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<th>International Executive</th>
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EDITORIAL

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With this thought, we bring forth this journal before you.
# TABLE OF CONTENTS

1. THE INDIAN TAXATION SYSTEM AND ITS IMPACT ON THE ECONOMY  
   By Aakansha Chadha ................................................................. 1

2. APPLICATION OF ARTIFICIAL INTELLIGENCE TO LEGAL INFORMATICS  
   By Aarti Dhillon & Nishant Mishra ........................................... 10

3. UNDERSTANDING THE CONCEPT OF STATE SUCCESSION AND ITS LEGAL ISSUES  
   By Adarsh Dubey ................................................................. 19

4. APPOINTMENT OF JUDGES IN HIGHER JUDICIARY- A CRITICAL REVIEW OF THE CONSTITUTIONAL PROVISIONS  
   By Akash Kumar ................................................................ 25

5. INTENTION TO CREATE LEGAL RELATIONSHIP IN COMMON LAW  
   By Ambir Khan ................................................................. 30

6. PRIVACY IN SOCIAL-LEGAL AND CULTURAL MILEU  
   By Anuj Datta & Madhu Singh ............................................. 47

7. GEOGRAPHICAL INDICATION: ANALYSIS IN LIGHT OF ARANMULA KANNADI  
   By Anushkaa Shekhar & Pritha Banerjee .................................. 52

8. SEXUAL HARASSMENT- ANGUISHED FABLES OF WOMEN AT WORKPLACE: A CRITIQUE OPINION VIS-À-VIS ITS PREVENTION  
   By Apoorv Gupta & Saloni Toshniwal .................................. 64

9. MEEK BODIES WITH OPTIMISTIC MINDS- A CRITICAL ANALYSIS OF THE APPLICATION OF POCSO ACT  
   By Apoorv Gupta, Rishank Nath Sharma, Aditi Karra and Safa Ali ....... 77

10. LACK OF IMPLEMENTATION OF ANIMAL LAWS IN INDIA: A CRITICAL APPRAISAL  
    By Archit Mishra & Neha Choudhary .................................... 91

11. INTERNATIONAL LAW ON THE RIGHT OF SELF-DETERMINATION  
    By Arunabh Rajan ............................................................. 104

12. DISABILITY LAWS IN INDIA: CONCEPTUAL STUDY  
    By Ayushi Bhajwani .......................................................... 111
13. FEMINIST CRIMINOLOGY: FLOWERS ARE COMMITTING SINS  
By Aayushi Shah, Priyanka Chaddha and Riya Kamdar .................................................. 124

14. A SOCIO-LEGAL PERSPECTIVE OF SUICIDE IN INDIA  
By Chinnamma K.C  .................................................................................................................. 134

15. HOMELESS PEOPLE IN DELHI (INTERNAL MIGRATION: IS IT THE LOSS OF IDENTITY?)  
By Deepanshi Trivedi .......................................................... 141

16. ORGAN DONATION: A CHANCE TO LIVE POSTHUMOUSLY, LEGAL ISSUES INVOLVED  
By Deepanshi Trivedi .......................................................... 147

17. THE SABRIMALA VERDICT: A CONFLICT OF CUSTOM AND LAW  
By Deepanshu Latka .......................................................... 152

18. EVOLUTION OF ENVIRONMENT LAWS IN INDIA  
By Ekta Sati ..................................................................................................................... 158

19. NOT IN KANSAS ANYMORE- THE PLIGHT OF CLIMATE REFUGEES  
By G.V. Athvaidh .......................................................... 168

20. UNITED NATIONS FRAMEWORK CONVENTION CLIMATE CHANGE: CLEAN DEVELOPMENT MECHANISM  
By Gargee Padhi & Utpanu Raj Nayak .......................................................... 175

21. ALTERNATIVE DISPUTE RESOLUTION  
By Himanshu Verma & Tanika Kothari .......................................................... 181

22. JUVENILE JUSTICE  
By Jagriti Thakur & Vanshika Yadav .......................................................... 186

23. A FLICKERING DEBATE ON THE FEMALE GENITAL MUTILATION- AN UNTOLD DARK SECRET  
By Kanimozhi Thaninayagam .......................................................... 193

24. MRITYU DANDA: IN MODERN INDIA  
By Karan Singh & Rashi Bhatia .......................................................... 200

25. COMPARATIVE STUDY OF THE CONCEPT OF EARNEST MONEY WITH REFERENCE TO DIFFERENT COUNTRIES AND JUDICIAL PRONOUNCEMENT  
By Milind Rajratnam .......................................................... 206

www.supremoamicus.org
26. ROLE OF MEDIA
By Muskan Gupta........................................................................................................220

27. HUMAN TRAFFICKING
By Poornima Singh Pawar & Sunshine Anand...............................................................225

28. AN EPOCH OF NON COMPLIANCE OF JUDICIAL PRONOUNCEMENTS:
CONFLICT BETWEEN CONSTITUTIONAL MORALITY AND PUBLIC MORALITY
By Pourna Vijay..................................................................................................................237

29. ARISTOCRACY OF POLICE AND VIOLATION OF HUMAN RIGHTS
By Priyanka.......................................................................................................................242

30. GENDER NEUTRALITY OF RAPE LAWS: A DENIAL OF RIGHTS TO MEN?
By Priyanka Narayanan......................................................................................................248

31. ANALYSIS OF INTERMEDIARY LIABILITY AND THE IT ACT
By Reshma Kumari.............................................................................................................253

32. CYBER CRIME- A GLOBAL MENACE
By Saksham Grover...........................................................................................................262

33. CRYPTOCURRENCY IN THE LIGHT OF COMPETITION LAW
By Sakshi Rastogi..............................................................................................................271

34. TRANSFORMATIVE CONSTITUTIONALISM: THE SAGA OF SOCIAL TRANSITION
By Sameer Samal...............................................................................................................286

35. SECONDARY MARKET AND ITS REGULATION
By Saurabh Kumar............................................................................................................290

36. ESTOPPEL AS AGAINST THE STATE ACCORDING TO INDIAN EVIDENCE ACT, 1872.
By Sharlin Puppal.............................................................................................................300

37. PENDENCY OF CASES IN INDIAN JUDICIARY- A CRITICAL ANALYSIS
By Shivangi Bhattacharya.................................................................................................306

38. A STUDY OF TRAFFICKING OF PERSONS BILL 2018
By Shivangi Mugdha.........................................................................................................316
39. DELAY IN DISPOSAL OF CLEMENCY PETITION BY THE PRESIDENT OF INDIA: AN IMPORTANT FACTOR FOR COMMUTATION OF DEATH SENTENCE INTO LIFE IMPRISONMENT
By Shreya Das & Abhishek Rajesh Bhattacharjee .................................................................328

40. FORCED EVICTION OF INDIVIDUALS- AN INTERNATIONAL PERSPECTIVE
By Shweta Krishnan ................................................................................................................339

41. PATENT RIGHTS V. PATIENT RIGHTS
By Siddhi Mundra ..................................................................................................................344

42. MARITAL RAPE: EXISTING DEFENSES TILL AN EXCLUSIVE LAW IS IN PLACE
By Sneha Mohanty ................................................................................................................360

43. FUNDAMENTAL DUTIES: TIME TO RECONSIDER THE ECLIPSED PART OF CONSTITUTION
By Suyash Gaur & Anchita Sood .......................................................................................367

44. MOB LYNCHING IN INDIA: A NEW NORMAL UNDER THE INDIAN LEGAL SYSTEM
By Tanishka Grover & Utkarsh Pareek ................................................................................378

45. CULTURAL RELATIVISM- THE DARK TALES OF UNHEARD CRY FOR AID IN THE VEIL OF CULTURE
By Tanvi Trivedi ....................................................................................................................387

46. THE MALADY NAMED MARGINALIZATION- AN ANALYSIS AND COMMENTARY
By Tanya Patwal & Tanya Agarwal ....................................................................................401

47. PROPERTY RIGHTS ON THE HUMAN BODY, PARTS, TISSUES AND CELLS
By Yazhini .............................................................................................................................408

48. COW SLAUGHTER AND THE CONSTITUTION: CRITICAL ASSESSMENT
By Yukta Dubey .....................................................................................................................416

49. CASE COMMENT ON SHAYARA BANO AND OTHERS V. UNION OF INDIA
By Dipti Gabriel ....................................................................................................................427

50. CHILD LABOR AND SOCIETY: A DETRIMENTAL SITUATION
By Dipti Gabriel ....................................................................................................................431
THE INDIAN TAXATION SYSTEM AND ITS IMPACT ON THE ECONOMY

By Aakansha Chadha
From Symbiosis Law School, Hyderabad

ABSTRACT:
Taxation laws cover the rules, policies and laws that oversee the tax process, which involves charges on estates, transactions, property, income, licenses etc. by the government. The basic idea behind laying down taxes is to ensure collection of revenue and raise funds for the different programmes for citizens of the country. Though the credibility of such process is still in question. There is a strategic, devised structure in every country with respect to the levying of taxes and the laws governing it. Taxation has an effect on various things, economy being the primary aspect. A proper structure assures proper income distribution and eliminates obstacles in business which in turn prospers the economy of the country. If there was no such structure there would be no regulations to govern the tax which would lower the development of the country in the economical aspect. This paper will include the effect of such taxation laws on the economy. The various factors such as improper distribution of wealth, existence of a parallel economy effects the transparency in the tax collection etc. affect the economy of a country and hence, must be looked upon. In this paper, an attempt has been made to carry out a comparison with that of laws in the developed nations of the world. This paper will also include the barriers being faced in executing the existing laws and the measures which will be taken to overcome them, treating everybody as an equal in order to impart justice to all citizens of the country.

Keywords: taxation, economy, government, parallel economy, transparency.

Introduction:
Indian taxation system has roots back into the prehistoric texts such as Arthashastra and Manusmriti according to which the peasants and the artisans would pay taxes in the form of their agricultural produce, silver or gold. However the concept of the modern form of taxation adopted in India was proposed in the year 1860 by Sir James William. But after independence the government made few changes to that system keeping in view of the economic requirements of the country. The tax system has been modified ever since.1

In USA, the taxes are laid down on income, sales, gifts and customs, property etc by both the central and the state bodies. It is a very progressive system and it mainly relies on direct taxes. In UK, taxes are levied on two levels i.e., the central and the local government. The central government levies taxes on income, fuel duty, VAT etc and the local government collects taxes for street parking, business rates and council tax etc. Further, the central government also

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1AnandNayar and Inderpal Singh, The India taxation system- Scenario Before GST, A comprehensive analysis of Goods and Services tax (GST) in India (February, 2018). https://www.researchgate.net/publication/323007997_A_Comprehensive_Analysis_of_Goods_and_Services_Tax_GST_in_India?fbclid=IwAR12oJhgqXDNL_D1G5HljhoFdvUpW6v9POp0MXiEN2lbNhtm27mWwR70SU
provides funds for welfare purposes to the local government. A similar system is followed in South Africa as wherein the two tier system is followed for the collection of tax. China depends on tax for the source of revenue because it follows socialist principles. It has 26 types of taxes divided under 8 categories.  

In India, at the beginning of the financial year, the ministry of finance presents the previous year’s review and tells about the financial budget for the upcoming year while also suggesting changes. These changes or prospective amendments are considered as proposals and if majority is obtained in both the houses, followed by the consent of the President will become the law. It might be a prospective law (i.e., comes into effect on a future date) or retrospective (i.e., applicable for an existing law). Article 265 of the Indian constitution provides that taxes shall not be levied or collected except by the authority of law. There are two types of taxes: direct tax which is collected from the citizens and the corporate entities (for example: - income tax, gift tax, wealth tax) and indirect taxes which is collected indirectly from people by levying taxes on goods and services (for example: - customs duty, Value added tax etc). GST came into force on the 1st of July 2017 until which the central, state and the local governments used to collect these taxes. GST replaced the central excise duty, service tax, sales tax, purchase tax, entertainment tax etc. Under this scheme CGST, SGST and IGST are applicable. CGST deals with the taxes which are collected by the central government when an intra-state transaction takes place. SGST deals with the taxes collected by the state government when an intra-state transaction takes place. Further, IGST is the tax which is collected by the central government when an inter-state transaction takes place. GST is destination based and is multi stage. It is extremely comprehensive and is levied on every value addition. GST basically reduces the tax on the tax which means the price of the good reduces. GST brought about uniformity in the taxation laws. GST managed to reduce the cumbersome indirect taxes which were many in number. This not only reduced the price of the goods but also made the tax collection system more transparent among other things.  

**GST in other countries:**

160 countries have adopted GST, France being the first country to adopt. GST is being followed in countries such as Canada, New Zealand, Malaysia, and Pakistan to name a few. The tax rate in India is 28% which makes it the country to having the highest tax rate. The procedure followed in India regarding GST is quite different from the other countries considering the fact that dual GST is applied in India wherein both the central and the state government have got the powers to levy the taxes.  

**Effect of GST on the economy of the country:**

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2 Mr. Nishant Ravindra Ghuge and CA Dr. Vivek Vasantrao Katdare, Overview of the Taxation structure: A Comparative study of Tax structure of India with respect to other countries (January 2016). [https://www.researchgate.net/publication/301477624 A Comparative Study of Tax Structure of India with respect to other countries](https://www.researchgate.net/publication/301477624)
Equalisation of products and services takes place and affixed rate of tax is set up in GST. Many tax reforms have taken places after India’s independence out of which GST remains the biggest ones. The main objective behind it was to formulate a marketplace which is common by removing the existing fiscal barriers within the states. The multiple taxes were all removed which was prevalent on every step from manufacturing to reaching the consumer. It unifies the centre and the state for the purposes of tax collection.

The State Goods and Service Tax (SGST) collect the pre-existent purchase tax, luxury tax, tax on lottery, gambling etc.and Central Goods and Service tax (CGST) came in place of the customs and excise duty, central sales and service tax. There also exists an Integrated Goods and Service Tax (IGST) which makes sure that the tax is received by the state which imports the good. The dealers are required to register under GST, and then the customers will be charged on the goods and services that they avail. Taxes are collected from the customers who may or may not be the ultimate consumers and the tax already paid will be deducted before paying the exchequer.3

Since the Indian economy is getting more globalised day by day, bringing in GST will lead to a single tax payment which will enhance the position of our country in a global level. Inhibition of inflation will take place and the tax to GDP ratio will rise. GST therefore plays a major role in enhancing the economy of the country.4

The implementation of GST removes the cascading effect on the cost of production of goods and services as well as cost of distribution. The GDP will rise when the prices reduce. Removal of tax barriers (which is the main object of GST) results in low supply chain cost. GST also reduced the Production costs of most of the goods up to 20%. GST also increases the revenue which is collected through tax. The existing distortions in the economy will be removed and it will lead to a sustainable growth.5

GST enhances the standard and cost of living. This is because the GDP will increase due to the increase in the consumption of the goods because of its low price. Further, the export of goods also will increase which indirectly affects the balance of payment of the country in a positive manner. The evasion of tax payment which is a common tactic used by huge companies and firms, can be curbed to a great extent because of the taxation on every transfer.6

Before the implementation of GST, if the production unit and the dealer were from separate states, a separate sales tax had to be paid which led to many production units in several states. This eventually increased the price of the commodities. But after the

3 Volume No. 27, Neelam Tandon and Deepak Tandon, Analytics of GST Enigma in India-Prospects, Imolutions & Rollout (2017).
4 Volume No. 19, Dr. Yogesh Kailash Chandra Agrawal, GST and its impact on Indian economy (2017).

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implementation this practice came into a halt.

The main positive outcome of the introduction of GST was curbing of a large number of unnecessary, cumbersome taxes. This reduced the compliances. It rationalised the tax structure and also provided a wider base for tax than before. A proper structure was put forward which harmonised the relationship between the centre and the state. A common market will be created nationwide.

The burden of a common man to pay hundreds of taxes is taken away by the implementation of GST. The circulation of black money can be curbed to a large extent. A corruption less surrounded around the country. GST gives credit to the producers who pay tax which in turn motivates them buy more materials from different dealers which invites more vendors.

The custom duty was removed by GST which increased the competitiveness in the global word due to the reduced cost of the transaction. The foreign direct investment (FDI) increases because of the increase in the exports. Demand and supply of products increase which raises the employment opportunities. Goods and service tax network (GSTN) is a joint venture by the centre and the state as a non-government company which provides IT infrastructure and services. The objective of GSTN is to provide and uniform tax interface.

**GST and its impact on the real estate sector:**

The real estate sector comes under one of the fast developing sectors. The lifestyle and standard of living has changed over the period of years due to globalisation and modernisation which indirectly has led to the growth of the real estate sector. The growth in the real estate sector directly leads to the growth of the Indian economy. It has been found out that that the real estate sector contributes 9% to the economy.

Real estate basically includes the land with the buildings and natural resources like crops, livestock, deposits of minerals etc. In India there are 4 types of real estate; land, residential real estate, industrial real estate and commercial real estate. Land includes the farms, ranches and the land which is vacant. Residential real estate includes school, colleges, hospitals, shopping centres and offices. Industrial real estate includes the production centres like buildings, warehouses and property. Buildings used for the purposes of manufacturing, production or storage of goods are included in the industrial real estate. Commercial real estate comprises of residential apartments like flats, independent houses, duplexes etc.

Prior to the introduction of GST, indirect taxes were levied on this sector. All the taxes which were paid before aren’t subsumed even after the introduction GST. In India, due to the federal powers conferred, both the centre and state can lay down the taxes and collect them. Under such

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8 Volume No. 3, Prof.Dr. Suresh Kumar Dhameja, Deepak Kumar and ManikaDhameja, *GST in India and its impact on Indian economy* (2016).

powers, the states still collect the stamp duty.

Section 9 of the Central Goods and Services Act, 2017, defines the leviability of GST. Section 7 read in light with section 9 of the Act gives a clear picture as to what the taxes must be levied. Schedule II of the Act further specifies about the transactions which come under real estate.

A person is required to register in the state or the union territory in which he pays the tax if the turnover is more than 20 lakhs and 10 lakhs if it is a state under the special category, as per section 22. This basically means that the builders and manufacturers having production units in different states must make registrations in all those states and the concept of centralised registration is done away.

Section 25 of the GST act also describes about distinct person according to which a person having multiple registrations will be considered to be a distinct person. So this concept has allowed the ones in the real estate sector having their business across different states to pay their GST from one state to another.

Several amendments have been made with respect to the rate of taxes to be paid under the real estate sector. The government has laid down different tax rates for different states. 18% tax must be paid for services in the real estate business (for example: construction work) excluding the value of the land. Moreover, 18% tax is charged on the renting of immovable properties as well. Any building which is built for the purposes of sale requires the developers to pay 12% tax including complete input tax credit which won’t be refunded.

**Impact of GST on other industries:**
The services provided by the telecom industries are taxed at a rate of 18%, much higher than earlier tax rate. Levying of 8 types of taxes on the pharmaceutical industries has ensured that the impact is constructive. Moreover the tax rate ranges between 5 to 12%.

The GST on the textile industry reduced from 18% to 5% and the input tax credit is available only when the tax is collected from the capital goods which mean it won’t be
allowed if it is collected from the unorganised sector.

Abolition of the special addition duty took place which was earlier present on the iron and steel industry, before GST came into existence. 12-28% tax is levied on the iron and steel industry. Further, an attempt is made to keep the logistics low by levying the taxes for transportation of steel lower than 5%.

Tax rate of 18% is levied on the automobile industry which is much lower compared to the earlier rate of 30-45%, which increases the profit for manufacturers, consumers and dealers. The automobile industry went through a lot of profit due to this. Throughout the nation hassle free taxation system is adopted which affects most of the industries in a positive way due its uniformity.

The agriculture industry also saw number of changes after the implementation of GST. The agricultural products which are in high demand and are used in great quantities were brought under the zero tax categories. 12% tax is levied on the processed food products. It is believed that the higher tax rate would reduce the demand which would indirectly reduce the production of the products.

**FDI and its impact on the Real estate sector:**
Foreign direct investment is when a company from a different country buys an enterprise or a company in a country where it plans to expand its business. The countries hosting the often are boosted with higher growth in the economy which increases the global competition. Further it leads to the growth in the income of the citizens in the country because of the introduction of new technologies, new markets etc. Globalisation of economy takes place through foreign direct investment.\(^\text{10}\)

Real estate sector comes under one of the most critical sectors in India. This is mainly because the Indian economy is greatly affected by the business taking place in the real estate sector. Therefore it has attracted a lot of investments from countries globally. There are several issues when it comes to foreign direct investment in India. The infrastructural facilities are not up to the mark. This discourages the investors in the international market from investing in India. Electricity issues are a major concern which puts the investors into thinking. The labour laws in our country are very stringent and the investors are required to be taking permission from the state government before setting up any business. Therefore even for retrenching the labour permissions are to be taken from the government which is cumbersome and the permission is rarely given. Moreover the corruption which is found in almost all the government and public offices drives away the foreign investors. The legal hurdles, improper reforms in the different institutions and corruption issues within the government offices prevalent in our country, drives the investors away. The state doesn’t have much power with respect to policy making or introducing reforms with respect to investments made by the foreign companies. The rate of corporate tax is high which is a

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\(^{10}\) VenkateshUmashankar, Ph.D and Mrs. Kirti Dutta, Foreign Direct Investment in the Indian Real Estate Sector – Problems and prospects (2006).
disincentive for the investments. The government is very unstable and indecisive which affects the foreign investments.

The economy, the government policies, the availability and skilled labours, the availability of necessary infrastructure in low cost are some of the determinants of the investment in India. The presence of rich natural resources also attracts the investors towards the real estate sector.

India is a developing country and it requires investment to be made from other countries because of scarcity in the capital. There are many other issues to be addressed such as health, education, poverty, employment, research, development etc with that capital. Foreign investment bridges the gap between the savings and the income. The extraction of the abundant natural resources requires foreign investments in our country. The balance of payment will be improved by FDI. Moreover the competition increases among the internal and external investors which in turn lead to the development.

Foreign Direct Investment is a requisite in the real estate sector to portray professionalism and to ensure transparency. The real estate sector is booming day by day and the growing economy is resulting in the rise of the prices of the property. The rise in the population also is increasing the demand for more shopping centres, more apartments and houses. The demand for housing facilities is rising day by day. Real estate sector provides employment facilities, being the second largest after agriculture.

However, the real estate in India is still in its infancy and it’s not very organised. The local developers have hardly got any national fame and the hue companies are not involved in the development of the real estate sector completely. Large projects require higher revenues and the small scale builders are devoid of sufficient revenue to undertake risks attached with them. The domestic builders fail to provide technical expertise and don’t invest in huge numbers which hinders the development of cities or towns. The government thus allowed the foreign direct investment in the real estate sector from January 2002.11

The Foreign direct investment increased over the years due to the relaxation of the rules and regulations by the Indian government. In spite of this the FDI/ GNP ratios are low due to deterring investors which is because of the cumbersome investment approval procedures and lack of transparency in the same. State bodies own the land in urban areas, procurement of which is a tedious procedure. Lack of a clear title, control of tenancies, further pose a threat to the investments. Thus the procedure for land procurement must be simplified.

There are many risks associated with foreign direct investment in India. The real estate sector is not transparent as per the requirements of international transactions. The turnover of the tenants maybe very frequent due to short leases. The market and the governance in our country are not sophisticated and are very immature. There are no stringent and uniformity with respect to the quality of building standards.

Unexpected changes in the tax policies further affect the investments in India.

It is estimated that the real estate sector contributes around 6.3% to the GDP and it is estimated that will create around 8 million jobs during the period. By the end of the year 2025, it is expected that this will rise up to 17 million.

The year 2018, saw a remarkable change wherein the government allowed 100% FDI. Basically it means that the foreign investors do not need the approval from the government for investing in the real estate channels mainly construction and commercial purposes. 100% FDI is allowed in the building and development of townships, development projects such as restaurants, resorts, hospitals, roads, bridges etc. Basically the builders and developers must complete the trunk infrastructure.

In case of housing there is no minimum area requirement but in the case of development and construction projects, a minimum floor area of 20,000 square metres is required. The quantum of investment within 6 months of starting the project must be a minimum of USD 5 million. The investor will be permitted to exit only after the completion of the trunk infrastructure such as roads, hospitals, bridges etc. The construction should follow all the rules and regulations in the country governing the land and real estate. The company which is investing can sell only those lands which it has developed. Certain regulations are relaxed for Non Resident Indians.

**Impact of GST on the Foreign Direct Investments in India:**

The introduction of GST boosted the confidence of the foreign investors to invest in India. GST not only supports the make in India concept but also invites more investors. Corporate transparency is boosted by the implementation of the GST. The tax compliance increased after the implementation of GST which reduces the litigations and boosts the confidence of the foreign investors looking to invest in India. Introduction of GST removed the cascading effect, raised the threshold for registration, reduced the compliances, increased the efficiency in logistics and regulated the unorganised sector. This made the business environment very convenient for the foreign investors. GST set up uniform tax rules across India and made sure that there is very less intervention from the bureaucrats.

**Conclusion:**

A good taxation system is necessary to bring in revenues for the government and makes sure that there is fair and equal distribution of wealth. The main object behind implementing GST was to bring in transparency in the system and encourage more investments while unifying large number of unnecessary taxes into one. Economy of a country depends on an efficient taxation system and the taxation system of India saw the introduction of GST. GST brought about a single, uniform tax in place of a diversified tax bringing in a single marketplace in India. While many of them criticised this step taken by the government, the system did prove to be a boon to most of the industries; the real estate sector being one of it. The real estate sector is very vulnerable and gets affected by
minute changes. Since it is not possible to get maximum positive development through the resources available in the country, Foreign Direct Investment is adopted by which the foreign investors invest in our country and bring about significant changes in the economy. Both FDI and GST have greatly helped in the development of the real estate sector. While one has made the taxation system more transparent the other has made sure that developments and investments take place. Moreover, they are inter-related and play a significant role in the development of the real estate sector. However, many factors such as technological developments, industrial revolution, upcoming government policies etc might bring about changes. It is time which will tell how effective the system and what more changes need to be brought about.
I
INTRODUCTION

The digitalization exponential of the world has prompted the use of innovation to each circle of human life and tries with the law being no exemption. Law and artificial intelligence have a significant history implanted in branches of knowledge such as legal informatics, legal data, technological law and other comparable classification. The capacity/handling of information has gained such a great amount of unmistakable quality for a large group of reasons conspicuous among which is the privilege of security and information assurance. In this manner, the law assumes a central job, the preparing/capacity of information making it unavoidable for lawyers to think about same. Due to the dynamic nature of AI with AI progressions to guarantee development in the field of legal informatics.

II
ARTIFICIAL INTELLIGENCE

In computer science, Artificial intelligence (AI), some of the time called machine intelligence, is intelligence exhibited by machines, rather than the regular intelligence shown by humans and different animals. Computer science characterizes AI investigate as the investigation of "intelligent agents": any gadget that sees its condition and takes activities that boost its risk of effectively accomplishing its objectives. More in detail, Kaplan and Haenlein characterize AI as "a system's capacity to effectively decipher outside data, to gain from such data, and to utilize those learning to accomplish explicit objectives and undertakings through adaptable adjustment".

Casually, the expression "artificial intelligence" is connected when a machine copies "psychological" capacities that humans connect with other human minds, for example, "learning" and "problem-solving". The extent of AI is debated: as machines turn out to be progressively proficient, undertakings considered as requiring "intelligence" are frequently expelled from the definition, a wonder known as the AI impact, prompting the witticism in Tesler's Theorem, "AI is whatever hasn't been done yet."15

In the twenty-first century, AI techniques have encountered a resurgence following simultaneous advances in computer control,
a lot of data, and hypothetical comprehension; and AI techniques have turned into a fundamental piece of the innovation business, solving many testing problems in computer science, programming building and research related to operations of the same.16

III
LEGAL INFORMATICS
The American Library Association characterizes informatics as "the investigation of the structure and properties of information, and in addition, the utilization of innovation to the association, stockpiling recovery, and scattering of information." Legal informatics, in this manner, pertains to the use of informatics inside the setting of the legal condition and in that capacity includes law-related organizations (e.g., law offices, courts, and law schools) and clients of information and information advances inside these organizations.17 Legal informatics has additionally been characterized as the hypothesis and routine with regards to computable law, i.e., of participation/advantageous interaction among humans and machines in legal problem-solving.18 Advances in technology and legal informatics have prompted new models for the conveyance of legal administrations. Legal administrations have generally been a "bespoke" item made by an expert attorney on an individual reason for every customer.19

Be that as it may, to work all the more proficiently, parts of these administrations will move consecutively from:
- bespoke to
- standardized,
- systematized,
- packaged, and
- commoditized20

Moving to start with one phase then onto the next will require grasping distinctive innovations and learning systems.21

IV
SOURCES OF LAW ON LEGAL INFORMATICS
In each part of the law, there exist sources from which the pertinent principles of law are inferred. Such sources can be compared to streams from which the appropriate standards in each part of the law are brought. The sources of law can, by and large, be characterized into primary and secondary sources.22

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17 Erdelez and O’Hare (1997)
In the field of legal informatics, the primary sources of law are gotten from national laws, international treaties, for example, the international settlements on security, data protection and E-trade within the EU and choices of the courts on IT/data protection related issues. The secondary sources of the law on legal informatics incorporate international journals on IT law/legal informatics, reading material and articles written by educated and prepared writers in the field.

Within the EU, the grundnorm/the most essential and primary sources of the law on legal informatics is the Treaty on the Functioning of the European Union (TFEU), which accommodates the right to data protection and furthermore enables the EU parliament to make laws for the protection of the right to data protection.\(^23\) Now and again, a portion of these texts is utilized by the court to support its decision while a portion of the researchers is additionally invited as amicus curiae to illuminate knotty issues in court(s) when important.

V APPLICATION OF ARTIFICIAL INTELLIGENCE TO LEGAL INFORMATICS

Artificial intelligence and law (AI and law) is a subfield of artificial intelligence (AI) mainly concerned about uses of AI to legal informatics problems and unique research on those problems. It is additionally concerned to contribute the other way: to send out instruments and techniques created with regards to legal problems to AI as a rule. For instance, hypotheses of legal decision making, particularly models of argumentation, have added to learning portrayal and thinking; models of social association dependent on standards have added to multi-operator systems; dissuading legal cases has added to case-based thinking; and the need to store and recover a lot of printed data has brought about commitments to applied information recovery and intelligent databases.

Formal models of legal texts and legal thinking have been utilized in AI and Law to elucidate issues, to give a progressively exact comprehension and to give a premise to usage. An assortment of formalisms has been utilized, including propositional and predicate calculi; worldly and non-monotonic logics; and state transition charts. Prakken and Sartor\(^24\) give a detailed and authoritative audit of the utilization of logic and argumentation in AI and Law and have a phenomenal arrangement of references.

A vital job of formal models is to expel ambiguity. Truth be told, legislation teems with ambiguity: since it is written in common language there are no sections thus the extent of connectives, for example, "and" and "or" can be vague (legal drafters don't watch the numerical conventions in this regard). "Except if" is additionally equipped for a few translations, and legal designer never write "if and just if", despite the fact that this is frequently what they expect by "if". In maybe the soonest utilization of logic to show law in AI and Law, Layman Allen pushed the utilization of

\(^{23}\) See section 16 (1) and (2) of the TFEU.

propositional logic to resolve such syntactic ambiguities in a progression of papers.\(\text{25}\) In the late 1970s and all through the 1980s a noteworthy strand on AI and Law work included the creation of executable models of legislation. Starting in the LEGAL work of Ronald Stamper\(\text{26}\) the thought was to speak to legislation utilizing a formal language and to utilize this formalization (regularly with some kind of UI to assemble the certainties of a specific case) as the reason for a specialist system.

This ended up well known, mainly utilizing the Horn Clause subset of first request predicate math. Specifically, Sergot et al.\(\text{27}\) the portrayal of the British Nationality Act\(\text{28}\) did a lot to advance the methodology. Truth to be told, as later work appeared, this was an untypically suitable bit of legislation on which to utilize the methodology: it was new, thus had not been altered, generally straightforward and the majority of the ideas were non-specialized. Later work, for example, that on Supplementary Benefits,\(\text{29}\) demonstrated that bigger, progressively confounded (containing many cross-references, exemptions, counterfactuals, and regarding arrangements), legislation which utilized numerous exceptionally specialized ideas, (for example, commitment conditions) and which had been the subject of numerous corrections created a far less agreeable last system.

A few endeavors were made to enhance matters from a product designing point of view, particularly to deal with problems, for example, cross reference, confirmation and continuous correction. The utilization of progressive representations\(\text{30}\) was recommended to address the main problem, thus called isomorphic\(\text{30}\) portrayal was planned to address the other two. As the 1990s built up this strand of work turned out to be to a great extent assimilated in the advancement of formalizations of domain conceptualizations, (purported ontologism), which ended up prominent in AI following crafted by Gruber.\(\text{31}\) Early precedents in AI and Law incorporate Valente’s practical ontology\(\text{32}\) and the casing based ontology’s of Visser and van Kralingen.\(\text{33}\) Legal ontology have since turned into the subject of customary workshops at AI and Law


\(\text{30}\) T.J.M. Bench-Capon, F.P. Coenen, Isomorphism and legal knowledge based systems, Artificial Intelligence and Law 1 (1992) 65–86.
meetings and there are numerous models extending from conventional best dimension and centre ontology to quite certain models of specific bits of legislation. Since law contains sets of standards, it is obvious that duty or obligation logics have been attempted as the formal reason for models of legislation. These, in any case, have not been generally received as the reason for master systems, maybe on the grounds that master systems should implement the standards, though expressing duty or obligation logic happens to genuine intrigue just when we have to consider infringement of the norms. In law coordinated obligations, whereby a commitment is owed to another named individual are quite compelling, since infringement of such commitments is regularly the premise of legal proceedings. There is likewise some fascinating work consolidating obligation or duty and activity logics to investigate regulating positions. With regards to multi-specialist systems, standards have been displayed utilizing state transition graphs. Frequently, particularly with regards to electronic institutions, the standards so depicted are controlled (i.e., can't be disregarded), yet in different systems infringement are likewise dealt with, giving an increasingly faithful impression of genuine standards.

Law regularly concerns issues about time, both identifying with the substance, for example, eras and due dates, and those identifying with the law itself, for example, beginning. A few endeavors have been made to display these worldly logics utilizing both computational formalisms, for example, the Event Calculus and transient logics, for example, defeasible fleeting logic.

In any thought of the utilization of logic to demonstrate law, it should be borne in mind that law is inalienably non-monotonic, as is appeared by the rights of advance revered in every single legal system, and the manner by which understandings of the law change over time. Moreover, in the drafting of law

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special cases flourish, and, in the use of the law, precedents are upset and in addition pursued. In logic programming approaches, the negation of failure is frequently used to deal with non-monotonic, yet explicit non-monotonic logics, for example, defeasible logic have additionally been utilized. Following the advancement of unique argumentation, be that as it may, these worries have been tended to through argumentation as opposed to using non-monotonic logics.

VI ARTIFICIAL INTELLIGENCE IN THE LEGAL DOMAIN AND THE EXPANDING USE OF ALGORITHMIC DECISION MAKING

To give a definite structure in decision-making forms with the goal that they can be automated by algorithms has been an engaging thought for some legal scholars and practitioners for quite a while. The field of legal informatics has fretted about the numerous inquiries encompassing employments of AI in legal settings since its initial days. The International Association


As of now, in the primes of legal master systems during the 1990s saw that there are relatively mythological desires with regards

Ashley, 2017; Bench-Capon et al., 2012; Russell &Norvig, 2009.

Waltl, Bonczek, Scepankova, Landthaler&Matthes, 2017

Vogl,2017.

Herbert Fiedler

www.supremoamicus.org
to algorithmic decision-making. For the field of legal master systems, he talked about six unmistakable desires that individuals have with respect to ADM, including the accompanying two pertaining to the idea of explain ability:

- The ability to effectively comprehend and pursue learning portrayal, and
- The explain ability and straightforwardness of decisions.

Today, little consideration is given to the possibilities of utilizing pre-characterized rules dependent on deductive and ontological reasoning techniques that are the main techniques basic legal master systems as a method for explaining automated decision-making forms. Ebb and flow research on ADM is increasingly centered on the techniques of the machine learning field, instead of the more static and human-designed decision structures of legal master systems. By and by, it is significant that high-quality reasoning apparatuses, for example, the Oracle Policy Automation tool, are utilized by organizations all around the globe to speak to decision structures and to empower automated (legal) reasoning. Be that as it may, as Fiedler brings up, even the decisions of those handmade systems are difficult to comprehend and explain. In light of that, and in light of the pervasiveness of the opaque machine-learning based automated decision-making systems, more consideration regarding the genuine algorithmic preparing basic an automated decision is warranted.

VII

CHALLENGES AND OPPORTUNITIES OF APPLICATION OF ARTIFICIAL INTELLIGENCE TO LEGAL INFORMATICS

Artificial intelligence (AI), a term coined in the 1950s, is set to wind up, especially problematic particularly with regards to due diligence. By a long shot, one of the greatest barriers to its take-up is boundless industry distrust, particularly among the individuals who might in all probability benefit from its utilization. Numerous lawyers wonder why change is extremely important when what has dependably been done and is profitable still works. The degree of knowledge on the theme persuades that they can postpone integration of the right programming for a rainy day.

While it is comprehended that AI can benefit various platforms, for instance, failure by the legal sector to understand the esteem added to their very own line of work is broad. This is especially problematic when productivity, competitive preferred standpoint and representative fulfillment are all in danger.

There is likewise a tremendous absence of incentive to take up AI as law firms, specifically, give costly, hourly-based tailored counsel. The idea that technology can substitute a portion of the manual assignments performed on a daily premise, for example, document analysis and grouping, with shrewd workflows and decrease the general expense to a customer isn't really appealing. All things considered, the internet and increased hiring for in-house counsel jobs have put weight on law firms to perform under time constraints. The ascent

50 Fiedler 1990.
in the volume and scope of documents for the survey isn't helping matters either.

As the saying goes ‘amongst trouble lies opportunity’ In spite of the fact that a settled versus hourly pricing model is dubious, particularly with regards to evaluating the quantity of work to be conveyed, using intelligent programming to robotize due diligence can permit law firms to charge their customers for, and centre their endeavors around, providing progressively qualified and detailed legal counsel.

Also, Law and policy issues in legal informatics come from the utilization of instructive advancements in the usage of law, for example, the utilization of subpoenas for data found in email look inquiries, and interpersonal organizations. Policy ways to deal with legal informatics issues fluctuate all through the world; for instance, European nations will, in general, require annihilation or anonymity of data so it can't be utilized for discovery.\(^{52}\)

Be that as it may, there are different opportunities of AI to legal informatics, for example, helping due diligence specialists with sorting huge volumes of information in this manner supporting all gatherings involved in an exchange, to enable speed to up the document audit stage and potential territories of interest are featured. Process streamlining and hazard analysis are not by any means the only benefits. Application of AI to legal informatics can both enhance the dimension of the task the board embraced and in addition increase the quantity of exchanges law firms chip away at as their customers' activities turn out to be progressively reasonable to outsource. In addition, assigning the repetitive undertakings to a stage with AI capabilities would apparently better pull in and retain the top ability, an issue that has tormented the sector for a considerable length of time.\(^{53}\)

**VIII CONCLUSION**

Artificial intelligence is based on the doctrine of philosophical procedures and mathematical operations. Although it can be observed that machines outperform humans in many tasks, their decisions are rational and follow strict mathematical, i.e. rational, structural. Artificial intelligence is already seen and developed in online dispute resolution platforms that use optimization algorithms and blind-bidding.\(^{54}\) Artificial intelligence is also frequently employed in, the legal ontology, "an explicit, formal, and general specification of a conceptualization of properties of and relations between objects in a given domain".\(^{55}\)

Within the practice issues conceptual area, progress continues to be made on both litigation as well as transaction focused on various technologies. In particular, technology which is including predictive coding which in turn has the potential to effect substantial efficiency gains in law


\(^{53}\) https://www.raconteur.net/sponsored/application-ai-legal-sector-challenges-opportunities


practice. Though predictive coding has largely been applied in the litigation space, it is beginning to make inroads in transaction practice, where it is being used to improve document review in mergers and acquisitions. Other advances, including coding in transaction contracts, and increasingly advanced document preparation systems demonstrate the importance of legal informatics in the transactional law space.

Also, there are various legal technology startups that are attempting and have somewhat succeeded to create proprietary models to predict case outcomes; one example is LexMachina, a company that provides intellectual property data and analytics. It is to be noted that treating legal informatics as a field as a serious tool for changing the way people interact with the law may pave the way for radical innovations in areas of law that are seen as inherently static, top-down, and bureaucratic as well as increasing explain ability of machine learning techniques more generally, will not only increase the acceptance of ADM based on machine learning, but it will also allow system engineers to improve the classification mechanisms and the algorithmic decision making itself.

AI isn't light years away and to dispute generally is to cover the head in the sand and turn out to be a piece of a period that has travelled every which way. Failing to invest in AI will keep firms from competing in the market. A few industry players embracing technology are exploring the choices offered by AI and its capability to disturb all around practised business rehearses and optimizes forms. With the inescapable restructuring of the sector officially in progress, firms won't just get on board, however, guarantee their view of AI as an addition as opposed to a basic mostly the direct business changes. Underlying policies should be evaluated and the ensuing training of staff considered. The best down methodology with a firm's administration on board and understanding client needs will be entered in defining the degree and quality of implementation.

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UNDERSTANDING THE CONCEPT OF STATE SUCCESSION AND ITS LEGAL ISSUES

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ABSTRACT

The concept of perpetuity is not attributable to political entities. As a result of which, State successions have become a common phenomenon. State succession refers to the branch of international law which deals with the consequences of change of sovereignty over a given territory. When there is a change in the political sovereignty over a given territory, a number of issues with respect to international or municipal law may arise. This paper aims to highlight those issues. The paper attempts to diagnose the role that the international law plays in resolving the aforesaid issues. The paper intends to elucidate the difficulties that might rise when state succession takes place, in the background of the two international conventions namely, The 1978 Vienna Convention on the Succession of States in Respect of Treatises and the 1983 Vienna Convention on the Succession of States in Respect of Property, Archives and Debts. Finally, the paper concludes that the concept of state succession has been and still continues to be a highly politicized issue, and it has been influenced by its interactions with the other fields of law.

INTRODUCTION

State succession takes place when one state is definitively replaced by another state in respect of sovereignty over a given territory, and when such a replacement is in conformity with the international law. Replacement of this kind occurs due to a number of reasons such as dismemberment of an existing state, secession of part of a state, cession or annexation of territory, merger of states and decolonization. Succession occurs only in case of permanent displacement of sovereign power and not when there are temporary changes as a result of hostile occupation, agency, or exclusive possession of territory resulting from a treaty.

When state succession takes place, one can see that a number of issues arises as a result of it. Some of these are as follows: Is the successor state bound by the treaties entered into by the predecessor state? Whether the inhabitants of the predecessor state automatically acquire the nationality of the successor state? Do the international claims involving the predecessor state such as predecessor’s national debt etc, have any effect on the successor state or not? The intention behind using the phrase “State Succession” has always been to describe an “area”, and the use of the same does not give rise to any presumption regarding the transmission or succession of legal rights.

59 James Crawford, Brownlie’s Principles of Public International Law (Eighth Edition, Oxford University Press 2013) 423
60 Ibid.
61 Ibid.
and duties in a particular case. State succession as a concept is quite uncertain and controversial. In order to rectify the above issues, efforts have been made by the ILC towards codification of laws relating to the practice of State Succession. As a result of this, two conventions were formed namely: The 1978 Vienna Convention on the Succession of States in Respect of Treaties and the 1983 Vienna Convention on the Succession of States in Respect of Property, Archives and Debts. But unfortunately, the aforesaid treatises were victim of serious criticisms due to its departure from the well-established International Law. This is quite visible from the fact that the 1978 Convention came into force on 1996 and has 22 parties whereas, on the other hand, the 1983 Convention is still not in force. However, in the last two decades, there have been instances where the parties involved in the territorial transformation have relied on the provisions proscribed in the abovementioned conventions to resolve various controversial questions. When new states are formed as result of multilateral peace treaties, it has been observed that the parties often try to regulate the succession problems as part of the territorial rearrangement. For e.g. The responsibility of the successor states of Austro-Hungarian monarchy with respect to its Public Debts was clearly provided in the Treaty of St. Germain. Mostly, the subject matter of the agreements between the successor and predecessor states have been the devolution of treaty rights and obligations. One cannot deny that there is some sort of relationship between the form of territorial change and the transmissibility of rights and obligations. According to the doctrine of “moving treaties boundaries”, the transfer of territory form one state to another is presumed not to affect the existing treaties.

Also, one should not confuse the concept of state succession with that of state continuity. While the former deals with the replacement of a given territory from one state to another, the latter refers to cases the same state continues to exist. State continuity reflects stability in legal relations, and in case a state continues to exist, then the question of succession does not arise for that particular state, that is, the question of state continuity precedes that of succession.

The law relating to the succession of states is quite controversial and uncertain, but there are certain principles that have been recognized to have general application in most of the issues in this field. These are:

There is not automatic succession to a treaty by a new state, if the subject matter of such a treaty is closely linked to the relations of the predecessor state with other parties.

After succession, the new state automatically succeeds to all the treaties and legal situations created by them in respect of matters such as status of territory, boundaries, navigation of rivers etc.

\[\text{Ibid. at p.425}\]
\[\text{Ibid. at p.427}\]
\[\text{Ibid.}\]
\[\text{Ibid. at p.427}\]
\[\text{Ibid. at p. 366}\]
III. When a state has been acquired by another state, then mostly all the treaties entered into by the acquired state will either lapse or will require discussion regarding the fate of the same with the other party. But when the principal of the “Moving Boundary” is applied, all the treaties of the absorbing state extends to the absorbed state, and the treaties entered into by the predecessor state ceases to exist. However, if there is a true union of states such as Yemen, most existing treaties will continue to bind the successor state, and you can also see this approach under art.31 of the 1978 Convention.

IV. There is no automatic succession by the new state in respect of multilateral treaties. Many theorists have argued that those treaties which embody accepted principles of international law, are binding on the successor states by the virtue of the principle of acquired rights or vested rights of the inhabitants of the state.  

V. There is no automatic succession by the new state in respect of bilateral treaties, except in matters of territorial treaties and suchlike as mentioned above.

STATE SUCCESSION AND ITS LEGAL ISSUES

State succession gives rise to a number of issues with respect to the Municipal law. Some of them are: (a) the fate of the property belonging to the ceding or former state, (b) the continuity of the legal arrangement, (c) Private property rights, and (d) issues of nationality. It is presumed that the Municipal law of the predecessor state continues to be in force until changes are made by the new sovereign. This is also known as the principle of Vested or Acquired rights, which states that change of sovereignty does not affect the acquired or vested rights of a foreign national. The Tribunals have also affirmed the aforesaid principle. But, at the same time, it also gives rise to a lot of confusion and questions, as the same serves as a basis to a variety of propositions. Some feel that the principle does not allow the private rights to get affected by the change of sovereign, while others see it as some kind of a limitation on the powers of the successor state in respect of the private rights of the aliens in addition to the established principles of international law, which regulates the treatment that is meted out to the aliens in cases not involving succession. The new sovereign is awarded the same sort of sovereignty that the transferor possessed before state succession which includes powers related to legislature, jurisdiction etc., and also the continuity of the old law depends on the consent of the new sovereign. Thus, the principle tries to promote the interests of the individuals by protecting their acquired rights from being affected to large extent due to change in sovereignty, and states that the alteration or termination of such rights must take place in conformity with the minimum standards of international law.

(A) STATE PROPERTY

Supra at note 1 at p.429

Ibid.
The accepted practice is that succession in matters relating to public property of the predecessor state, which is situated on the territory in question, is a principle of international customary law, and the same finds support from the jurisprudence of the Permanent Court of International Justice.\(^{77}\) Another way of looking at it would be to say that the principle gives rise to an assumption that the acquisition of the state property is inherent in the grant of territorial sovereignty and should be viewed as a natural consequence of such grant. This position has been affirmed by the 1983 Vienna Convention on the Succession of States in Respect of Property, Archives and Debts.\(^{78}\) It has been observed that partition of state property among the successors may give rise to difficulties, which are mostly resolved by negotiations and bilateral agreements based on the principle of equity. There may be conflicts with respect to opinions regarding the form of change in sovereignty for the purposes of governing the succession of property, and in some cases regarding the very definition of the phrase “state property.” For e.g. After the USSR’s break up, there were questions regarding the division of nuclear forces and other military property, which required immediate attention, as there was significant deviation from both the principles of territoriability and equity.\(^{79}\) But after a lot of negotiation and guarantee of compensation, they eventually reached to an agreement that Russia would continue to control all the nuclear weapons, whereas other members of the Commonwealth of Independent States, that is, Belarus, Kazakhstan and Ukraine, in whose territories the nuclear weapons were situated, would agree to total nuclear disarmament.\(^{80}\)

(B) CLAIMS RELATING TO PUBLIC LAW AND PUBLIC DEBT

From the above discussion, it is clear that the successor state has the right to take up the fiscal claims belonging to the predecessor state with respect to the territory in question. There has been a lot of controversy regarding the fate of the public debt of the replaced state, and it must be noted that there’s no well-established rule with respect to the same. However, theorists have believed that in cases involving annexation or dismemberment (as opposed to cession), the successor state is bound by the public debts of the extinct state.\(^{81}\) But in practice, it has been observed that the municipal courts will enforce the debts belonging to the predecessor state against the successor state only after the latter has recognized the same, and such recognition can take the form of unqualified continuation of the legal arrangement under which the obligation arises. The 1983 Vienna Convention on the Succession of States in Respect of Property, Archives and Debts provides for the transfer of the public debts to the successor state with reduction to an equitable proportion, and the same is be followed as the general norm in cases involving transfer of part of a state, dissolution of a state or succession (Art. 36, 37, 39 to 41).\(^{82}\) However, the above principle has no application in cases where the successor state is a newly independent

\(^{77}\)Ibid. at p. 430

\(^{78}\)Ibid.

\(^{79}\)Ibid. at p. 431

\(^{80}\) Ibid.

\(^{81}\)Ibid.

\(^{82}\)Ibid. at p.432
state. In such cases, the public debt will not pass, unless there is an agreement regarding the same (Art. 38). But the distinction between the successor state and a newly independent state has been a problematic one, especially with respect to its Categorical effects.

(C) STATE CONTRACTS AND CONCESSIONS

Like in cases of all rights acquired by the predecessor under the municipal law, the rights arising out of state contracts and concessions are also subject to changes by the new sovereign. However, many theorists state the principle that the rights acquired by a concessionaire must be respected by the successor. Also, there have been certain confusions regarding the selection of concessions which are going to be beneficiaries of the above principle, which may be related to other matters such as contracts of employment, pension rights etc. It is necessary that the judiciary while upholding the principle that a mere change of sovereign does not cancel the concessions, rights, do not propound the doctrine of acquired rights in manner that after the old sovereign has been replaced by a new one, all the rights of the aliens over the property acquired before such a change is maintained by the new sovereign. In short, a territorial change itself does not cancel or confer any special status on the private right, and they do not gain any immunity after the succession, but they will continue to be subject to the international minimum standard of protection.

(D) NATIONALITY

State succession also creates problems with respect to the nationality of the inhabitants of the transferred territory. However, the law of succession has not been very helpful in resolving the same. Many came out in support of the view that the population should follow the change of sovereignty in matters of nationality, and it is not surprising to find works of authorities stating the same. However, this view has received a lot of criticism, especially by Weis, who said that there is no such rule under international law which permits the nationality of the predecessor state to acquire the nationality of the successor state, and one cannot assume International Law to have such a direct effect. So, according to Weis, the presumption that the state will confer their nationality to the former nationals of the predecessor state will hold true only if there is no statutory provisions of municipal law regarding the same. But he failed to realize the fact that if the international law can create a presumption, then it can create a rule. There is also uncertainty regarding the fate of the nationality of those nationals of the predecessor state, who at the time of transfer, are residing outside the territory of the sovereignty of which changes. In such cases, the general rule has been that unless the nationals of the predecessor state possess a domicile in the transferred territory, they do not acquire the nationality of the

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83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid. at p.433
88 Ibid.
89 Ibid. at p.434
90 Ibid. at p.435
successor state. The intention behind having such a rule is that the person whose nationality is in question must have a substantial connection with the territory concerned either by citizenship or by residence in that given territory. One must remember that when the word “sovereignty” is used with respect to a state, it denotes certain responsibilities of a state towards its population. So, a mere change of sovereignty does give the new sovereign the right to dispose of the population at its discretion. It is presumed that the population follows the territory. The position is that the population has a local or territorial status, which remains unaffected whether there is a partial or universal successor, or whether there is a cession or a relinquishment by one state followed by disposition by an international authority. Also, in cases where the state claims continuity, the results are not very different than in cases of succession.

CONCLUSION

The recent state successions have highlighted the attempts that have been made to re-engage with the law of state succession in a different political and historical background. Most of these successions were based on consistent state practices that have been accumulated over the past two decades. Laws relating to state succession has always been a highly politicized issue, and it has been influenced by its interactions with the other fields of law. But, despite all of this, one cannot rule out the possibility of discerning certain legal principles or rules. Many critics of the law of state succession have argued that the field of state succession is mostly dominated by the politically motivated agreements rather than generalized rules, and they believe that such successions mostly depend on the will of the new states, and recognition by other parties rather than the general rules of automaticity.

91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid. at p.436
95 Ibid.
96 Ibid.
97 Ibid. at p.444

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APPOINTMENT OF JUDGES IN HIGHER JUDICIARY- A CRITICAL REVIEW OF THE CONSTITUTIONAL PROVISIONS

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ABSTRACT
The cardinal pillars of Indian democracy are Legislature, Executive and Judiciary. The powers and functions of these organs are clearly laid down in the Constitution. For a democracy to work at it’s best in order to sustain fundamental freedoms, independence of judiciary is sin qua non for the same.Though, the principle and policy of judicial independence rest on various pillars, appointment of judges is the central pillar of the edifice. Bare independence of the judiciary would assure healthy working of democracy in the country. This paper critically examines the constitutional provision of appointment of judges in higher judiciary. It also throws light upon the various legislations brought to overcome the challenge of fair appointment of judges.

INTRODUCTION
No democracy can flourish without an independent judicial system, a system free from fear or favour, or Mala fide intention, a system isolated from other branches of government. The Constitution of India under Article 124 and Article 217 lays down the provisions for the appointment of judges in the Supreme Court and High Courts respectively.

Article 124(2) of Constitution of India deals with the appointment of Supreme Court judges and reads as, Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal and shall hold office until he attains the age of sixty-five years.98 Article 217(1) of the Constitution of India deals with the appointment of High Court Judges and reads as, Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal shall hold the office until he attains the age of sixty-two years.99

RESEARCH OBJECTIVES
a) Is there a need of National Judicial Appointment Commission to ensure free and fair appointment of judges in higher judiciary?
b) Is the status quo of the appointment of judges in higher judiciary, just and in favour of the healthy working of the democracy?

APPOINTMENT OF JUDGES AND CONSTITUTIONAL PROVISIONS
The forefathers of the Indian Constitution constructed the Constitution in a way that neither gives blank cheque to the legislature nor is a cumbersome method which may give rise to the possibilities of subjecting the judicial appointment to political influence and pressure.100 The Indian method as lays down in article 121(2) neither gives absolute authority to the executive nor does it permit the parliament to influence appointment of judges. The executive required to consult persons who are well qualified to give

98 India Consti. Art. 124, cl. 2.
99 India Consti. Art. 217, cl. 1.
100 www.droitpenaleiljcc.in/PDF/V11I/11.pdf
proper advice to this regard.\textsuperscript{101} The system of appointment of judges has gone through various changes in order to attain such efficient system. The Supreme Court has played an important role in making such changes.

**Appointment of judges to the Supreme Court**
The Judges of Supreme Court are appointed by the President, although this power of the President is not unfettered. The constitution paves the way for President to seek consultation from such other judges of the higher judiciary, as he may deem necessary. The process of appointment of a judge of the supreme court is initiated by the Chief Justice of India through a collegium consisting of himself and four other senior most judges of the Supreme Court. The recommendation of the collegium is further sent to the President which is a binding recommendation. Over the years, a convention has developed that the senior most judge would become the Chief Justice whenever the vacancy arose.

**Appointment of judges to the High Courts**
The judges of the High Courts are appointed by the President after consulting the Chief Justice of India, governor of the state concerned and in case of appointment of a judge other than the Chief Justice of the High Court, the Chief Justice of the High Curt to which the appointment is to be made.\textsuperscript{102}

**Appointment of Judges in Higher Judiciary and Judicial Interpretation**
The appointment of judges in The Supreme Court and High Courts has been a matter of incompatibility between the judiciary and the executive over the years. It is crucial for securing the independence and objectivity of the judiciary that selection of judges in High Courts and the Supreme Court is done on the basis of merit and competency and any extra political influence in the appointment shall be eliminated. It is the constitution obligation of the court to keep check on the executive imposing undue influence in appointment of judges. The constitution merely says that the President will appoint Supreme Court judges in consultation of the Chief Justice of India and such other judges of the Supreme Court, as he may deem necessary.\textsuperscript{103} From the above provision it was not clear as to whose opinion was finally to prevail in case difference of opinion rises among the concerned people. This question was considered by the Supreme Court in several cases.

**S. P. Gupta v. Union of India**\textsuperscript{104}
In S. P. Gupta v. Union of India also known as the first judge’s case decided on 30/12/1981 by seven judge bench by majority held that Article 124(2) and 217(1) speak of consultation and not concurrence and therefore it was for the Union Government to consider the opinion given by the Constitutional Functionaries and to arrive at its own decision on the appointment or non-appointment. It was

\textsuperscript{102} India Const., Art. 217 (1).
\textsuperscript{103} INDIA CONST., Art. 124 (2).
\textsuperscript{104} A.I.R. 1982 SC 149.
further held by Justice Bhagwati that the power of appointment resides solely and exclusively in the President and the Central Government could override the opinion given by the Constitutional functionaries.

**Subhash Sharma v. Union of India**

The decision of Supreme Court in S. P. Gupta v. Union of India was criticised by the Supreme Court in the case in hand. The Supreme Court in this case emphasised that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The bench expressed the view that the role of the Chief Justice of India be recognised as of crucial importance in the matter of appointment to the Supreme Court and High Court of the states. The Supreme Court said that primacy be given to the views of the Chief Justice of India in the matter of selection of judges to the Supreme Court and High Courts. This would improve the selection of judges.

**Supreme Court Advocate-on-Record Association v. Union of India**

The Supreme Court in this case gave a wider meaning to the constitutional provision relating to the appointment of judges to the higher judiciary. The word ‘consultation’ in article 217(1) was given a wider meaning. The majority supported that the main concern of the Constitution is the selection of the most suitable persons for the higher judiciary. The Supreme Court held that, “In the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight as he is best suited to the worth of the appointee.” The court also expressed that the initiation of the proposal for appointment of the High Court judges must be by the Chief Justice of the concerned High Court.

**NATIONAL JUDICIAL APPOINTMENT COMMISSION**

The parliament passed the 121 Constitutional amendment Bill 2014 with a view to replace the collegium system with regard to the appointment of judges to the Supreme Court and High Court. The bill sought to enable equal participation of judiciary and executive and ensured that the appointment to the higher judiciary is more participatory, transparent and objective. The bill amended article 124 (2) of the Constitution to provide a commission to be known as the National judicial Appointment Commission (NJAC).

**Composition of NJAC**

The NJAC would consist of six members out of which Chief Justice of India as a chairperson, two senior most judges of the Supreme Court, union minister of law and Justice, two eminent persons (to be nominated by a committee consisting of Chief Justice of India, prime minister of India and leader of opposition in Loksabha). Of these two eminent persons, one person would be from SC/ST/OBC or minority community or a woman. These eminent persons to be nominated for a period of three years and shall not be eligible for re-election.

**Functions of National Judicial Appointment Commission**

The bill assigned following functions to the National Judicial Appointment Commission:

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• Recommending persons for appointment as Chief Justice of India and other judges of the Supreme Court.
• Recommending transfer of Chief Justice and other judges of the High Court’s from one High Court to another.
• Ensuring that the persons recommended are of ability and integrity.

National Judicial Appointment Commission struck down as unconstitutional

The validity of National Judicial Appointment Commission (NJAC) was challenged before the Supreme Court in Union of India. In a landmark judgment, a five-judge’s bench of Supreme Court by 4:1 majority struck down the 99 Constitutional amendment as ultra vires to Constitution. The bench held that NJAC sought to interfere with the independence of the judiciary, of which appointment of judges and primacy of the judiciary in making such appointments was indispensable. However, Justice J. Chelemaswar, gives a dissenting judgment and held that the ever-rising pendency of cases warranted a “comprehensive reform of the system” and upheld the validity of NJAC. Differing with the majority, he said that primacy of the Chief justice of India is not a basic structure of the Constitution and judiciary’s power over appointments was not the only means for the establishment of an independent and efficient judiciary.

CONCLUSION

It is a well-known fact that the independence of judiciary is the basic requisite for ensuring a free and fair exercise of powers by the different organs of the Government in a democratic system. The framers of the Indian Constitution at the time of framing of our Constitution were concerned about the kind of judiciary they want to have. This concern of the members was responded by Dr. Ambedkar in the following words: “There can be no difference of opinion in the house that our judiciary must be both independent of the executive and must be competent in itself.” However, a controversy always lies between the judiciary and the executive over the appointment of judges from the outset of the Constitution. This controversy is the outcome of follies committed by both these organs in the past. After independence, the judges of the Supreme Court were previously judges of High Courts with the senior most of them taking over as Chief Justice of India. In 1958, the Indian commission of India found that this process did not take merit into account. In 1973, the then Prime Minister interferes with the existing framework and appointed Justice A.N. Ray as Chief Justice of India, superseding three senior judges to him. After this in 1975, again Justice H.M. Beg was appointed Chief Justice of India, superseding Justice Khanna. The judiciary stung by such blatant misuse of powers, got an opportunity in the judge’s cases in 1981, 1993 and 1998 to get it right. As a result of the judge’s cases, the collegium system came into existence. It has almost ended the role of executive in the appointments to the higher judiciary. What the Indian judiciary has achieved today with regard to the appointment of judges, no judiciary has such freedom to appoint judges elsewhere in the world. The strick down of NJAC was a vital step in order to prohibit potential political influence and encroachment in appointment of judges. NJAC would create loopholes for the negative influence in appointing judges of higher Judiciary. It could not ensure
independence of the judiciary hence was in conflict with the basic structure of the the constitution. The status quo of the appointment of judiciary entertains insignificant political influence and hence is beneficial for the working of the Indian Judiciary.

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INTENTION TO CREATE LEGAL RELATIONSHIP IN COMMON LAW

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Introduction

Beside offer, acceptance, and consideration, the last element for a contract to be gone into which is enforceable at law is that the parties must have an intention to create legal relations. Without it there is no binding contract. Under UK law, an agreement supported by consideration isn't sufficient to make a lawfully binding contract; the parties should likewise have an intention to create legal relations. Frequently, the intention to create legal relations is explicitly expressed by the contracting parties. In different circumstances, the law will promptly infer the intention, on account of the idea of the business dealings between the parties. By and large it is accepted that in social and local sort of agreements this kind of intention is missing, however parties to plan to create legal relations in business arrangements. It is expected that this doctrine was not clearly settled until 1919.

On the other hand, it tends to be said that the depends depends on public policy ; in other words that, as an issue of approach, the law of contract should not mediate in household circumstances on the grounds that the courts would then be overwhelmed by piddling domestic question. We can have a case of it; I guarantee to pay my better half £50 in the event that she will type the original copy of this part of the paper. My better half concurs. Does this arrangement make a legally enforceable contract? On its substance there has all the earmarks of being no motivation behind why it ought not. We have achieved arrangement and the arrangement is bolstered by consideration. In any case, almost certainly, an English Court would presume that we had not gone into a legally binding contract since we did not have 'any intention to create legal relations', which has been held to be a fundamental component in any contract. (1)

One might say that the tenet depends on the expectation of the parties , impartially deciphered; in other words, my better half and I didn't mean that our arrangement would have lawful outcomes. In any case, my better half surely expected to get the cash in the event that she typed the paper, in spite of the fact that it is impossible that neither of us proposed that she would need to go to court so as to get her cash.

Scottish Law Commission in 1977 states that:

it is, in general,I right that courts should not enforce entirely social arrangements, such as arrangements to play squash or to come to dinner, even though the parties themselves may intend to be legally bound thereby”.

Also Section 4 of Singapore Contract Act explicit the requirement of Intention to Create Legal Relation-

“In the absence of contractual intention, an agreement, even if supported by consideration, cannot be enforced. Whether the parties to an agreement intended to create legally binding relations between them is a question determined by an objective assessment of the relevant facts.

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Commercial Arrangements—On account of agreements in the business context, the courts will by and large assume that the parties proposed to be lawfully bound. Be that as it may, the assumption can be dislodged where the parties explicitly proclaim the opposite expectation. This is regularly done using honor provisions, letters of intention, memorandum of understanding and other comparable devices, in spite of the fact that a definitive end would depend, not on the mark appended to the document, however on a target evaluation of the language utilized and on all the chaperon realities.

Social Arrangements—Australian Contract Law identifying significance of social arrangements separated it from consideration following words-

"For an agreement to exist the parties to an arrangement must mean to make legitimate relations. More often than not, the fairness of consideration will give proof of this – if the promisor has indicated something as the cost for the guarantee this – by and large – conveys with it a intention l that the parties be bound. Expectation remains, in any case, a free necessity and must be independently exhibited and there are cases in which consideration has been available yet no agreement found to exist since this precondition has not been satisfied. In deciding whether there is authoritative plan and target approach is taken.

While surveying each case the courts used to apply certain assumptions to various sorts of agreement; in this way, ordinarily, household or implicit arrangements were assumed not to have been made with an expectation to create legal relations and business arrangements were dared to have such aim. As of late, notwithstanding, the High Court in Australia has shown that assumptions ought not be utilized while deciding aim – for each situation intention must be demonstrated without the guide of such assumptions."

Family and domestic Arrangements

In local courses of action it is commonly expected that the parties don't plan to create legal relations. In numerous local agreements, for instance those made among married couples and guardians and youngsters, there is no expectation to create legal relations and no intention l that the agreement ought to be liable to prosecution. Familial connections don't block the development of a binding contract, however to create legally binding relations, there must be an unmistakable intention on either party to be bound.

When assessing each case the courts used to apply certain presumptions to different types of contract; thus, typically, domestic or social contracts were presumed not to have been created with an intention to create legal relations and commercial agreements were presumed to have such intention, it appears to be settled that in domestic contracts there is a rebuttable assumption that the parties don't have expectation to create legal relations.

Much significance is given to the arrangement that private existences of the residents ought to be shielded from an
excess of impedance from the courts. Chen-Wishart calls this 'Opportunity from contract.' Adams and Brownword thusly effectively express that the "authorizing" nearness of courts may restrain social connections.' There are a few points which could be made here – recall that when the courts discuss aim, they only occasionally mean the genuine intention of the parties – proof concerning the mental aura of the parties would not be viewed as applicable. What the judges are keen on is a sensible derivation from the activities of the parties – a intention test. Now often, what is a reasonable inference will tell you lots more about the person who is doing the inferring than it will about the state of mind of the persons who are the subject of the discussion.

**Balfour v Balfour[2]**

**Facts** – Mr Balfour was a structural designer, and worked for the Administration as the Chief of Water system in Ceylon (presently Sri Lanka). Mrs Balfour was living with him. In 1915, they both returned to Britain amid Mr Balfour's leave. However, Mrs Balfour got rheumatic joint inflammation. Her specialist exhorted her to remain, in light of the fact that a wilderness atmosphere was not helpful for her wellbeing. As Mr Balfour's watercraft was going to set sail, he guaranteed her £30 per month until she returned to Ceylon. They floated separated, and Mr Balfour composed saying it was better that they stay separated. In Walk 1918, Mrs Balfour sued him to stay aware of the month to month £30 installments. In July she got an announcement nisi and in December she got a request for divorce settlement.

The Court held that there was no enforceable contract, in spite of the fact that the profundity of their thinking contrasted.

**Warrington LJ** conveyed his supposition first, the center part being this entry,

The matter really reduces itself to an absurdity when one considers it, because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife on the other hand, so far as I can see, made no bargain at all. That is in my opinion sufficient to dispose of the case.”

At that point **Duke LJ** gave his conclusion

“In the Court below the plaintiff conceded that down to the time of her suing in the Divorce Division there was no separation, and that the period of absence was a period of absence as between husband and wife living in amity. An agreement for separation when it is established does involve mutual considerations.

That was why in Eastland v Burchell 3 QBD 432, the agreement for separation was found by the learned judge to have been of decisive consequence. But in this case there
was no separation agreement at all. The parties were husband and wife, and subject to all the conditions, in point of law, involved in that relationship. It is impossible to say that where the relationship of husband and wife exists, and promises are exchanged, they must be deemed to be promises of a contractual nature. In order to establish a contract there ought to be something more than mere mutual promises having regard to the domestic relations of the parties. It is required that the obligations arising out of that relationship shall be displaced before either of the parties can found a contract upon such promises…………….”

Lord Justice Atkin adopted a fairly extraordinary strategy, underlining that there was no "intention to effect legal relations". That was so on the grounds that it was a household arrangement among a couple, and it implied the onus of evidence was on the offended party, Mrs Balfour. She didn't invalidate the assumption.

Be that as it may, this frame of mind towards social agreements appears to have changed these days. Freeman classifies Balfour v Balfour as a 'Victorian Marriage' and sees the marriage of today 'less regulated' and 'more subordinate upon individual choice.' For him 'Marriage has turned into an 'individual instead of a social organization.' He argues for an adjustment in the treatment of assumptions in household circles.

The assumption that the parties to domestic agreements don't expect to make legal relations can be disproved in various distinctive ways. There is no limited rundown of techniques by which the assumption can be countered. There are, in any case, a couple of limitations on the sort of proof that can be driven. Specifically, the parties can't lead proof of their own emotional however that is a general relational word of contract law and is no kept to the present setting.

While or not the assumption has been disproved at last relies on the realities of the case, the cases in which the assumption has been refuted show some regular highlights. In any case the setting in which the arrangement was finished up has regularly been a factor in influencing the court to disprove the assumption. For instance, where the connection between the parties is moving toward the purpose of separate the courts are bound to reason that there was an aim to make legal relations.

Furthermore, the assumption might be refuted where the parties have acted to their inconvenience in dependence upon the agreement that hosts been closed between the parties. This factor does not generally get the job done to disprove.

Jones v. Padavatton,[3]

This case (Jones v. Padavatton [1969] 1 WLR 328 like Balfour shows that domestic arrangements, however complex, unpredictable, are assumed not to make contracts, unless there is clear indication to the contrary. Unlike the prior cases, however, the multifaceted nature and accuracy of the courses of action in this one implied that the actualities had at any rate to be considered, as opposed to being rejected as "outside the realm of contracts".
**Facts:** Mrs Jones offered to pay for her daughter, Mrs Padavatton, to study law on the off chance that she (daughter) left the USA and came to Britain. This she did. The mother at that point purchased a house in London which the little girl lived in; her upkeep was paid from the rents of different inhabitants.

Inevitably mother and daughter dropped out, and Mrs Jones made a move to recover ownership of the house. It was decided that in spite of the fact that the conditions were to such an extent that she couldn't have done this if the inhabitant had been anybody other than her little girl, there was no proof to demonstrate that the case overruled the standard presumption that household courses of action are not contracts.

**Judgment** - The Court held that there was no binding contract but there would have been a contract if it was not the domestic parties related, there was insufficient evidence to rebut the presumption against domestic arrangements.

**Salmon, L.J.** said in his judgment,

“The parties cannot have contemplated that the daughter should go on studying for the Bar and draw the allowance until she was seventy, nor on the other hand that the mother could have discontinued the allowance if the daughter did not pass her examinations within, say, 18 months. The promise was to pay the allowance until the daughter's studies were completed, and to my mind there was a clear implication that they were to be completed within a reasonable time. Studies are completed either by the student being called to the Bar or giving up the unequal struggle against the examiners. It may not be easy to decide, especially when there is such a paucity of evidence, what is a reasonable time. The daughter, however, was a well-educated intelligent woman capable of earning the equivalent of over £ 2,000 a year in Washington. It is true that she had a young son to look after, and may well (as the learned judge thought) have been hampered to some extent by the worry of this litigation. But, making all allowance for these factors and any other distraction, I cannot think that a reasonable time could possibly exceed five years from November 1962, the date when she began her studies.”

**DANCKWERTS, L.J.**

“There is no doubt that this case is a most difficult one, but I have reached a conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements. Balfour v. Balfour n(3) was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother. This, indeed, seems to me a compelling case.”

**FENTON ATKINSON, L.J.**

“At the time when the first arrangement was made, the mother and the daughter were, and always had been, to use the daughter’s own words, “very close”. I am satisfied that neither party at that time intended to enter into a legally binding contract, either then or
later when the house was bought. The daughter was prepared to trust the mother to honour her promise of support, just as the mother no doubt trusted the daughter to study for the Bar with diligence, and to get through her examinations as early as she could. It follows that in my view the mother’s claim for possession succeeds, and her appeal should be allowed. There remains the counterclaim. As to that I fully endorse what SALMON, L.J., has said as to the manner in which that should be disposed of."

Be that as it may, cases can be found in which it has worked to refute the assumption.

**Parker v Clark[4] (1960)**

This case (Parker v Clark) exhibits that albeit domestic arrangements are accepted not to make lawful binding contracts (see: Balfour v Balfour 1919, Jones v Padavatton 1969), at times this presumption might be overruled by the realities. For this situation the game plan significantly affected the lives of the influenced parties, and some would have been altogether burdened if the course of action had not been authorized.

Mrs and Mrs C welcomed their niece and her better half (Mr and Mrs P) to live in their home free of lease, as a byproduct of domestic help. The Ps sold their home and moved in. Afterward, the Cs endeavored to remove the Ps, and the Ps made lawful move to keep this. The court held that for this situation the seriousness of the circumstance permitted the arrangements between the Ps and the Cs as a contract.

**Devlin J. expressed**

" I can't accept… .. that the litigant truly figured the law would abandon him at freedom, on the off chance that he so pick, to tell the offended parties when they arrived that he has altered his opinion, that they could their furnishings away… … I am fulfilled that an arrangement authoritative in law was expected by the two parties "

However, the position may well have been distinctive had the parties dropped out before the offended parties acted to their inconvenience by selling the house and moving in with the defendants. On such facts a court may well have concluded that the parties did not intended to go into a binding contract. This proposes there might be a distinction among executed and executory arrangements.

On the off chance that we talk about the relations of a couple, at that point for the most part it is expected that there is no contract between them however circumstance might be diverse when they are isolated. The issue was considered in

**Merritt v Merritt[5],**

Facts– The couple were hitched in 1941 and had three kids. In 1966, the spouse wound up connected to another lady and left the wedding home to live with her. Around then, the wedding home, a freehold house, was in the joint names of the couple, and was liable to an extraordinary home loan of some £ 180. The spouse squeezed the husband to make courses of action for the future, and on 25th May 1966, they met and
talked the issue over in the husband's car. The husband said that he would pay the wife £40 per month out of which she should make the remarkable home loan installments on the house and he gave her the structure society contract book. Before leaving the vehicle the spouse demanded that the husband should explicitly state down a further arrangement, and on a bit of paper he composed: In consideration of the fact that you will pay all charges in connection with the house... until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property in to your sole ownership. The husband consented to and dated that arrangement, and the wife removed the bit of paper with her. In the next months she satisfied the home loan, incompletely out of the spouse's regularly scheduled installment to her and halfway out of her own profit. At the point when the home loan was satisfied the spouse would not exchange the house to the wife.

Court Held that — The written arrangement of 25th May 1966, was proposed to make legal relations between the part in light of the fact that the assumption of reality against such a intention where arrangements were made by a couple living in amity did not have any significant bearing to courses of action made when they were not living in harmony but rather were isolated or going to isolate, when (per Ruler Denning MR at p 762 ) it may securely be assumed that they intended to create legal relations; the encompassing conditions in the present case demonstrated that the parties did as such mean; in like manner, the wife was qualified(entitled) to sue on the agreement , and it being adequately sure and there being great thought by the wife satisfying the home loan, she was qualified for a presentation that she was the sole proprietor of the house and to a request that the husband joining in exchanging it to her.

A similar assumption applies to social arrangements.

Coward v. Motor Insurers Bureau[6]

In this issue Mr. Coward and Mr. Cole were work partners who had an arrangement with regard to shared lifts to work. Cole would drive his motorbike and Coward would ride pillion as a byproduct of a week after week aggregate of cash. Shockingly both were executed in a street car crash and the spouse of Mr. Coward made a case for harms against the estate of Mr. Cole. However Cole's insurance policy did not cover pillion travelers and as his domain had no assets or cash to satisfy the judgment, Mrs. Coward sought after the Motor Insurers Bureau (MIB).

The MIB have an agreement whereby accidents and consequential claims would be satisfied by the government in conditions where the driver has no pertinent policy of insurance. Anyway the principles covering this circumstance require Mr. Weakling was conveyed for "hire or reward". Thus Mrs. Coward needed to demonstrate that there was a contract set up among Coward and Cole for the lifts to work.

There was plainly an offer of transport and this was accepted. Moreover the consideration exchanged by the parties was
service of transport and the cash paid by Mr. Coward. However there was a question over how formal this course of action was in order to add up to a intention to create legal relations. Indeed this issue advanced to the Court of Appeal and it was chosen that despite the customary installment of cash as a byproduct of the lift, it was not all that formal as to make an agreement. There were no terms regarding to what extent this was to last, what might occur in default of installment or the accessibility of transport, or anything recorded in order to in any event make their expectation unmistakable.

The act of associates sharing a lift to work (or "vehicle pooling") is an accepted and widespread practice. Parties will normally concur that one will take their vehicle and consequently the others will make a commitment towards the petroleum costs. This is normally a matter of accommodation, decreasing expenses or even a cognizant choice to lessen emanations from each independently taking a vehicle. It can't be said anyway that the arrangement is so formal as to frame an agreement for the arrangement of this administration. The complexity is to a past precedent, that of open transport. There are no tickets, conditions or terms of agreement and no business or benefit making association is included. There can be no commitment upon individuals in this situation to guarantee that vehicle is constantly made accessible to the party that pays. What might happen when the proprietor of the vehicle went on vacation or there was a move change? In these conditions a component of good judgment must become an integral factor. The vast majority will make casual arrangements going from vehicle pooling to grabbing youngsters from school or notwithstanding being the assigned driver on a night out. None of these make an agreement as the intention is one of casual help or a shared advantage, not to create legal relations.

In Hadley v Kemp[7] (the Spandau Ballet case) that even if only one group member was credited for the as the composer of all the songs, a joint authorship could be established by showing a “significant and orignial contribution to the creation of the musical work”.

Business / Commercial Arrangements

Business Arrangements vary from domestic and social agreements in that the assumption works the other way. It is here that there is an extremely solid assumption that there is an expectation to make legal relations. For anybody to go along after they have made a common business contract and contend that there was no aim to make legal relations would squander their time. For such a contention to prevail there must be an exceptionally clear and unequivocal proclamation. One manner by which this can happen is if parties who are consulting for an agreement need to ensure that their dealings don't coincidently turn into an agreement. We saw this issue before when we inspected. On account of business exchanges the courts assume that the parties intended to make lawful relations and the assumption isn't a simple one to uproot. The quality of the assumption is with the end intention that the issue infrequently emerges in business case. One case in which it did emerge, and which delivered a division of legal sentiment, is the choice of the Place of

Esso Petroleum Ltd v Commissioners of Customs and Excise[8]

In 1970 the citizens (‘Esso’) devised a petroleum sale promotion scheme. The scheme included the circulation of a large number of coins to oil stations which sold Esso oil. Every one of the coins bore the similarity of one of the individuals from the English soccer crew which went to Mexico in 1970 to play On the planet Glass rivalry. The object of the plan was that petroleum station owners ought to urge drivers to purchase Esso oil by offering to give away a coin for each four gallons of Esso oil which the driver purchased. The mint pieces were of minimal natural esteem however it was trusted that drivers would continue purchasing Esso oil so as to gather the full arrangement of 30 coins. The plan was broadly promoted by Esso in the press and on TV with expressions, for example, ‘Going free, at your Esso Activity Station now’, and: ‘We are giving you a coin with each four gallons of oil’. Organizers were likewise caused by Esso to oil stations which expressed, entomb alia: ‘One coin ought to be given to each driver who purchases four gallons of oil – two coins for eight gallons, etc.’ 4,900 oil stations joined the plan. Extensive notices were conveyed by Esso to those stations, the most unmistakable lettering on the blurbs expressing: ‘The World Container coins’, ‘One coin given with each four gallons of oil’. The Traditions and Extract Officials guaranteed that the coins were chargeable to buy charge under s2(1) of the Buy Expense Act 1963 on the ground that they had been ‘created in amount for general deal’ and consequently fell inside Gathering 25 of Sch 1 to the 1963 Demonstration.

Court Held that:

Lord Simon of Glaisdale

In the clearly commercial context in which the offer of the coins was made, it cannot be accepted that Esso did not intend to create legal relations. It is undesirable to allow commercial operators in such situations to say that their offer was a mere puff. While the coins may have little intrinsic value, Esso clearly anticipated that they would have value to their customers, otherwise the promotion would not be worthwhile. What sort of transaction was entered? It appears to be a collateral contract, the consideration for which was entering the contract for the purchase of the petrol.

Lord Wilberforce agreed with Lord Simon of Glaisdale

Viscount Dilhorne –

Esso are engaged in business, and are supplying these coins in order to promote the sale of their petrol. But it does not necessarily follow that there was any intention on their part they should enter legally binding contracts with respect to the coins. Nor is there any reason to impute to the motorist an intention to enter into a legally binding contract for the supply of a coin.

If it were found that Esso, the dealer, and the customer intended to create a contract, it would seem to preclude the possibility of any dealer ever offering a free gift, however
negligible the value. A common intention to enter legal relations would be found more easily if the item were something of value to the purchaser. But here the coins were of little intrinsic value. If there were any contract relating to the coins, the consideration for it would be not the payment of money, but the entry into a contract to buy petrol.

Lord Fraser of Tullybelton (dissenting)

The matter of decisive importance is the form of the promotional posters. They correlate one coin with the purchase of every four gallons of petrol. When a customer purchases four gallons of petrol they are also entitled to receive a coin. Just as if a baker offers an additional bun with each dozen purchased, the customer is actually purchasing the extra bun, and in this case, the coin.

The factors arguing against this conclusion are the use of words such as “free” and “gift”, and the intrinsically negligible value of the coins. Nevertheless, it cannot be said that once a customer purchases petrol that Esso could say that they have no right to the coin.

Lord Russell of Killowen

Considered that in this case, in view of the intrinsically minimal value of the coins, there was no intention to create legal relations. This does not give carte blanche to other to renege on “free offers” where the items are of any value.

Supposing that there was a contractual obligation for the dealer to give the customer a coin, the further question arises whether this arises out of a contract of sale for money. Ignoring words such as “gift” and “free” the posters are saying “if you buy four gallons of petrol you will be entitled to a coin”. This is not a sale of the coins for money.

The presumption in favour of legal relations in commercial transactions can be rebutted but the cases in which it has been rebutted are few. It can be rebutted by the express stipulation of the parties. We can have its example by the case of Rose and Frank Co. v J.R. Crompton & Bros Ltd [1923] 2 KB 261; [1925] AC 445

Rose and Frank Co. v J.R. Crompton & Bros Ltd [9]

Facts: The defendant produced carbon paper in Britain. The plaintiff party purchased the respondent’s paper and sold it in New York. In the wake of managing each other for various years they went into a written contract with regards to the offended party having elite rights to purchase and sell the respondent’s products. The agreements said inter alia:

“this agreement is not a formal or legal agreement. It will not be subject to the jurisdiction of either the British or American courts. It is a record of the intention of the parties to which they honourably pledge themselves and is to be carried out with mutual loyalty and friendly cooperation.”

Following a series of disputes the plaintiff claimed that the defendant was in breach of
the agreement and the trial judge held that it was legally binding. The defendant appealed

**Judgement-**
The Court held that there was no legal contract. The clause had the effect of negating any other objective evidence of intention to create legal relations. Justice Vaisey, writing for the Court, reasoned that it was a gentlemen’s agreement, “which is not an agreement entered into between two persons, neither of whom is a gentleman, with each expecting the other to be strictly bound, while he himself has no intention of being bound at all.”

Bankes LJ, held:

An intention to be legally bound is essential. With business arrangements, it usually follows as a matter of course that legal relations are intended. With social arrangements, the reverse is the case. It is most improbable that firms engaged in international business arrangements, which are intended to take place over a period of years, should not have intended legal consequences. But there is no legal obstacle to prevent them from doing so. There is no law or issue of public policy against it. Once one reads the agreement in its ordinary meaning, then it is manifest that no action can be maintained on the basis of it.

Scrutton LJ, Held that:

If the parties clearly express themselves so as to avoid legal relations, then no reason in public policy why they should not do so.

Atkin LJ Held:

The normal presumption may be offset by implication and if that is so then it may surely be offset expressly. I have never seen a clause whereby business people would enter into a written agreement which was not intended to be legally binding – but it is not necessarily absurd to do so. I do not agree with the judge that the clause should be rejected on the basis of repugnancy. It is a dominant and operative clause.

A vital qualification must be drawn here. From one viewpoint, it is in opposition to open approach for parties to a legitimately restrictive contract to endeavor to expel the locale of the court. Then again, it isn't in opposition to open strategy for parties to a consent to embed into their arrangement a proviso the impact of which is to keep their arrangement from adding up to an agreement in law. For each situation the court must consider, as an issue of development, regardless of whether the impact of the words utilized is to counter the assumption that the parties expected to make lawful connection. To influence the idea all the more clear we have another case Edwards v. Skyways Ltd. This case (Edwards v Skyways Ltd 1964 [10] 1 WLR 349) demonstrates that if a party in a commercial agreement wishes to claim that part of the agreement is not intended to be legally binding, it has the evidential burden of proof. The assumption will always be that commercial dealings (including employer-employee) will be intended to create legal relations.

**Edwards v Skyways Ltd[10]**

Facts: The Secretary of the board of
Skyways was enabled in exchanges with the English Aircraft Pilots Relationship to consent to installments to excess aircrew individuals from an ex gratia sum as to annuity and superannuation. The Organization and Affiliation reps met and concurred that installment would be made of an ex gratia sum with respect to the benefits installment, and a discount of commitments. The choice was distributed in the bulletin. One repetitive pilot was told what his installment and discount would be. He got the discount, yet then the organization repealed its choice to make the ex gratia installments. When he looked to recoup it, he was informed that there was no commitment to pay it.

Megaw LJ held:

The company admits that a promise was made and that it intended to carry it out. The plaintiff acted on the belief that it would be fulfilled. The Co says the promise and agreement had no legal effect because there was no intention to enter legal relations. Rose and Frank and Balfour recognise that an agreement may not give rise to legal rights because this was not intended – in the social relations of that case. Even regarding business affairs, the parties can show that it was their intention to make the agreement binding in honour only and the courts will respect that intention.

In this case the matter is business relations. There was a meeting of minds, an intention to agree. I am not sure how the “objective” test of intention works between a company and a trade association where there were 5 or 6 people on either side. However, the company says, ex gratia means not binding and the background knowledge understood it as such. Ex gratia may mean without admission of liability, or without there being any pre-existing legal right (may be to avoid setting an awkward precedent). Settlements are often expressed in this way. But this does not mean that such agreements are legally unenforceable.

It was understood at the meeting that if the payments were made as a result of a legally enforceable agreement, they would be taxable. But if made without legal obligation on the part of the company, then it would not be taxable. So the agreement, it was argued, intended to exclude legal sanctions. The evidence does not show that this factor was an important element in the minds of all those at the meeting. Thus the argument was not sufficient to establish that this was the intention of all present.

**Judgment for the plaintiff**

Exceptionally, the presumption may be rebutted notwithstanding the absence of an express stipulation to this effect by the parties. An example is a collective agreement between a trade union and an employer (or an employer’s association) which presumed not to be legally enforceable as between the parties to the agreement. This was held to be the case at common law in Ford Motor Co Ltd v. Amalgamated Union of Engineering and Foundry Workers [1969] 2 QB 303. Statute has now intervened in order to strengthen the common law position. Thus section 179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 states that:

A collective agreement shall be conclusively
presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—

(a) is in writing, and

(b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

Sec. (2) further provides- A collective agreement which does satisfy those conditions shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract.

As opposed to look to refute the assumption that the parties expected to make legal relationship, a respondent may take the point that the parties did not plan to contract or generally needed authoritative purpose. What is contrast, assuming any, between the accommodation that the parties did not expect to make lawful relations? The appropriate response would seem, by all accounts, to be that the previous is a lot more extensive in degree, in that it can envelop issues, for example, regardless of whether the parties have in reality achieved arrangement. The last accommodation, paradoxically, acknowledges that the parties have achieved arrangement and is confined to the issue of whether the arrangement was proposed to make legal commitments.

While it is conceivable to isolate out these two issues in principle, practically speaking it may not be so natural to do this. The issues may cover. This is especially for the situation when the arrangement between the parties is communicated in ambiguous or questionable terms. In such a case a respondent may contend that there is no agreement on two grounds

(i) the agreement is too unclear or questionable to add up to an contract; and
(ii) the parties did not plan to make legal relationship. The two grounds are interrelated in that the dubiousness or vulnerability of the agreement may propose both that the parties did not achieve adequate concession to fundamental issues, and that they came up short on an expectation to make legal relationship.

It might be that as it may, be critical to recognize the two issues in connection to the area of the weight of verification. In the first place, it is for the petitioner to demonstrate that an agreement has been finished up. Yet, furthermore, when the presence of a generally enforceable contract has been set up and the defendant wishes to take the point that the agreement obviously finished up by the parties was not planned to offer ascent to legal commitments, the onus of confirmation changes to the respondent to demonstrate that that parties did not expect to make legal relationship, at any rate for the situation where the agreement is made in business setting.

The connection between these two issues was considered in more detail by Mance LJ in Baird Textile Holdings Ltd – v– Marks & Spencer PLC [2001] EWCA Civ 274[11]

Facts:
Baird Textile Holdings Ltd had provided garments to Imprints and Spencer plc. for a
long time. Out of the blue, M&S said they were dropping their request. Baird sued M&S because they ought to have been given sensible notice. The issue was, there was no express contract under which such a term could be said to have emerged. Baird contended that an agreement ought to be suggested through their course of dealings. The judge found there was no such contract, and Baird engaged the Court of Appeal.

Mance LJ.- Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain agreement may be reached, but there may be either expressly (i.e., by express agreement) or impliedly (e.g., in some family situations) no intention to create legal relations.

An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement......It is otherwise, when the case is that an implied contract falls to be inferred from parties’ conduct......It is then for the party asserting such a contract to show the necessity for implying it......if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred.

And, ultimately, Sir Andrew Morritt V-C (with whom Judge LJ and Mance LJ) concurred, found that a contract could not be implied.

There is another imperative case in this specific circumstance: Masters v Cameron [12]

In Masters v Cameron the High Court sketched out three circumstances that normally emerge when one party charges a binding contract has appeared ahead of time of execution of formal documentation.

The parties have concluded the terms of their deal and expect to be bound promptly to play out those terms, and yet propose to have the terms rehashed in a structure which will be more full or progressively exact however not diverse as a result;

The parties have totally concurred on every one of the terms of their deal and expect no takeoff from those terms yet in any case have made execution of at least one of the terms restrictive upon the execution of a formal archive; or

The expectation of the parties isn't to make a finishing up deal by any stretch of the imagination, except if and until they execute a formal contract.

In the initial two cases there is a binding contract. In the first there is an agreement restricting the parties promptly to play out the concurred terms whether they mulled over formal archive appears or not, and to join (on the off chance that they have so concurred) in settling and executing the formal record.

In the second case, there is an agreement restricting the parties to participate in bringing the formal contract into reality and after that to convey it into execution.
There is no binding contract in the third case. The terms of the arrangement are not expected to have, and along these lines don't have, any binding impact of their own.

While Masters v Cameron diagrams just three circumstances, a counter circumstance has been distinguished "in which the parties were substance to be bound quickly and only by the terms in which they had settled upon while hoping to make a further contract in substitution for the primary contract, containing, by assent, extra terms." That is, every one of the terms of the proposed exchange may not be at long last concurred between the parties and likewise changes may be made in the terms proposed and new terms could be presented. In such a case, there is an agreement between the parties.

**Conclusion**

The purpose of intention to make legal relationship has not come up short on its commenters. A few, for example, Professor Freeman, are disparaging of the manner by which it has been utilized to deny lawful impact to arrangements made in a family setting. Others brings up that the tenet lays on a fiction in that the parties to the supposed arrangements much of the time have no noticeable aim one way or the other. In any case, it is accepted that it is a fundamental piece of agreement. On account of Albert v Motor Insurers Bureau, it was expressed by the Upjohn LJ-

"The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or different hours of overtime, or incompatibility arising, make it most unlikely that either contemplated that the one was legally bound to carry and the other to be carried to work."

It is stated in "Chitty on Contracts" (25th Edition, Volume I, para. 123) thus:

"An agreement, even though it is supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations. Of course, in the case of ordinary commercial transactions, it is not normally necessary to prove that the parties in fact intended to create legal relations" (accentuation provided)

In our Indian law the intention to create legal relations isn't given as a basic element of contract law, yet even the Supreme court of India has communicated the need of separate requirement for ‘intention to contract’. Passing by the analysis which is as of now there in the West, the court found that it was a necessity of those systems where consideration was not a requisite of enforceability. Along these lines it is as yet an open question in India whether the necessity of "intention to contract" is applicable under the Indian Contract Act in the same manner in which it has been developed in Britain.

Be that as it may, prior to this, a constrained acknowledgment of the appropriateness of this standard in India could be induced from the choice of the Supreme Court in Banwari Lal v. Sukhdarshan Dayal.[13]. In an auction sale of plots of plot, a loudspeaker was spelling out the terms, etc., of the sale, one of the statements being that a plot of certain dimensions would be reserved for Dharamshala (public inn). Subsequently that
plot was also sold for private purposes. The purchasers sought to restrain this. Chandrachud J (afterwards CJ) said: “Microphones…….. have no yet acquired notoriety as carriers of binding representations. Promises held out our loudspeakers are often claptraps of politics. In the instant case, the announcement was, it at all, a puffing up for sale.”

In a subsequent case regarding this matter, the Supreme Court Court noticed the general suggestion that notwithstanding the presence of a contract and the nearness of consideration there is the third authoritative component as intention of the parties to create legal relationship.

Eventually we ought to expect that the aim to make legal relations is a basic prerequisite of contract. At the primary occasion it might have a few similitudes with consideration yet there might be such a large number of situations when both these components are different. As like if two companions chose to go to an eatery, and one of them guarantees to pay for the beverage and the other for the sustenance then we can not say that there is no thought but rather still there is no aim to make legal relations, and in the event that anybody of them sue the other for break of agreement, at that point the breach to contract ought to fall short.

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PRIVACY IN SOCIAL-LEGAL AND CULTURAL MILEU

By Anuj Datta & Madhu Singh
From Shambhunath Institute of Law

INTRODUCTION

What do you mean by privacy?
Regulation or statute that protects a person’s right to be left alone and governs collection, storage and release of his or her financial, medical and other person information. Right to privacy is an right which an individual possess by birth. Privacy simply means the right of an individual to be left alone which is recognized by the common law.

Need of Privacy
Privacy is an inherent part of human personality and inalienable form of human being. Jurist like Arthur Miller have stated that privacy is difficult to define because it is ephemeral. Black’s law dictionary define privacy as ‘right to be let alone, right of a person to be free from unwarranted publicity and right to live without unwanted interference by the matters in which the public is not necessarily concerned. The essence of the law derives from a Right To Privacy, define broadly as the Right To Be Left Alone it usually excludes personal matters or activities which may reasonably be of public interest, like those of celebrities or participants in news worthy events.

Under the constitutional law, the right to privacy is implicit in the fundamental right to life and liberty guaranteed by Article of the Constitution.

The Constitutional right to privacy flowing of Article 21 must, however, be read together with the Constitutional right to publish any matter of public interest, subject to reasonable restriction. Privacy is a fundamental human right recognized in the UN Declaration of human right, the international covenant on civil and political rights and in many other international and regional treaties. Privacy underpins human dignity.

Types of Privacy

Physical Privacy
Physical privacy could be defined as preventing "intrusions into one's physical space or solitude. Physical privacy may be a matter of cultural sensitivity, personal dignity, and/or shyness. There may also be concerns about safety, if for example one is wary of becoming the victim of crime or stalking. Civil inattention is a process whereby individuals are able to maintain their privacy within a crowd.

Informational Privacy
Information or data privacy refers to the evolving relationship between technology and the legal right to, or public expectation of privacy in the collection and sharing of data about one's self. Various types of personal information are often associated with privacy concerns. For various reasons, individuals may object to personal information such as their religion, sexual orientation, political affiliations, or personal activities being revealed, perhaps to avoid discrimination, personal embarrassment, or damage to their professional reputations.
**Financial Privacy**
Financial privacy, in which information about a person's financial transactions is guarded, is important for the avoidance of fraud including identity theft. Internet Privacy Internet privacy is the ability to determine what information one reveals or withholds about oneself over the Internet, who has access to such information, and for what purposes one's information may or may not be used.

**Medical Privacy**
Medical privacy allows a person to withhold their medical records and other information from others, perhaps because of fears that it might affect their insurance coverage or employment, or to avoid the embarrassment caused by revealing medical conditions or treatments. Medical information could also reveal other aspects of one's personal life, such as sexual preferences or proclivity. A right to sexual privacy enables individuals to acquire and use contraceptives without family, community or legal sanctions.

**Political Privacy**
Political privacy has been a concern since voting systems emerged in ancient times. The secret ballot helps to ensure that voters cannot be coerced into voting in certain ways, since they can allocate their vote as they wish in the privacy and security of the voting booth while maintaining the anonymity of the vote.

**Right to Privacy**
In recent years there have been attempts to clearly and precisely define a "right to privacy." Some experts assert that in fact the right to privacy "should not be defined as a separate legal right" at all. By their reasoning, existing laws relating to privacy in general should be sufficient. Other experts, such as Dean Prosser, have attempted, but failed, to find a "common ground" between the leading kinds of privacy cases in the court system, at least to formulate a definition. One law school treatise from Israel, however, on the subject of "privacy in the digital environment," suggests that the "right to privacy should be seen as an independent right that deserves legal protection in itself." It has therefore proposed a working definition for a "right to privacy":

Under the constitutional law, the right to privacy is implicit in the fundamental right to life and liberty guaranteed by Article 21 of the Constitution of India. This has been interpreted to include the right to be let alone. The constitutional right to privacy flowing from Article 21 must, however, be read together with the constitutional right to publish any matter of public interest, subject to reasonable restrictions.

The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose.

According to recommendations of Venkata Challiah Commission: It is proposed that a new article, namely, article 21-B of the Constitution, should be inserted on the following lines: 21-B.

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48
(1) Every person has a right to respect for his private and family life, his home and his correspondence.
(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others.

After the delivery of landmark judgment known as Maneka Gandhi v. Union of India, the scope of Article 21 was enormously increased so that this Article could include certain rights as fundamental rights. And Right to Privacy is one of those rights which have been evolved by The Hon’ble Supreme Court of India and which is implicit in Article 21.

An attempt at defining privacy is of no use if the levels of abstraction do not translate into concrete specifics. Broadly speaking, privacy law deals with freedom of thought, control over one's body, peace and solitude in one's home, control of information regarding oneself, freedom from surveillance, protection from unreasonable search and seizure, and protection of reputation.

"The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."13 However, Subba Rao, J. while partly concurring with the majority, stated: (AIR para 31) “It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but they said right is an essential ingredient of personal liberty. ... Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy.

"Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. This catalogue approach to the question is obviously not as instructive as it does not give an analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as a unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty."

However, the Court stated that the right to privacy was subject to "restrictions on the basis of compelling State interest".18 Thus, the regulations were upheld since they applied to a limited class of citizens i.e. habitual criminals.

Similarly, in Malak Singh v. State of Punjab surveillance was held to be intrusive and an encroachment upon the right to privacy and in Sunil Batra v. Delhi Admn. The Hon’ble
Supreme Court considered the question of whether two individuals, sentenced to death, were entitled to privacy and human rights. The Court found that though a minimum intrusion of privacy may have been inevitable, the guards were under an obligation to ensure that human rights and privacy standards were observed.

Search and seizure: The Fourth Amendment of the US Constitution reads: "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the (American) Fourth Amendment, I have no justification to import it, into a totally different fundamental right, by some process of strained construction. Therefore, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed.

CONCLUSION
The cases that fall under this segment have further broadened the ambit of the reasonable restrictions which apply to the right to privacy. While the "larger public interest" and the "security of the State" were considered to be restrictions on privacy, the right itself was interpreted in its informational context. The substantive interpretation of privacy is yet to make a formal appearance in Indian legal pronouncement.

Privacy had hardly a part to play in the decision, but the court recognized it as one of the ground on which the government could withhold information with holding such information cannot be traced to right to privacy which it self’s is not an absolute right. Right to privacy is subservient to that of security of state.

Granted, it may not be against your parents. But some have questioned whether the court was right to endorse the enforcement of the Right to Privacy against non-State (private) actors. But has it done this? Probably not. The different opinions do discuss at length people’s privacy rights vis-à-vis Internet companies (eg, justices Chandrachud and Kaul), and to a lesser extent, against publishers (eg, Justice Kaul). But while fundamental rights are no doubt enforceable against a State action, they can also be enforced with respect to private actions by asking the State to affirmatively act to uphold those rights. This happened in the famous Vishaka case of 1997 when the court noted a legislative vacuum on the subject of sexual harassment at workplace. This is also, for instance, what the petitioners seek in the pending Whatsapp case. Because they argue that the actions of Whatsapp infringe their privacy rights, they ask the State to protect their Fundamental Right to privacy by enacting a data protection law.

In the KS Puttaswamy and others vs Union of India and others case, the apex court
seems to be reasoning on this basis. On the discussion of Hon’ble Judges Internet company profiling of users is largely in the context of the recommendation of a data protection law, which, in other words, is a recommendation that the State needs to safeguard users’.

Fundamental Right to Privacy vis-à-vis private companies. It is, therefore, likely not an endorsement that the right can be enforced against private companies. In other words, it is more a suggestion that we have a Fundamental Right to a data protection regime. Justice Kaul’s have a separate discussion of publicity rights is admittedly tricky, but it may not be very difficult because:

1) He is alone in that view on the bench, so it is not binding law;
2) On a close reading, it could be understood as a discussion of the common law of Right of Privacy. The common law of the right of privacy applies to private persons.

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GEOGRAPHICAL INDICATION: ANALYSIS IN LIGHT OF ARANMULA KANNADI

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ABSTRACT
The concept of Geographical Indications is almost as old as the New World. Christopher Columbus sailed to India to strategize upon capturing the wealth of rich Indian Spices whereas Venetian Glass, China Silk and Dhaka Muslin were among the much sought out treasures. These meticulously built reputations had to be painstakingly maintained and preserved as inter-generational know-how. Steadily, a specific link between the goods and place of production evolved resulting in growth of geographical indications.

Geographical Indications (GI) are signs, which identify goods as originating in a specific geographical location. Being a collective right, it seeks to protect the economic interests of an entire community of producers from a particular region who specialize in the making or manufacturing of a native product. At the domestic level India ensures that GI protection is uniformly available to all types of products, however it is still noticed that products like Basmati are not adequately protected under TRIPs. While such protection has the potential to bring about economic prosperity of marginalized sections of society, the lack of it to products like Aranmula Kannadi, have raised concerns regarding the standards followed by the authorities while protecting the knowledge and diligent work of the labours of this unique mirror in Kerala, who just had a flood to wash away their years of scrupulous and meticulous handicraft work. The article examines the controversial issue surrounding the dearth of effective legislations for preservation of the knowledge attached with a GI recognition.

In India, GI recognition is granted to abundant products ranging from the famous Pashmina to Aranmula Kannadi and from Basmati Rice to the Madhubani Paintings. However even after the recognition there were disputes regarding the legitimacy of the origin of these GI acclaimed products.

This article seeks to examine the protection of geographical indications in India. The authors have attempted to study this in light of the ‘Aranmula Kannadi’ of Kerala, which obtained its GI tag in 2005, but currently stands disputed due to allegations of false GI from another organisation claiming to be the true inventors of the product. It is the endeavour of the authors to discern the problems cladding the covenant of a GI in India along with a few loopholes and possible solutions to prevent further malicious use of the products and productively tackle their protection.

INTRODUCTION
In recent years, Geographical Indications (GIs) have emerged as one of the most important instruments for protecting the quality, reputation and character of goods having a geographical origin which indicate their source and quality.

GI is an invention of the Trade-Related Intellectual Property Right (TRIPS) Agreement, which came into force with...
effect from January 1, 1995. The TRIPS Agreement requires World Trade Organisation (WTO) members to provide legal means to prevent the use of GIs that mislead the public as to the geographical origin of the goods or constitutes an act of unfair competition. The conflict between trademarks and GIs and its resolution has also been debated which has given rise to various conflicting proposals.

A geographical indication is a sign used on products that have a specific geographical origin and possess characteristics and qualities corresponding and derived from that place of origin. Article 22(1) of the TRIPS Agreement defines geographical indications as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geography. A product originating in a certain place must have ingredients, characteristics, quality and goodwill that establishes its connection with its geographical origin in order to function as a GI or acquire an indication mark. A clear link has to be established between the product and its original place of production since the distinguishing factor of that product results from factors like specific climate or raw material obtained from that particular region.

Darjeeling tea and basmati are the most common and important geographical indications for India. The hilly areas of Darjeeling district of West Bengal claim the rights to their native tea. The unique flavour to the tea comes from the geographical features like altitude, rainfall, sunshine and the mist. The soil is rich and the hill slopes serve as natural drainage. All these features make the tea produced in Darjeeling one of the most sought-after teas in India.

TRIPS AGREEMENT AND GI ACT 1999

There was no specific legislation to regulate geographical indication in India prior to 1999. However, the judiciary played an active role in preventing misuse of the geographical indications. In Mohan v. Scotch Whisky, the Delhi High Court affirmed the order of the registrar of trademarks by which he refused to register the applicant’s mark proposed to be used on whisky produced in India consisting of the words “Highland Chief” and the device of the head and shoulders of a gentleman dressed in Scottish highland costume wearing inter alia, feather bonnet and plaid and edged with tartan, a well-known symbol of Scottish origin.

