are duty bound to introduce laws in consonance with whatever ails the society. Marriage in India is a holy sacrament where the wife submits herself as a devotee to her husband. The social conditioning is such that the government has failed to enact a law protecting married women where the sexual

6301996 AIR 922, 1996 SCC (1) 490
631AIR 1997 SC 207
632AIR 1997 SC 3011
633Marital Rape – Sangamithra Logonanthan
6341999 (2) ALT Cri 77, II (1999) DMC 174
predator is the husband himself. In India, only two groups of married women are protected under the rape laws, namely: those being under 15 years and those who are separated from their husbands.635

Not only does the Indian law therefore condone statutory rape, it also doesn’t recognize the very possibility of rape in a marriage.

According to National Family Health Survey (2015-16), 31% of married women experienced sexual violence in India. Among ever-married women aged 15-49, who have ever experienced sexual violence, 83% reported their current husband and 9% reported their former husbands as perpetrators.637

During National Family Health Survey (NFHS) 4, Indian men were asked specific questions to assess their gender egalitarian attitudes. In particular, men were asked, if a woman refuses to have sex with her husband when he wants her to, does he have the right to display the following four different behaviors: use force and have sex with her even if she doesn’t want to; get angry and reprimand her or refuse to give her money or other means of financial support. According to the national average, 9% of the men agree to the fact that the husband has the right to use force and have sex with his wife even when she does not want to; 11% agree to the fact that the husband has the right to refuse financial support to his wife if she refuses to have sex with him; 18% men believe that they have the right to get angry and reprimand their wife if she refuses sexual intercourse; 9% of men agree to the fact that a husband is justified in chastising his wife if she refuses sexual intercourse.

These facts highlight the need of the hour which is to introduce legislation penalizing marital rape.

The introduction of the Domestic Violence Act was a breather for the oppressed Indian women. Although, it only penalized physical violence with regards to dowry, the women now had a tunnel of hope. Sexual abuse in marriages, especially in India, where it is regarded as the most pious institution prevailing in the society, is not only looked down upon albeit something which the society believes to be far from reality. The concept of mutual consent is assumed in the conduct of sexual relations between the spouses, whereas, it should be a precursor in any marriage.

The association of marriage and compulsory sexual intercourse should undergo a rational change because the social fabric allows submission of independent identity of women and does not recognize any sort of bodily autonomy yet. Through the statistics one can clearly comprehend what the average man in India believes- the right to have sex with his wife notwithstanding the fact that, whether she’s willing or not. Exemption of women rights in their own households only under the pretext of safeguarding the institution of marriage in India will only perpetuate the presence of supremacy of men over women.

In the words of Maneka Gandhi, “It is considered that the concept of marital rape as understood internationally cannot be

635 exception 2 to section 375, IPC
636 section 376-A, IPC
637 NFHS-4
suitably applied in the Indian context, due to various factors like level of education, illiteracy and poverty.” This view of the Cabinet Minister for Women and Child Development, clearly reflects the patriarchal and orthodox thought process of the Indian legislature at large. Being one of the lawmakers of the nation, it is expected of her to float changes for establishment of an egalitarian society. The stereotypes should not be perpetuated, but broken; these views places women as a second-class gender in India.

Justice Pardiwala of the Gujarat High Court opined- “A law that does not give married and unmarried women equal protection, creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”

Although a small voice, but the winds of change have definitely picked up in the Indian society. Mr. Shashi Tharoor, has championed the cause of marital rape in India by introducing ‘The Women’s Sexual, Reproductive and Menstrual Rights Bill’ in 2018. If the Bill sees the light of the day in both the Houses of Parliament, it will take away the exception given to men in section 375, IPC- which does not penalize the man, if the sexual intercourse is committed with his own wife who is above 15 years of age. The Bill said- “The autonomy of the woman must be rightfully restored to her by granting her the agency over her sexual and reproductive rights. For this, marital rape should be criminalized to eliminate the loss of woman’s sexual independence, post marriage.”

The introduction of marital rape laws does not necessitate acceptance of the same in the society. It will take a lot for married women to report as the taboo attached with women being recusant in their marriage will not be easy to surmount. The right to live with human dignity as enshrined in Article 21 of the Indian Constitution, is averse to the very idea of spousal rape in a marriage. This not only dampens her self-worth, as the one person that she entrusts her life to becomes her worst nightmare but also degrades her to a second-class citizen.

The 21st century women should not lose the agency of sexual autonomy to a man upon marrying him.

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PERCEPTION EXPANSION: A JURISPRUDENTIAL ANALYSIS OF RIGHT TO LIFE OF WHALES

By Shardul G.Ansingkar

ABSTRACT
The Sanskrit phrase “Yatha Drishti Tatha Srishti” means that ‘your perception determines the creation’. It elucidates a fundamental lacuna of Human Beings- We tend to evaluate the world through Human perception and by using Human Standards. Even after Darwin had established the continuities between ourselves and other apes, we have tried to cling to the idea that there is something quite unique to human beings, some way in which we differ, not only in degree, but also in kind, from animals. Such perception has led Human beings to assume superiority over other creatures and restrict the sphere of right-holders to Human beings and connected institutions. In order to justify such restriction, classical Human Jurists have defined law in such a way that sphere of rights and justice does not extend to Non-Humans. This article argues against such restriction by opposing the barbaric practice of Whaling through criticism and redefining of classical conception of personhood and relying upon the theory of utilitarianism as well as Locke’s conception of personhood.

A. INTRODUCTION
“The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species.”

Despite the Vedic treatment of Animals as equals, Human beings have constantly assumed superiority over Non-Humans.

Since, the Unknown author of Genesis established Mankind as ruler of Non-Humans; the Human beings have tried to dominate the Non-Humans by drawing a sharp divide between Humans and Non-Humans. An example of such Domination could be evinced in the Practice of Whaling i.e. Whale Hunting. Such Domination has resulted in denial of the most inherent right to life of Whales.

In this article, the author advocates for recognizing the right to life of whales and consequently implementing a permanent Moratorium on Whaling. The central issue in establishing such a claim is the exclusion of whales from the sphere of Personhood and consequently from the sphere of Right-holders. I argue for inclusion of whales within the sphere of Right Holders as was first propounded by D’Amato and Sudhir K.chopra. In line with such approach, I assess the demand of whales for inclusion in sphere of right-Holders by using the

638 Animal Welfare Board of India v. A. Nagaraja,(2014) 7 SCC 547 Quoting Isha Upanishad.
639 Vedas are the ancient religious books of Hindu dharma. There are four Vedas: Rigveda, Samved, Yajurved, Atharvaved.
640 Such Superiority is a manifestation of Speciesism Oxford English Dictionary defines Speciesism as “the assumption of human superiority over other creatures, leading to the exploitation of animals” It is attitude of Bias towards your own species and thereby perception of other species as Lower beings.
jurisprudential tool of Jeremy Bentham’s Utilitarianism.

B.SIGNIFICANCE OF ARGUMENT
The dependence on the whale meat obtained by whaling for subsistence dates back to as far as 4,000 years ago when early Norsemen used stone harpoon heads. Other early hunters were Basques, who developed the first organized whale fishery in the 12th century. They set a pattern of overfishing as evinced by virtual elimination of Biscayan right whales in the Bay of Biscay. Such pattern was followed by American, Norwegian, British and Japanese whalers in the modern era. The Modern commercial whaling began with the introduction of two inventions: the explosive harpoon and the factory ship. The continuous whaling, without any attention being paid to the preservation of whale resource, led to the total decline in whale population which was once estimated to be 100,000 to 300,000 to 9,468 by 1918-1919. After the First World War, the whaling nations -threatened by the constant plummeting in stocks and forever increasing yields- realized that collective profits depend on sizable number of whales and decided in their own interest to accept certain regulations on whaling activities. Such attitude of self interest culminated in conclusion of International Agreement for the Regulation of Whaling in 1937. It focused on longevity of whaling industry rather than the sole motivation of increasing current profitability as could evinced in the significant decision of prohibition on catching gray whales and right whales as well as other regulatory directions. However, in practice whaling operations remained unabated. The continuous operations of whaling nations reflected an approach to continue indiscriminate whaling without any respect for regulations until the whaling operations ceased to be remunerative. The significant fallacity of such approach is the neglect of the fact that whaling shall not end when the practice ceases to be profitable as could be evinced today from the constant support of Japan to resumption of commercial whaling despite its tremendous costs and low remuneration due to its cultural significance and sunken capital in whaling ships. inadequacy of the scope of regulations; inadequate scientific data; non-cooperation by some major whaling nations; poor enforcement of agreements and no international supervision or control; and lack of global interest led to further significant reduction in the stock of whales despite the conservative agreement of 1937. It led to signing of most important protocol regarding whaling activities- the new International Convention

644 International Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, TS No. 933, 190 LNTS 79.
645 The protection of right whales was already in place before the introduction of 1937 treaty. Additionally, gray whales were protected in 1937 agreement by virtue of article 4.
647 P. BIRNIE, INTERNATIONAL REGULATION OF WHALING 129-130 (Oceana 1985)
for the Regulation of Whaling (ICRW) of 1948. It superseded previous agreements and established International Whaling Commission (IWC), which convenes annually to identify protected species and revise whaling quotas on the basis of three quarters of majority vote. It started as a whaling club, focusing on conservationist approach to provide longevity to whaling industry but gradually shifted to protectionist end of spectrum focusing on providing longevity to whales as a species. Such shift, though manifested in legal documents, has to be attributed to increasing attention paid to animal rights and thereby changing psychological stand of people and states towards animals. For Instance. United States of America, an erstwhile diametrically opposed to whaling club was transformed to protectionist approach on account of increasing support of Animal rights movement led to Tom Regan and due to activities of clubs like the Sierra Club.

The protectionist approach could also be attributed to increasing awareness about environment preservation at the international forum. Such awareness, which had a significant impact on changing the status of IWC from whaling club to whales preservation forum is reflected in The Stockholm Conference on the Human Environment which passed a call for 10 year moratorium on commercial whaling as well as in various legal instruments such as Convention on International Trade in Endangered Species (CITES) which characterized 15 whaling species as endangered and the most comprehensive United Nations Convention on the Law of the Sea (UNCLOS). The most significant provision of UNCLOS is Article 65 which reads:

"States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."

The protectionist approach of article 65 directly referring to cetaceans (whales, dolphins, and porpoises) had a significant impact on the standing of IWC. another significant factor impacting the standing of IWC is the changing membership of IWC. From 1980 to 1981, the membership of IWC witnessed an increase of 33%. The new members were mostly non-whaling nations who voiced adamant opposition to whaling as could be evinced from the remarks of the then Indian Prime minister, Rajiv Gandhi who stated that The only purpose of India’s entrance into ICRW is to “join other nations . . . in their endeavor to save this most fascinating and remarkable member of our planet’s living fraternity.”

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651 CITES.org., https://www.cites.org/eng/app/appendices.php (last visited Nov. 6, 2018, 06.57 PM).
653 Id at art. 65.
654 For detailed account of 1982 IWC meeting See generally Birnie, Countdown to Zero, 7 MARINE POLY 64, 66 (1983); IWC, Chairman’s Report at 17-42, IWC/34th Mtg./1982.
655 These Nations had never participated in whaling.
656 IWC/37th Mtg./e1985/OS.
Such protectionist attitude led to approval of Seychelles proposal which proposed a Temporary moratorium on commercial whaling by 1986 by a vote of twenty-five in favor, seven against and five abstentions.\textsuperscript{657} The voting pattern for such moratorium clearly evinced a strong wave against whaling. However, such moratorium cannot be considered a strong protective measure against whaling in light of its temporary nature. The moratorium itself provided for its end. Global commons recommendation of world conservation strategy, an organization commissioned by the United nations environment programme further substantiated that moratorium is only to be extended to all commercial whaling until the consequences for the eco-systems concerned of removing large portions of the whales' populations, and such populations' capacity for recovery, can be predicted. The temporary nature of moratorium evinces that it can remain operative only on the basis of favorable political conditions.

It was hoped that such favorable political conditions will eventually culminate into an entitlement stage where the right to life of whales shall be recognized by the international community.\textsuperscript{658} However, recent developments suggest that such entitlement stage might remain only a moral desirability. Japan proposed partial resumption of commercial whaling with strict quotas in the 67th IWC meeting organized in Brazil in 2018 in a proposal titled “The way forward of IWC”.\textsuperscript{659} The Japanese proposal was rejected. However, the significant aspect of Florianopolis conference was the substantial increase in the pro whaling nations as could be evinced in the approval of 27 countries favoring Japan’s proposal of resumption of commercial whaling.\textsuperscript{660}

Furthermore, although IWC prohibits commercial whaling, North Atlantic Marine Mammal Commission (NAMMCO) permits Commercial Whaling. NAAMCO is an international regional body comprising of Faroe islands, Greenland, Iceland and Norway. It focuses on conservation, management and study of cetaceans while recognizing the need of coastal groups of subsistence and thereby consequently allowing commercial whaling within (liberal) quotas.\textsuperscript{661} It is a separate organisation which operates only in the north atlantic region. However, the existence of such separate organisation adopting a completely opposite stand than that of IWC, challenges the authority of IWC. The most troubling aspect in this regard is the amount of attention being paid to NAMMCO as evinced by high degree of attendance.\textsuperscript{662}

Such factors indicate that commercial whaling might resume in a few years. However, such resumption will be catastrophic for whales. Currently, IUCN red list has included various species of

\textsuperscript{657} Out of the seven oppositions, only three filed an objection, exempting them from the purview of ban.
\textsuperscript{658} D’Amato, supra note 4, at 40.
\textsuperscript{659} IWC, https://iwc.int/iwc67 (last visited Nov. 7, 2018, 08.54 PM).
\textsuperscript{661} NAMMCO, https://nammco.no/about-us/ (last visited Nov. 7, 2018, 09.54 PM).
whales in the “endangered” category and Convention on the international trade in endangered species of wild flora and fauna (CITES) has also listed 15 species of whales in appendix I. The precarious condition of whales clearly demonstrates that the return of commercial whaling might result in their extinction.

Therefore, Recognition of right to life of whales and consequent imposition of Permanent and complete moratorium on whaling has to be given immense importance in light of changing Legal and Political attitudes.

C. BENTHAM’S UTILITARIANISM
Jeremy Bentham proposed the Theory of Utilitarianism by analyzing Juristic concepts on the antagonism of Pleasure and pain. The Fundamental proposition is to engender the greatest possible amount of happiness. Bentham, while proposing such theory, unlike its predecessors expanded the scope of application of such doctrine to Non-Humans. Bentham proposed that "The question is not, Can they reason? Nor can they talk? But, Can they suffer?" The rationality of suffering for Legal Consideration is based on the empirical reality that if Any other criteria such as Capacity of Reasoning is taken as basis of Moral and consequently Legal Consideration, then Many Human beings would also be left out of the sphere of right Holders, For Instance, Infants and Mentally disabled. Such approach to right holders is also adopted by John Stuart Mill.

Mill endorsed such theory by drawing an analogy to slavery and drawing parallels between arguments advanced against Benthamian analysis as stated above and arguments of Slaveholders in the America. Peter singer, the noted animal Right activist has further stated that "Since Animals feel pain; they possess Interest of avoiding such a pain. Singer proposed that since animals posses such interest, equal consideration must be afforded to such Animals. Such utilitarianism approach clearly evinces that sentience i.e. capacity to feel pleasure and pain is construed as basis of according personhood to a “thing.”

However, the utilitarian approach concerns itself not with individual rights but with the Utilitarian calculus of the society. Therefore, Individual rights may be sacrificed at the altar of Maximum social welfare, for Instance, Right to religion may be sacrificed, if it be found inconsistent with the principle of social utility. In consequence Whaling also has to be measured on the utilitarian calculus by

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665 Appendix I lists only those species that are the most endangered among CITES-listed animals and plants.
667 Id.
668 JOHN STUART MILL, UTILITARIANISM AND OTHER ESSAYS 228, 252 (Penguin 1987).
669 Personhood entails endowment of rights upon the subject on whom personhood is endowed. On the other hand, “things” are not subject to endowment of rights in law.
demonstrating that the adverse impact of permanent Moratorium on whaling does not outweigh its benefits.

1. Adverse effects of permanent Moratorium on whaling:

   1) The moratorium does not take into consideration the interests of the consumers of whale products and the whaling industry. Interests of the consumers of whale products and of the whaling industry, though not conclusive but is a very strong persuasive argument while considering the validity of such Moratorium. Such ban would totally destroy the Whaling industry. Although it is true that whales are highly endangered today, the present ban on commercial moratorium, which is temporary in nature, allows the recovery of whales. After whales have been recovered, the moratorium on commercial whaling also has to be lifted. Such approach is in consonance with the object and purpose of ICRW. The object and purpose of any multilateral treaty or convention is primarily interpreted from the preamble of such treaty or convention. The preamble of ICRW states “a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.” The phrase makes clear that to the extent that it referred to protection of the stocks, this was to be done with a view to ensuring the future of the whaling industry by the use of foundational ideology of Conservation. Conservation is defined as the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. The phrase maximum supply in conservation supports such economically motivated approach. It is also consistent with the growing international trend towards free and unrestricted global trade.

   Such approach neglects the harmful impact of whaling and the constantly changing status of IWC, IWC might have started as a Whalers club but it has developed into the protectionist approach towards whales through increased focus on Environmental Impact. GATT, The most significant treaty aiming at unrestricted global trade recognizes protectionist approach towards environment and any interpretation of the GATT that involves a conflict between free trade and of the whaling industry, though not conclusive but is a very strong persuasive argument while considering the validity of such Moratorium. Such ban would totally destroy the Whaling industry. Although it is true that whales are highly endangered today, the present ban on commercial moratorium, which is temporary in nature, allows the recovery of whales. After whales have been recovered, the moratorium on commercial whaling also has to be lifted. Such approach is in consonance with the object and purpose of ICRW. The object and purpose of any multilateral treaty or convention is primarily interpreted from the preamble of such treaty or convention. The preamble of ICRW states “a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.” The phrase makes clear that to the extent that it referred to protection of the stocks, this was to be done with a view to ensuring the future of the whaling industry by the use of foundational ideology of Conservation. Conservation is defined as the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. The phrase maximum supply in conservation supports such economically motivated approach. It is also consistent with the growing international trend towards free and unrestricted global trade.

trade and the environment is influenced by the United Nations Conference on Environment and Development, the "Rio Conference," which discussed issues relating to trade and the environment with a discussion of GATT provisions and principles. Rio Conference adopted the concept of "sustainable development" (economic development that the environment can safely support). The present endangered situation of whales, as stated before, however, point to clear violation of sustainable development, if Whaling is not banned. Furthermore, Such approach violates the Sustainable development goals (SDG), adopted by 193 countries across the globe. Pro whaling nations like Norway have proposed that Whale meat, obtained from whaling is in consonance with SDG 2. However, such contention is fallacious as Whale, being a slow breeding and long living animals, whose populations are already severely depleted and which face a myriad of other threats which humans have been unable to solve, including by-catch, the consequences of marine debris (entanglement, ingestion, etc.), chemical pollution, food depletion, habitat degradation and climate change, whales can never be considered as a sustainable food source and communities with a dependency on their meat never achieve food security as a constant threat of extinction of whale resource looms over them. Additionally, The piling scientific evidence suggests that recovery of whale populations could actually lead to increased productivity for fisheries, in light of the significant role played by whales in our ecosystem. Such scientific evidence points towards providing food security to whaling nations and also could be considered to be in consonance with SDG 14. Additionally, SDG 3 aims at achieving healthy life for all people which depends upon the food they eat. Whales live in an ecosystem filled with manmade contaminants which they consume. Eating whale meat, therefore, has been considered hazardous to Human health in light of its Frenatal and postnatal effects as well as effects among Adults. Furthermore, Whaling interferes with the whale watching sport as whale watching operators depend on healthy populations of whales and dolphins and being able to reliably predict their

679 Id at 18, 20-22.
681 GA Res. A/RES/70/1, ¶59 (Sept. 25, 2015).
683 It could be described as “End Hunger, Achieve Food Security and improved nutrition and promote sustainable agriculture.”
686 It could be described as “Conserve and sustainably use the oceans,seas and marine resources for sustainable development.”
movements. Whaling has ceased to be a lucrative market. On the other hand, whale watching market is witnessed a consistent growth. This form of Eco-Tourism, which expands to 119 countries and overseas territories worldwide and employs 13200 people, has generated 2.1 Billion in revenues per year on account of 13 million people taking a whale watching trip every year. Therefore, whaling constitutes a significant hindrance in achieving Inclusive and sustainable economic development and expanding the scope of decent employment to all envisioned in SDG 8.

Furthermore, it could also be stated that the interpretation of objects and purpose of IWC used by Pro whaling nations to justify Whaling is fallacious. The International community is divided on the issue of correct interpretation of objects and purpose of IWC. While Pro whaling nations advance the interpretation stated before, Anti Whaling nations propose a different interpretation. The latter propose that as protection of whales is the primary purpose of the convention and development of whaling industry assumes secondary position. It seems that such conflict is guided by the principle of political motivation and preferences/ preconceptions of the Countries determined in accordance with the preferences/ preconceptions of the residents of the countries rather than by pure legal analysis. Although, both the approaches present a reasonable and prima facie legal interpretation of the object and purpose of IWC, I believe that the correct approach is the protectionist approach advanced by pro whaling nations in light of various protectionist measures introduced by IWC. However, it is possible that the author is also inclined towards protectionist approach in light of his preconceptions regarding Animal rights. Therefore, in the present assessment it is wise to not take into account the issue of interpretation of preamble of IWC as a tool of deciding the right to life of whales.

Even in the exclusion of such interpretation, in light of above stated violations, it could be stated that the interests of whaling industry cannot present a obstacle for recognition of right to life of whales and the proclamation of permanent moratorium on whaling.

2) It violates the cultural and nutritional significance of whaling.

Prof. Sumi, professor of international law at Yokohama City University, has proposed such argument against recognition of right to life of whales. Sumi proposes that the Anti-whaling nations have been consistently operating a cultural bias against Japan and other Pro-whaling nations. He states that Whaling in Japan is a part of culture rather than industry. whaling is an

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690 SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 20 (Oceana 1985).

ancient practice of Japan which could be demonstrated by the fact that many whale bones have been excavated from Japanese archaeological mounds. Furthermore, Ancient Japanese poem, “Manyoshu”, which was compiled at the end of the eighth century, contains references to whaling and whale meat.692 On the other hand, USA and other whaling states have made only commercial use of whale meat, blubber and particularly whale fuel. However, with discovery of oil, a relatively cheap fuel Anti whaling nations have taken a protective stand against whaling. Such approach clearly demonstrates that permanent Moratorium on whaling would just be a manifestation of such cultural bias and in complete contravention of Japanese cultural tradition.

However, The International law is clear that cultural practices are to be encapsulated in a new humanism in which the protection of culture is increasingly conceptualized through the prism of human rights.693 In other words, any conflict between culture and human rights will result in nullification of former in favour of latter. By extension, the same principle must apply to Animal Rights. Any other approach would result in placing human rights on a higher pedestal than animal rights and thereby assuming superiority over them. It would be a manifestation of speciesism. Therefore, a conflict between right to life of whale and Japanese culture has to be resolved in favour of whale’s right.

3) It precludes the scientific use of whales for the benefit of human society.

A complete Moratorium on whaling would prevent the scientific community from discovering any substantial use of whales or any of its products. Such approach is strengthened by the history of medical science. Medical sciences are replete with examples of cures derived from animals and plants, many of which seemed useless and were at the point of extinction at the time of the medical discovery. For Instance, A feverish Andean man suffering from malaria, accidently drank water from a pond containing quinine, which was later used to cure malaria on a global scale.695 Although it is correct that scientific curiosity has guided the progress of human society so far and shall continue to do so, it is also equally true that whaling is not the only option for satisfying such curiosity. Ample scientific evidence suggests that it is not required to kill a whale to learn about its biology and behaviour. All information required for the conservation and management of whale populations can be obtained from non lethal research

692 In Manyoshi, the term “Isanotori” (whale hunter) was used as a customary epithet in sea related context.

www.supremoamicus.org
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Methods. For instance, Until recently, no Non-lethal technique was available for accurately ageing the large free-swimming cetacean species. Such inadequacy was used by Japan to demonstrate the need for continuance of usage of lethal scientific methods. The search for a non-lethal technique to accurately describe the age of whales led to discovery of novel technique utilizing whale skin to form an epigenetic age estimation method. In the case of scientific whaling, if the costs are weighed against the competitive disadvantage of possible extinction of species and availability of non-lethal technique providing same, if not more accurate results, then non-lethal sampling is demonstrably the best practice and such studies ought to replace all lethal studies. Such argument finds support in the ominous practice of misreporting of game caught. The staggering accounts of misreporting revealed by Russian scientists reveal that Soviet Union has misreported scientific whaling for more than 100% for more than 40 years. During 1946—1986, the Soviet Union reported catch of 3651 for blue and pygmy blue whale while the actual catch was 13035, it reported catch of 2,710 for Humpback whale while the actual catch was 48,721, it reported catch of 19 for Bryde’s whale while the actual catch was 1,468, it reported catch of 4 for Southern Right whale while the actual catch was 3,368. Although the tendency to misreport cannot be attributed to every state, the staggering account of misreporting by soviet union makes a strong case for taking such misreporting into consideration while deciding upon the issue of permanent moratorium on whaling and such factor combined with before stated availability of non-lethal methods of accurately studying whales point towards the futility of scientific whaling and allows for the recognition of right to life of whales.

4) It violates right of Aboriginal subsistence Hunting of whales. Aboriginal subsistence whale hunting does not aim at maximizing profit or catches. It is aimed at subsistence of indigenous groups who have accepted whaling as an essential requirement of their cultural identity.

Presently four countries conduct Aboriginal subsistence Hunting of whales: Denmark

698 C.A. Waugh & V. Monamy, Opposing lethal wildlife research when nonlethal methods exist: scientific whaling as a case study, 7(1) J Wildl Manag 231, 234 (2016).
700 Id at 15.
701 https://iwc.int/aboriginal
Therefore, any Ban on whaling would violate the cultural inclusion of whaling among such Indigenous groups and thereby consequently violate the International Covenant on Economic, Social and Cultural Rights. Doubleday, while presenting the above stated argument opts for a literal interpretation of the Article 1(2) of International Covenant on Economic, Social and Cultural Rights. However, literal interpretation must not be used to assess the meaning of before stated phrase as if such interpretation is accepted, then it would lead to the absurd result of allowance of even human cannibalism. In order to avoid such absurd conclusion, as D’amato and Chopra suggest, it must not be read in isolation. It must be interpreted in light of violation of other rights. Consequently, as whaling violates right to life of whales, it cannot be justified on account of aboriginal subsistence requirement.

5) It violates sovereign right of states over its natural resources.

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703 IWC, https://iwc.int/aboriginal (last visited Nov. 7, 2018, 09.54 PM).
705 D’amato, supra note 4, at 27.
707 Id at ¶ 7.
its use for the development of the nation and for the well being of its people.

A need for discussion has arisen on the legitimacy of sovereign rights concept in light of the fact that the international law must not provide a simple exit from the teethes of international norms to any state who invokes the doctrine of sovereign rights. However, such discussion goes beyond the scope of this paper.

Although the claim for sovereign rights is legitimate, it must be weighed against the equally competent claim of precautionary principle. Precautionary principle states that lack of scientific certainty must not be used as a defense to avoid measures if serious threat of significant reduction in biological diversity or extinction of species exists. Such doctrine is incorporated in various international instruments and it is not overridden by UNCLOS as long as it is consistent with the ‘general principles and objectives’ of the Convention. The Precautionary Principle is applicable only when: (a) the threat is uncertain; (b) there is a threat of environmental damage and (c) the threatened harm is of an irreversible nature.

