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EDITORIAL

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

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

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

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INTERFACE BETWEEN PROPERTY LAW AND INTELLECTUAL PROPERTY LAW

By Aneesha Sondhi
From University School of Law and Legal Studies, Delhi.

ABSTRACT

The laws governing both property and intellectual property work together to protect the property interests of people in the society. The approach of the two might vary but the ultimate objectives are similar. The aim of this research is to identify the ballast i.e. connecting link between the two parallel rails on a railway track. Property law and IPR law are the two rails, governing two different sets of property and transactions, but headed in the same direction to achieve the same goal.

Introduction:

The universe of property law is vast. There exist plenty of legislations to govern different sets of properties as it is impossible as well as impractical to draft one comprehensive legislation to govern all of them. The laws governing movable and immovable properties have now been in existence for quite a long period. They include Transfer of Property Act, 1882, Sales of Goods Act 1936 and others. Whereas, the development of laws on intellectual property is relatively recent with the growth in the knowledge economy. The importance knowledge has today can be adjudged from the fact that almost every nation has drafted laws and brought structural changes to protect knowledge, creativity and innovations. There are several laws in India for the protection of intellectual property such as patents, copyrights, trademarks and many more.

Even though the legislations on intellectual property and traditional property are different, a plain reading of the laws would certainly show that the essence and the intent of both kinds of legislations are the same. Afterall, they all deal with ‘properties’ only. Below-mentioned are the few aspects where the ideologies of both the property and the intellectual property laws coincide.

Striving to achieve a balance between public interest and private interest:

Since the beginning of time, a lot of human sentiments have been attached to the issue of property. It is natural human tendency to be protective about one’s own property and wishing it to stay within the family for generations as it is seen as a matter of pride and status. However, if such wishes are granted and the property becomes inalienable, it would act as a detriment to property and the market. Furthermore, it would be against the interest of the community. Therefore, certain situations warrant that the property should be let free and enter the public domain.

The Transfer of Property Act, 1882 and the IP laws in India seek to achieve a balance between the wider public interest and private interest by limiting the ownership of the property for a certain period of time. This policy of the law exists to prevent property from being tied up forever. After a certain period of time, long or short, the property falls into the market and the public arena. The public may have access to it, or

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be able to purchase it, and even recreate it. The nature of the property will determine what would happen to the property next.

As regards property law in India, there exists Rule Against Perpetuity stipulated under section 14 of the TPA. It is based on the general principle that the liberty or right of the owner of the property to alienate or transfer his property at his pleasure, should not be so exercised that it is detrimental to the property itself. The objective of this section is to encourage free circulation of property in the market. Perpetuity has been said to be odious in law, destructive to the common wealth, and an impediment to commerce, by preventing the wholesome circulation of property. The section restrains the creation of future conditional interests in the property. It restricts the owner from creating unknown life interests and operates on account of public policy. Therefore, this rule balances human psychology and law; it balances between individual and community interest. It prevents the property from being blocked with one family till the end of time.

As regards copyright, the general rule is that a copyright will last for 60 years. In the case of original literary, dramatic, musical and artistic works, the 60-year period is counted from the year following the death of the author. For instance, all films in India made until 1959 have lost the protection provided by copyright and are now in the public domain. There is a high likelihood of a lot of big shot Bollywood movies getting remade. Part II may become a permanent suffix to a lot of upcoming movies. The law has been challenged by many artists to increase the duration of copyright protection. But whether the law will be amended or not is a question that is yet to be answered by the courts.

This termination of copyright can be construed as a rule against perpetuity in the field of Intellectual Property laws. The rationale behind the termination is to be able to revisit, adapt, and rewrite those works. It allows one to explore and examine those works in ways that criticism alone cannot. The original author gets his due recognition and revenue and her/his heirs are also benefited for a certain time period after his death. Like immortality of a human is a curse, likewise, immortality of the benefits of a creation is against public policy. Thus, this rule is enunciated for the protection of interests of the public and particularly those who want to explore the work in depth.

Eminent Domain: Property Acquisition by State

Plenty of provisions in both the property and IPR laws are incorporated to forbid fetters on the freedom of ownership. Ownership is not just defined as a single right but as a big basket containing numerous other rights and interests. The term ‘ownership’ is only an umbrella term. The other rights within it include right to enjoy the property as per ones likes and dislikes, right to alienate the property and many more. If one does not enjoy these securities, the essence of ownership will be undermined. However, there are certain exceptional situations where an owner of a property may be deprived of these rights. It happens in those situations where the interest of the public weighs more on the scale than the interest of the individual. Here the government plays the role of the

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3 D. J. Vakil, Commentaries on the Transfer of Property Act, P. 240 (2nd Ed. 2004).
‘Taker’. Acquisition by State can take place in case of both tangible and intangible properties.

The rationale behind this is that the State, i.e. the chosen government in power is the primary proprietor of land. The concept of eminent domain plays an important role in the Indian property law arena. The propriety right in the previous era was seen to exist with the kings and now, in a democracy, is viewed to be with the government. Even though the property is taken up by private individuals, the government’s primary power prevails in certain exceptional situations and for the benefit of the community at large.

This policy is founded on two maxims namely:

- “salus populi supreme lex esto” i.e. the well-being of the people is the supreme law.
- “necessitas public major est quam prius” i.e. public need is greater than the private need.

These maxims pave their way in both the property and intellectual property:

Patents Act, 1970 provides for the acquisition of inventions and patents by the Central Government. If the Central Government is satisfied that an invention should be acquired from the patentee for a public purpose, it will publish a notification in the Official Gazette, and thereupon the invention or patent and all rights would stand transferred to the Central Government. The patentee in such a case, shall be paid compensation. The compensation must be agreed upon between the parties. If no such agreement is arrived at, the compensation will be determined by the High Court on a reference made to it.

This usually takes place when patented invention is not available to public at a reasonably affordable price or the reasonable requirements of the public have not been satisfied.

The other option available to the government is Compulsory Licensing provided u/s 84 of the Act. Under compulsory license, the government permits some other party to produce the patented product or process without the consent of the patent owner. It is a contract between an unwilling seller and a willing buyer that is enforced by the government.

In the case of *Natco Pharma Ltd., India vs Bayer Corporation, USA,* the then Controller of Patents issued the order of grant of first compulsory license for patents in India. It was issued to Natco Pharma Ltd. The patent had been granted and belonged to M/S Bayer Corporation. This patent related to the drug Sorafenib Tosylate which was sold under the brand name Nexavar by Bayer Corporation. Nexavar is used for the treatment of kidney cancer and liver cancer. After getting this compulsory license Natco Pharma Ltd. is now free to manufacture and sell a generic version of Nexavar in treatment of cancer. Certain amount of Royalty is to be paid to Bayer Corporation for the net sales.

This decision by the Controller was found on consideration of the reasonable requirements of the public with respect to the patented invention. Prior to this landmark judgement, only 2% of total kidney and liver cancer patients were able to access the Bayer’s drug. Moreover, it was not available to the public at a

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4 Section 102, Patents Act, 1970.
5 M.K. BHANDARI, LAW RELATING TO IPR, p.111 (2nd Ed. 2010).
reasonably affordable price because Bayer was charging about Rs 2.8 lakhs for a therapy of one month of the drug. Non-availability of the drug in India was costing a fortune because of the high price of the imported drug. Therefore, in the light of these circumstances, the need for granting of a compulsory licence was indispensable.

On the other hand, land and property acquisition in India is governed by the Land Acquisition Act, 2013. Land acquisition in India has been defined as the process by which the union or a state government obtains private land for the industrialisation drive, development of infrastructural amenities or urbanisation of the secluded land. The power of eminent domain allows the government to take private land for public purposes only if the government provides fair compensation to the property owner. An interesting provision in the Act is Section 30 which provides for award of solatium i.e. compensation for emotional harm caused and the manner of determination of solatium is also provided under the First Schedule of the Act. The underlying principle within it is that land is considered more valuable than money as it lasts forever.

In case the acquisition is for a government project, the consent of the affected parties is not required. Although the position regarding consent is different for private projects. Since, right to property is not a Fundamental Right under the Constitution, the concerned individuals have to concede to the government but only after the government fulfils certain criterias.

Article 300-A of the Constitution provides that “No person shall be deprived of his property save by authority of law”. Hence, the rights to property can be shortened, abridged or altered by the State only by properly exercising its legislative power and decision-making where public requirement overrides the interest of individual right. In addition to that, to say valid it must please the following three tests:

1. The authority which has passed the law must have the legislative capability to do so;
2. It must not invade upon any other fundamental right under part III of the Constitution; and
3. It must not violate any other provision of the Constitution.

Transferability: Property and Intellectual Property

It is a general principle that almost all kinds of property are transferable. If one is an owner of a property, he/she/other always has an indispensable right to transfer the ownership of that property. Transferability is a necessary attribute of property and ownership. It is an implied right to be able to transfer. Not only ownership but other rights regarding the property can also be transferred without necessarily passing of the ownership. The medium of transfer includes sale, gift, exchange and others. The pre-requisite is that the property must be in existence at the date of the transfer and that the transferor should either be the owner or someone authorized to transfer the property.

Transfer of Property Act, Sale of goods Act, 1936 and other laws pertaining to corporeal property authorize the same. The position

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on transferability of incorporeal property is somewhat similar. Just like any other property, the intellectual property is also capable of being assigned, gifted, sold and licensed. For instance, a patent or a copyright in the law is a property right hence it is capable of being transferred. It can be done via grant of licence or through assignment.

As regards voluntary licensing, a similarity can be drawn with the concept of lease. By way of a license, the patent holder can permit others to make, use, or exercise, the invention which otherwise would not be permitted. This is done by way of a written agreement and neither Indian patent office nor the government has any role in the grant of such license. The bundle of rights transferred in such a case may be limited as to time, geographical area, or field of use. Similarly, in case of a lease, the bundle of rights is transferred by the lessor to the lessee for a stipulated period of time. A lease has been defined as a transaction with respect to immovable property and creates a right to enjoy such a property for a certain time and for consideration of the conditions mentioned in it. It is only a partial transfer where the right to use and enjoy the possession of a property is transferred in favour of the lessee. Both patent licence and lease are not for an indefinite period. The possession of both is capable of being retained by the owner.

On the other hand, a similarity can be drawn between Assignment under the Patents Act, 1970 and the provisions of Gift provided under the TPA, 1882. In the former, all or part of the patentee’s rights, title and interest in a patent can be passed via assignment. In the latter, all or part of the donor’s rights, title and interest in a property can be passed by way of a gift. The transfer can be made for any movable or immovable property that is capable of being transferred. In both the situations, i.e. assignment or gift, the transfer may either be an absolute one or a partial one. The owner may or may not divest himself of all his rights. He may retain some as per his own discretion.

**Crimes against property**

The rights regarding property would be reduced to plain sentences if adequate protection is not provided to safeguard the property. Infringement of Intellectual property can take place in many forms. For instance, infringement of a registered geographical indication takes place when an unauthorized person exploits the rights bestowed on the registered proprietor of the geographical indications. Similarly, other intellectual properties can also be infringed by way of unauthorized use, sale etc. Both criminal action and civil remedy can be availed in case of infringement of Intellectual Property. Similarly, regarding tangible property, both civil and criminal offences such as theft, breach of trust, trespass and others can be committed.

Once a crime against property is committed, the Criminal Procedure Code plays the role of a queen on the chess board. The offences under the Trade Marks Act, 1999 and the Copyright Act, 1957, by virtue of the First Schedule table II of the Code of Criminal Procedure, 1973, are classified as cognizable offences. Thus, the offence under these acts can be investigated and inquired by the police by mere registration of a FIR without the

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11 Section 105, Transfer of Property Act, 1882.
12 T.K. BANDYOPADHYAY, SAURABH BINDAL, INTELLECTUAL PROPERTY LAW, P. 137 (1st Ed. 2015).
adjudication by the Magistrate upon the issue. Many times, the identity of the manufacturers or the distributors of the infringing material is unknown to the complainant. Such a scenario might be construed to be a hindrance in the initiation of a criminal action. This problem is addressed u/s 93 and 94 of the Code by virtue of which one can request for initiation of a search and seizure proceedings against unknown persons. On the other hand, offences against property are made punishable under the IPC, 1860 and therefore pave their way within the CrPC, 1973.

Conclusion

While separated by many decades in terms of inception, laws governing property and intellectual property are amazingly similar in essence and goals. The origin of both is from the same Grundnorm and therefore they are of the same nature. Moreover, both the laws synchronize with human psychology. They aim to strike a balance between the public and the private interest. This is achieved by providing the individual a platform to protect his property as well as his knowledge property. This protection of property provides incentives to people to create new properties as well as accumulate them. It also leads to a desire to retain those properties. Sometimes, this retention is harmful to the needs and interests of the public. This is where the State comes into the picture. Where the public interest is being compromised, the State has power to acquire the property using its power of eminent domain for the larger interest of the society. So, the constant balancing of interests continues with judgements, one way or the other, being delivered from time to time leading to important shifts, and balancing and rebalancing exercises. It’s a delicate interface, but a very important one as well.

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CONNECTING THE DOTS: AN EXPLORATIVE ANALYSIS OF LOUBOTIN’S CASE AS AN OVERARCHING REGIME OF TRADEMARKS

By Anjali Jaiswal
From NMIMS Kirit P Mehta School of Law, Mumbai

Abstract

Colours come under the ambit of public domain and are devoid of any fanciful feature to classify distinctiveness. With globalization and economical advancement, distinctive usage of single colours has developed a secondary meaning making them eligible for trademark registration. Such novel forms of mark i.e., the unconventional/ non-traditional marks are the new stem of trademark jurisprudence. Fashion has developed as a dynamic industry making the question of protectibility of Intellectual Property of creative fashion designers need of the hour. The European Court of Justice recently recognized that the signature shoes with the red colour lacquered sole designed by the famous designer Christian Louboutin is a valid trademark. This leading judgement centred on the technicalities of European trademark law, questioning whether a trademark that includes a colour painted on the sole of a shoe consists exclusively of a shape; which is not entitled to protection, or whether it is a position mark, capable of trademark protection. Against the backdrop of the judgment by the European Court of Justice this article focuses on the unconventional trademarks as the overarching regime of trademarks. The author makes an attempt to understand the stance of Delhi High Court on the same issue and the position of colour marks in India

Keywords: Distinctiveness, Colour, Trademark, Red Sole, Unconventional Trademark

Introduction

According to Section 2(1)(zb), A trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours. On initial reading the definition mentioned in the Act tends to be open-ended, thus making way for the unconventional marks relating to smell, colour, etc which are not mentioned in the Act to be considered as trademarks. When comprehensively considered, an unconventional mark should have the expressive ability to distinguish among the goods or services of one person from that of another.

The basic hindrance behind registration of unconventional mark lies under the necessary condition of ‘graphical representation’ of the mark. The Indian Trade Marks Registry often finds this criterion of graphical representation unsatisfied by the unconventional marks and thus such applications for registration are often rejected. The Trademark Rules, 2017 introduced a developing and welcoming period for registration of unconventional or non-traditional marks. Under the rules sound marks can be registered by submitting a sound clip along with the musical notations. The Act while defining Trademark includes the expression ‘combination of colours’ and not a single colour. This is the inherent reason behind

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rejection of applications of single colour as a trademark by the registry. The basic assumption behind not granting trademark protection to a single colour is that it will create monopoly in the market thus hampering the competitiveness in the industry. It is usually difficult to show the combination of colours or single colour as inherently distinctive. The Application for registration of such marks should also be annexed with evidentiary documents showing that the colour or combinations of colours are solely related with the Applicant. Further it exclusively represents their goods and the consuming public associates the colour with the goods or services of the Applicant.

The onus for proving acquired distinctiveness of the mark or secondary meaning through continuous bonafide usage of the mark is upon the Applicant. The brand owners or the users of the mark can make an application for registration of the mark even if the mark is not inherently distinctive, by providing satisfactory evidence that the mark has acquired distinctiveness in the market due to its usage over a long span of time. According to Halsbury, certain conditions are required to be fulfilled to register an unconventional trademark:

- The mark should be intrinsically distinctive.
- The mark should be able to distinguish the particular product from other products.
- The mark should be capable of graphical representation.\(^{16}\)

To achieve protection of trademark in a particular colour, the colour must ‘act as an indicator of source’ instead of serving any function. Many single colours have been granted protection under the umbrella of Trademarks like the orange of Home Depot, Tiffany’s specific shade of blue used on its boxes and catalogues. These protected shades of colours have gained a secondary meaning in the industry, as the concerned set of consumers associates these protected colours with the specific goods or services provided by the brands. However, to protect an individual colour it is essential that it is used in respect of brand promotion and does not affects the brand’s identity by indulging into the functionality aspect of the goods or services. The essential objective of Trademark law is to provide protection to consumers from getting confused about the ‘origin and quality of the product’ and giving a unique identity to the goods.

Colour Trademarks is debatable topic in various countries, each one managing the issue differently. There is no doubt on the fact that colours are playing a fairly significant role in the realm of fashion. Colours sometimes provide the distinctive feature in a product or service. Recognizing this Article 15(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) redefined the definition of trademark law to encompass ‘any sign...capable of distinguishing the goods or services of one undertaking from those of other undertakings’. This paved the way for a non-conventional trademark i.e. Colour to be granted trademark protection.

The test while granting exclusive rights in that how closely is the colour to the design and whether the target consumers are capable of instantly recognizing the colour being particularly connected with the design or not?

The peculiar case of Christian Louboutin’s Red Sole

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Colour has dependably been a standout amongst the most critical parts of fashion industry. The issue of securing rights over a colour is an interesting battleground among courts and international brands, with different parties playing with various set of rules. According to world famous shoe designer Christian Louboutin, red implies sensuality - and serves as a crafty, subtle branding tool. I selected the colour because it is engaging, flirtatious, memorable and the colour of passion. The designer’s label is a well known luxury brand of shoes with signature red soles to distinguish it in the industry. The controversial Christian Louboutin’s Red Sole Case in the European Court of Justice focuses over one significant and basic question, that ‘Can a designer be permitted to have exclusive rights over a colour?’

The Ruling of European Court of Justice

Christian Louboutin was granted a Benelux trademark for the red colour (Pantone 18-1663TP) applied to the sole of high heels shoe in 2010. In 2012, Van Haren, a Dutch brand started to sell high-heeled women’s shoes with red coloured soles. This led to the trademark infringement proceedings initiated by Louboutin before the District Court in The Hague, Netherlands, succeeded in the initial proceeding.

The validity of Louboutin’s red sole trademark was challenged by Van Haren under Article 3(1)(e)(iii), which prevents registration of any sign which consists ‘exclusively of […] the shape which gives substantial value to the goods. Van Haren contended that the mark at issue was a two-dimensional figurative mark that consists of a red coloured surface and hence cannot be registered as a trademark. The Hague District Court indeterminate about the ambit and scope of the term ‘shape’ sought opinion from the Court of Justice of the European Union on the issue that whether the concept of ‘shape’ is limited to three-dimensional properties of the goods, such as their contours, measurements and volume, or whether it includes non-three-dimensional properties of the goods, such as their colour.

In an additional opinion, the Court of Justice of the European Union Advocate General indicated his inclination to maintain the mark as a sign inclusive of the shape of the goods because the shape of the sole matches the spatial delimitation of the colour red. The Court of Justice of the European Union, however, did not follow this opinion and confirmed the validity of the trademark. The Court concluded that where the main element of a sign is a specific colour designated by an internationally recognized identification code, that sign cannot be regarded as consisting ‘exclusively’ of a shape. The court observed that the Louboutin’s trademark description expressly excluded the contour of the sole from trademark protection. Article 3(1)(e)(iii) must therefore be interpreted as meaning that the sign in question did not consist exclusively of a ‘shape’, within the meaning of that provision.

This leading case centred on the technicalities of the European trademark law, questioning whether a trademark that consists of a colour, applied to the sole of a

17 Louboutin v Van Haren Schoenen BV (Case C-163/16).
18 Directive 2008/95/EC.
21 Directive 2008/95/EC.
shoe consists exclusively of a shape; which is not entitled to protection, or whether it is a position mark, capable of trademark protection.\textsuperscript{22} The Court of Justice of the European Union held that the red sole mark is a perfectly valid position mark and is not contradictory to the clause relating to the shape marks, thus acknowledging that Louboutin’s red soles are capable of protection under E.U. trademark law. This decision of the court has opened up plethora of opportunities in the fashion industry to register the trademarks and acquire distinctiveness in a single colour in some specific configurations and protect its creative identities.

**Stand of Delhi High Court on the ‘Red Sole’**

In India the destiny of Louboutin’s red coloured sole has been dubious inferable from the differed opinions of the Delhi High Court. In recent years the Delhi High Court has given fluctuated opinions in three different decisions where the essential pith of the issues in matter was whether the red coloured sole was a well known trademark in India. Except if there is a dictum by the Apex Court these judgments will continue creating a predicament on the issue. These judgments are summarized below to understand the mindset of the court in arriving at the distinguished conclusion in each case.

In the case of *Christian Louboutin Sas vs Mr Pawan Kumar & Ors*\textsuperscript{23}, 2017 the Plaintiff prayed for issue of permanent injunction restraining the Defendants from manufacturing and selling footwear bearing the Plaintiff’s red sole trademark. The Plaintiff also prayed to declare its Red Sole Trademark as a well-known trademark in India. The Delhi High Court held that the plaintiff’s trademark is internationally recognized and has extensive usage in India. It enjoys trans-border reputation in the country and the consumers were well aware about the goodwill enjoyed by the mark even before it was formally introduced in the Indian market.

Unlike the above decision, the same court in the case of *Christian Louboutin SAS v Abubaker*\textsuperscript{24}, 2018 dismissed the plaintiff’s suit of infringement against the defendants by holding that the usage of a single colour in the sole of the shoe does not qualify as a valid trademark in India. The court’s pronouncement essentially cantered around the definitions of a ‘mark’ and ‘trademark’ mentioned in the Act. It also relied on the absolute grounds for refusal of the mark specified under Section 9 of the Act and the corresponding provisions relating to the limits of the effect of a registered trademark laid down in Section 30 of the Trade Marks Act. It categorically referred to the legislative intent behind that the deliberate use of the expression ‘combination of colours’, and not use of the word ‘colour’ in singular form, thus clearly indicating that a single colour could not be included in the definition of ‘mark’.

Such use of a colour by a competitor cannot be forestalled, despite the fact that the very characteristic has received a registration. The court also highlighted that it has the authority to reject claims of ownership of, or entitlement to, a sign which is not capable of being a trademark. However in the case of *Christian Louboutin SAS v Ashish Bansal*\textsuperscript{25}, 2018 on similar facts an infringement suit was filed by the Plaintiff, wherein the court granted a decree

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\textsuperscript{23}CS(COMM) 714/2016

\textsuperscript{24}CS (COMM) No 890/2018

\textsuperscript{25}CS(COMM) 503/2016
of permanent injunction against the defendant from infringing the well known and registered ‘red sole trademark’. This recent judgment is in sync with the first case by the same court which recognised the validity of the red sole mark.

The Trademark Act, 1999 does not explicitly provide for protection of a single colour trademarks. Nonetheless, the practice guidelines drafted by the Trade Mark Office propose that single colours will be protected on strict evidence of acquired distinctiveness and that the registration of single colour will be permitted strictly to the degree of colour shade – in any case, with regards to enforcement, in principle, the comparable shades can be challenged against one another. Hence, to secure a single colour trademark registration, the Registrar shall be provided with the proof of acquired distinctiveness in India, before the date of filing of the trademark application. The Manual perceives that a single colour is proficient of obtaining registration. Nevertheless, the Manual clearly cautions that such marks will be subject to the objections under S.9 (1) (a) and profound evidence might be required to overcome these objections, given that they are not inherently distinctive. The Trade Mark Manual includes that while ‘a colour per se is not normally used by traders as a means of brand identification.’ and ‘consumers are not in the habit of making assumptions about the origin of goods based and services based solely on their colour or colour of their packaging’, single colours may be ‘in exceptional circumstances be capable of denoting the origin of a product or service’. The Manual anyway clearly directs towards what can comprise of exceptional circumstances. According to it, if the colour is ‘very unusual and peculiar in a trade and is recognized by traders and consumers alike that it serves as a badge of origin for that class of goods’, it might be registerable.

Conclusion

After doing a comprehensive study on the Christian Louboutin’s red sole dispute and the strikingly varied decision by the European Court of Justice and the Delhi High Court a realisation can be made that colour is an unmistakable component and a noteworthy player in the fashion industry and is frequently sought to have distinctive features. These characteristics often raise the question of trademark registration of a specific shade of a single colour. The decision of the European Court of Justice has potential to change the game in the fashion industry, focusing the players to seek protection for their colour marks if the specific shade adds distinctiveness to it.

However in India the archaic Trademark Act of 1999 nowhere discusses single colours but rather combination of colours. There is a reasonable weakness and a clear shortcoming in the Act as it is not in parity with the ever changing and evolving scenario in the competitive market. There is dire need of amendments in the Act for further clarity and to cater the needs of the developing economy. While each of the three cases before the Delhi High Court appear to have comparable realities, similar facts and revolve around the plaintiff’s Red Sole trademark there are diametrically opposite perspectives in the Delhi High Court’s decisions on the point of protection of single colour marks. The conflicting

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decisions and clashing opinions leave uncertainty with respect to registrability and implications of existing trademark registrations for single colour marks in India. It is very peculiar that in the time span of two to three years the Delhi High Court has looked at the issue in dispute from different angles. These decisions have cleared way for a debate on the registrability of single colour marks and the significance of pantone numbers, explicitly in the restrictive field of fashion, where it is getting easier and easier for big brands to monopolize the industry and corner the business.
INTELLECTUAL PROPERTY VS. COMPETITION LAW

By Ankit Somani
From Nirma University.

Abstract
Intellectual Property Rights and Competition Law cross each other’s path. At one side, Intellectual Property Rights provide exclusive rights to the creator while on the other side; Competition Law ensures free and fair functioning of market mechanism. The aim of both the stream is to ensure anti-competitive practices and boost of the economy.

As India is a developing country and is working on its administrative law, Indian company Micromax who has filed the case against the Microsoft India is just the starting of tussle between Intellectual Property Rights and Competition Law. There are thousands of cases arises out due to the conflict between Intellectual Property Rights and Competition Law. India has lack of case laws and jurisprudence which guide the legislative authority to form the stringent law. Moreover, India is looking the laws of US and EU and try to implement that law structure in Indian legal system.

The paper deals with the IP Laws and Competition Laws from India’s Perspective and the same as with the US. The analysis of both the country shows that how government and legislative authority plays a vital role for both the stream. This paper will also show the judicial interpretation in respect to both these act. Moreover, Intellectual property rights and competition law co-exist on the same parallel lines but it will never complement each other. There is no other way to work these two mechanisms by respecting and balancing between to each other.

Introduction
Intellectual Property Rights is a creativity that is presented to the world by the power of the mind. Intellectual Property Rights gives recognition to those people who by their artistic work, symbols, and designs create uniqueness in their work and differentiate them from others. The main agenda of this is to protect and secure the work of those intellectual who by their human intelligence has contributed something unique for the human welfare. Intellectual Property Rights try to promote each and every individual to do extraordinary in the science and technology, literature work and art that promotes creativity among other ones. The law that helps and secures the work of creativity of human intellectual is known as Intellectual Property Law.

Intellectual Property Rights are protected by different countries by their respective law and thus, serve the best interest to the creator. On the other hand, Competitive Law aid India by providing free and fair market to all the people who are engage in the sector of market. As India follows the mixed economy concept, it is of great necessary to provide a legal system that encourages free and fair market and this law helps all competitors by its preventative and stringent rule to run the market with the smooth and efficient functioning. In other words, competition law is a protective mechanism for the efficient working of the market. The basic idea is to stop


28 Competition Policy and Intellectual Property Rights in Developing Countries: Interests In Unilateral Initiatives And A WTO Agreement. (2019), Retrieved from
anticompetitive behavior and to promote creativity.

But, it should be noted that Intellectual Property Rights is playing the vital role in the economy by promotion and encouraging others to invest and invent new things. Moreover, it is the duty of the state to protect and preserve the individual rights who has done invention to the nation and at the same time it is also a duty to protect the competitor rights for free and fair functioning of market forces.

IP Laws and Competition Laws in India's Perspective

There is always a great concern in India related to the discussion between competition law and intellectual property rights. At the one side, Intellectual Property Rights protect and give exclusive rights to those intellectual by giving them the legal identity of Patents, copyrights, Geographical Indication, Trademarks and many more and on the other side, Competition Law plays a significant role in the economy of any nation to run the market forces efficiently. Both the law has one motive that is socio economic development and sustained economic growth. It is now evident from different countries approach towards Intellectual Property Rights that IP are the key and future of developed economy.

In 1991, India has created an open market policy in line with the economic liberalization of the country and with the increase in the competition in the market; India passed the Competition Act, 2002. The agenda of the Act is to avoid anti-competitive practices, not form any space of monopoly and most important is to regulate the limit of assets. As per Article 38 and 39 of Constitution of India which mentions that each state has a sense of duty to promote its people welfare by promotion, securing and protecting the social, economic as well as political justice. Moreover, it is also the duty of the state to recognize the work by via of ownership and provide power of control in such way which serve best to its community. All these duties are tracked down in the Competition Law as well as MRTP act, 1969, which is influenced by US, Canadian and UK legislation.

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India who started its economic journey by holding the rights in her hands (government has a rights to take the decision for the welfare of the state). But soon, it was realized by the government forces that they can’t control each and every market forces on their own and this realization leads to shift of public based economy to private based economy by the economic reform of 1991 that introduce with the term of Liberalization, Globalization and Privatization. India who is known for its conservative nature of economy has opened the doors to the world economy to invest and boost the economy. As India, to avoid any conflict between the competitors in the market, it has made competitive law for the efficient working of every sector of economy. By making competitive law, India tries to prevent the anti competitive practice that helps to control adverse affects on the economy and attain the best interest of both consumer and producer. Moreover, Section 3 of the Competition Act provides the principle to prevent anti competitive practices among business unit. Substitution,

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29 Competition Act 2002, section 3, 4 and 5.
India as a novice in the field of Intellectual Property Rights so that India is encouraging and promoting the creativity and for that India joined TRIPS agreement. The agreement work great for India in this field and achieved many intellectual claims. Moreover, TRIPS an agreement formed by the different nation on a common denominator of IP and Competition Law. TRIPS talks and adopted measured related to public interest such as health issue. Furthermore, it also shows serious concern and sense of duty related to nutrition level and other aspect of science and technology. Further, TRIPS came with the resolution that all members’ state of TRIPS provides licenses of patentee during the complete the patent term. Moreover, TRIPS portend that every member state has a right to issue compulsory licenses which are of two types. First, there is a problem of overriding public interest and secondly, to avoid anti-competitive manner.

### IP Laws and Competition Laws in the USA’s Perspective

The US objective is to promote the scientific research that will help their economy to become the global leader in intellectual rights. The US is working continuously for its progress of science and by passing law related to copyrights and patents. Substitution, US is also working with its Anti-trust law for the efficient working of their economy. US started it with the Sherman Act of 1890 and then Clayton Act of 1914. Sherman Act of US declared illegal all types of contracts, combinations or conspiracies which are in a restraint of trade or commerce among the states or territories or with foreign nations. The main objective that is required for this is that of mutual commitment and agreement for anti-competitive behavior.

US have a very distinct feature in this act i.e., this act deals with both Monopoly and Conspiracy to monopoly:

Notably, that a person doing all his activities in legal way and due to that he has attain goodwill in the market can’t be liable for monopoly unless he has done illegal act like prices control and exclusion of competition. Additionally, for monopoly there is required the combination of monopoly power and the intention to create monopoly, but there will be no monopoly of a person if he grows his business by implementing and conduction all the legal activities such as business tactics, schemes, superior product and subsequently he is also not liable for monopoly if the power is grown through all these activities.

Section 2 is added by US in the same act which prohibits monopoly or attempt regarding trade. Moreover, under this rule, monopoly and attempts to monopolize are judged with the reason.

The Clayton Act of 1914 provide guidelines that prohibit illegal all types of stock merger, tying etc. in the marker because it leads to monopoly in the business. Additionally, this Act also mentions about the offences that relates to price discrimination, exclusionary conduct etc.

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32 TRIPS (Article 8).
35 Ibid.
Moreover, there has been a constant battle between Intellectual Property and Competition Policy. Prevailing to this, to prevent the constant battle between them, in 1995 antitrust guidelines was issued by Federal trade commission and department of Justice. The basic guidelines created by the federal trade commission clearly stated that IPs and competition policy are working for the common objective of promoting of science with respect to innovation and on the other hand it is also dealing with the consumer welfare.

Judicial Decision on IPR
In the case of in Entertainment Network (India) Limited v. Super Cassette Industries Ltd, Supreme Court of India deals with basic question related to intellectual property protection and its competition effects on the market forces. The court with its due diligence specify that the owner of copyright has no doubt that he has a freedom on its product and it is on its discretion to use and charge on that royalty but it doesn’t give him the rights to do any monopoly by the means of unreasonable terms and court strictly said that “any transaction with unreasonable terms would amount to refusal”. However, this right is not absolute.

In Union of India v. Cynamide India Ltd and another, it was stated that it is a matter of great concern about price control on patented products and stated that especially lifesaving drugs could not fall outside the disclaimer of price control and especially it is more important when there is no substitute available in the market. Moreover, it becomes a great concern when it comes to developing countries that do not have proper resources for lifesaving drugs. The matter comes into notice because it was known that overpricing done to any patented product does not amount to violation of any competition policy.

In the case of Hawkins Cookers Limited v Murugan Enterprises, Delhi High Court stated that a company having unique mark gives him the sole right to create its business in the market with its product. As in the present case, Hawkins cookers mark of ‘Hawkins’ is used by defendant on its product of pressure cooker. As it was argued that, the use of gasket in the market is of different nature and the plaintiff by the mark tries to monopolize the market. So, decision was against the plaintiff as it was evident that the use is not of same nature and Hawkins cannot create monopoly with the use of its dominant position and it will be considered abuse of dominant status in the market.

These cases show that how the uses of IP are not absolute and it on the discretion on the different authority which regulates the whole system. Moreover, they tries to balance between intellectual property and competition policy that helps to create efficient working of different market forces for the purpose of greater goods of economy.

Conclusion
As from the above discussion, it is evident that intellectual property rights has a discretion of protecting individual rights while on the other hand, competition policy cover the inapt of whole market i.e., it

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37 Entertainment Network (India) Limited v Super Cassette Industries Ltd [2008] Supreme Court of India (Supreme Court of India).
38 Union of India v Cynamide India [1987] Supreme Court of India, 2 SCR (Supreme Court of India).
39 Hawkins Cookers Limited v Murugan Enterprises [2012] High Court of Delhi (High Court of Delhi).
protect the market from dominating nature and helps in better working of the mechanism. These two policies will always be talk simultaneously, as one talk about the rights while other talks about the highest use of that rights. Authority never interfere with the intellectual property rights such as goodwill, reputation status, firm’s identity etc and helps the person who has done unique for the society but on the contrary competition policy work to avoid the monopoly in the market by its rules and regulation. Notably, IP was promoted with the two incentives first, to protect the individual rights and interest on the unique product and second, to encourage the new comer to do unique and increase the competition in the market.

Moreover, there is vast difference between different laws in different countries. So, as to compare India with different countries and mainly with US and EU, India is far back from them in IPRs. The law in these countries has walked a long path by recommendation by different committee and by amendment in the law. As we compare the US policy, they have a unique law that don’t present in India i.e., even intention to monopolize has also come under the inapt of law and that aid to efficient working of market forces. India has to work in many areas which of great concern to reduce the conflict in IPR and competition policy.

There will always be heated debate on this issue with respect to individual rights over a product and its usage versus freedom of trade and commerce. It is matter of conflict for government to provide exclusive rights to one person by separating it from others or to provide freedom of trade of each and every product they want. For this, the government tries to solve the conflict between Intellectual Property Rights and competition policy by balancing both the sides. Evidentially, competition policy plays a vital role for IPR working in the market as it promotes and aid innovation but at the same time it makes laws which avoid the conflict between IP and other market competitor.

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SHAYARA BANO TO SABARIMALA: RELIGION VS PART III OF THE CONSTITUTION

By Anna Anu Priya
From Law College Dehradun, Uttaranchal University

This paper aims to address and study the existent conflict between the right to religion, the immunity of personal laws and the constitutional ideals as a whole. The subject of the study, \textit{prima facie}, appears oxymoronic and contradictory, given that religion (rather, the right to it) is itself a Fundamental Right and hence, a component of Part III of the Constitution. This paper, however, aims to analyse-in light of the recent Supreme Court judgements- the existing balance, if any, between religion- Article 25, Article 26 and personal laws on one hand and the remaining Fundamental Rights on the other.

The first is the \textit{Shayaro Bano} case, that decided the \textit{triple talaq} issue and gave some important observations on personal law in the process. The second would be the \textit{Sabarimala} decision, that laid down elaborate law regarding the exercise and limits of Article 25 and 26. The author examines these laws-not as precedents-but as subjects of research, while considering every other Court decision as a reference for comparison.

The paper also employs the use of the ‘\textit{basic structure doctrine}’ in the examination and analysis of this presumed balance that is the subject of the study. The extent of permissibility of Judicial Review in cases like these is also examined.

\textbf{The Premise}

‘Religion (in modern States) is, in part, constituted by means of law, but simultaneously as something that is constituted to stand at an arm’s length from the law.’

The first reason is that religion is a feudal institution—a component of the feudal society where equality among all was not justified. Early civilisations flourished with the use of muscular strength, manpower and the availability of water-resources. The concept of religion and the Gods were conceived during those ages. The possibility of organization and employment of intellect for sustenance grew with time and an industrial society was created. New opportunities were created, division of labor emerged at all levels—gradually, the possibility of contribution of all genders and all classes of people became equally possible. The second reason is that although human society grew from feudal to industrial, religion remained a matter of faith and not facts. Hence, these tenants of human faith that remained unchanged were bound to collide with the newfound ideas of the ‘industrial human society’. In such a society, a progressive interpretation of the Constitution ascertains that the rights under Part III of the Constitution are geared towards recognition of individual at its basic unit, and women are treated as equal individuals. As something that is intended to remain “at an arm’s length” from religion, law has, by virtue of creation and necessity, attempted to control it.

\textit{The State of Kerela, Writ Petition (Civil) No. 373 of 2006, decided on 28.09.2018 (Supreme Court)}

\textit{India Young Lawyers Associations & anr. v. The State of Kerela, Writ Petition (Civil) No. 373 of 2006, decided on 28.09.2018 (Supreme Court)}

\textit{Supra 1}

40 Michael Lambek, \textit{Interminable Disputes in Northwest Madagascar}; Religion in Disputes pp 1-18

41 India Young Lawyers Associations & anr. v. The State of Kerela, Writ Petition (Civil) No. 373 of 2006, decided on 28.09.2018 (Supreme Court)

42 Supra 1
The Conundrum and the Difference of Opinion

The two case laws that are the focal points of our study are: *India Young Lawyers Associations & anr. v. The State of Kerela* (the Sabarimala case) and *Shayara Bano v. Union of India & ors.* Both these cases involved aspects of religion in conflict with other Constitutional ideals. Individual dignity, specifically dignity of women, as opposed to religious constrains were examined in these cases. In the *Shayara Bano* case, the majority struck down the practice of triple *talaq* (or *talaq-e-biddat*) in exercise of its powers of ‘judicial review’ under Article 13(1) of the Constitution. The Sabarimala case led to the wiping out of an age-old practice of banning menstruating women from entering a place of worship. Rules were made pursuant to this disability, owing to the celibate nature of the deity. The apex Court struck down the law supporting this disability. While the societal effects of these rulings are intended to be nothing but positive, the complications of law were not far behind. The dissenting opinions of the same case laws paint a suave picture of these complications.

The minority opinion in the *talaq-e-biddat* issue concluded that although the practice is a social bane and is infested with gender bias at its very core, it satisfies the constraints provided by Article 25 of the Constitution. Personal laws have the protection of Article 25. To quote the former Chief Justice, “We (the Bench) were obliged to keep reminding ourselves, of the wisdoms of the framers of the Constitution, who placed matter of faith in Part III of the Constitution.” He further said that if the Court itself endeavored to proceed on the issue, “it would amount to overlooking the clear letter of law”. Khehar, J. speaking for himself and Nazeer, J., denied to take judicial course to entertain the issue, not before declaring that manifestation of the ‘legislative will’ for the cause would be the appropriate cause of action. An intermediate relief was given by granting injunction against the exercise of *triple talaq* for six months, and if legislative action was initiated, until the event of such law. Hence, in this case the Bench differed in their opinions of the jurisdiction of the Court.

The Sabarimala issue, although different from the *Shayara Bano* case, faces the same Conundrum of Equality vs Religion. The majority gave their ruling based on the general presumption that “in the Constitutional order of priorities, the individual right to freedom of religion is not intended to prevail over but was subject to overriding postulates of equality, liberty and personal freedoms as recognized in other provisions of Part III.” The dissent in this case was given by Indu Malhotra, J., wherein she said that issues of deep-rooted religious faith and sentiment must not ordinarily be interfered by Courts in a secular polity. In addition to cautioning the Court’s unwarranted interference in the matter, her opinion differed from the Bench in the matter of maintainability of the petition. Malhotra, J. questioned and dismissed the plea for considering the petition. The perils that could result out of questioning “long-standing customs at the behest of persons who do not subscribe to the faith” were not lost on her. She made her apprehensions, regarding setting a dangerous precedent, clear in her part of the judgment. Her concerns about religious

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43 Supra 2  
44 2017 (9) SCALE 178  
45 Supra 5  
46 Supra 2
minorities, especially for a religiously-motivated country like India, are well-found. She went on to enunciate a number of precedents, namely a.) Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshimdra Thirtha Swamiar of Sri Shirur Mutt47, b.) Sri Venkataramana Devaru & Ors. v. State of Mysore & ors48, c.) Mahant Moti Das v. S.P. Sahi, The Special Officer-in-Charge of Hindu Religious trust & Ors.49, d.) Durgah Committee, Aimer & Anr. v. Syed Hussain Ali & Ors.50, e.) Sardar Syedna Taher Saituddin Saheb v. State of Bombay51 and f.) Bijoe Emmanuel & Ors. v. State of Kerala & Ors.52. In all of these cases, the challenge to a religious practice was entertained because the aggrieved person filed the petition in Court. Justice Malhotra, while limiting the scope of Public Interest Litigation (PILs) on one hand, also said that Courts should interfere in matters of faith only if they are “pernicious, oppressive or social evils”.

Judicial Interpretation and Judicial Review: Possibilities and Limitations

Judicial activism has affected religion as much as it has other diverse areas like the environment or the or federalism.53 The instant case laws have examined laws created by religious denominations, personal laws and customs. To claim rights as a ‘denomination’, the ingredients of the same must be fulfilled. Evidence/declarations help to that cause. While the status of a religious denomination is clearly enunciated in the Constitution of India, the status of customs and personal laws has been controversial and open to interpretation. Some believe that customs and personal law are harmonious terms, while other repel this view. In the Narasu Appa Mali case54, customs have been considered as deviations from the personal laws, while in the Shayara Bano judgment55, the ability of the Court to rule on a custom and a personal law is discussed in parallel. Courts have tried to exercise self-restraint in exercising its powers when it comes to religion, as discussed in the previous heading. One cannot help but deny that the judiciary is playing this role of a progressive protector of human dignity when it comes to archaic and derogatory religious practices. One of the reasons judiciary can play this role is the legitimacy it enjoys in public perception.56 However, it must not be forgotten that in a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practices followed by any group, sect or denomination, could cause serious damage to the Constitutional and secular fabric of this country.57

The Extent of Permissible Religious Freedom and Indian Secularism

Religious freedom implies the freedom to profess one’s religion: rituals and practices. According to the Bombay High Court, “Whatever binds man to his own conscience, and whatever moral and ethical principles regulate the lives of men alone can constitute religion as understood in the

47 1954 SCR 1005
48 AIR 1958 SC 255
49 AIR 1959 SC 942
50 AIR 1961 SC 1402
51 AIR 1962 SC 853
52 (1986) 3 SCC 615
54 State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84
55 Supra 5 at 2
56 Supra 14
57 Supra 2 at 2
Constitution.

If such a progressive and inherently harmonizing definition of religion is adopted, there would be a minimal requirement of checks and balances. Right to religious freedom is enshrined in Article 25 and 26 of the Constitution. On the other hand, secularism is the basic feature of the Indian Constitution. This was laid down in *Keshavananda Bharti v. State of Kerala*, and unequivocally in *S.R. Bommai v. Union of India*.

In a 700-page ground-breaking judgment, a 13-judge Bench of the Supreme Court had evolved and recognized the basic feature of the Constitution—making it beyond doubt that secularism, one of the basic features of the Constitution, cannot be compromised with. The subject of the present discussion, however, is religion. Some view secularism as an antithesis of religion, while actually it is a formula for the co-existence of more than one religion. Religion and associated activities get their rights by virtue of the secular character of our legal system, religious freedom is derived from the roots of secularism.

There is altogether a new discussion regarding what forms a part of the private domain of religion and what constitutes the public domain. The Constitution of India laid down "a relatively sound basis for the creation of a secular State." Celebratory neutrality, along with religious freedom and reformatory justice, are the three components of Indian secularism. "Celebratory neutrality entails a State that assists in the celebration of all faiths, while reformatory justice implies regulation and reforms in the religious institutions, setting aside core elements beyond regulation."

All that remains to be done is the execution of the Constitutional directives in letter and spirit. However, in a country with multiplicity of religion and a history of communal violence, it is easier said than done.