The driving force for India to enact its own legislation for GI protection was the Basmati controversy. When Ricetec Inc., a U.S. multinational company received a patent for new lines and grains in the name of “Basmati” rice. Despite several attempts from India, they could not successfully fight back against the contention that Basmati was not geographic indicator even in India as it was grown all over India, Pakistan and even in Thailand. Additionally, even according to

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the TRIPs, there is no obligation for other countries to extend reciprocal protection unless a geographical indication is protected in the country of its origin.\textsuperscript{110}

In light of this eye-opening event, India enacted the Geographical Indications of Goods (Registration and Protection) Act in 1999. The definition of Geographical Indication under this act, though similar to TRIPs, is much more explanatory. It explicitly includes agricultural, natural or manufactured goods, the characteristics of which, apart from being attributable to geographical origin, one of the activities of either production or processing of the manufactured good takes place in that locality. The time period of registration for the geographical indication is ten years which can be repeatedly renewed for another ten years upon application in the prescribed manner by the proprietor. Similar provisions apply for authorised users.\textsuperscript{111}

REGISTRATION OF GI
Registration of the geographical indication is mandatory in order to claim any rights with respect to the geographical indication.\textsuperscript{112} The benefits of registration are: a. The registered proprietor and authorized users can claim a right to infringement in the event of an infringement

\begin{itemize}
  \item b. The authorized users receive exclusive right to the use of the GI of the goods.
\end{itemize}

Therefore, while registration of GI is not mandatory in India, Section 20 (1)\textsuperscript{114} doesn’t give legal backing to unregistered GIs. Thus, registration of a GI gives its registered owner and its authorized users the right to obtain relief for infringement.

THE ARANMULA KANNADI
Existing since the Vedic period, the Aranmula Kannadi is a rare and unique piece of craft whose creation is only known to a few families in the Aranmula village in Kerala’s Pathanamthitta district. The inimitable feature of this exclusive product is that it does not require the silver nitrate coating to develop a reflective nature to be called a mirror. The distinguishing feature of the Aranmula Kannadi from a regular mirror is that while the latter reflects images from its coated layer, the former does so directly from its surface. The makers, who are extremely skilled artisans claim no distortions in the images.

The reason for this is that in an ordinary mirror, the light first permeates the surface and gets reflected only when it touches the coated side at the back. The image gets slightly distorted due to an element of refraction. However, in Aranmula mirror, the light reflects right from the upper surface. The test which has been determined to identify an original Aranmula, is that when an index finger is placed on an

\begin{itemize}
  \item \textsuperscript{110} Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement, Art. 22, Jan 1,1995, (1869 U.N.T.S. 299).
  \item \textsuperscript{111} The Geographical Indications of Goods (Registration and Protection) Act, Section 18, 1999, No.48 of 1999, Acts of Parliament, India.
  \item \textsuperscript{113} The Geographical Indications of Goods (Registration and Protection) Act, Section 21, 1999, No.48 of 1999, Acts of Parliament, India.
  \item \textsuperscript{114} Supra n. 6.
\end{itemize}
ordinary mirror, there is a small gap visible between the finger edge and its reflection, however, this gap extinguishes in the case of an Aranmula.\textsuperscript{115}

The exact combination of metals that constitute this marvellous creation is unknown outside the Aranmula circle; however, the craftsmen claim that along with an alloy of silver, bronze, copper, tin and certain undisclosed alloys, the composition of the metal mirror also contains a divine touch since the ingredients for this were discovered during the construction of the Aranmula Parthasarathy temple. Long-time back, Indian artisans visited Aranmula at the behest of the King of Pandalam for the sanctification of the temple idol. Apart from carrying out the assigned tasks, the artisans also made ornaments such as bangles and rings, cooking vessels and bells through casting copper-based alloys. In the process of doing so, they discovered the reflective property of one particular copper-tin alloy, which led to the discovery of the Aranmula Kannadi.\textsuperscript{116}

Another myth has it that the ingredients of this rare piece of art were discovered while remaking the crown of the deity of the Aranmula Parthasarathy temple. The proportions of the bronze alloy were such that it shone like a mirror. The end result which was made out of the combination of copper and tin turned out to be a marvel of art and craft. It was silver like colour, brittle like glass, shone with rare brilliance, and when cleaned acquired the quality of reflection.\textsuperscript{116}

This metal mirror is also mentioned in the Rigveda coupled with some evidences of it excavated from the Harappan period. Temple sculptors have also depicted it at Khajuraho. The metallurgy of this metal mirror and the making process is a mystery to the modern scientists. The scientists from Regional Research Laboratory (RRL, CSIR), upon a thorough analysis of the alloy found the quantities of various metals. However, attempts to make a mirror of the Aranmula quality failed even at the hands of CSIR scientists.\textsuperscript{117}

\textbf{PROCESS OF CREATION}

Till date the craftsmen use traditional, indigenous methods and materials to produce the reflecting wonder called Aranmula Kannadi. It takes years of practice and tremendous amount of focus and patience to produce a perfect mirror piece.\textsuperscript{118} The artisans work under the scorching sun in a thatched workshop with utmost dedication to create the mirror without any flaws. The process starts with the making of the alloy. The next step is moulding, then casting the mould with the alloy in the furnace stoked by a fire. The moulds are cooled and then broken, to reveal the rudimentary mirror that is formed from

\begin{itemize}
  \item \textsuperscript{115} Aranmula Kannadi, Aranmula Kannadi- The Metal Magic for Prosperity!, http://aranmulakannadi.org/.
  \item \textsuperscript{116} Aranmula Kannadi, History and Tradition, http://aranmulakannadi.org/about/tradition/.
  \item \textsuperscript{118} Kerala Tourism, Aranmula Kannadi, https://www.keralatourism.org/kerala-article/mirror-aranmula/13.
\end{itemize}
The mirror is such a matter of pride for the entire nation that Prime Minister Narendra Modi presented it to his British counterpart David Cameron's wife during his UK visit, in 2015.\textsuperscript{119}

GRANTING OF GI\textsuperscript{120}

An application was made by the Vishwa Brahmana Aranmula Metal Mirror Nirman Society (VAMMNS), to grant the Mirrors a Geographical Indication for its unique manufacturing process. The secretary of the Society, in Aranmula applied for it stating that the secret ingredients of the metal mirror are known only to his family. His application elucidated on the entire process down to every detail.

Once satisfied with the uniqueness and secrecy of the product, the Geographical Indications Registry granted the patent to VAMMNS in 2005 for the ‘Aranmula Kannadi’. This was renewed after ten years and now the Geographical indication owned by the Society is valid till 2023.

THREAT TO THE ORIGINAL GI

In 2015 a family constituted as the Thikkinampallil Aranmula Metal Mirror Nirman Family Charitable Trust filed a petition in the GI Registry against the Vishwabrahmana Society questioning its legacy over the Aranmula Kannadi. The Trust filed for its own GI under the name ‘Thikkinampallil Aranmula Kannadi’ claiming that the process of manufacturing it is inherited from predeceased members of the Thikkinampallil family who are the actual inventors of the Kannadi.\textsuperscript{121} The inimitable method, which the Trust members claim to have inherited from their forefathers is more or less the same as described by VAMNNS with a few minor changes in the proportions of the metals.

The application by this Trust is under examination by the Board and no final decision has been given as to which organisation should be the true owner of the GI.

MISFORTUNE OF AUGUST 2018

The State of Kerala faced the worst flooding in nearly a century owing to the unusually high rainfall during the monsoon season which placed all 14 districts of the state on red alert. The Indian government had declared it as a Level 3 Calamity, or ‘calamity of a severe nature’.\textsuperscript{122} Thirty-five dams out of the total fifty-four within the state were opened for the first time in history. The impact of the floods caused widespread loss to life, livelihood and property. About 483 people died, 15 went missing and at least a million people were evacuated. The Aranmula Kannadi makers were also adversely affected in this calamity. The prepared mirrors became

\footnotesize{\textsuperscript{119}Aranmula Kannadi, Aranmula Kannadi- The Metal Magic for Prosperity!, http://aranmulakannadi.org/.
\textsuperscript{122} T.C.A. Sharad Raghavan, The Hindu explains: ‘Calamity of a severe nature’, The Hindu, August 20, 2018.}
irreparably damaged, workstations got washed away and the raw materials were rendered useless.

Problems after the Kerala flood
Post the floods, when the people were trying to recover from the trauma and return to their lifestyle, the craftsmen brought to light the problems which had shut their business temporarily. The moulds for the mirrors are made from the clay obtained from the paddy fields around Aranmula. But the floods caused the river to deposit a thick layer of slush over the paddy fields. This new layer of clay was unsuitable for the moulds and in order to obtain the right material, a thick coat of sand and mud needed to be removed. This tedious task couldn’t be performed over a large surface area soon enough to get the craftsmen back in business while making sure their homes don’t fall apart.

Secondly, the tools such as the chisels, hacksaw blades and hammers rusted due to being submerged in water. These tarnished tools which are a vital element to their craft could not be used for filling, engraving or embellishing designs on the frame.

Apart from all the benefits, creating the mirror is also a relatively green process. The material used is eco-friendly and obtained locally. There is minimum waste and most of the material is recycled, as the mould bits can be ground again, and the alloy pieces remelted. Hence, it is imperative to uplift the present conditions of the Aranmula Community.

PROBLEMS IN PROTECTION OF GI
Currently, one of the most fundamental problems with GI is the progressive loosening of the territorial linkage between GI products and GI regions in the definition of “geographical indications.” Although this territorial linkage has never been an absolute linkage since the first appearance of national laws regulating the use of geographical names, the current trend seems to privilege a considerably looser definition of GIs with respect to the actual geographical origin of the products, their ingredients, and manufacturing process. The territorial linkage between the GI and the products and the regions is the traditional basis for granting exclusive rights on GI precisely - the deep connection between the products and the land.

When GIs do not identify products that are entirely local, GIs no longer fulfil the function for which they are legally protected – accurate information being offered about products' geographical origin to consumers thus, incentivizing local development. Instead, GIs become marketing tools to sell GI products with the advantage of the GI name on the international market.

In today’s upcoming scenario, GI is becoming increasingly commercial and its legal protection is becoming imperative to ensure its legitimacy in the market. Unfair use of GI and business practices will result in loss of revenue for the genuine right holders of GI and mislead consumers as well.

_123_ Ramesh Babu, Floods threaten to take shine off Kerala’s famed mirror artisans, Hindustan Times, Sept 24, 2018.

There has been a stampede of GI registrations in India in the recent months. Though developed countries use GI primarily for food products, the Indian legislations have extended GI to a wide spectrum of goods from handicrafts to flowers and spices. Thus, the Aranmula mirror, along with assorted silks, saris, textiles and embroidery styles, joins soaps, incense, different varieties of jasmines, several strains of rice, tea, betel leaf, pepper and chillies have acquired the GI tag.

According to some experts, Article 22 of TRIPs is not good enough. Initially drafted for the effective protection of GI, it is now increasingly being used as a law against unfair trade practices and for consumer protection degrading from its goal of IPR protection. A producer outside a specific geographical region could still use the GI as long as the product’s true origin is indicated on the label. This means that an Aranmula mirror could be manufactured from, say, Houston in Texas, thus allowing an American producer to free ride on the reputation and market goodwill created by Keralite artisans over two centuries.

An excellent illustration would be the premium quality tea produced in the hilly regions of Darjeeling in West Bengal- the erstwhile Darjeeling Tea in the eastern province of India. This tea offers a distinct characteristic of quality, flavour followed by a global reputation of more than a century. Namely geographical origin and processing have contributed to such an exceptional and distinctive taste. While Darjeeling tea produced in Darjeeling is 10,000 tonnes, it is estimated that 40,000 tonnes of tea is sold as Darjeeling tea in the world market. The consumers of these 30,000 tonnes of tea, which is not Darjeeling tea, are being misled into believing that they are consuming Darjeeling tea when in fact they are not. Most of the tea coming on to the world market, as counterfeit Darjeeling seems to be coming from Kenya and Sri Lanka. The other source is said to be Nepal.

Nepalese tea is produced in similar geographic conditions to that of Darjeeling tea. About 60 per cent of Nepalese tea is exported to India and most of the Nepalese tea estates/gardens are owned by Indians. There are allegations that Nepalese tea imported into India is repackaged as Darjeeling tea and exported. Nepal is a small producer and exporter of tea in the world market. If contemporary commercial reputation becomes the benchmark, the boundary with trademark or unfair competition law breaks down and the justification for GIs, as a separate regime based on the causal connection between product and place, collapses.

In the case of the Aranmula Kannadi, the artefact had adequate protection and authenticity owing to the GI tag it obtained more than a decade ago. The devastating floods along with the allegations from the Thikkinampallil Family have left the craftsmen in despair and lost hope for the continuation of their divine art. One can also question the legitimacy of this new claim of inventors of the mirror on the


126 Id.
contention that why did they approach the GI Registry after almost a decade.

While settling this clash of claims, the government and the GI Registry also needs to look into losses faced due to the floods and work towards the upliftment of the craftsmen as well as promotion of the art.

Additionally, once GIs are registered there are practically no provisions for quality control, which is why there is proliferation of applications in India. Quality control is one of the pivotal issues in European countries. There is little possibility of fakes once a product is granted GI after proper checks and inspection, which is not the case in India.

A GI tag in India not only brings with itself a brand equity for the product but also demands premium in the market. Hence, a lot of background work needs to be conducted before an official application is made, and the absence of this in India leads to an enormous number of rejections. A recent instance for this is the ‘Hyderabadi Biryani’ as the applicants could not prove its historical origin along with supporting documents. This provision will prove to be a formidable hurdle in India, a country where in regions like the North East, which boast of far wider oral history and conventions than written proof.

To exemplify, the case of Assam could be taken into deliberation because the traditional wine rice called ‘Judima’ (made by Dimasa tribe of Dima Hasao, one of the autonomous hill districts of Assam). Assam government underwent difficulties in registering under Geographical Indicator category due to inability in gathering sufficient documentary evidence. It is only after recurrent efforts that recently Judima qualified to be registered as a GI.

However, this is a growing issue in GI registration in India and our experts have again and again questioned the rationality of this law which is proving to be a hurdle towards India’s development in the IPR sector.

SUGGESTIONS
Legal protection of GI holds enormous significance due to its commercial as well as cultural importance. Economically, GIs serve a two-fold purpose: on one hand, it enables indigenous producers to get market recognition and build goodwill around their products and, on the other hand protect consumers from counterfeit goods. Without suitable legal protection, the competitors who do not possess any legitimate rights on the GI might take undue advantage of its reputation. Such unfair business practices result in loss of revenue for the genuine right-holders of the GI and also misleads consumers. Besides, such practices may eventually hamper the goodwill and reputation associated with the GI.

They hold immense worth for local communities through products that are deeply rooted in their tradition, culture and geography. They also support rural

development and promote new job opportunities in production, processing and other related services.\footnote{European Commission, *Geographical Indications*, http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/} One of the main reasons and foundations of the geographical indication in India, is the making of quality products and preserving it, as long as its indication exists it is known for its original taste and flavour which had attracted it the GI at the first place. There is a dire need in India today to preserve high quality in such origin specific goods which Europe has already recognized and there are laws to safeguard the quality of a GI granted good.\footnote{Suman Sahai, *Protecting Basmati*, Economic and Political Weekly, Feb. 28 - Mar. 6, 1998.}

The European law on the protection of names relating to agricultural goods and foodstuffs enables consumers to make informed choices by providing clear information on their origin specific products which belong to their hometown. Moreover, they also give a competitive advantage to the producers having the GI over their contemporaries. In contrast, inspection and monitoring mechanisms for GI protection doesn’t grab much emphasis in the Indian GI Act.

It is the hallmark of a GI to ensure quality associated with geographical origin. However, the current legal framework on GI evidently lacks the rigour and teeth to ensure it. It is imperative in our country to preserve the consumer trust to save the integrity of GI. Some of the steps that can be suggested here are:

- **Effective verification of the goods:** Effective verification and controls at multiple levels in the supply chain will ensure compliance with product specification before placing it in the market. If we have officers placed at levels of the supply chain which leads to the, final product being manufactured for the market they will keep a check on the quality of the product so that quality is not sacrificed for profit and the trust of the consumers can also be retained.

- **Inspection and market monitoring:** To ensure legal compliance, the market monitoring of the use of names is mandatory. Hence there should be inspectors from the GI department in Chennai, who should visit all the factories and ensure that the original quality of the good which fetched it the GI in the first instance is not compromised years later exploiting their fame and the trust of the customers. Moreover, it is also crucial for the department if nothing else, to at least inspect and report the status of the goods and their production progress before giving them an extension after their initial ten years have expired.

- **Historic continuity of the product:** Continuity suggests that the present reputation rests on the product’s historic reputation. One of the central tasks here is to identify the characteristic features which set this product apart – characteristics which have made it distinctive when compared with similar cheeses or textiles or crafts. These characteristic features have sustained the product’s historic reputation over time.
The purpose of the historical analysis is therefore to establish a basis for the product’s reputation – which is attributable to its distinctive features. Finally, regarding the product’s history, the aim is to identify a causal connection between the product’s distinctive or characteristic features, which have sustained the historic as well as contemporary reputation, and the natural and/or human factors within the geographical region of origin. This should be a safety check to mark the fact that the product has retained its indigenous and aboriginal characteristics which makes it worth for an extension of the GI period.

- **Long and cumbersome procedure of registration:** Upon a closer examination, the authors speculate that the procedural requirement existing for the process of GI registration are extensive and lengthy, and a faster process, is applicable only to the applicant or a third party and not the Registry. After the applicant has done his part, the Registry may take as long as it needs to communicate the deficiencies in the application but the claimant has to revert back within a month. Similarly is the case for all other steps in the procedure. However, it can be said that the Registry is not time bound in order to effectively evaluate the numerous applications that it receives and to prevent any abuse of the privileges of the GI tag. The authors suggest that the Government could establish another GI Registry to reduce the workload on the office at Chennai and to ensure a faster processing of pending applications. It is also true that in such a scenario, if one or more branches are opened, people might use it to their advantage and file an application in another office after being rejected from one. In order to avoid this, an online database can be maintained where all the applications are uploaded so it becomes easier for each office to be aware of the applications already rejected. Moreover, if there is a shortage of manpower to maintain and keep the record up to date, new people can be hired thereby increasing the employment.

Furthermore, since the procedure established provides for filing for an objection, it can be questioned why the members of the Thikkinampallil Aranmula Metal Mirror Nirman Family Charitable Trust took twelve years to object to the GI received by the Vishwabrahmana Society. This brings out another loophole in the entire process- that the application shouldn’t only be published in the Journal but in a conspicuous place in that area for which it is applied or also even in a gazette. This will make more people aware who can then file an objection if they have any.

- **Promoting goods bearing Indian geographical indication in the export market:** There is a need to adopt a real strategy for geographical indications to yield gains. In the present scenario India is devoid of a ministry that is best placed to run a successful GI strategy for its betterment and international acclamation. It is important to adopt a mechanism or an organ through which the activities or the different government ministers and policy makers relating to geographical indications are coordinated. A legislative framework is the need of the hour for providing additional protection for geographical indications. Hence, to promote the export of the goods it is therefore necessary to market the product.
and make it known, otherwise neither the consumers nor the international companies will be aware of it. These are leading to situations where our daily wage labourers are being misused and paid oddly as the significance and atypical nature of their work is unknown to people. Secondly, India is losing out on revenue which can be earned by publicising and advertising these traditional and intricate goods bringing it home to the target group. If these regulations are implemented, then the exploitations like Darjeeling Tea, one of the oldest and famed GI good will not have to repeat the ordeal.

It is evident from all these records that the current legal framework of GI in India requires to be strengthened. Quality control and consumer expectations by insisting on multi-layered quality control systems should be a precondition for registration. India boasts of many locally produced goods which are unique and integral to the strong and rich Indian culture and heritage, the law in status quo with a few amendments and diligent implementation can work wonders and make India reach new heights in the world IPR programmes and initiatives hence giving it the name it deserves.

CONCLUSION
The most distinguishing feature of a GI is its potential to uplift the marginalized sections of the society. Being a collective right, it can effectively protect the livelihood of the artisans or other local communities who specialize in items unique to particular geographic locations. Therefore, proper protection of such GIs is very important to prevent commercial organizations, who are not the authorized users of GI from free riding on the reputation painstakingly built up by indigenous communities.

GI protection is very important for India on account of its rich cultural heritage and diverse geography which are responsible for the availability of vast number of native products that are unique to specific regions. Although the GI Act seeks to provide a proper regulatory mechanism for the same, the GI Registry has time and again failed to comply with the minimum requirements laid down under the Act. Given the fact that the legal regime for GI protection in India is still in the nascent stages, it is understandable that the GI Registry would not wish to set too high a standard for eligibility since it may discourage many from even attempting to secure a GI. However, handing out GI registrations to anything and everything which has a geographical name fails to achieve the broader objectives of instituting a system of GIs.

The lack of vigilance on the part of GI Registry is encouraging individual applicants like Tirupati Laddu whose primary objective is to procure monopoly rights over a product by using a GI. Even


prior to this, Reliance Industries Ltd (RIL) had filed GI application for registering “Jamnagar” as a GI for petrol, diesel, LPG. Although the application was subsequently abandoned by RIL, the fact that such an application was allowed to proceed till the stage of advertisement goes on to show the lax standards of the examination process of the GI Registry which in turn may have grave implications for the future of GI protection. If the GI Registry does not apply more stringent yardsticks for granting GI, it would become less potent as an instrument of IPR. Greater vigilance on the part of the authorities is needed to ensure that GI continues to remain an effective tool for furthering community rights.

While the authors delved deeper into this topic, we also realized the deep contrast between the protection accorded to the internationally acclaimed and reputed goods like the basmati rice and Darjeeling tea are, considerably noteworthy, whereas lesser known commodities like Banaganapella mangoes, KhandhmalHaldi or the Aranmula Kannadi are side-tracked due to their absence from media attention. We believe that the storms which engulfed Kerala in August, 2018 are probable in any other Indian city and without any precautions being mandated or taken in such situations it will be fatal, destroyable and annihilating to such unique manifestations which have proved to be India’s pride and testimony to its traditional aura. Hence, standing at such a dire situation it is imperative for us to not only raise awareness and knowledge on our traditional and ethnic merchandise but also protect and preserve their work in a form where they are cushioned from natural disasters or any other threat obstrucing the growth and expansion of their art and traditional knowledge.

This article could best be concluded with European Commission’s message: “your home probably has an unique and special local product and it would command respect and price premiums globally if only it had stronger legal protection.”

SEXUAL HARASSMENT-ANGUISHED FABLES OF WOMEN AT WORKPLACE: A CRITIQUE OPINION VIS-À-VIS ITS PREVENTION

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Abstract

“It is not a compliment, it is harassment.” - Mo Ibrahim

Sexual harassment at workplace is a symptom of deep-rooted patriarchy existing in society encouraging power-based prejudiced practices and in turn creating antagonistic work environments where women workers are susceptible to experience harassment and abuse. Economic dependence on the job for their source of revenue, job insecurity, social perception of obeying the superiors, and spilled over patriarchal discrimination into the work setting make women workers more vulnerable to befall as victims of sexual harassment.

In today’s era, women have begun to work outside the four walls of their houses and are trying to become independent. Thus, sexual harassment has become an apparatus of the workplace which is demeaning, tormenting, and sometimes physically vehement.

This article presents a framework that assesses the nature and incidences of sexual harassment experienced by the victim, organizational mechanisms to deal with such occurrences, methodically describes the behavior of both sexual harassers and their targets within the milieu of power and politics in a dyadic relationship.

Keywords – Sexual Harassment, Patriarchal Discrimination, Workplace Apparatus, Inequality

I. INTRODUCTION

India being a patriarchal society is trying very hard to eradicate the prejudice against women by educating them and watching them step out of homes and fulfil duties as an earning member in their own right. Opposing to popular belief, most working women have faced issues with sexual harassment at their workplace. It is just that now more women are coming forward and reporting occurrences of sexual harassment, for they refuse to take in such behavior without giving a fight.

Long past are the days when men used to be the sole earners of a family. Globalization has brought a deep-seated change in the status of women worldwide. However, with the larger inflow of women in the conventional workforce of India, sexual harassment at workplace has presumed greater magnitudes.

India is rapidly advancing in its growing goals and more and more women are joining the workforce. It is the duty of the state to provide for the safety and respect of its citizens to prevent frustration, low self-esteem, insecurity and emotional commotion, which, in turn, could affect

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134 Mo Ibrahim Quotes, HARASSMENT AND VIOLENCE, available at: https://www.brainyquote.com/quotes/mo_ibrahim_680749 (visited on March 03, 2019)
business efficacy, leading to loss of production and loss of repute for the organisation or the employer. In fact, the recognition of the right to protection against sexual harassment is an inherent component of the protection of women’s human rights. It is also a step towards providing women freedom, equality of opportunity and the right to work with dignity.

In the past 50 years, various international human rights organisations have been focusing on encouraging and protecting women’s rights. The United Nations has acknowledged that women’s rights are tantamount with human rights. The same was restated in the Beijing Declaration.

Most international women’s human rights movements have raised their opinion against abuse and violence committed against women in general. In 1979, the UN General Assembly accepted the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). Areas where discrimination was found to be widespread include political rights, marriage, family and employment. The convention accentuated that discrimination and attacks on a woman’s dignity violated the principle of equality of rights.

II. SEXUAL HARASSMENT AT WORKPLACE

A variable array of actions is a major reason for difficulty while learning this concept, as even the sufferers themselves are unable to express their tragic sexual harassment encounters. Therefore, there is no lone definition which can define prohibited behaviour.

In a comprehensive manner, sexual harassment at workplace is expressed as the “unwelcome sexual favor and other physical or verbal conduct of a sexual nature that tends to create an offensive work environment.”

The Supreme Court of India defined Sexual Harassment as any unwelcome direct or indirect sexually determined behavior such as;

1. Sexually shaded comments
2. A request or demand for sexual favors
3. Showing erotica
4. Physical contact and advances,
5. Any other unwelcome physical, non-verbal/verbal lead of sexual nature.

"Unwelcome" is a vital piece of the definition. Any such unwelcome or uninvited act is completely disallowed. Sexual collaboration between consenting individuals at work might be hostile to others or additionally prompt the infringement of the working environment's strategy; however it isn't lewd behavior at working environment.

Behavior adding up to Sexual Harassment at work environment:

1. Whistling at somebody
2. Actual or endeavored assault or rape
3. Touching a representative's dress, hair, or body
4. Kissing sounds, crying and smacking lips
5. Touching or rubbing oneself sexually around someone else
6. Unwanted sexual prodding, jokes, comments, or inquiries.
7. Unwanted ponder contacting, hanging over, cornering, or squeezing.

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Harasser and the Pestered
Dissimilar to the basic suspected that inappropriate behavior at work environment is constrained to cooperation between male bosses and female subordinates, lewd behavior can happen between any associates, as:

1. Subordinate badgering of an unrivaled;
2. Same-sex badgering men can disturb men; ladies can bother ladies;
3. Men can be sexually irritated by ladies;
4. Offenders can be associates, administrators, or non-representatives as providers, clients, and merchants.

Much of the evidence relies on unreliable measures, wide-ranging time frames, and attentively focused samples. In the absence of rigorous qualitative and longitudinal designs, the dynamics of gender, power, and harassment remain poorly understood.

III. NATURE AND OCCURRENCES OF SEXUAL HARASSMENT

Taking in account the history of sexual harassment we can say that it is a social practice. Social practices have lives, institutional lives and semiotic lives. And so social practices like sexual harassment have histories. Considering sexual harassment in historical perspective allows us to ask some fundamental questions can be posed considering sexual harassment's historical perspective. These questions may relate to the nature of the practice, the terms in which it has been contested, and the rules and rhetoric by which law constrains or enables the conduct in question.

With light to this the various occurrences of sexual harassment and the nature of each occurrence is explained below:

- Phaneesh Murthy was a director with Infosys and one of the top paid employee during 2002. However, he was accused of sexual harassment. These accusations were made by his executive secretary. An out of court settlement was reached by the complainant, Murthy and Reka Maximovitch, with the latter being paid $3 million. His fables of sexual harassment still continued as he was again levied with an accusation of sexual harassment while he was an employee at iGate. Again in 2013, he was alleged to have an affair with a junior employee. Therefore, iGate removed Murthy as CEO and President as he had not reported his relationship with the aforementioned worker employee. However, the company repudiated finding any instances of sexual misconduct.

- Indira Gandhi International Airport, New Delhi is one of the busiest airport in the world having various restaurants. In 2012, an employee working at a restaurant at the Indira Gandhi International Airport filed a case against a senior Air India official, accusing him of sexually harassing her. Air

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135 Catherine A. Mackinnon & Reva B. Siegel, DIRECTIONS IN SEXUAL HARASSMENT LAW, available at: https://law.yale.edu/system/files/documents/pdf/Faculty/Siegel_IntroductionAShortHistoryOfSexualHarassmentLaw.pdf (visited on March 07, 2019)

India had outsourced work to the firm to which the employee belonged to. The woman said the official showed her porn clips, nude pictures, and, thus, made physical advances. While the police launched a probe, the woman complained to an Assistant General Manager at Air India. However, this complaint of hers was ignored. The story doesn’t end here as another police complaint was filed against Binoy Jacob, Vice-President, Air India SATS Airports Services, Thiruvananthapuram, for sexual harassment. As per the complaint, Jacob used sexually explicit language while talking with women employees.

- Shreya Ukil, in 2015, was the reason to drag Wipro to the court. She did so contending that she was being discriminated against when it came to increment of salary and that her manager forced her to have an affair with him. A 1.2-million pound lawsuit was filed against the company in London. When the UK Employment Tribunal upheld the dismissal of the complainant from the services of the organisation as appropriate, Wipro won the case. This tribunal even rejected claims of adverse cultural attitude towards women in the organisation.

- The another fable is of The Viral Fever (TVF). Here, a former employee alleged rampant sexual harassment by the CEO Arunabh Kumar. This is one of the most recent cases of sexual harassment. Anonymously the complaint was made on social media. As a result of this complaint, several other TVF employees came out in support, reciting their own incidents of molestation. The CEO, blatantly wielding his position of power in his impetent comment to the Mumbai Mirror, according to which he said that these kind of insinuations the Facebook post makes are not true. He further added that since him being heterosexual, single man, whenever found a woman sexy, would simply tell her that she is sexy. He did this in a complimenting way.

- Tarun Tejpal was a senior journalist and editor-in-chief of Tehelka magazine. However, in November 2013 he was alleged of raping a young female staffer. This event took place in an elevator of a hotel in Goa during the magazine’s annual conclave, Thinkfest. Tejpal was charged with raping a female harassment, taking benefit of his position and committing rape on a woman in his custody by the Goa police. Before the supreme court granted him bail, Tejpal spent six years in jail. Soon after his arrest, another person who came into the picture was Shoma Choudhary, the then Managing Director of Tehelka. She had come under criticism for her ineffective handling of the complaint and for trying to hush up the matter.

- AK Ganguly was a Supreme Court judge. He was accused by an intern of sexually harassing her at a hotel in New Delhi during December 2013. This incident was first reported by the intern through a blog written by her. As result of this, the then Chief Justice of India decided to set up a panel to ascertain the accuracy of the former intern’s accusations. A three-judge committee of the Supreme Court then prosecuted Ganguly of committing an “act of unwelcome behaviour” and “conduct of sexual nature.” The Delhi
Supremo Amicus

Volume 11

ISSN: 2456-9704

Police said there wasn’t enough evidence to lodge an FIR against Ganguly. Thus, in July 2014, India’s Home Minister said that there was no case against him based on the information provided by the Delhi police.

- Doordarshan is India’s public-service television broadcaster. However, an employee of Doordarshan had contended that her supervisor in Patna had harassed her, sexually. She contended that the supervisor passed explicit comments, made physical advances, and then harassed her. In April 2015, she officially lodged a complaint. An internal investigation was set up and her allegations were found to be true. However, no action was taken against her harasser. Instead, an action was taken against her which led to her being transferred to another Doordarshan office. Subsequently, she approached the police but still no case was filed against her harasser.

- All India Radio (AIR) is the country’s national radio broadcaster. However, this broadcaster was in the news in 2014. The reason why this broadcaster to beamed into the news headlines was because women employees of AIR complained of sexual harassment and exploitation by senior officials. Months later, a scrutiny confirmed charges of sexual misconduct. Because of this investigation report, AIR was instructed to install closed-circuit cameras in offices and even invited surprise inspections.

- In 2015, a woman employee at Greenpeace India said she had to leave her job in 2013 due to sexual harassment and rape by a colleague. No action was taken despite constantly complaining to the human resources department, even though others, too, had logged complaints against the same person. Times of India in 2015 was informed by a member of Greenpeace’s internal complaints committee (ICC) 5 that a suggestion to oust the offender was “overturned” by the executive director.

**Reasons for the Anguishing Victimization**

Inappropriate behaviour at working environment is a worldwide concern today. As of late, the shocking admission of numerous American big names of rape by film head honcho, Harvey Weinstein shook individuals’ soul, trailed by a worldwide crusade drifting around internet based life labelled as '#MeToo' where ladies from various parts of the world shared their awful encounters of sexual attack.

As indicated by an overview directed by the Indian Bar Association in 2017 of 6,047 respondents, no less than 70% of the ladies dreaded to approach the fitting gathering announcing sexual manhandle at the working environment. In the vicinity of 2014 and 2015, instances of lewd behaviour inside office premises were more than twofold, 57 to 119, according to the information discharged by the National Crime Records Bureau.

There could be a few explanations behind sexual mishandle going unreported in the vast majority of the cases.

- Many ladies’ worker doesn’t have even the smallest mindfulness on how sexual manhandle at the work environment could
be a culpable offense, particularly with reference to what sort of conduct or acts can add up to lewd behaviour. They likewise fear the results which they accept will enormously influence their profession prospects.

In specific cases, absence of trust and respectability with the framework/system may prevent her from enrolling a protest convincing to persevere through the tedious manhandle. A few ladies trust that the request is probably going to support or grade towards the male partners regardless of clear confirmation of the sex equality segregation still keep on existing.

• Our society, tragically, appends a shame against rape or attack, demoralizing open talks and addresses of these issues, and the distressed on occasion fears being separated on ending the quietness.

• Lastly, it's not abnormal to discover a business bypassing the law and the working environment without an ICC, with legitimately prepared individuals or a proper chain of importance which could guarantee fast organization of equity to the ladies workforce. The insignificant portrayal of ladies in the ICC or the work environment, when all is said in done, can be another explanation behind non-enlistment of episodes.

The FICCI distributed an examination consider titled 'Encouraging Safe Workplaces' expressed that 36% of the Indian organizations and 25% of the MNCs had not constituted their ICCs until 2015.

V. NEED FOR LAWS AGAINST SEXUAL HARASSMENT AT WORKPLACE

One of the central concerns of the women’s movement in India since the early-'80s was Sexual Harassment at the Workplace (SHW). During the 1980s, the Forum Against Oppression of Women (Mumbai) initiated a militant action against the sexual harassment of nurses by the patients and their male relatives, ward-boys and other hospital staff in public and private hospitals by, against the air-hostesses by their colleagues and passengers, against the teachers by their colleagues, principals and management representatives against the PhD students by their guides and the long list, thus, received a lukewarm response from the trade unions and adverse publicity in the media.

However, the women’s rights’ activists were not deterred by this trivialisation. The number of women who took systematic action against SHW increased as more and more working women came forward. In Goa, Baailancho Saad (‘Women’s Voice’) mobilised public opinion against the chief minister, who ostensibly harassed his secretary. The public was mobilised through demonstrations, rallies and sit-ins till the minister was forced to resign. In 1990, the same organisation filed a public interest litigation to bring amendments in the antiquated rape law that defined rape in the narrowest sense of ‘penile penetration into the vagina’. A new roar struck the women’s groups as they came forward in support of a new concern about a variety of sexually
violent acts against women, including SHW\textsuperscript{137}.

The most controversial and brutal gang rape that happened at the workplace was during the 1990s involving a Rajasthan state government employee. She tried to prevent child marriage, performing her duties diligently as a worker of the Women Development Programme. The feudal patriarchs who were infuriated by her ‘guts’. In lieu of teaching her a lesson, they raped her repeatedly. After an extremely humiliating legal battle in the Rajasthan High Court the rape survivor did not get justice and her rapists, “educated and upper caste affluent men”, were allowed to go free. This lead to a public interest litigation in the Supreme Court of India\textsuperscript{138} filed by an enraged women’s rights group, Vishakha.

Before 1997, the procedure was entirely different with respect to SHW. The women who experienced SHW had to lodge a complaint under Section 354 and 509 of the Indian Penal Code. Section 354 of IPC deals with the ‘criminal assault of women to outrage women’s modesty’, and Section 509 provides for punishment to an individual/individuals for using a ‘word, gesture or act intended to insult the modesty of a woman’. As per these sections, the interpretation of ‘outraging women’s modesty’ was at the will of the police officer.

A landmark judgement was passed by the Supreme Court in 1997 in matter pertaining to the Vishakha case. This judgement laid down some guidelines. These guidelines were to be followed by the establishments in dealing with complaints about sexual harassment. The court stated that until the legislation is passed to deal with this issue, these guidelines were to be implemented.

Pursuant to this, the National Commission for Women (NCW) was requested by the Government of India to draft the legislation. Various concerns were raised regarding the NCW draft. Due to these concerns, ultimately, a drafting committee was set up to make a renewed draft. Several women’s organisations are part of this committee, including Majlis from Mumbai, which was asked to make the draft. In other words, the draft was a collective effort of various women’s organisations and women lawyers associated with trade unions in Mumbai. However, to emphasise there was a particular concern, whilst working out the draft. The concern related to the inclusion of the unorganised sector and for the incorporation of provisions related to the labour law.

Sexual Harassment of Women at The Workplace (Prevention and Redressal) Bill, 2004 is a bill that is introduced in the Indian Parliament. The main objective of this bill is prevention and redressal of sexual harassment of women at the workplace. This bill was passed in keeping with the principles of equality, freedom, life and liberty as enshrined in the Constitution of India, and as upheld by the Supreme Court in Vishakha v. State of Rajasthan\textsuperscript{139} and as reflected in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which has been ratified by the Government of India.

\textsuperscript{137} Chorine et al, 1999
\textsuperscript{138} Combat Law, 2003
\textsuperscript{139} 1997(7) SCC.323

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70
The table below shows the crime of sexual harassment at workplace.

<table>
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<tr>
<th>S. No.</th>
<th>State</th>
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<th>Crime Rate</th>
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VI. SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION, AND REDRESSAL) ACT, 2013

Empowering sexual orientation uniformity as the essential human right in all angles, the Constitution of India ensures every one of its natives correspondence of status and opportunity. Inappropriate behaviour is an infringement of a lady's essential ideal to balance as ensured by Articles 14 and 15 of the Constitution. Inappropriate behaviour at work environment of ladies makes an antagonistic and unreliable condition which demoralizes them and antagonistically influences their social and financial advance.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 ("Prevention of Workplace Sexual Harassment Act") upheld on December 09, 2013 by the Ministry of Women and Child Development is India's first particular enactment rendering to the issue. The demonstration expects to keep..."
and shield ladies from lewd behaviour at working environment and for the successful redressal of objections of inappropriate behaviour at working environment.

The Government has additionally told controls under the demonstration titled The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Rules, 2013 ("Prevention of Workplace Sexual Harassment Rules"). The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Rules, 2013 ("Prevention of Workplace Sexual Harassment Rules")

Every single such act that bargain the situation of a working lady are unlawful under the Prevention of Sexual Harassment at Workplace act, 2013. The Act obviously expresses the accompanying:

- It is required for any organization, or association having in excess of ten representatives to have an inappropriate behaviour board of trustees called the Vishakha Committee.

- The board of trustees ought to contain two, or three individuals from the said association and two individuals from outside, with the goal that it's adjusted and free.

- The sole occupation of the board is to research instances of inappropriate behaviour in the work environment and rundown fitting activities for the business.

- Workplace isn't only the four dividers of a physical office space, however any work environment'. An out-of-office meeting, online discussions as a consultant, 'easygoing' meeting in a bistro, or even a meeting in an organization where you are not utilized yet—you're entitled for insurance against lewd behaviour under the Act.

- It's the business' obligation to make accessible the names of the executive and advisory group individuals.

- Make beyond any doubt there is an arrangement that has been "viably" imparted to all labourers, independent of whether they are paid workers or volunteers.

- Display points of interest of both casual and formal routes accessible to a specialist to address/whine about working environment inappropriate behaviour.

- Undertake introduction on working environment lewd behaviour for all specialists in particular associations, foundations or organizations.

- A Complaints Committee which is prepared regarding aptitude and limit is basic for building trust.

- Encourage senior people/pioneers/bosses or any individual who can impact business related choices, to wind up good examples.

- Men and women ought to be incorporated into building a culture which never again endures work environment inappropriate behaviour.

VII. PROVISIONS IN THE INDIAN LAWS DEALING WITH
PUNISHMENT FOR SEXUAL HARASSMENT

1. Criminal case under sections of the Indian Penal Code (IPC):
   • Section 294
     Any obscene act or song done in public to annoy another is an offence cognizable, bailable and triable by any magistrate, as prescribed in the provisions in Chapter XVI entitled “Of Offences Affecting Public Health, Safety, Convenience, and Morals.”
   • Section 354
     When without the consent of the women, acts of physical attack or intentional force on the person of woman are committed to outrage her modesty, then the offender can be fined or sentenced to two years of imprisonment or convicted with both.
   • Section 509
     As in Chapter 22 – “Of Criminal Intimidation, Insult and Annoyance”, commission of act, utterance of words intentional gestures to insult the modesty, of a woman or hurt her privacy is an offence which is cognizable, bailable and triable by any magistrate and can be punished by way of fine or sentence up to two years of imprisonment or with both.

2. Criminal case under the Indecent Representation of Women (Prohibition) Act, 1987
   Under Indecent Representation of Women (Prohibition) Act, 1987 if any person harasses another by an indecent portrayal of women in books, films, photographs, paintings, etc., can be convicted for minimum two years’ sentence.
   Further, Section 7 says that when found guilty on instances of an indecent depiction of women by way of pornography display etc. on the company premises will be charged with minimum two years sentence.

3. Criminal proceedings
   Where any such conduct amounts to a specific offence under the IPC, the employer should initiate requisite measures in accordance with the law by making complaint with the appropriate authority. While dealing with sexual harassment complaints in particular, the employer should make sure that the victims or witnesses are not discriminated.

4. Filing a civil suit
   A civil suit for mental anguish, loss of income and employment caused by the sexual harassment can be instituted for damages under the law of tort.

VIII. RECOMMENDATIONS TO DEAL WITH SUCH OCCURRENCES

Obligation of the business or other capable people in working environments is to keep the commission of demonstrations of inappropriate behaviour and to give the methods to the determination, indictment or settlement of lead of lewd behaviour by making every fundamental walk.
• Steps to avert Sexual Harassment at work environment:
   All people accountable for work environment whether in broad daylight or private segment should find a way to counteract inappropriate behaviour at work. These means ought to be taken after without preference to the all inclusive statement of the commitment:
   1. Express denial of inappropriate behaviour as characterized above at the work environment ought to be
told, distributed and flowed in suitable ways.

2. Rules precluding inappropriate behaviour to be incorporated into government and open segment set of principles and train instrument and burden of suitable punishments against the guilty party of such guidelines.

3. Above said steps should likewise be incorporated into standing requests go under the Industrial Employment (Standing Orders) Act, 1946, with respect to the private area.

4. Suitable working conditions ought to be set up at all parts of work, wellbeing, cleanliness and recreation to keep a threatening situation towards ladies at work environments and no lady representative ought to have sensible grounds to feel hindered in connection to her business.

5. The most critical approach to, forestall lewd behaviour at work environment is through steady mindfulness and learning up gradation. It can be effortlessly accomplished by taking up this course by National University of Juridical Sciences.

• Disciplinary Action
Endorsed disciplinary activities must be started by the business as per the administration rules, when managing acts adding up to unfortunate activities in work as characterized in these tenets.

• Complaint Mechanism
For redressal of the casualty's protestation, a proper – time bound dissension component must be set up in the business' association to choose whether the affirmed inappropriate behaviour act constitutes an offense under law or a rupture of the administration rules.

• Internal Complaints Committee
The previously mentioned protest redressal component must be able to give a unique guide or other fundamental help benefit grievances advisory group during need. Likewise, attributable to the affectability of the issue, strict privacy must be guaranteed.

The synthesis of the grumblings advisory group must be at the very least half female individuals from the aggregate, which is to headed by a lady. Furthermore, an outsider association as NGO or different bodies ought to be organized to maintain a strategic distance from senior level impact or undue weight at any regard.

Yearly reports of the documented protestations and concerned advances taken by the dissensions panel must be submitted to the particular government office. Further, the businesses should likewise investigate the adherence to the endorsed rules, including on the reports of the objections board submitted to the administration division. These are strict compliances an organization must hold fast to. Resistance could prompt a considerable measure of repercussions including fines and loss of altruism.

IX. CONCLUSION
Ongoing occasions at both global and in addition local level, have brought the fundamental issue of Sexual Harassment at working environment to the front line. Partners, at all levels, from the shop-floor to meeting room and up to the financial specialists, ought to be sharpened of the significance of an evenhanded working environment. In our view, the Act will be
instrumental in giving a protected workplace to ladies representatives and is prepared to guarantee that Indian businesses lead the path, all around, in a sheltered workplace. The positive relationship between lower levels of badgering and higher occupation fulfilment among workers is proverbial, and an unequivocal win-win for partners.

Inappropriate behaviour at the working environment is a general issue. Despite the fact that the event of inappropriate behaviour at the working environment is far reaching in India and somewhere else, this is the first occasion when it has been perceived as an encroachment of the key privileges of a lady, under Article 19(1)(g) of the Constitution of India "to rehearse any calling or to do any occupation, exchange or business".

Recently, the issue of Sexual Harassment at the working environment has accepted genuine extents, with a transient ascent in the quantity of cases. Shockingly, in any case, by and large ladies don’t report the make a difference to the concerned specialists.

In India, Articles 14, 15 and 21 of the Indian Constitution give shields against all types of separation. As of late, the Supreme Court has given two point of interest judgments - Vishakha v. State of Rajasthan, 1997, and Apparel Export Promotion Council v. A K Chopra - in which it set out specific rules and measures to guarantee the aversion of such occurrences. In spite of these improvements, the issue of lewd behaviour is accepting disturbing extents and there is a squeezing requirement for household laws on the issue.

A Bill to Prevent Sexual Harassment at the Workplace, 2005, has just been presented in the Indian Parliament. Ladies’ gatherings have started campaigning with parliamentarians to get it go as an Act in the winter session of Parliament. For any lewd behaviour law to be fruitful in India, it is essential to know about the troubles defying our general public and approaches to defeat them. We as a whole realize that India is a male centric culture and most instances of lewd behaviour stay unreported. Ladies are hesitant to gripe and lean toward quietness because of absence of affectability with respect to Indian culture. There is a need to sexual orientation sharpens our general public with the goal that the casualty does not feel regretful and is urged to report any type of provocation. The casualty's security must be ensured. The police and an expansion in the conviction rate. Ladies themselves ought to be made mindful of their entitlement to a safe the legal, specifically, likewise should be sex sharpened. There ought to be expedient redressal and badgering free workplace.

The idea and meaning of Sexual Harassment ought to be unmistakably set down, and the redressal component made known to ladies in every single segment of the economy.

141PTI, "Law against sexual harassment at workplace comes into effect", TIMES OF INDIA, December 13, 2013 December (Visited on 08 March, 2019)
143 AIR 1999 SC 625
segment to battle SHW. Regardless of striking judgments by the Supreme Court, there is no lewd behaviour grumblings panel at most working environments, even in the administration segment. The pinnacle court should guide the different work environments to shape lewd behaviour advisory groups inside a stipulated time allotment.

In any cultivated society, it is the crucial right of individuals to have the capacity to lead their lives with poise, free from mental or physical torment. To guarantee this, transgressors must pay for their spontaneous lewd gestures. In the meantime associations, for example, Men Against Violence and Abuse, that direct sex sensitisation projects and self-preservation classes to battle lewd behaviour at the work environment, must be energized.

To successfully avoid SHW we require both a best down activity by the state and bosses and common society activities from natives' gatherings, ladies' associations and exchange associations.

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MEEK BODIES WITH OPTIMISTIC MINDS- A CRITICAL ANALYSIS OF THE APPLICATION OF POCSO ACT

By Apoorv Gupta, Rishank Nath Sharma, Aditi Karra and Safa Ali
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ABSTRACT
The growing intricacies of life and the dramatic changes brought about by the socio-economic transition in the society has played a major role in increasing the vulnerability of the children to various and newer forms of abuse. One of the forms of abuse inflicted upon the children is sexual abuse, which is a serious and pervasive social malady in India. This issue is more severe and complex in our nation as sexual offences against the children has always been a hidden problem and largely been ignored in public discourse. This is because intra-familial sexual abuse often goes unreported in the society. It is a major threat to the well-being of the children. Child sexual abuse can contribute to an array of psychological and emotional disorders that the children might experience for a lifetime.

Keeping the development of this intricacy trends in the society, the Government in order to combat with this ubiquitous social evil, enacted the new legislation – the Protection of Children from Sexual Offences (POCSO) Act, 2012. The present paper aims to focus on the working and the practical application of POCSO Act, 2012.

I. INTRODUCTION
“There can be no keener revelation of a society’s soul than the way in which it treats its children.” — Nelson Mandela, Former President of South Africa. Today’s children are tomorrow’s citizens and it is eventually in their hands to make or break a country. They are the backbone of any nation and hence their development and safety should be of utmost importance.

Being the world’s 3rd most populated country with a population count of 1.21 billion, India is also home to the largest number of children in the world, more specifically 41% of the total population consists of children below the age of 18 years. Having a population this big, there is also a significant risk for the safety of children, considering that the stakes for issues like violence against children, abuse, exploitation, trafficking, labour, sexual violence, child right violation, child pornography, etc. are rather high. The extent of the problem and the numbers of children affected is very difficult to assess, as official data is very scarce.

The weakest statistics on children had always been in the area of child protection except for data on child marriage, birth registration, and child labour, the latter


www.supremoamicus.org
being afflicted by definitional issues. The intrinsic nature of the problem of collection of data on child protection related to trafficking, child abuse, and other illegal and unlawful activities have already been described.

The well-being of a child is of a primary concern to the nation as they are the future of the nation. Their health and family relations play a key role in their development and this was rightly stated in the case of Lakshmi Kanth Pandey v. Union of India\textsuperscript{145}. The guidelines set forth by the Supreme Court regulated adoption over many years and became an effective tool for child rights.

As stated in the judgement by the supreme court of India for the said case, “The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's program should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.”

The United Nation Convention on Child Rights is a Human Rights treaty signed on 20\textsuperscript{th} November 1989 and came into force on 2\textsuperscript{nd} September 1990, has 140 signatories. It defines a child as “any human being under the age of eighteen unless the age of majority is attained earlier under national legislation”. The objective of this treaty is to ensure the safety of children and to keep them from issues like trafficking, prostitution, child pornography.

India ratified this convention on 11 December 1992, however it did not agree to the article which talks about child labour. This treaty isn’t a legally binding document. However, it takes on a child’s safety and development is more of an obligation than an investment. The child’s safety is an investment because in turn it is eventually developing the nation but this treaty considers it more of an obligation which is also why children in most countries aren’t safe and this is affecting not just their physical health but also their mental health.

Children in such a tender age are very vulnerable and they need special care and protection, and family plays the most important role in their development. The treaty indeed does state this but this has not brought much change in this the society.

The statistics of the crime against children in India are still the same and have rather increased over the years. The NCRB report shows the following data about the crime against children that were reported.

<table>
<thead>
<tr>
<th>Crime Head</th>
<th>Crime Incidence (IPC+SLL)</th>
<th>Percentag e Variation</th>
</tr>
</thead>
</table>

\textsuperscript{145} 1984 AIR 469, 1984 SCR (2) 795
Source: Crimes in India, 2016 Statistics, NCRB, p. xxxiii

<table>
<thead>
<tr>
<th>Crime Head</th>
<th>Total cases reported</th>
<th>Major Metropolitan Cities during 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kidnapping &amp; Abduction</td>
<td>12,5 (5,457)</td>
<td>Delhi (1,864)</td>
</tr>
<tr>
<td>Protection of Children from Sexual Offences Act, 2012</td>
<td>4,473 (1,374)</td>
<td>Mumbai (979)</td>
</tr>
</tbody>
</table>

Source: Crimes in India, 2016 Statistics, NCRB, p. xxxiii

In the year 2012, the Ministry of Women and Child Development after brainstorming field work and surveys with various Non-Governmental Organizations (NGOs) has helped in breaking the conspiracy silence and generated substantial political and popular momentum to address this grave issue. Finally, it led to the enactment of legislation called the Protection of Children from Sexual Offences (POCSO) Act, 2012 with the objective to contribute for the enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

**LEGALITY SANS LEGAL CLOUD – DAWN OF POCSO ACT**

“Children are the world’s most valuable resource and its best hope for the future” – John F. Kennedy. India is surely blessed to have one of the largest population of the world’s most valuable resource and its best hope for the future, children.

In the early traditional societies, child rights were secured on the concept of *patria potestas*, the parent of the children enjoyed absolute autonomy to decide on the raring and caring of the children. But with the passage of time and increasing community concern for the children, the concept of *patria potestas* evolved to be as *parens patria*, where the State began to exercise its power to safeguard the interest of children in need of care. In India, the...
first legislation dealing specially with the rights of children came in as the Apprentices Act, 1850 and since then the paedo-jurisprudence is evolving and developing. The years 2012-2013 have been eventful both in term of legislative law and judicial law from the point of view of child rights in India. This vital period has been responsible for the development and expansions of the horizons of child rights in terms of its ideological underpinnings range of interest brought under its sweep and techniques of enforcement at the ground level. In India too, the concept of child rights has remained at the focus of brisk legislative and judicial activity leading to the passage of laws such as the Commissions for Protection of Child Rights Act, 2005, Right of Children to Free and Compulsory Education Act, 2009, and the Protection of Children from Sexual Offences Act, 2012 which is also the latest legislation for the protection of child rights in the country. The times have changed indeed, being a victim has always been a constant for girls in this country. Right from being killed in the mother’s womb, to sacrificing their life in practices like sati, to being forced to pay dowry, to being a rape victim, rising above such social evils has always been a challenge for the females in this country.

One of the major issues in a male dominated society like ours is patriarchy and it has now become a way of living for most people regardless of how modern they claim to be, which is also why women in this country aren’t able to rise above these social norms and all the challenges that they face in their lives aren’t taken into account and are neglected. The fact that it has been neglected over the years has led to this state today and things wouldn’t change for better if there is no action taken to benefit the woman.

Normalisation of patriarchy in the nation needs to meet a red line. We all wish to live in a better world, but wishing is not all that we should be doing. The most vulnerable to the most horrendous of crimes are the children and woman of our nation. Before championing for a better world, we must champion for a better country. A country where there exists no place for paedophiles, no place for sexual abuse. A country where the dress of the little child, the saree of the woman is not covered with blood.

The POCSO Act, 2012 is a comprehensive legislation having many distinctive and new provisions to provide protection to children from a range of sexual offences with due regard for safeguarding the interest and wellbeing of the children at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for the establishment of Special Courts for speedy trial of such offences. This is for the first time; a special law is passed to address the issue of sexual offences against children. The Act clearly defines the offences and also provides for stringent punishments, which have been graded as per the gravity of the offence which ranges from simple to rigorous imprisonment of varying periods.

III. IN CLOSE PROXIMITY OF POCSO – WORKING OF THE ACT
In order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children through less ambiguous and more stringent legal provisions, the Ministry of Women and Child Development championed the introduction of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The Act has some salient features attached to it. These are:

- The Act has defined a child as any person below 18 years of age.
- To deal with the abuse faced by them, especially sexual abuse, the government of India came out with the Prevention of Children from Sexual Offences (POCSO) Act, 2012.
- It has been drafted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. It provides protection to all children from the offences of sexual assault, sexual harassment and pornography.
- The sexual abuse of children includes the following:
  1. Domestic violence against children.
  2. Raping of a child or doing sexual activities with him/her.
  3. Showing adult content to minors.
  4. Touching their private parts intentionally.
  5. Over exploitation of children.
- The provisions of this Act have been framed and are regulated by the Ministry of Women and Child Development. It is a gender neutral Act.
- An offence is treated as “agravated” when committed by a person in a position of trust or authority of child such as a member of security forces, police officer, public servant etc.
- This Act is monitored and implemented by National Commission for Protection of Child Rights (NCPCR) and State Commission for Protection of Child Rights (SCPCR).
- This Act includes males, females and transgender as well.
- It gives the formal definition of a child i.e. any person below the age of 18 years.
- The reporting, recording of evidence, investigation and trial of offences should be done in a child friendly manner. The trial of cases should be done in camera.
- Recording the statement of the child at his/her residence or at a place of his/her choice, preferably by a woman police officer not below the rank of sub inspector.
- No child should be detained in the police station in the night for any reason.
- Translators should be provided to them to overcome the language barrier. A special educator or any person familiar with the manner of communication of the child should be provided if the child is disabled.
- The statement of the child should be recorded as spoken by the child.
- During the time of recording the statement of the child, the police officer should be in casual dress to reduce the fear of police in the minds of children.
- Punishment and fine should be flexible according to the crime and also according to the mental health of the child.
- The Act has provided provisions for the establishment of Special Courts for trial of offences. Frequent breaks should be given for the child during trial. The trial should be completed within one year of time.
- Child should not to be called repeatedly to testify.
No aggressive questioning or character assassination of the child during the trial.

Medical examination of the child should be conducted in the presence of the parent of the child or any other person in whom the child has trust and confidence/guardian. In case the victim is a girl child, the medical examination shall be conducted by a woman doctor only.

Provision of long and short term rehabilitation through Juvenile Justice Board and Child Welfare Committee are also prescribed. The POCSO Act casts a duty on the Central and the State Governments to spread awareness through media at regular intervals of time to make the general public, children, their parents and guardians acquainted with the provisions of the Act.

The Act pertains to the attainment of the best interests and well-being of the child as being of paramount consideration at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child.

It gives an umbrella to the definition various forms of sexual abuse, including penetrative and non-penetrative assault as well as sexual harassment and pornography and deems as a sexual assault to be “aggravated” under certain circumstances such as when the child abused is mentally ill or when the abuse is committed by a person who is in a position of trust or authority vis-à-vis the child, likely to be a family member, police officer, teacher, or doctor.

People who traffic children for sexual purposes can also punished under the provisions relating to abetment in the POCSO Act. The Act has prescribed stringent punishment graded as per the gravity of the offence i.e., with a maximum term of rigorous imprisonment for life and fine. The punishments are mentioned in the table below:

<table>
<thead>
<tr>
<th>SECTION</th>
<th>OFFENCE</th>
<th>PUNISHMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 4</td>
<td>Penetrative sexual assault</td>
<td>Imprisonment for 7 years which may extend to imprisonment for life.</td>
</tr>
<tr>
<td>Section 6</td>
<td>Aggravative penetrative sexual assault</td>
<td>Regress imprisonment for 10 years extending to imprisonment for life.</td>
</tr>
<tr>
<td>Section 8</td>
<td>Sexual assault</td>
<td>Imprisonment for 3 years extending to 5 years.</td>
</tr>
<tr>
<td>Section 10</td>
<td>Aggravated sexual assault</td>
<td>Imprisonment for 5 years extending 7 years.</td>
</tr>
<tr>
<td>Section 12</td>
<td>Sexual harassment of child</td>
<td>Imprisonment extending to 3 years.</td>
</tr>
<tr>
<td>Section 14 (1)</td>
<td>Use of child for</td>
<td>Imprisonment extending</td>
</tr>
<tr>
<td>Section 14 (2)</td>
<td>Use of child for pornographic purpose plus commission of offence under section 3</td>
<td>Imprisonment of 10 years extending to imprisonment for life.</td>
</tr>
<tr>
<td>----------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------------------</td>
</tr>
<tr>
<td>Section 14 (3)</td>
<td>Use of child for pornographic purpose plus commission of offence under section 5</td>
<td>Regress imprisonment for life.</td>
</tr>
<tr>
<td>Section 14 (4)</td>
<td>Use of child for pornographic purpose plus commission of offence under section 7</td>
<td>Imprisonment for 6 years extending to 8 years.</td>
</tr>
<tr>
<td>Section 22(1)</td>
<td>False complainant w.r.t. offence under section 3, 5, 7 and 9</td>
<td>Imprisonment extending to 6 months.</td>
</tr>
</tbody>
</table>
I. JUDICIOUS REFLECTION ON JUDICIAL REFORM – ISSUES AND CHALLENGES

a. Age of the victim

Issues related to deciding the age of the victim is very sensitive and complex. The age of the victim is an important aspect to be decided before considering the question as to whether an offence as under Section 4 of the POCSO Act was committed or not\(^{146}\). The victim must be a child as per the definition of “child” provided under Section 2(d) of the POCSO Act which indicates that “child” means any person below the age of eighteen years and it should be proved by the prosecution before the court that as on the date of the commission of the crime, the victim was a child.

On the question of whether the school certificate can be relied upon to ascertain the age, the Supreme Court decided that entry in the register is a relevant fact. The content of itself does not stand proved, only the document is proved. There has to be more evidentiary proof to prove it. Transfer certificate or other documents if produced it has to be proved further by the person who has actually given the information, and who got it registered. In the case of Daya Chand v. Sahib Singh\(^{147}\), two different dates of birth were recorded in two different schools; the Supreme Court decided that the Medical Report was to be relied upon to find out the actual age of the victim.

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In Pradeep Kumar v. State of U.P.\(^{148}\) a three judge bench of SC accepted High School Certificate, Horoscope and medical opinion as an acceptable proof of age in the fact and circumstances of the case. Benefit of Children Act was given. In the contest of the age of the child there are many complications; Rule 12 of the Juvenile Justice Act can be used in criminal matters to determine the ages under the POCSO cases. This was rightly held in the case of Jarnail v. State of Haryana\(^{149}\).

Determining whether an allegation involving underage sex was forced or consensual would depend greatly on individual interpretation of the circumstances. In the case of consensual sex between two minors, the concepts of victim and perpetrator become interchangeable as the law inexorably criminalizes sexual behaviour for under 18 year olds.

In Santhosa v. State\(^{150}\) the Court looked into the material placed on record and held that as on the date of the alleged incident, the victim was at the age of 13 years. The contention of the learned Counsel for the respondent was that there was free consent of both victim and the accused of consuming the marriage. The Court rejected the contention and framed the issue as per the sections of the POCSO Act, 2012. For an offence under POCSO Act, which is a more stringent Act, the consent of the child would be of no

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\(^{147}\) (1991) 2 SCC 438
\(^{148}\) (1995) Supp 4 SCC 419
\(^{149}\) (2013) 7 SCC 263
\(^{150}\) Crl.P.No.906/2014
consequence, as she is protected by the provisions of law. Lack of proper support and professional help to the victim and accused in such matters sometimes cause greater psychological harm and trauma.

There are difficulties for the victim as well as for perpetrator under 18 years of age, the later are criminalized but are not provided with professional help they might need. In most countries, the age of consent varies between 13 and 18 years. The table below lists the age of consent in the selecting countries:

<table>
<thead>
<tr>
<th>Country</th>
<th>Age of Consent</th>
<th>Law Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States of America</td>
<td>Varies from state to state between 16 and 18 years. In some states, the difference in age between the two parties is taken into account. This can vary between 24 years.</td>
<td>Different state laws.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>16 years.</td>
<td>Sexual Offences Act, 2003</td>
</tr>
<tr>
<td>Germany</td>
<td>14 years (16 years if the accused is a person responsible)</td>
<td>German Criminal Code</td>
</tr>
<tr>
<td>Sweden</td>
<td>15 years (18 years if the child is the accused person's offspring or he is responsible for upbringing of the child).</td>
<td>Swedish Penal Code</td>
</tr>
<tr>
<td>France</td>
<td>15 years.</td>
<td>French Criminal Code</td>
</tr>
<tr>
<td>Malaysia</td>
<td>16 years for both males and females.</td>
<td>Malaysian Penal Code Child Act 2001</td>
</tr>
<tr>
<td>China</td>
<td>Sex with a girl below 14 years is considered rape. Sodomy of a child (male or female) below 14 years is an offence.</td>
<td>Criminal Law of China, 1997</td>
</tr>
<tr>
<td>Canada</td>
<td>16 years.</td>
<td>Criminal Code of Canada</td>
</tr>
<tr>
<td>Brazil</td>
<td>14 years.</td>
<td>Brazilian Penal Code, 2009</td>
</tr>
<tr>
<td>Australia</td>
<td>Varies between 16</td>
<td>Australian Criminal</td>
</tr>
</tbody>
</table>
and 17 years among different states and territorial jurisdictions. In two states, a person may engage in sexual activity with a minor if he is two years older than the child. In such cases the child has to be at least 10 years old.

India 18 years. Protection of Children Against Sexual Offences Act, 2012

b. Corroborate evidence
When two objects come into contact, they always leave a trace on the other. Every criminal case can be connected to its criminal by contact traces carried from the sense of crime or left by him at the scene of the crime. Here the forensic science helps in tracing the chain of evidence which ultimately help in concluding the evidence with strong conjoin.

In the cases of sexual offences against children, the children become a victim by their close relatives or family members or friends and therefore the crime committed within their houses or in places where it is difficult to collect the evidence from the scene. As a result, physical examination or medical examination is now an essential part of the investigation of sexually abused children as it helps in explaining the injury pattern, age and intensity of injury. Section 27 (2) of the POCSO Act, 2012 now mandates that in case of a female child/adolescent victim, the medical examination should be done by a female doctor. However, the law mandates the available medical officer to provide emergency medical care. On the other hand, the Section 166A of the IPC mandates that the Government medical officer on duty to examine the rape victim without fail. The conflicting legal position arises when female doctor is not available.

Another important aspect to be taken into consideration and which also need cautious examination is effective child forensic interview. Child forensic interview is a formal, structured interview technique that is used to investigate whether a child has experienced or witnessed physical or sexual abuse and if so, to get disclosure. The goal of child forensic interview is to:

- To get maximum information while causing minimum stress and contamination.
- To assist the child in providing detailed information.
- On the nature and extent of the abuse, including those responsible.

b. Obligatory Reporting
Section 19 of the POCSO Act, 2012 mandates that any person, especially those
who are working with children and young people in the education, social, religious or health sector, who has either the knowledge of any offence given in this act has been committed or is going to be committed to provide the information to the local police or to the special juvenile police unit. Failure to do so carries legal sanctions of imprisonment up to 6 months and/or fine. In Shankar Kishanrao Khade v. State\textsuperscript{151}, the Supreme Court exercising its parents patria obligation, especially with regard to children with intellectual disability, issues direction in respect of reporting of the offence, which are as follows:

- In charge of schools, special homes, shelter, hostels, remand homes etc. are under a special obligation to report special juvenile police unit or local police all the incidents of sexual abuse or assault of children that comes to their knowledge;
- Media persons, incharge of hotels, hospitals and clubs in compliance with section 20 are under an obligation to furnish information about sexual abuse/assault of children that comes to their knowledge;
- Special obligation of institutions handling children with disability;
- Where the accused of the crime is a family member reporting the matter relating to such children should be in consultation with the mother of the accused/assaulted child in the best interest of the child;
- Special obligation of the hospitals and medical institution where children come for treatment to report sexual abuse of children to appropriate authorities;
- Non – reporting of such crimes is in itself a serious offence and person should be subject to legal action for such in action;
- The Central and State Governments are directed to constitute Special Juvenile Police Unit in all the districts;
- Central and State Governments are directed to take all steps to give widest publicity to the provisions of the 2012 Act.

The overall purpose of the provision is included to encourage compliance with the law but the result of the same has mixed success. Mandatory reporting obligation under POCSO Act, 2012 raises three problems:

- Criminalizing sex less than 18 years virtually pushes it beyond the purview of health professionals and school counsellors who might be reluctant to impart safer sex advice or treat effects of unsafe or reckless sexual practices without breaching patient confidentiality and/or getting involved with reporting it to the authorities.
- The law raises many issues of institutions, charities and organizations working with poor and backward communities and children and who are deeply committed to building relationships based on trust with young people. Breach of trust would seriously jeopardize their efforts to communicate with and work with young people if they are legally bound to report any knowledge of consensual, albeit underage sex. Lack of training for professionals (doctors, teachers, psychologists, social workers, counsellors, etc.) working with children on how to deal with knowledge of sexual activity and to

\textsuperscript{151}(2013) 5 SCC 546.
respond appropriately can be an additional problem.

- Mandatory reporting raises the issue of who is or should be responsible for enforcing this legal obligation. The police are overworked and scarcely possess the capacity to do so. Prescribing a legal obligation with penal and financial sanctions, without thinking through the mechanism for its enforcement, and the resulting lack of accountability, might mean that cases of failure to report fall through the cracks. There is a danger that the law may be used only retroactively to punish transgressions, rather than ensure prospective reporting of suspected sexual offence against the child by competent authorities in appropriate cases.

c. Determination of the age vis-à-vis Child Marriage

Determining the age of the victim and the accused is fraught with problems. Section 34 (2) authorized the court to determine the age of the child, but no provision or guidelines has been provided as to how to determine the age. It is generally acknowledged that forensic means of establishing age of a living person can be inexact and quite complicated. In the matter of BablooPasi v. State of Jharkhand\(^{152}\), the Supreme Court decided that the age determination is very difficult in the absence of birth certificates or other official documentation and while the opinion of a specially constituted Medical Board may be useful, but it cannot be the only or conclusive factor to do so. The court further stated that a hyper-technical approach should also not be adopted and the court should lean towards giving the benefit of the doubt to the juvenile while ensuring that the law is not being misused. In developing country like India where a large proportion of births are just not registered and therefore substantial sections of the population do not have documents like birth certificates or school leaving certificates to provide proof of age, thus creating lots of chaos.

The legal age of consent and mandatory reporting obligations of POCSO Act, 2012 combine with the difficulty in determining age could cause more problems than anticipated. In a report by the Indian Express it is indicated that in India one in six women were married before they were 8 years of age, of which 17.5 per cent (6.5 million) women had been married within 4 years prior to when the data was collected. Thus there could be possible 6.5 million potential law suits under the POCSO Act. It would lead to enormous waste of time and resources of the criminal justice system in cases of consent to marriage by a girl between ages of 15 – 18 years.

Under the IPC, sexual intercourse by a man with his wife above 15 years of age is an exception to rape. The Criminal Law Amendment Act, 2013 raised the age of consent to 18 years but did not disturb this exception. As a result, sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount rape under the IPC\(^{153}\). But in case of conflict between the provisions of the POCSO Act and other laws, the former will override. Owing to Section 42A of the

\(^{152}\)(2008) 13 SCC 113

\(^{153}\)http://www.nls.ac.in/cRICT/cicatorichildrenposcoa.htm (retrieved on March 22, 2019).
POCSO Act, the exception under the IPC will not apply. Thus, in all cases of child marriage where the bride or groom is below 8 years of age, a charge of aggravated sexual assault can lie against them under the POCSO Act.

IV. CONCLUSION
Children are the citizens of the future era. On the proper bringing up of children and giving them the proper education to turn out to be good citizens depends the future of the country... Every society must devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate education, training and guidance in order that they may be able to have their rightful place in the society...

"(Supreme Court of India in Sheela Basre v. Children Aid Society and Others\textsuperscript{154}) Justice V. R. Krishna Iyer remarked that, the world’s culture and future are shaped by the practical policies and legal prescriptions relating to the work and growth of the Child, its environment and opportunities for development. The fledglings, if properly educated and brought up with sound initiatives, will be the wealth, not the tilth, of the country and the century‘. This is evident by the fact that UNCRC is the most widely and rapidly ratified human rights treaty in the world, as every nation put the issues relating to the children at the top most priority realizing the importance of the same. Whereas in India, the number of children increasing year after and the problem of primary health, nutrition, immunization, school enrolment, the noxious phenomenon of street children and orphans in neglect. Building a database focusing on disadvantage, elimination of social discrimination empowerment of women and pressing into use of NGOs as instruments to enforce the law and above all sensitization of the legal systems and all segments of society are under the eclipse.

After regular brainstorming exercises of the legislatures and judicial officer so much has been achieved in favour of the rights of the children but still there is so much to be contributed to the curb this social evil. Fir and foremost, there is need to mobilize, educate and sensitize the stakeholders and practitioners who are working in the field of education, health and social work about the possible methods and remedies available. Another is strengthening the vigilance of the matter coming up to the State for the speedy and effective delivery of the justice. Most importantly the government should take due diligence in securing the rehabilitation of the victims which is somehow left behind in many of the cases.

There has been no objective assessment of the manner and extent of implementation of Directive Principles by the Central State Governments excepting occasional surveys by the Planning Commission, some NGO studies and the Human Development Reports of the States. The annual reports of the Ministries of Human Resource Development and Health give scanty and fragmented data on investments and outcomes with no clear indication in terms of fulfilment of rights and obligations. As India is required to report

\textsuperscript{154}1987 AIR SC 656
performance on basic rights to the Human Rights Committee of the United Nations there ought to have been periodical reporting on nature and extent of rights availed or fulfilled to Parliament and State Legislatures so that there could be public scrutiny of not only government’s performance but also that of Parliament’s and legislatures as well.

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LACK OF IMPLEMENTATION OF ANIMAL LAWS IN INDIA: A CRITICAL APPRAISAL

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ABSTRACT
Animals are one of the most important partners of humans on this earth and they serve many purposes like domestication and act as workers and resources which really help humans at a great extent. The first law implemented for safeguarding the interest of animals was implemented in 1861. The inhuman condition under which animals have to live is due to different reasons, this paper reviews all the major laws related to animals and tries to incorporate the measures which can improve the conditions of animals. This study also covers what is the present scenario regarding laws related to animals and what is wrong in the implementation of these laws. The paper also incorporates changes and piece of advice that common man can do for the welfare of animals. It also discusses the role of various animal organizations like Animal Welfare Board of India (AWBI), People for the Ethical Treatment of Animals (PETA) and Plant and Animal Welfare Society (PAWS) etc. The primary research methodology has been used to conclude this research. An analysis of this study informs us that there are some fallacies in laws related to animals and it also brief us that authorities don’t look into this matter seriously and even they show an incautious behaviour towards animals. Despite the fact that there is no inadequacy of laws related to animals in our country, the overall image that emerges from the literature is that that the people lack an inner urge or an impulse to protect animals. Moreover, it can also be said that the attitude of authorities towards animals is apathetic, indifferent, impassive, unconcerned and unresponsive. The philosophy underlying these laws is explained, their main provisions are explored, and future directions that could move the ethic forward and further rationalize the laws are sketched. This work increases our understanding of laws corresponding to animal and one can easily comprehend them; this project will contribute to future research on similar topics as well.

KEY WORDS: Animal laws, Lack of Implementation, Appraisal, Inadequacy of laws.

“Humanity's true moral test, its fundamental test...consists of its attitude towards those who are at its mercy: animals.”
— Milan Kundera

INTRODUCTION
Animals are the best partners of humans on this Earth. In our mythological history we have lot of references how animals were used as an element of fun and how they were subjected to cruelty. According to a dramatized version of the events by the poet Kalidasa, the king Dushyanta married Shakuntala on his hunting expeditions in forests. Shakuntala gave birth to his child who was named by the Sage Kanwa named as Sarvadamana. Surrounded only by wild animals, Sarvadamana grew to be a strong child and made a sport of opening the mouths of tigers and lions and counting their teeth. Protection
of animals and their legal rights is one of the most debated issues of the legal arena. The criminologists, jurists, sociologists, and legal professionals have dealt with various aspects of the crime against animals and the penal system for crime against animals. Despite several initiatives from the Government of India in the form of scheme providing shelter homes to animals, providing facility of immunization and arranging ambulance transportation facilities for animals no satisfactory results have been reached yet, which can be social, morally and legally accepted to protect the legal interest of animals. Even India’s famous animal right activist and environmentalist Maneka Gandhi has also highlighted in her book “1000 Animal Quiz” that there is a lack of awareness related to animal welfare. Government of India has launched several schemes for protecting the animals. These schemes range from offering shelter to providing ambulance services for taking them to hospitals and also their birth control and immunization. The country also has laws in the form of Act 1960 & act 1972. Despite all these efforts and also the other initiatives of academicians & NGOs there has not been much of a difference in the plight of animals in the country. The newspapers pan India is generally flooded with the reports of atrocities against animals (TOI, 2016155; TOI, 2016156; The Hindu, 2014157). This paper discusses the current situation of laws related to animals comprehensively with a holistic approach in the wake of globalization and the institutionalization of animal rights. It becomes necessary to examine the relevance and legitimacy of current animal laws and are they fulfilling the current demand.

II.1 HISTORY

We have seen the different kinds of attitudes exhibited by humans towards animals in different eras. The Vedas, the first scriptures of Hinduism (originating in the second Millennium BCE), teach ahimsa or nonviolence towards all living beings158. In Hinduism, killing an animal is regarded as a violation of Ahimsa. Similarly, Jains also practice strict vegetarianism and many go to great lengths even to avoid harming insects. Buddhism is the third major religion to emerge in India, and its teachings also include ahimsa. Buddhism teaches vegetarianism (though not as strictly as Jainism), and many Buddhists practice life release in which animals destined for slaughter are purchased and released to the wild159. Despite the influence of Hinduism, Jainism, and Buddhism, meat-eating was

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156 One Lakh ducks to be culled in Kerala, The Times of India, (November 2, 2016, 06:27 PM IST http://timesofindia.indiatimes.com/home/environment/flora-fauna/One-lakh-ducks-to-be-culled-in-Kerala-


159 Life as a Vegetarian Tibetan Buddhist Practitioner, Eileen Weintraub, Society of Ethical and Religious Vegetarians.

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still common in ancient India. During the Ashoka regime, he issued edicts informed by the Buddhist teachings of compassion for all beings. These edicts included the provision of medical treatment for animals and bans on animal sacrifice, the castration of roosters, and hunting of many species.\(^{160}\)

The British also displayed concern for rights of animals. Moved by the suffering of strays and draught animals, Briton Colesworthy Grant founded the first Indian Society for the Prevention of Cruelty to Animals (SPCA) in 1861 in Calcutta. The Indian SPCAs successfully lobbied for anti-cruelty legislation in the 1860s, which was extended to all of India in 1890-91.\(^{161}\) The Cow Protection movement arose in the late 1800s in northern India. While the SPCAs were led by colonists and associated with Christianity, Cow Protection was a movement of native Hindus. Cow protectionists opposed the slaughter of cattle and provided sanctuaries for cows. Mahatma Gandhi was a vegetarian and advocate of vegetarianism. In 1931 Gandhi gave a talk to the London Vegetarian Society entitled The Moral Basis of Vegetarianism in which he argued for abstinence from meat and dairy on ethical (rather than health-related) grounds.\(^{162}\)

After independence India’s first national animal welfare law, the Prevention of Cruelty to Animals Act, 1960, criminalizing cruelty to animals was introduced. The law also kept provisions for use of animals for scientific experiments after adopting due safeguards. The 1960 law also created the Animal Welfare Board of India for implementing the anti-cruelty provisions promoting animal welfare. Subsequent laws have placed regulations and restrictions on the use of draught animals, the use of performing animals, animal transport, animal slaughter, and animal experimentation. Different laws are also passed regarding the prohibition of testing cosmetics and chemicals on animals.\(^{163}\)

### III.1 The Prevention of Cruelty to Animals Act, 1960

The Prevention of Cruelty to Animals Act, 1960 is an Act of the Parliament of India enacted to prevent the infliction of unnecessary pain or suffering on animals and to amend the laws relating to the prevention of cruelty to animals. The most significant provision of this act is provided in Chapter II of this act which prescribes the establishment of Animal Welfare Board of India for the promotion of animal welfare and for the purpose of protecting animals from being subjected to unnecessary pain or suffering. Animals are the creatures that are unable to raise their voice. As per Section 11 of Prevention of Cruelty to Animals Act, 1960, beating, kicking, overriding, overloading, overdriving, torturing or otherwise treating any animals so as to


\(^{161}\) Need For Increased Statutory Provision on Animal Welfare, Govind Abhijith, National University of advanced Legal Studies, Kochi, ISSN: 2394 – 5044, The World Journal on Juristic Polity.


\(^{163}\) Rule 148-C, Drugs and Cosmetics Rules, 1945; Rule 135-B, Drugs and Cosmetics Rules, 1945.

\(^{164}\) Animal Welfare Board of India v. A. Nagaraja and Ors., (2014) 7 SCC 547.
subject it to unnecessary pain amounts to cruelty on animals. And whoever indulges in an act of cruelty to animals makes himself liable for action under Prevention of Cruelty to Animals Act. There are designated agencies in Govt./local self-government Organizations that are authorized to deal with stray animals. Such Organizations regularly undertake inoculations, sterilization of animals and other programmes. It also reviews about how humans willfully and unreasonably administer any injurious drug or injurious substance to any animal or willfully and unreasonably causes or attempts to cause any such drug or substance to be taken by any animal. The law strictly provides that it is punishable by imprisonment and fine if any animal is treated with cruelty or if given poisonous food, there are serious consequences attached to it. Moreover it also lays down that transporting any animal in a manner that will cause him or her unnecessary suffering will be punishable. This includes loading cows into trucks without ramps and overcrowding the vehicle as well as tying up pigs and carrying them on cycles. Any violation of Section 11 is punishable by a fine of Rs.100 and/or up to three months in jail.

III.2 INDIAN PENAL CODE, 1860

Sections 428 and 429 of the Indian Penal Code make it illegal to maim or cause injury to any animal. Indian legislators are being urged by Humane Society International to replace the Prevention of Cruelty to Animals Act with the Draft Animal Welfare Bill 2014. The Prevention of Cruelty to Animals Act was a strongly worded law for 1960 when it was drafted, but has failed to protect animals for more than two decades now due to lack of enforcement. The current provisions, with penalties amounting to a maximum of only Rs. 50, fail miserably to deter animal abusers. Taking advantage of this obsolete act, animal abusers have continued to inflict unfathomable cruelty on animals.

IV.1 CURRENT CONDITION OF THE PREVENTION OF CRUELTY TO ANIMALS ACT, 1960

In India, where the condition of people living on the streets is so horrifying, the condition of stray animals is very unlikely to be on the government’s list of priorities. The plight of stray animals, especially dogs, is a horrible thing to witness. This problem can equally be witnessed in the rural as well as urban India. The national capital itself is severely affected. In Delhi, the streets are littered with stray dogs. They are at every roadside. Besides starvation and dehydration, they are also the victims of human cruelty. Walking in the city, you may pass a dog that is apparently sleeping on the pavement, but soon you will notice that it’s dead. In modern time exploitation of animals is done in a very different way. They are used

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166 Nair N.R. and Ors. v. Union of India, 2001 (3) SCR 353.
168 Animal welfare Board of India v. A. Nagaraja and Ors., (2014) 7 SCC 547.
in the shooting of different television programmes and they are exploited in this activity. According to the decisions of Hon’ble courts and the orders issued by Law ministry, a movie maker has to obtain a no objection certificate from the Animal Welfare Board of India before using animal during animal during shooting either in India or abroad. Zoos are considered to be the safest place for animals yet they are not. In the country’s oldest zoos animals have to live within the dirty and filthy environment. The water compounds which are built for animals end up becoming a nightmare for animals. They are dirty and there is a lot of garbage scattered around it. The whole condition of animals in the zoo is heartbreaking. It is very mournful to see our national bird i.e. Peacock and national animal i.e. Tiger in such a miserable condition.

We humans are at the top of displaying cruelty against animals as we use to slaughter animals as rituals in festivals. But we don’t know that killing of camels is not legal in India. Because of mass killing of camels in India, the species today face a possible threat of extinction. However, this practice also indisputably violates the Prevention of Animal Sacrifices Act of 1959;

and KPAS (Karnataka Prevention of Animal Sacrifices) rules 1963 to prevent illegal sacrifices. Moreover, we have a lot of illegal slaughterhouse in our country. A “slaughterhouse” is defined as a place in which 10 or more than 10 animals are slaughtered per day and is duly licensed or recognized under a Central, State or Provincial Act or any rules or regulations made under this act. The Prevention of Cruelty to Animals Act, 1960 enlists certain rules provided under the category, namely Slaughter House Rules, 2001.

During trials also, animals are treated brutally. Thus, in State of U.P v. Mustakeem and Ors., Hon’ble Supreme Court of India ruled that custody of animals, in cases of cruelty, shall not be given to the accused but to the nearest gaushala or pinjrapole, until the conclusion of the trial. According to Wildlife Protection Act, 1972 even owning the tiger’s claw or ivory jewellery is illegal. The Indian Tiger being an endangered animal is listed in the Schedule I of the Wildlife Act, 1972. This act gives it protection against hunting/poaching and trade for skins, bones and body parts. Any person violating this law leads to an imprisonment of three years extending up to seven years along with a fine from fifty thousand rupees to two lakh rupees. Animals are continuously used as professional tools for madaris and snake charmers. But it is illegal to use animals like langurs or snakes for one’s profession as buying/selling/possessing monkeys/langurs and snakes violates the Wildlife Protection Act, 1972.

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172 Valmik Thapar, Re-imagine the Zoo, Indian Express, (September 25, 2014 07:37AM http://indianexpress.com/article/opinion/columns/re-imagine-the-zoo/).

www.supremoamicus.org
Act of 1972. Keeping snakes in captivity and their display in public is prohibited under the Wildlife (Protection) Act 1972 and is an illegal activity. According to this act, wild animals specified in schedule I, II, III, and IV cannot be hunted. Even though snake charming is an inherited profession in India, it has been banned since 1991.

Animals have to face one of the greatest plights of smuggling. In *Gauri Maulekhi v. Union of India and Ors.* 176, referring *Gadhimai* animal sacrifice in Nepal Hon’ble Supreme Court of India ordered that there should be strict implementation of the prohibition of cattle smuggling across the border. Additionally, several welfare recommendations shall also be adopted.

Animals are continuously used as professional tools for madaris and snake charmers.

### IV.2 LAWS RELATED TO TRANSPORTATION OF ANIMALS

There is no awareness regarding laws related to transportation of animals and their rights. They are transported from one place to another in a very poor condition so much so that it leads to death of animals at the same time177. Some laws regarding transportation of animals are as follows:-

- Every animal to be transported on foot shall be healthy and in good condition for such transport178.
- Certain animals are not to be transported by foot. These animals include newly born animals of which the navel has not completely healed, disease animals, blind animals, pregnant animals that are due to deliver during the transport179.
- The owner is not allowed to use a whip or any other thing of the same sorts to hit the animal or to hasten their speed. If at all the animal has to tie, a rope with suitable cushioning has to be used and the rope should be tied around its neck and not around any other body part180.
- If at all two animals are to be tied with a single rope then there should be 2 feet distance in between them and should be of similar physical conditions and strength. Also, no more than two animals can be tied together with the same rope, adjacent to each other. The owner isn’t allowed to transport the animals on foot before sunrise and after sunset181.

Many animals are used as tools in the circus and other performing rites. But in *Nair, N.R. and Ors. v. Union of India and Ors.* 178, Kerala High Court said that bears, monkeys, tigers, panthers and lions shall not be trained or exhibited as performing animals.

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176 W.P. (C) No. 881/2014 with W.P. (C) No. 210/2015

177 Maneka Gandhi Vs. Union Territory of Delhi & Ors., ILR 1995 Delhi 49.


182 Nair, N.R. and Ors. v. Union of India & Ors., 2001 (3) SCR 353.
THE LAW COMMISSION’S VIEW: In its 261st Report on Animal Welfare Regulations which is submitted on 28th August 2015 observes that pet shops and breeders violate provisions of animal welfare laws with impunity, and recommends that it is necessary to regulate their practices. In its first chapter second part in 1.2.2, it clearly mentions that the Wildlife (Protection) Act, 1972 (“WPA”), prohibits the sale of certain animals in pet shops. However, these sales are continuing. All kinds of animals can be found for sale in animal markets across the country, and they are kept in terribly inhumane conditions. It was also recommended that many animals do not survive the trauma of being transported in small cages without adequate water or food, and estimates suggest that, overall, 40% of animals die in captivity or transportation. Moreover, even star tortoises and other protected animals are sold openly, and wild animals (including parakeets, munias, and mynas) are caught and sold in complete violation of the WPA. It is also submitted in this report that animals are not safe in the custody of authorities during trials also.

V.1 OTHER IMPORTANT LAWS FOR THE PROTECTION OF ANIMALS

There is no inadequacy of laws for the protection of the interest of animals but what our society lacks is the proper implementation of these laws. Some important laws which are essential for rights of animals are discussed below.

- **Article 51A(g) clearly states that it is our fundamental duty to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.** In *Ramesh Sharma v. State of Himachal Pradesh*, Hon’ble High Court held that it is the duty of every citizen to live and let live other creatures on this earth. Section 428 and 429 of Indian Penal Code (IPC) clearly lay down that it is punishable to kill or maim any animal, including stray animals also. In *Sri Ramratan Jhawar v. Govt. of AP & Anr.* Andhra Pradesh High Court held that under Sections 428 and 429 IPC, whoever commits mischief by killing animals, are liable for punishment up to two years and fine.

- **Rule 3, of Prevention of Cruelty to Animals, (Slaughterhouse) Rules, 2001** says that no animal (including chickens) can be slaughtered in any place other than a slaughterhouse and Chapter 4, Food Safety and Standards Regulations, 2011 says that sick or pregnant animals shall not be slaughtered. In *Animal Welfare Board*

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187 CWP No. 9257 of 2011 and CWO No.s 4499 and 5076/2012.
of India v. A. Nagaraja and Ors.\textsuperscript{189}, Supreme Court of India said that if any person slaughters any animal at any place other than slaughter house or tries to overpower the animal to do any act then that person will be held liable and will be punished according to the existing laws.

- Animal Birth Control (ABC) Rules 2001 says that stray dogs that have been operated for birth control cannot be captured or relocated by anybody including any authority.

- Section 11(1)(b), PCA Act, 1960 clearly lays down that neglecting an animal by denying her sufficient food, water, shelter and exercise or by keeping him chained/confined for long hours is punishable by a fine or imprisonment of up to three months or both. In \textit{Mohammed Balesharief v. State of A.P.}\textsuperscript{190}, High Court ordered that those who will not provide sufficient food, water or shelter or those who confine animals will be held liable and will be punished.

- Under Wildlife Protection Act, 1972 monkeys are protected and they are not subjected to be displayed or owned.

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

- Rules 148-Cand 135-B of Drugs & Cosmetics Rules, 1945 says that cosmetics tested on animals and the import of cosmetics tested on animals is banned.

In Indian Soaps and Toiletries Makers Association v. \textit{Qazir Husain and Ors.}\textsuperscript{191}, Hon’ble Supreme Court of India held that any enterprise, company, organization or any person using chemicals on animals will be held liable and will be punished.

- Under Section 38J, Wildlife (Protection) Act, 1972 reference to \textit{Shri Sachidanand Pandey and Anr. v. The State of West Bengal and Ors.}\textsuperscript{192}, the Supreme Court of India held that any individual disturbing the lives of animals in the premises of zoo will be held liable and punishable with a fine of Rs. 25000 or imprisonment of three years.

- Section 9 of Wildlife (Protection) Act, 1972 lays down that capturing, trapping, poisoning or baiting or hunting of any wild animal or even attempting to do so is punishable by law, with a fine of up to Rs. 25000 or imprisonment of up to seven years or both. Further the act defines hunting as disturbing or destroying eggs or nests of birds and reptiles or chopping a tree having nests of such birds and reptiles or even attempting to do so will attract punishment of a fine of up to Rs. 25000, or imprisonment of up to seven years or both.

In \textit{VikramTrivedi and Anr. v. Union of India-Through Project Director and Ors.}\textsuperscript{193}, Gujarat High Court said that in the interest of justice, it is completely illegal to cut the trees having nests of such birds and reptiles or even attempting to do so constitutes to

\textsuperscript{189} \textit{Animal Welfare Board of India v. A. Nagaraja and Ors.}, AIR 2014 SCW 3327.

\textsuperscript{190} MANU/AP/2848/2014.

\textsuperscript{191} \textit{Indian Soaps and Toiletries Makers Association v. Qazir Husain and Ors.}, (2013) 3 SCC 641.

\textsuperscript{192} \textit{Shri Sachidanand Pandey and Anr. v. The State of West Bengal and Ors.}, 1987 SCR (2) 223.

\textsuperscript{193} \textit{VikramTrivedi and Anr. v. Union of India-Through Project Director and Ors.}, MANU/GJ/1120/2013.

\url{www.supremoamicus.org}
VI.1 SUGGESTIONS

“For as long as men massacre animals, they will kill each other. Indeed, he who sows the seed of murder and pain cannot reap the joy of love.” – Pythagoras

What we humans can do is a lot to safeguard the interest animals. Some of the steps are listed below.

- When you see a dog or cow being hit or stoned, be sure to inform the offender of the law and get him or her to stop. Lodge an FIR at the nearest police station.
- Killing dogs in the name of preventing rabies is no solution. Rather authorities should immunize them. Moreover in Indian Handicrafts Emporium and Ors. Vs. Union of India and Ors., 194 Supreme Court of India ruled that killing any stray animal is an illegal activity which is a punishable offence. The Animal Welfare Board of India has developed a set of guidelines for all municipalities directing the implementation of the Animal Birth Control (ABC) programme. If there is an animal welfare organization in the area, urge it to take up the ABC programme. Regarding ABC programme the Delhi High Court in its judgement, pronounced on 18.12.2009 and 4.2.2010, says that “It is necessary to bring into record that these individuals and families who adopt stray animals are doing a great service to humanity as they are acting in the aid and assistance of Municipal Authorities by providing these animals with food and shelter and also by getting them vaccinated and sterilized. Without the assistance of such persons, no local Municipal Authority can successfully carry out its ABC programme”.
- It is illegal for a municipality to round up stray dogs and abandon them outside city limits, as it places them in circumstances likely to cause their death from starvation and thirst as their standard of living suddenly deteriorate. The municipal corporations can utilize the grant which is provided to them under the schemes for providing shelter homes. The authorities can also contact to different NGOs which are active in safeguarding the rights of animals.
- When anyone finds cows or buffaloes on the street or tethered on public pavements, ask those nearby if anyone knows their owner or the dairy to which they belong. Inform the owner that it is illegal to allow cows to wander. If the owner does not have enough space to keep the cows comfortable or the means to feed them, file a complaint with the municipality asking that the cows be sent to a suitable shelter. Cows and buffaloes left on the street are often hit by cars and die from eating plastic bags, broken glass, and other trash.
- If anyone notices cows or other animals with burn marks, usually on their rumps, near particular fruit and vegetable markets, it is probable that the vegetable sellers have thrown acid or any harmful substance on animals to drive them away from their stalls. If there is a market association, approach the head and inform her or him of the law (IPC, Sections 428 and 429) which are discussed above. Request all vegetable vendors not to do this act again.

194 Handicrafts Emporium and Ors. Vs. Union of India and Ors., 2003 (5) ALD 39 SC.
Inform the police station in the area to keep an eye out for such violations. Most of the stray animals do not get enough food as compared to their daily requirements and die due to this problem. There is no law that prohibits the feeding of street animals. Citizens/animal welfare volunteers who choose to feed stray animals are in fact performing a duty cast upon them by the Constitution of India—of showing compassion to all living creatures. Recently, the Animal Welfare Board of India (AWBI) which is a statutory body under Ministry of Environment and Forests, Government of India has framed exhaustive Guidelines regarding stray dog feeding. These have been placed before and upheld by the High Court of Delhi. The orders passed on 18th December, 2009, and 4th February, 2010 by the Hon’ble High Court of Delhi, mandate not only that those street dogs will be fed, but that they will be fed in order to confine them to the localities/areas that they belong to. Confining them to the localities that they belong to facilitates area-wise animal birth control, and yearly/annual vaccination.

- When anyone sees an animal knocked over by a vehicle, get the number of the vehicle. Try to provide first-aid to that animal as soon as possible. If you can take the animal to a veterinarian yourself, do so. If not, call an animal welfare organization that has an ambulance. Once the animal is taken care of, file a complaint against the offender in the nearest police station (IPC, Sections 428 and 429).

- If you know any research institute that is oriented on animals, ask them for the source of the animals. If you suspect the source of animals they are using and you think that the animals which are used are abused then immediately contact the Committee for the Purpose of Control and Supervision of Experiments on Animals (CPCSEA). In the meantime, file a case with the police.

The real solution lies in the hands of humans only. Our laws regarding animal cruelty have to be looked into and more stringent actions and punishments are to be given to culprits.

VII.1 CONCLUSION

In the wake of the above discussion and ground realities of present day world following conclusions can be drawn:

The process of globalisation has made the world smaller and brought many problems also. One of the serious threats arising recently is the behaviour of humans towards animals who are unable to raise their voice. It is a well-known fact that animals are equally important as we the humans are for the development and progress of any nation. The way a human community treats with the animals of their country also displays the evolution and growth of any country. Testing cosmetics on animals, using them as a slave and overpowering them to carry a huge load, using animals in circus and compelling them to do unusual activities shows the heinous ideology of human beings. Why we forget that they are also living beings, they are also the creation of God, they have their own rights? It can also easily be concluded that those who are cruel to animals will surely be hard in their dealings with men. We can easily judge the
heart of a man by his treatment of animals. From the above research, it can also be concluded that there is no inadequacy of laws for safeguarding the interest of animals. As a matter of fact, the main problem is the lack of implementation and administration of these laws. All these laws are laid down on paper only. The reality is far from what the law statues prescribe. Animals are mercilessly slaughtered, enslaved, hurt just for “fun”, transported in the most wretched manner so that more and more animals are compelled to adjust in a little space which created congestion and most of the animals die due to suffocation. In fact, humans exploit animals at every given opportunity.\textsuperscript{195}

People do not care about the rights of animals and they become selfish and forget about the rights of animals. Though it is not true that there is no awareness of laws dealing with animals but people are conscious about the rights of animals but what they lack is a basic urge, an impulse or an inner desire to help animals from the poor, brutish, indigent and substandard condition of living. We all know about rights of animals and laws related to them but still, we hear incidents which force us to introspect ourselves again and again. Incidents like killing of stray animals, death of animals in zoos, insecurity of animals in wildlife sanctuaries, killing and maiming of animals during Diwali festivities, utilisation of fund released for animals in different sectors, culling of ducks in large number and careless and relax attitude of administrative authorities regarding complaints received for the rights of animals.

In the wake of modernization, globalisation and advancement of extreme material values, there is a relative erosion of moral responsibility of the community, family, religion, etc. towards these speechless animals. We are living in the age where we are planning to settle on Mars but we are not realising that to maintain the balance of ecosystem animals are as much required as humans. The worst sin we humans do towards our fellow creatures is not to hate them, but to be indifferent to them: and that is the essence of inhumanity. Why we humans forget that the love for all living creatures is the noblest attribute of man. The assumption of humans that animals are without rights and the illusion that our treatment of them has no moral significance is a positively outrageous example of crudity and barbarity. Universal compassion is the only guarantee of morality.

The authorities need to think about the fact that only common mass is not at fault rather they are equally at fault with them. They should make more stringent laws which impose hefty penalties with the punishment of imprisonment also. Authorities should consider this crime under the ambit of the maxim “\textit{Salus populi est suprema lex}”\textsuperscript{196}


\textsuperscript{196} The Latin maxim “\textit{Salus populi est suprema lex}” which means the welfare of the public is the supreme law, is one of the well-known laws which deal with public interest. To this maxim all other maxims of public policy must yield for the object that “all laws are to promote the general well-being of society”. In other words, “regard for the public welfare is the highest law”. It also stands for
and should act more wisely to protect and safeguard the rights and interest of animals to a large extent.

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INTERNATIONAL LAW ON THE RIGHT OF SELF-DETERMINATION

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ABSTRACT

“Self-determination is an expression of the individual and collective right to democracy which is now recognized as a principle of legitimacy underlying modern international law.”

- Dr. Alfred de Zayas

The right of self-determination is a keystone in the United Nations human rights system and has been granted a privileged place in two major international treaties, namely the International Covenant on Civil and Political Rights (hereinafter, “ICCPR” or “the Covenant”) and the International Covenant on Economic, Social and Cultural Rights. Article 1 of both Covenants clearly establishes the right of all peoples to self-determination, including their right to freely determine their political status and freely pursue their economic, social and cultural development, and the corresponding obligation of States parties to respect and promote the realization of that right.

The paper deals with the right of self-determination as an essential component of international law and how it has acquired the position of Jus Cogens during the years as agreed by most jurists and authors.

The I.C.C.P.R. gives all peoples the right to self-determination, to freely determine their political status and freely pursue their economic, social and cultural development. I.C.C.P.R., obligates States to promote the realization of the right of self-determination, and respect it in conformity with the provisions of the Charter of the United Nations. The peoples’ right to self-determination is an inalienable right of erga omnes character.

The author had tried to lay down the essential conditions to exercise this right and whether there are any limitations to it or not?

Finally the author through various international instruments has tried to establish the importance of the right of self-determination of the people in the world community and the relevant international safeguards in that regard.

The right of self-determination is a keystone in the United Nations human rights system and has been granted a privileged place in two major international treaties, namely the International Covenant on Civil and Political Rights (herein after, “ICCPR” or “the Covenant”) and the International Covenant on Economic, Social and Cultural Rights. Article 1 of both Covenants clearly establishes the right of all people to self-determination, including their right to freely determine their political status and freely pursue their economic, social and cultural development, and the corresponding obligation of States parties to respect and promote the realization of that right.197

197 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

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1. All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Though no clear definition of the concept of "self-determination" has been provided by the Human Rights Committee when interpreting article 1 of the ICCPR. By contrast, the Committee Against Racial Discrimination has shed some light on this issue by identifying and defining two aspects of the right to self-determination:

1. The internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level,

2. The external aspect of self-determination implies that all people have the right to determine freely their political status and their place in the international community based upon the principle of equal rights.

As to the subjects of the right of self-determination, no definition of "peoples" has been provided either by the Human Rights Committee, although there seems to be a wide international consensus that this right is not limited to colonial peoples, with clear examples of secessions having occurred in recent times as an exercise of peoples' right to self-determination.

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199 John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006), Dugard and Raic, supra note 19, at 104.

Implicitly acknowledging this fact, in its Concluding Observations on the report of Azerbaijan, the Human Rights Committee called that, under article 1 of the Covenant, the principle of self-determination [applied] to all peoples and not merely to colonized peoples. According to CCPR General Comment No. 12, article 1 (3) imposes specific obligations on States parties to respect and to promote the realization of the right of self-determination, not only in relation to their own peoples but also vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising that right. This obligation would therefore extend to peoples outside the jurisdiction of the States parties.

In Gillotet al. v France, in every self-determination process, limitations of the electorate were legitimized by the need to ensure a sufficient definition of identity. Judge Schwobel stated in the Nicaragua case that it is lawful for a foreign State to give to a people struggling for self-determination moral, political and humanitarian assistance.

The right to self-determination is a peremptory norm of international law possessing an erga-omnes character.

The I.C.C.P.R. gives all people the right to self-determination, to freely determine their political status and freely pursue their economic, social and cultural development. I.C.C.P.R. obligates States to promote the realization of the right of self-determination, and respect it in conformity with the provisions of the Charter of the United Nations. The peoples’ right to self-determination is an inalienable right of erga-omnes character.

Thus, all...
States have an obligation to promote the realisation of the right to self-determination. Because of its fundamental importance, Judge Ammoun\(^{209}\), emphasized that the right to self-determination is an inalienable right of erga omnes character.\(^{210}\) Erga omnes are obligations owed to the international community as a whole.\(^{211}\) Thus, all States have an obligation to promote the realisation of the right to self-determination. Because of its fundamental importance, Judge Ammoun\(^{212}\), emphasized that the right to self determination is based on the ‘norm of juscogens’\(^{213}\), derogation from which is not permissible under any circumstance.\(^{214}\) Territorial integrity must be exercised in conformity with a State’s obligation under, inter alia, the law of self-determination, the law concerning human rights and humanitarian law.\(^{215}\) In case of breach of jus cogens rules or erga omnes obligations, any constraints derived from the principle of national sovereignty can be brushed aside.\(^{216}\) Self determination is based on the ‘norm of juscogens’\(^{217}\), derogation from

\(^{209}\) Barcelona Traction, supra note 17

\(^{210}\) East Timor (Port. v. Aus.), 1995 I.C.J. 90, 102 (June 30) [hereinafter ‘East Timor’]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, 171-2 (July 9) [hereinafter ‘Legal Consequences’]


\(^{212}\) Barcelona Traction, supra note 17
which is not permissible under any circumstance.\textsuperscript{218}

Territorial integrity must be exercised in conformity with a State’s obligation under, inter alia, the law of self-determination, the law concerning human rights and humanitarian law.\textsuperscript{219} In case of breach of jus cogens rules or erga omnes obligations, any constraints derived from the principle of national sovereignty can be brushed aside.\textsuperscript{220}

\textbf{RIGHT TO SELF-DETERMINATION AS CUSTOMARY INTERNATIONAL LAW}

The court whose function is to decide in accordance with the international law such disputes as are submitted to it, shall apply:

\begin{itemize}
  \item[a)] international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  \item[b)] International customs, as evidence of general practice accepted as law;
  \item[c)] The general principles of law recognised by the civilized countries.
  \item[d)] Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\textsuperscript{221}
\end{itemize}

Article 38 refers to international customary as evidence of general practice accepted as law’, and briefly\textsuperscript{222} remarks that ‘what is sought for is general recognition on among States of a certain practice as obligatory’. Although occasionally the terms are used interchangeably, ‘custom’ and ‘usage’ are


\textsuperscript{219} John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006)
\textsuperscript{220} Christian Tomuschat, Secession and Self-determination, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 40 (2006)
terms of art and have different meanings.\textsuperscript{223} A usage is a general practice which does not reflect a legal obligation, and examples are ceremonial salutes at sea and the practice of exempting diplomatic vehicles from parking prohibitions.\textsuperscript{224}

**STATE PRACTICE AND JUDICIAL OPINIONS SUPPORT A RIGHT TO EXTERNAL SELF-DETERMINATION OF AN OPPRESSED PEOPLE.**

State practice supports the right of a people, within a territory, not representing the population of the territory as a whole to secede.\textsuperscript{225} The International Commission of Jurists, in its report on Bangladeshi secession, stated that “if one of the constituent peoples of a State is denied equal rights and is discriminated against, it is submitted that their full right of self determination will revive.”\textsuperscript{226} Bangladesh came into being when the Bengalis of Pakistan seceded from Pakistan;\textsuperscript{227} Israel established itself as a State by secession from Palestine;\textsuperscript{228} Eritrea seceded from Ethiopia after a gruesome struggle.\textsuperscript{229} The South Sudanese people seceded from Sudan in 2011.\textsuperscript{230} The Albanian people of Kosovo seceded from Serbia in 2008;\textsuperscript{231} and Abkhazian people and South Ossetian people seceded from Georgia in 2008.