In the case of whales, Uncertainty exists as the IWC itself recognizes the considerable scientific uncertainty over the no. of whales of different species and in different geographical stocks. However, it is reasonable to expect adverse environmental impact considering scientific studies confirming that decline of whale’s populations certainly alters energy flow and tropic interactions; and such perturbations, have the potential to alter pelagic food web structure dramatically. Additionally the Status of various species of whales as Endangered leaves no room for doubt that Commercial whaling at such a phenomenal rate would lead to their extinction, which is irreversible. Therefore, the precautionary principle is applicable in case of whales and a permanent moratorium on whaling is only an extension of such principle.

711 Preamble to the Convention on Biodiversity, 1760 UNTS 79; 31 ILM 818 (1992) [CBD].
715 IWC, https://iwc.int/estimate (last visited November 6, 01.33PM).
716 Trites et al, Ecosystem change and the decline of marine mammals in the Eastern Bering Sea: testing the ecosystem shift and commercial whaling hypotheses, 7(1) Fisheries Centre Research Reports 106, 125 (1999).
717 IUCN Red List, Balaenoptera musculus (Blue whale)(last visited November 5, 2018, 03.48PM), 2018 at https://www.iucnredlist.org/search?query=Blue%20Whale&searchType=species ; IUCN Red List, Eubalaena glacialis (north atlantic right whale) (last visited November 5, 2018, 03.54PM), at https://www.iucnredlist.org/species/41712/50380891
Although, there exists a conflict between precautionary principle and sovereign rights, it is reasonable to ascertain that the conflict must result in negation of latter principle in light of before stated precarious condition of whales and violation of various sustainable development goals. Consequently, it could be stated that the social utilitarian calculus lies in favour of recognizing the right to life of whales.

D. CONCLUSION

Human ethics has focused on the inherent, independent value of individual life, free from external contribution i.e. The worth of a human being’s life is not determined in accordance with the individuals contribution to society or in connection with usefulness of the individual. Such fundamental moral principle has reflected in legal principles by honoring the sacredness of every individual’s life in the same manner. The philosophy of whale rights insists only that such logic be respected. The independent value of human beings implies that whales have such independent value. Any other approach would be an extension of speciesism. The logical conclusion is that women do not exist serve men, slaves do not exist do serve masters and whales do not exist to be hunted by human beings.

The main hindrance in recognition of such logic is the Human perception. The Vedas recognized such question by stating “Yatha Drishti Tatha Srishi” i.e. the creation is the result of your perception. The human beings have a tendency to humanize the world i.e. while evaluating anything in the world, human beings focus on Human characteristics and human standards. However, such perception is based on the inherent assumption that humans possess certain characteristics that separates us from the whales i.e. a manifestation of human exceptionalism and therefore, endows us with the right to judge the whales through the narrow prism of human standards i.e. a manifestation of human exceptionalism which must not be used while making such evaluation. Why should whales, majestic creatures that are more intelligent, more sentient as stated before and who have more lingual expertise than human beings, be judged by human standards?

Once such perception is set aside and the truth of inherent, independent value of life of whales is acknowledged, we can state that whales must be protected by recognition of right to life and no other lesser protection because the extension of human duties as could be evinced today by the temporary moratorium fails to achieve justice for whales. I do not agree that only the continuation of temporary moratorium on only commercial whaling is sufficient for the purpose of protection of whales because justice did not demand reformation of slavery or regularizing slavery but abolishing it and recognizing the rights of the erstwhile slaves. Similarly, Justice does not demand “more humane” hunting and trapping of whales, but the total eradication of these barbarous practices by recognition


The brain of whale is 6 times larger than human beings and its neo- cortex is more convuluted than human beings. Such findings indicate greater intelligence among whales than human beings.


The whales have developed language among themselves and also have developed interspecies communication with dolphins.
of their right to life in accordance with the Benthamian jurisprudential understanding of personhood and rights.

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ABSTRACT
Relinquishment of women's reproductive health, perpetuated by law, is part of a larger, systematic discrimination against women. Laws impede women's access to reproductive health services. Laws protecting women's reproductive health are rarely or inefficiently implemented. The WHO and the United Nations Population Fund (UNFPA) has always emphasized on the need for the reproductive rights of women. In every country, there is a need to control reproduction and provide basic rights to women. The socio-economic status of women should be maintained, providing them with the right to freedom from discrimination. The primary focus should be on providing equal reproductive rights to women as well as proper health care. But as a matter of fact, they are not getting those rights and they are constantly being deprived of them. The men, who often consider women as an object of satisfying their physical needs, don’t understand the pain that a woman has to suffer while giving birth to a child. There are instances when a woman doesn’t want to conceive a child but they are forced to give birth to them because it’s a fact that in a country like India, aborting a child is considered as no less than a taboo. For these reasons, there is an urgent need to have a proper reproductive justice system where the abortion should be based on the consent of women, taking proper precaution and the providing proper medical facility. This article provides an overview of the constitutional and global perspective of the reproductive rights of women. The authors have discussed the issue of reproductive rights prevailing in India with that of the United States of America and with some other countries as well. It is the responsibility of the government to take a proper step to protect and empower the women’s reproductive rights.

INTRODUCTION
The duty of the civil liberties is to establish laws for a good community and maintain a balance between an individual and a government. The people interest should be taken into consideration but due to the conflicting interest with the government, the interests of the people are ignored. As the civil liberties have not left a good impact on the people, there has been an emergence of Liberalism and Utilitarianism. These two schools of thoughts have emerged because of the failure of civil liberties. According to liberalism philosophy, an individual autonomy should not be restricted or limited by the State except they have the power to limit the liberty as prescribed by law. The utilitarianism follows the principle that “the greatest good of the greatest number” should be taken into consideration by the State. The utilitarianism works for the interests of the community at large. Although the liberalism works for an individual autonomy, they have given the power to the State to make laws based on certain terms and conditions. Whereas, the utilitarianism wants the State to function for the greater number of people, providing greatest good. The disputation between these two theories has formed the
topic of debate surrounding the reproductive rights of women.

World Health Organization (WHO) has rightly stated that:

‘Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information to do so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.’

It is the basic rights that are vested with an individual and a couple to decide whether they want to reproduce children or not. They can freely decide the number of children they want and are free from any discrimination, coercion and violence, as expressed in the human rights documents. They should also be aware of the rights of reproduction which is based on the highest attainable manageable sex. The couples can do family planning in order to stop pregnancy, use contraceptives (a device or drugs which controls pregnancy which includes methods like: condoms, the diaphragm, implants, intrauterine devices, sterilization and morning-after pills), learn about the sex education in public schools and to gain awareness about the outcome of reproduction.

NEED FOR REPRODUCTIVE RIGHTS OF WOMEN

The WHO and the United Nations Population Fund (UNFPA) has always emphasized on the need for the reproductive rights of women. In every country, there is a need to control reproduction and provide basic rights to women. The socio-economic status of women should be maintained, providing them with the right to freedom from discrimination. Development Alternatives with Women for a New Era (DAWN) has explained the need for the reproductive rights of women which includes right to have a safe abortion and right to control the reproductive functions. It also states that the health of women should be taken into consideration while she is pregnant. It is the women who the real sufferer and goes through so much pain. There is also need to protect and preserve the rights of women because there are women who are staying in the village and does not know the outcome their reproduction. The women who all are residing in the village only know that childbearing is for the society but at the same point in time, the personal health is at risk. There is also a need to control the population of a particular country by creating awareness about the need for the reproductive rights of women.

720 World Health Organization (January 25, 2019, 2: 45 PM) http://who.int/reproductivehealth/en/  
722 Development Alternatives with Women for a New Era (DAWN) (January 25, 2019, 2: 59 PM) http://www.dawnnet.org/feminist-resources/about/main
The primary focus should be on providing equal reproductive rights to women as well as proper healthcare but as a matter of fact, they are not getting those rights and they are constantly being deprived of them. The men, who often consider women as an object of satisfying their physical needs, don’t understand the pain that a woman has to suffer while giving birth to a child. There are instances when a woman doesn’t want to conceive a child but they are forced to give birth to them because it’s a fact that in a country like India, aborting a child is considered as no less than a taboo. For these reasons, there is an urgent need to have a proper reproductive justice system where the abortion should be based on the consent of women, taking proper precaution and providing proper medical facility.

MEN REPRODUCTIVE RIGHTS
As we are living in male dominating society, the reproductive rights of men are still a question to be answered. The reproductive justice system has legalized the reproductive rights of women in the matter pertaining to abortion, adoption and procreation. There is an organization, Center for Men (NCM) that fights for the rights of men when it comes to an issue related to false paternity, adoption, abortion choices and rights over frozen embryos. In Roe v Wade for Men, the court rejected the plea of a biological father who claimed that he is under no obligation to financially support an unwanted baby under the Equal Protection Clause. The court was not able to take a proper stand on the rights of the men. It was held that the constitutional law will be applied in the case of reproductive rights of men and women as they are treated equally in the society.

U.S.A. PERSPECTIVE ON REPRODUCTIVE RIGHTS OF WOMEN

The right to reproduce is something that has not been implicitly defined by U.S.A. Constitution but its Supreme Court has held that the personal right of women pertaining to procreation, contraception, family relationship and childbearing are part of fundamental rights. The 14th Amendment of U.S.A. constitution talks about the right to privacy of women which should not be infringed by any person when it is a case of reproduction. Let us take the case of abortion during the American Civil War. During the war, there was anti-abortion campaign taking place. All the Christian people were in favor to make a law, permitting the abortion with the consent of the pregnant woman. The State was against the policy and passed a law banning abortion. It suggested that the State was influenced by the strong religious groups which lead to the intervention of abortion. They never cared for the health of women, instead of that created a threat to the life of women and children. It was a feminist movement which legalized the abortion in the U.S.A. In the U.S.A. abortion is viewed as the woman’s right to personal liberty. In the year 1973, the reproductive rights of women got judicial recognition by the Supreme Court, where they refuted the anti-abortion laws on the ground that it violates women right to reproduce of their own choice and abortion was finally included as a part of right to personal liberty. Now U.S.A. Constitution has permitted abortion

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with the consent of women, at all stages prior to quickening. Earlier involuntary sterilization is something that was done in U.S.A. without the consent of the women and with the belief that the community interest was involved. The Supreme Court\textsuperscript{725} held that it violates the personal autonomy of an individual and hence made sterilization legalize with the consent of women. The reproductive rights of women have only been a matter of debate in the country like U.S.A. but with the strong constitutional jurisprudence, the reproductive rights of women have been given legal recognition. The State and Court have played a major role in legalizing the reproductive rights of women.

**INDIAN PERSPECTIVE ON REPRODUCTIVE RIGHTS OF WOMEN**

India is a part signatory body i.e. International Conference on Population and Development, 1994 which works for ethical and professional standards of personal reproductive autonomy of women. The National Population Policy, 2000 has given the right to women in the matter pertaining to contraception.\textsuperscript{727} Although the women reproductive rights are taken due care by the international organization whether it has been legalized in India or not. The society in India is conservative when it comes to matter pertaining to abortion, contraception, family relationship and childbearing. It is the social pressure from the society which hampers the women reproductive behavior and health.\textsuperscript{728} It is the NGOs in India who needs to fight for the reproductive rights and choice of women. Due to the family pressure, 33% of women want the birth of son instead of a daughter. Every 85% of husband and men wants at least one son in the family so that their family succession continues.\textsuperscript{729} It is also a fact that though the reproductive rights are vested with couples it is the family who takes the final call. There is need to implement the reproductive rights of women with due care and diligence.

In India, the family plays a very major role when it comes to childbearing but at the same time, the consent of women should be given equal importance. Every citizen in India, have the right to privacy which falls under the ambit of the right to life under Article 21 of the Constitution of India. It gives the women the right to have her choice and make a call in the matter of having a child.

Further, the policy and service implementation fails when it comes to the rural areas as the women are not provided with contraceptive because there is lack of primary health centers.\textsuperscript{730} In the rural areas, 

\textsuperscript{725} Buck v Bell, 274 U.S. 200
\textsuperscript{726} United Nations International Conference on Population and Development (ICPD), 5-13 September 1994, Cairo, Egypt (January 26, 2019, 1: 45 PM) \url{http://enb.iisd.org/cairo.html}
\textsuperscript{728} International center for research on women (ICRW), Reproductive Rights and choice: The role of abortion in India Information Bulletin, pg 1-4, November 2001 (January 26, 2019, 2: 05 PM) \url{http://cogprints.org/7794/1/2011-1-9.pdf}
\textsuperscript{730} Koeing M, Editor, Improving quality of care in India’s Family Welfare Programme, Population

www.supremoamicus.org
women can go for tubectomy or fertilization depending on the availability of health center. As the specialized medical officer prefer to do the treatment in urban areas. The woman is not left with any choice but to go urban place with such condition. The women are not given right to choice which violates Article 21 of Constitution. Even if the policy provides women to choose an option of their choice, the service provider (medical officer) does not practice such principle. There was a recent National Family Health Survey (NFHS 4) throws some light on the reproductive rights of women.

In the year 1972, the Parliament of India passed the law on Medical Termination of Pregnancy Act, 1971 (hereinafter referred as ‘MTP Act’) which made abortion legal in India. However, the benefits of this act are far away from what is expected from it.

Most of the people are unaware of this right. Further aborting a child is considered a taboo in Indian Society. Moreover, the act attracts a lot of criticism, as it gives more right to married women in cases of abortion when compared to single women. The issue has been discussed in detail in the further topics.

ABORTION
According to Section 312 of Indian Penal Code, 1860 (hereinafter referred as ‘IPC’) causing miscarriage is a criminal offence. The abortion can only be done only when the life of women is at risk. If the abortion is done voluntarily and if there is no risk to the life woman, then the person will be punished for three years imprisonment or fine or both. A woman also falls within the meaning of this section. Notwithstanding anything in this Section, the Parliament passed the MTP Act, which allows the abortion to take place if the pregnancy will cause grave injury to the mental or physical health of the women. With respect to gender relation, India is one of the most conservative countries in the world. It is considered no less than a taboo for an Indian woman to have a pre-marital sexual relationship or to conceive a child, this is mainly because of the so-called strict social, cultural and religious background or to put it in a better way, the patriarchal thinking we all Indians have. The MTP Act, 1971, is one of the finest examples where the legislators have shown their patriarchal thinking while enacting a law.

DIFFERENT APPROACHES FOR SINGLE AND MARRIED WOMEN
Under Section 3(2) of the MTP Act, 1971, it is clear that if the doctor is of the opinion ‘that 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 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, only in such cases the pregnancy can be terminated.’ One of the most important concerns in the MTP Act is that not even for once the term “single women” or “unmarried women” has been used in the act. This leaves us for us to interpret that what will happen if a single woman gets pregnant and she wants to terminate her pregnancy. From what we can interpret is that if the girl is single then in such case, she doesn’t get an abortion unless the doctor determines that a pregnancy puts her in grave physical or mental danger. If the girl is single, then she has no right to make choices about her own physical and emotional well-being. On the other hand, if the girl covers herself up with the cloak of marriage, then she doesn’t need a doctor to determine that whether she needs an abortion or not. As a virtuous bride lady, the Act has itself provided them with two loopholes i.e. “unplanned pregnancy” and “failure of contraception” in the Explanation 2 to Section 3 of MTP act, 1971. This is the level of discrimination which an unmarried woman has to suffer in cases of abortion, all applauses to our lawmakers.

Coming on to the constitutional perspective, the above-said anomaly violates the right to equality which is guaranteed under Article 14 of Constitution. Article 14 clearly states that the State shall not deny any person equality before the law and should provide equal protection of the law. The MTP Act, 1971 clearly violates Article 14 as unmarried women are not getting an equal right like a married woman in cases of termination of pregnancy. Although Article 14 states that the State can treat a different person differently by applying different laws but when it comes to termination of pregnancy, the biggest question which arises is that why marriage has to be the sole basis for giving different rights to different women. Isn’t every woman has the same human right to terminate her pregnancy irrespective of the fact whether she is married or not. The State has miserably failed to understand this fact and has enacted a law which is of such a discriminatory nature to the extent that it even violates Article 14 of the Indian Constitution.

In High Court On Its Own Motion v The State of Maharashtra 732, the court interpreted the MTP Act, 1971, which is considered as one of the most important judgments in the recent era in relation to giving equal rights to unmarried women in cases of abortion.

Facts
The brief facts of the case were that upon a direction from the High Court, a Judge of the City Civil and Sessions Court made a visit to a district women’s prison in Mumbai. During the visit, it was noticed that one of the female inmates had made an application seeking authorization to terminate her four-month-old pregnancy, on conditions of ill-health. The matter was taken up as a suomotu PIL by the High Court. The particular inmate’s case which prompted the PIL was finally able to medically terminate her pregnancy. The Court considered same conditions in which several other female prison inmates were unable to obtain the requisite permission to

732 2016 (4) RCR (Criminal) 417
medically terminate their pregnancies, despite being in dire conditions.

**Judgment**

The court held that ‘a pregnant woman prisoner should not be treated any differently from any other pregnant woman.’ Though the judges were mainly dealing with medical termination of pregnancy of two under trial prisoners in a Mumbai jail and consequently, laying down guidelines mainly to deal with termination of pregnancy rights for other women prisoners in Mumbai jails, to their due credit, the judges have very skilfully, chose not to restrict the application of the principles and observations made in the judgment only to cases of ‘under trial/ convicted women prisoners’. It is firmly stated that the judgment was applicable to all ‘pregnant prisoners’. It is firmly stated that ‘all prisoners’. It is firmly stated that ‘all prisoners’ irrespective of whether the woman is a single working woman or a housewife or a prisoner. They all have the equal rights in relation to the termination of pregnancy. The relevant parts of the judgment were:

‘A woman’s decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child… these are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy but were unable to do so. If a woman does not want to continue with the pregnancy, then

forcing her to do so represents a violation of the woman’s bodily integrity and aggravates her mental trauma which would be deleterious to her mental health’.

The most important part of the judgment which gives equal rights to unmarried women in matters related to abortion is:

‘The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant’.

**STERILIZATION**

The rule of compulsory sterilizations, enforced during the Emergency in 1975 was no less than dictatorship. A number of State Governments enacted laws making sterilizations as compulsory. Moreover, the forced sterilization surgeries are often unsuccessful which causes infection in the body of women. The government violated the reproductive autonomy of women by not providing the women with basic reproductive rights. The forced sterilization can cause infection in the body of women which is infringing the Right to life covered under Article 21 of the Constitution. They cannot take a life of an individual by implementing such ruthless policy in the country. It is also the duty of the state under Article 42 of the Constitution to protect the health of infant and mother by maternity benefit. Instead of forcing the women for sterilization the State shall improve public health for pregnant women under Article 47 of the Constitution. The policy of forced sterilization is disregard by the citizen of
India as it is infringing the right to reproductive choice of women.

In *Devika Biswas v Union of India & Others*, a health activist filed a Public Interest Litigation challenging the practice carried out by the Government of Bihar for forced sterilization of women. The women, who wanted to go for sterilization, were not given the proper counseling. The procedure to carry out the sterilization process took place in school rather than a hospital. The condition of the place was unsanitary and the process carried out by the government was unethical manner. The Court held that:

‘The respondents had violated two components of Article 21 of the Constitution (Protection of Life and Personal Liberty): the right to health and reproductive rights. The freedom to exercise reproductive rights includes the right to make a choice regarding sterilization on the basis of informed consent and free from any form of compulsion’.

**REPRODUCTIVE RIGHTS OF MENTALLY RETARDED WOMEN**

A woman who is disabled is always denied her constitutional rights because nobody is ready to deal with their problem. The state and the society think that she is the weakest person in the society due to the fact that she is mentally retarded. If she gets raped by a man, then she has to escape the pregnancy because nobody is there to take care of her child. If the retarded woman has a consensual sex with a man, then she can either escape the pregnancy or can give life to the child depending on the consent of men. The reproductive rights of mentally retarded women do not get any recognition in MTP Act. This raises a fundamental issue as there is no law that protects mentally retarded women to take a decision on her life and body. The State also deny its duty because the retarded women do not fall under the ambit of the same group as explained under Article 14 of the Constitution. According to Article 12 of UN Rights of Persons with Disabilities Convention, it is the duty of the state to provide a proper legal framework for mentally retarded women. The Indian legal system needs a great deal of change by following the international legislation. It also puts a question on the competence of Indian government as for whether they are competent enough to protect women with disabilities.

**GLOBAL PERSPECTIVE ON REPRODUCTIVE RIGHTS OF WOMEN**

Romania

The Constitution of Romania guarantees the protection of reproductive rights of women. The state has adopted a national strategy on sexual and reproductive health. They organize reproductive education programme where they talk about the teen pregnancy and issues related to it. In Romania, there is a high rate of teenage pregnancy. According to Constitution of Romania, it is the duty of the state to provide a good living standard to women and medical care in relation to public health. The physician is under an obligation to take due care of women during the time of pregnancy and abortion. If the physician intentionally kills or injured the women then they will be under Criminal Code for not taking due care of the patient.

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733 (2016) 10 SCC 726
The Democratic Republic of Congo
In the Democratic Republic of Congo, the women do not enjoy the same reproductive rights as men. Prima facie, according to Article 14 of Constitution of Democratic Republic of Congo it is the duty of the public authority to see to the eliminations of all forms of discrimination against women and ensures protection and promotions of their rights. But in reality, there is gender-based violence in the country where the external female genitalia is removed providing a very low standard of medical services. If abortion takes place illegally then both the medical practitioner and patient would be given imprisonment up to 5 years which may extend up to 15 years.

Mexico
In Mexico, if a woman illegally aborts a child then she will be charged under the Criminal law. Although some of the states permit abortion in special circumstances like medical tape. It is the duty of the Ministry of Health to provide medicine and health services to women at the time of pregnancy. Also according to Article 123(19)(k) of Mexico the women are entitled to get one month leave prior childbirth and two months leave after such date. They also get nursing aid and infant care services.

STEPS TO BE TAKEN TO EMPOWER WOMEN’S REPRODUCTIVE RIGHT
There is a need to take care of women during the time of pregnancy and abortion. If the health of a woman is not taken care of, it would result in unwanted pregnancy and the unsafe abortion which would lead to death and injury of women and children. If there are any harmful traditional practices carried out by society or family or men then it will lead to female genocide. It is the duty of every individual and doctor to provide with a quality of reproductive health services to women in order to safe childbearing and life of women. The steps to be taken are:

- Government should organize gender-sensitive programmes in which the couples should be made aware about decision making in a sexual relationship. They should also make the couples aware that both men and women play an important and equal role in family planning. The outcome of their relationship gives and takes the life of a child. They should also sensitize men by saying that how difficult it is for women to give birth to a child.
- The government should also organize family planning programmes, where the trained service provider should provide sensitive culture conditions. There should be a friendly relation that needs to be carried out between women and family. The counselor should also inform the family about the informed consent in contraceptive choice. At the same time, the women should get privacy, confidentiality, comfortableness and a good environment from the family.
- The government should also organize safe motherhood programme where they should talk about the outcome of infections, hypertension and obstructed labor. They should also be made aware of the nearest medical centers in case of emergency. The community health worker should make the mother aware about breastfeeding, infant care, hygiene, immunizations and maintaining good health.
The abortion and post abortion-related public health issue should be taken care by the government. It is the duty of the government to reduce unwanted pregnancy and prevent abortions. It is the duty of the government to provide quality health services to women.

It is the duty of the government to make laws for unmarried women who want to have an abortion. They should not leave the abortion of unmarried women in the good faith of a doctor. The law should also be made for mentally retarded women with respect to abortion.

The men and women should be also made aware of the outcome of sexually transmitted diseases (STDs), including Human immunodeficiency virus (HIV) and Acquired Immune Disease Syndrome (AIDS).

CONCLUSION
Women, all over the world, living in any part of the country, regardless of its development or financial status, are vulnerable to the problems of unwanted pregnancy. Legalized abortion is a significant public health matter because of its negative association with the socio-economic and health consequences for both the women and their families. The question of abortion in India brings up a dispute which is multifaceted with legal, medical social and moral arguments. It has constantly been a struggle to understand on whose side the rights are heavier in order to have the balance, the questions of whose life is to be given more importance. Well, that being said, there are numerous possible and perhaps practical solutions to the abortion debate, which only means that legislators and courts play a very vital role in dealing with them in a very sensitive manner, and any legislation, if it must last, must stem from an inclusive consideration of all the issues involved. The cases which arise relating to this issue have been decided by courts only when the case is of extreme emergency viz. of the likelihood of physical and mental damage to both the mother and the offspring, or to the trauma caused to survivors of rape, otherwise being staved off as a personal debate.

The Medical Termination of Pregnancy (Amendment) Bill, 2014, is a step forward towards giving more reproductive rights to women. The bill proposes to extend the limit for termination of pregnancy to twenty-four weeks. It also seeks to amend Section 3 of Act of 1971 which deals with Termination of pregnancy by a registered medical practitioner. The most important part of the bill is that it gives equal rights to unmarried women and their rights are at par with married women but the main problem with this bill is that it is still pending in the Parliament for more than two years. This shows the reluctance of our legislators in dealing with such sensitive issues.

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ANIMALS ABUSE: AN ANALYSIS OF CRUELTY AND ANIMAL RIGHT’S VIOLATION

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Abstract:
In years of human existence, the role of animals are considered to be one of the main factor to shape human culture. The contribution of animals to society is much generous and have benefited the humankind. Animals have also been a source of clothing and food to the society. These animals have also taken part in many religious customs and worships way back the earliest time. They also have unique contribution to balance our nature. But in in today’s competitive world they are being exploited since they are mute spectators and are inescapable of raising their voice against this cruelty. Truly, animals have been an influential part of this mankind. With these diverse views about animals and their helpfulness, animal abuse still continued in different parts of our country and was demonstrated in different ways. This paper totally focuses on recognizing animal rights and how are such rights being curtailed by humans in different areas. It also draws an attention to aware people about such rights and laws for proper implementation.

Introduction:
As custodians of the planet it is our responsibility to deal with all species with kindness, love, and compassion. That these animals suffer through human cruelty is beyond understanding.

Please help to stop this madness.  
Richard Gere

In the recent times it has often been seen that these animals are being enslaved, beaten and kept in chains for “entertainment” they are isolated, burned, electrocuted, brain damaged, blinded. They are wiped into submission. They are left to linger in cold cages alone without any painkiller until they are killed. They are denied everything natural to them, “Is this moral? Is this the right choice?”

Every day in countries there are number of voiceless animals who are fighting for their lives. These animal have a right to live on earth but, we often become insensitive to their pain, loneliness, torture and voices which are begging to be seen and recognized. “All life deserves respect, dignity, and compassion. All life.” as stated by Anthony Douglas Williams.

Objective of the study
There have been complains about the lack of attention given to animals in the field of criminology. The suffering and abuse of non human animals in variety of forms in which it occurs have mostly grown. Although there has been progress in social science with animals making an appearance in literature but still there remains a dearth of research.

on animals. Social science disciplines, criminology, criminal justice and victimology have ignored an entire category of sentient beings namely nonhuman animals. The presence of animals in victimology and criminology is quite sparse.

According to Beirne criminology, the increased presence of animals at work was since 1970. But why has the study of animals remain absent largely even today? Firstly, societies tend to value humans and not animals. Likewise, criminologist prefer to investigate harms committed by humans against other humans. As a result, violence committed against animals is not taken very seriously. And also media does not capture the full scope of animal cruelty cases, by which public perception about animal cruelty and abuse becomes less. Hence, a very small percentage of animal cruelty offences are being published, and many are seen as isolated incident.