**Conclusion: Blurred Lines**

According to Marc Galanter, who gave the concepts of limitation and intervention with reference to law’s control over religion, limitation implies the superiority of ‘secular public perception’ over ‘religious ideals’. Intervention, however, implies something more than limitation—it refers to some sort of ‘reformulation’ of the very basics of the religion. Having studied the aforementioned case laws on issue, it can be concluded that today’s Supreme Court is ensuring a fine balance between the efforts at ‘limitation’ and possibilities of ‘intervention’. The Courts had to define the legal boundary between the religious and the secular through successive rulings, a boundary which became both clear-cut and yet forever shifting as the corresponding case-law developed. One can include the One cannot help but notice that the dissent given by Khehar, J. in the *Shayara Bano* case appeared as to be a strict interpretation of law, irrespective of any societal considerations. Although an injunction was ordered by the judgment, the action was

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58 Ratilal v. State of Bombay, AIR 1953 Bom 242
59 (1973) 4 SCC 225
60 (1994) 3 SCC 1
61 Supra 20
64 Supra 14
still contingent of the promptness of the Legislature. However, the minority opinion of Indu Malhotra, J. in the Sabarimala case, without effort, seems to be a result of proactive societal observation and a wholesome interpretation. She examined the perils and dangers associated with setting a judicial precedent in the highest Court of law in the country, and rightly so. Having said all this, the borderline conclusion of both the dissenting judgments remain the same—Courts should not interfere in matters of faith, unless exorbitant circumstances compel otherwise. Lines are blurred, and probably will remain so for a long time to come. Until then, a progressive judiciary and an inspired Legislature—in harmony with the needs of the society, shall act as saviours.
CHILDREN SHOULDN’T WORK IN FIELDS BUT ON DREAMS: CHILD LABOUR

By Anupriya Kumari
From University of Petroleum and Energy Studies, School of Law, (Dehradun)

ABSTRACT
The children are delicate and precious flowers of life. They are the most beautiful creatures made by the god and it is undisputed that they are the potential embodiment of ours ideal, aspirations, dreams and hopes. Nelson Mandela famously quoted “There can be no keener revelation of society’s soul than the way in which it treats its children.” With these beautiful words, it prompts us to consider our global society and reflects on the changes that we actually need to see to live in a world where the health and happiness of our society is prioritized ahead of profit or economic gain. So, this paper aims to analyse the root cause of child labour in our society and highlights the recent change in types of child labour. A major concern is that the actual number of child labourers goes undetected. There are Laws which are meant for the protection of children from hazardous employment but they are not properly implemented. To eradicate this social issue even the international bodies like ILO and UNICEF has been working to reduce and eliminate the child labour by reforming the existing legislations. India has done well in enacting suitable legislations and policies to combat child labour. Nonetheless, its implementation at grassroot level is very much lacking.

KEY WORDS: Child Labour, Employed Children, Working child, NCLP

HISTORICAL ASPECTS OF CHILD LABOUR

Children in India and elsewhere in world have not been given proper attention and exploited by the people for the accomplishment of their selfish ends. The employment of children in India, in the form of slavery, was mentioned since from in Kautilya’s Arthashastra of 3th century B.C. it describes the existence of domestic slavery, in many prosperous households, where slaves were normally from low cast child slaves of less than eight years of age were known working in noble household works.

In medieval period, children were normally employed as trainees under artisans and craftsmen. The tradition is still prevalent in providing employment to large number of children in carpet weaving or cotton or silk weaving even today in our country. After industrial revolution, in 18th Century the large numbers of children are appointed initially by the mill owners and later by the factory owners. The term child labour is at times used as synonym for ‘employed child’ or ‘working child’, in this sense it is co-extensive with any kind of work done by a child for economic gain. Laws against child labour were passed under Employment of Children Act of 1938. These attempts of legislation failed as they failed to address the root cause of child labour that is poverty.

WHAT IS CHILD LABOUR?
Child labour is the practice of getting children engaged in economic activity, on part or full-time basis. It takes place when children are forced to work at an age when they are supposed to study and enjoy their phase of innocence. It directly effects the childhood that leads to exploitation of children not only physical but also as
mental, social, sexual and so on. The combination of Poverty and lack of social security network form the basis of harsher type of child labour. The increasing gap between the rich and the poor, privatization of basis services and the neo-liberal economic policies are causes major sections of the population out of employment and without basic needs. This adversely children more than any other group.  

The International Labour Organisation defines child labour as work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development. It refers to works that is mentally, physically, socially or morally harmful to children or work whose schedule interferes with their ability to attend regular school, or work that affects in any manner their ability to focus during school or experience healthy childhood.

UNICEF defines child labour differently. A child is considered to be involved in child labour activities if children between 5 to 11 years of age did at least one hour of economic activity or at least 28 hours of domestic work, and children between 12 to 14 years of age did at least 14 hours of economic activity or at least 42 hours of economic activity and domestic work combined per week..

There is no reliable data on the exact number of children being exploited at work. The estimate ranges from 20 to 100 millions. They are engaged in a variety of industries or vocations-matches and fireworks, carpet making, glass bangle making, incense stick production, plastics and rope weaving, salt extraction, etc.

CAUSES OF CHILD LABOUR

The main causes are Poverty, social inequality and lack of proper education. According to a UNICEF report, in rural and impoverished parts of the world, children have no adequate school facilities, even the availability and quality of schools is very low. Most children in child labour are unpaid family workers on family farm and in family enterprises. Basically, these families depend on the additional income that their children’s work generates.

FORMS OF CHILD LABOUR: A RECENT CHANGE

According to a study by the ILO, the majority of the child labour of the world (around 71 percent) are engaged in the agriculture sector, including cotton production and rice fields. Approx 17 percent of children are serving as service staff, mainly as domestic workers or in restaurants, and rest 12 percent of child labour have been spread across are employed in dangerous activities in factory or mine or engaged in any hazardous employment.

Many child labourers in India are working in textile factories, helping with the processing of carpets, or doing back breaking work in brick making factories and quarries for very low wages. Other child labourers work selling cigarettes, on the street for the tobacco industry. Children are also used for cheap labour in industries

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such as steel extraction, gem polishing, and carpet manufacturing.  

An astonishing number of girls are victims of child trafficking in India, whether through traditional bondage or through organized crime. Around 1.2 million children in India are involved in prostitution and the worst forms of child labour are the commercial sexual exploitation of children. The recent changes in forms of child labour are due to enforcement of legislation, awareness amongst buyers about child exploitation, and international pressure. Child labour is now more invisible because the location of the work has changed from the more formal setting of factories, to business owner’s homes. There has also been an increasing involvement of children in the home-based and informal sectors.

CONSTITUTIONAL PROVISIONS REGARDING CHILD LABOUR

Under the Constitution of India, there are several articles which deal with protection and provisions of child labour.

Article 21A (Right to Education)
The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Article 23(1)
Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this prohibition shall be an offence punishable in accordance with law.

Article 24
No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any hazardous employment.

Article 39(e)
The State shall, in particular, direct its policy towards securing that the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 45
The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 51(k)
It shall be the duty of every citizen of India, who is parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

LEGISLATIVE PROVISIONS TO PREVENT CHILD LABOUR IN INDIA

The Child Labour (Prohibition and Regulation) Amendment Rules, 2017
The Rules provide specific and board framework for prevention, prohibition, rescue and rehabilitation of child and adolescent workers. It makes clear on issue related to help in family and family enterprises and definition of family with


73 The Constitution of India, 1950.
respect to child, specific provisions have been incorporated in rules.

Further, it also provides rules for specific provisions incorporating duties and responsibilities of enforcement agencies in order to ensure effective implementation and compliance of the provisions of the Act.

The Child Labour (Prohibition and Regulation) Amendment Act, 2016
The Amendments prohibits the employment of adolescents in the age group of 14 to 18 years in hazardous occupations and processes and regulates their working conditions where they are not prohibited. The amendments also provide stricter punishments for employers for violation of the Act making the offence as cognizable. Further, the State Action Plan has been circulated to all States/UTs for ensuring effective implementation of the Act.

The Child Labour (Prohibition and Regulation) Act, 1986
The Act prohibits the employment of children below the age of 14 years in 16 occupations and 65 processes that are hazardous to the children’s lives and health.

The Factories Act, 1948
The Act prohibits the employment of children below the age of 14 years. An adolescent ages between 15 and 18 years can be employed in a factory only if he obtains the certificate of fitness from an authorized medical doctor. The Act also limits the working hours only for four and a half hours of work per day and prohibits the working during night hours.

The Mines Act, 1952
The Act prohibits the employments of children below 18 years of age in a mine. Further, it states that apprentices above 16 years may be allowed to work under proper supervision in a mine.

The Minimum Wages Act, 1948
It prescribes minimum wages for all employees in all establishments or to those working at home in certain sectors specified in the schedule of the Act. Central and State Governments can revise minimum wages specified in the schedule.

The Juvenile Justice (Care and Protection) of Children Act, 2000
This Act under Section 26 states that whoever procures a juvenile or the child for the purpose of any hazardous employment and keeps him in bondage and withholds his earnings or uses such earnings for his own personal gains shall be punishable with imprisonment for a term which may extend to three years and shall also be liable for fine.

The Rights of Children to Free and Compulsory Education Act, 2009
This Act provides free and compulsory education to all children aged between 6 to 14 years. It also provides Redressal of grievances under section 32 of the said act.

NATIONAL POLICIES AND PROGRAMMES FOR THE ERADICATION OF CHILD LABOUR
The National Policy on Child Labour, 1987
The National Policy on Child Labour declared in August, 1987, contains the action plan for tackling the problem of Child Labour. It envisages a legislative action plan, focusing and convergence of general development programmes for benefiting children wherever possible, and project-based action plan for launching of projects for the welfare of working children in areas of high concentration plan. The NCLP Scheme was started in 1988 to rehabilitate child labour. The Schemes
seeks to focus on rehabilitation of children working in hazardous occupations and processes in the first instance. Under the Scheme, after a survey of child labour in hazardous employment are withdrawn from these occupations and processes and then put into special schools in order to enable them to be mainstreamed into formal schooling system.\textsuperscript{74}

**INTERNATIONAL INITIATIVES ON CHILD LABOUR**

**ILO** (International Labour Organisation)

ILO sets labour standards, develop policies and devise programmes promoting decent work for all women and men. The enactment of the Child Labour Amendment (Prohibition and Regulation) Act, 2016 and The Right to Education Act 2009 have paved the way for ratification of ILO’S two core conventions:-

1. **Convention No. 138** basically states that the minimum age at which children can start work should not be below the age of compulsory schooling and in any case not less than 15 years; with a possible exception for developing countries.

2. **Convention No. 182** prohibits hazardous work which is likely to jeopardize children’s physical, mental or moral health. It aims at immediate elimination of the worst forms of child labour for children below 18 years.\textsuperscript{75}

**UNICEF** (United Nations International Children’s Emergency Fund)

UNICEF acknowledges the need to seriously address child labour as key component of the organization policy. It has long experience in working in India against child labour. Most programmes highlights the specific types of work, such as cotton production in the states of Gujarat, Rajasthan, Maharashtra, Tamil Nadu, Karnataka and Andhra Pradesh, metal and carpets works in Uttar Pradesh and tea gardens in Assam. These programmes helps thousands of children and their families in areas with high numbers of child labour.

UNICEF has been working to reduce and eliminate child labour by reforming the existing legislations, for example setting a minimum age for child labour, Expanding education access, improving quality and relevance of education, Awareness- raising and mobilization of families and communities against the exploitation of children. Working towards convergence between government departments to prevent child labour and rehabilitate existing child labourers.\textsuperscript{76}

**LANDMARK JUDGMENTS REGARDING CHILD LABOUR**

In *M.C Mehta v. State of Tamil Nadu and others*,\textsuperscript{77} where the Supreme Court observed that despite the constitutional mandates, the stark reality is that in our country like many others, children are an exploited a lot. Child labour is big issue and remain intractable, even after about 63 years of our having become independent, despite various legislative enactments prohibiting employment of a child in a number of occupations and avocations. In our country, Sivakasi was once taken as the worst offender in the matter of violating prohibition of employment child labour. As the situation there had become intolerable, the public –spirited lawyer, M.C Mehta, thought it necessary to invoke this Court’s power under Article 32, as after all the

\textsuperscript{74} \url{https://labour.gov.in/childlabour/child-labour-policies}[Accessed 10 Aug.2019].

\textsuperscript{75} \url{ilo.org/india; www.ilo.org/sacl}[Accessed 11 Aug.2019].

\textsuperscript{76} \url{http://unicef.in/whatwedo/21/child-labour}[Accessed 11 Aug.2019].

\textsuperscript{77} (1993) 1 SCC 645.
fundamental rights of the children guaranteed by Article 24 was being grossly violated. He, therefore, filed this petition. The Court then noted that the manufacturing process of matches and fireworks is hazardous, giving rise to accidents that can be of fatal in nature. So, keeping in view the provisions contained in Article 39(f) and 45 of the Constitution, it gave certain directions as to how the quality of life of children employed in the factories could be improved. The Apex Court also constituted a committee to inspect the directions.

In *Public Union for Civil Liberties v. State of Tamil Nadu*, the Supreme Court while giving directions to all concerned observed that large numbers of children are working as domestic help in the urban, town and rural areas with no chances to go to schools even though the education from Standards I to VIII is compulsory under the Right of Children to Free and Compulsory Education Act, 2009. The Local Authorities should recognized such children and ensure that they get proper education.

In *Bandhua Mukti Morcha v. Union of India*, as this case basically dealt with the child labour, the Court held as under:

This right to live with human dignity enshrined in Article 21 derives its life breath from the Directives Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in condition of freedom and dignity, education facilities, just and humane conditions of work. These are the minimum standards that must exist in order to make a person to live with human dignity and neither the Central Government nor any State Government – has the right to take any action which will deprive a person of the enjoyment of these basic essential.

In *Sheela Barse v. Secretary, Children Aid Society and Others*, the Supreme Court held, “If there will be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way.”

**CONCLUSION**

India has done well in enacting suitable legislations and policies to combat child labour. Nonetheless, its implementation at grassroot level is very much lacking. The laws related to child labour today does not eliminate it but only makes it shifts geographically to other places, to other occupations like agriculture which may be less paying or it might be still continued stealthy. The lack of specialized enforcement officer leads to lesser attention being given to child labour legislations. Moreover, many of the programmes related to child labour are very less funded. Child labour is a complex problem which cannot be eliminated without first attacking it at the roots. Thus, poverty, unemployment, lack of proper social security, illiteracy and the attitude of society need to be tackled first before any progress can be made. The aim of government should not only be to make child labour abandoned but also to make it “socially and culturally unacceptable”.

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78 (2013) 1 SCC (L & S) 215.
79 AIR 1984 SC 802.
80 1987 SCR (1) 870.
government and collective efforts on the part of society are needed to put an end to this evil practice of child labour. The government should also make efforts to increase the incomes of parents by launching various development schemes. Efforts should be made towards poverty eradication as it is major cause of child labour and also efforts should be taken for educational reforms to provide free or affordable access to quality education. Child labour can only be eliminated by 2020 by its all forms when comprehensive steps, are taken by the Government.

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The Child Labour (Prohibition and Regulation) Amendment Rules, 2017

E- Databases
SCC
Manupatra
LexisNexis

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NATIONAL MAP POLICY – AN OLD WINE IN A NEW BOTTLE

By Apoorv Gupta, Mukul Katyal, Rhythm Aggarwal and Maitry Bhandari
From: ICFAI Law School, IFHE Hyderabad & Amity Law School, Noida

ABSTRACT

“Maps, like faces, are the signature of history.” – Will Durant

Throughout the course of history geospatial information has played an important role in technological, economic, political and cultural dimensions of the human society. With technological developments taking place, the field of mapping – that is, collection, analysis, and representation of geospatial data – is continuously evolving. On the face of it, creation of geospatial data seems to be an exclusive scientific and technological matter. However, the political and economic facets of geospatial data are often as predominant and complex as its scientific practice.

Continuing from the colonial era, the political facet of mapping emerged significantly in the public discourse from the 1990s onwards as digital technologies amplified the ability of non-governmental actors to collect, generate, and share geospatial data, in the form of maps or otherwise. This 'democratisation' of the ability to map and share private/user-generated maps structurally undermined the government's ability to have an authoritative and universal voice when it comes to geospatial depiction of the nation and its various components.

Similar to the other upsurges in the digitized world, which is often followed by an introduction of legal provisions in order to keep access to and use of digital data under mechanisms of monitoring and permission, mapping in India has also has subsequently been governed under policies addressing both terrestrial mapping and remote sensing. Concerns of national security, naturally, have driven much of these policies.

This paper focuses on providing an overview of the present configuration of laws, policies, and guidelines that provides the legal framework in India for governance of creation and sharing of geospatial data in India. The paper also aims to study these policies in action by describing the key legal cases around the creation and use of geospatial data.

INTRODUCTION

Maps make stories easier to understand. A map has a very special ability, i.e. breaking down complex details into a simple and a clear picture that brings out immediate clarity. The boundaries depicted by a map are often fundamental to the story. Thus, the accuracy of maps is peculiar concern which often requires navigating legal and regulatory paths in order to avoid argument and controversy.

The National Map Policy, 2005 (NMP) governs the use of maps in publications by private publishers and detailed guidelines have been issued by the Survey of India (SOI) in December 2016. By these guidelines, the SOI is vested with the copyright of both digital and analogue maps.

High quality spatial data is required for all socio-economic developmental activities, conservation of natural resources, planning for disaster mitigation and infrastructure development. Diverse spatial data can be used in an integrated manner due to the
technological upgradation. SOI is even vested with the responsibility for producing, maintaining and disseminating the topographic map database of the whole country. This is the very foundation of all spatial data. Recently, in order to take a leadership role in liberalizing access of spatial data to user groups, SOI has been mandated to do so without jeopardizing national security. This requires clarity in stating the policy on dissemination of maps and spatial data.

The NMP is having two main objectives:

- It aims to provide, maintain and allow access and make available the National Topographic Database (NTDB) of the SOI in accordance with the national standards.
- In order to work towards a knowledge-based society, it aims to promote the use of geospatial knowledge and intelligence through partnerships and other mechanisms by all sections of the society.

NMP has been declared by National Topographic Database of SOI with the primary objective of unrestricted production, maintenance and dissemination of spatial data. This is an outcome of the consistent demand from several quarters including GIS industry to consider Topographic Database as national asset and to make it available without much restriction. NMP proposed two series maps to achieve the objective of national security, namely Defence Series Map (DSM) – to cater for defence and national security requirements and Open Series Map (OSM) – for common civilian use.

The UTM projection system on WGS-1984 datum will be used to produce OSMs. The WGS-1984 series maps will be openly made available to civil users, in both paper and digital form. Indian region is covered fully by 6 UTM zones numbering from 42 to 47 (Fig. 1)81.

As per New Map Policy, topographic database of Indian region will take a new shape in the form of Open Series Maps (OSM’s). These maps will have reference datum as WGS 84 and coordinate system as UTM (Universal Transverse Mercator). This is different from the existing topographic maps, which are based on Everest 1830 as reference ellipsoid and Polyconic as projection system. In order to ensure compatibility among GIS theme

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81 Fig. 1 Figure showing the arrangement of UTM zones.
databases, user community using Polyconic has two options, either begin using new database, whose availability in time is again in doubt, or accommodate the changes in existing database.

Old wine in a new bottle sums up the so called new map policy which claims to be prepared considering “the liberal economic regime and to accommodate the technological changes that have taken place in the field of Cartography and advancement in space based technology”. There is no mention of digital technology, in particular GIS and the Internet, unless all these are convolved under the rubric of ‘Cartography’.

CHAPTER I: MAPPING THE LEGAL JOURNEY OF GEOSPATIAL DATA: PAST TO PRESENT

“We know every inch of the nation, because we map every inch of it!” – Survey of India

Aforementioned slogan has been adopted by the primary organization responsible for mapping all geospatial data in India. This slogan indicates the importance of the geospatial data and mapping the same. While it indicates the importance of having access to mapping data in order to be aware of the geospatial features of one’s country, it also cleverly reveals the vulnerability that having access to mapped data brings. The phrase can be said to imply that mapping every inch of the country helps us in getting information about every inch of the nation which can be used usefully if it is in the hands of the government agency but might cause harm to the security for the nation if this information gets in the hands of the external agencies. This conflict between the accessibility of such information about the country and the security concerns arising from such an access has led to a rich evolution of legal policies governing the same.

From the public depiction of sovereign territories to navigating treacherous seas to (wrongly) ‘discover’ the land of spices, the global history of cartography is closely linked with political needs and economic interests. In India, the regulations for making and using maps got a new turn with the publication of the draft Geospatial Information Regulation Bill, 2016. As opposed to the expectations arising from the various government schemes which are promoting the digital economy in India– from start-ups to the ongoing expansion of connectivity network – the bill seems to be undoing various economic and humanitarian efforts, and other opportunities involving maps, by imposing strict ruler and hefty amount of penalties on the use of maps by private actors, commercial or otherwise without the consent of the government.

Set up in 1767, SOI was required to map the terrains of India to fulfil the commercial and political convenience of the East India Company. Back during the colonial times, maps were considered to be essential for governmental purposes and thus their dissemination to unauthorized persons was barred by Clause 5 of the Official Secrets Act, 1923. Thus, till 1950s mapping was being governed by the colonial provisions that restricted maps to official use only.

83 Ibid.
85 Ibid.
After getting independence, the major function of the SOI shifted towards providing information for the defence forces\(^86\).

An important change came in the form of orders and notifications by Ministry of Defence (hereinafter “MOD”) during 1960s, the major one being the 1965 order that permitted distribution of maps of scale 1:4 M\(^87\). The Map Restriction Policy of the MOD, however, imposed categorical restrictions on sharing of maps, aerial photos, and all geophysical data for various parts of India - with a focus on international border areas in the North-Eastern state, and the coastal zone that included several large cities like Chennai, Kochi, Kolkata, and Mumbai\(^88\). Dr. Manosi Lahiri notes that “this had a far reaching effect on the mapping culture of independent India and perpetuated the perception among many that maps were a security threat”\(^89\). By 1971, however, the functions of SOI extended to catering to inter alia all development activities and was hence brought under the ambit of Department of Science and Technology.

However, the catalytic transformation came in the form of National Map Policy, 2005 which made SOI the nodal governmental agency for dealing with all processes involving geospatial data. While harping for open access to geospatial data, the policy accompanied by corresponding guidelines have largely restricted the power to map geospatial data to SOI. The Policy and the guidelines have been discussed in detail as under.

### I.1. NATIONAL MAP POLICY, 2005

The NMP was announced by the Central Government on May 19, 2005\(^90\). The preamble of the policy identifies the importance of high quality spatial data in various facets such as socio-economic development, conservation of natural resources, infrastructure development etc.\(^91\) Topographic map database constitutes the foundation of all spatial data and its production, maintenance, and dissemination has been assigned as a responsibility to SOI, which is to "liberalize access" to spatial data without compromising upon security concerns. Thus, the conflict between national security and right to have access to information regarding one’s country is clearly highlighted in the policy as a need for enactment of the same. Thus, the policy objectives include access to National Topographic Database (NTDB)\(^92\) and promotion of geospatial based intelligence, subject to confirmation to national standards of SOI.

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86 Supra, 3.
87 Scale represents the relationship of the distance on the map/data to the actual distance on the ground. Map detail is determined by the source scale of the data: the finer the scale, the more detail”, available at: http://gif.berkeley.edu/documents/Scale_in_GIS.pdf, accessed on June 11, 2019.
89 Ibid.
92 Ibid, Objectives.
In order to realize the security concerns, inter alia, a dual-classification was created amongst the maps, namely –

i) **Defence Series Maps** ("DSM") and

ii) **Open Series Maps** ("OSM").

While the DSM caters towards providing information and topographical maps which prove as an helpful source to defence and security requirements of the country, the latter supports developmental activities. Hence, DSMs whether in analogue or digital form, fall under the classified category and the power to issue guidelines pertaining to their use vests digit mainly for developmental purposes, they are not openly accessible by ipso facto and need to gain the ‘unrestricted’ tag after clearance from MOD. A table specifying the distinction between DSMs and OSMs in detail has been provided below:

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Defence Series Maps (&quot;DSM&quot;)</th>
<th>Open Series Maps (&quot;OSM&quot;)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Why are these maps used?</td>
<td>The maps under this series cater to defence and security requirements of the country.</td>
<td>The maps under this series are useful in supporting various developmental activities in the country.</td>
</tr>
<tr>
<td>What are the technical classifications?</td>
<td>Everest/WGS-84 Datum and Polyconic/UTM Projection</td>
<td>UTM Projection on WGS-84 datum, bearing different map sheet scales (with heights, contours and full content without dilution of accuracy).</td>
</tr>
<tr>
<td>Who can use these maps?</td>
<td>Maps (in analogue or digital forms) for the entire country will be classified.</td>
<td>The hard copy and digital form both of them will become “Unrestricted” once a one-time clearance has been obtained from the Ministry of Defence.</td>
</tr>
<tr>
<td>How can the maps be used?</td>
<td>Guidelines regarding the use of DSMs will be formulated by the Ministry of Defence.</td>
<td>Guidelines regarding the use of OSMs will be formulated by SOI regarding aspects like procedure for access, further dissemination /sharing, ways and means of protecting business and commercial interests of SOI etc.</td>
</tr>
</tbody>
</table>
While the DSMs are completely classified, restrictive provisions regarding usage and dissemination of OSMs have also been incorporated in the policy. OSMs are not allowed to show any civil and military Vulnerable Areas and Vulnerable Points (VA’s/VP’s). OSMs on a scale larger than 1:1 needs to be disseminated either by sale or an agreement, which will allow the agency to add its own value to the maps obtained, and to share these maps with others.

The primary transaction between SOI and the agency as well as all the subsequent transactions between the agency and other users have to be registered in the Map Transaction Registry for records. While the Map Transaction Registry forms an important part of the NMP, no such registry information has been made available on the official website of SOI.

The policy allows users to publish maps on hard copy or web (with or without GIS interface) subject to a certification from SOI in case of depiction of international boundaries. The policy also upholds the validity of the previous MOD notifications pertaining to mapping subject to the modifications introduced by the policy and authorises SOI to issue further guidelines corresponding to the policy.

I.2. GUIDELINES ISSUED BY SURVEY OF INDIA

Under the powers vested by the NMP, SOI has issued detailed guidelines, having utmost clarity, in furtherance of the policy. The restrictions arising on mapping of geospatial data can be attributed to two major factors namely, Security concerns and Copyright provisions93. Under the guidelines, copyright of both digital and analogue maps has been vested with the SOI. Penal consequences have been mentioned as a result of violation of SOI’s copyrights. In furtherance of security concerns, the guidelines uphold the Ministry of Finance (Department of Revenue) Notification No. 118-Cus./F.No.21/ 5/62-Cus. I/VIII dated 4th May 1963 which prohibits the export of all maps/digital data in 1: 250K and larger scales through any means. Digital Topographical data has been an exclusive licensing domain of only Indian individuals, organisations, firms or companies.

While paper maps can be accessed from SOI offices against payment of price, digitisation of maps has been strictly made forbidden by the guidelines. Ownership of digital data has been vested completely with the SOI and can only be gained against payment after application through a specified format.

I.3. REMOTE SENSING DATA POLICY (RSDP)

In 2011, the confusion pertaining to applicability of NMP to both territorial and satellite mapping was resolved with the release of the Remote Sensing Data Policy (RSDP). The policy recognized the importance of remote sensing data and noted that it was largely used by government and non-government users from Indian and foreign remote sensing satellites. However, again banking upon the need for security considerations, the policy was released with the purpose of “….managing and/ or permitting the acquisition/dissemination of remote sensing data in support of developmental
Department of Science (DOS) was made the nodal government agency for all actions pertaining to remote sensing data under the policy.

A basic perusal of the policy indicates a parallelism between the RSDP and the NMP. Thus, similar to NMP, RSDP assures of a government managed Indian Remote Sensing Satellites (IRS) Programme, the data produced by which will be solely owned by the government and other users could only be provided with licences if need be. Any attempt at acquiring and/or dissemination of remote sensing data within India requires permission through the nodal government agency. National Remote Sensing Centre (NRSC) of the Indian Space Research Organisation (ISRO)/ DOS is vested with the authority to acquire and disseminate all satellite remote sensing data in India, both from Indian and foreign satellites. NRSC is also supposed to maintain a systematic National Remote Sensing Data Archive, and a log of all acquisitions/ sales of data for all satellites. Thus, nodal government agencies were created for both terrestrial mapping and satellite imagery, former being SOI and latter NRSC.

I.4. CIVIL AVIATION RULES

Aerial instruments and aircrafts act as important instruments for geophysical surveys and mapping. Thus, this area does not go ungoverned. While, till date, India doesn’t impose an explicit bar on foreign registered aircraft overflying its territory for aerial photography and geo-physical survey, the same is subject to prior clearance under rule 158 and 158A of the Aircraft Rules, 1937 on account of safety and security concerns, the procedure for which has been given under Civil Aviation Rules (CAR)95. CAR is applicable to inter alia agencies undertaking aerial photography, geophysical surveys etc. An application is required to be made as per Annexure E which inter alia requires confinement of photography/sensing to the exact area as applied and cleared by the Ministry of Defence. The application is forwarded by DGCA to the Ministry of Defence and other agencies responsible for issuing NOC.

DGCA’s restrictions extends to voluntary geographic information with prohibition of civilian drones in India. Unmanned drones are an important equipment used for the purpose of collecting geo-spatial data. The ban on flying drones in India exist from October, 2014 but is not in common knowledge96. While it is argued that drones could harm people and lead to chances of crashing, the major argument has always been the use of drones by anti-national elements to peruse sensitive places for plotting terror attacks97. While there is an ambiguity regarding using drones in India, flying drones over defence establishments and historical places is completely...
banned. Thus, civilians using drones for clicking pictures of monuments etc. have often been confronted by the police.

Thus, there is no single policy that acts as a deterrent for mapping in India but an accumulation of multiple policies, guidelines and legal provisions that are used by departments of government to restrict mapping in the name of security.

CHAPTER II: LEGAL CONSEQUENCES AND GOVERNANCE CHALLENGES

II.1. LEGAL CONSEQUENCES OF DEPICTING INACCURATE EXTERNAL BOUNDARIES AND COASTLINES OF INDIA

There are various meanings of showing fallacious boundaries, and the exact legal outcome depends on the nature of the depiction itself. These range from various legal effects such as those under the Official Secrets Act, 1923 (restricting the collection and sharing of information about prohibited places), the Customs Act, 1962 (prohibiting the export and import of certain maps), to the Criminal Law (Amendment Act) Act, 1990.

II.1.i. Criminal offence

In general terms, the publication of maps portraying inexact external boundaries and coastlines of India is treated as doubting the territorial integrity of India as a country of great virtues, and a person found guilty of such act may be punishable with imprisonment or with fine or both.

II.1.ii. Trading in official secrets

A more severe offence is found in Section 5 of the Official Trade Secret Act, 1923, is one which deals with wrongful communication of information.

It presents a person guilty of an offence, if that person unlawfully communicates or otherwise uses any map, among other things, over which that person has control, whose disclosure can affect the sovereignty and integrity of the country or the state security. The offence includes communication, using the information for the benefit of a foreign power, and failing to take reasonable care of the information that is in one's possession that will put the security of the nation in danger. Results can include imprisonment of anything up to 10 years, depending upon the gravity of the offence committed.

II.1.iii. Copyright violation

Violating SOI's copyright in announcing its maps without authority and appropriate sanction and credit can lead to an offence of copyright breach as well. The copyright of all maps published by the SOI vests with the Government of India completely and these maps may not be replicated or used as the basis by publishers without the approval of the Surveyor General of India. Any unauthorized reproduction of SOI maps may lead to imprisoned of anything between 6 (six) months to 3 (three) years and with a fine or both.

II.1.iv. Customs violations

Mere publication of an inexact map is not the only act that may lead to an offence. It is forbidden to also import into India any notification containing any works, signs or visible representations which directly or
indirectly question the frontiers of India in any manner. Similarly, it is prohibited to export maps on a scale of one-fourth inch or more equal to a mile and the micro-films obtained from such maps describing any part of India including its foreign boundaries and showing topographical features by contours.

II.2. GOVERNANCE CHALLENGES

The United National Development Programme [UNDP] (1997) describes governance as the use of economic, political, and administrative authority to manage a country’s affairs at different levels. It includes the mechanisms, processes, and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations, and mediate their differences. According to Stewart (2003), governance is a method of multi-stakeholder involvement, multiple interest resolution, compromise rather than confrontation, negotiation rather than administrative fiat. Thus, there are numerous alternative conceptualizations of governance that identify the plurality of actors. Governance in this wider sense includes the lawful power exercised in the purpose of government power and in the administration of public affairs. There is greater emphasis on participation, decentralization, accountability, and responsiveness and even broader concerns such as those of social equity and justice.

Governance, therefore, has a much wider canvass than government and envisages the roles of all stakeholders: the state, private sector, civil society, and citizens at large.

The role of GIS in governance is extensive and its use in the field of development has powerful effect on transparency and effective implementation. Governance provides a platform for transactions between diverse stakeholders. This platform displays a level playing field when different stakeholders have access to information for decision making. Based on these discussions, a working model of governance is recommended and shown in Fig. 2.

Fig. 2 – Governance Framework

As it is clear from Figure 2, the whole governance method spins around the growth goals. Community goals are determined by the macro-environment and the legal and policy environment. Sufficient infrastructure is essential for the fulfillment of development goals. Guiding policies not only guide the accomplishments of development goals but also guide the implementation method. Stakeholders influence and get affected by the implementation process and development goals. The correct kinds of policies are also needed to approach the implementation difficulties and surmise the development goals.
CHAPTER III: INCIDENCES OF LEGAL ACTIONS FACED BY AGENCIES

Since the advent of restrictive mapping policies, a number of incidents have come to light when agencies have found themselves challenged by legal actions for violation of such policies. In contemporary times, such incidents were publicly highlighted in 1998 when the sale of the CD-ROMs of Delhi Guide Maps created by Eicher were prohibited\(^{100}\). After the implementation of NMP, we have witnessed two major legal controversies, both involving SOI on one hand and Google on the other.

III.1. GOOGLE'S MAPATHON IN LEGAL TROUBLE

In furtherance of Google’s aim to have every nook and corner mapped, it holds a competition called ‘Mapathon’ every year\(^{101}\). The competition invites people from various areas to map their local surroundings incentivised by lucrative prizes to winners. However, this initiative launched for purely mapping purposes had to face a large legal hurdle in the year of 2013. Google-Mapathon, 2013, held in February-March, had declared Vishal Saini as the 1st winner who had mapped the military-prone city of Pathankot. According to legal provisions governing mapping practices in India, civil and military Vital Areas (VAs) /Vital Points (VPs) cannot be shown on maps in the public domain\(^{102}\) for security reasons. Thus, the tech-giant found itself tangled in legal controversy for having held the competition without permission from Survey of India after a concern raised by BJP’s Tarun Vijay. A case was filed by SOI at the R.K. Puram Police Station regarding the same. The primary contention of the case was that the “Mapathon 2013 activity is likely to jeopardise national security interest and violates the National Map Policy. Citizens of the country, who are ignorant of the legal consequences, are likely to violate the law of the land”\(^{103}\).

Considering the involvement of a U.S. based company, the investigation was handed over to CBI. During the probe, it was alleged by then Surveyor General of India Swarna Subba Rao that Google did not refrain from “polluting” the internet with classified material despite having been asked so. Further, then Additional Surveyor-General of India R.C. Padhi claimed that “The Survey of India is only mandated to undertake ‘Restricted’ category surveying and mapping, and no other government/private organisations or any individual are authorised to do so”. He told Reuters that some of the information provided by locals to Google could be ‘sensitive’ and the security of the nation could not be compromised at any cost\(^{105}\).

\(^{100}\) Supra, 4.


\(^{102}\) Supra, 10.

\(^{103}\) Supra, 21.


\(^{105}\) Sandeep Joshi, ‘Google didn’t take permission for Mapathon’ (The Hindu, 24 April, 2013), available
Google on the other hand said that its primary motive was to map local information of daily needs such as hospitals, restaurants, markets etc. and the competition was in consideration with national laws.  

Further, it was heard that Google had been approached regarding Mapathon by SOI and it had replied with intimation of willingness to talk to SOI. However, SOI had not reverted back and Google was always ready and willing to talk out the matter. However, the much hyped case did not have a substantial result and CBI had to close the probe on account of lack of evidence.

Considered a thing of past, the controversy resurfaced in January, 2016 post the Pathankot Air Base strike. Google was dragged to the court for having displayed sensitive geospatial data regarding Pathankot that made it possible to conduct an airstrike at the location. An injunction was sought to refrain Google from showing sensitive military areas and defence establishments on the maps made available by it. While the injunction was refused, Delhi High Court had asked the centre and the additional solicitor to look into the same and keep the court apprised about the issue. Thus, this can be termed as an open and unfinished matter ongoing legal contemplation.

While it is understandable that some areas are considered as vulnerable due to security concern. The laws keeps changing often leading to transgression into security places. But the major point being the list of vulnerable areas is classified and not released to public. In absence of such a list, how is it possible for google to vet its data to comply with security concerns.

III.2. One Country – Two Boundaries

Another major legal controversy in the field of geospatial mapping has been with regards to wrong depiction of international boundaries of India by Google. A brief perusal of the official website of SOI provides a list of only three documents under the tab of ‘Public Awareness’, all dealing with the crimes of depicting wrong Indian boundaries. While one of them includes the certified map with correct boundaries, to be complied with, other is a gazette notification bringing the Criminal Law Amendment Act, 1961 which criminalized the act of showing wrong depiction of boundaries. Section 69A of the IT Act has also been used earlier to restrict access to links depicting incorrect maps of India though it only speaks about

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109 Aman Sharma, '7-year jail, Rs 100 crore fine soon for showing PoK, Arunachal as disputed' (The Economic Times, 05 May 2016) available at: http://www.theguardian.com/news/world/2016/may/05/india-map-leaks-politics-security/>
restricting public access to data, necessary in the interest of Sovereignty and Integrity inter alia, the section per se does not deal with dissemination of geospatial data.

It was in the year of 2014, that on the directions of Department of Science and Technology, SOI filed a complaint against Google at the Dehradun Police Station for depiction of international boundaries not in a “wrong manner” i.e. not in consonance with Government of India authentication. The result was that today Google shows different boundaries on Indian domain, in compliance with SOI and different on International domain.

Google was also involved in a controversy when in 2009, Google maps marked areas of Arunachal Pradesh, including its capital Itanagar and Tawang, in China. It was followed by an apology from Google and an immediate rectification for Indian users. However, Google uses a different version for China and the world creating disparity in the boundary depiction.

Google has not been the only platform having faced the anger of Indian community for wrong depiction. In 2011, copies of the Economist Magazine were seized for having depicted the map of Kashmir divided between India, Pakistan and China which was also a matter of political concern. For similar reasons, Al Jazeera was taken off air by the Indian government after a 5-day ban imposed under Section 69A of the IT Act. Modi’s visit to Queensland University of Technology was accompanied by an “unqualified apology” from the authorities for having depicting Indian map without portions of Kashmir. Urban Development Department of Bihar also ended up show-causing one of its employees for putting up wrong map on its website and substituting the same with SOI’s version after media attention. India seems to be the country often furious due to wrong depictions of maps.

While India seems to be actively involved in Geo-politics, it isn’t the only country Google has fallen in legal trouble with, for wrongly depicting International Boundaries. In 2010, Google gained a lot of media attention for allegedly starting the ‘First Google Maps War’. It occurred...

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114 Ibid.
115 Ibid.
116 Ibid.
when a Nicaraguan official led his forces to the Costa Rican territory on other side of the customary border and used Google Maps as a proof to deny trespassing. Nicaragua and Costa Rica have a long territorial dispute and Google seem to have fuelled it by depicting the Nicaraguan version of border according to which that area of Costa Rican territory came within the boundaries of Nicaragua. Despite Nicaragua’s petition to Google to not accept Costa Rica’s petition to shift borders, Google voluntarily changed its borders to comply with the Costa Rican stance.

Another such incident followed in the case of Google’s depiction of Dutch-German border with respect to Dollart Bay. Germany claimed the border to be closer to Dutch land while Dutch claimed it to be more towards centre. Google, however, chose to depict a self-version that transferred the German city of Emden to the territorial control of Netherlands. This infuriated the city which resorted to expressing its displeasure and asking Google to change the depiction. Google, this time, however remained dormant and no amendment in the depiction of Dutch-German border could be witnessed.

At the time of Crimean referendum supporting independence, U.N. had passed a resolution condemning the same and supporting territorial integrity of Ukraine. Google, however, believed in the contrary and was quick to bring changes into its maps to depict formation of independent Crimea. Rather than a mistake, this time, Google had adopted a stance against the UN resolution and used its maps to vocalize the same.

Similarly during the inclusion of South Sudan in the U.N.G.A., while members voted, they were unaware of the exact territorial division between North and South Sudan. It was then that Google initiated the process of collecting geo-spatial information regarding South Sudan from locals in order to better the territorial integrity.

Thus, Google has times and again being accustomed to criticism for wrong depiction of international boundaries and even varied depictions of boundaries as per the perspective of the political entity. However, “Popularity does not bestow authority” and Google’s maps cannot be accurately relied upon for proving sovereign territorial holds. Thus, most of the international incidents have witnessed countries resorting to peaceful petitions to Google informing it regarding the inaccuracy of the border and requesting a shift in the same. Hardly has the world witnessed penal provisions being invoked against Google for depicting versions other than the perceived ones.

III.3. J. MOHANRAJ V. GOOGLE AND OTHERS

Apart from the above two incidents, another pertinent case is the 2008 judgment by the Madras High Court in J. Mohanraj v. (1) Secretary To Government, Delhi; (2) Indian Space Research Organisation, Bangalore; (3) Google India Private Limited, Bangalore . A writ petition was filed by Mohanraj seeking a complete ban on

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119 J. Mohanraj v (1) Secretary To Government, Delhi; (2) Indian Space Research Organisation, Bangalore; (3) Google India Private Limited, Bangalore, 2008 Indlaw MAD 3562.
Google Earth and ‘Bhuvan’; mapping initiatives by Google and ISRO respectively.

The petition was allegedly filed in public interest considering the security of Indian Government along with the threat posed by the terrorists. The petitioner claimed that the initiatives such as Google Earth used high quality satellite imagery to display bird’s eye view of various establishments including minute details and were bound to cover defence establishments and sensitive areas, posing a threat to Indian security. Dr. A.P.J. Abdul Kalam’s speech was referred to indicate his views against such open creation of geospatial data. The provisions of the NMP was highlighted and it was alleged that such mapping practices violated the individual rights of a person under Article 21 of the Constitution. Further, it was claimed that such practices could only be taken up by SOI and were outside the purview of private organizations.

However, the Court held that the petitioner was unable to produce any specific “Guidelines/Rules/Law laid down by the Central/State Governments, prohibiting the private organisations or any other individuals to Interactive Mapping Program, covering vast majority of the Planet”. Since the court could only interpret existing provisions and not lay down guidelines, passed the judgment against the petitioners.

From the above explained incident it seems that the NMP per se does not refrain creation of mapping data by agencies other than SOI. The centre of the conflict seems to lie with the interpretation of the policy by SOI claiming itself to be the exclusive agency entitled to map data. Hence, often though complaints and cases are filed against such activities, no concrete consequence emerges from the same. Further, the courts have also neglected the grievance of the issue and given ambiguous judgments in most cases.

Thus no judicial sanction or opposition to the SOI’s guidelines exist till date often allowing SOI to continue with following its own version. While these cannot be termed as a solution, they definitely indicate towards the root of the problem. Therefore, it becomes an old wine in a new bottle.

CHAPTER IV: JUDICIOUS REFLECTION ON JUDICIAL REFORM – RECOMMENDATIONS AND CONCLUSION

There is urgent need to review the National Map Policy framework to align with technologies, public expectations and support government in delivering services. It is time to streamline the procedures to implement them. Here are some recommendations for review and urgent change:

1. The time has come to frame one overarching Geo-spatial policy to consider all aspects of spatial products and activities. One regulatory authority to oversee all aspects of Geo-spatial data, institutions, policies and laws would help in removing uncertainties in interpretation of regulations. This policy must be framed after public debate and guidelines framed with a view to enabling compliance.

2. As of now, industry approaches several agencies for survey permissions and map clearances. A single window for survey permissions and map clearances is required. One Geo-spatial portal with a comprehensive checklist of all laws, policies, regulations, documents, processes and timelines would go a long
way to simplify engagements with regulators.

3. S&M often form a part of other large projects. Time taken to complete them has critical impact on the rollout of the overall project. Development projects get stalled because of the delay in providing survey results on time. So regulators must be time bound in giving approvals and to clear applications.

4. Over a period of half a century, some regulations have become archaic. The topography of restricted areas in India is seen on Web maps offered from overseas data centres via the Internet. So the restriction on export of maps, paper or digital, serve no purpose. The OSM maps, cleared by Ministry Of Defence for public distribution in India, should be available for export also.

5. Some policies may not withstand legal and constitutional scrutiny and have become superfluous. The RTI Act 2005, sections 4(1), (2) & (3), mandates all public authorities for proper documentation of data and provide its easy access to every citizen of the country. But the National Data Sharing And Accessibility Policy, 2012 promotes sharing data between government organizations only. The public should get access to maps, created by public funds.

6. The National Remote Sensing Centre is the sole distributor of satellite images in India. The Remote Sensing Data Policy protects its commercial interests, and this can be viewed as discriminatory in law. This practice negatively affects Indian industry and must be discontinued. Satellite images and data from foreign sensors can be sourced at lower prices, in shorter delivery time from overseas.

7. Mobile Smartphones, 3D videography, ubiquitous GPS enabled devices, HR satellite images downloads from the Internet, are today’s realities. Crowd sourcing data rapidly and inexpensively, using diverse platforms, is here to stay. Regulators must adopt internal process automation to quickly validate Industry’s pre-publication data using digital processes. This will reduce transaction cycle times for Survey & Mapping companies.

8. The National Map Policy should make it possible to distribute the certified international boundaries of India in digital form by the regulator from the SOI portal and Map Sales Offices, without the requirement for further approvals by the publisher. The international boundary files of India should be offered at different scales, approved by the regulator and acceptable by law.
TRANSFER OF TECHNOLOGY AGREEMENTS AND COMPETITION LAW

By Avni Tiwari
From Guru Gobind Singh Indraprastha University, New Delhi.

I. INTRODUCTION
The following text deals with the transfer of technology agreements. The report is divided into three parts. First, addressing the concerns as to relating the meaning of transfer of technology agreements and how they relate to the competition laws. Second, the problems that arise due to improper transfer of technology agreements, materially dealing with concepts of patent pooling, exclusive licencing and restrictive clauses in these agreements causing the market foreclosure effect. Thirdly, the regulations relating to the same internationally and suggesting the similar regulation for India.

II. Meaning of Transfer of Technology Agreements

The technology and skills of individuals in society together combine the basis for successful economy, technology transfers are of great significance in the world economy. Society is abstract in nature and the needs of the people changes with the changes in time. Also, modernisation being the factor of significance every nation, irrespective of it being developing or developed, needs new technology.