As far as the other element of opinio juris is concerned is it well established juris is established by the participation of the world community in the F.R.D.\textsuperscript{232} The 1993 Vienna Declaration,\textsuperscript{233} the Helsinki Final Act\textsuperscript{234} which advance a right of external-self determination for a part of population of an independent State suffering human rights violations and systematic oppression at the hands of the parent State. The subjective belief of States in such a right is also showcased through the recognition of Bangladesh, Eritrea, Kosovo, and South

\textsuperscript{223} Kosov, Separate Opinion of Judge Youseif at 621, ¶ 9; at 523, ¶ 228, Quebec, supra note 29, ¶ 123-124

\textsuperscript{224} International Commission of Jurists, The Events in East Pakistan, 8 International Commission of Jurists Review 23, 70 (1972) [hereinafter ‘The Events in East Pakistan’]

\textsuperscript{225} John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006)

\textsuperscript{226} International Commission of Jurists, The Events in East Pakistan, 8 International Commission of Jurists Review 23, 70 (1972) [hereinafter ‘The Events in East Pakistan’]

\textsuperscript{227} CRAWFORD, 393 (Bangladesh proclaimed its independence on Mar. 26, 1971).
Sudan. External right of self-determination is available to a minority as a last resort when the parent State lacks either the will enact and apply effective guarantees. In the Quebec Case, the Court recognised :-

the right of a people to secede unilaterally when denied their right to internal self-determination stating that “where a definable group is denied meaningful access to pursue their political, economic, social and cultural development, the people in question are entitled to right to external self-determination because they have been denied the ability to exert internally their right to self-determination as a last resort.”

The right of external self-determination was also recognized in the Katangese Peoples’ Congress v. Zaire and Kevin Mgwanga Gunme v. Cameroon.

Conclusion
The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled internally through a people’s pursuit of its political, economic, social and cultural development within the framework of an existing State.

A right to external self-determination arises in exceptional cases, legitimising secession from an independent State. The flagrant discrimination of the internal self-determination gives right to the people of that particular country to exercise external self-determination which can be realised through the “establishment of a sovereign and independent State, or the free association or integration with an independent State.” Systematic oppression ranging from denial of participatory rights, to serious and systematic discrimination and other violations of human rights of the members of one part of the population of a State give rise to a legitimate secession legitimate.

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235 Bangladesh was admitted to the UN in 1974; Eritrea was admitted to the UN in 1993; South Sudan was admitted to the UN in 2011; Kosovo has been recognized by 100 states as of January, 2015.
237 Id.
DISABILITY LAWS IN INDIA: CONCEPTUAL STUDY

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Abstract:
India is one of the first signatory to United Nations Convention on the Rights of Persons with Disabilities which means we have to adopt it in its full spirit. As many as 70 million disabled people spread across India continue to be treated as second-class citizens. For them segregation, marginalisation and discrimination are norms rather than exception that is faced with barriers put by stereotyped attitudes, they are generally viewed as objects of charity and welfare as the world merrily goes about trampling their most basic human rights. As the term disability carries with it the connotation of a lack or deficiency, whether mental, physical or sensory, it has been defined primarily in terms of a medical deficit. However, it has to be acknowledged that the word disability is itself not a homogeneous category, subsuming under it different kinds of bodily variations, physical impairments, sensory deficits and mental or learning inadequacies, which may be either congenital or acquired. Disability has been recognised as a human rights issue focusing attention on the needs of disabled people. The primary responsibility for ensuring respect for the rights of persons is with government and it has taken various steps to provide equal opportunities to persons with disabilities by enacting several Acts and implementing various policies and schemes for the empowerment of persons with disabilities but still not reached its end. Thus, this paper makes an attempt to examine various regulations relating to disability and its possible solution for smooth implementation.

Keywords: disability, statues, laws and regulation, Indian scenario, bad law.

I. Introduction:
Human rights, a citizen receive from his birth, separate rights were not announced for him, then why was the announcement of human right separately for disabled persons? Disable is also human; it is not an item to be divided into primary and secondary. Therefore the rights that an ordinary citizen receive from his birth, likewise a disabled person also receives same rights, since he also comes in the category of citizen of a country, not a secondary person. Therefore, The Constitution of India is equally applicable to every legal citizen of India, even if they are in any way (physically or mentally) healthy or disabled. Yes, it is of course that the disabled person needs some privileged rights rather than a normal person which should be given them. The reason is that they are special (Special child, special person). The second reason is, we ignored disabled persons, they are kept away from their rights, understood as problems, and seen as burden and abhorrence. In India, the disability sector in general estimates that 4-5% of the population is disabled. The Planning Commission recognizes this figure as 5%. As many as 70 million disabled

240 www.mierjs.in/ojs/index.php/mjestp/article/download/56/33

people spread across India continue to be treated as second-class citizens. For them segregation, marginalization and discrimination are norms rather than exception. Faced with barriers put by stereotyped attitudes, they are generally viewed as objects of charity and welfare as the world merrily goes about trampling their most basic human rights. Sadly, this is so despite the United Nations Declaration of Human Rights in 1948 that makes observance of human rights a precondition for ensuring justice, freedom and peace. In 1992, India became a signatory to the Proclamation on Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. This was adopted at Beijing at a conference convened by the Economic and Social Commission for Asian and Pacific Region. The proclamation brought an obligation upon the country to enact a law as per its solemn affirmations. And so, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995 got through Parliament. Amongst the four domestic legislations related to disability it is this Act that provides entitlements of rights to persons with disabilities and mandates the government to provide facilities for their full participation. The provisions under the Act are all very empowering but unfortunately, even though the Act was passed almost 19 years ago, its implementation remains woefully inadequate. Those responsible for its implementation and several persons with disabilities often remain unaware of the provisions of the Act. After in the last quarter of the 20th century, there has been growing awareness in the disability sector both at the national and international levels. The period of 1983-1992 which was proclaimed by the general Assembly as the U.N Decade for disabled person, a global movement has emerged which recognises the importance of integration of people with disabilities in the society. Today the issues relating to the disabled are no longer mere welfare measures but have grown into fundamental human right issue, a demand for full participation, equal opportunity and protection of rights from all perspectives have been taking place. The dominant social attitude towards persons with disability has been one of pity, from which springs monstrous forms of discrimination - the eventual source of their exclusion and extreme isolation. Effects of disability-based discrimination have been particularly severe in fields such as education, employment, housing, transport, cultural life and access to public place and services. Despite some progress in the terms of legislation, such violations of the human rights of persons with disability have not been systematically addressed in the society. The statistics data on their situation in India shows that there need more reforms and policy changes for them. Situations of person with disability often have been kept till rehabilitation and social services. A need exists for more comprehensive legislation to ensure the rights of disabled persons in all aspects – Political, Civil, Cultural, and economic rights- on an equal basis with persons without disabilities. Appropriate measures are required to address the existing discrimination and to promote thereby opportunities for persons with disabilities in social life and development.

II. Concept of disablement


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Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Thus, disability is a complex phenomenon, reflecting an interaction between features of a person’s body and features of the society in which he or she lives.

— World Health Organization, Disabilities

Disability is not a tragedy but an inconvenience. As noted above, about 650 million persons or one-tenth of the world’s population are estimated to be disabled in one form or another, e.g., Visual, auditory, physical, speech, cognitive and neurological. Unlike the disability legislation in various countries, the persons with Disabilities (Equal opportunity, Protection of Rights and Full Participation), Act 1995 in India, recognises only limited forms of disabilities such as:

I. Blindness;
II. Low vision;
III. Leprosy-cured;
IV. Hearing impairment;
V. Locomotors disability;
VI. Mental retardation
VII. Mental illness

Disability means the state or quality of being mentally or physically disabled or weakness, incapacity or inability to hold a certain job because of physical or mental handicap, want or legal qualification.

In pursuance of the U.N. Charter, the General Assembly of the United Nations, adopted the Declaration on the Rights of the Disabled Persons. The term "disabled person" means "any person unable to ensure for himself or herself wholly or partly the necessities of a normal individual and or social life as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities". The conditions of disability have been dealt with by legislations in two kinds of situations in India. One, which determines compensation on the occurrence of disability—whether it be on road or workplace. The Workmen's Compensation Act, 1923 and the Motor Vehicle Act, 1988 are two major statutes which are related with compensation-related disability legislations. The second situation of disability law making is when persons are disqualified from educational opportunities or undertaking particular jobs due to their disabilities. However, the important of these laws is the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

### III. Constitutional provisions: disability

The Preamble of a statute is a preliminary statement of the reasons which have made the passing of statute desirable, and its position is located immediately after the title and date of issuing the presidential assent. A Preamble may also be used to introduce a particular section or group of sections. The Preamble of the Constitution of India professes to secure to all its citizens social, economic and political justice. The concept of justice is already pregnant with various

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244 Aparajita Baruah: Preamble of the Constitution of India

www.supremoamicus.org

113
diverse notions of rights—morality, welfare, happiness, liberty and equality. Social justice means abolition of all sorts of inequalities which may result from the inequalities of wealth, opportunity, status, race, religion, caste, title and the like.

To achieve the ideal of social justice, the Constitution lays down the directives for the State to strive to eliminate inequalities in status, facilities and opportunities, to minimize the inequalities in income, to secure just and humane conditions of work and maternity relief; to prevent exploitation of children in labour and industry; to provide free primary education to all; to promote educational and economic interests of the backward classes; to secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; to check the concentration of wealth and means of production to the common detriment.

Social justice is not a simple or single idea of society but is an essential part of complex social change to relieve the poor etc., from handicaps, penury to ward off distress, and to make their life livable, for greater good of the society at large. Hence, by removing the exclusion and discrimination against persons with disabilities, State should ensure the social security, social insurance or other social welfare schemes which are in existence or are being developed for the general population. State should encourage local communities, welfare organizations and families to develop self-help measures and incentives for employment or employment-related activities for persons with disabilities. Right to employment, education and non-discrimination will embolden the right to social security.245

The Constitution of India applies uniformly to every legal citizen of India, whether they are healthy or disabled in any way (physically or mentally). Under the Constitution the disabled have been guaranteed the following fundamental rights:

1. The Constitution secures to the citizens including the disabled, a right of justice, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and for the promotion of fraternity.
2. Article 15(1) enjoins on the Government not to discriminate against any citizen of India (including disabled) on the ground of religion, race, caste, sex or place of birth.
3. Article 15 (2) States that no citizen (including the disabled) shall be subjected to any disability, liability, restriction or condition on any of the above grounds in the matter of their access to shops, public restaurants, hotels and places of public entertainment or in the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of government funds or dedicated to the use of the general public. Women and children and those belonging to any socially and educationally backward classes or the Scheduled Castes & Tribes can be given the benefit of special laws or special provisions made by the State. There shall be equality of opportunity for all citizens (including the disabled) in matters relating to employment or appointment to any office under the State.

245 Pranam Kumar Rout: Rights of Physically Challenges-A Legal Deliberation

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4. No person including the disabled irrespective of his belonging can be treated as an untouchable. It would be an offence punishable in accordance with law as provided by Article 17 of the Constitution.

5. Every person including the disabled has his life and liberty guaranteed under Article 21 of the Constitution.

6. There can be no traffic in human beings (including the disabled), and beggar and other forms of forced labour is prohibited and the same is made punishable in accordance with law (Article 23).

7. Article 24 prohibits employment of children (including the disabled) below the age of 14 years to work in any factory or mine or to be engaged in any other hazardous employment. Even a private contractor acting for the Government cannot engage children below 14 years of age in such employment.

8. Article 25 guarantees to every citizen (including the disabled) the right to freedom of religion. Every disabled person (like the non-disabled) has the freedom of conscience to practice and propagate his religion subject to proper order, morality and health.

9. No disabled person can be compelled to pay any taxes for the promotion and maintenance of any particular religion or religious group.

10. No Disabled person will be deprived of the right to the language, script or culture which he has or to which he belongs.

11. Every disabled person can move the Supreme Court of India to enforce his fundamental rights and the rights to move the Supreme Court is itself guaranteed by Article 32.

12. No disabled person owning property (like the non-disabled) can be deprived of his property except by authority of law though right to property is not a fundamental right. Any unauthorized deprivation of property can be challenged by suit and for relief by way of damages.

13. Every disabled person (like the non-disabled) on attaining the age of 18 years of age becomes eligible for inclusion of his name in the general electoral roll for the territorial constituency to which he belongs. Educational institution maintained by the State or receiving aid out of State funds on the ground of religion, race, caste or language. Article 45 of the Constitution directs the State to provide free and compulsory education for all children (including the disabled) until they attain the age of 14 years. No child can be denied admission into any education institution maintained by the State or receiving aid out of State funds on the ground of religion, race, caste or language.

Article 47 of the constitution imposes on the Government a primary duty to raise the level of nutrition and standard of living of its people and make improvements in public health, particularly to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious to one’s health except for medicinal purposes. The health laws of India have many provisions for the disabled. Some of the Acts which make provision for health of the citizens including the disabled may be seen in the Mental Health Act, 1987. List-II Entry 9 of the Constitution of India deals with Relief of the disabled and unemployable, to be provided by the State. The State legislatures has exclusive power to make laws on these subjects. But in exceptional situations, Parliament can also enact legislations on subjects mentioned in
the State list. There are 61 subjects (Entries) in the State List. Though States have exclusive powers to legislate with regards to items on the State List, Articles 249, 250, 252, and 253 lay down situations in which the Union Government can legislate on these items. Though relief of the disabled is a state subject, the Central government has a cardinal duty to discharge. The Ministry of Welfare has been made the nodal Ministry by the government for the welfare of the disabled people.

Until the recent past, there was no comprehensive law for persons with disabilities. The first attempt was made in July, 1980 when a Working Group was set up. A draft legislation known as ‘Disabled Persons (Security & Rehabilitation) Bill, 1981 was prepared. As it is known, 1981 was International Year of Disabled Persons. In the year 1987-88 a Committee was constituted under the Chairmanship of Member of Parliament Shri Bharul Islam, who was the former Judge of the Supreme Court.

The Committee submitted its report in June 1988 and it made wide-ranging recommendations concerning the various aspects of rehabilitation, e.g., prevention, early intervention, education, training, employment etc. These recommendations, however, could not be enacted into a law. It should also be mentioned that since welfare of the Disabled is a State subject, Indian Parliament lacked jurisdiction in passing a comprehensive legislation at the national level.

The Economic and Social Commission for Asia and the Pacific (ESCAP) at its 40th Session held at Beijing in 1992 adopted its Resolution 48/3 which proclaimed the period 1993-2002 as the Asia and the Pacific Decade of Disabled Persons with a view to give impetus to the implementation of World Program of Action in the ESCAP Region beyond 1992. India is a signatory to the ESCAP Resolution. The Resolution emphasized on the enactment of legislation aimed at equal opportunities for people with disabilities, protection of their rights and prohibition of abuse and neglect of these persons and discrimination against them. Under Article 253 of the Constitution of India, Parliament can enact a law even in respect of a subject of State List in order to give effect to international conference. This made it possible for Indian Parliament to enact a comprehensive law for persons with disabilities.

In September 1993 a National Conference of eminent NGOs, State Governments and various associated Ministries of the Government of India was organized which inter-alia recommended enactment of a comprehensive legislation. As a result of the Government of India’s commitment at ESCAP Conference, recommendation of the National Conference, recommendation of the previous Committees and strong NGO movement in the country, the process of discussion and consultation for drafting a comprehensive law was started in right earnest towards the end of 1993. Initially a draft was prepared and it was circulated to all the State Governments, eminent NGOs of the country, professionals and the other concerned Ministries of the Government of India.

The Act has 14 chapters and seeks to:
a) Spell out the State's responsibility towards prevention of impairments and protection of disabled people's rights in health, education, training, employment and rehabilitation;
b) Work to create a barrier-free environment for disabled people;
c) Work to remove discrimination in the sharing of development benefits;
d) Counteract any abuse or exploitation of disabled people;
e) Lay down strategies for a comprehensive development of programmes and services and for equalization of opportunities for disabled people; and
f) Make provision for the integration of disabled people into the social mainstream.
g) The Act has been in effect since 7th February, 1996. Justice V.R Krishna Iyer has opined that—Society is guilty if anyone suffers unjustly. He, further, held that the task of social justice is to make comprehensive legislation regarding disabled persons from womb to tomb. The judicial system can only do what the law empowers it to do. Parliament must first make adequate amendments to the law for the judiciary to be effective. The judiciary should be given training in disability and remedial jurisprudence. The state must empower every person including a pregnant woman and a child in the womb to have corrective treatment so that deformities may be avoided and child nutrition taken care of. On the whole, the Constitutional foundation is equalitarian in fact and in law, for every person to the extent science and technology can help and state resources set right.  

In order to implement the principle of equality of status and opportunity, it is the duty of the State to demolish the wall between the normal and disabled persons. All the rights and privileges should be made available even to the disabled persons.

IV. Family law: disablement

Under the Hindu Succession Act, 1956 which applies to Hindus it has been specifically provided that physical disability or physical deformity would not disentitle a person from inheriting ancestral property. Similarly in the Indian Succession Act, 1925 which applies in the case of intestate and testamentary succession, there is no provision which deprives the disabled from inheriting an ancestral property. The position with regard to Parsis and the Muslims is the same. In fact, a disabled person can also dispose his property by writing a ‘will’ provided he understands the import and consequence of writing a will at the time when a will is written. For example, a person of unsound mind can make a Will during periods of sanity. Even blind persons or those who are deaf and dumb can make their Wills if they understand the import and consequence of doing it.

V. Beneficial provisions: disabled people

There are various laws relating to marriage was enacted by the parliamentary Legislative for different communities in India. All these laws relating to marriage is also equally applicable to the disabled

246 69. disabilityworld.org/April-May2000/Governance/India.htm

persons. The most of these acts which was passed by parliament, and it has been provided that the following circumstances to the disable person at the time of undertaking a marriage.

According to the Acts, either party is an idiot or lunatic which as unable to give a valid consent due to unsoundness of mind or suffering from a mental disorder. Such an extent as to be that the party is unfit for marriage to procreation of children.

Under such acts as the Hindu Marriage Act 1955, the Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1935 it pertained to note here that the special Marriage Act, which as special for spouses of different religions and Foreign Marriage Act, for marriage outside India. The Child Marriage Restraint Act 1929 are also applies to the disabled person. This Act was amended by the parliament in 1978 to prevent the solemnization of child marriages in India” [30]. Similarly, it also specified that the disabled person cannot act as a guardian of a minor under the Guardians and Wards Act 1890. Even if the disability is of such a degree that one cannot act as a guardian of the minor. The same position was taken by the Hindu Minority and Guardianship Act, 1956 which has also covered under the Muslim Law”.[248]

In the connection under the Hindu Succession Act 1956 which were applied only to Hindus. It has been also specifically provided that physical disability or physical deformity would not disentitle a person from inheriting ancestral property. Hence, the Indian Succession Act 1925 applied in the case of intestate and testamentary succession. There is no provision which deprives the disabled from inheriting an ancestral property”.[249]

Similarly, the Muslims, Christians, and the Parsis are also the same position. In facts disabled person can also dispose his property by writing a ‘will’ provided he understands the import and consequences of writing a will at the time when a will is written. Even blind persons or those who are deaf can make their wills if they understand the import and consequence of doing it”.[250]

Thirdly, the rights of the disabled have not been spelt out in the labour legislation, because the provisions which cater to the disabled in their relationship with the employer are contained in delegated legislation such as rules, regulations and standing orders. Further, it also provides answer to various issues related to disabled person employed under PWD Act 1995”.[251]

Fourthly, another important act which was enacted during the British Rule to Judicial Procedures for the disabled. These act also known as the designs Act 1911”.According to these act which deals with the law relating to the protection of designs any person having jurisdiction in respect of the property of a disabled person (who is incapable of making any statement or doing anything required to be done under this Act) may be appointed by the court under Section 74”[252], to make such statement or do such thing in the name and on behalf of the person subject

248 wikaspedia.in/education/parents...for...disabilities/legal-rights-of-the-disabled-in-india

249 Ibid
250 Ibid
251 Ibid
252 Ibid
to the disability. The disability may be lunacy or other disability.

There are several beneficial provisions which have been specified in the income Tax law especially for disabled person. According to under section 80 DD\(^{253}\), to provide for a deduction in respect of the expenditure incurred by an individual or Hindu Undivided Family resident in India on the medical treatment (including nursing), training and rehabilitation etc. of handicapped dependents. For officiating the increased cost of such maintenance, the limit of the deduction has been raised from Rs.75,000 to Rs. 1, 25,000. In case the tax benefits get only Individual Suffering from disability\(^{254}\) as well as any dependent family member of the individual is suffering from a disability\(^{255}\). Similarly, a new section 80V\(^{256}\) has been introduced to ensure that the parent in whose hand’s income of a permanently disabled minor has been clubbed under Section 64, is allowed to claim a deduction up to Rs.20,000 in terms of Section 80 V. It also provides for an additional rebate from the net tax payable by a resident individual who has attained the age of 65 years which was specified under Section 88B’of income tax. It has been amended to increase the rebate from 10% to 20% in the cases where the gross total income does not exceed Rs. 75,000

VI. Judicial pronouncements: right of disabled people

The Indian Judiciary has played a very significant role in developing the human rights of the disabled persons. In a number of cases the Supreme Court and the High Courts interpreted the disability legislations furthering the objectives contained therein. The extraordinary powers vested in the Supreme Court under Articles 32 and 142, and the High Courts under Article 226 of the Constitution of India, have ensured that the rights of the citizens, and more specifically, that of the disabled citizens, are not trampled upon.

In Javed Abidi v. Union of India\(^{257}\), while directing Indian Airlines to provide concessions for passengers suffering from locomotor disability, the Supreme Court keeping in view the object of the persons with disabilities Act, 1995, directed creation of various free environment for person with disabilities and making special provisions for their rehabilitation, medical care, education, employment, training and protection of their rights.

In D.N. Chanchala v. State\(^{258}\), the Supreme Court advocating the right based approach to disability extended the equitable principle of preferential treatment under Art 15 (4) to persons with disabilities to bring them to the mainstream of the society by giving them equal opportunity in the field of education. The Allahabad High Court in National Federation of Blinds UP Branch v. Stae of UP \(^{259}\) ordered the Lucknow Development Authority not only to give preference in the matter of allotment of land houses to

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\(^{253}\) Income tax Act, 1961, https://www.hrblock.in/.../section-80dd-tax-deduction-on-medical-expense
\(^{254}\) Section 80U Under Income Tax Act 1961
\(^{255}\) section 80DDB under Income Tax Act 1961
\(^{256}\) Income tax Act, 1961, https://www.hrblock.in/.../section-80dd-tax-deduction-on-medical-expenses
\(^{257}\) [AIR 1971 SC 1762]
\(^{258}\) [AIR 1979 SCC 467]
\(^{259}\) [AIR 2000 All 258]

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119
handicapped persons, but also to provide concessional rates to them.

In Chandan Kumar Banik v. State of West Bengal 260 the Supreme Court rescued mentally challenged inmates of a hospital in Hooghly District who were being kept chained by the hospital administration to control their unruly and violent behaviour. Absence of reservations for persons with a physical handicap in medical colleges was found by the Calcutta High Court to be an infringement of Persons with Disabilities Act and the Constitution as well in Dy. Secy. (Mart), Deptt. of Health and Family Welfare v. Sanchita Biswas261. This view of the Calcutta High Court finds support in a plethora of judgments [Raman Khanna (Dr.) v. University of Delhi, (2003) 106 DLT 97; Vijay Kr. Agarwal v. State of Rajasthan, CWP No. 1239 of 2000; A.P. Federation of the Blind v. Registrar, Andra University, WP No.10234 of 1999; Benny v. State of Kerala, WA No. 3660, decided on 30.01.2003 etc.] pronounced by different High Courts of the country. In Sheeela Bharse v. Union of India,262 the Supreme Court held that mentally ill non-criminal persons cannot be kept in jail and opined that keeping the non-criminals in jail along with other convicts is unconstitutional. Like this in a plethora of cases, the Indian judiciary has shown its concern towards the protection of the human rights of the disabled persons and played a vital role in the realm of disability rights in India.

VII. International laws: disablement

The United Nations since its inception in 1945 is making a relentless campaign for the protection of human rights of all in general and various deprived sections in particular. Based on the International Bill of Rights, the U.N. formulated the first specific document regarding disabilities in 1971 in the form of Declaration on the Rights of Mentally Retarded Persons. Basically, all international human rights instruments, protect the human rights of persons with disabilities, as they apply to all persons, thus principle of universality is reinforced by the principles of equality and non-discrimination which are included in human rights instruments. International human rights law determines that every person has:

1. The right to equality.
2. The right to non-discrimination.
3. The right to equal opportunity.
4. The right to independent living.
5. The right to full integration.
6. The right to security

The Universal Declaration of Human Rights (UDHR) represents the normative basis that led to formulating the standards concerning persons with disabilities that exist today. In Article 25(1)of the UDHR specifically mentions the socio-economic rights of people with disabilities: the right to an adequate standard of living, including food, clothing, housing and medical care and social services and the right to security in the event of unemployment, sickness, disability, widowhood, and old age or other lack of livelihood in circumstances beyond his control. The Universal Declaration recognises a form of equity inherent in human dignity with equal and inalienable rights as the foundation of freedom and

260[1995 Supp (5)
261[AIR 2000 Cal 202]
262[(1993) 4 SCC, 204]
justice; that all men are born free, and equal in dignity and rights; that all are equal before the law; and that all are entitled to equal protection against discrimination and that everyone has the right to freedom of thought International Covenant on Civil and Political Rights, 1966 (ICCPR) lists several rights that are relevant to disability. Article 26 states that all people are equal before the law and have the right to equal protection of the law.

In 1969, the United Nations General Assembly adopted the Declaration on Social Progress and Development,' which started the movement relating to the right of persons with disability. The Declaration while proclaiming the right to live in dignity for all people emphasised the need to assure disadvantaged sectors of the population equal opportunities for social and economic advancement.

In 1971 General Assembly adopted the declaration on the rights of mentally disabled persons. The Declaration states that: "The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings". The Declaration calls for national and international guidance as would enable him to develop his maximum potential. Proper medical care and such education, training, rehabilitation and the rights of disabled persons. The mentally retarded person has a right to action to ensure that it will be used as a common basis for the protection and international action to ensure that it will be used as a common basis for the protection of the rights of disabled person.

In 1975, the General Assembly adopted the "Declaration on the Rights of Disabled Persons.” It was the first international document that tried to define the term "disability". Like the Declaration on Mentally Retarded Persons, this Declaration also stresses that disabled persons have the inherent right to respect for their human dignity and the right to enjoy a decent life, as normal and full as possible. They are entitled to measures designed to enable them to become as self-reliant as possible, and that their special needs must be taken into consideration at all stages of economic and social planning.

The Declaration on the Rights of Deaf-Blind Persons, 1979 also guarantees universal human rights to all deaf-blind persons. Article 1 of the Declaration states that "every deaf-blind person is entitled to enjoy the universal rights that are guaranteed to all people by the Universal Declaration of Human Rights and the rights provided for all disabled persons by the Declaration of the Rights of Disabled Persons".

In a landmark resolution adopted on 16 December 1976, the United Year' of Nations General Assembly proclaimed 1981 as the "international Disabled Persons" with the theme "Full Participation and Equality". Two international human right treaties, namely the convention on the Elimination of All forms of Discrimination Against Women, 1979 (CEDAW), and the Convention on the Rights of the Child (CRC) highlighted particular vulnerability of women and children to right abuse. Thus, the United Nations and its various agencies are contributing substantially towards the integration of persons with disabilities by adopting various conventions, declarations and recommendations.

VIII. Conclusion
Inevitably, as mentioned the issue of disability is related to many other social, economic and political issues including those of chronic poverty, gender inequality, mal-administration and political victimization. All these must be removed to make the ‘disability right’ a reality. There must be active involvement of disabled people in planning and policy making process relating to their lives and full recognition and enforcement of human rights as well as various other rights associated with them. It is clear that the Constitution of India needs amendment in order to include the persons with disabilities within its ambit. Part III and Part IV should be amended as promptly as possible. Protective and Welfare legislations can work effectively only when the Constitution is amended accordingly. The duties of the states to oblige of constitutional norms regard to provide equal opportunities and protection of disabilities rights, because the majority of disable persons can lead a better quality of life in the society.

It also required special attention to women with disabilities to provide a protection against exploitation and abuse in the society. In keeping of view, it needs Special programs for with women disabilities to developed for education, employment and providing of other rehabilitation services. However, the state should take an initiative for prevention of disabilities and organized the various Programs for prevention of diseases.

Another important thing that it needs special attention to children with disabilities is the most vulnerable group. The states should strive to ensure right to development as well as recognition of special need and of care, protection and security for children with disabilities. It ensure that right to development with dignity and equality creating an enabling environment and also Organized the special health vocational training along with specialized rehabilitation services Children with disabilities.

Every state also ensures that the persons with disabilities obtain the disability certificates without any difficulty in the shortest period of time and adoption of obtain the disability certificates must be simple procedures. It provides additional expenditure for facilitating activities of daily living, medical care, transportation, assistive devices etc to disabled persons. Sometime disabled person’s families and care givers are not afforded to give the better treatment to them. The state Government as well as Central Government also encouraged developing a comprehensive social security policy for persons with disabilities.

Besides, the NGO’s has played a very important role to provide affordable services to complement the endeavors of the Government as well as the provisions of services for persons with disabilities. The states also have a very important role to formulation policy, planning, implementation, monitoring and also seeking their advice on various issues relating to persons with disabilities.

Every state should strive to improve the quality of life of persons with disabilities. It also ensures to establish the research center for disabilities person regarding to do the research on their socio-economic and cause of disabilities. The state should take necessary steps to provide them opportunity
for participation in various sports, recreation and cultural activities. In many decades central Government has passed very important acts for the Persons with Disabilities. It brings the developments programs in the disability sector, and makes a certain amendment to the disabilities Act which have become necessary. All the attempts made till to date in India for providing equal rights and opportunities for the persons with disabilities are purely based on medical model and lack the social, economic, and legal perspective making such protection discriminatory. However, the future of the disabled individuals is not all that gloomy there is lot of scope for amendments to the existing legislation PD Act 1995 in conformity with UN Convention on the Rights of Persons with Disabilities (2006) to which India a signatory in the following areas:

• Inclusion of a new definition on ‘persons with disabilities that endorses the social model of disability as it locates the problem of disability outside the individual person.

• Inclusion of Right to Barrier free environment in order to ensure proper accessibility to the persons with disability in all buildings and facilities both in rural and urban areas. In this regard the State must formulate suitable Accessibility Standards from time to time by adapting prevailing international standards on physical environment information and communication technologies and develop systems that are suitable to Indian conditions.

• Promotion of Right to Equality and Non-Discrimination and ‘reasonable accommodation’ by the State would enable them to have access to, participate in, or advance in employment, to enjoy legal capacity on an equal basis with others in all aspects of life right.

• As women and girls with disabilities are more vulnerable to all kinds of exploitation, abuse and violence, they must be taken care off in all settings at all places including, home, care-houses, educational institutions, institutions, workplaces.

• The Right to access court is an essential component of guaranteeing the enjoyment of any right therefore, all buildings which are related to the justice system, including courts and police stations, should be made accessible to persons with disabilities.

• To promote, protect and enforce the rights of the persons with disability on an equal basis with others a Disability Rights Authority (DRA) must be constituted. Thus, a clear and comprehensive procedural mechanism is to be formulated for the advancement of disability rights. It is important to realize that human rights of the disabled cannot be fought for and secured in a vacuum.
ABSTRACT
This article deals with Female Criminality. The paper reviews some of the theories based on female criminality, and relate to the explained causes and measures of prevention with the conditions prevailing in present times. Thus, based on data available, the paper tries to find out the type of crimes which is been attracting more female to its trap. Also, it tries to recognize the social environment that contributes to the making of women criminals. Studying the factors leading to the causes of making of female criminals, re-examining the solutions provided by criminologists over the year and studying the recent trends, this paper tries to bring out certain measures that can be adopted to bring about a significant positive change to the rate of crimes done by women.

I. INTRODUCTION
Marxist feminist perspective adapts the principles of Marxism to emphasise how capitalism uses the family oppresses women, and the harmful consequences of the family to women’s lives.

Marxist feminists looked on class and gender inequalities as dual systems of oppression, with both being very powerful and independent systems. Marxist feminists often argue that class and gender inequalities reinforce each other and create groups that are doubly oppressed.

Criminology is itself the study of law of crimes and criminal justice. The relations between gender and crime are deep. Gender has been recognized as one of the most important factors that play a significant role in dealing with different kinds of crimes within criminal justice systems. It has long been considered that men and women differ in their offence rates and patterns and in their victimization experiences. The idea that crimes are committed primarily by males has had a major effect on criminological thinking and on criminal justice policies. This effect is different from one society to another and from time to time within one society, since gender roles and expectations are changing. The aim of this essay is to consider how gender affects the way the law and society respond to different types of crime and violence. It will argue that gender plays a significant role in dealing with various crimes within the criminal justice system. Although as a general statement it can be said that the law does not differentiate between men and women, research conducted in the field of criminology have

263 Revised version of the paper presented at the Second International Conference of the South Asian Society of Criminology and Victimology (SASCV) at Kanyakumari, India conducted during 11 – 13, January, 2013.
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124
clearly shown that social characteristics of offenders such as race, gender and class, have influenced the decisions made in the Court. It has been observed over the time period that women are treated more leniently than men within the Court, and they are less likely to be arrested, convicted and jailed. This essay will consider whether society’s views about gender roles and expectations affect the way that it responds to crimes, particularly violent crime.

Feminist criminology seeks to address this limitation by enhancing our understanding of both male and female offending as well as criminal justice system responses to their crimes. Feminist criminologists seek to place gender at the center of the discourse, bringing women’s ways of understanding the world into the scholarship on crime, criminality, and responses to crime.

Traditionally, women were not the focus of criminal study, as women were not expected, to be criminals or commit crime, and those that did were often considered to be mentally deficient. Many of those who study feminist criminology argue that traditional texts neglect how women are victimized. This leads to neglect of the crimes abated by women. 266

II. STRANDS OF FEMINIST CRIMINOLOGY

- **Liberal Feminism** - This is the variety of feminism that works within the structure of mainstream society to integrate women into that structure. As is often the case with liberals, they slog along inside the system, getting little done amongst the compromises until some radical movement shows up and pulls those compromises left of center.

- **Radical Feminism** - Provides the safeguard of theoretical thought in feminism. Radical feminism provides an important foundation for the rest of "feminist flavors". The reason this group gets the "radical" label is that they view the oppression of women as the most fundamental form of oppression, one that cuts across boundaries of race, culture, and economic class. This is a movement intent on social change, change of rather revolutionary proportions. Radical feminism have reframed the ways in which crime is commonly understood in our society. Rather than a crime of sex, it is more apt to be viewed as one of male power, control, and domination.

- **Marxist and Socialist Feminism** - Marxism recognizes that women are oppressed, and attribute the oppression to the capitalist/private property system. Thus they insist that the only way to end the oppression of women is to overthrow the capitalist system. Socialist feminism is the result of Marxism meeting radical feminism. 267

III. SCOPE OF FEMINIST CRIMINOLOGY

The scope includes research on women working in the criminal justice profession268, women as offenders and how they are dealt with in the criminal justice system, women as victims, and theories and test of theories related to women and crime. The feminist critique of Criminology incorporates a

266 https://www.papermasters.com/feminist-criminology.html
267 https://www.uah.edu/woolf/feminism_kinds.htm
268 https://www.scimagojr.com/journalsearch.php?q=11400153312&tip=sid

www.supremoamicus.org 125
perspective that the parts to crime differ from males and females, just research that use sex as control variable often fails illuminate the factors that predict female criminality. This highlights research that takes a perspective design to demonstrate the gendered nature of crime and responses to crime. It is apparent that males do indeed commit far more offenses, principally those deemed important to criminology, than females do.16 This is because the association of criminology with legislative, corrections and criminal justice systems. The field gradually developed in part to help and improve the understanding of why people commit crimes so that policies could be enacted to reduce those crimes. Not only do women commit lesser crimes, but also they commit crimes that are of least interest to those concerned about public safety.269 Thus, women were largely ignored until the 1970s. 270 Additionally, the Weberian value-free approach to the study of criminology has failed to recognize that the experiences of the researchers themselves shape and formulate their own approaches to their research. This has resulted in supposition that data’s, Theories and Result of theories about boys and men would be generalizable to girls and women. Researchers and theorists have assumed that the study of male crime was the generic study of crime and that can be applicable to women who engaged in crime were more of an aberration than a subject to be studied in and of itself. Ultimately, the feminist approach to criminology emerged from the critical point of view. It has been only in the last 30 years that feminist criminology has developed into a recognized point of view in criminology. However, the term feminist criminology is somewhat misleading and wrong; it might perhaps be better to speak of feminist criminology. Feminist criminology contains a wide range of theoretical perspectives, views and methodologies that place the ways in which gender shapes experience at the center of scholarly inquiry. It focuses on a different range of issues related to women and crime, including theoretical explanations of crime, responses to female offending and offenders, programming in women’s prisons, women as workers in the field of corrections, the special and different needs of women prisoners. Feminist thought is not a homogeneous approach; it includes the liberal feminist focus on equal opportunities for women, the Marxist feminist focus on class relations and capitalism as the source of women’s oppression, socialist feminists’ blending of male domination with political and economic structures in society as the source of inequality, and the radical feminist focus on patriarchal domination of women, to name the most well-known branches. However, these feminist perspectives have in common their focus on the ways in which the gendered structure of society is related to crime. The victimization of women is a large and growing concern part of criminology and is of central interest to feminists in and outside criminology. The relatively high feminist visibility in this area may lead criminologists to regard it as the only relevant site for feminist inquiry in criminology. Not so the more one reads the literature on victimization—the physical and sexual abuse of children, women, and men—the more difficult it becomes to separate

...fending, especially in... on... humiliation
...https://student.cc.uoc.gr/uploadFiles/181-%CE%9A%CE%9C%CE%9C%CE%9A397/Simpson%20Feminist%20Theory%20crime%20and%20justice.pdf

...allegations after the fallout of a marriage, India is rising in the number of false allegations against innocent men. That greater number of victims compared to men, the legal system. Albeit women are the faces by the laws ranging from sexual to abuse and sexual violence by men against women, these major points and findings are seen:

- Rape and violence-especially between intimates are far more common and widespread than imagined previously.
- Police, court officials, juries, (criminal justice system) and members of the general public do not take victims of rape or violence seriously, especially when victim-offender relations involve intimates or acquaintances.
- Whereas female victims feel humiliation and shame, male offenders often do not view their behavior as morally and legally wrong.
- Strategies for change include empowerment of women via speak outs, marches, shelters and centers, and legal advocacy; and changing men's behavior via counseling, probable arrest for domestic violence, and more active prosecution and tougher sanctions for rape.

IV. FEMINIST CRIMINALITY DEALT BY EXECUTIVE AND JUDICIARY BODIES

The law is prejudiced towards women, due to the availability of reservations in the constitutional provisions of our country. There is a disregard in the abuse that a man faces by the laws ranging from sexual to economic abuse, these shows a disparity in the legal system. Albeit women are the greater number of victims compared to men, that statistic is slowly dissipating in the light of false allegations against innocent men. India is rising in the number of false allegations after the fallout of a marriage, after a woman feels scorned. The law, and judiciary system doesn't provide protection of men from these shaming allegations leading to drastic measures in the form of suicide.

Police
Arguments about whether and how justice is gendered must begin with police behavior. That police decisions to arrest can be influenced by extralegal factors such as the demeanor of the offender has been established. It is a little clear how gender, either alone or in conjunction with other characteristics, may consciously or inadvertently influence police behavior. Neither gender nor race should have an effect on police behavior once crime type, especially as it interacts with demeanor of the offender, was controlled. On the other hand, comparison of juvenile male and female probabilities of transition from self-report incident to police contact and arrest, finds males to be more likely to incur police contact and arrest than females. It has been observed that the interaction between race and gender is a key factor influencing arrest decision.

Courts:
Police contact is not the only point in justice processing at which discrimination can occur. Women have been found to receive more lenient treatment in the early stages of court processing (i.e., bail, release on own recognizance, and/or cash alternatives to bail) and further into the process, e.g., conviction and sentencing. Other studies
find no gender bias when controlling for crime seriousness and prior record or little effect from extralegal factors when legal factors and bench bias are controlled. Variation in sentencing may be related to so-called countertype offenses, that is, women are treated more harshly when processed for non-traditional female crimes, like assault or when they violate female sexual norms. Given variable-specification problems, however, some of these findings are potentially spurious.

Studies of court processing are not entirely dominated by liberal perspectives. More critical perspectives emphasize social power and patriarchal control as the primary mechanisms through which justice is gendered.

The most important factor determining sentence outcome, once prior record and offense seriousness are controlled, is marital and/or familial status." Marital status has not been found to matter for women (married receive more lenient sentences) but not for men or to be as important for both. Pretrial release and sentencing are seen to be both "familied" and "gendered." They are familied in that court decisions regarding the removal of men and women from families "elicit different concerns from the court". They are gendered in that women’s care of others and male economic support for families represent “different types of dependencies in family life”. Men and women without family responsibilities are treated similarly, but more harshly than familied men and women. Women with families, however, are treated with the greatest degree of leniency due to “the differing social costs arising from separating them from their families”. The economic role played by familied men can, more easily, be covered by state entitlement programs, but it is putatively more difficult to replace the functional role of familied women. Judges rationalize such sentencing disparities as necessary for keeping families together.272

Observation: The above chart depicts the percentage of types of crimes by female. According the chart Cruelty by husband and

272 Stacey and Thorne (1985:308) argue that more radical feminist thinking has been marginalized-ghettoized within Marxist sociology, which ensures that feminist thinking has less of a chance to influence mainstream sociological paradigms and research. 622 SIMPSON
relatives is 21%; Hurt is 19%; Riots is 10%; Theft is 4%; Dowry Deaths is 2%; Molestation is 2%; Murder 2%; Attempt to murder is 2%; Kidnapping and abduction is 2%; other IPC crimes is 2%. Therefore this shows female Criminality in India.

V. OVERVIEW
In response to the limitations of mainstream criminology, feminist and visual criminology offer alternative approaches to the study of crime, deviance, justice institutions, and the people implicated by them. Although feminist and visual lines of criminological inquiry have distinct foci and analytical strengths, they both illuminate disciplinary blind spots. Feminist criminology responds to criminology’s embedded gender biases, while visual criminology challenges criminology’s reliance on text and numbers. They offer approaches to redress criminology’s general lack of attention to the broader cultural dynamics that inform crime, both as a category and as a practice. Unpacking the visual through a feminist criminological lens is an emergent critical project, one that brings together and extends existing feminist and visual criminological practices. Combining feminist criminology and visual studies offers new possibilities in the areas of theory and methodology. Doing so also lends to new modes through which to query gendered power relationships embedded in the images of crime, deviance, and culture. Moreover, such an approach provides alternative lenses for illuminating the constitutive relationships between visuality, crime, and society, many of which exceed mainstream criminological framings. It brings together interdisciplinary perspectives from feminist studies and visual studies rarely engaged by mainstream criminology. Thus, a feminist visual criminology, as an extension of feminist criminology’s deconstructivist aims, has the potential to pose significant—arguably foundational—critiques of mainstream criminology.

VI. A THEORETICAL VIEW
Theories about crime have been propounded from time to time. Many writers have explained the deviant behavior of a person. We have writers of the biological school, the psychological school as well as of the sociological school. Writers of the biological school explain deviant behavior in terms of inherited traits - physical and mental. According to the psychoanalytical school, deviance is not problematical because this theory starts with the postulate about human nature according to which the tendency to deviance is ‘given’. But sociologists look at it as problematical and as a tendency that is not given but learned. They explain deviant behavior as the function of social environment and as one which is learned through group associations. We shall consider in this chapter major theoretical explanations of criminal behavior.

- Otto Pollock
In his book ‘The Criminality of Women’, Poliak 275 has challenged the so-called disproportion between male and female criminality. Poliak’s major concern was the “masked” character of female criminality.

274 http://shodhganga.inflibnet.ac.in/bitstream/10603/140499/7/07_chapter%202.pdf
275 Poliak Otto. ‘The Criminality of Women’, p.48

www.supremoamicus.org
129
This masked character is achieved in three ways: firstly, female criminality is concealed by the under-reporting of offences committed by women; secondly by the lower detection rates of female offenders compared to male offenders; and thirdly, by the greater leniency shown to women by police and courts. Keeping in mind the masked character of female crime, Poliak advanced the theory of the “hidden” female criminal to account for what he considered unreasonably low official crime rates for women. A major reason for the existence of hidden crime, as he sees it, lies in the nature of women. Women are instigators rather than perpetrators of criminal activity. He believed that if the amount of hidden crime is added, the female figures would surpass the figures for males. He believed that law enforcement officers as well as judges are much more lenient towards women than towards men which are why the official statistics and records of female criminality do not reflect the real number of crimes committed by women. The masked character of female criminals, Poliak observed, results in gross under-reporting and bolsters the official belief that females are a very low risk for crime. Generalizing on the basis of arrest data on female crime, he maintained that women offenders have lesser chance to be reported to be arrested, to be convicted and to be committed than men. The theories on female criminality, as Poliak rightly said, are generally contaminated by popular stereotypes and myths regarding women. Both classical and contemporary criminologists have failed to dismantle the sexist notions and common sense perceptions about women in general and female offenders in particular.

- **W.I. Thomas**

Thomas’s most important work in regard to female criminality is *The Unadjusted Girl*, Thomas lays emphasis on individualistic, psycho-physiological and socio-cultural approach. However, he failed to consider the secondary and low social status of women. Thomas deals with female delinquency as a normal response under certain social conditions, using assumptions about the nature of women. He rejects economic causes as a possibility at all, denying its importance in criminal activity. Thomas offered an explanation for delinquency on part of young females which characterizes them engaging in departures from lines of conduct that are biologically and psychologically normal for women. Every human, he believed, has certain basic desires. The desire for new experience and the desire for response influenced criminality. A woman enters prostitution to satisfy a desire for excitement and response. For a woman, prostitution is, in one form or another, a means to satisfy these needs. Thomas did not altogether ignore environmental factors.

**VII. FEMINIST CRIMINOLOGY: STATUS IN INDIA**

- **Causes of Female Criminality in India**

Causes based on biological viewpoint postulated by early criminologists were baseless and does not apply to women in India. The early researchers attributed female criminality to biological or sociological antecedents. Crime, as a

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behavioral or social problem, is complicated and not easily understood. Women are considered as turning crime as a perversion of feminine role whether their causes are biological, psychological, social or environmental.

- **Biological Viewpoint:**
  Under the Biological Viewpoint, Caesar Lombroso's contribution is considered as the foundation of scientific study on female crime. He viewed, "female devianve as rooted in the biological make up or as inherent feature of the female species". He stated that female criminals are more terrible than the male criminals because cruelty by a female was much more 'refined' and diabolic than men. Lombroso thought women shared many qualities with children and they were morally deficient and their lack of intelligence was the reason of their relatively small participation in crime. Lombroso and Ferrero (1895) postulated theory that was based on a belief that all individuals displaying anti-social behavior were biological throwbacks. The born female criminal was considered to have the criminal qualities of men and the worst qualities of women. However, we feel that, Indian women are inclined to crime more because of social or economic deprivation than being biological throwbacks. Pollack elucidated the influence of hormonal changes over menstruation, pregnancy and menopausal stage. He stated that in the pregnancy and menopausal phase, the psychological characteristics such as emotional changes of moods, abnormal craving and impulses and temporary impairment of consciousness point in the direction of criminal causation. However, in the present age of information technology and impersonal relations, such basic theories seem to be unreasonable and unscientific and especially for India it is not applicable. All the biological theories depict crime as an inherent human trait which does not adequately describe the phenomenal variations in the nature of crime being committed these days, when crime has risen up to the status of career for many, involving highly advanced professional skills and typical scientific techniques.

**Recommendations:**

- **Preventive Measures:**
  It is said that prevention is better than cure and having said that, in case of crime and preventive, that too in a vast and diverse country like India, is a humongous task. Crime prevention among females in India is even bigger challenge because it is difficult to recognize the vulnerable areas and people especially women, easily. General awareness of the role of woman in a society, her rights and laws for them should be briefed to the uneducated women. Legal awareness and awareness about illegal activities and to report or keep themselves away from illegal activities should be provided by social service/adult education units. Sex education plays an important role wherein the women indulge in crime following lack of awareness regarding sex-rackets and flesh trade. And also need Tobe informed about the harsher laws against being a part of such crimes. Constructive social action movement to spread awareness is important. In order to reduce tensions in the family or society it is advisable for couples and families to undergo Pre-marital and post marital counseling. It is necessary to treat domestic violence cases harshly to

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279 Ibid

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avoid future crimes and laws against dowry must be implemented properly.

- **Corrective measures:** Female criminals who are serving their term in the prison due to crime committed by them or in collaboration with other companion/companions, should be given a chance to rectify or correct their ways so that when they finish their term and come out of the prison, they should be a lady with no criminal attributes, well informed and more aware, which would enable her to stay away from the crimes and other criminals. Most women are deprived of their liberty and do crimes to break off the chains of cruel traditions. Such women should be given enough support and help to be independent and do something worthwhile for herself, her family and her kids. In prisons, women are engaged in various activities like cooking, tailoring, gardening, painting, handicrafts etc. which is a positive initiative and helps a lot to improve their self-respect and confidence. Proper public awareness is also a need as a criminal returning to her society is not accepted and is taunted by everyone. This might result in her ending up committing other harsher crimes. People need to be made aware of the rights of a reformed criminal as they too have the right to continue with their life as before.

- **Rehabilitative and Supportive measures:** Under rehabilitative and supportive measures, a female criminal should be given chance to fulfill her parental responsibilities. Attention should be paid on providing female prisoner with proper medical aid and even on rehabilitation. In case a female offender suffers from a mental condition and she comes out of prison after serving her term, she would probably continue to commit crimes because the problem still subsists in her, and who knows it would have probably even become from bad to worse. Caretaking of children of imprisoned mothers should be done or they should be allowed to be in touch with their kids and relatives. Access to legal advice should be provided as most of the women come to prison for no mistake of their own.

**VIII. GLOBAL PERSPECTIVE**

Feminist criminology has arguably had more impact on the global platform. This is because of the focus on violence against women that is a hallmark of feminist criminology as well as a recognized problem internationally. At the international level, considerable attention has been paid to the exploitation of women and girls in the global sex industry. In addition, feminist criminologists study the ways in which laws and criminal justice policies around the world may victimize women, sanctioning them for violating traditional gender norms, in particular in regard to sexuality. For example, in some Muslim countries, women who are raped may be viewed and treated as offenders instead of as victims because they have violated the expectations regarding women’s sexuality.

**IX. CONCLUSION**

Despite the fact that laws on paper deal with men and women equally, it is not guaranteed that male and female defendants will be treated equally. From researches and cases
that have been discussed, it has become clear that both the conviction and sentencing stages of criminal procedures are affected by the gender of victims and defendants, and, in general, female defendants are treated more leniently by the courts. Certain trends and patterns in female criminality, as compared with male criminality, have long been observed. It is assumed that women commit a small percentage of all crime, these are less serious, rarely professional and less likely to be repeated, and, consequently, women form a small proportion of prison populations. 281 But the reality is that they commit these violent crimes just like men do. The concerned authorities should, however, serve to motivate a constant effort to overcome practical difficulties in how the rules and measures are implemented. 282 Women are now more assertive, more aggressive, and, indeed, more ‘masculine’. Therefore flowers are no more just innocent delicate flowers. The thorns have turned up and round the stereotypical typical centric, has reversed and the legal system needs to refine the laws framing it in a way to scrap these thorns so that ‘Crimes are not minted in a fat purse’.

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A SOCIO-LEGAL PERSPECTIVE OF SUICIDE IN INDIA

By Chinnamma K.C.
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“Suicide is a permanent solution to a temporary problem.”
Phil Donahue. American Media Personality.

Abstract:
The Oxford Dictionary defines suicide as the act of killing oneself intentionally. In India, suicide is the leading cause of death in the 15-39-year age group with 37 per cent of the total global suicide deaths among women coming from the country, according to a new study conducted by Indian Council of Medical Research (ICMR), Public Health Foundation of India (PHFI) and Institute for Health Metrics and Evaluation (IHME) in collaboration with the Ministry of Health and Family Welfare along with health experts and stakeholders. This is an alarming situation for a country with the largest youth population in the world. Before the enactment of the Mental Health Act (2017), the attempt to commit suicide was punishable under section 309 of the Indian Penal Code (1860). The decriminalisation of attempt to commit suicide by the Mental Health Act (2017) is a commendable step towards dealing with the increasing number of suicides as it leads to openly seeking help and reduction of stigma surrounding it. However, the initiatives for suicide prevention are still lacking in India. There are very few suicide helplines in India and those are mainly run by non-governmental organisations. The number of suicide helplines run by the government are virtually non-existent. There is a lack of trained mental healthcare providers and mental health care facilities to counsel and treat suicide survivors. This paper seeks to explore the various causes of suicide in India and the legislative efforts to curb the same. This paper also deals with mental health care facilities available in India to people with suicidal tendencies and the role played by non-governmental organisations in suicide prevention.

Key words: Suicide, helplines, mental health, suicide prevention.

1. Introduction
Suicide is a psychosocial problem. Every year approximately 800,000 people die due to suicides all over the world. 79% of global suicides occur in low- and middle-income countries. For every successful suicide attempt, there are many more people whose attempts fail and go undetected. In 1968, the World Health Organisation (WHO) defined suicidal act as ‘the injury with varying degree of lethal intent’ and that suicide may be defined as ‘a suicidal act with fatal outcome’. Suicidal acts with non-fatal outcomes are labelled by WHO as ‘attempted suicide’. Suicide is the second leading cause of death among 15–29-year-olds. It is an important public health concern around the world as well as in India. In

283 Suicide, World Health Organization (Feb. 23, 2019, 08.22 pm), https://www.who.int/newsroom/fact-sheets/detail/suicide.

References

www.supremoamicus.org 134
India, more than two lakh people kill themselves every year. The fact that most of these Indians fall in the age group 18-45 years is a major cause for concern. Suicide is a complex issue. Any initiative to address the issue must take into consideration the social, economic and the psychological aspects of suicide. The suicide rates among students and farmers in our country are widely debated. Attempted suicide was earlier a punishable offence under section 309 of the Indian penal Code (1860). However, the enactment of the Mental Healthcare Act (2017) has effectively decriminalised attempted suicide making a commendable step towards dealing with the increasing number of suicides in India. In our country, the state of mental health services and suicide prevention programs are abysmal. The increasing number of suicides has become a public health concern in our country.

2. Suicide statistics in India
In India, the National Crime Records Bureau (NCRB) is the government agency responsible for collection and analysis of data related to crime. The Accidental Deaths and Suicides in India -2016 report has not yet been released by the NCRB. The latest report available by NCRB is that of 2015. 1,33,623 people committed suicide in India in the year 2015. Maharashtra, Tamil Nadu, West Bengal and Karnataka have reported the highest number of suicides while the north-eastern states of Nagaland and Manipur have reported the least number of suicides in the year 2015. ‘Family problems’ (27.6%) and ‘Illnesses’ (15.8%) accounted for the major causes of suicides followed by ‘Matrimonial Issues’ (4.8%), ‘Bankruptcy’ & ‘Love Affairs’ (3.3% each), ‘Drug Abuse/Alcoholic Addiction’ (2.7%) and ‘Failure in Examination’ & ‘Unemployment’ (2.0% each), ‘Property Dispute’ (1.9%), Poverty (1.3%) and Professional/Career Problem (1.2%).

The male: female ratio of suicide victims was 68.5: 31.5. The majority of the suicide victims were between the ages of 18-45 years. Among cities, Chennai, Bengaluru, Delhi and Mumbai reported the highest number of suicides. 6.7% of suicide victims were students. 6% of the people who committed suicide belonged to the agricultural sector i.e. farmers, cultivators and agricultural labourers. Hanging and consumption of poison were reported to be the prominent mode of committing suicide. Although these are the official figures, the actual numbers are estimated to be much higher. Reports in the media have claimed that the actual suicide rates in India are much higher. Reportedly, in 2016 around 230,000 people committed suicide in India, of which 135,000 were men and 95,000 were women. One of every three women dying by suicide is from India. In the year 2016, the number of suicide deaths in India were higher than deaths related to AIDS (62,000 in 2016) or maternal mortality (45,000 in 2015).

287 Indulekha Arvind, 2.3 lakh deaths a year! It’s time India tackled suicide, the silent killer, as a public health crisis, The Economic Times (Oct. 14, 2018, 09.04 AM), https://economictimes.indiatimes.com/news/politics-and-nation/2-3-lakh-deaths-a-year-its-time-india-
3. Legal aspects of suicide in India
In India, suicides and attempted suicides are underreported. One of the main reasons for this is, up to 2017, attempted suicide was a punishable offence under IPC. Section 309 of the Indian Penal Code states that “whoever attempts to commit suicide and does any act towards the commission of such an offense shall be punished with simple imprisonment for a term which may extend to one year or with a fine or with both”. This law was intended to act as a deterrent to suicide. However, the aim of the law to prevent suicide by legal methods proved to be counter-productive. Those who attempted suicide were denied emergency medical attention as many hospitals and practitioners would hesitate to provide the necessary medical attention for the fear of getting embroiled in legal hassles. Many attempts were described to be accidental to avoid entanglement with police and courts. This resulted in a lot of such attempts going unreported. This in turn was, one of the hurdles to assess the actual number of suicides and attempted suicides in our country.

Under A.21 of the Indian Constitution every citizen of the country is guaranteed the right to life and personal liberty. The question whether this right to life includes the right to die has been asked many times. Answering this question in the affirmative would have negated the premise on which S.309 of IPC was enacted. The appropriateness of the provision was questioned in many cases. Justice P.B. Sawanth expressed his concerns about the relevance of the provision to suicide prevention by stating, “If the purpose of the prescribed punishment is to prevent the prospective suicides by deterrence, it is difficult to understand how the same can be achieved by punishing those who have made the attempts.” In 1985, the Delhi High Court opined that the continuance of section 309 of the Indian Penal Code would be an anachronism unworthy of a human society like ours. The Supreme Court struck down the provision in 1994 calling it a cruel and irrational provision violative of Article 21 of the constitution. However, this decision was overruled by a five judge Constitutional Bench of the Supreme Court in Gian Kaur v. State of Punjab and the constitutionality of the provision was upheld. The court said, “Right to life’ is a natural right embodied in Article 21, but suicide is an unnatural termination or extinction of life and therefore incompatible and inconsistent with the concept of ‘right to life’. However, the Mental Healthcare Act (2017) which came into effect from July, 2018 has effectively decriminalised attempted suicide. According to section 115(1) of the Act, “Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to

283 P. Rathinam v. Union of India, AIR 1994 SC 1844 (India).
284 AIR 1996 SC 1257 (India).
have severe stress and shall not be tried and punished under the said Code.” Section 115(2) of the Act imposes a duty on the appropriate government to provide care, rehabilitation and treatment to such a person to reduce the risk of recurrence of the act. This is a progressive and laudable step taken by India in the process of suicide prevention. It is a humane and sensitive approach towards the issue. It also enables survivors of attempted suicide to get the help they need. It can help in the improvement in epidemiological data, better planning, and resource allocation.

4. Causes of suicide in India

Although suicide is a deeply personal and an individual act, suicidal behaviour is determined by a number of individual and social factors. Research has found a strong connection between suicide and mental disorders (depression and alcohol use disorders). People who kill themselves do so impulsively in moments of crisis unable to deal with stressful life situations like financial problems, relationship break up or chronic pain and illness. Experiencing conflict, disaster, violence, abuse, or loss and a sense of isolation also contribute to suicidal behaviour. A previous suicide attempt is a strong risk factor for suicide. People who are well integrated with their families and community have a good support system during crises, protecting them against suicide. Risk factors related to the family include parenting style, family history of mental illness and suicide, and physical and sexual abuse in childhood. Suicide attempters with a history of sexual or physical abuse in childhood show more suicidal behaviour and are at a higher risk for mental disturbances in adulthood even after controlling for other contributory factors. Marital conflict is the most common cause of suicide among women, while interpersonal conflict is the most common cause among men. Sexual abuse and illicit intimate pregnancy also lead to suicides due to the India cultural taboos related to sexuality.

Among young people, suicidal behaviour was found to be associated with not attending school or college, independent decision making, premarital sex, physical abuse at home, lifetime experience of sexual abuse, and probable common mental disorders. According to NCRB, 6.7 % of people who commit suicide in India are students. This can be attributed to academic

297 Latha Vijayakumar, Suicide and its prevention: The urgent need in India, 2 Indian J Psychiatry, 4, 81-84(2007).
298 Suicide, World Health Organization (Feb. 23, 2019, 08.22 pm), https://www.who.int/news-room/fact-sheets/detail/suicide.
pressure, social pressures, modernisation of urban centres, relationship concerns, and the breakdown of support systems. The lack of economic, social, and emotional resources further aggravates the situation. The suicide rate is generally reported to be higher in urban areas because of a variety of stressors related to living and working in cities, including overcrowding and social isolation. Unemployment may drive up the suicide risk through factors such as poverty, social deprivation, domestic difficulties, and hopelessness.

In India, there is lack of awareness regarding mental health. The stigma associated with psychiatric illnesses makes people reluctant to seek help. Due to these reasons, psychiatric disorders are under diagnosed and untreated. This makes it difficult to determine the relation between psychiatric disorders and suicides in India. People with psychiatric disorders are at higher risk of suicide and are also more likely to be unemployed. In one psychological autopsy study, 24% of suicides had a psychiatric diagnosis, namely major depressive disorder, bipolar affective disorder, or schizophrenia and substance abuse was prevalent in 18% of suicide cases.

About 6% of people who commit suicide in India work in the agricultural sector either as farmers or cultivators or as agricultural labourers. Factors contributing to the high rate of suicide in the agricultural sector include economic adversity, exclusive dependence on rainfall for agriculture, and possibly monetary compensation to the family following suicide. A fall in public investment in irrigation and infrastructure, and in technological research and innovations in the agricultural field have made agriculture an uncertain profession. This coupled with lack of irrigation, fragmentation of land, unsuitability of seeds and inadequate sources of credit have made many farmers take the extreme step and end their lives.

5. Role of NGOs in suicide prevention in India

Suicide is a serious threat to our public health. However, suicides are preventable with timely, evidence-based and often low-cost interventions. For effective suicide prevention, a comprehensive multisectoral suicide prevention strategy is required. Every year, 10th September is observed as World Suicide Prevention Day. The International Association for Suicide Prevention (IASP) in collaboration with WHO uses this day to call attention to suicide as a leading cause of premature and preventable death. The rising rates of suicide in India, especially among


the youth, has caused health professionals, NGOs and the community to sit up and take notice of this grave mental health problem. Knowledge of the most commonly used suicide methods is important to devise prevention strategies which have shown to be effective, such as restriction of access to means of suicide.307

Non-Governmental Organizations (NGOs) are institutions, recognized by governments as non-profit or welfare oriented, which play a key role as advocates, service providers, activists and researchers on a range of issues pertaining to human and social development. In India, we have many mental health NGOs (MHNGOs) which have made suicide prevention their sole objective. They have, to a certain extent, bridged the gap that exists between mental healthcare and its need in India. These MHNGOs run suicide helplines, conduct awareness programmes and provide counselling to suicide survivors. The primary aim of these NGOs is to provide support to suicidal individuals by befriending them. Often these centres function as an entry point for those needing professional services.308

MHNGOs providing community-based counselling and suicide prevention activities have started playing an active role in mental healthcare in India. Although MHNGOs are predominantly urban in location, many have begun to extend services into rural areas.309 MHNGOs through their large numbers, geographic distribution and infrastructure, provide access to people without the means to travel to urban centres where mental health specialists typically practice.310 India does not have a national suicide helpline run by the government. People in remote areas, who have to travel long distances to get help, can be greatly helped by crisis counselling over phone. Many MHNGOs run suicide helplines which can act as the first step in helping a person with suicidal thoughts.311 Many MHNGOs like Sneha in Chennai, Aasra in Mumbai, Maitreyi in Pondicherry, Lifeline Foundation in Kolkata and iCall run by Tata Institute of Social Sciences run suicide prevention and psycho-social counselling helplines. In our country, suicide, rather than being seen as a mental health problem, is viewed by people as a character flaw or a sign of a weak mind. Even our religions, call suicide the ultimate sin. This mentality makes people hesitant to seek help for suicidal thoughts for the fear of being perceived negatively by the society. Due to the stigma and taboo associated with suicide, the anonymity provided by these helplines helps people seek help.312

307 Suicide, World Health Organization (Feb. 23, 2019, 08.22 pm), https://www.who.int/news-room/fact-sheets/detail/suicide.
308 Latha Vijayakumar, Suicide and its prevention: The urgent need in India, 2 Indian J Psychiatry, 4, 81-84 (2007).
suicide helplines greatly helps people with suicidal thoughts who are reluctant to seek help.

6.Conlusion and suggestions

A suicide in its wake leaves behind many victims i.e. the deceased and the family and friends he/she leaves behind. It is a social and psychological problem which is preventable. A country like India cannot afford to neglect this public health crisis which claims a portion of its youth population every year. The government should become pro-active in its approach towards prevention of suicide. To effectively combat the suicide crisis in India, the government, the mental health sector, the justice system and the society should work in collaboration with each other. The media should show responsibility and restraint while reporting incidents of suicide. The government should aim to train non-specialised health workers to counsel and treat people who exhibit suicidal tendencies and behaviour. The number of trained mental health professional who specialise in suicide prevention should increase. Rural areas which are largely neglected must be provided adequate mental healthcare facilities. A public-private partnership in the field of mental health could greatly benefit the country and address its present need for mental healthcare resources.

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HOMELESS PEOPLE IN DELHI
(INTERNAL MIGRATION: IS IT THE LOSS OF IDENTITY?)

By Deepanshi Trivedi
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ABSTRACT

Internal migration is common practice in India, but is it only beneficial to those middle class or upper middle class who have job with job security or capabilities to buy their resources? Poor families migrating to cities in order to find jobs are often found in helpless situations where they lose everything including their identity and a roof in order to survive in big cities. Government has no check on how many landless or illegal lands acquired live in these cities. How many rights are they not aware of and how many rights are they deprived of? What is the count on their birth and death? All the schemes given by government are on ration cards and adhar cards which have their native lands address, they have no access to any schemes.

I have interviewed the slums of Delhi to see what are the present situation is. I have researched this issue with primary data collected by me.

KEYWORDS: SLUMS, GOVERNMENT, IDENTITY, MIGRATION, INCOME

ARTICLE

When asked to Rajesh about how many years has he been living in Delhi, he couldn’t calculate he replied “zamane ho Gaye”. Sending money to family was difficult to this illiterate person. So he called all his family members here and now only visits his village once a year or more according to capacity to buy ticket. These people are assured that big cities always would provide bigger opportunities of employment and living. But the brutal truth of reality is far different from their perspective, with no place to live permanently and no proper job, it is getting worse to survive in Delhi.

He has been selling balloons and flutes roaming in the city all day. After a lot of hard work and also switching to be part time labour at industries, He barely manages to earn 5000 per month. With onset of apartment trends, their business has gone down drastically because now they are not allowed to enter societies and no one is able to they exist. Also with change in times people prefer buying these things from mall or by ordering online.

With a son who is named NAWAB. He lives on land of some person who doesn’t lives in Delhi anymore on small jhopdi made of polythene, sticks and iron or wooden sheets found in garbage. There is no safe drinking water, they buy cans of bottle to drink and use it for washing clothes, utensils and bathing purpose. An organization named rohinhood army comes to this place every Saturday to teach children and have also donated in sending them to school.

There is no adhar card or ration card and they don’t get any governmental aid. He has their ration card back in Faizabad (Uttar Pradesh) but which is not giving them any benefit. He has his home back there so he has got all facilities of house and washroom.

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there but there is no employment there. He and his family has no excess to government health care, they visit private doctors which costs them much higher than their capacity. The little they save goes in travelling back to town or medical emergency and they go back from where he started. Having an identity that shows they are citizen of Faizabad and not of Delhi makes their identity at stake. Living here without identity, shelter, food, sanitation, drinking water or a job that promises all this is like being lost and unrecognized in the high standards living of metropolitan city like Delhi. Delhi to them is like sparkle that appeared to be pure gold and running behind better opportunities and better survival option has lead to getting worse on conditions.

The life of Nazana, a 90 year old beggar at local temple is harder than all. Her husband and elder son died two years ago with swine flu and younger son turned his back towards her and went to Mumbai with his wife. She has no support from her son and no contact with her relatives. “Everyone leaves you in your bad times” she sighs.

Living alone in the house without anything to eat and then paralytic attack made her life no worse than death. She could work with her right side of body paralysed and hence, decided to beg to eat. She moved to Noida from Tajpur (Uttar Pradesh) and continued begging. Now the only possession she has is a blanket which she uses to wrap around in winters and sleep over it in summer. She begs all day and buys food but not all days are good days. She needs medicines at this age, a house and care. She sleeps on roads and there is no place she can call hers. She cries and prays to god for death but it is not even easy to die. Her health and hygiene are at stake. She has no adhar card or ration card. There is no track of her existence with government. There is no one to help her in this condition. No NGO or any other organization helps her. She is no restricted by area anymore. the only reason why she came here was she believed that people in big cities would have big heart and at least one of them would turn up help her but believes didn’t last and now she has given up the hopes on humanity. There is no turning back to old city now and this is where she will die.

Meera, 15 year old mother of two kids lives illegally on land of owner of Travel Company. She was married 3 years ago when girls like her go to school. She is house maker with no house. Her husband is a rickshaw puller and 12 years older to her. He barely earns 6000-7000. Because of auto and e rickshaws anyone hardly prefers rickshaw these days and he doesn’t know how to drive auto. She lives where there is no sanitation and has to go to near sewer lines in the morning before people wake up. She gave birth to one child in the house she made out of sticks and polythenes. Second child was born in private hospital where all her savings went and when she caught infection after delivery, she had no money to go to private hospital. Later her uterus had to be removed and for this operation, they had to take loan from local merchant. She has no identity card or ration card. The family gets no aid from government or any organization. She has to buy food and water from store to survive which is beyond their affordability. There is no education in her family or awareness for family program, this
has led her to be mother of two children in mere age of sixteen years and now being unable to reproduce. She lives a dark life of illiterate. She lives under control of her mother in law and has no decision making power of her own. She has no say in the family and is suppressed to do household work. They have their native village in pura (Uttar Pradesh) where they go once in a year.

These are three cases out of fifteen I interviewed. All have very similar outline to migrating to Delhi and the case may differ but they all fall in nearly same class group in terms of earning or standard of living. From survey taken on 15 people living on streets of New Delhi, various results came out, some were majorly shocking. 14 out of 15 people shifted to New Delhi thinking that it will be more employment giving and standard of living would increase. Migration from rural to urban cities is very common in India. Migration of people from one geographic location to another for various reasons is an inevitable phenomenon. Delhi being the Capital of India generates enormous job opportunities for laborers, skilled and unskilled workers. So people who are not paid well or who do not have enough job opportunities in their native land or the ones who are looking for growth and better job opportunities are attracted towards Delhi.

This movement is benefiting migrants in terms of better wages and better lifestyle but this mass migration is somewhere inversely impacting the Capital. Delhi now has more number of slums, unauthorized areas, JJ clusters and jhuggis. It is estimated that more than half of the population of Delhi resides in unauthorized colonies and slums which lack even basic facility of water and drainage. The crime rate and other social issues have increased manifold in Delhi. Though it cannot be said with certainty that migration is the whole sole reason for all this but definitely there is a connection among all these.

The world’s best known demographer Kingsley Davis had in a treatise on India in 1951 regarded the country as a relatively immobile society estimating that three out of every ten Indians migrate internally. But in the last one decade the Capital is seeing increase influx of people from other States. The widening developmental gap between the rural and urban areas has largely spurred the migration. Low profits in agriculture and high returns from industry are pulling people towards cities. Small cities often have employment but the wages are quite low and job security is major issue. Landless laborers have no other option than migrating because often the land they take rent on proves to give less return from crops or they fail to use proper techniques of production which causes loss. They fail to pay the rent and go in debt. These people live in heavy debt. Like Meera, these people have to take loans to fulfill their basic amenities because the ratio of their earning/income and what they spent/require to spend is quite wide. Loans are also taken from local merchants or moneylender who gives it on high rate of returns. These people have no option but take it. Going to bank is considered a huge task. These people often have no possession to take loans on also it is hard for them to understand the functioning of banks.
Hardship of Delhi- Migration impacts the population size and service provision. Housing for all is coming out as major challenge in the Capital because of increasing migration. Other problems such as lack of basic amenities like electricity, sewerage, sanitation and water supply are associated with this. By 1951 Delhi along with Chennai and Hyderabad became the million-plus cities. In 2001 Delhi had approximately 45 percent migrants.

The problem of street children is also on rise in Delhi and can be linked to migration. When a family moves they bring their children along. Children even move with their friends and sometimes alone. Children leave their homes for different reasons. In Delhi, population of street children is increasing dramatically. These children end up doing odd jobs like rag picking, drug peddling, robbery etc. Girls are even sold and forced to become prostitutes. On the other hand, migrants do not enjoy social security benefits associated with the residence. They are generally treated as second-class citizens and discriminated.

Government and adhar-government has started adhar card system to keep a track of identity and linking it with all the other schemes of government which will help them to validate where and whom the money of scheme is going. In our survey, 10 people had their ration card from the place they belonged and not of here. Also adhar was only with 8 people but with address of their native land and rest didn’t bother much of having it. all the schemes of government could not be given in Delhi because government has no track of them living here. 4 people also said they had toilets and house provided to them by government and there family resides there. There is a big loop in here which is due to no up gradation of identity card. They have become discriminated and they have no voice nor can they participate in voting system of Delhi area despite living here for so many years because they don’t have voting card of Delhi. They also don’t back to vote in their native land because their going back depends on money they have, also if they go they vote for people they don’t know and voting their doesn’t not let them exercise their rights. This all have led to putting their rights at stake and their identity being in lost state. They are living their lives in the most miserable way. In country like India where democracy is all talked about, they have no knowledge of what democracy is and what all they have got to enjoy their lives. It is high time they should be made aware of all this, so that they can live their life with dignity.

Family planning-these people have no knowledge of family planning and 9 families I surveyed had more than 3 children. They are not afraid of raising them instead they take it in sense that they would grow up to help them financially and in survival. All of their children rare going to nearby school but education is not taken their so seriously. Their children also work in nearby factories. 2 families who had their kids above age 9 were working in nearby dabba or general store after school. Their parents don’t feel anything wrong about it instead it is seen as their responsibility to support their family financially. Girls in these families are married at tender age of 12-13 years like Meera and before that they are told to learn household work and look after family. Only
5 families sent their girls to school rest didn’t feel a need to do so. They rather saved that money for their marriage. Girls are told to take care of their siblings. This shows the root of orthodoxy in Indian families and even after so many struggles of women for equal rights but these things still not in the main roots of India. These things tell us need of spreading awareness in such areas about family planning, education and women empowerment.

These people hardly visit their native land and 7 families go once to their town, 4 families go twice and 4 families go according to money they could save sometimes not going for 2 years. Travelling cost them a lot of money, so they save whole year and then visit their towns. One family whose husband stayed here working as security guard has not gone to his family for last two years because he doesn’t get enough leave and going for 2-3 days would cost him a lot. He sends half of his income to his family in native place and rest he keeps with himself for his survival here. Going back to town would mean leaving the job which is risk he can’t afford to take.

Medical conditions and their treatment is an expensive business for these families. 13 families in my survey take medicines from veds or local doctors who charge high rates from them and they are bound to pay. In case of very medical emergency, they go to nearby private hospital which leaves them in debts for years. Medical hospitals of government are not given any preferences here and these aids are not used in any way. 2 families who avail these facilities tell us about conditions of these hospitals and tell us medicines are normally not available and doctors are not available, nurses treat them badly. They often fall ill because of unhygienic conditions they leave in and in cases of epidemic; they tend to lose their lives. They don’t have a strong immune system or any nutrition in their body to survive it. Like Nazana’s husband and elder son who lost their life due to swine flu and she also got paralytic attack but none of them could be treated better.

These homeless people often come from backward and illiterate background and education is often ignored in such regions. They are son of laborers or poor farmers. They also have been into this business since their childhood. Only two people in our survey had basic knowledge to sign instead of putting thumb impression but their schooling was limited to primary school. Some believe that their children will be first one to earn on ground of being educated. They tell us it is not life they wanted but it is gifted to them by their fate, and conditions have been same since their many generations.

They here have work like laborers and balloon selling, auto rickshaw pullers, staff in housekeeping or daily age workers. They usually don’t get high income. 3000 to 6000 is the variation of income in the survey I took. All these professions don’t have a job security and don’t promise high income. There is no fixed income. In daily wage working, they work all day long still get charged at rs. 80 per day. All under the schemes like MNREGA where government promises to give 100 days’ employment is not given here. These people make their families work with them still they can’t meet...
their two ends. Their children are involved in employment like restaurant.

There are many NGOs who come forward to help them but all their projects are temporary ones like giving food to them on some event or distributing clothes to them for winters. This in longer term doesn’t work because what they need is employment to fulfill their needs. No organization can promise that other than government itself. One organization visits and teaches their children every Saturday. Such organizations are appreciated for their work and these families also look to them for support and help. Much work for human rights but this should be realized that they are also having their rights at stake without identity.

CONCLUSION
MIGRATION is improvement but when we look at these cases. We see these people live miserable life of hopelessness. Government should take a check on no. of migration and ensure their identity. Employment opportunity should be created and aids should be given to such people. Schemes that are launched in order to curb poverty should also be brought into their notice. Awareness should be spread about sanitation, hygiene and medical aids. This is not the issue to go unnoticed because these people are only counted when population is checked and not when these people require the aid for survival. We have a lot of human resource but it is void until we don’t use it in a proper way. We should work in this direction because it is not only matter of country but it is about thousands of people leaving without any identity and lost rights. They are leaving life of second citizens. This is hurting the growth and they have become hindrance in our ways when they can be used as boon to our society. Every such issue is directly hurting Delhi and its development. Hence migration to Delhi must be checked and steps must be taken to control it.

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ORGAN DONATION: A CHANCE TO LIVE POSTHUMOUSLY, LEGAL ISSUES INVOLVED

By Deepanshi Trivedi
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Never forget this, in the midst of your diagrams and equations: concern for man himself and his fate must always form the chief interest of all technical endeavors. — Albert Einstein


2 Someone with current active cancer cannot become an organ donor. However, it may be possible for people with certain types of cancers to donate after three years of treatment. It may also be possible to donate eyes and some tissue in these circumstances.

3 In rare cases, the organs of donors who have HIV or hepatitis C have been used to help others with the same conditions.

Organ donation is the process of removing tissue or organ and placing it into another/needy person surgically. Organs and tissues that can be transplanted include Intestine, Cornea, Middle ear, Skin, Bone, Liver, Kidney, Pancreas, Heart, Lung, Bone marrow, Heart valves, Connective tissue and Vascularized composite allograft (transplant of several structures that may include skin, bone, muscles, blood vessels, nerves, and connective tissue). It is usually transplanted because other person is having damaged organ due to disease or injury. Transplantation is boon to many lives and is one of the greatest developments in field of modern medicines. The unfortunate relation is the ratio of organ donors and number of people who actually need it is very poor. Even after families and social notions allow there is very small number of people who actually can donate due to various reason. It mostly depends on relief on donors and their families agreeing to donate.

There are three different ways to donate. These are:

Donation following brain death (DBD): When a person is diagnosed as dead through Neurological Criteria testing. This person would live had a severe brain injury and permanently lost the potential for consciousness and the capacity to breathe. This may happen even when a ventilator is keeping the person's heart beating and oxygen is circulated through their blood.

Donation following circulatory death (DCD): When a person is diagnosed as dead through circulatory determination. This is when a person has irreversible loss of function of the heart and lungs after a cardiac arrest from which the person cannot or should not be resuscitated. It can also be the planned withdrawal of life-sustaining treatment from a person cared for in a critical care environment.

Living donation: Whilst you are still alive you can choose to donate through a medical operation a kidney (most commonly), in some cases a small section of your liver or lung or discarded bone from a hip or knee replacement and amniotic membrane (placenta).

Medical conditions
Having an illness or medical condition doesn't necessarily prevent a person from becoming an organ or tissue donor. The decision about whether some or all organs or tissue are suitable for transplant is made by a medical specialist at the time of donation, taking into account your medical, travel and social history. There are very few conditions where organ donation is ruled out completely. A person cannot become an organ donor if they have or are suspected of having Creutzfeldt-Jakob Disease (CJD), Ebola virus disease, Active cancer2 and HIV or hepatitis C3.

Challenges
Organ donation is greatest challenge that community faces especially in field of transplantation and medicines.

There is widespread community unawareness and reluctance to donation of organ in countries all over the world mainly in Africa, Asia and Latin America even when appropriate legislation exists. Factors to which are indigenous culture and religious beliefs and values and technical/financial constraints, paucity of skilled staff, inadequate infrastructure. There is lack of general knowledge and absence of organ banking facilities or medical advancement as whole. Some countries lack social trust on successful organ and transplant programme also there are inadequate laws and legislation. All of these need to be remedied to increase organ donation.

The social unawareness is related to many myths that are wide spread in community. In general organ donation and transplantation is seen as big sacrifice made for other one and a fear that donor card possession will abduct them from extent of health care that the patient receives as it is barrier to increased rate of donation. There is also lack of medical infrastructure which doesn’t let the society to have trust on it. It is still thought to be risky business. Nothing but public education that uses effective strategy to sensitize the cultural and emotional area for people can help create a change. Public awareness about organ donation should use techniques to make people understand that it is of common interest to have adequate supplies of organs as every person is potential donor as well as recipient. Therefore awareness programmes must focus transparently on ethics, access and safety. Possible roles of – (1) seek ways to optimize the donation of organs, tissues and cells from deceased donors; (2) support and facilitate qualitative, empiric research to comprehend resistance to donation and help find indigenous ways and local resources to increase donation; and (3) encourage and facilitate governments to have appropriate legislation and oversight mechanisms in place.

People who are brain dead don’t have many hopes to life and donating organ in return helps many lives. It is in fact mandatory to discuss about such issues and learning about them. The mechanisms should also be well equipped with better healthcare professionals and OPO staff on 24 hour a day, 7 day a week basis. It is necessary to build the sufficient trust on the system and getting registrated as an organ donor. Family of brain dead patients should be made aware that how their mandated choice will mean to recipient and hopes of new life to someone who has registered as needy. Mere forcing
them to choose to be organ donor does not capture the potential of mandated choice and weaken the argument for it. A broad-based and multidimensional educational campaign is needed that confronts issues around death and dying, debunks the myths and misperceptions surrounding organ donation, and emphasizes the benefits of organ donation. Pilot tests of mandated choice could be reconsidered in the future when there is a broader and more accurate understanding of organ donation among all sectors of society. If public education is successfully intensified, however, mandated choice may prove to be unnecessary. Deceased donation after brain death has slowly started happening in India. The opportunity to decide whether to be an organ donor should be a part of end-of-life decision making. Patients and their families should be offered this opportunity as standard end-of-life care. For the organ donation process to be fully integrated into end-of-life care, a wide range of healthcare professionals need enhanced awareness of and training regarding the organ donation process.

India has a fairly well developed donation programmes; however, donation after brain death has been relatively slow to take off. Most of the transplants done in India are living related or unrelated transplants. To curb organ commerce and promote donation after brain death the government enacted a law called "The Transplantation of Human Organs Act" in 1994 that brought about a significant change in the organ donation and transplantation scene in India. Many Indian states have adopted the law. Despite the law there have been stray instances of organ trade in India and these have been widely reported in the press. This resulted in the amendment of the law further in 2011.

Laws and Rules Governing Organ Transplantation in India

Human organ and tissue transplantation was started in India in 1962. Initially, the organ transplant was unregulated, and organ trafficking was rampant. The primary legislation related to organ donation and transplantation in India, Transplantation of Human Organs Act, was passed in 1994 and is aimed at regulation of removal, storage and transplantation of human organs for therapeutic purposes and for prevention of commercial dealings in human organs. This has been subsequently amended in 2011, and new rules came into force in 2014. General public as well as scholars in field of law are not aware of the act.

In India all the issues related to medicines and health care are governed by each state itself and there is no interference of central government in this regard. The act came into force on request and initiation of Maharashtra, Himachal Pradesh and Goa (they adopted it by default). It was later adopted by all the states (except Andhra Pradesh and Jammu and Kashmir). There were huge number of cases of commercial dealing and organ trafficking in India despite all the regulatory frameworks and legislation. An amendment was kept forward by state of Goa, Himachal Pradesh and West Bengal for this act in 2009. It addressed inadequacies in the efficacy, relevance and impact of the Act. The amendment to the Act was passed by the parliament in 2011, and the rules were notified in 2014. The same is adopted by the proposing states and
union territories by default and may be adopted by other states by passing a resolution.

There are two methods of being able to donate even after dead (i) if People can pledge their organs during their lifetime if they want their organs to be used after death or (ii) if they become brain dead and relatives agree to donate its organs. For former they need to fill form 7 pledging their desire. After the death and certification of brain stem death of the person, it is mandatory for surgeon or medical practitioner to ask near relative or person in lawful possession of the dead body if he has in the presence of two or more witnesses (one of which at least should be near relative) signed the specified form 7 before his or her death for removal of his organ or tissues after his or her death for therapeutic purposes. Also if he has not signed such option is given to relative if he is interested in donating the organs. The consent of legal possession holder of dead body, if near relative is required even if he has signed the pledge form stating to donate his/her organs and tissues.

For the certification of brain death approval by a panel of doctors is required including neurologist or neurosurgeons, anesthetists, critical care specialists, intensivist, physicians, or surgeons. New rule in 2014 has now made changes for facilitation of brain death declaration. The brain death certification is now done by four doctors (i) treating doctor (II) neurologist/neurosurgeon/physician, intensivist, and anesthetist (III) hospital administrator and (IV) resident doctor of the hospital.

for brain dead donor form 8 and 9 are required for donation and committee’s permission is granted in format given in form 10. All the maintenance is borne by the institution, government or nongovernmental organization, recipient (it is mainly as per decision of respective state government so it differs) and not by the donor family. Maintenance includes retrieval of organs and tissues and transportation charges.

The allocation of organ has a hierocracy to be followed going from regional list, state list, national list, person of Indian origin and to foreigner. Also organs and tissues of deceased donors are given in order of priority which has order of not having suitable donor in near relative, having near relatives as donor but they have refused in writing to donate, those who have suitable living donor but they have declined to donate in writing.

Procedure for donation of organ or tissue in medicolegal cases – Medicolegal cases (MLC) are also acceptable for organ donation, but proper protocols have to be followed as per the THOTA. After the brain stem death declaration and consent to donate organs from a brain stem dead donor are obtained, the registered medical practitioner of the hospital requests to the Superintendent of Police or Deputy Inspector General of the area either directly or through the police post located in the hospital to facilitate timely retrieval of organs from the
donor, and a copy of such a request is sent to the designated postmortem doctor of area simultaneously. It is ensured that, by retrieving organs, the determination of the cause of death is not jeopardized. The medical report is prepared at the time of retrieval by retrieving doctor and is taken on record in postmortem notes by the registered medical practitioner doing postmortem. The postmortem registered medical practitioner should be present at the time of organ or tissue retrieval even after office hours. In case, retrieval hospital is not doing postmortem, they arrange transportation of body along with medical records, after organ retrieval, to the designated postmortem center, and the postmortem center undertakes the postmortem of such cases on priority, even beyond office timing, so that the body is handed over to the relatives with least inconvenience.

We have governmental bodies in all level (regional, state and central) but we don’t have link between all of them which makes it a difference as we don’t have big data analysis. It would have served as source of data for matching of organ donor countrywide also it will help us assess outcomes and help in making more transparent guidelines and paving way for improving practices. The digitalization would also help a lot in simplification of process and making it more transparent. The development of this link is also highlighted in act for creating a big circle for demographic, clinical laboratory and follow up data of patients waiting for transplants and donors available(living or dead) also patient who have been transplanted already in past.

Conclusion
Indian medical field is progressively working towards this technology and its success rate. It has now better facilities and better surgeons in the field the transplantation and organ donation. The transplantation and organ donation programmes are not only aid to needy but also to the society at large. The transplantation act’s present form has evolved over last decades to be more flexible and life changing. As a society we should be aware of such rules and no more make the reluctance of donation a hindrance in the way. This will go a long way in avoiding legal hassles in day-to-day transplant practice. It is an opportunity for human kind to live posthumously and be savior to lives of not only one person but families. It is not materlistic and is indeed a virtue.

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THE SABRIMALA VERDICT: A CONFLICT OF CUSTOM AND LAW

By Deepanshu Latka
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Introduction:
Customs plays an important role in the civilization of human. If we say that society makes people increase their standard of living then customs also hones a person’s beliefs and values. Custom is something that many people do, and have done for a long time. Generation after generation this belief gets stronger and all of a sudden when someone tries to uproot this belief our mind can’t resist that attack on our belief and as per the consequences many things happens and this article is also one of those consequences.

Sabarimala is a pilgrimage centre dedicated to hindu devotees, which is located at the Periyar tiger reserve that is in the Western Ghats mountain ranges in the Pathanamthitta District of Kerala. Sabarimala is one of the largest annual pilgrimages in the world in which every year an estimated 45-50 million devotees came for visiting. Sabarimala is a temple dedicated to Lord Ayyappa who was a great warrior and was the avatar of Lord Sastha. This temple is very prominent among all temples in Kerala. Belief of many people attached with this temple and it is said that people have to observe penance for 41 days before going to Sabarimala which includes the simple living, holy thoughts and absolute celibacy for at least 41 days. It is a belief that this deity is a ‘naishtika Brahmachari’ (eternal celibate).

But the burning question which gets highlighted after the verdict of Supreme Court is that should women under the age 10-50 years be allowed to enter in Sabarimala. Many people try to start linking this with women rights and gender equality. Many political parties , Social activist organization like Bhumata brigade taking advantage of this to came in limelight but gender equality and women rights are not the main reason behind the ban of women because there are at least 8 temples where men are not allowed to enter such as Attukal temple located in Kerala, Chakkulathukavu Temple located in Kerala, In Brahma temple located in Pushkar, married men are prohibited to enter into the temple premises and many such examples are there to clear the biased belief that ban of women in Sabarimala is not related to gender inequality Unlike other religions, every Hindu deity has a history to tell. It is said that Lord Ayyappa was a Brahmachari and was not supposed to come close to women. The celibate nature of lord Ayyappa is said to be one of the greatest reason why women are not allowed to enter in Sabarimala. It was the choice of Ayyappa to maintain a distance from women but again question will raised that why only for a certain age limit 10-50 why not for women of all ages then the answer will be that it was given in a ordinance passed by Kerala government just to prevent from getting in radar of constitutional of equality but unfortunately it was challenged on this basis only.
History behind the mystery:
Once Ayyappa killed a Mahishi and a beautiful lady appeared as per the curse and she wanted to marry him but due to the eternal bharamcharya he could not marry her due to his eternal brahmacharya but promised to marry her when new pilgrims stop coming to him. Hence a temple in respect of Maalikapurathamma was build next to the Sabarimala and it is also said that to show respect to the Goddess Maalikapurathamma as she is waiting to get marry with Swamy Ayyappa they voluntarily don’t enter into the temple.

Attack on the belief:
A group of five women lawyers has challenged rule 3(b) of the Kerala Hindu places of public worship (authorization of entry) rules,1965, which authorizes restriction on women “of menstruating age” in 1991 Kerala high court banned the entry of women above the age of 10 and below the age of 50, from entering the Sabarimala shrine and Kerala high court stated that since this ban of women entering in Sabarimala has been existed since the time immemorial and ‘Tantri’ i.e head priest is the only one who was empowered to take decisions on religious matters. Later this decision was challenged by senior advocate Indira Jaising, who represented the petitioners, said the restrictions went against articles 14(equality before law), 15(prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth) and 17(abolition of untouchability) of the constitution. According to her this custom is discriminatory in nature and stigmatized women, and that women should be allowed to pray at the place of their choice. Now lets discuss the historic Judgment given by supreme court on September 28, 2018, actually In 2006 the case was on the table of supreme court seeking justice for women guiding through the propaganda of leftists with the help of the armor provided by the constitution of India. This case was later referred to bench led by former chief justice of India Deepak mishra and comprising justices R F Nariman, A M Khanwilkar, D Y Chandrachund and Indu malhotra. The bench lifted the ban and by the 4-1 majority ruled that women of all age either is older than 10 years or younger than 50 years can enter the Shrine of Sabarimala without any gender discrimination.

GENDER DISCRIMINATION
If we talk about the rights of women in our country, I am not denying that there is no gender discrimination somehow it exists in our country but this does not certify that ban of entering in Sabarimala is a gender discrimination not an old age custom through which sentiments of millions people are attached as I already mentioned that there are certain temples which does not allow men to enter into the temple premises and we are not even complaining for that because it is the custom of that specified temple. In our Hindu religion women have the most respected place. For every auspicious work we used to worship Goddess Lakhmi, for knowledge we used every auspicious work we used to worship Goddess Saraswati and we worship Goddess Durga for strength.

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Women used to participate in these poojas very actively and even in Durga puja girls are considered as Goddess, how can anyone questions on our immemorial old age practice just for the name, fame and to take fake credibility of women rights and gender equality.

**Position after the supreme court verdict:**
After the decision of SC over Sabarimala two women, Bindu(42), a CPI(ML) activist and Knakadurga(44) entered the temple in the very early morning 3:45. Having faith is different thing but revealing it publicly just to tease others devotees is very derogatory step taken by community’s Kerala government. As expected this lead to violence and vandalism due to which many were injured, a total number of 1,286 cases were registered and 3,282 people were arrested in connection with the violent incidents.

**Opportunist strategy:**
Now if we talk about some specific NGOs, media houses, political parties they are acting as the vulture in this issue, especially the communist party of India (Marxist) who is the current ruling party of Kerala are brutally trying to destroy the rich culture of India by misrepresenting the common people by various means such as advertisement, propagating fake rumors about a religion, show hate towards a specific colour such as saffron. The word saffron terror was first used by Frontline magazine in 2002, many congress leaders such as P. Chidambaram, Digvijay singh and Shushil kumar Shinde also defamed Hindu religion by denoting a derogatory term saffron terrorism, as saffron is considered very holy colour in this religion hence it was highly condemned by many Hindu groups such as RSS, Viswa Hindu Parishad, Shivsena and others. Leftist media, kerala’s communist government and all the vulture like NGOs after the judgement gets license to criticize a religion which is immemorial time older then the whole communist ideology.

**Kerala government:**
The stand of current Kerala government toward the disciples of Sabarimala is very disturbing and heart shattering even PM Narendra Modi also lashed on the LDF government’s stand on Sabarimala temple row. On the other hand congress says, one thing in parliament and another thing in Pathanamthitta (where lord Ayyappa shrine is located ) according to BJP, violence of Sabarimala is unleashed by Kerala government instead with dealing protesters in more sensible way, wreaked havoc, devotees has lost their lives also. Even the local women of Kerala who have faith upon the Lord Ayyappa does not wants to enter into the Temple of Sabarimala premises just not because they are backward or facing gender inequality but they have belief in our ancient tradition and do not let it be destroyed by any fame seeking NGO, communists, biased designer journalists or anyone. A human chain was made protesting against the decision of Supreme Court in which many women actively participated and protested against verdict of Supreme Court. Even the local police was under the influence
of communist’s Kerala government. They controlled the situation in a very brutal manner. Many devotees were arrested and treated badly who were protesting against the verdict of Supreme court in a peaceful manner.

**Interference of outsiders:**

A question still exists that should the third party who has nothing to do with the belief of Sabarimala and who is not a disciple of Lord Ayyappa has the right to questioned a tradition which has been following from a long time, indeed everyone has right only if that specific practice is harming integrity or advertising violence but in this case it is just a matter of faith and also if we always prevail our fundamental rights then no custom will remain safe after all India is an country which is totally based on different cultures. Justice Indu Malhotra, who was the only women judge on the bench, said that the petition does not deserve to be entertained in the court. Her view on this issue was that it is not compulsory for courts to determine which religious practices are to be struck down except in the issues of social evil like ‘sati’ or we may add ‘dowry’ here. Adding that the issue of Sabarimala is critical to various religions, she said, “Issues of deep religious sentiments which are attached to the devotees shouldn’t be ordinarily be interfered by the court. The Sabarimala shrine and the deity is protected by Article 25 of the constitution of India and the religious practices cannot be tested solely on the basis of Article 14 of the Indian constitution. Further she added that “Conception of rationality can’t appealed in matters of religion” said justice Malhotra further added “What constitutes essential religious practice is for the religious community to decide, not for the court or any other institutions”, After all India is a diverse country with a perfect blend of different cultures. Constitutional morality would allow all to practice their beliefs and faith. The court should not interfere on religious matter unless if there is any aggrieved person from that section or religion or any evil practice is going on such as Triple talaq.

**Double Standards:**

If we compare Hindu religion with other religions this always has been a soft target for every media houses, many political parties and even supreme court. In Janmastami, Supreme court don’t forget to specify the height of Dahi handi but never ever dare to question to the zulus of Moharram’s tazia, in which every many died due to certain risky stunts, Supreme court will interfere in bursting of crackers but never dare to interfere in Bakar-eid, if we celebrate crackerless Deepawali why can’t they celebrate bloodless Bakar-eid? So if Supreme court want to interfere it should interfere but only with good motive and equality. Why only one should contribute and sacrifice in sake of all. The change should be equal from both sides, One should not hold the whole burden.

**Negative Feminism:**

The another aspect in this issue is feminism as we all know there are three waves of feminism but a new forth wave of feminism has started.
after the very famous #metoo movement and the Sabarimala issue is also attached to the feminism. Many females take this issue contradictory to their self respect due to the misrepresentative propaganda as circulated by biased media. Feminism is the shield through which everyone is attacking on the rich culture of Hinduism. Even in some temples men are not allowed to worship, that is ritual but in the Sabarimala issue all women activists are crying like hell. In this issue many journalists who run this type of ill propaganda against the culture and country modified this issue from tradition to feminism. The new wave of Feminism is more dangerous and impure in respect to the previous ones. It is harming our tradition on the day by day basis. Feminism in Indian context has taken a wrong turn and no one can deny to this fact. In the shield of feminism they used to glorify themselves and pretend as there is no other person who cares about women rights and gender equality. Entering of women in any Hindu temple if there is complete ban of women in all temples would be a gender discrimination but this is the open and shut case of tradition because other temples allow them to do poojas in the temple also it is not the complete ban over the women only a specified age groups are restricted. Pseudo-feminist vultures should immediately be stopped otherwise they will pluck out our tradition from our India. There is difference between Feminism and Pseudo-Feminism, feminism does not mean to kiss in public to oppose moral policing of right wing but mean to be ‘Mary kom’, ‘Sakshi mallik’ won medals for country and make the country proud on the daughters of mother India.

Misinterpretation of Secularism:
Our constitution says that India is a secular country but now a day’s secular doesn’t mean that state recognize all religion and respect all religion, it means to sacrifice one’s rights for minority. Secularism in today’s context means the Ex Prime minister of India, Dr. Manmohan Singh during his post tantalize minority in the name of secularism by saying that, Minorities must have first claim on resources. Today if you pretend yourself as secular then you have to criticize your own beliefs, own religion, own peoples and even your own family. Today being Secular means criticize the right wing and pro-nationalism even they can go against their own nation in the name of secularism. To satisfy these pseudo-secularism worms is very difficult task. They act as the sleeper cells of the country, the pseudo-seculars are the cancer cells of the nation. Even the bollywood industry propagates the idea of pseudo-secularism or we can simply say them ‘sickulars’, a movie named ‘Haider’ in the shield of entertainment, secularism and William Shekhsphere this movie brutally maligned our army and AFSPA(Armed forces special powers act), In the name of secularism everyone is polishing their market, a movie named PK, very smartly show the sickularism by showing Lord Shiva in the toilet but dare not to enter into the mosque with liquor, another movie which was in malyalam language named as ‘Sexy Durga’, which was the conspiracy to malign a Hindu

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Goddess, the director/producer changed the name after protest and several objections.

**Conclusion:**
In the end I will just say that every rule that are imposed by supreme court on the matter of religious issue for the welfare of the society is need not that they will be acceptable by all, but if that rule is for the eradication of social evil such as Dowry, Sati then it must be welcomed but if that rule is uprooting the social balance of your custom and the society then it must be questioned again and again. The question should be raised in a gentle manner, vandalism is not the perfect way to question executives. In India there are several temples and every temple has a history to tell, if any women who is a devotee of Lord Ayyappa then she herself will respect the tradition of that temple. Fake Feminism or Pseudo Feminism is forming its web across the country and we have to be careful from this. The overdose of anything is very harmful and this perfectly applies when we talk about Secularism in India, The situation is getting worsen day by day, it turned into Sickularism from secularism. Bollywood movie provides platform to promote the overdose of secularism concept. We all should have to beware from all the vultures who are trying to attack on a particular religion. After all India is a nation which have diverse culture and a perfect blending of different culture also exists in the atmosphere of this country, this should not be disturbed at any cost.

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EVOLUTION OF ENVIRONMENT LAWS IN INDIA

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ABSTRACT
This article analyses the constitutional perspectives of Environment protection laws, during the time of the ancient period and during the time of the British period. It mainly focuses with certain constitutional provisions in The Indian Constitution that mainly includes a preamble, fundamental rights, Right to Equality and Directive principle of state policy. Also, this article includes the role of the judiciary for Environment Protection in India which is mainly regarding Wildlife Protection, freedom of trade and commerce and the environment, right to clean and healthy environment. This article also includes the concept of sustainable development which is the sum of three important principles which are Polluter pays principle, Precautionary principle, and Public Trust Doctrine, and sustainable development. At last this article has conclusion and suggestions which includes the observational part of the author and the co-author.

Keywords: Environment Protection, Legislations, Provisions, Utilization, Pollution, Sustainable Development, Principles, Natural Resources, Government.

1. INTRODUCTION:

Dalai Lama in his book “An open heart” speaks about the environment in the following words:

"We must also care for our environment. This is our home, only home. It is true that we hear scientist talk about the possibility of settling on Mars or the moon. If we are able to do so in a feasible, comfortable way, good; but somehow, I think it might be difficult. We would need a lot of equipment simply to breathe there. I think our blue planet is very difficult and dear to us. If we destroy it or if some terrible damage occurs because of our negligence, where would we go? So, taking care of our environment is in our own interest.”

Environment belongs to all, influences all and is important to all. Therefore, it is rightly defined by T.S. Doabia, J. “The mother Earth on which we spend our life span and ultimately mingle with dust, the water, which cleans everything including internally and externally, the air without which no life we can survive are all elements, which fall within the term “Environment”.

Whatever we do, the environment will be definitely affected by our deeds but it depends, whether the act done by us is affecting the environment and casting good implication upon it or bad. As Lester Brown has congruously said, "We have not inherited this earth from our forefathers but have borrowed it from our children". The need of the hour is to prevent the misuse of resources and instead use them efficiently as Mother Earth cannot sustain such fast

312 Published by Hodder and Stoughton, in 2002 on page 12.
utilization of resources. Thus, we have to make prudent use of this motherland and towards all those things that we owe to her. Every living creature including human being recon on the environment. For the last few decades, it has been difficult for every living organism to live in this polluted environment and it has affected their life skeptically. Every creature needs a particular type of environment such as air, water, soil, vegetation, and minerals. Thus, the creation of disruption in the environment has made Arijit Pasayat, J. say that:

“By destroying nature, environment, man is committing matricide, having in a way killed mother earth. Technological excellence growth of industries, economic gains have led to the depletion of natural resources irreversibly. Indifference to the grave consequences, lack of concern and foresight have contributed in large measures to the alarming position. 313"

"The basic insight of ecology is that all the living beings exist in the interconnected system: nothing exists in isolation, the world system is web-like; to pluck one strand is to cause all to vibrate; whatever happens to one part has ramifications for all the rest. Our actions are not individual but social; they reverberate throughout the whole ecosystem" 314 And the actions of the mankind is having a clear picture, they are those actions that lead to the issues such as global warming, depletion of ozone layer, dwindling forests, and energy resources, loss of global biodiversity etc.

2. LEGISLATIONS BEFORE AND AFTER INDEPENDENCE:

2.1. Ancient period:
Since Vedic time the motto of social life was “to live in harmony with nature”. 315 The origin of human civilization and the history of primitive society reveal that there was a close connection between living beings particularly humans and non-living beings i.e. environment. In India, the perception of environment protection is of ancient origin. The genesis of environment protection lies in the Indian ideas and practices that have been followed from time immemorial and have been an integral part of our customs, traditions, and laws. Some ancient texts tell us that our society paid more attention to protect the environment than we imagine today. These texts tell us that it was dharma of each individual in society to protect nature, 316 so much so that people worship the objects of nature. Trees, water, land, and animals had considerable importance in our ancient text.

2.2. Laws in British India:
The early days of British Rule in India were days of plunder of natural resources. There was a total indifference to the needs of forests conservancy. 317 During the British era, steps were taken for preserving the natural resource, i.e. air, sea, shore, and water.

313 T.N. Godavarman Thirumalpad vs. Union of India, AIR 2003 SC 724
314 S. Shankarkumar. Introduction to Environment law Lexis Nexis, Butterworth, Nagpur (2nd edn. 2009)
2.2.1. Legislations dealing with Environmental Matters before 1947

The government before independence was conscious of the fact that natural resources are to be kept free from pollution. The second half of the 19th century marked the beginning of organized forest management in India with some administrative steps taken to conserve forest; the formulation of forests policy and the legislation to implement the policy decision. The first step of the British government to assess state monopoly right over the forest was the enactment of the Force Act, 1865. It was revised in 1878 and extended to most of the territories under the British rule. To implement the Forest Policy of 1884, the Forest Act 1927 was enacted.

The Shore Nuisance (Bombay and Kolaba) Act of 1853, was one of the earliest laws concerning water pollution. In 1857, an attempt was made to regulate the pollution produced by the Oriental Gas Company by imposing fines on the Company and giving a right of compensation to anyone whose water was ‘fouled’ by the company’s discharges. Apart from the Shore Nuisance Act of 1853, the British Government also concentrated on certain other areas like air pollution, wildlife, and land use by enacting numerous legislation some of the acts were as given under:

a) Indian Penal Code of 1860
b) Indian Fisheries Act of 1897.
c) Indian Ports Act, 1908

Thus, it is clear that legislative measures were taken by the British Government for the prevention of pollution and for the conservation of natural resources.

2.3. Constitutional Provision in the Indian Constitution

Indian constitution is perhaps the first constitution in the world which contains specific provisions for the protection and improvement of the environment. One of the most important achievement of modern law in India is constitutionalization of the environmental problems by the Supreme court.

2.3.1. Preamble:

The preamble of a statute is a ‘key’ to the understanding of it. It may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one meaning to keep the effect of the statute within its real scope, whenever the enacting part is in any of these respects open to doubt. In 1977, the 42nd amendment proclaimed India as a socialist republic. The word Socialist was introduced into the preamble of the Constitution. Implications of the introduction of the word socialist, which “has become the centre of the hopes and aspirations of the people a beacon to guide and inspire all that is enshrined in the article of the constitution” is clearly to set up a “vibrant throbbing socialist welfare society” in the place of a “feudal exploited society”. This 42nd Amendment comprises of two significant Articles 48-A and 51-A(g) to protect and improve the environmental conditions.

\[319\] Supra 2 at p.78
\[320\] Kochuni v. State of Madras and Kerala, AIR 1960 SC 1080
Article 48-A. Protection and improvement of environment and safeguarding of forests and wildlife- The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.

Article 51-A. Fundamental Duties- It shall be the duty of every citizen of India- (g) to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.