The neglect of animal within victimology and other social sciences such as criminology and sociology has come to an end.

Conceptualizing and understanding of animal rights

What do you mean by animal rights? And why are they given such rights?

Animal rights is an idea that intents to provide humane treatments to animal. It means the right not to be exploited for human purposes and that the interest of nonhuman animals should be given the same consideration as similar to human beings. It is also termed as animal liberation. The only reason to give rights to these animals are because they are sentient, and human treat speciesism differently like racism and sexism. Many animals are also treated popularly in the meat industries like cows, pigs and chickens, which makes them confine, torture and slaughter.

There is no reason to morally distinguish between humans and nonhuman animals. They have also the equal right to prevent themselves from suffering unjustly and from extraordinary animal cruelty.

Theoretical background

Peter Singer is regarded as the founding father of the contemporary animal liberation movement and played an extremely important role to protect the interest of animals. The Contemporary philosophical arm of animal rights or liberation movement effectively began in 1975 with Peter Singer’s book Animal Liberation. The increased public awareness of what exactly transpires in our treatment of nonhuman in factory farming, medical research, product testing, and so on is, to a significant extent, due to the wide circulation of the work. Singer argues that, the moral theory known as utilitarianism can be used to justify and defend the moral claims of nonhuman animals.

738 Id.
741 Id.
animals. According to utilitarianism, a morally good action is one which promotes or produces the greatest amount of pleasure, happiness, or satisfaction of desires, and Singer argues, quite forcibly, that such promotion requires abandoning such practices as animal husbandry, and experimentation upon animals for scientific or commercial purposes. Singer’s case for animal liberation, then, is anchored in his adoption of a utilitarian moral theory.

Utilitarianism gets the intuitively right answer with respect to particular moral issues. Singer’s utilitarian argument for vegetarianism is simple. If we are preference-utilitarians, for example, we will have to weigh up the preferences satisfied and frustrated by a policy of continuing to eat meat against the preferences satisfied and frustrated by a policy of abandoning meateating. And since the preferences of those nonhuman animals involved in the animal husbandry process will have to be included, it may seem that utilitarianism licenses a straightforward and clearcut result. Singer presents a powerful argument by claiming that justice requires equal consideration of the interests of nonhuman as well as human animals. He also places the idea of equal consideration at the centre of the conceptual stage.

Mental status of nonhuman Animal

Do animal feel joy, grief, depression and rejection? People might disagree about the nature of emotions in nonhuman animal beings. The expression of emotions in animals rises a number of stimulating and challenging questions like “Can they think? Can they feel and can they experience emotions?”

Charles Darwin the naturalist and biologist argued that there is a continuity between the emotional lives of human and those of other animal, and that is the difference among many animals are in degree rather than in kinds. Categorically denying emotions to animals just because they can not be studied directly does not constitute a reasonable argument against their existence. What are emotions? Emotions can be broadly defined as psychological phenomenon that help in behavioral management and control, and most of the researcher believe that emotions are not simply the result of some bodily state that leads to an action as postulated in the late 1800s by William James and Carl Lange. James and Lange argued that fear, results from an awareness of the bodily changes that were stimulated by a fearful stimulus. The emotional states of many animals are easily recognizable. There faces, eyes and the way in which they carry themselves can be used to make strong inferences about what they feel. Changes in muscle tone, posture, gait, facial expression, eye size and gaze, vocalization, odors singly

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742 Ibid., 10
744 Ibid.
746 Ibid.
and together indicate emotional responses to certain situations.\footnote{747}

Primary emotions, are considered to be a basic inborn emotions, which include generalized rapid, reflex like fear and flight or flight responses to stimuli for the present danger. Animals can perform a primary fear responses such as avoiding an object, but they do not have to recognize the object generating the reaction. Primary emotions are weird into evolutionary old limbic system, the “emotional” part of the brain, as said by Paul MacLean in 1952, are similar emotional circuit shared among many different species and provide a neutral substrate for primary emotions. MacLean suggested that reptilian emotions or primitive brain possessed by fish, amphibians, reptiles, birds and mammals packed in cranium is connected to other two but each has it’s own capacity.\footnote{748} Clearly it says that emotions helps us to manage and regulate our relationship with each other. Emotions are an integral part of our life. There is a continuity between the neurobehavioral system that underlie nonhuman emotions. Animals have reach emotional lives, even if thy are very different from humans.\footnote{749}

**Historical perspective:**

**Concept under Hinduism**

*Avoiding harm to all creatures... this is true knowledge. All else is ignorance. Bhagavad Gita*\footnote{750}. You must not use your God given body for killing God’s creatures, whatever it may be human or animal:- *Yajur Veda.*\footnote{751}

In India over eighty percent of the population are Hindu and Hinduism is an ancient spiritual tradition which encompasses a wide range of practices and believes. It teaches respect to all creature including tiny creatures as aspects of God, having souls of their own and going through the same process of birth and death.

Animals are spiritually important and had religious significance. Evidence from a earliest known Indian civilization indicates that animals hold “something of the divine”. Indian literature also teaches Hindus to love and respect nature and God’s creation. According to various schools of Hinduism, there is no distinction between human beings and other forms of life. The main reason for Hindu to respect animal rights is from the principle of *ahimsa*. According to the principle of ahimsa, no living thing should be harmed. This applies to humans and animals too.\footnote{752}

The killing of animal in the name of *Yajna* has been condemned as mad and undisciplined acts in *Mahabharata*. The *Padma Purana* mentions that, those who sacrifice cattle are doomed to perdition. In

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\footnote{747}{Supra note 10.}
\footnote{748}{Id.}
\footnote{749}{Id.}
\footnote{750}{Why Animals Matter: A Religious and philosophical perspective Hinduism Quotations,}
\footnote{751}{The Yajur Veda.}
\footnote{752}{What does Hinduism teach about animal rights?, available at https://www.bbc.com/bitesize/guides/z3ygjxs/revisions/5 (last visited on December 28, 2018).}

**Manusmriti**, the cruelty towards animals has been condemned. It is stated that the killer of the cattle is doomed to die as many times as there are hair on the skin of the cattle. It is further stated that ever after death, he shall have no peace.\(^{753}\)

In Hinduism the bird garuda, considers to be the vehicle of Lord Vishnu and is worshiped among the *Vaishnava* cult. Lion, the king of animal kingdom, is considered to be the vehicle of Goddess Durga and is worshiped among the *Shakti* cult. All these shows that in different religious faiths there is a compassion for wildlife - Birds and Animal.\(^{754}\)

**Concept under Islam**

"And the earth, He has assigned it to all living creatures" (Quran 55:10).

These verse serves as a reminder to us that wildlife, like humans, are created with purpose. They have feelings and are part of the spiritual world. They too have a right to life, and protection from pain and suffering.\(^{755}\)

According to Islamic principles, humanity has no power to do everything with the living beings. Furthermore, there are Islamic restrictions so that the animals can be manipulated, for limited hours of work. Hunting of young birds for pleasure is forbidden by Islam. From the Islamic viewpoint, animals are represented as Allah's might and wisdom, and humanity must pay attention to their health and living conditions. Several Islamic manuscripts states that animals have their own position in the creation hierarchy and humans are responsible for the facilities and animals at their disposal, including animals' health and feed. Islam determines the living costs of animals and, orders humanity to respect them and not to abuse them.\(^{756}\)

- **Animal evolution and resurrection**

  *Many quranic verses emphasize animal resurrection, such as "When animals are resurrected" (81:5).*\(^{757}\) Moreover, Allah says, "Certainly, there is no living thing on earth or on the wing unless it belongs to its own group the same way that you humans belong to your own race; We have not ignored anything in the book of creation and eventually all the living things will be resurrected and return to their Lord" (6:38).\(^{758}\)

This Quranic verse's interpretation states that animals are natural signs of God's might and live in their own specific societies according to the divine rule inspired by God. Like human beings, animals have their own individual and social beliefs on the basis of which they always act to survive and save themselves from extinction.

Prohibition on separating baby birds or animals from their mother. Hunting baby birds before they have left the nest is forbidden in Islam, and it is recommended that younglings should not be separated from their mother.\(^{759}\)

\(^{753}\)P.S. Jaswal and Nishtha Jswal, Environmental Law, 6( Third edition, 2009).

\(^{754}\)P.S. Jaswal and Nishtha Jswal, Environmental Law, 7( Third edition, 2009).

\(^{755}\)The Qur’an 55:10
In general, major animal rights in Islam are preparing suitable feed and water as well as mental and physical living conditions for animals, observing hygiene and specially treating sickness, manipulating them correctly, and no abusing, maltreating and misusing.\footnote{Betty Miller, What the Bible Says about Animal Abuse, available at https://bibleresources.org/animal-abuse/(last visited on February 1, 2019).}

\textbf{Concept under Christianity}

"For every beast of the forest is Mine, The cattle on a thousand hills. "I know every bird of the mountains, And everything that moves in the field is Mine. :-) Psalm 50:10-11\footnote{The Bible Psalm 50:10-11.}

The Bible has much to say in regard to animal abuse. In the beginning, God created the earth and all the creatures on it to be under the authority of humanity. He entrusted these beautiful elements of His creation to our care (Genesis 1:26).\footnote{Ibid., 30} God expects the Christians, above all others, to be sensitive to all of His creation, knowing that exploiting or abusing it shows a disrespect for God Himself. Abuse of anything that God made is not the character of God, but rather of the Evil One.\footnote{Id.}

In addition to domesticated animals, God also watches over wild animals and commands us to do the same. In Deuteronomy 22:6-7, \textit{God promises a long life to those who will watch over wild birds.}\footnote{Id.} God created animals for us to love and to learn from. In addition, God also tells us to learn from their wisdom: \textquote{Go to the ant, you sluggard; consider its ways and be wise! It has no commander, no overseer or ruler, yet it stores its provisions in summer and gathers its food at harvest} (Proverbs 6:6-8).\footnote{The Bible Proverbs 6:6-8}

- \textbf{God communicates with animals}
  This is the best explanation for the migration of the animals to Noah’s ark. In Genesis, God told Noah to build an ark in order to save himself, his family, and the land-dwelling creatures from the coming flood. However, he didn’t tell Noah to go out and round up the animals. He told him to bring them into the ark (Gen. 6:19), which meant to simply receive them. When it was time for the flood to begin, the text says the animals “went into the ark to Noah” (Gen. 7:9). The only explanation for the actions of the animals is that God drew them to the ark. God communicated with them directly, and they responded.\footnote{Barrett Duke, 10 biblical truths about animals, available at https://erlc.com/resourcelibrary/articles/10-biblical-truths-about-animals(last visited on February 1, 2019).}

- \textbf{Animals have the capacity to enjoy life}
  The psalmist was lighthearted when he described the joy animals feel. \textit{In Psalm 104, he said God formed the sea creature Leviathan “to play” in the sea (v. 26).}\footnote{Id.} They are the beings with the capacity for joy. Animal also teaches us about the nature of justice, and god had created them for their innocence which is not only important for
our understanding but it also helps us to understand our sense of justice.\textsuperscript{768}

**Meaning of Animal cruelty:**

Animal cruelty is a behaviour that is harmful to animals, from unintentional neglect to intentional killing. It is a matter that affects everyone. Just because animals can not tell us what they feel, does not mean they are not trying to tell us.

Ten thousand attire species are wiped out every year because of the action of one species. Deforesting the planet poisoning the oceans, rivers, aquifers is a crime of unimaginable proportions. We do not talk much about animal rights, we talk about human responsibility. Its really more about us than it is about them. We need to understand that they think, feel and make choices. That they want to live just as much as we want to live, they want to avoid pain and suffering as each one of us does. But its really about our choices, because in the relationship between us and animals we hold all the cards. We have all the powers. In human history, only hundred billions human beings have ever lived. Seven billion people lived today on earth and out of which, we human beings have killed two billion sentient living and loving animal every week. Further we also have stabbed and suffocated one billion ocean animals every eight hours. The little action that we take have such consequence. Just imagine if human would be killed or being tested on or given little food just to stay alive, then we would be wiped out in one weekend. This is not the behaviour that we are supposed to do with the animals. **Upnishadas**\textsuperscript{3},000 years ago ahimsan non violence to any living beings, it says we reject violence whenever it occurs. Because it protect the most precious of all things i.e “Life”.

**Question of Animal autonomy**

If we focus on depth, most animal are on the relief of suffering. The agenda, is far more broader. Animal have rights and they should not be made subject to human use and control. **Ex- many people use chimpanzees in entertainment, zoos or uses horses for showing or riding, and do not consider them as the relevant animals but as a mere means to human ends.** Are such confinements in zoos or other cruelties made to animals move animal autonomy?\textsuperscript{769}

**Different kinds of animal cruelty in present scenario:**

Animal cruelty is a practice which have been continued million years ago. The misuse of animal or the use of animals for the purpose beyond the animal limit is an animal abuse. Animals on factory firms, laboratories, zoo, circuses, aquariums, amusement parks and all of it are routinely beaten. This is the way that most of the animals die. There are many ways by which animals are tortured, such as:-

- **Slaughterhouse Cruelty**
  Animals have been firmed by humans for thousand of years but the way to handle these animals have changed dramatically over the past century. The rise of the factory firm has meant that billions of animals have

\textsuperscript{768}Supra note 26.

\textsuperscript{769} Cass R. Sunstein, Animal Rights : Current Debates and New Directions, 17 (2004).
had to endure a life which can only be described as cruel and barbaric.\textsuperscript{770}

1. Battery chicken lives on space smaller than iPad
   In battery cage 280 millions laying hens lives, where 6 to 8 birds are jammed into one cage. Each bird under the industry standard has 67 square inches of space, that’s the living space of a laying hen.

2. Animals are forced to grow of faster than naturally:
   Due to selective breeding animals are forced to grow at an alarming rate. Chickens are made overweight and fattened up for slaughter every year globally.\textsuperscript{47} it is attributed to genetic manipulation, almost 12.5 billion chicken experience painful problem for their rapid growth.

3. Absence of Veterinary care to sick and injured animals:
   Sick and injured animals are neglected and left untreated in the hope that they will survive until they reach the slaughter house. Illness due to environmental condition are common form of damage that these animal face.

\textbullet Laboratory Experiments or animal testing:
   Countless monkeys, rats, cats, dogs are poisoned and drugged for economic reason every year. The animals used for testing are subjected to harmful chemicals which affect their health adversely. For example, albino rabbits are tested for chemicals that cause eye irritation. The liquid form of such chemicals are dropped into the eyes of rabbits and they are left in that condition for about 2-3 days.\textsuperscript{771} About 85% animal experiments are conducted on rats and mice. It is not only cruel but also represents a bad science. Animals at the beginning of the experiments are usually healthy and then they are made ill, they are either given a diseases or made injured by artificial means which no way resembles the natural history.

\textbullet Animal used for the purpose of entertainment
   Countless animals like elephants, monkeys, dogs, cats, and others are forced to perform by trainers using abusive tools, including electric prods and whips. They are often beaten by trainers, and locked in cramped cages or chained for months as they travel from city to city. They are captured as babies, ripped away from their mothers to begin a life of cruelty and abuse. Wild animals such as lions, tigers, and elephants are kept in shamefully inadequate conditions in tiny spaces.\textsuperscript{772} When they become ill they rarely receive veterinary care. It also plays unnatural demand upon animals, Making them perform bizarre tricks with the aid of whips, collars, muzzles and electric prods.


2. Animal used in a cinema

Animal have long been used for the purpose of entertainment. They are caged, beaten, mistreated and restrained from behaving in their own instinctive way. They are often treated as little more than probes behind the scenes. Some animals are even drugged to make the work easier, and many of them have their teeth and claws surgically removed or they are jaws stitched out.  

3. Animal used in sports

Sports is a great part of amusement in the civilized society and animals are a huge part of sports and entertainment industries. Animals are the principle victims of exploitation in human sporting activities. The main purpose of animal sports for human beings is to indulge their penchant for gambling. Examples:- Horses are frequently being used in the entertainment world and are abused, injured and die. Bull fighting is probably the most barbaric exploitation of animals that is still legally practised in some foreign country.

4. Animal used in Dairy industries.

Cows produce milk for the same reason that humans do: to nourish their young. In order to force them to continue producing milk, factory farming operators typically impregnate them using artificial insemination every year. Calves are generally torn away from their mothers within a day of birth, which causes them both extreme distress. Male calves are destined to end up in cramped veal crates or barren feedlots where they will be fattened for beef, and females are sentenced to the same sad fate as their mothers.

After their calves have been taken away from them, mother cows are hooked up, two or more times a day, to milking machines. Their reproductive systems are exploited through genetic selection, despite the negative effects on their health. Artificial insemination, milking regimens, and sometimes drugs are used to force them to produce even more milk. The average cow in one day produces more than four times. Cows may be dosed with recombinant bovine growth hormone (rBGH), which contributes to an increased incidence of mastitis, a painful inflammation of the udder. which is one of the leading causes of death in adult cows in the dairy industry.

**Implication of Animal Rights**

Firstly we have to understand that what “right” means it means legal protection against harm, which does not include any act of cruelty or torture against animals. And indeed, state should create laws for the protection against cruelty and neglect. The law should be simple minimalist position in favour of animal rights and should prevent acts of cruelty to animal.

People who impound or confine an animal is obliged to provide good air, water, shelter, and food. And people who transport an animal in truck, car or in railroad are

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773 Supra note 38
774 Supra note 40
775 The Dairy Industry, Available at https://www.peta.org/issues/animals-used-for-food/factory-farming/cows/dairy-industry/ (Visited on February 12, 2019).
required to allow the animal to rest and give them enough space to move. People who abandon, an animal including a pet should face criminal penalty. These acts should be taken seriously and should deal greatly to protect animal from suffering and premature death.\textsuperscript{777}

Analysis of Animal Cruelty and Abuse Laws in India:

Animals are an integral part of the biological diversity. They have been used in various field, especially agriculture, transportation and amusement etc. To reap maximum gain they have been exploited by human beings by using cohesive method and by inflicting unnecessary pain. The then British Government in India enacted the \textit{Prevention Of Cruelty to Animals Act, 1890}. To give effect to the Act Cruelty to Animals, the Bill was passed by both the House of Parliament and approved by the president on 26\textsuperscript{th} December 1960.\textsuperscript{778} Which came on the statute\textsuperscript{779} book as \textit{Prevention of Cruelty to Animal Act, 1960}\textsuperscript{59 of 1960).} This Act prohibits, any person from inflicting or causing any harm to the animals or the owner permitting unnecessary pain or suffering to be inflicted on any animals. The Act makes it a crime to beat, kick, torture, mutilate, administer an injurious substance, or cruelly kill an animal. It is also illegal to over ride, over drive, over load, or work an unfit animal. It is an offense to cruelly transport, confine or chain to an animal. It is a violation to engage in animal fighting or shooting competitions in which animals are released from captivity to be shot. An owner commits an offense if he or she fails to provide sufficient food, drink or shelter, unreasonably abandons any animal, or permits any diseased or disabled animal to roam or die in any street.\textsuperscript{780}

\textit{The Environment Protection Act, 1986} provides the Protection and improvement of environment, safeguarding of forests and wildlife, under Article 48(A)\textsuperscript{781}, and Article 51A(g). It states, that the fundamental duty of every citizen of India is to have compassion for all living creatures.\textsuperscript{782} Above mentioned constitutional provisions impose two-fold responsibilities. On one hand, they give direction to the State for the protection and improvement of environment and on the other hand they cast a duty on every citizen to help in the preservation of natural environment.\textsuperscript{783} These two Article are often read along with Article 21A, which not only safeguards the right to the environment but also the rights of the environment.\textsuperscript{784}

It intends to prevent cruelty to animals and consequent loss to the owner. Therefore, it becomes necessary to prove the intention or knowledge of the accused, that was likely to

\textsuperscript{777}Supra note 43
\textsuperscript{778}Maneka Gandhi, Ozair Husain and Raj Panjwani, Animal Laws Of India, 5 (6\textsuperscript{th} ed, 2013).
\textsuperscript{779}Id.

\textsuperscript{781}Ibid., 49
\textsuperscript{782}V.N.Shukla, Constitution of India, 385(Twelfth ed, 2013).
\textsuperscript{783}CONSTITUTIONAL MANDATE FOR ENVIRONMENT PROTECTION IN INDIA, Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/174248/9/09_chapter%204.pdf (Visited on February 8, 2019).
\textsuperscript{784}Id.
cause wrongful damage or loss for convicting under sec428 and 429 of the Indian Penal Code which make illegal to maimingor causing injury to any animal with a monetary value. The Code also makes illegal for cars which purposefully injure or kill dogs, cats and cows on the street.

Categorized as an “unnatural offence”, whoever voluntarily has carnal intercourse against the order of nature or keep consensual sexual intercourse between persons of same-sex or animals shall be punished for life imprisonment under sec 377. The Supreme Court has laid down certain guidelines while partially striking down Section 377 of the Indian Penal Code. The apex court, however, said any kind of sexual activity with animals shall remain penal offence under Section 377 of the IPC.

Judicial decision that changed the status of Animal:

In this case the Court recognized the acts of cruelty towards animals, it banned the sport of jalikattu which violated sec 3, sec 11(1)(a), sec 11(1)(m), sec 11(1)(n) and sec 22 of PCA and Art 51 A(g) and (h) of the Constitution. In 2014, the Hon’ble Supreme court of India passed a landmark judgment pinching strongly on animal rights in India. It is presently consider as the matter of animal laws and also extended the fundamental and constitutional right to life.

Life means something more than mere survival or existence or instrumental value for human beings, and animals has also honor and dignity which can not arbitrarily deprived of. Every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. The supreme court also spoke about the concept of unnecessary pain, it held that in cases of animal offences it is important to see whether the suffering caused to the animal, have been reasonable avoided or whether the conduct causing suffering is for a “legitimate purpose”. The court while interpreting sec 3 of prevention of cruelty Act gave the opinion that sec 3 of prevention of cruelty Act does not confer any right upon any person to inflict necessary or unnecessary pain or suffering to animals. In the case of Compassion Unlimited Plus Action V Union of India, held that any action which causes...
unnecessary pain and suffering to animals is an offence. In consonance with the provision of the PCA, Bombay High Court held in *krushi Goseva Sangh V State of Maharashtra*, that the transfer of cattle, in cages not proportionate to there size is an offence under PCA. Transportation of animals for slaughter amounts to an offence under sec 11(1)(e) of PCA. In *Bharat Amartal Kothari V Dosukhan Samatkanh Sindhi*, where the issue was regarding transportation of animal for slaughter via truck, in which they had been filled in a cruel manner, the Supreme court not only imputed liability for the offence for the driver but also on the owners of the truck.\(^{793}\)

In *People for Animals V Md. Mahazzim*, Delhi High Court recognized, that the fundamental rights of the birds is to fly in the sky as against the rights of human to keep them in cages for the purpose of trade or business. How ever, the Supreme Court, in Nagaraja recognized the fundamental, right of animals to live with dignity and honor, by expanding the definition and scope of Art 21 of the Constitution, which includes animal life as well.\(^{794}\) Animals thus, have been given the right to live with dignity and honor which is reflected in the constitution of India.\(^{795}\)

**Stop Animal Cruelty**“A life worth living”:

Each and every year million of animals suffer from human action directly or indirectly. Dogs are being abused, cats are being mistreated, and some animals are raised on farms simple for human consumption, circuses are held for entertainment purposes, experiments are done on cosmetic products etc.\(^{796}\)

Mahatma Gandhi once rightly said, “the greatness of a Nation is judged by the way it treats its animals”. The history of the movement in the context of protecting the rights of animals dates back to the 3rd century when Ashoka explicitly banned the killing of any animal in his kingdom.\(^{797}\) But in today’s competitive world they are being exploited since they are mute spectators and are inescapable of raising their voice against this cruelty. To curb the menace of cruelty against animals, various laws has been implemented by the central Government quickly such as Prevention of Cruelty to Animals Act, 1960 to rescue those animals from exploitation.

Necessary steps should be taken :-

**Step1:** Inform local animal lover or NGOs in any way so that they can help and make your work easier.

**Step2:** Confront the perpetrators and tell them that they are doing something wrong and illegal. Lodge a complain in the police and have immediate action. Note that if what they are doing involve wildlife or not, Wildlife include all animals apart from few domestic animals. If the perpetrator caught while harming or

\(^{793}\)Bharat Amartal Kothari V Dosukhan Samatkanh Sindhi,2010 1 SCC 234.

\(^{794}\)People for Animal V Md. Mahazzim, 2015 SCC Online Del 9508.

\(^{795}\)Id.


\(^{797}\)Rebecca Furtado, Cruelty Against Animals in India, available at https://blog.ipleaders.in/cruelty-animals-india/ (last visited on December 31, 2018).
capturing them, he can be liable for serious crime which involves imprisonment. And if domestic animal are being hurt unnecessarily it can still be a crime under the law for which there is a punishment. 798

Step 3: If they do not listen, record the evidence of the wrong doing over a phone. And also tell them that the recording can go viral in social media.

Step 4: Along with the recording, go to the police station and lodge a complain if wildlife is involved, inform the wildlife department about such incident. If the police refuses to lodge such complain send directly to the SP by registered post. And tell them that people from Animal welfare NGOs will come to insist if they do not register complaint.

Step 5: Inform animal welfare people to take medical care if the animal is hurt unnecessarily.  799

Additional step in case of serious instances:

Contact the Honorary Animal Welfare Officer of the respective state and inform him about the ill treatment and cruelty which has occurred, and ask him to take some immediate action. 800

Conclusion:
Animal cruelty is still a kind of inhuman behaviour which makes the animal surrender or wipe into existence. These animal are no longer animals they have turned into meat, milk and egg producing machinery. They are confined into a space where they can not even turn around or extend their limbs. It is not just a moral problem, it is a legal problem which the country needs to recognize. In India there has been some development in laws regarding welfare of animals. Government has initiated different kind of laws regarding the protection of animals, such as Prevention of Animal from Cruelty. However it has also been identified by the judiciary increasingly to give rights to animals under the Constitution and also impose certain duties on citizens. To overcome this, we should educate people that as we suffer, animals also suffer equally, they feel pain too. “Sky is like Father, earth is like Mother, and all the creatures that live in between constitute a family. Any disturbance to any one of them will disturb the entire system”:- Rig Veda.

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EXEMPTIONS UNDER RIGHT TO INFORMATION ACT, 2005: A CRITICAL ANALYSIS

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“Information is a seed for an idea and grows only when it is watered.”

Introduction:
The Right to Information Act, 2005 is an Act of the Parliament that made the right to information a practical reality for the citizens. It replaced the Freedom of Information Act, 2002. It was enacted by the Parliament of India on 15th June 2005 which fully came into force on 12th October 2005.

Under the provisions of the Act, any citizen can claim information from a public authority which responds within 30 days for a reasonable charge usually of Rs.10. Also, it shall be noted that if the information relates to a person’s personal life and liberty then it shall be provided within 48 hours of the request. Besides, The Act makes it obligatory for every public authority to make suo motu disclosure of the information for it would help in 2 important ways. Firstly, the number of applications would be reduced and Secondly, it would facilitate the process of providing information.

The Act also requires every public authority to computerize their records for wide distribution of information proactively so that the citizens need minimum recourse to request for information formally. There are the Central Information Commission and State Information Commission for providing information at both Central and State level.

In the long history of RTI Act 2005 in India, there were various objections to surmount. Since British times, there have been many laws that prohibited implementation of right to information. From time to time, there have been many moves by government as well as private institutions to bring the right of information to the citizen. Also, The Mazdoor Kisan Shakti Sanghathan (MKSS) started a huge campaign for Right to Information – demanding information for the development of rural Rajasthan. This movement grew and finally resulted in the government of Rajasthan to enact a law on Right to Information in 2000. Various bills were passed in the Houses of Parliament but all in vain.