According to the advancing needs of their own society. Leading to the need of acquiring and assigning the technologies internationally and domestically.

With the advancements in the economies globally and the process of modernisation. The concept of technology transfer and technology diffusion has evolved in various sectors of the economy. Thereafter, the United Nations Conference on Trade and Development drafted regulations on the “Code of Conduct for Transfer of Technology Agreements”, which defined transfer of technology as “the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the mere sale or lease of goods”.

Ways of Technology Transfer

There are namely five ways through which technology can be transferred:
1. The assignment, sale and licensing of all forms of industrial property, except for trademarks, service marks and trade names when they are not part of technology transfer transactions;
2. The provision of know-how and technical expertise in the form of feasibility studies, plans, diagrams, models, instructions, guides, formulae, basic or detailed engineering designs, specifications and equipment for training, services involving technical advisory and managerial personnel, and personnel training;
3. The provision of technological knowledge necessary for the installation, operation and functioning of plant and equipment, and turnkey projects;

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4. The provision of technological knowledge necessary to acquire, install and use machinery, equipment, intermediate goods and/or raw materials which have been acquired by purchase, lease or other means;
5. The provision of technological contents of industrial and technical cooperation arrangements.\textsuperscript{122}

It must also be material in this discussion that the concepts of technology diffusion and transfer are different. The prior, implies to the progressive adoption of the technology that may or may not be purposeful and without enforcement of agreements. The latter is a purposeful adoption of technology through enforcement of agreement.\textsuperscript{125}

Features of Technology Transfer

Technology transfer agreements have a number of special features:
- they involve the licensing of IPRs, usually in return for the payment of royalties (e.g. on a per unit or lump sum basis). The licensee acquires the right to manufacture the goods or otherwise use the licensor’s technology. The licensor therefore needs to exercise a certain amount of continuing control over the licensee to safeguard its IPRs;
- they differ from true assignments of IPRs, under which ownership is transferred completely to another party (often in exchange for a single upfront payment).\textsuperscript{124} An assignor or vendor of IPRs generally has less scope to restrict the purchaser’s use of the rights transferred; and
- they can bring about a cross-fertilisation of ideas, insofar as the licensee may further develop the technology. This can result in the parties subsequently cross-licensing their respective IPRs and possibly granting licences to third parties.\textsuperscript{125}

It could also be inferred that the transfer of technology helps to boost the R&D and in turn the economy of the country. The technology can be transferred from various sectors of the economy from the agriculture to assignment of software licences. Thus, the technology transfer of agreements holds an essential position in economies. The clauses and way these agreements are executed have the impact upon the market. Certain unreasonable conditions that could be imposed by the transferors may adversely affect the market or cause market foreclosure.

The underlying philosophy of the approach is that technology transfer agreements are generally good for society, because they foster innovation and normally bring about short and long-term benefits for consumers. Nonetheless, these agreements may entail anti-competitive effects: for example, exclusive agreements may restrict competition; or grant-back clauses – under

\textsuperscript{122} See, UNCTAD, TRANSFER OF TECHNOLOGY AND KNOWLEDGE SHARING FOR DEVELOPMENT Science, technology and innovation issues for developing countries, Available at: https://unctad.org/en/docs/psiteid28.en.pdf
\textsuperscript{123} Ibid at 3;
\textsuperscript{124} Slaughter and May, The EU competition rules on intellectual property licensing: A guide to the European Commission’s Technology Transfer Block Exemption Regulation and competition issues relating to IP licensing and enforcement, Available at: https://www.slaughterandmay.com/media/2536585/the-eu-competition-rules-on-intellectual-property-licensing.pdf [Last Accessed: 23 July 2019].
\textsuperscript{125} European Union, Technology Transfer Guidelines, para. 261.
which the licensee has to disclose and transfer all improvements to the licensor – may reduce the incentive for innovation by reducing the expected reward for risky investments. Under certain conditions, agreements between competitors can also foster collusion or generally determine an increase in the price paid by end consumers.126

III. Technology Transfers and It’s Conflicts with Competition Law

This part deals with the how the transfer of technology agreements raises competition concerns. Transfer of Technology agreements may contain clauses that might affect the competition. As a result, most of the literature in licensing contracts relates to the possible clauses and conflicts with antitrust policy and law.127 Some instances may include conditions restraining the licensee from competing in the unrelated market, the illegal tying in agreements in forms of licenses and cases of patent pooling in competing technology in order to form cartels.128

Technology transfer may impose vertical restraints or horizontal restraints. Vertical restraints refer to the limitations imposed between different levels of the market, for example, those imposed by a manufacturer on a dealer. Horizontal restraints, on the other hand refers to a restraint by one competition to another at the level of the market. For example, those imposed by one producer of the product A on another producer of product A. Horizontal restraints appears to be more restrictive trade practise.129

These agreements may include:

**Patent Pooling**

A ‘patent pool’ refers to licensing arrangements wherein two or more patent holders license their patents to each other or co-license their patents to a third-party.130 It must to be obvious that these agreements may raise competition concerns. By pooling amounting to horizontal agreements, jointly monopolising the market by exclusive license or refuse to licence by preventing the competitor in relevant market.

**Licencing Practices**

In general, there are authorities and legislation different from the competition law concerns dealing with the ‘reasonability’ of the clauses in the licensing agreements. But there are certain agreements in this parlance that lead to the territorial restrictions, non-compete clauses or the clauses that so adversely affect the market. These are the clauses in such agreements that raise the competition law concerns. Thus it is apparent that on imposition of certain requirement or clauses, technology transfer licenses may result in severe restraints on the competition prevalent in market. These licenses are therefore ought to be governed by the competition laws.131

**IP and tying in agreements**

http://nopr.niscair.res.in/bitstream/123456789/11976/1/JIPR%202016%283%29%20258-266.pdf [ Last Accessed 22th July 2019].
128 Ibid at 1;
130 Ibid at 1;
131 Ibid at 6;
Under Such agreements the licensee required to procure certain goods from the patentee, thus foreclosing market opportunities for other producers. Generally linking multiple intellectual property products and offering them as a license to the users.\(^{132}\) It could be the case where the sale of patented product is subject to the sale of unpatented product. In some cases, there could be a technological tie up, where the tying and the tied products are bundled together physically or produced in such a way that they are compatible with each other.\(^{133}\) Abovementioned conditions are possible so as to affect the market equilibrium. Further, these are the primary concern on which this report is based on. The implications of these concerns are not trivial, rather, they have an impact on the economy.

This section of the report deals with the legislations on competition law governing the transfers of technology agreements.

**IV. Transfer of Technology Block Chain Regulations in European Union**

The principal rules of EU competition law relating to technology licensing are set out in the European Commission’s Technology Transfer Block Exemption Regulation (“TTBER”) and Guidelines on Technology Transfer Agreements (“Guidelines”) (collectively, the “TTBER and Guidelines”). The TTBER provides a “block exemption” that shields certain types of agreements from EU antitrust scrutiny, while the Guidelines explain the TTBER and provide additional guidance on the EU competition law analysis of technology transfer agreements that do not fall within the scope of the TTBER. Agreements not falling within the block exemption are:

subject to a case-by-case analysis of their competitive effects using the analytical methodology set forth in the Guidelines or presumed to be a violation if they fall within the “hardcore” restrictive provisions identified in the TTBER.\(^{134}\) These block chain exemptions are applicable to only a category of agreements. The TTBER is only available for technology transfer agreements between two parties. The Technology Transfer Guidelines do, however, provide guidance for the appraisal of multi-party agreements. For example, while the TTBER does not apply to agreements setting up technology pools nor to licensing out from these pools,\(^{135}\) the Guidelines provide a ‘safe harbour’ so that the creation and operation of such pools should fall outside of Article 101(1) if they fulfil certain conditions. The TTBER only applies to licence agreements entered into for the purpose of

\(^{132}\) *Ibid* at 6;


\(^{134}\) Commission Regulation (EU) No …/..of XXX on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements; Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements.

\(^{135}\) Technology Transfer Guidelines, para. 247. Licensing out from the pool is considered to be a multi-party agreement as the contributors commonly determine the conditions for licensing the technology package.
producing the contract products. Where the parties do not exploit the licensed technology (for example, if the intention is simply to block the development of a competing technology), the agreement will not be covered by the TTBER. Furthermore, when competing parties fail to exploit the licensed technology, this could arouse suspicions of disguised anti-competitive conduct.136

MEANING OF ‘SAFE HARBOUR’

The TTBER is consistent with the approach in other block exemption regulations, seeking to apply an economic effects approach to analysing agreements rather than concentrating on legal form.137 It is primarily concerned with prohibiting ‘hardcore’ restrictions such as price fixing, output or sales restrictions and market sharing. Any restriction not expressly prohibited by the TTBER is permitted, the agreement satisfies the TTBER ‘safe harbour’ criteria. This requires an analysis of the competitive position of the parties and technology in the relevant markets.

Consistent with its more economic and effects-based approach towards vertical agreements and horizontal cooperation, the Commission is more inclined to accept that technology licences between non-competitors, even if exclusive, generally do not restrict competition.138

The TTBER provides a blanket exemption or ‘safe harbour’ for all technology transfer agreements falling within its scope and meeting certain criteria. The following could be considered as the factors of ascertainment.

i. whether the parties to the agreement are competitors;

ii. what market shares are attributable to each party; and

iii. whether the agreement contains any problem clauses (hardcore or excluded restrictions).

V. Section 3(5) of Competition Act

The Competition Commission of India under the Competition Act, 2002 aims to regulate the market. Also, to keep a check for the anti-competitive practices. The section 3(5) of said Act deals with such agreements. Further, from the interpretation we may infer that, the clauses which promote monopoly could be considered as reasonable. But, on the other hand, the clause which adversely affect the market or cause market foreclosure are not ‘reasonable’ thus void.

It must also be noted that the ambit of reasonableness is not reasonable. As

136 Slaughter and May, The EU competition rules on intellectual property licensing: A guide to the European Commission’s Technology Transfer Block Exemption Regulation and competition issues relating to IP licensing and enforcement, Available at: https://www.slaughterandmay.com/media/2536

137 Ibid at 17;

138 Slaughter and May, The EU competition rules on vertical agreements.
different thresholds of reasonability may be present by different interpretations.

Some of arrangements described above in technology transfer agreements are likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights. Therefore, the unreasonable conditions are not covered under the protection given by Section 3 (5) of the Competition Act 2002 and therefore Competition Commission of India may be called upon take note of anti-competitive agreement under Section 19 of the Competition Act 2002 and such agreements can be declared void.

Although, the ambit of the Act is defined to the Commission. But the law in current scenario does not provide ‘safe harbour’ conditions for the effortless transfer of technology. If the conditions in the market promote the effortless transfer of technology that would result in the boost the economy in hands with modernisation.

VI. CONCLUSION

The report dealt with the meaning of transfer of technology agreements and their interplay with competition law. Firstly, explaining the technology and how it impacts the lives of the people. Also, how technology transfer gradually leads to technology diffusion. The meaning and implications of transfer of technology agreements. Essential features of these agreements and the procedure of forming them.

Secondly, the interaction of transfer of technology agreements with the competition law. The ways and already established practices liked patent pooling, licensing clauses etc that cause the market foreclosure effect. The ways and means by which the competition of the market is affected. Further, the clauses being restrictive in nature cause.

Therefore, these agreements may restrain the market economy. The Commission has the duty and the power to regulate market. Through the it is put in the light the, these agreements must be regulated on the condition or clauses prohibiting competition in the market. Such regulation is essential for the overall growth, benefit and development of the society. The diffusion is technology essential for the improvement of resource and development in the society in an economy. If through regulation the such technological transfer becomes effortless, it would eventually lead to the technology diffusion and development of domestic infrastructure.

VIOLENCE AGAINST WOMEN: AN INDIAN APPROACH

By Bhavesh Goel and Rahul Prasad Shambu
From Symbiosis Law School, Hyderabad

Abstract:
This paper clearly envisages and reflects the fact that women have faced violence, cruelty, brutality, discrimination, and coercion which endorses that women, in the past, were not integral when it comes to execution of Human Rights in true spirits and in clear terms articulating the consequences of failure. It is alarming that to note that women are still a deprived a lot in the masculine world. In order to safeguard & uplift these rights, though painstaking yet a critical approach has been made by many social Activists and NGOs . This is to make sure that the human rights framework is developed and women are safeguarded and given the due dignity. However, the increasing crimes & atrocities against womanhood is indicative of inaccessibility, lack of knowledge coupled with lack of conviction & commitment in enforcement. This would clearly be huge lag and inevitably the biggest stumbling block to the idea of progressive development of the nation, since we stand to forego the remits of synergy. The ability of a woman to enjoy her rights is generally defined and anchored on the fundamental societal structures and power relations which have an impact on various aspects like – law and politics, family life and community wellbeing, social and economic conditions, employment opportunities, education, training, etc. Gender discrimination and gender based violence is one of the most notable violation of human rights which is rooted in laws of gender inequality. Women unfortunately have been the victims of such type of viciousness. Protection of Women against Domestic Violence Act (PWDVA), 2005 is an initiative taken up by the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) – a treaty adopted in 1979 by the UN General Assembly to guard protection of human rights of women. The focus of this paper, however, is on the ineffective implementation of such laws leading to a tremendous increase in the number of domestic violence cases unfortunately quite a lot of them go un-reported. Therefore, the need for protection of human rights of women is the need of the hour and furthermore, there is an imminent need to aware women about the available rights to them and the ways by which they can protect them. A nation is developed only when its people are developed and for that, one of the most essential elements is to protect the basic rights to women so that they are able to prosper and ultimately play catalyst in being the integral part of progress of the country.

Keywords: Women rights empowerment, Discrimination, UN General Assembly, protection, violation, Development, education society.

The term Gender , according to Cambridge Dictionary, is defined as the physical and/or social condition of being male or female. The universally accepted definition of the word gender is that it refers to identities and attributes including the roles of men and women

which are constructed socially. Gender cannot be interchanged with women. The positioning of men and women in the society is affected by various factors including political, social, religious, economic, ideological and other factors and these can be modified by the society, community and culture. A popular cultural understanding is that the role of women, in most societies, is to look after children and other domestic activities while men play an active role in providing for the family by working. However, changes in these perceptions about the men and women role have changed and are constantly evolving. Ironically, due to the gender differences, women at a global level are positioned at disadvantageous positions despite the fact that women constitute about one half of the global population\textsuperscript{141}. The worst victims of exploitations of a patriarchal society all over the world are women which remains prevalent even today. Equality, as a concept, was almost unknown till the Constitution of India was enacted. It provides for freedom of speech and expression, freedom of faith and worship, equality of status and opportunity and assuring individual's dignity thereby promoting fraternity\textsuperscript{142}. However the concept of equality is seldom seen in practice.

The Violence Protection Alliance (VPA) in its \textit{World report on violence and health} (WRVH) defines violence as "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal development, or deprivation\textsuperscript{143}". The United Nations Declaration on the Elimination of Violence against Women, 1993, has defined violence against women as "any act of gender-based violence that results in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life\textsuperscript{144}".

In legal terms, violence has been defined as an attempt to injure someone with a malicious intention by use of physical force. Among the different kinds of violence that prevails, the central focus of this paper shall be on Domestic Violence, various forms of domestic violence, laws on the same, their implementations and statistics and the current scenario.

Women have been subjected to crimes like rape, kidnap, molestation, eve-teasing, sexual harassment, cruelty, dowry violence, etc. It is an undisputable fact that women have been the worst victims of domestic violence at a global level which by far, in the public domain, has remained invisible. Over the last two decades, domestic violence against women has been a major problem recognized nationally and internationally and has been increasing drastically.

Since the later Vedic period in India women have been exploited and considered vulnerable. The victims of domestic violence may be children, woman, aged,

\textsuperscript{141} Vol. 64, Jogendra Kr. Das, \textit{Reflections On Human Rights And The Position Of Indian Women}, pp. 203-220 (The Indian Journal of Political Science)
\textsuperscript{142} IND. Const.
\textsuperscript{144} Declaration on the Elimination of Violence against Women, UN Resolution (1993) Art.1 Proclaimed by General Assembly resolution 48/104 of 20 December 1993
disabled or any other vulnerable group. Domestic violence happens behind the very doors which are to safeguard women from the perils of the external world. In India, domestic violence is rampant and women on a regular basis encounter such kind of violence. Ironically, it is such a crime which is least reported due to the reason that the social stigma that prevails in the society where it is expected of a women to be subservient not only to their male counterparts but also to their male relatives\textsuperscript{145}. Limited remedies to tackle the issues of domestic violence victims existed till 2005, amongst these, the provisions of Sections – 304 B\textsuperscript{146} and 498 A\textsuperscript{147} of the Indian Penal Code, 1872\textsuperscript{148} are a few to mention.

Under the provisions of these sections, women had to go either to the civil court for the decree of divorce or a prosecution could be initiated in a criminal court. However, there were no emergency reliefs available. All these circumstances led majority of women with no choice but to suffer in silence. Analyzing the loopholes in the aforementioned sections of IPC, The Protection of Women from Domestic Violence Act, 2005\textsuperscript{149} was enacted by the Indian Parliament. It is a progressive act whose motto is to protect women from any kind of violence, irrespective of the kind of relationship she shares with the accused. This Act is civil in nature and it entrusts the state a duty to publicize, sensitize and take proper steps for creating awareness on the issues which have been addressed in this act to the authorities including the police officials, members in the judicial services, etc\textsuperscript{150}. Therefore, a person may, at any time, inform the concerned protection officer if he has any reason to believe that an act of domestic violence has been or is likely to happen against him. Section 5 of this act lays down the duties of police officials, protection officers, service providers and Magistrates\textsuperscript{151} in case any complaints received on domestic violence.

The aggrieved person\textsuperscript{152} shall be informed about the right to seek one or more reliefs by making an application as specified in the act.

Some of the drawbacks of the provisions of sections 304 B and 498 A are: failure in safeguarding women subjected to violence in marital relationships and reliefs like maintenance, shelter, custody etc. are also not provided. Since women do not have any support from her family and friends, a recourse in law cannot be taken by them if the offence is merely recognized and the guilty is punished. As the provisions of the criminal law are state driven, the victim’s needs are hardly reflected. To implement

\textsuperscript{146} The Indian Penal Code, § 304 B, 1860
\textsuperscript{147} The Indian Penal Code, § 498 A, 1860
\textsuperscript{148} The Indian Penal Code, 1872
\textsuperscript{149} The Protection of Women from Domestic Violence Act, 2005, is an act to provide for more effective protection of the rights of women guaranteed under the Indian Constitution who are victims of violence of any kind occurring within the family and for matters connected there with or incidental there to.
\textsuperscript{150} Sahoo Harihar and Pradhan Manas Ranjan, ‘Domestic Violence in India: An Empirical Analysis’, 89(3), Man in India, 2009
\textsuperscript{151} The Protection of Women from Domestic Violence Act, § 5, (2005): Duties of police officers, service providers and Magistrate.
\textsuperscript{152} The Protection of Women from Domestic Violence Act, § 2(a), (2005): “aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent...
such laws, there are many hurdles. The provisions of these sections had ignored violence that women encounter on an everyday basis by not specifying the measurable standards.

Section 304 B of Indian Penal Code\(^\text{153}\) which imply that dowry deaths becomes effective only when the woman is dead. Dowry deaths cannot be proved easily as specified in the section because while meeting the dowry demands, there is no maintained record while the girl is still alive. On the whole, this section does not favour women to tackle domestic violence. From the words “soon before her death” it can be inferred that violence committed prior and violence committed on daily basis are not included in this section. Thus, this section fails to bring abetment to suicide under its purview.

According to the Report of National Crime Records Bureau (Crime in India) by Ministry of Home Affairs, 2016, most reported cases under crimes against women were recorded under the category of ‘Cruelty by Husband or His Relatives’ (32.6%) followed by ‘Assault on women with Intent to Outrage her Modesty’ (25.0%), ‘Kidnapping & Abduction of Women’ (19.0%) and ‘Rape’ (11.5%). The highest number of cases was reported in Uttar Pradesh amounting to 14.5% (49,262 out of 3,8954 cases) during 2016. Delhi reported the highest crime rate (160.4) compared to the national average rate of 55.2\(^\text{154}\).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)\(^\text{155}\) adopted by the UN General Assembly had mandated exercise of due diligence by the States to prevent, investigate and punish the convicts in the violent acts against women in accordance with the National legislation. All State parties have been directed to take appropriate measures in preventing discrimination of all forms against women. India is a signatory to CEDAW and has accepted and ratified it in June, 1993. When there is inconsistency between the domestic laws, the domestic Courts in India have been obligated to give due regard to International Conventions and Norms\(^\text{156}\).”

The implementation of PWDVA has not been effective as it is beset with numerous challenges like lack of funds and human resources, indigent coordination across agencies, and ineffective monitoring mechanisms, etc. The Indian Government has also given its commitment of achieving gender equality and empowers all girls by 2030 while focusing on Sustainable Development Goals.

Domestic Violence is an infringement of fundamental laws which are mentioned in the Universal Declaration of Human Rights.\(^\text{157}\) Of the Women between the age group of 15 and 49, one third of them encounter domestic violence and one out of every ten women encounter sexual violence as mentioned under National Family Health

\(^{153}\) Supra 7


\(^{155}\) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)


\(^{157}\) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Recommendation No: 19
Survey (NFHS) Round III report (2005-06). Comprehensively, 35 per cent of the women have encountered physical and sexual violence while 37.2 per cent of women have encountered spousal violence.

The term “domestic violence” in India generally is understood that any kind of violence endured by an individual from a biological relative, commonly it is the female who suffers violence by male members other family or relatives. Under Section 3 of the Protection of Women from Domestic Violence Act, 2005, domestic violence has been clearly defined as any act, omission or commission of respondent where the life, safety, health, limb or well-being is injured, or tends to aggrieve the person mentally or physically will amount to domestic violence. It includes physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. It can also be viewed as injuring or harassing the aggrieved person with an intention to coerce her or any other related person demanding dowry or any other property unlawfully.

There are different kinds of domestic violence and these have also been mentioned in the act and they can be expressed as follows: physical abuse which means any physical force which may result in bodily injury, pain or impairment. The gravity of the injury might vary from minimal tissue damage, fracture leading to a permanent injury or even death of a person. Physical abuse conjointly includes denying a partner treatment or forcing alcohol and/or drug use. It also may include depriving a woman for seeking a medical treatment. Sexual Abuse refers to any sexual act, or attempting to seek any sexual act, unwelcome sexual comments or advances, or any act which goes against the sexuality of a person, using unwanted force, by any person, irrespective of the relation with the victim, whichever place apart from home and work. Acts like rape or any other forms of sexual assault, subjection to pornography, genital mutilation of a female, testing the virginity, incest, etc.

Verbal or emotional abuse is kind of abuse where the psychological integrity of a woman is directly impaired due to an act or set or certain acts. Some acts of psychological violence may include intimidating harm against the woman or anyone close to her which may be verbally or through some actions, mortifying comments, restricting and isolating from communication, hurting the woman using a child by violent intimate partner.

Economic abuse is commonly known as any action or set of actions used to curb woman’s access to resources which may include time, basic necessities such as food and clothes, money, and also transportation. Acts that constitute to economic violence are constraining a woman from going to work, prevent her from financial decision.

158 National Family Health Survey (NFHS) Round III report (2005-06)
159 id. 19
161 The Protection of Women from Domestic Violence Act, § 3, (2005)
162 GA Res. 48/104 of 1993
163 The Protection of Women from Domestic Violence Act, § 3, (2005)
making in the family, denying paying maintenance, etc.

This act also provides the right to live a violence free life and it has also been acknowledged unambiguously and proper provisions for immediate relief to victim in case of emergency has also been provided in this act. Another key feature of this act is that it ensures effective access to justice by way of introducing new authorities and mechanisms such as protection officers who shall act as the mediator or an interface between the woman and the court. This act also provides for a blend of civil and criminal laws in a two phase process which includes the orders passed by the Magistrate on application including the details of such cases in civil matters as referred in section -12 of the act and also arrest of the perpetrator on breach of civil orders. 164

The important mechanisms provided under the PWDV Act in order to address the needs of a victim are creation of a Single Window Remedy system which could be coordinated by Protection Officers, Police, in-charges for Medical Facilities, Service Providers and Magistrates. Under the act, the term ‘Protection Officer’ is appointed by the State Government under sub-section (1) of section 8 165. The protection officers are the key authorities who act as a nodal agency between the various stakeholders.

The Act also specifies the duties of these protection officers which include enforcement of the court orders, receiving of complaints of the victim, and making her aware of the rights available and also facilitate her in having an access to the Court and other services. The role of Service Providers which comprise people within governmental and members of non-governmental organizations which are registered under the act is to perform a significant role in supporting the protection officers and serving victims of domestic violence. The role of Police is to assist in the enforcement of this law. States like Karnataka, Kerala, Tamil Nadu and Maharashtra have appointed full time Protection Officers from within the Government. Requisite infrastructure and facilities have also been provided in all these states. Within other states, preliminary facilities have been provided to the protection officers. To carry out their functions effectively, protection officers in the full time independent cadre of government have been provided adequate infrastructural facilities 166.

PWDV Act’s another mechanism is the provision of Shelter Homes and Medical facilities as expressed under Sections 6 and 7. 167 The notification of establishment of shelter homes ensures that women who are in need of such facilities are not deprived of them. The shelter homes 168

2012 reflects that full time govt. of cadre of POs have been effectively carrying out their duties under the Act.

164 The Protection of Women from Domestic Violence Act, § 12
165 The Protection of Women from Domestic Violence Act, § 8(1), (2005) “The State Government shall, by notification, appoint such number of Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act.”
166 State visit study, 2012 conducted by LCWRI in collaboration with Vimochana & Infrastructure data,

167 The Protection of Women from Domestic Violence Act, 2005
168 The Protection of Women from Domestic Violence Act, § 2(t), Rule 16 (2005) : "shelter home" means any shelter home as may be notified by the State Government to be a shelter home for the purposes of this Act”
envisions a clear framework for women survivors to enable them lead their life with dignity. The person who has the authority of the notified shelter home will provide shelter to an aggrieved person if a request has been made by her, or on her behalf, by any other person.\(^{169}\) The Swadhar Greh refers to those funds for the shelter home that have been allotted on the demand of the state government. The Swadhar Greh Scheme was launched by Ministry of Women and Child Development under the scope of this act. According to the scheme, shelter homes should be setup in every district with a capacity of 30 women. Any districts or big cities where the population is above 40 lakh or a district or a city where extra amount of support is required more than one shelter home can be setup. Provision of basic needs like food, shelter, clothing and medical treatment to the aggrieved is the main objective of shelter homes, besides, emotional and economical support. Currently, in India there are 551 shelter homes functioning in both public and private sectors.\(^{170}\)

A graphical representation of shelter homes set up in each state has been given below, based on which one can understand that major metropolitan states like Delhi, Goa, Jammu and Kashmir, Sikkim, etc. lack these shelter homes for the protection of women which is a major drawback. For example, a city like Delhi where the rate of crime against women is high merely has two shelter homes. Maharashtra records the highest number of shelter homes, 76. While states like Arunachal Pradesh, Chandigarh, Goa, Haryana, Nagaland, Puducherry, Sikkim and Union Territory of Andaman and Nicobar Islands, has the least recorded number of shelter homes i.e., 1 each.\(^{171}\)


Usha Kiran Yojana\(^{172}\), a scheme launched by the Madhya Pradesh government, with the intention that if not funded the government, the aforesaid act will be funded by an assistance grant of Rs. 2 Lakh in the very first year. According to the report released under National Data Sharing and Accessibility Policy (NDSAP) of the Ministry of Women and Child Development in the year 2017-18 the states where shelter homes have been established have discrepancy in the amount that has been allocated for these shelter homes.\(^{173}\) A

\(^{169}\) The Protection of Women from Domestic Violence Act, § 6 (2005)


\(^{171}\) Id 25

\(^{172}\) www.mp.gov.in/wcd-uk-scheme February, 13, (13:29)

\(^{173}\) Report by National Data Sharing and Accessibility Policy (NDSAP) of the Ministry of Women and Child Development , 2017
separate state budget is still not made by many states for the proper implementation of the PWDV Act. Under this act, registration of women's help groups, NGOS working against violence for women are recognized as Service providers with significant role played by them\textsuperscript{174}.

Court directed counseling granted in section 14 of the concerned act states that only a member of Service Provider who own adequate qualifications and experience in counseling can conduct counseling following the detailed procedures mentioned in Rule 14 of the act. Counseling is conducted with a purpose to curb the menace of the violent acts and to ensure that the convicted furnishes an undertaking of refraining himself/herself from causing further violence\textsuperscript{175}. The Act also specifies those provisions which clearly indicate that such counseling must be carried out by following the feminist principles. The Court and the protection officer shall supervise the counselor in his work. Mizoram, with 94 Domestic Incidence Reports earlier, now is one of those states with progressive implementation of those laws in all stages of litigation where Service Providers have assisted the Protection Officers. It has been noted that assistance was provided in serving notice in about 98 cases and 25 house visits were conducted. Additionally, assistance in 90 cases was given for enforcing the court orders\textsuperscript{176}.

The duties of police are laid in the present act to ensure that assistance is provided to women and help the Protection Officers and Service Providers in serving notice and enforcing orders. According to the Act, once a Domestic Incident Report (DIR)\textsuperscript{177} is recorded, the copies of this report must be forwarded by the protection officer to the Magistrate and the local police station\textsuperscript{178}. In case, an order is breached, the police should take an action under Section 31\textsuperscript{179} and Section 32\textsuperscript{180} of the Act where the respondent must be produced before the court.

The medical authorities under this act are authorized to record Domestic Incidence Reports and are imposed with a duty to provide medical aid to women who are a victim of domestic violence. An intervention centre based on public hospital crisis was established in certain states which aim at institutionalizing domestic violence as an important concern of public health within the system of the government. These centers have not been functioning as effectively due to lack of funds from the government in appointment of professionals who can provide proper medical aid to the victims of domestic violence.

PWDVVA recognizes the right of an aggrieved person to seek legal aid under the Legal Services Authorities Act, 1987 (39 of 1987)\textsuperscript{181}. Many states have taken this

\textsuperscript{174} The Protection of Women from Domestic Violence Act, § 10 (2005)
\textsuperscript{175} The Protection of Women from Domestic Violence Act, § 2(t), Rule 14(3), (2005)
\textsuperscript{177} The Protection of Women from Domestic Violence Act, § 12, (2005)
\textsuperscript{178} The Protection of Women from Domestic Violence Act, § 9(b), (2005)
\textsuperscript{179} The Protection of Women from Domestic Violence Act, § 31, (2005): Penalty for breach of protection order by respondent
\textsuperscript{180} The Protection of Women from Domestic Violence Act, § 32, (2005)
\textsuperscript{181} The Protection of Women from Domestic Violence Act, § 9(d), (2005) imposes a duty on the Protection Officer to ensure that legal aid is provided to the women.
initiative and provided assistance in providing legal aid to the victims of domestic violence. with a view to review once in every two months, the procedural and practical hurdles and challenges encountered by the Protection Officers, victims of Domestic Violence and Service Providers in the implementation of the Act, a legal aid cell has been created. A report of the cell with proper suggestions for resolutions shall be submitted to the State Authority regularly. Although there are effective measures being taken, yet there are few states which have not taken any such measures to provide such legal aid to the victims of domestic violence. Hence these victims continue to suffer as they are unaware of the rights available to them.

With regards to the creation of awareness of this act a number of steps have been taken up by the government like a toll free women helpline number. In Gujarat, a resource centre on gender has hoarded the buses and other modes of public transport with basic information of PWDV Act and other contact details of the helpline for women. This has been followed by many other states even today. However there is still lack of awareness of prevalence of such act in remote areas where people are uneducated and where there are higher cases of domestic violence.

Bell Bajao Campaign\textsuperscript{182} in the form of an advertisement starring Mr. Boman Irani,\textsuperscript{183} is another initiative taken up by Breakthrough in India for creating awareness on the rights available to women against domestic violence. This indicates to the abuser that the community is vigilant about what is happening around. This campaign has also been instrumental in ensuring that men play a pivotal role in ending this menace of violence and lend a helping hand in making the country a violence free country.

The budgetary allocation and utilization of funds for the implementation of the act has not been taken very seriously. While some states have no separate schemes for protection of women against such acts, the other states have neglected the core aspects in allocating budget for the schemes that they have undertaken. In many cases, the allocated fund remains unspent or is misused to a large extent. For example, there are funds allocated for awareness creation and capacity building and also for salary of the protection officers, but, aspects like assistance to service providers, medical facilities, legal aid, shelter homes, etc., have been neglected. The specific components of the budget must be carefully looked at for positive results and effective implementation.

National Commission for Women had released a draft in the year 2012 called Centrally Sponsored Scheme (CSS) with a view to remove the disparities in the implementation of the law at the inter-state and inter-district level. The primary objective of such a scheme is to increase the accessibility to justice for women by providing enough financial aid to states which can strengthen and create suitable and institutional mechanisms to control domestic violence. The estimated annual Union Budget for this scheme was Rs. 1158 crore for the implementation of the act. But this action of the government is not in force due to poor budgetary allocation. This draft scheme, at the national level, creates a council in accordance with PWDVA which

\textsuperscript{182} Information available on the Breakthrough website http://www.bellbajao.org/

\textsuperscript{183} https://www.youtube.com/watch?v=zmNz0cTcxFU
would solely be accountable for monitoring and implementation of the scheme under the act. Being an advisory body, the main task of this council is to review the reports of the states on the effective implementation of the PWDV Act and initiate proper measures and take necessary actions in case there are hurdles in the process of enforcement or implementation of the mentioned act. Co-operating with the Gram Nyayalayas, creating awareness among the general public, training and capacity building, etc., are some of the other major other aspects of this scheme. The implementation procedures and law practices under this act are in an evolving juncture. Some of the International Principles on Effective Implementation of Laws on Domestic Violence are legal provisions are setup for protecting women, enabling access to support services and justice, execution of laws provoking to women’s agency, adequate budgetary allocations, actions plans or strategies for capacity building and training of stakeholders etc.

Further discussing about the budgetary issues, for the better implementation of the Act the Central Government has not dispensed funds exclusively, although the Act is under the purview of the Ministry of Women and Child Development. Therefore, due to the lack of financial assistance some states have established Plan Schemes and designate some basic resources. For example an allocation of amount of Rupees 560.73 lakh under the Swadhar Greh Scheme, which support the state in finer execution and implementation of the Act. Nevertheless, some states have still not commenced any such scheme.

Therefore to bring effect on the various schemes under this Act Centrally Sponsored Scheme (CSS) have a vital importance.

One of the major reasons for celebrating the introduction of PWDV Act by Women’s Rights Activists across the country was incorporation of critical provisions in the Act for protection of women from the greater extent of injustice. Some of which include the appointment of Protection Officers and notification of Service Providers, therefore it is very much necessary to delve into whether the state has allocated adequate funds for the critical provisions under the Act. Protection Officers are the integral connection between the resentful women and the judicial system. Therefore lack in providing financial support which surely affects the service delivery quality and overall satisfaction of the Protection Officers should also be taken into consideration. Although the Act provides for appointment of a protection officer at the block level assisted by support staff, yet it is not the case in when it comes to implementation.

One of the drawbacks of this act is that, it is not accessible to the vulnerable sections of society like bisexual, lesbians, transgender, etc. furthermore, there are no specific provisions mentioned under the aforesaid Act with regards to the aggrieved in case the woman is disabled. Lack of immediate relief to victims is still not addressed in the given Act. The time taken to dispose cases under the Act is longer than as mentioned under the statute.

Lack of infrastructure and the guidelines for enlisting the service providers, their roles and duties, and their engagement with the

184 Centre for Budget & Governance Accountability, New Delhi, Report- 2011

185 Jhuma Sen: Handbook For Parliamentarians, Centre For Legislative Research and Advocacy (CLRA) and Oxfam India.

186 Id 27
other stakeholders etc. have not been mentioned clearly which hinder the service providers in carrying out their duties efficiently.

Keeping all this issues in mind, it could be inferred that this issue needs to be addressed in order to safeguard women’s rights. In this endeavour, there is an ardent need to review the current act and make certain modifications which would ultimately lead to effective implementation of the act at all levels. Thus, the following recommendations are put forth to bring certain changes and ensure the implementation of the act accordingly.

The Protection Officers in adequate numbers should be employed full time exclusively in order to fulfill their role effectively under the Act. One of the integral parts of training of the Protection Officers is Gender sensitivity and as such proper awareness must be created on gender sensitivity issues. It is necessary to have qualified protection officers who have knowledge in social sciences, social work or law. There must be an easy access to the location of the officer of the protection office for women as well as the courts. Proper Infrastructure must be provided by the State for the protection officers. A proper record of woman who entreats help from the Protection Officers must be duly maintained by the Protection Officers. They must in all cases be directed to fill out Domestic Incidence Reports even if such cases do not go to court.

The Protection Officers must also make an attempt to undertake socio legal counseling and conduct awareness drives by briefing women of their available rights under the law. Stringent action should be taken against those protection officers who attempt reconciliation or mediation in cases where women have approached them. An annual report has to be made by these protection officers which includes the number of cases which are on record along with their details to the concerned authority so that any modifications required in the mechanism can be made for effective implementation.

With regards to the service providers, they must have an experience record in working cases which involve violence against women. Just like Protection Officers, it is necessary to have competent and adequate number of Service Providers throughout the state. Proper infrastructure must be ensured to these service providers and they must be directed to follow the guidelines and counsel the victim after the order has been passed by the court. and must be directed to be available to the victims at all times throughout the entire three-stage process of litigation. In this endeavour, the social workers must also helps the victim in following necessary procedures required for filing a suit. The Service Providers must also be directed to maintain a track record of feminist principles based casework conducted by them.

Police must also play a crucial role in mediating and making referrals to the Protection Officers, Service Providers and Medical Officers and co-ordinate them to provide relief to the victims even in cases of emergencies. The Police authorities must be vigilant enough in serving the notice and also in enforcing the orders of the court. It should be made mandatory for all the medical institutions providing medical assistance to the victims, to record the Domestic Incidence Reports (DIR) and identify the cases of domestic violence. Such cases must be documented separately and preserved for future endeavors. The law should also mandate preserving the document of medical history as narrated by
the victim in each case. Medical aid should also be provided in cases of emergency and for this, proper infrastructure and adequate funds must be granted by the state at all times keeping in view, the needs of such medical institutions. Proper guidelines must be set and their implementation must be ensured.

The Women Empowerment committees must take initiative to review the existing laws and their implementation and accordingly consultations on enforcement, amendments, etc must be organized. Public hearings must be held to look into the gaps in the legislation with the stakeholders. Auditing and monitoring the legislation shall be strictly ensured by the courts. The failures in the implementation of the law must be brought to the notice of the respective Parliamentary committees and hearings of the same must be conducted duly. Political commitment which is backed by adequate resources is needed for the effective implementation of any law. It is necessary for the policy framers to ensure that budget is allocated in a proper way and in a timely manner in order to avoid any such gaps in the implementation process. It should be the obligation of the Central Government to advance protocols on providing services to women under the law for courts and other ministries.

The present paper deals with understanding the reality behind the implementation of Protection of Women from Domestic Violence, Act, 2005. It is necessary to look at the shortcomings of this act as domestic violence is internationally looked by many components. Domestic violence against any person is undoubtedly an infringement of a human right. The judiciary in India, in a series of cases have interpreted the provisions of this Act and also recognized its guaranteed rights. New rights like right to residence, right of divorcee to reside in the share household of the husband, right to get monetary relief though maintenance, right to get protection order even though the aggrieved woman is not residing with the respondent, etc., are recognized, safeguarded and enforced by the concerned act which could not be possible under the criminal law.

For making the Protection of Women from domestic Violence Act, 2005, effective in its functioning, a comprehensive policy or a legal framework is needed in its implementation. Although, the act is enacted to ameliorate position of one of the most important sections of the society, there are statutory, factual and administrative hurdles which come in the way of the implementation process. Hence, we must look forward and act upon the changes which can be made in the act and make the act more effective, user-friendly and accessible to all the women and ultimately make India, a violence-free country.

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187 Vimlaben Ajitbhai Patel v. Vatslabeen Ashokbhai Patel, 2008 ALL SCR 1707, the Court held that, the Protection of Women from Domestic Violence Act, 2005 provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also there under acquires a right of residence. The right of residence is a higher right.

188 5 Razzak Khan v. Shanaz Khan, 2008 ALL MR (Cri.) Journal 213

189 Sunil Hujband v. Smita Hujband, 2010 ALL MR (Cri.) 1221, See also Rajesh Kurre v. Safurabai, 2009 ALL MR (Cri.) 215

190 Suresh Khullar v. Vijay Khullar, I 2008DMC 719 (DB)

191 Savita Bhanot v. V.D. Bhanot, 2011 CRI.L.J. 2963
References:
2. Sethi, S. 2009, ‘Man’s clothes prompt beating’, Times of India, 5 February. (FACTIVA)
4. Raaj, N. 2009, ‘Ring the bell, stop domestic violence’, Times of India, 8 February. (FACTIVA)
6. ‘Study highlights loopholes in India’s domestic violence law’, OneWorld South Asia website, source: Women’s Feature Service


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STATUS OF STATUTORY DUES UNDER INSOLVENCY AND BANKRUPTCY CODE, 2019

By Damini Mathur
From Amity Law School, Noida

ABSTRACT
The Insolvency and Bankruptcy Code, 2016 is a major reform in the world of corporate law. It consolidates all the provisions in different acts into one single piece of legislation making the insolvency procedure more efficient, methodical and time saving. It has provided immense relief to the corporations that are drowning in debt. The set time frame and streamlined Corporate Insolvency Resolution Process (CIRP) are two of the key highlights of this reform. But, the Code still has plenty of shortcomings with regards to its framework and implementation.

One of the major concerns through the entire process is the management of overdue taxes and fees owed to statutory authorities by the insolvent company. The statutory dues act as Public Revenue Receipts in the government budget which helps in the growth and development of the country. In most resolution plans the importance in repayment of statutory dues is scarce to none. Even various courts and tribunals approve and authorize it. But, its non-payment leads to a serious blow to the country’s finances. Crores of rupees have been waived off due to sheer negligence. Since the implementation of the legislation, there have been many debates and issues raised which are yet to be answered by Insolvency and Bankruptcy Board of India or the courts.

This article is an attempt to address the concerning complication which effects the country at large. Through the various loopholes, both corporations and the statutory authorities have been lax when it came to paying back the dues. Here various judgments and case studies have been analyzed to understand and comprehend the legal status that statutory dues hold in Insolvency Law.

Research Objectives:

- To analyze the loopholes in the Insolvency and Bankruptcy Code, 2016 which allow the non-payment of Statutory Dues.
- To study the legal status of Statutory Dues as per the National Company Law Tribunal (NCLT) and National Company Law Appeal Tribunal (NCLAT).
- To understand the consequences of the non-payment of the Statutory dues.

Research Methodology:

- Analyzing and interpreting various case laws
- Understanding the Corporate Insolvency Resolution Process to find the loopholes in the Insolvency and Bankruptcy Code.

INTRODUCTION
The Insolvency and Bankruptcy Code, 2016 is an enactment that consolidates all the frame works into one single law for insolvency and bankruptcy. This enactment was a major reform in the legal jurisprudence and fills a lacuna in Commercial/Business Laws. It was enacted on 28th May, 2016 and came into effect in December, 2016. The Code aimed to address the problem of the sick units or Non-Performing Assets (NPAs) in a time bound manner. Lokesh Vasudevan, a Partner at Brahmayya & Co, said, “The Code is a beneficial legislation which should have put the corporate debtor back on its feet and not be treated as a mere
recovery legislation for creditors. Recovery in case of resolution is fixed and unchangeable, whereas, realizations out of liquidation are uncertain, time-consuming and stressful.”\(^{192}\)

The Insolvency and Bankruptcy Code lays down different resolution procedures for corporate individuals as well as individuals and partnership firms to either sell the NPAs or to liquidate them in a timely manner. It aims to maximize the value of the insolvent entity so as to promote entrepreneurship and credit availability while balancing the interests of the stakeholders.

The Code also established the Insolvency and Bankruptcy Board of India (IBBI) as the regulatory authority over all Acts and laws relating to insolvency and bankruptcy. It looks over all Insolvency Resolution Professionals, Insolvency Professional Agencies and Information Utilities. It helps to implement the provisions of IBC and helps to amend the laws to suit the current challenges.

The following are the objectives of The Insolvency and Bankruptcy Code, 2016:

- To smoothen the legalities with regards to all insolvency and bankruptcy cases
- To stimulate the attitude of entrepreneurship and development in the country through easy credit availability in the market
- To resolve insolvency and bankruptcy cases in a time bound manner
- To make one single legal framework and eliminate the conflict of laws
- To balance the interests of all stakeholders and prioritize government dues over other secured dues
- To establish Insolvency and Bankruptcy Board of India as the regulatory body for insolvency and bankruptcy law

**CORPORATE INSOLVENCY RESOLUTION PROCESS**

Corporate Insolvency Resolution Process (CIRP) is the procedure through which the corporate person, partnership firm or an individual undergoes the insolvency procedure. It is the debt recovery mechanism for the creditors while acting as a way out from messy debt repayment structures for the bleeding companies and NPAs. After making an application in the NCLT, the CIRP is initiated. First it is established whether the person who has defaulted is capable to repay the dues or not. If not, then the company is either restructured or liquidated.

Sec 3(8) defines a Corporate Debtor as “a corporate person who owes a debt to any person.”\(^{193}\) This is the person who is to be revived or liquidated.

Sec 3(10) defines a creditor as “any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder.”\(^{194}\) Through this definition it may be understood that there are two basic categories of creditors –

1. **FINANCIAL CREDITORS**

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\(^{192}\) V Rishi Kumar *Insolvency proceedings: For each revival under IBC, four firms go under* The Hindu (June 28th, 2019) https://www.thehindubusinessline.com/money-and-banking/insolvency-proceedings-for-each-revival-under-ibc-four-firms-go-under/article28211892.ece

\(^{193}\) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India).

\(^{194}\) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India).
Financial Creditors refers to any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. Their relationship with the debtor is financial in nature. The contract between the two entities is purely a financial contract, like loans and debt security along with the requisite interest (if any) and hence is a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

2. OPERATIONAL CREDITORS
Operational Creditors refers to "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred". The operational debt includes providing a good or service to the debtor or any monetary dues arising out of the existing laws which is to be paid to either the Central Government, State Government or to any local authority.