Further, it brought some changes in the seventh schedule as well as seventh schedule: List III, Concurrent List: 17-A. Forests 17-B. Protection of wild animals and birds 20-A. Population control and family planning

2.3.2. Fundamental Rights and Environment Laws (Article 13)

“Law” includes “any ordinance, order, bye-law, rule, Regulation, notification, custom or usage having in the territory of India the force of law”.

So long as the policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected to do under it. But it cannot bind citizens unless the impugned policy is shown to have acquired the force of law. 324

2.3.3. Right to Equality (Article 14)

Article 14 is direct with the Preamble of the Constitution. This article is first of series which embodies the ideal of equality expressed in the Preamble to the Constitution. 325 Article 14 of the Constitution of India Guarantees equality of opportunity. As a concept, it has no parallel. But when it is in practice exceptions are carved out. Unequal cannot be clubbed. 326 The doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted by the constitution. One of the aspects of the rule of law is that every executive action, if it is to operate to the prejudice of any, must ‘normally’ be supported by some legislative authority. 327 M.C. Mehta v. Union of India(oleum gas leak case) 328

The court held that any enterprise that is engaged in an inherently dangerous activity is ‘absolutely’ liable to compensate all those

324 Gulf Goans Hotels Company Ltd. v. Union of India, (2014)10 SCC 673
328 M.C. Mehta v. Union of India AIR 1986 SC 1468
affected by an accident. The key feature of the judgment was the principle of ‘absolute liability’, in which no exceptions (such as an ‘act of God’) are brooked.

2.3.4. **Directive principles of state policy**

The directive principles are policy prescription that guides the government. Some of them are in the nature of economic rights that India could not guarantee when the Constitution was enacted, but that was expected to realize in succeeding years. Although unenforceable by a court, the directive principles are increasingly cited by judges as complementary to the fundamental rights. In several fundamental cases, the courts have been guided by the language.  

Part IV of the Constitution, containing Articles 36 to 51, deals with Directive principles of state policy. The directive principles form the fundamental feature and are designed to achieve socio-economic goals. Article 48A Directive principles of state policy oblige state to protect and improve environment and 51A(g) obligated citizens to undertake the same responsibility. In Rural Litigation & Entitlement Kendra v. State of U.P. 329, the Supreme Court clarified: “Preservation of the environment and keeping the ecological balance unaffected is a task which not only governments but also every citizen must undertake. It is a social obligation let us remind every citizen that it is his fundamental duty as enshrined in Article 51A(g) of the Constitution.”

3. **JUDICIAL RESPONSE OF ENVIRONMENT PROTECTION LAWS IN INDIA**

3.1. **Wildlife protection**

Life in the dictionary means, ‘state of functional activity' and continual change peculiar to organized matter, and especially to the portion of it constituting an animal or plant before death, animate existence of being alive. Life is the most cherished possession of a man. This right one inherits from birth. It is the state which stands restrained from interfering with freedom of life and liberty except in accordance with the procedure established by law.  

The Fundamental right of Right to life is also available to species of animals. The court declared that “we are committed to safeguard this endangered species because this species has a right to live on this earth, just like human being and that Article 21 of the Indian constitution “protects not only human rights but also casts an obligation on human beings to protect and preserve a species from becoming extinct, conservation and protection of environment is an inseparable part of right to life”334. Thus, we as human beings have pious duty to prevent the species who are on the verge of extinction and must implement effectively “species protection regime”. Thus, the state,

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330 Art. 48A "the state shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country”  
331 Art. 51A(g) “It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures”  
332(1985)3 SCC 614

334 Centre for environmental law, Worldwide Fund-India vs Union of India, SCC 2013,234

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162
as a custodian, is also duty-bound to maintain and safeguard the benefit of the public but for the "best interest of flora and fauna, wildlife."

3.2. Freedom of Trade and Commerce and the Environment
Most of the pollution is mainly from trade and business-particularly from industries. It has been found that tanneries, acid factories, tie and dye factories, distilleries and nowadays the hotel industries are contributing to the environmental pollution. Thus, it all relates to the fundamental right to freedom of trade and commerce/business guaranteed under Article 19(1)(g) of the Indian Constitution. Some of these industries or businesses are carried on in a manner which endangers vegetation cover, animals’ aquatic life, and human health. But time and again, it has been made clear that this freedom of trade and commerce is not absolute and subject to some reasonable restrictions. Therefore, ay trade or business which is offensive to flora and fauna or human beings cannot be permitted to be carried on in the name of the fundamental right.

In the case of Abilash Textile v. Rajkot Municipal Corporation\textsuperscript{335}, the Gujarat High Court was required to balance the right to carry on business against the danger to public health from the discharge of “dirty water” onto public roads and drains.

3.3. Right to clean and healthy environment
Article 21 of Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve those species becoming extinct; conservation and protection of the environment is an inseparable part of the right to life. In M.C. Mehta v. Kamal Nath,\textsuperscript{336} the Supreme Court of India enunciated the doctrine of “public trust”.

Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of loss a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

The resources like air, sea, waters and the forests have such great importance to the people as a whole, that it would be totally unjustified to make them a subject of private ownership. The state, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public but for the best interest of flora and fauna wildlife and so on. The doctrine of “public trust” has to be addressed in this perspective.\textsuperscript{337}

4. SUSTAINABLE DEVELOPMENT AND ITS PRINCIPLES:
As Lester Brown has congruously said, "We have not inherited this earth from our forefathers but have borrowed it from our children". The need of the hour is to prevent the misuse of resources and instead use them efficiently as Mother Earth cannot sustain such fast utilization of resources. This is only possible through ‘sustainable development’.

\textsuperscript{335} AIR 1998 GUJ 57
\textsuperscript{336} M.C. Mehta v. Kamal Nath,(1997) 1 SCC 388
\textsuperscript{337} Centre for Environment Law,WWF-I v. Union of India,(2013) 8 SCC
The World Commission on Environment and Development (WCED) in its report prominently known as the ‘Brundtland Report’ named after the Chairman of the Commission Ms. GH Brundtland highlights the concept of sustainable development. As per Brundtland Report, Sustainable development signifies” development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”.

There is a need for the courts to strike a balance between development and the environment. Sustainable Development then is a concept of rising real income and educational standards and an improvement in the general quality of life. The least advantaged section in society must have their needs provided for and development must take note of inequalities within the society at the moment along with taking care of the generations to come.

“Sustainable Development has come to be, accepted as a viable concern to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems”.

Rural Litigation and Entitlement Kendra v. State of UP

4.1. The Polluter Pays Principle:

Whosoever is responsible for causing pollution should meet the cost of mitigating the damage caused. This, in a nutshell, is the sum and substance of this principle. This concept is not new. The earliest adoption of this principle can be found in the council of the Organisation for Economic Cooperation and Development(OECD) in 1972 as an economic Principle for allocating the costs of pollution control.

The municipal Laws did contain provisions for the imposition of fines if the damage was caused to the environment. These statutes contained the power to impose fine, realize penalty and also to charge fees. The Polluter Pays Principle has been held to be a sound principle by the Supreme Court of India in Indian Council for Enviro-Legal Action v. Union of India, where the Court Observed.


339 Justice Satyabrata Sinha, Chief Justice of High Court of A.P. “Environmental Protection Role of Constitutional Court” in the Souvenir released on the occasion of the 50 years celebration of the A.P. High Court.

340 Supra 21


“…we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country.”

“…once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.”

The "Polluter Pays Principle" as interpreted by the Supreme Court of India means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “Sustainable Development” and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

4.2. Precautionary Principle

The origin of the precautionary principle can be found in German Environmental policy known as Vorsorgeprinzip. The precautionary principle for the first time made its work in the year 1925 in ‘Vienna Convention for the Protection of the Ozone Layer’ where the parties adopted the ‘precautionary measures’ for the protection of the ozone layer from depleting.

The precautionary principle is basically linked with irreversible damage with scientific uncertainty. Principle 15 of Rio Declaration, 1992, provides that "in order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities, where there are threats of serious irreversible damage, lack of full scientific certainty shall be used as a reason for postponing cost-effective measures to prevent environmental degradation.” In M.C. Mehta v. UOI (CNG Vehicles case) 345, the supreme court watched that "The Precautionary Principle can be viewed as human-centric in its pith, and unchallenging of the proprietor protest worldview. Rather, it basically perceives points of confinement to the degree to which we can abuse environmental without undermining our own living environments."

4.3. Public Trust Doctrine

The Public Trust Doctrine primarily rests on the principle that certain resources like air, water, sea and the forests have such great importance to people as a whole that it would be wholly unjustified to make them a subject of private ownership.

In the case of M.C. Mehta v. Kamalnath and others 346 it was articulated that “our lawful framework which depends on English common Law incorporates people, in general, confide in principle as a component of its law the state is the trustee of every single characteristic asset which is by environmental implied for open utilization and satisfaction. The state as a trustee is under a lawful obligation to secure the regular resources. These resources implied for open utilize can't be changed over into private ownership.”

344 Brian J. Preston, CJ, “The role of the judiciary in promoting sustainable development: the experience of Asia Pacific”

345 AIR 2002 SC 1696

The Supreme Court of India, in Vellore Citizens Forum Case, developed the following three concepts for the precautionary principle:

- Environmental measures must anticipate, prevent and attack the causes of environmental degradation.
- Lack of scientific certainty should not be used as a reason for postponing measures.
- The onus of proof is on the actor to show that his action is benign.

5. **Talking about the Indian Context:**
   India has still a long route to go for the implementation of the ideology of sustainable development. We have to lay emphasis on making a properly structured strategy for the development purpose of our economy as well as ecology. Along with abundant natural resource, we also have a huge population which makes the planning of sustainable development highly complex in nature. The National Council of Environmental Planning and coordination (NCEPC) set up in 1972 was the main agency in this regard.

Industries generating high pollution should be moved out of the perimeters of cities. Regular Monitoring of high Pollutants needs to be devised by establishing a National Network of Sampling Situations. Also, Legislation and Policy pronouncements will be ineffective as long as Enforcement Machinery remains week. Therefore, a fresh look is desired for strengthening the Enforcement Mechanism. The man has acquired the ability to change the environment more than any other organism present on the planet. But a man should also never forget that he is not a master, instead just a part of this huge and massive global environment. There has to be public awareness in each individual regarding the protection of the environment and making it a better place to live.

As Mahatma Gandhi rightly said, "Be the change you wish to see in the world."

6. **CONCLUSION AND SUGGESTIONS**

The right to environment is not merely of moral concern. It is comprehensive right like any other basic right at both national and international levels. The Indian judiciary has interpreted the various Constitutional and legal provisions relating to the environment in an appropriate direction by promoting ecological balance and sustainable development. The great scientist Albert Einstein said “you cannot solve a problem with the same mindset which created it in the first place” That is why taken responses to like purchasing the recycled paper, using a CFC- free refrigerator, or driving an electric car or CNG auto is never going to save the environment. Instead of protecting the earth or our ecology from the destroyers and polluters, we must rather protect it first from ourselves, it is our lifestyle, greed, lack of awareness that is creating all the problems in the environment. There is a need for environmental rights to be seen as social rights and sustainable development to be envisaged as development, not at the cost of people but development for the people. The principles of democracy, participation and the strengthening of social institutions play a major play in the understanding of sustainable development.

There are certain steps which we can adopt in our daily life
• Step out of the process of consumerism and preserve our individual Liberty.
• To decide our actual, want and need for living a reasonable and healthy life by not being deviated by artificial needs imposed by society.
• To develop a sense of universal responsibility, caring for others and for the coming generation.
• To believe that the collective interest of all organisms in the world is above the interest of any particular caste, race, entity.
• It is recognized that environmental education plays an important role in molding the culture and value system of society towards the environment but given its long term gains limited focus is given to this during the planning process.

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NOT IN KANSAS ANYMORE- THE PLIGHT OF CLIMATE REFUGEES

By G.V. Athvaidh
From The Tamil Nadu Dr. Ambedkar Law University

INTRODUCTION

"No one puts their children in a boat unless the water is safer than the land."347

Syria. For anyone following the news, the word evokes images of debris, destruction and dying children. The civil war in Syria is called by many as the worst manmade crisis of our time.348 As the war enters its ninth year, chemical weapons, cluster bombs, disease and starvation have already left half a million dead and half the population displaced.349 The war has pushed close to five million people to flee the country and seek refuge elsewhere. The whole affair is of course a depressing reminder in what humans can do to each other, especially when one sees pictures of Syrian children killed in chemical attacks. But what few people know is that this whole conflict was triggered in part, by global warming.350 Mother Nature colluded with man in creating this crisis.

The Syrian civil war was preceded by a prolonged and devastating drought that drove a mass of rural workers into Syrian cities. The severity of the drought combined with the Regime’s failure to prepare and respond to it, sparked widespread protests from the citizenry. The Regime’s crackdown on this civil uprising and the ensuing escalation of the conflict led to a full blown civil war, with domestic and foreign forces on both sides of the conflict. It has also birthed the worst refugee crisis of the 21st century (so far). The Syrian civil war is just an example of how climate change is already starting to catalyze international conflicts.

The people of Syria are fleeing war, not floods or forest fires. Climate change is not the direct cause of their migration. They aren’t what one could call a ‘climate refugee’ or an ‘environmental refugee’. These phrases refer to people who are driven out of their homes by the more serious manifestations of climate change, like rising sea levels and extreme weather patterns.

347 Warsan Shire


The current debate on environmental migrants is built on the definition provided by Essam El-Hinnawi in the mid-1980s. He defined environmental refugees as "people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption that jeopardized their existence or seriously affected the quality of their life\textsuperscript{352}".

Climate change is rapidly becoming one of the biggest reasons for migration around the globe. The office of the UNHCR estimates that rising sea levels, intense droughts and other extreme weather patterns will uproot 250 million people by 2050\textsuperscript{353}. Most of these refugees are expected to come from developing nations in Africa, Asia and Latin America.

Displacement due to climate change affects not only coastal countries but also rich landlocked countries, safe from the rising sea. These countries would have to deal with the sudden influx of climate refugees knocking on their doors. They would also have to deal with extreme weather events internally displacing their own population within their borders. They cannot build a wall to keep cyclones out. Nor can they deport their own citizens.

As the slow tsunami consumes coastal nations and weather events turn extreme, it becomes critical to determine the status of climate refugees and undertake international efforts to address this problem.

HOW BAD IS THE CLIMATE REFUGEE CRISIS?

"First it came for the Island Nations. I did nothing because I wasn’t in an Island Nation.

Floods, hurricanes, Earthquakes, Drought and Famine- our ancestors saw these phenomena as divine retribution. We still use the word ‘Act of God’ to refer to these events. But if the climate scientists are to be believed, ‘God’ seems to be getting more and more vengeful by the year. Manmade climate change has contributed to ever-rising sea levels and unprecedented weather events in every continent.

Climate refugees are already looking for new homes in many countries. In coastal Bangladesh, hundreds of thousands of people are routinely uprooted by the flooding. Many make a long and treacherous journey to the slums of the capital, Dhaka. The disappearance of Lake Chad in West Africa has empowered terrorists and forced more than four million people into camps\textsuperscript{354}.

\textsuperscript{352} Renner, Michael, Environment a Growing Driver in Displacement of People, Is MEAT SUSTAINABLE? \textsuperscript{[WORLDWATCH INSTITUTE, http://www.worldwatch.org/node/5888 (last visited Mar 1, 2019)]}


In India, close to 1.5 million people are internally displaced every year, many for climate change reasons. Not even the mighty USA is safe from Mother Nature, as a slew of hurricanes, forest fires and cold waves left thousands dead and thousands more without a home in 2018. Meanwhile, the steady drip, drip, drip of the melting polar ice caps continues.

Climate change will not impact all people and countries in the same way. Countries with a broad coastline and Island nations will be the immediate and most severely affected victims. One can weather a hurricane and rebuild his home after it passes. But that won’t be an option when the ocean arrives at his doorstep and drags his home underwater. Doing so would mean sleeping with the fishes, in more ways than one.

While floods ravage some areas, others will be reduced to deserts. Desertification and depletion of resources like water and fertile land will aggravate poverty, incite conflicts, political crises and mass population displacement. The Intergovernmental Panel on Climate Change (IPCC) estimates that by 2080, about 1.1 to 3.2 Billion (with a B) people will experience water scarcity and 200 to 600 million will go to their beds hungry. These people will inevitably make long treks looking for new homes, for survival. ‘These people’ could be you and me.

Even in a relatively wealthy isolationist nation which is willing to turn refugees away at its border, frequent and devastating natural disasters are bound to destroy homes and displace its citizens. This will hit the poorest of its population the hardest as they can’t afford to migrate internationally and escape the effects of climate change. The rich will barricade themselves in their mansions or fly private jets to their summer resorts, indifferent to the plight of their fellow nationals. This may inflame class conflicts within that country, leaving its economy fragile and its government on edge. Climate change will not only affect areas environmentally and economically, but culturally and politically too. Such tensions within countries are likely to have ripple effects in their dealings with others and could sour international relations. And whenever local conflicts bleed into international relations, the threat of nuclear weapons looms in the background like a mushroom cloud.

All this may sound alarmist, but it is good to scope out the full extent of a problem before looking for solutions.

STATUS OF CLIMATE REFUGEES IN INTERNATIONAL LAW

The 1951 Geneva Refugee Convention defines a ‘refugee’ as a person who "owing to well-founded fear of being persecuted for

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reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” . Coming out of recent horrors of the Holocaust and the Second World War, this was a pretty solid definition for a refugee. One can’t fault the makers of the Convention for not including a provision for climate refugees. The concept of global warming and climate change only went mainstream three decades later.

The 1951 Convention offers protection for those fleeing persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. It provides no solace to people persecuted by nature. Since climate refugees lacked any formal definition or recognition under international law for a long time, they were essentially left in no-man’s land. To date no person has been granted asylum solely on the grounds of fleeing the effects of climate change. There was clearly a protection gap in the international system that needed to be addressed.

The first international instrument to recognise climate change as a driver of migration is the Global Compact for Safe, Orderly and Regular Migration (GCM) which was adopted on the tenth of December, 2018. Among its many provisions, the Compact calls on U.N. members to-

I. Strengthen joint analysis and sharing of information to better map, understand, predict and address migration movements resulting from climate change, while ensuring the effective respect, protection and fulfillment of the human rights of all migrants.

II. Develop adaptation and resilience strategies to counter adverse effects of climate change, taking into account the potential implications on migration, while recognizing that adaptation in the country of origin is a priority.

III. Integrate displacement considerations into disaster preparedness strategies and promote cooperation with neighboring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information.

IV. Harmonize and develop approaches and mechanisms at sub-regional and regional levels to address the vulnerabilities of persons affected by sudden-onset and slow-onset natural disasters, by ensuring

357 February 2019.
358 António Guterres, UN High Commissioner for Refugees.


www.supremoamicus.org 171
they have access to humanitarian assistance that meets their essential needs with full respect for their rights wherever they are, and by promoting sustainable outcomes that increase resilience and self-reliance, taking into account the capacities of all countries involved.

V. Develop coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters, including by taking into consideration relevant recommendations from State-led consultative processes.

This document is a great first drop in the ocean of protecting climate refugees. However, it is a voluntary and nonbinding instrument. Prominent countries like the USA and Brazil refused to sign it, while many European countries like Belgium withdrew. The Compact also does not clearly define climate refugees. It leaves that piece of business to the discretion of the respective countries.

A proper definition must comprise all types of environmental migrants fleeing from all kinds of environmental disasters. The International Organisation for Migration proposes three such types.

(i) **Environmental emergency migrants**: These are people who flee temporarily due to an environmental disaster or sudden environmental event. (Example: Someone forced to leave due to a hurricane)

(ii) **Environmental forced migrants**: These are people who are forced to leave due to deteriorating environmental conditions. (Example: Someone forced to leave due to deforestation)

(iii) **Environmentally induced economic migrants**: These are people who choose to leave to avoid possible future problems. (Example: A farmer who leaves due to declining crop productivity due to desertification)

Individual countries may define the term narrowly and in doing so, may set impossible standards for some types of environmental refugees in seeking asylum. It is far more effective if there is an international framework for determining who counts as a climate refugee.

**CLIMATE REFUGEES IN INDIA**

As was referenced earlier, roughly 1.5 million people are internally displaced every year in India, mostly due to the effects of climate change. In 2018, Northeast India was ravaged by flash floods affecting over 100,000 people in Assam alone. The situation was equally worse in Tripura, Manipur, Meghalaya and Mizoram. The seven sisters weren’t the only states affected in 2018. The state of Kerala witnessed one

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362 International Organization for Migration’s Perspective on Migration and Climate Change, Archived 8 August 2009 at the Library of Congress.

of the worst floods in nearly a century that killed over 400 people and many more missing. A UN report in 2018 estimated that India has lost $80 Billion to Natural disasters in the last two decades\textsuperscript{364}.

India is still heavily dependent on agriculture. Around 70\% of the Indian population depends on farming, either directly or indirectly. The agriculture sector hosts around 58\% of the employment in the country\textsuperscript{365}. Most of these farmers already live at subsistence levels. Their livelihood largely depends on the traditional Monsoon patterns in their respective areas. If the rain patterns change, that would mean hundreds of millions of people who suddenly find that they’re unable to feed themselves. The amount of migration that could result from a situation like this would be unparalleled in human history\textsuperscript{366}. Speaking on this issue at an international food conference in Milan, the Former President of the United States, Barack Obama rightly pointed out that the worst effects of climate change would be borne by people in poor nations that are least equipped to handle it.

Another important category of climate migrants to consider in the context of India are those who move from Bangladesh into India. Coastal Bangladesh, with a fourth of its land just five feet above sea level, is one of the ‘potential impact hotspots’ in the world. It is routinely threatened by extreme river floods. In the last three decades, almost a million Bangladeshis have been rendered homeless as a consequence of increasing erosion in the Brahmaputra basin. The sheer number of refugees generated in these events would be unmanageable for any government. Forecasts estimate that around 50 to 100 million people in Bangladesh affected by floods and saltwater intrusions may end up knocking at India’s doors\textsuperscript{367}.

It is worth mentioning here that India is one of the few countries in the world that has refused to sign the 1951 Refugee Convention. This means that climate migrants coming into India will find themselves labeled as ‘illegal immigrants’. In a country like India where competition for jobs and resources are already very high, a refugee crisis of this scale can easily be exploited for political gain. Current migration from Bangladesh has already resulted in low-scale conflicts\textsuperscript{368}. India has


\textsuperscript{368} William Alex Litchfield, RAZOR TIE ARTERY FOUNDATION ANNOUNCE NEW JOINT VENTURE RECORDINGS | RAZOR & TIE (2010), https://web.archive.org/web/20110720133948/http://w
begun building an India-Bangladesh Barrier. The officially stated purpose of this barrier is to deter drug trade, but in the future, this barrier may also keep out desperate climate refugees coming in from Bangladesh\textsuperscript{369}. India, with its rapidly growing population and vulnerable neighbours, has to come up with a comprehensive policy to address climate refugees both within and without its borders.

**SUGGESTIONS**

The war on climate change should be fought on two fronts and will require the participation of the whole planet. On one front, the International community should be working overtime on reducing global warming and reversing the effects of climate change. At the same time, it also has to provide a home for the people already rendered homeless by climate change. Below are a few suggestions for achieving this goal.

1. Full implementation of the 2015 Paris global climate agreement.
2. An international framework for defining who constitutes a ‘climate refugee’.
3. An international framework for recognition and protection of the rights of climate refugees.
4. Adaptation and resilience measures for reducing displacement risk, in the form of early warning systems, flood-defense infrastructure, sustainable agriculture and drought resistant crops.
5. Drafting of internal migration policies by individual nation-states in order to aid and resettle persons internally displaced by climate change.

**CONCLUSION**

“The perennial cry to “Save Earth” is odd. Planet Earth survives massive asteroid strikes – it’ll survive anything we throw at it. But Life on Earth will not\textsuperscript{370}.”

Climate change is one of the most serious threats facing life on Earth. Beyond natural disasters and rising seas, climate change serves as a ‘threat multiplier’ by exacerbating conflict over resources and driving mass migration. Migration of climate refugees will be the major humanitarian challenge in the 21\textsuperscript{st} century. It is highly imperative that the international community is adequately prepared in rising to this challenge.

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\textsuperscript{370} Neil Degrasse Tyson, Astrophysicist.
INTRODUCTION

The United Nations Framework was signed in 1992 at United Nations Conference on Environment and Development, which constitute the foundation of climate agreement for the most consequent international climate agreements. The United Nations Framework Convention on Climate Change was established with an aim to reduce the emission of Greenhouse gas concentrations, which would prevent anthropogenic interference with the climate system. It was designed to initiate the process for more climate change agreements between the countries. The important reasons for the establishment of UNFCCC is Greenhouse Gas Inventory. The United Nations Framework Convention on Climate Change was signed between 150 countries in Rio de Janeiro in 1992, which went on to widely recognize that climate change is a major threat to world’s environment and economic development. The United Nations Climate Change has divided the countries into important groups. The first group includes the countries, which are the member of Organization for Economic Co-operation and Development, (OECD) in 1992 and the countries with economies in conversion called as the EIT, which included the Russian Federation, the Baltic States and several Central and Eastern European States. The second group consists of Organization for Economic Co-operation and Development (OECD) but not the EIT parties, which is there on the first committee. The constituents of the committees are required to provide financial services to the developing countries for the reductions of emissions activities and help them to adapt the adverse effects of climate change. The convention has mainly focused on activities pertaining to special concerns of climate change and special concern about the vulnerable countries for the technology, investment and insurance.

CLEAN DEVELOPMENT MECHANISM

Clean Development Mechanism is defined under Article 12 of the Kyoto Protocol, which allows the countries for the reduction or emission-limitation commitment in the developing countries. Article 12 of the Kyoto Protocol, which allows the clean development mechanism for emission reduction projects in the developing countries to receive certified emission reductions (CERs) which are equal to one tone (907 Kilogram) of carbon dioxide. The certified emission reductions can be sold and used by industry to meet their requirement under emission reduction goals under the Kyoto Protocol. This process stimulated the

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373 Id.
374 Id.
sustainable development and helps the industry to achieve their required goals. The Clean development mechanisms project must have a public registration and a well settled process to make sure that it is implemented for the emission reductions in the earth for better climate change.  

The Clean Development Executive Board looks after the mechanisms under these regulations and accountable to the ratified countries under the Kyoto Protocol. The Central Development Mechanism has two-fold process to assist the developing countries for achieving the sustainable development goals and to assist the developed country parties for the reduction commitments and emission limitations.

India is one of significant member country of Clean Development Mechanism. Clean development mechanisms has been a significant component of the global carbon market. The global carbon market has been established with an objective to reduce carbon emissions in the globe. India has been the part of Kyoto Protocol in August 2002 and the objective of the protocol was to fulfill the prerequisites for the clean development mechanism. The central government reflects on clean development mechanism as a significant process for which it has constituted the National Clean Development Mechanism Authority for the reason of protecting and improving the quality of environment with respect to the objectives of Kyoto Protocol.  

The National Clean Development Mechanism authority accepts projects for the evaluation and approval, which are in accordance with the guidelines of the clean development executive board and conference of parties serving the meeting of parties to the United Nations Framework Convention on Climate change. The central government constitutes the body of the National Clean Development Mechanism Authority as per the Environment Protection Act, 1986 with reference to sub section (1) and (3). The committees member includes the

1- Chairperson-Secretary (Environment and Forests)
2- Member-Foreign Secretary of his nominee
3- Member- Finance Secretary or his nominee
4- Member- Secretary, Industrial Policy and Promotion or his nominee
5- Member- Secretary, Ministry of Non Conventional Emery Sources or his nominee
6- Member- Secretary, Ministry of Power or his nominee
7- Member- Secretary, Planning Commission or his nominee
8- Member- Joint Secretary (Climate Change), Ministry of Environment and Forests
9- Member- Secretary- Director (Climate Change), Ministry of Environment and Forests

The National clean development mechanism authority will exercise the following functions for the environment protection and

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376 Supra 5.
377 Id.
379 Id.
380 Id.
to increase the efficiency of the clean developed mechanism. The authority checks that the measures taken under section-3(2)(viii), (ix), (x), (xii) of Environment protection Act, 1986 and issue directions under section 5 of the Environmental Protection Act, 1986.  

Section 3 of the Environmental Protection Act states the power of the central government to protect the environment and look after the sustainable development goals. Section 3(2) (viii) states about the examination of the manufacturing process and substances, which are likely to cause environmental pollution. Section 3(2) (ix) states about the carrying out investigations and research relating to the problems caused in environmental pollution. Section 3(2) (x) states about the inspection process into certain premises, plant, equipment for control and prevention of environment pollution. Section 3(2)(xii) states about the collection of information regarding the matters related to environmental pollution. The NCDM authority accepts the projects for the evaluation and approval as per the guidelines of Clean Development Mechanism which are issued at the meeting of parties in the United Nations Framework Convention on Climate Change. The evaluation of the clean development mechanisms will be based on the prerequisites of the objectives of sustainable development goals and meet the national priorities. National priorities will include the majority of the people and protect the environment at large and hence the interest of the private party would be ignored under national priority. It will give additional recommendations to the people or group who has proposed the project for clean development mechanism to achieve the sustainable development goals within the legal framework of the country to ensure that the projects are compatible with the national priorities and the stakeholders have been duly consulted. It ensures that the priority with respect to investment to the project is given to those projects which have achieved higher and long-term sustainable development benefits. The financial review of the project is done to check that the projects are not diversified for other goals and complied with the rules and modalities of the clean development mechanism. It maintains the registration of the CDM projects approved and the certified emission reduction potential. It makes sure that the project holder has sufficient and vast knowledge about the clean development mechanism to ensure better environmental protection and sustainable development. It collects and publishes the technical data related to the clean development mechanism projects in India.

The national clean development authority has the definite powers. It invites the officials and experts from Government, financial institutions, consultancy organization, non-governmental organizations, and civil society for the technical and professional inputs for the projects. It helps in the interaction with the concerned authorities & institutions for the CDM projects. It takes up matters which are

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383 Id.
384 Id.
385 Id.
386 Supra 12

www.supremoamicus.org

177
of environment concern and sustainable development projects that are prescribed by the central government. It recommends about the guidelines of the CDM projects to the central government for upholding the nation priority at the top.\textsuperscript{387}

The report of the conference of the parties under the Kyoto Protocol held at Montreal from 28 November to 10 December 2005 has discussed about the modalities and procedure for the clean development mechanism. \textsuperscript{388} Article 12 of the Kyoto Protocol defines the purpose of the clean development mechanism in the global world for protecting the environment from the pollution. It further states that there should be emission reduction for the sustainable development goals. Article 3 states the there should be awareness about the goals of clean development mechanism and the procedure under Article 12 should be followed up. \textsuperscript{389} Article 12 further states that it should follow the modalities and procedures for the clean development mechanism. It should invite the executive board to review the modalities and procedures for the clean development mechanism and if necessary make appropriate recommendations to the conference of parties of the Kyoto Protocol. It further decides that the rules and modalities for clean development mechanism are in accordance to the conference of parties of the Kyoto Protocol. \textsuperscript{390} The role of conference of parties, which are served as the meeting of parties shall give guidance to the executive board for the rules of procedure. The conference of parties also reviews the annual reports of the executive board. The executive board shall administer the clean development mechanism under the conference of parties. The executive board has the following functions with respect to the clean development mechanism project.\textsuperscript{391}

1- It gives recommendations to the conference of parties regarding the modalities and procedures of the CDM.
2- It gives a report of its activities to the conference of parties.
3- It supervises about the baselines and project boundaries related to the clean development projects.
4- It reviews the modalities and procedures about the clean development mechanism and small-scale projects.
5- It is responsible for the accreditation of the operational entities and in accordance with the accreditation standards make recommendations to the conference of parties. The responsibility includes the decisions of the re-accreditation, suspension and withdrawal of accreditation and operationalization of accreditation procedures and standards.
6- It gives report on the regional and sub-regional distribution of clean development projects mechanism to the conference of parties.
7- It gives relevant information to public about the clean development projects in order to receive funding for the project.
8- It make the availability of technical reports commissioned to the public and provide them a period of 8 weeks for the comments and suggestions before

\textsuperscript{387} Id.
\textsuperscript{389} Id.
\textsuperscript{390} Id.
\textsuperscript{391} Id.
finalizing the report and giving it to the conference of parties.

9- It maintains and develops rules and makes publicly available the repository of approved rules and procedures.

10- It maintains the publicly available database of the clean development projects for the information contained on the registered project design documents.

11- It states and addresses the rules of the clean development mechanism project to the project participants and operational entities.

12- It carries out any further functions, which are prescribed by conference of parties.

These were the guidelines provided by the national central development authority for protecting the environment. Nevertheless, the approval projects of these aspects are important for the reader to understand the whole mechanism of this process. The project proposed by the project participants should have certain qualification for the approval process. The project should have a quality to lead to real, measurable and long term sustainable goals for the protection of the environment. The additional GHG mitigation has to be reduced with respect to the baseline of the environment. The additional certified emission reduction should not be in the form of the official development assistance. The authority checking for the approval process should notice that the clean development projects should achieve the sustainable development goals. The clean development mechanism should improve the life of the environment in the best way. The clean development mechanism should have a social well being activity which should terminate poverty in the country and generate additional employments to the poor people. The clean development mechanism project should have an additional investment consistent with the need of the people. It should also look after the environmental and technological well being of the country. The environmental well-being should have a discussion regarding the clean development mechanism and its impact on the environment. The technological well-being include the transfer of the environmentally safe and sound technologies for the upgradation of the technological base.

Like every other projects, the clean development mechanism project should have a methodology for the determination of the baseline. The baseline should be transparent, precise, comparable and workable for the project holders. The determination of the project should be uniform and reliable. It should avoid the potential errors and that should be indicated. System boundaries of the baseline should be indicated and the interval between the baselines should be updated. It should include the lifetime of the project cycle and clearly mention about the project. The small-scale clean development projects are

393 Id.
394 Supra 22.
395 Id.
396 Id.
397 Id.
simplified procedures and can be used for the project proponent.

The approved procedure for the programme of activities is mention herein. The manager of the programme of activities submits to the National CDM authority. The projects are submitted in a single window & are opened by the National CDM authority. The projects proposer is required to apply to the administrator of the National CDM authority through the website by filling the user registration form. After the receipt of the user registration form, the project holder needs to fill the online Project Concept Note and upload the Project Design Document.\textsuperscript{398} The National CDM authority examines the documents submitted regarding the CDM projects and if there exist any preliminary queries, it can seek response from the project holder. The project proposals are than put up for consideration by the National CDM authority. The project holders are given a time of ten-fifteen days of notice to come to the authority for a meeting and give a power point presentation on the project whereby the members of the authority seek clarifications.\textsuperscript{399} In case, a member needs additional clarifications than it asks clarifications from the project holder. After complete satisfaction by the entire member, the Member- Secretary of the National CDM authority for that particular project issues the Host Country Approval. Hence, this is the way the clean development projects are approved by the national clean development authority.

One of the recent examples of clean development mechanism project & first under CDM is by a Gujarat based company for reducing green house gases emission from the environment as reported in Down to earth.\textsuperscript{400}

CONCLUSION

Environment pollution control, be it climate, air, water, soil etc is the need of the hour. Since GHG & carbon emission are causing irreparable loss to the environment leading to climate change, which, is now affecting the world in many ways. It has created extreme weather conditions & affects health & agriculture directly. The UNFCCC seeks a better world for all irrespective of people living in developed or developing countries. The sustainable development goals can only be achieved under the UNFCCC protocols. India being a signatory to the UNFCCC has taken up many clean development projects. People’s participation in CDM mechanism is necessary for achieving the objectives of UNFCCC, which must be in the forefront of the agenda of every citizen. Climate change is a reality & can only be fought together without differentiating the rich & the poor.

\textsuperscript{398}Ritu Gupta, India’s first CDM projects, Down To Earth, 4Jul.2015 available at https://www.downtoearth.org.in/news/climate-change/indias-first-cdm-project-9597

\textsuperscript{399}Id.

\textsuperscript{400}Id.
ALTERNATIVE DISPUTE RESOLUTION

By Himanshu Verma & Tanika Kothari
From University of Petroleum and Energy Studies

INTRODUCTION

Justice Delivery System plays a very important role in securing the interest of the litigants and in maintaining peace and order in the society. Words of Wisdom from one of the greatest man LJ Earl Warren as “It is the spirit and not the form of law that keeps the justice alive”.

ADR is one of the forms evolved as a movement to ease the burden on the courts with pending cases and to give relief to the litigants who were in queue to get justice. It is an informal and non-adversarial method of dispute resolution wherein the parties take the assistance of third neutral party to resolve their dispute in a more cost effective manner. This mechanism is most often preferred by the parties as it avoids the risk of uncertainties and local practices involved in litigation process because no one will ever desire to get into the web of litigation which involves time consuming and a complex procedure. The parties always desire to have quicker and efficient decision which will be more conducive to the preservation of their business relationships too as it ends in the harmony between the parties. ADR has gained broad acceptance in the business and legal communities as it offers an opportunity to the disputing parties to choose their own method, procedure, location, neutral party and cost for resolving dispute. This mechanism is intended to cover mediation, arbitration, conciliation, negotiation, Lok Adalat which cover the disputes relating to commercial, civil, labor and family where the parties want to conclude their settlement amicably.

The goal behind introducing this mechanism into our legal system is to achieve the constitutional goal of providing complete justice as it acts as a self-reliant management system wherein the people are empowering themselves and securing justice.

NEED OF ADR

Accessibility and affordability to justice are very important challenges to the court litigation procedure. The adversarial method of resolving dispute has faced much criticism because of the huge pendency of cases in the court for years. Resolving the disputes through formal litigation is an endless process where interest of the parties get affected as most of the population in India is illiterate and thus they are unaware of their rights and the court procedures. Most of the people discourage litigation process as it can create a situation for them to become a real looser from a nominal winner. There is one more drawback of the present adjudicating legal system. The paucity of competent lawyers who can be recruited for the judicial post. Pendency of huge cases, high cost, unnecessary delays in delivering justice have great impact on the faith of litigants towards the formal litigation procedure. It is said that “the poor usually gets the raw end of the stick in legal matters”. Richer clients will get better results as compare to poorer clients as stated by Moore.
With the emergence of the new element of the commercial sector in the economy, a need was felt to come up with other alternative mechanisms for the consensual dispute resolution as the grievances were not solved within the reasonable time and because of that other parties were not ready to invest in the company. As ADR ensures that their reputation and goodwill will not be affected because of its confidentiality provision and there will be harmony between the parties even after the dispute resolution which will be good for their future working relationship. Thus, other forms of dispute resolution are frequently used by the litigants to get speedier remedy.

Justice Krishna Iyer, depicted the public suffering in his language, “commercial causes should as far as possible be adjudged by Non-Litigative mechanisms of dispute resolution since forensic process, dilatory and contention hamper the flow of trade and harm both sides whoever wins or loses the lis. A legal adjudication may be fair but not heartless. A negotiated settlement will be satisfying, even if it departs from strict law”.

HISTORICAL BACKGROUND
India has a very vast rural background. It’s a long and old tradition in India wherein people prefer the alternatives to old litigation in India. The learned members, the elders of the villages and the other bodies such as NYAYA PANCHAYAT used to settle the dispute at the grass root level only even before the advent of the British. These types of settlements were unofficial and always varied from province to province. With the advent of the British legal system in India, these old traditional mechanism to resolve disputed were vanished and the formal litigation legal system was introduced. After the Independence, it was observed that the system requires some changes to be done as it is not in a position to bear the entire burden of litigation. A very basic objective of any legal system is to deliver justice to its citizens by providing the adequate means of dispute resolution mechanisms. With the increasing population, there is an increase in the pendency of cases in the court which is denying access to justice to most of us.

TYPES OF ADR
The term ADR consist of different types of methods a litigant can adopt to resolve the dispute prior to approaching court procedure. It intended to cover Arbitration, negotiation, mediation, conciliation, lok adalat.

ARBITRATION
Arbitration is a legal process, which is carried outside the court, through a qualified expert known as Arbitrator. It can be chosen by the parties either through court reference or by the way of an agreement known as Arbitration agreement. The Arbitral award given by the arbitrator is binding upon the parties, but an appeal can be made further to the higher court on dissatisfaction by the decision of the arbitrator.

The United Nations General Assembly recommended that all the countries must give due consideration to the treaty International Commercial Arbitration, 1985 in order to ensure uniformity in law. In lieu of that The Arbitration and Conciliation act of 1966 was being enacted to govern the process of Arbitration and conciliation in
India. It includes the dispute mechanism for domestic and commercial legal issues. The Supreme Court has emphasized that this act should be interpreted and applied keeping the commercial sense of dispute in mind.

MEDIATON
Mediation is flexible and informal techniques of ADR which is facilitated by the parties with the assistance of a skilled, trained and experienced mediator aiming to provide an amicable settlement to the parties. It is a non-binding process wherein the mediator provides the parties with an opportunity to negotiate, converse and to decide about the settlement out of the court. Though it is more formal than the negotiation but less formal than the arbitration and litigation.

Contractual disputes, matrimonial disputes, consumer disputes are best suited for mediation. The Supreme Court of India in its judgment has clearly said that representative suits, election disputes, criminal offences, cases against specific classes of section have been excluded from the scope of mediation.

CONCILIATION
Conciliation is similar to mediation as parties freely consent to appoint a neutral third party known as conciliator to resolve their disputes. The conciliator acts as an interventionist by suggesting potential solution to their parties in order to resolve their disputes. It is non binding procedure where the conciliator does not himself give the decision but make both the parties to come to a settlement themselves.

Section 89 of the civil procedure Code, 1908 governs both the mediation and conciliation. This section only deals with the court referred mediation. Further, section12 (a) provides for conciliation as a viable means of resolving disputes in the labor sectors.

The Supreme Court observed that —the policy of law emerging from Industrial Disputes Act, and its sister enactments is to provide an alternative dispute – resolution mechanism to the workmen, a mechanism, which is speedy, inexpensive, informal and unencumbered by the plethora of procedural Laws and appeals and revisions applicable to civil courts.

NEGOTIATION
Negotiation is a voluntary non-binding process where the parties have the control over the procedure and the decision without the assistance of any third party unlike other forms of ADR. It does not have any legal recognition. It is self counseling and has no uniform rules but there are possibilities of reaching to an amicable solution.

LOK ADALAT
It is a new innovative contribution to our Indian legal system. It has jurisdiction to settle any dispute pending before any court as well as matters at pre-limitative stage. It’s

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a very fast process as the parties can directly interact with the judge.

Lok adalat is very affective in settlement of money claims like partition suits, damages and matrimonial cases. The main objective of lok adalat is to compromise and the award given by the lok adalat is binding and cannot be made subject to appeal. The award is enforced as a decree of a civil court. An amendment was made in 2002 in The Legal Services Authority Act, 1987\(^{406}\) to establish permanent lok Adalats.

The National Legal Services Authority was constituted under National legal Services Authority Act, 1947 for framing effective and economical schemes for legal services, legal aids and speedy justice through lok adalat.

**FAILURE IN ADR**
ADR is not a solution for all the disputes and it has its own limitations.

- **Power imbalances:** - ADR is not suitable for all those cases wherein one party is under the pressure of another party because of the economic position or of some business relationships between them as the weaker party may require court’s protection. This process focuses more on settlement between the parties instead of giving recognition to their legal rights.

- **Limits on arbitral award:** - In Arbitration, an arbitrator cannot order any party to do or refrain from doing something. Arbitrators can only resolve disputes that involve money. ADR processes cannot be used where the dispute is regarding systematic injustice, discrimination, violation of human rights or serious frauds.

**No guaranteed resolution:** - ADR does not always leads to resolution between the parties. It might happen that inspite of investing time and money in this process, the parties may turn to the same court procedure. Since ADR consists of confidential provision, it cannot set precedents and will have no educational and deterrent value.

ADR mechanism will not be suited wherein the parties want to enforce their particular right or requires to consider the precedent by an authority. Where the party is of the opinion that he has a very strong case will not approach this mechanism rather will force the other party to get his right enforced through court of law.

**SUGGESTIONS**
Our legal system should provide such a platform to the litigant which helps them to end their dispute harmoniously. Though ADR is much more advantageous to the old conventional justice delivery system as it saves the time and money. The rising pendency of cases, expensive litigations may cause injustice to the poor people who are often exploited by the richer.

**AWARENESS:**-
Most of the people In India are unaware of their legal and constitutional rights and the court procedure thus the government should take some steps to organize some legal aid programmes, seminars, workshops, camps, publication through media, local cable television, radio, pamphlets, brochures’ and

newspapers etc. about the concept and benefits of ADR mechanism.

LEGISLATURE:-
Legislature should make such a law which give legal recognition to all the forms of ADR mechanisms so that their decisions becomes binding on the parties and the burden on the courts can get reduced. Section 34 of Arbitration and Conciliation act, 1966 should be amended as it allows the parties in dispute to make further appeal in case of dissatisfaction. It has been observed that there is paucity in the infrastructure and the manpower which is acting as a hindrance in the proper implementation of the ADR mechanism. Government should take some concrete steps to allocate proper funding for the ADR mechanism so as to broaden the scope of this mechanism in the future.

LAW INSTITUTIONS
University should inculcate ADR as a compulsory subject in their courses so that the students can pursue their carrier as an expert in this field. Moreover, the professor should also be trained with specific skills of all ADR mechanisms. To enhance the landscape of ADR mechanism, institutions should teach law students about the process and the advantages of the ADR so that they will pursue their carrier as legal practitioner in this field. There is need to work upon the qualifications of the third neutral party as they should be trained mediators.

CONCLUSION
An ADR mechanism is necessary to give effective remedy to the disputing parties. Though most of the people prefer ADR mechanism but it will take more time to get into the roots of Indian legal system whereby people will start preferring it as a primary mode of dispute resolution rather than as an alternative to it.

The researcher answer in affirmative, and deduce that alternative dispute resolution mechanism is more favorable than the court redressed mechanism, if executed with strong administrative set up, trained judges and skilled mediators with efficacious case management this is said on the basis of the analysis of the data collected and examined by the researcher. All over the country the recent trend is shifted from litigation to alternative dispute resolution to some extent, it is very practical submission which if contrive can narrow the workload of civil courts by half. Thus, it becomes the bounded obligation of the bar to take this back-breaking task of implementing ADR on itself so as to get matters settled without going into the warren of judicial procedures and technicalities.
JUVENILE JUSTICE

By Jagriti Thakur & Vanshika Yadav
From Lloyd law college

INTRODUCTION
As we all know youth are developmentally as of different from adults and these difference make them more amenable to intervention and different treatment. Some youth are beyond reform. From its inception, the juvenile court has focused on rehabiting youth rather than give punishment to them. The first juvenile court was establishment with the that youth are everyone’s responsibility both the courts and society need to become partner to ensure that the court has the resources essential to deal effectively with the problems of youth and their families.

To help youth, we should interview effectively with the entire family. If we are juvenile and family court judges do not intervene early and effectively, the child who first comes before the court as a victim has a great likelihood of returning as an offender.

Many problems with juvenile violence threaten the safety and security of communities all over the world the projections for the future are cause nation wide alarm. Demographic expert predict that juvenile arrest for violent crimes will more than double in future. It is clear that our children and juvenilr justice system need more and more effectiveness for eradicate

In the juvenile justice Facilities had substantial and widespread deficiencies in the following areas: crowding, security, suicide prevention and health screening and appraisals.

CROWDING
This had a pervasive problem in Juvenile confinement, affecting sleeping rooms and entire facilities. In the year of 1987, thirty six percent of juvenile were in a facility in which the population exceeded design capacity. These facilities have respond to crowding by restricting particularly in training. As a result, although crowding has become more widespread since 1987, population levels in crowded facilities have at about 120 percent. Injury were higher in crowded facilities making them more dangerous for juveniles. Jurisdiction making plans that identify decisions affecting confinement to control crowding and the plans should be

- Characteristics of juveniles identifying of who enter system.
- Establishing nonconfinement and confinement placement options.

Less experienced members were more likely be injured by juveniles and more likely to injure juveniles.

SECURITY
Security practices are to provide a safe and general environment for juveniles and staff prevent escapes. A level of nonconformance with security assessment criteria and substantial problems with injuries and escapes in juvenile facilities. In this confined juveniles 81% were housed in facilities that made housing assignments based on the factor of risk. of individual juveniles. Only thirty six percent were in facilities in which the supervision staffing ratio met assessment criterion. The classification of juveniles according to the
potential predators victims to protect methods of juveniles.

SUICIDAL BEHAVIOUR
In the juvenile the suicidal behavior was a serious problem. The general population , juveniles in confinement killed themselves a rate roughly double that youth. During the time of 30 days, facilities reported 2.4 suicidal behavior incidents for every 100 confined juveniles. In this most of the juvenile were placed facilities that have been in the suicide prevention and the persons considered to suicide risks at least four times an hour. Suicidal behavior youth were in facilities that screened juvenile for indicators for suicide at risk. Suicidal behavior has lower rates of the facilities conducted suicide screening at admission. and with this other suicide prevention measures- frequent monitoring , training staff and written prevention plans these were not associated with suicidal behavior rates. There v are some certain housing arrangements were associated with suicidal behavior. The problem of increase incidence was associated with placement of juveniles in single rooms or in short term isolation of 1 to 24 hours.

HEATH SCREENING AND APPRAISALS.
Health screening and appraisals were not completed in timely manner and in this 43 percent were screened with a n hour of admission in conformance with national standards and 90 percent of confined juvenile received screening received health appraisals within a week of admission. One third of the juvenile in detention centers provide health screening for the staff members who were not trained by medical personnel. on of this problem.

DRUG COURT
In the juvenile justice drug court is a account that target criminal defendants and offenders, juvenile offenders and child welfare cases who have alchol and other drud addiction. Need of youth with substance use disorder and juvenile, drug court apply similar approach that is trilored. These program provide youth and with their families promote immediate intervention , improve level of functionary , education and other services too built skills that increase their ability to lead drug and promote accountability for all values.

WOMEN AND GIRLS IN THE JUVENILLE ASTEM
As compare to male criminal behavior, female criminal behavior has been commonly precived as a less serious problem. The women relatively a very small numbers of prisoners and these facts secrete a tend in rising percentage of female offenders and their participation in violent crime and inhibited development of gender specific program.

CHILD ABUSE
Child abuse is physical or sexual neglect of the child
Child maltreatment are wide ranging . Juvenile delinquency substance abuse and mental health problems it can be associate with lower school. This can be result in long term social , physical and emotional problem or even death . And even child maltreatment is abroad term that covers all types of abuse and neglect child age of 18 or
another person in this such as a coach or a teacher. Child abuse is associated as several with several risk factors. Although a preoperator of this who is most at risk for being a victim.

CLAIM OF JUVENILLITY
A new section-7A has been interted which lays procedure to be followed which claim of juvenility is raised before any court by Juvenillle Justice amendment act 2006.Any claim of juvenility is raised before any court the opinion would be ascend person was juvenile on the date of commission of the offence. The court shall make an inquiry, such as evidence (out of affidavit) so as to determine the age of the person. In any case a person find to juvenile by the court on the date of commission of the offence, the juvenile shall be forward to the board for passing appropriate order and the sentence if any shall deemed to have no effect.

JUVENILE JUSTICE BOARD
Section 4 of juvenile justice act 2000, the appointment of the members of the board to discharge duties for the district or group of districts and separate system to deal with child in conflict with law. The board would be consist of the judicial Magistrate, as the case may be and two social works of whom at least shall be a women. Under this act no magistrate can be appointed a member unless he has special knowledge or training in psychology and no social worker shall be appointed as a member of the board unless he has been actively involved in the health education or welfare activities pertaining to children for seven years.

BAILMENT OF JUVENILE

JUVENILE DELIQUENCY

Section 12 of juvenile justice amendment act is bail of juvenile. A person can be released on bail also when any person accused of a bailable or non bailable offence and a juvenile is arrested or detained. A board shall be released on bail with or without surety anything contained in CPC or any law force. The section also provide that if there appears believing that the release is likely to bring him a association with any known criminal or expose him physical danger, he shall not so released.

CHILD WELFARE COMMITTEE
Section 24 provides that government may by notification compose for every district or group of district one or more child welfare committee for exercising power and discharging duties conferred on such committee in relation to children in need of care and protection under this act. A chairperson and four other member as the state government may think to fit to appoint. Out of these four members at least one would be a women and another expert on matter concerning children.

HOMES
There are some in the act in the terms of treatment and rehabilitation. A children’s home under section 34 of juvenile justice act, 2006 has been provided of the state government may establish and maintained either by itself or an association with voluntary organizations children home in every district for reception of children in need of care and protection during the tendency of any inquiry and subsequently for their care and treatment.
Juvenile delinquency is the participation of a minor child, usually between the age of 10 and 17 in illegal behavior. The behavior of minor in which the criminal activities are involved and president antisocial behavior and in this a violation of law which is not punishable by death or life imprisonment. Juvenile delinquency it is the habitual committing of criminal acts or offences by a young person especially who are below the age at which ordinary criminal mostly. The most concerning matter is that the generation of youth are believed to be the future by soon their behavior. We can define juvenile delinquency as the behavior of a minor child that is marked by criminal activities persistence antisocial behavior or disobedience which the child’s parents are unable to control.

Juvenile delinquent: there are two types of offenders–

1. Repeat offenders.
2. Age specific offenders.

Repeat offenders – Repeat offenders are also called life course president offenders. It began offending or showing other signs of antisocial behavior deeming adolences. It continue to engage in violation of criminal activities and aggressive behavior even after they enter adulthood age specific offenders – this behavior begins during adolescence unlike the repeat offender, the behavior of the age specific offender ends before. The minor become an adult. The actions of juvenile shows during adolescence are often a good indictor of the type of offender be will become. Age specific offenders leave their delinquent behavior belived when they enter adulthood., they often have more mental heath problem engage in substance abuse and have greater financial problems than adults who were delinquent as juvenile.

Measures to prevent Juvenile delinquency–There are amnyorentions services are offenders by number and private agencies and include search services as-

- Substance abuse treatment.
- Family counseling.
- Individual counseling.
- Parenting counseling.
- Family planning services.

The availblity of education provided proper education and encouragement of minors in obtaining an education play a vital role in prevention of juvenile delinquency. This is important because education promote social cohesion and helps children of all age learn to make good choices and try to lean self control. The office of juvenile justice and delinquency presentation is just one agency that since resources into researching juvenile delinquency and providing both presentation and rehabilitationprogrammes. The agency also works towards reducing under age substance abuse and gang influence on minor.

International instruments – For the protection and physical and mental well being of juvenile the united nations concept are deserved. Juvenile who are through state intervention, deprived of their liberty, there are mainly who are either at social risk or those likely to become social deviants, deprivation of liberty is effected or bis to be effected in conditions and circumstances that will ensure respects for the juvenile human rights and meaningful activities which moved some to promote and sustain their physical and mental health and self respect and encourage those attitudes and that will assist than in developing their
potential as number of society. The international instrument which have an important behaving on and an important relevance to the concept of juvenile justics administration are-

- The United Nations standing minimum rules for juvenile justice administration general assembly resolution.
- United nation declaration of the rights of the child Resolution.
- The convention on the rights of child.
- The convention on the rights of the child Resolution.
- The United Nations declaration of the rights of the child Resolution.

Juvenile justice act, 1986

Objeys and reasons

The proposed legislation aims at achieving many objects. Firstly, like to lay down a uniform legal framework for juvenile justice in the country to ensure that not a single child under any circumstances is in jail or in police lockup. This has been ensured by establishing juvenile welfare boards and juvenile courts. Secondly, to provide for a special approach towards protection and treatment of juvenile delinquency and fulfill the needs of developmental of the child found in any situation of social fault adjustment. Thirdly, to provide the machinery and infrastructure required for care, protection, treatment, development and rehabilitation of different categories of children coming with in the purview of juvenile justice system. It is proposed to achieve by establishing observation homes for neglected juvenile and special homes for delinquent juvenile. To formation of norms and standard for the administration of juvenile justice. For investigation and prosecution, adjuction and disposition care and treatment. Fifth, to create co-ordination between the formal system of juvenile justice and voluntary agencies working in welfare of neglected children and to specifically define the areas of the responsibilities. Sixth, to take care of special offences and relation to juvenile and provide for punishments.

The objective of this act reflect in case Krishna bhgvan V state of Bihar, the Punjab high court observes that offenders were subjected to punitive measures of compensatory redistributive and deterrent character with no or very little attention to their personal and social circumstances. But gradually with the sweeping social and economic charges together with a rapid progress of science dealing with social circumstances. Juvenile justice act has been enacted with this end in view.

In the case Dajitsingh V state of Punjab, the court observes that we have to keep in mind that before coming of juvenile justice act, there were different states enactment operative in different states. It’s undoubtedly clear that the juvenile justice act, 1986 is a complete court in itself and has sweeping overwriting effect on any other enactment of the state legislature, the court rejecting the inquiry of trial against delinquent juvenile or any other criminal charge.

Juvenile justice (care and protection of children) 2000

Juvenile justice act 1986 was enacted by legislature in response to a long standing demand for rationalizing the system of dealing with socially deviant children in keeping with the spirit of social justice the act provided for care protection and rehabilitation of neglected juvenile justice (care and protection), 2000 repealed the

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408 1992 Cr 1051: 1992(1) crimes 142
juvenile justice act, 1986. There was demand for replacement of act 1986, was coming from the long time. Dissatisfaction at large scale with functioning and effective of juvenile justice act, let some demand the exclusion of neglected children from its purview the main fault in the act 1986 was that it did not provide for a differential approach to delinquent and neglected juvenile.

IMPORTANT PROVISONS OF JUVENILE JUSTICE ACT

Juvenile delinquent has been rephrased as juvenile in conflict with law the definition of this rephrased is the same that given in section 2 (L) i.e. ‘ a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years’. Juvenile conflict with law means a juvenile who is alleged to have committed an offence.

One of the difference between 1986 act and 2000 act relates to the age of male and female under 1986 act, a juvenile means a male juvenile and a juvenile means a female juvenile on the basis of age has not been maintained, the age limit is 18 years both female and male.

In the case Bhavnagar university V Palitana sugar milk (P ltd.) 409 it was held that in terms of 1986 exact, a person could be tried in any court who is not a juvenile. Section 20 of 2000 act, take care of such act a situation taking that the same, the trial continued in that court as the act help not been passed and in the event, he is formed to be guilty of the commission of an offence in the case Sihnod India ltd. V CCE 410 held that a legal fiction as is well known must be given its full effect although it has its own limitations in another case state of Maharashtra V LaljitRajshi Shah 411 observed that after ascertaining the purpose the court has to assume all those facts and consequences which are incidental or inhabitable for giving effect to the fiction. But in so construing the fiction is not to be extended beyond the purpose for which it is created or beyond the language of the provison by which it is created.

Pratap V state of Jharkhand 412 the constitution bench held that the gae of the offender must be reckoned from the date when the alleged offence was committed it is written in terms of 1986 act. According 2000 act will have the limited application in the case pending under 1986 act. The court would be entitled to apply the ordinynaery rule of evidence for the purpose of determining the age of juvenile taking into consideration the provison of section 35 of evidence act as the model rule framed by central government have no staturary word.

Conclusion

At last we conclude that its important to remember that it will take long time to see an impact from child, prent, and school interventions than from community interventions. An additional finding worth noting is that much juvenile violence commit when there is a group of unsupervised teenagers. Although adolescents cannot and should not be supervised at all times, it is possible to increase the level of supervision in some

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410 JT 2004 (6) SC 456
411 (2000) 2 SCC 699
412 JT 2005 (2) SC 271
circumstances, particularly in and around schools. Many action plans provide model program examples that communities can draw from to address several areas where problematic areas identified by the Juvenile Violence Research Studies, including reducing youth involvement with guns and gangs and providing more neighborhood-based programs for children and youth. Many experts observed that December 2012 Delhi Gang Rape responses as creation of media sensationalisation of the issue, and cautioned against any regressive move to disturb the momentum of Juvenile Justice Legislation in the Country. However some sections in the society felt that in view of terrorism and other heinous offences, Juvenile Justice Act of 2000 needed to be amended to include punitive approaches in the existing Juvenile Justice Law, which so far is purely rehabilitative and reformative. In July 2014, Indian Express reported that Pakistan-based terrorist organization Lashkar-e-Toiba had asked its members to declare their age to be below 18 years. This would ensure that they are tried under the Juvenile Justice Act instead of the Indian Penal Code (IPC). The maximum punishment under the Act is three years.

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A FLICKERING DEBATE ON THE FEMALE GENITAL MUTILATION-AN UNTOLD DARK SECRET

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INTRODUCTION:

Should the bodily integrity of women be brooked to be settled or Infringed? Sequences of torment and Female Genital Mutilation are envisaged as clips of twinge and notches into the human flesh of female genitalia. Female Genital Mutilation and the spill of the same has been a subject of representation in sundry liberal discussions of law and violence as a chronicle of misfortune. The Chronicle of Female Genital Mutilation is, therefore, no anodyne story, where a human is being held down, a human is being deprived of rights, a human is being subjected to a laceration. The female Genital Mutilation is a speculation that is inundated with the unseens of law. It is nevertheless, inexorable that in a bailiwick being unfixed as far as the contemporary endeavors in decimating Female Genital Mutilation there are matters to which dispassionate and comprehensive acknowledgement has not been laddled out thereby making it ineluctable. Injuring or altering the genitalia of women/children through a procedure for non-medical reasons are called as Female Genital Mutilation(FGM/C)- has the possibility of increasing the risk of HIV transmission, Infertility etc.". The very first reaction on FGM/C is a bamboozlement to many, whereas to some it is an incredulity and trepidation. The hunt arising out of the responses to the procedure(FGM/C) has not been adequate as this brutal practice continues. This conventional praxis has allured the attentiveness and the curiosity of the global policy arena for the past two decades. A sundry of terms have been used in the local dialects by the Indigenous populations while describing this procedure(for example: bolokoli in Mali). Tracing the fundamental cause of occurrence of this practice, it divulges that the patriarchal society which we live in where many women still surmise that marriage can be the only means of reifying security. This FGM/C has always been viewed as a debate as it always promulgates a dichotomy which is the Individual rights versus the Collective rights. Female Genital Mutilation has now become a foreshadow of menace in today’s world. Female Genital Mutilation is not just an issue to be addressed and to be given concern for a particular city/ state, but Female Genital Mutilation today is a “Global Concern”. The World Health Organization has firmly urged that the health professionals are not supposed to carry out this procedure as it affects the health of a girl child with long-term impacts. Infections such as tetanus, heavy bleeding, severe infections, death etc can be examples of consequences that would result from FGM/C. The FGM/C is carried out mainly in girls who are young(occasionally in girls between infancy and

413 Juliet Rogers, Laws cut on the Body Of Human Rights Female Circumcision, torture and Sacred flesh, 4(2013)

414 What you need to know about Female Genital Mutilation, UNICEF for every child, https://www.unicef.org/protection/57929_endFGM.html
adolescence) which can be classified into four types. The crucial point to note here is that there is no relevance to any religious scripts prescribing this barbarous procedure, but the practitioners have a belief that FGM/C has a religious base. People belonging to certain groups believe that the formidable slur possible for a boy child is “Are you a son of an uncircumcised woman?”. What is seen is to put young girls into a trauma is portrayed as a cultural practice in the Society? Steps have been taken by the World Health Organization for abnegating this practice, one such step would be the passing of a resolution WHA61.16 in the year 2008 for eliminating the same. Viewing this practice from a human rights perspective, it is evident that it actually reflects deep-rooted inequality and discrimination on the basis of gender/sex. It is seen that this issue has been addressed by many monitoring bodies belonging to the United Nations human rights treaty. It is true that there are various International treaties (A convention adopted in the year 1951 in relation to the status of refugees, protocol in relation to the status of refugees, committee on rights of the child etc) regional treaties (African Charter on Human and Peoples’ rights, African charter which was adopted in the year 1990 on the Rights and welfare of the child etc) and consensus documents (such as Beijing Declaration and a platform for action of the fourth world conference on women, UNESCO Universal Declaration on Cultural Diversity etc) addressing this practice but it is pathetic to see the practice still being continued due to various cultural and religious reasons in the world. As far as India is concerned, the practice is mostly performed among the Dawoodi Bohra Muslim Women and few sects of Muslims in kerala. There are provisions in the existing laws in India such as IPC and POCSO Act, but what India lack today as far as the eradication of the practice is concerned is the enforcement. Effective Enforcement of the existing law is the key to the abnegation of any brutal practice.

FEMALE GENITAL MUTILATION AS AN UNTOLD DARK SECRET IN INDIA: DEARTH OF DESIRE, INNOCENCE AND FREEDOM:
The practice of Female Genital Mutilation (FGM/C) still stands as an unambiguous proof as to why India is seen as a country holding dark secrets in many dark corners without giving any voice over it. It is not only a precarious practice making women and children suffer at such an early age, but also it has a lot of effects to be faced spoiling their future thereby. It is seen that more than 200 million girls (approximately) in the world have already been cut and the number is absolutely rising. This perilous practice was seen to be practiced in Africa initially but now India cannot be named as an exception as this practice is being practiced very secretly in India. This cruel practice named Female Genita Mutilation (FGM/C) is seen to be banned in around 27 African countries according to a report, even

415 Female Genital Mutilation, World Health Organization, (January 31, 2018), http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

countries like United States Of America and the United Kingdom have outlawed this barbarous practice (FGM/C) with a unanimous resolution having been adopted by the UN general assembly in the year 2012 for eliminating the same. Generally, it is observed that it is the Dawoodi Bohra community who actually maintained it as a secret for a long period of time as far as India is concerned. The Female Genital Mutilation/cutting is seen to be a very productive practice among the Muslim Dawoodi Bohra Community in India called as khafid or khatna. This cruel practice is seen to be practiced among few sects such as Dawoodi, Suleimani and Alvi Bohras capturing systematic public attention since 2012 in India. This practice is also observed to be reportedly practiced in different parts of states like Kerala among few sunni subsects of Muslims and the same is commonly referred to in the state as female Sunnath Kalynam. According to several reports and complaints, it is the Bohra’s girl mother or grandmother who takes her to place where she could be controlled physically and this practice is performed in the place very secretly at the age of seven years generally. During this practice, it is observed that generally a part of women’s clitoris is being removed abruptly in the name of culture. And the most contradicting fact is that the women of Bohra community are seen to be historically more empowering and economically independent in general compared to all other women in the society itself, the Bohra community enjoys a special place in India as a model minority who pride themselves as the most law-abiding citizens of the country. The most striking factor which should be given primacy is that unsurprisingly the mother’s age belonging to the Bohra community is not considered to be taken into regard as to whether or not the daughter would be prone to this abrupt practice khatna. In the age where a child could only literally imagine of being given chocolates and Ice cream it is completely disheartening to see young children and women being prone to this crude practice where all they can do is scream and cry in tremendous pain. They go wholly helpless and the most unfavorable part is they call tradition as a reason for the same. As far as India is concerned there are four types of Female Genital Mutilation practiced by the Bohra community which is classified by the World Health Organization. First type is where the clitoris is abruptly removed either partially or grossly, second type is where the clitoris is removed partially or grossly with or without the labia majora, third type is the removal of labia minora or majora and the stitching of the vaginal opening either with the ejection of clitoris or without the ejection of clitoris and the final type includes all other superfluous procedures such as pricking, cautery of the female genitalia etc. All these types of Female Genital Mutilation have several other impacts such as physical effects (burning sensation during urination),

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Immediate physical effects (excruciating, pain, bleeding, difficulty while walking etc), Long-term physical effects( wearing sanitary napkins were always seen to be problem, burning sensation every time while urinating), sexual impacts and sexual problems (lack of sensitivity in the clitoral area, feelings of inadequacy, disturbing thoughts during sexual intercourse, low sex drive, disinterest in initiating sex, delayed arousal, dryness, lack of lubrication, pain during the sexual intercourse and difficulty masturbating etc) and several other psychological impacts too419. Sex education is the key, lack of sex education is reported as one of the reasons as to why a lot of women still suffer in silence. Given how aborning this field is, there are no fixed and true estimates yet with regard to the extent and the frequency rates of FGM/C as far as India is concerned.

EXISTING LEGAL SKELETON IN INDIA- THE INTERNATIONAL AND REGIONAL INSTRUMENTS WITH REGARD TO FGM/C:
As far as India is concerned there are already laws prohibiting this practice such as the Indian Penal Code and the POCSO act, apart from which we have various other International and regional Instruments which is applicable globally. According to an estimation given by the UNICEF, the cruel practice named FGM/C has been practiced on 200 million girls children throughout the world causing severe psychological as well as long-term physical impacts. As far as India is concerned, there are necessary safeguards already prohibiting this barbarous practice but all we need is an effective enforcement of the same. It is a practice generally performed to bring women’s sexuality to control. How do women become victims as soon as this cruel practice is performed on them? When a girl child is prone to this practice she automatically becomes a victim of discrimination based on gender, where her fundamental rights and liberties are curbed thereby. The very prohibition of discrimination based on gender/sex is supported by various International and regional Instruments. Since this barbarous practice is seen to be practiced among girls below the age of 18 years it infringes the guarantee of non-discrimination. Also, it is a whole violation of rights that are given in the UNCRC (The United Nations Convention on the Rights Of the Child,1989). Since 1948, this barbarous practice has been an issue of the United Nations as it has brutal consequences on women and children420. To start from the UDHR (Universal Declaration Of Human Rights, 1948) article 3, provides that every individual has a right to life. And no Individual shall be prone to or subjected to any kind of torture(Article 5 of Universal Declaration Of Human Rights). Article 7 of the International Covenant On Civil and Political Rights(ICCPR) also provides that no individual without his/her

419 Lakshmi Anantnarayan, Shabana Diler, Natasha Menon, Khafid or Female Genital Mutilation/Cutting(FGM/C) in India_ The Clitoral Hood A Contested Site, http://www.wespeakout.org/site/assets/files/1439/fgm c_study_results_jan_2018.pdf

consent/permission shall be subject to any medical examination. This practice actually discriminates women and children on the basis of gender firstly, which is actually an explicit violation of article 1 of CEDAW (Convention on the elimination of all forms of discrimination against women, 1979) which provides a definition as to what constitutes the term discrimination (discrimination can be defined as any exclusion or a kind of restriction made on the basis of sex, which in turn has the impact or effect of nullifying any enjoyment by women provided that their marital status is immaterial). Next comes the rights such as the right to life and physical integrity that gets violated by this brutal practice. The basic human right as protected by International Instruments such as UDHR (Article 3), ICCPR (Article 6), and UNCR (Article 6) is right to life. According to various complaints, this cruel practice named FGM/C may even lead to death that can be either maternal or neonatal in very extreme cases. Right to liberty, dignity, security and the right to privacy are all seen to be violated by FGM/C which is guaranteed by a wide number of human rights principles. Threatening the lives of women and children by subjecting them to FGM/C violates the physical integrity of them at large. There are a lot of other rights being violated in addition to what is provided above, one such right would be “The right of every individual to the highest attainable standard of physical health as well as mental health as provided in the UDHR (Article 25), and ICESCR (Article 12). Female Genital Mutilation (FGM/C) is generally practiced among the children (girls) in the age ranging from 1 to 15 years, hence the practice by itself can be said as a violation of the child’s rights. In the year 1990, the Convention On The Elimination Of All Forms Of Discrimination Against Women, 1979 (CEDAW) committee in the year 1990 has adopted a general recommendation (No. 14) on female circumcision itself, there are other provisions provided by the International and regional Instruments, declarations and resolutions globally to put an end to this brutal practice.

TIME TO ALTER THE NARRATIVE--ROAD TOWARDS ENDING A PERVERSE PRACTICE

It is mandatory that, for any act or practice to be performed, it has to stand the scrutiny of the Indian Constitution. If not it cannot be continued, in this case, this practice cannot stand the test and hence discriminatory. A biggest universal programme has been jointly led by the UNICEF and the UNFDPA in accelerating the abnegation or abandonment of the Female Genital Mutilation. They play a significant role in accelerating a change today. The only living document which can play a significant role in shaping the values and morality in India would be our very own constitution, with Supreme Court having its power in interpreting the same taking into consideration the fundamental values and changes in the society which could be witnessed day by day, it would be exhilarating to see the Supreme Court comes with a decision completely banning this cruel practice which is actually being

performed without any medical reason as that would be a huge step towards eradicating the practice itself. Looking into the Indian constitution Article 14 clearly provides that equality cannot be denied to any person by the state, whereas Article 21 deals with the protection of life and personal liberty. Despite having explicit protection under the Indian Constitution itself, it is wholly forlorn to see this practice being tolerated in India among the Dawoodi Muslim Bohra community at large. Article 25 of the Indian Constitution deals with the freedom of conscience, free profession, practice and propagation of religion. A Public Interest Litigation(PIL) was filed by Sunita Tiwari in the Supreme court of India by February 2017 who is a Delhi based lawyer against the practice of khalf(Sunita Tiwari vs. Union Of India). She stated in her PIL that this practice of Female Genital Mutilation(FGM/C) has been carried out in India without any medical reason or without having any reference to the religion hence the same should be declared as a non-bailable offence, she also said that the women belonging to the Dawoodi Bohra Community are being forced to undergo this practice a result of which they are being put in a physical and mental trauma. On the other side unsurprisingly the Dawoodi Bohra Women’s Association cited 13 religious texts in explaining its point. They claimed that this was actually a matter of religious freedom, which was guaranteed by our constitution under article 25 and 26. But the question is whether female genital mutilation is a religious practice that could be conferred protection under article 25 of the Indian Constitution. Religious freedom in India is dealt with under article 25 and 26 of the Indian constitution. As female genital mutilation has got irreparable effects to girls and women at large, Article 25 of the Indian Constitution was referred by the top law officer who referred the same and said that if a religious practice is against any public order, morality and health, then it can be stopped.

CONCLUSION:
Female Genital Mutilation cannot be called as essentially a religious practice when it has been held illegal and criminal by the law itself. With Female Genital Mutilation being constituted as an offense both under the Indian Penal Code(IPC) and the Protection Of Children From Sexual Offenses Act(POCSO Act), the practice cannot be called as the essential practice of religion. Any touching of the genitals with the exceptions being given by medical reason is an offense. Despite having provisions in

426 Female Genital Mutilation Violates Constitutional Rights: Supreme Court, NDTV, (July 31, 2018, 07:26
IPC, the question that pops up in every citizen’s mind is “why are the provisions of IPC not being enforced strictly?” and perhaps that can also be said as one of the reasons as to why blindly women and children still seem to be brooking this 14th-century-old custom. Despite the Supreme Court of India taking its yet another stand on this vicious practice of female genital mutilation holding that women have numerous obligations to do even beyond their marriage, not surprisingly India still seems to be a hub of maintaining the same as a dark secret. The Supreme court also held that this merciless practice is seen to be violating the articles 15 and 21 of the Indian constitution which guarantees personal liberty and without a doubt their right to life thereby scrapping discrimination on all grounds. In order to reaffirm faith on the judiciary and on our Indian constitution a complete ban on this cruel practice (FGM/C) is a must.

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MRITYU DANDA: IN MODERN INDIA

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ABSTRACT
“An eye for an eye makes the whole world blind.”

-Mahatma Gandhi

India being a developing country has been facing a problem of an increase in crime rates. In India, there are numerous laws and legislations which have been in force to prevent the commission of crimes. On 31st August 2015, the law commission of India submitted its report to the government which recommended the capital punishment should be abolished for all crimes in India except the war wagging crime or crime related to terrorism. Various kinds of punishment have also been attached with such legislations (i.e. imprisonment, life imprisonment, fine, the death penalty (capital punishment)). Capital punishment is a carrying out of a legal sentence of death as punishment for crime. The Supreme Court of India has recently gave the order that capital punishment is not unconstitutional as a result the courts are free to use capital punishment for grievous offences committed or in rarest to rarest cases. This research says about the status of capital punishment in India and also defines the concept of capital offence and also the modes of capital punishment in India, also explains the two major theories related to capital punishment in namely retributive theory and preventive theory and also explains about the rarest of rare cases. The research article has also shown that the influence of news media, public pressure on lawmakersand study about the present status of capital punishment present in India and the changing scenario of the public in the country and why it is still necessary for India.

Keywords: Punishment, Crime, Legislation, Capital offences.

INTRODUCTION

In 1931, Benjamin Cardozo predicted that perhaps the whole business of the retention of the death penalty will seem to be the later generation, as it seem too many even now, anachronism too discordant to be suffered, mocking will gruesome reproach of all our clamorous professions of the sanctity of life. India is a country where a large number of crime and criminals are increasing on an everyday basis and many legislations have been amended to impose the punishment rigorously maximum of the punishment in India are based on the motive to give penalty for the wrong doer the reason behind imposing these rigorous punishment one being that the wrongdoer must suffer and other one the suffering of wrongdoer discouraging others from further doing any such offences. Maintenance of law and order has been one of the primary functions of state prescribe law which provides punishment for doing offences one of them being capital punishment or death penalty the term capital is derived from Latin term capitals means head referring to execution.


429 Benjamin N. Cardozo, Law and Literature (1931) 93-94
by beheading capital punishment is said to be justified only in extreme cases in which high degree of culpability is involved causing grave danger to society. While awarding capital punishment personal attribute of convict circumstances in which offence was committed gravity of offences etc. are taken into consideration. Death sentences have been given occasionally in the past having a retributive effect and the contention being presented for such retributive justice are based on the principle of lex talionis, meaning “eye for an eye and tooth for a tooth”. Legal vengeance solidifies social solidarity against lawbreakers and probably is the only alternative to the disruptive private revenge if those who feel harmed.430 The Constitution of India also gives power to the governor under Article 156 and to the president under Article 72 for pardoning of capital punishment to a wrongdoer on his discretion.

CAPITAL PUNISHMENT IN INDIA
The capital punishment is a contemporary concept for Indian justice delivering system it has been prevailing in India since ancient time the ancient lawgiver Manu has also emphasised on the use of fear for the judicial phenomenon he propounded that to stop people from committing such sinful offences the death penalty was a necessary instrument otherwise the society will not be in harmony, and a barbaric society will be in action where the powerful people will be suppressing the weaker section. In Modern India, the provision of the death penalty is also prevalent and is awarded for most heinous and grievous offences. Article 21 of the Constitution of India provides “no person shall be deprived of his life except by the procedure established by law” this article provides that every person has a right to live with dignity and that this right of his can only be altered by the just procedure established by the law of the land. The Indian penal code of India also provides death sentences in the form of punishment for various crimes which are of the different manner in commission:

1. Waging war against the state.
2. Abetment of mutiny.
3. Giving or fabricating false evidence leading to procure one’s conviction for a capital offence
4. Murder
5. Abetment of suicide committed by child or insane
6. Kidnapping for ransom
7. Dacoity with murder

Although the aforesaid offences are provided for the death penalty, but there has been an alternate punishment (i.e. life imprisonment) for all of the above-mentioned offences have also been provided so this is left on the discretion of the court to decide whether to give death penalty is the last option to serve the end of justice. Further in that also the judge also has to provide for the special reasons for why the alternate punishment cannot be awarded. Further, the Supreme Court of India in its judgment said that capital punishment should only be given in rarest to rare cases only.431

METHODS OF EXECUTION IN INDIA

431 Bachan Singh v. state of Punjab, I[980], MANU/SC/0111.

www.supremoamicus.org
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From the ancient time in India, there has been a different method for execution for capital punishment such as crucifying, drowning, burning, beheading, throwing before wild beast hanging the offender by the neck till death in public places, shooting by gun, starving him till death. All the above-mentioned modes were considered to be the barbaric modes and are not prevailing in present scenario due to the humanitarian approach to penology. In India there are two modes through which the execution of capital offenders takes place:

**Hanging** : All capital punishment in India have been executed by hanging the convict by the neck till death after independence, the first person to be executed by this method was they murderer of Mahatma Gandhi (i.e.godse).

**Shooting** : In India, The Army Act and Air force Act also give the method of execution shot till death to convict. The Air force Act, 1950 also allows the court-martial to thrust the death sentence for the unlawful act.

**CORROBORATION OF DEATH SENTENCES**

The Code of Criminal Procedure, 1973 provides that the death sentences can be only passed by session judge or an additional session’s judge. Further, the code also specifies that the sentence passed by the session judge shall be subject to confirmation proceeding before the high court exercise jurisdiction over it.

The Supreme Court of India has also provided in its judgment that these provisions ensure that the entire evidential material bearing on the innocence as or guilt of the accused and the question of sentences must be scrutinised with utmost caution and care by a Superior Court further the Indian penal code also provides many of the provisions which provide death penalty as a form of punishment (i.e. Section 121,132,194,302,305,307,364-A, 396).

**PARDONING POWER OF PRESIDENT AND GOVERNOR**

The pardoning powers have always been provided to the highest authority in society for example in ancient times, this power was conferred to kings who can grant pardon to the convict in same way in Modern India the Constitution of India has also provided the power to pardon the death sentence in the hands of executive heads of state to president of India where it provides that the president of India and governor of state shall have the power to grant pardons, reprieves, respite or remission any punishment or to suspend, remit or commute the sentences of any convict of capital offence.

1. In all such cases where the punishment or sentence is by a court-martial.

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432 The Air force Act 1950, Section 34(a) to (o), 163.
435 Bachan Singh v. state of Punjab, [1980], MANU/SC/0111.
436 The Indian penal code,1860.
437 The Constitution of India,1950,part-v Article-72,161.
2. In such cases where the punishment is of the death sentence.

3. In these types of cases where the punishment or sentence is for an offence against any law relating to the matter to which the executive power of the Union extends.

The Supreme Court of India quashed an order of the governor pardoning a person convicted of murder on the basis that the governor had not been advised properly with all the relevant materials. The court further spelt out specifically the consideration that need to be taken in account of while exercising the power of pardon, namely the period of sentence in fact undergone by the said convict as well as his conduct and behaviour while he underwent the sentence the court further stated “not being aware of such material facts would tend to make an order of granting pardon arbitrarily and irrational.”438

CRIMINOLOGICAL APPROACH OF CAPITAL PUNISHMENT IN INDIA

There have been two major theories prevailing in India for capital punishment which are:

1. Retributive theory
2. Preventive theory

Retributive theory: “Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society. Instead it must in all cases be imposed on him only on the grounds that he has committed a crime; for a human being can never be manipulated merely as a means to the purpose of someone else.”439

Further it can be said that this theory of retributive is an end in itself and based on the concept of evil should be returned with evil where it can be clearly said that this is based on the concept where the whole theory is related to the vengeance or revenge and the contention given is that the pain faced by convict should be more than the good he has gained from committing that crime.

Preventive theory: Prevention is better than cure; the main aim of this preventive theory is to keep the offender away from society. According to this theory the main aim of punishment is to set an example for others and prevent them from committing further criminal activity this theory further promote that an convict who has undergone the imprisonment will not be committing any further crimes as being aware of the severest form of imprisonment he has faced in the past in this theory the death penalty is considered to be the most severe form of punishment where it ends the life of a convict as he has also taken the life of another man.

JUDICIAL TRENDS IN CAPITAL PUNISHMENT

The Supreme Court of India in a case has struck down Section 303 of the Indian Penal Code, which provided for mandatory death punishment for offenders serving life sentences.440

439Emanuel Kant “Meta physics of morals”1797 part 1.
As the Supreme Court has also led down guidelines that only in rarest to rare cases the capital punishment can be given which has shaken the collective conscience of society.

Further it has also been provided in another judgment of Supreme Court of India where it has provided that death sentence act as deterrence but as token of emphatic disapproval of the crime by the society, where the murder is diabolical in conception and cruel in execution and that such murderers cannot be simply wished away by finding alibis in the social maladjustment of the murderer.\textsuperscript{441}

Justice V.R Krishna Iyer was of opinion of not imposing death penalty in one of the judgements of Supreme Court of India where he quoted Benjamin Cardozo from the nature of the judicial process by saying that “if a judge has woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, their hands of their successors.”\textsuperscript{442}

**LAW COMMISSION REPORT ON CAPITAL PUNISHMENT**

The Law Commission of India presented its report in which it was provided that the objective of capital punishment is the society’s rage against criminals rather than their feelings of revenge. Therefore, maintaining capital punishment in law and further the report provided:

1. If at the generation of the crime the age of criminal is less than 18 years, he should not be granted capital punishment.
2. Being women is no reason to escape from capital punishment.
3. In India, the attempt to commit suicide should not be considered as a capital crime.
4. The death penalty does not provide the penological goal of deterrence any more than life imprisonment. Further, life imprisonment under act means imprisonment for the whole of life subject to just remissions which, in many states in cases of heinous crimes, are granted only after many years of imprisonment which range from 30-60 years.
5. Retribution has an crucial role to play in punishment. However, it cannot be reduced to vengeance. The notion of “an eye for an eye, tooth for a tooth” has no place in our constitutionally mediated criminal justice system. Capital Punishment fails to enact any constitutionally valid penological goals.
6. The Commission accordingly recommends that the death penalty is abolished for all crimes other than terrorism-related offences & waging war.\textsuperscript{443}

**INFLUENCE OF NEWS MEDIA**

The best source of information for any social topic the society receives the news from media & such information whether fake or does not leave an influence on the general mass. Especially the issues like capital punishment which is a big social issue in the media play a prominent role in developing the presumption of mass towards such

\textsuperscript{441} Jagnohan Singh v. state of Uttar Pradesh [1991]3,SCC-471.

\textsuperscript{442} Rajendra Prasad v. State of Uttar Pradesh AIR1979,SC,916.

\textsuperscript{443} Law commission of India, “The Death penalty”, 2015(law commission report No.262).
convict or accused of capital offences which means that the role of media is not just to provide mass with the facts & reports of cases, but generally it sometimes make people what they want them to believe in. The result of which is that though the cases of capital punishment is statistically rare in India still they get so much attention of news media which can sometimes affect the reality in which the people believes in this can be considered as another reason as to why there is sometimes high demand & from society to give capital punishment to those who commit offences which are not acceptable by the society.

CONCLUSION
The capital punishment in India has been a debatable issue from last few decades, and till now there has been a lot of development in the process of deciding about the cases in which the death penalty should be given. The Supreme Court in its recent judgement has led down that capital punishment is constitutional although different views can be seen in the bench while giving the verdict. The law commission has also led down in its report that capital punishment has lost its influence as an effective tool to deterrent the criminal to commit capital offences; thus it can be concluded from the above research that capital punishment should be abolished and different means of punishment should be thought of having rigorous impact on criminal to change his thinking not taking his life only the pain he should be suffering must not be physical only but emotional too. Like the movie, “Shawshank Redemption” has provided that life in prison thinking about the crime committed by them is much more painful than the death they have to face the punishment. Thus it can be said that life imprisonment is much worse than capital punishment as a penalty for the commission of a capital offence.

SUGGESTIONS
- Capital punishment should be abolished.
- The reformatory approach should be taken while dealing with the convict of capital offences.
- The media should not be permitted to propagate any view about the accused of capital offences.

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MEANING OF EARNEST MONEY

“Earnest money is part of the purchase price when the transaction goes forward.” In some cases, when the parties enter into the contract, they intentionally use the word “advance” but mere misdescriptive nomenclature will not conclude the matter. What may be called “advance” may be “deposit” and what may be termed as “deposit” may ultimately be proved to be “advance”. In either case, the cardinal rule of interpretation of the contract is to find out whether the actual intention of the parties will be applicable. And such an intention can be gathered by the express terms of the contract or from the conduct and by the surrounding circumstances incidental to such a contract. But this is not considered as the sole guide for the purposes of determination of the fact whether the amount should be treated as “earnest money”, or it is just a “deposit”. If by pleadings or proof, it is established that the amount given by the depositor as earnest money for the due performance of the contract only then it can be forfeited by the deposit notwithstanding the breach of the contract by the depositor: this proposition, however, is subject to the doctrine of reasonableness.

According to Earl Jowitt, “Giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds”. As observed by the judicial committee in Charanjit Singh v. Har Swarup, “Earnest-money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendor.” Similarly, in HUDA v. Kewal Krishan Goel, this Court quoted the following observations of Hamilton, Sumner and Leivesley v. John Brown & Co., with regard to the meaning of “earnest”:

“Earnest” … meant something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver or if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited.

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444 Krishna Chandra v. Sanat Kumar, ILR 44 Cal. 162.
445 The dictionary of English Law, 689.
447 Charanjit Singh v. Har Swarup AIR 1926 PC I
448 HUDA v. Kewal Krishan Goel(1996) 4 SCC 249
449 Sumner and Leivesley v. John Brown & Co(1909) 25 TLR 745
450 Villayati Ram Mittal (P) Ltd. v. Union of India, (2010) 10 SCC 532
BASIC FEATURES OF EARNEST MONEY

♣ It must be given at the moment when the contract is concluded.

♣ It must be the part of the purchase price when the transaction is carried out.

♣ It must be present as a guarantee that the contract will be fulfilled or, in other words, it can be said that it must be given to bind the contract.

♣ It is only forfeited when the transaction falls through by reason of the fault or failure of the purchaser.

♣ Moreover, on default omitted by the purchaser, the seller is entitled to forfeit the earnest money, unless there is anything contrary in the terms of the contract.

Thus, in a given contract if a sum is paid under the heading “deposit” or “earnest money” or has to be interpreted as such, according to the intention of the parties, and is made forfeitable in case of breach, even the courts have to adjudge the reasonable compensation to which the party would be entitled to, in such circumstances. The above mentioned features were laid down by the Supreme Court in the case of Hanuman Cotton Mills after reviewing various decisions noted in the judgement, which includes that of the Privy Council rendered in Chiranjit Singh’s case. Precisely, it can be said that features of “earnest money” serves basically two purposes:

♣ Firstly, it moves in part payment of the purchase money for which it is deposited; and

♣ Secondly, but primarily, it is the security for the performance of the contract.

DIFFERENCE BETWEEN EARNEST MONEY AND SECURITY DEPOSIT

Security Deposit — Money deposited by or for the tenant with the landlord, to be held by the landlord for the following purposes: (1) to remedy tenant defaults for damage to the premises (be it accidental or intentional), for failure to pay rent due or for failure to return keys at the end of the tenancy; (2) to clean the dwelling so as to place it in as fit a condition as when the tenant commenced possession, considering normal wear and tear; and (3) to compensate for damages caused by a tenant who wrongfully quits the dwelling unit. The security deposit is not regarded as liquidated damages, but rather is a fund held in trust for the tenant that the landlord can use to offset damages caused by the tenant. A security deposit is not taxable to the landlord until applied to remedy any tenant defaults. Neither can the tenant take the deposit as a tax deduction. Some states require security deposit monies to be placed in an interest bearing account in trust for the lessee.

The tenant’s claim to the security deposit monies is superior to all claims of the landlord’s creditors. An exception is claims of a trustee in bankruptcy.

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452 Chiranjit Singh v. HarSwarup, AIR 1926, PC 1

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Under the Uniform Residential Landlord and Tenant Act, the security deposit may not exceed one month’s rent. The landlord must return the security deposit, less any authorized retained portion, to the tenant no later than 14 days after the termination of the rental agreement. The landlord must give written notice to the tenant setting forth the grounds for and evidence supporting any claimed retention of any portion of the security deposit. Certain states require landlords to return security deposits to tenants within a specified time period and to account for all claims to any part of the deposits; disputes over security deposits may be handled expeditiously in small claims court, which provide for penalties in the event a landlord fails to comply with the regulations. Difficulties in the accounting and administration of security deposits have led some authorities to advocate their abolition. Although the Uniform Residential Landlord and Tenant Act preserves the security deposit, it limits the amount (one month’s rent) and prescribes penalties for its misuse. The act does not limit the prepayment of rent, as distinguished from security deposits; nor does it require the landlord to pay interest on the security deposits.

The lease should clearly specify whether a payment is a security deposit or an advance rental. If it is a security deposit, the tenant is not entitled to apply it as discharge of the final month’s rent. If it is an advance rental, the landlord will have to pay taxes on it when received. Many state laws specifically state that the security deposit is not to be construed as payment of the last month’s rent by the tenant. When the lessor sells the property, the sales contract should cover the appropriate accounting of security deposit monies (i.e., debit seller and credit buyer).

**Earnest Money Deposit** — The cash deposit (including initial and additional deposits) paid by the prospective buyer of real property as evidence of good-faith intention to complete the transaction; called bargain money, caution money, hand money, or a binder in some states. The amount of earnest money deposited rarely exceeds 10 percent of the purchase price, and its primary purpose is to serve as a source of payment of damages should the buyer default. Earnest money is not essential to make a purchase agreement binding if the buyer’s and seller’s exchange of mutual promises of performance (that is, the buyer’s promise to purchase and the seller’s promise to sell at a specified price and terms) constitutes the consideration for the contract. Thought should be given to placing the money in an interest-bearing account for the buyer’s benefit, which can be done by the parties agreeing in writing to place it with a neutral third party such as an escrow company.

The deposit, or earnest money, is usually given to the broker at the time the sales contract is signed. The broker’s authority to hold this money on behalf of the seller should be specifically set forth in the listing, because such authority is not implied in law. The broker has the responsibility under the license laws to deposit this money into a client trust account or neutral escrow; or with the knowledge and consent of both parties, the broker may hold the earnest money until the offer has been accepted. The broker may not, however, commingle this money with the broker’s own general funds.
When the transaction is consummated, the earnest money is credited toward the down payment. If the seller defaults, the broker should check with the buyer before returning the earnest money. The buyer may not want the earnest money returned directly to the seller if he or she wishes to sue the seller for specific performance.

There is some uncertainty as to exactly who owns the earnest money once it is put on deposit. Until the offer is accepted, the money is, in a sense, the buyer’s. Once the seller accepts the offer, however, the buyer may not get the money back, even though the seller will not be entitled to it until the transaction is completed. At this point, the money does not belong to the broker either, for it must be deposited in a special trust account maintained especially for such purposes. This uncertain nature of earnest money deposits makes it absolutely necessary that such funds be properly protected pending final decision on how they are to be disbursed.

**DIFFERENCE BETWEEN EARNEST MONEY AND ADVANCE DEPOSIT**

Civil Code of the republic of Lithuania article 6.98

“Earnest money shall be deemed to be a monetary amount issued by one contracting party from the payments due to be paid by him under a contract to the other party to prove the conclusion of the contract and secure its performance. The earnest money cannot be used for securing a preliminary contract, likewise a contract that must be concluded in the obligatory notarial form.”

Meanwhile, we can’t find definition of advance in Civil Code of the republic of Lithuania. Only of other Civil Code articles we can define that advance – part of its price, paid to person who undertakes to sell an object (thing).

In Lithuanian Supreme Court civil case no. 3K-7-23 / 2000 found that earnest performs several functions:

1. **Payment** – earnest in the amount, with debtor need to pay to creditor
2. **Probative** – earnest transferred to the award show. This feature means that the agreement on the earnest of a complementary nature, if not the principal obligation, it can not be an agreement on the earnest.
3. **Security** – earnest shall be communicated to the obligation (contract) to ensure compliance. Agreement on earnest parties understand that if the contractor is responsible for failure to earnest given country, this earnest remains the second party, and if the contract is responsible for failure to earnest receiving countries, it is required to pay to the second party to double earnest amount.

Lithuanian Supreme Court found that the presence of these three features capable of distinguishing the earnest of advance payment. The advance, as earnest, performs the function of a payment (credited to future payments) may carry out evidential function (both valid claim, as well as an agreement to conclude the contract in the future). But unlike the earnest, the advance has never been completed security function, if country paid an advance, is entitled to claim a refund on all contractual obligations in cases of non-compliance, and the party received an advance, under any circumstances, do not get it back double.

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The Karnataka High Court in K.C.N Gowda and Bros. v. Malakaram Tekchand and Sons\textsuperscript{454}, has explained the difference. Das Gupta, C.J., speaking for the Bench observed that there is fundamental difference between “earnest money” and “part payment of price” and that has to be decided in each case whether or not a payment was made by way of earnest or by way of advance i.e., part payment of price. The nomenclature “earnest” or “advance” does not matter and the right of forfeiture has no application to money received as such part payment.

**FUNCTION OF EARNEST MONEY IN DIFFERENT CIVIL LAW COUNTRIES**

**Germany:** The German Civil Code provides:**

Section 336. If, on entering into a contract, something is given as earnest, this is deemed to be proof of the conclusion of the contract. In case of doubt the earnest is not deemed to be a forfeit.

Section 337. The earnest shall, in case of doubt, be credited on the performance due from the giver, or, when this cannot be done, shall be returned on performance of the contract. If the contract is rescinded the earnest shall be returned.

Section 338. If the performance due from the giver becomes impossible in consequence of a circumstance for which he is responsible, or if the rescinding of the contract is due to his fault, the holder of the earnest is entitled to retain it. If the holder of the earnest demand compensation for non-performance, the earnest shall, in case of doubt, be credited, or if this cannot be done shall be returned on payment of compensation.

In German law earnest money, in the absence of a contrary agreement, performs the same function as in classical law, i.e., it is evidence of the formation of the agreement, and is not presumed to be a forfeit.\textsuperscript{456}

**Austria:** The Austrian Civil Code provides **\textsuperscript{457}**

Sec. 908. If, on entering into a contract something is given, unless otherwise agreed upon, it is deemed to be given as proof of the conclusion of or as security for the performance of the contract and is called earnest (Angeld). If the contract is not performed through the fault of a party, the party free from fault may retain the earnest money received or demand back double the amount of the earnest given. If the party is not satisfied with that he may demand specific performance, or damages if that is no longer possible.

According to the provisions of the Austrian Commercial Code, earnest money is to be regarded as a forfeit conferring the privilege of withdrawing, only when it is so agreed between the parties or in case it is customary to regard it as a forfeit. The highest court of Austria has decided that this provision of the Commercial Code does not detract from the

\textsuperscript{454}K.C.N Gowda and Bros. v. Malakaram Tekchand and Sons AIR 1958 Mys. 10.

\textsuperscript{455}German Civil Code (Wang’s trans. 1907).

\textsuperscript{456}See Schuster. Principles of German Civil Law 191 (1907).

\textsuperscript{457}Translated from STUBENRAUCH. Commentar zum österreichischen Allgemeinen bu.gerlichen gesetzbuiehe (6th. ed. 1892)
principle of Section 908 of the Civil Code.  

The Netherlands: The Civil Code of the Netherlands repudiates the doctrine of forfeiture and withdrawal: Article 1500. If the sale has been concluded with the giving of earnest, neither of the parties may withdraw, be it by abandoning or be it by restoring the earnest.  

Switzerland: Swiss law recognizes the giving of earnest solely as a means of proof of the existence of the contract unless there is a special agreement to the contrary. If the contract is not carried out the earnest must be restored, and the injured party may sue for damages. When it is specially agreed that the earnest is to be considered as a forfeit, each of the contracting parties is free to withdraw from the contract, the one who has paid the earnest, by abandoning it, and the one who has received it by restoring double.  

Italy: The Italian Civil Code enacts:  

Article 1217. When not otherwise agreed upon, that which has been paid before the conclusion of the contract is considered as a guaranty for the reparation of damages in case of the inexecution of the contract, and is called earnest (caparra). The party who is not at fault, if he does not wish to obtain specific performance of the agreement, may retain the earnest received or demand double of that he has given.

Portugal: The Portuguese Civil Code enacts:  

Article 1548. The reciprocal promise to sell and to buy, when it is accompanied with an agreement upon the thing and the price, produces a simple obligation to do, which is regulated by the general rules relating to these contracts; with this difference, if earnest has been given, the loss of the earnest or the restoration of double the earnest money, will form the indemnity due to the party having a cause of action for damage.  

South Africa: Roman Dutch law in effect in South Africa recognizes the doctrine of forfeiture and withdrawal from agreements of sale on the payment of earnest money. According to one authority, the doctrine applies to contracts of sale even though they are regarded as complete. On the other hand, the writings of Grotius, which are largely relied on as authority in jurisdictions governed by Roman Dutch law, clearly indicate that Grotius considered that a Party might only withdraw from incomplete contracts. Grotius says, .. so long as the sale remains in any way incomplete, either party may withdraw from the contract without incurring any loss, except that the buyer loses the earnest." The subject of

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458 Art. 285 Commercial Code of Austria; STUBENRAUCH  
459 Translated from the French by Haanebrink, Civil Code of the Netherlands (1921) Art. 1500  
460 ROSSEL, Droit fédéral des Obligations (4th. ed. 1920) Sec. 322.  
461 FICK, Commentaire du Code fédéral des obligations (1915 ed.) Art 158  
462 Code Civil Italien (Collection Des Codes Et.angers by Prudhomme 1951.  
463 Code Civil Portugais (Laneyrie and Dubois 1896). (93) 72.  
464 MORICE, SALE IN ROMAN DUTCH LAW (1919)  
465 Ibid.  
466 LEE, THE JURISPRUDENCE OF HOLLAND. (1926) (Trans. from Grotius) p. 367
earnest money seems to be of no modern importance in Roman Dutch law.  


Article 475. The sums which it is the custom to give in sales, under the name of earnest (senal or arras), are always considered as a part of the purchase price and as a sign of the completion of the contract, without either of the parties being able to withdraw by losing the earnest. When the vendor and the purchaser agree that, by means of losing the earnest or a sum paid in advance, they will be permitted to withdraw from the execution of the contract, they must mention it in a special clause of the contract.  

Brazil: Earnest in the civil law of Brazil is simply evidence of the final agreement:  

Article 1094. The sign, or earnest (arrhas) given by one of the contracting parties confirms (firma) the presumption of final accord and renders the contract obligatory.  

Earnest money is considered as part payment in the absence of a contrary agreement: But if the party who makes the deposit of the earnest refused to perform he forfeits his earnest. The parties may expressly agree that the payment of earnest shall give each of the parties the right to withdraw from the agreement. In case of such an agreement, the party who receives it must return double if he retracts. The same rules apply to commercial sales.  

Chile: The Civil Code of Chile provides:  

Article 1803. If the sale has been made with earnest, that is to say, giving a thing as pledge of the celebration or of the execution of the contract, each of the contracting parties is free to withdraw from the contract, the one who has given the earnest by losing it, and one who has received it by restoring double. The parties may expressly agree that the earnest is on account of the purchase price, in which case the parties are no longer free to withdraw. With regard to commercial sales, the giving of earnest does not permit the parties to withdraw unless it is expressly agreed that they shall have this privilege.  

Colombia: The Civil Code provides:  

Article 1859. If a sale is made with earnest money (arras), that is, giving something as a sign of the completion of the contract, it is understood that each of the contracting parties will be able to retract; he who has given the earnest, by losing it, and he who has received it by restoring double.  

Spain, Cuba, Porto Rico, and the Philippines. The Civil Code in effect in these jurisdictions contains the following provision relating to earnest:  

467 GROTIUS, Dutch Jurisprudence (Herbert's trans. 1845) p. 342.  
468 Code de Commerce Argentin (Prudhomme 1893).  
469 MACKEURTAN, LAW OF SALE OF GOODS IN SOUTH AFRICA (1921) p. 10  
470 BRAZIL CIVIL CO. Art. 1097  
471 Ibid. Art. 1095  
472 OBREGON, LATIN AMERICAN COMMERCIAL LAW (1921) 389, citing the provisions of the commercial code  
473 Code Civil Chilien (Prudhomme 1892)  
474 Lagrasserie, Code Civil Chilien (1896) p. 312  
475 Chilien Code of Commerce (Prudhomme 1892) Arts. 107, 108  
476 Civil Code of Colombia (1915 ed.)
Article 1454. When earnest money or a pledge has been given in the contract of purchase and sale, the contract may be rescinded, if the vendee should agree to forfeit the money or the vendor to return double the amount.\textsuperscript{477}

In Spain a distinction is made if the sale is a commercial transaction. In such a case the earnest serves as evidence of the existence of the contract and not as the price of the privilege of withdrawing, unless it is otherwise stipulated.\textsuperscript{478}

Mexico: The Mexican Civil Code enacts:\textsuperscript{479}

Article 2820. If the purchase and sale should not be realized and payments, by way of earnest should have been made, the purchaser shall lose what he has paid when through his fault the contract shall not be carried into effect.

Article 2821. If the fault should be that of the vendor, the latter shall return the earnest money (arras), with as much more. As in Spain, a distinction is made where the transaction is a commercial sale, in which case the earnest is evidence of the completion of the agreement and does not give the privilege of withdrawing\textsuperscript{480}

Japan: The Japanese Civil Code contains the following provision relating to earnest money:

\textsuperscript{477} Civil Code in force in Spain, Cuba, Porto Rico, and Philippines (Wilson's Trans. 1900)
\textsuperscript{478} OBREGON, Spanish Commercial Code Art. 343
\textsuperscript{479} Mexican Civil Code (Taylor's Trans. 1904). Cf. Whelless, Compen- dium of the Laws of Mexico (1910) v. 1 p. 269
\textsuperscript{480} OBREGON, op. cit. supra. n. 102 citing Mexican Commercial Code Art. 381

Article 557. When the purchaser has delivered bargain money (earnest) to the seller, so long as one of the parties has not commenced performance the contract may be rescinded by the purchaser by abandoning the bargain money, and the seller by repaying twice its amount.\textsuperscript{481}

**FORFEITURE OF EARNEST MONEY**

The Supreme Court has drawn distinction between “earnest money” and “security deposit”, for the application of section 74 to the forfeiture clauses. The distinction was set to work in Fateh Chand v. Balkishan Das.\textsuperscript{482} It is very important to discuss the facts of this case, as considered one of the leading authorities on this point. The facts of this case are as follows:-

“There was an agreement between the parties for the sale of certain land and bungalow for Rs. 25,000. It was provided in the agreement that the buyer had to pay Rs. 1000 as earnest money and rest of the Rs. 24,000 had to be paid on delivery of possession. It was further, provided in the agreement that if the buyer failed to pay the balance price and get the sale deed registered by certain day, the sum of Rs. 25,000 would stand forfeited, the agreement would be considered as cancelled and the buyer shall return possession to the seller. The seller forfeited the above sum because the buyer defaulted. Moreover, the seller brought an action to recover the possession and compensation for occupation and use.”

In this case, the seller was allowed to forfeit Rs. 1000 being earnest money and to retain the sum of Rs. 24,000 also not by virtue of

\textsuperscript{481} Civil Code of Japan (DeBecker's Trans. 1909).
his right to forfeit, but as representing use value. The defendant did not object to the plaintiff’s right to forfeit Rs. 1000 paid as earnest money under the agreement, but contended that Rs. 24,000 was expressly paid out of sale price and the stipulation was in the nature of penalty. The Supreme Court made it very clear that Rs. 24,000 was not paid as an earnest money, and it was expressly referred to in the agreement as paid “out of sale price”. Moreover, no evidence was found regarding the fact that Rs. 24,000 was paid as a security for the performance of the contract. Thus, in these circumstances, it could not be assumed that because there was a stipulation for forfeiture of the amount paid must bear the character of deposit for the performance of the contract. Hence, the plaintiff was only entitled to retain Rs. 1000 received by him as earnest money. If in any contract there is no forfeiture clause, then the vendor cannot forfeit earnest money, and he would be entitled to reasonable compensation only.\(^{483}\)

Therefore, in all cases, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of the contract, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.