Finally, after immense efforts, RTI Bill was passed in Lok Sabha on 11th May 2005, and in Rajya Sabha on 12th May 2005. It had received the acquiescence of President of India on 15th June 2005, and was published in the Gazette of India on 21st June 2005. RTI Act, 2005 came into force from 12th October 2005, and known as Right to Information Act, 2005.

Exemptions Under Right to Information Act, 2005:
Though it is the duty of the public authorities to disclose information upon requests made; through the exemptions provided in Section 8 and Section 9 of the Right to Information Act, 2005 the public authorities might refuse to disclose the information.

The right to information is not absolute. Not all data that the Government generates will or should be presented out to the open. Everyone would there are some pieces of
information, which are so sensitive that if they were released to the public, they might actually cause serious harm to more important interests.

For instance, if at a time of conflict, if someone wanted to know how many troops were being deployed and where they were being sent, the Government might legitimately want to keep these information secret because if this information fell into the erroneous hands, it could pose a great risk to the national security of India. Yet, if someone requested the same information two years after the war, it would be less clear that the information should be kept secret because the probability of harm being caused by revelation would probably be less.

All of India’s right to information laws contained exemptions provisions. In the Central Act, Section 8 (1) lists all of the exemptions. The main grounds under which the Public Authorities might refuse to disclose information if such information violates the following grounds:

- National Security or Sovereignty
- National Economic Interests
- Relations with Foreign States
- Law Enforcement and the Judicial Process
- Cabinet and Other Decision-Making Documents
- Trade Secrets and Commercial Confidentiality
- Individual Safety
- Personal Privacy

The positive aspect of this Act is that it also provides for Public Interest Override under Section 8 (2). The above stated phrase means that even where requested information is covered by an exemption, the information should still be disclosed to the applicant if the public interest in the specific case requires it.

For instance, the judgment of S.P. Gupta V. President of India can be referred to. The relevant portion of this case concerns the disclosure of certain correspondence between the Law Minister, Chief Justice of Delhi and Chief Justice of India, and the relevant notes made by them in respect to the non-appointment of a judge for a further term and the transfer of a High Court Judge. Petitioners, and one of the judges in question, sought the disclosure of these documents. The government argued that the documents were privileged from disclosure on two grounds:

802. The query whether any, and if so what, advice was provided by Ministers to the President shall not be inquired into in any Court.

803. No one shall be authorized to give any information derived from unpublished official records relating to any affairs of State, except with the approval of the officer at the head of the department concerned, who shall give or refuse such permission as he thinks fit. The Court rejected the government’s declaration that the documents were protected from revelation on the grounds:

801 AIR 1982 SC 149
802 A per Article 74(2) of the Constitution
3. Section 123 of the Indian Evidence Act. (para 55)
grounds that they were advice from the Council of Ministers to the President.

804. The Court indicated that when there is an objection to disclosure, the Court must consider whether the document related to the transaction of state, and whether its disclosure would be injurious to the public interest.

If the answers to those questions are satisfactory, the same can be exercised.

However, Section 8 (3) of the Act does not require the Public authorities to retain records for indefinite period. The records should be maintained as per the record retention programme applicable to the concerned public authority.

This project shall deal with various aspects of the exemptions under RTI, 2005 and the contradictions between various decisions of Central Information Commission regarding additional exemptions and decisions of Hon’ble Courts.

The Central information Commission was set up under the Right to Information Act, 2005 under Government of India to act upon complaints from those individuals who have not been able to submit information pursuance to a Central Public Information Officer or State Public Information Officer due to either the officer not have been appointed, or because the respective Central Assistant Public Information Officer or State Assistant Public Information Officer refused to receive the application for information under the RTI Act,2005.

Talking about exemptions, Section 8(1) and Section 9 provides for various grounds under which the public authorities are privileged to refuse disclosure of information. Though the CIC is entitled to provide information to the complaints but sometimes the queries asked are not of importance rather, just to misuse the provisions of the Act or to derogate the reputation of the concerned Organization. Also, informations are sometimes sought with a malicious intent to harm a person or sometimes such information might bog down the executive efficiency by indulging them in non productive work.

The Act in anyway should not be allowed to be abused and become a tool for obstruction to the National Development & Integration and to destroy the tranquility & harmony among citizens.

Generally the CIC abides by the provisions given under the Act, but in some instances the CIC may use it’s own discretionary powers to decide whether information shall be disclosed or not according to the case as it may concern.

Several matters and decisions could be referred as an example to show how Right to Information Act is often misused:

1. The Appellant sought information related to his service records which was provided except the details of ACR (Annual Confidential Report). The CIC held that the denial of information relating to ACRs is justified under Section 8 (1) (j), as it contained remarks of the superior officers about the competence and the attitude
towards work of the concerned staff.\footnote{Decision No. 2141/IC(A)/2008 dated 31.03.2008} As the information had been asked for promotion of personal interest such denial was justified.

2. In the matter of Amarpal Singh V. Registrar of Newspapers for India\footnote{CIC/AD/A/2010/00173 Dated 25/01/2011} the applicant had sought for information relating to the Sales promotion schemes of the impugned Newspaper Company. The said Company was exempted by the CIC under Section 8(1)(d) as the information sought for was commercially sensitive and confidential in nature which could be misused and further adversely affect the competitive position.

3. In the matter of M. Sushil Kumar V. IOCL\footnote{CIC/SS/A/2013/002695/SH.} information regarding 63 LPG trucks was sought along with their mileage details and the month wise payments which was denied for being such a voluminous information under Section 7(9) because it would divert the resources of the organization towards a non productive work and lead to inefficiency in management.

4. The decision of Subhash Chandra Agarwal V. The Registrar, Supreme Court of India & Ors\footnote{LPA 34/2015 & C.M.No.1287/2015.} states that the information regarding a person’s medical facilities availed is a completely private information and hence shall not serve any public interest. The Hon’ble Court opined that providing such information would only amount to invasion of a person’s privacy and nothing more under Section 8 (1)(j). However, information regarding the total expenditure incurred for the medical facilities can be provided by the Central Public Information Officer.

5. The matter of\footnote{Civil Appeal No. 9052 of 2013} Bihar State Public Service Commission V. Syed Hussain Abbas Rizvi relates to the Appellant seeking for information relating to whether details of Identity of the Interview Committee. Providing of such information by the CIC under Section 8(1)(g) exempted as it could endanger the safety and confidentiality of the persons so concerned.

Also, in the matter of\footnote{Special Leave Petition (Civil) No. 27734 of 2012} Girish Ramchandra Deshpande V. Central Information Commission the applicant’s sought information regarding copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer, movable and immovable properties, investments, income tax returns, lending and borrowing from banks and other financial institutions was denied by the Hon’ble Court in agreement with the CIC stating that seeking such information by the applicant does not serve any larger public interest and all the above information is private and disclosure of which would only lead to invading a person’s personal space and nothing more under Section 8(1)(j).

Also, the Hon’ble Court stated that the petitioner could not provide proper explanation as to how it would favour a large public interest.

6. But, in the matter of\footnote{WP.(Civil) 9988 of 2007 dated 11.07.2007} Canara Bank V. Central Information Commissioner & Anr, the Applicant sought for information about appointment, transfer and posting of clerical staff employed by Canara Bank in the
Ernakulam district of Kerala. The bank denied access on various grounds. The applicant being aggrieved escalated the matter to Central Information Commission, which ordered the information to be disclosed. The bank challenged the order before High Court of Kerala and sought for protection under Section 8 (1) (j). The Hon’ble court held the opinion that the information mentioned in the section relates to private information and in the present matter the information sought was not one that the employees should keep just to themselves. Also, the Hon’ble Court held the opinion that the proviso to the impugned section states that any information that cannot be denied to the parliament cannot as well be denied to the citizens of the country, and the information impugned in this case was not in anyway of the above mentioned nature.

Though the immediate above mentioned matter does not relate to the exemption but, the same might be referred as to how the matters are dealt by the Central Information Commission and the Hon’ble Courts harmoniously and for the greater public interest.

Matters Relating To Third Party Information:

Section 11 of the Right to Information Act, 2005 states that when the information sought pertains to the details of a third party and which is confidential to such third party, the CPIO shall request such third party to disclose such information if deemed fit within 5 days of the request made. The decision completely depends on the such aforementioned third party whether to disclose the information or not.

Let us take a view of certain matters pertaining to the same.

1. In the matter of Ms. Harpreet Kaur V. Delhi Subordinate Services Selection Board, Delhi the appellant had sought for disclosure of her own answer sheets along with the answer sheets of a third party. The CIC opined that a candidate with regard to his/her own answer sheet can surely obtain a copy as a matter of right. But, when it is concerned with that of a third party, unless the candidate is able to show that larger public interest is involved or permission is sought from such third party, the same information cannot be furnished.

2. An article of the Economic Times reads that a Chennai based RTI activist Mr. V. Gopalkrishnan had sought details of Congress chief Sonia Gandhi’s income tax returns from 2000 to 2011. The Public Information Officer (PIO), Income tax, New Delhi wrote to Sonia Gandhi asking her to respond to the request made by Mr Gopalkrishnan. She flatly refused the information stating it is an intrusion into personal freedom and does not involve public interest. She also stated that it involves a security risk. The PIO in turn declined information to Mr Gopalkrishnan.

3. In the matter of H.K. Chaturvedi V. Deputy Commissioner of Police the appellant sought for investigation report

812. CIC/SA/A/2014/000135
disclosed to a third party. The CIC opined that the information seeker is neither a complainant nor the witness not accused in the matter. Hence the disclosure of such information of investigation report of third party would cause improper invasion to privacy of the individual under Section 8(1)(j).

4. In the matter of Shri K.L. Sharma V. BPCL A part of information sought pertained to the details of an application submitted by an aspirant of BPCL distributorship. The commission opined that since such documents are submitted by a third party, the details of information sought had no relationship with any public activity. Therefore, under the exemption of Section 8(1)(j) CPIO denied disclosure of such information.

Analysis of Additional Exemptions by CIC under right to Information Act, 2005

Till so far we have looked upon the exemptions applied by the Central Information Commission under the Right to information Act, 2005. But sometimes the Commissions face situations where applicants seek information asking for vague and voluminous informations, and non specific informations which tends to slow down the efficiency and working of the public authorities by indulging them in useless chores.

Also, applicants often tend to confuse the motive of Right to Information Act, 2005.

The main job of the Act is to answer query related issues and not provide opinions or deal with personal grievances of citizens. For instance, a company is responsible to answer matters and queries related to it’s working or if the query is related to policy decisions then it is liable to answer only till the limits of it’s own discretion, but is not liable to give opinions or explanations as to what policy decisions are going to be taken and the necessary reasons behind the same.

Few matters are discussed herein further for better understanding of the same.

According to an article, by Mr. G.D. Binani from Bikaner wrote against the frequent increase in charges of Internet Banking OTP which he claims that it should not be chargeable rather it should be a part of mandatory SMS. He claims that Internet Banking is given free of cost in most of the banks, but in certain banks, it is chargeable which should not be the case. Further he feels disturbed at the unfair treatment that bank customers face due to sudden decisions regarding bank charges and chargeable SMS category.

The above form of complaint is not a query to be specific but a form of grievance. The job of the Act, as mentioned above is not to deal with grievance redressal. Similarly the matter of Shri Ashok Kumar Verma V. (GAIL) India Ltd pertains to the issue of grievance redressal which is not again a part of the Act. In this particular matter the appellant sought information regarding delays in promotions, seniority

815 Decision No. 608/IC/(A)/2007 Dated 27.12.2007
817 Decision No. 1814/IC(A)/2007 dated 09.01.2008
lists and denial of his transfer to Delhi along with whether the approval of competent authority was sought in certain matters. It is alleged that even after getting the reply by the CPIO the appellant was not satisfied. CPIO argued that using the RTI Act as a veil the appellant was seeking redressal for his grievances which does not fall anyway under the purview of the Act.

2. In the matter of Shri Ashok Kumar V. BPCL the appellant had sought information relating to the details of collecting and manufacturing of crude oil, Petrol, Diesel and Kerosene, etc. The information sought by him related to the activities of 04 PSUs. The complete information is not available with any one CPIO of PSUs. While the CPIO of the respondent had duly responded and advised the appellant to seek specific information, the appellant had not acted upon the advice of the CPIO. Instead, he had complained to the Commission. The Commission opined that the information sought was not specific in nature as to what quantities, sources and year. It was also not clear as to whether the information was available with the CPIO or not. Hence, the appellant was directed not to go on a fishing spree rather should specifically seek clear information as it would save both the CPIO and of the appellants time and efficiency.

3. A very important matter of Central Board of Secondary Education and Anr. V. Aditya Bandopadhyay & Ors. the appellant sought for indiscriminate and voluminous information which was not related to transparency and accountability in the functioning of public authorities. The main purpose of the Act is to provide and furnish information to the citizens. The nation in anyway does not want a situation where 75% of the public authorities leave their daily chores and at the cost of it provide information to the applicants. And moreover, such voluminous information would not serve any larger public interest to be specific.

Also, this particular case could be explained from another dimension of fiduciary relationship. This relationship refers to one in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party. An employee who comes into ownership of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and not disclose any information to others. Similarly, if on request of the employer an employee furnishes his personal details and information to be retained in confidence the same is expected to be held by the employer as a fiduciary.

4. In the matter of Subrata Guha Ray V. CPIO the appellant re-iterated his submissions made during the last hearing and alleged that vide a letter issued in April, 2012, the CBEC had taken a decision to close the file but the Commissioner of Customs, Kolkata in its reply had submitted that the case is under process hence the

818 Decision No. 733/MA/A/2007/00131 dated 25.05.2007
819 Civil Appeal No. 6454 of 2011, Supreme Court.
820 SLP [C] No. 7526/2009, dated 09.08.2011
821 CIC/SB/A/2016/001025/CBECE-BJ
information sought was exempt from disclosure as per section 8 (1) (h) of the RTI Act, 2005. Commission observed that under the provisions of the RTI Act, 2005, only such information as is available and existing and held by the public authority or is under control of the public authority can be provided. The PIO is not supposed to create information that is not a matter of the record.

5. In the matter of Shekhar Vaishnav V. CPIO, SEBI Mumbai the appellant had sought by a question to SEBI as to what would be the future plans or steps thereto to be taken to initiate an inquiry. His appeal was dismissed on the ground that the CPIO under RTI Act is not liable to provide information regarding the future course of action as it is not a matter of record and could be confidential to the organization. They also referred to the judgement of Shri Ravi Kumar V. Coffee Board, Bangalore where it was opined or stated that information relating to future course of action which is not in any material form is not any “information” within the definition of “information” as per Section 2(f).

Contradictions To CIC Decisions:

In the preceding Chapter, it was studied that the Central Information Commission works in accordance with the Hon’ble Courts. But, there have been instances where contradictions arise between their decisions. Contradictions also take place within the different officials of the Information Commissions. On such occasions certain matters shall be studied as an example as to how such situations are dealt.

In the matter of The Registrar Vs. R S Misra a writ petition was filed challenging the decision of Central Information Commission. The CIC vide the impugned order allowed the appeal of the respondent and directed the Central Public Information Officer, Supreme Court of India to answer queries raised by the applicant. The CIC also directed the CPIO to provide information pertaining to a judicial matter in which the respondent himself was a party, i.e. in Special Leave Petition. The Commission with all respect concords with the decision of the then Chief Information Commissioner that the PIO, Supreme Court may choose to repudiate the information sought under the RTI Act. The bench further ruled that all citizens have right to information under the Act and the PIOs should provide with the sought information. The Court’s reasoning upon the analysis of the facts was that the CIC should not have directed the petitioner to supply information, without considering whether the queries raised were maintainable under the RTI Act. The court was of the view that where there was no information to be given or applicant is seeking non-existent information or where the query is inherently absurd or bordering on contempt, like in the present case, the cic should not have directed the petitioner to supply information. Another matter of the Central Information Commission where the appellant Mr. Yogesh Singh Pawar was seeking information/documents regarding the Attendance record of the Engineering

823 W.P.(C) 3530/2011
Staff and for Duty Charts for a particular period. The Commission heard both the sides. The commission decided to club this case with another one as the informations sought were almost identical. On both the occasions the Respondents held that the documents were not traceable. But, in one of the response they stated that according to the AIR manual they required to keep such documents only for 1 year and not more than that. But the appellant contended by holding that they had sought information before the expiry of the said 1 year. Appellant stated that he had wanted these records as there were cases of irregularity and inherent corruption in matter of attendance and allotment of duties, etc. the Commission feels it necessary that these records are supplied to the Appellant. The Commission ordered accordingly. The Court set aside the order of the of the Commission and remanded the matter back to the Commission for fresh hearing.

Another matter of Shri Premlal Pathak V. Food Corporation of India the appellant sought for certified copies of tender acceptance letters, details of rake loaded by FCI, copy of railway receipt, etc. The appellant on receipt of information stated that part information was received by them and that some of the copies provided by the CPIO was incomplete. The CPIO on the other hand stated that the information was not available as the files were shadow files and were ceized for investigation by CBI. After hearing the both the parties the Commission held the opinion that the case was dealt in the most lackadaisical manner and the CPIO & FAA were directed to file written submissions on their behalf. After submissions by them it was noticed that they were contradictory to each other. The Commission therefore finds it fit to remand back the appeal to FAA and cautioned it to strictly abide by the RTI regime.

826 Another matter, C.Chamideeswari V. BSNL, Chennai the appellant sought information regarding action taken on complaints lodged by Group-A woman officers working in Chennai Telephones. The Public Information Officer (PIO) denied the request under Section 8(1)(j) of the RTI Act. The First Apellate Authority (FAA) on the other hand claimed that no complaint was made on behalf of the Group-A woman officers. The appellant filed a second appeal before the Hon’ble CIC stating that the statements of the PIO & FAA are contradictory. The Commission observed that the allegations on the appellant’s part were true. If no such complaint was filed then the PIO would have replied with “NIL” and not invoke Section 8(1)(j).

Analysis of Decisions of Supreme Court & High Court overruling CIC Decisions

This Chapter shall deal with the Hon’ble Supreme Court and High Court deviating from the decisions of Central Information Commission and overruling it’s mandate or decision. The Supreme Court & High Court are the supreme authorities to decide and give final judgement on a matter, therefore in some instances if the Ld. Hon’ble Courts feel matters might be remanded or disposed off and the decisions given by the Information Commissions might be overruled.

825 F.No. CIC/YA/A/2014/902315

826 RTIFI/2012/CIC

www.supremoamicus.org
Matters related to the same are:

1. In the matter of All India Institute of Medical Sciences V. Vikrant Bhunia the appellant had sought for certified copies of original question papers of all Super speciality Exams. The Information Officer had rejected it and refused to supply such information claiming that question papers were a part of the Question bank and were supposed be repeated again. So, disclosure of such question papers might lead to larger public harm. Also, they held that question papers were an intellectual property to them, and that it was a part of their confidential document and it would compromise their selection process. It was thus argued that the question papers of the entrance examination for super-speciality courses could not be made public. CIC vide its’ order directed the appellant to provide such information and that question papers could not be termed as “intellectual property.” The appellant filed a Writ petition before the, Learned Delhi High Court seeking justice. The Ld. Court after several submissions and studies cancelled the writ petition and set aside the order of CIC by holding the opinion that unless the institution discloses the question paper openly in market, the company cannot be forced to share the past question papers as they indeed are an intellectual property.

2. In the matter of Shri Ashwani Kumar V. Northern Railways the appellant had filed a number of RTI applications asking for Information on the status of North Zone Railway Employees Association, Action taken on his complaints against Shri Anil Kumar Rajpal, Chairman of NZRE, etc. The applicant did not recieve any reply from the CPIO. The matter moved to the Hon’ble Central Information Commission who declared the NZRE ( Northern Zonal Railways Employees ) as a public authority under Section 2(h) of the RTI Act and directed it to provide all the information sought by the applicants. The Hon’ble Court quashed the order of the CIC and held that the mere fact that the petitioner comes within the purview of MSCS Act also makes no difference to the status of the petitioner in relation to the RTI Act. If the submission of learned counsel for the respondents/querists were to be accepted, it would mean that every cooperative society to which the MSCS Act applies would, ipso facto, qualify as a public authority. This position cannot be accepted. Hence the matter was disposed off.

3. In the matter of Ms. Bindu Khanna V. Directorate of Education, GNCT of Delhi the appellant alleged that the School has not complied with the order dated April 23, 2008 passed by the Appellate Authority of the respondent. The PIO stated that the School which is the custodian of information has not been cooperative in the matter and, therefore, it would not be possible to obtain the information from the School. He also stated that the School has stated that the school being a private entity, is not covered under the provisions of the Act. In view of that, the Court opined that all the Schools are performing public function, they are covered under the definition of the public authority, under Section 2(h) of the Act. Therefore, no ground for seeking exemption from the applicability of various

27. LPA No. 487/2011.
828 W.P No. 12210/2009
829 Decision No.3278/IC(A)/2008
provisions of the Act.

Conclusion:

While wrapping up the article, I would like to quote Honourable Justice Mathew, “In Governance of social control like ours where all the agents of the state must be responsible for their behaviour, there can be but a few secrets. The people of this country have a right to know every public act, whatever is done by the officials out in the public. The responsibility of officials is to explain or to justify their acts as a chief measure against subjugation and corruptness.”

The enactment of Right to Information Act, 2005 has ushered a new era leading us towards the development of democracy. It has led to a series of debates among the rationals and has also affected common people. But, the Act sadly is not totally used the way it should be. There are numerous instances of Right to Information Act, 2005, being misused. As seen above on many occasions applicants have been turned down for requesting unuseful and confidential informations. The Government has surely implemented the Act but the citizens are not fully aware of the main provisions and functions of the same.

Citizens should be made aware of the main usage of the Act so that it does not become a tool to obstruct the National Development of the country, the tranquility and peace among it’s citizens. Above all, the RTI, Act is a useful piece of legislation apart from the aforementioned loopholes which if removed can further improve the Act. Also, the citizens need to use this right in order to make oneself aware about the allocation of public funds, the election candidates, political parties, private institutions, schools, colleges etc. This would eradicate corrupt practices within different stratas of the society. Because, if people become well informed they will be able to make better choices with regards to politics, elections and the future of the nation will improve.

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PRE-TRIAL DETENTION: UNDER TRIAL REVIEW COMMITTEES

By Srishti Ray
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The Indian Constitution upholds the paramount importance of liberty for its citizens, with reasonable restrictions under certain conditions. India is a signatory country to the United Nations Standard Minimum Rules for Treatment of Offenders and the International Covenant on Civil and Political Rights. All the stakeholders in the criminal justice system have a moral duty to accord protection and relevant privileges to prisoners in line with these international covenants. The legal system in India recognises the presumption of innocence as an essential prerequisite of a fair trial. Thus, it is of utmost importance that no person be denied their liberty unless it is the last resort and is set within the due process requirements of the legal framework. Pre-trial detention undermines the chance of a fair trial. Many countries do not have an adequate legal aid system, and many people cannot afford to pay for a lawyer. Even when they can, it is much harder to prepare well for a trial in a prison cell. People in pre-trial detention are particularly likely to suffer violence and abuse. Pre-trial detention has a hugely damaging impact on defendants, their families and communities. So, I believe pre-trial detention should be an exception and not a rule. If there is a risk of the person absconding, then less intrusive methods can be applied, like confiscation of travel docs, etc. Hence, laws regarding this will obviously mean less pre-trial detainees.

Recent amendments in the Code of Criminal Procedure, 1973 have inserted statutory framework, placing restrictions on the police and other law enforcement agencies on arbitrary arrests which often lead to long periods of detention under judicial custody. However, there are no safeguards for undertrials who fail to get bail, or for cases where the investigation of detained persons generally takes years to complete and trials do not conclude within a reasonable time period. As a corollary, it follows that custodial institutions, in particular prisons, should not be used to detain accused persons for prolonged periods of time. This is particularly so, when undertrials don’t have much scope of case review, while they await the completion of the investigation, framing of charges and commencement and completion of their trial without any time frame. One could argue that bail provisions provide a pre-trial detainee with the opportunity to seek release from custody. However, a large proportion of the prison population is illiterate and indigent. As such, there is no assurance that every prisoner has an equal opportunity to engage a competent lawyer in order to seek bail. The importance of the undertrial review committees (URCs) can be seen from this perspective. These are crucial monitoring agencies which can ensure that incarceration of each pre-trial detainee is lawful and not a result of lack of oversight, callousness or negligence on the part of any agency of the criminal justice system.

Overcrowding is a major strain on prison resources and infrastructure and one of the main reasons for the abhorrent prison
conditions in our country. The executive has periodically introduced plans to remedy this situation, yet no radical change has been perceived. The Supreme Court too has periodically issued directions for the release of undertrials, and liberal use of bail provisions, but this has not led to any change in the high percentage of undertrials lodged in prisons. However, in the last two years, there were two such decisions of the Supreme Court which are of prime importance in this regard viz. Bhim Singh v Union of India and Re Inhuman Conditions in 1382 Prisons. In the Bhim Singh case the court emphasised the implementation of Section 436A of the Code of Criminal Procedure, 1973 (CrPC) and fast-tracking of courts, to ensure that no undertrial remains in prison beyond half of their maximum sentence. It directed the concerned magistrates to visit the prisons in their district, and hold one sitting every week in prisons for two months, commencing from 1 October 2014. In the meetings, the judicial officers were to identify undertrial prisoners who had spent half of their maximum sentences in jail and provide an order for their release. The court further directed the report of each sitting to be forwarded to the Registrar General of the High Court, and at the end of two months, the Registrar General should submit the report to the Secretary General of the Court without delay. A copy of this order was to be sent to the Registrar General of each High Court, who in turn was to communicate a copy of the order to all sessions judges within the state for necessary compliance. This order introduced the concept of reviews of undertrial cases, by way of judicial pronouncement, into the criminal justice system for the first time. The concept of undertrial review committees is not new; they have been under discussion since April 1979 when a conference of Chief Secretaries, for the first time, recommended the constitution of district and state level review committees. The All India Jail Reforms Committee of 1980-83, popularly known as the Mulla Committee, had also recommended a regular, effective review mechanism at the district level and the state level. In 2013, the Home Minister too sent a letter to all state governments to set up state-level multi-disciplinary committees to review undertrial incarceration. However, till date, the Apex Court had not directed conducting such reviews on a pan-India basis. The need to set up an undertrial review committee in every district is evident. With

831 On 26 January 2010, the Ministry of Law & Justice, Government of India, introduced the “Mission Mode Programme for Delivery of Justice & Legal Reforms – Undertrial Programme” to reduce two-thirds of the undertrial cases and to ease congestion in jails by 31 July, 2010.
833 Motiram &Ors v. State of Madhya Pradesh AIR 1978 SC 1594
834 Writ Petition(s)(Civil) No(s).406/2013.
835 Section 436A of the CrPC proscribes the detention of undertrials beyond the maximum term of sentence. It also provides an undertrial the right to apply for bail once s/he has served one half of the maximum term of sentence s/he would have served had s/he been convicted.

every agency of the criminal justice system being overburdened with their own work, all attempts to reduce the number of undertrials, ensure speedy trials and prevent prolonged pre-trial detention are bound to fail if no specific bodies/mechanisms such as undertrial review committees, which can review cases of undertrial prisoners on a regular basis and recommend for their timely release, are set in place. Undertrial review committees (URC) are an excellent inter-agency coordinating body that allows for all the relevant persons to come together to assist the courts to ensure that there is no unjustifiable infringement of the right to liberty to which we are all entitled. The aim of creating URCs is basically to safeguard individual liberty and to guarantee fair trial, especially to the unrepresented and unfortunate. The mandate of such review committees is very clear – to frequently review the cases of every prisoner awaiting trial and apply appropriate correctives to ensure that no undertrial is held for unjustifiably long periods in detention or is simply lost in the files.\textsuperscript{837} The data received from correctional homes of West Bengal indicates that the URCs are yet to be set up in most districts, and in places where they have been set up, case review, consideration for release and subsequent release on bail/personal bond has not been prompt. Feedback from the correctional home staff indicates that a number of review meetings were fruitless as the court records were not available or that at most places the superintendent/representative of the correctional home is not part of the review committee meetings. This makes it difficult to provide information or subsequently follow up on the reviews. There is lack of uniformity in conducting reviews in all the CHs. Data reveals that different patterns of review are carried out. In some correctional homes, especially the central correctional homes, inmates from more than one district are detained. In these cases, undertrial review committees should have been set up for each district. The data is not indicative of such a setup. Further, the powers of the committees have not been identified anywhere. Can the committee only give recommendations and if yes, how can they ensure that their recommendations are acted upon? One other concern that emerges is that in a large number of correctional homes the number of prisoners eligible for release under Section 436A of the CrPC is nil. This may lead one to believe that the non-eligibility of inmates under Section 436A negates the purpose of setting up URCs. However, this argument can and must be countered with the argument that inmate population is not stagnant, with inmates being admitted and released from correctional homes at a random pace. Thus, even if in a certain month only one person was eligible under Section 436A, it does not necessarily mean that in the next few months 20 others will not be eligible. And herein lies the reason why there is need for monthly review of cases. It is imperative to note here that all the attention in relation to URCs seems to be based on the review of three types of cases: cases under Section 436A of the CrPC; cases where inmates are unable to furnish bail; and compoundable offences, at this juncture. However, one must be reminded that review of cases need not be restricted to only these categories. In order to ensure that no undertrial prisoners is

detained in prison unnecessarily, there is a need to expand the mandate of the URCs to review all other cases as well. While the court has not expressly stated what kind of cases are to be considered, the implementing authorities must chalk out a criterion based on which a review of all undertrials can be considered.