The process starts with the creditors or the corporate debtor, itself, filing an application with the National Company Law Tribunal (NCLT). The creditors have to prove to the court that a debt exceeding Rs. 1 lakh is due and wasn’t paid even after giving a 14 day notice period. The NCLT has to pass an order either admitted or denying the application. If admitted, then the corporate debtor is accepted into CIRP.

Once entered into CIRP, firstly an Interim Resolution Professional is appointed. He takes over the company and the Board of Directors cease to have any control over the activities of the company. A moratorium is placed which prohibits the following:

1. Continuance or inception of any legal matters against the corporate debtor
2. Transfer of Assets
3. Execution of security interest
4. Discontinuance or termination of the supply of goods and services

Next, the Interim Resolution Professional summons all the claims by various corporate debtors. He maintains a record for all of them and verifies the claims. The Liquidator further verifies and revalues all the claims. The Interim Resolution Professional then constitutes the Committee of Creditors.

In the first meeting, the CoC appoints a permanent Resolution Professional for the remaining of the CIRP who may or may not be the Interim Resolution Professional. The CoC is in charge of considering different Resolution Plans for restructuring the corporation and admit one within 180 days since the initiation of CIRP. The accepted Resolution Plan is then put forward to the NCLT for approval. If approved, the conditions proposed in the plan become binding on all creditors and the corporation. If not, the corporation is then liquidated.

Through this entire process, one of the main creditors become statutory authorities that impose various taxes and fees on the corporations. These taxes and fees are a result of the enforcement of statutes. They count as revenue receipts to the government budget. The amounts so procured are used for the expenditures of the state for growth and development of the country. Most of the times there are major defaults on part of the corporations and the debt piles up to crores and crores of rupees.

195 Sec 5(7) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India).
196 Sec 5(21) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India).
197 Sec 12 (2) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India).
Through this paper, the legal status of statutory dues is analyzed along with the monetary and moral impacts of the leeway provided to corporations and statutory authorities alike. Firstly, the landmark judgment of Pr. Director General of Income Tax V. M/S Synergies Dooray Automotive\(^{198}\) is analyzed whether statutory dues could come under the category of operational creditors. Next, the involvement of statutory authorities in the Committee of Creditors is criticized. Finally, other problems with regards to statutory authorities is discussed.

**STATUTORY DUES AS OPERATIONAL DEBTS**

One of the major challenges in the sphere of Insolvency Law is the status and position of statutory dues. The question which is asked time and time again is under which category of debts do statutory debts fall under? The answer to this plays an importance role in determining the rank the debts hold at the time of repayment or liquidation. On 20\(^{th}\) March, 2019, National Law Company Appeal Tribunal put the discussion to rest. It held that statutory dues come under the umbrella of operational debts.

Over the years various statutory departments including the income tax and other service tax departments of the various states had filed appeals against the decisions of various benches of National Company Law Tribunals (NCLT). The departments stated that the NCLTs had approved various resolution plans which waivered huge amounts of debts in favor of quick resolution and restructuring of the companies. Collectively addressed by NCLAT, it pronounced its judgment through Pr. Director General of Income Tax V. M/S Synergies Dooray Automotive\(^{199}\). The bench stated that there were two questions which had to be addressed to get to the crux of the matter\(^{200}\):

1. Whether the ‘Income Tax’, ‘Value Added Tax’ or other statutory dues, such as ‘Municipal Tax’, ‘Excise Duty’, etc. come within the meaning of ‘Operational Debt’ or not?
2. Whether the Central Government, the State Government or the legal authority having statutory claim, come within the meaning of ‘Operational Creditors’?

Firstly, they determined that Income Tax, Value Added Tax and other statutory dues do come within the meaning of Operational Debt. For this, the Bench along with the Amicus Curiae interpreted the bare reading of Sec 5(21)\(^{201}\) and the Supreme Court judgment of Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors\(^{202}\).

The main argument with respect to the definition of Operational Debt is whether the ‘or’ should be read as ‘and’ i.e. a conjunctive or whether the ‘or’ disjoins the first part to the second. Sec 5(21) defines Operational Debt as follows:

> “Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable

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\(^{199}\) Supra.  
\(^{200}\) ICSI Institute for Insolvency Professionals, IBC – Learning Curve(31), (23rd March, 2019)  

\(^{201}\) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India)  
to the Central Government, any State Government or any local authority.”

The first part is “a claim in respect of the provision of goods or services” while the second part is “or a debt in respect of the repayment of dues arising under any law”. The ‘or’ in between the two parts is the source of contention. The statutory authorities, backed by the Amicus Curiae, stated that the ‘or’ should be read as ‘and’ since that would refer to operational debts arise from the provision of goods and services. Whereas, if the word ‘or’ is used to disjoin the two parts, an entirely new category of operational debts would arise which is not related to the provision of goods and services.

The bench also referred to the Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors judgment which stated in Para 23: “23. ...On the other hand, an ‘operational debt’ would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.”

However, the NCLAT used plain reading of Sec 5(21) and quoted authorities to state that interpreting ‘or’ as ‘and’ should be done only in extraordinary circumstances and this definition doesn’t fall into that category.

NCLAT (in Para 29) held that operational debts refer to those debts that arise only when the company is actually producing some goods or providing some services. As the statutory dues arise only when the company is actually operating, there lies a direct connection between the two. Therefore it was established that statutory dues would be considered as Operational Debt.

“29. ‘Operational Debt’ in normal course means a debt arising during the operation of the Company (‘Corporate Debtor’). The ‘goods’ and ‘services’ including employment are required to keep the Company (‘Corporate Debtor’) operational as a going concern. If the Company (‘Corporate Debtor’) is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of ‘Operational Debt’.”

Hence, automatically the Income Tax Department of the Central Government and the Sales Tax Department(s) of the State Government(s) and local authorities, who are entitled for dues are ‘Operational Creditor’ within the meaning of Sec5(20).

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204 Supra.


206 Sec 5(20) Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India)

Operational Creditor means a person to whom an operational debt is owed and includes any person to
While this verdict is landmark since it actually substantiates statutory dues in the entire process and the fact that the statutory authorities can now initiate CIRP against the corporate debtor\(^{207}\), there are many glaring problems too. The first shall be the fact that by being classified as operational creditors the authorities now hold an extremely passive role in the entire process. Furthermore, there are many situations where albeit the company is not in operation (but still in legal existence), tax liabilities and statutory fees may be applicable. Lastly, there are very few similarities between trade and commerce related Operational Creditors and statutory authorities.

### WAIVER OF STATUTORY DUES AND ITS IMPACT ON PUBLIC MONEY

The Insolvency and Bankruptcy Code, 2016 faces another obstacle, which is extremely human and non-technical in nature — the lax and careless attitude of statutory authorities and the misuse of the laws to find loopholes by the Companies. Through Insolvency process, statutory authorities can receive huge sums of money which can be greatly beneficial to the general public. But, unfortunately, reports tend to show that certain well place rich elite are trying to use this law for hostile takeover of major stressed Companies, while aggravating the situation of non-payment of bank loans, refusing to pay genuine dues of the Operational Creditors and most importantly trying to rob the Government of their statutory dues. Hence this has been thus noted as a new area of development of Insolvency Law with major concerns.

Apart from the Insolvency Code, Sec 35AA\(^{208}\) and 35AB\(^{209}\) of the Banking Regulation Act, 1949 were amended to permit Reserve Bank of India to issue notifications for taking large NPA Accounts to Insolvency Law. In this regard, RBI to issue notifications for taking large NPA Accounts to Insolvency Law - one of them being a Notification dated 13/6/17\(^{210}\) in which large 12 accounts were named as Major Insolvent Accounts representing various Companies. Most of these Companies have gone through the Resolution Process and have been taken over by various Groups. Unfortunately, hardly any information is available whom such debt has been legally assigned or transferred.

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\(^{208}\) The Banking Regulation (Amendment) Act, 2017, Act No. 30 Of 2017 (India)

35AA. The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.

\(^{209}\) The Banking Regulation (Amendment) Act, 2017, Act No. 30 Of 2017 (India)

35AB (1) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to any banking company or banking companies for resolution of stressed assets.

2 (2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise any banking company or banking companies on resolution of stressed assets.

regarding the Insolvency Process of most of these Companies.

The Statutory Authorities, including the Revenue Departments, as well as Statutory Body under Insolvency Code being the Central Government and IBBI Board, have failed to perform their duties properly. Further, the conduct of the Public Sector Banks and the Resolution Professional appointed by them is also highly susceptible, because the proceeding are being conducted in a manner that would lead to windfall gains to certain rich and influential private parties, without trying to protect the interests of banks, operational creditors, and most importantly – the Statutory Dues.

One such cases is the case of Insolvency of a major construction company of India – Jaypee Infratech Ltd. It has an outstanding debt of nearly Rs. 9,800 crores out of which Rs. 4,334 crores pertain to IDBI Bank, who filed an Insolvency petition against Jaypee Infratech Ltd. before NCLT, Allahabad. Corporate Insolvency Resolution Process was triggered in the matter of Jaypee Infratech Ltd. In August 2017 an Interim Resolution Professional (IRP) was appointed to manage the Company’s business.

Amongst the operational creditors’ due of approximately Rs. 9,712, Income Tax dues are to the tune of Rs. 3,334 crores (34.33% of Operational Dues), the dues of Yamuna Expressway Industrial Development Authority (YEIDA) are Rs. 6,112 crores (62.93% of Operational Dues) and other operational creditors’ dues are to the tune of Rs. 267 crores. 212

It has been ascertained that the IRP has admitted claims worth Rs. 464 crores only out of total operational debt of approximately Rs. 9,712 crores (4.77% of the claimed amount) 213. It is a settled law that the IRP cannot adjudicate upon the claim and has to admit the entire claim. Further, it is shocking that the statutory authorities do not seem to have made any representations/objections that their dues were not admitted in full.

Various parties showed interest in taking over debt-ridden Jaypee Infratech Ltd. It is understood that National Building Construction Corporation Ltd. (NBCC), in its revised resolution plan, has also sought many reliefs and concessions including consent from Yamuna Express Industrial Development Authority (YEIDA), if Jaypee Group transfers land and Yamuna Expressway to separate special purpose vehicles (SPVs) and has offered to pay Rs. 20 crores against over Rs. 9,712 crores dues of operational creditors (4.31% of the admitted amount and 0.21% of the claimed amount), including the income tax department and Yamuna Express Industrial Development Authority (YEIDA). 214

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211 IBDI Bank Ltd. v. Jaypee Infratech Ltd. Company Petition (IB) 77/ALD/2017
On transfer of land to Jaypee Infratech from YEIDA as a part of concession agreement, NBCC has stated in its resolution plan that Income Tax department has been making an addition to the income of about Rs. 2,950 on annual basis, which could result in a tax liability of Rs. 33,000, in its entirety, should be extinguished upon approval of this plan.

It may be noted that the claims of Statutory Authorities are evidently more than 10% of the total debt of the company. In theory, they should have a right of participation in the Committee of Creditors meeting under Section 24 of the Insolvency Code, but they cannot be part of the C.O.C. as a result of being classified as Operational Creditors. The statutory authorities cannot participate or make any representations before C.O.C regarding their dues. But they do not even record any objection to such waiver of dues, not even seeking a hearing to them, much less pressing for any requirement of their consent in most of the cases.

If the entire due is repaid to the Income Tax department and YEIDA, then the statutory authorities shall receive Rs. 9,446 crores. This large amount would have been more than enough to fund the government initiate to digitize education delivery in state run schools. If we consider that the amount due to the Income Tax department is in the same proportion as the claimed figures (while YEIDA agrees to waiver as stated in the Resolution Plan presented by NBCC), then the Income Tax department shall only receive 34.33% of Rs.20 crores i.e. Rs. 6.866 crores. 6 crores is the amount allocated for the preparations of Natural Resource inventory for micro-level agricultural planning in three potential districts of Arunachal Pradesh by the Arunachal Pradesh’s State Government.

It is also interesting to note that neither the Central Government nor the IBBI Board, has made any rules in this regard. The Central Board of Direct Taxes or Central Board of Indirect Taxes have also not issued any rules, circulars or standing orders in order to clarify as to how the Government Authorities shall participate in the CIRP Process and hearings of a Resolution Plan, to safeguard the interest of public money in form of Statutory Dues. In absence of such rules, a walkover is given to the high and mighty people who cause such huge losses to the Government.

Both NCLT and NCLAT Rules were framed primarily to deal with matters under the Companies Act, 2013. Hence there is a serious lacuna in the said rules to deal with the process of approving the Resolution Plans and more particularly the mode, the method, the manner of giving notice to, seeking reply from and giving hearing to statutory authorities and Operational Creditors prior to approval of Resolution Plan.

This lacuna and loophole in the process has been conveniently allowed to develop by the Central Government, Ministry of Finance, Ministry of Corporate Affairs,


216 Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India)
Sec 24 (1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.
IBBI Board, Resolution Professionals and Committee of Creditors in order to enable the proceedings to carry out behind the back of the statutory authorities so that no issue is raised in the public fore or in the Department where they are being given nearly zero payment, after the takeover of the Company.

Statutory Authorities coerce the taxpayers even for dues of Rs. 1,000 and the Ministries fight and challenge the disability pension matters, day in and day out right up to the Supreme Court, however, in the cases such as above example, involving a huge sum of Statutory Dues running in thousands of crores, the authorities have absolutely no concern even if such statutory dues are entirely wiped out due to their inaction and culpable negligence.

When any Application is filed before any authority and the Order is passed by the said Authority would be binding on any third person then that third person, whether it is a Statutory Authority or a private person. Such third persons are ought to have been given notice and should have been allowed to file their consent or objections. But they do not seem to hold any objection and if they do, they don’t record or present them in front of the concerning authorities. Even the waivers sought by entities in the Resolution Plan is in the public domain and cannot be said to be hidden from the Statutory Authorities but they neglect to look and check for the same which results in forfeiture of crores of rupees.

The entity seeking waiver of tax dues and acquiring the Corporate Debtor at paltry amounts cannot be permitted to be enriched at the cost of tax payers and moreover, the money collected by the Company from the consumers towards tax belongs to the Government, and the same cannot be withheld under any circumstances.

As per Section 30 (2) (e) of the Code, a resolution plan shall not contravene any law for the time being in force. Any resolution plan which seeks waiver or the scale down of statutory dues, without hearing the statutory authorities and without ensuring their participation in accordance with the Code, is illegal and hit be Section 30 (2) (e). But, despite thereof, NCLTs continue to approve resolution plans which stipulate waiver or extinguishment of statutory dues as done in the matters of Bhushan Steel Ltd., Star Argo Marine Exports Pvt. Ltd., Ved Cellulose Ltd. Mor Farms Pvt Ltd and JEKPL Pvt. Ltd. etc.

OTHER MAJOR CONCERNS REGARDING STATUTORY DUES IN CORPORATE INSOLVENCY RESOLUTION PROCESS

One of the other major problems faced during the Resolution Process is the tax implications on the entire process. CIRP is an expensive and exhaustive process from the stand point of both, the acquirer and the Corporate Debtor. It a question put before the Code whether the expenses incurred from such activities will be liable for taxation, specifically Income Tax. While any specific provision regarding the same to clear it out, judicial precedents support classification of restructuring expenses as revenue expenditure. But still, any amendments or clarifications from IBBI Board or the Income Tax Department of the

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218 Insolvency and Bankruptcy Code, 2016, Act No.31 of 2016 (India).
Sec 30(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

219 PCIT vs. Akzo Nobel India Ltd [2018] 94 taxmann 38 [Kol]
Central Government is sought to clarify the same. Another issue brought to light may be the payment of tax dues in the event of the liquidation of the company. While the priority of payment in the event of restructuring of the company is quite low, upon liquidation, the authorities may seek preferential treatment. In the case of Leo Edibles & Fat vs. Tax Recovery Officer, the Andhra Pradesh and Telengana High Court has upheld the fact that the Income Tax Department may not any priority. The same applies for Indirect Tax Dues as well.

CONCLUSION
While the Insolvency and Bankruptcy Code, 2016 is a landmark legislation bringing about a huge change in Insolvency Law, there are various amendments and clarifications that have to be made. To make the Code as effective as possible in the real world, many points of contentions need to be straightened out by the Insolvency and Bankruptcy Board of India or any other authority. One of them is the how overdue statutory dues and fees to be handled during the Corporate Insolvency Resolution Process.

Companies and corporations use the society’s resources to establish and make a name for themselves. In the event of insolvency, where they lose the public’s trust, it is pertinent that they should make up for it. This can be done by paying the government its dues.

However, in the past 3 years, there have been many instances and cases where statutory dues are waivered off by the Resolution Professional, the acquirer and also the courts and tribunals. These waivers can play a major part in the government budget and can be a major source of government income down the line. But, since they are waivered, the public is being robbed off from living in a welfare state. One of the amendments I would like to suggest is that by elevating the status and rank of statutory authorities in the Committee of Creditors and/or in the priority of repayment, huge amounts of money can be procured and used for the country. Also, separate departments should be established inside the tax and other local authorities to ensure the compliance in repayment of the outstanding taxes, debts and fees.

It is pertinent that statutory authorities play a much larger role in the entire process. By the way of this, the taxpayer’s liability will automatically decrease while the country continues to grow and thrive in today’s world.

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JADHAV CASE (INDIA V. PAKISTAN)

By Deeksha Kathayat
From DR. D.Y. Patil College Of Law, Nerul

Introduction
Vienna convention on Consular Relations of 1963 is an international treaty ratified by almost 180 countries for providing consular actions between independent states. A consul normally operates out of an embassy in another country. He is mostly entrusted with two functions: firstly, protecting in the host country the interests of their countrymen, and secondly, furthering the commercial and economic relations between the two states.

This case of India versus Pakistan (Jadhav) will truly be a landmark for other similar cases where consular access was denied and there was contravention of Vienna convention on Consular Relations.

Facts of the case
Since 3 March 2016, an individual named Kulbhushan Sudhir Jadhav has been in the custody of Pakistani authorities. He is a retired officer of Indian Navy. There was dispute about the circumstances and facts about his arrest between India and Pakistan. According to India, Mr. Jadhav was kidnapped from Iran and later was transferred to Pakistan and detained for interrogation. Whereas, Pakistan contended that Mr. Jadhav, whom it accuses of performing acts of espionage and terrorism on behalf of India, was arrested in Balochistan near the border with Iran after illegally entering Pakistani territory.

On 25 March 2016, Pakistan raised this issue with the High Commissioner of India in Islamabad and released a suspicious video in which Mr. Jadhav appears to confess to his involvement in acts of espionage and terrorism in Pakistan on the orders of India’s foreign intelligence agency “Research and Analysis Wing” (also referred to by its acronym “RAW”). The circumstances under which the video was recorded were unknown to the Court. On the same day, by means of a Note Verbale from the High Commission of India in Islamabad to the Ministry of Foreign Affairs of Pakistan, India noted the “purported arrest of an Indian” and requested consular access to Mr Jadhav. Until 9 October 2017, India sent more than ten Notes Verbales in which it identified Mr. Jadhav as its national and sought consular access to him and Pakistan paid no heed to the request of providing consular access.

The trial of Mr. Jadhav was initiated on 21 September 2016 and was conducted before a Field General Court Martial. On the basis of this information (from the only source made available to the Court), it appears that Mr. Jadhav was tried under Section 59 of the Pakistan Army Act of 1952 and Section 3 of the Official Secrets Act of 1923. According to Pakistan, after the trial had begun, he was given an additional period of three weeks in order to facilitate the preparation of his defence, for which “a law qualified field officer” was specifically appointed.

On 23 January 2017, the Ministry of Foreign Affairs of Pakistan sent a “Letter of Assistance for Criminal Investigation against Mr Jadhav to the High Commission of India in Islamabad, seeking support in “obtaining evidence, material and record for the criminal investigation” of Mr. Jadhav’s activities. On 21 March,2017 Pakistan sent a note verbale that India’s request of consular access will only be
given if India assists Pakistan for assistance in Investigation process.
On 10 April 2017, Pakistan announced that Jadhav had been sentenced to death.

Issues raised
1) Pakistan breached the Vienna Convention as it repeatedly denied consular access to Kulbhushan Jadhav
(2) the process of resolution of this case.

Judgment
India seeks to found the Court’s jurisdiction on Article 36, paragraph 1, of the Statute and on Article I of the Optional Protocol.
The Court found that it has jurisdiction under Article I of the Optional Protocol to entertain India’s claims based on alleged violations of the Vienna Convention.
The International Court of Justice has by an overwhelming majority of 15-1 ruled that Pakistan do an “effective review and reconsideration of conviction and sentence” of Jadhav, that it grants Indian official consular access to him, and directed, “Pakistan to take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in the present proceedings. The Court considers that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav”.

Clearly the judgment is in India’s favour though Pakistanis are claiming it’s their victory because ICJ has not accepted the extreme remedies which India had sought for. India however have added that if the remedies India was demanding are not available, then the Court should ensure a retrial with full consular access to Jadhav and India be given the right to arrange for his legal representation. These were granted in the judgment handed down on July 17, 2019.

To what extent the Judgment was in India’s favour?
First, the ICJ suspended the death penalty awarded to Jadhav by the Pakistani military court. Secondly, the ICJ ruled that Pakistan will have to review the entire process of trial and conviction of Kulbhushan Jadhav. And Thirdly, ICJ noted that Pakistan breached the obligation incumbent upon it under Article 36 of the Vienna Convention on consular relations. This means that Pakistan has now to provide India consular access to Kulbhushan Jadhav.

Conclusion
The ICJ should have laid down some detailed guidelines for how the trial has to be carried out because Pakistanis are already crowing on the fact that ICJ have ruled they can reconsider and review by “means of its own choosing”. As we are very well aware of the fact that “fair trails are oxymoron in Pakistan still Pakistan can not afford to follow the judgment pronounced by the ICJ. What can be concluded from the judgment is that ICJ delivered ‘justice’ in the true sense of that word, upholding human rights, due procedure and the rule of law.
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Karmanye Vadhikaraste Ma Phaleshu Kada Chana – Judicial Review Versus Judicial Activism Vs Judicial Overreach

By Deeksha Kathayat
From DR. D.Y. Patil College Of Law, Nerul

Just imagine one day you wake up and find that a law is passed that you can no more send or make any memes on anybody and you will be punished harshly if you make any meme criticizing government. Yes! For many it will be devastating law ever passed in the history of mankind. If you look and think about this seriously you will realize that most of the things rather I should say rights which we exercise casually in our day to day life are those rights which are not only our birth right but are also as I would like to say “protected rights”. These rights though are guaranteed to us by our constitution but it is the judiciary that has protected these rights being curtailed by the legislators or the executives.

Well the above example would sound funny or childish to some but then there was actually one incident took place where two young girls were arrested for expressing their view on internet. It was the Supreme court that came to the rescue against the arbitrary law and passed a judgment striking section 66A of Information technology act, 2000 which provides power to arrest a person for posting allegedly “offensive” content on websites. The court said, Section 66A is violative of Article 19(1)(a), not saved by Article 19(2), hence unconstitutional.

This power or rather I should say super power which judiciary exercises wherein it can review the validity of the law passed by the legislature is called Judicial Review.

Judicial Review

The power of judicial review exercised by Judiciary is a constitutional power under article 13. The power of judicial review is evoked to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. There are several examples to cite where the court has exercised the power of Judicial review. Such as the case of legality of the order of the Speaker of the Uttarakhand Assembly dismissing nine legislators for cross-voting which was dealt by the SC and the Uttarakhand High Court.

Even in the landmark judgment Keshvananda Bharati Case, the Judicial review was held to be the basic structure of the Indian Constitution. Justice PN Bhagwati, relying on Minerva Mills Ltd (1980) declared that it was well settled that Judicial review forms the basic structure of our Indian Constitution.

However, there is one more point to be taken into account that Judicial Review is not automatic The Supreme Court cannot not use the power of judicial review of its own. It can use it only when any law or rule is specifically challenged before it or when during the course of hearing a case the validity of any law is challenged before it. Judicial Activism

The power of judicial review may have limitations which will hinder the justice delivery but yet again there are some other ways through which judiciary can play more active role. The most used techniques are PIL (PUBLIC INTEREST LITIGATION), Suo moto cases etc. the use of these techniques for dispensation of social justice is called Judicial Activism. Emergence of the Public Interest Litigation (PIL), have allowed the Judiciary to intervene in many public cases and so the judiciary can play an active role in the dispensation of social justice.
issues, even when there is no complaint from the concerned party.

Although the earlier exercise of Judicial Activism was connected with enforcing Fundamental Rights, nowadays, Judiciary has started interfering in the governance related issues as well.

Some of the remarkable instances of judicial activism are - Invention of the basic structure doctrine by which Supreme Court further extended the scope of Judicial Review, introduction of collegium system, institutionalization of PIL, banning smoking in public places based on PIL, the order by Supreme Court in 2001 to provide mid-day meals to schoolchildren and many more.

Judicial over reach
The role of judiciary is always in question majorly by legislative authorities who have always alleged judiciary in over stepping their powers and have in the name of judicial activism have crossed their limits. There is very thin line between the two and when judiciary crosses its limit and indulge themselves into judicial adventurism that’s what is known as judicial over reach.

The problem of judicial over reach can only be controlled by making judiciary accountable. they must be made accountable not only in respect of their personal conduct and integrity, but also in regard to the judicial verdicts that they deliver.

But if we introspect properly what can be concluded is that what may be judicial over reach for some group of persons it may be a case of judicial activism or judicial review for others. Calling a judicial decision an act of judicial overreach or review or activism is purely subjective.

For instance, in the Supreme Court, ruling on a PIL which was about road safety, has banned the sale of liquor at retail outlets, as also in hotels, restaurants, and bars, that are within 500m of any national or state highway. It was looked as an act of judicial overreach by some people and the legislature and was considered as an unnecessary interference on the part of judiciary affecting the revenue and also leading to loss of employment. But to many it was a remarkable judgment for the public interest.

Also, the national anthem case The Supreme Court on December 2016, passed its judgment in the case of Shyam Narayan Chouksey v. Union of India, which makes it mandatory, that all the cinema halls in India shall play the National Anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the National Anthem. Many pseudo liberals were offended by this decision and called this an act of over reach. But to many this was a great judgment as standing for the national anthem is the least, we can do to show our respect for our country and for the brave hearts who have sacrificed their life guarding and serving it.

Conclusion
The debate is ongoing and never-ending judiciary was, is and will be criticized for being very pro- active but as it is written in Bhagawad Gita “Karmanye Vadhikaraste Ma Phaleshu Kada Chana” where lord Krishna explains Arjun to perform his duties despite all obstacles and criticism because that was what his dharm (duty) is. So also, the saying applies in this case to judiciary also because no matter what the judiciary performs its duties sincerely despite facing lots of criticism because doing justice is its only dharm.

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DNA AND PATERNITY ISSUES -
REFERENCE CASE: NANDLAL WASUDEO BADWAIK V. LATA NANDLAL BADWAIK & ANR AIR 2014 SC 932

By Devika Arora

Abstract

The colossal progression within the zone of science and innovation has made it inevitable to apply modernised approaches therein to resolve cases of crime and has impressively bridged the gap between methods of innovation and the legitimate zone making them supplementary to one another. Before the dawn of forensic science as a separately acknowledged discipline, legal issues were troublesome to be settled and were time devouring. This paper is majorly based on one of the foremost basic viewpoints of pathological revolution, DNA. It will discuss DNA mechanisms’ expanding solicitation for resolution of matters of crime and its far-reaching centrality. In spite of the mounting prominence of such pathological practises in the licit arena there stands no exclusive legislative enactment to differentiate and govern the former. In this manner, it is quintessential to give it the place it deserves in the legal field in order to enable the judicature to adjudge upon the matters and dispense justness to the lay man as expeditiously and effectively as possible.

Introduction

Medicinal jurisprudence is the department of the legislative framework that employs the doctrines of law to medicine and on the other hand, the knowledge of medicinal science to the legal glitches. The advent of this discipline has considerably encouraged both the medicinal arena as well as the proficiency of law. An improved collaboration has stemmed and has smoothed the working of both the disciplines. Formerly insoluble cases are being solved with lesser hurdles owing to its remarkable progression. It envelopes the provision of evidence for a wide array of matters. It can be resorted to for clinching the bewilderment affecting the parenthood of children and also be employed for purposes of connexion of individuals’ bodies, which get marred due to natural disasters, outbursts in factories, bomb flare-ups by terrorists and the like. In the arena of Evidence Laws, it is employed to resolve cases involving crimes such as murders, rapes etc.

Be that as it may, in spite of their cosmic advantages to the legal discipline, the practices of medicinal theories are not cogitated as primary evidence in the current era. The present Evidence Act still contemplates technical outcomes within the latitude of evidence established by experts. This legal setting will linger on unless an exclusive enactment is brought into execution by the law-making authorities, thereby giving the scientifically proven outcomes the place they deserve. The Indian Evidence Act, 1872, under section 45 has defined an expert and therein states that, when the court needs to shape a conclusion upon a point related to science, or craftsmanship, or as to character of penmanship or finger impression, the conclusions on the point of science, of such people who are particularly talented in science or craftsmanship or any issue as to personality of penmanship or finger impressions are important truths and such people are called experts. The expression opinion upon a point of science of personnel particularly competent in science is capable of application to all future
progresses in science which facilitate the drawing of experts’ estimations on a specific issue at hand. Due to the overwhelming abuse and ignorance of the courts pertaining to scientific evidence, they tend to hesitate in applying these techniques.  

The forensic science discipline is going through a period of revolution at the heels of the evolution in DNA related modern techniques. DNA innovations have taken a matchless locus in the medico-legal arena. A geneticist of British origin called Dr. Alec Jeffreys, was the first person to apply DNA mechanisms to an investigation of a crime in England. He is also renowned for developing methods of fingerprinting and profiling of DNA which are effectively employed throughout the world.

The case of Colin Pitchfork was the primary tall profile case where hereditary profiling was utilized to demonstrate the guiltlessness of one man and the blame of another. This case is considered to be one of the notorious cases of the decades. The murder as well as rape was committed on two teenage girls. A questionable person committed the murder of one girl and agreed to it. He didn’t commit the murder of the other girl. The genetic profiling was used by the police for proving him guilty; but it established him being innocent and held Pitchfork guilty.

Jeffreys was requested by the police to make use of the evidence recovered from the teenagers and conclude accordingly. The DNA test undertaken by Jeffreys absolved the one that the cops doubted. A genetic quest was conducted by the cops which required the blood samples to be taken from thousands of male dwellers of that region. The conclusion of the search was that Pitchfork had asked one of his companions to replace a sample to intrigue everyone and evade from the heinous act. Consequently, the veil was lifted and Pitchfork was interfaced to all the murders of that region. Hence, Pitchfork became the first person in the world to be identified, captured and successfully prosecuted and sentenced to 30 years in prison as a result of DNA evidence.

DNA analysis has ended up becoming a novel manner of gathering evidence. However, there is still no proper enactment has been brought for governing the mechanism of DNA and other scientific tests to be followed by the authorities who carry out enquiry which poses a serious setback in the framework of law. It is necessary and inevitable to evolve laws, rules and regulations consistently so that the outmoded ways of resolving issues get substituted with the improvised ones and therefore, the verdict process is not hampered in any manner whatsoever. The modulation of laws is vital to keep pace with the fluctuating factors such as social, political, economic and most importantly.

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technological in the periphery of the legal system.

In this paper, I present background information on DNA, its advantages, the present law provisions citing it and the application of DNA analysis to legal problems pertaining to paternity issues.

Chapter 1 - Meaning of DNA

DNA is a condensed structure of Nucleic Acid. DNA is found in each and every living cell and it provides a hereditary blue print to individual. It is a natural organic substance. Human behaviour, character and bodily characteristics are formed by DNA. It can be released from saliva, hair, blood, bones, semen and other organs present in the human body. Each and every human on this earth has different and distinctive DNA. Its forms and structure varies from individual to individual.”

1.1 DNA mechanism

DNA analysis, correspondingly known as DNA profiling or DNA typing, scrutinizes the DNA established in physical evidence obtained from blood, hair, and semen, and concludes whether it is similar to the DNA taken from other respective persons. It is also alluded to in instances of common nature, particularly in cases concerning the determination of parenthood, particularly fatherhood. DNA can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones.

The process of DNA examination has extended the skyline of both medical treatment and law enforcement. At present, there is no particular law that regulates the tolerability of criminological systems and strategies like DNA investigation, in any case, it determines legitimacy by righteousness of different arrangements set down in The Criminal Procedure Code and The Evidence Act.

Chapter 2 - DNA Test and the Legal System of India

The Criminal procedure code 1973 and Indian evidence act 1872 respectively were administered in a time when the law framing bodies were not successful to anticipate the remarkable progression that was to happen relating to developments. The term forensic science is generally new in connection to adjudication system and the legislature couldn’t think about the fluctuated use of it in the organisation of justice as it is pervasive today. The solid law, owing its origin to outdated law principles has not joined a particular arrangement, for methods like DNA examination.

2.1 Provisions under The Code of Criminal Procedure, 1973

Section 53- Examination of accused by medical practitioner at the request of the police:

Indian Evidence Act Must Be Amended.”


226 Dharam Deo Yadav Vs. State of UP, (2014) 5 SCC 509
This provision gives entitlement to the police officer who is not beneath the level of a sub-inspector to make a request to the medical examiner to undertake the bodily examination of any individual who is arrested, if he is under the impression that such examination could unveil some information that could be used as beneficial evidence regarding the commission of the respective crime. Although a certain supremacy is emphasised on the investigating personnel by virtue of this provision but this supremacy cannot be considered as that of an unrestrained nature. It does not give any sort of permission to a complainant to collect the bodily substances like blood or semen from the charged individual for drawing and framing charges against him. Moreover, this section merely talks about the investigation of matters involving criminal nature which have been inaugurated by the police only. No weightage is given to those matters which get introduced to the stage of investigation by filing of complaints.

Since there were numerous deficiencies and inadequacies in the said provision, there was dire need to amplify its scope and make it significant by bringing it in conformity with the standards laid down as a result of the improved methods of logical investigation. This was achieved with the amendment of the year 2005 which elaborated the meaning of the term ‘examination’ expended in Section 53 to be interpreted as widely as possible meaning, examination of bodily substances such as blood, stains of blood, swabs and semen in matters of sexual kind, sweat and sputum, strands of hair and toe and finger nail clippings by the employment of improved and modernised technical methods of innovation including DNA profiling and such other tests which in the opinion of a registered medical practitioner are to be considered as fundamental in the respective matter at its disposal.227

Moreover, in heinous offences such as rape followed by murder, the Apex Court has opined and ruled out that it is of utmost importance that the report of DNA tests is formulated with due care and caution so that its outcome is technically proper and genuine. The Apex Court also restricted the power of the judicature by asserting that no judge would be entitled to have his own opinion preferred over the outcomes of such tests as they are very critical and technical in nature. 228

53-A Examination of person accused of rape by medical practitioner - Sub- clause iv to clause 2 has talked about DNA by averring that for the purposes of analysis of the genetic material, the medical practitioner is ought to provide the details and description of the material extricated from the charged individual.

Similarly, Section 164A (2) (iii) also talks about DNA and states that the medical practitioner examining the victim of rape is required to prepare a report of her DNA profiling at the earliest without any delay.

### 2.2 Constitutionality of DNA evaluation


228 Santosh Kumar Singh Vs. State through CBI, (2010) 9 SCC 747
The lay man perceives that the progression in DNA and its innovation renders his rights futile. They feel that with such progression, their “Privacy rights” and “Right against Self-insinuation” get vulnerable. Right to Privacy has been incorporated under Right to Life and Personal Liberty (Article 21) of the Indian Constitution. Right against Self-insinuation comes by virtue of Article 20(3) which aids the charged individuals from furnishing evidences against themselves as it could prove their guilt. Due to this foremost this is the foremost reason behind the courts being disinclined from accepting evidences in criminal trials based on DNA methods. However, the courts in the following cases have impliedly accepted the evolution in science and technology particularly, DNA analysis.

The Apex Court in Sharda v. Dharnipal229 case stated the following:

1. The Apex court has laid great emphasis on the prominence of the privacy rights over decades by the settlement of matters associated thereto. It has been embraced within the phrase “personal liberty” by interpreting it extensively by virtue of Article 21.

2. But even while construing Article 21 as widely as possible, the right to privacy cannot be given the power of an absolute right. In instances where a conflict cropped between fundamental rights of two parties, the judiciary always favours the right which upholds public morality.

3. The Parliament of our country has framed certain laws following which the charged individual might be subjected to medical tests or tests of a similar nature.

4. The disputes pertaining to matrimony especially those where some party is seeking divorce due to dejection of the partner being infertile or severely diseased it becomes highly necessary to draw conclusions following proper bodily examination for corroborating the allegation. If the respondent dodges such medical examination by reasoning that that it would violate his privacy rights as enshrined under Article 21, then it may in most of such cases become impossible to conclude the allegation. Therefore, because the right to privacy stands embraced in Article 21 and does not have an exclusive standing and has weightage merely due to the extensive interpretation of the phrase “personal liberty”, it would be wrongful to recognise it as an absolute right. Therefore, the court has to resolve these competing interests while balancing both as per the facts and circumstances.

5. A convincing case for drawing an adversarial supposition would be made out if despite an order passed by the court, a person refuses to submit himself to such medical examination. This has been made accomplishable by Section 114 of the Evidence Act which enables a court to draw an adverse inference where the party does not yield the relevant evidences which are in his clout and possession or evades them.

6. Resultantly, it is one of the implicit powers of the judiciary to direct medical examinations where required in matrimony litigation and the same cannot be held to be encroachment of an individual’s privacy rights.

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The Apex court in Smt. Selvi v. State of Karnataka, stated that amongst the several methods of medical examination, DNA profiling has been explicitly incorporated in the revised explanation to Sections 53 and 53-A of the Code of criminal procedure. For the purposes of drawing conclusions, the comparison and identification of gathered samples cannot be said to be an endorsement or coercion or in other words self-insinuation. Hence, the taking and retention of DNA samples for evidentiary reasons do not face constitutional hurdles in the Indian context.

Chapter 3- Evidentiary value of DNA evaluation

DNA to be considered a form of evidence has to be to be gathered and well-preserved in an efficient and accurate fashion and the documents related to it must be filed properly. This is preferable so that admissibility of such gathered evidence can be ensured in hearings. Otherwise they cannot be relied upon. Its admissibility has been in a doubtful state for years since there is no specific legislation pertaining to DNA and its use for evidence. The Apex Court and the High Courts in various judgments have been observed to be conflicting in their verdicts. Judges do not deny the scientific accuracy of DNA testing, but hold themselves back from permitting them in some situations to uphold the public policy.  

3.1 Determination of parenthood by DNA test

It is laid down under Section 112 of the Indian Evidence Act, when an individual is born during the subsistence of a lawful wed-lock to a couple, or within the duration of 280 days after the termination such wed-lock and in those 280 days the lady remained single, it shall be a convincing and certain proof that the offspring conceived thereby is the lawful offspring of the man. The only exception to this presumption is when the parties can demonstrate that they did not have a sexual contact with each other during that period. To reiterate, The Indian Evidence Act, 1872 was enacted based on old-style morals and ethics of the society and hence the abovementioned presumption was laid down upholding the public morality. However, the society and its people evolve consistently and over time their beliefs change owing to increasing literacy rate and development in all walks of life. Therefore, the law framing and executing bodies have been observed to have recognised matters where the above-mentioned presumption has been debated and controverted. Hence, in instances where the man denies the fatherhood towards an individual, this presumption is capable of being rebuttable.

Paternity testing is carried out in order to reveal useful information about the biological relationship between a man and his alleged child.

What is DNA Paternity Test?

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231 bhan, ashok. “DNA and Indian Legal System.” Jammu Kashmir Latest News | Tourism |
Section 112 of the Indian Evidence Act states that the fact that any person was born during the continuance of a valid marriage between his/her mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties had no access to each other at any time when that child could have been begotten. To reiterate, The Indian Evidence Act, 1872 was enacted based on traditional principles of the Indian society and hence the above-mentioned presumption. In order to keep pace with the evolution of the society and to meet the changes brought thereby the courts have recognised cases where this presumption has been rebutted. The presumption is rebuttable in cases where the person concerned intends to deny paternity over a child. In Amarjit Kaur v. Har Bhajan Singh\textsuperscript{232}, the court observed that section 112 of the Evidence Act was enacted at a time when the prevailing scientific progressions with deoxyribonucleic acid (DNA) and ribonucleic acid (RNA) tests were not executed. A genuine DNA test is considered to be scientifically accurate. But even that is not enough to escape from the conclusiveness of presumption of law about the legitimacy of the child. Under section 112 of the Act for example if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrefutable and erroneous.

3.2 Maintaining the credibility of evidence by incorporating renovated methods

Due to the fast pace of the development in the technical methods and innovation, it has become pre-requisite for the legal framework to evolve itself so as to enable the pavement for an effective system of settlement of disputes that the victims place before them. However, DNA analysis being a new concept of extracting evidence in the legal system of India it is not being easily adaptable due to the long and continuous prevalent outmoded practices since times immemorial. Thus, the courts have to bear in mind the beliefs of the common man upon which the laws are framed and at the same time comprehend the possible favourable and non-favourable consequences upon the lay man and on the society as a whole and only after such consideration order such a test to for the extrication of evidence.

“The Hon’ble lordships namely, Mr. Justice A. M. Ahmadi and S. Mohan. JJ of the Apex Court have enumerated the subsequent parameters:

(1) The judicature is not empowered to direct tests of examination as a standard and casual procedure

(2) They must not pay heed to applications seeking blood tests for mere inquiry.

(3) To dissipate the presumption of legitimacy of the offspring, the person who challenges it must ascertain that he had no chance of sexual contact with the partner.

(4) The judicature must be careful in weighting the potential outcomes of directing such tests. Ignorance of the potential outcomes could lead to labelling the offspring as misbegotten and his or her mother as a lady of low virtue.

(5) The judicature is not entitled to coerce any individual to make available his blood sample for examination.

The intriguing matter to be considered is that if such parameters are employed for the settlement of matters especially those that cannot be settled by mere fluke or ignorance, the very provision for investigation would be defeated. There are certain heinous offences such as rape, murder, disputes of parenthood and the like which require the aid of DNA methods to prove certainty.  

The court should not direct DNA test or such other test for ironing out the contention merely because the parties involved in the case have disputed a factum of paternity. The parties should be directed to present evidence to prove or disprove the factum of paternity and only if the court finds it impossible to draw an inference or adversarial inference on the basis of such evidence placed before it or the contentious issue is not able to be resolved without resorting to a DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes vital to resolve the controversy the court can direct such a test. DNA test, in any case, cannot be directed as a matter of routine or ordinarily. The court should provide and record reasons as to the essential need for such test in the respective case in order to resolve the controversy and is indispensable. That is necessary since a result of such test, in matrimonial and succession cases, being negative will have an effect of branding a child as a bastard and the mother as an unchaste woman as noted in Goutam Kundu v. State of West Bengal. That may also adversely affect the child psychologically. The courts, however, should not hesitate to direct DNA test if it is in the best interest of a child.

The other objection that stands as a hurdle in applying DNA for obtaining evidence in paternity issues is that no person can be compelled to be a witness as against himself (self-incrimination) and that no person shall be deprived of his life and personal liberty (Article 21 of the Indian Constitution) except according to the procedure established by law. By directing the petitioner herein to undergo DNA test to prove the paternity of the first respondent, cannot be said to be affecting his fundamental rights and it is not in violation of his right to personal liberty enunciated under Article 21 of the Constitution of India. The said issue came for consideration before the court in Bommi and another v. Munirathinam. In the said judgment, the respective court after going through various judgements delivered by the Apex court and other High courts, held that when the paternity of a child is challenged, there is nothing wrong in directing a DNA test, which would lift the veil and unfold the truth and it has been further held that such an act is not an interference with the personal liberty of the person concerned, who is required to undergo the test.


235 Bommi and another v. Munirathinam, 2005 (1) LW 713 (Madras).
3.3 The Indian Evidence (Amendment) Bill, 2003

As the Evidence laws have proved to remain backward and hesitant in accommodating the Owing to the inability of Section 112 to accommodate headways within the realm of science and innovation, the 185th Report of the Law Commission has propositioned an amendment bill of evidence in the year 2003 which recognises that in order to ponder upon the presumption of fatherhood there can be other grounds to be checked upon apart from no physical or sexual contact.

The revised provisions as per the Commission are written below which shall make up for the inadequacies in the present provisions:

112. The truth that an offspring was conceived at the time when the substantial lawful wed-lock was subsisting amid a couple, or in the duration 280 days,
(i) once the wed-lock was terminated by law and the mother of the offspring remained single, (ii) after the wed-lock was maintained at a strategic distance by way of disintegration and the mother remained single,
would be considered as a concluding proof that the offspring mentioned above is the lawful offspring of that man, unless,
(a) the one who contests it proves that the couple did not have any sexual access or contact with each other when the offspring could have been conceived; or
(b) the alleged father is able to prove convincingly that he is not responsible for parenthood of the offspring with the help of tests enumerated below,

(i) medical tests that ascertain that the attacked individual was infertile in the duration when the wed-lock was subsisting; or
(ii) The couple in the suit conjointly took a decision to get blood tests so that they could figure out whether the respective individual is the parent of the offspring or not,
(iii) To be sure of the parenthood the couple conjointly agree to get their DNA analysed

These provisions, however, come with the conditions that the tests mentioned above ought to be undertaken as per the well-established technical procedures with due care and no irresponsibility. Moreover, minimum two tests must be undertaken which should give out the same conclusion about the non-parenthood of the person attacked.