The provision is applicable to every kind of deposit by whatever name it may be called. The words “any other stipulation by way of penalty” are wide enough to cover all kinds of forfeiture provisions. Union of India v. Shyam Sundar Lal\(^{484}\), Bombay Scrap Traders v. Port of Bombay\(^{485}\), failure on the part of the tenderer to comply with the work order, forfeiture of earnest money, Held justified. State of Karnataka v. Stellar Construction Co., AIR 2002 Kant.6: (2002) 5 Kant. LJ 474, the road building contract was not paid extra charges because the claim in respect of thereof, was not found by the Department to be justified. He had received payment as per contractual terms. He stopped working, and did not resume it in spite of clear notice. The court said that this amounted to breach. He was not entitled to claim refund of the forfeited security deposit. New Media Broadcasting (P) Ltd. v. Union of India, AIR 2008 NOC 967 (Del), contract envisaged specifications of further details, by government, some changes or representation of bidders were within tender terms, bidder those bead bars excepted refused to sign, right to forfeit earnest money and claim damages arose. Winmaxx Management Service (P) Ltd. v. UCO Bank\(^{486}\), buyer failed to pay the whole of the earnest money. Forfeiture of money actually paid by him held to be justified. Haryana Financial Corporation v. Rajesh Gupta, AIR 2010 SC 338, auction sale of unit, earnest money deposited on assurance that independent approach road to unit would be provided, but not actually done, the purchaser did not make further payment, forfeiture of his earnest held to be not proper.


\(^{484}\) Union of India v. Shyam Sundar Lal 1963 All LJ 251

\(^{485}\) Bombay Scrap Traders v. Port of Bombay, (1994) 1 Bom CR 266

\(^{486}\) Winmaxx Management Service (P) Ltd. v. UCO Bank AIR 2011 Gau 217
The respondent Rampur distillery & chemical co. ltd., supplied to the appellant-Union of India- a large quantity of rum. The rum was found not to conform to the quality stipulated and was, therefore, rejected by the appellants. The appellant then cancelled the Contract and forfeited the entire security deposit of Rs. 18332 which was kept by the respondent for the due performance of the contract. The breach of Contract caused no loss to the appellant. The stipulated quantity of rum was subsequently supplied to the respondent by the respondents themselves are the same rate. That the High Court was right in rejecting the appellant claim that they are entitled to forfeit the security deposit.

Plaintiff entered in contract of supplying potatoes with respondent. Earnest money deposited by plaintiff. Default made by him in supplying potatoes and so contract rescinded by respondent. Earnest money deposit forfeited. Petition filed by plaintiff in Court of Civil Judge for recovery of earnest money. Court held that respondent justified in rescinding contract but amount cannot be forfeited. On appeal decree modified by Trial Court and amount of money returned to plaintiff reduced. Against decision appeal filed when petitioner did not accept that they committed breach of contract. Appeal dismissed as appellants committed breach of contract. Held, they were not entitled to recover earnest money.

Appellants entered in contract for sale of area-scrap with respondent. Earnest money deposited. Contract repudiated by appellants. Respondent forfeited earnest money deposited by appellants. Appellants for recovery of said money filed suit in High Court. Suit dismissed. High Court held that said amount was deposited as earnest money. Appellants entitled to same only on specific performance of contract. Certificate granted by High court and appeal filed in Supreme Court. Supreme Court observed that there was misrepresentation regarding quantity of material. Appellants entitled to recover earnest money by on that ground. Appellants abandoned that ground by accepting that they committed breach of contract. Appeal dismissed as appellants committed breach of contract. Held, they were not entitled to recover earnest money.

Parties entered into contract for sale of certain land and certain amount was paid to petitioner as earnest money. Suit for specific performance filed when petitioner did not execute sale deed and decreed by Trial Court. In appeal Additional District Judge observed that both parties suffered from mistake of fact as to area of land and sale-

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487 Union of India v. Rampur Distiller and Chemical co. ltd. AIR 1973 SC 1098 at pp. 1098-99


www.supremoamicus.org

215
consideration. Decree for specific aperformance not passed but decree for refund of earnest money passed which was confirmed by High Court. Appeal by special leave. Petitioner contended according to forfeiture clause in contract respondent not entitled to refund of earnest money. Observed that contract was void from its inception as observed by Additional District Judge. Forfeiture clause in contract also void. Petitioner could not legally forfeit amount and seek enforcement of forfeiture clause. Decree for refund of earnest money confirmed. 490

Whether Tribunal was right in law in holding that earnest money deposit of Rs. 75000 received by assessee in respect of agreements for sale of old and uneconomic rubber trees is revenue income assessable to income-tax when forfeited consequent to termination of agreements for breach thereof by purchasers. Amounts received by assessee/appellant in respect of an abortive sale transaction of rubber trees were capital or revenue receipts. Assesssee’s right to recover compensation was to place assessee in same position as if breach had not taken place. If agreed sums of money under agreements received by assessee they would have been credited in its account as capital receipt. Forfeited amounts treated as capital receipts. Agreements were of sale where both payment of price and delivery deferred. Purchasers paid purchase price in agreed installments right to take delivery of trees under agreement complete. Question referred by assessee answered in negative. Appeal in favour of Assessee. 491

Respondent entered into an agreement with Respondent No. 1 (DLF) for purchasing a flat and paid earnest money. Respondent also paid some installments. Respondent showed his inability to make further payments. Respondent sent a legal notice to Appellant to refund the entire amount along with interest. As Appellant did not accede to his request, he filed an application before the Monopolies and Restrictive Trade Practices Commission (Commission) purported to be under Section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 (Act). Application was allowed and Appellant was directed to refund the entire amount together with the interest. Hence, present appeal. Held, power of the Commission to award compensation was restricted to a case where loss or damage had been caused as a result of monopolistic or restrictive or unfair trade practice. It had no jurisdiction where damage was claimed for mere breach of contract. Appeal disposed of accordingly. 492

CONCLUSION

There are certain rules regarding the forfeiture of earnest money which the courts must keep in mind while deciding whether the earnest money should be forfeited or not. These are as follows:

- Neither the earnest money nor any other kind of deposit, which is liable to be forfeited, can be subjected to forfeiture if the

underlying contract is void. Moreover, it is refundable under section 65, if the contract is found to be void.  

There can be no forfeiture or encashment of bank guarantee where no contract arises due to the revocation of acceptance or due to any other reason.

Forfeiture of earnest money is permissible by way of liquidated damages.

There is no absolute right to forfeit the entire amount without the proof of total extent of loss, when the material on record showed that the extent of loss was less than the amount held as earnest, forfeiture could not go beyond that.

No one can be allowed to enrich himself at the cost of the other by taking advantage of forfeiture clause.

Forfeiture of earnest money under a contract of sale, if the amount is reasonable does not fall within Sec. 74.

Forfeiture of earnest money should be allowed only when it is reasonable to do so.

No forfeiture of earnest money should be allowed where extra cost otherwise can be recovered.

No forfeiture of earnest money should be allowed where contract still has not performed and the amount if forfeited is refundable.

To invoke Sec. 74 it is not necessary that a contract should be broken in its entirety.

Forfeiture of earnest money without issuance of a show cause notice is considered as violation of the principle of natural justice.

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ROLE OF MEDIA

By Muskan Gupta
From Banasthali Vidyapith

The word media is derived from the word medium, signifying mode. This world was first used in respect of books and newspapers i.e.; print media and with advent of technology, radio etc. Media in aspect of law, media law is not a term of uniform and separate law like any other law. It is a variety of law and ethics which considered most important for a working journalist and a media industry.

‘Media is considered as “mirror” of the modern society, infect, it is the media which shapes our lives.’

In today’s world, media become an essential part of our life and shaping or creating the opinion of people’s. Power of speech is a pleasure to listen to people and to express the feeling of one and another on all topics. Freedom of expression has always been emphasized as a special right for the democratic, economic functioning of the society. This is been included in Article 19 (1) (a) of our Indian Constitution i.e.; the freedom of the press and also having reasonable restrictions as provided in Article 19 (2) of our Indian Constitution.

Case: Shreya Singhal vs. Union of India

Under this case, it is held that the Section is unconstitutional also on the ground that it takes it within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of over breadth.

Section 66 A of the Information Technology Act 2000, is struck down in its entirety being violative of the Article 19 (1) (a) and not saved under Article 19 (2).


‘Media takes discipline not to let social media to steal your time.’

Media helps to convey the strong message towards the world about what is wrong or right. Media is most powerful tool for conveying our thoughts towards the world, and help to developing or developed countries. Our today’s generation is relying on media mostly and spend most of the time with it only. It affects them in both the aspect good as well as bad and this effect is all depend on their thoughts and mindset, in what manner they all take it. Media helps to create awareness to all over the world in all aspects.

Media’s work was and still to provide all relevant information to the public at large about occurrences in the countries and world. And this is one of the greatest advantage of media to spread awareness to each corner of all over the world. Media should equalize all the news whether it is local, national and internationals. Media
should not be biased from any of them and spread full and fair occurrences of the actions on time.

‘If the liberty means anything at all, it means the right to tell people what they do not want to hear.’

**Control of a media on society:**
The media becomes the addictive to this generation because this forming the trap for the youth and changes the way how to today’s people mainly new generation behave or communicate with each other.

In today’s world youth have both aspect positive as well as negative. And on the time of today’s world many fake news are also in the existence. Because of these fake news youth gets attracted and this influence provoke them to committing the crime or reacts the fast on non-valuable issues. This fake news conveys the misinformation and becomes dangerous as the smearing hateful propaganda.

If the media want them, they have the power to make the innocent guilty and guilty innocent. This media controls the mind of almost the world as hole. Because of all this, people are unable to fully rely or believing on media and start doubting and raising the questions on media.

Media criticize the government and act like the watchdog for the betterment of the country, in democracy. It even specifies the particular work done or contribute by the political party in the development of the country and provide hard competition.

Because of this media the hard competition converted into healthy competition which provide a benefit to the common people.

**Case: Sakal Papers vs. Union of India**

The daily Newspapers (Price and Page) Order, 1960, which fixed the number of pages and size which a newspaper could publish at a price was held to be violative of freedom of press and not a reasonable restriction under the Article 19 (2). Similarly, in **Bennett Coleman & Co. Vs. Union of India**, the validity of the Newprint Control Order, which fixed the maximum number of pages, was struck down by the Court holding to be violative of provision of Article 19 (1) (a) and not to be reasonable restriction under Article 19 (2). The court also rejected a plea of the government that it would help small newspapers to grow.

**Case: Brij Bhushan vs. State of Delhi**

The validity of censorship previous to the publication of an English Weekly of Delhi, the Organizer was questioned. The court struck down the Section 7 of the East Punjab Safety Act, 1949, which directed the editor and publisher of a newspaper ‘to submit for scrutiny in duplicate, before the publication, till the further orders, all common matters all the matters and news and views about Pakistan, including photographs, and cartoons’, on the ground that it was a restriction on the liberty of the press. Similarly, prohibiting newspaper from publishing its own views or views of correspondents about a topic has been held to be a serious encroachment on the freedom of speech and expression.

‘Education is the passport to the future,

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501 1962(3) SCR 842  
502 AIR 1973 SC 106  
503 AIR 1950 SC 129  

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for tomorrow belongs to those who prepare for it today.’

Role of media in aspects of education:
Today’s world facing problem like information explosions and population explosions. Information explosion refer to the explosion of knowledge. Today all over the world, the social and technological changes taking place sharply due to expanding the world of information.

With the explosion of knowledge, there is continuous increase in the explosion of population too. In today’s world, demand of education increases year by year as the countries expanding and comes in the list of competitive line all over the world. India is facing serious difficulties both from population as well as information explosion. Information explosion is necessary because education makes an individual more creative, efficient and active in his life for his better future.

Precedence:
In today’s world it is easy to keep an eye on current affairs, get easily all breaking news and also stay up to date with all over the world with the help of smart phones, computers, televisions etc. While staying up to date, able to see what other cultures have to offer and this may help for teaching Childrens about other cultures as her. Therefore, it is a great tool for helping up to date and also contribute towards the children's education.

The biggest advantage of media is to spread the news all over the world between public at large within a few minutes. The media also provide a first mover advantage before facing any problem and warn us of impending whether, dangerous situation in a city, a state or a country. The media has the resources and right to expose justices, corruption or abuse of power that an average citizen would never be able to expose and this may help to change our country positively. The media has uncovered events where elected officials have been using government workers to campaign for them while they are supposedly working on the government business.

After the Nirbhaya Case the media started the several awareness programs and several self-protection classes to support the women’s safety and this goes on very high level. And government faced very negative feedback from public. Thus, the government had no chance left, now the government started to make policies and laws for women safety. Thus, media have a significant role to bring a revolution in the Indian Parliament to take the steps against the rape cases.

As we all know media act like a fight on behalf of the girl of Nirbhaya Case. If media would not highlight it, the hidden problem of rape cases would be eye sighted by the government and common people. Media supported her to get the best treatment by accusing the failure of the government not to save her.

Drawbacks:
As we seen the precedence of media but together with it, we have to accept some bitter truth of media also (ie; drawbacks). As we saw the Nirbhaya Case full of advantages of media but here we can see some drawbacks that is:

After the one year the voice of media murphed under beneath the ocean on the name of going down the Television Rating
Point (TRP) and fame of the politicians and the government.

Nowadays, media (news channels) focus on their television rating point only they do not have any concerned about, any truth of the matter. They only show the breaking or highlighted people like the superstar etc. They do not work to uplift the hidden talent between the common people. They do not have to show the news on full day basis “like the news of Salman Khan” last month on the repetitive basis for the full day which was not relevant for our country. Because there was more news which have to be run on news channels. We can accept that most of the news channels which support several programs like clean ganga etc. But they don’t give the monthly update report on these programs to wake up the general people. They remember these statistics only during the election period. We know our politicians are corrupt, but we have to accept it also our is corrupt and partial too. Most of the reporters find some very big running problems which are not disclosed in our country till now. But their superiors reject the news due to their higher television rating point because they have the fear to get fall in their television rating point, they do not show the truth.

Another famous example of Bal Thackeray, under this example Bal Thackeray made the cartoons against the famous politician of his time to publish in the newspaper. But his superior rejected his proposal due to the television rating point and the influence of that same politician and after that Bal Thackeray fired from his job.

The media does not want to misguide the public but due to the presence of question mark of every news and lack of information leads to misguide the public.

**Conclusion:**

‘Technology is a drug.
We can’t get enough it.’

The media allow access to an incredible amount of information and continues to become very integral to the lives of many people and the world become more globalized.

The media is a market place of thoughts and ideas. So they should hear broadcast and promote different viewpoints from different parties, whether it be social groups, political parties, religious organizations etc. Through media, publicity role can access the public on a widespread basis and draw attention to themselves- for better and worse.

Media has a very strong role to provide to the public an opportunity to hear all sides of a story not just what is included in ministerial media. The media have a duty to import information which is fair, accurate and contemporaneous when it comes to reporting legal proceedings.

Media contribute towards the economic and political development of citizens in any country in the world. It creates a broad range of information and communication to the citizens on the various developmental issues in their country. Media is an important factor in promoting democracy and the rule of law only if it will be given the opportunity of freedom of expression and to deliver message to the people without being
oppressed or intimidated by the authorities of the respective countries or any entities that have the authority to prevent information from the people.

The media also expose the loopholes in the democratic system, which ultimately helps the government to fill the Vacuum of these loopholes and to make the system more accountable, responsive and citizen-friendly. A democracy without media is like a vehicle without wheel.

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HUMAN TRAFFICKING

By Poornima Singh Pawar & Sunshine
Anand
From GD Goenka University

ABSTRACT

Human trafficking is the 3rd most horrendous crimes around the globe. Human Trafficking, in India, to be more specific is one of the biggest organized crimes in India after rape and dowry. Till date, the exact number of people who have been trafficked is unknown. According to media, widespread human trafficking is major issue in today’s time. Now who are we kidding! When we talk about human trafficking (in INDIA) we mainly see kids and women disappear more than men. Every year more than 100 such cases have been reported. Kids and women specially from northeast are taken away from their homes and are sold in out stations within and out of India just for exploitation (sexual) or to make them work as bonded labor. In addition to trafficking or smuggling for prostitution, girls and women are also bought and sold into forced marriages, in women deficit areas. Due to female infanticide in almost elite society. The forced children are subjected to physical and sexual abuse and treated as slaves. In many cases, trafficked children and women are at risk of all manner of ills, from unwanted pregnancy, HIV/Aids, cervical cancer, severe physical injury, violence, drug abuse and more, not to mention the emotional trauma and long-run psychological impact. The reason behind the increasing rate of human been trafficked in India is mainly because men who migrate to major commercial cities demand for commercial sexual intercourse. Here the fundamental theory of demand and supply plays a very important role. Women and kids from rural areas are mainly at high risk because, it is that segmented group of individuals who are abducted/ kidnapped for such crimes. Prostitution is NOT the only reason why women and girls are abducted. Other reasons such as forceful marriages, bonded labor or slavery, etc. are also why humans (women and girls mainly) get trafficked. To overcome such crime, facilities such as proper education and awareness on how can women and girls take up actions against people who are involved in such crime, should be provided in localities. This would of course not demolish the crime but would definitely bring down the number of humans been exploited and used as a “thing” and not as how they should actually be treated. Many social activists and NGOs along with Governmental implementation are actively participating in numerous activities especially in educating and training people at the community level and protecting the vulnerable class of the society.

KEY WORDS: Human trafficking, exploitation, trade against Individual, Crime, Slave trade.

Introduction

Human trafficking includes enlistment, harbouring or transporting individuals into a circumstance of misuse using viciousness, duplicity or pressure and compelled to neutralize their will. As such, trafficking is a
procedure of subjugating individuals, pressuring them into a circumstance with no chance to get out, and misusing them. Individuals can be trafficked for a wide range of types of misuse, for example, constrained prostitution; constrained work, constrained asking, constrained guiltiness, residential bondage, constrained marriage, and constrained organ expulsion. At the point when children are trafficked, no viciousness or intimidation should be included. Basically, bringing them into exploitative conditions establishes trafficking. Trafficking for sexual misuse gets much consideration. Nonetheless, the dominant part of individuals is trafficked in the process of childbirth abuse. Numerous individuals who fall casualty of trafficking need to escape destitution, enhance their lives, and bolster their families. Regularly they get an offer of a generously compensated activity abroad or in another area. Frequently, they acquire cash from their traffickers ahead of time to pay for masterminding the activity, travel, and settlement. When they arrive, they find that the work they connected for does not exist, or the conditions are totally extraordinary. Be that as it may, it's past the point of no return, their reports are regularly removed and they are compelled to work until the point when their obligation is satisfied. Individuals regularly confound human trafficking and individuals carrying. Individuals carrying are the illicit development of individuals crosswise over global fringes for an expense. Human trafficking is unique. The trafficker is moving a man for misuse. There is no compelling reason to cross a universal fringe. Human trafficking happens at a national level, or even inside one network. Casualties of this across the board type of trafficking come fundamentally from creating nations. They are selected and trafficked utilizing trickery and pressure and wind up held in states of subjection in an assortment of occupations. Men, women and kids are occupied with horticultural, fisheries and development work, alongside local subjugation and other work serious employments. Trafficking of Children and women is a genuine concern in India. As per a report distributed by the US Department of State, India is the source, goal and travel nation for human trafficking who at that point get associated with constrained work and sex trafficking. The measurements of the Ministry of Women and Child Development expresses that 19,223 women and kids were trafficked in 2016 against 15,448 of every 2015, with the most elevated number of unfortunate casualties being recorded in the eastern territory of West Bengal. Individuals from the lower cast or the inborn networks and the women and kids from the avoided gatherings of the general public are by and large tricked of a superior way of life and work opportunity and sold by the operators. Human trafficking is viewed as the third biggest sorted out wrongdoing, all-inclusive and the number is expanding each year. Destitution, uneven business, sexual orientation segregation, unsafe conventional and social practices and absence of appropriate arrangement execution to end this grave condition are a portion of the reasons for human trafficking in India. The Government of India does not completely meet the base principles for the disposal of trafficking; be that as it may, it is attempting critical endeavours to do so. The government showed expanding endeavours by expanding the quantity of unfortunate
casualties recognized, examinations finished, and traffickers indicted, and also its financial plan for safe house programs for female and tyke trafficking exploited people. The legislature embraced an activity plan for children, which included plans to counteract tyke trafficking and secure kid exploited people. Be that as it may, the legislature did not meet the base norms in a few key territories. By and large unfortunate casualty distinguishing proof and insurance stayed deficient and conflicting and the administration in some cases punished exploited people through captures for violations submitted because of being exposed to human trafficking.

In excess of 8,000 instances of human trafficking were accounted for in India in 2016, while 23,000 unfortunate casualties, including 182 non-native’s, were saved amid the year, as indicated by National Crime Records Bureau information. A year ago, an aggregate of 8,132 cases were accounted for from the nation over contrasted with the 6,877 cases in 2015. Of the aggregate 15,379 unfortunate casualties in these cases, 9,034 (58%) were beneath the age of 18 years, as indicated by the most recent NCRB insights on wrongdoing discharged for 2016.

West Bengal bested the rundown in detailed instances of human trafficking at 3,579, representing 44% of aggregate cases in the nation. The state had revealed 1,255 (18.2%) such cases in 2015, when it positioned second just to Assam. Assam detailed 91 cases (1.12%) of human trafficking in 2016, seeing an extraordinary decrease since 2015 when it positioned first in the nation with 1,494 (21.7%) such occurrences. Rajasthan with 1,422 (17.5%) cases was second on the rundown for detailed human trafficking episodes in 2016, trailed by Gujarat (548), Maharashtra (517) and Tamil Nadu (434). In 2015, Rajasthan had announced 131 cases (1.9%) of human trafficking while Gujarat had enrolled 47 (0.7%). Delhi is fourteenth in this rundown for 2016 with 66 revealed instances of human trafficking, down from 87 such cases in 2015.

The "Trafficking of Persons Bill", 2018,' that was presented in the outcome of Nirbhaya case, and makes the NIA the nodal office to test such cases, will realize an enhancement in the present situation. Previous uncommon magistrate of Delhi Police, Amod Kanth, communicated this expectation at a course sorted out on 'Sex trafficking of young women and women in the subcontinent' at the India International Centre in New Delhi on Thursday.504

Foundation, which holds address arrangement by famous identities on sexual orientation issues, on the event of International Women's Day. Kanth, who was earlier a DCP in focal Delhi that is home to the notorious GB Road red light zone, stated, "Human trafficking is the main wrongdoing that finds a notice in the Constitution. Tragically, it was not depicted thoroughly till the Nirbhaya occurrence occurred and the Criminal Law (Amendment) Act, 2013, was passed by the Parliament."

Casualties of Human Trafficking
The point of the examination is to efficiently assess the effect of trafficking against

counteractive action activities specifically mindfulness raising exercises (counting on the web exercises) and additionally instructive projects, measures to diminish request, measures particularly focusing on main drivers as these are effortlessly connected to trafficking in individuals. The United Nations Convention against Transnational Organized Crime decides human trafficking as the enlistment, transportation, harbouring or receipt of people, with the end goal of sexual subjugation, sexual misuse, constrained work, organs evacuation, and so on. It likewise can appear as constrained marriage or ask, children offering, including kids in war clashes as troopers, etcetera. As indicated by the ongoing reports of the Council of Europe, human trafficking has achieved its plague extents. Billions of individuals are being trafficked for various reasons, for the most part for sexual abuse, constrained work, and even a few types of subjection. Women and children are the essential casualties of human trafficking, which makes the issue extremely intense. The vast majority long for a superior life some place other than where they grow up. Some need it so terrible they flee from the wellbeing of home to the splendid lights of the city.

Youthful high school young women end up helpless and frightened. At the point when what appears to be a blessed messenger comes to spare you off the avenues. The fallen angel appears to fit this character better, taking in young women giving them an alleged home, and promising his insurance. He swears that nobody can hurt her as long as she does all that he says. The trafficker for the most part goes for benefiting the human administrations for illicit purposes without wanting to. The administrations pointed by the merchant are constrained as made reference to before and basically incorporate constrained sex slave, constrained work, or prostitution for procuring cash utilizing people totally out of good limits. The sorts of acts incorporated into the human trafficking might be the one of giving a mate if there should arise an occurrence of constrained marriage or even the physical pulling back of tissues. It is tragic, however evident that there exist no bound to the human trafficking as it might happen broadly or universally. It is in reality a criminal offence since it results in a break of human rights and includes the abuse of their body. The global report on trafficking in Persons 2016 states that in excess of 500 distinctive trafficking streams were distinguished amid the past couple of years. 51% of unfortunate casualties are women, 21% are men, and 20% and 8% are young women, and young men likewise. Furthermore, a standout amongst the most stressing variables that specifically effect on trafficking increment is the development of displaced people and transients’ number. It's the biggest seen since the WWII and increased amid the most recent years.

Human trafficking incorporates sexual misuse, work trafficking, and so forth. These days even cross-outskirts human trafficking is pervasive. India has an immense populace and therefore and our diminishing economy numerous individuals live beneath the poverty line. The bootleggers and traffickers guarantee them a superior life—a beam of expectation, employments as local hirelings, in the film world or in manufacturing plants. They can offer them cash, delight trip
solicitations or bogus guarantees of marriage. The primary targets are – the vulnerable individuals are the ones who are abused the most. Social and religious practices too have been a major reason. The enrolment specialists are the first in the chain - procurer-they might be guardians, neighbours, relatives or darlings or individuals who have been trafficked previously. The procurers move to the "potential locales" for unfortunate casualties which for most part are the destitution-stricken territories where there has been no appropriate recovery and after that they frequent the transport stops, railroad stations, avenues, and so forth. The period they decide for trafficking relies upon if that put has endured a dry season or social or political calamities as of late, with the goal that it is less demanding to draw in effectively enduring unfortunate casualties. The procurers utilize drugs, snatching, capturing, influence or double dealing to pack the objectives. They hand the exploited people to the massage parlor proprietors, escort administrations, or supervisors of a sex foundation.

Women and children from developing nations, and from powerless parts of different societies, are baited by guarantees of conventional work into leaving their homes and heading out to what they consider will be a superior life. Exploited people are regularly furnished with false travel reports and a composed system is utilized to transport them to the goal nation, where they wind up constrained into sexual subjugation and held in harsh conditions and consistent dread.

In India, open discussion on the issue of trafficking of women and children for business sexual misuse developed during the 1990s.

**Constitutional and Legislative Provisions**

There are constitutional & legislative provisions related to trafficking in India. There are constitutional & legislative provisions related to trafficking in India. Trafficking in Human Beings or Persons is disallowed under the Constitution of India under Article 23 (1)

- **The Immoral Traffic (Prevention) Act, 1956 (ITPA)** is the head enactment for anticipation of trafficking for business sexual misuse.
- **Criminal Law (correction) Act 2013** has come into power wherein Section 370 of the Indian Penal Code has been substituted with Section 370 and 370A IPC which accommodate exhaustive measures to counter the hazard of human trafficking including trafficking of kids for misuse in any frame including physical abuse or any type of sexual abuse, bondage, subjugation, or the constrained expulsion of organs.
- **Assurance of Children from Sexual offences (POCSO) Act 2012** which has become effective from fourteenth November, 2012 is an uncommon law to shield kids from sexual maltreatment and misuse. It gives exact definitions to various types of sexual maltreatment, including penetrative and non-penetrative rape, lewd behaviour.

Act, 1994, aside from particular Sections in the IPC, e.g. Segments 372 and 373 managing offering and purchasing of young women with the end goal of prostitution. State Governments have likewise instituted particular enactments to manage the issue. (e.g. The Punjab Prevention of Human Smuggling Act, 2012)\(^{505}\).

**Discussion**

(Statistics for the year of 2005-2017)

According to the graph shown above, the common age of a diagnosed sufferer of trafficking is 26 years old (on the time of assistance), and half of those diagnosed are among 18- and 34-years antique. The common age of sufferers identified in 2015–2016 was 29 years vintage, with male victims being, on common, older than female victims. at least 16 in line with cent of recognized victims in the same length were children. On common, a sufferer is trafficked for about years, consequently the common age of entry into trafficking is below 26 years. In latest years, the share of identified instances of trafficking for sexual exploitation has declined, while the percentage of diagnosed cases of trafficking for pressured labour has extended there’s now a better propensity to discover victims of human trafficking for the functions of labour exploitation.

The vast majority of sufferers diagnosed between 2002 and 2016 entered the trafficking technique through labour migration, despite the fact that a large proportion of diagnosed baby victims in 2014–2016 have been bought by using their households or entered the trafficking method via friend or family. Sufferers identified in sectors like mining and production are almost exclusively men, whilst sufferers diagnosed in prostitution and sectors consisting of hospitality are by and large girls.

Through IOM’s provision of direct help to victims of trafficking, has developed the biggest information of victim of trafficking case within the world. The information contains over 50000 individual cases, with

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some 5000 new cases more annually. IOM presently assists between 7000 to 9000 victims annually, grouping a supply of knowledge on victims of trafficking that's international in scope. Information captured embody data concerning the victims’ backgrounds, trafficking locations and routes, however individuals constitute the trafficking method, associated types of exploitation and abuse, sectors of exploitation, means that by that victim’s area unit controlled, and a few data on perpetrators.

IOM’s information has not been in public out there within the overdue to the sensitivity of its content, and information protection and confidentiality concerns. However, in 2017, IOM has created de-identified, individual-level, primary information on victims of human trafficking out there on-line through the Counter-Trafficking information cooperative (CTDC) information portal. This information portal provides registered users access to transfer anonymize human trafficking information contributed by counter-trafficking organizations round the world.

This world dataset presently contains more or less 45,000 records, whereas the non-anonymize combined dataset presently contains over 80,000 observations, on that the info portal’s visualizations are primarily based. IOM and variable star are the primary contributors to the worldwide dataset, and that they are joined by Liberty Asia and alternative organizations have additionally expressed associate interest to contribute.

The above analysis of human trafficking section is from crimes information 2016 by National Crimes Record Bureau, India. The map on top of shows the state wise range of human trafficking cases reported in the year 2016. Here the dimensions of the circle represent the mid-year population of 2016. The states wherever the cases reportable high are state, Rajasthan, Gujarat, geographical area and Madras. The states wherever the cases reportable low are Andaman and Nicobar Islands, Chandigarh, Sikkim, Arunachal Pradesh and Mizoram.

506 Migration data portal, the bigger picture, https://migrationdataportal.org/themes/human-trafficking

The graph above demonstrates the reason behind the human trafficking and the ten states for each reason. For the reason Sexual abuse Madhya Pradesh is in the best place pursued by Tamil Nadu and Maharashtra. With the end goal of forced marriage, the state West Bengal is in the best place pursued by Madhya Pradesh and Gujarat. With the end goal of constrained work, the state Rajasthan is in the best place pursued by Madhya Pradesh and Tamil Nadu and with the end goal of household subjugation Madhya Pradesh is in the best place pursued by Delhi and Uttar Pradesh.

At the point when there are numerous reasons for trafficking, the general population is likewise getting saved. The graphs below demonstrate the level of individuals trafficked and protected in 2016 in India.

**Graph 1**
Graph 1 – percentage of people trafficked in the year of 2016

The above diagram demonstrates that the females of age beneath 18 years or over 18 years are trafficked more than guys independent of their age. In any case, guys at the age under 18 are more defenseless towards human trafficking contrasted with the guys over 18 years.
Graph 2: Percentage of people rescued in the year of 2016

The above graph demonstrates the level of individuals saved in 2016. For the general population age beneath 18 years guys are safeguarded more than females. Be that as it may, it is inverse on account of individuals of age over 18 years where females are safeguarded more than guys. The females under the age of 18 years were significantly saved from sexual abuse in the conditions of Gujarat, Madhya Pradesh, Mizoram and Sikkim.

In India, the trafficking in people for business sexual abuse, constrained work, constrained relational unions and local bondage is viewed as a sorted-out wrongdoing. The Government of India applies the Criminal Law (Amendment) Act 2013, dynamic from 3 February 2013, and in addition Section 370 and 370A IPC, which characterizes human trafficking and "gives stringent discipline to human trafficking; trafficking of children for abuse in any frame including physical misuse; or any type of sexual misuse, subjugation, bondage or the constrained evacuation of organs".

R.P.N. Singh, India's Minister of State for Home Affairs, propelled an administration online interface, the Anti-Human Trafficking Portal, on 20 February 2014.

Unfortunately, trafficking numbers are expanding each year, and trafficking systems are getting savvier in the manner in which they utilize and abuse individuals. All things considered, there are likewise presently better practices to distinguish trafficking unfortunate casualties, more associations dealing with enactment, and better preparing for law implementation on human trafficking. Yet, despite everything we have far to go. Mindfulness is just a large portion of the fight—we should find new and proficient strategies to avoid trafficking, and work to restore the individuals who

have encountered it to break the trafficking cycle.509

Conclusion

Bondage and it's like, have existed for centuries. And have social and monetary disparities. Through the statement of the 2030 Sustainable Development Goals, the universal network has guaranteed that endeavors will be committed to diminishing destitution, guaranteeing sound lives, and, most reassuringly, advancing conventional work. This takes us back to the recommendation we presented at first: human trafficking ought to be viewed as a worldwide wellbeing concern. In the first place, as far as pervasiveness, when contrasted and other all around perceived worldwide medical issues, for example, the roughly 35 million individuals tainted with HIV or the 1 million young women under age 15 who conceive an offspring who contract HIV or the 1 million young women under roughly 35 million individuals affected by human trafficking ought to all the while be resistant to such interests and maybe this be creating a generational cycle of incapacity and disappointment.

In a similar vein the estimation of human work seems, by all accounts, to be methodically corrupted and political talk further minimizes effectively ignored vagrants and distraught specialists, now is a favorable minute to dispatch, decisively, worldwide wellbeing activities to handle endemic work misuse. Current groups, for example, 'MUSE', 'Radiohead' and 'The Killers' are now required with tasks related to 'MTV Exit' and 'Abolitionist Slavery International', making music and video which handles the subject of Human Slavery.

While there are numerous beneficial offices and associations around who do precious work getting the message out and helping casualties of Human trafficking, the proceeded with governments slices to subsidizing power these altruistic associations to speak to the overall population for help with monetary assistant. This in this way makes society turned out to be resistant to such interests and maybe this

509 Winters Ellie, I'm The Girl Who'd Rather Raise A Family Than A Feminist Protest Sign
You raise your protest picket signs and I’ll raise my white picket fence.
https://www.theodysseyonline.com/not-feminist-not-sorry
is somewhat the purpose behind general society's absence of consciousness of Human Trafficking.

**Ways to help fight human trafficking are:**

1. Take in the warnings that may show human trafficking and ask follow up inquiries with the goal that you can help distinguish a potential trafficking injured individual. Human trafficking mindfulness preparing is accessible for people, organizations, specialists on call, law authorization, and government workers.
2. Be a faithful purchaser. Find your Slavery Footprint, and look at the Department of labor’s List of Goods Produced by Child labour or Forced labour. Empower organizations, including your own, to find a way to research and dispense with subjection and human trafficking in their supply binds and to distribute the data for purchaser mindfulness.
3. Join human trafficking data into your expert affiliations' gatherings, trainings, manuals, and different materials as pertinent.
4. Meet with or potentially keep in touch with your neighborhood, state, and national government agents to tell them that you care about battling human trafficking in your locale, and ask what they are doing to address human trafficking in your general vicinity.
5. Volunteer to do injured individual effort or offer your expert administrations to a neighbourhood hostile to trafficking association.
6. Donate funds or basic necessities to an anti-trafficking organization in your area or locality. (7) Hosting a mindfulness occasion to watch and examine an ongoing human trafficking narrative. On a bigger scale, have a human trafficking film celebration.
7. Consider completing one of your exploration papers on a subject concerning human trafficking. Teachers: Request that human trafficking be an issue incorporated into college educational modules. Increment grant about human trafficking by distributing an article, showing a class, or facilitating a symposium.

Hostile to trafficking associations think about that administrations, to all casualties of trafficking, ought to be given by built up associations involvement in reacting to savagery against women. They have additionally noticed the requirement for both master administrations reacting to rape and aggressive behavior at home, and additionally more generalist administrations, for example, those in the wellbeing segment, to connect all the more completely with women in prostitution. At long last, notwithstanding focusing on the “decisions” or “choices” accessible to women casualties of trafficking, there is a squeezing need to take a gander at the “decisions” or “choices” of the men who abuse them. Tending to request is a fundamental, however regularly neglected, component of the Trafficking Protocol.

Human Trafficking is spread in each nation and community around the world, and
keeping in mind that there are numerous people and associations working all-inclusive to battle this issue, it might require some investment before it is completely acknowledged exactly how tremendous this issue is. We can cooperate to stop this. Relatively few individuals know about the human trafficking issue on the planet today. As people we work to perfection at cooperating with others and sharing our musings and thoughts. We can take the data adapted today and educate others about human trafficking and ideally the word will spread to bring up everybody pays special mind to human trafficking and report suspicious movement when required. Together, we can do it!

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AN EPOCH OF NON COMPLIANCE OF JUDICIAL PRONOUNCEMENTS: CONFLICT BETWEEN CONSTITUTIONAL MORALITY AND PUBLIC MORALITY

By Purna Vijay
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ABSTRACT
The paper deals with the thriving issue of unwelcoming of judicial pronouncements by public. India being a federal democratic union incorporated of different states and territories, jointly and individually administered by tiers of government and their organs, inculcating diversities and likeness, there are various reasons for this phenomenon of non-compliance. This article focuses on the issue of conflict between constitutional morality and public morality in the light of certain recent case laws. The article emphasise on the essentiality of considering both constitutional morality as well as public morality while deciding a case of public importance, and tries to throw light on the ramifications of ignoring any one of the above said notion. The paper further suggests method for deciding a case in a well conclusive manner by inculcating the concept of constitutional morality as well as public morality.

INTRODUCTION
Indian Supreme Court is well known for its crucial landmark verdicts and moves, being the apex court of the land, it is considered to be the repository of judicial powers. Further, our constitution has palpably laid down the authorities and privileges of the institution running from Article 124 to Article 147. Despite this constitutional and legal arrangement, the apex court is suffering from a syndrome of non-compliance of its verdicts by inferior or subordinates authorities and public. And this reminds me of a anecdote about President John F Kennedy's derisive comment on President Dwight David 'Ike' Eisenhower about whose administrative ability he had a dismal opinion. Taking his guests on a tour of the White House, Kennedy would point to the presidential chair in the Oval Office and say: 'Ike would sit there, and say, 'Do this, do that' and nothing would happen!' Similarly, India's Supreme Court too, in many instances, sits there and says, 'Do this, do that' and nothing happens on the ground by way of compliance.

And this is a quite serious scenario and if this continues, will bring about dangerous outcomes that may vandalise the independency and majesty of Indian judiciary. Thus it is essential to tackle this contingency. This harrowing phenomenon can be attributed various causes or reasons such as irresponsible and corrupted attitude of executives and other subordinate authorities, illegitimate political inclinations, friction or hostility prevailing between states or among union and state, discrepancies prevailing among the organs of nation, failure of parliament to pass appropriate law in regard to verdict of Court, unreasonable or illegitimate intervention of presidential power. Apart from these causes, there is yet another thriving and trending reason behind

the non-compliance phenomenon, that is the lack of public support for the decision. Or can be rather explained as a conflict between constitutional morality and public morality. And this notion can be well understood through a critical analysis or appraisal of certain recent pronouncements by the Apex Court. But before moving on to that, it is inevitable to consider the concept of Public morality and Constitutional Morality.

PUBLIC MORALITY Vs CONSTITUTIONAL MORALITY

Public Morality and Constitutional Morality are two crucial, imperative concepts upon which the whole system of our nation is based upon. Public morality is a wide and exhaustive term, it can be defined as popular sentiment prevalent at a particular point of time. It showcases the desires, believes, values and intricate emotions of society, this is certainly a driving force of society.

Constitutional morality on the other hand is yet another intricate concept that depicts the legally embedded believes or constitution values of a state. Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmation of constitutional morality which is the pillar stone of good governance511. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would be arbitrary or violative of the rule of law512. The scope of constitutional morality is not limited only to following the constitutional provisions literally but it is so broad that it includes commitment to inclusive and democratic political process in which both individual and collective interests are satisfied513.

According to me, a judgement can be said to well conclusive if it is evenly or finely incorporated with the principle or notion of Constitutional morality, Public morality. Incorporating these elements while pronouncing a verdict is one of the most challenging task as far as judiciary is concerned. The complexity in factual situation and legal issues embroils or excruciates the whole process of decision making and it often forces the judicial institutions to leave behind any of one the notion. Thus it is undoubtedly true that there often happens to be a conflict between constitutional morality and public morality, and this has undermined the impeccability or content of judicial pronouncements.

A CRITICAL ANALYSIS OF RECENT SUPREME COURT JUDGEMENTS

Let us now analyse three crucial judgements given in the year 2018. Consider the case of Navtej Singh Johar v Union of India, which partially decriminalised section 377 of Indian Penal Code, whereby it paved a way for homosexuals to have sexual intercourse without the fear of punishment. Definitely the decision was quiet justifiable or upright from its legal or constitutional perspective as it put an end to the 158 years old colonial law which positioned the homosexual acts under the title of ‘unnatural offences’. The

511 Justice K.S.Puttaswamy(Retd) vs Union Of India (2017) 10 SCC
512 Manoj Narula vs Union Of India, (2014) 9 SCC
decision was in congruence with the principle of equality, dignity and such other constitutional principles established under Article 14, Article 21 etc. Every person has got an identity or individuality, a very essential feature of a sovereign nation is the freedom of people to express or promulgate their identity or individuality. Identity is the vital unique feature of a person that determines his way of life and several other aspects. Any law which prohibits self expression is highly erroneous and discriminative. Section 377 was one such provision which impeded the process of self expression or determination, indirectly it was violating the fundamental rights of a particular class of people, it was basically against the very notion or essence of our Constitution. ‘India, a democratic, secular, non- discriminatory, empowering civilised nation’ , the alleged rule was totally contradicting the above said titles or features. I would say, through the act striking down 377 partially, India has taken a step to justify or comply with these disseminated titles. As a result of the societal set up, rigid stereotypes, and such other dogmatic social norms, this particular class of people (LGBTQ) were subjected to social exclusion and identity seclusion, this so-called judgment has rendered them a dignified position in the society.

In the case of Joseph Shine v Union of India, Supreme Court decriminalised the offence of Adultery (Section 497 of IPC), on the ground that it violates Article 14, Article 15(1) and Article 21. The court stated that section 497 is an archaic law premised on a feudal and paternalistic understanding of marital relationship. The alleged provision objectifies women and demeans or degrades the status of women and thus falls out of modern constitutional doctrine. Further, there were certain other discrepancies with the provision, for example, wife’s extramarital sexual acts, when done with her husband’s consent are not a criminal offense made section 497 manifestly arbitrary. Thus the whole decision seems to be valid and apt from the legal point of view.

Likewise, in the case of Indian Young Lawyers Association v State of Kerala, Supreme Court struck down the years old ban on women between the age of 10-50 from entering the premise of Sabarimala Temple. The ban was based on the age old practices, tradition and religious beliefs of Hindus that Lord Ayyapa, the deity of Sabarimala is a celibate, and entry women between the alleged age gap would sabotage the sanctity of the temple. Court held that the ban abridges the principle of equality and is derogatory to the dignity of women. It further takes away the constitutionally religious freedom from women. Here again the judgement is condign or apt from constitutional point of view as the ban was violative of Article 14, Article 15, Article 17, Article 25.

Now consider the current status or social acceptance of these cases, all three remains unwelcomed and non-complied by the public. And this non-acceptance can be attributed to the lack of public morality in the judgements. In all three cases there was a thriving a conflict between constitutional

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morality and public morality, and the court discarded popular sentiments or opinion. India is still a conventional society in many aspects and majority adheres to heterosexuality and consider homosexuality and related aspects to be unnatural. Thus, 377 judgement was forcefully imposed on Indian society, and therefore remain to be un-accepted by majority. Likewise, a lay man is totally unconcerned and ignorant of the alleged discrepancies and issues of objectifying women, according to him, all kind extra marital sexual affairs between a man and married women is immoral and illegal. Therefore there is nothing to get surprised or dejected with the unwelcomed status of Joseph shine v Union of India. Similarly, Sabarimala case involved a total destruction of age old beliefs and sentiments of Hindus. This was highly sensitive matter which is rooted to religious practice, such issues can be settled amicably only through considerable degree of public support, legal framework alone can’t absolve the issue. This is again well clear from kind of havoc and protests that was continuing in the state of Kerala. The whole situation was out of control and there was a failure of law and order. And still the matter is not settled, around 25 plus review petitions are pending before the Apex court.

These cases well definably established the importance of public morality and the ramifications if the said notion is not considered. With this note I am no way trying to undermine the value of constitutional morality. This is of course a most imperative notion in constitutional democracy like India, but this alone may not bring about the desired positive outcome always, especially when the issue is deeply connected with public spirit or sentiments. In such cases it is inevitable to consider public morality to certain extent.

CONCLUSION
The concept of constitutional morality and public morality are closely connected. Constitutional morality has its certain roots in public morality, if travel back to the history of our constitution we will come across the notion that constitution is nothing but the will of people. This was further established in the case of Supreme Court Advocates on Record Association v. Union of India. Therefore, Constitutional morality and other subordinate law cannot go against the interest on public. It should consider larger public interest and safety at first. The individual or organization or any other entity who is party to the case may not always represent the public opinion or morality, that may something different. For example in the case of sabarimala, the women association or organization that opposed the ban does not represent the majority. Now here arises a question as to what can be done to thwart these displeasing outcomes. I would suggest, the method of plebiscite, that is whenever a public issue involving a conflict between constitutional morality and public morality comes before the court, it has to go for a plebiscite asking the people to cast their vote or opinion on the matter. This might appear to non pragmatic and impossible for a few at least, it is accepted that it is a humongous or excruciating task to go for plebiscite in a country like India where judiciary is suffering from slow motion syndrome due to heaps of cases pending. But this will be

515 Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441

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240
definitely apt in a diverse democracy like India, if this is complied will certainly bring about some positive changes as to the acceptance or compliance of judicial pronouncements. Further this rejuvenate or Arden the public trust in judiciary. Further through this suggestion I don’t mean to invite for public opinion in every cases or to totally discard constitutional morality, this said procedure should be practiced only in certain highly sensitive issues, resorting to this method in all cases will definitely destroy the judicial independency and the concept of constitutional morality. According to me, the pending review petition on Sabarimala matter has to be determined through a plebiscite. Here women and her religious right is the main issue, thus all women should asked to put her stand on it.
ARISTOCRACY OF POLICE AND VIOLATION OF HUMAN RIGHTS

By Priyanka
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Need to take proactive steps against Police Brutality

Introduction :- The citizens of the country are the assets of that country so that it is the duty of the state to protect their people and their property from any kind of loss, for this purpose the state setup the police system for the better administration. It is a responsibility of police officers to perform their duties and functions with honesty and integrity without misuse their power which is vested to them to protect the life of the citizens. But during the last few years the instances of police aristocracy are increased day by day such as Custodial torture, Custodial rape, illegal detention, worst behaviour with women, maximum use of third degree methods, violations of human rights, corruption practices.

Police – Public Relationship In The Present Scenario:- In the present time, the lack of cooperation between the police and public is the main reason of public distrust. Mutual trust and confidence between the police and public is lacking because of over bearing attitude of police varying on harassment. The main reason of this distrust is the occupational delay in the restoration of cases and the harsh treatment given to the complaints, discourtesy and impoliteness.

Human Rights And Police :- Man has certain rights which are universal, inalienable, inherent, fundamental and basic, the enjoyment of which is the foundation of freedom, justice and peace. The misuse of power and authority by the police officer found to be denial of such rights. In doing so, some police officers do not understand that they are violating the human rights of the people for whose welfare and protection the service is created. Every citizen has a right to get register their complaint but it is found that police generally not register the complaint of people.

Custodial Violence :- Custodial violence includes torture, death, and other excesses in police custody or prison. It is practiced by the law enforcement agencies on prisoners, criminals, and wrongdoers. The victims of these violence are mainly ordinary men and women belong to socio-eco disadvantage strata of the society. Custodial Violence is a term which is used for describing violence committed against a person who is in the custody by a police authority.

Custodial Torture :- Custodial torture has become a common phenomenon and a routine police practice of interrogation these days. The magnitude of police custodial torture in India is evident by the Report of Amnesty International (1992) which says that 415 persons died in the custody of police and security forces due to torture 1985 – 91. The Government itself admitted in Rajya Sabha that 46 persons died in police custody due to torture within three months i.e January to March 1993 in Delhi alone. These figures point at
the alarming dimensions of the problem. As per the crime statistics of the year 2002 published by NCRB, 84 custodial deaths were reported, 30 cases were registered, 32 policeman were charge sheeted but none was convicted during that year. The detailed report of the number of deaths in police custody during the year 2009 as published by NCRB in CRIME IN INDIA shows there were as many as 449 custodial deaths during the period from 1 January to 31 December 2009. In Yusuf Ali VS State of Maharashtra\(^{516}\) the Supreme Court reiterated that if the accused is beaten or starved or tortured in any way during the course of investigation by the police it will be taken as a case of custodial torture.

In Niranjan Singh VS Prabhakar Rajaram\(^{517}\), while dealing with cases of custodial torture in police stations, the Supreme Court observed, “the police instead of being protector of Law, have become the engineer of terror and panic putting people into fear”.

**Method of torture:**

The method of torture that are followed by the police are as follows:

- **Roller Method** – In this method, the victim is made to lie on the floor and then a wooden log is rolled over the thighs of the victim which gives a severe pain as resulted the muscles of the thighs are squash and disjoint from the backbone. This is cruel and vicious kind of torture. This method of torture came into light after the case of RAJAN, who was subjected to roller method and died in police custody.

- **Heavy Electric Shocks** – This technique of torture is used in different ways. First, person is asked to pee into the on electric wire as resulted person get continuous current through his private part. Second, person is asked to sit on chair after tied his hands live electric wires are touch to his body to pass the electric current to him.

- **Finger Nail Torturing** – Finger nail may be pull off by use force. This can cause unbearable pain to the victim.

**Custodial Deaths** :- Death in police custody are usually the result of torture because the person cannot bear the pain. Human Rights Commission registered the 1080 cases of custodial deaths in the last 10 months. According to Union Minister of State of Home Hansraj Gangaram Ahir – 144 cases of death in police custody and 1530 cases of death in judicial custody were registered by NCRB between April 1, 2007 and February 28, 2018. According to NCRB between 2010 and 2015, 591 people died in police custody. The Supreme Court took a serious view of police custodial deaths in Dalip Singh VS State of Haryana\(^{518}\), in this case two constables along with a Sub Inspector of Kurukshetra District were found guilty of causing death of the accused by beating and convicted them under section 304 (II) of IPC, i.e., for causing death by negligence. Yet in another case\(^{519}\) of custodial death, the Supreme Court not only directed Home Secretary of Punjab to suspend the guilty Sub Inspector but also ordered CBI to conduct an inquiry into the case. In this case, and innocent person, Sarabjeet, was...

\(^{516}\) AIR 1968 SC 150.

\(^{517}\) AIR 1980 SC 785.

\(^{518}\) AIR 1993 SC 2302.

\(^{519}\) The Hindustan times (Delhi) dated 6 Nov, 1993.
picked up by the police, detained for several days and finally gunned down near the Indo-Pak border. It was later on found that the deceased had nothing to do with terrorist activities and was completely innocent. Since police custodial torture and death is a blatant violation of fundamental right to life as guaranteed by Article 21 of the Indian Constitution, compensation has been considered as an appropriate relief in such cases. The case of Nilabati Behra VS State of Orrisa\(^{520}\) may be cited to illustrate the point. In this case, the Supreme Court treated the letter of one Nilabati Behra as a writ petition under Article 32 of the Constitution, wherein petitioner had claimed compensation for death of her son Suman Behra aged 22 years in police custody in District Sundergarh in Orrisa. The State Government on behalf of police contended that the deceased had escaped from custody and was run over by train while being chased by the police party. Therefore, it was not a case of custodial death. The Government also raised a plea of sovereign immunity. The Supreme Court rejected both the contentions of the respondents and held that defence of sovereign immunity is not available in case of constitutional remedy and there was no evidence that the death of the deceased was accidental. The course awarded Rs 1,50,000 as compensation to the deceased’s mother.

**Aristocracy Of Police Against Women:**

Women are the backbone of any society need to be loved and respected. Women victims of crime are deterred from approaching the police to seek relief due to lack of confidence. More importantly there are instances of policeman themselves committing crimes like molestation and rape against who came in contact with police as a victim or accused. If a woman goes in police station for registration of FIR by herself, she is abused and not heard. In case of *Sheela Barse vs State of Maharashtra*\(^{521}\) Justice Bhagwati showed deep concern for the rights of women and gave detailed directions for protecting the rights of women confined in police lock-ups.

(a) Female suspect should not be kept in a police lock-up in which male suspect are detained.

(b) Police lock-ups for female suspect should be in reasonably good localities and should be guarded by female constables.

(c) Interrogation of female should be carried out only in the presence of female police officer.

(d) An arrested person must be informed that he is entitled to apply for bail and grounds of arrest must be communicated to him.

(e) Four or five police lock-ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspect should not be kept in the same police lock-ups in which male suspect are detained.

(f) Interrogation of women should be carried out only in the presence of women police officers. The court expressed the confidence that if these directions are carried out both in letter and in spirit, that will afford considerable protection to prisoners in police lock-ups.

\(^{520}\) AIR 1993 SC 1960.

\(^{521}\) AIR 1983 S.C 378.
 Custodial Rape:
In many police stations even where there is women police officer is also appointed, women taken in police custody, brutally tortured, molested, abused and raped by male police. These police officer doesn’t show mercy even for the women who is pregnant. The Mathura rape case was an incident of custodial rape in India on 26 March 1972, wherein Mathura, a young tribal girl, was raped by two policemen on the compound of Desai Ganj Police Station in Chandrapur district of Maharashtra. The supreme court ruled in Tukaram vs State of Maharashtra522 that there were no injuries on the on the body of the girl, which meant that she did not put up resistance and that the incidence was a peaceful affair. After the supreme court acquitted the accused, there was public outcry and protests, which eventually lead to amendments in the Indian rape law via the criminal law (second amendment) Act 1983 (No.46). On 12 September 2018, in Rewari Gang Rape case, a 19 years old girl was raped and the main accused of this case is an army man serving in Rajasthan, this incident proves that “the guard is the eater”. The Chief Minister of Kerala Pinarayi Vijayan also said that “Police officers who indulge in crimes should not expect any mercy”.

Illegal Detention :- Illegal detention is a wrongful restraintment, arbitrarily detention, indiscriminate arrest and wrongful use of arrest powers by the police. In the case of Joginder Kumar VS State of UP and others523, a young lawyer aged 28 was called to the police of the senior superintendent of police, Ghaziabad in connection with “some enquiries”. He was accompanied by friends and his brother, who were told by the police that he would be released in the evening. Joginder Kumar was taken to a police station with the assurance that he would be released on next day. But he was not released as the police allegedly wanted his help in making “further inquiries”. When his family went to the police station on the third day, they found that he had been taken to an undisclosed location. Thus Joginder was illegally detained by police for more than five days. When the aggrieved family filed a habeas corpus write petition, the Supreme Court issued notice to the state of UP and SSP to immediately produce Joginder Kumar and explain why he was detained for five days without a valid reason and why his detention was not recorded in the police diary and why he was not produce before the magistrate. The police version was that Joginder Kumar was cooperating with them out of his own free will which the court was not convinced to accept. The Court, inter alia, ruled that an arrest cannot be made simply because it is lawful for a police officer to do so. “The existence of the power to arrest is one thing, the justification for the exercise of it quite another ............ the police officer must be able to justify the arrest .......... The Court said that the officer making the arrested must function under a “reasonable belief” both as to person’s complicity in committing the offences and the need to effective about arrest. The Apex Court laid down the guidelines for arrest by police which are as follows :-

1. Arrests are not to be made in routine manner the officer making arrest must be

522 AIR 1979 SC 185 ; (1979)2 SCC 143 ; 1978 Cr L J 1864 ; 1979 SCC 143.
able to justify its necessity on the basis of some preliminary investigation.

2. An arrested person should be informed the grounds of his arrest and allowed to inform his friends or relatives about the same. An entry in the police diary about the arrest and the person who were informed about the arrest must be made by the police officer at the police station.

3. The Magistrate concerned must satisfy that the above requirements have been complied with by the police.

**Supreme Court’s Directives for avoidance of Custodial Crimes**:

The Supreme Court has expressed its concern for custodial Commission of crimes during investigation and interrogation and laid down certain principles to be followed by concerned police officers in its historic decision in *D. K. Basu VS State of West Bengal.*

The basic requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf to prevent custodial Violence are as follows:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the are arrestee must be recorded in a register.

2. The police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrestee is made.

3. A person who has been arrested or detained and being held in custody in a police station or interrogation or lock-up, shall be entitled to inform his friend/relative or a person having interest in his welfare, as soon as practicable, that he has been arrested and is being detained at a particular place, unless the attesting witness of the memory of arrest is himself such friend/relative.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police.

5. The person arrested must be made aware of his right to have some informed if his arrest and detention as soon as he is put under arrest or is detained.

6. An entry must be made in a diary at the place of detention giving all details, about his friend/relative or person informed.

7. The arrestee should, where he so requests, be also examined at the time of arrest and medical examination by a trained doctor every 48 hours during his detention in custody.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody.

9. Copies of all documents including memory of arrest, should be sent you the Illaqua Magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

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524 AIR 1997 SC 3017.
The Apex Court opined that the failure to comply with the above requirements will render the officer concerned liable to be punished for contempt of court besides the usual departmental action against him.

**Conclusion**: The continued police brutality and after seen the results of this brutality during the past two decades it seems that protectors of law have become the law breakers. If the police follow the rules designed to deter torture and mistreatment, deaths in custody could be prevented. The police must change its attitude and behaviour while dealing with witnesses, suspects and criminals. Good policing is policing that is both effective and fair and helpful in developing public confidence and cooperation. Police who are ineffective, or illegitimate or unfair, in protecting the public against crime will lose the public trust and confidence. Police accountability is also necessary so that the police accept being questioned about their decision and actions and accept the consequences of being found guilty of misconduct, including sanctions and having to compensate victims. Habeas corpus is another fundamental measure to hold police accountable when depriving someone of his or her liberty. To prevent the violation of human rights, it is require to promote legal awareness among the citizens of India so that they could not became the victim of police brutality.

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GENDER NEUTRALITY OF RAPE LAWS: A DENIAL OF RIGHTS TO MEN?

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With the changing times and the fluidity of gender roles in the modern society, it has been an often debated subject as to whether the Union of India requires a law governing the offence of rape that is gender neutral, which means allowing for men and women to be regarded as both potential offenders and potential victims. As the very nature of rape is dependent on the assertion of power of the perpetrator on the victim, the rape of a man as compared to the rape of a woman should be considered equally heinous. Several countries, like the United States of America, the United Kingdom and most recently, China have changes their rape laws to make it gender neutral. This paper analysis the requirement for such laws in our country and the effect that it will have on the society.

The questions that arise in this regard would be:
1. Whether there is there a need for neutrality in the Rape laws of India?
2. What effect will such a law have on the male victims?

According to the National Crime Victimization Survey, rape is “the unlawful penetration of a person against the will of the victim, with the use or threatened use of force, or attempting such an act.” Their definition of rape is not limited to the physical act of penetration but also includes the psychological coercion, penetration by foreign objects, and the victimizations suffered by male and female victims. This definition makes it clear that the bureau looks at the act of commission of rape as well as the victimization of rape as gender neutral. Historically, however, the definitions of rape have been gendered.

The traditional definition of rape; the carnal knowledge of a woman against her will, is a gendered approach to the offence of rape and reflects the patriarchal mindset of the world at large. This notion of a female victim and a male perpetrator conform to the traditional view of the patriarchal notion of rape, where men that have been victims of this crime are considered to have lost their masculinity. This view not only colors the societal view of a male victim of sexual assault, it denies the victim his rights to a legal remedy under the law of the land. The emphasis on the traditional gender roles expected by the society leads to the further oppression of a raped male as the social standard is that only a woman can get raped as men are strong enough to protect themselves against their assailants. This barrier leads to the isolation of the victim.

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527Id.
528Id.
due to the lack of support that they encounter.

In the case of India, the offence of rape, as under Section 375 of the Indian Penal Code, after its amendment in the year 2013 by the Criminal Law Amendment Act (2013), is defined as follows:

A man is said to commit “rape” if he –

a. penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a woman or makes her do so with him or any other person; or

b. inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman, or makes her do so to him with any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her do so to him with any other person under the circumstances falling under any of the following seven descriptions:

First - Against her will.
Second - Without her consent.
Third – With her consent, when her consent has been obtained by putting her or nay person in whom she is interested, in fear of death or of hurt.
Fourth – With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifth – With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and the consequences of that to which she gives consent.
Sixth – With or without her consent, when she is under eighteen years of age.
Seventh – When she is unable to communicate consent.

Where the exceptions to the provision are:
Exception 1 – A medical procedure or intervention shall not constitute rape.
Exception 2 – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under the age of fifteen years, is not rape.

The punishment for rape, as enumerated in Section 376(1) States that:
Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall be liable to fine.

As seen clearly from the above stated provision, the Indian Penal Code does not consider men to be victims of rape. The only solace that a man can find is within Section 377 of the Indian Penal Code, which defines “Unnatural Offences” –

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment.

529529 The Indian Penal Code (1860), Act No. 45 of 19860, Section 375.
530 The Indian Penal Code (1860), Act No. 45 of 19860, Section 376.
of either description for a term which may extend to ten years, and shall also be liable to fine.  

This law made consent and age irrelevant by imposing a blanket restriction on any act, which included any non penile-vaginal sexual acts. Section 377, also called India’s anti-sodomy law, is the only route for a male victim to find justice, provided that a man assaults him. Sodomy, however, is not considered to be actual rape, primarily due to the fact that there is no distinction between consensual and non-consensual sexual acts between two male adults. Moreover, it does not provide for any remedy to a man if the perpetrator is a woman.

The statistics brought forth by the Center for Disease Control, in the year 2010, found that 93.3% male rape victims reported of their perpetrators being male, but 1 out of every 21 males that were subject to unwanted sexual contact reported that they were “made to penetrate” by women, through the use of aggressive and coercive tactics, psychological pressure and coercion. The commission of such acts, against the will of the man causes the same psychological pressure that a female victim of rape faces and the absence of any legal recourse in this regard violates the rights of the men in the society.

In the case of Bodhisattwa Gautam v. Subhara Chakraborty, the Supreme Court observed that “(Rape) destroys the entire psychology of a woman and pushes into deep emotional crisis… Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s Fundamental Right to Life contained in Article 21.”

Keeping this view in mind, when we come to the case of male rape, the violation and the psychological effect that a man has in this situation is similar, if not identical, to the psychology of the woman. In both cases, the victim’s right to life is being infringed upon and by recognizing only the woman’s suffering and providing remedy for the same, it infringes upon the man’s rights, as guaranteed under Article 14, of Equality before the Law. This means, as the state guarantees the right to equality before the law, the state violates this provision by not recognizing the male victim.

Atrocities suffered by male victims:
1. In 2015 a report brought forth fifteen instances of “corrective rapes” that were perpetrated in Telengana over 5 years. This act of violence is committed by the family and is categorized as a hate crime that is wielded to correct their homosexual children’s sexual preference. In these scenarios, the homosexual individual is forced into having sex with their family members, maybe even a parent, to ‘cure’ them.
2. In 2015, a 16-year-old boy was sexually assaulted by his friend’s mother.

531 The Indian Penal Code (1860), Act No. 45 of 19860, Section 377.
533 Patricia Novotny, Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?, 1 SEATTLE JOURNAL FOR SOCIAL JUSTICE (2003).
534 (1996) 1 SCC 490.
535 Rohini Chatterji, Parents in India are using ‘corrective rape’ to cure homosexual children, FIRSTPOST, June 1st, 2015.
According to the report that followed, when the boy had gone to meet his friend on Chembur, Mumbai, the mother spiked his soft drink. When he lost consciousness, she stripped him and forced herself upon him and recorded the entire thing. She proceeded to blackmail him and regularly summoned him to her house for the next three months. She threatened to accuse him of rape if he ever told anybody of what had taken place between them.\textsuperscript{536}

3. A 19-year-old male student of Banaras Hindu University was gang raped by five men inside a car within the campus of the university.\textsuperscript{537} Despite filing a report, the police are lax in taking up the investigation.

4. A man who went through sexual abuse his entire life, beginning with his uncle at the age of 7 and then being gang raped at the age of 12, had no legal recourse for these violations as when he realized that it was happening to him, he was 18 years old.\textsuperscript{538}

5. A male student, of Delhi University, was raped by men that were sent by his girlfriend’s father and tortured him after the act.\textsuperscript{539}

As we can see through these examples, the case of male rape is not uncommon. The absence of statistics that prove the case in India is due to the largely accepted notion that men cannot be raped due to their strength and their masculinity.\textsuperscript{540} What the society fails to understand is that the victims of masculinity are both men and women. The act of rape is not committed primarily with the intention of indulging in the act of sex but is rather an act of asserting their dominance and power over the victim by forcing the victim to subjugate against their will. The act of assertion caused a sense of helplessness in the minds of the victim, regardless of their gender and causes adverse psychological effects.\textsuperscript{541}

Article 14 of the Indian Constitution guarantees to its citizens the right to equality before the law and the act of rape violates Article 21, which guarantees to all its citizens the right to life. By having a gendered law for rape, the government is protecting the right to life of one section of the society and not the other. The absence of a legal remedy for men results in a violation of Article 14 of the constitution.

Thus, in conclusion, there is a dire need for gender-neutral rape laws. Though we do not have the statistics necessary to make an estimation of the amount of male rapes
committed within the bounds of India, if we draw from international statistics and the cases that we read of in the newspaper, we may come to the conclusion that it is a substantial threat to the men in the society. Protecting women from any form of abuse as used against their gender and failing to do so for the men in the society will not lead to harmonious society, but to the denial of rights to men.

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ANALYSIS OF INTERMEDIARY LIABILITY AND THE IT ACT

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ABSTRACT
India is one of the vast countries and has the largest number of internet users in the world. Privacy is the serious concerns among the people. The discloser of data and information has become easier and more uncontrollable. Now it is the time to disclose the internet and the Indian state is highly making demand on intermediaries to monitor and screen data which is posted on internet that will increase the tension among the individuals for exercising our right to privacy, freedom of speech and expression and defamation on the internet. India also provides the social media platform for free speech and has incorporated a safe harbor protection in order to limit the liability of the intermediaries but legislative ambiguities coupled with the onerous obligations imposed on intermediaries threatens to defeat the purpose of providing safe harbor protection. Further, a recent spate of judicial decisions that endorses overbroad filtering without taking into account its chilling effects on free speech highlights a need for immediate change in the legislative, executive and judicial approach towards intermediary liability and internet service providers in India.

Keywords: Intermediary, Internet, privacy, Freedom of speech and expression, Safe harbor, legislative, judicial decision.

1. INTRODUCTION

In the present world the obligations, liabilities, and the responsibilities of online intermediary is increasing on the internet. However, these obligations infringe the legal rights of both the users and the business opportunities. Internet service provider is one of the types of Intermediary which allows the users to upload any type of information, data on the internet, which includes text, video, comments etc.; some of the example of intermediaries are Facebook, WhatsApp, Twitter, Instagram, YouTube and BlogSpot. In India the word ‘intermediary’ is described in section2(1)(w) of the Information Technology Act, 2000 stated as “any one person on behalf of another person receive, stores, or transmits, that record and provide any service to that of record; this include internet service provider, network service provider, telecom service provider online market place, cyber café.” Definition of intermediary is only satisfied if there is exchange of data, information, goods and service through the internet on the social media platform. Intermediary is widely recognized as essential cogs in the wheel of exercising the right to freedom of speech and expression on the internet. To limit the liability of the intermediary many such institutions in the world ensure that this wheel does not stop spinning.

In 1990s, when internet was still coming into its form, intermediaries were subject to only limited regulation. In present times,
they have grown to provide a prosperous social media platform through which information or data uploaded. India provides both internet-related services as well as ‘consuming’ the internet all over the world. India is one of the leading IT service providers to the businesses over the globe, its own internet users were 481 million at the end of 2017, report said by internet and mobile association of India (IAMAI). The large scale information transmitted across world has facilitated the commission of offences such as defamation, violation of privacy, unlawful acts and intellectual property infringement. These harms are raised due to the invasion of privacy of the particular individual. The information should be collected and used by intermediary in a manner that privacy cannot be harmed. The main purpose of this research paper is to find the best approach to divide the intermediaries’ into two categories based on whether the liability is primary or secondary. In some cases, there is direct infringement of the privacy of individual when the information, data is deliberately and unknowingly disclosed by the intermediary. On the other way if intermediary service is used by third party to commit an unlawful act which infringes the rights of privacy, freedom of expression of individual, and if intermediary fails to understand that he exercised a reasonable care in monitoring the content hosted by it, may be secondary liable of infringement. Depending on the nature of the concern, the right to privacy of individuals can be secured by three means: (a) self-regulation, or the governance of the internet by the participants themselves, without intervention by the State; (b) privacy-enabling technology architecture; or (c) through state action, in the form of laws. For the purpose of this Report, its analysis will be restricted to the regulation of intermediaries in India through the operation of law.

INTERMEDIARY LIABILITY BEFORE AND AFTER IT AMENDMENT ACT 2008.

After the enforcement of IT Act, 2000 intermediaries have become liable for the act of the third parties. The most suitable case defining the legal responsibilities of intermediaries is Baazee.com case (also called as ebay.in), an auction portal which is owned by an American auction giant Ebay.com. Avnish Bajaj the CEO of the company was taken into custody for allowing the auction of pornographic video clip involving two students on its website. Amazon provides for a system whereby an aggrieved person can notify Amazon about the material that has been infringed by giving a description of the work or by


549VipullVinod, liabilities of Intermediaries and Safe Harbours under Cyber Law Regime in India, 8 RMLNJU, 182-183(2016).
providing a statement showing the rightful owner. In the case if the In case one feels that one's work has been infringed, this needs to be notified to the respective sites with a description of the material and the signature of the person authorized to act on behalf of the owner of the material. These sites further provide that one is responsible for maintaining confidentiality. The Yahoo Auction site also clearly provides that they are not in any way liable for the material that is uploaded and may at any time terminate a user's account. Under the old IT Act, they could be released only if they proved that they had no knowledge about the infringement and they had exercised all due diligence to prevent such offence. If the website had knowledge about the unlawful content posted on the website or he didn't take proper care then the websites are liable. However, it is impossible for any website to monitor this content. This led to amendment of the IT Act 2000. After that the old IT Act, is changed into the new IT Act, 2008. Under the Information Technology Amendment Act 2008section 79 states that: “If any data or information posted on the internet by the third party then the intermediary is not liable as they had no knowledge about what is posted on the websites.” However there are some conditions:

- The role of intermediary is minimal and providing access to communication system over the information accessible to the third party to transmitted or temporarily hosted.
- Intermediaries are not allowed to modify any type of data posted by the third party.
- While discharging his duties the intermediary must observe due diligence. Due to this amendment the internet service provider i.e., the ‘intermediary’ have been exempted from the liability under the section 79 of the IT Act. However, if the intermediary forced or threatens any of the users to upload obscene, unlawful content that harm the reputation of the third party then the intermediary loses their liability. Many foreign jurisdictions the idea of ‘notice and take down’is prevalent and section 79 of the IT Act also uses this idea for the protection of rights of intermediary. An intermediary loses the liability if they have knowledge of the unlawful content and fails to remove or disable access to that material.

Even though they are immune from liability but still they are liable under the section 72A for the disclosure of personal information without the consent of person to whom it can cause wrongful loss or breach of contract. And punishment for such discloser is imprisonment extending to three years or fine extending to five lakh rupees or both. This provision was introduced under IT Act, 2008 and is aimed to protect the privacy of the individual.

3. ANALYSIS OF INFORMATION TECHNOLOGY (INTERMEDIARIES GUIDELINES) RULES, 2018


553Ibid.

www.supremoamicus.org
The IT (Intermediary Guidelines) Rules 2011, under section 79(2) of the Act clearly specify the due diligence requirements under such exemption.\(^{554}\) In 2018 a discussion was raised in the Parliament on misuse of social media platform. \(^{555}\) The Ministry of Electronics and Information Technology released a new Rule to the intermediary which amends the due diligence and requirements for the intermediaries.\(^{556}\)

### 3.1 Key features of the rule

- The Intermediary Guidelines Rules \(^{557}\) prohibit the users from uploading certain types of content on social media platform like obscene content. Thenew Rules prohibit new category of information which threatens to ‘public health or safety’.

- Previously intermediary was required to remove unlawful content within 36 hours if intermediary did not remove within stipulated time then he couldn’t avail ‘safe harbor’\(^{558}\) protection. But according to new guidelines they have to provide assistance to any government agency within 72 hours and further they must trace the origin of the information on their platform.

- Intermediary must have technology tools to identify and remove the unlawful contents.

Further, intermediary with more than fifty lakh users must incorporate a company in India.

#### 3.2 Analysis of the Key Features

- Intermediary is required to prohibit the publication of content that harms the public health or safety. It may be argued here that this may violate the right of freedom of speech and expression under article 19(1) but the Supreme Court clarified that threat to public health or safety cannot be a ground to restrict freedom of speech. Further, the court stated that any restriction on freedom of speech must relate to article 19(2).\(^{559}\) One of the Supreme Court judgments clarified that restriction on speech should be reasonable, narrowly so as to restrict only what is absolutely necessary.\(^{560}\)

- In 2015 the Supreme Court, examined section 79(3) (b) of the IT Act\(^{561}\) which requires intermediaries to remove or disable content on basis of user request. The content which falls under the following categories should be disabling or removed:

  - If the court or government orders the intermediaries to remove, and
  - The order relates to the restriction under the article 19(2) of constitution.\(^{562}\)

- New rules provide that intermediaries with more than fifty lakh users must incorporate in India under the Companies Act, 2013. Also, the new rules say that when the intermediary receives knowledge from the court or are notified by the government


\(^{556}\) The draft IT (Intermediary Guidelines (Amendment) Rules), (December 24, 2018), http://meity.gov.in/writereddata/files/Draft_Intermediary_Amendment_24122018.pdf.

\(^{557}\) (2011).

\(^{558}\) A safe harbor is a provision in a law or regulation that affords protection from liability or penalty under specific situations, or if certain conditions are met.


\(^{560}\) ShreyaSinghal vs. Union of India (2015) AIR SC 1523(India).

\(^{561}\) (2000).

\(^{562}\) Ibid.
under section 79(3) (b) of Act shall remove or disable access to unlawful act under article 19(2) of constitution of India which is related to the sovereignty and integrity of India, security of state, friendly relation with foreign states, public order, morality, or in the contempt of court, defamation but in no case later than twenty four hours in sub rule (6) of rule 3. Further, intermediary has to preserve the information or record for at least previously ninety days but after (new guidelines) it is one hundred and eighty days for investigation purpose or either by longer times decided by the court or government. This new guideline ensures traceability for content posted by user.\textsuperscript{563}

One issue whether an intermediary is treated as a publisher of content, Mr. Sundaram argued that an intermediary cannot be the publisher of the content. If intermediary fails to take any action despite of notice given by court or government authorities and has knowledge of such content then fails to take down then publisher of content is liable.\textsuperscript{564} Supreme Court clarifies that private parties should not be able to force content offline just by sending a notice to online intermediary.\textsuperscript{565}

4. \textbf{SUPREME COURT AND THE IT ACT}


\textsuperscript{564} Google India v. Visaka Industries, A.I.R 2017 (NOC 582) 193(India).

\textsuperscript{565} Giancarlo Frosio, Landmark Intermediary Liability Decision from the Indian Supreme Court (March 27, 2015), http://cyberlaw.stanford.edu/blog/2015/03/landmark-intermediary-liability-decision-indian-supreme-court.

Since the IT Act, came in the year 2000 and this Act, faces a lot of criticism from the public and legal community. Conditions are becoming worse that lead to the amendment in the IT Act, 2000 is replaced with the IT Amendment Act, and 2008 has introduced the infamous section 66A. This section defines the punishment for sending “offensive” messages through computer and any other communication devices. And convict can fetch a maximum of three year jail and fine. The main problem with this section is what is “offensive”. It is very difficult to decide which is offensive or which is not. Apart from Section 66A the Information Technology (Intermediary Guidelines) Rules, 2011.

Also face criticism while section 79 of this Act, exempt the liability of the intermediaries in certain cases. Furthermore, the information technology (procedure and safeguard for blocking for access of information by public) rules, 2009 provide the page to block without any notice given to public and this fails to meet the natural justice. After some time the section 66A of the information technology Act, was struck down because of the violation of article 19(1) (a) and not falling under the scope of ‘reasonable restriction’ under the article 19(2) of Indian constitution. While the supreme court in the landmark judgment ShreyaSinghal v. Union of India\textsuperscript{566} not only upheld the freedom of speech and expression but also narrowed down the law pertaining to protection of rights of online intermediary like twitter, Facebook, WhatsApp or other social media called ‘intermediaries’ from liability under the section 79 of the information technology.

\textsuperscript{566}(2013) 12 SCC 73.
Act, 2000. Further the court also held that the intermediary is required to take down or block content only after the notice from the government agency or a court order and not the discretion of the other member. The process of blocking is entirely secret and ex facie fail to meet constitutional safeguard of natural justice.567

The Delhi high court in the case Super Cassettes Industries ltd v. MySpace Inc 568 (called “MySpace”), held that the proviso to section 81 of IT Act, does not provide defense of safe harbor to intermediary liability against copyright claims. Further the court held that the immunity under section 79(1) of IT Act is not available unless due diligence requirement is fluffed under sub section 2.569

In Sabu Mathew George v. Union of India570 the Supreme Court directed Google, Microsoft and Yahoo to “auto-block” the advertisement related to sex determination. That imposes criminal liability for imposing or displaying any advertisement which can lead to knowledge of the unborn child and the applicant enforce under the section 22 of Pre-conception and Pre-natal Diagnostic Techniques Act.571 The court held the order in November 2016.572

The European commission has narrowed the limitation of e-commerce for online intermediary liability and putting in place a “fit for purpose”- or vertical - regulatory environment for platform and intermediaries. It is planning to introduce enhanced obligation on websites that deal with the third party content.573

5. DATA PROTECTION IN INDIA
In India there is no hard and fast rule for the protection of data, but adopted the sectorial approach. There are almost fifty sectorial laws, policies, and regulations that deal with the concept of privacy574, also including legislation in the financial575, and health.576 In the context of internet and digital information, the information technology Act577 used the term privacy protection. This is lack of awareness on privacy in India.578 The term privacy is different in United States and in India, in India “privacy” is still

569Ibid.
571(1944).
574Kessler, Ross & Hickok, A Comparative Analysis, supra note 44.
575Chapter VI (Sections 19 to 22) of the Credit Information Companies (Regulation) Act 2005 lays down, in detail, the requirements that are to be complied with by a Credit Information Company while conducting its business.
576For example, Regulation 1.3 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 provides for the maintenance of medical records and the procedure to be followed while disclosing these records.
577(2000).
construed as the term of personal space whereas in United States “privacy” is used in context of financial information and identity theft.

6. INTERMEDIARY LIABILITY IN UNITED STATE OF AMERICA

Internet intermediary liabilities are of two types that are primary and secondary by nature primary liability is due to the intermediary’s own act and omission. Whereas secondary liability is due to unlawful user generated content, may either intermediary contributed to it or have the knowledge of the same. The regulatory regimes in the world have introduced stringent laws that increased the use and misuse of the intermediary liability. Intermediary comes under the fire of action of user and third party generated content. While fundamental jurisdiction of United States of America has developed the safeguard to promote internet intermediary. However in developing countries like India are still struggling to establish uniform and coherent limits of internet intermediary. As we all know that United States of America is the first place where mostly electronic and internet related things are discover for use of all people across the world. So it is common to know that.


United States has passed legislation earlier in 1990, to encourage the development of intermediary and provide the protection from the content posted by the user or the third party.581 Also see in US, previously the communication Decency Act (called CDA) 582 and the “Digital Millennium Copyright Act” (called “DMCA”) deals with intermediary liability. While section 230 of the CDA caters to claims of privacy invasion, defamation tortuous offences and third party negligence, the claims against intellectual infringement, criminal law and the Electronic Communication Privacy Act, related offence that recourse under section 512 of the CDA.

In US, courts have been antipathetic in dismissing petition on the defense of immunity in absence of conclusive determination that online intermediary did not contribute and not connected to the development of the content. However, interaction with the content not lead to loss of immunity under the provision, but related to the factum of publishers such as publish or altering or removing content. In the case law Levitt v. Yelp! Inc 583, where in case the defendant Yelp! Has recorded the views of certain business, the court held that the intent of the defendant to edit the content

581 AnupamChander, Internet Intermediaries as Platforms for Expression and Innovation, GLOBAL COMMISION ON INTERNET GOVERNANCE(May. 20, 2016, 08:00 PM), www.cigionline.org/sites/default/files/documents/GC IG%20no.42.pdf.

582 Communications Decency Act 1996 (USA).

was irrelevant. The court further, held that mere ‘encouragement’ of the contents of development was insufficient to waive immunity hence, intermediary like Facebook, Google have been exempted for hosting contented uploaded by the third party.584

As, Facebook is used by almost 17,000 employees 350 million photo uploaded per day. 1.9 billion Users (as of 2013) therefore it is difficult for the intermediaries to monitor the content.585 Further the section 203 of CDA the DMCA provides relief against intermediaries. Many online platforms such as Facebook, YouTube etc comes under the provision of ‘safe harbor’.

7. RECOMMENDATIONS

The intermediary liability regime in India imposes direct liability upon intermediaries for third party content in case the due diligence requirement have not been satisfied, or where the ‘actual knowledge’ standard has not been satisfied. To comply with the principle the framework under the Information Technology Act, would need to be amended to clarify that no direct liability for unlawful content of third party.

There are various tools which may allow balancing the rights of intermediaries from undue liability and ensuring efficient removal of content. The administrative quasi-judicial committee constituted under the Blocking Rules attempts to provide such a model, however, it lacks important safeguards - in particular, there is no provision for judicial review of allegedly illegal content. Judicial process is to address unlawful content may be bring into the Indian substructure as well as, there is existing concern of exhaust judicial systems and processes that would have to be considered.

The liability for failure to comply with a court direction must be proportional to the action of the intermediary, which may be penalized under general laws of contempt of court decision, or others failure to comply with Section 79 of the Information Technology Act586. Therefore, it is proposed that Section 79(1), providing for safe harbor, be de-linked from the obligation to take down content upon issuance of a court order under Section 79(3) (b). Under Canada’s notice-and notice framework, the liability of intermediaries is limited to a financial penalty for failure to forward a notice of infringement to an identified third party content provider. That restricts the liability of an intermediary and aegis intermediaries from direct liability for the third parties.

8. CONCLUSION

The summation of the law on intermediary liability, freedom of expression and law on privacy presented by this paper suggests that India is moving in the right direction in order to achieve a balance between intermediaries’ operations and individuals’ right to privacy. Even though the constitutional status of the right to privacy in India is far from settled, the legislature has taken steps to ensure that proper safeguards are developed to keep up with the privacy concerns that arise in the context of the

585Shounak Banerjee, Intermediary Liability in USA and India: To Block or Not to Block, 4 CMET, 1, 4-6(2017).
586(2000).
rapidly-advancing technologies that constitute an ‘intermediary’. While the amendments to the Information Technology Act \(^{587}\) serve to achieve these ends to a certain extent, the privacy of an individual in cyberspace will only be truly secured when it is formally recognized and applied by privacy law.

India has taken a unified approach to issue of intermediary liability by prescribing the same standard for holding such intermediaries liable irrespective of their classification. The Courts have handled blocking of internet intermediaries in a very high-handed fashion. Such practice has the potential to turn away very lucrative business of Internet intermediary that contributes to the economy and e-commerce in the country.

In fact, the Centre for Internet and Society, as part of a research project, sent take-down requests to un-named Indian intermediaries targeting perfectly legal content and six out of seven intermediaries over-complied with the notices. However, this proposed legislation is not without its gaps in coverage, which ideally will be resolved prior to it being passed. For instance, the validity of the provisions which provide for extraterritorial operation of the Act must be examined, and the means of enforcement against foreign entities need to be clearly laid down.

Furthermore, the effect of such legislation on other sectors is not clear, which are governed by specific regulations. For example, the medical profession is governed by the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations \(^{588}\) that provide for the maintenance of medical records and the procedure to be followed when disclosing these records. The application of the privacy principles discussed in this Report to the medical field may not be desirable; for example, if doctors are required to destroy a patient’s records after treatment, they will be left with no medical history to rely on for providing care in the future.

Finally, the legislature must specify the extent to which the privacy principles will apply to data held by the Government, as well as put in place adequate checks and balances to reign in the Government’s ability to intercept or modulate content hosted by intermediaries.

The objective should have always been the removal of infringing content whilst maintaining standards of transparency to ensure accountability, rather than indulging in a witch-hunt of intermediaries when it comes to content regulation. The dynamics of emerging economies like that of India in the context of online content and the critical bearing of unwarranted blocking on such legitimate content cannot be treated as a settled matter but one that requires immediate attention of the Government and a strong legislative intervention.

\(^{587}\) (2000).

\(^{588}\) (2002).
CYBER CRIME - A GLOBAL MENACE

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ABSTRACT:
The evolution of information/cyber technology and the dependence on the internet has provided the population with a plethora of opportunities. However, this is laterally accompanied by the vulnerability of society to the world of cybercrime. This new medium of technology does not distinguish between good or evil, national or international and only provides a platform for the offences that take place in the cyber world. These offences include a computer as a tool or a target or both and include offences such as phishing, unauthorized access and hacking, pornography, cyber stalking, etc.

With extensive and worldwide use of the internet, the scope of cybercrime around the world is no less than terrorism today. Various countries including India have had the need of enacting legislations to curb this peril. In India, the Information Technology Act, 2000 was enacted with the prime objective of providing legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication. The last decade has witnessed a significant evolution in the international as well as regional instruments to curb cyber crime which include certain binding and non-binding instruments.

Robert Mueller, American Attorney has rightly said, “We need to take lessons learned from fighting terrorism and apply them to cybercrime.” Users of the internet can, however, adopt various techniques aimed at preventing cyber crimes such as firewalls, anti-virus software, etc. Plenty of national as well as international efforts have been made at intervals to prevent cross-border cybercrime. Furthermore, to prevent such crimes, special cyber-cells have been formed in various police departments across the globe which serves as a great preventive measure against cyber offences.

1. INTRODUCTION

The operation of internet is prevailing in almost every industry today. With numerous notable advancements in the information and communications industry over the last half decade, internet has now become the part and parcel of every educated person in this world. Internet is undoubtedly the easiest option to connect one person to another all around the globe.

Internet Users in the World by Regions - June 30, 2018

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However, it also unknowingly and dangerously connects and transmits data to the cyber criminals standing by to hit the gullible users. This has raised concerns about cyber-security, IPR issues, information privacy and electronic transactions. These issues and challenges have brought about a tremendous shift in the legal system as well. Today, there exists a whole separate branch of law which governs the cyber world. Cyber law is the term which is used to refer to the legal and the regulatory framework which govern these offences.

2. WHAT IS CYBER CRIME?

Indian law, even the Information Technology Act, 2000 which deals with cyber crime nowhere specifically defines the term ‘cyber crime.’ In general, cyber crime means an offence which takes place on or with the means of a computer, internet or any other technology recognized under different laws globally.

Encyclopedia Britannica defines cyber crime as "Cybercrime, also called computer crime, the use of a computer as an instrument to further illegal ends, such as committing fraud, trafficking in child pornography and intellectual property, stealing identities, or violating privacy." 590

The United Nations has categorized cyber crime into two parts and thus, defined it as:

a. Cybercrime in a narrow sense (computer crime): Any illegal behavior directed by means of electronic operations that targets the security of computer systems and the data processed by them.

b. Cybercrime in a broader sense (computer-related crime): Any illegal behavior committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession [and] offering or distributing information by means of a computer system or network.

Dr. Debarati Halder and Dr. K. Jaishankar define cybercrimes as: “Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm, or loss, to the victim directly or indirectly, using modern telecommunication networks such as Internet (Chat rooms, emails, notice boards and groups) and mobile phones (SMS/MMS).” 591

The definitions provided by various jurists and organizations time and again do not seem to be exhaustive but provide the people with an excellent starting point.

2.1 What does Cyber Crime Include?
The three major categories that cyber crime can be identified into include: individual, property and government depending on the method and the gamut of the offence.

Types of cybercrime

a. Identity Theft: Cybercrime where a criminal gains unauthorized access to an
user’s personal, confidential information to steal funds, to access accounts and open new accounts using a user’s name, buy or rent properties and use identity of an user to commit offences.

b. **Stalking (Cyber stalking):** The development of the social media platforms have to a great extent given rise to offences of online or cyber stalking. This includes harassment of a user by another user via messages or online content. Majority of these cases are among a person’s own contacts. The criminal uses content to instill fear in the victim about the consequences.

c. **Potentionally Unwanted Programs (PUPs):** The act of installing unwanted and unnecessary harmful softwares including applications falls under this category. These are a type of malware which intent to harm and damage a computer’s software.

d. **Phishing:** Phishing involves a hacker making use of e-mails and other messaging platforms to lure user into accessing the message which provides the hacker with the personal information of the user.

e. **Scams:** Usually in form of online advertisements and spams claiming to provide the user which a reward or unrealistic amounts of money. These enticing offers can cause damage to software and compromise of personal information.

f. **Software Piracy:** One of the most common and known crimes which includes copying or accessing someone’s invention or production. Piracy usually involves an infringement of copyright and trademark over a certain property.

g. **Web-jacking:** Deriving its name from the term ‘high jacking’, this type of crime includes seeking and taking control over someone’s website or domain by gaining access to the website’s original address.

h. **Child abuse/Child pornography:** The most heinous crimes of all, includes harassment and luring of children via means of chat rooms and other platforms into the world of pornography as well as being trafficking. There are many other activities which constitute child abuse such as downloading, selling and distribution of child pornography.

3. **Cyber Crime Against Women**

Cyber crimes originate from the development and use of the information technology and the internet in specific. The current trends in the world of cyber crime are mostly diverted towards the individuals. In a society where the cyber laws are inadequate and perfunctory, the users of the internet are targeted by the criminals over the online platform. Various studies and statistics have shown that the most targeted and the most vulnerable victims remain to be women and children. Crimes against women have, in general increased over the years. Recently a study published that a majority of girls and women who are subjected to such harassment commit suicide after their private photos and videos are leaked online.

3.1 **Common forms of cyber crimes against women**

A criminal may make use of a woman’s photographs, videos and other personal data without the consent of the woman and share
it online via the internet. For example: It has unfortunately become a common practice among the people to use the online services for their revengeful acts. A criminal can use a woman’s profile picture from a social media platform and post it on a pornographic website or any other related platforms. Cases like these come to light every now and then today.

a. **Hate speech:** Verbal statements, comments which are directed towards women with a particular ideology and views. These statements and comments often involve negative and abusive content including body shaming, slut shaming, sexual comments on the online social media and other platforms. Today, this is used as a tool for ‘trolling’ and shaming the women actively using social media.

b. **Impersonation:** Another common activity which is on the rise due to inadequate regulations on the social media is impersonation and creation of fake account using a person’s name and his/her picture and posting malicious information using that account.

c. **Stalking:** Cyber stalking which is one of the major cyber crimes is usually directed towards women and children. Cyber stalking not only includes keeping track of one’s activities but also harassment of different kinds which victimize and compromise a woman’s integrity.

d. **Defamation:** Defamation includes both libel and slander which a criminal publishes on online platforms causing the reputation of a woman to disintegrate and causes mental agony and pain.

**3.2 Reasons for crimes against women**

Among millions of users of the internet globally, women comprise of a sizeable number among these users. Many of these users who do not own a computer access the internet at cybercafés. It is common activity that these cybercafés often leak and share the data and information of a customer online which is then used for illegal and wrong purposes. Though India only has about 30% of female users of the internet, this number increases depending upon the region. For example in the US, this number goes up to 88% of women who use the internet at least occasionally.

592

a. **Legal loopholes:** The Information Technology Act, 2000 was enacted for creation and enhancement of e-commerce by covering commercial and business malpractices such as hacking, fraud, confidentiality breach, etc. While the formation of the law, the legislators either being unaware or ignorant towards the safety of the users did not make the law as such to enhance not only safety of transactions but also of the population making those transactions. Though the act criminalizes acts such as publishing or sharing of obscene information electronically (Section 67), publication for fraudulent purposes (Section 74) 593. These provisions time and again prove to be deficient in providing women and children with the safety that they need during this generation. Issues such as lack of specific enactment of laws for women and children, jurisdiction, lack of evidence, lack of cyber control associations and also lack of awareness makes it quite easy for the criminals to use

592

593 The Information Technology Act, 2000
such loopholes and get away with a lot of acts.

b. **Sociological issues:** Technology is one such field which is increasing at a faster pace than any other industry. Despite of being one of the most developed fields, the awareness and the education about the issues, consequences and laws are lacking. This is the reason why a majority of cyber crimes remain unreported and are handled recklessly by the authorities. The hesitation and the fear that is instilled in the victim about the defamation of herself and the family make her even more vulnerable towards such crimes. Many times the women believe herself to be responsible for the act that has taken place and even commit suicide.

3.3 Preventive measures and recommendations

a. Education and awareness beats any other solution for prevention of such digital harassment regimes. Awareness regarding the issues and the legal framework revolving around these crimes would help women in meeting these challenges in a better manner.

b. Abstaining from transmitting any personal data and information whether financial or personal to any stranger or friend whose identity is at doubt.

c. One such measure that needs to be taken in order to ensure safety is breaking the barrier of societal pressures and manipulation and making a woman hesitation free and independent enough to report such heinous acts.

d. Formation and development of regulatory organizations by the Government and stricter laws.

e. The owners of the websites and social media platforms should frame policies and rules which ensure the safety of its users. Checking the traffic and irregularities on the website can be an effective way of ensuring that no malicious act takes place.

f. A speedy redressal system for the victims of cyber crimes can also prove to be useful in gaining trust of the victims which would also encourage others to report and take actions against such offences.

g. Many social media websites now provide an option for their users with privacy options where the users can decide what a person can see on their account. The use of his option should be made effectively by the users, especially women to prevent themselves from being targeted by the cyber criminals. Complete justice is provided to the victims by means of compensatory remedies and punishment of highest grade to the criminals involved.

4. **CYBER CRIME AGAINST CHILDREN**

In the world of cyber crime, children seem to be the newest victims that are targeted and lured by the criminals. The services of internet are being used to commit offences against the children in many ways. This technology has proved to be both a boon and bane for the young generation. The increasing magnitude of the information technology has led to this online exploitation to become an international concern. Children adapting to these technologies at a young age has exposed these children to the world of exploitation and abuse. Using the internet, access to the online content has been made easier which makes it convenient for the offenders to reach these children faster and in large
quantities. Chat rooms, social media platforms and online games are some examples of the ways by which an offender can gain access to a child.

4.1 Types of cyber crimes against children

a. Child pornography/Sexually Malicious Content: The most heinous of all crimes is child pornography. Child pornography is a form of child sexual exploitation. Federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor (persons less than 18 years old). Images of child pornography are also referred to as child sexual abuse images. The intention is one of the requisites to be charged for an offence under this category. To be held guilty, an individual must intentionally and knowingly possess, receive or distribute such content. The legal regulations with respect to child pornography are stringent not just in India but all over the globe. Not only publishing or transmission of this content but also browsing, possession and downloading of such content is dealt with harshly under majority of civilized legal systems.

b. Online Grooming: The method used by a lot of sex offenders which includes building of a trust relationship with a minor/a child, befriending a minor over the internet in order to establish an emotional connection and eventually using such relationship to exploit the child sexually and indulge into intercourse with the child. These sex offenders are usually referred to as ‘pedophiles’. This online manipulation of a minor becomes easier for the offender due to the lack of awareness and sense which a child inhibits. This often leads to the minor being dragged into pornography or even trafficking. Unfortunately, these cases do not always involve a stranger but sometimes includes the involvement of a known person such as a relative of the child. The overwhelming response of children and minors towards the social media platforms and their use of the internet have led to a huge increase in cases of online grooming. This not onlydamages a child physically but also mentally. In fact, the mental agony and stress that an activity of this sort causes to a child is unbearable and irreversible leading to a traumatized and a bleak future.

Harassment and Cyber Bullying: Unlike harassment and bullying in real life, cyber bullying can follow a person anywhere they go and can be agonizing. Cyber bullying and online harassment includes:

- Sharing and storing personal data including images, videos.
- Sending offensive, threatening and abusive content online.
- Trolling
- Body shaming, slut-shaming, etc.
- Hate speech, setting up groups to harass a child online
- Creation of fake accounts, hacking into a person’s account.
- Non consensual explicit and sexual messages
- Manipulation and blackmail of a child into sending explicit and sexual images of him/her

5. LEGISLATIONS AND INTERNATIONAL

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594 The United States, Department of Justice
According to a Global 2021 Forecast published by Cisco, there has been a rapid growth in the usage of internet. Globally, monthly IP traffic will reach 50 GB per capita by 2022, up from 16 GB per capita in 2017, and Internet traffic will reach 44 GB per capita by 2022, up from 13 GB per capita in 2017. Ten years ago, in 2007, per capita Internet traffic was well under 1 GB per month. In 2000, per capita Internet traffic was 10 Megabytes (MB) per month.595

This dramatic growth and changes in the trends of technology has lead to an evenly spread of the offences that entail such technology as well.

5.1 Indian legal structure
a. Information Technology Act, 2002
The act enacted for the regulation of the online activities majorly dealing with transaction which are commercial in nature. However, this legislation in some ways also deals with breach of privacy directed towards an individual such as penalizing the act of stalking and criminalization of child pornography. An overview of provisions under this act acting against cyber crime is:

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<th>Section</th>
<th>Punishment for publishing</th>
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<td>67B</td>
<td>or transmitting of material depicting children in sexually explicit act, etc. in electronic form</td>
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| Section 66A | Punishment for sending offensive messages through communications service, etc. |
| Section 66B | Punishment for dishonestly receiving stolen computer resource or communication device |
| Section 66C | Punishment for identity theft |
| Section 66D | Punishment for cheating by impersonation by using computer resource |
| Section 66E | Punishment for violation of privacy |
| Section 66F | Cyber terrorism |

b. Indian Penal Code, 1860

| Section 503 | Sending threatening messages by e-mail |
| Section 499 | Sending defamatory messages by e-mail |
| Section 463 | Forgery of electronic records, e-mail spoofing |

c. The Protection of Children from Sexual Offences Act, 2012 (POCSO) is one of the major essential legislations that specifically deals with offences involving victimization of children. This legislation criminalizes cyber crime

such as child pornography, stalking, online child trafficking, harassment and other related offences committed against children in the online world.

5.2 International laws and instruments
Meeting the challenges proposed by this new category of crimes which take place via computer sources and internet is becoming a global phenomenon. Numerous legislations by different countries and instruments by the United Nations have been enacted and proposed to make and review every respective region’s criminal laws that are battling against cyber crimes. During this generation, frequent crimes pop up which involve a crime using the internet as a source. Laws acting against various acts such as unlawful access to data and information, spying and stalking, frauds, etc. have been formed in respective states. Though, not exhaustive and sometimes inadequate in fighting against cyber crimes, these laws do provide a great start to the population to act and end cyber crime in the world.

a. International organizations: Regional international organizations such as Council of Europe (COE), Asia-Pacific Economic Cooperation (APEC), and The European Union (EU) have been setup to intercept cyber crimes. This organization comprises of 21 member economies working towards minimization of cyber crime. Some of the members include The United States of America, Russia and China. Interpol is one such other major organization which is committed to the fight against cyber crime.

b. Multi-national cooperation: The organization for economic cooperation and development (OECD) is one example of multi-national organizations which has been addressing cyber security as one of the most important regime. Comprising of 30 member countries, this organization is a major instrument tackling cyber crime.

c. Several conventions and resolutions enacted by the United Nations Organization to take strict actions in order to eliminate crimes via communication sources, internet, etc. Various publications by the United Nations Commission on Crime prevention and Criminal Justice (CCPCJ) have addressed the growing cyber crimes against children and the need to eliminate them. These laws extend over jurisdictions governed by the United Nations Office on Drugs and Crime which undertakes international actions to combat national as well as transnational crimes.

6. CONCLUSION
The anonymity, secrecy and ease of association that internet provides has been taken advantage of by the cyber criminals time and again. Though every individual in the world is a potential victim of crimes taking place via the internet, women and children still remain to be one of the most vulnerable groups in the population. Furthermore, in cases involving children, age and gender remain a major factor. It is often witnessed that children belonging to lower strata of society and from a particular socio-economic background are targeted more than children belonging to upper class of the society. Here, education and awareness plays a major role in the safety of a child. For a very long time, the legislatures
of almost all countries have been ignorant of crimes taking place online but with such rapid growth in the information and communication technology the legal authorities are now coming up with finer and more developed laws to deal with the issue of cyber crime. Because of the nature and the methodology of such crimes, they differ in a major way from crimes committed in the real world. Cyber crimes are unfortunately a harsh truth that exists in the modern technological world. The economic and personal damage that cyber crimes can cause is massive. Such criminals not only target individuals but also government and other governmental organizations which could also be a huge blow to the privacy of the citizens as well as the organization. The need of the hour is to tackle cyber crimes to the maximum for minimizing and even elimination of these offences. The future trends in this field only seem to be increasing. An increase in technology would lead to a simultaneous increase in the number of cyber crimes. Cyber crimes need more than just a motive and an intention. Most of the online criminals are committed by educated and qualified people since there is a need of a particular skill set needed to commit such an offense. The laws against cyber crimes need to become more stringent and have to be developed at a faster pace than the crimes. However, there is a thin line of difference between protection of a citizen and infringement of privacy and rights of a citizen, this difference needs to be taken care of by the authorities while any law progresses. There is so much that we can do personally, in individual capacities to fight against the cyber crime and to ensure a safe and a secure environment for present as well as future generations.

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CRYPTOCURRENCY IN THE LIGHT OF COMPETITION LAW

By Sakshi Rastogi
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1. INTRODUCTION

Even before the invention of the cryptocurrency, digital cash has been theorized in a setting of centralized system to prevent the double spending by chawn in 1983. Later, in 2008 with the invention of the cryptocurrency which was introduced by Satoshi Nakamoto in his paper “Bitcoin: A Peer to Peer Electronic Cash System; however it was decentralized in nature. In spite of major cryptographic advances in the technology till now, failure to ensure competition friendly nature due to decentralization, anonymity and transparency of blockchain eventually put this new form of technology into question. Though there are wide applications of blockchain, this paper will mainly focus on cryptocurrency and how the very nature of cryptocurrency can be the reason to disrupt competition in the market and thus can be anti-competitive in nature.

The firstly presents the structure of cryptocurrency and blockchain technology which form the basis for the subsequent analysis of fundamental issues with respect to their influence to the competition in the market. The principal issue which will be discussed here is whether the use of cryptocurrency can give rise to the unilateral conduct by a dominant firm and whether there is a risk of collusion due to the use of cryptocurrency in the market. Also, since cryptocurrencies are decentralised, transparent and anonymous in nature it raises many questions regarding the detection of such anti-competitive practices and identification of persons involved in such practices. This paper further aims to discuss that whether the existing competition law is adequate in respect of this technology as to prevent the development of anti-competitive practices through it.

As blockchain technology is still under the process of evolution and recognition, it is difficult to answer all the potential threats of cryptocurrency to competition in the market but the foreseeable can be answered and prevented.

Chapter 1 provides the whole picture to the main question: anti-competitive practices raised by the use of cryptocurrency, competition law, blockchain technology, how blockchain technology work and uses of blockchain technology, what is cryptocurrency and factors determining the influence of cryptocurrency in the market. Chapter 2 focuses on the collusion and why cryptocurrency can be a concern for raising collusion and disrupting competition in the market. The chapter states the new forms of collusion by this evolving technology underlying cryptocurrency and how it could facilitate collusion through cryptocurrency. Chapter 3 focuses on abuse of dominance or unilateral conduct which can be resulted if cryptocurrency gain the dominant position in certain circumstance in the relevant market by showing through illustrations. Chapter 4 provides the identification and detection problems of the anti-competitive
practices with respect to the cryptocurrencies and blockchain and provides for the competition law challenges.

2. CRYPTOocurrency AND COmpetitiON LAw

MAIN QUESTION AND ISSUES

The fundamental or central question of this thesis is: “Whether the use of cryptocurrency can give rise to anti-competitive practices?”

The transformative nature of blockchain technology underlying cryptocurrency has raised many potential legal issues. These can include issues varying from the enforceability of Smart Contracts to anti-money laundering, securities regulations to competition law issues.\(^{596}\) This paper will focus on a number of key competition concerns raised by the cryptocurrencies.

Competition in market “means sellers striving independently for buyer’s patronage, to maximize profit or other business objectives.”\(^{597}\) Buyer’s gets their maximum benefit and seller their maximum benefit. Competition is necessary so that consumers can access to the broadest range of services or products possible at competitive prices while producers get an incentive to innovate, reduce their costs and meet consumers demand at the same time. Therefore, competition promotes allocative and productive efficiency. This requires healthy market conditions so came the need of competition law.

The competition law is virtually limitless. It is enforced in overwhelming majority of sectors from cement to rail, roads, food industry to innovation and technology and captures a very wide range of business practices. Unquestionably, antitrust enforcement must not be taken frivolously and only used where damage is probable or proven. Competition authority should be conscious of the danger of over interference the risk that competition enforcement might chill innovation and the competition in the relevant market. At the same time, they should be conscious of the price of under-enforcement.

**Competition Law provisions are triggered in the following situations:**

1. Anti-competitive Agreements
2. Unilateral conduct of dominant firms
3. Combination or merger and acquisition

Against aggressive practices states assortment of business conducts in which a firm may include so as to confine competition in the market, to hold or expand their "relative market position and benefits without fundamentally giving goods and services at a lower cost or of higher quality". "Firms invent as far as possible competition by not constructing such a great amount on their favorable circumstances but rather on misusing their market position to the inconvenience or hindrance" of customers, clients and providers, for example, price fixing, limit output, market restriction and so forth results in "loss of financial proficiency


and misallocation of assets (or blends thereof)".

**WHAT IS CRYPTOCURRENCY?**
Cryptocurrencies is an alternative online payment system based on blockchain technology which allows shoppers and suppliers or buyer and seller to interact directly eliminating the need of any intermediary. There are wide range of applications for blockchain technology including cryptocurrency which attracts many issues in respect of Competition Law along with it. However, this paper will mainly focus on the implications of cryptocurrency on Competition Law.

3. **COLLUSION**

“In 2018, US probe into cryptocurrencies like bitcoin and ethereum involvement in collusion. Regulators are weighing the likelihood that colluding traders are making the price of several cryptocurrencies to rise and crash, artificially for personal gain according to the report published by Bloomberg”.

To understand how collusion is possible in cryptocurrencies, it is important to know what amounts to collusion under competition law or anti-trust law and why it comes under the red flag of anti-trust authorities i.e. when it is considered anti-competitive in nature.

**WHAT IS COLLUSION?**
At whatever point new technological tools revolutionise profoundly the manner in which firms or organisation operate and interact with each other, there is the risk that some market players use their enhanced power to accomplish private interests that are not lined up with social objectives. The term “collusion” commonly refers to any form of co-ordination or agreement among competing firms with the objective of raising profits to a higher level than the non-co-operative equilibrium, resulting in a deadweight loss.