The primary purpose of review committees is to ensure that no undertrial is held for unjustifiably long periods in detention or simply gets lost in the system without being given a chance to knock on the doors of justice. Thus, attention should be given to persons who become eligible to be released on bail, have already served one-half or the maximum jail term for their offence, do not have access to counsel, are vulnerable due to mental and physical disability, are accused of serious offences and have been under trial for a long period of time, or have committed such petty offences that there is no need to keep them in judicial custody.

Members of the review committee should meet every month to review individual cases of prisoners and take necessary action towards recommending their release on bail, effective production before the court, appointment of legal aid lawyers, or any other action as required. The district & sessions judge or the head of the committee may fix a particular day in the month to be assured of regularity; for example, the second Saturday of every month. A letter in this regard can be sent from the office of the district & sessions judge to all the members of the committee to ensure regularity and attendance. If the district & sessions judge or head of the committee is unable to convene the meeting owing to unavoidable circumstances, then another officer may be assigned the responsibility and must convene the meeting. The committee meeting must be convened and cannot be delayed under any circumstances.

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RIGHT TO PRIVACY STANDING UP AGAINST UNREGULATED STING OPERATIONS

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Abstract

Rights of the journalists to publish the wrongdoing with an aim to discover the truth should not stretch to an extent that it threatens an individual’s privacy rights. In the guise of Sting Operations media, private investigation agencies and people on the path of greater good have neglected the need to respect an individual’s personal space. There is a need for a better regulatory framework to keep sting operations on the side of serving public good and away from being used as a tool to disrupt public peace. Along with questioning the purpose of sting operations we need to understand its relevance as well, as said by Justice Mathew in the case of State of UP v Raj Narain (1975), “The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. Their right to know is derived from the concept of freedom of speech”. With the change in understanding of public and private space we need an updated legal framework to cope up with it, a clear distinction is required between stories that expose corruption and political implications and those which amount to invasion of privacy. By drawing a comparison between US laws on sting operations with the ones in India, the author aims at coming up with suggestions and recommendations that will help in better regulating sting operations without cribbing the right to information.

Keywords: Sting operations, media, privacy, journalist

Introduction

It is easier to choose between liberty and restraint, but to make a judgment call is much harder when two liberties are at odds with each other.

In the context of constitution and media, these two liberties are Right to Freedom of Speech & Expression, a fundamental right drawing its legality from the Indian Constitution and the Right to Privacy also a fundamental right by the milestone judgment of the Supreme Court, declaring privacy a constitutional core of human dignity.

Free speech and expression extends to media, their purpose is to put forward different understanding towards issues that the citizen of the country has, media either print or virtual works as a tool for different opinion from different masses of the society to be heard by everyone else. To keep these opinions from being manipulated, media enjoys the same freedom of speech as guaranteed to a citizen be that in India or US, the first amendment of the US constitution says, “Congress shall make no law…abridging (limiting) the freedom of speech, or of the press…” this amendment

838 Constitution of India 15-16 (Eastern Book Company, 2018)
840 The United States Bill of Rights: First ten amendments to the constitution, ACLU,

www.supremoamicus.org
strengthen the right against the fear of government restraint.

With great power comes great responsibility, media has a indomitable duty on them to make sure that they are not encroaching over the privacy rights of others while trying to enjoy their own freedom of expression. 841

It has to be understood that over inquisitive media which is the product of over commercialization, is severely encroaching upon an individual right to privacy by crossing the boundaries of its freedom. 842

At the epitome of this encroachment lies Sting Operations, an operation designed, planned and executed in a way to catch a wrongdoer in the act. A typical sting will have a law-enforcement officer or cooperative member of the public play a role as criminal partner or potential victim and go along with a suspect’s actions to gather evidence of the suspect’s wrong doing. The purpose behind conducting sting operations is to look into the working of the government for public interest. 843 Due to evidence of both positive and negative impacts of sting operations we face the question of the change required in the regulatory framework of the Sting Operations if at all we need them.

Overlapping of Freedom of Speech & Expression with Right to Privacy

Scope of Media’s Freedom of Speech

Intention of the drafting committee was always to make free speech as a constitutive element of democratic government from free speech as a liberal or human right. As provided in Part III of the Indian Constitution, Article 19 (1)(a) reads, All citizens shall have the right to freedom of speech and expression. Since this right cannot be absolute law makers added reasonable restriction by way of Art 19 (2). Just like the citizen of India, press also derives its right to freedom of expression from the above mentioned articles.

A free press is a fundamental to a democratic society. It seeks out and circulates news, information, ideas, comment and opinion and holds those in authority to account. The press provides the platform for multiplicity of voices to be heard. At national, regional and local level, it is the public’s watchdog, activist and guardian as well as educator, entertainer and contemporary. 844

At US, institutional press have been much debated as well, whether media is entitled to greater freedom from governmental regulations or restrictions than are non-press individuals, groups, or associations. 845

https://www.aclu.org/united-states-bill-rights-first-10-amendments-constitution
841 Dr. Poonam Kataria, freedom of press vis-à-vis right to privacy, Volume 1, Issue 10, 34-39 (2016)
842 ibid.
843 Yogendra Aldak, Sting Operation To be or not to be?, Legal Services India, http://www.legalserviceindia.com/article/l166-Sting-Operation.html
844 Press Media- Why is it Important, News Media Association (Last Accessed Sep. 6, 2018), http://www.newsmediauk.org/Current-Topics/Press-Freedom
As argued by Justice Stewart, “That the First Amendment speaks separately of freedom of speech of the press is no constitutional accident, but an acknowledgement of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”

When privacy and press collide

Sipple v. Chronicle Publishing Co, a 1984 California case demonstrate dramatically just how far courts had come in sliding with journalists over privacy claimants. Risking his own life, former Marine Oliver Sipple had intervened to save the life of President Ford during an assassination attempt by Sara Jane Moore, knocking her gun away as she was about to shoot. He was hailed a hero. Shortly after the event, newspapers began to report that Sipple was gay. Sipple unsuccessfully sued for publication of private facts. The court held that Sipple’s sexual orientation was newsworthy because it helped to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against minority group such as homosexuals.

The news for journalism is not all dire. Even today, most courts continue to side with the media in determining newsworthiness, sometimes even in cases involving deeply private disclosures. But the emerging trends are towards narrower and less predictable judicial conceptions of the news. An approach that relies on ethics codes which judges and juries often simply do not understand will pose increasing hazards as society grows more anxious about the loss of privacy.

Sting Operations: A necessary evil?

Sting Operations, in simple terms is an operation systematically designed to catch a person red handed committing a crime, through the means of deception. A sting operation usually involves an investigative agency such as the media or the police so that those who conduct the sting can lure the person to commit that crime, ultimately catching them in the act it is also seen as undercover journalism. In India, the purpose of sting has largely been to increase the transparency of the government machinery for the larger public good. The dark side of this is the operations conducted by private individuals who at most look forward to defame a person or look for profit making sensationalization.

There exist both the good and evil of Sting operations which can be much clearer with the instances provided below:

In the year of 1981, an operation was planned by the Indian Express, to expose the sex work and buying and selling of women. This was done by the reporters of Indian express bought a woman in the Dholpur market of Madhya Pradesh, the validity of the news was dismissed. However, when the reporters of tehelka newspaper used hidden

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846 Houchins v. KQED, INC., No. 76-1310 (1978)
848 Amy Gajda, Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press, CLR 1039, 1063 (2009)
849 Ibid.
camera in an attempt to expose corruption, sting operations slowly came into focus.\(^{850}\)

Although, there are some positives of Sting operations, the havoc it creates is of far more greater degree, a news item reported in the daily edition of Hindustan times dated 7\(^{th}\) September, 2007 in the respect of a sting operation relating to one Ms. Uma Khurana. Prior to the said date, “Live India” a television news channel aired a programme about the above said sting operation, showing Ms. Uma Khurana, a teacher with a Delhi Government school, purportedly forcing a girl student into prostitution. Subsequent to the said telecast, aghast at the said act of the teacher, a crowd gathered at the school gate and started raising slogans demanding handing over of Ms. Uma Khurana to them. In the commotion and mayhem that followed some persons physically attacked Ms. Uma Khurana and even tore her clothes. Shocked by the aforesaid incident and consequent to public outcry the Directorate of Education, Government of Delhi first suspended Ms. Khurana and later dismissed her from service, in exercise of special powers vested in the Government. Police also sprung into action and started investigation. Later the aforementioned news item was published in the Hindustan Times which indicated that there was something more to the whole sting operation than what met the eyes. In the aforesaid news item it was stated that the girl who had been shown as a student who was allegedly being forced into prostitution by Ms. Uma Khurana was neither a school girl nor a prostitute but a budding journalist eager to make a name in the media world.\(^{851}\)

*How the judiciary see sting operations*

Justice Mathews ruled in the case of *State of UP v. Raj Narain*\(^{852}\), ‘The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. Their right to know is derived from the concept of freedom of speech’.

It said unlike the U.S. and certain other countries where a sting operation is recognised as a legal method of law enforcement, though in a limited manner, the same is not the position in India.

In *Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors v. Union of India*\(^{853}\), the Court emphasized that the freedom of press and information were ‘vital for the realization of human rights’ and relied upon Article 19 of Universal declaration of Human Rights. The heart of journalism has to be public interest and sting operation serve it, most of the times.\(^{854}\)

This being said, the problem in the opinion of the author is that a Sting operation to its fundamental nature is deceptive. Even though we consider that these operations are designed to nab criminal they still are weak

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\(^{851}\) Court on its motion v State, (2008) 146 DLT 429 (India)

\(^{852}\) State of UP v Raj Narain & Ors, (1975) SCR (3) 333

\(^{853}\) Indian Express Newspapers v Union of India & Ors, (1984) 1985 SCR (2) 287

on the aspect of moral ethics. The individual who is the subject of operations may or may not be innocent but is lured into committing the crime. Also is it right holding that person responsible for committing the crime which he may not have committed in the regular course of events?

Changes in law: Need of the hour

India does not have a specific law regarding sting operations; neither do have judicial precedents that can help in better understanding Sting operations conducted by media. Though there are Supreme Court judgments that support privacy rights over sting operations such as, in the case of Khadak Singh v. State of UP said that, ‘right to privacy that flows from Article 21 couldn’t be invoked against private entities. It cannot be denied that it is of practical importance that a precarious balance between the fundamental right to expression and the right to ones privacy be maintained. ‘Right to Privacy’ has ceased to have any pragmatic value where ‘sting operations’ define the order of the day. The right to privacy is an alleged human right, which may restrain both government and private party action that threatens the privacy of individuals. It has been recognized as a fundamental right by the Hon’ble SC under Article 21.

In the case of R. Rajagopal and Anr v. State of Tamil Nadu and Ors, Supreme Court further puts light on the limits of the freedom of press, “A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”

We still don’t have laws governing sting operations; there is the classic ethical problem that haunts all sting operations: can you hold somebody responsible for a crime that he would not have committed if you hadn’t encouraged him? The essence of all entrapment is that you promise a man a reward for breaking the law and then, apprehend him when he takes the bait. All sting operations involve making people commit crimes that they would not otherwise have committed and are therefore

856 Khadak Singh v. The State of U.P & Others, (1964) SCR (1) 332

857 Yogendra Aldak, Sting Operation To be or not to be?, Legal Services India, http://www.legalserviceindia.com/article/l166-Sting-Operation.html
858 R. Rajagopal and Anr v State of T.N and Ors, (1994) SCC (6)632
859 Yogendra Aldak, Sting Operation To be or not to be?, Legal Services India, http://www.legalserviceindia.com/article/l166-Sting-Operation.html
immoral. It is against the public morality and decency and hence falls within the purview of Article 19 (2).

Although there is no law governing them, sting operations still hold legality, drawing it from Art 19(1)(a) interpreting as right to know and dissemination of information. In the case of R.K Anand v. Registrar, Delhi High Court, court said that Sting operation is a necessary evil. Court cannot stop media from opining these doors. Therefore Sting Operations are legal in nature.

Not ignoring the fact that in R.K Anand case the court also said that Sting Operations are not acceptable in all cases, “a crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to our criminal jurisprudence. At the same time the criminal intent behind the commission if the act will be alleged to have occasioned the crime will have to be established before the liability of the person charged with the commission of crime can be adjudged.”

Still no guidelines were provided by the court, only after Uma Khurana sting court understood the need for guidelines. These guidelines asked the channel telecasting sting operations to obtain a certificate from the person who recorded it along with concurrent record in writing of the various stages of the sting operations.

The matter of concern in these guidelines in point 12 which says, “Channels must not use material relating to persons personal or private affairs or which invades an individual’s privacy unless there is identifiable larger public interest reason for the material to be broadcast or published.”

A matter of grave nature cannot be regulated by such vague guideline, as established before, media as far as sting operations in India is concerned includes an India citizen as well. Identifiable public interest has to be narrowed down to much more specific subjects.

Drawing inspiration from US Law

According to the criminal justice system of the United States, entrapment is when a person is coerced, compelled, or induced into committing a crime that they otherwise may not commit. This is different than a sting operation since, in a sting an atmosphere is developed by the people conducting sting where the victim may knowingly conduct a crime. These fine margins differentiate a sting operation from an entrapment.

As far as the US Law is concerned, law enforcement officers are allowed to engage in sting operations, whereby they create circumstances that allow individuals to take criminal actions that they can then be arrested and prosecuted for. These are considered “opportunities” for individuals believed to be involved in criminal behavior to commit crimes. An opportunity is considered very different from entrapment.

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and involves merely the temptation to violate the law, not being forced to do so.\textsuperscript{862}

The office of US Department of Justice, published manuals developed on empirical data titled “Sting Operations: The Pros and Cons of such undercover operations”, which offer a conclusion that sting operations can be expensive, are demanding on personnel and generally offer limited relief from crime and disorder problems\textsuperscript{863}

Furthermore, this interpretation and analysis refers to the police departments and not to media functionaries or media practice. This is because in the United States, nobody except the Federal Bureau of Investigation is legally permitted to execute sting operations: the media is not. In India, the common link that the layman finds between a sting operation and the person who carry it out is the media and not the police\textsuperscript{864}

Conclusions and Suggestions

As said before, its easier to choose between liberty and restraint but to make a judgment call is much harder when two liberties are at odds from each other.

Freedom of speech and expression is the bulwark of a democratic government and is thus to be understood as the mother of all liberties mandated under the constitutional framework.\textsuperscript{865} In the present world the justification given for sting operations by media is that press has taken the responsibility to bring the criminals in the light of public view when the law enforcement agencies themselves are unwilling to do that. What we don’t focus on is, since there is no code of conduct regarding sting operations it just becomes an instrument for gaining viewership and TRP. When an issue of grave serious nature is turned into a television series or seen as a spectacle the manipulative impact it has on individuals is unimaginable.

In India, there is a dire need for a regulatory framework to manage sting operations, like United States where a private entity be that it is media or an individual cannot conduct a sting operation. The purpose of a sting operation is to bring out the truth which has public importance attached to it, when that is not the case its nothing more than a violation of privacy rights. Furthermore, as far as broadcasting is concerned, we need a solid self regulatory mechanism to monitor what media broadcast on live television, monitored preferably by an autonomous quasijudicial body that has powers of both censure and enforcement. The Indian media does make pious noises in this regard, but it is not serious about subjecting itself to self regulation.

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\textsuperscript{862} Shoma A Chatterji, Sting Operations and the Ethics of Journalism, Kerala Media Academy (Last Accessed: Sept. 6, 2018), https://mediamagazine.in/content/sting-operations-and-ethics-journalism

\textsuperscript{863} Ibid.

\textsuperscript{864} Ibid.

ABSTRACT
Refugees are one of the foremost vulnerable sections of the society. They face multiple issues on a usual that we as independent citizens can't even imagine of. The 1951 Convention majorly deals with the protection of rights of the refugees. A refugee, in accordance with the Convention, “is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.” In this manner, a person who is not capable to measure exclusive of concern in his place of foundation in addition to a consequence of this moves to another place is implied as an immigrant. On the contrary a displaced person might be a one with the intention that doesn't own the citizenship of any State. This proposes that a stateless individual is dispossessed of the safety given to the individuals as a consequence of in step with law there's no responsibility upon the State to protect the rights of an emigrant person. As a result, the stateless people are at risk of being subjected to a changed behavior as compared to the voters of the State they are residing in. The 1954 Convention with respect to the status of unsettled People characterizes the term "stateless person" as a person Who isn't thought-about as a resident by any State beneath the process of its law. It also endorses the guidelines of conduct to be agreed to stateless persons. In this manner, refugees and stateless persons, being helpless groups of the society are given international protection.

INTRODUCTION
The focal point of this document is at the Rohingyas Who are stateless and are right now being accepted as displaced people by bound nations like Malaysia as a consequence of the crisis situation in Myanmar. The paper in addition analyzes the challenges highlighted by such people especially on the human rights front and gives arrangements to the above expressed issues. The paper is divided into four parts. The main part of it talks about how the states have utilized the displaced people as an explanation for right infringement in addition to why it abuses the Rule of Law of that country. The next part clarifies Who are Rohingyas and why their host nation considers them unsettled. The third part discusses with respect to the sustained Rohingya crisis and its history. The fourth part clarifies how the Rohingyas became unsettled as refugees. At last, the paper concludes by a list of recommendations as per the norms of the law of such countries.

STATELESSNESS AS A JUSTIFICATION FOR VIOLATION OF HUMAN RIGHTS
The Universal Declaration of Human Rights is that the most vita instrument for safeguarding the Human Rights of an individual. The rights that are provided during such process are a group of tips on

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how a state ought to accommodate its subjects. The Courts that uphold the Rule of Law should follow these against the state 867. Article 15 of the Universal Declaration of Human Rights lays down that, "Everyone has the right to a nationality". It is an accepted norm by the law of nations, scholars that States offer domestic and international protection and access to rights solely to their voters. This suggests that a right to status is that of right to possess rights and thus stateless people don’t own any rights. But on the other hand, the principles of human rights claim that being human itself implies that not everybody may be bereft of their human rights 868. This position has been forwarded within the 1951 and 1961 Convention on the rights of the unsettled or stateless. The 1961 Convention on the Reduction of Statelessness, states that a State party to the present Convention agrees to grant its status to an individual born in its territory who would well be unsettled. The State additionally agrees, subject to bound conditions, to not deprive an individual of his status if such deprivation would render him unsettled. The Convention specifies that an individual or group of people shall not be treated of their status on racial, ethnic, spiritual or political grounds 869. On the applying of Article 15 of the Universal Declaration of Human Rights along with the 1961 Convention it is well clear that the Declaration is being desecrated if the rule of law is applied to solely the people of the State and not the refugees within the state. This conclusion is supported by the language that is declared within the Article 15 of the Declaration that states that "everyone" is entitled to the rights and freedoms listed within the articles, and no distinction is to be created among individuals thanks to their national or social origin, property, birth or different standing. Therefore, associate individual’s claim to the enjoyment of human rights cannot be refused on the shortage of citizenship to it country. Human rights violations are thought-about as a Magnifi cance reason behind mass exoduses that have an effect on the peace and stability of the planet. Thus, it is necessary for all the States to safeguard the human rights of their subjects whether or not they are citizens of that country 870.

WHO ARE ROHINGYA’S AND THE REASON WHY THEY ARE STATELESS

Rohingyas are an ethnic and minority group of people who reside within the Arakan state of Myanmar. They were never being accepted as legal citizens of the state and were treated as foreign residents. There are two opposing views in relation to the history of the Rohingyas Muslims. The Burmese military government claims that the Rohingyas don’t have any historical association to the land on that they’re residing and their presence is a mere arrival to that place and thus cannot be accepted as voters of that country. However, the Rohingyas claim that they have an extended history of their attachment

867 UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 20, Human Rights and Refugees, July 1993, No. 20.
869 Supranote 2
870 Supra note 4

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to the Arakan State. Their claim is that they have been living within the Northern Arakan State which was previously a freelance of Myanmar. They were secure of a separate land by British that didn't happen. As a consequence, they fashioned a military and visited Islamic Republic of Pakistani leader Muhammad Ali Jinnah and requested him to incorporate their land to Pakistan. This event is the major reason that the Burmese Government isn't sympathetic towards this community as a result of which they believe that the Rohingyas have exposed the territorial sovereignty of Myanmar. The Rohingyas are expelled of their right of citizenship, their freedom of movement instruction and employment opportunities. The atrocities upon these individuals have solely been increasing by the passing decades. They have been treated in a cruel manner and many of their rights are being abused. However, the biggest drawback is that they're not recognized as voters of Myanmar and are thus forced to depart from their countries and take asylum in neighboring countries of Asia nation and Bharat. They have been expelled of their citizenship due to their longing history with the Burmese government. There have been various international interventions in regard with this issue and however it has not resulted in anything since the Myanmar government does not agree to acknowledge the Rohingyas as a part of their country.

**HISTORY OF THE ROHINGYA REFUGEE CRISIS**

There have been some major developments in Myanmar over the years that prove the associate ever increasing plight of the Rohingyas. The primary events were the Operation Nagamin that came into operation within the year 1978, the aim of the operation was to charge actions against the foreigners who had illegally entered into the country. As a consequence of this operation the documentations accessible with the Rohingyas were detached. Then came the 1982 Citizenship Law that took away all rights of the Rohingyas altogether with their right to citizenship. Before this Act, the ethnicities were broadly speaking outlined however once this law there was publication of a closed list of a hundred thirty-five ethnicities from that the Rohingyas were excluded. For having the ability to use for citizenship, the Rohingyas had to trace their ancestry to the colonial amount that wasn't attainable thanks to lack of documentation. Finally, the most recent development that happened was that Myanmar from being a military country became a democracy after the election of Aung San Suu Kyi diode National League for Democracy in 1990 national elections. Thereafter, the formation of a Constituent Assembly was proclaimed to draft a replacement constitution for the country so new elections may occur. The military government wished to once more gain power in its own hands and once it had been unable to try and do thus because of protests they turned to the Rohingyas for uniting the individuals against them. There was a

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871 Living in Limbo: Burmese Rohingyas in Malaysia

873 Ibid.
rise in right violations against the civilians that forced the Rohingyas to escape to different countries. These refugees told of outline executions, rape, and different types of torture that they’d witnessed or in person endured at the hands of the military. The growing human rights violations are continued since the year 1991. Since 1992, successive UN special Rapporteurs have documented patterns of human rights violations against the Rohingyas. In 2016, thousands of Rohingyas claimed that the Myanmar’s soldiers were accountable for all the villages that had been burnt down or by any attack on them. A recent incident reported in February 2017, wherever a whole family, together with old and disabled individuals were fastened within a house by the military of Rakhine villagers, throughout the stifling within the Rakhine State and was ablaze for all of them to die.

STATELESSNESS

Due to the increasing range of the attacks on the Rohingyas, the only option left for them was to flee to other countries as refugees. Being a refugee is another significant drawback that the Rohingyas face. The refugees are pre-supposed to be given permanent shelter once they need become a refugee however this can be not invariably attainable. An exile scenario, which fits on for a substantial amount of your time, is understood because the long refugee scenario that’s no less dreadful than being unsettled. during this scenario, the temporary shelter provided to those refugees continues for an amount of your time while not having the rights to maneuver and work therefore living during a state of limbo. Though the risks to their lives could also be radically reduced compared to true from that they fled, their lives stay physically and psychologically insecure, oft a lot of insecure than they might be if they came back home.

SUGGESTED SOLUTIONS

Due to the on top of reasons, it becomes imperative that a permanent answer ought to be resorted to accommodate the Rohingya crisis. The urged solutions are enumerated below:

1. Since the exile Conventions aren’t enforceable while not the agreement of the concerned States, the international community may contemplate implementing the UN council Resolution 1674 (UNSC 1674), a reassertion of the ‘Responsibility to Protect’ (R2P) populations that suffer from extreme human rights abuses and lack of protection from their own governments. this might be an efficient thanks to curb the atrocities
that the Rohingyas are being subjected to by the Myanmar Government providing all the 5 countries of the UN council adopt such a Resolution.

2. The long refugees ought to be allowed to ascertain their own livelihoods and should be given opportunities to become self-directed within the country of refuge. whether or not the country isn't capable of providing such opportunities to the refugees it'll become problematic for his or her country as they'll get entangled in criminal activities to sustain themselves. several Rohingyas living as an exile in Asian nation United Nations agency need to jaunt different countries as migrant worker should be allowed to try and do thus and special travel documents may well be provided by the govt. that may even be helpful for his or her own economy.

3. The current rate at that the Rohingyas are exploiting Myanmar associated sinking in neighbor countries is a proof that they're under the ambit of the Burmese Government to commit crimes against humanity. this may be brought into check through the Rome Statute. Even a non-State Party like Myanmar may be brought inside the ambit of the Rome Statute through Article 13(b) and (c). The UN council (UNSC) might refer true in Myanmar to the ICC underneath Article 13(b) of the Rome Statute. this can be a long-run legal choice that the planet community may fancy to finish the plight of the Rohingyas.

4. A political answer will to be created with the support of the neighboring countries and Association of Southeast Asian Nations (ASEAN) and also the international community. The Association of Southeast Asian Nations Intergovernmental Commission on Human Rights (AICHR) is accountable for the promotion and protection of human rights within the Asian region. The Association of Southeast Asian Nations Human Rights Declaration additionally entails the correct of all persons to equality and fairness. This right of equality is additionally accessible to the Rohingyas no matter the standing of their status.