Therefore, in determination of parentage, homicide, rape and other cases of such nature which require identification, D.N.A evidence is bound to play an increasingly significant role. Though it alone does not prove without reasonable apprehension that a person was present at a crime scene or that he is guilty, it can be used in permutation with other evidence. While courts may be hesitant in accepting such novel scientific evidence, the reason may be that they are unable to appreciate its accuracy and applicability. The department of science must then take the initiative to enlighten the legal personalities about the nuances of D.N.A evidence and its potential. The legislature on its part must ensure that judges can incorporate the uses of D.N.A evidence within the legislative framework. Courts would then be more receptive to expert opinion under section 45 of the

236“The Indian Evidence (Amendment) Bill, 2003.”
Http://Lawcommissionofindia.nic.in/reports/185threport-partv.pdf.
Evidence Act and would be able to develop an informed analysis about the respective issue.\textsuperscript{237}

3.4 DNA test to controvert presumption under Section 112 Indian Evidence Act.

Section 112 of the law of Evidence, is based on renowned maxim \textit{pater est quem nuptiae demonstrant}, meaning, the father is one whom the marriage indicates. Thus, a special protection has been provided by the law to the status of lawfulness of an offspring. However, the latter part of the section provides an outlet to the party to get away from the rigour of the decisiveness only by regarding the legality of a child cannot be allowed to be lightly repealed or allowed to be broken or shaken merely by probabilities. To dispel the presumption of legitimacy of a child the evidence must be direct, strong, distinct and conclusive. These rigours are justified by considerations of public for the stigma of illegitimacy is very severe and may affect not only the entire life of the child, his family but his future generation as well.\textsuperscript{238}

3.4.1 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr\textsuperscript{239}

The Supreme Court, in this case, has given great importance to D.N.A test and placed it at an edge over the presumption envisaged by section 112 of the Indian Evidence Act, 1872.

**Facts:** Nandlal and Lata tied the knot in 1990. The relationship between them deteriorated in the nick of time and hence, the marriage fell apart. Consequently, an application seeking maintenance by virtue of Section 125 of the Code of Criminal Procedure was filed by the wife. The learned Magistrate of the Trial Court disdained her request by an order on 10th December, 1993. Thereafter, the wife resorted to a fresh proceeding under the same provision of the Code of Criminal Procedure, by which she claimed maintenance for herself as well as for her daughter. She purported that she resumed living with her husband from the date 20\textsuperscript{th} of June, 1996 and stayed with him for about two years during which she got pregnant. Thereafter, she was sent to her parents’ home for the delivery and eventually she gave birth to a girl child. The husband resisted the claim and contended that the contentions of the wife having stayed with him since 20th June 1996 is fabricated. He also denied the parenthood over the girl borne to him as asserted by the wife.

Consequently, the husband approached the High Court and preferred a revision petition wherein he pleaded them to direct a DNA test so that he could prove that he had no responsibility of being a parent to the alleged offspring and at the same time asserted that no maintenance ought to have been awarded to the child. The High Court disdained his petition for the revision and denied his claim. The dejected appellant then resorted to a Special Leave Petition before the Apex Court in opposition to the order of High Court. The Apex Court overlooked the order of High court and favoured the appellant and directed the test on the condition that the appellant was required to deposit all the expenses in respect of the maintenance awarded to the wife and child in return. The appellant thus,

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\textsuperscript{237} Cri LJ, Journal Section, page no.54, 55, 56, 57 (2006).
\textsuperscript{238} Nayan Joshi, Medical Jurisprudence and Toxicology, page no. 135.
\textsuperscript{239} Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr, AIR 2014 SC 932.
\end{flushright}
paid the amount as directed by the judicature. As a result, the Apex Court approved the appellant’s prayer for conducting DNA test for discovering the disputed and controversial parenthood of the alleged offspring. The test undertaken in the lab and the report made opined that the appellant was excluded to be the biological parent of the child and their samples did not match to one another. Since the respondent asserted him being the parent of her child she was not satisfied by the order and hence requested for re-test. The Court paid heed to her request for the last time and directed a further test to be conducted at the Laboratory for the same purpose at Hyderabad. The Central Forensic Laboratory submitted its report and opined that the appellant can be excluded from being the biological father of the child. The respondent’s counsel submitted that the direction for the test should not have been granted because the prerequisite of ascertaining that he had no sexual contact with the partner was a fiasco and he could not be proved. In view of the aforesaid he submitted that the result of such a test should be ignored.

The appellant’s counsel then raised the contention that when the DNA test had already been ordered by the judicature, the respondent did not deny it at that time, neither expressly nor impliedly. Since the outcome of the report was not favourable to the respondent, she challenged that the test should not have been ordered in the first place.

Judgment: The Apex Court observed and pointed out that while considering such questions of legality, we should acknowledge that the law of evidence was framed and brought into force over two centuries ago when the authorities responsible for enacting the laws could not even fathom the evolution of society as an upshot of literacy rate and education as well as consistent progression in innovation and logic. Although the section itself lays down that the judicature shall presume and consider without any doubt that the offspring conceived during the subsistence of the legal wed-lock would be genuine in the eyes of the legal framework along with the satisfaction of the conditions listed in the said provision, yet it leaves the room open to the technical methods of innovation to establish the contrary which are to be recognised as they yield full proof. Hence, the court should give the opportunity to the victims to resort to the modern techniques so that evidence is gathered leaving no room for doubts. The Apex court also opined that when the presumption and the evidence gathered by way of technical tests like DNA analysis are diverging from one another, the technical evidence gathered will be given an edge.

The judicature in the above discoursed matter gave the chance to the innocent individual the opportunity of being heard. He was able to justify that there was no sexual contact between the couple by DNA testing. Therefore, the court laid great weightage on this innovated method.

Coming to the conclusion, DNA techniques can also be employed for repudiating parenthood and not only for ascertaining the same.

Chapter 4- Merits of DNA evaluation

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240 Mudassir Nazir, Admissibility of DNA in civil and criminal cases in India, Volume 3 Issue 5, JCIL, page no. 12.
1. Research and development- It can be made use of for studying purposes such as evolution of human beings for centuries. Moreover, it is quite useful in gathering data on diseases inherited from predecessors including ailments as well as maladies such as Hemophilia, Down syndrome.

2. Resolution of heinous offences- Until a few years ago, the offences affecting females were not undraped straightforwardly. The preys to offences such as rape, trafficking, abuse of body and the like would hesitate to lift the veil over their suffering. This could be due to them not being able to be vocal about their miseries. Therefore, these methods have remarkably streamlined the investigation procedure.

3. Aid to already convicted individuals- Matters wherein the individual is condemned by relying upon fabricated evidence. Therefore, to exculpate an individual who was detained wrongly or by mistake, such tests can be employed.

4.1 The DNA Based Technology (Use and Regulation) Bill, 2017

It was pondered upon by a commission belonging to the biotechnology division of the government that there must be a separate legislative enactment for the purposes of the rules and regulations to adhere to when it comes to employing DNA methods for resolution of cases and also for governing the procedure to be adopted for the search for people who cannot be found. This commission paved the way for the Law Commission of India to prepare a formalised version of a Bill for the exercise of the methods and mechanisms of DNA innovation. This Bill was brought into being after scrutinising the proclamations of the judicature on all levels of practice and also going through the provisions of the Constitution.

Principally, the following formalised version of these parameters have been discussed in the Bill:

- It occasions necessities for formulating a Team of directors which would take up the onus of enclosing procedures charting the use of such mechanisms. At the same stretch, establish catalogues for launching labs for conducting the tests. The Bill also determined that no lab could function without being ascribed.
- The panel thus created would be under the solemn onus to render notifications to the Governments, both at the Centre as well as to those of all the States as per the operation of the labs.
- The tests in such labs must be conducted by obeying the international parameters inculcating respect for ethics.
- The Board should also have the responsibility to supervise, monitor, inspect and assess the laboratories.

Conclusion

Thus, considering the multiple excellences of the modernised system of gathering data, D.N.A profiling methods must be incorporated in the legal framework as an exclusive technique. Although, this technique has been given

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recognition impliedly by the law-making authorities in the provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, discussed above, it still becomes inevitable to formulate a separate enactment. For the effective and efficient resolution of matters, the respective enactment needs to lay down the proper procedure to be followed in gathering samples for proofs, the test methods, and the deterrents in the execution. Moreover, laws must be amended and modified timely in order to keep pace with the consistent evolution and progress in the field of science and innovation.

By virtue of the objective, unbiased and infallible character of the D.N.A analysis methods it has undoubtedly revolutionised the administration of justice in our legal system. Some of the suggestions regarding care and caution to avoid its misuse by human agencies are:

- Ascendency of formulating a uniformly systematic and exclusive law on the conduct of proofs gathered by employing innovative mechanisms must be taken up by the law-making bodies.
- There should be spirit of brotherhood between the legal fraternity and the innovation personnel to foster collaboration between the two.
- To standardise procedures followed in Forensic laboratories in order to proliferate dependability on its report.
- Medical jurisprudence should be studied thoroughly for resolution of cases.
- The government should organise awareness programmes on forensic techniques for the judges.
- An authority must be entrusted with the onus of monitoring the profiling labs.
- There should be a systematic preservation of information on DNA at all levels.

It is vital to create more formal interactive forums between the innovative institutes and Judicatures to enable increased dialogue between them so that a better understanding is embarked upon in drawing conclusions.

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PRISON LAW IN INDIA - NEED FOR REFORMATION WITH A VIEW TOWARDS REHABILITATION

By Gnaneshwar Rajan and Hema Varshini C
From SASTRA Deemed to be University, Tirumalaisamudram, Thanjavur, Tamil Nadu.

INTRODUCTION
Prisoners’ rights and need for reformation of the law governing prisons in India is a topic that is not given much needed importance it deserves. It is imperative to note that India is a country that cares less for prisoner reformation in spite of guidelines that have been passed in recent years. There are various problems that concern the age-old prison system in the country. Socio-legal problems like overcrowding of prisons, societal view of prisoners after their release, lack of basic facilities in prison, offences by fellow prisoners and guards and legal problems like the Prisons Act of 1894.

The Indian prison system is governed by the Prisons Act passed in the pre-independence era. This act provides for rules and regulations that the guards have to follow with a view to maintain discipline in prisons. The act provides for solitary confinement. But the same act does not provide for prisoner reformation.

At this juncture, it is important to identify and bring out the purpose for which this act was passed. This act, since its inception, never focused on prisoner rehabilitation but only on prisoner discipline. It is also important to note the time period in which the act was passed. It was passed at a time where India was finding its footing in its pursuit towards independence. But it has been more than 70 years since India attained independence. And yet, prison system in India is still governed by a pre-colonial era legislation.

This and more problems shall be discussed in this paper and possible solutions will also be provided.

PROBLEMS OF THE PRISON SYSTEM IN INDIA:
1. Socio-legal problems:
   a. Overcrowding of prisons:
      This is an important problem that requires immediate addressing. The Supreme Court recently expressed its concern over this issue and it blamed the governments of the states and union territories for their lack of commitment towards finding solutions to this problem. “Prison overcrowding compels prisoners to be kept under conditions that are unacceptable in light of the United Nations Standard Minimum Rules for Treatment of Offenders to which India is the signatory”, said the Supreme Court in response to a writ petition.
      This is an alarming statistic that has not received much attention in recent times. This is, therefore, a problem that should be given relevance, if not importance.

   b. Sexual abuse in prisons:
      This is a problem that is rather unheard of and one that the society will view it with great shock and angst. But it is true. Sexual abuse does take place amongst prisoners inside the prison. Indiscriminate mingling

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242. National policy on prison reforms and correctional administration.
243. Section 73 of Prisons Act, 1894.
of prisoners leads to sexual abuse and homosexuality\textsuperscript{246}. There, it seems, is no proper segregation of prisoner inside the prison which is a prime requisite of maintaining discipline and order amongst prisoner. Acts of sexual abuse leads to “forced homosexuality” among prisoners. This is a rarely discussed problem and it needs quick addressing.

c. **Societal view on prisoners after their release:**

This, like the previous problem, is a topic that is rarely discussed. It equally concerns the society as much as it concerns the prisoners who get out of prisons with a view towards self-reformation and a prerogative to start a new life with their families once outside prison. Society, unfortunately, do not provide, or attempt to provide, opportunities to prisoners who get out of prisons as their view on prisoners do not change even when they (the prisoners) have reformed. Society has a history of ostracizing people they don’t like. And the same goes towards prisoners. Prisoners form a section of society which is shunned, secluded and seldom talked about.\textsuperscript{247} If prisoners are continually being shunned and ostracized like this, it has a huge psychological effect on them. Their initial prerogative of self-reformation is made irrelevant with continual discrimination showed towards them in the society. There’s a chance that they might relapse and get back to the life of crime that they best know of. This defeats the very purpose of “prisons”. If the objective of a prison is to reform the prisoners serving their sentences there, it is massively defeated by the society’s reluctance in welcoming the prisoners back and their lack of interest in reintegration of prisoners also serves as a cause that defeats the sole objective of a prison.

d. **Lack of staffing:**

This issue should concern only the governments of the states and union territories. Due regard is to be given to the guards who man the prison cells. There is a lack of female staff in women prisons, which includes guards, doctors, etc.\textsuperscript{248} This puts the women prisoners in risk of sexual harassment by male prison guards (and sometimes female guards). This creates a question as to whether or not prisons in India are safe or not. This also creates a question as to whether or not guards are properly trained enough to man the prison cells filled with violent criminals and persons with a history of criminal offences.

To analyze as to how this problem is created, overcrowding of prisons is to be taken out as the cause of lack of employment of prison guards. The guards that are in prisons feel overworked due to massive overcrowding and are demotivated due to lack of support from the administration. Therefore, due consideration towards guards is also to be equally given as is given to prisoners.

2. **Prisons Act, 1894:**

As mentioned before, the Indian prison system is governed by a pre-colonial era legislation that is the Prisons Act of 1894. The purpose of the act is also mentioned before; the purpose which is not in tune with today’s changing economic and social conditions. Though the act provides for rights-and-values-indian-democracy

\textsuperscript{246} A convict in the Central Prison of Thiruvananthapuram vs State of Kerala, 1993 Cri LJ 3242.

\textsuperscript{247} Baljeet Kaur, Prisoners’ rights and values of Indian democracy, Engage, Jul 27, 2019, https://www.epw.in/engage/article/prisoners’-

\textsuperscript{248} Ministry of women and child development, Government of India, Women in prisons, Jun 5, 2018.
employment of prisoners\textsuperscript{249}, there is no provision as to making proper use of their skills. This act has colonial approach which deflects with the contemporary ideology of reformation of prisoners on humanitarian grounds in order to change their heart and mind to become responsible citizens rather than to advocate punitive and disciplinary measures of taming them in prisoners like animals in zoo\textsuperscript{250}.

The act does not provide for basic needs like legal aid, mental health treatment, protection against punishments given without the orders of a court, etc. This is a legislation that, somehow, is not given due importance in the legislatures of the states and the union. Given the magnitude of this issue, the lack of consideration shown by the legislature is baffling.

**SOLUTIONS:**

a. **Amendments to the Prisons Act, 1894:**

It is high time that the Prisons Act is brought out for discussion in the legislature. The time has come to unlock the colonial Indian prison system and amend the centurion old Prisons Act 1894 as its obsolete and not in tune with modern day and age where the reformation is required not only of prisons but also the prisoners who shall be equipped with basic fundamental rights which this nation grants to its every citizen\textsuperscript{251}. India, in the economic and social sense, is changing rapidly and it is imperative that every legislation that is governing the country is in pace with the changing times. And so, due consideration is also to be given to the law that governs the prison system of our country. A law that is passed with the purpose of disciplining the prisoners and not with a view of reformation of the same, it’d be difficult to reintegrate them into the society once they get out. Amendments and new additions to the act can be considered to be made with respect to sections that focus on reformation of prisoners as there are no sections in the act that provide for the same.

b. **Commitment towards treatment of prisoners:**

The Supreme Court expressed deep displeasure on finding out that governments of the states and union territories weren’t giving due considerations to the problem of overcrowding of prisons and mistreatment of prisoners inside the prisons\textsuperscript{252}. This clearly highlights the fact that the governments of the states, union territories and even the Central government is simply disinterested in reforming the prison system of our country and attempting to solve the problems that surround the aforementioned system that governs the prisons of our country. This has an immediate psychological effect on the prisoners as they might feel that the government is not supporting them and probably would not support them in the near future. Problems like lack of prison guards would probably be solved by adding in more prison guards who are willing to guard the prisons or by adding people who are simply looking for employment opportunities. This can result in more employment opportunities for young adults.

c. **Open prisons:**

\textsuperscript{249} Section 34 provides for employment to civil prisoners and Section 35 states the time limit a criminal prisoner shall work every day.


\textsuperscript{252} PTI, Supreme Court shocked at over 600 per cent overcrowding in jails, Times of India, Mar 30, 2018.
This might solve the problem of overcrowding of prisons. Open prisons were first formed in 1891 in Switzerland. It was later followed up by the United States and the United Kingdom in the early part of the 20th century. Sir Alexander Paterson, a member of the Prison Commission from 1922 to 1947, played an important role in the creation of open prisons. His philosophy with respect to open prisons were as follows:

1. A man is sent to prison as a punishment and not for punishment.
2. You cannot train a man for freedom under conditions of captivity.

In Dharambir v. State of U. P, the Supreme Court supported the institution of open prisons and was of the view that open prisons had certain advantages in the context of young offenders who could be protected from some of the well-known vices to which young inmates were subjected to in ordinary jails. Open prisons do not restrict inmates much and unlike ordinary prisons, look to provide with more freedom of movement to prisoners in accordance with provisions of Article 19 (1)(d) of the Constitution that talks about freedom of movement anywhere in the country. And this includes freedom of movement inside the prisons of our country as well. Open prisons look to provide more of this freedom.

d. Employment opportunities to prisoners:
It is imperative to credit the Government of Telangana on providing with employment opportunities to 235 ex-prisoners in the state. If, like the Government of Telangana, every government in the country looks to provide prisoners with employment opportunities that are in tune with their skill set, there’d be economic advantages that every government in the country can make full use of. As the economic principle goes, more employees mean more production means more sales means more revenue. Employment opportunities to prisoners can result in a chain reaction of this sort. It also helps in adding up of more human capital that employers can make use of.

e. Changing the views of the society:
This is a difficult, yet important problem that needs quick addressing. The only way prisoners and their families can reintegrate themselves into the society is if society accepts them irrespective of their past. The reason why it will be difficult for society to change their views on prisoners who have been released is due to the general fear they have towards the prisoners. The fear that the prisoners might get back to their usual criminal activities will be justified by the society by pointing out the sentences that the prisoners served. In defense of the prisoners, they, once reformed, want to get into a normal life with a normal family in a normal city or town or village. They just want to experience the “normality” of life. And this can be achieved only if society has a broader outlook towards them and accepts them as fellow human beings. The reformation is not seen in prisoners when they get released out of jail cells as they become absolute misfits in the society after suffering from inhuman tortures and adding to their misery the social stigma they have to live with as they are never accepted by society.

254 (1979) 3 SCC 645.
CONCLUSION:
Prison law and reformation of prison law is, as mentioned before, a topic that has not found relevance, if not importance in the legislature. It is a topic worthy of discussion. The Prisons Act of 1894 is one of the few pre-colonial era legislations that have not been amended after independence. It is high time that the aforementioned law is opened up again and to be considered for amendments for the purpose of reformation of prisoners.

Society and the media are not aware of the legislation governing the prison system of our country. Awareness of such a legislation is key. Furthermore, a change in the views of the society towards prisoners, would be of immense help as it would result in reduction of crime rates in the country. Prisoners, if accepted into the society as fellow human beings, would not go back to the life of crime that they so want to get out of. They’d be less tempted to become criminals again and this can result in a reduction of offences committed by repeat offenders.

Therefore, it should be of utmost importance that the legislature and the society come together to help in the process of reformation of prisoners in the country.
CONSTITUTION AND CONSTITUTIONALISM: A POLITICAL VIEW

By Harshita Parihar
From Maharashtra National Law University, Aurangabad

The ideas of constitution and constitutionalism visit the legal framework of a rustic. While the constitution is usually outlined because it is the “supreme law of,” constitutionalism may be a system of governance below that the ability of the govt. is restricted by the rule of law. Constitutionalism acknowledges the requirement of limiting concentration of power so as to safeguard the rights of teams and people. In such a system, the power of the government can be limited by the constitution and by the provisions and regulations contained in it but also by other measures and norms. In order to grasp the ideas furthermore understanding their similarities and variations is a must. It is necessary to grasp their history and evolution. The idea of the constitution has modified considerably compared to the primary examples seen in ancient Greek country, whereas the construct of constitutionalism has fully grown around the principle that the authority of the government springs from and restricted by a group of rules and laws.

Constitution has various meanings and each definition tries to interpret its meaning in different ways. The philosopher Aristotle (384–322 bc.), in his work Politics, analyzed over 150 Greek constitutions. He delineated a constitution as making the frame upon that the government and laws of a society are built.

A constitution may be defined as an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members are prescribed. Laws, as distinct from the frame of the constitution, are the rules by which the magistrates should exercise their powers, and should watch and check transgressors.

Duhaime’s law dictionary defines the constitution as:-

The basic, fundamental law of a state which sets out how that state will be organized and the powers, authorities of the government between different political units and citizens.

Well, constitutionalism carries its own meaning. It can be interpreted as follows: A government’s authority is determined by a body of laws or constitution. Generally, this refers to prevent arbitrary government. Basically, the idea of this is linked to the development of the democracies. Important elements of the constitution are

(1) government as indicated by the constitution; (2) detachment of intensity; (3) sway of the general population and popularity based government; (4) constitutional review; (5) free legal; (6) constrained government subject to a bill of individual rights; (7) controlling the police; (8) regular citizen control of the military; and (9) no state control, or exceptionally restricted and entirely delineated state

257 www.britannica.com/topic/constitutioanlism

258 www.legalservicesindia.com/article1699/constitutioanlism.html
control, to suspend the task of a few sections of, or the whole, constitution.

259 In I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors. the view was taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of the Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism.

In Rameshwar Prasad and Ors. Versus Association of India (UOI) and Anr. "The constitutionalism or protected arrangement of Government detests absolutism - it is started on the Rule of Law in which emotional fulfilment is substituted by objectivity given by the arrangements of the Constitution itself." Constitutionalism is about cut-off points and desires. As seen by Chandrachud, CJ, in Minerva Mills Ltd. - "The Constitution is a valuable legacy and, in this way, you can't crush its character'. On one hand, our lawful move such learned responses that "Trust in the legitimate is of prime hugeness. Our very own is a free nation. Among such people respect for law and trust in its sacrosanct comprehension by courts require an amazing dimension of strength and coordinated effort for the estimation of dominant part rule government and survival of constitutionalism" said in Indra Sawhney and Ors. Versus Union of India (UOI) and Ors. The constitution of India was embraced by the Constituent Assembly of India on 26 November 1949 and wound up successful on 26 January 1950. Constitution and constitutionalism are covering thoughts, in spite of the way that the essential suggest a made gathering out of laws and order and the second is a multifaceted standard and plan of organization. A segment of the similitudes between the two include: Both insinuate quite far and features of the course of action of organization of a country. Constitutionalism would not exist without a constitution, and a set up system for governing a nation requires cut-off points and purposes of restriction to the central master. Both impact the activities of both government and masses. Other than giving a system to political and institutional structure, the constitution sets out the focal picks that all local people should seek after. Moreover, controlling sacredly recommends that the get together applies the controls spread out in the constitution to keep and deal with the subjects' presentations – always concerning individual and total rights; Both guarantee and ensure individual and total rights, shielding the focal government from misusing of its powers and infringing on the locals' fundamental chances; and Both have created and in a general sense changed in the midst of the latest couple of many years, benefitting from the spread of fame based convictions and getting the opportunity to be key features of the predominant piece of Western countries.

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259 Milan Dalal, “India ’s New Constitutionalism: Two Cases That Have Reshaped Indian Law”, "Boston College International and Comparative Law Review", volume no 31, issue no 2, article 4, 2005
Distinction among Constitution and Constitutionalism

The essential complexity among constitution and constitutionalism lies in how the constitution is, generally, a created record, made by the governing body (consistently with the collaboration of the basic culture), while constitutionalism is a standard and a course of action of organization that respects the standard of law and limits the power of the organization. Most present-day constitutions were made a very long time back, yet laws and norms had quite recently been creating and changing for a significant period of time, and continue doing in that capacity. The constitution (and laws with everything taken into account) is a living component that should conform to the changing features of the front line world and of current social requests. Fail to change the constitution – without losing its middle benchmarks and characteristics – may provoke an obsolete organization system. Distinctive differences between the two thoughts include:

Constitutionalism relies upon the measures plot in the constitution – or in other focus legitimate chronicles – be that as it may, it is similarly its own one of a kind standard. The likelihood of constitutionalism is against the possibility of a despot and tyrannical rule and relies upon the conviction that the power of the lawmaking body should be compelled with the ultimate objective to balance abuses and bounties;

The constitution is routinely a formed chronicle, while the models of constitutionalism are all around unwritten. Both constitution and constitutionalism advance with the decree of fair objectives – regardless of the way that they don't for the most part proceed at a comparable speed. There can be a built up kind of organization – that respects the benefits of the inhabitants and advances dominant part rule regards – in spite of the way that the national constitution is outdated. Meanwhile, an inefficient just government will probably be not able to oversee normally, despite the nearness of a constitution.

The constitution of India was framed on a philosophy of liberalism and democracy was its functional manifestation. As Professor K Lowenstein says, the constitution is either a suit made to measure or to be actually worn or a readymade suit which is not worn but hangs in the closet or it is not a suit at all but a fancy dress or a mere cloak. Constitution of India is highly influenced by religion and India. On the other side the constitution and constitutionalism, both go hand in hand. So religion affects constitutionalism also. The following inquiry to examine is the thing that sort of state-religion relationship and religious frameworks are perfect with liberal majority rule government, and what is most certainly not. National sacred controls about religion and the arbitration of religious rights can be thought about from both an individual rights point of view and an aggregate rights point of view. The individual rights point of view sees religious opportunity as an issue of singular decision and the aggregate rights viewpoint sees religious opportunity as a question of the proceeded with reasonability of religious gatherings. To evaluate these unique procedures for the state control of religion, diverse models of chapel state relations, must be analyzed, for instance, how extraordinary governments formally perceive religious gatherings, empower (or not) their practices and manage religious protesters. One has likewise taken a gander at universal human rights bargains together with the statute of global bargain bodies.
since settlement duties impact how states comprehend their legitimate commitments around there too. Nationally protected methodologies change even in liberal sacred popular governments due to verifiable contrasts and the diverse religious syntheses of the various national populace. This assortment is generous. Despite the fact that the constitutions of most Western majority rule nations don't require a solitary state church, greater part places of worship can be singled out as national houses of worship, as in Italy (1947), Spain (1977) or Poland (1997). In multi-confessional commonwealths, similar to Germany, uncommon state acknowledgment for numerous holy places can prompt the accumulation of chapel imposes by the state, offered back to the places of worship once in a while with an extra state appropriation. This establishes a more altruistic sort of secularism, with a cooperationist' mentality of the state towards houses of worship. This sort of methodology some of the time agrees with open law status to holy places or formalizes concordats with the Holy See as a legitimate substance, not the same as the Vatican, for instance. State neutrality in other liberal constitutions can likewise be related with more secularist approaches, similar to the French laicite or the American non-foundation framework. In the strict separation frameworks, as in France, and Turkey religion is to a great extent privatized. This does not imply that all liberal, non-religious states are consequently common. Be that as it may, in every single liberal constitution, the religious opportunity has turned out to be acknowledged as a person ideal from the nineteenth century onwards.

The disestablishment of religion guaranteed by the First Amendment34 of the US Constitution went for freeing of religious establishments from the state. The inspiration driving this disestablishment was less to make a more typical open culture, be that as it may, to free religious enunciation, and empower the free blessed spots to thrive. In this model, religion is free of government support and free of government control. The structure of American opportunity concerning religion relied upon pluralism and grouped assortment since as Rawls raised, the purpose of the organization was to decay to use state ability to constrain a particular cognizance of the extraordinary life upon one's individual citizens.35 According to this liberal conflict, empowering the organization to set up religion with specific advantages would not invigorate, yet rather weaken religion. The American sort of separation of the state and church inferred from one point of view the protection of individuals from obliged help for religions they didn't place stock in, also, protection of religious relationship from legislative obstruction on the other. The possibility of constitutionalism is an incredible transition in the UK because of the law and legislative issues in the UK.

These present advancements must, notwithstanding, be seen against the background of the quickly going before time of supported and profound level sacred change, as administrative measures concerning the security of human rights (the Human Rights Act 1998), the devolution of intensity (the Scotland Act 1998, Government of Wales Acts 1998 and 2006, and Northern Ireland Act 1998), opportunity of data (the Freedom of Information Act 2000), and change of the legal (the Constitutional Reform Act 2005) ordered while the previous Labour government was in office somewhere in the range of 1997 and 2010. The United Kingdom's enrollment of the European
Union has additionally had proceeding with profound level noteworthiness for discussion about the continuous feasibility of Parliamentary power as the bedrock established guideline or rule of the local constitution. Moreover, the courts have kept on creating for themselves the intensity of legal survey of official activity, and a couple of senior judges have even recommended that Parliamentary power, as a custom-based law rule, is available to legal reinterpretation or abandonment. At a more everyday level, worries about national security have saturated the political condition since the psychological militant assaults of September 11, 2001, and July 7, 2005, and supported the section of progressive antiterrorism resolutions, promoting here and there obvious strains among lawmakers and the legal, as everybody accused of upholding the Human Rights Act 1998. Worries about national security have, in their turn, had a generous effect on the progressing regularizing banter about the job of sorted out religions (regardless of whether Christian, Muslim, or Jewish) in law and national life, and about the privileges of contending religious gatherings.

Well every almost every constitution makes some reference to religion. On the other side, there is only one religion where the constitution is not relevant that is the Czech republic's constitution. Dealing with religion for the constitution is not so tough, rights are given in the form of freedom for such causes.

There are no neat divisions or classifications to describe the relationship between constitutional law and religion in the region, nor of legal traditions increasingly broadly. The worldwide law animates the legal systems of Pakistan, Bangladesh, Malaysia, Singapore, Myanmar, and India, while starchy law systems typify Thailand and Indonesia; and mixed systems exist in Afghanistan. Structuring these legal systems are vastly variegated ramble systems and multiple ways of recognizing, or relegating, religion in public and private life. Some constitutions recognize a religion, others acknowledge several religions, and others prefer secularism as a cadre principle. Yet, there are core themes and ideas that run through and unite these jurisdictions, regardless of differences in constitutional form or religious make-up.

It follows from these tendencies that liberalism and democracy do not necessarily go hand in hand. It follows from these tendencies that liberalism and democracy do not necessarily go hand in hand. As the case of the Muslim Brotherhood in Egypt after 2011 shows in the Middle East democratization is likely to push Islamist parties towards greater illiberalism. In religiously conservative societies there is in general widespread support for more mixing of religion and politics, not less. For example in Egypt even after the overthrow of President Morsi overwhelming majorities support Shari’a, as a primary or only source of law, including the role of religious leaders in drafting legislation, religiously derived criminal punishment, and gender inequality. This means that if democratic elections are provided Arabs would rather decide not to be liberal, as even the most moderate Islamist want the state to promote religious and moral values through the soft power of the state machinery, the educational system, and the media. But as many examples in the secular Europe show, Islamist cannot fully express their Islamism in a strictly secular state, since the notion that liberalism is neutral can be accepted only within a liberal framework. Therefore for democracy to flourish in the Middle
East it will have to find a way to incorporate Islamist parties and it will have to be at least somewhat illiberal.260

Due to the liberal American disestablishment, there have been no proceeded with requires the area, state or government to deny religious pictures from open spots or schools. Be that as it may, with respect to court appearances, court confinement, drivers' allow issuance, and air travel, U.S. policymakers and courts have affirmed laws and practice that intrude with Muslim women's free exercise of their religion, to be particular, the wearing of hijab, niqab or burqa that conceals the hair or face from view. For instance, the Michigan District Court ousted a Muslim woman's case against a vehicle rental association when she declined to reveal. The Supreme Court of Michigan has concurred with zone Court by getting a change to Michigan Rule of Evidence, which gives that: "The court will rehearse sensible control over the nearness of social events and observers with the end goal to (1) ensure that the manner of such individuals may be watched and studied by the truth pioneer, and (2) to ensure the exact ID of such individuals." Other states of the US have extra laws giving settles on a choice about capacity to control apparel. The US Supreme Court has not particularly watched out for restrictions on Muslim headscarves or then again facial shroud. In the point of reference Cohen v. California (1971), the Court hurled out the turbulent lead conviction of a California man who wore a coat bearing the antagonistic words "Screw the Draft" in a courthouse corridor.37 The Cohen decision laid on the requirements of the chance of verbalization guaranteed by the First Revision. The First Amendment likewise secures the free exercise of religion. On the off chance that the first Amendment secures coats worn for political purposes, it could be relied upon to ensure humility clothing worn for religious purposes. In contrast to the American progressives, their French partners declined to isolate church from state, rather expected much more noteworthy political power over religion.

Moved by the Republican conviction arrangement of Rousseau they attempted to a state in which the particular wills of the subjects and the general will were in central congruity. As shown by the French beginning of citizenship, the national does not have a character free from the state. Specialize over religion is essential in this thought likewise, religious pluralism is a threat to such a component of the state. The segment of chapel and state would be a mistake in this structure since it would provoke isolated loyalties. The state anticipated that would direction over simple guidance, and superseded religious rules in the schools with what was known as the central of "universal significant quality". In November 1793, the Commune of Paris declared "that all of the sanctuaries and places of petition of every religion and association which exist in Paris will be closed forthwith".

This argument may seem politically unfeasible. That, however, would be a quick conclusion. To begin with, judgments concerning feasibility or practicality or realism are not merely factual judgments devoid of normative judgments and goals. The Article contested the facts that underlie the realist argument either by presenting new facts or by showing how these facts necessitate a normative judgment regarding how one arrives at these facts (e.g., how we


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should measure popular will). If the realist concedes that a sharia clause is not an ideal arrangement, then there is a need to identify a desirable alternative arrangement. Once this goal is identified, it can become a regulative idea towards which political action can be oriented. The answer cannot be: “accept the existing bad arrangement and hope it will change in the future” because, as previously indicated, choices made at the present influence the availability of options in the future. If one disagrees normatively with a sharia clause then one undermines her own position, at least over the long-term, when she agrees to it under the banner of realpolitik. Ultimately, this realpolitik is no more than an apology to the status quo.

In I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors. view taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The protection of fundamental constitutional rights through the common law is main feature of common lawconstitutionalism.

In Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr. “The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.” Constitutionalism is about limits and aspirations. As observed by Chandrachud, CJ, in Minerva Mills Ltd. – “The Constitution is a precious heritage and, therefore, you cannot destroy its identity”

By and by, enactment including correction of the constitution and land change laws was tested in the courts. In what wound up known as the Kesavananda Bharati case, a thirteen-judge board of the incomparable court issued an original sentiment traversing almost 800 pages and a whole volume of the Supreme Court Cases Reporter. The court proficiently issued a progression of instrumental decisions. First, the court toppled the Golak Nath case, which had held that Parliament come up short on the ability to change central rights in the constitution without a protected convention. Second, by an edge of thirteen-to-zero, the court maintained the Twenty-fourth Amendment, which stipulated that the "Parliament had the ability to correct any or all arrangements of the Constitution." Ruling seven-to-six, in any case, the court included one admonition: albeit no piece of the constitution was beyond alteration, Parliament couldn’t revoke the "fundamental structure" of the constitution through straightforward amendments. Additionally, the court maintained the Twenty-ninth Amendment, holding the Kerala land change laws were past legal survey, as they were contained in the Ninth Schedule. Hence, the court, while maintaining the revisions gone by Parliament, embedded the intensity of legal
audit for itself by decision that revisions, modifying the "essential structure" of the constitution couldn't withstand legal scrutiny. Although the legislature scrutinized the essential structure principle enunciated in Kesavananda Bharati, the decision was re-asserted in subsequent decisions.57 Thus, for more than thirty years, Parliament had the option to work by changing the constitution insofar as it didn't dissolve the essential structure of the constitution.

The two recent decisions of the Indian Supreme Court, in Coelho and Raja Ram Pal, can be heralded as significant victories for Indian constitutional law and democratic government.131 The court's decisions were seminal because they re-evaluated the conduct of Parliament and the scope of judicial review in which the court could engage with respect to Parliament's legislative and non-legislative functions.132 The Coelho case held that laws and constitutional amendments that altered the basic structure of the constitution, by violating fundamental rights, could be invalidated.133 This decision is significant for a variety of reasons.262

To start with, the consistent conclusion in Coelho can be seen as a triumph for central rights.135 Given the earlier activity of Parliament in dumping several laws into the Ninth Schedule, it was vague whether the basic rights progressed by the constitution would be liable to straightforward correction or disintegration by Parliament.136 In light of the court's choice, be that as it may, it is currently certain that rights, for example, "balance," "opportunity," and "life" are considered "key" and in this manner "are not bamboos that will curve to suit passing political winds."137Related to the main point is the idea of political accountabil-ity.138 Before, lawmakers have been enticed to mishandle the structure of article 31B and the Ninth Schedule to incorporate laws irrelevant to land change or completion feudalism as a methods for scoring political focuses with constituents; they will now never again have the option to dodge the scrumodest of an attentive judiciary.139Third, this choice re-establishes a perceived leverage between the legislative and legal branches.140 At the center of any vote based system is a free, flourishing judiciary.141 Part-and-package of such a framework is the capacity of courts to take part in legal survey and strike down laws that don't acclimate with the fundamental contract of legislative power.142 By deciding that the court could strike down any law that adjusted the basic structure of the constitution, the court protected the constitution and put a basic beware of Parliament.143At a similar time, the Coelho supposition can't be seen as just having a positive impact.144 It has opened the court to significant roads of criticism.145 For instance, one could contend the choice gives the legal executive an over the top measure of intensity, countering the "re-establishing harmony" contention offered previously.

The Supreme Court of India is clearly more assertive today than it was just thirty years ago, when it held in the Kesavananda Bharati case that it had limited ability to conduct judicial review of laws placed in the infamous Ninth Schedule, thus shielding them from review. Recent decisions in the Coelho and Raja Ram Pal cases show the court is more willing to undertake judicial review, by permitting examination of both Parliament’s legislative and non-legislative roles. Such action has al-allowed the court to tackle

262 India’s new constitutionalism law review.
issues ranging from invalidating laws that have nothing to do with land reform, to stemming political corruption. The court’s decisions are not without controversy, as various sides see them as expanding accountability, and others see them as usurping the role of the legislature. Given the seminal nature of these Indian Supreme Court decisions, however, the cases are likely to have a lasting impact on not only Indian constitutional law, but also the way Parliament crafts laws and constitutional amendments in the future.

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INTERCONNECTION BETWEEN INTELLECTUAL PROPERTY RIGHTS AND CYBER SECURITY

By Ishaan Behal and Ragini Rao
From Amity Law School, Noida and Ansal University, Gurgaon respectively

Abstract
This paper is an attempt to depict Intellectual Property Rights in accordance to cyber space. At present, the legislative framework regulating IPR in cyberspace is inadequate to cope with all the components of cyber security. The existing laws are getting outdated and should be revised in order to adapt to the dynamic nature of the digital world, to maintain the quality of protection and regulation they provide. Some key questions which are answered in this paper are -
1) How are Intellectual Property Rights connected with cyber space?
2) What kind of Intellectual Property Rights are available in cyber space?
3) Are there any loopholes in the legal system regulating IPR in cyber space?
This paper is a twofold scenario which initially describes Intellectual Property Rights and cyber security. Later, it talks about the colligation of both, by explaining how Intellectual Property can be connected with cyber space and what are the various kinds of Intellectual Property Rights available in cyber space. At the end, this paper also provides some suggestions in order to improvise the current legislative regime regulating IPR in cyber space.

Introduction
In the world where most of the population finds it convenient to download software, movies, music etc. for free on the internet rather than purchasing the original version, it gets very easy for the hackers to gain access to our private information. After the emergence of Social media, people don’t even think twice before opening and sharing links. This lack of after math has led to loss of confidentiality over their personal data. According to WIPO (World Intellectual Property Organization) Intellectual property refers to creations of the mind – inventions, literary and artistic works and symbols, names and images used in commerce.

In the modern time, the world has been facing a great deal of flood in the Cyber Crime with Globalization being the main factor behind it. Cyber Crimes can be in the form of Bullying over social media, Cyber Stalking, Spamming, Torjan Attacks etc.

In the legal framework of our country, till date only the Information Technology Act, 2000 has been enacted in order to regulate cybercrime. However, time has radically changed from where everything started, in like manner the act needs to go through many further changes so as to adjust to the present day situation. To bring down the cybercrime rate, suitable measures need to be taken at both Legislative and Judiciary levels to keep the guilty parties from infringing upon the law.

Intellectual Property Rights
Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in Article27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of
scientific, literary or artistic productions. The importance of IP was for the very first time discussed in the Paris Convention, 1883 for protection of Industrial Property and then later on in the Berne Convention, 1886 for the protection of Literary and Artistic Works. Both of these are regulated by WIPO (World Intellectual Property Organization). It is an international organization that administers a number of international agreements that deal partly or entirely with the protection of geographical indications (in particular, the Paris Convention and the Lisbon Agreement).

The following are the list of activities covered by the intellectual property rights laid down by the WIPO –

- Industrial designs
- Inventions possible in human venture
- Trademarks, service marks, designations etc.
- Scientific Inventions
- Literary, artistic, and scientific works
- Unhealthy competition
- Performances of performing artists, phonograms, and broadcasts
- All other rights intellect
- Intellectual property in industrial, scientific, literary, or artistic fields

Intellectual property rights protecting the cyber space are as follows –

- Copyright Law
- Trademark Law
- Patent law

Colligation of the Intellectual Property Rights and Cyber Space will be further discussed in detail in this research paper.

Cyber Security

Security is the foremost urgency in every aspect of our lives. There has been an extensive growth of cyber security in the software industry. These threats have risen up to a whole different level.

We live in a world where our private information is as crucial as it has ever been. With the rising software industries, it has become truly primary to specifically design something with a framework that retains the integrity and confidentiality of the system as a whole. Everything comes at stake once the extirpation of security takes place.

Cyber security is characterized as giving protection to the network, interface and the system as a whole. It protects the entire framework from the malicious and unauthorized access.

Data theft is the forbidden shift or storage of any information that is confidential, personal, or financial in nature, including passwords, software code, or algorithms, proprietary process-oriented information, or technologies.

Some common modes of data theft are – USB drive, portable hard drive, devices using memory cards and PDAs, Emails, Printing, Remote sharing, and Malware attacks.

CYBER CRIME

Cybercrime is characterized by the felonious usage of computer and theft. It has been growing ever since such as viruses, spams, breaking into a server or a network, theft of data thereby breaking its

264 http://hrlibrary.umn.edu/gencomm/escgencom17.html
265 www.wipo.int/edocs/pubdocs
266 www.itgovernance.co.uk/what-is-cybersecurity
confidentiality, stalking someone and using their information to further bully them, fraudulent activity and so on. Unfortunately, it won’t just stop here as there is advancement in the technology more or less there has been a drastic increase in cybercrime. (R)

**Things highly affecting cyber security**

- **Web servers:**

There are attacks on these web applications to take out data or to pass out the nasty code that exists. Attackers often pass out their nasty code through these web servers that they have already hacked. Henceforth we need something big that protects our web servers and web applications to the core. Web servers have now become one of the most convenient platforms for the attackers to steal data.

- **Cloud computing and its services**

Nowadays every small or large scale company is adopting and working with the cloud and utilizing its services. The world is gradually propelling towards the clouds. This newest technology shows even bigger challenge for cyber security. Moreover, as the number of web applications available in the cloud increases, there should also be a huge change in the policy controls for web applications and cloud services so that the valuable information is protected. Cloud may provide many facilities but it should also be considered that as the cloud grows care the security is not compromised.

- **Advanced Persistent Threat**

Advanced Persistent Threat, is a completely different kind of a cybercrime. As attackers grow stronger and incorporate ambiguous techniques, network security must develop other security services to detect attacks. Hence one we should improve our security techniques to prevent threats coming in the near future.

- **Mobile Networks**

We can connect to anyone in any part of the world we wish to through these networks. It is undeniable that these mobile networks need a high end security and it is a major concern. Now a days we can observe that firewalls and other security measures have become way more permeable as we are using devices like mobile phones, tablets, PCs, and so on, all of them need extra security apart from those which are being used in the applications. We must always consider the security that could easily beat gateways of these mobile networks. Mobile networks are easily attacked and they are largely open to these cyber-crimes henceforth a lot of care must be taken.

- **IPv6 - New Internet Protocol**

IPv6 - New Internet Protocol is the new internet protocol that is taking over IPv4 which is the older version of it that has been a support for our entire networks and the Internet as a whole. While IPv6 is a whole new substitute in making more IP addresses available, there are some basic changes to the protocol that should be taken care of in the security policy. It is better to switch to IPv6 as it is more secure and the cybercrime can be much reduced this way.

- **Encryption of the code**

Encryption is characterized as encoding messages or the given data in a way that nobody else can understand or read except for the concerned user. The message or data is encrypted using different algorithms, converting them it into an unreadable
cipher text. There is an encryption key that shows how the message is to be converted or say encoded. Encryption helps in protecting data privacy and its integrity. Encryption protects data in transit, like when data is being transferred through networks like, mobile telephones or wireless. So by encrypting the given or sent code we can discover if there is any leakage of data or the relevant information.

SOCIAL MEDIA IN CYBER SECURITY

Organizations and companies should find new ways to secure personal information as the social media and sharing of information has grown up to a whole next level. Social media is a great deal in cyber security and will invite many personal cyber threats as social media and social networking sites are used by all of us every day and night it has eventually become a major platform for the attackers for hacking and misusing the private information and stealing our most valuable data.

We see that people are rapidly attracted by the schemes of the social media thereby the hackers or attackers utilize them to gather the valuable information and everything that they need. So, we should take very accurate and appropriate measures in coping up with social media so that we can help secure it and prevent all kind of valuable data loss and theft. With giving someone the authority to broadcast delicate data or information, it also gives the same authority to transmit the bad or false information, which could get equally damaging. The quick transmission of this false information via social media comes under the arising risks identified in Global Risks 2013 report.  

A few international cyber-attack examples are as follows-

- **North Korea 'stole $2bn for weapons via cyber-attacks'** - North Korea has stolen $2bn (£1.6bn) to fund its weapons programme using cyber-attacks, a leaked United Nations report says. The confidential report says Pyongyang has targeted banks and cryptocurrency exchanges to collect cash. Sources confirmed to the BBC that the UN was investigating 35 cyber-attacks. It follows a string of missile launches by North Korea in recent weeks, with the country's leader Kim Jong-un saying the launches were a warning against joint military exercises being carried out by the US and South Korea.

- **British Airways faces record £183m fine for data breach** – The incident took place after users of British Airways' website were diverted to a fraudulent site. Through this false site, details of about 500,000 customers were harvested by the attackers, the ICO said.