In other words, collusion is a joint profit maximisation strategy put in place by competing firms that might harm consumers. “In order to reach and sustain a collusive equilibrium over time, competitors must put in place a structure to govern their interaction, enabling them:

1. To agree on a common policy;
2. To monitor the adherence to this common policy; and
3. To enforce the common policy by punishing any deviations”.

**THE COMPETITION ACT, 2002**
Section 3 of the Competition Act provides for the anti-competitive agreement. “Anti-competitive agreement” means an agreement which is entered by two or more enterprise to prevent either directly or indirectly others

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598 The Justice Department is investigating possible collusion among cryptocurrency traders who may be manipulating the price of Bitcoin, Etherum and other cryptocurrencies.
602 *Id* at 19.
603 Section 3, Competition Act, 2002.
from entering into the market or even try to exclude or eliminate them. The effect of such kind of agreement is always to foreclose the competition from the market.

TYPES OF COLLUSION
Economists usually distinguish between two forms of collusion, explicit and tacit.

i. Explicit Collusion
“It refers to anti-competitive conducts that are maintained with explicit agreements, whether they are written or oral. The most direct way for firms to achieve an explicit collusive outcome is to interact directly and agree on the optimal level of price or output.”

Explicit collusion is an assertion among competitors to stifle competition, that depends on interfirm correspondence or potentially exchanges. Competition between contenders disintegrates benefits; the concealment of competition through collusion is one road by which firms can improve benefits.

ii. Tacit Collusion
“It refers to forms of anti-competitive co-ordination which can be achieved without any need for an explicit agreement, but which competitors are able to maintain by recognising their mutual interdependence. In a tacit collusive context, the non-competitive outcome is achieved by each participant deciding its own profit-maximising strategy independently of its competitors.”

This typically occurs in transparent markets with few market players, where firms can benefit from their collective market power without entering in any explicit communication and is more effective. For instance, by facilitating detection of cheating and the administration of punishment of deviations.

In order to address these intermediate forms of co-ordination, some jurisdiction have stretched the concept of “agreement” for anti-trust purposes and looked at whether an agreement can be concluded from data suggesting that competitors have not acted independently. Even in the absence of an explicit agreement, for instance, courts have established an infringement of the competition law if evidence of parallel conduct was accompanied by other factors, which indicated that the parallel conduct was indeed inconsistent with unilateral behaviour and rather the result of co-ordination among the parties.

For instance other factors include communications revealing an intention to collude or engagements in facilitating practices, such as information exchanges. Some jurisdictions, in particular those in the EU, also depend on the notion of “concerted practice”, allowing them to deal with conduct that do not amount to an agreement but nevertheless have the effect of replacing effective competition with practical co-operation between the competitors.

Issue No. 1: Whether the use of cryptocurrency can give rise to collusion?
The exchange of information is a typical component of all cartel members being

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equal what's more, a major component of the blockchain. Can developer who contend in a similar market use blockchain in a way that comprises a cartel? Would they be able to exchange data to empower them to settle on better-economic choices in the market? To state the self-evident, if a cartel wishes to utilize blockchain to help or encourage it, it is, obviously, conceivable similarly a cartel can use email or the phone.

What is important to consider is whether the idea of a blockchain could incidentally make or encourage a cartel. The main explanation behind this plausibility is the component of block chain’s transparency. On a basic level, each individual from a blockchain can discover the subtleties of exchange led utilizing the blockchain. This proposes value coordination might develop as rivals in a blockchain see costs change with more noteworthy speed and exactness than previously, and adjust their future activities thus. The equivalent can be said for some other material enlightening components influencing competition that are likewise recorded in the blockchain exchange.

Where the market is transparent and user data is relatively easy available. In such a case the problem may arise because of the use of computer algorithms in a way that promotes express and tacit collusion: algorithms can be used to find non-competitive price equilibria, implement agreements, detect deviations and implement automatic reactions to market conditions. Such conduct may even result not from the conscious behaviour of competitors but from other circumstances, such as using the same services provider for the data-based algorithms.

**Collusion both for exclusion and exploitation**

Blockchain cryptocurrency uses mathematical algorithm for creating and verifying a continuously growing data structure to which data can only be added and from which existing data cannot be removed that takes the form of a chain of “transaction blocks”, which functions as a distributed ledger.\(^{607}\) It is done to protect blockchain data from prospective hackers but this is can also be a concern for competitive authority as according to the Organisation for Economic Cooperation and Development (OECD), "a particular concern highlighted in the literature is the risk that algorithms may work as a facilitating factor for collusion and may enable new forms of co-ordination that were not observed or even possible before. This is referred to as “algorithmic collusion”\(^{608}\).

When few market players make an investment in technology to benefit from an "algorithmic competitive advantage", the remaining firms of the industry have a strong incentive to do the same, risking otherwise being driven out of the market. The increase of market transparency is not only a result of more data being available, but also of the ability of algorithms to make predictions and to reduce strategic uncertainty. “Indeed, complex algorithms


with powerful data mining capacity are in a better place to distinguish between intentional deviations from collusion and natural reactions to changes in market conditions or even mistakes, which may prevent unnecessary retaliations"609.

With respect to the frequency of interaction, the advent of the digital economy has revolutionised the speed at which firms can make business decisions. Unlike in a brick and mortar business environment where price adjustments are costly and take time to implement, in online markets prices can in principle be changed as frequently as the manager wishes. If automation through pricing algorithms is added to digitisation, prices may be updated in real-time, allowing for an immediate retaliation to deviations from collusion610. In fact, the combination of machine learning with market data may allow algorithms to accurately predict rivals’ reactions and to anticipate any deviations before they actually take place making it more effective.

There are many different ways in which algorithms may be used for collusion. Ariel Ezrachi and Maurice Stucke (Artificial Intelligence & Collusion: When Computers Inhibit Competition, 2017) discuss four such ways and their categorisation and nomenclature have been borrowed in this paper.

1. **Messenger**
   The first type of algorithm collusion in which human beings agree to collude and merely use the algorithm to implement such agreement. An example of this could be the selfish mining case where miner form group to increase their revenue by forming a secret block.

2. **Hub and Spoke**
   This is a second type of algorithm collusion where market players adopt the same algorithm. Such collusion is facilitated by the developer of the algorithm who by entering into vertical agreements with various competitors ensures price fixing or could be a third-party service provider.

3. **Predictable Agent**
   The third category is “Predictable Agent” where competitors do not use the same algorithm but independently and unilaterally design their own algorithm. These algorithms are designed to react in certain ways to market changes and deliver predictable outcomes. Therefore, even though the competitors do not use the same algorithm by programming algorithms to react in the same manner to the same stimulants tacit collusion is affected.

4. **Digital Eye**
   The fourth type of algorithmic collusion—“Digital Eye” involves machine-learning algorithms. Here the makers once again develop their algorithms unilaterally but this time without programming them to react a certain way to market stimulants. However, since these algorithms use artificial intelligence, and by the virtue of self-learning, start colluding on their own.


The Cryptocurrency case of collusion in India can at best fall under any of the above categories. The issues posed by such cases are not very different from the conventional collusion cases since the algorithms are merely being used to reflect the collusive intent of the players- a scenario very similar to the standard colluders manually fixing prices of commodities.

In India, the provision which prohibits collusion is Sec 3(3) of the Competition Act. Sec 3(3) is not just limited to horizontal agreements but extends also to practice and decisions taken in a collusive manner, making the section quite broad.

Sec 3(3) of The Competition Act, 2002 can be broken down into 3 components:
(i) “any “agreement entered into” or “practice carried on” or “decision taken by”;
(ii) persons or association of persons or enterprises or association of enterprises;
(iii) which directly or indirectly determines, purchase or sale prices; then it shall be presumed to have an appreciable adverse effect on competition”.
(iv)

Applying Sec. 3(3) to the present issue
It is important to note that appreciable adverse effect in such cases needn’t be proved and is automatically presumed. The third leg of the test involves proving price parallelism. Since it is a factual determination, it is not relevant for this paper. The first two requirements under Sec 3(3) are analysed in turn.

The First Requirement
First, the width of conduct which might fall under “horizontal restraint” is quite expansive. Unlike most other jurisdictions not just explicit agreements but even practice or decision could fall within the ambit of horizontal restraints. “Agreement” has been defined to include any arrangement or understanding or action in concert and similarly, “Practice” has been broadly defined to include any practice relating to the carrying on of any trade by a person or enterprise.612

- First kind of algorithmic collusion (“Messenger”) is concerned it is very clear from the meaning itself that it would amount to agreement between the stakeholder of the cryptocurrency and therefore will come under the purview of competition authority.
- Second kind of algorithmic collusion (“Hub and Spoke”) is using the service of same third party for the determination of price or change in the market price ultimately leading to price-fixing.
- As far as the third kind of algorithmic collusion (“Predictable Agent”) is concerned, it is clear that the act of programming algorithms to react a certain way to market stimulants (even though done independently and unilaterally) would amount to both an “action in concert” and to “practice.”
- Additionally, for the fourth kind of collusion (“Digital Eye”), the act of self-learning algorithms to price fares at a certain level in response to the price fixed by the algorithms of other competitors would amount to an “action in concert.” For Instance, AI services used in cryptocurrency.

Therefore, irrespective of the nature of the interaction between the algorithms it is likely to satisfy the first criteria of the test

611 Section 3(3), the Competition Act, 2002.

612 Competition Commission of India, Introduction to competition law (2016).
because of the broad ambit of conduct covered under horizontal restraint.

**The Second Requirement**

Second, the agreement or practice or decision must be between persons or enterprises or associations thereof. It is doubtful whether the existing groups of “individual,” “artificial juridical person” or the other groups under the definition of “person” could be read to include algorithms.

However, the definition of “person” is inclusive. Therefore, if a purposive interpretation of the Act were to be adopted then protection of consumer welfare and competitive structures should lead the CCI to utilise the non-exhaustive nature of the definition of “person” to include algorithms in it.

**Collusion can between the following:**

1. **Collusion between stakeholder of different cryptocurrencies**
   Collusion is possible between the stakeholders of different cryptocurrencies to co-ordinated their prices or for exclusive distribution. Say bitcoin and litecoin coordinate their prices on which customers can invest on that particular cryptocurrency.

2. **Exclusive agreement between stakeholders in a cryptocurrency and third-party providers.**
   There can be exclusive agreement between stakeholders in a cryptocurrency and the third-party provider to limit the open competition. For instance, stakeholders use same third-party provider’s pricing algorithm to determine the market price and or react to market changes which can lead to price fixing.

3. **Selfish Mining**

Selfish Mining is an approach for mining cryptocurrency in which groups of miners collude to increase their revenue.  

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**4. Vertical restraint between operators and input providers**

Vertical restraint refers to restrictive agreements made between firms at different levels of production/distribution/supply chain. For instance, there can be restrictive agreement between blockchain technology providers with the cryptocurrency stakeholders to limit the open competition or causing foreclosure of new cryptocurrency.

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**COLLUSION AND CRYPTOCURRENCY**

There are possibilities that all competitor will use a single blockchain technology. Another possibility is that each firm have their own blockchain in the way that each firm has their own server space. Where a single blockchain is used by all, the potential transparency might help identify any deviation by cartel participants. The transparency might also help to identify the terms on which to collude, for example the price or market share. The potential transparency offered by blockchain technology underlying cryptocurrency might also help firms in oligopolistic market to coordinate tacitly without any direct or indirect contact or any agreement to do so.

“The principle behind blockchain is that miners are atomistic individuals who cannot collude but in practice, the highly concentrated nature of mining pools can

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make collusion by packs of miners” a real possibility. This is particularly for less significant and identified cryptocurrencies where the populace of miners is small. For instance, in Bitcoin, the miners are more numerous, but the mining pools themselves are highly concentrated, with three mining pools accounting for more than 50% of the computing power.

4. DOMINANCE
It is ability of an enterprise to behave /act independently of a market force that determines its dominant position. Position of market power enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Some powerful firms have the ability to influence the market outcomes very significantly. Where this is the case competition law applies to prevent that the market conditions are not detrimental further by the behaviour of the dominant firm.

In a perfectly competitive market no enterprise has control over the market especially in determination of price of product. Possibly the most prominent objectives of these practices are from the buyers who are often unaware of the degree of the influence. Therefore, Act mentions the various factors that ought to be taken into consideration while considering that whether a firm is dominant or not.

WHAT IS DOMINANT POSITION?
“A position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to:-
1) Operate independently of competitive forces prevailing in the relevant market, or
2) affect its competitors/consumers or the relevant market in its favour.”

ABUSE OF DOMINANCE
“Dominance is not considered bad per se but its abuse is.” “Abuse is stated to occur when an enterprise or a group of enterprise uses its dominant position in the relevant market in an exclusionary or exploitative manner.”

The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and therefore prohibited. “Such practices shall constitute abuse only when adopted by an

615 Hyun Shon Shin, Cryptocurrencies and economics of money (2018).
616 Id at 5.
enterprise enjoying dominant position in the relevant market in India.\textsuperscript{623}

**EXPLOITATIVE AND EXCLUSIONARY BEHAVIOUR**

Abuse in the Act falls in two categories:

a) “Exploitative Behaviour: Excessive or discriminatory pricing

b) Exclusionary Behaviour: For instance: Denial of market access, Predatory Pricing etc.\textsuperscript{624}

**PREDATORY PRICING**

The “predatory price” under the Act means “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors”\textsuperscript{625} [Explanation (b) of Section 4].

“Predation is exclusionary behavior and can be indulged in only by enterprises(s) having dominant position in the concerned relevant market.”\textsuperscript{626}

**REFUSAL TO ACCESS**


\textsuperscript{624}Anubhav Pandey, *Evolution and Development of Competition Law in India*, iPleaders(August 8\textsuperscript{th}, 2017) https://blog.ipleaders.in/competition-law-evolution/.

\textsuperscript{625}Section 4, the Competition Act, 2002; http://www.cci.com/sites/default/files/advocacy_booklet_document/AOD.pdf.

\textsuperscript{626}Harsh Pandey, *Anti-Dumping and Predatory Pricing (Laws according to competition act, 2002)*, ACADEMIA (Feb 12\textsuperscript{th}, 2019), https://www.academia.edu/16193724/Anti-Dumping_and_Predatory_Pricing_laws_according_to_Competition_Act_2002.

Abuse of dominance can also be prompted by refusal to access of permissioned blockchain, where such existence is indispensable to contribute in the market. Wherever access stands organised and controlled mutually through current members of the consortia, such controlled arrangement of access might be used to foreclose or exit new entrants in the market. This concept is called “gating”. Similarly a private blockchain might only give access to that consumers to make transactions with a few dominant firms. Such a scenario could also raise the possibility of predatory pricing.

**EXCLUSIVE AGREEMENT**

Exclusive Agreement can be of two types:

- **Exclusive Distribution Agreement:** Agreement to limit, restrict or withhold the output or supply of any goods or services, or allocate any area or market for disposal or sale of goods or services is referred as exclusive distribution agreement\textsuperscript{627}.

- **Exclusive Supply Agreement:** Agreement restricting in any manner the purchaser from acquiring in course of business any goods other than those of seller or any other person is referred as exclusive supply agreement\textsuperscript{628}.

**TIE-IN ARRANGEMENT**

The condition to purchase some other goods with the required item is referred as tie-in arrangement. There are four elements of tying:

\textsuperscript{627}Explanation (c) of section 3, The Competition Act, 2002.

\textsuperscript{628}Explanation (b) of Section 3, The Competition Act, 2002.
a) Tying and Tied: The tying product would never be on standalone basis while the tied product can be on standalone basis.

b) Dominant Position in tying product: Manufactures or supplier or developer should have dominant position.

c) Coercion: Customers do not have option to buy the tying product alone. So out of compulsion they buy both the products together.

d) Foreclosure of competition (always in respect of the tied product): Competition of the tied product are driven out of the market.

Technical tying or technological tying concerns a situation in which the condition imposed on customer does not result from a contractual device but from the fact that it only works well with the tied product. For instance cryptocurrency which in dominant position can be tied with wallets specific suitable for the easy transaction of that particular cryptocurrency.

**BUNDLING**

Bundling is a type of Rebates offered on buys of an assortment of items by a dominant firm. Bundling is moving of at least two items just together in; One group at one discounted cost.

**FACTORS DETERMINING THE INFLUENCE OF CRYPTOCURRENCY IN MARKET**

I. Relevant market associated with cryptocurrency

Dominance can only be determined and have importance for competition perspective when the relevant market has been well-defined.

The relevant market means “the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”\(^{629}\).

The Act sets out a few variables of which any one or all will be considered by the Commission while characterizing the applicable relevant market. Relevant product market entails a market consisting of all those goods or services which can be considered as interchangeable or substitutable through the customer, by purpose of features of the goods or services, their prices and anticipated usage. Relevant product market is defined in terms of substitutability. It is the smallest arrangement of the both goods and services which are variable or substitutable between themselves, given a small but significant non-transitory increase in price (SSNIP).

Relevant geographic market is defined in terms of “the area in which the environment of competition for supply of goods or provision of services or demand of goods or services are specifically homogenous and can be notable from the environment prevailing in the neighbouring areas”\(^ {630}\).

Dominance of an undertaking has been traditionally demarcated in footings of market share or market power of the undertaking or group of undertakings concerned. However, a number of other

\(^{629}\)Section 2(r), The Competition Act, 2002.

\(^{630}\)Section 2(s), the Competition Act, 2002.
Factors play a role in determining the influence of an enterprise or a group of enterprises in the market.

Factors that determine the dominant position is given in section 19(4) of the Competition Act, 2002.

The following are the relevant market associated with the cryptocurrency, and which should be considered while determining the dominant position with respect to the cryptocurrency market.

a. Cryptocurrencies provides for money functions
Cryptocurrency can perform monetary functions, though many countries have banned it due to the regulation issues many countries have adopted it.
- Medium of exchange
- Store of value
- Unit of account

b. Cryptocurrencies are separate payment system
- Compete with each other and other traditional payment systems or service providers.
Cryptocurrencies can perform separate payment system and therefore can compete with the traditional payments system such as credit cards.

c. Cryptocurrencies can be a platform for intermediation of suitable services.
- Smart contracts
  Bitcoin could be alluded to as a cutting edge case of effective shrewd smart contracts: the system of nodes will possibly approve transactions made on the blockchain network if certain conditions intended to guarantee the genuineness and estimation of the transactions are altogether met. If not, the exchange doesn't go through or work.
- AI services
  For example, AICoin.
- Data storage
  For example, The Filecoin network.

III. Market power in cryptocurrency market
Competition law concerned as a matter of first importance with the issues that happen when firms or two or more firms have market control. Firms that have market control appreciate a portion of the advantages accessible to a genuine monopolist. Market control empowers firms to restrain output, development and innovation, and nature and quality of products or restricting customer decisions and raise costs, destructive to buyer welfare.

a) Market power within cryptocurrency
- Certain stakeholders can have market power vis-à-vis other stakeholders in a cryptocurrency
  i. Academia: universities that provides research and support the growth of cryptocurrency.
  ii. Association: Trade and Industry that represent the use of the technology underlying cryptocurrency.
iii. Advocacy groups who provides research and education on cryptocurrency. For example Coin Center.

iv. Customers who buy cryptocurrency; etc.
- Anti-competitive alliances are possible
  b) **Market power in broader relevant markets where a cryptocurrency participate**
  - Certain cryptocurrencies may gain a strong position in a relevant market.
  - The stakeholders can engage in exclusionary or exploitative practices.

IV. **Market power within cryptocurrency**
  a) **Operators**
  - Users who perform validation and maintain the cryptocurrency’s integrity
  b) **Code-developers**
  c) **Input Providers**
  - Software, hardware, communication providers, financial services providers
  d) **Normal Users**
  - Those who use cryptocurrency as intended

V. **Market power in broader relevant markets where a cryptocurrency participate**
  - Stakeholders within the various cryptocurrencies
  - Wallets and exchanges
  - Payment services providers
  - Financial infrastructures
  - Banks
  - Internet or communication providers

**Issue No. 2: Whether the use of cryptocurrency can give rise to unilateral conduct or abuse of dominance?**

**MIGHT CRYPTOCURRENCIES EXPLOIT DOMINANT POSITION BY REFUSAL TO ACCESS?**

Abuse of dominance can also be prompted by *refusal to access* of permissioned blockchain, where such existence is indispensable to contribute in the market.
Wherever access stands organised and controlled mutually through current members of the consortia, such controlled arrangement of access might be used to foreclose or exit new entrants in the market. This concept is called “gating”. For instance, if cryptocurrency replaces other tradition payment service in future, there will be need for blockchain network for all the banks in the market to facilitate payment. If a new entity was seeking entry in the market, it would require access to the blockchain in order to become a competitive force. This entity could be declined entry on the system by the controlling members (the guardians or gatekeepers) subsequently enjoying aggressive conduct, and constraining the selections of buyers to execute only with the dominant one’s in the market.

MIGHT THIRD PARTIES EXPLOIT OR EXCLUDE USING A DOMINANT POSITION THAT DEPENDS UPON BLOCKCHAIN RELATED DEMAND?

For example, firms that sell the specialised hardware that is required for mining tokens might find themselves with market power over inputs required by blockchain users that ‘mine’ the currency(by solving the cryptographic challenges required to validate the blockchain). These users might have few alternatives, and so might find themselves subject to excessive pricing in the absence of regulation. Alternatively, these firms might seek to leverage their market power in mining hardware into downstream markets.

MIGHT CRYPTOCURRENCIES ABUSE DOMINANT POSITION THROUGH EXCLUSION

MIGHT CRYPTOCURRENCIES ABUSE DOMINANT POSITION THROUGH EXCLUSION

TRANSACTION BY CERTAIN USERS OR OF BLOCKS VALIDATED BY CERTAIN VALIDATORS?

Several stakeholders of the cryptocurrency markets can be said to have market power for instance Bitcoin. Several practices of these stakeholders can be considered as unilateral conduct of their dominant position according to the anti-trust law. Predatory Pricing can be considered as one of the exclusionary practice under the abuse of dominant position. Predatory Pricing involves a supplier who sets prices below the cost of production and therefore forcing the competitors out of the market. 634 For instance, a large block validator or a mining pool of a dominant cryptocurrency to set transaction fees below cost in the market with the intention to exclude a rival cryptocurrency.

MIGHT EXCHANGES, WALLETS OR PAYMENT SERVICES PROVIDERS MAY OBTAIN A DOMINANT POSITION AND DISCRIMINATE AGAINST CERTAIN CRYPTOCURRENCIES?

Another example can be that a marketing team of a cryptocurrency could provide important merchants and suppliers of payment services free or services charged below cost in exchange for preferential handling of this particular currency. This could raise the exploitative or discriminatory practices against certain other cryptocurrencies resulting in foreclosure of competition in the market.

634 Section 4, the Competition Act, 2002.
5. CONCLUSION
The principal reason for the Competition law is to secure and advance competition in the market. Competition is exceptionally essential as it benefits: the Consumers as they get more extensive selection of merchandise and enterprises, better quality and improved an incentive for cash; it benefits the Businesses as a dimension playing field is made and a redressal of against anti-competitive practices is accessible, the inputs are aggressively evaluated, they will, in general, have more prominent profitability and capacity to contend in worldwide markets lastly it additionally benefits the state as there is ideal acknowledgment from closeout of advantages and there is upgraded accessibility of assets for social part.

Accordingly, by ensuring competition in the market the competition law is advantageous to every player in the market which thusly is valuable for the economy all in all.

Violations of competition law can result in, prolonged investigations and huge fines. In some jurisdictions, they can also expose companies to private litigation and, in the most serious cases, potential criminal liability. The situation is not yet clear how competition authorities will approach the regulatory issues raised by blockchain technology underlying cryptocurrency. But it is important for companies to be aware of the potential competition law risks as they begin to harness its benefits.

Blockchain technology, though still in its start, carries the promise to be the next huge disruption after the Internet, with its uses as wide as one’s mind's eye. The exceptional features of blockchain such as pseudo-anonymity, transparency and immutability give limitless possibilities of its use cases even though as cryptocurrency. However, setting up a blockchain may involve direct or indirect collaboration between competitors at different levels in the value chain. Further, as the innovation develops and its uses develop into various divisions, it will exhibit competition challenges novel to the factual circumstance close by.

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TRANSFORMATIVE CONSTITUTIONALISM: THE SAGA OF SOCIAL TRANSITION

By Sameer Samal
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Introduction:
Law prevailed amidst man since the origins of society as the natural outcome of it, wherein; Natural law was the genesis of law. Some orderly civilizations supported peace and recognized natural rights although, there existed some civilizations that believed in authoritarian establishment. Natural law became the underlying principle for preserving justice and securing freedom of the inhabitants. Thus, law and social advancement turned out to be adjacent aspects. Law is an immensely broad concept that includes a wide array of notions, out of which justice is the most fundamental ingredient. The rationale behind law will fail without the achievement of justice. Therefore, there has to be a direct nexus between man-made law and justice.

In the present modern society where democracy and liberty prevails and where individuals are aware of their rights and duties, the society can progress only if social change is embraced. For this constant evolution to succeed, the law of the state has to support this growth and ensure social stability. In other words, it is mandatory for the law to be in a constant state of transformation simultaneous to the transition in society.

The concept of ‘Transformative Constitutionalism’:
The fundamental law of a sovereign nation exists in its Constitution. This Constitution encompasses the basic principles to which internal life in this country is to be confirmed. All Constitutional democracies in the world indicate to “the brooding spirit of law”, the spirit being, justice for all. The “brooding spirit of law” and its qualities inspired the founding fathers to infuse its eternal aroma into the Indian Constitution and to thus, constitute India into a Sovereign, Socialist, Secular and Democratic Republic. Indians, having been dominated and oppressed by the colonials for over a hundred years imagined and conceptualized a cluster of essential rights. These rights took the form of fundamental rights and other legal rights in the Constitution that enabled independent India to secure to all its citizens; justice, liberty, equality and fraternity. The Constitution makers drafted this document and conferred it the status of the Supreme Legal Document of our country. Considering the dynamic and transitional society of India, the Constitution was drafted in such a distinct manner that an amending power was incorporated within its provisions for any future alterations. Therefore, the Constitution of India is characterized as both rigid and flexible at the same time. In the wise words of S.K. Kaul, J.,

The Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity. It sought to create a Montesquian framework that would endear in both war time and in peace time and in Ambedkar’s famous words, “if things go wrong under the new Constitution the reason will not be
that we had a bad Constitution. What we
will have to say is that Man was vile”.

For a constitutional democracy to advance in all spheres, the law governing that nation must adapt and evolve gradually. A law that does not amend with the changing times will be as futile as a lifeless branch on a tree that is not only dormant but also restricts the growth of that tree. The Constitution of India has been in force since the last 69 years governing the state functions and guarding the rights of individuals. These rights and privileges are aimed at transforming an individual’s personality and to do so, they have to be in consonance with its consistent fluctuations. The human nature itself is contrary to the notion of stability. It seeks a better life, it desires for social advancement and it craves towards harmony. Therefore, it is the duty of the constitutional courts in particular and the judiciary in general to interpret the provisions of the Constitution in such a broad manner that its real intent of justice extends to all sections of the society. Guided by a logical inference it may be settled that the Constitution has two facets, one, the ability of this document to transform which confers it the status of an organic document, and second, its ability to continuously shape the lives of individuals in the society. This innate essence is perceived as ‘Transformative Constitutionalism’.

Contemporary developments in India:
Recent judgments involving the most crucial aspects of social life wherein the Supreme Court observed the principles of transformative constitutionalism:

1. Right to Privacy Case
2. Section 377 Case
3. Sabarimala Case
4. Triple Talaq Case

(i) The Right to Privacy Case:
The Right to Privacy case was a subordinate issue arising out of the Aadhar Card case, wherein the validity of the compulsion imposed by the Government of India to have an ‘Aadhar Card’ to avail benefits of governmental schemes. The issue dealing with the sphere of privacy was recommended to a larger bench that, upheld the right to privacy as a fundamental right of an individual. In the words of Dr. D.Y. Chandra, J.,

“But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decision on how life should be lived are entrusted to the individual.... the duty of the State is to safeguard the ability to take decisions - the autonomy of the individual - and not to dictate those decisions.

The bench observed privacy to be an intrinsic and inalienable right of a citizen and therefore, embedded it under the protective cloak of Article 21 of the Constitution of India. This would reshape the following aspects: (i) privacy involving the person, (ii) informational privacy and (iii) the privacy of choice. Therefore, the words of the Constitution come alive only when interpreted in a broad cannon.

(ii) The Section 377 Case:

This judgment upheld the rights of the LGBT community by quashing Section 377 of the Indian Penal Code, so long as it criminalizes consensual sexual acts between consenting adults. The Bench extensively referred to the concept of ‘Constitutional morality’ while deciding the issue. Constitutional morality refers to the paramount reverence to the provisions of the constitution while ensuring the prominence of free speech and expression because; it is this free expression that is the cornerstone of democracy. In this case, Deepak Misra, C.J., observed:

The overarching ideals of individual autonomy and liberty, equality for all, sans discrimination of any kind, recognition with identity and privacy of human beings constitute the cardinal four corners of our momental constitution forming the concrete substratum of our fundamental rights.

The ideals of transformative constitutionalism were broadly discussed to arrive at a desirable conclusion while interpreting the constitution regarding the validity of Section 377 of the Indian Penal Code. Both the fundamental aspects of transformative constitutionalism were dealt with, wherein the bench agreed that the purpose of having a constitution is to transform the society to a better place and secondly, it is the ability of the Constitution to transform that gives it the status of a living and an organic document. Interpreting the values imbibed in the constitution regarding equality and liberty, the Apex Court upheld the equal status of the citizens belonging to the fewer sections of society that still lived in the shackles of preposterous social norms. The ideal behind this concept of transformative constitution is to ensure justice for individuals throughout the evolution of society. The changing times should not be a barrier to interpret this supreme document. In the words of Justice Brennan, “For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope up with current problems and current needs”.

(iii) The Sabarimala Case:

The Right to worship case, also known as the Sabarimala Case is presumably the most controversial case in recent times. The constitutional validity of Rule 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules that bars women of a certain age group to enter a religious place and the exclusionary practice based upon biological factors exclusive to the female gender was challenged. The Petitioners argued that the said practice was discriminative in nature thereby violating the very core of Articles 14, 15 and 17 of the Constitution of India. The Constitutional Bench upheld the rights of the Petitioners by a 4:1 judgment. While determining the validity and nature of the issue, the then Chief Justice of India, Deepak Misra, stated, “In the theater of life, it seems, man has put the autograph and there is no space for a woman to even put her signature”. He further held that this denial of the right to worship of the aggrieved individuals violated Article 25(1) of the Constitution.

Such activity practiced by a section of the society since 100s of years was believed

637 Indian Young Lawyers Association &Ors. v. The State of Kerala &Ors., W.P(C) No. 373 of 2006.
necessary to be stopped. This felt ‘necessity’ was due to the changing social fabric that introduced a much more liberal approach towards certain rigid religious practices. Whether the said practice is socially moral or not, will differ depending on the present society. What was considered socially or morally acceptable earlier may or may not be considered appropriate in the future. But it is an obligation on the judiciary to interpret the Constitution extensively enough to ensure justice for every individual regardless of the prevalent era. These obligations will be justly met by observing the principles of transformative constitutionalism.

(iv) The Triple Talaq Case⁶³⁸:
The only fundamental foundation of a secular nation is to respect the religious beliefs and ideals of all the sections of the society. The judiciary in India has adhered perpetually by the said notion. It was this landmark case that changed the way in which the citizens perceive personal laws. The Petitioner in this case belonged to a religious denomination that practiced a certain form of divorce method wherein the husband could divorce his wife by pronouncing the word ‘Talaq’ thrice. It was this practice that kept women within the restraints of their husband’s whims. While dealing with the issue at hand, the majority Bench held that the said practice is against the basic ideals of the Holy Quran and therefore, violates the personal law, i.e., Shariat. What was argued to be a matter of personal law was brought into consideration of the Constitution of India and what was argued to be a timeless practice in the religion was declared to be against the prevailing constitutional guarantees.

It is indeed brilliant how an individual governed by his/her own personal law may claim for violation of a right that is equally available to all the citizens of this nation. The Constitution is bound to ensure fairness and justice for the said violation regardless of the practices followed in the religion. In the cases of both the religious denomination where their practice was challenged to be against the provisions of the Constitution, it was held that the judiciary may interpret the Constitution in such an extensive manner so as to call the violations unconstitutional.

Conclusion:
It is a widely accepted notion that the judiciary of this nation may, at times of necessity, interpret and read the divine words of this Constitution in such an extensive manner so as to cater the needs and prayers of the prevalent society. It is the nature of society to develop and advance and at the same time it is the uniqueness of this eternal document to adapt these transitions and safeguard the essential rights of the individuals. From right to privacy to the right to worship, from right to equality to right against undesirable religious practices, these recent times have proven that the Constitution will at times of concern, transform itself to be a part of this society and guide it towards prosperity. It is this ideal that makes the Constitution of India as a perfect example of a transformative constitution.


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289
SECONDARY MARKET AND ITS REGULATION

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Abstract
This paper examines the role of SEBI for the financial market and also the corporate objective, function in corporate productivity and efficiency. In this paper a great stress is taken to discuss the regulation and regulatory body for the financial market. Here, we discuss mainly the secondary market and its regulation. Secondary market is those markets where the already traded shares or financial instruments are traded. In this paper we briefly discuss about the various markets and try to examine the difference between all. Different types of shares and financial securities are traded in the secondary market, which is categorically dealt in this paper. We are also supposed to discuss here the various functions of this market and importance as well.

SEBI is a body which is regulatory body and gives certain directions to the market and also imposes the various restrictions on the market. SEBI plays various function like regulatory function, developmental function etc. These all are deeply discussed in this paper.

Keywords: Financial Market, Secondary Market, SEBI, Regulatory function

Introduction
The secondary market, also called aftermarket, is the financial market in which previously issued financial instruments such as stock, bonds, options, and futures are bought and sold. Another frequent usage of "secondary market" is to refer to loans which are sold by a mortgage bank to investors such as Fannie Mae and Freddie Mac. The term "secondary market" is also used to refer to the market for any used goods or assets, or an alternative use for an existing product or asset where the customer base is the second market (for example, corn has been traditionally used primarily for food production and feedstock, but a "second" or "third" market has developed for use in ethanol production) 639. With primary issuances of securities or financial instruments, or the primary market, investors purchase these securities directly from issuers such as corporations issuing shares in an IPO or private placement, or directly from the federal government in the case of treasuries. After the initial issuance, investors can purchase from other investors in the secondary market. The secondary market for a variety of assets can vary from loans to stocks, from fragmented to centralized, and from illiquid to very liquid. The major stock exchanges are the most visible example of liquid secondary markets in this case, for stocks of publicly traded companies. Exchanges such as the New York Stock Exchange, London Stock Exchange and NASDAQ provide a centralized, liquid secondary market for the investors who own stocks that trade on those exchanges 640. Most bonds and structured

639 Available at https://www.google.co.in/url?url=https://www.investopedia.com/terms/s/secondarymarket.asp&rcr=1&sa=U&ved=2ahUKEwid58vH96raAhWEO18KHdU5C0YOFjAMegQICBAB (last seen on 02/03/2018)
640 Available at https://www.google.co.in/url?url=https://www.invest
products trade “over the counter,” or by phoning the bond desk of one’s broker dealer. Loans sometimes trade online using a Loan Exchange.

In simple words, secondary market is a market where the existing shares or securities are traded. It is an option available to the holder to trade his securities and convert those assets into cash or kind. SEBI is a body which has regulatory body and gives certain directions to the market and also imposes the various restrictions on the market.

Understanding of financial market in India

Before discussing and understanding of the secondary market and its regulation it is important to discuss about financial market. Generally speaking, there is no specific location place or location to indicate a financial market. Whenever a financial transaction takes place it is deemed to have been taken place in the financial market. Hence financial markets are pervasive in nature since financial transactions are themselves very pervasive throughout the economic system.

However financial markets can be referred to as those centers and arrangements which facilitate buying and selling of financial assets, claims and services. In India the financial markets are divided into following:

- Unorganized Markets
- Organized Markets

Organized markets can be further classified into money and capital market.

- Money market
- Capital market

Money Market:
Money market is a market for debt securities that pay off in the short term usually less than one year, for example the market for 90-days treasury bills. This market encompasses the trading and issuance of short term non equity debt instruments including treasury bills, commercial papers, bankers acceptance, certificates of deposits, etc.

Capital Market:
Capital market is a market for long term debt and equity shares. In this market, the capital funds comprising of both equity and debt are issued and traded, this also includes private placement sources of debt and equity as well as organized markets like stock exchanges. Capital market can be further divided into primary and secondary markets.

Finally capital market is again divided into three categories as follows:

- Industrial Securities market
- Government securities Market
- Long term Issues Market

Industrial Securities Market is generally classified into two types. They are

1. Primary Market
2. Secondary Market

Secondary Market
Secondary Market refers to a market where securities are traded after being initially

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642 Ibid.
offered to the public in the primary market or listed on the Stock Exchange. Majority of the trading is done in the secondary market. Secondary market comprises of equity markets and the debt markets. For the general investor, the secondary market provides an efficient platform for trading of his securities. For the management of the company, Secondary equity markets serve as a monitoring and control conduit by facilitating value enhancing control activities, enabling implementation of incentive-based management contracts, and aggregating information (via price discovery) that guides management decisions.

The term "secondary market" is also used to refer to the market for any used goods or assets, or an alternative use for an existing product or asset where the customer base is the second market (for example, corn has been traditionally used primarily for food production and feedstock, but a "second" or "third" market has developed for use in ethanol production). With primary issuances of securities or financial instruments on the primary market, investors purchase these securities directly from issuers such as corporations issuing shares in an IPO or private placement, or directly from the federal government in the case of treasuries. After the initial issuance, investors can purchase from other investors in the secondary market. The secondary market for a variety of assets can vary from loans to stocks, from fragmented to centralized, and from illiquid to very liquid. The major stock exchanges are the most visible example of liquid secondary markets in this case, for stocks of publicly traded companies. Exchanges such as the New York Stock Exchange, London Stock Exchange and NASDAQ provide a centralized, liquid secondary market for the investors who own stocks that trade on those exchanges. Most bonds and structured products trade "over the counter," or by phoning the bond desk of one’s broker dealer. Loans sometimes trade online using Loan Exchange.

**Functions of Secondary Market:**

In the secondary market, securities are sold by and transferred from one investor or speculator to another. It is therefore important that the secondary market be highly liquid (originally, the only way to create this liquidity was for investors and speculators to meet at a fixed place regularly; this is how stock exchanges originated, see History of the Stock Exchange). As a general rule, the greater the number of investors that participate in a given market place and the greater the centralization of that market place, the more liquid the market.

Fundamentally, secondary markets mesh the investor's preference for liquidity (i.e., the investor's desire not to tie up his or her money for a long period of time, in case the investor needs it to deal with unforeseen circumstances) with the capital user's

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644 Available at https://www.google.co.in/url?url=https://economictimes.indiatimes.com/definition/secondary-market&rct=j&sa=U&ved=2ahUKEwid58vH96raAhWEOI8KhU5C0YQFjANegQIBhAB&q (last seen on 05/03/2018)

645 Supra note 5 at 503
preference to be able to use the capital for an extended period of time.

Instrument dealt in the secondary market
Following are the main financial products or instruments dealt in the secondary market:
Equity: The ownership interest in a company of holders of its common and preferred stock. The various kinds of equity shares are as follows\

**Equity Shares:**
An equity share, commonly referred to as an ordinary share also represents the form of fractional ownership in which a shareholder, as a fractional owner, undertakes the maximum entrepreneurial risk associated with a business venture. The holders of such shares are members of the company and have voting rights.

**Bonus Shares:** Shares issued by the companies to their shareholders free of cost by capitalization of accumulated reserves from the profits earned in the earlier years.

**Preferred Stock / Preference shares:** Owners of these kinds of shares are entitled to a fixed dividend or dividend calculated at a fixed rate to be paid regularly before dividend can be paid in respect of equity share. They also enjoy priority over the equity shareholders in payment of surplus. But in the event of liquidation, their claims rank below the claims of the company’s creditors, bondholders / debenture holders.

**Cumulative Preference Shares:** A type of preference shares on which dividend accumulates if remains unpaid. All arrears of preference dividend have to be paid out before paying dividend on equity shares.

**Cumulative Convertible Preference Shares:** A type of preference shares where the dividend payable on the same accumulates, if not paid. After a specified date, these shares will be converted into equity capital of the company.

**Participating Preference Share:** The right of certain preference shareholders to participate in profits after a specified fixed dividend contracted for is paid. Participation right is linked with the quantum of dividend paid on the equity shares over and above a particular specified level.

**Security Receipts:** Security receipt means a receipt or other security, issued by a securitisation company or reconstruction company to any qualified institutional buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation.

**Government securities (G_Secs):** These are sovereign (credit risk free) coupon bearing instruments which are issued by the Reserve Bank of India on behalf of Government of India, in lieu of the Central Governments market.

**Borrowing programme:** These securities have a fixed coupon that is paid on specific dates on half yearly basis. These securities are available in wide range of maturity dates, from short dated (less than one year) to long dated (up to twenty years).

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**Debentures**: Bonds issued by a company bearing a fixed rate of interest usually payable half yearly on specific dates and principal amount repayable on particular date on redemption of the debentures. Debentures are normally secured / charged against the asset of the company in favour of debenture holder.

**Bond**: A negotiable certificate evidencing indebtedness. It is normally unsecured. A debt security is generally issued by a company, municipality or government agency. A bond investor lends money to the issuer and in exchange, the issuer promises to repay the loan amount on a specified maturity date. The issuer usually pays the bond holder periodic interest payments over the life of the loan. The various types of Bonds are as follows-

**Zero Coupon Bond**: Bond issued at a discount and repaid at a face value. No periodic interest is paid. The difference between the issue price and redemption price represents the return to the holder. The buyer of these bonds receives only one payment, at the maturity of the bond

**Convertible Bond**: A bond giving the investor the option to convert the bond into equity at a fixed conversion price.

**Commercial Paper**: A short term promise to repay a fixed amount that is placed on the market either directly or through a specialized intermediary. It is usually issued by companies with a high credit standing in the form of a promissory note redeemable at par to the holder on maturity and therefore, doesn’t require any guarantee. Commercial paper is a money market instrument issued normally for tenure of 90 days.

**Treasury Bills**: Short-term (up to 91 days) bearer discount security issued by the Government as a means of financing its cash requirements.

**Process of Trading in Secondary Market**: The Procedure of trading in securities can be explained with the help of an example given below:

- **Placement of Order and Execution of Transaction**: Investor A want to sell 1000 shares of ONGC Ltd and Investor B want to purchase the same shares. Both the investors would first contact their respective brokers. Let X be the broker of A and Y be the broker of B. A would place his sell order through X and B would place his buy order through Y. The Transaction would take place only if the price of the two investors would match. Now brokers X and Y will have to issue contract notes to their respective client A and B respectively. The contract note is an evidence of the fact that the broker has executed a transaction in a given security for his client.

- **Payment and Delivery**: The seller client A after receiving the contract note will have to transfer shares in the broker account and the buyer client, B, after

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647 Available at https://www.google.co.in/url?sa=g&usg=AOvVaw73z8qcQ-3iIz6z1-Ikbcob. See also www.supremoamicus.org

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294
receiving the contract note from his broker will have to deposit money in the brokers account for the shares purchased by him.

- **Settlement of Transaction in stock exchange:** The stock exchanges have the responsibility of settling the transactions among its brokers. Therefore for each trading day, there is pay in and pay out of securities and funds.

- The Brokers X and Y after having received funds and shares for their respective clients would transfer them in their account.

**SECURITIES & EXCHANGE BOARD OF INDIA**

Under various circumstances, the government felt the need for setting up of an apex body to develop and regulate the stock market in India. Eventually, the Securities and Exchange Board of India (SEBI) was set up on April 12, 1992. To start with, SEBI was set up as a non statutory body. It took all most four years for the government to bring about a separate legislation called Securities & Exchange Board of India Act, 1992. The Act conferred SEBI comprehensive powers all aspects capital market operation. The SEBI is the regulatory authority established under Section 3 of SEBI Act 1992 to protect the interests of the investors in securities and to promote the development of, and to regulate, the securities market and for matters connected herewith and incidental thereto.

**Objectives**

According to the preamble of the SEBI Act, the primary objects of the SEBI are to promote healthy and orderly growth of the securities market and secure investor protection. For this purpose, the SEBI monitors the activities of not only stock exchanges but also merchant bankers etc. The objectives of SEBI are as follows:

- To protect the interest of investors so that there is a steady flow of savings in to the capital market.
- To regulate the securities market & ensure fair practices by the issuers of securities so that they can raise resource at minimum cost.
- To promote efficient services by brokers, merchant bankers & other intermediaries so that they become competitive and professional.

**Functions**

Section 11 of the SEBI Act specifies the functions as follows:

- **Regulatory Functions:**
  - Regulation of stock exchange and if regulatory organizations.
  - Registration and regulations of stock brokers, sub brokers, registrar to all issue Merchant Bankers, Underwriters, Portfolio

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649 M. Y Khan, Indian Financial System 5.10 (MC Graw Hill Education 9th Edn.)
Managers and such other intermediaries who are associated with securities market.

- Registration and regulation of the working of the collective investment schemes including mutual funds.
- Prohibition of fraudulent and unfair trade practices relating to securities market.
- Prohibition of insider trading in securities
- Calculating substantial acquisitions of shares and takeover of companies.

Developmental Functions:650:

- Promoting investors education
- Training of intermediaries
- Conducting research and public information useful to all market participants
- Promoting Self Regulatory Organizations

powers SEBI has been vested with the following powers
i. To call periodical returns from recognized stock exchanges.
ii. To call any information or explanations from recognized stock exchanges or their members.
iii. To direct enquiries to be made in relation to affairs of stock exchanges of their
iv. To grant approval to bye laws of recognized stock exchanges.
v. To make or amend bye laws of recognized stock exchanges.
vi. To compel listing of securities by public companies.
vii. To control and regulate stock exchanges.
viii. To grant registration to market intermediaries.
ix. To levy fees or other charges for carrying out the purpose of regulation.
x. To declare applicability of Section 17 of the securities contract Organizations.

Necessities for Setting up of SEBI

Stock market regulation was a pre-independence phenomenon in India. During the I World War period, in the Defense Rules of India, 1943, provisions were made to check the flow of capital into production of essential commodities. These rules, which were promulgated as a temporary measure continued alter the war and culminated into the Capital Issues (Control) Act, 1947.

This legislation had the following objectives651:

- To further the growth of companies with sound capital structure
- To avoid undue congestion or overcrowding of public issues to ensure that investment takes place in conformity with the objectives of Five Year Plan.
- To ensure orderly and healthy growth of capital markets with adequate protection to investors

Controller of Capital Issues (CCI)

For the purpose of achieving the above objectives, an office of the Controller of Capital Issues was set up. It was entrusted with the responsibility of regulating the capital issues in the country. The CCI was vested with the powers to the kind of instruments, size, timing and premium of issue.

Malpractices in Securities Market

With the growth of securities market, the number of malpractices also increased in both the primary and secondary markets. The malpractices were noticed in the case of

650 Supra note 11 at 5.7

651 Com16_9_etext. Module 9,SGTB khalsa college, University of Delhi
companies, merchant bankers and broker who are all operating in the market.
A few examples of malpractices are follows:
- Manipulation of Security Prices
- Price rigging
- Insider Trading
- Delay in settlement
- Delay in Listing & commencement of Trading.

**Deficiencies in the Market:**
Besides, the Indian stock market is said to be deficient in the following respects:
- Lack of Diversity in Financial Instrument
- Disclosure of Financial Information
- Preponderance of Speculative Trading
- Poor Liquidity
- Lack of Control over Brokers.

**SEBI and the Central Government:**
The Central Government has the power to issue directions to the SEBI Board, to supersede the Board, if necessary and to call for returns and report etc. as and when necessary. The Central Government has also powers to give any guidelines or to make regulations and rules for SEBI and its operations. The activities of SEBI are financed by grants from the Government in addition to fees, charges etc. collected by SEBI. The fund called the SEBI General Fund is set up to which all grants, fees, charges etc. are credited. The fund is used to meet the expenses of the board and to pay salaries of staff and remuneration to officers, members of the Board etc.652

**SEBI GUIDELINES:**
SEBI has brought out a number of guidelines separately, from time to time, for primary market, secondary market, Mutual funds, merchant bankers, foreign institutional investors, investor protection etc. Here we consider only those relating to the secondary market of India. The guidelines are described below.653

**Stock exchange:**
1. Board of directors of stock exchange has to be recognized so as to include nonmembers, public representatives, government representative to the extent of 40% of total no of members.
2. Capital adequacy norms have been laid down for members of various stock exchanges depending upon their turnover of trade and other factors.
3. Working hours for all stocks exchanges have been fixed uniformly.
4. All the recognized stick exchanges will have to inform about the transaction within 24 hours.
5. Guidelines have been issued for introducing the system of market making in less liquid scrip’s in a phased manner in all stock exchanges

**Brokers:**
1. Registration of brokers and sub brokers is made compulsory.
2. In order to ensure that brokers are professionally qualified and financially solvent, capital adequacy norms for registration of brokers have been evolved.

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652 Supra note 13

3. Compulsory audit of brokers book and filing of audit report with SEBI have been made mandatory.
4. To bring about greater transparency and brokerage separately in the contract notes issued to client.
5. No broker is allowed to underwritemore than 5% of public issue.

Foreign Institutional Investors (FII):
1. Foreign institutional investors have been allowed to invest in all securities traded in primary and secondary markets.
2. There would be no restriction on the volume of the purpose of entry of FII.
3. The holding of single FII in a company will not exceed the ceiling of 5% of the equity capital of a company.
4. Disinvestment will be allowed only through stock exchanges in India.
5" FII have to pay a concessional tax rate of 10% on large capital gain (more than one year) and 30% on short term capital gains. A tax rate of 20% on dividend and interest is prescribed.

Bonus Issue:
The guidelines relating to the issue of bonus shares have undergone several changes since 1969. The latest sets of guidelines announced by SEBI were made effective from April 3, 1994. At present, there are in all 10 guidelines laid down for bonus shares.

1. There should be provision in the Articles of Association of the Company for issue of bonus shares. If not, the company should pass a resolution at the General Body Meeting, marketing provision for capitalizations of profits. The proposal for bonus issues is recommended by the Board of Directors and then approved in the general Body Meeting.
2. The bonus is made out of free reserves built out of the genuine profits or share premium collected in cash only.
3. Reserves created by revaluation of fixed assets are not permitted to be capitalized.
4. The declaration of bonus issue in lieu of dividend is not to be made.
5. Bonus issues are not permitted unless the partly paid shares exiting are fully paid up.
6. No bonus issue will be permitted if there are sufficient reasons to believe that the company has defaulted in respect of statutory dues to the employees such as provident fund, gratuity, bonus, etc. Further, no bonus issue is permitted if the Company defaults in payment of principal or fixed deposits or on debentures.
7. No bonus issue can be made within 12 months of any public issue/rights issue.
8. A company which announces bonus issue alter the approval of the Board of direct or must implement the proposals and shall not have the option of changing the decision.
9. Consequent to the issue of bonus shares, if the subscribed and paid up capital exceed the authorized share capital, a resolution shall be passed by the company at its general body meeting for increasing the authorized capital.
10. Issue of bonus shares aner any public/rights issue is subject to the condition that no bonus shall be made...
which will dilute the value or rights of a holders of debenture, convertible fully or partly.

**Right Issue:**
Section 81 of the Companies Act specifies the conditions to be satisfied by a public company for issuing rights shares. SEBI has issued the following guidelines for the issue of rights share.

1. **Composite Issue:** A public and rights issue can be made at different prices where these two kinds of issues are made as a composite issue by exiting listed companies.

2. **Appointment of Merchant bankers:** Appointment of merchant bankers is not mandatory, if the size of rights issue by a listed company does not exceed Rs. 50 lakh. For issues of listed companies exceeding Rs. 50 lakh, the issue is to be managed by an authorized merchant banker.

3. **Minimum Subscription:** If the company does not receive minimum subscription of 90% of the issue amount including development of underwriters within 120 days from the date of opening of issue, the company has to refund the entire subscriptions within 128 days with interest at 15% p.a. for delay beyond 78 days from the date of closure of the issue.

**Conclusion**

After the above discussion I am trying to conclude my whole research work as, financial market is place where the entire financial instrument is traded. Broadly speaking there is two types of market namely primary market and secondary market. Primary market is a place where a financial instrument is introduced in the market for the trade, where secondary market is a place where existing shares or any financial instrument is traded. As we know for the smooth functioning of any system there must be a regulatory body which regulate that system, similarly for the secondary market there a Security exchange board of India (SEBI). SEBI gives various guideline time to time for the smooth functioning of the same. The main objective of the SEBI is as follows:

- To protect the interest of investors so that there is a steady flow of savings into the capital market.
- To regulate the securities market & ensure fair practices by the issuers of securities so that they can raise resource at minimum cost.
- To promote efficient services by brokers, merchant bankers & other intermediaries so that they become competitive and professional.

For any business if investor are not protected then there is grave chance that, business will not successes. In case of secondary market as there is chance of malpractice like Manipulation of Security Prices, Price rigging, Insider Trading, and Delay in settlement, Delay in Listing & commencement of Trading etc. To avoid all these malpractices and fair trading of securities in the secondary market, SEBI is very much concern and it may impose reasonable restriction on the secondary market. There is a legislation named security and exchange board of India Act, 1992 which regulates the financial market.

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ESTOPPEL AS AGAINST THE STATE
ACCORDING TO INDIAN EVIDENCE
ACT, 1872.

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Introduction

He who seeks equity must do equity. Estoppel being an equitable doctrine must yield when equity so requires. Rule of estoppel is regarded as a rule of evidence based on equity and good conscience. The object is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Estoppel is based on the maxim, ‘allegans contraria non estauidendus’, a person alleging contradictory facts should not be heard and is that species of ‘prosumptio juris et de jure’, where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by a reason of some act done, it is in truth a kind of ‘argumentum ad hominem’, which means fallacious argument that attacks not an opponent’s belief but his motives and character.

The principle of estoppel in India is a rule of evidence incorporated in Section 115 of the Indian Evidence Act, 1872. The section reads as follows: “When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe such a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.” Estoppel is the rule of evidence and the general rule is enacted under section 115 of the Indian Evidence Act, 1872 which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Estoppel deals with questions of fact and not question of right. Estoppels can be classified into three kinds: (1) estoppel by matter of record; (2) estoppel by Deed; and (3) estoppel by matter in pais. The first two are sometimes referred to as technical estoppels as distinguished from acquirable estoppels or estoppel in pais. All these kinds have been discussed under Indian law in various cases.

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656 Delhi Clothes General Mills Ltd. v Union of India AIR 1987 SC 2414.
658 R.S Maddanappa v Chandramma AIR 1965 SC 1812.
660 Section 115 of The Indian Evidence Act, 1872.
661 Section 115, Indian Evidence Act, 1872.

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300
To invoke the Doctrine of Estoppel, four conditions are necessary. One party should make a factual representation to the other party. Secondly, the other party should accept and rely upon the aforesaid factual representation. Thirdly, having relied on the aforesaid factual representation, the second party should alter his position. Fourthly, the instant alteration of position, should be such, that it would be iniquitous to require him to revert back to original position. Therefore, the Doctrine of Estoppel would apply only when based on a representation by the first party, the second party alter his position, in such manner, that it would be unfair to restore the initial position.

An estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. Where the rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights.

**Estoppel as against the State**

The doctrine of estoppel as against the state or government is one that is based on equity and accordingly it applies with respect to the circumstances of the case. Therefore, there are no such predictive rules as far as the position of estoppel against the state is concerned, in some cases the court has stated that the plea of estoppel can be accepted against the state whereas it has completely denied the estoppel against the state or government. In that essence, the courts will have to examine whether the injustice done to an individual outweighs the disadvantages to public interest. Hence, as the doctrine is a principle of equity, the courts have taken a prerogative to lay emphasis on equity and justice and have examined the doctrine of estoppel in various cases.

The state is entitled to a plea of estoppel and in the case of Assudibai v Haribai 1943 S 177 it was held that the doctrine of detriment was by representation does not apply to a government department such as the court of Wards. However, in cases where the public officers purposely neglect or omit their public duties, it will not work as an estoppel against state. A mistaken interpretation made by the government officers of a grant by the state and their consequent mistaken acts are not binding on the state and would not create an estoppel as against the state.

Even mistaken representation by an innocent party can apply as an estoppel against the party making the representation, and the state is not bound by the doctrine of estoppel for acts of its subordinate done in violation of its direction on administrative instructions.

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665 Pratima Chaudhary v Kalpana Mukherjee (2014) 4 SCC 196
667 Jit Ram Shiv Kumar v. State of Haryana 1980 AIR 1285
668 Assudibai v Haribai 1943 S 177;
669 Ibid.
In the case of State of Punjab And Ors. vs Amrit Banaspati Co., Ltd, the court relied on American Jurisprudence which stated: “A sovereign State is not subject to an estoppel to the same extent as an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in government. The doctrine of estoppel is not applied to the extent of impairing sovereign powers of a State such as it exercises, for example, in the enactment and enforcement of police measures. A State cannot be estopped by the unauthorised acts or representations of its officers. On the other hand, a contract or deed lawfully made by a State may create an estoppel against it if the effect of the estoppel will not be to impair the exercise of the powers of government. Moreover, an estoppel may arise against the State out of a transaction in which it acted in a governmental capacity if an estoppel is necessary to prevent loss to another and the perpetration of a fraud and if such estoppel will not impair the exercise of the sovereign powers of the State.”

In Mulamchand v. State of Madhya Pradesh (1968) 3 SCR 214, the Supreme Court did not apply estoppel against the Government in certain cases of contracts and the court stated that if the estoppel is allowed it would mean the repeal of an important constitutional provision, intended for the protection of the general public. Also, in case of Jit Ram Shiv Kumar v State of Haryana, It was held in this case that the doctrine of estoppel is not available against the exercise of executive functions of the state. The court did not allow the plea of estoppel against the Government if it had the effect of repealing any provision of the Constitution.

In the case of Excise Commissioner, U.P. Allahabad v. Ram Kumar, this was also a decision on which strong reliance was placed on behalf of the State. In this case, the court observed that, it is now well settled principle that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers.

Generally, a state is not subject to an estoppel to the same extent as an individual or a private corporation. Therefore, as a general rule the doctrine of estoppel will not be applied against the State in its Governmental, Public or sovereign capacity. An exception however arises in the application of estoppel to the State where it is necessary to prevent fraud or manifest injustice. Also in the case of Express Newspaper Pvt. Ltd. v. Union of India. 

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673 State of Punjab And Ors. vs Amrit Banaspati Co., Ltd. And Ors AIR 1977
675 Mulamchand v. State of Madhya Pradesh 1968] 3 SCR 214
676 Jit Ram Shiv Kumar v State of Haryana 1980 AIR 1285
677 Ibid.
678 Excise Commissioner, U.P. Allahabad v. Ram Kumar 1976 AIR 2237
679 Ibid.

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India where the doctrine was used to preclude the Government from quashing the action of a minister for approval of a lease as it was within the scope of his authority to grant such permission. Thus the fraud on power was checked. But if there is misrepresentation by the party itself to obtain the promise then the State is not bound by the promissory estoppel as held in Central Airmen Selection Board v. Surender Kumar. The court said that a person, who has himself misled the authority by making a fake statement, couldn’t invoke this principle.

However, in certain cases courts have made different with regard to the application of the estoppel against the government and state. It has also in some circumstances stated that the doctrine of estoppel is available as against the government or state. In the case of Motilal Padampat Sugar Mills vs State of Uttar Pradesh And Ors, it was stated that estoppel may be applied against the state even in its governmental, public or sovereign capacity if its application is necessary to prevent fraud or manifest injustice. Further, it stated that there is considerable dispute as to the application of estoppel with respect to the state. It stated that equitable estoppel will be invoked against the state when justified by the facts. Similarly, in the case of Century Spinning and Manufacturing Co. v. Ulhasnagar Municipality, it stated that the supervening public interest would prevail over estoppel and the state was bound by its promise held out in such situation. Moreover, in the case of Union of India &ors vs Godfrey Philips India Ltd, the court appreciated the decision which was given in Motilal’s casemarks a significant development in the law relating to the doctrine of estoppel.

The general rule which is established in law is that there can be no estoppel against the government or against the state or any public authority. However, in certain circumstances the court have explicitly stated that the estoppel can be accepted against state if justified with proper facts.


This is a landmark case regarding the applicability of the doctrine of the estoppel against the government. In this case the Chief Secretary of the Government gave a categorical assurance that total exemption from sales tax would be given for three years to all new industrial units in order to establish themselves firmly. Acting on this assurance the appellant sugar mills set up a plant by raising a huge loan. Subsequently, the Government changed its policy and announced that sales tax exemption will be given at varying rates over three years. The appellant contended

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682 Express Newspaper Pvt. Ltd. v. Union of India 1986 AIR 872
683 Express Newspaper Pvt. Ltd. v. Union of India 1986 AIR 872
684 Central Airmen Selection Board v. Surender Kumar Appeal (civil) 251 of 1994
685 Motilal Padampat Sugar Mills vs State of Uttar Pradesh And Ors 1979 AIR 621
686 Century Spinning and Manufacturing Co. v. Ulhasnagar Municipality AIR 1958 SC 86
687 Union of India v. Godfrey Phillips India Ltd AIR 1986 SC 806
688 Motilal Padampat Sugar Mills vs State of Uttar Pradesh And Ors 1979 AIR 621
that they set up the plant and raised huge loans only due to the assurance given by the Government. The court discussed a very point issue which was ‘How far and to what extent is the State bound by the doctrine of promissory estoppel?’ it was observed by the court that if the acts or omissions of the officers of the Government are within the scope of their authority and are not otherwise impermissible under the law, they “will work estoppel against the Government”. The doctrine of estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negative, which means that its application could not be defeated by invoking defence of executive necessity. 690

However, the decision was over looked in Jit Ram Shiv Kumar v. State of Haryana 691 where it was held that the doctrine of promissory estoppel is not available against the exercise of executive functions of the State. The court did not consider the decision which was given in Motilal Padampat Sugar Mills v. State of U.P. 692 It relied on other cases such as A Bench of four judges of this Court in a decision Excise Commissioner. U. P. Allahabad v. Ram Kumar 693, after examining the case law on the subject observed that "it is now well-settled by a catena of decisions that there can be no question of estoppel against the Government in exercise of its legislative, sovereign or executive powers.” The earlier decisions of the court on State of Kerala and Anr. v. The Gwalior Rayon Silk Manufacturing Co. Ltd694 were followed. It may, therefore, be stated that the view of this Court has been that the principle of estoppel is not available against the Government in exercise of legislative, sovereign or executive power. It was stated that Government of its legislative powers to be used for public good cannot avail the company or operate against the Government as equitable estoppel.

The court stated that the scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows:

1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.
2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.
3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorised acts of its officers. 695

The Supreme Court in Union of India v. Godfrey Phillips India Ltd. 696 soon overruled the decision and stated that the law laid down in Motilal case represents the

689 Ibid.
690 Ibid.
691 Jit Ram Shiv Kumar v. State of Haryana 1980 AIR 1285
692 Motilal Padampat Sugar Mills v. State of Uttar Pradesh And Ors1979 AIR 621
693 Excise Commissioner, U.P. Allahabad v. Ram Kumar 1976 AIR 2237
694 State of Kerala v. Gwalior Rayon Silk Manufacturing Co. Ltd. 1973 AIR 2734
695 Jit Ram Shiv Kumar v. State of Haryana 1980 AIR 1285
696 Union of India v. Godfrey Phillips India Ltd AIR 1986 SC 806
correct law on estoppel and further stated that it marks as a significant development in the law relating to the doctrine of promissory estoppel.

Conclusion
Estoppel is the rule of evidence and the general rule is enacted under section 115 of the Indian Evidence Act, 1872. Rule of estoppel is regarded as a rule of evidence based on equity and good conscience. The object is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. The doctrine of estoppel is one that is based on equity and accordingly applied with respect to the circumstances of the case. Even mistaken representation by an innocent party can apply as an estoppel against the party making the representation and the state is not bound by the doctrine of estoppel for acts of its subordinate done in violation of its direction on administrative instructions. In certain landmark cases such Motilal Padampat’s case, State of Rajasthan v Mahavir mills and Century Spinning and Manufacturing Co. v. Ulhasnagar Municipality, Union of India v. Godfrey Phillips India Ltd etc, the court allowed the doctrine of estoppel against the government, but in certain cases such as State of Kerala and Anr. v. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd and Excise Commissioner, U.P. Allahabad v. Ram Kumar, it stated that plea of estoppel is not available against the exercise of the legislative functions of the State.

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PENDENCY OF CASES IN INDIAN JUDICIARY- A CRITICAL ANALYSIS

By Shivangi Bhattacharya  
From KIIT School of Law

JUSTICE DELAYED IS JUSTICE DENIED

The Justice System in India is governed by the Common Law System. This System of legal jurisdiction is mostly based on precedents and case laws. The decisions of the courts and tribunals serve as a backbone of the Justice System in India. India being the seventh largest country in the world boasts of second largest population and the largest Constitution. One of the consequences of huge population is the staggering amount of cases that are pending in the dockets of its judicial system. The judiciary system is planned as per the requirements of the citizen at large and with proper allocation of courts. One of the major failures faced by the Indian Judiciary system is the enormous number of pending cases in each division of courts. This issue of Pendency has made the process of administering speedy trial and providing justice to the mass very sluggish. The main purpose and objective of this study is sharing the knowledge of the uprising issue of declining efficiency of the Judiciary in India and the various legal and administrative ambiguity responsible for such delay in providing justice. There are many case laws that support the need of fair and speedy trial and there are petitions filed against delay in proceedings of one court in another court. This obstacle of pendency acts as a shackles, holding back the Indian Judiciary to make a difference. It is known, that India falls under the concept of developing country, but to be distinguished under the notion of first world country, India has to ameliorate the speed and process of delivering justice.

The Supreme Court of India is the highest court of appeal in the Hierarchy which is at the national level established under Article 124 of Constitution of India. The Supreme Court acts as the apex court, the court of records situated at New Delhi. According to the figures provided by the Law Ministry, the Supreme Court had approximately 59,468 cases as on February 19, 2016. A recent data released by the same source denotes the latest pendency figures which shows nearly 48,418 Civil cases are pending in Supreme Court out of which 1,132 cases are pending more than 10 years. A data published by the Press Information Bureau says that there are roughly 11,050 Criminal cases pending as on 19.02.16.

At State level we have High Courts for the respective states. There are currently 24 High Courts in India out of 29 states. The High Courts accept appeals from lower courts, District Courts and writ petitions in terms of Article 226 of Constitution of India. When speaking about pending cases in High Courts, Allahabad High Court has the largest Number of pending cases.

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697 48,418 civil cases and 11,050 criminal cases
699 A nodal agency of Government of India.
700 Article 226 gives the High Court power to issue writs.

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exceeding 9,00,000 cases in 2016 and 2017. According to National Judicial Data Grid\textsuperscript{701}, there were over 4.2 million cases pending in 24 High Courts of India as on February 2018, among which 49% of the cases are more than five years old. In terms of increase in number of pending cases, Karnataka High Court is the most stressed court with an increase in pendency of 36,479 cases, followed by Hyderabad, Punjab and Haryana. By a report released by Ministry of Law and Justice, 31,16,492 civil cases are pending in the High Courts of which more than 5,89,631 cases are pending for more than 10 years. The number of criminal cases pending in high courts for more than 10 years is 18,799. It is stated that the Chief Justices’ Conference held on 3rd and 4th April, 2015 has resolved that each High Court shall establish an Arrears Committee to clear the backlog of cases pending for more than 5 years. According to a report released by Centre for Public Policy Research and British Deputy High Commission, a total of 16,884 commercial disputes are pending in High Courts with original jurisdiction. Out of which Madras High Court tops with 5865 cases. Around 2.7 crore cases are pending in District and Subordinate Courts. Figures provided by National Judicial Data Grid as on December 2015; 2.6 crore cases are pending in Lower Courts of which 41.38% cases have been pending for less than two years and 10.83% have been pending for over 10 years. There are numerous reasons, both direct and indirect, which contribute to the enormous pendency within courts and tribunals, and the lengthy process of seeking justice in India\textsuperscript{702}. Some of these reasons are captured as below:

**AMBIGUOUS LEGAL PROVISIONS:** Prime Minister Modi rightly said addressing a valedictory function of the Advocates Association of western India, **“At the root of pendency of cases are laws that have 10 interpretations. There is shortage of quality manpower for drafting laws”**\textsuperscript{703}

We have several Indian legal provisions which are vague and ambiguous, they have more than one interpretations and hence it makes it hard for the judge to interpret it the correct way as applicable to the respective case. The provision of Section 497 of Indian Penal Code which is currently a topic of debate if the provision is vague or not. The mentioned law of Adultery violates Article 14 of the Constitution. Under the said section, only men will be liable for committing adultery and not the woman. This provision is said to be a sexist provision. On the other hand Adultery is also a ground for filing divorce for a woman hence it violates the right to Personal life and Liberty. In the vast field of Indian law, this provision is very much debated on.

**RECIROCITY IN TERMS OF MULTIPLE CASES FILED AND JUSTICE SERVED:** Sometimes there are multiple cases filed for one cause of action. There

\textsuperscript{701} A public access portal launched by the SC as a step towards demystification of judicial process for the ordinary citizen so as to find out what ails the justice delivery system across India.

\textsuperscript{702} Description of the pendency and figures associated with it are provided in Introduction of the project at pg-1

should be a proper data base to compound such cases filed in accordance to the cause of action required which will thereby help the judiciary to stop accepting such repetitive cases. For an example if there is a case for Section 378, Theft and there is another case for Section 351, Assault; where it was seen that both the offenses took place together and there is one cause of action for both the cases. In such a situation there should be only one case. If there is a record provided then more than one cases file for the same cause of action can be rejected straightaway by the judge and justice would be served in no time. This would help in speeding up the trial as well as reducing the burden of cases on judiciary.

UNFILLED VACANCIES IN COURTS:
There are not enough judges in the courts provided to administer justice and settle disputes among the citizen. In 2014 the ratio of judges to population was reportedly 17.48 judges to per million people. The Law Commission Report in 1987 recommended at least 50 to 1 million and the population has increased by over 25 crore since 1987. The Centre says that the State should take the lead in increasing the number of judges on the other hand the State says that the Centre should do so. As the tug-of -war goes on, judges remain in scarcity and litigant remain in jail. There has always been a power battle between the Judiciary and Executive regarding appointment of Judges to Supreme Court and also some High Courts. A new Memorandum of Procedure was established which gave the Centre the power to reject any name on the ground of national security , this memorandum was shot down by the Supreme Court. Consequently, the disposal rate of high courts and subordinate courts decreased over the past years. To end the delay it was decided to stick by the old procedure of selection wherein the selected names would be sent to the Information Bureau (IB) for vetting. It is only after the IB vets and approves the recommendations that the list reaches the Centre for a final approval.

Addressing this process the then Chief Justice Of India, T.S. Thakur said:

“ While we (judiciary) remain keen to ensure that judges’ appointments are made quickly, the machinery involved with the appointment of judges continues to grind very slowly. The confidence of people on the judiciary has, over the years, multiplied. Over three crore cases are pending in various courts across the country. Access to justice is a fundamental right and the government cannot afford to deny the people their fundamental right”

A major loophole that is being ignored amongst everything is that only 170 names

705. Recommended by 120th Law Commission report published Sep, 09, 2011, (Aug, 02, 2018, 1:00AM), https://www.pib.nic.in
707. Investigate thoroughly in order to ensure that a person is suitable for a certain job.
were provided as opposed to the need of 462 judges.

TECHNOLOGICALLY VOID & INADEQUATE COURT ROOMS: India needs more court rooms and more benches. Indian Judiciary has insufficient resources. Both Centre and States have not shown interest in spending with respect to Judiciary. Modernization and computerization have not reached all courts. There are huge number of cases pending in Supreme Court, High Courts as well as in Lower Courts for more than 10 years in India as evident from the previous figures, and simple logistics suggests that with more number of courts and judges the problem of pendency could be mitigated. For an increase in the same, the Judiciary needs fund and for decades now the Indian Judiciary has survived on low monetary allocation ranging from 0.2% to 0.4% of the Annual Budget. Moreover, the fund available has never been utilized properly. For example, The Union Budget for 2017-2018 had earmarked Rs. 1174/- crore for the Judiciary and the Supreme Court was allocated only Rs.247.06 crore, which included administrative expenditure, salaries and travel expenses for Chief Justice and other Judges, Office and Security equipment, Maintenance of CCTV and court rooms and preparation of annual report of the court.

Senior advocate and former President of Supreme Court Bar Association, Rupinder Singh Suri told India Legal:

“Has the judiciary utilized whatever funds it has been allocated? The answer is ‘no’. They have not even spent the meager amount that has come. If you spend less than what has been allotted to you, then next year that much less amount is allotted to you in the budget. How can they justifiably ask for more money when they have not spent the amount allotted properly and sensibly?”

VEXATIOUS LITIGATION: An interesting reason behind the cause is rise in number of Vexatious Litigation. Somewhere at some point, increase in literacy and living standards of people give rise to the growth of aimless lawsuits being filed daily. Where the right to justice is misused by filing cases just for the purpose of personal rivalry or to satisfy ego problems or in some case family issues, where court has merely any participation, is nothing but means of wasting time of the court by indiscriminate use of writ jurisdiction. Courts in all over India has millions of cases pending which suggests that there are millions of people who are actually waiting for justice, people who are in jail for more than what their punishment should have been, people who are fighting day and night for their land and getting nothing for years, and on the other hand we have people who waste the time of the court by filing false cases. Laws against vexatious litigation already exist in 2 states - in Maharashtra as Maharashtra Vexatious Litigation (Prevention) Act, 1971 and in Tamil Nadu as Madras Vexatious Litigation (Prevention) Act, 1949. The Law

709 Annual financial statement presenting the Government’s proposed revenues and expenditure for a financial year.

Commission had proposed a similar legislation for the whole country, but the arguments rooted in the idea that a Court’s time should not be taken up by those who persistently litigate without a justifiable cause. India’s high courts and Supreme Court already have certain basic safeguards against petitions that have no reasonable ground. Indian Law has incorporated provision to strike out civil plea that may be unnecessary, frivolous, or vexatious, or that may abuse the process of court by the Code of Civil Procedure. If a criminal litigation is filed before the magistrate without a reasonable cause, Section 250 of the Code of Criminal Procedure enables the magistrate to order the magistrate to pay compensation to the accused. The official litigation fee is usually around Rs. 2000 but the Bombay High Court at times charge Rs. 50,000 as a potential fine for filing vexatious petitions and for wasting the court’s time. The 2005 Law Commission report claimed that a national law to prevent vexatious litigation, is important for “public good” because such a law would impose restrictions on a “vexatious” person’s “access to justice”.

FREQUENT ADJOURNMENT: The Civil Procedure Code, 1908 mentions and directs about the rule of adjournment in Section 309, Order XVII Rule 1 which says that :- The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reason to be recorded in writing: Provided that no such adjournment shall be granted more than three times to a party during hearing of the suit.

The laid down procedure of allowing maximum of three adjournments per case is not followed in over 50% of the matters being heard by courts, leading to rise pendency of cases. The task forces set up by the government to suggest changes in judicial procedures for faster disposal of commercial disputes and to improve the country’s ranking in the World Bank Index of doing business. According to a news data, in Rajasthan, the average number of adjournments granted in district and subordinate courts range from 12-42 in civil cases; In Odisha it is 151 in civil cases and 33 in criminal cases. Adjournments on fragile grounds are one of the reasons for heavy pendency of cases. By granting daily adjournments, the judges degraded the importance of the needed remedy. It is no more called justice when the justice is not delivered in proper time and at a proper pace.

An official of Ministry of Law and Justice said, “Imposing costs and fixing a timeframe for disposing of cases will overcome the challenges in the system”

INDIAN GOVERNMENT- THE LARGEST LITIGANT: The government is the largest litigant in India, responsible

711 Commercial dispute means material disputes relating to price, invoice, terms, quantity, delivery of claims or arising out of any transaction.
712 Lawsuits usually dealing with contracts or torts related matters. E.g Negligence.
714 A person involved in a lawsuit.
for nearly half of the pending cases. Many of them are actually one department of the government suing another, leaving decision making to the courts. Also in most of the cases when the government files a case it is seen that the government side fails to prove the point. Justice T S Thakur, the senior most judge of the Supreme Court criticized the government for being the “biggest litigant” saying that large number of cases against it “cannot be a good sign of good governance”. The government faces 369 contempt cases across courts in India as the biggest litigant in the country. According to June 2017 data, a total of 135060 government cases and 369 contempt cases were pending in the courts. The Railway Ministry tops the chart with the maximum number of contempt of court cases pending against it. After the Railways, which has 241 cases it has the Ministry Of Home Affairs with 68 cases and the Ministry Of Communication has 21 cases of contempt pending. As per a data released by a news channel on June 2017, Railways have the highest number of cases pending, 6685, cases followed by the Ministry of Defence with 15646. The Ministry Of Panchayati Raj with only 3 pending cases is the least of all.

Law Minister Ravi Shankar Prasad said “Government must cease to be a compulsive litigant...the judiciary has to spend its maximum time in tackling cases where the government is a party, and the burden on the judiciary can only be reduced if the cases are filed after taking a careful and considered view.”

SPECIAL LEAVE PETITIONS: A lot of cases are entertained under Article 136 of Constitution of India - Special Leave Petition, which cases would otherwise not fall in the criminal/appellate/advisory jurisdiction. This article 136 deals with extraordinary power of the Supreme Court to grant special leave.

The Article reads as ‘The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India’.

A paper analysis statistical data pending cases, appeals filed and dismissed by the Supreme Court makes a gesture about the increasing rate of filing and acceptance of Special Leave Petitions (SLPs). The Apex Court had been given this power under Article 136 to accept exceptional petitions where there has been a miscarriage of justice. But lately the said Article has lost its importance where a random filing of SLPs is witnessed without any constitutional issues or any injustice done. The special provision is used for early addressing of grievances and wasting the time of the Apex Court. The major fact which is highly ignored is that the Apex Court was not created as a regular court of appeal against orders from High

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715 Example of contempt cases are willful disobedience of the order of the court.

Courts, Sessions courts or even Magistrates but it was created as an ultimate body which would intervene to give a final verdict whenever a law for the entire country is required and to grant special leave whenever the court itself would deem necessary. Accumulation of regular and petty cases in the form of SLP and turning the Apex Court into an ordinary court of appeal has made the working of the Supreme Court leisurely and clumsy which leads to pendency of important cases for decades.

**Is Justice Delayed An Infringement of Fundamental Right?**

Article 21 of the Constitution of India protects the right to fair and speedy trial. It reads as: “Protection Of Life and Liberty:- No person shall be deprived of his life and personal liberty except according to procedure established by law”

Every citizen of India has the right to a fair and speedy trial. This saying has been even strengthened by the judgment pronounced by the landmark case of Maneka Gandhi v. Union of India717. The apex court said that article 21 imposed restriction upon the state where it prescribed a procedure for depriving a person of his personal life or liberty. Pendency of cases in one of the causes due to which the fair and speedy trial policy is highly hindered. Due to lakhs and crores of cases pending in the courts of India, a major percentage of citizen of India does not get the privilege of speedy trial which is justice delayed. In reference to pending appeals of bail, the case of Smt. Akhtari Bi v. State of Madhya Pradesh718, which said that if an appeal is not hears for 5 years, not including the delay for which accused himself is responsible, the bail should be granted normally. When talking about denial of speedy trial, the landmark case of Abdul Rehman Antulay and ors v. R.S. Nayak and anr.719 must be spoken of. Under the mentioned case it was held that right to speedy trial is a fundamental right being a part and parcel of Article 21. It also added that in case of violation of right to speedy trial, a higher court can direct conclusion of proceedings in a fixed time other than quashing it.

With regard to the issue of denial of fair trial, a very important quote from the judgment of Hussainara Khatoon Case 1979720 is:

“The poor in their contact with the legal system have always been on the wrong side of the law. They have always come across law for the poor rather than law of the poor”721

The Hussainara Khatoon judgement also cited the very important Maneka Gandhi Case. The brief fact of the Hussainara Khatoon case is an issue regarding release of under-trial prisoners in Bihar, some of whom had been imprisoned for a longer term than the maximum period of punishment under the law, waiting for the

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717 Maneka Gandhi v. Union of India, AIR 597, 1978 SCR (2) 621.

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trial. The court ordered immediate release of the prisoners so mentioned. This appeal for which this case is regarded as a landmark is in the light of Article 21722 There is no doubt that under trial prisoners should not be neglected in jails because of their bail refusal or their monetary incapacity. Trials of these accused should be disposed of early as possible by orders from subordinate courts where such functioning is overseen by the High Court of the respective state. Destituted of personal liberty and not ensuring speedy trial in inconsistent with Article 21. Even though liberty can be hampered for some period once an accused is arrested but that period must not last long if he is proven not guilty. Lastly, mention must be made of Noor Mohammed v. Jethanand and ani723 where it is mentioned that timely delivery of justice is a part of human right and denial of such right is a threat to public conference in the administration of justice.

The Indian Democracy today has a population of 133.42 crores724, approximately as on 2016 which is the second largest in the world after China and a total of 29 states & 7 union territories. Against the entire 133.42 population there is only one Central Judiciary (1Apex Court, 24 High Courts & few more than 5000 subordinate courts) to cater to their needs. This makes the ratio of judges to the population severely low. In addition to this as discussed earlier there are vacancy of judges and the present acting judges of Supreme Court and High Courts stay on leave for the majority of their working period. As a result, the judicial system though capable enough, fails drastically in administering justice and amounts to a huge number of backlog cases. There is no doubt upon the integrity of the judiciary, it has the lengthiest constitution with all possible criminal laws and civil laws, new amendments and new acts evolved with changing times. Among all other constitutions, Indian constitution has been amended the most as laid down by the landmark Keshvananda Bharati Judgment725 that Indian Constitution can be amended to an extend which does not destroy its basic structure. If we take a look at the history, the Supreme Court since its establishment in 1950 has given 25000 judgments reportedly. With a rise in new and modern provisions like provisions for women and children (POCSO Act726, Sexual Harassment of Women at Workplace 727, MTP Act728, Section 498A of IPC729, Dowry Death provisions730, etc.) there has also been a rapid growth in misuse of the provisions through vexatious litigation. Indian Judiciary is also known for its record of corruption which is by far the leading reason for the downfall of not only the judiciary but also the legislature and the executive. Corruption is not only concentrated at the

722 Provision for Right to personal life and liberty.
central level but it has now spread its wings also at the state and district levels. If these severe issues can be mitigated then we can see a new judiciary in India which people have hardly seen since 1947. The first thing that has to be done is increase the number of judges per 1000 of people. While most developed democracies all over the world has 50-100 judges per million population, India has only 13 judges. There is a deficiency in our legal system from the initial stage which starts with the number of law schools both national and private. To increase the number of judges first of all there has to be a growth in the number of law students passed out every year and number of lawyers. If the lawyers at the subordinate courts and Sessions courts increase, the judge bench in High Courts can increase and the best judges from the high court can be used to fill up the vacancy at the apex court. This process would enhance the quality of lawyers and judges, this can take a while but would prove to be a good method to reduce pendency.

The step that should be taken by the government after having stabilized the number of judges, is increase the working day of the court. It will certainly be a waste to expect the courts to work all the 365 days of the year but it will be a lot easier if the vacations are reduced. At least during the time of heavy work load or pending cases, the working time of the courts could be expanded to speed up trial. An implementation of night shift magistrates for handling emergency situations would be a good try to strengthen the judiciary. Stalling of cases by the lawyers is a primedrawback of Indian lower courts. Dates are missed almost on every occasion which causes the delay in justice delivery. A bench of retired judges can be implemented to look after the causes for stalling and who can take necessary actions to avoid hindrance in delivering judgment.

Cases like Ajmal Amir Kasab v. State of Maharashtra, Salman Salim Khan V. state of Maharashtra are destined for the superior courts then why waste time of the lower courts? These types of cases can be directly passed to the Supreme Court. Such cases should be identified and straightaway sent to the superior judges without making any further delay in giving the verdict. An addition of all the necessary measures as mentioned should be able to eradicate the delay in judgment and the time would be saved, process would speed up and justice would be done to all. Definitely, the courts should garner resources and modernization should be taken care of. There should be enough space for accommodation of the people and proper ventilation. Maximum states of India experience a hot and humid climate throughout the year hence there should be facility for air-conditioned court rooms. This should be taken care of especially at the district and subordinate levels.

In US, the President appoints judges to the US Supreme Court, on the contrary in India, the judges appoint themselves. This is a very disturbing tradition that has been followed for years. Where the Members of Parliament and Members of Legislative Assembly are representatives of the people then why not the judges as well? If the judges themselves elect each other then of-course there will be corruption in the process. Everybody is

unfair until he is answerable to someone. Hence to make the system better in India, we need innovative and time-bound solutions. Shortage of judge in Indian courts is an ancient problem and the delay in justice is also eminent by observing the huge leap in the two dates: Date of filing of petition and the date of the judgment. Despite several shortcomings, there are efficient judges and lawyers who are recognised for their hard work and achievements in the history of Indian Law. Internal loopholes are long term changes which will take time to be restructured but the external changes will bring interest of the people to work for the managing the internal, long term solutions. Hence to make the a better place to live in, reform has to start from the lower court and with the immediate problem can be dealt by simply reproducing established technical alteration.
A STUDY OF TRAFFICKING OF PERSONS BILL 2018

By Shivangi Mugdha
From KPMSOL, NMIMS

1.) Abstract

Purpose: To make people more aware about how the Trafficking of persons bill has evolved and what are the various features included in it for the people who are a victim of trafficking and what are the punishments mentioned in it for the people who commit the crime.

Research Implications: This research paper tries to bring to light the role and importance of the bill. It tries to analyze the role this bill will play in near future. It also tries to read and critique the good and bad part of the bill. The researcher also tries to portray the views of people who are not in favour of the bill.

Findings: The author believes that the bill however impressive may seem has a lot of points people may oppose, and there is a big question that is the bill as good as it seems. The government in the first place needs to dig into its own complex legal history. It then needs to work out the precise relationship between the varied streams of anti-trafficking law and consolidate these, conceptually, definitional and in regulatory terms. However, it is a good step taken for going towards something better.

Originality: The author has also read and written about how various strata of the society are having problems with the bill and how an individual is affected by the same. A detailed and comprehensive study of the bill and its effect has been done which most of the paper written before have not done.

Key words: human trafficking bill, prevention, sex workers, rescue, rehabilitation, women, children.

1. Introduction

Human trafficking refers to the act of illegally transporting people to another area or country for the purpose of forced labor or commercial social exploitation. In Indian law the definition of trafficking is drawn primarily from the section 370 of the IPC, which says ‘any act physical exploitation, sexual exploitation, slavery or practices similar to slavery and servitude’.

Human trafficking is not a topic on which political debates or agenda should be centered, rather it is about the millions of people who’s not only body but mind and spirit are also trafficked which results in the destruction of emotional as well as mental stability and leads to a lot of human misery. Human trafficking is third largest organized crime which violates basic human rights. The same is in some aspects ignored by law. However, there were laws pertaining for this specific act. Existing law for trafficking in India includes the Immoral Traffic (prevention) act, 1956, the Bonded Labor Act, and the Indian Penal code. Because there were deficiencies found in the existing laws on trafficking in India, the Supreme Court was mandated to study the upshots the current laws to address the human trafficking in the country. The process of formulation of the law started back in 2015 however, the present bill was first presented.
This Bill aims at increasing prevention, rescue and rehabilitation of trafficked persons. Key features of the bill include:

- National anti-trafficking Bureau
- Anti-trafficking units
- States anti trafficking Officers
- Functions of the Bureau
- Relief and rehabilitation committee
- Search and rescue
- Protection homes and rehabilitation provisions
- Trials and penalties

Some other features of the bill include medical checkups after returning home, the prerequisite flow of fund for welfare of affected persons, strict punishments for traffickers. The recent draft has also made more conceptual clarities by giving clearer roles, detailed definition and responsibilities and the definition given is binding. And some of the new provisions proposed in the Bill include creating economic prevention by attachment and penalty of property and freezing of bank accounts used for trafficking, directing surveys, awareness generation and community-based rehabilitation. The bill further aims at creating a special action plan for avoidance of trafficking, providing for International cooperation to tackle cross-border trafficking, mandating a right to rehabilitation to survivors. Also, there are three levels of committees, district, state and national to take care of the rehabilitation and welfare activities of the victimized persons. This Bill also sets international pattern in bringing legislative rehabilitation together with all aspects of prevention, protection, and online forms of trafficking in one ample legislation. This will provide a solitary point of support to all survivors. It can be rightly argued that the Bill is a massive step by India to not only accomplish, but also set the highest international standards of fighting trafficking in persons. The bill provides to set up designated courts in each district and there are provisions for the victims to be represented by private lawyers. It also has rules for victim compensation through the Legal Service Authority of each state at various stages – from the filing of First Information Report (FIR) to the disposal of the case.

1.1 Research Objectives
- To have an in-depth knowledge of the trafficking of persons bill, 2018.
- To know its key features and see whether it is appropriate for the people who are affected by such instances.
- To analyze why certain group of people in the country are opposing the bill.
- To study whether and how the bill actually harms those it wants to protect.
- To analyze suggested amendments to the bill and its further applicability.

1.2 Research Question
- How the bill did come into existence and what does it aim to do?
- What are various other pre-existing laws for human trafficking and why were they not so effective?
Is it exactly doing and serving the motive for which it was introduced or does it have any loopholes?

Why is it that people who are supposed to be protected under the bill are opposing and speaking against the bill?

What are the ambiguities in this bill and are further amendments needed?

### 1.3 Research Methodology

To meet the objective of this study the researcher has used the secondary mode of research. As the research has taken the help of several methods such as e-books, online journals and other relevant materials, the primary research method of survey and interviews pose to be infeasible and ineffective means as the ambit of the topic is based on conversion based study.

### 2. Evolution of the Bill

The Indian law on trafficking had basically 2 sides in sync with the National Crime Bureau which can be further be broken down into general criminal law, which is in the Indian penal code, 1860 and then the local law such as Immoral trafficking (prevention) Act, 1986.

Now, after the abolition of slavery, the IPC tried bringing in various laws for prevention of procuration, importation, buying and selling minors for prostitution, unlawful compulsory labor and habitual dealing in slaves. Thus in 2013, section 370, a standalone offence on trafficking was introduced. Although India managed to develop labor law jurisprudence in 1970s on bonded, contract laborers which is in today’s date referred to as “trafficking” however these laws have remained largely in books. The fact that out of the 231 prosecution that were launched under Bonded Labor System Abolishment Act(BLSAA) since 1996-97, only six has been decided and even those has been resulted in acquittal, leads us to the previous statement. Also the Contract Labor Act 1970 which was a result of the Contract Labor Amendment Act of 1986(CLRAAA) has been undetermined severely. Even the Inter-State Migrant Workman Act, 1979 which was meant to regulate the working etc. of a large no. of migrant workers has been used in a much restricted manner as compared to BLSAA or CLRAA. The CLRAA has been unable to realize either of the goals of the law—that is elimination or regulation of contract law, which results in them getting paid less than the minimum wage.

Coming to the Immoral Trafficking Prevention Act (ITPA), section 5 of the act criminalizes acquisitionfor sex with or without consent of the person mixing trafficking with sex work, also some aspect of sex work is criminalized but not the act of sale of sex per se. Such ambiguities in the law in combination with some sections of IPC were used against the sex workers by the police in various cases. In the 1990s, the availability of international funding for HIV prevention enabled the mobilization of Indian sex workers who organized into the National Network of Sex Workers (NNSW) and the All India Network of Sex Workers (AINESS). They reframed “prostitution” as sex work—a legitimate form of reproductive labor.

This position is supported by neo-abolitionist anti-trafficking non-governmental organizations (NGOs). However, as efforts to amend the ITPA did not materialize, these groups took
to public interest litigation (PIL) as a route to achieving institutional reform. Activist Supreme Court lawyers had already approached the courts in *Vishal Jeet v Union of India* 1990 and *Gaurav Jain v Union of India* 1997, but through the 1990s, neo-abolitionist NGOs followed suit. These groups sought to hold a weak and understaffed executive (and ineffective police) accountable for the prosecution of exploiters and traffickers (Nair and Sen 2004), the framing of a Victims’ Protection Protocol and guidelines for proper rehabilitation.\(^{733}\) In 2006 the ministry of Women And Child Development introduced an amendment to criminalize customers of trafficked sex workers “trafficking” being defined broadly after India was downgraded to Tier Two on the Trafficking of persons report issued by the US state department, however it lapsed in March 2009. Again, The MWCD’s inter-ministerial committee appointed in September 2012 associated trafficking exclusively with sex work and then they presented The Criminal Law (Amendment) Bill in Parliament on 4 December 2012 which fact had no anti-trafficking offences. After all this ultimately section 370 did not mix trafficking with prostitution. Even after all these things were clarified and section 370A being used in a wrong manner A PIL filled by Prajwala in 2004 came alive which lead to a new committee established by the National Legal Service Authority (NALSA) which included judges and civil society members, which submitted a report in August 2015 on anti-trafficking legislation after which the Supreme Court disposed the petition. The MWCD then drafted the *Trafficking of Persons (Prevention, Protection and Rehabilitation) bill*, 2016 which was eventually passed by the Lok Sabha on 26\(^{th}\) July 2018.

3. **Analysis**

India has various other such laws like the *Trafficking in Persons Act, 1956*. Amendments to this bill have been under construction since 2006 but were never enacted. Also, in the meantime, section 370 was introduced in the IPC which redefined trafficking. Barely the country was getting a grip of this act, a new bill was introduced. However Human trafficking is a huge crime which prevails in India and for which severe concern should be there. Thus, keeping the fact into consideration, Trafficking of Persons Bill 2018 has been prepared. Some of the provisions of the bill are as follows:

- The view point of prevention, rescue and rehabilitation has been taken into consideration while addressing the issue if trafficking.
  - It ensures confidentiality as the identity of victim, complaints or witnesses are not being disclosed to public.
  - Time bound trial, designated courts in each district and sending the victim back to their home within a year from the time of cognizance has also been ensured.
  - It defines various serious kinds of trafficking such as trafficking by giving chemical substance or hormones on a person for the purpose of early sexual maturity, trafficking for the sole purpose of bonded labor, trafficking of children

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and women for the purpose of marriage etc.

- It also mentions to ensure immediate protection and rehabilitation of the rescued victims.

- It also entitles victims to a short-term relief within 30 days to address mental, physical and emotion turmoil and further relief for 60 days from the day of filling a charge sheet.

- It also states that the government shall, establish a Bureau called the Nation Anti-Trafficking Bureau for exercising the powers and discharging its function under the act. Various other mechanisms at the state, district and central level will also be responsible for work related to trafficking.

- It class for Rehabilitation fund which will be used for the well-being of the victims such as education, legal aid, safe and good accommodation, health, etc.

- International crime has also been taken into consideration in the bill and the NATB will perform the function of international coordination to facilitate and keep into check inter-state and trans-border transfer of victims or witnesses and international video conferencing in judicial proceedings if found necessary at any point of time.

- The bill ensures punishment for facilitating or promotion of trafficking which includes printing, producing or distributing fake certificates, fraud for procuring the acquisition of clearances and necessary documents from Government agencies.

- It also states that whosoever is found committing the offence of aggravated form of trafficking of a person shall be subjected to imprisonment of not less than 10 years which can however be extended to life imprisonment, and shall be liable for fine which shall not be less than 1 lakh rupees.

4. Impact of the bill

Trafficking of person bill passed recently is for sure a step in the right direction to curb the huge problem of human trafficking in India but it also has been a much-debated topic in the recent scenario some people welcome it with an open heart, some welcome it but also criticizes it at some point, and some people are completely against it. The scope of this research paper is to look on the various aspect as to how does it affect the children, the transgender community, the sex workers, bonded laborers etc.

Children in concern

The bill makes references to the Juvenile Justice Act 2015, recognizing the fact that the trafficked person may be a child, but the bill misses on the point of intersect with other important laws such Child and Adolescent Labour Act, 1986 and the Prohibition of Child Marriage Act, 2006 as children are also trafficked for labor and marriage. Even the Protection of Children from Sexual Offences Act (POCSO Act), 2012 finds a mention in the bill but how will it intersect with this law in cases of sexual exploitation of children is very unclear. Various serious and well documented form of trafficking related to child such as trafficking for and through adoption, trafficking of children through agencies for serving as domestic helpers is nowhere mentioned in the proposed bill. Also, the mention of various and multiple layer of authorities will create a chaos. The child protection committee right till the village
level is responsible for the solo purpose of preventive mechanism, how these bodies will coordinate with the newly made committee is quite unclear. There are high chances that so many layers of authorities will create cracks and gaps in which the child victim if trafficking will fall and will be denied and ignored from given the justice they deserve.

A perfect example of this is that section 23 of the bill mention the registration of Rehabilitation and protection home. Now the Juvenile Justice Act already includes child care institutions that are to be registered under the Act for housing affected Child. Now with the mention in both the places will it mean that such a house will need to get registered in both the places or will the registration be canceled or actions will be taken if it is not mentioning under any 1 of these acts?

Another example can be Section 26 of the bill which allows either the Child Welfare, Committee or the Anti-Trafficking Committee to deal with the Rehabilitation of victims which clear cut shows how the law easily allows the scope of both the authorities ignoring the responsibilities and leaves the victim to suffer for day in and day out.

**Sex Workers and transgender**

In today’s date when the number of victims of sex trafficking is as high as 16 million, even in such cases the bill fails to mention ‘sexual exploitation’ or ‘prostitution’ anywhere. Also, the bill has no specific mention of punishment for the customer or Clint who knowingly deals with and promotes trafficking of marginalized girls and women. Despite the fact that the trafficking bill claims to be addressing other forms of slavery and servitude like domestic work, surrogacy and even marriage there is little doubt that the most vulnerable sections that will be adversely impacted by the bill are adult sex workers. The fundamental flaw with the bill is that it treats victims of human trafficking on par with adult persons in sex work. Trafficking of persons into forced or coerced labor (including sexual exploitation) should not be equated with sex work undertaken by consenting adults. This conflation could lead to misuse and over-broad application of the provisions in this bill. For instance, the report of the UN Special Reporter on violence against women regarding her 2013 mission to India Rashida Manjoo included specific recommendations to review the country’s statute on “immoral traffic” that de facto criminalizes sex work and to “ensure that measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers.”

Earlier drafts of the bill available in the public domain, in relation with experiences arising from the implementation of the Immoral Traffic (Prevention) Act, 1986 (ITPA) give rise to serious apprehensions because sex workers have consistently been at the receiving end of miss managed anti-trafficking laws and policies. Unless sex work between agreeing adults—sex workers and their clients—is especially removed from the purview of the bill, large-scale

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human rights violations in the name of anti-trafficking will continue to be the norm. The world over, anti-trafficking laws and policies have placed sex workers on the edge of violence applied by law enforcers and anti-trafficking groups. Also, on the postulation of lack of consent through section 17(2) of the act states that, women who are rescued as a consequence of raid and research operation can be handed over to into the safe hands of guardians and this also included adult woman who have consented for the act. A magistrate satisfied about the previous relation and suitability of the husband, parents or guardians, may issue an order granting custody to them. This section in ITPA which treats adult women as infants is debilitating for women who are in sex work as adults living independent of parents or family. Many are heads of their households and bread earners for their families. In many cases, adult women do not inform their families that they are in this profession. When directed by the magistrate, to bring a husband, parents and guardians in court, they are forced to contact family members in embarrassing circumstances. In many cases such custody is compiled by an affidavit of the woman undertaking that she will not do sex work in the future. “This bill does not differentiate between trafficking and consensual sex work and forces rescue and rehabilitation on us. I can tell you as a sex worker, the two are separate. I came to this work through my own desire; I’m not asking to be rescued. I can fundamentally stay anywhere in India- but according to this bill; a magistrate will decide where to send me for rehabilitation. This violates my right.” Says Nisha Gulur, head of National Network of Sex Workers.

The police, NGOs and others involved in ordering and conducting raids are generally not sensitive to the complex situation of the individuals they encounter during raids. The prevailing presumption that rescued sex workers are victims runs through the entire enterprise, along with a refusal to listen to those who are being rescued. And this is one of the biggest reasons why Raid, rescue and rehabilitation strategies backfire. The only light at the end of this dark tunnel comes from the togetherness of vigilant sex workers who can organize themselves to root out the violence and abuse in their own lives and that of minors and women trafficked into sex work. In any society, the idea that a rescue can be integrated from the “outside” using an oppressive police force that incites violence rather than protection, compounds the problem.

However, the list of offences under Chapter XII of the Bill only criminalizes a person who buys and sells other persons for the purpose of profiteering. The Bill does not criminalize voluntary sex work. It aims at criminalization of trafficking in relation with the already existing definition of trafficking under Section 370 of the Indian Penal Code 1860. The point of transgender if taken into consideration is very wage as the bill is stated to be gender neutral. It tries to bring all under one umbrella and serve each and every individual equally and maybe this is the reason why special vulnerabilities of transgender individuals are addressed in the Bill.

**Bonded laborers**

In the current time of globalization, the forms of labor dispossession and exploitation are changing and are also increasing. Nobody can deny the reality that
a large no. of women and girls are entering into the labor force just because they want to bring home some bread or the survival of the family. They generally move out seasonally many times alone for longer period depending on the need. They move through various contractors and go to various places without a permanent mention of the wages which they will be getting. The bill neither seeks to highlight the need for awareness-raising to ensure safer channels of migration nor does it consider the trafficked persons as workers who have rights.

There is a lack of clarity as to whom is the bill addressed to. The statement declares that the purpose of the bill is to address lacunae in existing legislations, namely, Section 370 of the Indian Penal Code (IPC), 1860 introduced in 2013, which, according to the bill, only defines and penalizes trafficking of persons, and the Immoral Traffic (Prevention) Act (ITPA), 1956, which, according to the bill, deals only with commercial sexual exploitation and not trafficking of persons for “physical and other forms of exploitation.” Yet the statement does not make any direct reference to bonded labor and is quite on the Bonded Labour System (Abolition) Act (BLSAA), 1976. Only trafficking, Trafficking of person etc. is mentioned throughout the Bill and there is No direct mention of bonded labor and forced labor.

The initial clause states: “A bill to prevent trafficking of persons, especially women and children and to provide care, protection and rehabilitation to the victims of trafficking, to prosecute offenders and to create a legal, economic and social environment for the victims….” Here also, forced labor and bonded labor are not mentioned clearly. The focus is therefore on the trafficking of persons, especially women and children, and the victims of trafficking. By specifying women and children as the main victims of trafficking, it is easy to understand that men are excluded from the scope of the bill and that the bill is concerned only with sexual exploitation.

Of particular concern is the overlap between the ITPA, IPC 370, the bill and BLSAA and the lack of clarity as to which legislation should be used for which crime. As a result, none may be in a condition to function effectively. The mistake could be that the first three legislations will be used with one another (to the neglect of the BLSAA) resulting in no action against bonded labor at all. There would be terrific confusion in approaching the appropriate authority for any particular form of exploitation and in interpreting the definitions in the various legislations concerned. Since these legislations are enforced and monitored by different ministries, there may not be any coordination regarding their implementation. This will give further scope for district and sub-divisional administrations to not take action against bonded labor and pass on the responsibility to the bodies proposed under the bill, which may not entertain bonded labor at the beginning stage itself.

**Socio-economic condition of trafficked person**

The proposed bill places awesome confidence in restoration and reintegration activities. While on the essence of it this might be viewed as a quality, it is vital to know about lacunae in current practices in helping trafficked people and find a way to address those. Numerous in our supporters,
both in India and over the globe, disagree with the possibility that there is essentially something that one should be "restored" from. Our individuals have discovered that when the components that prompt trafficking in any case have not been settled, there is a high danger of continued trafficking or of the individual coming back to the earth of abuse. Most "reintegration" activities encourage an arrival to the individual's locale/nation of birthplace, which may not generally be the best arrangement and might, truth be told, neutralize their social incorporation in the long haul (GAATW 2016). The most tough and rights-attesting approaches put the individual at the middle, and bolster network-based approaches, instead of the protectionist and organized consideration approach proposed in the bill, which restrict ladies' rights and opportunities and disregard their security. Network based reintegration models, for example, those kept running by Shakti Samuha, our part in Nepal, have been, basic in having the capacity to address a standout amongst the most harming components of the trafficking background—social shame.

The GAATW's understanding in the course of the most recent 25 years has likewise added to our worry over what we see as an extreme spotlight on indictment. In 2016, we welcomed researchers and experts to break down and banter the issues with indicting human trafficking. Expanded punishments, captures and arraignments remove the concentration from unfortunate casualties and survivors, bother injured individual traumatisation and move us far from seriously tending to the issue. Surely, Gallagher (2017) has alluded to the worldwide endeavors to arraign trafficking as "hopeless"—with just 9,000 indictments made in 2016 against an issue of a scale that, while not precisely measured, is evaluated to be in the many millions. In view of her firsthand involvement in South-east Asia, Gallagher has additionally seen that "the drive for indictments (generally started and sustained by the United States government through the Trafficking in Persons Report process) is adding to premature deliveries of equity on a critical scale as nations scramble to demonstrate their pledge to hostile to trafficking endeavors in a way that will engage their assessors. Cases that are not trafficking, (for example, pimping and marriage facilitating) are being arraigned all things considered and feelings are prompting punishments that are horribly unbalanced to the earnestness of the hidden direct. Charged people are time and again being denied the privilege to challenge their informers, to profit by an assumption of guiltlessness and to anchor help with their safeguard (Anti-Trafficking Review 2016). Actualizing a rights-based methodology that encourages, and does not criminalize movement and one that advances nice work is the most productive way to deal with anticipating trafficking in people. It decreases open doors for misuse and empowers people to report wrongdoings and look for help without dread of detainment and expulsion. Trafficking and without a doubt relocation can't be taken a gander at in separation from advancement and financial approaches that are making an inexorably unequal world. Without tending to the auxiliary drivers in the worldwide economy that fuel the interest for the modest products and enterprises made conceivable by poor pay and working conditions with next to
zero work control, the conditions for work
misuse, including that of vagrant specialists
and which may establish trafficking in
people, will proceed with (GAATW 2017).