5. The only answer is that the Union of Burma Government agrees to provide citizenship to the Rohingya Muslims. this might cause a stable and peaceful setting for the whole International community. this may be created attainable by the applying of the belief of real and effective link that says that a person should be eligible to receive citizenship from states with that she or he contains a substantial association or a real and effective link. This should be beholden upon the Myanmar Government and should be applied as a customary law of nations that doesn't need agreement by the States.


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881 Supra note 8.

882 Supra note 4.
6. It's believed that everyone Rohingya born in Burma and their kids have a right to Burmese citizenship. By denial of this citizenship, Burma is violating law of nations. It's therefore forcing its neighbors up-to-date the burden of its actions. The international community should place pressure on Burma to produce full citizenship and attendant rights to its Rohingya population. The correct to status while not impulsive deprivation is currently recognized as a basic right underneath law of nations, which, through legal instruments and also the observe of the many states, imposes the final duty on states to not produce statelessness. Although Union of Burma isn't a celebration to those Conventions, however the final principles are to be complied by all the States. The discrimination and right abuses featured by the Rohingya would be restrained to an outsized extent if they're given the correct of citizenship.

7. Human Rights Watch has persistently caught up the Myanmar government to amend the 1982 Citizenship Law in line with recommendations created by the U.N. Special registrar coping with Myanmar, and to grant Rohingya full citizenship and different rights. The special registrar has known as on the Myanmar government to "abolish its over- taxing needs for voters during a manner that has discriminatory effects on racial or ethnic minorities."

CONCLUSION

883 Supra note 7.

The refugees endure powerful lives although they are protected underneath many international conventions. The explanation is that they're not accepted by the state to that they belong. It's the first responsibility of the host country to not produce such conditions thus on force these individuals to migrate from one country to a different to guide a traditional and healthy life. The Rohingya crisis may be peacefully solved by the intervention created by the International community and specially the powerful international organisation council to exert pressure on the Myanmar Government to safeguard the interests of those Rohingya Muslims who have long suffered from discrimination and violation of their human rights. This solely can be attained once all the five countries of UNSC notice the magnitude of this drawback and are willing to require acceptable action against the Myanmar Government. Once such a resolution is formed, it'll stay permanent and therefore, a stable and peaceful life may be expected for the current and also the future Rohingyas and also the ones Who are refugees may also come back to their home and luxuriate in the rights of citizenship that are complemented by all different basic rights.
DEATH TO DETER RAPE: HOW EFFECTIVE IS CAPITAL PUNISHMENT?

By Tarun Sharma
From University of Petroleum and Energy Studies

INTRODUCTION
On August 10 2018 Indian becomes 14th country to introduce death penalty for child rape. The Indian Parliament has passed the ‘Criminal Law Amendment Bill 2018. By passing the Amendment Bill 2018 there were certain amendments in different statutes have been done. One of the major amendment in the history of the “Criminal Justice System” of India that is, death penalty for the rape of a girl below the age of twelve years. Giving death penalty to someone is not the easy task for the judiciary on the other hand it is the burden over the judiciary and the interpretation of which is left to the court. To this end, the Bill amends provisions of Indian Penal Code (IPC), Code of Criminal Procedure, Indian Evidence Act and Protection of Children from Sexual Offences Act (POCSO). Under the old codified penal laws which are prevalent from last many years the punishments for heinous crimes like for rape, murder are defined. Now the question arises that the existing punishments have deterrence effect or not? Because the need of this amendment regarding death penalty is also depends on above mentioned this issue. Before passing of the ‘Amendment Bill 2018’ there was an ordinance promulgated by Central Government in April 2018, in wake of the public outcry over Kathua incident of rape and murder of a minor girl. The parliament passed the Amendment Bill 2018 which has replaced the Ordinance.

The 2018 Amendment Bill is not the consequence of just the one case or of the two cases but it the effect of many rape incidents which are happening from last many years and these offences increasing day by day and the punishments in the penal laws are not sufficient to stop these crimes. One of the rape incident in December 2013 where a medical student aboard a moving bus in the capital Delhi that had shaken the whole Country and the justice making system of the Country come under the question. The government announced that death penalty would be applicable to those convicted of rape resulting in death. The new amendments will enable a court to hand out death penalty to the accused that convicted of raping a child under 12, even if it does not result in death.

FEATURES OF CRIMINAL LAW AMENDMENT BILL
1. Amendment in IPC, 1860 where the punishment for rape of women has been increased from seven years to ten years.
2. Minimum punishment for rape and gang rape of girls below the age of 12 years is imprisonment of twenty years and is extendable to life imprisonment or death.
3. Punishment for rape of the girls below the age of 16 years is imprisonment of twenty years or life imprisonment.

Major changes by the Criminal Law (Amendment) Bill, 2018

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The investigation into the rape of child under the provision of **Cod of Criminal Procedure, 1973** must be completed within three months. The bill reduces this time period to two months for all the rape cases.

According to the Amendment Bill, 2018 the anticipatory bail is not granted in cases of rape of minor girls below 16 years of age. Further, any appeal against a sentence for rape cases must be disposed of within six months.884

### CRIMINAL LAW AMENDMENT BILL, 2018

Reason behind passing the Amendment Bill and increasing the punishment is to reduce the crime rate, but the it is a very debatable topic from the beginning that imposing death penalty for rape convicts has any deterrent effect to reduce the crime rate or not, because death penalty itself is very debatable it doesn’t matter it is the punishment for rape convicts or the punishment for murder. The question that has been debated around the world- does toughening the sentence actually reduce crimes? Because the major argument against imposing the death penalty is that it actually deters the system from handing out conviction.

While describing death penalty for “rarest of rare case” that is specified in the case of terrorism. Now execution in the case of rape it has to be that the rape is at the equal footing of terrorism. The cases of rape and gang rape are continuously increasing while conviction rates remain abysmally low. Sometimes the system and the law enforcing authorities are under the question while performing their duties for maintaining law and order. The issue raised that police are biased against women and are hesitant to even register cases of gang rape as that would mean the death penalty for a group of men. In many cases form the history of India where police tend to broker compromises, the issue raised that police are biased against women and are hesitant to even register cases of gang rape as that would mean the death penalty for a group of men. In many cases form the history of India where police tend to broker compromises,

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<tr>
<th>Age of woman</th>
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<td>Below 16 Years</td>
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<td>Rape-</td>
<td>-7 years to life imprisonment</td>
<td>-10 years to life imprisonment</td>
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encouraging survivors, under threat or coercion, to withdraw their complaint, so that the accused is set free on the basis of “low probability of conviction”. In many countries like in Bangladesh, where the parliament has passed the Oppression of women and Children (Special Provisions) Act in 1995 to facilitate stringent punishments, including the death penalty in the case of rape, gang rape, acid attacks and trafficking of children. But here also, the severity of the punishment meant many of accused walked free due to “insufficient evidence” and because there was no option of less harsh sentence. Deterrence of the crime and the victim’s access to justice require both better implementation of existing laws and systematic changes that indicates that access to justice, and not sentencing in a handful of cases, is the problem that need to be solved as far as retributive justice is concerned. It is very difficult for a particular legal provision to have all form of reparation that can be decided on the basis of the nature of the crime, so death penalty is also meant to victim support and rehabilitation, despite evidence pointing to the need for one so that victim can be facilitated at every stage from the police station, to hospital and courts. As far as victim compensation in concerned there are five ways of reparation (to repair what the victim has suffered) to the victim these are:

5. Guarantee for non-repetition

Victimology in the criminal justice system comprises five ways of reparation depends on different different cases like if we talk about monetary compensation then it is not possible in the case of heinous crimes like murder and rape where there is punishment has decided that are imprisonment for certain years or life imprisonment or death sentence.

Retributive justice talks about giving punishment inflicted on someone as vengeance for a wrong or criminal act. When we say ‘death to the rapist’, that is either a retributive action where the retribution for a heinous crime or a deterrent action which the affected party is seeking would act as a preventive factor against the crime from occurring.

Punishing child rape with death penalty that will definitely lead reduction in crime is a fallacy. It may lead some short-term reduction since the causes of rape are variable and subjective. But if the question comes to signify retribution, then the death penalty for the child rapists makes perfect sense. Capital punishment is all about retribution, which does comprises the reformative aspect of the criminal justice system, and it is said to have little deterrent effect.

ARBITRARINESS IN TERMS OF AGE
One of the striking features of the amendment is its arbitrariness in terms of the cut-off age of 12 years. According to the


study of Rahat, the socio-legal support arm of Majlis Legal Centre looked at 644 children rape-related FIRs registered between 2008 and 2012 by Mumbai Police under the IPC and the POCSO Act. It found that children aged between 11 and 18 are most vulnerable, accounting for almost 51% of the total cases. Only 2% of the assault cases against children aged between six and 10 resulted in acquittals, while the proportion of acquittals was as high as 38% in cases involving children aged between 11 and 15 years, and 54% in cases where the victim was aged between 16 and 18. It suggested a tendency to disbelieve adolescents or a trend of the victims turning hostile.

There is also the issue of “sentencing arbitrariness” cited by the Justice Verma Committee. Again, a 2016 study by the Centre on Death Penalty found that a majority of death row inmates belonged to the backward section or religious minorities and were economically vulnerable.

ADDED BURDEN FOR VICTIMS

Death penalty is the harsher and biggest punishment in the Indian legal system or any other country’s legal system. Because death penalty is the biggest punishment that is not easy to give to a person committing petty offences so it is very necessary for the judges to look each and every aspect of a particular case because the crime should be proved beyond the reasonable doubt so far as adversarial system(based on accusatorial method) is concerned. The concern has been voiced by many Indian activists who oppose the death penalty for rape. Reporting a case related to crime against women is a problem because the perpetrators are mostly known to the victims and there are all sorts of dynamics at play that cause victims and their guardians to not report the crime.

Another issue is that, in many rural areas in particular, there is a stigma exists with regard to rape that diminishes the reputation in the society if they raise voice against the criminals. The victims are under the fear that is why they do not enforce their rights so it doesn’t mean that punishment is harsher or not? Stronger laws do not encourage victims to come forward.

YEARS SPENT WAITING FOR JUSTICE

The slow pace of the justice system has also been cited as an issue. Because of Long-drawn-out trials in India victims have to wait for many years to get justice. And it cases where the death penalty has been given to the persons have many chances to appeal against their sentence. The consequence of a prolonged legal process is that it often adds to the victim’s suffering. Because of these lacunae giving death penalty is not the result of justice but the result of adding the suffering of victims. Death penalty potentially has a negative impact on getting justice of the survivor. Without the efforts of law enforcing authorities like police, judiciary, government officers and society robust laws would have a very limited impact in reducing the crime.

MANDATORY REVIEW FOR PROPORIONALITY

Every legal system supports this argument that whatever punishment is given it should

887 Ibid.

888 Supra note 2.
proportionate to the crime that has been done. Usually the death penalty is criticized on two important grounds first that it is the violation of human rights and the second ground is that it is not proportionate to the crime that is the violation of the natural justice. Also where the mandatory review of all death sentences is provided as per the proportionality or that should be imposed on the basis of constitutionality. The court must look at-

- Whether the sentence was imposed under influence of passion, prejudice, or arbitrary factors.
- Whether the evidence supported a finding of statutory aggravating circumstances.
- Whether the sentence, in view of both the offense and the offender, is disproportionate to the penalty imposed in other cases.

A punishment is unconstitutional if it is excessive in nature as per the severity of the offense. A punishment is excessive in nature if-

- It is grossly out of proportion to the severity of the crime.
- Makes no measurable contribution to the acceptable goals of punishment, and hence is nothing more than the needless imposition of pain and suffering.

On the basis of these two test the excessiveness and the constitutionality of a punishment determines. These test used as an arguments against giving death penalty in rape cases or the justification that the death penalty is not excessive and unconstitutional in nature. In determining whether a punishment is disproportionate to a given crime, a must weigh three factors: (1) the Severity of the penalty, (2) the gravity of the offense, and (3) a times the blameworthiness of the defendant.889

HUMAN RIGHTS
It has said that who has given the birth that is the God, has only the right to take it. This is the reason because of that death penalty is always opposed by humans. Those who are against the death penalty say that it is the violation of human rights of fundamental rights because our constitution protect the right to life under Article 21 of the Constitution.

Justice Verma Committee:
The committee led by former chief justice of India JS Verma set up after the incident of 2012 Delhi gang rape case. Its mandate was to suggest possible amendments to the criminal law to provide for quicker trial enhanced punishment for sexual crimes against women.

The submissions of the working group on Human Rights in India and resolutions adopted by the UN Commission on Human Rights have been examined by committee. The latter, the committee’s report states, has adopted four resolutions to impose a moratorium on death penalty until death penalty is fully abolished. The first resolution is dated on December 18, 2007. It has also examined the Jurisprudential aspect of death penalty and emphasized on “rarest of the rare” case that the death penalty is awarded in ‘rarest of the rare’ case. It had acknowledged that rape is very often accompanied by physical injury to the victim is still in a position from which she

can, with some support from the society, overcome the trauma and lead a normal life. In other words we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death.  

According to the reports of the committee there is considerable evidence that the deterrent effect of the death penalty on serious crimes is actually a myth. Hence it is suggested that the amendment regarding death penalty is the violation of Human rights.

**United Nations on death penalty:**
When the Hon’ble Supreme Court ordered capital punishment for the four accused in the Delhi Gang rape case, the United Nations Human Rights Council (UNHRC) has recommended that India do away with death penalty. United Nations also against the death penalty which according to UN is, the violation of Human Rights that is excessive in nature and not proportionate to the crime of rape. UN Human Rights High Commissioner Navi Pillay’s statement is significant: “Popular support for the death penalty today does not mean that it will still be there tomorrow. There are undisputed historical precedents where laws, policies and practices that were inconsistent with human rights standards had the support of a majority of the people, but were proven wrong and eventually abolished or banned.”

**CONCLUSION**
Capital punishment in all cases is a highly controversial and divisive issue, and it comprises many limitations regarding its enforcement. Giving death penalty in rape cases where the 2018 Amendment Bill gives death penalty in the cases where victim is below the age of 12 years, need strong reason and justification that why the death penalty has been introduced. A clear view of the Constitution is also necessary to know its functioning, that is why we need to understand the meaning of the amendments and their importance in the society. The intention may not be to increase the gravity, awfulness and inhumanity through these punishments. What about the gravity, awfulness and inhumanity through these crimes are all blamable and ought to be punished. The arguments related to the morality of death penalty sometimes will not stand because it is a part of debate which is still hot issue nowadays. Only one argument that has its stand is about the deterrent effect of the punishment if it has its deterrent effect then it is fine but if not then it is worthless. To demonstrate the irregularities, inequalities, so many errors, so many flaws in the criminal justice system, these kinds of amendments and punishments are necessary from which constitutionality can be imposed and carried out. Capital punishment as we have observed not only at the National level but also at the international level is fraught with too many flaws: the flaws of

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891 Ibid.
discrimination, the flaws of incompetency, the flaws of professional negligence, the flaws of corruption etc. and each and every flaw has its own justification but it is not considerable when the gravity of the crimes is more than the flaws and where there is no other option except to introduce these punishment for the deterrent effect and the for the sake of retributive justice in the Criminal Justice System.

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Sedition law has once again attained public attention, thanks to the virtual media for making the discourse again in the limelight. Sedition law has always been part of the Indian legal system, the law which has its origin in the colonial British legal framework like most of the existing laws in India. It was originally section 113 of the Macaulay’s Draft penal code of 1837. It was omitted from the penal code when the Indian Penal Code was enacted in 1860. However, the need for such a provision was felt in 1870 when section 124A was placed in the statute book by Indian Penal Code (Amendment Act) 1870. It was later replaced with minor changes by section 124A of the Indian Penal Code Amendment Act 1898. Some changes were made in 1937, 1948 and 1950 and the present 124A reads as under.

124A. Sedition. Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, bring or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the government establishment by law in India, shall be punished with {imprisonment for life}, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1- The expression disaffection includes disloyalty and all feelings of enmity.

Explanation 2- Comments expressing disapprobation of the measures of the government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3- Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

The colonial government in India inserted Section 124A in the code for the purpose of suppressing the Indian Voice. So the law of Sedition was made stringent which was different from the English Law. The English law did not define sedition but the Indian code defined it.

In Queen Empress v Jogendra Chunder Bose the then chief justice of Calcutta High Court held that a person who excites or attempt to excite a feeling contract to affection is liable for sedition. In Queen Empress v Bal Gangadhar Tilak also offered some interpretation to section 124A wherein he held that the offence of sedition as outlined in section 124A Consists in Exciting or attempting to excite in other certain feeling towards the Government and not in the exciting or attempting to excite mutiny or rebellion or any sort of actual disturbance, great or small. The Privy Council therefore said that if the law defines the offence in clear terms the court should go by that definition and as per the text of section 124A a simple speech or statement which can cause disaffection towards the government and nothing more shall bring it...
within the mischief of sedition. This is how the law of sedition was always enforced in India.

Post 1947 saw many cases as well as public demand to scrap the sedition Law which many consider as the classical example British Legal suppression. In Kedar Nath Singh v State of Bihar Supreme court of India upheld the constitutional validity of section 124A of Indian Penal code however with certain caveats of safeguards. It held that only those matters that had the intent or tendency to incite public disorder or violence would be made penal in this section of Indian Penal Code. Kedar Nath Singh case is considered as the water mark event in the entire sedition law related issues. On one side the apex court recognized the constitutional validity of the section 124A but also laid down certain safeguards like seditious speech and expression may be punished only if the speech is an incitement to violence or public disorder.

In Balwant Singh v State of Punjab 1995, Supreme Court of India held that the casual raising of the slogans, once or twice by two individuals alone cannot be said to be aimed at exiting or attempt to excite hatred or disaffection towards the government established by law in India. The prosecution case is that the appellant raised provocative slogans on the day of assassination of Indira Gandhi in front of a cinema hall. Supreme Court in this case held that section 124A of Indian Penal Code would in the fact and circumstances of the case have no application.

In another landmark case Arup Bhuyan V State of Assam the Supreme Court held that only speech that amount to incitement to imminent lawless action can be criminalized. In Shreya Singhal v Union of India the supreme court of India drew a clear distinction between advocacy and incitement, stating that only the latter would be punished. It is in this case that the court considered section 66A of Information Technology Act 2000 as unconstitutional, thus making it clear that Right to freedom of expression is fundamental in nature and thus should not be curbed in any means. In Bilal Ahmed Kaloo v State of Andhra Pradesh, a Kashmiri youth was arrested in Hyderabad in charge of sedition. The only evidence adduced against him was that he was spreading news that members of the Indian army were indulging in commission of atrocities against Kashmiri Muslims. Even the charge framed against him was bereft of any allegation that the accused acted in any manner against Government of India or the state government. The Supreme Court deprecated the manner in which the trial court recorded conviction, when there was not only no evidence, but also even the charges framed did not contain the essential ingredients of the offence. The court condemned the mechanical order of conviction of citizens in such serious offences and advised that more care should be taken before the liberty of a citizen is interfered with.

THE MUCH NEEDED REFORME

Delving into the law related to sedition as outlined in section 124A of IPC the fifth Law Commission has identified three major defects in it. First, section 124A, because of the pernicious tendency or intention underlying the seditious utterance, has not been expressly related to the interest of integrity or security of India or of public
order. Secondly, section 124A does not take into account disaffection towards the constitution, the legislatures and the administration of justice, even though disaffection towards all these would be as disastrous to the security of the state or disaffection towards the government of India. Thirdly the punishment provided under section 124A for sedition is very odd as it would be either imprisonment for life or an imprisonment for a period up to three years and nothing in between. The commission suggested that these defects, by redrafting section 124A be removed.

The Twenty first Law commission in a working paper also noted that criticizing the government does not amount to sedition and that people have a right to express dissent and criticize the government. The report says “Sedition as an act trying to destabilize the government should only be invoked in cases where there is a real threat or actual use of violent means to overthrow the democratically elected government. Therefore, advocating revolution or advocating even violent overthrow of the state does not amount to sedition, unless there is incitement to violence and more importantly the incitement is to imminent violence.

Right to freedom of speech and expression being part of the fundamental Right, the concept of Human Right and liberty is evolving day by day and new areas are added to the scope of Human Right. At this crucial juncture when dynamics of freedom of speech and expression changing drastically it is disturbing to find a provision like sedition which is colonial in nature still holding position in Indian legal system. It is plain contrast that India tries to place itself as the country of tolerance and freedom of expression and still hold rules like Sedition; it is high time that we need to alter this law.

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ANALYSIS AND CONSTITUTIONALITY OF ALL INDIA BAR EXAMINATIONS

By Tushar Kumrawat
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OBJECTIVE
The objective of the research is to throw light and analyze conduct and the constitutional validity of the All India Bar Examinations.

SCOPE OF THE PAPER
The project wafts rays on the provisions of the Constitution of India, it also eyes on the Advocates Act, Legal Education Rules and Bar Council of India rules and regulations along with important case(s).

HYPOTHESIS
AIBE is a violation of the constitutional provisions yet can be fit under reasonable restriction, but it is not fulfilling the motive for which it was started.

RESEARCH QUESTION(s)
1. Evolution of AIBE
2. Meaning and Determination of Constitutional Validity
3. Violation of Fundamental rights by AIBE
4. Improper Conduct of AIBE
5. Amendments in Advocates Act and other law(s) regarding AIBE.

CHAPTERIZATION

CHAPTER I Deals with Constitution and Fundamental Rights & Constitutional Validity, its meaning and determination

CHAPTER II Deals with AIBE and its Conduct & Motive of AIBE

CHAPTER III Deals with Evaluation of AIBE using different lenses & Changes needed in AIBE

CHAPTER IV Deals with Conclusion

ANALYSIS AND CONSTITUTIONALITY OF AIBE

ABSTRACT
Legal Profession is a noble, learned and attractive profession. It plays a vital role in the administration of justice. An Advocate while presenting the most appropriate legal material relating to case, helps the court in arriving at a correct judgment. Therefore, the members of the legal profession play an important role and occupy high social status. For maintaining the quality of the profession eight years ago Bar Council of India came up with a resolution of AIBE that every law graduate has to clear to be enrolled as an advocate and practice in courts. This paper analyses AIBE in different ways possible through different parameters.

1.1 CONSTITUTION AND FUNDAMENTAL RIGHTS
"Think and plan independently of traditional methods, know that there is always an answer and a solution to every problem." 893

The Indian Constitution came into existence in 1950 which laid down the goals which India had to achieve. Society cannot remain constant throughout the times rather it keeps on changing with economic, technological and scientific developments. Hence, law has to keep on evolving and adapt itself according to the changing requirements.

893 Dr. Joseph Murphy, “The Power of Your Subconscious Mind”, pg.104

www.supremoamicus.org 355
The Constitution of India in itself witnesses to be a great social document. It rudiments the plinth of the supremacy of law, social, economic and political justice, secularism and democracy.

The Constitution of India is a borrowed constitution as many of its provisions are borrowed from the constitutions throughout the globe, i.e. From Brazil, South Africa, Australia, Ireland, etc. The provisions of Fundamental Rights enshrined in Part III of the Constitution of India is derived from the Bill of Rights of the American Constitution. These rights are guaranteed to the Indian citizens to constitute a basis for a free and democratic society. The Fundamental Rights though are not absolute, but are legally enforceable in the courts of law when violated, but only against the ‘State’. The term ‘State’ is defined under Art 12 of the Constitution, which reads as follows: “In this part, unless the context otherwise requires, the State includes the Government, and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”

Under Art. 12, the meaning of “other authorities” in order to cover more and more institutions and organizations within the term “State” has been widened considerably for preventing them from acting in violation of fundamental rights. The United States Constitution has defined their legislative and executive powers in two Articles, which makes it easier to define their correlation.

However, Indian Constitution being an elaborate one, it is difficult to correlate the legislative and executive powers because those powers are to be found in widely separated parts of our Constitution.

In the case of R.D. Shetty v/s International Airport Authority, the Court laid down five tests to be considered “other authority”:
1) Entire share capital is owned or managed by State.
2) Enjoys monopoly status.
3) Department of Government is transferred to Corporation.
4) Functional character governmental in essence.
5) Deep and pervasive State control.
6) Object of Authority

Every type of public authority, exercising statutory powers, whether such powers are governmental or quasi-governmental or non-governmental, and whether such authority is under the control of government or not.

1.2 CONSTITUTIONAL VALIDITY

In the most basic sense as defined by the Cambridge Dictionary, Constitutionally invalid means ‘not allowed by the constitution.’ Every law must be parallel to the provisions of the Constitution as the Constitution is the supreme law of the land. The power to test the constitutionality of any law has been conferred upon the superior Judiciary i.e. The Supreme Court and High Courts in India.

896 1979 SCR (3)1014.
897 Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, 8

Dr. Avtar Singh and Dr. Harpreet Kaur, "Introduction to Jurisprudence", pg 422 (4th Edn. 2016)
Article 13 of the Indian Constitution States that:
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 law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by 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 of Equality.\(^{898}\)

By the virtue of Art. 13, the Fundamental rights becomes legally enforceable. The effect of inserting this article is that no infringement on the fundamental rights of the people can be done by the government either through administrative action or by enacting a law.\(^{899}\)

2.1 ALL INDIA BAR EXAMINATIONS (AIBE)
The objective of The All India Bar Examination (AIBE) is to examine an advocate's capability to practice the profession of law in India. The AIBE will assess skills at a basic level, and is intended to set a minimum benchmark for admission to the practice of law; it addresses a candidate’s analytical abilities and understanding basic knowledge of law. After passing the examination candidate will be awarded "Certificate of Practice" by the Bar Council of India. AIBE will be conducted in 40 cities all across India. Candidates will have 11 languages to choose for attempting the examination. Examination pattern will be multiple choice question and it will be open book exam. The notification bringing the All India Bar Examination into force was passed by the Legal Education Committee and the members of the Bar Council of India at duly constituted meetings on April 10, 2010 and April 30, 2010.\(^{900}\)

This was to be brought in practice after the 2010 notification that proposed of the AIBE, but before 2010, the procedure was that a Law graduated filled a form of the BCI and get it attested by two advocates who are in practice for a minimum of 10 years and after that he was granted the Certificate of Practice to the concerned person.

The Bar Council of India resolution at its meeting held on 30 April to amend Part VI, Chapter III of the Bar Council of India Rules

\(^{898}\) Article 13, Constitution of India, 1950

\(^{900}\)http://www.allindiabarexamination.com/about_us.a spx, 28/12/2018, 21:52
(Conditions for Right to Practice) was published in the Gazette of India on June 12, 2010. The following resolution was adopted by the Bar Council of India on 10 April 2010 to conduct an All India Bar Examination, the passing of which will entitle an advocate to practice law in India. Consequent to the resolution, the following rules were inserted into Part VI, Chapter III of the Bar Council of India Rules:

RESOLVED that as the Bar Council of India is vested with the power of laying down conditions subject to which an advocate shall have the right to practice, these Rules, therefore, lay down such condition of an All India Bar Examination, the passing of which would entitle the advocate to a Certificate of Practice which would permit him/her to practice under Chapter IV of the Advocates Act, 1961.

No advocate enrolled under section 24 of the Advocates Act, 1961 shall be entitled to practice under Chapter IV of the Advocates Act, 1961, unless such advocate successfully passes the All India Bar Examination conducted by the Bar Council of India. It is clarified that the Bar Examination shall be mandatory for all law students graduating from academic year 2009-2010 onwards and enrolled as advocates under Section 24 of the Advocates Act, 1961.

THE ALL INDIA BAR EXAMINATION

10. (1) The All India Bar Examination shall be conducted by the Bar Council of India. (a) The Bar Examination shall be held at least twice each year in such month and such places that the Bar Council of India may determine from time to time.

(b) The Bar Examination shall test advocates in such substantive and procedural law areas as the Bar Council of India may determine from time to time.