Information Commissioner Elizabeth Denham said: "People's personal data is just that - personal. When an organization fails to protect it from loss, damage or theft, it is more than an inconvenience. That’s why the law is clear - when you are entrusted with personal data, you must look after it. Those that don't will face scrutiny from my office to check they have taken appropriate steps to protect fundamental privacy rights."

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267 www.rapid7.com/fundamentals/types-of-attacks

268 https://www.bbc.com/news/topics/cp3mvdp1r2t/cyber-attacks

www.supremoamicus.org
The incident was first disclosed on 6 September 2018 and BA had initially said approximately 380,000 transactions were affected, but the stolen data did not include travel or passport details.  

CYBER SECURITY TECHNIQUES

The Access control and password security

We all know generating user names and passwords have always been basic ways of securing our valuable information or data. It might be one of the first acts regarding cyber security.

Authentication of the data

The documents and files that we get should always be authenticated even before downloading them it should be seen whether or not it has originated from a trusted and a more reliable source and that they are not at all changed or disturbed in any way. Authenticating documents is done by the anti-virus software which is present there in the device itself. Thus, a solid anti-virus software is also important to secure the devices from malicious codes also known as viruses.

The Malware scanners

It is software which regularly scans all the files and documents which are located in the system for the bad code or harmful viruses. Viruses or worms or Trojan horses are such examples of malicious software which are frequently clubbed together and known as malware.

Firewall

A firewall is basically a software program which helps in identifying hackers, worms, Trojans, viruses, and so on, which try to get our computers infected or attacked. All the texts entering or leaving the internet go through the firewall which is located there, which analyses each text and then blocks those messages which do not fit in the required security criteria.

Anti-virus software

Antivirus is a basically a computer program which identifies, rules out, and intervenes to eliminate pernicious software programs, like, viruses and worms. Most antivirus programs constitute of an auto-update feature which calls attention to. It helps enable the program to download profiles of the newly detected. An anti-virus software is a basic requirement for every single system.

Interconnection between IPR and Cybersecurity

The main objective of this article is to enlighten the readers and the creators of cyber content, about the rights available to them, so as to protect their innovation to be used without their prior permission over the internet.

Various Intellectual Property Rights protecting the data, software and contents available in cyber space are as following –

a) Copyright – With reference to Section 13 of the Indian Copyright Act, 1957 it can be stated that, copyright shall subsist throughout India in the following classes of works –

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Copyright is basically a legal device which gives the creator of the given classes of work, the sole right to sell and publish his work. In the meantime, copyright law has been incorporated and implemented to secure the content available on net. It provides protection to authentic work which is presented in substantial manner. In spite of the fact that the present copyright laws do give security to copyright proprietors, but it can’t be ignored that they contain few deficiencies with regards to the adequacy of copyright insurance being authorized on the general population. To overcome these hindrances, we require a more grounded and mightier relationship in different wards along with close participation of various global associations. It is therefore the duty of the society to spread awareness about the need of copyright protection in order to control and prevent unauthorized usage of original work.

The Copyright Treaty 1996 and Performances and Phonograms Treaty 1996 are two major legal instruments at global level relating to cyberspace created under the guidance of W.I.P.O. These treaties give the copyright owner the specific rights to distribute, display and communicate to public. However these sole rights given to the proprietor of the copyright are subject to the doctrine of ‘Fair Use’

Fair Use

The doctrine of fair use allows in person to copy or use a copyrighted material for limited and transformative purposes such as to criticize, comment or parody a copyrighted work. Fair use can act as a defense against a claim of copyright infringement if your use qualifies fair use, else it will be an illegal infringement

Database

The term database can be defined as compilation of a particular set of data stored in a computer system. This term was for the very first time mentioned in the Information Technology Act, 2000. The Indian Copyright Act 1957 includes and protects Databases as a part of “Literary Works” under Section 13(1). Also, section 43 and section 66 of the IT Act, 2000 provides for penal liabilities against the person who infringes a copyrighted database and entitles the owner of a the copyrighted database, which has been violated for compensation up to one crore rupees

Electronic Copyright Management System

The copyright proprietors have an alternative to utilize the technology security measures. E.C.M.S is a legislative framework to ensure against outsiders evading these systems.

Different kinds of technology protection measures are as following –

1. Access control measures - These kinds of measures prevent outsiders from gaining access to the copyrighted contents. For eg, Setting up of passwords, encryption etc.

2. Duplicate control measures – These kinds on measures prevent copyrighted
content from being copied by the third parties. For eg. Disabling right click. Installing piracy protector on movie CDs etc.

E.C.M.S empowers the copyright proprietors to follow, track, and oversee and to avoid replicating of their work or recognize unapproved duplicates made from their original work.

**D.M.C.A (Digital Millennium Copyright Act 1998)**

The Digital Millennium Copyright Act (DMCA) is a 1998 United States copyright law that implements two 1996 treaties of the World Intellectual Property Organization (WIPO). It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works. It also criminalizes the act of circumventing an access control, whether or not there is actual infringement of copyright itself. In addition, the DMCA heightens the penalties for copyright infringement on the Internet.

**b) Patent law -** A Patent is basically a government license or permit providing a privilege or title for a set period, particularly to the sole holder of the patent to reject others from making, utilizing, or selling a creation. However, according to the section 3(d) of the Patent Act, 1970. “The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant, is not patentable “

In most of the cases, computer software available for purchase are protected by the means of copyright law. However, in certain cases PC implemented creations can be covered under patent protection if they fulfil the requirements of patentability. The invention must be novel and must not fall under any category mentioned in Section 2 of the Patent Act, 1970. Whether or not the pc implemented creations furnishes a unique technical effect, is the key question which determines whether the creation can enjoy patentability or not.

The US Supreme Court in Parker v. Flook (437 US 584: 57 L Ed 2d 451) also held that “a method for updating alarm limits during catalytic conversion, which is a mathematical formula, is not patentable.” In the Indian legal framework, section 3(k) of the Patent Act, 1970 states that a mathematical or business method or computer program per se or algorithms is not invention for purposes of the Patents Act.

An invention which meets the essential requirement of patentability (novelty, resourceful step, business software) can’t be excluded from protection only due to the fact that a computer software was used for its operation. Any technical process carried out through the means of a computer hardware or software has no connection with the computer program, cannot be denied patent protection.

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272 section 3(d) of the Patent Act, 1970  
273 Parker v. Flook (437 US 584: 57 L Ed 2d 451)
In the case Gottschalk v. Benson (409 US 63: 34 L Ed 2d 273) (the Gottschalk case), the US Supreme Court held that a “computer software, involving a method to convert binary coded decimal numerals into pure binary numerals can’t be patented because

- The method was so abstract as to cover both known and unknown uses of the binary-coded-decimal to pure binary conversion;
- The end use could vary and could be performed through any existing machinery or future-devised machinery or without any apparatus;
- The mathematical formula involved had no substantial practical application except in connection with a digital computer; and
- The result of granting a patent would be to improperly issue a patent for an idea.  

Suggestions and conclusion

In this paper, I would like to communicate some suggestions which would help us prevent intellectual property infringement in cyber space.

Firstly, an immediate step which should be taken by the respected authorities is to implement a global convention regulating the cyberspace, in order to cope up with the safety measures required to prevent Intellectual property right infringement at an international level. Secondly, any person trying to violate this global convention by infringing the intellectual assets of another user should be made liable to the same legislative punishment, which he would have been, had he been violating any other international convention.

At the end, it can be concluded by agreeing to the fact that the present implemented laws protecting the Intellectual Property Rights in cyber space are getting outdated and are not really enough to fight the humungous problem of Intellectual Property violation in cyber space. These laws need to be revised according to the present conditions in order to stay updated. Also, the establishment of a global agency for tracking and monitoring, intellectual property right violation in cyber space is a must to regulate cyber security.

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275 Section 2 (zb) of the Trade Marks Act, 1999
RIGHTS OF THE PRISONERS

By J. Mary Nisha and N. Pourna Dhevi
From School Of Excellence In Law, The Tamilnadu Dr. Ambedkar Law University

INTRODUCTION

“Every saint has a past;
Every sinner has a future”
-Oscar Wilde

Above 200 years ago, the prisoners were treated badly. Life in the prisons were bitter and punishments were severe. After a very long struggle, the offenders were recognised to be human beings. The socio-legal system in India was mainly based on non-violence, mutual respect and human dignity of a person. A prisoner on committing a crime, does not cease to be a human-being.

“To deny people their human rights is to challenge their very humanity”
-Nelson Mandela

So, he must be provided with all fundamental rights, though he is imprisoned. This paper presents the rights of the prisoners in detail with related case laws.

PRISONER- MEANING AND DEFINITION:

A prisoner means, “a person under custody in jail or prison because he/she committed an unlawful act”\(^\text{276}\).

A prisoner is a “person whose liberty is deprived by forceful restraint or confinement”. Prisoners have basic legal rights that can’t be taken away from them.\(^\text{277}\)

Section 1 of the Prisons Security Act, 1992 defines the term ‘prisoner’. The word prisoner means “any person for the time-being in a person as a result of any requirement imposed by a Court or otherwise that he be detained in legal custody”.

RIGHTS OF THE PRISONERS:

The basic right of the prisoners include

- Right to food and water
- Right to legal aid
- Right to speedy trial
- Right to expression
- Right against solitary confinement, hand-cuffing and bar fetters and protection from torture
- Right to meet friends and consult lawyer
- Right to reasonable wages in prison
- Right against racial harassment
- Right against sexual harassment or sex crimes
- Right to medical and mental health care
- Right to complain about prison conditions

**i. Right to food and water**

Prisoner must be given a decent access to sufficient food and to be free from hunger and malnutrition. He also should be provided with sufficient and clean water for personal uses.

**ii. Right to legal aid:**

In India, there are so many far-flung villages steeped with poverty, destitution and illiteracy. Due to this, when a person is deprived of his legal rights, it is very challenging for him to reach the Court and seek remedy. This is a very pathetic situation in India. So, legal aid is a constitutional right and the Court may appoint an advocate to defend


him, provided he does not object to it. In India, Judiciary had played an important role in developing the concept of legal aid and helped the people to seek remedy from the Courts when there is a violation of their human rights.

In *M.H. Wadanrao Hoskot v. State of Maharashtra* 278, the Court held “Right to legal aid is one of the ingredients of fair procedure”.

If a prisoner needs legal assistance to go for an appeal, the Court shall engage a lawyer for his defence to provide him a complete justice. It is implicit in the Court under Article 142 read with Article 21 and 39A of the Indian Constitution.

### iii. Right to speedy trial

It is a implied fundamental right of a prisoner under Article 21 of the Indian Constitution. It provides for “just, fair and reasonable procedure”.

In *Hussainara Khatoon v. Home Secretary, State of Bihar* 279, the Court while dealing with the cases of undertrials who had suffered long incarceration held that a procedure which keeps such a large number of people behind bars without trial so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article 21.

In *Mathew Areeparmitil and Other v. State of Bihar and Other* 280, where no proceedings at all have taken place in regard to the accused within 3 years, from the date of the lodging of FIR, the accused should be released forthwith under Section 169 of Cr.P.C. If there are cases in which neither charge sheet have been submitted nor investigation has been completed during the last 3 years, the accused should be released forthwith subject to reinvestigation to the said cases on the fresh facts and they should not be arrested without the permission of the Magistrate.

### iv. Right to Expression:

In *State of Maharashtra v. Prabhakar Pandurange* 281, the Court held that the right to personal liberty includes the right to write a book and get it published. The State of its officials cannot prevent or restrain the publication.

### v. Right against solitary confinement, hand-cuffing and bar fetters and protection from torture:

Solitary confinement means isolation of a prisoner from the human society with only occasional access to other persons and only at the discretion of the jail authorities.

Torture means causing painful tangible or intangible wounds in the body or soul of a person by the Police or investigating agency to extract information regarding crime. In *Arvinder Singh Bagga v. State of UP and Others* 282, the Court observed that the torture is not merely physical, there may be mental torture and psychological torture.

An arrested person or undertrial prisoner should not be subjected to handcuffing in the absence of justifying circumstances. In *Prem Shankar Shukla v. Delhi Administration* 283, to handcuff is to hoop harshly and to punish humiliatingly. A detainee is entitled to the minimum freedom of movement under Article 19 which cannot be cut

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278 (1978) 3 SCC 544  
279 (1980) 1 SCC 81  
280 AIR 1984 SC 1854  
281 1966 AIR 424  
282 (1994) 6 SCC 565  
283 AIR 1980 SC 1535
down by the application of hand-cuffs. The handcuffs must be the last resort as there are other ways for ensuring security.

Police officers must be the protector of the citizens and not be the one who violates the precious rights of the citizens.

vi. Right to meet friends and consult lawyer

The prisoners rights work towards protecting them, not only from physical torture but also from mental torture. In *Sunil Batra v. Delhi Administration* 284, the Supreme Court recognised the right of the prisoners to be visited by their friends and relatives. The Court favoured their visits but subject to search and discipline and other security criteria.

vii. Right to reasonable wages in prison

The prisoners may be asked to provide service by the state and they should be provided with wages not less than the minimum wages. He should not be deprived of reasonable wages just because he is a prisoner serving a sentence. In *Mohammed Giasuddin v. State of AP* 285, the Court directed the state to take into account that the wages should be paid at a reasonable rate. It should not be below minimum wages, this factor should be taken into account while finalizing the rules for payment of wages to prisoners, as well as to give retrospective effect to wage policy.

viii. Right against racial harassment

Prisoners have right to be free from racial discrimination which includes racial segregation, disparate treatment based on ethnicity or religion or age.

ix. Right against sexual harassment or sex crimes

The prisoners have a right to be free from sexual harassment by other prisoners or prison personnels.

x. Right to medical and mental health care

The prisoners must be given adequate medical and mental health treatments.

xi. Right to complain about prison conditions

The prisoners have the right to complain about prison conditions and seek remedy from prison officials and Courts.

INTERNATIONAL INSTRUMENTS ON PRISONERS RIGHTS:

International Human Rights Laws protect people from racial discrimination and torture. They recognise the rights of special groups such as women, children, disabled and indigenous people and migrant workers.

A. UN Charter:

The UN Charter was signed on 26th June, 1945 in San Fransisco at UN Conference on International Organisation. It came into force on 24th October, 1945. Some of the principles for the treatment of prisoners are as follows:

- Prisoners shall be treated with inherent dignity and valued as human beings.
- No discrimination on the grounds of race, sex, colour, language, religion, political, national, social origin, property, birth, or other status.
- All prisoners shall retain the human rights and fundamental freedoms set out in UDHR, ICCPR, ICESCR and the optional protocol as well as such other rights as are set out in other UN Covenants.
- Rights of the prisoners to take part in cultural activities and education.

284 (1980) SC 1579

285 1977 3 SCC 287
Abolition of solitary confinement as a punishment.
Prisoners to undertake meaningful remunerated employment.
Access to health services without any discrimination.

B. International Bill Of Rights:
a. Universal Declaration of Human Rights (UDHR), 1948:

In United Nations, a movement was started in the form of Universal Declaration of Human Rights in 1948. It was adopted in the General Assembly of the United Nations. Some basic principles of the Administration of Justice are as follows:

- No one shall be subjected to torture, or to cruel, inhumane or degrading treatment or punishment.
- Everyone has the right to life, liberty and security of person.
- No one shall be subjected to arbitrary arrest, detention, or exile.
- Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

b. The International Covenants on Civil and Political Rights (ICCPR), 1966:

The ICCPR remains the core instrumental treaty on the protection of the rights of the prisoners. The provisions of the covenants are as follows:

- No one shall be subjected to cruel, inhumane or degrading treatment or punishments.
- Everyone has the right to liberty and security of person.
- No one shall be subjected to arbitrary arrest or detention.
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity.

- No one shall be imprisoned merely on a ground of inability to fulfil a contractual obligation.

C. UN Core Conventions and Specific Instruments:

In 1955, Amnesty International formulated certain standard rules for the treatment of prisoners which are as follows:

- Principle of Equality should prevail;
- Men and women shall so far as possible be detained in separate institution;
- Complete separation between civil prisoners and persons imprisoned by reason of criminal offence; young prisoners should be kept separate from the adult prisoners.
- All sorts of cruel, inhumane, degrading punishments shall be completely prohibited. (Convention against Torture and other cruel, inhumane, degrading treatment or punishments).
- State party has to take effective legislative, judicial and other measures to prevent acts of torture.
- No state party shall expel, return or extradite a person who is in danger of being subjected to torture.
- State party should ensure all acts of torture are offences under its criminal law.

NATIONAL LAWS OF INDIA REGARDING RIGHTS OF THE PRISONERS:

1) Constitution of India:

A prisoner is also a human being in the eyes of law. So, the fundamental rights guaranteed in the Part III of the...
Indian Constitution are available to them.  

**Article 14** states that equals should be treated equally. It also talks about the concept of reasonable classification. So, the prison authorities must categorise the prisoners only with the object of reformation.  

**Article 19** guarantees six freedoms to all the citizens of India. Among these *freedom of speech and expression* and *freedom to become member of an association* only can be enjoyed by the prisoners. The other four freedoms such as *freedom of movement*, *freedom to residence and to settle* and *freedom of profession* cannot be enjoyed by the prisoners.  

**Article 21** says “No person shall be deprived of his life or personal liberty except according to procedure established by law”. It talks about two concepts.  

- **Right to life.**  
- **Principle of liberty.**  

So this article applies to all the Indian citizens including the prisoners.  

**Article 21** impliedly guarantees certain rights to the prisoners.  

- i. Right to protective homes  
- ii. Right to free legal aid  
- iii. Right to speedy trial  
- iv. Right against cruel and unusual punishment  
- v. Right to fair trial  
- vi. Right against custodial violence  
- vii. Right to live with human dignity  

Besides these, the Constitution of India provides certain rights to the prisoners.  

- i. Right to meet friends and consult lawyer  
- ii. Right against solitary confinement, handcuffing and bar fetters and protection from torture  
- iii. Right to reasonable wages in prison

2) **Other Enactments:**

A. **The Prisons Act, 1894**

It is the first legislation in India to talk about the prison regulations. The main provisions regarding the reformation of prisoners are as follows:

- Accomodation and sanitary conditions for prisoners,
- Provision for the shelter and safe custody of the excess number of prisoners who cannot be safely kept in any prison,
- Provisions relating to the examination of prisoners by qualified medical officer,
- Provisions relating to separation of prisoners, containing female and male prisoners, civil and criminal prisoners and convicted and undertrial prisoners,
- Provisions relating to treatment of undertrials, civil prisoners, parole and temporary release of prisoners.

B. **The Prisons Act, 1990:**

It is the duty of the Government for the removal of any prisoner detained under any order or sentence of any Court, which is of unsound mind to a lunatic asylum and other place where he will be given proper treatment.

Any court which is a High Court may in a case in which it has recommended to Government the granting of a free pardon to any prisoner, permit him to be at liberty on his own cognizance.

C. **The Transfer of Prisoners Act, 1950:**

This Act was enacted for the transfer of prisoners from one state to
another for rehabilitation or vocational training and from over populated jails to less congested jails within the State.

D. The Prisoners (Attendance in Courts) Act, 1955:

This Act contains provisions authorising the removal of prisoners to a civil or criminal court for giving evidence or for answering to the charge of an offence.

REGIONAL LAWS:


This Convention has some importance of human rights. Some of the important provisions of this Convention are as follows:

- No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.
- No one shall subject to inhuman treatment or degrading treatment or punishment.
- Everyone who is deprived of his liberty by arrest shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release be order if the detention is not lawful.
- Everyone who been the victim of arrest in contravention of the provisions shall have an enforceable right to compensation.

B. Prison Litigation Reform Act (PLRA):

In the United States, the Prison Litigation Reform Act was enacted in 1996. The intent was to limit frivolous lawsuits by prisoners.

CONCLUSION

“Forgiveness is the attribute of the strong”

- Gandhi.

In a famous case, the Supreme Court in US said that life is not merely an animal existence. So, being a prisoner he/she must be provided with all the rights which a free man is provided with. The Court must act as a custodian and protector of fundamental and basic rights of the citizens. The Indian Constitution expressly and impliedly provides certain rights to the prisoners. The Prisons Act, 1894 contain provisions for the welfare and protection of prisoners. A prisoner is a human being, a natural person and also a legal person. The prisoners rights should be taken seriously inorder to achieve complete justice.

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EVOLUTION OF VICTIM COMPENSATION LAW IN INDIA

By K. Prathyusha
From Damodaram Sanjivayya National Law University

Abstract
Any person or an entity who has suffered harm or loss due to the violation of criminal law can be called as a victim. A person can be a victim even the accused is unidentified or unknown. Indian legal system gives more emphasis to the retributive theory of punishment there by punishing the accused became the prime motto of it. In this scenario, even the accused is punished, the fate of the victim is getting worse day by day. To fill this lacunae, various criminologists lead to the development of study of criminology in the victim perspective which paved a way to incorporate new legislations which are victim oriented than the accused. Though it all started after the end of World War II but it has rapidly evolved into an important branch of Criminology. There are many land mark judgements which clearly depicts the essence of victims perspective in delivering a Judgement and the importance of the concept of providing compensation and how it helps the victim, there by development of Victim Compensation Scheme. This research paper mainly deals about the importance of development of victim’s perspective and its scientific approach in the criminology to render justice in the highest possible ways. It talks about the evolution and the importance of studying criminology in victim perspective in the bigger picture and the development of various laws and the landmark judgements that changed the India.

Introduction
Victim compensation has been well accorded the status of the weeping beggar at the doors of the whole criminal justice administration. Despite the fact that the same is an archaic concept but much of logic and poignancy can be well attached to it, as the same tends to work in the veins of science and its development as a branch of criminology has at the similar instance added to its development and buttressed its foundation. It is imperative on our part to note the every fact that there have been several countries which have devised various modes of payment of compensation to the victims of the crime and much of credit is to be given to the various legislative measures as taken.

Considering the domestic paradigm it is imperative on our part to know that we also have in place a plethora of legislations to compensate the victims of the crime that being Fatal Accident Act, 1855, Probation of offenders Act, 1958 and last but never the least the Code of Criminal procedure, 1973. As we proceed further it is imperative on our part to consider the recommendations of the law commission. Considering a comprehensive provision as regards to the same, Section 357 of the code of criminal Procedure Code, attaching more brevity to the same it is 357(1)(3), the court may award the victim of the crime compensation only after the trial and conviction of the accused. It must be noted that these powers are not subsidiary to other sentences, but is in addition to the same and the discretion is readily vested with the courts and the basis of deciding the same is sorely dependent upon the facts and circumstances.

288 41st Report, Law commission of India on Indian Penal Code(1860)

of the same. How-ever an inference can readily be drawn that the present regime of victim compensation is a sorry state of affairs as any compensation awarded under this section has a trial spanning for a period of 8-10 years and conclusion of the appellate round is a must.

The term casualty of wrongdoing and its importance has not characterized under any Indian law managing pay to the people in question. It was simply included 2008 through change of the Code of Criminal Procedure. The correction to the Criminal Procedure Code in 2008 gives the meaning of 'unfortunate casualty' under segment 2 condition "[as pursues:-] "Victim" signifies an individual who has endured any misfortune or damage brought about by reason of the demonstration or exclusion for which the denounced individual has been charged and the articulation "injured individual" incorporates his or her watchman or lawful beneficiary.

The meaning of 'Injured individual', in the previously mentioned definition there are three critical fixings which are to be noted plainly:
I. Reason of act or oversight because of which an individual has endured any misfortune.
II. Denounced individual has been charged for his demonstration or oversight.
III. Articulation injured individual incorporates himself or his or her watchman or any legitimate beneficiary.

A significant truth being that the preliminary courts have only from time to time utilized the power as presented upon it by the goodness of Section 357 of crpc and the real imprudence lies in the very actuality that the equivalent has not in the slightest degree been utilized in a liberal way and in spite of being in the rule book of the nation for such a long time the courts have not in any manner contemplated the equivalent. The law commission has moaned about the condition of illicit relationships as respects to the equivalent in the accompanying words:-

“We have a very comprehensive provision for payment of compensation to the injured party under Section 545 of the code of criminal procedure. It is regrettable that our courts do not exercise their statutory powers as are conferred upon them and the same has not been liberally exercised as falling short of the way it was desired to be done. The section has no doubt has its limitations. It’s applications depends, in the first instance on whether the courts consider substantial fine as a proper punishment for the offence. In cases having severe gravity, the court may think that a heavy fine in addition to imprisonment for long term is not justified, especially when the Public prosecutor does no presses upon the same”

Diving further it is basic on our part to take note of that the case, has been a proof of the supreme style of Krishna Iyer J. expressed that while social obligation of the criminal to re-establish the misfortune or recuperate the damage is a piece of the correctional exercise, the length of the term is no reparation to the deprived or the disabled however is mercilessness summed with sheer worthlessness. Victimology must discover satisfaction said the court, not through barbarity but rather by necessary recouptment by the transgressor for the harm as caused. The case, coordinated the consideration of the considerable number of

290Mundrathi, S., Law on Compensation - To Victims of Crime and Abuse of Power 182, Deep and Deep

www.supremoamicus.org
courts to practice the power as presented under Section 357 of the code in a liberal fashion.

The case spawned the judicial observation that the award or refusal of compensation in a particular case may be the discretion of the court, there exists a mandatory duty to apply its mind to the very question in every case and the same is well substantiated by according well reasoned stance. It was in the year 2008, the code of criminal procedure was amended and Section 357 A was added in which there takes place the introduction of the very victim compensation scheme had been introduced, however it was in the case where he courts failed to accord any reasons behind not awarding any compensation to the victim and they were passing non speaking orders in the same. Also it is worth noting that in the year 2013 introduction of Section 357B, 357 C have been inserted in the code of criminal procedure and 357B provides for those victims who have suffered from offences under 326 A and 376 D of the IPC

In addition to the same it is worth noting that the compensatory jurisprudence has also seen the light of the day in the sphere of the human rights philosophy as a dynamic interpretation and the same is read in the vein of Article 21 of the constitution of India. There exists a catena of judgments of supreme court as well as the High court which tend to deal with the whole debacle as surrounding the victim compensation, but a new sphere is added to the same when it is read with Article 32 and 226 of the constitution of India

Referring to the case it was observed by the court that:-
“\textit{The courts have an obligation to satisfy the social aspiration of the citizens and they have to apply the tool and grant compensation as damages in a public law proceeding seeking enforcement of fundamental rights and the same does grant compensation too by penalising the wrongdoer}”

Referring to the very principle of ubi jus, ibi-remedium and the same is the basic principle in the tort law which goes on to state that the wrongs must not remain unaddressed and the compensation tends to include an inseparable part of the whole thing. There are various dimensions as regard to the issue of payment of damages and compensation in the law as related to that of torts and the principles as relating to the payment of damages relating to measure of damages etc. However if we consider the present context the very connotation of it being amends for the loss sustained and its more a way to bridge the gap between the previous state of being and the present state of being. It is a sign of responsibility of the society to make good the losses

The very term “Compensation” has to be made distinct from the term damages as they are quite dissimilar in nature and the same is used in terms of relation to a wrongful acts that tends to cause an injury and now a great deal of credit is to be extended to the very compensatory jurisprudence that tends to extends the definition of victim and make it inclusive of the legal representatives of the accused also, it can be construed as “equivalent rendered” for the losses suffered. It is imperative on our part to delve further into theoretical construct of the same, as it is

\begin{itemize}
  \item Ankush Shivaji Gaikwad v. State of Maharashtra, Criminal Appeal no. 689 of 2013
  \item The Criminal amendment Act, 2008
  \item Guru Basavraj V Union of India
  \item Rabindra Nath Ghoshal V University of Calcutta \&ors. AIR 2002 SC 3560
  \item State of Gujarat V Shantilal, AIR 1969 SC 634
\end{itemize}
quite a well-known fact that the criminal justice administration would in India efficaciously and in order to render expeditious justice. As sated earlier regarding the 2008 criminal law amendments as were made and the same was done in order to strengthen the very criminal justice administration and buttress the foundation of its overall functioning.

**Historical perspective**

The very inquiry as to the origins and functioning of the same would remain totally incomplete and the same is to be done with sheer objectivity. The very concept if seen historically the same can be well traced back to the 12th and 13th century and a distinction was drawn between the types of the wrongs being that being the civil and criminal wrongs. As taking into consideration the civil wrongs the same was readily confined to that of the individual self only and not the society as a whole and thus the perpetrator was necessitated to pay the amount. At the similar instance when the offence was committed against the whole society at large and thus the whole state was involved in the picture and the state wholeheartedly took the onus upon itself regarding the very treatment that is to be done with the perpetrator. There have been instance where various justifications have been posed and brought into picture for the approach as used. And the same was well inclusive of benefit to the victims, symbolic social recognition, deterrent effect as regards the offender and at the same instance the paying of the compensation had an intrinsic moral impact over the very individual.

Much of poignancy can be well attached to the below mentioned text taken from the Hammurabi code of the ancient text of Babylonian which goes as:-

“If a man has committed robbery and is caught the man shall be put to death. If the robber is not caught, the man who has been robbed off shall formally declare what he has lost….and the city shall replace whatever he has lost for him. If it is life of the owner that he has lost, the city mayor shall pay 1 maneh of silver to his kinfolk”

A similar rule had inside its circles a decent amount of authenticity and the equivalent had a lot of agreeableness in England and the Anglo-Saxon time of the seventh century. The Kentish laws of the Ethel contained explicit measure of remuneration for an expansive number of violations running from infidelity to kill. In the early custom-based law of Middle England, if a man was killed, the group of the injured individual was qualified for a wergild of four pounds.

Over the time the criminal equity framework was isolated from that of the common framework and the well-suited reason that must be concurred was expected to the, each reality that the clerical forces and the imperial forces had been developing. It is to be noticed that the present criminal equity framework depends on the very assumption that the cases of unfortunate casualty are adequately fulfilled by the conviction of the culprit.

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The panel on the changes of the criminal equity organization depends on the proposals of Justice Malimath who considered rendering equity to that of the exploited people to the greatest objectives to the entire organization of the criminal equity framework. It is suggestive of an all-encompassing equity framework for permitting investment in the criminal procedures and remuneration to the person in question.

In India there are in function 5 possible statutory provisions under which compensation shall may be awarded for the crime and they are namely:-  
1) Fatal Accidents Act, 1855  
2) Motor vehicles Act, 1988  
3) Criminal Procedure Code, 1973  
4) Probation of offenders Act, 1958  

It was the year 2009 until which there was sheer absence on a comprehensive legislative or a well-designed statutory scheme that allowed the victim to seek compensation either from the perpetrator or the state.

PRE-AMENDMENT POSITION  
Giving a careful glance at the code of criminal procedure, 1973 there surfaces a highly fragmented legislative schemes for the purpose of compensating the victims. In pursuance of the recommendations of the 41st law commission report of 1969, a provision was enacted in the statute under the name of Section 357 of crpc and the same states that “Court may award compensation to victims of crime at the time of passing the judgment, if the same is important in the interest of justice”, However a major folly of the aforesaid provision being that the said amount if compensation cannot exceed the amount of fine as imposed and there are four grounds which are to be considered:-

- Defraying the financial misfortunes acquired by the individual in indictment, or by a true blue buyer of merchandise that being stolen products or for misfortune brought about by damage or passing. Be that as it may, Section 357(3) empowers to an equivalent degree the court to grant pay despite the fact that fine does not shape a piece of the sentence and the equivalent is left to the court and its prudence and there must be taken into the thought the realities and the conditions of the case.
- It must be noticed that the standard basic Section 357 of the code is like that as conceived in the UN Basic Principles of equity for casualties of wrongdoing and in the meantime a significant truth must be taken into notice and that being that given the low rates of conviction one needs to address whether a viable injured individual pay plot exists or not and a panacea couldn't be come to due to the very reality that it was utilized in a grim manner.

It is basic on our part to take note of the very reality that the meaning of unfortunate casualty has been given under Section 2(w) of the code of criminal system and the equivalent goes as:- Victim hints an individual who has endured any misfortune or damage brought about by any reason of act or oversight for which the blamed is charged and the equivalent is well comprehensive of his/her wards"

An examination is should be done so as to have into spot a sound discourse and the equivalent will be contrasted and that of the

299Sections 357, 421 & 431
United countries presentation of essential standards of equity and for casualties of wrongdoing and maltreatment of intensity :- Victim incorporates any individual who separately, aggregately, has endured hurt, including physical, mental damage, enthusiastic enduring, financial misfortune or generous loss of his major rights, through acts or exclusions that are infringing upon the criminal laws working inside the part states including laws accommodating criminal maltreatment of influence. The leitmotif of the very correlation being that there has occurred an extremely tight translation of "misfortune or damage" endured by the unfortunate casualty we trust that a far reaching importance having a more extensive understanding ought to be included the governing body and at a similar occurrence there more likely than not occurred unequivocal consideration of casualty of wrongdoing of maltreatment of influence and notwithstanding a similar it must be comprehensive of those individuals who have been harmed amid the mediation procedure and a similar example California, Massachusetts have the equivalent. The entire essence of the issue being that every one of these measures in totality help the police to check the wrongdoings and the equivalent will in general be very comprehensive in nature and in this way builds the dimension of investment.

Sec 545 - analysis of 1898 code

The victim compensation and the penal law has it traces from the British rule and colonised India. The very first trace of this provision can be found in the section 545 of CrPC, 1898 which gave the power to the court to order the whole or any part of the fine recovered from the accused can be awarded as the fine to the victim. According to this code if any loss was caused due to the theft, stolen property or criminal misappropriation then the victim was compensated, if the victim purchased the same with bona-fide intention. If any compensation which was awarded and if there is any appeal related to the same then no such payment shall be made and the same was discussed in the section 545(2) of 1898 code. Here the opinion of the court has major value and such recovery can be claimed in the civil courts as this provision was not so effective and courts are not using the provided power in liberal nature for compensating the victim. So the government of India introduced a new bill for change in the criminal procedure Code in 1970 after taking the report of 41st law commission into consideration where the section 545 was discussed thoroughly and introduced the section 357 in the latest code of 1973.

The main reason and object of introducing the 1970 bill was:- According to the section 545 of the 1898 code if the court imposes the fine on the accused then only the victim was compensated and the compensation is limited to the amount of fine. So in the new provision the victim was compensated irrespective of the offence whether it was imposed with the fine or not. The accused was made liable to compensate the victim if there are any losses related to crime committed. It may be the physical injury or pecuniary damages the accused was made liable to pay the compensation. So the section 357 of 1973 code was broader in perspective and there was an utmost need for the implementation the same to meet the ends of the justice. The main aim of this implementation is to provide the relief to the poorer sections of the community. The addition of clause 4 to the same court says that compensation may be awarded not only by the trail court but the same can be awarded by the appellate court, it may be the court of sessions or the high court or the
supreme court when exercising its power of revision in order to meet the justice.

357= analysis of 1973 code
Under the Amended Indian law, 357(1) of the code of criminal procedure, 1973 tends to discuss the preparation of an apt scheme for possible compensation to victims or his dependents who have suffered loss and they are in need of rehabilitation. According to, Sub-Section 2 of the same whenever the court makes an order to pay compensation, the quantum of the same shall be decided by the DLSA, thus implying the District legal services authority or state legal services authority as per the requirements and needs of the case.

However it becomes a noteworthy fact that 357(3) of the Crpc the trial court has been empowered to make recommendations for compensation in cases where:-
*Either the quantum that has been fixed turns out to be inadequate
*Where the case entails acquittal and victim requires rehabilitation

Another beneficiary aspect can be traced from the provision of 357A(4) of the crpc according to which if the accused is not identified or known, the victim can still apply for compensation to the requisite authority as readily stated above. It must be noted that in the UK there has taken place establishment of state funded victim compensation scheme, a major beneficial aspect of the same is that it readily takes into account all the difficulties of an overburdened criminal justice system. Section 357(5) of the same states that on receipt of an application under 357(4) of the code of criminal procedure, the period as necessitated upon it for awarding compensation shall be fixed at 2 months and the rationale behind the same is that it entails speedy trial and speedy disposal of justice and it readily connotes fairness as the provision goes on to state that the compensation as given must be fair and adequate enough

The establishment has been all around buttressed by 357(6) of the crpc which proceeds to express that so as to reduce the person in question and his/her anguish, the state or the locale lawful administrations specialist may arrange quick emergency treatment office or health advantages to be made accessible free of expense or some other interval help as esteemed fit by the proper expert and the sole goal of the area is focused on "mitigation of the misery”.

Notwithstanding equivalent to per the alteration Section 372 of the crpc proceeds to express that:- Provided that the unfortunate casualty will reserve an option to lean toward an intrigue any request gone by the court vindicating the denounced or indicting for a lesser offense, or forcing lacking remuneration, and such intrigue will mislead the court to which an intrigue commonly lies against the request of conviction of the court.

Constitutional remedies and the evolution of cases related to the victim compensation laws
The constitution is a ground-norm and bed rock for the justice system in India. Especially fundamental rights, particularly art 14 (Right to equality) and art 21 (Right to protection and personal liberty) and directive principles of state policy forms a major role in new social order for social and economic justice. Though DPSP are non-justiciable and un-enforceable they impose a duty on state to take constructive action for the welling being of citizens in the society. The fundamental duties under Art-51 A helps a lot in developing humanity among the people. These provisions would
broadly construed which includes the rights of the victims.\textsuperscript{300}

The significant phase of evolution of constitutional remedies to the victim starts from 1980 and 1990’s by the supreme court giving special right to the victim to be compensated either by the private criminal or through the criminal administrative justice. The Mathura rape\textsuperscript{301} case was the lowest point in Indian judiciary through the weak laws and blatant decisions by the judiciary.

In the case of Rudul shah V. state of Bihar\textsuperscript{302} is considered as a new era in the victim compensation as the victim was compensated for infringement of Fundamental Rights for the first time in Indian History by Just. Chandrachud specially by invoking the extra ordinary powers of supreme Court under Article 32 of Indian constitution. In the Punjab V. Ajaib\textsuperscript{303} Singh case the court ordered the compensation of 5 lakhs even after the accused was acquitted. In Bodhi SatwaGoutham case\textsuperscript{304} first time the concept of interim compensation was introduced as the victim should not be left unjust due to the delay in the process of delivering of the justice. The same principle was later added in the 2009 amendment.

In the Uttarakhand Stir Case\textsuperscript{305}, the court has given a path breaking judgement by awarding a huge amount of compensation to the victims who were killed, raped and sexually molested and some were injured and illegally detained by the firing of police forces. In this case even the state was held vicariously liable for the things that were done by the police officers and it was also made liable for paying the compensation instead of protecting under the Doctrine of sovereignty through which generally the state was avoided from the criminal liability.

In D.K Basu v. State of West Bengal\textsuperscript{306} it was stated that the monetary fund doesn’t completely relief the victim from the loss but it is the only effective relief for the family members of the deceased victim if he was the bread winner of the family. In the case of Chairman of Railway board V. Chandrima Das\textsuperscript{307} where the victim was the national of Bangladeshi was raped many times by the railway officers was awarded the compensation of amount of 10 lakhs by the supreme court of India. The court held that even though she may be a foreigner eh was entitled for the right to life in India under article 21 of Indian Constitution.

These are some of the land mark cases related to the victim compensation evolution in India. The deep examination of the cases tells us that the power of awarding the compensation is wholly under the discretion of judges section 357(3) of CrPC has readily granted the quantum and under sec 357 A the judiciary has readily granted the powers for compensating the victim but it should be liberal in invoking the power under this provision and should work for the greatest benefit of victim.

\textsuperscript{300}Anu see A, Right to Compensation for Victims of Crime In India: Need For A Comprehensive Legislation In India 2 IJLDAI 45 (2016)
\textsuperscript{301}Tukaram & Anr V. State Of Maharashtra (1978) Crim.LJ SC 1864
\textsuperscript{302} 1983 (4) SCC 141
\textsuperscript{303} 1995 (2) SCC 486
In Maru Ram and ors v. Union of India and ors, just. Krishna Iyer stated that the victimology should find the need of compensation to the victim. The main perspective of some cases is to compensate the victim by providing the pecuniary losses that are caused to the victim which is the social responsibility of the accused but it is barbaric to order the long-term punishments to the accused. In many cases the sec 357 is considered as the salt in the flour and never taken seriously. So in the case of Hari kishan it was held that the courts should use their powers as liberally as they can, in order to provide the adequate compensation to the victim. In this case it was also explained meticulously the usage of section 357 and its importance in the victimology which directed the attention of all the courts. The court also said that section 357(3) has invoked seldom in it. The order of the court to give compensation is not ancillary in nature but it is an addition thereto the other sentences which were awarded.

In ankushshivaji Gaikwad v. state of Maharasthi it was held that the compensation its awarding and refusal depends upon the discretion of the court and there is a mandatory duty of the court to apply its brain according to the facts and circumstances of the case and the court should record its reasons for the same.

In 2008 Cr.P.C was amended and newly sec 357 A was introduced which deals with the victim compensation scheme. Once again in 2013 some additions are made to the sect 357. There inserted section 357 B which deals with the additional compensation to the victims of section 326 A and 376 D of Indian Penal Code which deals with the victims of acid attack and rape cases and Section 357 C which deals with the free medication and treatments to the victims of 326A and 376A 376 D of Indian Penal Code and it is directed to all the hospitals irrespective of public or private sectors.

In Shantila and Smt. P.Ramadevi v. C.B Sai Bala Krishna case it was clearly explained that compensation may be of any kind which actually recover the losses that are caused to the victim, the things that are equivalent to the same.

In Ratan Singh v. state of Punjab, it was highlighted aptly by Krishna Iyer that “It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislation.”

Victim compensation scheme through states in India-2008 amendment to crpc-section 357 a.
The state funds are very much needed to compensate the victim adequately along with the private criminal and the central government. So through the 2008 amendment, section 357 A is inserted to the Criminal Procedure Code. As this depends on the state there will be a huge difference from state to state and we cannot expect the uniformity in the same. So they will differ in the minimum and maximum limit of

308(1981) 1 SCC 107
311State of Gujarat v. ShantilalAIR 1994 Kant 8 (12)
312AIR 1994 Kant 8 (12)
3131979 (4) SCC 719.
compensation related to the same crime in different states. For instance the victim of rape the Kerala Government will give the maximum compensation of 3 lakh and in the Karnataka it is 1.5 lakh. This may cause the injustice among the victims as there will be the difference in the pecuniary compensation for the same criminal injury in 2 different states. In most of the cases the compensation provides by the state is inadequate to compensate the victim. So in the Suresh and other v. state of Haryana\(^{314}\), it was held that the compensation ordered by the state of Kerala was on the higher side so all the other states should follow the same for compensating the rape victims. As there are many differences rising out this issue it compelled the central government to enact Central Victim Compensation Fund, 2015 which contains twelve criminal injuries. If any injury does not fall in the same category then the state government will provide compensation however there is no bar on the state government by the central government.

If the state government awarded any compensation under sec 357 A of Cr.P.C then the State Legal service authority or the District Legal Service Authority can decide the quantum of compensation to be awarded. If the victim did not meet the needs through the compensation paid by the accused then the state can be made to pay by the order of the court, the case is same if it is related to the compensation is inadequate that is ordered by the trail court. If the court thinks that there is a need to order the immediate compensation in order to meet the end of the justice then it can go for awarding the interim compensation if there is any delay in the final judgement. It should be order either by the magistrate or the police officer not below the rank of in-charge of police station. As any scheme made by the state can only cover the limited criminal injuries, alone with section 357A we can’t meet the ends of justice so we need to use section 357 as far as possible as it covers the wide injuries.

In Baldev singh v. state of Karnataka\(^{315}\) the judicial law making approached in the aspect of the victimology. The apex court ordered the compensation by invoking the provision of section 357(3) and held that ordering the compensation to be paid is more appropriate than giving the punishment to the accused. The court used its judicial power under this provision to benefit the victim by ordering the compensation instead of enhancing the compensation.

In adamji Umar v. state of Bombay\(^{316}\) the apex court held that the judiciary should always mind the proportionality between the offence committed and the penalty awarded and it must be reasonable.

**Conclusion**

There is no statutory right in India that exclusively fight for victim compensation and the worst part is that there is no mechanism which work effectively to collect the ordered compensation from the accused and pay it to the victim unlike the western countries\(^{317}\) it was believed in olden days that even though lost homage or honour may not come back but the victim High Court on the accused, who has been sentenced to life imprisonment for committing murder, to a meagre sum of Rs. 3,000. This was once again reiterated by the Supreme Court in Swaran Singh & Anr. v. State of Punjab, (2000) 5 S.C.C. 668

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\(^{314}\)(2015)2 SCC 227,  
\(^{315}\)(1995) 6 S.C.C. 593, 14  
\(^{316}\)Adamji Umar v. State of Bombay, A.I.R. 1952 S.C. 14. This was also held in Palaniappa Gounder v. State of Tamil Nadu, A.I.R. 1978 S.C. 1525. The court reduced the fine of Rs. 20,000 imposed by the  
\(^{317}\)The criminal Injuries Compensation Act,1995
can at least feel the relief if the compensation is paid to the victim. State compensation provisions also pay a vital role in compensating the victim. As most of the victims and the offenders are poor, it is impossible to expect that the accused alone should compensate the victim and the situation will be far better if the state will take the active part by compensating the victim through consolidated state fund of the victim welfare fund. In most of the cases it will be helpful and assist the victim to have some financial support. There are certain provisions which will provide interim reliefs to the victims in cases which are related to the rape or acid attacks according to the new laws. The power of the courts to order compensation under the old law i.e., sec 545 of Criminal procedure Code, 1898 was limited and the main motto was to remove the unjust enrichment that was caused and to provide relief to the victim but the victim compensation under section 357of Criminal procedure Code, 1973 is very wide and it has a social purpose to serve but its application by courts became a big hurdle. The law commission of India observed the fact that they are not only liberal in administering the powers under this section but is also admitted that the courts cannot use the powers under this section as liberally as they desired.318 After 2009 Amendment of Criminal Procedure Code is holistic but it depends on the discretion of the judges and the court. So, judges should ultimately use this provision for the best of their knowledge and at any cost their discretionary powers should not be the vanishing point of the victim compensation laws.

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318 The 41st Law commission Report on The Code Of Criminal Procedure ,1898 (1969) at 356
WOMEN ENFORCEMENT IN POLICE FORCE

By Kriti Gera and Jyoti Pandey
From Amity University Noida.