5. Suggestion
After doing a through reading of the bill
some suggestions which may be taken into
consideration if further amendment of the
bill is done are:

- Section 21 and 22 mentions just the
  rehabilitation home and protection home
  however they are not categorized.
  They should be differentiated like shelter
  homes, observation homes etc. It must be
distinguished from children’s home. It must be
made clear that adult victims will not be housed with child
victim and child victims will be sent to
children’s home.
- The bill also mentions rehabilitation but
  fails to mention psycho,socio and
  economic rehabilitation of the victim.
- Trafficking for the purposes of begging is
  considered “aggravated” under the Bill, whereas trafficking for
  sexual exploitation and forced removal of organs is simple
  trafficking, even though the MWCD always said that its primary
  concern is sexual abuse and exploitation
  of women and children. Further still, “slavery and practices similar to
  slavery and servitude”, which capture the most shocking forms of coercion and
  bondage under domestic and international law, are also simple
  trafficking. This should also be amended
  and a clearer and more concentrated
  definition should be given.
- Section 3 of the Immoral Trafficking
  Prevention act makes the act of standing in
  public spaces by the traffickers a criminal
  offence. This should be amended and the
  woman should be treated as a victim of the
  circumstances and not as the offender.

The bill is a walk in the right direction
however its way seems a bit hazy. A few
amendments taking into consideration the
general public demand and the reaction
and suggestion of learned individuals can
lead it to be a very decent and effective
bill.

6. Conclusion
This research paper followed as to how the
Trafficking of Person Bill came into picture
and was passed in the Lok Sabha. There
were various preexisting laws such as the
Immoral Traffic (prevention) act, 1956, the
Bonded Labor Act, and the Indian Penal
code. However, these existing laws only
criminalize the act and no framework is
provided for prevention of trafficking, or
protection and rehabilitation of the victims.
This bill lays down a clear three tier
framework for the institutions at the state,
district and national level. The bill
recognizes some of the wider scope of
trafficking as a crime including bride-
trafficking, trafficking of children for
transportation of for arms and drugs and
various others. The bill concentrates and
aims to “prevent trafficking of persons, especially women and children and to
provide care, protection and rehabilitation to
the victims of trafficking, to prosecute
culprits and to create a mentally decent, economic and social environment for the
victims and for matters connected therewith or incidental thereto.” Even though the core
of the bill is survivor centered, it also caters
to crime and prosecution of offenders. It
does miss out on certain issues and there are
some critical loopholes in the way the bill is
drafts the outline of the concept of rehabilitation. Some also state that the bill is not completely gender neutral and there is a lack of provision for the rehabilitation of transgender and male victim of child sexual exploitation. The sex workers who were supposed to be protected under this act are also speaking against it as the act in some ways takes away their freedom of free trade and practices. The Bill also in some ways forces itself on individuals who are voluntarily into the business of proving sexual pleasures in return of some kind of capital thus, creating trouble in their earnings as well as free and eased way of working. The bill also criminalizes hormone therapy which is an unjust to do with the people who are willing to do it on their personal discretion. There are some ambiguities in the bill which is becoming the main reason for the bill to be opposed by some people. The bill will however tie various legislations together through a single system of framework which will together, work in the dedicated field of trafficking of person and related crime. Also, criticism can lead to many great suggestions and those will always lead to a better framework off the bill and will result in the well-being of the country as a whole. There has been a long struggle to bring this bill into existence which stated back from 2004. This is the right path to travel however hazy it may be, the problems faced will eventually lead to a well-polished future.

“And as we have arrived here today, we will continue to push the boundaries of justice to collaboratively protect and empower the most vulnerable persons of our society. But today, a child in sexual exploitation and a woman in slavery re looking up to us and questioning us on what we are doing as a civilized society and a welfare state. We need to take this step together, because our children and women cannot wait.”

However, the government in the first place needs to dig into its own complex legal history. It then needs to work out the precise relationship between the varied streams of anti-trafficking law and consolidate these, conceptually, definitional and in regulatory terms. The efforts to stop human trafficking need not be just restricted to forming laws and laying down provision for punishment and providing services to the community affected. But the learned individuals especially lawyers, bureaucrats, judges and activists need to bring the problem into light for the individuals who are not aware and ultimately become victims to such acts. The state also has to look at changing ways how each individual as well as a community looks at trafficking survivors, gender role, and violence. Not being aware and making certain things a taboo will never help a society evolve from a certain backlog however strict the law prevailing there may be.

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DELAY IN DISPOSAL OF CLEMENCY PETITION BY THE PRESIDENT OF INDIA: AN IMPORTANT FACTOR FOR COMMUTATION OF DEATH SENTENCE INTO LIFE IMPRISONMENT

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ABSTRACT

The power of clemency in India is vested in the highest authority by way of prerogative. The authority exercises the power in its discretion. However the discretion is not absolute and is subjected to certain limits, and if the authority disposes of the clemency petition in an arbitrary manner by going beyond the limits, then the courts may declare such an order to be void. On being awarded death penalty and after exhaustion of all other judicial remedies, one may approach the President who is constitutionally empowered to grant pardon or reprieves. India remains one of over a hundred countries who have retained death penalty. The question which often arises is what should be done in cases where there has been a delay in the execution of death sentence. Off late, delay in the disposal of mercy petition has been considered to be a ground to commute death sentences into life imprisonment. The first half of the paper deals with delay in execution of death sentence and its impact on right to life and then goes into the effects of delay on execution and the validity of a delayed execution. The text also includes information regarding various international conventions and their take on the issue at hand. The paper does not delve into any debate regarding the validity of death penalty be it for any sociological, penological, or any constitutional purpose. The discussion is limited as to how delay can become a ground for commutation of death sentence into life imprisonment.

KEYWORDS: clemency, President, death penalty, life imprisonment, delay, commutation.

INTRODUCTION

Death Penalty as a form of punishment has always been debated. These debates are largely based on constitutionality of death sentence, its importance in criminal jurisprudence and the human rights dealing with justice to convicts. The debates regarding the same has been taken up at various international forums. In India also, abolitionists have repeatedly tried to acquire legislative sanction to their demands and have raised the issue in the Parliament thrice but they were either rejected or withdrawn. Thus India remains a country that has retained death penalty.

A question that is often asked is that what must be done if there is a delay in the execution of the death sentence. Many convicts whose mercy petitions to the President have been rejected, have employed this delay in the execution of the death sentence caused due to the delay in the disposal of the mercy petition, as a ground
for the commutation of their death sentence into life imprisonment. What has been noticed is the fact that this weapon has been used by many convicts to escape a stricter punishment. It has been seen that the convicts file a mercy petition hoping that there will be a delay in its disposal and then he can use the same delay as a ground or commutation of his death sentence. In this paper, the focus is not placed on the constitutional validity of death sentence as a punishment but on the effects which delay in disposal of the mercy petition by the President of India will have on the death sentence which is awarded to the convict.

**DELAY AND RIGHT TO LIFE**

Prolonged delay in execution of a sentence of death has the constitutional implication of depriving the person, of his life in an unjust, unfair and unreasonable way to offend Article 21. The criminal justice system necessarily interferes or encroaches upon fundamental rights guaranteed under Article 21 and thus in case of doubt or dispute the interpretation must lean in favour of the accused. In the case of Bandhua Mukti Morcha v. Union of India, Bhagwati, J. observed:

*It is the fundamental right of everyone in this country....to live with human dignity free from exploitation.*

The precious right guaranteed by Article 21 cannot be denied to convicts, under trials, detenus and other prisoners in custody except according to the procedure established by law. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21. Moreover, Article 21 of the Constitution of India is not a limitation on the powers of the legislature but only on those of the executive. In matters where the liberty of citizens is involved, it is necessary for the officers to act with expedition and in strict compliance with the mandatory provisions of law, as it is not permissible in such cases to take a liberal or generous view of the lapses on part of officers. Since the case of Maneka Gandhi v. Union of India, the Supreme Court has tested various aspects of criminal justice and prison administration on the touchstone that the Sunil Batra case had set out. The protection of Article 21 extends to all persons – persons accused of offences, under – trial prisoners, prisoners undergoing jail sentences etc. and thus all aspects of criminal justice fall under the umbrella of Article 21.

In the case of Jumman v. State of Uttar Pradesh, it was held by the Supreme Court that it may under Article 32 read with Article 21 commute the sentence of death into one of life imprisonment on the ground of undue delay in execution of death since it was confirmed. However, it is also a fact that a prisoner who is sentenced to death and is kept in jail custody under a warrant under Section 366(2) of the Code of Criminal Procedure Code, 1973, is neither serving rigorous

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736 1990 Cri LJ 2314A (2317) (DB)  
737 2002 (64) DRI 379 (388) (DB)  
738 (1984) 3 SCC 161  
740 AIR 1956 All 589 (592) (DB)  
741 AIR 1987 SC 762 (766)  
742 (1978) 1 SCC 248  
743 (1991) 1 SCC 752  

imprisonment nor simple imprisonment. In substance he is in jail so that he is kept safe and protected with the purpose that he may be available for execution of the sentence which has been awarded. He must be kept safe as it is the purpose of the jail custody to make him available for execution after the sentence is finally confirmed.

In the case of Shatrugan Chauhan v. Union of India\textsuperscript{744}, the Hon’ble Supreme Court held:

Prolonged delay in execution of a sentence of death has a dehumanising effect and this has the Constitutional Implication of depriving a person of his life in an unjust, unfair, and unreasonable way to offend the Fundamental Right under Article 21 of the Constitution. Except the specific ratio relating to delay exceeding 2 years in execution of sentence of death laid down in T.V. Vatheeswaran\textsuperscript{745}, all other propositions laid down therein are acceptable, and in fact, have been followed in subsequent decision and should be considered sufficient to entitle the person under a sentence of death to invoke Article 21 of the Constitution and plead for commutation of the sentence. Delay caused by circumstances beyond the control of death convict mandates commutation of death sentence. Articles 14, 19 and 21 of the Constitution supplement one another and the right to commutation of the death penalty due to undue and inordinate delay in execution of mercy petition is a substantive right of the convict and not merely a matter of procedure established by law.

Addressing the issue of delay, the first relevant judgement would be from the Constitution Bench in State of West Bengal v. Committee for Protection of Democratic Rights\textsuperscript{746} has laid down a guideline which says that Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. An accused unless convicted or acquitted is bound to remain in custody, especially when he is accused of a crime like terrorism.

**EFFECT OF DELAY ON EXECUTION**

Delayed execution serves no penological purpose and is, therefore, excessive. The Supreme Court has also held that delayed execution of the death sentence does not serve any of the penal purposes originally expected of it at the time the court confirmed the same on the convict. A delayed death sentence to that extent only embody mindless and medieval retributive quality which offends the present civilizational norms of punishment. The 208 Supreme Court in Jagdish v. State of M.P.\textsuperscript{747} invoked the embargo against cruel and unusual punishment in Eighth Amendment to the US Constitution to rule that delayed executions fail to serve both the retributive and deterrence rationales of death penalty. The Court observed that “the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself” and when the death penalty “ceases realistically to further these purposes, … its imposition would then be

\textsuperscript{744} (2014) 3 SCC I relied on by State of West Bengal v. Committee for Protection of Democratic Rights (2010) 3 SCC 571 
\textsuperscript{745} (1983) 2 SCC 68 

\textsuperscript{746} (2010) 3 SCC 571 
\textsuperscript{747} 2016 SCC MP 9198
the pointless and needless extinction of life
with only marginal contributions to any
discernible social or public purposes.” The
Courts have, however, said that the time
taken by the accused in pursuing legal and
constitutional remedies cannot be taken
against him. It has been repeatedly
emphasised that the death sentence has two
underlying philosophies:

(1) That it should be retributive, and

(2) It should act as a deterrent

And as the delay has the effect of
obliterating both the above factors, there can
be no justification for the execution of a
prisoner after much delay. While examining
the matter in the background of the Eighth
Amendment to the US Constitution which
provides that: “excessive bail should not be
required, nor excessive fine imposed, nor
cruel and unusual punishment inflicted” it
has been observed that though the death
penalty was permissible, its effect was lost
in case of delay.748

In the case of Sher Singh v. State of
Punjab749, the Supreme Court took serious
note of the delay in decisions of the mercy
petitions filed under Article 72 of the
Constitution of India. The Court observed
that, “A self-imposed rule should be
followed by the executive authorities
vigorously, that every such petition shall be
disposed of within a period of 3 months
from the date when it is received. Long
delays in the disposal of these petitions are a
serious hurdle in the dispensation of justice
and indeed such delays tend to shake the
confidence of people in the system of
justice.”

The Case of Gurmeet Singh: When a convict
on death row has already spent a
considerable period of time in prison, before
the mercy plea is decided by the President, it
becomes a strong factor in deciding whether
or not such a prisoner still deserves the
additional punishment of execution.
Gurmeet was arrested on 16.10.1986,
convicted and sentenced to death by the trial
court on 20.7.1992. The High Court
confirmed his death sentence (per majori
on 8.3.1996, and the Supreme Court upheld
the conviction and death sentence on
28.9.2001). The convict’s mercy petition was
decided on 1.3.2013, by which time he had
spent 27 years in custody, of which about 21
years were under a death sentence. These
factors were ignored and his mercy petition
was rejected. The Supreme Court in
Shatrughan Chauhan commuted the death
sentence of Gurmeet Singh on account of
inordinate time taken by the executive in
disposal of his mercy petition.750

On 14.7.1993, and convicted by the trial
court under the Terrorist and Disruptive
They were sentenced to life imprisonment.
The state appealed to the Supreme Court for
enhancement of sentence, but its special
leave petition was dismissed due to delay.
When the criminal appeal filed by the
convicts was being heard, the Supreme Court,
suo motu, issued notice for

748 Gregg v. Georgia [49 L Ed 2d 859: 428 US 153
(1976)]
749 AIR1983 SC 465
750 262nd Law Commission of India Report, The
Death Penalty 192 (2015), available at
http://lawcommissionofindia.nic.in/reports/report262.
pdf, last seen on 04/03/2019

www.supremoamicus.org
enhancement of sentence, and then sentenced the convicts to death on 29.1.2004. This was the first time the convicts had been sentenced to death, and since it had been done by the Supreme Court there was no appeal possible after this. When the convict’s mercy pleas were decided 9 years later, they had already spent 19 years and 7 months in custody in prison.

Shatrugan Chauhan vs Union of India, the accused was given life imprisonment because of undue delay in disposal of the mercy petition. In Madhu Mehta v. Union of India, the death sentence of the prisoner was commuted to life imprisonment in view of the fact that seven years had elapsed after the date of murder. In Ram Adhar v. State of U.P. the delay of six years from the date of occurrence was held sufficient to commute the sentence of death to life imprisonment. The court also observed that the accused was not responsible in any manner for the lapse of time that has occurred.

In Nethi Sreeramulu v. State of A. P., the Court while disposing of the appeal in 1973 commuted the sentence of death given in 1971 to life imprisonment. In State of U.P. v. Lalla Singh & Ors. a six years delay from the date of judgment of the trial court was a consideration for not giving the death sentence. In Sadhu Singh v. State of U.P., about three years and seven months during which the accused was under spectre of death sentence, was one of the relevant factors to reduce the sentence to life imprisonment.

In Madhu Mehta v. Union of India, the death sentence of the prisoner was commuted to life imprisonment because of delay in executing it due to inordinate delay in the disposal of mercy petition by the President of India. In Shivaji Jaisingh Babar v. State of Maharashtra, the death sentence was changed into one of life imprisonment because of undue delay in disposal of the mercy petition.

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752 Supra. 9
753 [1971] 1 SCR 468
754 [1973] 3 SCC 647
755 [1974] 3 SCC 376
756 [1981] 3 SCC 635 at 643
757 [1982] 1 SCC 352
758 supra. 21
759 [1979] 3 SCC 774 at 777
760 [1974] 3 SCC 314
761 [1978] 1 SCC 142
762 [1978] 4 SCC 428
763 AIR 1989 SC 2299
764 AIR 1991 SC 2147
The Supreme Court in Sher Singh \textsuperscript{765} held that in such Article 32 petitions a death row convict cannot be allowed to take advantage of delay which is caused on account of proceedings filed by him to delay the execution. The Court held that the equitable basis of a prisoner's plea for commutation in such a case is compromised if he has in any way contributed to the delay caused in disposal of his mercy petition. In this case which was a decision of a three Judges' Bench it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years rule could not be laid down in cases of delay. It was held that the Court in the context of the nature of offence and delay could consider the question of commutation of death sentence. The Court observed:

"Apart from the fact that the rule of two years run in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities. We are of the opinion that no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence; the sentence must be substituted by the sentence of life imprisonment. There are several other factors which must be taken into account while considering the question as to whether the death sentence should be vacated. A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who does not want to live." It was further observed: "Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of "quod erat demonstrandum".

Each and every delay does not necessarily prejudice the accused.\textsuperscript{766} In Devender Pal Singh Bhullar v. State of NCT of Delhi\textsuperscript{767} the court rejected the petition and opined that delay could not be a ground for commutation in terror cases.

The Court held that in such circumstances where appeal is still pending, the convict does not suffer from mental torture of waiting for an eventual execution as the sentence of death has not yet become a sure certainty. Further, in the case of Triveniben v. State of Gujarat\textsuperscript{768} it has been held that no fixed period of delay could be held to make the sentence of death inexecutable. The Supreme Court of India in Sher Singh v. The State of Punjab\textsuperscript{769} held that a sentence of death imposed by the “Apex Court”, which

\textsuperscript{765} Supra. 14

\textsuperscript{766} A.R. Antulay v. R.S. Nayak AIR1992 SC 1701

\textsuperscript{767} (2013)6 SCC 195

\textsuperscript{768} AIR1989 SC 1335

\textsuperscript{769} supra.14, 30
will itself have considered delay when imposing the death sentence, can only be set aside thereafter upon petition to the Supreme Court upon grounds of delay occurring after that date. Oza J. said, at page 410: - “If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed.” In their Lordships’ view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.” The Triveniben case in certain terms held that the delay for the purpose of an Article 21 claim made by the convict could only be said to kick in once the judicial process has come to an end after the Supreme Court has dismissed the appeal.

It is therefore clear that the prisoner who is sentenced to death and is kept in jail custody under a warrant under Section 366(2) of the Code of Criminal Procedure Code, 1973, is neither serving rigorous imprisonment nor simple imprisonment. In substance he is in jail so that he is kept safe and protected with the purpose that he may be available for execution of the sentence which has been awarded. He must be kept safe as it is the purpose of the jail custody to make him available.

**RAREST OF RARE DOCTRINE**

In the case of Purushottam Dasharath Borate v. State of Maharashtra\(^{770}\), it was held that: The “Rarest of the Rare” case exists when an accused would be a menace or threat to an incompatible with harmony in the society. In a case where the accused does not act on provocation or on the spur of the moment, but meticulously executes a deliberated, cold – blooded and pre – planned crime, giving scant regard to the consequences of the same, the precarious balance in the sentencing policy evolved by Indian Criminal Jurisprudence would tilt heavily towards the death sentence. The criminal law requires strict adherence to the rule of proportionality in awarding punishment and the same must be in accordance with the culpability of the criminal act. Furthermore, the Supreme Court is also conscious to the effect of not awarding just punishment on the society. In this aspect one may analyse the recent Supreme Court decision in, Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra\(^{771}\). The court stated that it was duty bound to equally consider both aggravating and mitigating circumstances and then arrive at conclusion. In its opinion, gravity, nature and motive relating to crime plays an important role in analysis in capital sentencing. The court held that the protections emanating from Articles 14 and 21 of the Constitution were to be applied in

\(^{770}\) (2015) 6 SCC 652

\(^{771}\) (2009) 6 SCC 498

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strictest possible terms in context of punishments. Also in the case of Macchi Singh v. State of Punjab,\textsuperscript{772} 5 circumstances were laid down in which death penalty can be considered to be a suitable option. The 4th point states about magnitude of crime, when multiple murders have taken place of a community, caste, locality or other, death sentence may be awarded. Further, the Court has held in cases like Gurvail Singh @ Gala v. State of Punjab\textsuperscript{773}, that three tests have to be satisfied before awarding the death penalty: the crime test, meaning the aggravating circumstances of the case; the criminal test, meaning that there should be no mitigating circumstance favouring the accused; and if both tests are satisfied, then the rarest of rare cases test, “which depends on the perception of the society and not ‘judge-centric’, that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes…” Explaining this test, the Court in Mofil Khan v. State of Jharkhand\textsuperscript{774}, stated that the test is to “basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community.” In this, the test is in keeping with the spirit of Bachan Singh\textsuperscript{775} that the death penalty should be imposed only in the most exceptional of circumstances. In Dhanonjoy Chatterjee v. State of West Bengal\textsuperscript{776} as well, the court held that the measure of punishment in a given case must depend upon the atrocity of the crime, conduct, of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals. Where the accused committed cold blooded murder with professional stamp, the only sentence which could possibly be imposed upon him would be that of death and no circumstances exist for interference with that sentence. Hence it cannot be said that in refusing to commute the sentence of death into a lesser sentence, the President has in any manner transgressed his discretionary power under Article 72, whatever may be the guidelines observed for the exercise of the power conferred by Article 72.\textsuperscript{777}

**INTERNATIONAL CONVENTIONS AND HUMAN RIGHTS**

In cases involving violation of human rights, the Courts forever remain alive to the International Instruments & conventions and apply the same to a given case when there is no inconsistency between the international norms and domestic law occupying the field.\textsuperscript{778} In Geneva on 30th January 2014, two United Nations independent experts welcomed a recent decision by the Supreme Court of India to commute into life imprisonment the death sentences of 15 individuals, and to introduce guidelines safeguarding the rights of people on death row. “This judgment by

\textsuperscript{772} (1983) 3 SCC 470
\textsuperscript{773} (2013) 2 SCC 713
\textsuperscript{774} (2015) 1 SCC 67
\textsuperscript{775} 1980(2) SCC 684
\textsuperscript{776} (2004) 9 SCC 751
\textsuperscript{777} AIR1982 SC 774
\textsuperscript{778} AIR 1999 SC 625 (634)
the Supreme Court reaffirms the value of human rights and respect for human life, as enshrined in the Indian Constitution,” said UN Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns. “If the death penalty is to be used at all, international law clearly requires that it must follow a trial that meets the highest standards of fairness and due process guarantees,” he added. On 21 January 2014, the Indian Supreme Court commuted the death sentences of 13 individuals after finding that there had been an unexplained and unreasonable delay by the authorities in deciding on their petitions for mercy. Two other individuals had their death sentences commuted to life sentence on the ground of mental illness.\footnote{779} It is the fundamental principle of British jurisprudence, which has also been adopted by Indian Courts, that the executive cannot deprive any person of his life, liberty of property or any other rights except in accordance with law.\footnote{780} It can be safely said that an 8 year delay by the executive to dispose of a matter of life and death of a human being is certainly not in accordance with law.

The right to life, which is protected under international and regional human rights treaties, such as the International Covenant on Civil and Political Rights, has been described as “the supreme right” because without its effective guarantee, all other human rights would be without meaning. The protection of the right to life includes an obligation on States to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction. In addition, international and regional human rights law has recognized that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual, which certainly includes terrorists. Also important to highlight is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist. This of course includes terrorist threats. States have a right and a duty to take effective counter-terrorism measures to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts. In order to fulfil their obligations under human rights law to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts. At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights. As part of States’ duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must themselves also comply with States’ obligations under international law, international human rights, refugee and humanitarian law.

Terrorism clearly has a very real and direct impact on human rights, with devastating consequences for the enjoyment of the right to life, liberty and physical integrity of victims. The destructive impact of terrorism

\footnote{779}https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14205&LangID=E\footnote{780} AIR 1931 PC 248 (251, 252)
on human rights and security has been recognized at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council. International and regional human rights law makes clear that States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of States to protect individuals under their jurisdiction against interference in the enjoyment of human rights. More specifically, this duty is recognized as part of States’ obligations to ensure respect for the right to life and the right to security.

CONCLUSION

Public mawkishness channelled through the efforts of the legislators in the sanctified chambers of Parliament has reflected time and again a resolve to hold the death penalty. This mawkishness is not the consideration of some mindless ‘mob mentality’. The intellectuals, as evidenced through the reports of the Law Commission and many judgments by the highest judicial establishments has time and again felt the need to retain such a punishment. Such a belief continues not just in India, but exceeds jurisdictions of ‘civilised nations’, many of whose legal schemes are also premised on justice, equity, fairness and rule of law. Moreover, this debate is not merely academic, neither is it correctly solely rely on practical methods of collecting statistics and other empirical facts, since they can never truly capture the incorporeal sentiment and impact that the idea of the death penalty has on the awareness of society. Therefore, courts must tread with caution when they impose such a penalty, and moreso when they choose to commute the same.

Perhaps a day may come when India decides to do away with this punishment altogether, and likely, it rightfully may. However, until that day comes it must be noted that the apprehensions of most abolitionists have found voice by way of judgments, which have narrowed the scope of when the death penalty may be awarded. In fact, one would say, in the present scheme of things, the number of cases in which the death penalty may be inflicted, if correctly applied according to judicial guidelines, would only further wane. The issue at hand to be understood, though, is not the legality or morality of awarding such a punishment. The fact that remains is, in post-mercy cases such a punishment has already been awarded and reaffirmed by the various organs of the state based on notions of rule of law.

It must ultimately be remembered, that the power to commute death sentences has not been derived from any codified legal principles. The court in exercise of its supervening powers to do “complete justice” vacates the sentence if it is the most appropriate remedy. However, the courts, primarily enforcers of individual rights, must not lose sight of the fact that justice is not a one-sided concept. Looking merely at the effects of delay on the prisoner alone does not satisfy the interests of justice, since it does not factor in the interests of society at large, or the agony of the friends and families of those who have lost their loved ones, for whom no amount of compensation can have a restorative effect. The Supreme Court, essentially a

781 The Constitution of India, 1950, Art. 142
constitutional court, must be mindful of its role in setting the law of the land, which has far-reaching implications that permeate the lives of real people, and goes deep into the hearts and minds of society, to which not only the victims and their families belong, but also the convicts themselves. The courts must find it in themselves to be humanitarian in their approach, yet not shy away from their responsibility to steel their hearts and award the correct, exemplary punishment when the situation demands.  

Delay matters represent a special category of cases where as discussed above, after due consideration, both the judiciary, as well as the legislature in all of their wisdom have not found it fit to commute the sentence of the those convicted for the rarest of rare cases. The question of commuting their sentences must therefore be treated with caution. So long as the judge considering the matter does not find himself going against the Triveniben dicta, he must not commute the sentences of death row inmates. As Justice Mukherjee had put it when reaffirming the death penalty “If, in spite thereof, we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy”. Accordingly, in light of the arguments advanced above, we conclude that delay simpliciter must not be the only ground to commute the death sentences of a convict.

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FORCED EVICTION OF INDIVIDUALS- AN INTERNATIONAL PERSPECTIVE

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ABSTRACT

Each year, there are evictions or threat of eviction of millions of people across the world. This often results in extreme poverty and destitute. It happens in both developing and developed nations. There are various reasons that have been stated varying from climate change, accelerating urbanization and globalization etc.

The paper dwells into the concept of forced eviction and brings about an understanding of the term. It also provides for the provisions present and that are often used in the international forum to solve the problem, as well as conventions and codes related to the same with importance to the forced eviction fact sheet of OHCHR and the special rapporteur report on adequate housing. It concludes by providing for suggestions and remedies to the persisting problem.

INTRODUCTION

The definition of eviction states that, “to force someone to leave somewhere” 784. Forced eviction is linked to the absence of legally secure tenure, which has a connection the right of adequate housing. It is usually a result of the following consequences,

- Arbitrary displacement.
- Population transfer.
- Mass expulsions.
- Mass exodus.
- Ethnic cleansing.
- Other practices.

Forced evictions have increased over the years as well as the level of violence had also increased relatively. Atleast 60 countries across the world has reported evictions in the past three years. Without discrimination it happens in both rich and poor countries, therefore affecting the lives of millions of children, men, woman and also putting jeopardy on the attainment of the Millenium Development Goals 785.

FORCED EVICTION

The international community has always been on the opinion that forced evictions are a gross violation of human rights, especially in respect of the right to adequate housing. 786 Human rights are considered to be independent, indivisible and inter-related. It’s a violation right to remain, right to freedom of movement, right to privacy, the right to property, right to an adequate standard of living, the right to security of the person, the right to security of home, right to security of tenure and right to equality of treatment. 787

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784 Evict
https://dictionary.cambridge.org/dictionary/english/e\nict accessed on 10/03/19.

785 Millennium Development Goals
https://www.who.int/topics/millennium_development_goals/about/en/ accessed on 10/03/19.


787 Resolution 1993/77 of UN Commission of Human Rights and U.N sub-commission on the protection
Although various countries have ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and other regional instruments also have been implemented, forced evictions still occur.

Forced evictions result in extreme poverty and an overall risk to right to life. Its also found to be cruel, inhuman or degrading and especially when carried out with violence or with discriminatory intent.

It can lead to indirect violation of political rights too, such as the right to vote. Often woman and girls are easily the most vulnerable in this, since they also face sexual violence due to eviction. It often has a psychological impact also. Access to justice is also a right that is often violated.

DEVELOPMENT-BASED EVICTIONS
It is often planned to serve the public good or public interest, but most of the time do not provide protection for the most vulnerable, procedural guarantees in due process. Large dams, mining, extractive industries, large-scale land acquisitions, urban renewal, city beautification or major international business or sporting events.

Though the concept is to serve the public it often does not benefit those who need it the most. Slum clearance and forced evictions are often an attempt to meet this Goal, which clearly shows that evictions are in fact a result of human interventions.

PROHIBITION OF FORCED EVICTION IN INTERNATIONAL LAW
The following are the various provisions provided by the OHCHR in its forced eviction fact sheet789,

- The right to life (International Covenant on Civil and Political Rights, art. 6.1)
- Freedom from cruel, inhuman and degrading treatment (ibid., art. 7)
- The right to security of the person (ibid., art. 9.1)
- The right to an adequate home and family (International Covenant on Economic, Social and Cultural Rights, art. 11, and related Human Rights Council resolutions)
- The right to non-interference with privacy, home and family (International Covenant on Civil and Political Rights, art. 17)
- Freedom of movement and to choose one's residence (ibid., art. 12.1)
- The right to health (International Covenant on Economic, Social and Cultural Rights, art. 12) The right to education (ibid., art. 13)
- The right to work (ibid., art. 6.1)
- The right to an effective remedy (International Covenant on Civil and Political Rights, arts. 2.3 and 26)
- The right to property (Universal Declaration of Human Rights, art. 17)

The rights to vote and take part in the conduct of public affairs (International Covenant on Civil and Political Rights, art. 25)

They cover the concepts on the way the evictions are decided, the way they are planned, the way they are carried out, use of harassment, threats, violence or force, and the result of the eviction.

Apart from this the fact sheet also states that various other laws both regional and international will be applicable when it is coupled with other concepts such as racial and sexual discrimination.

FORCED EVICTION AND INTERNATIONAL HUMANITARIAN LAW

Population transfers, mass expulsions, ethnic cleansing are some examples in which forced eviction violates international humanitarian law principles.

The Geneva Convention of 1949 and their additional protocols of 1977 prohibit the forced displacement of the civilian population and the extensive force used by military which are not necessary in the contexts of both international and non-international armed conflict, which can also amount to forced eviction.

Article 8 of the Rome Statute of the International Criminal Court also states that war crimes also include the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly in the context of international or non-international conflicts.

Also states “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” is a war crime.

The Guiding Principles on Internal Displacement provides for protection on occasions of forced eviction which can also affect those who are refugees or internally displaced person’s nation and international human rights as well as humanitarian law which specifically protects against arbitrary and forced displacement.

STATES AND OTHERS OBLIGATIONS

There are often times when evictions are unavoidable due to public interest projects, to safeguard from derelict buildings or hazardous places. Though they should leave the evicted in a better place after it takes place. Courts also play a part in eviction in various instances.

It is the obligation of the state as well as the courts to conform to national and international standards, including the due process protections.

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791 Geneva convention of 1984

792 Rome Statute of the International Criminal Court
https://www.icc-cpi.int/nr/drdlyres/addr16852-ae69-4757-abe7-9dc7cf02886/283503/romestatutengl.pdf accessed on 17/03/19

793 Guiding principles on internal displacement
https://www.unhcr.org/protection/idps/43ce1cf72/guiding-principles-internal-displacement.html accessed on 18/03/19

In certain instances it has been followed like in The High Court of Delhi, India, used the basic principles and guidelines on development-based evictions and displacement to lay down that an eviction should not take place without the provision of alternative land and housing and that evictees should not be placed in a worse situation after eviction. The following obligations must be followed,

- The prohibition of forced evictions must be of immediate effect and not dependent on resources.
- States must take all measures to prevent the occurrence of evictions.
- States have to protect all from forced evictions by third parties too.
- A human rights and protection of due process approach must be followed and always kept in mind.
- All alternatives to eviction have to be considered first.
- All projects should incorporate an eviction impact assessment.
- Right to information and meaningful consultation and participation should be respected.
- Legal and other remedies should be available always.
- It should not always result in homelessness.

United Nation agencies and international financial institutions such as the World Bank, Organisation for Economic Cooperation and Development and other regional financial institutions also play an important role and have their own obligations that they must follow. National accountability and monitoring in the form of legislative protections and judicial remedies as well as national human rights institutions must be provided and present. Civil society organizations and communities also play an important crucial role in raising awareness and monitoring forced evictions.

**UNITED NATIONS SPECIAL PROCEDURE**

Special Rapporteur in a 2007 report, the UN guidelines on evictions, especially on adequate housing has focused on forced eviction and it often reports and intervenes to prevent and redress forced eviction since 2007. Basic principles had been drafted on the development based evictions and displacement. Various rights such as right of food, right of land etc. has been given importance and the possibilities of prohibition of forced eviction has since been looked into.

Apart from that the various other special procedures that monitor on forced evictions are.

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• The Special Rapporteur on violence against women
• The Special Rapporteur on the rights of indigenous peoples
• The Special Rapporteur on the human rights of internally displaced persons
• The Special Rapporteur on contemporary forms of racism
• The Special Rapporteur on the situation of human rights defenders
• The Special Rapporteur on torture
• The Independent Expert on minority issues
• The Special Rapporteur on extreme poverty and human rights

SUGGESTIONS AND REMEDIES FOR FORCED EVICTION
Some of the remedies that can be applicable for the individual who have faced eviction or for the states to take into consideration are,

• A fair hearing: - Often the complaints are mostly on the reason of fair trial not being held, through fair trial the evicted can come to an understanding and go forward.
• Access to legal counsel: - Since the evicted are often thrown into poverty after the eviction, they can’t afford legal counselling, therefore one of the important systems needed is access to legal counsel.
• Legal aid: - Another main aspect, that is a fundamental right and should be upheld is right to legal aid.
• Return: - The option of returning for the evicted must be given.
• Restitution: - The evicted should be restituted back to their original state after eviction.

• Resettlement, Rehabilitation and compensation: - Since eviction is unavoidable in various circumstances there should be rehabilitation and compensation and the most important resettlement offered.

CONCLUSION
The UN guidelines itself state that eviction is unavoidable and is necessary for the promotion of general welfare, but the Member State must provide or ensure fair and just compensation for any losses of personal real or other property or goods, including rights or interests in property.

Both the OHCHR forced eviction factsheet and the Kothari’s guidelines must be utilized and followed in order to provide for a better condition to the evicted. There could have be inclusions of operational and government accountability as well as the process and plans that are to be followed for an effective utilization of the same.

Though eviction is unavoidable and necessary for public interest, the same public interest must be kept in mind while exercising eviction and fundamental human rights and humanitarian law must be kept in utmost importance and consideration.

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ABSTRACT

Patents are a tribute to human ingenuity. Patent ecosystem has led to remarkable innovations in field of medicines. The availability of patents does result in more inventions of drugs; we do not wish to question this fact – but this positive effect may well be cancelled out by the limitation of the use of patented drugs. The patent system allows the price of patented items to be kept artificially high which makes the patented drugs inaccessible for common public.

At first, when I chose up the topic, after a superficial reading I felt that Right to health is supreme and patient’s rights would over shadow patent rights, thus opting for a human rights based recourse. But after a thorough research and understanding of the equally important aspect of patent rights, the dilemma surfaced.

The article deals with justification of both the rights followed by overview of drug pricing policy in various countries then critical analysis of Indian scenario and the suggestions to strike a balance between both.

1. MONOPOLY AS A PRACTICE: ETHICAL JUSTIFICATION

It has been several times claimed that IP has its root in natural law. Lockean’s labor desert theory was popularly the first justification for IP. Other IP rights thus are quite easily justified but patents are different. They face an uphill battle which other rights do not.

The main cause behind dealing with this issue of Patent rights v. patient rights is due to the monopoly granted to the owner of the patent rights. Now, the question arises that as a policy should monopoly be practiced? Attempts to construct a moral justification of the patent system have been based on three grounds: (1) natural rights; (2) distributive justice; and (3) utilitarian (economic) arguments. 800

Natural rights

Some people believe that man has a natural right to his ideas and consequently that society is obliged to enforce that right. Thus, the use of ideas without the authorization of the owner must be considered as theft. Natural property rights take precedence over social institutions and should be respected whatever the consequences.

Discussions on the natural rights argument generally refer to John Locke’s ‘labor theory of property’. Although Locke seems to identify property with land, various commentators have applied his theory to

799 According to Locke, the appropriation of a thing occurs by man applying his labor to it, by ‘mixing’ the thing with his labor. By adding something of his own to the thing, he excludes others from having a right to it.
800 Sigrid Streckx, Patents and Access to Drugs in Developing Countries: An Ethical Analysis, 4, Dev. WorldBioeth, 58, 62 (2004).
other types of goods, including ‘intangible’ objects.

Distributive justice
According to the distributive justice argument, fairness requires that inventors be rewarded because they render a service to society. It would be unfair to allow people a ‘free ride’ at the expense of others who apply themselves to the act of inventing. Free riders – people who did not invest time or money in the development of an invention – should not be allowed to compete with the inventor under normal market conditions. Therefore, society should grant exclusive rights to inventors.

A utilitarian justification
The utilitarian justification, which is considered by many as the most convincing, is essentially based on the following two arguments.

(a) The so-called ‘incentive-to-invent-and-innovate’ argument: in the absence of patents, inventions can be copied by competitors. Consequently, the price must be reduced and the investor does not have the opportunity to regain his investments, let alone make a profit. Thus, the incentive to invent and innovate is eroded. A ‘special’ incentive is required so that enough people should be prepared to invest in R&D. According to this argument, the patent system provides the necessary encouragement.

(b) The so-called ‘incentive-to-disclose’ argument: the patent system encourages inventors to disclose their inventions instead of keeping them secret. One of the patentability requirements is that the applicant must disclose the invention in sufficient detail in the application forms.

Thanks to the patent system, it is said, technological information is spread – making technological progress possible, which in turn induces economic growth. Several commentators claim that both these arguments are nowhere more valid than in the pharmaceutical sector, as this is the most research-intensive sector.

The theories are not black and white as it seems so. Each of these attempts involves many problems. For Example, If we look at the implications of this theory for the justification of drug patents, the main question seems to be: how much ‘labor’ is really involved in the research and development (R&D) of drugs? The greater part of pharmaceutical R&D budgets is spent on ‘me-too’ drugs – the slightly altered versions of successful products manufactured by the competition. When examined in the context of distributive justification of drug patents, this argument, too, seems problematic. First, the question arises whether fairness does not also require an equal access to drugs, which is prevented by the working of the patent system. Another question at issue here is: does justice require that inventors be rewarded with patents, allowing them to decide who may legally use the invention? Thirdly: what about the fairness of granting private property rights to the results of R&D, which is, in great part, publicly funded? Whether it is fair to grant inventors rewards that are excessive? Many manufacturers of brand-name

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801 In a utilitarian framework, as discussed above, the unequal access is said to be justified by the incentive-to-invent it creates. However, in a framework of distributive justice such an argument cannot be decisive.
pharmaceuticals relentlessly try to obtain extensions of the protection term of their patents, and they often succeed. This phenomenon, known as ‘patent evergreening’, hinders producers of generic drugs (products equivalent to brand drugs, which can be put on the market after the patent expires).

Well, to some extent these arguments are negated when we talk about India specifically as Indian patent laws are stringent and neither do they allow evergreening of patents nor would they ever confer patent rights for frivolous inventions. Of course, the availability of patent does result in more inventions of drugs; we do not wish to question this fact – but this positive effect may well be cancelled out by the limitation of the use of patented drugs. The patent system allows the price of patented items to be kept artificially high. The introduction in developing countries – mandated by TRIPs – of product patents in the field of pharmaceuticals will almost certainly lead to a price increase of 200–300%. Moreover, as we noted earlier, pharmaceutical companies frequently take legal action to postpone the introduction of generic alternatives. This hinders the access to drugs even more. So, should we look into the alternatives? There exist a few non-patent methods that support innovation. Such as, fees, awards, acknowledgements, gratitude, praise, security, power, status, and public financial support. 803 Also, research grants and contracts; tax policies; innovative finance mechanisms including research mandates; and innovation inducement prizes are few other alternatives, analyzing them is beyond the scope of researcher and I personally feel patent as the best available option.

Patents are a tribute to human ingenuity. Patent ecosystem has led to remarkable innovations in field of medicines. The advocates of strong drug patents claim that the implementation of the WTO-TRIPs Agreement will offer the following advantages:

1. Encouragement of local drug research, through which new drugs would become available catering to the country’s specific needs (e.g., drugs for tropical diseases);
2. Industrialized countries making important new drugs available in developing countries;
3. The attraction of foreign investments in the pharmaceutical sector.

Each of these arguments is again susceptible to criticism. Argument in relation with hindrance to access of drugs, that is not countered yet gives rise to the issue of Patents Rights v. Patient Rights.

2. PATENT RIGHTS INTERFACE WITH PUBLIC’S RIGHT TO HEALTH

Drug patents, particularly the strong kind of drug patents granted today, are hard to justify on natural rights, fairness or


utilitarian grounds. Many drugs are of vital importance for very large groups of people. This vital importance should be reflected in the debate about the justification of drug patents.

Clearly, fighting not only human rights, but also Doctors without borders and Nelson Mandela against a backdrop of dying children to defend a ‘trade related’ right is difficult public relations battle, one which should never have been waged.  

Various claims based on right to health, and right to development demanding access to quality health and medicines, the battle with AIDS, etc. has left scars on pharmaceutical companies.

Major concern in the interface of patent rights and right to health is the exclusionary affect that may result in difficulty to access medicines. Here we are talking about the right of patent owner to prevent third parties from acts of making, using, selling, or importing the product for these purposes conferred by Article 28.1(a) of Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The link between medical patents and the human right to health subjects as a central concern at the international level. Article 25 of United Nations’ Universal Declaration of Human Rights 1948 states that “Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”

Human rights law, in particular through Covenant on Economic, Social and Cultural Rights, has made a contribution to the codification of the human right to health and our understanding of its scope.

When we talk about the Right to health in the National aspect, India has been a well-known example of State adopting domestic legislation that fully incorporates safeguards and flexibilities that ensure access to medicines. Article 21 enshrines the right to life. Although not providing explicitly for the right to health, the Indian Supreme Court has consistently interpreted enjoyment of the right to life u/a 21 as including within its scope right to health and access to means by which to achieve health.

The Supreme Court has also made it clear that the Indian govt. has a constitutional obligation to provide health facilities. Also, part IV of the constitution, Article 47 and various other Directive Principles of State Policy makes improvement of public health a primary duty of State.

Intellectual property law and human rights law have largely evolved independently. However, with the

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804 CHRISTOPHE GEIGER,RESEARCH HANDBOOKONHUMANRIGHTSANDINTELLECTUALPROPERTY,96,(Edward Elgar Publishing Inc. 2015).
805 Article 28, TRIPS Agreement.
808 Bandhu Mukti Morcha v. UOI, AIR 1984 SC 802.
broadening scope of patents into basic needs such as health, and recent developments in the health sector the links between the two fields are becoming increasingly obvious necessitating further consideration of the relationship between health and patents on medicines, in particular in the case of developing countries like India.

Patents generally constitute an incentive for the development of the private sector in areas where they are granted. In the pharmaceutical sector, the private sector health industry finds them indispensable. Industry representatives argue that the pharmaceutical industry spends more than any other industry on R&D and that, while the development of new drugs is a costly process, it is relatively easy to copy an existing drug. The patent system thus allows firms to charge prices that are higher than the marginal price of production and distribution for the first generations of patients, who are expected to absorb the cost of developing the drug. It is only after the patent protection for the product expires that competition among generic versions can bring the price closer to the marginal cost.

This is in part attributable to the fact that there is a significant tension between the pharmaceutical industry’s aim to recoup its investments and governments’ interest in containing the costs of healthcare. The issue of patent protection in the health sector has proved increasingly divisive.

Surveys by Taylor and Silberston (1973) of industry participants about the impact of patents on R&D incentives have found the pharmaceutical industry to be critically – and almost uniquely – dependent on patent protection. Other such surveys include Mansfield (1981), and more recently, Levin et al (1987) and Cohen et al (2000) and the various Community Innovation Surveys conducted in EU member states since the early 1990s. In these surveys, pharmaceutical companies show a very high propensity to patent, and research managers typically report that patents are very important to securing competitive advantage, or would reduce R&D by a very large fraction (>50 per cent) if patent protection for pharmaceutical products were removed.

Till now it must be felt that Right to health and patent rights are in conflict with each other but it is not so. Patent rights, in one way or the other increase access and availability of medicines. Let us understand how. Even from a health perspective, TRIPS is justified because, while it protects the interests of the private sector pharmaceutical industry, it also promotes increased R&D in the health sector, which in turn increases the availability of medicines and thus also accessibility. For a detail understanding of the aforesaid concept, the determinants of availability, accessibility and affordability should be known.

**Determinants of Availability**

Innovation is an important determinant of availability at the level of product

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development but also at that of local communities. For products where a commercial market exists, delivery is not the end of the story. Rather, the experience with the product in real life situations by large numbers of patients provides new information on responses, side-effects and other characteristics, which may form the basis for further incremental, or even more fundamental, innovation. In a commercial setting it is this feedback from the marketplace that contributes to a process of continuous improvement and innovation. Although the experience in the developing country setting may reveal significant deficiencies in the existing treatment regime, the incentive for innovation to improve the regime is lacking. For instance, no new TB drugs have been discovered for about 40 years and the current treatment regime is very lengthy (six months or more), making compliance a big problem, and fuelling the spread of drug-resistant strains. Only in the past few years, as a result of the work of groups such as the TB Alliance, has there been a systematic programme to develop new drugs in combinations which will shorten treatment, improve compliance and combat resistant strains.

Delivery is also about the ability to make existing products available, for which a capacity for efficient local production as well as a capacity to import are important. The adequacy of national health systems – basic infrastructure, adequate human resources with the requisite skills, functioning primary and secondary health-care delivery systems, among many others – are central to making existing treatments available. Investments in health delivery systems are necessarily hampered by a lack of resources. But the diverse experience of countries and regions at different levels of income shows what can be done if there is a political commitment to improved health—success story of Cuba and Kerela. Cuba is an example of a lower middle income country that has achieved considerable success in ensuring good health for its people. Life-expectancy at birth in Cuba, 76 years, is closer to that in the United States and United Kingdom, 76 and 77 years respectively. Despite its economic challenges, Cuba’s public health picture resembles that of far wealthier nations. Cuba’s public health achievements are derived in large part from its focus on education and on its health-care system. Cuba remains committed to providing free, universal, and mandatory education up to the 12th grade. Cuba’s public health system was also designed to limit disparity, and focus on the principles of universality and accessibility. The strong primary health care system, with doctors and nurses living in neighbourhood clinics, was able to provide comprehensive care for the community. Moreover, the integration of primary, secondary and tertiary services, despite economic strain and limited infrastructure, has led to the strong performance of the public health system in Cuba.

Kerala’s per capita income is only about a hundredth of that in wealthy countries.

Its annual expenditure on health (US$ 28 per person) is much less than that of the United States (US$ 3925 per person), and yet its performance with regard to standard health indicators is remarkably similar. Life
expectancy at birth in Kerala, 76 years for women and 70 years for men, is close to that in the United States, 80 years for women and 74 years for men. In contrast, life expectancy at birth in India as a whole is 63 years for women and 62 years for men.

A number of different factors have facilitated the public health success that Kerala has achieved. Primary among them are the government’s focus on education, on access to primary health care, and strong political and financial commitment towards ensuring public health. Also, a large allocation of funds for Education purposes has resulted in its overall development. Moreover, more than 97% of Kerala’s population has access to health care, facilitated both by the state’s strong focus on primary health care facilities and the substantial work of faith-based organizations in the state. Much like Cuba, Kerala has been able to protect and ensure the health of its people despite facing strong economic challenges.

**Determinants of Accessibility**

There are many determinants of accessibility (and indeed availability) which, in particular circumstances, may override economic and other considerations. Policies can be influenced by legal, political, cultural and religious factors. However, the determinants of accessibility on which we will concentrate are principally economic. We have described above, at some length, how availability is dependent on the state of health-care infrastructure and resources provided by governments. The focus here includes factors affecting the price at which products, whether existing or prospective, can be supplied and the funds available to purchase these products (by patients or by others on behalf of patients) or to subsidize further their price. Together these determine economic accessibility. The price of medicines and other health products, even when “at cost” in the poorest settings, and the ability to pay for them, are the critical factors in enhancing or hindering access. The price of the product involved (such as an antibiotic for TB) may not be directly related to the overall cost of treatment. For instance, a new TB antibiotic may itself cost significantly more than its predecessors but the overall cost of treatment may be much lower because the treatment time is shorter, compliance better and the overall call on ancillary services less. Assessing the cost-effectiveness of different interventions requires taking a long-term view of cost, and not simply counting the dollars required up-front for the purchase of a product. In the case of the Brazilian AIDS programme, although the cost of the drugs and administration is high, substantial savings have been estimated, which are likely to exceed the costs of the programme. Apart from direct health benefits (extended life of better quality), direct cost savings include avoided hospitalization. (such as TB).

Thus products which are more expensive than their possible substitutes can make economic and financial sense as well as

811 Ibid.

improve health, provided the price remains affordable.

By reading the determinants in detail, we get to know that there are various market short comings that contribute to reduced access and availability of medicines and the reasons for unaffordability due to high price can be because of costly production and low demand other than IP issues. Nevertheless, the pricing of the product itself is extremely important in developing countries because most medicines are purchased directly by patients, rather than the State or insurers.

A number of approaches may be adopted to ensuring that the prices of drugs and other products are as affordable as possible. There are global policies such as differential pricing, or global funding mechanisms to provide subsidized or free drugs or vaccines. For which we are going to study in brief the pricing policies in a few countries—US & UK (2 most developed super power nations), Germany (European Union country), and China (BRICS nation).

3. PRICING POLICY FRAMEWORK OF PATENTED PHARMACEUTICALS IN DIFFERENT COUNTRIES

United States of America

The US has one of the most efficient patent systems in place. Though, it is world’s largest pharma industry, it has excluded pricing system for medicines. There is almost no involvement of government and prices are set by the manufacturers according to the market forces of demand and supply. Emphasis has been laid on clinical and economic data to support reimbursement decisions, the reason being the high penetration of coverage of health insurance products through private sector and public sector products like Medicaid and Medicare. Such kind of highly capitalistic approach is not suitable for country like India.

United Kingdom

UK has one of the best health policies in the World. The National Institute for Health and Care Excellence (NICE) is an executive non-departmental public body of the Department of Health in the United Kingdom. It serves the English National Health Service (NHS) which is the world’s largest public funded healthcare service. It has Pharmaceuticals Price Regulation Scheme valid till 2019. This is a scheme of holistic UK pricing agreement which ensure Value Based Pricing (VBP) through retaining pricing freedom for innovative products. There is Patient Access Schemes on NICE’s value assessment.

Germany

Germany has a well defined pricing mechanism. It has an institute of Quality & Efficacy in healthcare which assesses products and Federal Joint Committee, which decides for additional Health benefits. Prices are determined by

813 CIPRA, NISIU, Bangalore: Conference report on Affordability, availability, accessibility of Medicines and IPR, (2016).
negotiations and until the agreement is reached, maybe on the basis of arbitration or cost benefit analysis, the companies can decide whatever prices they want to quote. Thus, Germany has one of the highest medicine prices amongst EU. But still 90% of the population is covered by Statutory Health Insurance which reduces out-of-pocket expenditures.

China
China has high proportion of health expenditure. It used to work on price mark-up system. But with the current reform from June 2015, aiming at Universal Health Coverage, the government has attempted to replace its direct control over the prices of reimbursable drugs with indirect, incentive-driven influence. Although the exact implementation of the reform remains unclear at the moment, the changes introduced so far and the pilot project designs indicate that China is considering adaptation of some form of internal and external reference pricing policies, commonly used in the OECD countries. China also gives high importance to the National Formulary to ensure affordability of new approved drugs.

4. DRUG PRICING MECHANISM IN INDIA

In India, responsibility of price fixation of medicines, revision, etc. lies with the National Pharmaceutical Pricing Authority (NPPA). The Authority is primarily mandated to oversee the implementation of Drugs (Prices Control) Order (DPCO). The DPCO 2013, notified under the Essential Commodities Act, 1955 adopts the National list of Essential Medicines (NLEM) 2011 for the purpose of determining prices of scheduled drugs. The NLEM drugs are listed in the First Schedule of the DPCO 2013, as scheduled formulations. Those not specified in the schedule are non-scheduled formulations. The NLEM 2011 comprises of 680 scheduled formulations. The DPCO 2013 adopts market based pricing instead of the cost based pricing of DPCO 1995 i.e.\[\text{R.P.} = \frac{\text{M.C.} + \text{C.C.} + \text{P.M.} + \text{P.C.}}{[1+\text{MAPE}/100]} + \text{E.D.}\]

where, RP: Retail price stands for - RP, MC: Material cost, CC: Conversion cost, PM: Packaging material cost, PC: Packaging charges, MAPE: Maximum allowable post-manufacturing expenses, and ED: Excise duty stands for ED.

Market-based pricing is defined as a process of setting prices of goods/services based on the current market conditions, and prices are set according to mutual decision between sellers and buyers. The prices of scheduled drugs are regulated by fixing the ceiling prices on the basis of simple average pricing of all brands of formulation that have a market share of 1% and above.

While, prices of non scheduled formulations are not regulated by the govt but it monitors the MRP of all drugs

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including the non scheduled ones and ensure that no manufacturer increases the MRP of the drug more than 10% of maximum retail price during the preceding 12 months.

Unfortunately Market based pricing has bearing with cost of medicine, directly it has no relation with cost of medicine; it is simply based on the competitors price prevailing in that therapeutic category.

The following (Table 1) further proves my point that how the current market based pricing mechanism is making the drugs costly.

<table>
<thead>
<tr>
<th>Drug</th>
<th>Disease</th>
<th>Market based pricing (weighted average) (in Rupees)</th>
<th>Market based pricing (Simple average) (in Rupees)</th>
<th>Cost based pricing (in Rupees)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metformin</td>
<td>Diabetes</td>
<td>33</td>
<td>45</td>
<td>14</td>
</tr>
<tr>
<td>Atorvastatin</td>
<td>Highbloodcholesterol</td>
<td>142</td>
<td>127</td>
<td>17</td>
</tr>
<tr>
<td>Atenolol</td>
<td>High Bloodpressur e</td>
<td>51</td>
<td>38.5</td>
<td>8</td>
</tr>
</tbody>
</table>

(Source: Jan SwasthayaAbhiyaan (JSA))

The MBP strategy is certainly not working in favour of common masses-there is strong demand that essential drugs should be sold under generic name- a strategy which India’s neighbouring country is pursuing since last 3 decades and as per 2011 statistics the NMR (Neonatal Mortality rate, per thousand live birth) of India and Bangladesh is 34 and 30 respectively; even the U5MR (Under five mortality rate, per thousand live births) of India and Bangladesh is 64 and 52 respectively.

Hence, in my opinion, Indian government should review the drug policy and should consider with a strong base to consider that pricing strategy which the society at large and makes healthcare accessible and affordable to the citizens.

In the whole DPCO, patented drugs are referred to only once in the case of non-application of provisions of the order under para 32 wherein the patented drugs are exempted from price control for a period of 5 years from the date of commencement of commercial production.

**ANALYSIS**

This price control exemption clause acts as the only reward and motivating factor for the innovators. The fallacious arguments of curbing this period of 5 years is not appreciated at all because at least this much incentive is needed for keeping alive the innovations in Pharma Industry as it allows the inventor to recoup the time and capital invested in the invention. Also, as diseases now a days are gradually becoming resistant to all kinds of prevailing treatments, this calls for newer innovations on a regular basis. Availability and accessibility can only be attained if innovations are promoted in this manner. In India, presently, according to
the IP annual report of 2014-15; no. of drug patent applications filed in 2014 was 2640 and 389 were granted. This figure again proves that India has a strong IP regime with stringent patent laws and higher standard of patentability. If we look at the 389 drug patents granted in the year 2014-15, though the exclusive rights would exist for 20 years from the date of filing the patent application as per Indian Patents Act, but after 5 years i.e. by 2019-20, the number of drugs that fall into the category of scheduled formulations would have their maximum prices ceiled and those falling into the category of non scheduled formulations would have rate of increase of MRP’s monitored as per the Drugs price control order 2013. In such case the question of affordability arises only for the first 5 years of price control exemption. This short term trade off is necessary for long term welfare gain that would be achieved once the patent expires. Now, when we understand that this period is very crucial for the development and growth of the patentee group along with the whole Pharma Industry and that right to health cannot be granted at the cost of Innovation. What can be the possible resorts that lie with the government so that the patient group does not have to suffer?

As per my understanding government can resort to following measures:-

**For instant relief**

- The first thing that comes to my mind is subsidizing the price of patented drugs for which the total public expenditure for 5 years and its feasibility according to fiscal year’s budget has to be evaluated and granting of subsidies are economically unadvisable to the government. In such a scenario, if taxes and tariffs on those patented drugs are eliminated and the existing concept of tax holiday or tax exemption is more easily granted, that would somewhat reduce the cost of the drug thereby reducing the out of pocket expenditures.

- Another thing that can be done is bringing in the role of NGO’s and non-profit organizations who would work like Robinhood for the patient group by buying medicines from the large funds donated to them by the philanthropic group of the society and providing it to the needy. In recognition of NGOs’ value, even the Millennium Declaration recommends that greater opportunities be given to NGOs to contribute towards global health goals. NGOs play a critical role in campaigning for increased and better-coordinated resources for healthcare and promoting sustainable health systems, notably for chronic disease treatment. However, their attention has to be shifted from specific diseases like HIV/AIDS towards other high impact diseases as well and thereby attempting overall health improvement.

**Continual measures:-**

- Making Renegotiation of prices in periodic intervals integral part of negotiation process. By using threat of compulsory licensing, the government gets a better bargain position. Though, use of compulsory licensing is not advisable at all because it highly disincentivizes innovation and CL would make India’s
image as a weak IP regime and abate domestic R&D. It would rather seem fairer to place the burden of proof on the side of the patent holder— in other words, to force the patent holder to prove that granting a compulsory license is not necessary which would prevent the patent holder from abusing his monopoly.

- It should be checked that prices of patented drugs that do not provide a significant breakthrough in treating diseases should not be higher than maximum prices of the other drugs that treat the same disease.

- Developing advance purchases chemist to contribute to the development of vaccines, medicines and diagnostics and improve financing of the purchase of medicines and vaccines and investing appropriately in health delivery infrastructure would lead to greater accessibility and availability.

- Also, encouraging the creation of patent pools would facilitate product development as well as reduced costs.

- Analyzing the health needs of the nation, especially the poor segment and promoting health research that is in line with public health needs and driving research towards priority diseases should be the exact required approach.

- A new trend has been observed where Companies tend to spend more on marketing than R&D, this should be discouraged. (see pg19).

- A global R&D treaty could encompass a number of measures that would improve the existing system. For example, countries could commit on making sustainable contributions to an international R&D fund. This fund, analogous in some ways to the US National Institutes of Health, could pay the full costs of R&D so that there would be no need to recoup investments and medicines could be sold at cost, making treatments much more affordable and health systems more sustainable.

**Long term approaches**

- Academic institutions should be research oriented. A lot of funds are allotted to the institutions for this purpose. Hence, Mandate should be passed that all the Medical universities, bio-tech institutions should come up with substantial research every year, failing to which strict actions would be taken. Academicians should assume the role of researchers. In a Malyalam movie named Ohm Shanti Oshana, wherein the doctor lives with thought that what is the use of being a doctor when he cannot invent a new efficient drug, such mentality should be inculcated which would promote research and development significantly.

- Building efficient domestic R&D and increasing funding for research projects run by public–private partnerships and making that funding more sustainable would enhance affordability.

- Ideally, India’s business environment should incentivise innovators to conduct an increasing portion of their R&D and drug manufacturing in low cost hubs within India, thereby decreasing the overall cost of drug discovery and development to the benefit of consumers.
worldwide. A regulatory framework conducive to such a scenario requires serious attention from Indian policymakers.

- Incorporation of digital libraries of traditional medical knowledge into the patent offices’ data to ensure that data contained in them are considered when patent applications are processed has proved to be a wise measure. Only need is to work on its development for a wider coverage and a better classification system for its worldwide easy access. The origin of Traditional Knowledge Digital Library (TKDL) goes back to the legal battle waged by Council of Scientific and Industrial Research (CSIR) from India for re-examination of patent No. US 5,401,504, which was granted for the wound healing properties of turmeric filed by two US based Indians. In a landmark decision, United States Patent and Trademark Office (US PTO) revoked this patent after ascertaining that there was no novelty, the innovation having been used in India for centuries. This was the first time that a patent based on the traditional knowledge of a developing country was challenged successfully and US PTO revoked the patent. The case of the revocation of the patent granted to W.R. Grace Company and US Department of Agriculture on Neem (EPO patent No. 436257) by European Patent Office, again on the same grounds of its use having been known in India, is another example. TKDL will not only prevent frivolous patents but at the same time promote innovation as it acts as a bridge between modern science and traditional knowledge, and can be used for international advanced research based on TK for developing novel drugs.

- Fewer failures at the lab and development stage can drastically reduce the cost of a new drug. Such an approach is wholly welcome. In India, policymakers should be equipped to assess the real cost of a patented drug.

- And last but most important, India too like various other countries should aim Universal Health coverage. In the absence of effective health insurance system, out of pocket expenditures for purchase of health care can more so for drugs is ever increasing. Health insurance in India has just begun to emerge for select population. Nearly, 79% of the health expenditure is borne by the private individuals out of their pocket while only 21% is covered by govt. or insurance companies. Thus, strong and efficient health coverage and reimbursement policy is the need of the hour and has to be developed as soon as possible.

The scale and complexity of today's global health problems, calls for a joint action. While governments continue to hold the primary responsibility for ensuring access to health-care and essential medicines for all their citizens, pharmaceutical companies are expected to assume their share of responsibilities. Some companies like GSK and Dr. Reddy have understood this but others still remain ignorant. For instance, a new trend has been observed where Companies tend to spend more on marketing than R&D. The biggest spender, Johnson&Johnson, shelled out $17.5 billion on sales and

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817 V.K. Gupta, TRADITIONAL KNOWLEDGE DIGITAL LIBRARY, Asia-Pacific Database on Intangible Cultural Heritage (ICH) by ACCU, 2005.
marketing in 2013, compared with $8.2 billion for R&D. In the top10, only Roche spent more on R&D than on sales and marketing. Most of this marketing money is directed at the physicians who do the prescribing, rather than consumers.  

Source: Dadaviz

At the same time, Pharmaceutical firm Glaxo Smith Kline has already said it wants to make it easier for manufacturers in the world's poorest countries to copy its medicines. And thus it would not file patents in some 50 countries while in lower middle income countries it will continue to file patents, but will grant licenses to generic manufacturers in exchange for a “small royalty”. It would continue to seek full patent protection in richer parts of the world.

The experience GSK has with the Medicines Patent Pool for Tivicay- their newest HIV medicine and one of our most commercially successful products-gives us confidence that increasing access, incentivizing innovation appropriately and achieving business success can go hand in hand. This is a brave and positive step towards broadening the access to important new medicines in the developing world.

With the help of DRF (Dr.Reddy’s Research foundation) and an ever increasing production capacity, Dr. Reddy’s has been able to alleviate the financial burden many people face when trying to obtain lifesaving medication. Emphasizing the importance of access to medicine for everyone, many of the medicines Dr. Reddy’s launched in to the Indian market are so affordable that even a rickshaw driver in a remote village can afford them.  

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820 Ibid.

These examples should set precedent for the major pharmaceutical firms to follow as company’s assuming of its share of responsibilities would help Indian Pharmaceutical Industry has to emerge in a way that both producers as well as customers reap the benefits. Now, more than ever, we must act. As academics, researchers and scientists it is our responsibility to generate and transmit knowledge. And we should think about striking a balance in accordance with the Government for better policies in the sector.

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MARITAL RAPE: EXISTING DEFENSES TILL AN EXCLUSIVE LAW IS IN PLACE

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ABSTRACT
Marital rape is an aspect of marriage that is solely not taken care of by the present existing laws. This paper is an attempt to throw light on the aspect and the existing laws that can be used as a defence by a partner in case of marital rape. There are many descending opinions on the idea of marital law, few are that criminalisation of marital law would flaw the institution of marriage and courts aren’t supposed to interfere within what goes around with a husband and wife.

India is currently the seventh largest country in the world, and the pace at which the crime rates are going up is highly alarming and embarrassing for a thriving, multi-cultural, large and secular country like India. Marital rape is not only the chief concern in the field of women’s rights at the moment, but it also violates several constitutional provisions at the same time. Somebody rightly pointed out that a country’s growth and development can be assessed by looking at the position and respect that it gives to its women.

In this paper, the researchers would like to give out the scope of marital rape in India, the laws that it violates, a comparative study between the laws of other successful countries compared to the laws in India, an analysis as to why hasn’t it been legalised yet and why it should be legalised and a final note on suggestion and conclusion.

Chapter I
Introduction

“Her friends used to tell her it wasn’t rape if the man was her husband. She didn’t say anything, but inside, she seethed. She wanted to take a knife to their faces” – F. H. Batacan

The idea of marital rape has always been under a limelight when it came to the situations of India. The laws in India have extensively worked on rape, sexual assault and sexual abuse but have turned a dead eye to the concept of marital rape. Not that marital rape doesn’t exist in India, or its existence is close to negligible, but the central government apparently claims that it would break the values of family system and act like a strong hit against the institution of marriage. They also made a claim that the husbands will be harassed if so is given a statutory position. Marital rape is generally regarded as the act of initiating sexual intercourse with one’s spouse without the other spouse giving consent to do so. In many forward countries, marital rape has been criminalised and thus, it holds the same legal consequences and statutory position as rape to any other individual.

India is currently the seventh largest country in the world, and the pace at which the crime rates are going up is highly alarming and embarrassing for a thriving, multi-cultural, large and secular country like India. Marital rape is not only the chief concern in the field of women’s rights at the moment, but it also violates several constitutional provisions at.
the same time. Somebody rightly pointed out that a country’s growth and development can be assessed by looking at the position and respect that it gives to its women.

Everyone in the world has their own perspective on whether marital rape should attract punitive actions or it should just be treated as a part and parcel of marriage as a broad institution. The question surrounding this matter is whether marital rape is evidently guarded by the provisions of the Indian Constitution and the Indian Penal Code or the said provisions deny its illegality.

The idea of marital rape generated international attention and momentum in the second half of the 20th century. International bodies started working towards the idea of marital rape and thus, to clear off the dark, hidden violence against married women. International covenants and laws came into existence, thus, proving marital rape null and void, but some countries still follow it as a part and parcel of the institution of marriage.

In ancient India, marital rape had legal and social backing which backed it up on the ground that a spouse was entitled to the right of having sexual intercourse with his spouse. That is rather a patriarchal claim in this context. Marital rape in India strongly depends on nonexistent, sometimes interpretative verses in the Indian Constitution or the Indian Penal Code and the varying understanding of Courts. However, the central government alone cannot be blamed for such a heinous and gruesome act against women is still in place, it is the very patriarchal and male dominated set up of the Indian society that we live in. The very society gives its men the power to commit such crimes and get away with it at the end of the day. Marital rape, in itself, is a part of domestic violence. It is a means of forceful control of another individual’s thoughts, ideas, body and mind. It invades an individual’s Right to Privacy and Right to live a dignified life.

In this paper, the researcher would like to give out the scope of marital rape in India, the laws that it violates, a comparative study between the laws of other successful countries compared to the laws in India, an analysis as to why hasn’t it been legalised yet and why it should be legalised and a final note on suggestion and conclusion.

**Research Objective**

**Hypothesis:**
Marital Rape is guarded by existing laws in India and should also be outrightly be considered null and void

**Research Question:**
Should marital rape be criminalised?

**Research Methodology:**
The methodology adopted for the present research is doctrinal method. The doctrinal research involves thorough scrutiny and analyses of prior laws, cases, articles, books and websites.

**Chapter II**
Laws guarding Marital Rape in India

2.1 The Indian Constitution
Not only is the Indian Constitution a safeguard against all the wrongs for the Indian citizens, but it also clearly
demarcates what’s right from what’s wrong. Along with rights, it also crowns upon its citizens the responsibility that go hand in hand with it. Each citizen has a responsibility towards the State and its fellow citizens.

**Article 21: Right to Life and Right to Live with Human Dignity**

The Right to Life is an all encompassing right. Every time an issue on human rights violation crops up, the Right to Life comes to play an integral role in that scenario. The Article 21 guarantees each and every citizen a Right to a healthy and a decent life without any kind of encroachment from the State or any other party. Ones this right is violated, the victim can approach the Court to seek Constitutional remedies against the violation under Article 32 of the Indian constitution.

In the celebrated case Francis Coralie Mullin v The Administrator, the Union Territory of Delhi, the Honourable Supreme Court of India stated that one cannot arrive at a perfect definition of the Right to Life. Until that, the Courts can give varied interpretations to the Right and thus further explore the ambit of the right. It might also mean that an individual can enjoy the right to a decent and dignified life. Even prisoners or detenus have such a right. They have all the access to their human rights, except those that they cannot enjoy being prisoners.

In another landmark case, Chairman, Railway Board & Others v Chandrima Das & Others, a foreign woman, Smt Hanuffa Khatoon was raped in the Yatri Nivas by four men belonging to the Railway Departement and thus later raped again by a member of the Railway department where she was gagged and abused. Hearing her hue and cry, the people from the rented flat had rescued her and she was given Rs10 Lacs as compensation from the Court. The Supreme Court in this regard pointed out that rape is not only a crime against the victim individual but it is also a crime against the society at large. Rape disturbs the entire society as well as the victim equally.

**Right to Privacy**

The Right to Privacy is a recent judicial development where the Court realised that no individual should be subjected to encroachment to their personal space and privacy. More than 150 national Constitutions give the Right to Privacy a legal standing in their respective countries. In the celebrated case of Justice K S Puttaswamy (Retd) vs Union of India, the Honourable Supreme Court of India unanimously upheld the Right to privacy as an important and intrinsic part of the Article 21- Right to Life and Personal Liberty.

This could also be interpreted in favour of marital rape. A woman is entitled to the Right to Privacy. No one can encroach upon or invade her Right to privacy. More so, she is entitled to the Right to her sexual privacy. No man or woman can invade into another man or woman’s sexual privacy. It is something that isn’t open for anyone to violate or infringe her right according to their wish.

In the landmark case of Vishaka vs State of Rajasthan, the same was observed. It is a

822 1981 AIR 746
823 AIR 2000 SC 988
824 (1997) six SCC 241
woman’s personal right. No one can infringe her Article 21 against her wishes. In the case of State of Maharashtra vs Madhakar Narayan, the Supreme Court held that a woman’s sexual privacy is not open to all according to their wishes. Its her own personal right and decision and it should be respected accordingly.

2.2 Indian Penal Code, 1860
The Indian Penal Code, 1860 is the main criminal code in India. It is a comprehensive act which is divided into twenty tree chapters and five hundred and eleven sections. The Indian Penal Code lays down crimes along side of its punishments. However, it doesn’t give out any kind of procedures because that arena is dictated by the Code of Criminal Procedure. The following are the relevant sections of the IPC, 1860 in this regard:

Section 319 – Hurt Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320- Grievous Hurt The following kinds of hurt only are designated as "grievous":-
First- Emasculation.
Secondly- Permanent privation of the sight of either eye.
Thirdly- Permanent privation of the hearing of either ear.
Fourthly- Privation of any member or joint.
Fifthly- Destruction or permanent impairing of the powers of any member or joint.
Sixthly- Permanent disfiguration of the head or face.
Seventhly- Fracture or dislocation of a bone or tooth.

Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 321- Voluntarily causing hurt
Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Section 322- Voluntarily causing grievous hurt
Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely thereby to cause is grievous hurt, and if the hurt which he causes grievous hurt, is said "voluntarily to cause grievous hurt."

Section 339- Wrongful restraint
Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Section 349- Force
A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of
Marital rape or spousal rape is criminalised in all the fifty states in the United States of America. However, not all the states in the United States of America treat marital rape and rape the same. Some states like Ohio, Michigan, Nevada treat them differently. But anyhow, marital rape is a crime under some section or the other. In no state is it legal in accordance with the existing laws.

For instance, in Maryland, two individuals who have separated paths by way of judicial separation or divorce are totally strangers to one another. Any coerced sexual act between the two will be considered no different than rape. This part of the US law is quite similar to that of India. The same law applies to the Indian legal scenario. However, the twist takes place when two spouses are residing together, if one of them coerces, threatens or uses force on the other, without the consent of the other spouse, then a valid prosecution can take place.

In Mississippi, a similar situation exists. A prosecution can come into existence only if the rapist and the victim are married and living together at the time of the incident and the rapist performs penetration against the victim’s will. However, this law would exclude a situation where the victim is incapable of controlling their conduct, under drugs or narcotic influence or any other substance the victim is subjected to which numbs down their sense and presence of mind.

In Nevada, marriage can only be a defence in a situation where there was no threat or force. In a scenario where the victim was subjected to any kind of force or threat, then the defence of marriage is to no avail.
However, in Oklahoma, a person cannot charge their spouse for rape if they were compelled to submit under the influence of narcotics and drugs.

Laws in the USA vary according to the state. In some places marital rape is considered null and void by law in all its forms, in other states the laws have missed out the influence of drugs and narcotics and some other aspects which have not yet come to light.

3.2 United Kingdom
In the United Kingdom, all kinds of sexual offences are dealt with under the Sexual Offences Act, 2003. In the UK too marital rape is expressly considered a crime. Section 1 of the same talks about rape. A person is said to have committed the crime of rape if the accused penetrates his penis into the vagina, anus or mouth of the person without their consent and on purpose. It doesn’t matter whether the victim resides with the accused or not, knows the accused or not, or is or was married to the accused or not. What matters is the element of consent. If the victim hasn’t consented to the penetration, then it will be considered as rape.

A landmark case in this regard is R v R. In this case, the House of Lords held that it is possible under the English Criminal Law to commit rape on his own wife. The defendant, that is the husband, claimed that he can commit rape on his wife since the wife gave him irrevocable consent by the contract of marriage. Thus, as a reaction to this, both the House of Lords and the Court of Appeal held that there is no exception of marital rape under the English law.

COUNTER ARGUMENTS:
- Criminalising marital rape would be an attack to the holy sacrament of marriage
- Women can misuse the defence of marital rape with every disagreement they face with their husband
- Criminalising marital rape for women is too woman centric
- Marital rape is okay as long as it is between the husband and wife
- Courts cannot interfere in a personal matter like marriage

CHAPTER IV ANALYSIS
As one can deduce from the words given above, there are several sections in the Indian Penal Code which could be used to safeguard a woman from marital rape. There are several sections from the IPC which are violated when ideas like Marital Rape aren’t taken seriously in a marriage. However, countering the counter arguments, the idea of marital rape is one that tarnishes the idea of marriage because it is a woman’s own husband that forces her for sexual encounter, whom she trusts and has faith to protect her. This causes more of a trauma than being raped by a total stranger.

As one can see that the country of England has made much progress in accepting marital rape as a flaw and making laws towards it. Not far behind is the United States of America, which has banned marital rape in few states now.

Chapter V
Conclusion
Taking into account the laws of other countries in comparison to the Indian nation, India is far behind from taking a step to
create an exclusive law for MARITAL RAPE at the moment. Till a new law comes into being, the provisions from IPC and the Indian Constitution could be used as a defence. However, in the changing times every law needs to go through a change as one is discovering new things everyday and human mind is constantly evolving. Thus, till a new law is in place, one can use the existing provisions. After a scrutinising study one can bring a new law in place for Marital Rape or add relevant sections to IPC or the Domestic Violence Act.

Countries like the United Kingdom have taken relevant steps to recognise this social evil and are constantly making new laws in order to fight this kind of an atrocity against woman. However, there have been many counter arguments in this line of thoughts namely, that curbing marital rape would be an attack on the institution of marriage and thus would be constantly misused. This is the reason why the researcher suggests that the law making authorities may take time to analyse and scrutinise the consequences and results rather than haphazardly put a law in place. Marital rape, without a doubt, is a violation of a woman’s right to dignity and wellbeing and thus, for a progressive country to thrive, a law should be brought into place.

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FUNDAMENTAL DUTIES: TIME TO RECONSIDER THE ECLIPSED PART OF CONSTITUTION

By Suyash Gaur & Anchita Sood
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INTRODUCTION

Fundamental duties along with fundamental rights and directive principles of state policy constitute the bills of rights of every citizen under the Constitution of India. The framers of the Constitution from the Soviet Union adopted fundamental duties. 42nd and 86th Amendment Acts of the Constitution of India introduced fundamental duties. The basic object of including fundamental duties are to regulate the conduct of every citizen along with laying down certain moral responsibilities they must abide by towards the country.

The concept behind introduction of fundamental duties was that the rights and duties are inseparable as two sides of the same coin. The fundamental rights are correlated to the fundamental duties. Therefore for the effective exercising of the fundamental rights, there are some duties, which the citizen must abide.

NATURE OF FUNDAMENTAL DUTIES

The fundamental duties under the constitution unlike the rights are only applicable on the citizens and not to aliens. Further these duties bring our constitution in conformity with Article 21(1) of the Universal Declaration of Human Rights, which states, “Everyone has duties to the community in which alone the free and full development of his personality is possible.” Further it also brings our constitution together with several other modern constitutions of other countries. Out of the ten clauses in article 51A, six are positive duties and the other five are negative duties. Clauses (b), (d), (f), (h), (j) and (k) require the citizens to perform these Fundamental Duties actively.

NEED FOR THE INTRODUCTION OF FUNDAMENTAL DUTIES

Fundamental duties were not initially inserted in the constitution by the framers. However, during the national emergency period from 1975 to 1977, there were over utilization of the rights by the people of the country. This lead to the introduction of the concept known as fundamental duties in the Indian Constitution. The reason was clear, people neglected the fact that they owe something to the society and the nation and made the most out of fundamental rights by using them under all possible circumstances in there favor.

The presence of the fundamental duties in the constitution has the effect of a reminder to every citizen that along with the fundamental rights they exercise is in balance with the corresponding duty they have to fulfill. This leads to the proper evolution of the people in the state towards striving excellence and shaping of the community.

The Indians before the independence have raised the slogan that freedom is our birthright. The democratic rights are based on the fact that every individual inherit them by birth as natural rights and they are inseparable and indispensable even at the
hands and will of the person. They are only recognized and protected by the state.

On the inspiration from the Soviet model, the fundamental duties were added by 42nd amendment in the Indian constitution in 1976. The fundamental duties are specified in Art. 51A.

**VARIOUS LEADERS AND JURISTS ON FUNDAMENTAL DUTIES**

According to **Mahatma Gandhi**: “The true source of right is duty. If we all discharge our duties, rights will be far to seek. If leaving duties unperformed we run after rights they will escape us like will-o-the-wisp.”

According to **USA President Kennedy**: “Ask not what the nation has done for you but what you have done for the nation.”

According to **Indian Prime Minister Smt. Indira Gandhi**: “the moral value of fundamental duties would be not to smoother rights but to establish a democratic balance by making the people conscious of their duties equally as they are conscious of their rights.”

According to **Sir. John Salmond**: “there can be no right, without a corresponding duty.”

**INSPIRATION OF FUNDAMENTAL DUTIES**

Fundamental duties were adopted from the Soviet Union. The socialist countries lay down greater emphasis on the duties of the citizen towards the state in relation to capitalists counties.

**Yugoslavian Constitution:**

Under chapter III, Article 32, it clearly signifies that the right of an individual can be fulfilled only by the fulfillment of the duties along with them by the person.

Article 32 speaks, “The freedoms and rights of man and citizen are an inalienable part and expression of the socialist and democratic relations which are protected by the Constitution, and through which man is being emancipated from every exploitation and arbitrariness, and [through which man] by his personal and socially organized work is creating the conditions for comprehensive development, for the unrestricted expression and protection of his personality and the attainment of his human dignity. The freedoms and rights shall be achieved in solidarity among the people and by the fulfillment of their duties toward one another.”

**Soviet Constitution:**

The soviet constitution has always been conscious of the fact that the citizen owes some duty towards the state and hence they must be abiding by for the exercising use of the rights. Under Chapter VII it states the duty of the citizen in broad terms and not specifically.

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826 1974 Yugoslav Constitution

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Article 59 speaks, “Citizens’ exercise of their rights and freedoms is inseparable from the performance of their duties and obligations. Citizens of the USSR are obliged to observe the Constitution of the USSR and Soviet laws, comply with the standards of socialist conduct, and uphold the honour and dignity of Soviet citizenship.”

Article 60 speaks, “It is the duty of, and matter of honour for, every able-bodied citizen of the USSR to work conscientiously in his chosen, socially useful occupation, and strictly to observe labour discipline. Evasion of socially useful work is incompatible with the principles of socialist society”

Article 69 speaks, “It is the internationalist duty of citizens of the USSR to promote friendship and co-operation with peoples of other lands and help maintain and strengthen world peace.”

Republic of China Constitution:

The constitution of China under Article 51 expressly states that the citizens of the state while exercising their rights shall not infringe upon the interest of the state, society or the collective rights of other citizens. Further under other Articles it lays down the duties of the citizens as follows:

Article 52 speaks, “It is the duty of citizens of the People’s Republic of China to safeguard the unification of the country and the unity of all its nationalities.”

Article 53 speaks, “Citizens of the People’s Republic of China must abide by the Constitution and other laws, keep State secrets, protect public property, observe labour discipline and public order and respect social ethics.”

Article 54 speaks, “It is the duty of citizens of the People’s Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.”

Article 55 speaks, “It is the sacred duty of every citizen of the People’s Republic of China to defend the motherland and resist aggression. It is the honourable duty of citizens of the People’s Republic of China to perform military service and join the militia in accordance with law.”

Article 56 speaks, “It is the duty of citizens of the People’s Republic of China to pay taxes in accordance with law.”

Democratic Republic of Vietnam Constitution:

Chapter II of the Republic of Vietnam constitution deals with the duties, which every citizen must abide. These duties serves as a reminder as well as obligations to be performed on part of the citizens against the rights granted to them.

827 1977 Soviet Constitution

828 Constitution of the People’s Republic of China 1982

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Article 44 speaks, “A citizen has the obligation to be loyal to the Fatherland. High treason is the most serious crime.”

Article 45 speaks, “1. It is the sacred duty and the noble right of citizens to defend their Fatherland.
2. A citizen shall perform military service and participate in building a national defense of all the people.”

Article 46 speaks, “A citizen has the obligation to obey the Constitution and law; participate in the safeguarding of national security and social order and safety, and observe the rules of public life.”

Article 47 speaks, “Everyone has the obligation to pay taxes in accordance with the law.”

Article 48 speaks, “Foreigners residing in Vietnam shall abide by the Vietnamese Constitution and law; and have their lives, property, rights and justifiable interests protected by Vietnamese law.”

On the other hand, in certain countries such as U.S.A., Australia, Canada, the fundamental duties are not specifically laid down. The common law and judicial precedents govern them. However, it does not mean that the citizens of those countries can act in irresponsible manner and they are bound by certain restriction in favor of public interest and the state as a whole.

829 The Constitution of the socialist Republic of Vietnam 2013
(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.
(k) to provide opportunities for education by the parent the guardian, to his child, or a ward between the age of 6-14 years as the case may be.  

**IMPORTANCE OF FUNDAMENTAL DUTIES**

The fundamental duties are of very wider scope in terms of interpretation. Fundamental duties in short sentences define the very culture of our country. They clearly lay down the ideology, which every citizen of the country must cherish. The important features of the fundamental duties can be categorized as the following:

- **Common Heritage:** India in terms of culture is a very diverse country, but fundamental duties helps to uphold our common heritage which every man must perform and is accepted by almost every culture in the society.
- **Accepted by everyone:** Politicians of different age agree on the essence of the fundamental duties in the society. It is believed that to regulate the society certain general norms must be specified so as to the principles an individual must live by in the society.

- **Non justiciable:** Fundamental rights cannot be enforced in a court of law but the Hon’ble courts have in various judgments dealt with the importance and significance of the fundamental rights and the duty of every citizen not to ignore them just because they are not enforceable.
- **Collective interest:** In an era of development where individual interests are at supreme, the fundamental duties serve as a reminder towards the collective interest of society over the individual interest. They provide a sense of responsibility of an individual towards the state.

**ENFORCEABILITY OF FUNDAMENTAL DUTIES**

The Parliament of India has laid down no enforcement mechanism for the fundamental duties while passing them in the houses. This has lead to the decline in the effective implementation of the fundamental duties in our country. The non-enforceable nature has lead to decline in the importance and significance of the fundamental duties as the people pay less attention to the written postulates in comparison to the law, which provides punishment to the violators. Therefore, in comparison to the rights exercised by the people, it is clearly found that there is a negligence and ignorance on their part to imply and follow the duties as well. It is also found that these duties in today’s era has become vital and essential for the growth of society, which has neglected them from the past till date. This can be found out in the following scenarios:

- **For the Fundamental Duty enumerated in 51A (a):** The government of India in

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830 The Indian Constitution 1950
power tried to implement a protocol of presenting the national anthem before the movie in the theaters which lead to nation vide criticism. This was non a bad step to promote the sense of patriotism and indirectly also upholding the duty under 51A (a). However, due to such criticisms, objections and different perspective of people, the Hon’ble courts of law have declared it non-mandatory for the people to stand and playing the national anthem before movies.

- **For the Fundamental Duty enumerated in 51A (e):** This duty is one of the most essential duty the country requires in today’s time. There has been various mob violence acts around the country in the name of religion. Various criminal acts have been performed by the people which are neither acceptable by the society, nor the other religious groups. The people do intentional acts to harm and cause mental agony to certain religious groups. On the other part, still in the backward areas of the country, the practices, which are derogatory to the dignity of the women, are still performed as a custom such as female feticide. There are various laws enacted by the parliament but there is a clear failure in the implementation of such laws and a change from within the people themselves.

- **For the Fundamental Duty enumerated in 51A (g):** The era of development has harmed our environment in almost every way possible. The forest covers of our countries have vanished significantly to make the path for multiplex shopping centers and various offices. For the earning of profits and competing with other states we have harmed and extinct some of the diverse flora and fauna in the country. There have been crores spent by the government to clean our rivers but it is quite shameful that two of our main rivers, that is, Ganga and Yamuna make the way into top 10 world’s most polluted rivers. There have been various acts and judicial pronouncements to stop such practices, which pollute the rivers, however still the pollution level keeps on increasing due to the unawareness and negligent act of the people.

- **For the Fundamental Duty enumerated in 51A (i):** People while utilizing the public property take it for granted because they have the mindset that it does not belong to them. They show no consideration and care for such property and utilize and damage it as per their convenience. The Tejas Express train launched by the government can prove one such example. People stole the headphones, scratched the LED screens after the only maiden run. This clearly shows that the mindset of viewpoint of people towards the care of the public property.

- **For the Fundamental Duty enumerated in 51A (k):** This duty was added later on and was not there in the initial duties. Child Labor has been one of the most prevalent practices in the country. This is mainly due to increasing wealth gap and poverty, which exists from the pre British period. Poverty is based on a principle, ‘necessity knows no law’ and therefore children with or without their will have been engaged in labor work to earn money. This has lead to the sacrifice of their education. Even the backward people who fails to earn the money or don’t have the money to hire labor believes that increasing the count of child will contribute as their helping hand...
which gradually leads to increase in the number of poor people.

**SIGNIFICANCE OF FUNDAMENTAL DUTIES**

A duty is an obligation on the part of the citizen whether he likes it or not. The citizen has to fulfill the obligation even if it against his will for the betterment of the cause. Fundamental duties are those duties, which are imposed by the state on the citizen as his/her basic duties towards the state which he must comply with. Hence, it is a responsibility as well as moral and in some states a legal obligation to perform these duties. The significance of fundamental duties can be summarized in the following points:

- Fundamental duties act as a corresponding responsibility of the individual towards the state while exercising the rights granted by the state.
- Fundamental duties promote patriotism among the people with a sense of belongingness towards the state. It also helps to prevent the anti national acts of the citizens.
- They help to regulate and ensure the involvement of the people in the country for the functioning of the society rather than mere spectators.

**COMMITTEES AND COMMISSION ON FUNDAMENTAL DUTIES**

The committee was formed after the national emergency from 1975-1977. The object of the committee was the formulation of the fundamental duties. They lay down certain duties, which every citizen must follow along with the rights they enjoy. At first they decided to formulate 8 duties, however two more were added while formulating.

The committee recommended for the enforcement of such fundamental duties and laws for the effect enforcement of duties by the parliament. They also suggested that all the violators must be punished for the integrity of the fundamental duties.

**The National Commission to Review the Working of the Constitution, 2002**

The commission recommended that certain additional duties must be implemented along with the other duties under Article 51A of the Constitution of India. These recommendations were following:

- Duty to vote at elections
- Duty to actively participate in the democratic process of governance
- Duty to pay taxes
- Duty to foster family values and responsible parenthood
• Duty of industrial organizations to provide education to children of their employees
• With the increasing incidents of communal violence and religion-based mob violence (example beef lynching), strict adherence to fundamental duties is the need of the hour to foster feeling of common brotherhood and to maintain the unity and integrity of India.

CRITICISM OF FUNDAMENTAL DUTIES

Fundamental duties is one of the most undisputed chapter in our constitution which every political party as well as a citizen find sensible and important for the better upbringing of the state. However, it is usually criticized on the grounds that they are just laid down postulates without any enforceability and effectiveness. Fundamental duties are considered as a car without petrol, which cannot run on its own. Several other criticisms may be summarized as the following:

• Complicated: Certain terms such as ‘noble ideas’ and ‘composite culture’ are too vague and not possible to figure out by a common man. They are not expressly defined along with their essence.
• Not enforceable: Parliament has laid down to enforcement mechanism for the fundamental duties and hence they cannot be challenged or enforced in a court of law. This gives the violators an open door to perform any act even if it is in contradiction with the fundamental duties.

Not required: Fundamental duties by various eminent jurists are considered as a general obligation, which every man fulfills in a socialized society and hence, they are not required to be laid down in the constitutions along with the law of the land.

General duties: It is also criticized on the ground that a duty may be important for one but not for another person. For example under duty (d), not everyone wants to go ahead and participate in the defense forces. It also considered that important duties such as to pay tax and several others should have been placed there.

Why fundamental duties should not be enforceable

When one go through the fundamental duties, the person wonders as to why such duties are not enforceable in the country as there are no objections for the enforcement of the fundamental duties. Fundamental duties are positive and greatly contribute towards the effective and positive building of the society. However, if we go through all the legislations enacted by the parliament of the country, we find that there are already protection laws present for the most of them. For the enquiry about the enforcement of the fundamental duties, the JS Verma Committee was formed. Certain specific legal provisions as noted by the committee were as following:
For the Fundamental Duty enumerated in 51A (a): The Prevention of Insults to National Honour Act 1971 was enacted to ensure that no disrespect is shown to the National Flag, Constitution of India and the National Anthem.

For the Fundamental Duty enumerated in 51A (e): Section 153A of the Indian Penal Code (IPC) prohibits writings, speeches, gestures, activities, exercises, drills, etc. aimed at creating a feeling of insecurity or ill-will among the members of various communities.

For the Fundamental Duty enumerated in 51A (c): Activities and assertions prejudicial to national integration constitute offence under Section 153B of the IPC.

For the Fundamental Duty enumerated in 51A (e): Offences related to religion and caste are covered in Sections 295-298 of the IPC (Chapter XV) and provisions of the Protection of Civil Rights Act, 1955.

Section 123(3) and 3(A) of the Representation of People Act, 1951 declares soliciting of votes on the ground of religion and the promotion of feelings of ill will and hatred among different religious communities as a corrupt electoral practice.

Article 51A(g) regarding protection of environment has received particular attention from the various courts. The JS Verma committee on Fundamental Duties has listed and documented as many as 138 Supreme Court cases in the area of environmental protection.831

Fundamental duties per se are not enforceable and non remedial in the court of law hence a writ of mandamus cannot be sought against any individual, as pronounced in the judgment by the Hon’ble Rajasthan High Court in Surya V. Union of India.832 However, the Indian judiciary has always considered them to be an integral part of our constitution and in various judgments pronounced the importance of the duties as laid down by the framers of the constitution.

The realization and importance of the fundamental duties can be figured our from the following judicial pronouncements:

In Chandra Bhawan Boarding V. State of Mysore,833 the Supreme Court before the insertion of fundamental duties, the court emphasized that the absence of duties in respect of the rights granted to the citizens is a fault in the constitution. There must be presence of the duties, which enables the legislature to build the society in a more effective and welfare method.

In Ambuja Petrochemicals Limited V. A.P. Pollution Control Board,834 the industry was discharging the partially treated effluents in the river. The state board gave the order for the factory to be closed.

831 JS Verma Committee Report

832 AIR 1982 Raj 1, WLN 198
833 1970 AIR 2042
834 AIR 1997 AP 41

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375
On appeal it was held that the order was neither shocking nor excessive punishment and hence valid.

In *AIIMS Student’s Union V. AIIMS*, the Supreme Court laid down the importance of the fundamental duties. The Hon’ble court observed that though the duties are not enforceable, yet they provide guidance for the people and for various legal issues.

The Supreme Court in *Sanjeev Bhatnagar V. Union of India*, the Supreme Court rejecting the plea to exclude ‘Sindh’ from the National Anthem on the basis of territorial allegations stated that the word ‘Sindh’ has cultural connotation and the National Anthem is immortal and inalienable and cannot be changed or altered.

There have been numerous cases by social activists such as MC Mehta for the protection and restoring of the environment. The courts and tribunals punish the polluters of environment with heavy fines and seizures of certain illegal factories.

**CONCLUSION**

Every right comes with certain duty and if we enjoy all our fundamental rights be it right to equality or right to life and personal liberty, we must abide by the fundamental duties which are defined under Part IV of the Constitution of India for the common interest of the individuals.

Fundamental duties are those duties, which are imposed by the state on the citizen as his/her basic duties towards the state which he must comply with. A Fundamental Right Heavy democracy in total disregard to Fundamental Duty is on shaky ground in the long rule. For a multi racial, multi cultural and plural society like India, nation building has to be a main concern and hence, the importance of symbols of nationhood – the anthem, the flag, the song, the epics and texts, culture must be felt.

The only problem is, the parliament while passing these duties, followed the no enforcement mechanism which lead to the deterioration in implication of these duties and people don’t even bother about their duties towards the society.

USA 35th President Kennedy had famously said, ‘Ask not what the nation has done for you but what you have done for the nation.’ His words appear prophetic when we look at the existing situation in India. Everyone seems to be looking at the state for freebies, there appears to be no concern for self development & self empowerment and yes, people are increasingly vocal about their rights for which they don’t think twice before taking to streets and damaging public property.

It is usually criticized on the grounds that they are just laid down postulates without any enforceability and effectiveness. People don’t comprehend that these duties are vital for the growth of the citizens individually as well as for the growth of the society as a whole. Ambedkar incorporated the civil rights for the depressed clauses into law books because he felt Hindu society won’t change by mere calls for change. The same...

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835 AIR 2001 SC 3262  
836 AIR 2005 SC 2841
needs to be done now. Fundamental Duties are very important for building nationhood and an energetic civil society. They are no less important than the Fundamental Rights and therefore there is a need for these duties to be obligatory for all the citizens subject to the State enforcing the same by means of a valid protection laws.

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MOB LYNCHING IN INDIA: A NEW NORMAL UNDER THE INDIAN LEGAL SYSTEM

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Abstract
Mob Lynching is the current burning topic in India. Lynching is not defined under the Indian Legal System and there are no punishments in regards of lynching. However, the word lynching has been originated during the American Revolution by Charles Lynch. In India lynching was first reported in the Khairlanji Massacre, 2006. But, last year incidences of mob lynching again got the lime light as total 8 cases were observed out of which 5 were happened in the month of June. Lynching is a serious crime and a punishable offence and it should be included under various offences given in the Indian Penal Code. Recently the Supreme Court in the Poonawalla case issued certain rules keeping in view the disturbing ascent in the occurrences of lynching and directed states to maintain law and order accordingly. It is the duty of the Government to punish a criminal; a layman should not take law into his own hands. As it is the high time for legislation to passed law against mob lynching in the country. The paper focus on the current legal system in relation to curb mob lynching, effective measures required by the state to safeguard the people and conduct awareness programs so that the people are aware that lynching is a serious offence and not to take part in it.

INTRODUCTION

Lynching has become another ordinary in India. News of lynching comes from various parts of the whole country. If it would have occurred concurrently, it would have shaken the world into retaliation. The outrageous act of lynching has become a part of the society as people have mindset that they can do justice themselves.

Several innocent people are savagely tortured and a few even lost their lives being a victim of hordes. The rise of slaying in Republic of India shows an odd barbarous behavior of human throughout the twentieth century. The construct of Hindutva among their Hindu community is appropriate however, one cannot force Hindutva everywhere Republic of India it restricts a person’s freedom to practice its own faith under Article 25 and is also a kind of discrimination towards the minority on the grounds of faith, race, caste, etc. under Article 15 of the Indian Constitution. This paper is addressing a study on varied cases concerning the act of lynching everywhere in India, focus on the current legal system on mob lynching, effective measures required by the state to safeguard its people and need of awareness programs in order to aware people that lynching is a serious offence and not to take part in it.

Origin and Definition of Lynching
The starting point of the word 'lynch' is said to have begun amid the American Revolution expressed as 'Lynch Law' which is a discipline without preliminary. The word ‘lynch’ or ‘lynch law’ has been derived from two Americans known as Charles Lynch and William Lynch who
were from Virginia. During 1782, Charles Lynch had wrote that the ‘Loyalist’ or ‘Tories’ who were supporters of British side were provided Lynch Laws to deal with the ‘Negroes’.

As per English lexicon, lynch intends to execute, particularly by hanging, by horde activity without lawful expert. At the end of the day, lynching is an unlawful murder by an irate crowd of individuals. Lynching is characterized as executing (as by hanging) by crowd activity without legitimate endorsement or consent. It remains for extrajudicial discipline -, for example, open executions - by a casual gathering, for example, swarm, to rebuff an affirmed transgressor. At its centre it is an extraordinary type of casual gathering social control, with a float toward the general population scene. Lynching is one form of vigilantism, itself the act of law enforcement undertaken without legal authority by a self-appointed group of people.

**Rise of Mob Lynching in India**

Swarm brutality and lynching are not new to India, yet rather have a long history in the nation, frequently connected to authentic treacheries, for example, those identified with the standing framework. Crowd viciousness has customarily taken three frames:

i. 'witch-chasing', of crowds lynching slow-witted ladies in parts of provincial India, blamed for kidnapping and some of the time killing kids, the Hindi expression for witch being ‘dayan’. An evaluated 2097 such murders were submitted somewhere in the range of 2000 and 2012 in around 12 states of the nation.

ii. Caste based viciousness against Dalits, including assault, kill, and different types of physical assaults, all by mobs.

iii. Finally swarm brutality in cases of communal conflicts, for example, against Sikhs (1984), Christians (Kandamahal, 2009, and different occasions) and against Muslims, in Gujarat (2002), Muzaffarnagar (2013), and Baksa (2015), generally as of late.

In any case, the present spate of crowd viciousness and lynching speaks to production of another classification of brutality and new targets. Lynching deaths being 97 percent of these have happened over the most recent 3 years.

**INCIDENCES RELATING TO MOB LYINGCHING IN INDIA**

1. **Kherlanji Massacre 2006**

On 29th September 2006, the first case reported in India relating to lynching. It occurred at Bhandara district in the state of Maharashtra. The lynching was due to a land...
dispute where a mob of at least 50 villagers barged into the house of the victim beating four members of the family and parading naked the wife and their daughter before they murdered them\textsuperscript{842}

2. Dimapur Lynching 2015
On 5th March 2015, in Dimapur a district of Nagaland, a person named Syed Farid Khan was accused of rape. A group of angry mob broke into the Dimapur Central jail and lynched the accused\textsuperscript{843}.

3. Dadri Lynching 2015
On 28th September 2015, an incident of lynching occurred at Bisara village, Uttar Pradesh. A group of Hindu Mob had lynched Mohammad Akhlaq and his son Danish accusing them of stealing and slaughtering a cow calf and storing the meat for consuming. This was the first case of a Hindu Mob lynching a Muslim in the name of cow or beef\textsuperscript{844}

4. Chatra District Lynching 2016
On 18th March 2016, Mazlum Ansari (32 years old) and Imteyaz Khan (15 years old) were brutally lynched by a mob known as ‘GauRakshak’ who is cow vigilantes at Chatra a district of Jharkhand. They were accused of cattle smuggling but in reality they had a cattle market and were on their way to sell eight oxens\textsuperscript{845}

5. Alwar, Rajasthan Lynching 2017
On 5th April 2017, Similar to the previous case, Pehlu Khan and 14 others were accused of cattle smuggling and were lynched by cow vigilantes. The disturbing part of the case was that the police had filed a case against Khan who had a Government permit to transport cows \textsuperscript{846}.

6. Jharkhand Lynching 2017
On 18th May 2017, in the districts of Jharkhand we had observe seven men being accused of child lifting and was lynched by the people. The violence occurred due to circulation of warning messages in WhatsApp regarding child lifters around the district. Four of the accused were Muslims while the other three were Hindus\textsuperscript{847}

\textsuperscript{842} FirstPoststaffs,'Khairlanji Massacre: On 10yr anniversary of brutal attack on Dalits, Maratha agitation gains momentum’ (First Post, 2016) www.firstpost.com/politics/khairlanji-massacre-on-10-yr-anniversary-of-brutal-attack-on-dalits-maratha-agitation-gains-momentum-3023870.html accessed on 10th September 2018

\textsuperscript{843} Sandip Roy,’Don’t touch ‘our’ women; Dimapur lynching was never about justice’(First Post, 2015) www.firstpost.com/india/dont-touch-our-women-the-dimapur-lynching-was-never-about-justice-2143305.html accessed on 10th September 2018

\textsuperscript{844} ‘Internet Desk,’The Dadri lynching: How events unfolded’(The Hindu, 2015)<www.thehindu.com/specials/in-depth/the-dadri-lynching-how-events-unfolded/article7719414.ece> accessed on 10 September 2018

\textsuperscript{845} Manob Chowdhury,’Cow Vigilantism: Families contest Jharkhand Government’s claims on Latehar Lynching’(2016, Scroll.in) www.scroll.in/article/805548/latehar-lynchings-good-step-to-stop-cow-slaughter.html accessed on 12 September 2018

\textsuperscript{846} Sachin Saini, Deep Mukherjee,’Alwar lynching: Pehlu Khan, killed by cow vigilantes, was no cattle smuggler’(Hindustan Times, 2017)www.hindustantimes.com/india-news/alwar-lynching-pehlu-khan-killed-by-cow-vigilantes-was-no-cattle-smuggler/story-oHFwJT3e8R8KJn3KEGOO.html accessed on 12 September 2018

\textsuperscript{847} The Wire Staff, ‘Two Arrests, Protests Follow After WhatsApp Rumours Lead to Lynching of Seven in Jharkhand’(The Wire, 2017) <www.thewire.in/ 138667/whatsapp-message-turns-tribals-violent-leaves-seven-dead.html> accessed on 12 September 2018
7. Delhi Lynching 2017
On 25th May 2017, an e-rickshaw driver was lynched by a mob of students from Delhi University. The incident occurred after the driver had stopped two drunken students from urinating in public which later they had returned with a group of students to Lynch the driver.848

8. Pratapgarh, Rajasthan Lynching 2017
On 17th June 2017, at the district of Pratapgarh, Zafar Khan, an activist found a Government civil official taking pictures of woman defecating in public and stopped him from taking such photos. An argument arose where people say the activist was lynched but police state that his death was due to heart attack and post mortem shows no sign of murder.849

9. Haryana Lynching 2017
On 22nd June 2017, three muslim brothers were travelling in an EMU train from Tughlakabad to Ballabhgarh. At times Public transport in India becomes overcrowded making it difficult for people to travel and at times experiences bumps against co-passengers. While the brothers were travelling an argument arose over train seats. The brothers were also accused of being muslims, anti-nationals or terrorist or Pakisyanis and also that they were the ones consuming beef and they might be carrying it right now, by the argument where they were lynched by a mob of Hindus. Juniad was stabbed to death while his brother survived even after multiple stabs.850

10. Srinagar, Jammu and Kashmir Lynching 2017
On the same day that is June 22, a group of angry mob outside Nowhatta’s Jamai Masjid had lynched a Deputy Superintendent of Police, Mohammad AyubPandith. Some reports say that he had opened fire on few people who caught him taking picture of the masjid while other report say he was on his duty while he got attacked by a mob which he used his pistol as self defence.851

11. Jalwe, Jharkhand Lynching 2017
On 29th June 2017, MithunHansda who was an accused of rape and murder of an eight year old girl was allegedly trashed to death by an angry mob of villagers.852

852 Dev Goswami,’Jharkhand: Man accused of raping, killing 8-year-old lynched by mob.
12. Thoubal, Manipur Lynching 2017
On 29th June 2017, Md Rakib Ali (19years) Md Anish (20years) by an angry mob in Thoubal district, Manipur. The very next day a video clip was posted on Facebook by the Chief Minister Nongthombam Biren Singh on his page. As per the cases identifying lynching in India has watched an extreme increment amid this year. The general population acted as a vigilante towards the blamed. Is it in light of the fact that the Government has not done their part in making a move against these hoodlums? Is there no administration of law in the country today? The demonstration of lynching isn’t the correct method to manage a charged person in light of the fact that the blamed might be an innocent individual.

WHY SHOULD MOB LYNCHING BE STOP?
In India all people are given equal treatment as stated by our constitution, ‘every person has the Right to equality’. A person has the right to prove innocence of the crime for which he is charged at the court. If a lower court passes an order stating that he has been found guilty, he can appeal towards a higher court. Sometimes the process of punishing a person can be a long process were years are being taken to give a proper judgment to prove a criminal guilt or to bail him out of prison. This system of slow process of final judgment by the judiciary is done as to make a careful statement towards judging a person. It is for the benefit of all people but some fail to understand the system. In some cases, it leads to anger of the people enraging them to protest and take law into their own hands as we have observed in the Dimapur lynching case during the year 2015. It is not the duty of a layman to take law into their own hands and punish the criminal in the most brutal of ways. If the people are not satisfied with the functioning of the judiciary, they should approach the judiciary itself. The nation is for the people and the people if they get together and mend the judicial system by giving in solutions and ideas of how to function well would be a more professional manner. But our people fail such sort of education and decency to think of solutions without violence.

IS PRESENT INDIAN LAWS ARE SUFFICIENT TO CURB MOB LYNCHING?
A legitimate method for teaching our residents towards lawful instruction ought to be the initial step however to satisfy this, the training framework in India should change by acquiring handy investigations more than savants.