(c) Such substantive/procedural law areas and syllabi shall be published by the Bar Council of India at least three months prior to the scheduled date of examination.

(d) The percentage of marks required to pass the Bar Examination shall be determined by the Bar Council of India.

(e) An unsuccessful advocate may appear again for the Bar Examination, without any limit on the number of appearances.

(f) The Bar Council of India, through a committee of experts, shall determine the syllabi, recommended readings, appointment of paper setters, moderators, evaluators, model answers, examination hall rules and other related matters.

(g) The Bar Council of India shall determine the manner and format of application for the examination.

(h) Upon successfully passing the Bar Examination, the advocate shall be entitled to a Certificate of Practice.

APPLICATION OF CERTIFICATE OF PRACTICE

11. (1) The Certificate of Practice shall be issued by the Bar Council of India to the address of the successful advocate within 30 days of the date of declaration of results.

(2) The Certificate of Practice shall be issued by the Bar Council of India under the signature of the Chairman, Bar Council of India.

MOTIVE OF AIBE:

901 The Gazette of India, No. 24 New Delhi, June 12-18, 2010, Part III, Sec. 4 All India Bar Examination Rules 2010 Notification
1. To evaluate an law graduate’s skills to practice the profession.
2. To evaluate and analyze the legal capabilities at a initial level.
3. To set a minimum standard for admission to the practice of legal profession.
4. To assess an law graduate’s analytical abilities and basic knowledge of law of the land.

3.1 EVALUATION OF AIBE USING DIFFERENT LENSES

The All India Bar Exam is more sarcastically referred to as “All India Bogus Examination” by the candidates taking the exam. The bogus parts are spread out evenly throughout the AIBE timeline.

The Bar Council of India first decided to implement it strictly as a necessary step towards an authentic legal practice when the 1st All India Bar Examination was conducted on 6th March, 2011. The 4th All India Bar Examination was conducted on the 9th December, 2012 in absolute mayhem and chaos. The exam was canceled in Jaipur and Bhopal centers due to shortage of question papers. The organizers should have anticipated such shortcomings after making registration provisional for the exam takers. This happened in the first place because of the incorrect registration process which rendered hundreds of paid applicants as unregistered.

This comment was made by Srishti Sharma who took the December 2012 exam – “It was an absolute farce. The exam was about how quickly you can open the bare act and pick out the answer. The questions also named the act so you don’t even have to make that effort. They tried to make it an open book – but forgot it should be application based. Only 2-3 questions required actual application of mind. Anyway, the bar exam doesn’t fit into our procedural functions. We already had our lawyer ID cards issues to us which is unconditional of you passing the AIBE.”

The arguments forwarded for AIBE is that it will scrutinize among the law graduates to maintain the nobility and quality of the profession. AIBE was brought into practice through a resolution and further no amendment were made in the necessary statutes that would make the AIBE valid. As Sec. 24 of the Advocates Act mentions the conditions that must be fulfilled to be recognized as an advocate and practice law in the courts, but till date there is no such amendment made in the act.

Section 24 of Advocates Act, 1961 reads as follows:

24. Persons who may be admitted as advocates on a State roll.902—

(1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:—
(a) he is a citizen of India: Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country;
(b) he has completed the age of twenty-one years;
(c) he has obtained a degree in law—

902 Section 24, Advocates Act, 1961
to be enrolled in a degree in law

(i) before the 1[12th day of March, 1967], from any University in the territory of India; or
(ii) before the 15th August, 1947, from any University in any area which was comprised before that date within India as defined by the Government of India Act, 1935; or 2[(iii) after the 12th day of March, 1967, save as provided in sub-clause (iiiia), after undergoing a three year course of study in law from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or
(iiiia) after undergoing a course of study in law, the duration of which is not less than two academic years commencing from the academic year 1967-68 or any earlier academic year from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or] 3[(iv) he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter; 7[(f) he has paid, in respect of the enrolment, stamp duty, if any, chargeable under the Indian Stamp Act, 1899 (2 of 1899), and an enrolment fee payable to the State Bar Council of 8[six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council]: Provided that where such person is a member of the Schedule Castes or the Schedule Tribes and produces a certificate to that effect from such authority as may be prescribed, the enrolment fee payable by him to the State Bar Council shall be 9[one hundred rupees and to the Bar Council of India, twenty-five rupees]. 10[Explanation.—For the purposes of this sub-section, a person shall be deemed to have obtained a degree in law from a University in India on that date on which the results of the examination for that degree are published by the University on its notice board or otherwise declaring him to have passed that examination.]

(2) Notwithstanding anything contained in sub-section (1), 11[a vakil or a pleader who is a law graduate] may be admitted as an advocate on a State roll, if he—
(a) makes an application for such enrolment in accordance with the provisions of this Act, not later than two years from the appointed day, and
(b) fulfils the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).

12[(3) Notwithstanding anything contained in sub-section (1) a person who—
(a) 13[***] has, for at least three years, been a vakil or pleader or a mukhtar, or, was entitled at any time to be enrolled under any law 14[***] as an advocate of a High Court (including a High Court of a former Part B State) or of a Court of Judicial Commissioner in any Union territory; or 15[(aa) before the 1st day of December, 1961, was entitled otherwise than as an advocate practise the profession

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of law (whether by of pleading or acting or both) by virtue of the provision of any law, or who would have been so entitled had he not been in public service on the said date; or \[16[***] 
(c) before the 1st day of April, 1937, has been an advocate of any High Court in any area which was comprised within Burma as defined in the Government of India Act, 1935; or 
(d) is entitled to be enrolled as an advocate under any rule made by the Bar Council of India in this behalf, may be admitted as an advocate on a State roll if he—
(i) makes an application for such enrolment in accordance with the provisions of this Act; and
(ii) fulfils the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).] \[17[***]

SC in V Sudeer v. Bar Council of India, is that no conditions, other than those enumerated in Section 24 of the Advocates Act, can be put on a person wishing to practice law. As Section 24 does not allow for a separate examination, it seems the AIBE would not be permissible. However, the Court did recognise that some “conditions on practice” could be put in place. As to whether an examination would qualify as a condition on practice is certainly debatable.\[903]

A two-judge bench decided the matter in the Sudeer case

Also in a recent PIL filed in the Supreme Court against AIBE contending it to be violating of fundamental rights guarantee under Article 19(1)(g) of the constitution. And the matter is pending before the court since then.

Article 19(1)(g) and 19(6) reads as follows:\[904]

19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(g) to practice any profession, or to carry on any occupation, trade or business

(6) Nothing in sub clause (g) of the said sub clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

Article 19(6)(i)- Fulfilments of some inherent professional and technical requirements guided by the code of the

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\[904\] Article 19, Constitution of India, 1950

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respective profession or contemplated by the state.

This allows state to form a law required to be formed in regards to professional or technical qualifications necessary for practising a profession or carrying on any occupation, trade or business. For example., lawyer needs to get educational degree as well as pass Bar Council Exam in order to practice in court. This does not impose any unreasonable restrictions or violate Article 19(1)(g).This restriction has not restricted its power to any particular space but tried to include every ambit ,such various forms can be license &licensing fees, trade entry fees and others. But nowhere judicial interpretation of words professional or technical qualifications is there. But undoubtedly this restrictions also needs to pass test of reasonableness and objective test. State has now and then used this indirect restriction to curtail citizen’s right to practice.

In A.K. Gopalan v. State of Madras905, the Supreme Court has that the word, “general public” refers to the rest of the citizens with reference to free citizen who claims the right in question. It does not refer to any group or class of people as distinguished from the people generally. Therefore there exists a need to maintain quality in profession as for the securement of justice for the innocent.

Linking this with the AIBE there surely exists a need to maintain quality in the profession but the Bar Council of India is answerable for not making/proposing necessary amendments in the statutes any conducting the exams from past eight on the note of a resolution. Also the Legal Education Rules, 2008 need an amendment as according to them there exists no need of the AIBE.

3.2 AIBE NEEDS MANY CHANGES

Every rule has an exception of course, and it would be extremely unfair to paint all three-year courses with the same brush. Many lawyers from these courses go on to become excellent litigators and are a credit to the profession. Similarly, the legal knowledge of many students from five-year law courses is barely worth the value of the paper on which their degree is printed. The quality of legal education fluctuates tremendously between institutions and the absorption of that knowledge varies among students of the same institution as well. Thus a common external exam would ensure that those who take up the cause of justice and fight for the rights of others are actually equipped to do so. But the method in which AIBE is conducted needs major changes and its syllabus should be according to the motive behind conducting the exams .

The syllabus of AIBE is : 906

As per the AIBE syllabus shared the law entrance exam will comprise of questions asked from 19 topics/subjects. Aspirants can view AIBE XIII syllabus below:

<table>
<thead>
<tr>
<th>Subject</th>
<th>No. of Questions (New Syllabus)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Law</td>
<td>10</td>
</tr>
<tr>
<td>Indian Penal Code</td>
<td>8</td>
</tr>
<tr>
<td>Criminal Procedure Code</td>
<td>10</td>
</tr>
</tbody>
</table>


905AIR 1956 S.C. 27
The main motive behind AIBE’s conduct is to maintain the quality among the profession, but the syllabus provided does not match with the motive as these following subjects are already studied by a law graduate and in an open book exam as AIBE is conducted he can easily clear it, also there is no maximum number of attempts set up for an individual these creates major drawbacks that curtain in fulfillment of the motive behind conduct of AIBE.

### 4. CONCLUSION
AIBE is non-violative of any fundamental rights and therefore is constitutionally valid the only answer BCI needs to give is to amend the advocates act in regard to AIBE and make strict changes in the procedure of AIBE. The suggestion here is to borrow the system from US, i.e.

- a. A multistate Bar exam wherein questions that test *principles of common law* spread
- b. A multistate essay exam which tests candidates’ *analytical* and *communicational* skills;
- c. A multistate performance test where candidate has to perform a *standard lawyering task* (mostly preparing a brief) using the case file and material provided to them.

*****
INTRODUCTION

What are human rights?
Each and every individual endowed human rights and all human beings are born independent, free and equal in dignity , rights and privileges. Human rights are the very emerging concept in the 21st century that should be understood in a definite manner to understand the concept of rights of prisoners as they also possess equal human rights respective of their religion, cast, creed, sex, race, nationality, opinions, beliefs, preferences, jobs ,historical background, language or any other status. Human rights are interrelated independent indivisible which are guaranteed by the law of the Nations. These rights are universal in nature that means it is present in every scenario of the lifestyle. These universal human rights are expressed in the form of treaties, statutes, ordinances, promulgation, customs, international law. For example, the universal human rights: International Human Rights knowledge down obligations of government to act in a certain way or refrain from certain acts and it is implemented as well as imposed to every nation of the world to maintain the international peace and security that is a major concern. Non discrimination is a very important aspect
that can be seen in every element of international human rights law. The principle of non discrimination is present in all major Human Rights. Particular name of some of the international Human Rights convention is Convention on the Elimination of all form of the Discrimination against Women which is concerned only for the women prevailing in the different parts of the world.

Human rights of prisoners
As we know every individual possess different rights and privileges therefore prisoners also provided with different set of rights as a normal individual provided to. Being Human Rights are mentioned in various conventions like the 1993 Vienna World Conference on human rights is based on the human rights of prisoners itself. The conference focuses on the promotion and the production of all human rights and fundamental freedoms regardless of their political economic and cultural systems of different natives.

Who are Prisoners?
In a simple language, the word Prisoner means any person or an individual who is kept under custody or in jail or in prison because he or she committed and offence which is prohibited by the law of a country. A Prisoner is also known as an inmate restrained by his arrival and liberty to go elsewhere. And this Liberty can be deprived by unwilling full force, restraint and confinement which is against the will of an individual who committed the offence. This confinement sometimes leads to violent behaviour by the police officials which is against the human respect of an individual who kept under the custody. By committing any offence he or she can't be deprived of having his or her human rights. Even if the person is confined or imprisoned in custody for the wrongful act done by the same person also entitled to have same human rights as a normal individual entitled to. Human Rights ensure that every individual entitled to dignified life.

"No one shall be subject to torture on cruelty, inhumanity or degrading treatment of punishment"
Prisoners are entitled to the basic legal rights that can't be taken away from them even if committed serious offences for example, Kasab - serious of offender who was actively engaged in the 26/11 bomb blasts Mumbai which is the again a serious offence is related to the terrorism. He also entitled to the same treatment as well as same rights of prisoners as a normal offender is entitled to. It was seen clearly that he was engaged in the same activity even if he was given equal rights like right to be heard etc.

Some of the basic legal rights are as follows:
- The right of food and water
- Protection from torture
- Protection from cruelty
- Natural justice
- Right to be heard
- Right to hire legal representative
- Protection from violent behaviour
- Racial harassment
- Being able to get in touch with an attorney to defend himself.

MEANING AND NECESSITY OF PRISONERS RIGHTS
What are prisoners rights?
The word president means any person who is kept in the custody or in jail because he or she committed and offence or an art which is against the law of a nation. And the rights which are entitled to every prisoner refers to be as prisoners rights. Prisoners rights focuses with the rights of the phone who were behind the bar restrained from the freedom and liberty. They also have a legal basic rights from them even if they are committed a serious offence .These basic legal rights includes right to food ,water, right to in human treatment etc. Section 1 of the Prison Security act 1992 define the term prisoner. According to this act prisoner refers to the person for the time being in a prison as a result of any requirement imposed by the court or otherwise that he or she be detained in a legal custody. There is a separate law for the Prisoners rights. Many of the laws are directly or indirectly related to the quotation fundamental principles focusing on human rights. These rights are entitled by Prisoners under the constitution of India, prisons act 1894 and there are various promulgation for the protection of prisoners rights.

**State of Arunachal Pradesh Vs Challa Ramakrishna Reddy**

In this case it was held by the Court of land that a Prisoner is entitled to fundamental right .Everybody has been constitutionally curtailed.Supreme Court has emphasized with that a Convict under trial of detained does not seem to be a human being and considered to be an equal human being with the same degree of the rights guaranteed by the constitution of India included the right of life guaranteed by the constitution of India.

**Necessity of rights of prisoners**

Every man has a property in his own person: Everybody has any right to but himself. The labour of his body, and the work of his hands, we may say are properly. John Locke, “the second treatise on civil government”.

Every individual entitled women treatment in order to do so he must be free from the initiation of force.

“A right is a moral principle defining and functioning immense freedom of action in a social context” - Ayn Rand

Human rights are absolute in nature and are required by the rational nature of a human being. Human rights are important in the relationship that exists between the individual and the society and the individual to the Government of the country. The government plays an important role in exercising power over its people for implementing the rights on Prisoners.

**Some of the most important attributes of human right are as follows:**

1. There for every individual
2. They are internationally guaranteed
3. They are protected by the law
4. They are related to the humanitarian grounds
5. They protect dignity of a human being
6. They are entitled each and every individual rights
7. These rights cannot be taken away

**TYPES OF RIGHTS OF PRISONERS**

In general

Indonesian flight of Canada divided into the following categories or we can say that
the basic necessity that are mentioned generally as follows:

- Prisoners are to be treated with dignity
- Should be protected from violent behaviour physical mental torture what any kind of in human treatment or degrading punishment which is against the human rights.
- Should be protected from sexual harassment or sex crimes.
- Prisoner have right to complain about prison conditions and access to the courts.
- Prisoners with disabilities are entitled to certain reasonable accommodation.
- Prisoners are entitled to receive medical care and mental health treatment.
- Statutory availed rights appropriately based on proper classification

The perspective about the rights of prisoners is very much change in recent years. If we compare it from ancient, attitude towards business was brutal and barbaric. Change in the attitude of perspective towards Prisoners has been done after a very long struggle which understood by classifying the rights of prisoners into following categories that are discussed below:

**Right to Legal Aid**
Legally google it is not a matter of Charity or something like that but a matter of constitutional rights. It is given by the constitutional itself which ensures a person is not able to hire a lawyer to defend himself, he will get a Legal Aid that means provided to him without paying any cost for the service of a lawyer.

**Right to Speedy Trial**
Basically right to speedy trial is given under Article 21 of the Constitution with itself is a fundamental right of a prisoner. In which it ensures fair just and reasonable procedure that is favourable to the aggrieved party. This right is on the public interest or serve the social interest also.

In the case of Hussainara Khatoon v. State, ashokan state of affairs in regard to the administration of justice came forward in this case men and women that also include children and behind the prison was 4 years and here waiting for the justice which is related to the delayed justice which really means justice delayed is justice denied. The Hon'ble Supreme Court said that "What faith can these lost souls have in the judicial system which denies them a bare trial for life", many years and keeps them behind the bars not because they are guilty; but because they are too poor to afford bail and the courts have no time to try them

In Shaheen Welfare Association v. Union of India and others, the court while delivering the judgment said that " in spite of officer review, from the figures which we have cited above ,it is clear that there is very little prospect of a speedy trial of cases under TADA in some of the States because of the absence of an adequate number of Designated Courts even in cases where a chargesheet has been filed and the cases are ready for trial.. But when the release of under-trials on bail is severely restricted as in the case of TADA by virtue of the provisions of Section 20 (8) of TADA, it becomes necessary that the trial does proceed and conclude within treasonable time. Where this is not practical, release on bail which can be taken to embedded in the right of a speedy trial may,
in some cases, be necessary to meet the requirements of Article 21.

Right against Solitary Confinement, Handcuffing & Bar Fetters
Generally, solitary confinement means the separate confinement of a prisoner with only situational access any other person, and that also depends upon the decision of a court. In solitary confinement there is a complete isolation of a person from family and Society. On the other handcuffing is also not allowed except under certain circumstances

Rights against torture
Torture is a very wide term which includes mental torture, physical torture which sometimes act as a wound in a soul that can't be easily cured. From protecting the Prisoner from these situations there separate rights given against torture to the Prisoners.

Right to meet friends and consult lawyer
Every Prisoner have right to meet his or her friends he can consult a appropriate lawyer to defend himself. He could not be restrained from doing so.

In the case of Sunil Batra(II) v. Delhi Administration, the Supreme Court recognized the right of the prisoners to be visited by their friends and relatives. The court favoured their visits but subject to search and discipline and other security criteria.

The court observed:
- Visits to prisoners by family and friends are a solace in insulation, and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity.
- Right to reasonable wages in prison
- Rights of prisoners also include the right to reasonable wages in the prison. Every person is entitled a minimum reasonable beach for the services he provided. That person should get equivalent money addition as per the services rendered by him.

In the case of People's Union for Democratic Rights v. Union of India, the Bench observed thus:
“We are, therefore, of the view that where a person provides labour or service to another or remuneration which is less than the Minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23.

RIGHTS OF PRISONERS UNDER DIFFERENT STATUTES

Constitution
Prisoners' rights under the constitution of India
Generally constitution of India does not expressly provided the provision that is only related to the rights of prisoners a very notable case T.V. Vatheeswaran v. State of Tamil Nadu, it was held that the Articles 14, 19 and 21 are available to the prisoners same as Freeman. Prison walls do not keep out fundamental rights. Article 14 of the Constitution of India says that the State shall not deny to any person equality before law or the equal protection of laws within the territory of India. Thus Article 14 contemplated that like should be treated alike, and also provided the concept of reasonable classification.
**Article 21 of the constitution**

Article 21 of the Constitution says no person shall be deprived of his life or personal liberty except according to the procedure established by law. Following are the rights of prisoners which are only provided under the article 21 of the constitution which is to the rights of prisoners:

1. Right to free Legal Aid
2. Right to speedy trial
3. Right against handcuffing
4. Rights against torture
5. Rights against custodial violence in police custody.
6. Right to live with human dignity

**International human rights**

**UN charter**

There are some guidelines that are provided below student proclaimed by general assembly resolution of 14 December 1990:

1. All prisoners shall be treated with the respect due to the inherent dignity and the value As human beings.
2. Freeze colour ,sex ,language, religion, political or other opinion, National, social origin, property birth or other status.
3. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with the states other social objective and its fundamental responsibilities for promoting the well being and development of all members of the society.
4. All prisoners shall have right to take part in each and every cultural activity that is performed in the premises.
5. There should be a abolition of solitary confinement as a punishment.
6. Prisoners are also entitled to the health services available in the primary itself without any discrimination.
7. The above said principal shall be applied impartially.

**International bill of rights:**

**Universal Declaration of Human Rights**

Universal Declaration of Human Rights out stations of the government to act in a particular manner order to promote and protect the human rights of individual that is prisoners to ensure their fundamental rights.

**International Convenants on Civil and political rights ,1966**

It is a key Treaty on the protection of rights of prisoners which ensures following rights:

- No one shall be subjected to cruel inhuman treatments
- Everyone right to liberty and security of a person
- No person shall be subject to arbitrary arrest or detention.
- No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.

**UN core conventions and specific instruments**

There are core conventions and specific instruments in which there is a concept of rights of prisoners. This conventions promote rights of prisoners and provides protection against infringement of rights of prisoners.

**Prisoners Act, 1894**

This promulgation has been passed in the dear 1894 which was the first legislation that
concerned with the prisons regulation in India. Following are the some important provisions that are concerned only with the Prisoners rights:

- Specific accommodation and sanitary conditions for prisoners
- Provisions related to mental and physical state of prisoners.
- Provisions relating to the examination of prisoners by qualified medical officer.
- Provisions related to the treatment of prisoners.

The Prisoner Act, 1990
This act was enacted in the year 1990 which ensures the duties of the government for the removal of any Prisoner detained under any order or sentence of any Court which is of unsound mind to a lunatic Asylum and other place where he will be given proper treatment he required to.

The Transfer of Prisoners Act, 1950 was enacted for the transfer of prisoners from one place to another place as the name suggest. Transferring of prisoners from one place to another takes place for the vocational training or for free rehabilitation.

The Prisoners (Attendance in Court) Act, 1955
This promulgation was enacted to organise the removal of prisoners to a Civil and Criminal Court for giving evidence for answering to the charge of an offence.

Policy documents, Government Schemes
There is a separate policy documents and separate government schemes that elaborates the condition of women Prisoners specifically in India. Government of India.

International expert committee on women prisoners under the chairmanship of Justice Krishna Iyer to examine the condition of women Prisoners in jail.

Regional law

European Convention on Human rights
This convention is one of the notable convention in the world which has its own history and significance because of its flexible provisions as discussed below:

- No person is to be deprived of his life
- No person is to be given a harsh treatment or inhuman treatment including brutal punishments.

RIGHTS OF PRISONERS IN INDIA: CURRENT SCENARIO
Human rights of prisoners in India: Current scenario on violation
Specifically, if we talk about India, rights of prisoners are violated many times. Be it physical torture, sexual torture, mental torture, defamatory statement, extracting confessions in the name of Investigation of crimes which is also comes in the infringement of rights of prisoners.

The Hon’ble Supreme Court of India in the case of Joginder Kumar v. State of UP and Ors. said that the “the quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of criminal law. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. the court has been receiving complaints about violation of human rights because of indiscriminate arrests. A realistic approach should be made in this direction.
The law of arrest is one of balancing individual rights, liberties and privileges, on one hand and individual duties obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider.

ISSUES CONCERN WITH THE RIGHTS: Prisoners Welfare Schemes
The Hon’ble Supreme Court of India in the case of Rama Murthy V State of Karnataka specified 9 problems that the Indian Prisons are afflicted with. Those are as below:
1. 80% prisoners are under trials
2. 4. Delay in trial.
3. 5. Even though bail is granted, prisoners are not released.
4. 6. Lack or insufficient provision of medical aid to prisoners
5. 7. Callous and insensitive attitude of jail authorities
6. 8. Punishment carried out by jail authorities not coherent with punishment given by court.
7. 9. Harsh mental and physical torture
8. 10. Lack of proper legal aid
9. 11. Corruption and other malpractices.

Solution to the worldwide and in India: Prison welfare schemes
To the solution to the above problem as discussed above can be tackled by promoting and introducing various provisions prison welfare schemes help the Prisoners to lead a better life after their release also and lead a better life in a prison also. It also includes involving of prisoners in various activities which is educational in nature or knowledgeable in nature so that they do not indulge in any evil activity directly indirectly harmed the society.
Business should be involved in various games and sports activities so that their mind could be diverted from many mysterious activities.
To be given proper opportunities to work in various factories so that they could understand the importance of work which divert their Minds too.
Job placements should also be provided to the Prisoners to enhance their morale.
They should be provided with proper healthcare, sanitary and medical conditions for their sustainable development.

RECENT REPORT ON RIGHT OF PRISONERS
CHRI Launches Two Reports on Alarming Conditions in Indian Prisons
The Commonwealth Human Rights Initiative has launched a set of unique reports that spotlight the dismal conditions in India’s prisons. These reports underline how a lack of review has led to alarming conditions in jails–with a huge under-trial population of which a majority is poor.

Looking into the Haze: A Study on Prison Monitoring in India, and Circle of Justice: A National Report Under Trial Review Committees on Prison Monitoring were presented to the media and human rights activists in Delhi.
WHAT PRISONERS SHOULD KNOW ABOUT SOCIAL SECURITY : RECENT DEVELOPMENT

Prisoners should know about the right that are given under various provisions under various statutes. Prisoners are entitled to one under constitution of India such as freedom from Cruel and unusual punishment and the right to medical care. There is an act for providing protection for infringement of rights of prisoners which is discussed below:


Prohibits payment of any retroactive Title II or Title XVI payments to a current or terminated who is subject to:
- A prisoner,
- Confined in a public institution based on a court order for a criminal act (CPICO);
- A fugitive felon (FF); or
- In violation of probation or parole (PPV).

CONCLUSION

As we know everything has a past likewise, the conditions of rights of prisoners which are day by day improving by the recent developments by the governing bodies of different states for the promotion and the protection of rights of prisoners which are a part of fundamental rights and Human Rights as well. Eradication of infringement of rights of prisoners can be done through various prisoners welfare schemes which tackles the current scenario of each and every country regarding the infringement of rights of prisoners in numerous manners recharge mental torture, physical abuse, sexual torture, handcuffing, inducing the Prisoners, compelling the witnesses the name of Investigation etc. This can be tackled serious reforms and practices which should be taken place as soon as possible.

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PERMANENT SLAVES OF GOD:
UNTOLD STORY OF DEVDASI SYSTEM IN INDIA

By Zainab Sana Tarannum
From Gujarat National Law University

A CHILD SHOULD BE CAREFREE
PLAYING UNDER THE SUN: NOT
LIVING IN THE NIGHTMARE IN
DARKNESS OF SOUAL

-DAVID PLAER (A CHILD CALLED ‘IT’)

ABSTRACT
St. Augustin, Bertrand Russel the renowned philosopher has regarded prostitution is morally reprehensible but prostitution gave an outlet to certain individuals whose lust is dangerous to the stable family life. But today these profession are not look upon as the problem solver, but the ladies who are joining these profession are subjected to suffer from lifelong pain and exploitation. Devdasi system was prevalent in South India and the word ‘DEVASIS’ has been derived from Sanskrit which means ‘SERVENTS OF GOD’. The number of devdasi is highest in Karnataka and Maharashtra. These servants of god has faced illegitimate exploitation in their life. Devdasi system was the first system which has violated the human rights in past and it is still doing it in present. Today when a wave of feminism is all around the country still many of devdasi is exploited in the name of god. In spite of section 372 of IPC many of girl child was sold in the name of god for the prostitution. Devdasi is most common in lower cast because of many of reasons. This Article aims to understand devdasi system in India. And concept of Devdasi in relation to violation of Human rights.

KEY WORDS- Devdasi, Yellama Cult, Prostitution, Government legislation, Sustainable development.