The accompanying review tries to do an anthropological research on ladies who function as cops in India. These female officers confront different issues, for example, societal, individual, and furthermore mental issues because of different reasons which incorporates vital offices and in addition foundation and transportation offices. They are less in number as of now and further new enrollments are not being finished. Additionally, ladies confront a great deal of segregation by low and prominent officers. Such segregations are noticeable in giving them deficient power in self-representing. Additionally, the significance of assorted qualities in policing has as of late been the subject of scholastic review. We have as of now saw that ladies have officially confronted restriction to their entrance into this calling. Likewise, Police strengths had encountered a lot of contention while permitting ladies into such calling. The investigates have proposed that ladies confront resistance even today to go into such calling from both male officers and different areas of society. The resistance is as lewd behavior, sending and harassing, sexual orientation separation in advancements and a general absence of sympathy toward coordinating ladies in police strengths.

INTRODUCTION

In the last few years India has observed a drastic and positive change in the role of women in the society. The Industrial Revolution along with Liberalization and Globalization has elevated the status of women from a traditional housewife to that of a professional. Indian women are not actively taking part in all economic activities and simultaneously taking care of their family.

Some of the greatest examples are:
- Mrs. Indira Gandhi (First Female Prime Minister of India)
- Mrs. Pratibha Patil (First Female President of India)
- Ms. Chanda Kochchar (First Female MD and CEO of the country’s private sector)
- Ms. Kanchan C. Bhattacharya (First Female DG of Police)
- Ms. Kiran Bedi (First Female IPS Officer)

However, on the other hand gender discrimination against women still exists particularly in the Police Force. Policing is one of the most male dominated professions in the world. Women are for the most part viewed as the weaker sex and one supplied with womanly qualities and along these lines require a defend. Policing is a requesting work which includes long and undetermined hours of obligation. It is trusted that the attributes of ladies are not fit for the necessities of such a calling. The state of police ladies in India is the very same, ladies are still under spoke to and are not doled out to handle missions to an indistinguishable degree from men.

They are ensured and are not really doled out imposing police work. The greater part of them are presented as PSOS on VIP spouses and youngsters and are infrequently given critical parts denying them of acquiring distinguishing proof and
sharing force. Just when there is a ladies driven or where the criminal is a ladies, they are conveyed. Passing by this rationale most extreme number of ladies police staff ought to be found in Delhi given the way that the city has earned the title of the "assault capital" of the nation. Assault by a police official as custodial assault or generally is by all accounts a point of reference here.

In a reaction to a RTI inquiry, it was unveiled that roughly 100 policemen were observed to be required in assault in the previous 10 years. To aggravate matters, it was recently revealed that a sub-auditor of a territory was involved in assault on the guise of marriage. Needless to state that the general population particularly ladies of Delhi have lost confidence in the police. Along these lines it has moved toward becoming crucial to employ more ladies in the police. As indicated by 2013 measurements policewomen constitutes just 7.13% (5,356) of 75,169 police workforce in Delhi. Various states in India (for example Andhra Pradesh, Gujarat, Jharkhand, Karnataka, Rajasthan, Tamil Nadu and Punjab) have established all ladies police stations (AWPS) which are overseen and run entirely by ladies personnel.

This is on account of ladies for the most part feel less good about moving toward police headquarters kept an eye on by ladies, instead of customary police headquarters particularly for ladies related issues, for example, share pressurization, sexual attack, ambush, polygamy, eve-prodding, abusive behavior at home and so forth. Shockingly, Delhi hasn’t gained any ground here. On numerous occasions different guarantees have been made by the administration and police experts guaranteeing that more ladies staff will be incorporated into the drive, however the number remains woefully low.

Rule of Law is the cornerstone of any vote based system. Rule of law basically implies equity under the steady gaze of law and all people being subjected to similar laws in a similar measure. Our constitution gifts uniformity to ladies and also engages the state to embrace measures of positive separation for ladies to adjust the expanding financial, instructive and political impediments confronted by them. The guideline of sexual orientation correspondence is revered in the Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. In spite of the fact that the Indian Government has authorized different ladies’ particular enactments to uphold the established mandate but protection against gender-based discrimination in recruitment and promotions is expressly provided by the Equal Remuneration Act, 1976.

With the end goal of expanding business chances of ladies, an arrangement in this demonstration solely rings for setting of a counseling board of trustees. Additionally, the National Police Commission in its fifth report prescribed the need of selecting more ladies and allocating square with work to both men and ladies. India has also confirmed different universal traditions and human rights instruments communicating a similar view like the Nairobi Forward Looking Strategies1985. Beijing Declaration and the platform for activity 1995. The most imperative being the Convention on end of all types of Discrimination against ladies. Nonetheless, one can without much of a stretch notice the wide crevice common between the objectives articulated in the Constitution, enactment, approaches and anticipates the
one hand and the stark reality of the status of policeman in India on the other. The part of the police is essential in any general public. In our general public a policeman is viewed as a sign of state power, compel and discipline and not as a defender of the state. Keeping up open request and peace with such a picture can startle undertaking. Under these conditions, ladies can turn out to be an advantage for the compel. Look into have invalidated the thought that ladies are not suited for policing. Ladies are known to employ an alternate style of contention determination i.e. correspondence before physical encounter. While ladies are typically seen as humane, emotional and nonviolent, the exceptionally same qualities can improve the quality and productivity of a division as they rush to reaction to wrongdoings against ladies and children. Men and ladies have distinctive personality qualities and conduct designs. On the off chance that these distinctions are made do with appropriate comprehension, they can be helpful in making a magnificent workplace inside the police association.

The primary difficulties that the female law implementation officers are confronting are those established in preferences with respect to refinements amongst men and ladies. There is no truth in the way that the normal female cop is physically weaker and much more miniscule in stature than her male mates, which surely can exhibit a test while physically overcoming male suspects. This can represent a genuine threat to female officers while going up against male suspects, particularly substantially bigger and more grounded presumes who might be tipsy in view of liquor or drugs, or the officer’s move down has not yet landed on the scene. In general, in any case, female cops have behaved outstandingly in the city and are credited with utilizing more successful strategies that have kept the requirement for physical squabbles. Ladies cops tend to be more mindful in the territory of oral and physical correspondences that can remunerate to their inconvenience in the range of physical quality.

The fundamental difficulties for female police workplaces, then, are in the previously established inclinations existing among their male partners and bosses. Ladies have fought for a long time to be dealt with similarly to men, and that hustle proceeds right up 'til the present time in numerous callings, including law inconveniences. Indeed, even subsequent to showing insistence of competency comparable to male cops, ladies are still subjected to the sorts of attack and debasing conduct that survives each exertion at fixing the convictions covered such conduct. Ladies are thought to be less dynamic, and just as of late have seen their female partners advanced in strict understanding with legitimacy as opposed to culture – and there are couple of callings more saturated with male-commanded societies than law inconveniences. Relieve herself. It is surely hard to believe but sexual molestation and lack of toilets is a major problems faced by women in the India police force. Women have been facing inappropriate behavior of their male counterparts from a long time n it is prevailing even today. Allocation of duties and ranks are still seen to be biased and women had to work twice as much as men to prove their worth in the police force. Inspite of being capable enough they have been given a backseat just because they are “women” and they could not be ahead of their male counterparts. They have to work twice or sometimes even thrice as that of the male colleagues to prove their worth and capability for this job.
There was lack of several basic facilities to the females in the Indian police force. Women were not given required facilities to survive in the police force. They spend the whole day toiling under the hot sun with unhygienic conditions because of lack of sanitation. Despite the fact that the Government of India issued guidelines already stating that all police stations need to mandatorily have creches and toilets, it is not yet implemented properly. Women in traffic departments are suffering a lot because of this lack of sanitation. Most women choose to remain thirsty rather than using the facilities they offer. Women in India’s police forces face bias from male colleagues and sometimes female might also have such a mindset they are weak, less willing to work and less tough and less capable.

Another major problem is that though the number of women in the police forces nationally has grown in India but it still remains only 6 per cent as yet. The wide difference between the no. of males and females in the Indian police force is this is despite the fact that in approx. 12 states a rule has been passed setting a quota of 30% or more for the women in police force. Another major problem is that even if it is implemented it only applies to the small number of posts that become vacant every year with requirements.

Another, more perplexing test female cops face is in the zone of covert working. Ladies cops are a noteworthy asset while infiltrating criminal associations or while regulating observation of criminal blamed. They frequently mix into their condition superior to anything male officers and the utilization of fake a couple groups is an unmistakable favorable position in numerous social or open settings. The issue grows, nonetheless, when alone female covert officers are constrained with the inescapable sexual assistance of male suspects to whom they have developed close in the understanding of their obligations. The examination must be stopped before the female officer is compelled to do any such movement, certainly raising the wariness of the suspect. These difficulties, be that as it may, are distinguished and taken care of as needs be, and the benefits of female covert officers extraordinarily surpasses the restricted test of sexual weights from criminal suspects.

CASE STUDIES ON GENDER INEQUALITY ON THE INDIAN POLICE FORCE
A review discharged by the ward human rights activity on the state of lady working in police constrain in south Asia. It uncovers that in a police constrain of 22,83646, just 1,05,325 are females of the Indian police drive just 928 female work compel are IPS officers and the aggregate number of IPS officer is roughly 4000. The legislature in its arrangement guaranteed 33% portrayal for ladies in the police constrain in all union domains. In a report titled "Harsh Roads to Equality – Women police in South Asia". Uncovered that lone 4.6% of police drive were females while in Pakistan it was 0.9% and in Maldives 7.4%.

In another report it was found that there has been no recompenses for parenthood which is a ladies social obligation display in the Indian police compel and furthermore the work timings are troublesome for ladies to stay aware of. Another real lead brought by the administration that each instance of viciousness against ladies be taken up by a ladies cop which makes work more troublesome in states with less female officers. Then again Tamil Nadu having the most elevated number of ladies cops remains at 12% with 13842 ladies cops.
Additionally Assam having just 510 ladies officers which include 0.93% of the aggregate ladies officers.

Inappropriate behavior is over the top in the Indian police compel and is viewed as typical in the police. The disposition is that on the off chance that you have come to work you need to endure also. Ladies feel hesitant to protest about the male partners and furthermore numerous ladies didn't realize that they can really protestation. A review uncovered that in Kerala and Haryana 18 out of 66 respondents did not realize that they can protest about inappropriate behavior.

Another report propelled by province human rights activity CHRI tosses a light on the low number of ladies in the Indian police compel the report discussing sexual orientation disparity in the police drive likewise discusses the basic causes strategy lacking and furthermore the mentality of the overall population and the police compel specifically that are in charge of such proportion of men and ladies in the Indian police drive. The quantity of ladies in Indian police compel have been developing possibly.

An Un ladies report of 2011 assessed that Globally just 9% of the police constrain are females with a rate falling as low as 2% falling in a few sections of the world. There are a few basic causes which is in charge of the low number of ladies in the Indian police constrain. The reasons extend from the societal state of mind towards ladies and furthermore the police constrain being male commanded because of arrangement level obstacles and enlistment handle, advancements absence of essential offices tyke mind strategies and offices.

Gender Inequality in the Indian police constrain begins from the enrollment procedure from itself. Police enlistment happens at focal (IPS for associate director onwards) however ladies are for the most part selected at the constable level likewise state level state police strengths keep on having separate caders for men and ladies at state level passage focuses which implies a not very many opening are left for ladies which influences their profession as expansive number of status and advancement rundown are named to the male officers.

Men are in a main position in the police constrain and ladies hold bring down positions as they are thought to be not so much mindful but rather more limited in their reactions while watching bad conduct among their partners. Men are thought to be more mindful of the unseemly conduct as indicated by the official set of principles.

**EXISTING EVIDENCE OF GENDER DIFFERENCES**

Considers have demonstrated that ladies are better sexual orientation and discovered to be less degenerate than their male partners. Ladies are claim to be all the more star social and moral. They are viewed as neither more nor less socially situated however basically more delicate in representing social conditions contrasted with men. Research facility confirmations recommend that ladies are basically more fair yet more crafty when they have an opportunity to break a degenerate contract. The sex contrasts in states of mind towards debasement are not general but rather are organically and purposefully shaped. Despite the fact that walk 8 has been commended as ladies' day which is an extremely positive thing and glad thing to do however ladies are as yet confronting a great deal of issues. It is constantly trusted that a general public advance just when ladies have square with partake in all kinds
of different backgrounds. In spite of the fact that because of reservations more number of ladies are participating similarly in a general public yet at the same time the number is negligible and not up to the check.

Man and woman are both equal and both plays a important role in the synthesis and development of their families in a particular and the society in general. Indeed, the fight for legal impartiality has been one of the major area of concern of the women’s fight all over the world. In India, since long back, women were considered as a mistreated section of the society and they were suppressed for centuries. During the national struggle for independence, Gandhi gave a call of upliftment of women. He said that he is not going to compromise in the matter of women’s rights. The difference in sex and physical form denotes no difference in status. Women complement men equally and are no way inferior. Thus, the first task in post-independent India was to provide a constitution to the people, which would not make any differences on the basis of gender. The preamble of constitution promises to secure to all its citizens- “Justice - economic, social, and political”.

The constitution declares that the equality before the law and the equal protection of laws will be available to all the citizen of India. Similarly, there shall be no discrimination against any citizen on the ground of gender. Article 15(1) guarantees equalities of opportunities for all citizens in matters of employment. Article 15(3) provides that the state can make any special provisions for women and children. Besides, directive principle of state policy which concern women directly and have a special bearing on their status directly and have a special bearing on their status include Article 39(a) right to an adequate means of livelihood; (d) equal pay for equal work both men and women, (e) protection of health and strength of workers –men, women, children and Article 42 provides for just and humane conditions of work and maternity relief.

It is really important to note that though the Constitution of India is working since more than sixty years, the raising of the status of women to one of equality, freedom and dignity is still a question mark.

In India, since independence, a large number of steps have been taken for the upliftment of women in the society. For instance the Dowry prohibition Act 1961, The Equal Remuneration Act 1986, The Hindu Marriage Act 1956, The Hindu Succession Act 1956, The Muslim Women (Protection of Rights on Divorce) Act, 1986, the commission of Sati (prevention) Act 1987, Protection of the Women from Domestic Violence Act 2005, etc. But, these laws have not made substantially any difference for the society.

The sense of diffidence, embarrassment and degradation always keep a women reticent. Our whole enculturation is such that for any unsuccessful marriage which results in such domestic violence or divorce, it is always the woman, who is held responsible. The traditions and the orthodox beliefs in India had left women helpless and they are not able to uplift their positions in the society. Family relations in India are governed by personal laws. The major religious communities are – Hindu, Muslim, Christian each have their personal laws. They are governed by their personal laws in matters of succession, marriage, divorce etc. In the laws of all the communities in particular women have a very little right of representation. It is very sad reality of today’s world that women are considered to
be inferior in practice as well as in religious texts which has further deteriorated their conditions.

Gender Inequalities refers to the evident or concealed discrepancies among individuals based on the representation of gender. This problem in simple term is known as Gender prejudices which in simple terms means the gender favouritism or making difference between a male and female. In making partiality among the gender India has 10th rank out of all the countries in the world which is a matter of discontent for India. But this problem is becoming more serious day by day although government has banned the pre-natal sex examination test. In India since the older times this problem is prevailing more in the rural areas of our country where girl children are considered as a burden for the parents. The afflicted world in which we live is distinguished by deeply unequal sharing of the burden of tribulation between women and men. Gender Inequality exists in most part of the world.

However, imbalance between men and women has already taken many different forms. Indeed, gender inequality is not one analogous phenomenon, but a collection of different and interconnected problems. The issue of gender inequality is one which has been publicly resonating through society for years. The problem of disproportion in employment being one of the most important issues today. In order to rectify this situation one get to the roots of the problem and must understand the societal factors that cause women to have a much more difficult time getting the same benefits, wages, and job opportunities as their male colleagues. The society in which we live has been shaped historically as a patriarchal society.

However, in many parts of the world, women receive less importance and health care than men do, and particularly girls often receive very much less support than boys. As a result of this gender inequality, the ethicality rates of females often exceed those of males in these countries. The concept of missing women was introduced to give some idea of the immensity of the phenomenon of women's tribulation in impermanence by concentrating on the women who are simply not there, due to unusually high tribulation compared with male mortality rates. In some regions in the world, inequality between women and men directly involves matters of great concerns, and takes the form of unusually high tribulation rates of women and a consequent prevalence of men in the total population, as opposed to the prevalence of women found in societies with little or no gender inequality in health care and nutrition.

The rationale behind sexual orientation vaccination, preparing for police with a specific end goal to make cops act in a sex insusceptible way in instances of viciousness against ladies and in the arrival of their obligations as a rule, there is a dire need to do sex inoculation working courses for police. At present, the idea of sex is misconstrued by countless officers. There is additionally an absence of legitimate worry of the common sexual orientation irregular characteristics among cops. Regardless of the possibility that there is data, the faction of patriarchy winning in the police powers does not effortlessly allow an adjustment in the perpective of male cops toward ladies. The held by the police about sexual manhandle and local mishandle, unmistakably show the general disposition of police towards ladies. There are discoveries that male officers need to talk with respect to the part of ladies associates
likewise mirror the state of mind of a lion's share of cops towards ladies and the absence of mindfulness about the idea of sex. There is no compelling reason to coordinate ladies into the higher posts of police. Ladies police staff ought to be given errands worried to ladies and kids as they are given simple works they turn out to be less excited towards their occupations. Ladies fill in as cooks in the police mess. Ladies ought to escort just female detainees and not the guys. Ladies ought not be included in operations against aggressors and extremists. Ladies cops are extremely prohibitive and are not equipped for taking care of solidified crooks. Keeping in mind the end goal to expel the generalizations and partiality of cops towards ladies when all is said in done which included ladies casualties and in addition ladies officers so ladies can manage instances of brutality against ladies all the more adequately, it is imperative that all State police associations embrace appropriate strides, including sorting out preparing strategies to vaccinate the cops at all levels.

In the course of recent years, cops and policing have changed. Policing used to lean intensely toward physical qualities, for example, weight, conduct, tallness. After some time, the qualities that were thought to make a decent cop have moved. The occupation still requires an incredible level of mental and physical wellness; be that as it may, what's more imperative now is great moral character, and astounding relational, critical thinking and strife determination aptitudes.

This move can be credited to another, proactive style of policing called "group policing". Group policing is currently utilized crosswise over North America, and the EPS is a pioneer here. It's a vital piece of how we take a shot at a regular schedule in our group.

Group Policing
Group policing is a theory that advances authoritative methodologies which bolster the precise utilization of associations and critical thinking systems. It proactively addresses the quick conditions that offer ascent to open security issues, for example, wrongdoing, social issue, and dread of wrongdoing.

Basically, it's about setting up connections in the group — with occupants, entrepreneurs and group associations — and working together with those accomplices keeping in mind the end goal to proactively decrease and counteract wrongdoing.

Preparing and Patrol
At the point when our volunteers finish Academy Foundations Training, they hit the avenues with a police preparing officer to do group policing obligations in a watch part. Some portion of this in the city preparing is to chip away at a critical thinking activity in the range where they are positioned. From the very first moment, the EPS fortifies that critical thinking is an imperative piece of the occupation. For more data.

Amid watch obligation, officers refine the policing aptitudes learned in preparing and pick up the certainty expected to exceed expectations in future, specific parts. It's additionally where you'll increase a hefty portion of your fondest work recollections. Approach any officer for some of their watch stories and you will find out about adrenaline surges, getting terrible folks and an energy to have any kind of effect.
Qualities

The EPS searches for some imperative qualities in potential applicants. Officers must be straightforward and have the most extreme trustworthiness. They should show fearlessness and persistence, alongside sympathy and comprehension, when reacting to testing calls. These qualities are not entirely male or female characteristics, but rather ones that help make a decent cop — regardless of what your sex.

Ladies convey a one of a kind element to policing and female officers are regularly able in essential segments of group policing. For the most part, ladies are great communicators with incredible relational aptitudes. While this is essential to policing all in all, it’s particularly useful in circumstances where casualties feel more great examining the points of interest of a wrongdoing with a female officer.

Female officers supplement their male accomplices and can give a substitute viewpoint on an issue. Ladies frequently approach and tackle problems from an alternate point than their male partners. EPS officers perceive these distinctions and consider them to be essential parts of an awesome group. At last, every sex conveys something interesting and profitable to the employment — that is the reason a different participation is so critical to the EPS.

The very nearness of ladies work force in police headquarters could make a perfect domain for ladies to have an entrance to police headquarters without cognizance and had firmly embraced that the service ought to make all the conceivable strides for the unique enlistment of ladies in police compel so that their aggregate portrayal could achieve the coveted level of 33% as right on time as would be prudent.

Government has given different assets to the modernization of police strengths at the state too focal level.

Government has additionally found a way to battle the inaccessibility of toilets and restrooms for the ladies police drive and have prescribed to care for the explanation for this and have taken emotional measures to guarantee the adequate offices required for ladies in the Indian police constrain.

Recommendations of various committee reports for Upliftment of Women in Indian Police Force

Committee on Empowerment of Women (2014-2015)

The report basically deals with all the steps taken by the government for the better condition of women in India Police Force and to end the gender inequality prevailing in the police forces. This report tells about the increase in the percentage of women present in the police forces of various states. It was recorded that the state of Andhra Pradesh saw the highest increase in the percentage of women in police forces. It gave various recommendations and changes to be brought about at both center and state level for the better working conditions for women.

To begin with they tried to bring a change in the basic amenities and also to provide basic facilities to the women in the police forces. They tried to end the inadequacies of the basic facilities and also ensure basic health care facilities so that they are not discouraged to work for the police forces. They were ensured with basic health care.
and hygienic environment. Proper sanitation facilities including mobile toilets and also a mandatory and clean toilets in all the police stations all over India. Also the provision of separate toilets for men and women was talked about in this report. Also adequate and clean water for the shower facilities with separate rest rooms for men and women. The rest rooms should be located close to their place of duty. Also it was mandatory for the organization to look into all the facilities and also keep a check that women are not placed in the places devoid of such basic facilities. All these facilities should be adequately accessible so that there is no compromise with the safety of the women officials.

**RESIDENTIAL ACCOMMODATION**

This report also brought into for another reason for the low number of women in police forces that is the lack of residential accommodations available nearby their work place. By this report the Government suggested to bring out a proper housing policy to elevate the availability of accommodation facilities especially for the women nearby their workplace so that it is easy for the women to take care of their families as well as work efficiently in the police force. After the 14th Finance Commission Report, it is the responsibility of the state government to provide for accommodation facilities to the women police personnel especially. Earlier police stations were built upon rented accommodation which makes it difficult to build residential accommodations for the women personnel nearby. So after this report it was advised to give security verified rented accommodations nearby the quarters on priority basis to the women. This report took into consideration the lack of residential accommodations which is a major cause of less number of women police officers in the country and also devised ways and means to overcome such problems and take effective measure to provide a safe and secure housing policies for women in the Indian police force.

**GENDER SENSTISATION**

This report also talks about the importance of gender sensitization in the police system of the country. This report suggested to bring this issue in the forefront and to do the needful to get over with this hurdle so that there is equality in the police forces and women are not downgraded just because they are women.

The features of Gender Sensitization Programme:

- Legality of punishments of crimes conducted against women
- Efforts by the police officials for gender sensitization in police system
- Case laws dealing with crimes against women
- Punishing the wrongdoers
- Taking care of the victims and give them adequate care.
- Keeping a check on the inequalities prevailing between men and women in policing
- Bringing in focus the reason behind lack of representation of women in police system
- Institutional analysis of marriage, family and other institutions

The committee strongly felt that gender sensitization in the police force will surely bring about positive changes in the system and works for the empowerment of women. Apart from the above feature the report talked about various other initiatives such as:

- The committee asked the states and union territories to conduct seminars and programmes for the awareness and importance as well as need of gender sensitization.
Also to organize workshops to stop crimes against women which are deteriorating the conditions of women in forces.

- Talked about the steps taken to combat with the crimes and punish the wrong doers.
- A new course is organized named “Crime against Women” in which investigators are trained to investigate for the crimes against women.

All these steps of the committee had a positive outlook towards creating a conducive working environment for women police officers in the police system. Also advised to print manuals for the different cadres on gender modules and also to make the police system to be more gender sensitise.

National Conference for Women in Police

The committee took various measures for the betterment of women which if taken seriously will bring about a positive change in the society. But if the state government failed to take follow all the recommendation seriously then the basic aim of such committee would fail to bring about the positive change. So the government suggested to introduce a mechanism to take care the progress done by the measures taken and effectively they working for the betterment of the police system and also what all further steps can be taken for the betterment of the system. Also the committee suggested to devise a specific time period after which the progress reports will be submitted so that effective and positive changes can brought about and the shortcomings in the system be overcome and also bring out more representation for the women in uniform in the police system.

Also six National conferences of women in police (NCWP) have been held:
1. New Delhi in 2002
2. Mussoorie in 2005
3. Panchkula in 2009
4. Bhubaneshwar in 2010
5. Thrissur in 2012
6. Guwahati in 2014

After the 6th Conference a survey is conducted on the participants of the conference and their feedback was take and observations were brought into focus that are:

(i) Work satisfaction- out of all 86% of participants were satisfied with the work given to them and also were ready to do any work given to their male colleagues as well.

(ii) Delegation of official posts- only 27% of the participants were satisfied with the posts given to them. Many women claimed that they were not given any senior posts and promotions. They were not satisfied as the higher posts were still occupied by the males in particular.

(iii) Gender discrimination- Approximately 63% of participants did not felt any gender favouritism after the important steps taken by states to give more representation to women in the system, also 37% of the participants were victims of gender discrimination.

(iv) Support from male counterparts- Approximately 87.4% of the participants felt that there was adequate and positive support from their male colleagues for the empowerment of women in system rather 10.8% of participants were not happy with their male counterparts.
(v) Balance between personal and professional life- After the mandatory steps taken women found it easier to manage between their family and career. Due to the housing policy, accommodations were nearby their working places and they took care of their families easily but still 45% of women still found it difficult to manage with their family and career efficiently. Also participants were asked for some suggestions so they suggested for the introduction of crèche facilities and play school for married women officers on duty.

(vi) Harassment/Grievance redressal system- Though the suggestion were made to punish the wrongdoers to stop the violence but that was not effective in practice, only 5.40% participants were satisfied with the redressal system.

Though the committee has asked the state administration for the timely action reports of all the measures taken and the changes they brought about but it is conclusive from the above report that the states were not working efficiently and also not submitting the reports timely. And that setting up of norms was not sufficient for the administration but the actual implementation was to be done and checked timely so that important measures can be brought about for a positive change.

STRESS MANAGEMENT IN POLICE FORCES
This report talks about the importance of stress management in the Indian Police forces. The need of the hour was to investigate about the various reasons behind the stress in the Indian Police Forces especially women and to take effective measures for the stress management. The various problems faced by women personnel are as follows:

- Child care centres and crèche facilities
- Promotions and selection
- Responsibilities, duties and deployments
- Coaches and trainings by them
- Maternity leaves and child care leaves
- Sexual molestation at workplace
- Councilors for stress management

This was the major issue for the committee to work upon the stress management because it was very essential for the police system. Women on duty if are suffering from stress couldn’t efficiently focus on their duties because their tensions won’t let them concentrate on their work which will harm the administration. This committee talks about eliminating and combating the reasons for the stress of the officers by bringing up new policies that will help solving their problems and will bring them at peace and after they will be able to concentrate on their duties and work efficiently for the better working of the administration.

ENOCOURAGEMENT TO WOMEN CANDIDATES
According to this report, women holding NCC ‘C’ certificates were given some additional marks which were different in different states. Some states also did not give any extra marks for the certificate holders which was backdrop for the women holding the certificates. After this report there comes a provision of giving mandatory extra marks to the NCC ‘C’ certificate holders in the police recruitments which will give women an opportunity to gain representation in the police system. Also in this report various guidelines were formulated for the states and union territories and it was mandatory for them to
follow the practices. This will also become an encouraging factor for the women to come up and grab this opportunity. Women after this report were aware of their right to take the advantage of the certificates they have and gain representation in the policing. The ministry of home affairs after this reports issued guidelines for the state to follow and women holding the certificates should be given the extra weightage as stated. By this report a good number of women came up and used the opportunity and asked for their right.

**BASIC AMENITIES**

After this report, a target was set by the States/UT’s to provide for mandatory toilets each for men and women at every police stations. Also the target was to provide clean and healthy environment at work place. And to give adequate accommodations to the women officers to improve representation of women in policing. The committee talked about looking into the reasons behind the lack of basic facilities for women police personnel and to take all the essential measures to ensure that the basic facilities are provided to the women officers at their workplace. Also committee wanted the state to allocate funds for providing basic amenities to the women officer and also to achieve this objective as early as possible.

The status of the Central Armed Police Forces (CAPF’S) is given below:

(i) Central Reserve Police Force: In CRPF’s a large number of mobile toilets were made available for women officers on duty so that they do no compromise with their hygiene while being on duty. Around 55 mobile toilets were made for them to ensure them proper sanitation facilities.

(ii) Border Security Force: Women constables were employed in this for the duty of gate management and routine works and it was very essential to provide them with all the basic sanitation facilities by giving them separate toilets and rest rooms.

Central Industrial Security Force: For all the lady personnel, the areas were properly equipped with all the basic facilities and were provided hygienic work conditions

Sashastra Seema Bal: Adequate accommodations for all the women personnel were provided necessarily. Permanent and semi-permanent accommodations for all women officers. Also they were provided with separate kitchen, dining areas and rest rooms facilities.

Indo-Tibetan Border Force: These women personnel on duty are indulge into all the static work and so it is essential to provide them with hygienic and adequate number of toilets and rest room facilities.

Assam Rifles: The women personnel posted here, most of them work in the hospitals and it was ensured that they are provided with all the basic facilities of rest rooms and washrooms adequately and hygienically.

National Security Guard: women officers have been provided with separate rest room facilities.

The police stations existing in the country should have proper sanitation facilities with all the security ensured for the women personnel. Washrooms should have proper lockable doors and security of women should be on the priority list of the administration. Also ventilation and lighting should be ensured. It was a
mandatory thing to provide with separate toilets for men and women and also the toilets should be clean and conveniently available. These facilities should be adequately and easily accessible to the women police personnel.

CRECHES/DAY CARE CENTRE FACILITIES
The committee advised for providing creches and day care facilities for the young children of the women officers so that it is easy for them to take care of their family and also concentrate on their duties. This will enable them to be satisfied that their children are safe and are given hygienic environment and it will enable them to concentrate on their duties efficiently. The committee ensured. Various policies were made by the government and also the funds were allocated for them so that this new facility should be made available to the women officers as adequately and as easily as possible.

POSTINGS & TRANSFER OF THE WOMEN PERSONNEL
The committee brought into focus another major reason for lesser number of women in police system and that is the rigid policy of the government for postings and transfer of the women police personnel. The committee brought about a policy to post the spouses at the same station and is being implemented by various police administration but it is not yet a pan India policy yet, it is at the discretion of the administration to follow this policy or not. Though this committee took a lot of initiatives for this policy to come into function and work in a positive for the women empowerment in police forces. This committee ensured that the transfer policy should be in the 144avour of women personnel.

CONCLUSION & SUGGESTIONS
The Indian Police Force need to actually work upon the problems which are resulting into less number of women personnel so as to get away with the gender biasness prevailing in the policing system. These problems need to look upon effectively and to provide various measures to bring an end to such problems. If such problems keep on increasing then the lack will increase with time. It is not only about bringing out measures but it is about what changes does the measures are bringing for the society with time and if the progress is also then also think of the reasons why the progress is slow and what steps should be taken to improve the progress of the policies implemented by the government for the empowerment of women. It is necessary for the policy makers to look into the positive and negative aspects of the policies and to work upon them effectively and efficiently. Women in the police forces need some motivating factors to convince themselves to join the police force. They do not want to hamper their careers at the cost of their family responsibility as the society itself wants them to be more responsible towards their family. Though these notions are considered orthodox but this is what is expected from the women. The changes in the policing system needs to be brought which will actually convince more and more women to join the police forces. The requirement of basic facilities that will help to ensure their health and hygiene. The presence of full support from their male counterparts will help them. Also less gender biasness in the police forces will help them empower themselves and to grab the high posts and positions because of their own capability.

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GRAFFITI- A NON CONVENTIONAL COPYRIGHT?

By Kunwar Abhijeet and Prerna Mitra
From School of Law, Christ (Deemed to be University)

ABSTRACT
Art is a tool to promote creativity- a form of expressing one’s self and one’s identity. Looking through the window of time, art has undergone a series of transformation- from painting on cave walls to painting on any walls, all for the cause making the city a colourful and pleasant place to reside in. Modern art of walls of buildings or on posts are termed as graffiti. Graffiti can also serve as a source of information on various pressing social concerns which the society is conveniently ignorant about. While most of the graffiti artworks in India are illegal, there are a few which are approbated and thereby, legal. But can an illegal work be entitled to a copyright protection under our existing laws of copyright?

This paper aims at providing a discourse on the copyrightability of illegal and legal graffiti artwork in India. Furthermore, it shall examine whether entitling an illegal graffiti to copyright protection defeats the objectives upon which the foundation of the Copyright Act rests.

INTRODUCTION
“Some people become cops because they want to make the world a better place. Some people become vandals because they want to make the world a better looking place.”

- Banksy

Satirical graffiti artist Banksy, who has adorned city walls, bridges and streets all across England with dark humour, firmly believes that graffiti art is a medium of disseminating awareness amongst the masses; therefore, he vehemently advocates its promotion as a form of art. Graffiti wasn’t always considered as a form of art and expression, in fact the evolution of graffiti as a form of art was absent until the 1980s. It is only in the recent years that its presence has been felt in the pop culture and contemporary art form. However, graffiti art in India is a nascent concept which is primarily regarded as a work of vandalism and therefore, illegal.

The Oxford Dictionary defines ‘graffiti’ as “writings or drawings scribbled, scratched or sprayed illicitly on a wall or other surface in a public place.” It can be befittingly insinuated from the definition that graffiti is mostly an artwork that is produced illegally. Nonetheless, nowadays, most of the graffiti works are produced legally under due authorisation of the Government or other city authorities or companies with the aim of spreading a significant message and beautifying the city. Since graffiti art is proliferating rapidly, works of renowned graffiti artists are being offered for sale in galleries and are put to both commercial and non-commercial use by various companies with or without the authorization of such artists. The cascading effect of such proliferation is that the original author of most of the graffiti arts is unknown to the public; consequently their work is prone to unauthorized exploitation, such as being used as a background in tv series or commercial advertisements for product promotion. This is a flagrant violation of the requisites of copyright protection that is granted to a work. But the question that surfaces addressing this issue is- whether graffiti qualifies as ‘work’ in which copyright protection subsist? To best argue the copyrightability of graffiti, the primary focus of the authors will be on illegal graffiti (graffiti that has been fixated
upon a surface without permission from the owner of such surface).
The pivotal ambiguity that will be highlighted in the paper is the conflicting interests of the graffiti artist and owner of the surface upon which such art has been fixated. A juxtaposed reading of the conflicting provisions of Section 14(c) and Section 52(t) of the Copyrights Act, 1957 will be adopted to interpret the true legislative intent behind inclusion of the two provisions. Furthermore it is imperative to understand whether an illegal work (illegal graffiti) is entitled to a copyright protection at all, given to the fact that copyright is a strategic legal tool that is granted to creative literary, musical or artistic work for further development of such work in the pursuit of protecting the economic and moral rights of the author of such work. In addition, if such copyright protection is granted to illegal graffiti, it will not only be different from the conventional subject-matters of copyright protection, thereby giving it the status of a non-conventional copyright, but will also broaden the horizon of subject matter governed by copyright laws.

**REQUISITES FOR COPYRIGHT PROTECTION**

Graffiti will fall under the subject matter of copyright protection if it qualifies as ‘work’ under Section 2 (y)\(^\text{320}\) of the Copyright Act, 1957. The section reads, as follows:

“work means any of the following works, namely-

i. A literary, dramatic, musical or artistic work;

ii. A cinematograph film;

iii. A sound recording;”

Graffiti is defined in Cambridge Dictionary as “words or drawings, especially humorous, rude, or political, on walls, doors, etc. in public places.” It is evidential from the definition of ‘graffiti’ that it qualifies as an artistic work under the definition of ‘work’ so provided by Section 2 (y) of the Act. Since it has been established that graffiti is an artistic work, the meaning of artistic work has to be looked into. Section 2 (c)\(^\text{321}\) of the Copyright Act defines ‘artistic work’ as-

“Artistic work means-

i. A painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possess artistic quality;

ii. A work of architecture; and

iii. Any other work of artistic craftsmanship.”

A literal interpretation of the wordings of the aforementioned provision delineates that graffiti qualifies as ‘artistic work’ under sub-clause (i) of the Section. Graffiti is made using spray paint, wall paint or ink, and requires sense of creativity which is brought to fruition by artistic skills. Thus, it is best suited to qualify under sub-clause (i) of Section 2 (c) because as per the definition of ‘Painting’ provided by the Cambridge Dictionary; it says “the skill or activity of making a picture or putting paint on a wall”. It has been established that graffiti qualifies as an artistic work under Section 2 (c) of the Act. Now it is essential to prove if the basic requirements for copyright protection are fulfilled by it. The requisites are:


\(^{321}\) Section 2(c), The Copyrights Act 1957, Legal manual Intellectual Property Laws 2017, Universal Law Publication, Pg. 179
Original work of authorship
The definition for ‘Original’ is not expressly provided for in the Copyright Act, 1957, but Section 13\\(^{322}\) of the Act mentions the term- “subject to the provisions of this section and other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say- Original literary, dramatic, musical and artistic work, cinematographic films, and sound recordings.” The word original in the context of the provision alludes that idea cannot be copyrighted but the expression of an idea in a particular way is what is entitled to a copyright protection.

Judiciary has taken a keen interest in setting the boundaries of what work qualifies as original in a myriad of cases, primarily instrumentalizing three distinct rules, such as-

- The Sweat of the Brow
- The Modicum of Creativity,
- The Skill and Judgement.

University of London Press Ltd. v Tutorial Press Ltd.\\(^{323}\) is an exemplary case that relied on the rule of the ‘Sweat of the Brow’. The Court observed that originality does not mean that the work has to be original, but it only means that some effort has to be put in for it to be deemed as original.

In the case of Fiest Publications Inc. v. Rural Telephone Service Co.\\(^{324}\) the necessity for the ‘modicum of creativity’ was emphasised upon. The Court held that there should be at least “minimal creativity in the work for it to warrant copyright protection.” Therefore, the contents of a telephone directory would not amount to an original work since there exists no creativity at all.

Eastern Book Co. v. D.B. Modak\\(^{325}\) altered the dimension of determining originality of a work. The Court held that mere application of labour will not suffice for a copyright protection. Thus, it adopted the “Skill and Judgement” requirement where application of certain set of skills and ability to discern shall determine the originality of a work.

It is evident from the aforesaid cases that for a work to be copyrightable it has to be original work of authorship. Graffiti will undoubtedly qualify as an original work if it is creative and contrived with a set of skills attained for over years. But the problem rests with the copyrightability of tags or throw-ups, which are primarily words that already exist in the common parlance, therefore, aren’t original. So the question that ensues is whether tags or throw-ups will be entitled to copyright if created in a unique style? The case of Jade Berreau v. McDonald’s Corporation\\(^{326}\) sheds light on the issue. The primary contention of the complainants was that an outlet of McDonald’s Corporation in London that used graffiti artist Dash Snow’s stylized signature of his pseudonym ‘SACE’, were clearly infringing upon his copyright over the name and work with its unauthorized use.

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323 [1916] 2 Ch 601
324 499 U.S. 340
325 (2008) 1 SCC 1
326 Jade Berreau v. Mc Donalds Corporation (2:16-cv-07394) District Court, C.D. California
US Court dealt with the issue of copyrightability of tags in the case of *Reece v. Mark Ecko Unlimited*. In this case the Court was of the opinion that, although words ‘Dip’ and ‘Dipism’ are not themselves subject to copyright protection, the original manner in which the word ‘Dip’ was expressed by plaintiff Reece, should be protectable.

Thus, it can be adduced from the aforementioned cases that the words in the common parlance is not the subject of copyright protection but its lettering rendition or style if original shall be entitled to copyright protection.

**Fixed in a tangible medium**

The second criterion for a work to be entitled to copyright protection is that the work should be fixed in a ‘tangible medium of expression’. On a cursory look graffiti seems to qualify the fixation requirement because graffiti artwork is generally painted on walls or posts, etc. The problem, however, arises when such illegal graffiti artwork is removed by the owner of the property - can work which is ephemeral in nature be entitled to a copyright protection? *Section 2 (2)* of the Berne Convention for Protection of Literary and Artistic Works, 1886 (India is a signatory to the Convention) provides that “works shall not be liable to be protected unless they have been fixed in some material form.” The objection to this provision in the context of ephemeral work is that it demands the work to be “sufficiently permanent or stable to allow it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”. and graffiti which is ephemeral in nature appears to be sufficient to satisfy the fixation requirement under the Convention.

**MORAL RIGHTS**

Graffiti artwork qualifies the basic requirements to be entitled to copyright protection. If a work of original authorship is entitled to copyright protection, *Section 57* of the Copyright Act, 1957, confers upon such author a wide amplitude of power which puts the ‘work’ produced on a higher pedestal and not the object of copyright. Section 57 of the Act safeguards the special rights of the author which extend beyond his economic rights. These rights which are commonly referred to as moral rights of an author, enable the author to claim authorship over his work and also allows him to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to his said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.

There is a close bond that an author shares with his work; the author strongly identifies himself with his work. It is as Hegel formulated in his *Personhood Theory* - there is a normative connection between property and personality and such property is a notional extension of one’s personality.

Hughes famously argued that intellectual property are comparatively more ‘receptacle for personality.’ The paternity rights and integrity rights which are imbibed in the aforementioned provision give rise to a conflict between the

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330 William Fisher, Theories of Intellectual Property, pg no. 6
rights of the author and rights of the property owners in disposing of the tangible object they have become owner of against their will. A myriad of US case laws are precedent to this conflict. “In Hanrahan v Ramirez" a group of young artists had painted a mural carrying an anti-drug message on the side of a liquor store with the authorization of the property owner. After the store owner whitewashed half of the mural three years later, the artists took legal action. The court held in 1998 that the piece had recognized stature because it had won a national prize, received the local community’s support and had been displayed in a government building as a photograph. The judge awarded the artists £48,000 as compensation and ordered the restoration of the mural.” This underscores that if graffiti attains a ‘recognised stature’ and the content of art is not illegal then such graffiti should be entitled to protection as against the interest of the property owner.

The author strongly feels that if a work is authorised then claiming copyright protection over it is justified, but if a work is illegally created, a claim of copyright protection over it is not justified irrespective of how creative the work is. Property owners’ interest should be given paramount attention because no one should be harassed by destruction or mutilation of their property without their consent. The same can be substantiated with John Locke’s Labour theory where he argues that “all persons have a duty not to harm others.” However, it is also unjustified if a property owner removes or has someone remove the graffiti on his property for the purpose of exhibiting it or offering it for sale. This would amount to unjust enrichment of the property owner at the cost of the author of the graffiti artwork. Therefore, where property owners’ interest to protect their property from destruction or mutilation should be safeguarded, they should be strictly disallowed from cashing upon such graffiti artwork.

COPYRIGHT PROTECTION TO ILLEGAL WORK

Copyright protection demands two requirements- it has to be an original work of authorship and it should be fixed in a tangible medium. These requirements fail to address the nature of work which could be immoral or illegal. For instance, if a person steals a page from another person’s notebook and creates a drawing, or if he steals a camera and clicks an impeccably beautiful photo, for which he then demands copyright protection, should his work actually be entitled to such protection despite of it being a consequent product of theft? The Copyright Act, 1957 is not clear on whether illegal or immoral work can be registered for copyright protection. Before delving into the issue of copyrighting illegal work, a distinction between illegal and immoral work is of utmost importance. “Illegal work essentially consists of works whose content is illegal or work that directly relates to a crime or an individual convicted of a criminal offence." On the other hand, what might be immoral doesn’t necessarily have to be illegal. Morality is an ever-changing standard of conduct which differs from person to person. Graffiti artwork isn’t

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332 Lior Zemer, On the Value of Copyright Theory, pg no. 11
http://ssrn.com/abstract=1657855
Last visited on 25th February, 2019

333 Eldar Haber, Copyright protection of illegal works, , Non-Conventional Copyright Do New and Atypical Works Deserve Protection?, ISBN: 978 1 78643 406 7, published in 2018, pg no. 404
immoral but an illegal act since it’s an act of vandalism. Whether illegal graffiti artworks are entitled to copyright protection can be substantiated after examining the broader question of whether copyright law should examine the content of a work as a prerequisite to granting copyright protection? Creative work may stagnate due to the consequence of content reviewing which would in turn defeat the idea of free speech and expression. To mitigate this issue the court in the case of Jartech, Inc. v. Clancy, held that illegal work cannot be a defence to copyright infringement, thereby propounding a content-neutral approach. The content-neutral approach doesn’t resolve the problem either. This is because what constitutes as immoral work would vary from jurisdiction to jurisdiction, thus, giving extra power to the registrars of copyright or courts to decide which work ought to be protected and which do not. Certain standards should be prescribed to determine what content should be copyrightable and such standard should be internationally implemented so as to avoid discrepancies amongst jurisdictions.

Another pressing concern about copyrighting of illegal work is whether such work will prove to be instrumental in benefiting the society by promoting the progress of knowledge which is indeed the main objective of copyright laws. The dilemma of deciding upon this concern assertively is that while works of Adolf Hitler, Mahatma Gandhi, Nelson Mandela, and Martin Luther King Jr, who wrote inspirational books while serving their sentences in prisons absolutely benefit the society despite of being illegal, work such as child pornography doesn’t benefit the society at all. Graffiti artwork befittingly falls in the grey area where the work might not necessarily benefit the society, nor is it as illegal as child pornography. Despite of being an illegal act the content of the act cannot be said to be illegal.

In the author’s opinion content whose very creation is illegal or the content of it is illegal shall be elided or not be entitled to copyright protection. Jeremy Bentham’s Utilitarian theory focuses on protecting the happiness of the majority as against the minority. On the basis of this theory, authors of illegal graffiti artwork shall not be entitled to copyright protection because it is against the public interest. Graffiti is an act of vandalism which is constitutes the offence of mischief under Section 425 of the Indian Penal Code. Granting copyright protection to such work would be implicitly condoning work that harms the society instead of benefitting them.