As many people today are not aware of what rights and duties they are provided by the constitution. The people should also be aware that the Indian judicial system follows

854 Nina Berman, ‘MM 2014. It was a Kind of slavery’<http://www.motherjones.com/politics/2014/02/returning-to-dozier-florida-school-for-boys.html> accessed 3rd Sept, 2018

www.supremoamicus.org
382
a systematic way to process its orders. Punishing of a criminal is one of their main functions which can take a long time to prove a criminal guilty as a criminal is also given his right to appeal against an order given by a lower court. A criminal can be punished under offences relating to rape, murder, illegal activities of cattle smuggling, animal cruelty, and those which affects the rights of another living being. The kinds of punishments given to these criminals may be given towards the crime they have committed starting from fine, imprisonment, fine with imprisonment and if a serious crime is committed the person will be given life imprisonment.

A criminal should be punished but the practise of mob lynching is not the way to punish a criminal. Lynching is a serious crime as it deals with a murder of a person by a group of angry mob without any legal authority. Any person acting against the legal authority is an illegal act and can be punishable by the court. The Indian Legal system has no definition and punishment regarding lynching. Thus it is a need of an hour for a law based on lynching as it also falls under a crime committed to a person against the governments wish.

Supreme Court's observation on Mob Lynching

The apex court bench comprising of Justice Dipak Mishra, Justice A.M. Khanwilkar and Justice D.Y Chandrachud on account of TehseenPoonawalla versus Union of India 835 issued certain guidelines to the Parliament for enacting a legislation for preventive, remedial and punitive measures keeping in view the disturbing increase in lynching or mob violence so as to secure the constitutional rights of vulnerable people, to punish demonstrators of lynching/mob violence and to give rehabilitation to the victims.

A. PREVENTIVE MEASURES

1. Each state ought to choose a senior cop, not beneath the rank of Superintendent of Police, as the Nodal Officer in each District. The nodal officer will guarantee that preventive measures are taken against episodes of crowd savagery/lynching. In playing out his capacities, the nodal officer will be helped by the Officer accountable for the police headquarters of the concerned territories.

2. Hostile material or some other means utilized so as to advance lynching of a specific individual or gathering of people.

3. The state government shall identify districts, sub-divisions or villages where instances of mob lynching have been reported in the recent past, e.g., in the last five years. The Secretary, Home Department of the concerned States shall issue directives/advisories to the Nodal Officer of the concerned Districts for ensuring that special care is taken to prevent incidents of lynching/mob violence in identified areas.

4. Every police officer, directly in charge of maintaining law and order in an area shall take all reasonable steps to prevent any act of lynching including its incitement and commission. In doing so, he shall make all possible efforts to identify and prohibit instances of dissemination offensive material or any other means employed in order to incite or promote lynching of a particular person or group of persons.

5. Every cop, straightforwardly accountable for keeping up lawfulness in a territory.

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will try every single conceivable push to distinguish examples of brutality in the region under his locale, that show event of targeted viciousness, including the creation or presence of unfriendly condition against a man or gathering of people.

6. It will be the obligation of each cop, directly responsible for keeping up peace in an area, to practice his power on the crowd so as to make it scatter. In exercise of his power, such a cop may utilize such powers as vested in him under Section 129 of the Code.

B. REMEDIAL MEASURES

1. If an episode of lynching/swarm brutality happens despite of the measures taken by the state, the jurisdictional police headquarters will promptly hold up a F.I.R. under the suitable arrangements of law. Implication of the enrolment of the FIR will be immediately given to the Nodal Officer in the area who, thusly, will guarantee that investigation and examination is done.

2. Cases where a charge sheet isn’t recorded within the time of three months from the date of the First Information Report will be reviewed by the Nodal Officer. The Nodal Officer may pass orders for a fresh investigation by another officer not underneath the rank of Deputy Superintendent of Police when he is of the considered believe that the same is essential.

3. Immediate steps will be taken by the district administration to give security to the victim of lynching/crowd savagery and his/her family.

4. The State Government through the office of the Chief Secretary will give Compensation to victims of lynching within 30 days of the incident. Where the demise of a man has happened as an outcome of lynching, the pay for such passing will be paid to the closest relative of the expired.

5. While figuring out amount of compensation, the State Government must give due respect to the substantial damage, mental damage, material damage and loss of income including misfortune chance of business and instruction, costs bared for medical and legal assistance.

6. Wherever it is discovered that a cop or an officer of the district administration has purposely not followed these bearings or has neglected to practice the power legitimately vested in him to anticipate or research an act of lynching/horde savagery, such activity will be viewed as wilful carelessness/unfortunate behaviour. Disciplinary action according to rules must be taken against the same. An enquiry in regards to the same must be conducted within a half year.

C. MEASURES FOR AN EFFECTIVE TRIAL

1. Incidents of lynching/swarm viciousness will be tried by the assigned fast track courts in each area. Such a Court will hold the trial of an offense on an everyday premise. The trial will ideally be finished up within a half year of the date of taking cognizance of the offense.

2. A Designated court may, on an application made by a witness in any procedures tried by it or by the Public Prosecutor in connection to such movement, accept such measures as it considers fit for keeping the personality and address of the witness anonymous.
3. A victim will have the privilege to accurate, reasonable and timely notice of any court proceeding. He or she will have right to be heard at any proceeding under this Act in regard of bail, release, discharge, parole, conviction or sentence of a blamed.

4. A victim will be entitled for get free legal aid in the event that he/she so picks and to engage any lawyer under the Legal Services Authorities Act, 1987 and the Legal Aid Services Authority set up under the said Act will pay all costs, expenses and fees of the advocate appointed by the victim according to the guidelines of the act.

5. It shall be the duty of the State Government for making arrangements for protection of victims who suffer wrath from mob lynching.

CONCLUSION
Since, first major lynching incident, Kherlanji massacre there has been a gradual increase in the number of lynching cases in India. There has been shoot up in the number of cases because of the ideology carried by people in India that they can lynch someone whom they feel has done wrong or has hurt the sentiments of people. This takes place due to the mindset of the public that by taking law into their hands would save the public and society at large in a short span of time instead of going for a suit in court for that matter. In contrast to their prediction of welfare, it further leads to public disorder in the country. Thus, it is high time that legislation needs to be passed to curb mob lynching in the country. Awareness should be spread that lynching is a serious act against humanity and hampers law too.

RECOMMENDATIONS
The following are some recommendations that can be used to prevent lynching in India-

Individual Cases
1. Speedy investigations and inquiries of perpetrators and instigators involved in lynchings.
2. There shall be independent investigation for inaction by the police for vigilantism, hanging, assault, murder or rape.
3. Provisions shall be made for relief and rehabilitation for victim’s families, which shall also include victim compensation and witness protection.
4. Provide justice to the victims of lynching and legal aid services.

Law
1. Revocation of Centre’s notification under Prevention of Cruelty to Animals (Regulation of Livestock Market Rules, 2017) which bans sale of cattle for slaughters which have taken away livelihood for many of the workers in this trading and business.
2. Need for changes in the cattle/cow protection laws in the various states as there is no requirement of private protectors like GauRakshak Dals. Transparent systems and permits for conduct of such business and trading.
3. Hate speech laws are required, to prosecute hate violence instigators and perpetrators.
4. Publishing of data which are of hate crimes and hate speech.

Civil Society
1. Document hate crime and violence including reports to those appropriate
audience to create awareness regarding these practices and bring up issues in the public domain.

2. Advocacy with executive, legislative and judiciary improves the outcomes for victims of lynching.

3. Create wider acceptance that lynching is heinous crime and harms the society.

4. Provide legal awareness and provide legal training to victims, and vulnerable communities on hate crime, accessing justice, obtaining compensation;

5. Provide legal aid, other support to victims to be able to fights cases and obtain justice.

**International community**

1. Encouragement to India for investigation and prosecution of lynchings and other such crimes against minorities, perpetrator or instigators.

2. For now, India needs a support system to help form a legal framework against mob lynching.

3. Encourage India to abide by the relevant international instruments used to deal with such issues and problems.

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CULTURAL RELATIVISM- THE DARK TALES OF UNHEARD CRY FOR AID IN THE VEIL OF CULTURE

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ABSTRACT

The "Universalism v. Cultural Relativism" a warfare dialogue has been highlighted ever since whereby the international human rights law powerfully needs the limelight of the essential fundamental principle of honest play and justice that overshadow culture, society and politics. The aim of this article is to acquire the facts and figures regarding human cultures, discriminatory traditions and cultural practices and overpowering the weaker section of the society.

The cultural differences have created havoc among the people of different countries around the world which lead to the rise of 'Ethnocentrism' and 'Xenophobia' which is still prevalent in present scenario. It has been witnessed about the everyday tragic story of women in this male dominating society whose rights are been violated at the extreme level wherein they are forced into prostitution involving physical and mental torture, human trafficking, gender inequality and endless crimes which is widely acceptable in a culture to make women feel inferior and use them as a means of living but takes the defence to ensure protection and safeguard against the evil society in the name of culture. The innocent children are being brutally trapped in this dirty games of cultural relativism wherein they are sexually abused, gender swapping, child marriages and so on.

It is to acknowledge cultural relativism and social inclusiveness to overcome unfairness and prejudice in order to maintain peace and harmony and creating and developing a domain for healthy interactions between people, groups and different cultural communities all over the world.

Keywords: Human Rights, Universalism, Cultural Relativism, Ethnocentrism, Xenophobia, CEDAW, UNCRC

PROLOGUE

"Where after all, do human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory; farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world." - Eleanor Roosevelt

Human Rights are considered to be a set of principles which provide the basic rights to a human being by the virtue of his birth. These are the natural rights which never depend for their existence on legal basis. It gives human being the pleasure to live a dignified life with respect in the society.
without any fear, harassment or discrimination on the grounds of religion, race, caste, sex or place of birth. Human rights are same for everyone living on this earth - men or women, rich or poor, young or old. Everyone should be set free to live their life peacefully regardless to what we think, where we live or what we believe. A creation of society which have respect for every human being and the acceptance of their culture and traditions what makes the human rights a universal.

Human rights have two opposing perceptions. The first perception forms a view that universalism is considered to be absolute moral structure which rests on the ideology that all humans deserves respect in society provided with their basic rights wherein the laws are universally applicable to everyone from which no one is exempt. The second perception regarding cultural relativism involves a right to exploit people in the name of culture wherein no one dares to raise their voice against anyone's culture which may lead to disharmony and destruction at the same time. It holds the conception that meaning of a right can be moulded from country to country, and culture to culture.\footnote{2. Acharya.\textit{91, Can human rights be universal and have respect for cultural relativism?}, (Mar. 29, 2019, 8:48 PM), http://www.legalservicesindia.com/article/381/Can-Human-Rights-be-Universal-&-Have-Respect-for-Cultural-Relativism?.html.}


The discussion on human rights cannot be isolated from the issue of cultural relativism. Cultural Relativism is considered to be an excuse for the human rights violation and has a strong power over universalism.

There has always been a conflict between Universalism and Cultural Relativism. Universalism refers to the notion that laws
are universally applicable all over the world to every human being where as Cultural Relativists object and argue the notion that human rights depend on their cultures and that no moral, values and beliefs can be made applicable to all cultures, depriving themselves from following the concept of universalism and taking into consideration their own rules and regulations under the label of culture.

Like now, as the Cultural Relativism and Universalism has been elucidated, the question that arises based on these speculations. Whether the notion of universalism can co-exist in this multicultural world?859

A culture cannot be defined as to what is right or wrong but it is the mentality and cultural beliefs which decides the parameter for good and evil. A person's moral beliefs are solely dependent on the kind of environment he was born and grew up in. Living in this contemporary world, we engage in interacting with people from different cultures. As a result, we learnt to respect, accept and tolerate the cultural practices around the world.860 But only those cultural beliefs should be duly accepted having love and support for its people acting in good faith. Returning back to the roots of history, the Sati Pratha in Hindu communities in India involving the burning of a widow to death on her husband's funeral pyre was regarded as the most brutal form of human rights violation till date. Such cultural beliefs has been considered to be horrific in nature and was later abolished by Commission of Sati (Prevention) Act 1987 861. However, this kind of beliefs cannot be approved in this beautiful world of people.

It is true that some cultural practices imposes an obligation especially on a woman to dress in a decent manner without compromising with ethics for instance, the Muslim veil wherein they are asked to remain in their burkhas all the time and not to speak to men. This kind of practice is only valid within the boundaries of Muslim law. Contrary, the Female Genital Mutilation (FGM) practice which is found to be discriminatory and inhumane or degrading treatment of girls and women is accepted under the "so-called" moral principle that it is the duty to safeguard women of their society. In such cases, it is impossible to support culture relativism and defend human rights at a same pace.862

Different people have different ideologies living in the same world but the question is whether a culture will teach its people to violate human rights and behave discriminately against another person? Whether following such dreadful practices make everyone happy and contended? Whether the culture supports the notion of plucking away the freedom of choice from its people? Culture involves the teachings of life from holy books such as Bhagavat Gita, Ramayana, Bible, Gurugranth Sahib and Quran which indicate the love for humanity and society rests on the principle of divine justice without oppression of any kind.

6. Id at 5.
8. Id at 5.
Therefore, the reason why cultural relativism is deemed as violating and discriminatory is because the different cultures are kept into isolation from around the world neglecting the universal human rights where law and order maintains equality among the people as it is quite difficult to raise voice against anyone's culture until and unless the concerned victim takes the initiative for the same.

**COMPLETE ABSTENTION FROM ETHNOCENTRISM - A POSSIBILITY OR A MYTH?**

Ethnocentrism is an act of determining another culture based on their values, beliefs, and standard of living. Ethnocentric behaviour is regarded as a harsh behaviour towards another culture in respect of their traditions, language, customs and religion characterised as living in pride, vanity and having a feeling of superiority. It is believed to draw preconceptions about any culture making them feel inferior and divides the society into in-groups and out-groups.

The live example can be seen in today's era wherein foreign females consider themselves to be superior in comparison to Indian females who they consider inferior in terms of culture, traditions, education, job, dressing, freedom and marriage. The females living in foreign are having a better standard of living to live a dignified life.

Ethnocentrism is an old concept which was seen in the past history and even in modern-day society, here are instances to prove that how harsh ethnocentrism was until today.

**Nazi Germany**: This was the most extreme and tragic form of ethnocentrism. Hitler considered Jews and other communities to be inferior which did not match his ethnicity and does not deserve to live. He slaughtered thousands and thousands of innocent people in concentration camps because they were not of 'pure' race as Hitler considered him to be superior to all of them.863

**Phoolan Devi Case**: Phoolan Devi, popularly known as "Bandit Queen" belonged to a lower ranked Mallah caste and was married off to an older man at the age of 11. She was kidnapped, abused and was Mangrared by the high ranked Rajput men who were dacoits in the village of Uttar Pradesh. She was intentionally targeted to exploit her sexually and insult her caste system.864

**Terrorism and Hate Crimes**: Terrorism and Hate Crimes takes place when one religion or community consider themselves to be superior and powerful. Such outlook creates rift between different religions when others are being treated as inferior, bad and wrong, in such cases, the people begin to hate and disrespect other people's ethnicity which turns violent in the form of terrorism.865

**Donald Trump**: This is an excellent example of ethnocentrism says Kam, William R. Kenan, Jr. Professor of Political Science at Vanderbilt where he always speaks against others. For instance,
protecting his country against the Muslims, building wall between United States and Mexico. The majorities having a feeling of hatred towards Muslim women wherein their hijabs were ripped off, black families waking up to their shock with the hate speech being spray-painted outside their houses. Middle-eastern people including men and women were being accused as terrorists and insulted in front of public. His supporters created countless videos have popped up showing delivery of hatred dialogues against minorities in the name of 'Trump'.

However, it is not completely possible to abstain oneself from ethnocentrism because the discrimination always takes place on many aspects such as racial discrimination, sex, caste and religion. Furthermore, the most cruel discrimination fall out on the underdeveloped countries and uneducated families who are side kicked and considered to be inferior than those living in developed countries. Ethnocentrism not only talks about the superiority of one's own culture but it is the matter of thoughts, emotions and feelings inculcated in humans to think and make assumptions on their own. Once the perception is formulated against a particular community, that remains forever in the minds of people as a result of halo effect.

Therefore, if the concept of ethnocentrism is to be dissolved then it is possible only by bringing change in our conceptualization and inculcating discipline in one's life in order to create a new world free from biasness and discrimination. The students in educational institutions all over the world should be taught about unity, brotherhood and respecting every religion and culture thereby living a peaceful life.

**XENOPHOBIA - THE FEAR FROM HORRORS OF OUTSIDE WORLD**

The expression "Xenophobia" has been split into two segments, 'xenos' meaning stranger and 'phobos' indicating fear. It mentions the intense and irrational fear that people have against people that is bizarre and weird especially the foreign nations or ethnic backgrounds. Xenophobia has been categorized into two kinds. The first classification involves cultural fear wherein the phobia is against the elements of a particular culture including language, clothing and religion. The second is against the members of the group who are been blacklisted from being a part of the society, that befall usually during a mass immigration which receives a strong reaction ranging from small scale to large executions of apartheid and genocides. Xenophobia is an intentional act involving violence, hostility, direct discrimination and incitement to hatred. Its main aim is to denigrate, humiliate and hurt the "connected" group of people.

Article 2 of the Universal Declaration of Human Rights, 1948 clearly states that - "Everyone is entitled to all the rights and freedoms set forth in this Declaration,

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without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."  

Xenophobia has always created terror in the intellect of people regarding various discriminations wherein it has greatly affected people in the course of human history.

**Brown v. Board of Education of Topeka**

Oliver and other plaintiffs who were African-Americans were denied admission into a public school attended by white children based on laws allowing public education to be segregated by race. The following case concerns the application of the equal protection clause to the right of education. The US Supreme Court decided that the existence of schools segregated according to racial criteria amounted to a breach of the equal protection clause, and ordered that the school system be overhauled in accordance with the ruling. 

**Ku Klux Klan** : This clan was formed by the soldiers of the confederate army of civil war. The main objective was of spreading all-whites supremacy across the United States. They targeted freed slaves through threat and violence. Its members were convicted of murdering civil rights workers and black families. In present situation, many people consider this group as a terrorist organization wherein their ideologies matches the xenophobic nature.

**Human Zoos** : The xenophobic tendencies were shown in the early Europe wherein people from Africa, Philippines and other tribes around the world were trapped and displayed in the zoo with exotic animals. Nowadays, xenophobic policy has been increasing in many parts of the European countries where anti-Jews and anti-Muslim runs epidemic.

**Rape of Nanking** : During the Second World War, when the Japanese invaded China wherein the Chinese people to their shock witnessed the rape of Nanking which included torture, rape, deaths of babies and women.

**Kanto Earthquake** : Koreans in large number were convicted and imprisoned and were later killed due to the suspicion of poisoning the water supply after the Kanto earthquake. The xenophobia is still prevalent today as the law regards the ethnic matters with low-priority in the legislative procedure.

**Apartheid** : Until Nelson Mandela and African National Party passed anti-Apartheid legislation, Indian history witnessed extremely lasting impression in South Africa wherein Blacks were denied citizenship, healthcare facilities and basic
facilities that were required in the daily lives.\footnote{877}

**Rwanda's Genocide**: The rift between majority Hutus and minority Tutsi began with civil war and political competitiveness wherein several Tutsis were murdered within a period of hundred days. A method of 'ethnic cleansing' deemed as a form of genocide was adopted where numerous Tutsi women were raped in full public view. The media and channels like Radio Rwanda were accused of propagating anti-Tutsi sentiment in that period and also the listeners were provoked and motivated to kill 'Tutsi Cockroaches'.\footnote{878}

**Indian Caste System**: The caste system in India which is categorized into several levels of caste divisions involving Schedule Caste, Schedule Tribe, Other Backward Classes. The discrimination with Dalits, lower caste Hindus regarded as the poorest section of the society are treated inhumanly.\footnote{879} However, the after effects of Xenophobia are extremely serious and tragic. It is now a high time that appropriate measures are taken by the government, media and the general public on grass-root levels to curb such practices growing out of prejudice and fear.

**VIOLENCE AGAINST WOMEN IN THE NAME OF 'CULTURE' IS PANDEMIC**

In our Hindu mythology, we witnessed how women were sexually assaulted and harassed in those times. In *Ramayana*, when Sita was abducted by Ravana wherein she was forcefully made to stay in the Ashoka Vatika in order to marry her and aftermath Lord Rama asked Sita to give a fire test (*Agnipariksha*) to prove her purity publicly. Similarly, in *Mahabharata* when Pandavas lost a dice game to Kauravas wherein they had put at stake all their properties even their wife Draupadi. In the later part, Kauravas tried to insult Draupadi in open court by disrobing her sari (*Cheer Haran*) wherein she was protected by Lord Krishna. In many cultures, we observe that gender injustice has always been an issue since ages as most of them considers men superior and women inferior. Women has always been considered as a puppet wherein the strings are controlled according to the culprits and the pain and suffering are carried by the female victims. Although, these cultural practices aims at protecting women from evil eye, they fail to differentiate between right and wrong.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines the rights of women to be free from discrimination and sets the core principles to ensure women have equal access and equal opportunities in public and private life. The CEDAW convention carries with it the obligation that are legally binding on states while also establishing a monitoring mechanism for individual state parties as well as the possibility for individuals to lodge a complaint to the CEDAW committee. Customs and Culture often override considerations of state obligations under CEDAW.\footnote{880}
A large number of cultural practices are harmful to the individuals involving women and children wherein they are harmed either through undurable physical pain while others are subject to humiliating and degrading treatment. Such horrendous traditional implementations emanate from deeply rooted discriminating views and beliefs about the role and position of women in our society. The gender differentiation in the society relegate women to remain inferior throughout their lives and maintain the position of subordination which is been legitimized and sustained with the gender-based violence. Women are being physically, mentally, emotionally and economically ill-treated and tortured by the people of their society.\(^\text{881}\)

For instance, in the countries like South Africa, Lesotho and Swaziland, there is an outlandish belief that of any male engaged in a sexual intercourse with a young virgin girl, he would be able to cure HIV and AIDS which lead to the increasing sexual offences against girls resulting in psychological scars on their heart and mind.\(^\text{882}\)

**Khap Panchayat:** The "Honour Killing" is very popular among villages in India as a young couple being in a relationship is regarded as bringing shame and dishonour to the family. The inter-caste marriages, love marriages or a marriage of a higher-caste girl and lower-caste boy has not been sanctioned by the traditional caste norms. If such circumstances arises, then Khap Panchayat takes a strict action against the couple and they are put to death or if any family member gives approval to such marriage would also be punished by the caste panchayat and resulting in social boycott.\(^\text{883}\)

**Sexual abuse in Turkey:** In Turkey, the Syrian women migrated to turkey face many forms of violence such as sexual harassment, forced marriages and trafficking by soldiers and border officers.\(^\text{884}\)

**Hudood Ordinance in Pakistan:** It is not always the cultural communities involved in violating women rights but several times it is the legislation that is acting against the interest of the women. The Hudood ordinance of Pakistan held that women convicted of extra marital offence would be publicly whipped and stoned to death.\(^\text{885}\)

In Brazil, the criminal law defines crime from the perspective of culture. The offended party, a women, if she makes an accusation she has to come within the category of a 'Pure and Honest' women, otherwise the case is unlikely to be investigated.\(^\text{886}\)

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28. Id at 27.
"Lotus feet" in China: Foot binding or "lotus feet" is a cruel ritual in China that begins once a girl is aged five or six years recent. The first step in the procedure involves wherein her feet are plunged in hot water and her toe nails are trimmed. Secondly, the toes were massaged and oiled and then broken and bound flat against the sole, which takes the shape of a triangle. Thirdly, the feet would be bent double and then bound using a silk strip. After the gut-wrenching process, in order to break the arches of the feet and crush their little feet, the girls were forced to walk long miles. The inappropriate reasoning behind such practice was that a girl with small feet were regarded as beautiful that was a sign of wealth and marriage eligibility.

Jirga System in Pakistan: Jirga system has been formulated in Pakistan wherein the members consists of all male council of the village. The purpose of forming this system was to punish females if the male family member commits any crime which is derogatory in respect of traditional customs of the village. In the Mukhtar Mai Case, the brother of Mukhtar Mai had fallen in love with a woman who was elder to him, this was against the culture of the village and to inflict a punishment on the victim, she was gang-raped in open public view in order to take revenge from her brother.

Mohammedan Laws: The personal laws of Muslim community has been showcased as the most terrible form of laws which violates women rights such as Triple Talaq wherein a husband has a right to divorce her wife at any point of time just by uttering the three words "Talaq, Talaq, Talaq" either through face-to-face, or by an e-mail or through a telephonic conversation or at any other place. The another violating law to be known as Muta Marriage which is quite prevalent in Dubai and Iraq. The literal meaning of Muta marriage means "marriage for pleasure" wherein the marriage could be of one day, one week or one year as an intriguing way of relieving sexual frustration and the bride gets a sum of money in exchange. The third right infringing law which is popularly known as Halala Nikaah wherein if a husband divorce his wife and if both of them want to reconcile then a condition applies to the woman that she have to marry another man consummate her marriage with him and then she is permitted to return to her first husband. Lastly, Muslim laws has given a privilege to men that they can marry more than one woman at the same time committing the offence of Bigamy and Polygamy.

Force-Feeding Young Girls: A horrid turn in every girl's life in North Africa's Mauritania, a practice called "leb louh or gavage" wherein young girls are forced to fed on an unhealthy diet and high calorie diets reason being to get an appealing suitors for such girls. The young girls aged six are sent to special "fattening camps" where they are forced to have at least two kilograms of millet, litres of milk and two cups of butter.

every day taking around 16,000 calories and if they don't comply with such practice they are punished and if they throw up then they are sometimes forced to ingest their vomit.\textsuperscript{892}

**Menstruating Women Removed to Cattle Sheds** : The practice of “Chhaupadi” in the parts of Nepal is a tradition wherein a menstruating women are isolated and removed to cattle sheds. They have to sleep, eat and remain among the cows and buffaloes and they are forbidden to enter their houses and touch anything till their duration of menstrual period is completed because she is considered as 'impure' during their periods, and if anybody touches her, they would have to undergo through rituals and customs to purify themselves.\textsuperscript{893}

**Finger Amputation To Mourn Death** : In Papua, Indonesia, the members of Dani tribe have an usual belief that if a death takes place in the family, they cut-off the top part of their fingers to mourn death as a sign of grief. Although, death has a huge affect on everyone equally, but only women is entitled to this torturous ritual. Sometime before the part of the finger is cut, it is tightly tied with a string to let it go numb and after the amputation the finger tips are sanitized. It has been believed that death being a permanent loss, the grief of emotional pain manifests into visible physical distress. This practice has been banned, but we can find the older women with chopped finger tips.\textsuperscript{894}

**Lip Plating** : In Ethiopia, women belonging to Mursi and Surma tribes has a tradition of wearing large circular wooden or clay discs on their lips marked as a status of being beautiful. A hole is made into the lip along with the removal of two or four lower teeth. It is believed that the larger the disc is inserted, the larger amount of dowry is received by the girl on her wedding. The purpose of this ritual has not been originated as a beauty enhancement mastery but the intended disfigurement is meant to keep the slave traders at bay.\textsuperscript{895}

'Sexual Cleansing' of Widows : In the parts of Tanzania and Kenya, the custom dictates that women have to undergo a ritual of 'sexual cleansing' wherein they are forced to have sex with one of her brothers-in law to exorcise the spirit of her dead spouse, then only they are inherited by the in-laws family. In such a case, women's chances of getting the risk of contracting sexually-transmitted diseases increases. Taking into consideration such a risk, male relatives refuses to have sex with the widow due to HIV epidemic. For this purpose, professional cleansers are hired to perform his job using condom as a taboo. It is considered that only cleanser's sperm has the power to 'cleanse and purify' the widow.\textsuperscript{896}

**Witch Branding in India** : Women in the villages of India are regarded as witches if they bring bad omen to the family or village for instance, the death of a child, a meagre harvest, a deadliest disease outbreak in the village or bad weather. They are accused of sorcery and if they found to be guilty they branded as witches and hunted. Later on,

\textsuperscript{39} Id at 38.
\textsuperscript{894} supra note 38.
\textsuperscript{895} Id at 40.
\textsuperscript{896} Id at 40.
they are hanged to a Peeple tree and are either stoned to death or burned alive.\textsuperscript{897} However, these cultural practices proved to be a disaster for every woman around the world wherein their growth and development has been terminated since past scenario and are lacking behind on various aspects such as education, freedom, healthcare facilities etc. which is a necessity for females to survive.

\section*{INDIGNITY OF WOMEN: WHERE PROSTITUTION IS A TAINTED TRADITION}

Prostitution is considered to be a tradition in some parts of India for violation of women rights and dignity. There are many small clusters in the urban areas of India wherein the entire place is known as "red light area" which has been inhabited only by the prostitutes. No girl or woman would like to choose her profession as a prostitute until and unless they feel helpless and have no option but to accept the reality. Many poor families in certain scenarios force their girl children and women to enter into the prostitution as a means for their living. There are many small towns and villages where the prostitution is treated as a traditional practice.

\textbf{Nats Purva Village} : Nats Purva, a small village in Uttar Pradesh regards prostitution as a traditional practice and basically a trade which is passed from generation to generation where in their culture girls and women are considered superior than men as they are sole breadwinners for their living.\textsuperscript{899}

\textbf{Bachara Tribe} : It is located in the west of Madhya Pradesh, where prostitution is treated as a famous tradition. In the Bachara Tribe, the eldest daughter of the family enters into the world of prostitution for the sake of her family as a means of living. Once the eldest daughter gets older, the younger daughter takes her place. The only way to get rid of this distress life for a woman is when the suitor agrees to pay an expensive sum of dowry to her parents according to their demands.\textsuperscript{900}

\textbf{Bedia Community} : It is located in Madhya Pradesh wherein culturally, women earn living through prostitution and the entire house is run by women only.\textsuperscript{901}

\textbf{Devadasi System} : A Devadasi literally means "God's Female Servant". Devadasi System has been turned down from a religious custom to a women's exploitation. Girls were married off to the 'local' God even when they did not hit the age of puberty. Such women would enjoy high status in their society when they were married to kings living a luxurious life and avoiding participation in domestic chores. Even in today's era, where this tradition had been abolished long back is still prevalent wherein women are forced into prostitution in the parts of Andhra Pradesh, Maharashtra, India.\textsuperscript{902}


\textsuperscript{46} . Id at 45.

\textsuperscript{47} . Id at 45.
Gujarat, Tamil Nadu and Karnataka. Now the situation had become adverse, when a woman is married off to anybody who bids the highest on her virginity thus, her sexual exploitation.902

Wadia Village: Wadia Village is located in North Gujarat where this area is famous for prostitution as the birth of a girl is celebrated like a festival because they get a breadwinner for their family. The girls born in this village are groomed to be a prostitute beginning at the age of 12 and boys are trained to be as pimps. Men travel to Wadia from far places like Mumbai, Rajasthan, Ahmadabad and even Pakistan to buy sex with rates ranging between INR 500-10,000.903

Hence, women and girls are kept in a dark corner of this awful world of prostitution wherein their profession is decided even before their birth, living a life of a prostitute to support her family financially.

VIOLATION OF CHILDREN'S RIGHTS: MALEVOLENT PRACTICES BASED ON CULTURE, TRADITION, RELIGION OR SUPERSTITION

The trend of using young children and infants in the malefic practices subject to culture, religion, tradition or superstition has been at its peak as they clearly lack the capacity to give consent or refuse to consent themselves. Being small kids they do not have the understanding of worldliness. The "Parental Powers or Rights" over their children allows the perpetuation of these detrimental practices by the parents directly or by some other individuals obtaining parental concern either assumed or actual. The UN Convention on the Rights of Child (CRC) has been ratified by almost every state, and has made the most vital replacement of the words wherein parental "rights" has been swapped with parental "responsibilities" as it is the duty of the parents to corroborate the best interest of their child and this should be their basic concern.904

There are many malefic practices that are gross and unlawful wherein the rights of children are been violated and put to test. Such practices may include:

Bacha Posh: In Afghanistan, there is a disreputable practice known as "Bacha Posh" wherein a girl is required to dress up and disguise as a boy. This tradition has been accepted by almost every girl as they get all the freedom as given to a boy to live a happy life such as right to education, stepping out of the house and playing with friends, permitted to do a job and so on. There are many interviews taken of the girls been targeted to become bacha posh which had been uploaded on the website of bacha posh wherein they communicated that they are living a happy life as a boy. One of the stories portray that a girl agreed for the acceptance of bacha posh so that after becoming a boy she can support her ill mother financially. Although, these girls

48. Id at 45.
49. Id at 45.

accepted their life as bach posh but still it is discriminatory on the ground of gender.\textsuperscript{905}

**Bacha Bazi:** The "Bacha Bazi" is an ancient tradition in Afghanistan wherein a boy who is either orphan or belonging to a poor family is forced to dress up like a girl and used as sex slaves by the wealthy men in the community. The boys are trained to dance and sing in front of wealthy landlords in cheap parties as a means of entertainment wherein they are sexually abused.\textsuperscript{906}

**Child Soldiers:** Children are abducted and recruited by force to become soldiers in armed conflicts at a very young age serving in government forces and armed opposition groups. They are assigned with malefic jobs such as fighting on the frontline, participating in suicide missions and acting as spies or messengers. Many girls are used as a sex slave in such situation.\textsuperscript{907}

**Kamalari System:** In Nepal, many girls belonging to poor families are forced to educate both children and adults to rescue children from living a life of suffering.

**Ritual Killings:** In many countries like India and Africa, there is a superstition in respect of children wherein they are tortured, murdered and sacrifice their life to spirits to cure disease, obtain wealth or increase superstitious powers.\textsuperscript{909}

With a speedy increase of heinous crimes against children, this issue has to be addressed at high levels through comprehensive programmes. In order to expose this light of crime, grass-root level of work has been taken in hand by the NGO'S like Save the Children, CRY and many more to educate both children and adults to rescue children from living a life of suffering.

**EPILOGUE**

Culture creates a beautiful framework of traditions, customs, rituals, language, dress, faith, religion, food, art, music, dramatics etc. which allows its people to enjoy the freedom of practicing them. It sets certain principles for its members which helps them to differentiate between right and wrong and inculcate goodness in oneself. Cultural Relativism cannot be completely abstained from its people and declared as a method of human rights violation just because these traditional practices have been wilfully accepted by the individuals of their respective states as nobody wishes to stand against their culture. The reason to follow such practices may include family reputation, a peaceful life to avoid conflicts, considers their culture to be right and superior etc. Everyone have their own perception regarding different cultures one may see it as acceptable the other may criticize the same as being a violation of human rights. The weaker section of the society that is women and children are regarded as the most targeted group for creating terror and disaster leaving psychological scars in their life. All the


\textsuperscript{54} Id at 52.

\textsuperscript{55} Id. at 52.
women around the world speaks one single language - the language of silence as they are the neglected group of society. Everyone deserves their rights and freedom and to ensure this it is very essential to enforce fundamental doctrines to be made universal. Not every cultural or traditional practice could be disconnected from its people but the most grievous forms of practices such as slavery, physical torture, sexism, xenophobia, female genital mutilation, ethnocentrism, infanticide must be dragged to universal standards.

A person if full heartedly respects his culture are the values that are been taught to him but to emotionally attach oneself and flow with the sentiments consolidated with religion, caste, traditions and rituals to the point that fair play, truth and justice becomes peripheral, then such education, knowledge and wisdom are fruitless.

TORTURE AS OFFENCE, CULTURE AS DEFENCE!!!
INTRODUCTION

The Indian constitution guarantees its citizens equality in all aspects of life, but the reality is that in every community, there exist diverse people belonging to all strata of the society and this leads to social and economic inequality, creating different marginalised groups. Such groups face irreversible discrimination from the dominant members of the society. The Encyclopaedia of Public Health defines marginalization as, “To be marginalized is to be placed in the margins, and thus excluded from the privilege and power found at the centre.” Latin observes that, “‘Marginality’ is so thoroughly demeaning, for economic well-being, for human dignity, as well as for physical security.”

In general, the term ‘marginalization’ or what we refer to as ‘social exclusion’ in simpler terms, describes the overt actions or tendencies of human societies, where people who seem to be undesirable or without useful function, are excluded. These people form a GROUP or COMMUNITY for their protection and integration. Marginalized people have little control over their own lives and the resources available to them, not by choice but by the status quo, thus rendering them unable to contribute towards society.

The lack of optimism and support which prevents the marginalized from participating in the local social life sets up a vicious cycle which leads to further isolation creating an immense impact on their development as well as on society at large. For addressing the issue of Marginalisation, the objective is to create an environment for people to enjoy a productive, healthy and creative life. It deprives a large majority of people from participating in the process of development. It is a complex problem, and there are many factors that cause marginalization which need to be addressed at the policy level.

HISTORY OF MARGINALIZATION IN INDIA

When one turns the pages of the glorious Indian history and looks closely, right in between the lines glorifying certain rulers and ages and describing the gone eras, there lies latent mention of a peculiar form of social exclusion that based on caste. Caste, in simple terms, is a form of social stratification of different classes in Hinduism based on the ‘purity’ and ‘pollution’ of the caste. Right on top of this
Hierarchical order stood the ‘Brahmins’, those who were well-versed with the religious texts. Warriors and rulers followed the Brahmins as ‘Kshatriyas’, who in turn were followed by ‘Vaishyas’, the working class of peasants, traders, merchants etc. Right at the bottom were ‘Shudras’ the lowest caste who were those who did tasks which were ‘menial and dirty’, thus earning them the tag of being ‘untouchables.’ Interestingly, this stratification was based on the occupation of an individual but was fixed by the occasion of birth- a child born to a family of Brahmins would remain a Brahmin till he died. Same was the case for the other castes as well.

Naturally, the ‘Shudras’ were considered to be polluted and untouchables, which led to their social exclusion. They had separate tanks to drink water from, separate parks, separate fairs etc. Simply put, their lifestyle lacked a solid base where grassroot work can be done. This shows that marginalisation exists in every sphere of the community which is not only caste-based as even gender and physical structure of human beings puts them under such categories.

THE MARGINALIZED- WHO, HOW AND WHY: India is home to many marginalized groups. Over the years, this list has just become longer. The following are some of the most vulnerable of India’s marginalized-

1. **Dalits and Scheduled Castes**- Dalits have been the recipients of marginalizing behaviour for a long time now. It started as a part of social stratification based on occupation and fixed itself terribly in the Indian setup. Untouchability, caste-distinction and consciousness, social exclusion- all are the methods and consequences of their marginalization.

2. **Scheduled Tribes**- Tribes find themselves far-removed and socially excluded not just
because of their geographical distance but because of the vast culture difference between them and those living in the urban-rural setup. Historically, tribes never tried to fraternize with those living outside the forests and thus never participated in the education and other facilities which created a wide chasm of differences and unequal footing, ultimately leading to their marginalization.

3. **Women** - The ‘fairer’ sex is now the butt of lewd and inappropriate jokes and many are excluded from society because of the orthodox mindsets of their families and their own dependency which makes rebelling or changing tough. Women have now gained the status of always being on the periphery of the core family as either daughters, wives or mothers- whether it comes to their private decisions or the fundamental policy decisions.

4. **Religious Minorities** - Muslims, Sikhs, Christians, Parsi and other people belonging to different religions in India form the ‘minority’ in the predominantly Hindu but secular India. As the second largest religious group after Hindus Muslims face the brunt of marginalization more than the followers of any other religion in India. Their culture and festivals are hardly celebrated with great pomp and show as Hindu culture and festivals are and political leaders see them, along with Dalits and SCs, as mere vote banks to help them with their electoral wins.

5. **Ethnic Minorities** - People from the North-East are heavily stereotyped and marginalized.

6. **LGBTQ+ Groups** - Due to their different sexual orientations and views, people of the LGBTQ+ community are now being marginalized and often are subjected to violence. While they may have faced legal recognition, courtesy the judgments by the apex court which removed homosexuality from Section 377 of the IPC and recognized the third gender, they still have a long way to go for social recognition and acceptance.

7. **People with Disabilities** - People with physical disabilities find themselves excluded socially where people tend to either sympathise with them but treat them pathetically or avoid them entirely. The lack of application of principle of equity is evident as many institutions still lack facilities like wheelchair accessibility etc., which makes people with disabilities unable to enjoy the benefits of these institutions.

8. **Poor People** - Surprisingly, poor or lower middle-income groups are finding themselves being marginalized by those who belong to wealthier and ‘elite’ classes because of their starkly different lifestyles and thinking processes/mentality.

9. **Addicted Youth** - The youngsters who are battling addictions often find themselves alone and marginalised and are vulnerable to violence and even exploitation at the hands of the suppliers who supply them with the substances they are addicted to.

10. **The Elderly** - The elderly in our society now find themselves marginalised as they find themselves dependant on their

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914 The Supreme Court held that Section 377 of the Indian Penal Code 1860 was unconstitutional “in so far as it criminalises consensual sexual conduct between adults of the same sex” in the landmark judgment of Navtej Singh Johar & Ors. v. Union of India W.P. (Crl.) No. 76 of 2016

915 National Legal Services Authority v. Union of India W.P. (Civil) No. 604 of 2013
children after retirement and are also more vulnerable to either being hurt or abandoned or, if they are independent, to thefts and robberies.

11. People with Mental Illnesses—People battling mental illnesses like depression, anxiety, schizophrenia etc. are ostracised and they often do not speak out for the fear of being marginalised. Those who do speak out find themselves being ridiculed and shamed as ‘crazy’ and ‘mental’ due to the stigma against mental illnesses which leads to their deteriorating mental health.

12. People with Venereal Diseases—Due to the existing stigma against Sexually Transmitted Diseases (STDs) and misinformation that it spreads by mere physical contact, those who suffer from STDs are shunned and often find themselves without work which leads to deterioration of their health and lack of funds to get treatments.

CURRENT LEGAL SCENARIO AND EXISTING REMEDIES

The United Nations has continuously expressed concerns over the “deteriorating” human rights conditions in the country, adding that all the marginalised groups were feeling insecure. Many groups in India remain marginalised while facing entrenched discrimination, violence and neglect. SCs and STs regularly face structural discrimination and from the historical point of view, they have also been subjected to societal exploitation. They constitute a large proportion of casual laborers, industrial laborers etc. These people remain landless with little control over resources such as land, forest and water. This has resulted in poverty among them which further leads to low levels of education, poor health and reduced access to healthcare services. They are less likely to afford and get access to healthcare services when required. They are practically deprived of many civic facilities and isolated from the modern and civilized way of living for many centuries. The Infant Mortality Rate among Scheduled Castes is 83 per 1000 live births while it is 84.2 per 1000 per live births among the Scheduled Tribes. Other forms of exploitation include early marriage, forced prostitution, trafficking etc. In cases of caste conflict, women face sexual violence from men of upper caste and other forms of mental torture and humiliation.

Most marginalised sections of Indian society include Dalits (SCs) and Tribals (STs) and they are facing atrocities for centuries now. These atrocities are present in various forms, for instance in the case of Kizhavenmani in Tamil Nadu in 1958, 44 SCs were burnt to death in a confined building because SC agricultural laborers sought a little raise in their very low wages. The High Court acquitted all the accused. In the Indian society, caste structures are dominant in the


916 Ali, All Marginalized Groups are Insecure, The Hindu, NEW DELHI, DECEMBER 08, 2012.
form of endogamy and honour killings are prevalent on a wide scale. In the case of BhagwanDass v. Delhi it has been deemed that honour killings are the “rarest of rare” category of crimes that deserve the death penalty.\(^\text{920}\)

In present times women are also under marginalized section of the society and even though their position has been improved, there are still cases where they suffer from deeply sexist and humiliating behaviour. Death sentence to Nirbhaya's rapists\(^\text{921}\), the case that shook the nation more than six years ago is still branded in our minds as a representation of everything that is wrong in our nation – from the way we treat our women to the faulty judicial system. Even though the four accused were convicted, it was only last year that the Supreme Court upheld the much-debated death sentence while the sixth accused, a juvenile, was able to walk free after three years in a juvenile home. This may have led to amendments in our Criminal law, yet these amendments haven’t deterred potential and existing offenders.

The important question therefore is where do the marginalized groups stand today? Though there has been some improvement in certain spheres and despite some positive changes like promotion of inter-caste marriages, the standard of living for the marginalized communities has not improved yet. The Indian Government has introduced various ways to control atrocities against marginalised groups which are visible in the Indian Constitution, Indian Parliament, and various state legislatures that have stringent provisions against atrocities targeting SCs or STs. Following are the provisions present under Indian constitution:

**Indian Constitution**\(^\text{922}\)-

✓ **Article 15** seeks to prohibit discrimination on the grounds of religion, race, caste, sex or place of birth.

✓ **Article 17** seeks to abolish ‘untouchability’. The institution of ‘untouchability’ refers not just to the avoidance or prohibition of physical contact but to a much broader set of social sanctions.

✓ **Article 21A** makes education free and compulsory for children between 6-14 years of age, thus giving underprivileged children the chance to uplift themselves.

✓ **Article 46** – promotes the educational and economic interests of SCs, STs, and other weaker sections of the society and to protect them from social injustice and exploitation.

✓ **Article 338** – National Commission for Scheduled Castes

- Its functions include among others:
  1. investigate and monitor all matters relating to the constitutional and other legal safeguards for the SCs and to evaluate their working;
  2. inquire into specific complaints with respect to the deprivation of rights and safeguards of the SCs;

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\(^{922}\) Constitution of India.
In 1989, the Government of India passed the Prevention of Atrocities Act (POA), which delineates specific crimes against Scheduled Castes and Scheduled Tribes as atrocities and describes strategies and prescribes punishments to counter these acts. The Act attempts to curb and punish violence against Dalits as it identifies what acts constitute “atrocities” and calls upon all the states to convert an existing sessions court in each district into a Special Court to try cases registered under the POA. The Act is a transformative act and a ‘Brahmasstra’ in the arsenal of hapless Dalits to fight their historically asymmetrical war of subjugation. The judgment of Subhash Kashinath Mahajan vs State of Maharashtra should be used as an opportunity to investigate this dimension rather than weakening the act. The most important thing to do for ending discrimination and improving fraternity is persistent societal action. The Supreme Court in the case of Lata Singh vs. the State of UP has opined that inter-caste marriages are in the national interest as they destroy the caste system, enabling promotion of overall development of the nation and ending the notion of marginalisation. POA acts as a tool in this endeavour rather than an end in itself.

Laws are used as a means of creating the most important output of government for citizens in society. And the laws in India regulate economic and social conditions to a greater extent than laws in most other countries do. The laws can be used to create burdens as well as benefits. Hence, law should play the dominant role in protecting the rights of the depressed sections of society. The one way to improve the condition of Dalits is to enforce the laws made for their protection right from the grassroot level. Officers from the government should be appointed with special powers to ensure that the discrimination against the Dalits is stopped. Primary education should be made compulsory not only by law but should be put into practice also. The State Governments should come out with a concrete plan whereby Grievance cells should be formed in each state which would have an officer and an investigative team which could go to the interior villages and find out the true facts about the harassment of Dalits and then report to the officer.

CONCLUSION


The list of marginalized people has now increased to include poor people, youth with addiction issues, old and ageing people and members of the LGBTQ+ community along with caste groups, ethnic and religious minorities, women, people with disabilities and tribes- all of whom are in a very vulnerable position. The best way to move forward would be using education and skills as tools to empower these groups to stand independent financially and emotionally. Education and skills would help these groups identify and ultimately, achieve their potential to the maximum. There are enough laws and regulations in our country that address the issues faced by these groups and the remedies available to them- it now falls on the society at large to make these groups aware of their basic rights and recourse to legal remedies.

The best way forward, apart from education, is through social changes. Animosity against the SCs, STs and other such groups for whom seats are reserved in educational and vocational spaces has increased over time because of the misuse by the creamy layer belonging to these groups. People need to be made aware of the true state of affairs where those for whom this facility was meant are still lagging behind, cocooned in debts, poverty and lack of basic amenities while the privileged few of their group are the ones benefiting. This again brings us to the moot problem of faulty implementation of the various welfare schemes of the Government, which must be regulated. The marginalization of women can be tackled through the battle of feminism only if people grow sensitized enough to understand the injustice women have suffered and the treatment they have undergone.

Most importantly, we should be made aware as to why positive or beneficial discrimination (like reservation) is necessary to uplift marginalized people- it helps in their upliftment which would negate the amount of discrimination they have faced for all this while. Only a clear and unbiased understanding can help rectify the situation we are finding ourselves in. The ones wronged shall continue to be wronged till those who can empower them step into the picture. As Janet Mock said, “When marginalized people gain voice and centre their own experiences, things begin changing. And we see this in all kinds of grassroots movements.”

ABSTRACT:
In recent years, the human body has confronted a lot of complex and considerable advancement in the field of medicine and biotechnology. Now, in the field of law, the human body plays a critical appearance. How a human body is related to a property? Can ownership rights be subjected to the parts, tissues, and cells of the human body? Essentially, we need to know what is a “property”. A property is widely considered as an object, thing or an element is owned by a person. When something is contemplated as a property then the owner has the right of possession, disposal, use or demolition, which is termed as “ownership”. Now, will these interpretations of property and ownership be suitable to a human body, parts, tissues, and cells? According to law, when a property right is given to any of the cases, the subject must be settled in every aspect. It must be morally, legally, constitutionally resolved. But, in this case, there are many unsettled issues. The legally unconvincing conditions are prostitution, abortion, suicide, euthanasia, slavery and, related topics. Even after examining these legal complications should property rights must be given to the human body? This article explains how a human body is studied as a property, what are the current legal status, strengths, and weaknesses of recognizing property rights over a human body. The author illustrates the various decisions and judgments so far. This article demonstrates the probable consequences of recognition of property rights over the human body will reflect.

INTRODUCTION:
Do we OWN our own body? Many people may think that the answer would be yes. But legally and technically speaking no people have right over their own body or others. Is our body a property? Who are we then? We could answer this question in different ways. We may be the mind, we may be the body, we may be the spirit or flesh or anything that the man desires. But, in each case, the contrast arises that the realization of the body is indeed a kind of stranger over which we have utterly no control.

In the famous American case, Henrietta Lacks was a young woman who died of cancer in 1951. During her treatment, a sample of her cervical cells was sent to a laboratory for research purpose without her consent. And those cells were the first human cells to manipulate outside the human body. And those cells were sent to the HeLa cell line which is one of the largest cell line industry. And fifty years later those cells were used to earn a multimillion-dollar as it was used to cure various diseases. And the family of Lacks has no idea of those cell line. Do any of her relatives have the right to demand the share over the profit earned by her cells? Did Lacks herself owned her body?

Even if it is claimed that we should not go quite that far, we are still in detail that impressionistically – about why we treat body parts as so different from other things. We do not have an exact answer to questions like these, with a catch that bodies are not
like other things. If they are not, we need a clear account of what the difference is, and what is the difference of rules that explains the giving of organs from the giving of other things.

The definition of property is defined in Black’s law as, “The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.”

An author described this philosophy as follows: “Natural persons are distinguishable from things, this being a bioethical imperative derived from the prevailing Kantian philosophy that insists that human persons be accorded nothing less than full human dignity and not be relegated to the status of sub-humans or objects. Recognizing free will as the basis of moral right, Kant deduced the right of private property from the fact that the human will must be capable of exercising control over things. Accordingly, we may explain the absence of legal ownership of body materials naturally contained within or upon a living person by concluding that such materials are part of the person.”

THE CURRENT STATE OF LAW:
According to Black’s law dictionary, ownership is defined as, “He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he is prevented by some agreement or covenant which restrains his right.”

It can be told that the definition of ownership indicates the right to buy, sell and possess a particular object or thing. But a body is never an object to be owned and, the definition of ownership does not apply to the human body, its parts, tissues and, cells. The human body is an array of living tissues and cells.

The countries like the UK do not recognise the property rights over the body. These were initially seen and dealt with the corpses. But in a peculiar case of *R v. Bentham* 928, the living bodies were also included. In this case, the defendant committed a robbery by giving an impression that his hand was a gun which was concealed in his leather jacket. He was charged for possession of imitation firearm, but because he cannot be charged for the possession of his own body part, this was overturned by the House of Lords.

The recent and famous California case *Moore v. Regents of the University of California* 929 spots about the ideas and ramifications that would help to get an explanation regarding the property rights. This case talks about the non-consensual use of plaintiff’s cancerous MO spleen cells to develop a million-dollar pharmaceutical products using recombinant deoxyribonucleic acid technology. The plaintiff contended for the conversion of his property and was, therefore, entitled to share the profit which was acquired from trading the cells. The Supreme Court of California held that there are no property rights over the substances and tissues extracted from a human body. And the plaintiff would

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929 *Moore v. Regents of the University of California*.  

www.supremoamicus.org
acquire compensation only for not obtaining the consent of his and not for the conversion of property.

In this situation of suborning, the selling of body and the body tissues will be a very profitable business. Once the right of ownership is given, then there is a lot on the plate to be approved linked with the ownership rights.

In the case of Venner v. State\textsuperscript{930}, narcotics were found in the defendant’s faeces in the hospital bedpan which was seized by the police. The legality of the seizure is depending on if the defendant has a property right over it or not. The Court of Maryland stated that a person has no right over the body and the substances removed from it. Thus, the seizure is found to be legal and it states that there are no property rights applied.

If the person is given the right to ownership, then he is allowed to sell his body parts. And definitely, there will be other arguments regarding the sale of their whole body while a part of their body is sold. Thus, the concept of property rights is itself fundamentally wrong because it gives rise to various other constitutional issues.

In the other famous case of Browning v. Norton-children’s Hospital\textsuperscript{931}, the plaintiff was admitted in the hospital and after learning four weeks of amputation surgery, his legs have been incinerated. He has suffered a severe mental torment and agony. The Kentucky Court of Appeals rejected the claim stating that he has no right over his body.

In the case of Morky v. University of Texas Health Science Centre\textsuperscript{932}, at Dallas the patient lost his eyeball down due to unprotected skin drain. The plaintiff had filed the case based on two clauses stating that due to that loss he has suffered headaches and nervousness. And the other is his loss of property. Morky also sufficiently filed the suit under the Texas Tort Claims Act. This statute allows the Court to award damages according to the loss of property rights or personal injury. And the Court chose the latter. This decision clearly indicates the lack of property recognition in the human body and its parts.

**CLAIM OF PROPERTY OVER DEAD PERSON:**

It is been told that a person after death can be claimed as ‘’Quasi-property’’. The property rights are restricted to the cremations and other rituals to be performed. And not all the person can exercise that property right but only the legal heirs.

Canada also suggests similar decisions in various cases. This is stated in the case Hunter v. Hunter, in Ontario Supreme Court, where the term quasi-property is interpreted. But it is clearly told that no absolute rights can be claimed over the body, only the rights for performing the cremations is been allowed. And those cremating rights will only be given to the kith and kin.

The similar decision is seen in the case Edmund v. Armstrong Funeral Home

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\textsuperscript{931} Browning v. Norton-Children’s Hospital, 504 S.W. 2d 713 (1974).

\textsuperscript{932} Morky v. University of Texas Health Centre, 793 P 2d 479 (Cal 1990).
BODY INCLUDES EMBRYOS TOO:
If property recognition is given to the body, will embryo come under all these clauses? Will it be considered as a property? One of the highly debatable topics is the distinction between a foetus and a frozen embryo. The author opines that the only difference between them is, the foetus is inside the human body and the frozen embryo is outside.

And the other major controversy would be based on to whom the property rights are given. In all other cases, there are no other people associated. Here, respecting this foetus and frozen embryo, there are two people involved.

In the case of York v. Jones\textsuperscript{934}, a husband and wife who were worried about conceiving preserved a frozen embryo for later use. But the marriage broke up and the woman was left infertile. Should the embryo be considered as a property? If the Court held that it must be considered as a property and the woman is entitled to own it, then it will be considered as a movable property. If such rights are given, the woman will have a right to do anything with the embryo. She can do trade with it, dump it or chop it, making the provision of such rights immoral.

But according to the Draft Human Tissues and Embryos Bill 2006/2007, the embryo is considered as a bundle of human tissue and cell and thus it has to be given legal status equivalent to living human being.

LEGAL CONDITION OF ABORTION:
Interestingly, in the case of abortions, a woman can abort a foetus before 24 weeks of her pregnancy unless there is a valid reason to progress beyond that according to the Abortion Act 1957. And thus, this does not give any validity after the time period of 24 weeks. It can be inferred that after the time period the woman has no rights over the foetus because it is now a child and she cannot decide anything regarding it. This clarifies the question of legal status over the human body.

CASE OF YEARWORTH AND ITS LEGACY:
In the case of Yearworth v. North Bristol NHS Trust\textsuperscript{935}, the plaintiff and five others had been admitted to a hospital for cancer treatment. The patients were asked to store their sperms due to the chance of infertility during the treatment. But the hospital, due to negligence failed to store the sperms safely. The plaintiff after 10 years approached the hospital regarding the sperm. The hospital informed that the stored sperms were not preserved safely due to the fault in the storage fridge. The plaintiff had filed a case in the Court regarding the loss of sperm and has put forth three issues. The first issue is the breach of bailment, second, damage of property because of negligence and the third is for suffering personal injuries. The hospital contended that they could not claim for both personal injuries and destruction of properties because sperm is nowhere a

\textsuperscript{935}Yearworth v. North Bristol NHS Trust, [2009] 3 WLR 118.
‘person’. The Court held that the compensation for the destruction of property must be given because the person has property rights over his sperm.

Even though this is one of the famous decisions for recognising property rights over body, tissues, and cells, this did not pave the way for its development in the legal system. It is still unclear, ambiguous and undecided.

OTHER SIMILAR RECOGNITIONS:
An exception to this rigid prohibition was outraged in Australian case in the nineteenth century. In the case of Doodeward v. Spence\(^{936}\), there was a dispute over a two-headed foetus which was examined and brought for an exhibition. The Court gave the rights over that foetus to the person who brought it because of the work and skill involved in the preservation of that foetus. And the Court also stated that the foetus in this instance is not considered as a corpse because of the lawful exercise of work and skill.

The rule stated in the above case was confirmed by the case, R v. Kelly\(^{937}\), where the parts of the human corpse could be considered a property for the Theft Act 1958 because of the lawful preservation and dissection over it.

Analysing the decisions, the law has kept us in a rather unsatisfactory situation. In the uncertain position, we can not come to situation respecting to the acceptance of this right.

KANT AND HIS CONTRIBUTION:
Kant, philosophically speaking, does not agree with this right. According to his view, a person is not allowed to sell his limbs what so ever the amount may be. He gives some more reasons for his opposition. He insists on humanity and dignity as a major argument. Speaking of humanity and dignity, he considers the human body is filled with moral value. And if such thing has been started to apprise as a property, it is not acceptable. The human body does not deserve to be treated in a way how an object or a thing is treated. It has its own dignity which in any case should be protected. Kant thinks that when a person has started to sell his body then it would be the end of humanity. And of course, it degrades humanity. Next, Kant takes self-respect as his argument. He explains self-respect as an inner moral value which every person has to consider for a standard of moral living by which one person judges himself and others. He insists that cultural differences also play a role here. Thus, according to his arguments, he does not consider approving property rights is a faithful decision. Form his views we get inferred that this recognition of property rights over the human body is not only legally settled but morally too.

CONSTRUCTIVE BACKGROUND OF PROPERTY RIGHTS:
If this property is been approved, there will be a greater chance of prevention overmisuse of genetic information. The wrongful use of body parts after death can be taken into care. Next, bodies can be prevented from unlawful tampering. Already there are offences like desecration of a corpse. If rights and punishments towards

\(^{936}\)Doodeward v. Spence, [1908] 6 CLR 406.

these offences are taken into a slightly higher level of consideration, these offences can be averted. Thirdly, this would improve the enhancement of research purposes. Bodies can be used for teaching and research. The biotechnology industry will have a greater chance of improvement due to these rights. Finally, organ donation and transplantation will have a clear path. People will have authority over their parts and the work of transplantation will be made easier. The intellectual property rights and the patentability over body materials will increase the quality of organ donation and the usage of body parts for the commercial purpose can be certainly decreased. According to the present legal condition, these property rights are not widely appreciated and approved. Due to which there is complexity in the matters of organ transplantation, organ donation and, even blood transfusion. This dispute will be resolved due to the acceptance of property rights over the human body. Finally, speaking about the invasion of privacy rights, which is a highly debatable topic will come to an end.

OTHER CONSTITUTIONAL ISSUES:
If such rights of ownership over our body is been permitted we have immense authority to do anything that is related to the same. And those authorities include many activities which are not legally acceptable. One can commit suicide, sell his own organs, can go into slavery, gets right to prostitution, euthanasia, women can abort their children in early stages, people could exercise drugs in their body. All these legally unapproved activities would take place if the absolute command over their body is given to the persons.

Logically speaking, once a body is made a property, it has to be inherited. For example, if a father dies and he writes a will to inherit all of his property to be equally shared between his two sons. As his body is also considered as a property, on which grounds will this property be shared? The concept of this itself is absurd.

If my body and its parts are my property, I may sell them to whomever I wish and under such terms as I think civil. There is a great deal of antagonism on whether a person is ought to be allowed to sell body parts or not. One detailed reason is that it makes the poor specifically susceptible. But, on the other hand, of course, it is a way for the poor to gather in needed capital.

Exploitation is considered as one of the major problems for recognising the said right. This may again lead us to the slippery slope of slavery and exploitations. After these many years of education and awareness, one will not again exploit himself. There is a greater chance of being exploited by others after the acceptance of this right. As the basic definition of the property itself says it as an object to be sold, bought, owned and possessed, anybody can do such things to any individual if people started to own their fellow beings.

In the concept of slavery, it states that a slave is a property of the master. Later this slavery was abolished. But even in this twenty-first century, there is a widespread commotion on baby-selling and sex-slavery. Nobody has the right over other’s body when they don’t own theirs. There is a period when baby-selling was considered as a trade. Only after the recent years of
awareness and punishments, such trade was taken into control. If this right is recognised then there is a greater chance of bringing back those offences.

In the case of R v. Tang\textsuperscript{938}, a person who was operating a brothel was convicted of slavery for treating five contract workers as if they were some objects which he owns. In this case, Hayne J stated that slavery is ‘defined as the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.

When there was a case in India regarding the enrolment of Aadhar card, there was a controversy regarding the invasion of their privacy and their body parts. People contended that the fingerprint and the iris are their body parts and they need not submit it to any of the government or private officials.

Thus, the basic idea of ownership is itself not appropriate. This conveys that the body is nowhere a private property and it is entirely a different thing. Totally, the human body has some grace which has to be protected. Analytically speaking, the human body must be treated with some moral value. By interpreting all the above cases and facts, we could witness that this right has gone through a path of improvement. When this right has been brought into the spotlight, this was not approved and actually, this was not even taken into consideration. The Court in later years has observed a lot more cases than expected. This right initially came into the consideration of the Court in Moore’s case. This topic has got itself into the greater debates only after this case. This decision of this case wasn’t positive for the recognition. In the following cases, there was mixed opinions, judgements, and interpretations. There comes the Yearworth case which was a very big step stone for the enhancement of this right. Even though the Court had started to recognise it but in the recent Tang’s case, there was a controversy in approving it. The author doesn’t support this idea of recognising property rights over the human body, parts, tissues, and cells. Yes, this right may give a lot more opportunity to explore and traverse towards improvement and modernisation, but the author prefers to save the moral values over the rationalisation in this particular topic. The author desires to prevent some crimes which would probably happen due to this recognition by raising a voice against it.

**CONCLUSION:**

From all the above-discussed arguments the view of property rights on the human body is not ideal and optimal. Even though the rights were denied in the earlier period, the cases like Yearworth has given the acceptance to such rights to the body and its parts. One cannot own his body, tissues, parts of his body as of now according to the major decisions seen and witnessed. As this will lead to various other legal issues, this concept is not legally applicable.

But many philosophers and lawyers even have a different opinion on this complex concept. Some don’t agree with the concept of property rights on the body, some argue that those are their central rights which should not be invaded.

If the court decides to provide this right, then certain consequences which will be both positive as well as negative will be experienced.

The positive consequences of recognising this right can be,

- The widespread debate of invasion over privacy rights can be put to rest.
- The body can be prevented from unlawful tampering.
- This property rights may be helpful for the enhancement of research purposes.
- This would increase the instances of organ-donation.

The negative consequences are,

- This will again ignite the concept of slavery.
- Demands will arise to make prostitution legal.
- A greater possibility of exploitation can be expected.
- Compulsion to make abortions legal.
- Increasing instances of organ selling as a business.
- Coercion to permit euthanasia and suicide.
- Baby-selling and sex slavery may again come into practice.

From taking account of both the highlights and challenges of the recognition of this right, the adverse effect has an upper hand. Some provisions or laws can be made to prevent offences that are happening due to this restriction, but a sanction of this right is not applicable. Strict punishments can be enforced to prevent the offences which are happening because of its refusal. Time and its change will give us an appropriate answer to all the questions demanded. It is not only the work of the Court to implement a suitable law, but also the division of medicine and biotechnology should contribute. Thus, the author is of the conclusion that it is not an intelligent idea to provide liberty over this right.

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COW SLAUGHTER AND THE CONSTITUTION: CRITICAL ASSESSMENT

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ABSTRACT
"I have been long pledged to serve the cow but how can my religion also be the religion of the rest of the Indians" said by Mahatma Gandhi shines a light on the ideologies of the builders of our nation, how they wanted to secure the cultural and religious rights of all the citizens of this nation. Cow slaughter in India has been an altercate and a sensitive issue since decades. The issue started with the clashes between the cultural practices of both the Hindu and the Muslim communities of one worshiping the cow and the other sacrificing it. This issue raised many questions.

The paper begins with a brief history of cows and cow slaughter in the ancient scriptures of Hinduism and Islam and the disputes around this issue. It further provides a keen view on the Constituent Assembly Debates regarding this matter and various provisions of the Articles of the Indian Constitution and emphasises on the idea of secularism with regards to cow slaughters.

RESEARCH QUESTIONS:
1. What was the need for a separate provision for cow slaughter in the constitution?
2. What was the reason behind adding the issue of cow slaughter in the DPSP and not in the fundamental rights of the constitution?
3. Whether article 48 of the constitution that prohibits the cow slaughter challenges the idea of secularism given as the fundamental right in the constitution?

RESEARCH OBJECTIVES:
The objectives of this paper are as follows:

- To study and analyse the idea of secularism along with the provisions in the article 48.
- To study and analyse the need of giving article 48 the status of DPSP and not as a fundamental right.
- To understand whether the religious sentiments override the idea of secularism.

COW SLAUGHTER AND RELIGIOUS TEXTS
The problem lies in the interpretation of ancient text. The beef eating was common in Vedic period. Indra, the Vedic god is described as stating "they cook for me fifteen plus twenty oxen". At other places he is referred to as having eaten the flesh of bulls. Cattle were also sacrificed for Agni, who is described in Rig Veda as" one whose food is ox and barren cow".939

Many other texts were found from later Vedic texts and one of them, the Taittriya Brahmana, refers to the sacrificial killing of the cow which is "verily food".940 That the sacrificial victim was generally meant for human consumption is indicated by several texts, especially the Gopatha

939 Rigveda X.86.14, (VIII.43.11) 940 Taittriya Brahmana III.9.8
Brahmana(I.3.18), where it is stated that the carcass was to be divided into thirty six shares. Cattle were also killed in ordinary domestic rites.

A Rig vedic passage (X.85.13) refers to the slaughter of a cow on the occasion of marriage and later, and later in the Aitreya Brahmana (III.4), we are told that “if a ruler comes as a guest or anyone else deserving honour comes, people kill a cow." So it's not that cow were not being slayed during Vedic times. From the post Mauryan period onwards the Brahminical attitude to cow liking had begun to change.

Dr. D.N Jha has said that “I’m inclined to think that ,which may have been emerging as an emotive symbol among the brahminical circle during the medieval period ,became much more emotive with the rise of Maratha kingdom and shivaji who was thought of as the protector of cows and Brahmins. But it was in the late 19th century that this animal was first used by the Sikh Kuka Movement for mass political mobilisation against the British. At around the same time, in 1882 to be precise, Dayanand Saraswati founded the Gorakishni Sabha and he used it for uniting a wide variety of people against the muslims.941

Further in Manusmriti , it is mentioned that god made some animal to be eaten and there is no sin in eating them.

Laws of Manu942, chapter 5, v 31-40-

31. 'The consumption of meat (is befitting) for sacrifices,' that is declared to be a rule made by the Gods; but to persist (in using it) on other (occasions) is said to be a proceeding worthy of Rakshasas.

32. He who eats meat, when he honours the gods and manes, commits no sin, whether he has bought it, or himself has killed (the animal), or has received it as a present from others.

33. A twice-born man who knows the law, must not eat meat except in conformity with the law; for if he has eaten it unlawfully, he will, unable to save himself, be eaten after death by his (victims).

34. After death the guilt of one who slays deer for gain is not as (great) as that of him who eats meat for no (sacred) purpose.

**ISLAM AND COW SLAUGHTER**

In Quran chapter two (Al Baqara) from verse 2.67 – 2.73, it’s about Cow. Cow slaughter is permitted with restrictions like a cow neither too old nor too young, but between the two conditions (2.68). Also the cow has never till a land or water the field (2.71) and the cow should be bright yellow in color (2.69). In 2.70 (from the 2nd chapter of quran verses) it’s clearly said that the cow which follows all this is not clearly known and one should take refuge of God and will be guided. So it’s very clear that Cow sacrifice is practically not possible and not a straight forward ordered or command of God.

Islam really pays attention to the rights of animals, and in Islamic slaughtering, the
scientific findings conclude that the
animals feel no pain (or less pain) in
comparison to other methods of
slaughtering because of its appropriate
method. For instance, in Islamic
slaughtering, it is said to be good-tempered
with the animals, to have sharp knife, to
have high speed operation and so on, then
observing such items can help the animal to
have less pain during the slaughtering.

The Quran Verse 2:173 in Surah Al-Baqarah
(The Cow) says, "He has only forbidden to
you dead animals, blood, the flesh of swine,
and that which has been dedicated to other
than God. But whoever is forced [by
necessity], neither desiring [it] nor
transgressing [its limit], there is no sin upon
him. Indeed, God is Forgiving and
Merciful." 943

Anything that does not fall in any of the
above categories is permissible to be eaten
according to Islam. So yes, like a cow, goat,
camel, hen, etc being an animal that falls out
of the above restricted ones, is permitted to
be slaughtered for food.

Again the problem is the interpretation of
religious text. The dispute of cow slaughter
has a history which goes back to the
founding of republic. During the framing of
the constitution, the status of cow was the
most fraught and contentious topic of
debate. Seth Govind Das a member of
collective assembly such as Shibban Lal
Saxena, Thakur Das Bhargava, Ramnarayan
singh, Raghu vira. Proponents of cow
slaughter ban advanced a mix of cultural and
economic arguments, invoking the
sentiments of “thirty crores of population”,
on the one hand, and the indespensibility of
steer in agrarian economy on the other. But
the other argument was that fundamental
rights were meant for human being and not
animals. After much debate the constitution
drafting committee agreed upon a
compromise ;Prohibition of cow slaughter
will find a place in constitution ,but not as
an enforceable fundamental right .It would
be included as a directive principle of state
policy, which was meant to guide the state
in policymaking. so, in the final form, this
directive principle (Article 48 of the
constitution) carefully excluded the question
of religious sentiments. Nor did it require the
state to ban cow slaughter outright.

Members of the constituent assembly found
these compromise both unprincipled and
unsatisfactory . Shibban Lal Saxena objected
to such back door and asked the assembly
why the drafting committee was ashamed of
providing for the prohibition of cow
slaughter frankly and boldly in so many
plain words.

Z.H Lari one of the muslim representative in
the constituent assembly ,stated that his
community world would not stand in the
way of community desire ,but asked the
majority to express the status of cows
“clearly and definitely” , so that muslim
could know what is the actual position of
cow slaughter . 944 However, clear and
definite expression was on the main issue

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943 Holy Quran, Surah Al-Baqarah, 2:173

944 Constitutional assembly debate-CAD
24.nov,1948.

www.supremoamicus.org

418
that the assembly was unwilling to commit. Article, 48 that left nobody satisfied came into existence on January 26, 1950.

**CONSTITUENT ASSEMBLY DEBATE**

**Arguments For A Ban On Cow Slaughter**

The petitioners for the cow protection law included the likes of Seth Govind Das, Pandit Thakurdas, Shibban Lal Saxena, Ram Sahai and Raghu Vira among others. Incidentally, all of them also belonged to a dominant Hindu background. Thakurdas, a Congress member from East Punjab and an outspoken advocate of Hindu sentiment, proposed the amendment for the prohibition of cow slaughter in the draft constitution. He began his speech by tendering economic arguments for cow protection and said that the solution for agricultural failure and human health lied in cow protection. “The best way of increasing the production (of food crops) is to improve the health of human beings and breed of cattle, whose milk and manure and labour are more essential in growing food. Thus, the whole agriculture and food problem of the country is nothing but the problem of improvement of cow and its breed.

The hypocrisy displayed by the framers of the constitution has persisted in modern India. Various judicial pronouncements have revealed the undercurrent flow of religion and caste in the otherwise ‘secular’ laws on beef consumption and cow slaughter. What has also remained unchanged is the victimisation of minorities in the name of the holy cow.

**INTERPRETATION OF ARTICLES OF CONSTITUTION AND RIGHTS**

**Article 48**

Why does the article 48 of the Indian constitution talk of prohibiting cow slaughter?

“Beware of false knowledge. It is more dangerous than ignorance”

- George Bernard Shaw

This quote completely explains this question. The article 48 (DPSP) of the Indian constitution is stated as follows.

Article 48 says -

48. Organisation of agriculture and animal husbandry.

The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle. The article doesn’t only include cows but includes other milch, draught cattle and calves. There is a reason why cow is made important in this constitution and even in Hinduism. It is due to the value of products that we get from them. There are certain countries which permit the slaughter of these animals as a result of which they need to import dairy products ruining their balance of payment (foreign currency reserve). An example-Amul Formed in 1946, it is a brand managed by a cooperative body, the Gujarat Co-operative Milk Marketing Federation Ltd. (GCMMF), which today is jointly owned by 3.6 million milk producers in INDIA CONST. art. 48.

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945 INDIA CONST. art. 48.
Gujarat. This corporative has achieved milestones the latest one being. In a country like India with high population density and 70% population (87 crore people) depending on agriculture, it is almost impossible to increase the land under agriculture. Dairy farming was the best alternative as proved by companies like Amul. Rearing animals like cow amounts to Indian constitution has clearly justified that those article between 36 to 51 shall not be directly enforced by law. Its some directives passed to State Govt, whether they wish to follow or not. because having jurisdictions on directive principles may challenge your FUNDAMENTAL RIGHTS that's what now going on. Some group of citizens of India are being deprived from their fundamental rights which can be judicially enforced by law through State governments. Its not a law but a Derivative principle for states and thus it needs to be implemented at state level depending upon the food habit within states as India is too diverse.

Honourable supreme court in Mohammed Hanif Qureshi v. State of west Bengal\footnote{Mohammad Hanif Qureshi and Ors. v. The State of Bihar, AIR 1958 SC 731.} and State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat\footnote{(2005) 8 SCC 534.} interpreted article 48 and said that the prohibition of slaughter is only on animal (both cow and its progeny) which are useful, either as milk giving or as draught (working). But then in 1958, Qureshi decision had made it clear that a total ban on slaughter of cows and calves (both male and female) is valid. But so far as other such animals in the progeny, such as she-buffaloes, bulls and bullocks are concerned, the ban on slaughter of animals which have ceased to be draught or milch is not in public interest and hence invalid.

Overruling Quareshi in 2005, Mirzapur decision made it explicit that an effective total ban on slaughter of cow and its progeny is valid. The reasons given were agricultural and economic and also on the finding that cow and it progeny never becomes useless, even after the cattle cease
to breed, to work, or to give milk. They still continue to give dung for fuel, manure and biogas and, they cannot be said to be useless.

It should be noted that if the utility of the cattle dung and urine increased from 1958 (Quareshi) to 2005 when the Mirzapur judgment was delivered. Or is it that the earlier court failed to consider such a known fact? It is equally possible that the later Court over valued the utility factor for the justification on the cow slaughter. It could even be a camouflage of the religious factor super added to the utility factor. Chief justice R.C. Lahoti had observed in his judgement that cow and his progeny, i.e., bull, bullocks and calves are worshipped by Hindus on certain auspicious days and that a good number of temples are to be found where the statute of “Nandi” or ‘bull’ is regularly worshipped. It is really thinkable to notice that the need for this observation by the court where the parties themselves have not argued on any religious grounds or, article 25, unless judicial process was inclined towards the religious sentiments as well.

Going back to the Constituent Assembly Debates, it is needed to trace why prohibition of cow slaughter finds a place in the Constitution under a misleading title of organization of agriculture and animal husbandry. If the purpose is the one in the title, then why should there be an absolute ban on slaughter of cows, even when they stopped milching or breeding. There has to be something attached to the cow which makes it protection prone than a buffalo or a bull or an ox, which are milch or draught as well. It could be religious reasons because our constitution establishes a secular state.

**Article 51-A**

**Fundamental Duties:** it shall be the duty of every citizen of India.

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures. **949**

Article 51 was added in the constitution in the 42nd amendment, in accordance with the recommendations of the Swaran Singh Committee. The citizen, it is expected, should be his own monitor while exercising and enforcing his fundamental rights—remembering that he owes duties specified in Art 51 to the State and that if someone does not care for their duties they should not deserve the rights. **950** The duties as such are not legally enforceable in the courts, but if the state makes a law to prohibit any act or conduct in violation of any of the duties, the courts would uphold that as a reasonable restriction on the relevant fundamental right. Article 51-A(g) enjoins it as a fundamental duty of every citizen "to have compassion for living creatures", which in its wider fold embraces the category of cattle spoken of specifically in Article 48. **951**

The concept of compassion for living creatures enshrined in Article 51A (g) of the Constitution of India is based on the background of the rich cultural heritage of India—the land of Mahatma Gandhi, Vinobha, Mahaveer, Budha, Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society. It has...

**949** INDIA CONSTIT. Art.51. cls A, sub-cls(g)

**950** Durga Das Basu, Constitutional Law of India , pg.139.

**951** AIR 2006 SC 212, para 24.
unity in diversity. The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased. A cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called ‘useless’. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived, forgetting its service for the major part of its life, for which it had remained milch or draught. We have to remember : the weak and meek need more of protection and compassion.952

In T.N Godavarman Thirumalpad v. Union of India & others, the court read article 48-A and 51-A together as laying down the foundation for the jurisprudence of environmental protection and held that “today the state and the citizens under fundamental obligation to protection and improve the environment, including forest, lakes, rivers, wildlife and to ‘have compassion for living creatures’” 953

Article 25
freedom of conscience and free profession, practice and propagation of religion:
25(1) subject to public order, morality and health and to other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
In this Article optional religious practice is not been covered.954

It was also contended that the High Court had misread the judgment in Quareshi case1 as this case had interpreted Article 25 of the Constitution of India and in that light it was held that slaughter of cows could not be considered to be a part of essential religious requirement.955

It was also contended that the High Court had held that, sacrifice of any animal by muslims for their religious purpose on Bakrid does not include slaughtering of cow as the only way of practicing their religion. Slaughtering of cow of cow on Bakrid is not an essential part of their religious ceremony. It is done for economic reasons. It is an option for the muslim to slaughter cows on Bakrid. And an optional religious practice is not covered by Article 25(1). Whereas in the case of Hindu’s cow, bull, bullock and calves are worshipped. Hindus follow a tradition of first feedin the cow before eating themselves a belie that they should first offer food to god and then eat. Number of temples are found where the statue of ‘Nandi’ or ‘Bull’ is worshipped.956

Article 19
Protection of certain rights regarding freedom of speech :-
(1) All citizens shall have the right to:-
(g) to practice any profession, or carry on any occupation, trade or business.957

957 INDIA CONST. art. 19, cl. 1(g).
This freedom means that every citizen has the right to choose his own employment or to take up any trade or calling subject only to the limits as maybe imposed by the State in the interest of the public welfare, and other grounds mentioned in Cl.958. Just as a right to carry on a business also includes a right to close down a business that has already started, reasonable restrictions can be imposed to protect the public interests. Whether ‘restriction’ includes prohibition:- It cannot be properly categorised if reasonable restriction can include total prohibition. Thus:—

a. Total prohibition would be reasonable where a business or a trade is inherently dangerous.

b. Trading in essential commodities.

c. Upholding a coercive sanction for the realisation of tax.

But outside these exceptional categories, a total prohibition on a right to carry business would be regarded as ‘unreasonable’ restriction.959 The burden of proving that the total prohibition on the exercise of the right alone may ensure the maintenance of public interest lies heavily upon the State. As the State failed in discharging that burden, the notification was held liable to be struck down as imposing an unreasonable restriction on the fundamental right of the petitioners.963

The question that was raised before the court is whether the ‘total prohibition’ on the slaughter of cows infringed the fundamental right of the butchers under the Article 19(1)(g), freedom to practice any trade and profession.the supreme court defined public order as a state of tranquillity, which prevails among the members of a political society as a result of the internal regulations, enforced by the government which they have established.962

The decision of the Court in Narendra Kumar & Ors. v. The Union of India and Ors., which upholds the view that the term "restriction" in Articles 19(5) and 19(6) of the Constitution includes cases of "prohibition" also. Their Lordships drew a distinction between cases of "control" and "prohibition" and held that when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone would ensure the maintenance of the general public interest lies heavily upon the State. As the State failed in discharging that burden, the notification was held liable to be struck down as imposing an unreasonable restriction on the fundamental right of the petitioners.963

In the case of Hanif Qureshi v. State of Bihar, the directive contained in the latter part of article 48 enjoins the prohibition of slaughter of any species of cattle mentioned, irrespective of their utility from the standpoint of agriculture or animal husbandry,such prohibition cannot be held

References:

961 Durga Das Basu, Constitutional Law of India, pg.59-60.
963 Narendra Kumar and Ors. V. Union of India, (1960) 2 SCR 375.

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to an unreasonable restriction upon the right conferred by Articl 19(1)(g).  

In the case of Abdul Hakim v. State of Bihar reported that the ban imposed by the States of Bihar, Madhya Pradesh and U.P. which came up for consideration before this Court and in this context it was observed as under: "The test of reasonableness should be applied to each individual statute impugned and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict." In the same case the ground of challenge was article was confined to article 19(1)(g) read with article 19(6).the ban was held to be a ‘total’ and hence an unreasonable restriction on fundamental rights.

His Lordship has discussed the question of reasonable restriction under Article 19 (6) in the case of State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors. and after considering all material placed before the Court, and adverting to social, religious, utility point of view in most exhaustive manner finally concluded thus:

"(i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48; (ii) that a total ban on the slaughter of she-buffaloes, or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public." It was a 7 judges bench where 6 judges were of the opinion that “the ban is not on the total activity of butchers (kasais); They can slaughter animals other than cow progeny and carry on their business activity”.

In Haji Usmanhbai Hassambhai Qureshi and Ors. V. State of Gujarat it was held that the test of reasonableness of the restriction on the fundamental right guaranteed by Article19(1)(g) was held to have been satisfied.

Right To Eat
Right to eat food of ones choice is certainly a part of the constitution but the limits recognised by the courts state that the food should be obtained legally.the newly formed rules certainly impact the choice of food that a person may have.

Right of Animals
Protecting animals from cruelty is the biggest reason behind the formation of rules. Earlier the centre had proposed an Adhaar like UID to track animals, while also

964 AIR 1958 SC 731.
965 Abdul Hakim Qureshi & Ors. V. State of Bihar, AIR 1961 SC 448.
967 Haji Usmanbhai Hassambhai Qureshi and Ors. V. State of Gujarat, AIR 1986 SC 1213.
instructing parliament to keep a check on smuggling animals. The judgement on jalikattu expanded the animal rights jurisprudence in the country. In its furtherance milking is now being claimed as sexual harrasmentof cattle and the question of animal rights is conflicting with human right of eating animal produce.\footnote{Virag Gupta, Battle Over Cattle.}\

**LEGAL COMMENTS**

- The preamble of the Universal Declaration Of The Rights Of Animals of London reads “all animals have rights” and uses the word ‘genocide’. Article 6 of this declaration categorically declares that “all companion animals have the right to complete their natural span of life” and Article 14 states that “The rights of animals, like human rights, should enjoy the protection of law.”\footnote{Universal Declaration of Rights of Animals, September.1977.}

- In the case of Hanif Qureshi it was held that “Art. 48 enjoins the state to prohibit the slaughter of cows and calves and those animals which are presently or potentially capable of yielding milk or of doing work as draught cattle, but does not…extend to cattle which at one time were milch or draught cattle but which have ceased to be such.” And also that “a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Article 48”\footnote{AIR 1958 SC 731.}\

- In Mohd. Hanif Quareshi and Ors. v. The State of Bihar, the view of the High Court is that “slaughtering of healthy cows on Bakrid is not essential or required for religious purpose for muslims or in other word it is not a part of religious requirements for a muslim that a cow must be necessarily sacrificed for earning religious merit on Bakrid”\footnote{State of West Bengal and Ors. v. Ashutosh Lahiri and Ors., AIR 1995 SC 464.}

- The distinction between cases of “control” and “prohibition” was stated in the case of Mohd. Faruk v. State of M.P and the Supreme Court held that when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone would ensure the maintenance of the general public interest lies heavily upon the State. Since the State Government failed in discharging that burden, the said notification was held struck down.\footnote{Mohd. Faruk v. State of M.P., (1969) 1 SCC 853.}

> “Preventing a citizen from possessing flesh of cow, bull or bullock slaughter outside the state amounts to prohibiting a citizen from possessing and consuming food of his choice”\footnote{2017 (2) ABR 140, In the High Court Of Bombay.}

**CONCLUSION**

The whole debate on constitutional validity of cow slaughter is because of the lack of proper interpretation of religious texts without any biasness with logical point of view .It is because of the diversity of our country and a difficulty to accommodate and
balance the secularism of our country. The provisions on cow slaughter are a part of DPSP and not in the Fundamental Rights because the makers of the constitution contended that Fundamental Rights are only for human beings and not for animals, moreover it was made as a part of DPSP keeping in mind the cultural diversity of the country and the agrarian economy. The state can make policies to protect not only cows but also other draught and milch animals. The author is of the view that the makers of the constitution did not want to compromise with the idea of secularism and that’s why they didn’t expressly define the status of cow in our constitution. In the end, India was able to hide its irrationality from the world by protecting the cow in the directive principle and not in fundamental rights. Article 48 is also one of the rare provisions in the constitution where the Constituent Assembly was clearly fragmented on communal lines. It is undisputed that Article 48 has been worded, in terms of scientific organisation of animal husbandry and not on religious sentiments. It is also clear that the formulation of the provision involved a distinctive presence of religious fervour. It is this dichotomy of a religious soul with a non-religious body that gives an impression that the cow protection law is not about religion but about improved animal husbandry.

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CASE COMMENT ON SHAYARA BANO AND OTHERS V. UNION OF INDIA

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INTRODUCTION
The Triple Talaq Bill is not about politics but empowerment and justice for women. This bill is not about any specific religion and community. The bill is about humanity and justice.

— Union Law Minister Ravi Shankar Prasad

The struggle for women for their rights in a country like India is a huge challenge. As seen in the case of triple talaq or ‘talaq-e-biddat’ whereby a husband can divorce his wife only by pronouncing the word ‘talaq’ (Arabic word for ‘divorce’) three times at once either in oral, written or more recently in electronic form. The divorce in such form is irrevocable and instant. The issue elementarily emerged when the Bharatiya Muslim Mahila Andolan (BMMA) launched a campaign for the ban of triple talaq system; following which the case of Shayara Bano and several other petitions as PIL before Supreme Court were considered regarding certain aspects of the Muslim personal law to be gender biased and hence violative of the fundamental rights of women and hence the apex court set aside this practice of talaq-e-biddat. The following case comment gives a brief comment on the case of ‘Shayara Bano and others v. Union of India’ and is being followed by using the FILAC method.

BACKGROUND
Shayara Bano, wife of Rizwan Ahmad was married for 15 years. Her husband pronounced ‘talaq’ three times in the presence of two witnesses and delivered ‘talaq nama’ on 10/10/2015 to her. The wife challenged the same in front of the Supreme Court arguing that these three practices, triple talaq, polygamy and nikah malaka were unconstitutional; due to which the constitutional validity of such practice was called before a constitutional bench of the apex court consisting of 5 judges from different grounds. She claimed that these practices were violative of several provided under the Constitution of India including; Article 14 (right to equality), Article 15(1) (prohibition of discrimination on the basis of gender), Article 21 (right to life and personal liberty) as well as Article 25 (freedom of religion). The main issues concerning this case were-

a) Is talaq-e-biddat Islamic in nature?
b) Whether the Muslim Personal Law (Shariat) Act, 1937 grants statutory status to the subjects regulated by it or is it still covered under “Personal Law” which is not “law” under Article 13 of the Constitution as per previous the Supreme Court judgments?

975 Quotes on triple talaq and women’s rights, available at: https://www.msn.com/en-in/news/ last seen on 01/03/2019
976 Talaq-e-biddat, available at; https://www.thehindu.com/opinion/op-ed/ last seen on 01/03/2019
977 Facts of the case, available at: http://www.feministlawprofessors.com/2017/ last seen on 01/03/2019

www.supremoamicus.org
c) Is it protected by Article 25 of the Constitution?\textsuperscript{978}

The laws concerning this case are the fundamental rights of Article 14 which gives (right to equality), Article 15(1) which talks about (prohibition from discrimination on the basis of gender), Article 21 that speaks of (right to life and personal liberty), Article 25 which guarantees freedom of religion,

Section 2 of the Muslim Personal (Shariat) Application Act, 1937\textsuperscript{979} which says- Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land, regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat);

Section 25 of the Code of Civil Procedure 1908\textsuperscript{980} which talks about (an application of transfer of suit) with Order XXXVI-B of the Supreme Court Rules, 1966.

\textsuperscript{978} Issues in Shayara Bano case, available at: http://gelmag.com/2017/09/13/ last seen on 1/03/2019

\textsuperscript{979} Muslim personal Shariat Application Act 1937, available at https://indiacode.nic.in/bitstream/123456789/2303/ last seen on 02/03/2019

\textsuperscript{980} Code of Civil Procedure, 1908

**ANALYSIS**

The Triple Talaq judgment is widely appreciated throughout the jurisdictions as a protection shield against the social evil such as this practice promoted. The majority bench on the face of it criticized the government for not making relevant laws to prohibit such a regressive practice. This act allowed the husband to end the marital tie on his whims and fancies, thereby making the life of the women hell. The Muslim women have since many years demanding the protection from such a regressive and bad practice and finally it was the apex court which gave them the appropriate remedy.

On August 22, 2017 the Supreme Court of India decided the practice of triple talaq to be unconstitutional in the case of Shayara Bano and others, v. Union of India with a majority decision of 3:2 (being a constitutional bench) which analyzed the Quran and the customs practiced and the related constitutional provisions. The three judges in the majority decided the practice to be invalid by using separate reasoning to arrive at such a conclusion. Whereas the dissenting opinion by Chief Justice Jagdish Singh Kehar and Justice Abdul Nazeer by saying that triple talaq can be regarded as invalid but it is the duty of the Parliament to regulate on this matter and should not be struck down by the courts. While the majority view resolved that the 1937 Muslim Personal (Shariat) Application Act which defines triple talaq can be found as violative of Article 14 of the Indian Constitution.

It can be considered that according to Article 25 of the Indian Constitution, the right to freely practice and propagate one’s
own religion of choice is provided to the people to in turn facilitate the purposes of secularism. The state cannot take away the essential religious practices of a person. If a practice is not prohibited, it does not necessarily mean that such a practice is essential. When a particular religion has certain practices that discriminates people on the grounds of gender, we usually don’t see much legal protection being given to such practices which has to be considered as a greater concern today. It can be even observed that such discrimination is reflected in this practice as the power to make an irrevocable divorce has been only given to husbands and not wives. Even considering the sources of such practices that is, the Holy Quran, does not even speak of this practice rather it frowns to such beliefs. Thus it can be well said that since the main holy source of Islam does not brace the practice of triple talaq; it can be easily considered un-Islamic. It becomes the duty of courts to in turn provide justice as this issue being violative of the fundamental rights of Islamic women. It is not necessary that the talaq being given was true in its form (in the sense that, the husband may have been in some other mental condition or stress which could have been taken out in form of aggression and therefore resulting in some kind of an argument between the two and ended up in giving talaq). Here the woman is clearly shown to be unable to exercise her authority or her reasonable fundamental rights which is a clear discrimination of gender. The practice of triple talaq not being Islamic makes it more non-essential to be practiced. Like many other post-colonial states, India also maintains a personal law system, according to which certain family and property matters as in (marriage, divorce, adoption, maintenance, guardianship, succession and inheritance) of Hindus, Muslims, Parsis and Christians as well as Jews.

The majority in this judgment agreed to the phrase “what is bad in theology cannot be good in law”. One does not need to go down into the details and should understand that if Triple Talaq had been an essential religious practice of Islam then in that case it would not have been banned in almost all Islamic nations. Further, the said practice is only practiced in Hanafi School who itself considers it sinful. Therefore, the majority bench correctly held such practice as unconstitutional.

The minority bench ignored the atrocities that are committed by the said practice. It is the duty of the courts to dispense justice and the courts should not be deterred by mere technicalities in dispense justice. The minority judgment is per incuriam as the judges said that however bad the practice be, if it is an essential practice it cannot be struck down. As even in Sardar Syedna Taheer Saifuddin Saheb case981, which was taken as one of the precedents in this judgment; was debated on the constitutional validity of Section 3 of the Bombay Prevention and excommunication act, 1949 which infringed the fundamental rights of the dawoodi bohra community as it violated Article 25 and 26 of the Indian Constitution and hence it was declared void.982 Even considering another precedent taken into the

981 Sardar Syedna Taheer Saifuddin Saheb case 1962 AIR 853
982 Case brief, available at: https://www.legalcrystal.com/case/ last seen on 4/03/2019
judgment, that is of; Shamim Ara v. State of U.P.\textsuperscript{983} This concerned with the appellant being filed an application in 1979 under Section 125 CrPC complaining of cruelty to her and her children as well as desertion. The husband claimed that he had divorced her on 11-7-1987, and therefore her disentitlement for maintenance. There was no statement of circumstances or justification by reasons or any proof of efforts at reconciliation and no evidence of witnesses in support of the talaq. The Family Court had accepted an affidavit produced by the husband as proof of the talaq and accordingly dismissed the wife’s suit for maintenance. On an appeal to the High Court by his wife, the High Court of Allahabad held that the alleged divorce had not been communicated to the appellant, the divorce stood completed in 1990 when the husband filed written statement to her appeal.

Hence the reasoning of the minority bench, in the judgment of Shyara Bano is unfair, irrational, and unjust. If the two judges have also ruled in the favor of majority the impact would be altogether different. Hence, the justified reasoning provided by the majority bench in India finally did away with the backward practice of *Triple Talaq* or *Talaq-e-biddat*.

**CONCLUSION**

After various attempts, the petitions of Shayara Bano, Aafreen Rehman, Ishrat Jahan, Gulshan Parveen the Supreme Court gave a successful judgment in bringing justice to many unheard voices in India. The decision is particularly relevant because it addressed a practice within the ambit of personal law through the lens of structural equality and within the framework of fundamental rights. Now, it will be feasible to test and challenge other discriminatory personal laws against fundamental rights.\textsuperscript{984} No husband can now abandon his wife by ending marital tie on his whims and fancies. The court ensured that the ideas of equality especially gender equality is not a mere theoretical ideology. However, the opinion of minority bench worries the nation. If the Chief Justice of India is giving primacy to practices such as *Triple Talaq* ignoring the widespread atrocities, then there is some serious rethink required by the Judges of the Apex court.

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CHILD LABOR AND SOCIETY: A DETRIMENTAL SITUATION

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ABSTRACT
Child labor perpetuates poverty, unemployment, illiteracy, population growth, and other social problems. This is as stated by Kailash Satyarthi:

All children are the valuable assets of a particular country and no country on the globe can ignore the responsibility to ensure the proper growth and development of them as their future lies with them. Ironically the problem of child labor exists throughout the world. Even according to the 2002 estimates of the International Labor Organization (ILO) around 246 million children aged 5-17 years are working worldwide; or we can say around one-eighth children are exposed to the worst forms of child labor which may deteriorate their physical moral well-being and mental health. The situation in India is exacerbating. Despite hectic planning, legislation, welfare programmes, and administrative action in the past few decades, a large majority of the Indian Children continue to remain in turmoil and distress. Most families neglect them caretakers thrash them and are then sexually abused by employers in work-place. Child labor continues to flourish in both rural and urban India. Though this problem of physical, emotional, and sexual abuse of children is increasing in India, it has failed to capture the attention of sociologists, psychiatrists and social workers. The public and the government are also yet to recognize this child labor as a serious problem. This paper tries to probe the nature, extent, magnitude and impact of Child labor worldwide and further gives a brief comparison with the situation of child labor and violation of child rights in India and also analyses the issue of human rights violation of children through child labor in India. The paper also makes an attempt to locate the significance of Child rights & concludes with some measures from a strategic perspective to curb the increase of child labor in India.

KEYWORDS - CHILD LABOR, ABUSE, INTERNATIONAL LABOR ORGANIZATION, CHILD RIGHTS.

INTRODUCTION
I. Meaning, Context and Purpose
What is child labor?
As per the International Labor Organization, child labor refers to the ‘work that deprives children of their potential, dignity and childhood and which is harmful to their physical and mental development.’ It defines such ‘work’ that;

- Is physically, mentally, morally or socially harmful and dangerous to children;

987 Basics of child labor, available at: https://jcst.journals.yorku.ca/index.php last seen on 20/02/2019
• Interrupts with their schooling by:
• Depriving them of the opportunity to attend school;
• Mandating them to leave school prematurely;
• Requiring them to combine school attendance with excessively heavy and long work.

About past two decades the Government of India (GOI) has come up with many measures to curb and combat child labor in the country. Based on the principles enshrined in the Indian Constitution, one major legislation against child labor was introduced in 1986. The ends of the resultant National Child Labor Policy (1987) (which focused on rehabilitating children who are working in hazardous occupations) were a more strict enforcement of relevant and required legislation, the amalgamation of child labor issues into the development strategies of different ministries and departments and project based action plans in areas with high concentrations of hazardous occupations. This was based on the recommendations of the committee in 1986 which enacted The Child Labor Prohibition and Regulation Act 1986.\(^{988}\) It outlines where and how children can work and where they cannot. The provisions of the act are meant to be acted upon immediately after the publication of the act, except for part III that discusses the conditions in which a child may work. Part III can only come into effect as per a date appointed by the Central Government (which was decided as 26th of May, 1993).

It further calls for the establishment of the Child Labor Technical Advisory Committee (CLTAC) which is basically responsible for advising the government about additions to the scheduled lists.

II. Objects and Reasons for the Child Labor Prohibition and Regulation Act 1986

i. ban the employment of children, i.e, those who have not completed their fourteenth year, in specified occupations and processes;
ii. lay down a procedure to describe modifications to the Schedule of banned occupations or processes;
iii. regulate the conditions of work of children in employments where they are not prohibited from working;
iv. lay down enhanced penalties for employment of children in violation of the provisions of this Act, and other Acts which forbid the employment of children;
v. to obtain uniformity in the definition of ‘child’ in the related laws.\(^{989}\)

After the commencement of this Act, the Central Legislature has made few substantial amendments in the provisions of the 1986 Child Labor Act in July 30 2016 due to which it is called as ‘Child and Adolescent Labor (Prohibition and Regulation) Act, 1986’\(^{990}\)

The provisions of the said Act completely prohibits the employment of a child labor that is; a child who comes below the age of

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\(^{988}\) Indian legislations for child labor, available at; http://childlineindia.org.in/Child-Labour-Prohibition-and-Regulation-Act-1986.htm last seen on 20/02/2019

\(^{989}\) Reasons for CLPRA, available at; https://labour.gov.in/sites/default/files/act_3.pdf last seen on 21/02/2019

\(^{990}\) Child and Adolescent Labor Act, available at; https://singhania.in/child-labour-act-2016-india-child-labour-act-amendments/ last seen on 21/02/2019
14 years, who is employed in an establishment whether hazardous or not. It says that a child can only work to help his family and this can be extended as in- as a child artist after school hours or during vacations. This Act even comes up with a new concept of ‘adolescent labor.’ An adolescent is a person who comes under the age category of 14-18 years. This amendment provision allows the employment of such adolescent labor except in hazardous places or occupations so as to prevent ‘Hazardous Child Labor.’

Hazardous Child Labor is verily defined under Article 3(d) of the International Labor Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, 1999 as;

‘work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals, of children’

Regarding the main reasons for the enactments of such legislations is that, the future of a nation lies in how it treats its children who will actually lead the nation in coming generations and therefore it becomes the moral duty of every citizen of the country to ensure that the childhood of our children is safeguarded and not ruined with instances like that of child labor in India which arise out of poverty and helplessness.

III. Types of Child Labor in India
1. Industrial Child Labor
Industrial sector in India is the largest employer of children underneath the legitimate age of 18. Roughly, more than 10 Million youngsters between the age category of 5 to 14 years are working in small or informal industries, including around 4.5 Million young girls. Small enterprises like clothing industry, block furnace, horticulture, firecrackers businesses, jewel enterprises and so forth, establish probably the biggest employer of such children.

2. Domestic Child Labor
It includes both boys and girls who are employed by wealthy families for managing their everyday chores. Nearly 10% of children in India are domestically employed. Poverty being the main factor for such labor of these children.

3. Bonded Child Labor
Such labor means when a child is forcibly employed to pay off a debt of his parents or a guardian. The number of bonded child labors has considerably declined in recent past due strict government legislations and supervision which ban it due to which it slowly goes into remote places.

991 Definition of adolescent labor, available at; http://www.mondaq.com/india/x/602434/employee+rights+labour+relations/ last seen on 21/02/2019
992 Age group for child labor, available at; https://www.ilo.org/ipec/facts/WorstFormsOfChildLabour/HazardousChildLabour/ last seen on 21/02/2019
993 Definition of hazardous child labor available at; https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_413175.pdf last seen on 22/02/2019
IV. India and International Labor Organization (ILO)
Since India has been a founding member of the ILO (founded in 1919), the responses to the International Labor Standards has always been positive. Child Labor is considered a socio-economic problem, which needs sustained efforts for a long period of time for resolving it. The Government of India is following a sequential approach which concerns the children working in hazardous occupations or processes and has adopted a multi-criteria strategy for eradication of child labor which is:

2. Project-based action plan in areas of high concentration of Child Labor under National Child Labor Project Scheme.
3. Focus on general development programmes for the benefit of the families of Child Labor.

The Government of India is even implementing National Child Labor Project (NCLP) which focuses on the rehabilitation of children from such work. Under this project, children are withdrawn from their work and are enrolled in special schools where they are provided education, nutrition, vocational training, healthcare etc.

Additional to this, the government of India has taken a significant step by making the Right to Education as a Fundamental Right for children under the Indian Constitution.\textsuperscript{995} Other related National legislations are:

Juvenile Justice (Care and Protection of Children) Act 2000 (the JJ Act) and amendment of the JJ Act in 2006 which includes the working child under the category of children in need of care and protection, without any limitation of age or type of occupation. Section 23 (cruelty to Juvenile) and Section 26 (exploitation of juvenile employee) specifically deal with child labour under children in need of care and protection.

The Right to Education Act 2009 has made it mandatory for the state to ensure that all children under the age group of 6 to 14 years should be in school and receive free education. Along with Article 21A of the Constitution of India recognizing education as a fundamental right, this constitutes a timely opportunity to use education to curb child labor in India.\textsuperscript{996}

V. Approaches to eliminate Child Labor
There can be many measures and approaches to actually eliminate child labor such as:

1. Basic education
Basic education is a valuable legacy of our freedom. Free and compulsory primary education for all children up to the age of 14 years is a constitutional obligation. The elementary education system enrolls 136 million children today as compared to only 22.3 million children in 1951. Education or literacy contributes to socio-cultural consciousness and concerns for such issues as women, health, welfare, personal and social hygiene, child care, protection of

\textsuperscript{995} India and ILO, http://hcpcr.gov.in/showfile.php?lid=129 last seen on 23/02/2019

\textsuperscript{996} Unicef and child labor in India, available at http://unicef.in/whatwedo/21/child-labour. Last seen on 23/02/2019
children from health hazards, nutrition and their mental development. Dr. Myron Weiner, who is the UNICEF representative of India; says that child labor can only be eliminated or curbed in India if government ensures that elementary education is made compulsory and there are enough teachers and schools as well as an appropriate action plan is being followed.997

2. Trainings
Youth volunteers, school teachers, gram panchayats, officers of labor department and others, all must be given training about child labor and their respective roles in abolition of child labor. Training modules should be prepared on the issue of education and child labor. All the participants must have a legal literacy and have a full knowledge of children’s rights and their entitlements, the role of various departments, and awareness of the schemes and programs meant for children.998

3. Constitutional Safeguards
The Constitution of the Republic of India was drafted with a view, among other things, to protect the interest of is children—both through the Fundamental Rights, and the Directive Principles of State Policy whereas several other provisions.999

4. Abstain from employing a child as a domestic help or labor
This can be a biggest step one can do to curb child labor. In India people employ children for petty works in shops and garages like helper, cleaner etc. As per United Nations development report 40% of domestic help in Mumbai are under-15 girls. Most people justify such employment of children by reasoning that they provide them better life as compared to what they would have been living in their homes which should be avoided.

5. Report to police when you see child labor
Whenever a person witnesses any kind of child labor in force he/she should immediately report it to the police and should make use of the required legislations for the same. This will ensure that the child gets timely help and gets rescued instead of being exploited.

Other steps could be- to encourage children to take up education instead of work; universalization of early development and childhood care as well as quality education for all children, provision for a legal and social protection from all kinds of abuse, neglect and exploitation; abolishing child labor with the aim of eliminating all forms of economic exploitation of children; monitoring the review and reform of programmes, policies and laws to ensure protection of the interests and rights of children; focusing on better coordination at national, state, district levels targeting elimination of child labor and protocols should be formulated for the rescue and rehabilitation of child laborers.1000

Indian legislations, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/6187/12_chapter%204.pdf , last seen on 24/02/2019

Measures taken to avoid child labor, available at; http://ncpcr.gov.in/showfile.php?lid=66, Last seen on 24/02/2019

Avoiding child labor, available at; https://blog.timetoswipe.com/5-steps-stop-child-labour-india/, last seen on 24/02/2019

Steps taken by Indian government to curb child labor, available at;
VI. Conclusion
India looks ahead on the establishment of new social order which will be free from all sorts of exploitation. Children being our precious and supreme assets shouldn’t be ignored for anything concerning their development, survival, participation as well as protection. However, in a country with a large number of population, vast disparities, social conflict and turmoil, the challenge to attend to all their rights becomes even greater. The rights of children should be a matter of great concern all the citizens because the children constitute one of the most vulnerable sections of the present along with the future society.

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https://ijest.journals.yorku.ca/index.php/ijest/article/viewFile/39705/35953 last seen on 24/02.2019