INTRODUCTION
India has always seen women reproductive organs as the symbol of purity and pollution. It started with the fact with second feminism wave when it was believed that men started to control the sexuality, social and economic status of women. Till the date for feminism prostitution has been seen as victimizing and exploitation. In India the feminists raised the prostitution movement where the question lies that the ‘consent’ of the women in this type of relationship. Devdasi was once seen as most prestigious position in Ancient India, however them also the women was subjected to the exploitation. Women enjoys the post but then she has to pay the cost for her position.

However in recent times the devdasi system looks like normal prostitution practice and so the Devdasi who once enjoyed the position and who was only exploited physically in present days she suffered from all type of problem which include physical, social, and economical losses.

The devadasi system is mixture and result of both the superstitious believe which prevalent from the ancient India, the economic insolvency the poverty which exist in India.
This paper will look how this practice started and the changes which exist today in this practice. This practice mostly followed in Andhra Pradesh, Kerala, Maharashtra, Telengana, and Tamil Nadu. Mostly it is spread in the state of Andhra Pradesh which have around 80,000 of Devadasi. As per the National Commission of Women, more than 2.5 lakh young ladies, the greater part of whom have a place with the Dalit people group, are committed to sanctuaries in the Maharashtra-Karnataka fringe. Other than Karnataka, the Devadasi framework proceeds in Maharashtra, Andhra Pradesh and Tamil Nadu. A 1993-94 overview found there were 22,873 Devdasi spread crosswise over 10 areas. Also, a re-review in 2007 uncovered that there are around 30,000 Devdasi in 14 regions.

Although the exploitation of women in the form of devadasi system was known to India at the time of 3rd Century A.D. During the period of the puranas and the system got stronger at the time of Pallava and Chola dynasties. But the exploitation of women was not new in the history. The research paper will unfold some of similar practices like devadasi system which have been existed the history. Also the outer factors like diseases which influences these practices will be seen.

The authentic record of the devadasi framework is cloudy because of its initial inception. The primary affirmed reference to a devadasi was amid the Keshari Dynasty in the sixth century A.D. in South India. The practice started when one of the immense rulers of the Dynasty chose that keeping in mind the end goal to respect the divine beings, certain ladies who were prepared in established moving, ought to be hitched to the deities. The beginning of the practice was one that was pervaded with extraordinary regard as the ladies whom were progressed toward becoming devadasi were liable to two amazing privileges: in the first place, since they were truly hitched to the god, they were to be dealt with as though they were simply the Goddess Lakshmi, and second, the ladies were regarded in light of the fact that they were thought to be "those incredible ladies who could control characteristic human motivations, their five faculties and could submit themselves totally to God. "As they were hitched to an unfading, the ladies were thought to be promising. Nattuvanars were the male dancer who trained the devadasi. At that time Devdasi enjoy major status it was said that they are essential guest at time of marriage without them there is no marriage to take place without them because they are Akhand Saubhagyawati.

For inception of Devadasi in Maharastra it can be found in the Rashtrakuta lords in the eighth and tenth Centuries. Be that as it may, the presence of devadasis in this district originates before these engravings by numerous years. The Yadava rulers of Daulatabad ousted the Rashtrakuta rulers in 973 A.D. Be that as it may, the devadasis proceeded with moving before sanctuary

HISTORICAL AND DEGRADATION OF DEVADASI SYSTEM


devadasi are those who are sole administrator of the temple. When a woman full of devotion voluntarily denote herself to the god she is known to be Bhrutya devadasi. Alankara devadasi are those women who are well qualified and scholar and are donated to temple with ornaments. Young girls who are trained in Music and dance are known as Gopika or Rudraganika.

The degradation of devdasi system started with when the Islamic rulers began to destroy Hindu temples for the purpose of religion\textsuperscript{910}. Now Devdasi sing and dance but not in front of god but kings and at party for money as they are left with no choice. Their degradation got worse with British rule. The foreigners are unable to understand the custom of young and attractive girls donated to god. So they term them nath girls. They tried to abolish the system but they rigid the system of hierarchy which is present in India this lead them to suffer more, as higher cast demand lower cast family to donate their girl child. the British chain of importance dislodged benefactors and rulers who were steady of the conventional Devdasi framework, prompting the proceeded with underestimation, and therefore misuse, of the Devdasi gathering.

**CURRENT PROBLEM**

India is the land of tradition and culture. The people of India is family oriented and any kind of sexual relation between a man and women is consider to be a deviant behavior in society. Indian family is family oriented. Tradition change according to the society, the correct example for this can be devdasi

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\textsuperscript{910} Hyun Jin Lee, Temple Prostitutes: Devadasi Practice And Human Trafficking In India, 8 Regent J. Int’l L. 1, 2 (2011).

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system in India. This system start with Kshatriya dynasty when queen decided to dedicate some lower cast girls to god who will be trained dancer. At that time they enjoy great status in the society. Today time has change, devadasi who once are consider important for the society had lower their status in the society. According to National Commision for women today 2.5 lakh young ladies are dedecated as devadasi. This devadasi system is prevalent in today’s India because of its multi dimension aspect, because of poverty and increasing population young girls unable to support their family choose this path where they think their dedication will help their family to deal with the problem. The next important factor for persisting this system is because of religiouse endorsement. It is belive that by dedicating a girl family will be blessed. Also this dedication is seen as solution for medical problem so if anyone is suffering from medical problem people will not take the help of medication they will choose to give their older daughter as devine prostitute.

The next main problem which this devadasi system is causing to society is it is increasing the risk of spreading sexual disease like AIDS. At the end of 2013, there were an estimated 4.8 million people living with HIV across the region. And we are taking about the sex worker they are estimated population size of sex workers is 868,000, of which 2.8 per cent is HIV—positive\textsuperscript{911}. Since the girls who are dedicated as divine prostitute is very young they raise the question of child sexual abuse. They are have deep physiological effect. Devdasi system also rigid the practice of social discrimination on cast because the girls who are dedicated as devdasi is mostly lower cast.

**PROSTITUTION IN HINDUISM**

In Hinduism do not allow sex for pleasure sex should only happen between married couples for the process of procreation but not for the process of pleasure. If a man does the sex for pleasure then he has to pay price for doing so. Pre Vedic society forbidden man to have any kind of relation whether it is emotional or physical with an unmarried women. Sexual relation between a man and a prostitute is seen an Adharma\textsuperscript{912}. As Hinduism consider the body as temple of divine so if care is not taken the human body will become home for the wild desires and will harm the society. Prostitutes are forbidden they are the women who commerce on the looks they are consider to be a women who are deviated from ideal life and they are a hurdle for the peaceful mind and performance of Dharma. According to the Hinduism the sex is undivine but lust is definaty. The Hinduisms against the sex which is injunction to dharma it is against the sex which is harmful to the society and the individual and the


family. As far as the prostitution is concerned the Hinduism is against it because the core principle of the prostitution is based upon the sensual pleasure for the sex. Though Hinduism do not support prostitution but expects that every prostitutes to be treated with love and compassion. As mentioned earlier Hinduism believed that prostitution is result of bad Karma. It condemns the prostitute but it consider adultery as most heinous act then prostitution. People enter into prostitution because of survival but enters into adultery because of lust which is more harmful to the society. However if a prostitute has entered into prostitution because of her own pleasure she will defiantly suffer from the negative consequences. Therefore it is prostitution is reflecting the social condition of the society. As far as Devdasi system is concerned it was established as part of tantric believe to give the female equal opportunity to serve in the temple. The changing dimension of the Devdasi system makes this practice a web of prostitution.

THE TRADITION OF DEVADASI

Dvadasi or the nruth girls have long history behind them. Term devdasi in Sanskrit means “slaves of god”. So usually this practice is concerned with marriage of young girls belongs to lower cast with god. This practice is very interesting as it does not only arises the out of economic problem of person but social problem is also responsible to turn a young girl into Devdasi. There are many theories on which how this practice came into existence these are differ from one state to another but in this article theories are given which is most supported.

According theory it started with Keshari Dynasty in the 6th century A.D. In South India. It started with when one of the queen ordered to honor the god by donating the young girls who will be trained dancer in bharatnatyam. This was considered as great honor because first of all they are married to god second they were consider to be treated as goddess Lakshmi and also since they are equivalent to be goddess Lakshmi they were considered to have control their five sense. The second theory yellama it started with Renuka, consort of sage Jamadagni, The earliest references to Renuka occur in Mahabharata at two places. One is in Anusasanaparva, where the origin of sandals and umbrella and another is in Vanaparva where Renuka’s death and her rejuvenation is explained. Renuka was a very pure lady she was that pure that she can carry water in freshly molded pot. Every day she visited the river to fetch water. One day she finds the Gandharva couple bathing in river she was struck by the handsome looks of the male partner she saw his reflection in the river, immediately the pot which was freshly molded break the mythology says that it is the result of the breaking of the vows which were offerings of love, and the Gandharva couple were rewarded by being reincarnated as Renuka and her husband.

913 Ibid
914 Ibid

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**916 R. Kalaivani, Devadasi System in India and Its Legal Initiatives – An Analysis, 20 IOSR Journal of Humanities and Social Science 50 (2015).**

Renuka has taken at the time of marriage which forbids Renuka to look at Stanger men. As a result of this Jamadagni caught Renuka in the “act of adultery” Jamadagni think that Renuka has committed a “sinned” she has desire for a man who was not her husband which breaks the vows of marriage. This instance was surly a puncture to the ego of Jamadagni He was very angry and ordered his twelve year old son Parasuram to decapitate her own mother, Parasuram without any question decapitate his own mother, seeing the loyalty of his son Jamadagni gifted Parasuram with boon and Parasuram asked Jamadagni to bring back his mother to life. They saw matangi passing by so father decapitated her and attached Renukas’s head to matangi body. Husband thus wished to make amendments to his deed which he has done in fury. But Renuka ended up with the head of an upper cast and body of lower cast so Jamadagni give her a boon that young girls will marry her and during their life they will stay committed to her.

Prepared to fulfill every single sexual request made on them by her child Parasuram, present as he seemed to be, inside each man. The young ladies, would take a gander at each man as Parasuram in human shape and would in this way promptly fulfill his sexual needs without requesting anything consequently – marriage in any frame, or any sort of changeless holding, or anything in real money or kind. These young ladies, Jamadagni supported, would have no privilege to turn back a man regardless of the possibility that he was a pariah requesting sexual favors. Their wellspring of work would originate from asking for contributions from way to entryway on the Friday of consistently for the sake of Yellamma 918. However according to this concept there were also male companion they were called Nattuvanars 919.

THE YELLAMMA CULT

THE MYTH

Worshipping of deities is not new to Indian culture. This worshipping is for both male and female god and goddesses. Although the worshipping is dominated by the male god like Siva, Vishnu and Rama, they are known to the great god, however there are Gramadevata also which help the villagers in the time of natural calamities or any other Malamities and this Gramadevata will protect whole village. So Gramadevata is local deity of a village or any particular area.

As mentioned above the story of Yellama which is mentioned in different puranas. From the story it is clear that Renuka was a pure women who got totally submissive to her husband. That is why she is still worshipped in many parts of India especially in Maharashtra, Andhra, Karnataka and Tamilnadu.

Now according to another story Renuka was gifted with chaste and because of the power of chastity she believe to have a power from which she can carry water in hands, she didn't require any compartment or container to get water. She could hold water in her palm like a ball and after her shower the fabric would fold and get dried noticeable

918 Andrew Creighton & Andy Capper, Prostitutes of God (Documentary) (2010).

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all around over her head, taking after her as she strolled. One day while she was taking bath she observed Gandharvas while doing this she breached the marriage vows angry with his wife deeds Jamadagni ordered his twelve year old son Parasuram to behead his own mother. For this Parasuram take his mother to the forest and has do behead his mother on his way Renuka meat an out casted women who try to protect her from her from Parasuram, Parasuram try to separate them but failed he give a Sevier blow for beheading his mother he used force because of which both women and Renuka was beheaded. When Parasuram reached home Jamadagni was very happy with his son unquestioned loyalty towards him. Jamadagni gave his son a boon, the clever son asked for rejuvenation of his mother. For this Jamadagni gave her son the water which should be sprinkled on the neck which will join the body and head of his mother. Parasuram reached to her mother corpus but in hurry he joined the head wrongly, i.e. Rebuke’s head was joined to the corpus of out casted women and Renukas body was joined by head of out casted women. They both were rejuvenated. When this news spread in the forest the villagers started to parse both as Gramadevata. The one with the head of Renuka was named as Mariamma and other one came to be known as Yellamma. Another nearby form of this same story saved by the fans of Renuka is in this manner. Here a lady having a place with Mang community had compassion for Renuka and in light of this she prevented Parasurama from cutting the head of Renuka. Here likewise Parasurama cut the heads of both the ladies.

As indicated by a myth renowned in Maharashtra, when Kartaviryarjuna slaughtered Jamadagni and injured his better half Renuka, Parasurama, before delivering retribution on Arjuna, chose to take the dead body of his dad for doing burial service ceremonies. He found that Mahur close Sahyadri goes as a legitimate place. Renuka choose to consume herself in burial service fire and requested that her child leave the place. He cleared out the place yet in the wake of traverse some separation, returned to spare his mom yet found that the whole collection of Renuka with the exception of the head had consume. In that place itself the head of Renuka was adored by the nearby individuals considering her as the Sati Devi. Renuka is venerated in various parts of south India having diverse names in various districts. She is worshipped as Yellamma, Ekavira, Yamai, Mariamma et cetera. As these goddesses ended up noticeably well known with a specific name and specific place or locale, different myths and people stories step by step created around the divinity in that specific range. Such stories are found in the generally safeguarded writing including people melodies. Through these stories it is evident that the Renuka moves toward becoming goddess or achieve heavenliness. This is a direct result of head change occurrence in the main myth and because of the head staying episode in the second one. Renuka is

venerated as Yellamma and as Mariamma in south Indian locales.

There is another conviction likewise that Yellamma speaks to mother earth. There is a particular ritual performed on the full moon days interfering with December and January and amongst March and April. The previous full moon day is considered to the day of dowager hood and the later to be of conceiving conjugal status. This custom speaks to that by gathering of corps, the earth loses its flourishing and this condition is believed to be like widowhood. Again in the Caitra month the spring begins with new bloom all over the place and this should be recapturing the conjugal status. This custom is performed by the Devadasis in the regions of Andhra Pradesh and Maharashtra. In this manner Yellamma faction in these regions and Devadasi framework in these regions and in numerous zones of Karnataka are interrelated. Devadasi framework, prostitution or sex work hence is associated with the Yellamma faction curiously.

**HISTORICAL BACKGROUND OF YELLAM CULT**

The celebrated sanctuary of Yellamma in Soundatti at Belgaum region in Karnataka manages this clique and Devadasi framework. As per history, Soundatti is a place controlled by a lord had a place with Jaina faction. Prior to their control this was under the nearby boss where venerating Yellamma as their mom goddess and there Virgin ladies were named as the clerics. Later by eighth century, when Jaina kingdom assumed control over the run, they began selecting nuns to do customs in this sanctuary. Be that as it may, in ninth century, when this kingdom lost its energy and power in the religion as well, the Saktas assumed control over the holy place of Yellamma at the end of the day. In tenth and eleventh hundreds of years, Saiva lords had a place with Kapalika faction oversaw this zone. Amid this time, female ministers were supplanted by male clerics who additionally had a place with Kapalika organization. They began reveling and utilizing before ladies ministers of the sanctum for sex. In twelfth century when Virasaivism wound up plainly overwhelming and these clerics were supplanted by Jangama priests. When Virasaivas got the control here, they restricted all the evil practices and presented more refined ceremonies and conviction frameworks. Amid the late twelfth century, Virasaivism began declining inferable from religious revolts in it. Politically likewise Soundatti zone went under the Vijayanagara rulers who were fundamentally Vaisnavites. They again changed over this place of worship in a Vaisnava one by designating Brahmaclerics there. These clerics introduced the icons of Vaisnava divine beings, for example, Jamadagni, Dattatreya and Parasurama. Different myths were created both to bolster their confidence and to debilitate the prior divinity and custom too. However till the finish of fifteenth century they proceeded with the organization of the sanctuary and duties towards the fans. Toward the start of sixteenth century, at the end of the day this sanctuary went under the Vijayanagara rulers who were fundamentally Vaisnavites. They were otherwise called Joiggayya and Joggamma, who were the admirers of goddess Bhavani. They made gifts and offered assurance to the hallowed place. It was amid that period, endeavors...
were made by Brahmanical ministers to assume control over the sanctuary from non Brahmanical clerics. Be that as it may, as officially noted, they just prevailing with regards to introducing and doing offerings to the icons of Parasurama, Dattatreya. They even introduced Laksmi as well. Amid this time Yellamma’s names changed as Renuka. It is additionally eminent that numerous nearby myths are like Renuka’s myth as stories in the Puranas. The myths were joined with the minor or nearby myths of Yellamma to make the Yellamma as same as Renuka itself.

There are a few clues about the association of prostitution with Yellamma religion. However, a watchful investigation is needful to fine out the reality. Yellamma turned out to be free from skin ailment in light of serving Ekayya and Jogayya. She likewise turned into a man having an indistinguizable incentive from those heavenly people. She additionally took a couple of ladies into her administration who had promised to serve her by spreading her radiance and gathering individuals to serve them. After Yellama’s demise might be she excessively turned out to be sacred individual and all trusted that any promises taken in her name can take care of the issues including sicknesses on people. There are a few sorts of homeless people appended to the hallowed place of Yellamma. They are male, female and both youthful and old ones. They are known to be Yallappa or Yallavva. Their fundamental occupation is to spread the transcendence of Yellamma. They convey with them a couple questions, for example, Chowri (pack of hair), metal pot, wicker bin, picture of the divinity and so forth. Likewise they took many promises which can be called as custom and not as convention. Pledges for the most part contain three components. They are going to the god to maintain a strategic distance from or beat troubles or to concede a help, promising the god to offer something consequently and satisfaction of pledges. These promises can be again partitioned into two sorts, those including offerings or endowments and those including the discipline of the divinity. The previous is again isolated into two those having changeless nature and having impermanent nature. In this sort of offering any endowments, offering young lady to the divinity additionally is incorporated.

THE PRACTICE OF YELLAMA IN PRESENT DAYS

The intial dedication starts when the parents or young girl take a vow to be a devine prostitute. To protect the family from any calamities, sometime parents of unborn child vow to dedicate their first girl child as the devine prostitute. After the girl is matured then she has to be sold to a man she is send to temple where the ‘union’ of occur. Before the union man has to pay the price for purchasing the girl. According to this believe after the union the family of girl will have all possible prosperity in their life and whatever the problems which they are facing in their life will solve if they give their first child as prostitute. The girl will stay with that man from one night to one weak and after that she has to practice the mourning. Till she get a new man in her life.

This practice is called as ‘divine’ because it start with as religious practice and later become a custom. Most of the girls which are dedicated as Devdasi is from the cast of

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Mahar, Mang Dowani and Chambhar which means as most of the girls belong to lower caste and this dedication will help the family economically, and socially. The girls are dedicated to god because of the ordering of higher cast people or the rich person. Once the dedication is done this rich man pays the family of girl in cash and he is first one who contribute to make the girl in 'divine prostitute'. Girls are not only dedicated on the order of rich people but because of some physical problems also for example Jata, dry hair, white patch, leprosy and even mental problems have been traditionally interpreted as signs of the call of the goddess Yellamma to join her.

The main identity of the devdasi who are dedicated to yellama is the beads and necklace they wear. There are mainly three type of Devdasi which are dedicated to yellama they are Gati Muttu, Sule Muttu and Jogati Muttu. These are devadasi who are classified according to their virginity. They represent three level of prostitute. The first one are those who remain virgin throughout the life. Second one are those who continues to maintain sexual relation with one me and the third one is that women who becomes a Devdasi or a divine prostitute for pleasure and excitement of sexual relation.

There is yet another type of devadasi which is known as Gati Muttu which means they offer their virginity to goddess, and after completion of the vows undergo some ritual by which she ready to be an active prostitute.

These gatherings once in a while after the promised period experience another custom and go as sex accomplices of men who enable them to perform to the holy place and culmination ceremonies and make installments to the sanctum and the ministers. The individuals who go as business whores, experience the start custom of the request of wearing Sule Muttu sort. The devotion ceremonies and offerings to the divinity are the same in both cases. For the situation those wearing the Jogathi Muttu, are religious vagabonds. They constitute a few sorts of men and ladies who are sexually a useful are additionally specifically started into the administration of the divinity as religious homeless person functions. Notwithstanding these classifications there are likewise couple of men and ladies who have a place with this convention execute, wear the dress of inverse sex, i.e. men wearing the women’s dress. They are likewise called as Yellavva and Yellappa. Maybe this might be begun when the female ministers were supplanted by the male clerics, and because of weight of local people; this practice was trailed by the male ministers to impact the neighborhood fans. As each Dasas these individuals likewise spread the wonderfulness of Yellamma by moving and singing different customary and people melodies identified with Yellamma and Renuka and in this way gathering cash for running their life.

GOVERNMENT LEGISLATION
India has shown her intolerance towards this degrading system in the year 1924 when she made this type of dedication illegal, with the section of Sections 372 and 373 of the Indian Penal Code which makes the ultimate purpose of Devdasi system as illegal. It
forbids any person of 18 years below to engage in the prostitution.

Bombay Devadasi Protection Act 1934 this act was passed by british in the domain of Bombay, as the practice excited their the main feature of this act which help for the progress in the status of devdasi is it not only make devasi system as illegal but it also made valid for a devdasi to remarry. And the children of devdasi is to be consider as legitimate child.

Karnataka Devadasis (Prohibition of Dedication) Act 1982 Act reinforces the reformatory arrangements that were up to this point accessible under the 1934 Act. The greatest discipline was expanded to three years detainment and most extreme fine was expanded to Rs. 2000. In the event that the blameworthy was observed to be a parent or gatekeeper or relative of the committed lady, the reformatory arrangements are much more grounded. Detainment in such a case can reach out up to five years with a base term of two years and the fine can be dependent upon Rs. 5000-with the base fine being Rs. 2000

Karnataka Devadasis (Prohibition of Dedication) Act essentially gave that standards might be encircled to accommodate the care, insurance, welfare and recovery of the Devadasis. The recovery of the Devadasis must be key to the acknowledgment of the goals set out in the Act and due acknowledgment was given to this perspective in the Act itself. The Government to embrace enactment at an early date to put a stage to the act of devoting young ladies and young ladies to Hindu sanctuaries which has by and large brought about presenting them to a shameless life.

Devadasi Abolition Bill December 20, 1947 The above all else and the main protest of the proposed enactment is that such a commitment of Hindu young ladies and ladies by and large brought about communicating them to a shameless life. This identifies with the fate of our womankind and is for the most part against an unethical life. The people group which commits their ladies to sanctuary administration is known as Devadasis. Shuddha Nritta is the move called "Bharatha Natyam". In the time of 1913, Government presented a bill for the security of ladies and young ladies. Facilitate in the year 1923, Sec 372 and 373 of Indian Penal Code Amended. Different names of devadasis are Devaradiyar, Devadasis, Kanigai, VilaiMathar.

THE CONCEPT OF SUSTAINABLE DEVELOPMENT
Transforming our world: the 2030 Agenda for Sustainable Development which is commonly known as sustainable development goals, in the year 1972 it was relies that human family needs a safe environment to sustain their life and for this industrialize country and developing country meet at Stockholm, Sweden, for the United Nations Conference on the Human Environment, after this united nation in the year 1983 decided to form a body which is known as world commission for environment and development which has define the sustainable development as "meeting the needs of the present without compromising the ability of future
generations to meet their own needs." \(^921\) The first agenda for the development of the environment is develop in Rio. In arrangement for the Rio+20 Conference, Indonesia held a July 2011 government withdraw in Solo, Indonesia. At this occasion, Colombia proposed the possibility of the SDGs. This was gotten by the United countries Department of Public Information 64th NGO Conference in September 2011 in Bonn where the result record proposed 17 economical advancement objectives and related targets. In the keep running up to Rio+20 there was much exchange about the possibility of SDGs. At the Rio+20 Conference, a determination, known as “The Future We Want” was come to by part states. Among the key topics concurred on were destitution destruction, vitality, water and sanitation, wellbeing, and human settlement.

Section 246 of the Future We Want result archive frames the connection between the, Rio+20 understanding and the Millennium Development Goals: "We perceive that the improvement of objectives could likewise be valuable for seeking after concentrated and lucid activity on supportable advancement. The objectives ought to address and fuse balanced every one of the three measurements of feasible advancement (condition, financial matters, and society) and their interlink ages. The improvement of these objectives ought not to occupy center or exertion from the accomplishment of the Millennium Development Goals". Passage 249 states that "the procedure should be composed and cognizant with the procedures to consider the post-2015 advancement motivation"\(^922\).

Taken together, passage 246 and 249 made ready for the Millennium Development Goals (MDGs). The MDGs were formally settled after the Millennium Summit of the United Nations in 2000 and the understanding in the Future we want result archive. The Rio+20 summit likewise concurred that the way toward outlining practical improvement objectives, ought to be "activity arranged, brief and simple to impart, constrained in number, optimistic, worldwide in nature and all around appropriate to all nations while considering distinctive national substances, limits and levels of advancement and regarding national approaches and priorities".

Since the MDGs were to be accomplished by 2015, a further procedure was required. Talk of the post-2015 structure for universal improvement started well ahead of time, with the United Nations System Task Team on Post 2015 Development Agenda discharging the principal report known as Realizing the Future We Want. The Report was the primary endeavor to accomplish the necessities under section 246 and 249 of the Future We Want record. It distinguished four measurements as a major aspect of a worldwide vision for practical advancement: Inclusive Social Development, Environmental Sustainability, Inclusive


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Economic Development, and Peace and Security. Different procedures incorporated the UN Secretary General’s High Level Panel on the Post 2015 Development Agenda\textsuperscript{923}, whose report was submitted to the Secretary General in 2013\textsuperscript{924}.

DEVDASI AND SUSTAINABLE DEVELOPMENT GOALS
As the concept of Devdasi states that it is system in which young girls are married to deities which later degraded to the system in which the young girl was trapped into the web of prostitution. India has been seriously committed to the 2030 goals which includes the sustainable development goal. Indian’s national development goal is ‘sab ka sath, sab ka vikas’. India is not new to the concept of “development of all” father of nation Bapu has already given the concept such as Savodaya (upliftment of all) and Antodaya (reaching to the poorest of the poor.), today India has been successfully trying to achieving all seventeen goals. NITI Ayog is the official mapping body for achieving these goals.

Goal number eight of sustainable development states that the job which ensure the decent work for all the decent work means the work should give social and economic security to the person. The work should recognize the importance of each and every worker working in the company. Also the work should be in accordance to Article 7 of the International Covenant on Economic, Social and Cultural Rights. It also includes the safe environment for working force.

Since the girls at very early age is donated to god they are not able to achieve quality education which is very necessary for every child. Goal four of sustainable development does not talks about only giving education it believes in providing the education which is equitable, inclusive and provides a lifelong opportunities for learning for all.

CONCLUSION
After the Delhi rape case India is more concerned and careful with the security of women, but there are some cultures in India which contributing to exploiting women and their stools. Devdasi is such culture which degrade with the time. Although statistic says that number of Devdasi which are their in India is very low but it raise the fact that this practice are still present in India.

Devdasi on the other hand suffer badly in India. They not only suffer from social and economic problem but this practice affect them physiology. In ancient period Devdasi was the community in which the lower cast girl enjoy status because they are consider to be god’s wife. But now the real irony occur when this community is suffering the discrimination from the society.

It is not like India cannot curb this type of cultures, India has already put an end to the practice of tawaif. So devdasi practice also have end in near future.


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