The golden rule in English Law is one of the rules of interpretation adopted by the English Courts. A wider approach of this rule is applied by Courts to avoid the defeat of principles of public policy. As opportunely held by the Court in the case of In Re Sigsworth, a particular law should not be literally interpreted if it doesn’t not serve the purpose of public good, it should only be made applicable when it is in sync with the tenets of public policy, which is why illegal graffiti shall be disentitled to a

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334 Jartech, Inc. v. Clancy, 666 F.2d 403,408 (9th Circuit, 1982)  
335 Eldar Haber, Copyright protection of illegal works, Non-Conventional Copyright Do New and Atypical Works Deserve Protection?, ISBN: 978 1 78643 406 7, published in 2018, pg no. 411  
336 Section 425, The Indian Penal Code 1860, By Ram Jethmalani and D.S. Chopra, Thomson Reuters  
337 [1935] 1 CH 98
copyright protection as it would prove to be against public good.

FAIR USE AND LEGALLY AUTHORIZED GRAFFITI

The paper primarily deals with the impediments in granting copyright protection to illegal graffiti artwork, but this segment of the paper focuses on the impediments of granting copyright protection to legally authorised graffiti artwork. This issue surfaces due to the conflicting provisions of Section 14 (c) (ii) and Section 52 (1) (t) of the Copyrights Act, 1957. The prior mentioned Section confers upon the author of a legally authorised graffiti artwork the power to communicate his work to the public, whereas the later section deals with the provision of fair dealing that states, “the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of section 2, if such work is permanently situate in a public place or any premises to which the public has access.”

As has been previously established in the paper, graffiti artwork qualifies as artistic work under Section 2 (c) (i) of the Act, by the virtue of which it falls under the ambit of Section 52 (1) (t) which takes away from the authors of graffiti artwork to “make or publish” their work as against the exclusive right granted to such authors under Section 14 (c) (ii) to communicate their work to the public.

To deconstruct the provision of Section 52 (1) (t) in lieu of Section 14 (c) (ii), the term “public place” has to be construed. Section 52(1) (t) states “if a work is permanently situate in a public place or any premises to which the public has access“.

As the Copyrights Act, 1957 does not provide a definition for “public place”, let us consider an example where a person has made an authorised graffiti in an art gallery where public has access to. Does the gallery qualify a public place? If yes, then will the author of the graffiti be entitled to a copyright protection? To answer these questions interpretation of ‘public place’ imperative. Public must be delineated as the ‘general public'; performance before a ‘closed group,’ however, large in number, does not constitute performance in public.

In Harms v Martans Club it was decided by the Court of Appeal that performance in a club provided on payment of necessary membership fee is considered a public performance. Furthermore, in Performing Right Society Ltd v Rangers RC Supporters Club the court observed that the relationship of owner of the copyright is a primary consideration and if the audience was one which owner of the copyright could consider as part of public, then the performance is in public.

Therefore, in the light of the judgements aforcited, an Art gallery should be considered as a “public place” since it is available to the general public.

CONCLUSION

The objective of Copyright, whether conventional or non-conventional, is to ensure that there is encouragement of

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340 Harms (Inc) Ltd and Chappell and Co Ltd v Martans Club (1927) 1Ch 526 at p. 532, 533
341 Performing Rights Society Ltd v Rangers RC Supporters Club (1975) RPC 626.
learning and dissemination of knowledge. Granting copyright protection to graffiti would mean widening the scope of copyright under non-conventional subject-matter that can be copyrighted, but is promotion and protection of illegal act that constitutes a crime under the IPC, the objective of Copyright Act? The very intent of having a legal mechanism in place is to ensure that interests of a victim are upheld. Thereby it is apposite to state that one seeking relief before the court should enter the court with “clean hands”. The “Clean hand doctrine” gives the defendant the upper hand by arguing that plaintiff is not entitled to equitable remedy because the plaintiff has himself acted unethically or in bad faith. Thus, the author of an illegal graffiti artwork cannot bring about a claim that his work has been destroyed or mutilated unjustly and demand compensation from the property owner, because he himself has committed an offence. Jeremy Bentham’s Utilitarian theory focuses on protecting the happiness of the majority as against the minority. On the basis of this theory, authors of illegal graffiti artwork shall not be entitled to copyright protection because it is against the public interest as it promotes commission of an offence.

Now looking into the fair dealing scenario, the conflict between Section 52 (1) (t) and Section 14 (c) (ii), which deprives an author of an authorised graffiti from communicating his work to the public and claiming copyright protection over it, should be done away with, because according to this arbitrary and vague provision of Section 52 (1) (t), not only graffiti, but making and publishing of any artwork in a public place will not be protected by Copyright Act, thereby going against the objective of Copyright Act to promote and encourage creative and original work. If this provision is not done away with, how do we propose an artist communicates his work to the public, which also happens to be a flagrant attack on the Freedom of Speech and Expression granted to the citizens of India under Article 19 (1) (a)?

Further if graffiti work is authorised then by applying four factor tests established as provided for in the case of Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), it could be determined whether the reproduction of the work amounts to fair use or not. The four factors which judges consider are the Purpose, the Nature, the Amount of the work taken and the Effect of such copying on the potential market. By applying this test most of the infringers of copyright work on graffiti, who copy such graffiti without the author’s permission in their movies or advertisements, won’t be able to claim the defence of fair use since the reproduction of these work are mostly for commercial benefits and the substantial amount is copied.

After careful examination of legal and illegal graffiti artworks, the author opinionates that graffiti artwork shall only be entitled to copyright protection when it is legally created under proper authorisation. If the graffiti is produced illegally, irrespective of its beauty or originality, it should not be entitled to copyright protection as it would be violative of the very tenets on which our society is founded.

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342 2012 SCC 37
GENESIS OF THE CONSTITUTIONAL SIN: ARTICLE 370

By Manas Sharma and Kushagra Kaul
From Rajiv Gandhi National University Of Law, Punjab

Introduction
It was hailed as a baneful legacy of the Nehruvian past. Towering leader and one of the members of the interim cabinet, Shyama Prasad Mukherjee gave up his life for the cause of abrogating it, he directed his tirade against the then central government and said: “Ek desh mein do vidhaan, do pradhaan aur do nishaan nahi challenge” (A nation can’t have two constitution, two premiers and two flags).
Senior Congress leader Janardan Dwivedi cited Socialist stalwart Ram Manohar Lohia who had adopted a similar stance against it and backed the government’s move to put an end to it. The critical questions that need to be answered is that how this article came into being? What were the compulsions? Whether it enshrines the constitutional principles or not and moreover whether it was necessary to abrogate it?

Article 370: At the very inception
The temporary and transitory provision of the Constitution, which was the necessity at that time was given an unchangeable status because of the erroneous judgement of the then establishment. The ruler of Kashmir, Maharaja Hari Singh convinced the Indian government to surrender only three jurisdictions namely, external affairs, defence and communications. The mistakes of the governments can be summed up as follows:

- The prime minister made the error of not using effective methods like Home Minister did with the Nizam of Hyderabad to merge the state unconditionally and without any residuary powers.
- Under the pressure of Lord Mountbatten, the prime minister agreed that final decision to accede would be ratified by the state’s constituent assembly.

The said article was only intended for temporary period, that is “until the ratification of the Instrument of Accession by the state’s Constituent Assembly”. This article, in brief specifies that except for defence, foreign affairs and communications the Indian Parliament needs state government’s concurrence for applying other laws. In this manner, state executive was given special powers, citing which the premiers of the state justify and emphasise Jammu and Kashmir’s special status.

The Constituent Assembly of Jammu and Kashmir formalized the accession of the state in the year 1954. Later on, as the constitution was adopted in 1956, its section 3 read: “The state of Jammu and Kashmir is and shall be an integral part of the Union of India”.

Effect of Art 370

345 Art 370, Constitution of India

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343 Thakur, A. (2019, August 5th) J&K flag to be removed permanently after revocation of special status for J&K, India Today.
Albeit the central government extended many of its powers over the state since 1953, retention of Article 370 has produced many detrimental consequences, both for the state and also for the country. Similar to the demand of referendum, it became a constant source for nurturing the mindset of separatism among a section of Kashmiri leaders, undoubtedly at the instigation of their masters across the border. Under article 19 (1)(e) and (g) of the Indian Constitution, a citizen is free to reside and settle in any part of the nation and to practice any profession or carry on any trade, occupation or business. But Article 370 deprives Indians from rest of the nation to settle permanently in Jammu and Kashmir. It is also detrimental to the rights of the women born in the state. If a woman, who is a permanent citizen of the state, marries a man from outside the state, she is destined to lose her property. She is even deprived of her ancestral property. But a Kashmiri man who is a permanent resident can own property and bequeath his property to his children even if he is married to a woman who is not a permanent resident. Thus, the said article is gender biased and encourages patriarchy. Though these were the products of Article 35A, it was the corollary of Article 370. As a matter of fact, the said proviso was struck down in the landmark judgement, State of Jammu and Kashmir vs Dr Susheela Sawhney, the three judges bench held that: “In view of the majority opinion, we hold that a daughter of a permanent resident marrying a non permanent resident will not lose the status of permanent resident of the state of Jammu and Kashmir.”

In the landmark judgement, T.M.A. Pai Foundation and Ors. Vs. State of Karnataka and Ors. Under this case the Hon’ble Chief Justice India B.N Kirpal observed: “Linguistic and religious minorities are covered by the expression “minority” under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.”

But in the state, the government has neither notified the minorities (the constitution of the state is also silent on the issue) nor the National Commission for Minorities Act,1992 is applicable in the state (because of the said article). The byproduct is that when the National Minorities Development and Finance Corporation in 2011 constituted Jammu and Kashmir Entrepreneurship Development Institute to channelise the loan schemes, the beneficiaries of the said schemes were Muslims, Sikhs, Buddhists and Christians (excluding Hindus). Thus, the state government had covertly recognised Hindus to be in majority and Muslims to be in Minority, disregarding the census report of 2011 which estimated the population of

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347 Art 19, Constitution Of India
349 State of Jammu and Kashmir vs Dr Susheela Sawhney, AIR 2003 J K 83
349 State of Jammu and Kashmir vs Dr Susheela Sawhney, AIR 2003 J K 83
349 State of Jammu and Kashmir vs Dr Susheela Sawhney, AIR 2003 J K 83
Muslims in the state to be around 68.31%.  

**Opposition to Art 370**  
The most vocal critic of the article was none other than Bharatiya Jan Sangh, the precursor of Bharatiya Janata Party. Perhaps no other party had ever incorporated the issue in its election manifesto and even with such regularity. In the party’s resolution of 1966, the Jana Sangh said: “Jammu and Kashmir is an integral part of India. Pakistan has aggressively occupied one third of the state since 1947. To get that aggression vacated and secure the liberation of Pak occupied part of the state is the duty of the government of India…. The question of the constitutional integration of that part of Jammu and Kashmir with the rest of India is a purely internal affair of India. The temporary and transitional article 370 of the Indian Constitution on the basis of which Jammu and Kashmir has a separate constitution of its own is a big hindrance in the way of such integration. It has created a psychological barrier between the people of the state and their counterparts in the rest of India, which has been exploited all these years by anti-national element and Pak agents to the detriment of India’s vital interests. Its abrogation and application of the Indian Constitution in full to Jammu and Kashmir, is an essential prerequisite for the normalization of the situation within the state”.

Even J.L Nehru, ultimately realised the long lasting harmful effects of article 370. Perchance he was more influenced by the repercussions of the pacifist policies that his regime followed. Thus on 27 November 1963, he said in Lok Sabha: “Our view is that Article 370, as is written in the constitution, is a transitional, in other words a temporary provision… as a matter of fact, as the Home Minister has pointed out, it has been eroded, if I may use the word, and many things have been done in the last few years which have made the relationship of Kashmir with the Union of India very close. There is no doubt that Kashmir is fully integrated. So we feel that this process of gradual erosion of Article 370 is going on…”

**Long Term effects**
The country was shell shocked on 26 June 2000, during the NDA rule, when the Jammu and Kashmir assembly adopted a report of the State Autonomy Committee (SAC) and urged New Delhi to implement it forthwith. The SAC recommended complete reversal of situation in J&K to its pre 1953 status, by restoring to the state all subjects for governance except defence, foreign affairs and communication.

The Union Cabinet met on 4th July 2000 and the state autonomy resolution. The then Home Minister, LK Advani told the media: “Its acceptance will set the clock back and reverse the natural process of harmonising the aspirations of the people of the state with integrity of the nation…If the government were to accept it, it would encourage trends that will not be conducive to national unity… there is a clear case for devolution of more financial and administrative powers from the centre to the states’, the NDA government favoured this for all the states and not for J&K alone. In any case devolution of greater powers to states was very different from granting

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353 Government Of India, (2011)Office of the Registrar General & Census Commissioner, India  
355 Nehru, J. (1963, November 27th ), Lok Sabha  
autonomy to states. I also reminded that the issue of restoring the constitutional situation in J&K to its pre 1953 status had been discussed and settled a quarter century ago, in the 1975 accord between Indira Gandhi and Sheikh Abdullah. This agreement had clearly affirmed that provisions of Constitution of India already applied in the state of J&K without modification or adaption are unalterable.”

Sardar, Nehru and Gopalaswamy: Final Incorporation of Article 370

In his memoirs, LK Advani had wrote in detail how the three actors played their respective roles to incorporate the said article. Advani writes: “One day in early 1990s, I went to the parliament library to search for archival records about decades on his subject…In the course of longish statements on Kashmir made in Lok Sabha on 24 July 1952, Nehru defended the Article… He went on to add that the matter relating to J&K position in the constitution was clinched in November 1949 and that it was Sardar Patel who was all the time dealing with it.”

The statement made by Nehru was incorrect. Sardar’s private secretary unveiled the truth as to the then PMs statement. V Shankar writes in the two volume book: “Sheikh Abdullah didn’t trust the Indian Government and while he accepted overlordship of Republic of India, in fact he wanted J&K to be vassal state not an integral part of India. Nehru entrusted the task of inserting the provisions pertaining to J&K to the then defense minister Gopalswamy Iyengar. He first presented the proposals to congress parliamentary party. No one could predict the extent of opposition that the said provision could invite. Shankar further writes: “It provoked a storm of angry protests from all sides and Iyengar found himself a lone defender with Maulana Azad an ineffective supporter.” Thus, their was resounding protests against the article within the CPP. According to Shankar: “In the party, there was a strong body of opinion which looked askance at any suggestion of discrimination between J&K state and other states as members of the future Indian Union and was not prepared to go beyond certain limits in providing for the special position J&K. Sardar was himself fully in accord with his opinion, but due to his usual policy of not standing in the way of Pandit Nehru and Gopalaswamy Iyengar, who sorted out problems in their own light, he had kept his own views in the background. In fact, he had not taken any part in framing the draft proposals with the result that he heard the proposals only when Gopalaswamy Iyengar announced them to Congress Party”

Iyengar was completely taken aback, he didn’t expect such kind of opposition. Neither he enjoyed political support nor he had moral standing. He rushed to Sardar for help. Shankar recounts this experience as: “Sardar heard him and lapsed into silence. To my query as to what reply he would like to give, he said he would like to think it over. Later in the evening, he rang me up…

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358 See Supra note 15
360 See Supra note 17
and told that he had sent for Satyanarayan Sinha, the Congress party chief whip, and asked him to convene a meeting of party executive, together with some of prominent stormy petrels and they would discuss the matter; he wanted me to be present at the meeting. The meeting was held at the appointed hour and Maulana Azad was also present. The meeting was one of the stormiest I have ever witnessed. The opinion in opposition to Gopalaswamy’s formula was forcefully and even militantly expressed…even Maulana was shouted down. It was left to Sardar to bring the discussion down to the practical plane and to plead that because of international complications, a provisional approach alone could be made…”

Later on it seemed that INC kowtowed to Sardar’s will. This can explain why there was little resistance in constituent assembly because the steam had already been let off. In Sardar’s entourage, the most affected was none other than Shankar, he even turned down offer of lunch given by Maniben (Sardar’s daughter). After constant insistence he agreed for a talk, Shankar recounts the conversation as: “So you’re annoyed with me for accepting Gopalaswamy formula (Sardar spoke) … I was deeply concerned at the situation…If Jawaharlal were here I could have had it out with him. But how could I do so with Gopalaswamy, who was only acting under orders? If I did, people would have said that I was taking revenge on his confidante when he away. Gopalaswamy had appealed to me for help. How could I have let him down in the absence of his chief? … He (Sardar) conceded the validity of criticism but pointed out the delicate international position of the state and the issue of relationship with India… He also said that neither Sheikh Abdullah nor Gopalaswamy was permanent. The future would depend on the strength and guts of the Indian government and if we cannot have confidence in our own strength we do not deserve to exist as a nation”

Analysis
Thus, one can safely conclude that July speech of Nehru was an ill return to Sardar for magnanimity he had shown in accepting his point of view against his better judgement. The reason why he gave the statement is still enshrouded in mystery and it can be safely left to the readers to speculate.

On 5th of August 2019, Indian Government effectively revoked the article. With the benefit of the hindsight, one can say that the act was neither masculine nor agile but was belated fulfilment of nationalist aspirations. It was not only required for national cohesion but also to create national consciousness amongst Kashmiri people. The repercussions, feared by many may or may not prove themselves to be true, but the truth lying before us is that, Kashmir the land of Kashyap rishi has become more Indian than ever.

361 See Supra note 17
362 See Supra note 17
363 See Supra note 15

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LAW OF SURROGACY

By M. Nagasai
From Damodaram Sanjivaya National Law University

DEFINITIONS:

According to the black’s law dictionary the word Surrogacy is defined as “the process of carrying and delivering a child for another person”\textsuperscript{364}

The word surrogate mother is defined as “a woman who carries out the gestational function and gives birth to a child for another; especially a woman who agrees to provide her uterus to carry an embryo throughout the pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of a child.”\textsuperscript{365}

The word surrogate agreement is defined as “a contract between the person(s) availing of assisted reproductive technology and the surrogate mother” under sec. 2(cc), ART bill 2010. In simple terms surrogacy agreement means a “comprehensive document that lays foundation for governing relation between the commissioning couple and the surrogate including rights, liabilities, responsibilities details about the need for surrogacy, purpose and situation of both parties, the terms under which the surrogate has agreed, compensated, payment schedule etc...”\textsuperscript{366}

Surrogacy is the process of in-vitro fertilisation and transfer of embryo into the womb of another woman (surrogate) to be carried for nine months through birth. History is crammed with instances of such acts and many religions and civilisations upholding surrogate mothers with adulation for their noble services of mankind. Modern surrogacy, however, found mention only as recently as late 1970’s when lawyer Noel Keane, brokered the first official legal agreement between a couple\textsuperscript{367}

TREND OF SURROGACY:

It’s her egg and his sperm, and I am just the oven its totally their bun these are the words said by rooabe buffay a character on the popular American sitcom friends as she explained the process of being a surrogate in a speech in 1998. With this surrogacy has become a popular as a common and trendy solution for developing a family.

BACK GROUND:

Surrogacy is gradually becoming a mainstream method of creating a family. But the idea of surrogacy dates back to biblical times. The book of genesis Abram’s wife Sara could not conceive a child so she gave her husband her maid, Hagar, saying “the lord has kept me from bearing children. Have intercourse, then with my maid; perhaps i shall have sons through her.”\textsuperscript{368}

\textsuperscript{364} Surrogacy, BLACK’S LAW DICTIONARY 1674 (10th ed.2009).
\textsuperscript{365} Id. 1168.
\textsuperscript{366} Sonali Kusum, Legal Glitches Facing Surrogacy Agreement in India (Aug. 8 2019 8:00PM)
http://docs.manupatra.in/newslineline/articles/Upload/ CFC0FA22-6E4C-456D-A920-D069C37A118F.2- b__civil.pdf
\textsuperscript{367} Santosh A. Shah, the Surrogacy Bill 2016 a Boon or Bane? (Aug. 7, 2019, 9:30PM)
http://www.livelaw.in/surrogacy-bill-2016-boon-bane/
\textsuperscript{368} Izabela Jargilo, Regulating the trade of commercial surrogacy in India, 15 J.INT’L BUS.& L. 337,360(2016).
REASONS FOR INDIA’S POPULARITY IN SURROGACY

India is stated as the top destination for the fertility tourism. High quality health care, western trained doctors and low medical costs make India attractive to would be western parents. Another reason for India’s popularity with infertile couples is the relative scarcity of laws regulating reproductive technologies. In 2005 Indian council of medical research (ICMR) has drafted national guidelines to regulate fertility services.

Since the 1970s, when in vitro fertilization (IVF) first made it possible for a women to carry a child genetically unrelated to her governments have grappled with the complex legal, moral and ethical issues raised by IVF surrogate motherhood.369

TYPES AND DEVELOPMENT OF SURROGACY:

Surrogacy is categorised into two categories. They are: traditional surrogacy and gestational surrogacy. To many, surrogacy may seem like a radical idea. While there are always changes within the legal and medical arenas of gestational surrogacy, traditional surrogacy has been practiced for thousands of years. In fact, the bible even cites an ancient instance of traditional surrogacy in Genesis – Sarah, who was infertile, requested that her handmaiden, Hagar, carry her husband, Abraham’s, child.

While traditional surrogacy has been practiced for ages, gestational surrogacy was developed much more recently. In 1978, the first in vitro fertilization (IVF) baby was born. Just five years later, in 1982, the first baby from an egg donation was born.

The combination of these two innovative technologies resulted in the emergence of gestational surrogacy, which was first performed in 1985 and has grown exponentially in popularity over the past 20 years.

FIRST LEGAL HURDLE OF SURROGACY:

In 1986, surrogacy encountered its first real legal hurdle when upon giving birth to the child; a traditional surrogate decided that she wanted to keep the child. A two-year-long legal battle between the surrogate and the intended parents eventually resulted in the intended parents retaining custody.

As the practice of gestational surrogacy continued to grow, this landmark case, referred to as ‘the Baby M case,’ sparked many legal questions in many countries around the world. Today, commercial surrogacy is legal in most U.S. states, and a handful of countries including India, Russia, and Ukraine; however, intended parents from countries where surrogacy is illegal may travel abroad to legally have a child through surrogacy.

SPECIAL PROGRAM OF ASSISTED REPRODUCTION:

In 1999, surrogacy took another step forward with the development of the Special Program of Assisted Reproduction (SPAR). This program allows an HIV-positive man to become the biological father of his children without transmitting the disease.

Even more recently, in 2011 several surrogacy records were broken when the oldest-ever surrogate mother, 61, carried her own grandchild. Surrogacy, both traditional and gestational has aided families for centuries.

The practice has developed from a rarely documented occurrence thousands of years ago, to a rapidly growing and viable option for having children. In fact, we just celebrated the birth of our 1500th baby through our surrogacy and egg donation programs! At this pace, we can only imagine what the future holds for surrogacy.

ABSENCE OF LAW:
No Indian law prohibits surrogacy and so surrogacy agreements are governed by the ordinary contract law i.e. the Indian contract act 1872 and the enforceability of any such agreement is within the domain of Indian civil procedural laws.

In the absence of any law governing surrogacy the Indian council of medical research (ICMR) had issued guidelines in 2005 to check the malpractices in India but these guidelines being non statutory are not mandatory, do not have compulsive force and so not enforceable and not justiciable in the court of law in India.

CASE BEFORE SC:
In a case baby Manji Yamada v. Union of India and another judgement today the Supreme Court held that commercial surrogacy is legal in India. In paragraph 5 of the judgement it stated that the word surrogate was derived from the Latin word subrogate which means appointed to act in the place of it also defined traditional surrogacy (also called as straight method), gestational surrogacy (also called as the host method) altruistic surrogacy, commercial surrogacy etc.

Where in the paragraph 9 of the judgement Supreme Court stated that this medical procedure is legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms “wombs for rent, “outsourced pregnancies”, or baby farms”.

ROLE OF SURROGATE:
The surrogate in India continues to fulfil her role as a gestate according to the surrogate bill of 2018. In keeping with the insistence on gestational surrogacy, which makes the use of IVF and other assisted reproductive technologies mandatory, the current Bill is faithful to the Indian Council of Medical Research’s Draft Assisted Reproductive Technology (Regulation) Bill, 2010. The Assisted Reproductive Technology (regulation) bill 2010 has governed the practice of surrogacy till the Surrogacy Bill of 2016 banning commercial surrogacy comes into effect.
Determination of citizenship has become complicated because of this international surrogacy as different jurisdictions have different approaches. The majority of the nationality laws depicting citizenship are often interpreted in such a way as to exclude commissioning parents from becoming legal parents of a child born overseas via surrogacy, especially in cases of commercial surrogacy unless the country has legalized commercial surrogacy. So in order to 161ardhan this problem the countries are categorized according to their legal regime on surrogacy.

**CATEGORY A:** countries where commercial surrogacy is legally permitted. India, Ukraine, Russia, panama, Thailand, some states of USA etc…. have adopted laws to synchronize commissioning parent and surrogate born child citizenship.

**CATEGORY B:** countries where commercial surrogacy is restricted, but altruistic surrogacy (born children of their citizens) is usually allowed in the countries of Canada, UK, New Zealand, Israel, Australia etc…

**CATEGORY C:** countries where surrogacy is entirely prohibited. France, Germany, china, Spain, Japan, etc… are the countries where surrogacy is entirely prohibited.

Indian surrogacy laws make it illegal for foreign intended parents to complete a surrogacy in India. The only people who can complete a commercial surrogacy in India today are Indian intended parents who have been married for at least five years.

Indian surrogacy law was passed that made commercial surrogacy illegal and only allows altruistic surrogacy for needy, infertile Indian couples and requires intended parents to be married for five years and have a doctor’s certificate of their infertility. Restricts women to being surrogates only once, and only if they are a close relative of the intended parents, are married and have a biological child, Bans single parents, homosexuals and live-in couples from surrogacy.

Commercial surrogacy has been legal in India since 2002. India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost.

Indians clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK.

**DECISION OF SC ON COMMERCIAL SURROGACY:**

Surrogacy in India is relatively low cost and the legal environment is favourable. In 2008, the Supreme Court of India in the Manji’s case (Japanese Baby) has held that commercial surrogacy is permitted in India.

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with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India.

At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

**LAW COMMISSION REPORT:**

The Law Commission of India has submitted the 228th Report on “Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy”.

Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear a child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes. This is one of the suggestions made by the law commission on surrogacy.375

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375 Legality, surrogacy laws India, (Aug. 11 2019 7:00PM)
http://surrogacylawsindia.com/legality.php?id=%207andmenu_id=71
376 Prabha raghavan, surrogacy bill useless without ART bill; committee to Rajya Sabha, the economic times (Aug. 11 2019, 6:30PM)
SURROGACY BILL 2019:

The Lok Sabha on August 5, 2019 passed the surrogacy (regulation) bill 2019. It was introduced by Union Health Minister Harsha 163ardhan. The bill essentially seeks to regulate surrogacy in India while imposing an absolute prohibition on commercial surrogacy.

While the bill allows altruistic surrogacy, a selfless arrangement where only medical expenses and insurance cover are provided to the surrogate mother, and there is no room for any other monetary reward. The bill also provides for constituting national surrogacy board and state surrogacy boards for the regulation of surrogacy.

The bill also provides for the Eligibility criteria for a surrogate mother, protection of surrogate child, offences and penalties for the major issues covered under the surrogacy.378

The Rajya Sabha has not yet passed the bill and once it was passed then the commercial surrogacy is completely banned and only altruistic surrogacy will be allowed. So let's wait for the consent of Rajya Sabha.

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ANIMAL TORMENT- ILLEGAL UTILIZATION: LOOPOLES IN THE PRESENT LEGISLATION

By Nikhil Parakh and Sejal Makkad
From Amity Law School, Amity University, Chattisgarh

"One of the most dangerous things that can happen to a child is to kill or torture an animal and get away with it."
- Anthropologist Margaret Mead.

I. ABSTRACT
India is a country which has witnessed the respect for animals since ages. In our historical times we had a huge respect for the animals whether stray or pet & wild or domestic. In our story tales like Panchatantra’s we have seen a huge respect for animals.

Despite having such a great history in modern times, we are just forgetting our beliefs and respect for these beautiful creatures of almighty. There are very inhuman conditions for these animals throughout the nation. The social media is flooded with news and clips showing the inhuman behaviour of young generations. The major flaw is in our laws and policies which are not very much strict in nature. The Prevention of Cruelty to Animals Act was passed in 1960 with the aim of curbing atrocities towards animals but, it has clearly failed to keep up with the times. Violations under this act come under the category of non-cognizable bailable offences, which roughly translates into the fact that violators usually get off only with a fine. None of the recent governments has made any efforts to amend the archaic law.

There are various issues attached with the problem of cruelty to animals like Cosmetic testing on animals, neglect of stray dogs after the procedure of birth control, Keeping animals in battery cages and many more.

The paper is inclusive of the change in behaviour of humans from past to present towards animals. The loopholes in the act of 1960(mentioned above) along with the solutions. Also, the exigency for new legislations. The inhuman behaviour by the corporates towards animals in different ways. The authors will also provide with suggestions to make the conditions better for animals.

Keywords: animals, cruelty, loopholes, corporates

II. RESEARCH QUESTIONS
1. How are present Indian Laws being a big faiure for the protection of animals from cruelty and what are the loopholes?
2. What steps are needed to protect the animals from such cruelty?
3. What are the needs for enacting new law?
4. How the companies are responsible for animal cruelty?

III. RESEARCH OBJECTIVE
The object of the study is to find the loopholes in the present law related to animals and find solutions to them so as to decrease the percentage of cruelty with animals.

IV. RESEARCH METHODOLOGY
The authors have done this research which is truly based on qualitative research and secondary sources to gather the information to achieve its objective in this research.
V. INTRODUCTION
The cruelty to which animals are being subjected is increasing day by day. The poisoning chemicals which is being fed to animals to reduce their numbers is being common. The creatures which provide humans with many resources necessary for survival, are being treated in a cruel manner. Unnecessary testing of products on animals results in their deaths most of the times. The victims of rape are not only the humans but also the animals who are not even able to speak their hearts out. In 2018, a pregnant goat was gang raped by 8 drug addicts after which she died. This kind of inhuman behaviour is an example of decline of humanity. Such acts are being performed on a high ratio and many animals die such deaths daily.

In India, The Prevention of Cruelty to Animals Act, 1960 is the legislation related to animal cruelty. In this legislation, the sections define the basic terms as well as many other important aspects have been covered under it. There are some loopholes due to which the crimes related to animals are increasing at a high pace. Some of the provisions are not very strict due to the law is not being implemented properly. The punishments, charges, grounds etc include some transformation to cope up with the present-day situations.

The young minds of the nation are using animals in a wrong way for their profitability. The use of animals by different kind of industries is also a kind of cruelty. Illegal killing of animals for the purpose of profitability of the corporates is accusing a hug loss of creatures. The implementation of law is null due to which the criminals are getting wings. The loopholes in the law are necessary to be filled along with the enactment of fresh legislation in relation to stray animals.

VI. INHUMANE BEHAVIOUR BY HUMAN BEINGS
In India, some animals are being treated as gods and are believed to have spiritual powers. In the ancient times, the animals have been mentioned in some of the holy books too. People were concerned and respected animals. There was a spirit of humanity among humans in relation to animals. Along with the time, people started looking for profits in everything which included animals too. The corporates started cages animals for their profits and testing.

Presently, mainly instances have been seen where people have been doing acts with animals just for fun. Such acts include raping female animals, burning, beating, cutting, poisoning of them. People have lost their religious beliefs are more concerned about their own lives. The rats which are said to connected with Lord Ganpati are being used by companies for their product testing. Goats and cows give us give are raped brutally. Dogs, best friends of humans are being burnt, killed by the youngsters just for fun.

Such instances are clearly the cases of animal cruelty and are to covered under the laws related to animal cruelty. The only way to get rid of such crimes is to have strict laws against them. The strictness of laws is the only way which can stop people and their cruelty. The beliefs of people need to be restored in order to save animals. The awareness needs to be increased too.

379http:// www.news18.com
VII. LOOPHOLES : A PATHWAY TO CRIMES

The Prevention of Cruelty to Animals Act, 1960 is the legislation which governs the animal related crimes in country. This was first enacted animal law of India and also brought many important provisions but, there are some loopholes which need to be corrected to decrease the crimes related to animals. In July 2018, a man was taken into custody as he was caught having sex with a female dog. The dog was later rescued and was taken to hospital. Though the man was alleged to be charged under Section 377 of Indian Penal Code, 1860, the Act of 1960 itself needs to include this as crime to make it a crime separately against animals. Section 11 of the Act includes many acts which are to be treated as cruelty but, rape and having unnatural sex with animals by humans is not included under it. The section should also make a sub-section making it as a crime with grievous punishment.

Section 11(o) of the act of 1960, includes punishment for both offences but, the penalty for the former one is not sufficient. The promotion of such crimes should be treated as abetment to the crime and should be treated equally as the commission as the fine of such ales amount will encourage people to promote others for committing such offences of shooting animals.

Section 17 of the previously mentioned act deals with the rules and regulations regarding the experimentation of animals by the companies for testing their products. In 2017, it was discovered by an NGO that 21 beagle dogs caged for scientific experiments and were subjected to pain and cruelty.382 As mentioned in Section 17(e) states the penalties which are not sufficient for the humans to make guilty of their offences.

Chapter V of the act deals with the use of animals in the shows and rules and regulations related to them. The punishments and fines in these cases are also less. The main loopholes are in the value of fine due to which people are not taking their actions and crimes and are not following the law. Such loopholes need to be sorted and amended.

VIII. EXIGENCE FOR NEW LEGISLATION

The PCAA, 1960 is the central governing act for non-wildlife/other animals in India. The law provides for various conditions to which the animals are subjected along with rules and regulations. The penalties and punishments are also mentioned according to the crime committed with the animals. The act is not being implemented properly and ahşs many loopholes due to which the crime rate is increasing. The violation of law is taking place due to which animals are being subjected to more cruelty every day. The4re has been a considerable increase in

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380 Unnatural offence. —Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

381 promotes or takes part in any shooting match or competition wherein animals are released from captivity for the purpose of such shooting; he shall

382 https://timesofindia.indiatimes.com
the number of deaths of animals unnaturally.

The Draft (Animal Welfare Act), 2011 (DAWA) has been drafted in concern with the animals. It is more comprehensive and detailed in terms of the crimes and cruelty towards animals. The exigency for having new legislation is a result of the violations of the former one. The improper or null implementation of the laws by the individuals have increased the need for new and strict legislation. This draft is also concerned with the welfare of different animals and this in also includes the working of slaughter houses and cruelty of animals in them. The penalties have been increased keeping in mind the irresponsible behaviour of people. Also, many new points related to committees and their constitution have been inserted to bring more uniformity and simplicity in the working. The passing of the act will bring a considerable change in the human behaviour.

IX. TESTING AND TORTURING OF ANIMALS BY CORPORATE

The products we use in today’s world are being tested on the cost of one’s life. The products like lipsticks, shampoo, hair colours and many other beauty products are being tested on animals to check the effects of the chemicals used to manufacture it. These tests are majorly done on rabbits, guinea pigs, hamsters, rats and mice. The company puts their product on their eyes and on skin to see the reactions and collect data for their research. Pain relief isn't provided to animals on the premise that it might interfere with take a look at results, and the animals used are almost always killed at the end of an experiment. However, these animals get blind and suffer huge skin infections due to the chemicals and they end up in losing their life. The use of animals for cosmetics testing was instituted in the 1940s in response to serious injuries suffered by people who were exposed to unsafe beauty products. The Chinese government conducts obligatory animal tests on all cosmetic merchandise foreign into the country. The government may conduct animal tests on things force from store shelves. Therefore, albeit a cosmetics company doesn't take a look at their merchandise or ingredients on animals, if they sell their products in China, they cannot be considered cruelty-free. Cosmetics tests performed on animals are:

Skin and eye irritation tests where chemicals are rubbed onto the shaved skin or dripped into the eyes of restrained rabbits without any pain relief. Repeated force-feeding studies lasting weeks or months to seem for signs of general ill health or specific health hazards like cancer or birth defects.

Widely condemned "lethal dose" tests, within which animals' area unit forced to swallow massive amounts of a take a look at chemical to work out the dose that causes death.

X. AVOIDANCE OF ANIMAL TESTING

Modern non-animal tests represent the terribly latest techniques that science has got to supply to confirm the security of recent cosmetic merchandise and ingredients. These alternatives test area unit usually faster, cheaper and more reliable than outdated animal tests, producing results that are more relevant to humans and better able to predict how cosmetic chemicals will react in the human body.

383 https://www.hsi.org
More than forty non-animal tests are valid to be used. For example, there are a number of skin tests available that use human reconstructed skin, such as Epidermis and EPISKIN, as well as the “3T3 NRU” test for sunlight-induced “photo toxicity,” and the Bovine Cornea Opacity and Permeability test for eye corrosion. There are a unit already several merchandise on the market that are unit created exploitation thousands of ingredients that have an extended history of safe use. Companies will guarantee safety by selecting to form merchandise exploitation those ingredients. Companies even have the choice of exploitation existing non-animal tests or finance in and developing different non-animal tests for brand spanking new ingredients. There are a unit nearly fifty non-animal tests that are valid to be used, with more in development. These trendy alternatives offer results that aren't solely additional relevant to individuals, however additional economical and cost-efficient. Advanced non-animal tests represent the terribly latest techniques that science has got to supply, exchange noncurrent animal tests that were developed decades past.

Cruelty-Free campaign
The Humane Society of the United States and Humane Society International are unit committed to ending animal testing forever. Through our Be Cruelty-Free campaign, we are working in the U.S. and round the globe to form a world wherever animals now not ought to suffer to provide lipstick and shampoo. In the u. s., the Humane Cosmetics Act was introduced, which, if enacted, would prohibit animal testing for cosmetics in the U.S., as well as the import of animal-tested cosmetics. We’re also reaching out to legislators and regulators in Canada, Asia and South America to achieve lasting progress for animals. By operating with scientists from universities, private companies and government agencies worldwide, we are supporting efforts to develop an approach to testing that combines ultra-fast cell tests and sophisticated computer models to deliver human-relevant ends up in hours, unlike some animal tests that can take months or years.384

The Leather Industry
Leather will be made up of cows, pigs, goats, and sheep; exotic animals such as alligators, ostriches, and kangaroos; and even dogs and cats, who are slaughtered for their meat and skin in China, which exports their skins around the world. Because animal skin is generally not labelled, you never really know where (or whom) it came from. Most animal skin comes from developing countries like Republic of India and China, where animal welfare laws are either non-existent or not enforced. In India, a PETA investigation found that employees break cows’ tails and rub chili peppers and tobacco into their eyes so as to force them to induce up and walk once they collapse from exhaustion on the thanks to the butchery.

Buying leather directly contributes to factory farms and slaughterhouses because skin is the most economically important coproduct of the meat industry. Leather is additionally no friend of the setting, as it shares responsibility for all the environmental destruction caused by the meat industry as well as the pollution caused by the toxins used in tanning. With each combine of animal skin shoes that you just purchase, you sentence an animal to a lifetime of suffering. Instead,

384 https://www.humanesociety.org
you’ll select from many kinds of non-leather shoes, clothing, belts, bags, and wallets. Check out PETA’s cruelty-free clothing guide for great tips on where to find fashionable yet compassionate clothing. Fashion should be fun, not fatal.  

Pharmaceuticals industries abusing animals:

Pharmaceuticals industries are one of the major contributors to the cruelty against animals. The drug manufacturers test their drug on the animals to check the reactions of the drug on the living creatures as a result these creatures lose their life. The companies argue that it is necessary to check out the results of the drugs before it is made available to the public. They check whether the drug is toxic or not or it has some harmful effects. Laws and regulatory agencies worldwide currently require that medicines are tested on animals before clinical trials on humans. Millions of animals are used in these cruel tests worldwide every year. Dogs and monkeys are used to test the medicines and about 81% of these animals are dead due to the side effects of these drugs.

XI. SUGGESTIONS

The authors have some suggestions after doing the research on the topic. The suggestions are as follows:

a) There must be campaigns to promote awareness among people about the cruelty to which the animals are being subjected to.
b) The loopholes in The Prevention of Cruelty to Animals Act, 1960 should be sorted urgently.
c) The amendment bill for the same act should be passed as soon as possible.
d) There must a new legislation with more deep and complete provisions.
e) The fines and penalties must be increased along with the time.
f) There must be strict actions against the companies using and torturing animals unnecessarily.
g) There must be a mandate for the companies not to test their products on animals.

XII. CONCLUSION

The laws governing the animal cruelty cases in India are having some major loopholes, these need to be covered and sorted as soon as possible. The need for enactment of new law for other issues related to animals is also an urgent need for the country. The cruel behavior by humans is increasing and needs to be stopped so that we may not lose much animals. Those living beings are being considered less than others.

The major issue is with the corporates because their experimentations are harming animals and also, they are not following the laws. Such corporates need to be controlled and governed properly. The law in relation to animal prevention in corporates is a separate and foremost need. The filling of loopholes, enactment of new law and also the awareness among youngsters are the only ways to decrease the cruelty among animals.

385 https://www.peta.org
GENDER BIAS AT WORKPLACE IN INDIA: ITS CAUSES, EFFECTS AND CONSEQUENCES

By Nishtha
From Khalsa College of Law, Amritsar

ABSTRACT-

In developing world, women are better off than ever. We stand on the shoulders of the women who fought for the rights, we now take for granted. But knowing that things could be worse should not stop us from betterment. But the truth is Men still run the world. Women hold just 20% of the seats in the parliaments globally. This means that when it comes to making decisions that affects the world, women’s voices are not heard equally.

The principle of gender equality had been enshrined in our Preamble, Fundamental rights, Fundamental duties and Directive Principles. The Constitution not only grants equality of women but also empowers the state to adopt measures of positive discrimination in favor of women.

Globally, over 2.7 billion women are legally restricted from having the same choices of jobs as men. Of 189 economies assessed in 2018, 104 economies still have laws preventing women from working in specific jobs, 59 economies have no laws on sexual harassment in the workplace and in 18 economies, husband can legally prevent their wives from working.

This discourages girls from pursuing different careers and leadership. We hinder ourselves – by lacking confidence and pulling back cause of distress of being judged.

BRAVERY is something our society forgets when it comes to girls. By teaching girls bravery, we tend to raise a generation who knows how to hold power and be dauntless.

INTRODUCTION-

Globally, over 2.7 billion women are legally restricted from having the same choices of jobs as men. Of 189 economies assessed in 2018, 104 economies still have laws preventing women from working in specific jobs, 59 economies have no laws on sexual harassment in the workplace and in 18 economies, husband can legally prevent their wives from working.

We need to acknowledge the fact that our condition is far better than women in countries where basic civil rights are not available to women and we stand on shoulder of the suffragettes, who protested for our rights. But knowing that things could have been obnoxious should not stop us from achieving higher and moving forward. The verity is that men still run the world. All top industries, C-level jobs, governments of evolved and advancing...
countries are being lead by men that manifests that when it comes to making real impactful decisions in the world, women voices are not being heard\footnote{“The legendary investor Warren Buffet - states generously that one of the reasons for his great success was that he was competing with only half of the population.”}. Women face hindrances like chauvinism, sexual harassment and discrimination at workplaces, which are the evil social practices that had been prevailing in our society for so long. When law recognizes the harms inflicted by social practices, it is intervening in the social world it is describing, both enabling and constraining challenges to the social order of which the practices are a part. For this reason, the language of discrimination is a specialized language, one that describes the social world in selective ways.

The recent periodic labour force survey by the ministry of statistics have shown that the unemployment rate was the highest among urban females at 10.8% while it was at 3.8% among rural females in the financial year 2019. Women face harder choices between professional and personal life success. Recent studies showed that, of married senior managers, $\frac{2}{3}$rd of married men have children and only $\frac{1}{3}$rd of married women have children. So the question is how are we going to fix this and how are we going to change these numbers? There are many significant factors that contribute to this problem but what I really want to emphasis is on how Law can assist in doing this and what we need legally to succour them at individual level and as a society. Under stereotypical roles men and women are often socialized in as breadwinner and homemaker respectively, these social roles contribute only half of our population and talent to be utilized. And as a nation, how are we going to succeed if half of the resources and talent have never been discovered or given opportunity to come forward?

Imagine if Career is nothing but a Marathon Race, a long tiring but a rewarding sport. There are two players in this race man and woman, who starting initially by arriving a starting line with equal potentials, stamina and zeal to succeed. The gun runs off and both of them starting running side by side. Male marathoner is being routinely cheered on “looking strong! On keep going” but female runner hear a different message “you know you don’t have to do this!” or “good start but you probably won’t be able to complete this”. The farther the race goes, the louder these cries grow for man to “keep going!” “You can do this”. But women hear more doubt about their efforts along the way. The voices repeatedly questioning them and their decision to keep running and then turn hostile along the way “why are you running when your child need you at home?” And if this continues whom do you think will succeed and quit under pressure?

\textit{The Constitution of India, 1950}

We had won our freedom struggle in 1947, and India had been declared republic for more than 69 years. Our Constitution came into force on 26th January, 1950. Since then various provisions has been enacted for providing the Rights of Women. \textbf{Article 14} states \textit{“State shall not deny to any person equality before law and equally protection of the laws within territories of India”}, this article unfolds that all persons and things in similar circumstances shall be treated alike both in privileges conferred and liabilities imposed. Hence it forbids all kinds of discrimination between persons employed under substantially in similar conditions and circumstances. \textit{Bhagwati, J.}, in \textit{Maneka
Gandhi case\textsuperscript{388} observed the principle of reasonableness in article 14 as “Article 14 strikes at arbitrariness in state action and ensure fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.” Article 14 read along with Article 15 and Article 16 embody facets of magnified grandeur of equality\textsuperscript{389}.

Article 15 (3) explains “Nothing in this article shall prevent the state from making any special provision for women and children”. This provision is evidence that our Constitution makers realize the need to protect women and strengthen their status in society. The apex court in Dattatraya Moiram more v. State of Bombay held that “as a result of the joint operation of Article15 (1) and Article 15(3), the State may discriminate in favour of women against men, but I may not discriminate in favour of men against women”.

Article 16(2) explicate “No person shall, on grounds only of religion ,race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the state”. The court recognized the need to bridge the gap between the constitutional prohibitions on sex discrimination in Article 16 and the actual law in practice\textsuperscript{391}. Feminist critiques of violence against women suggest that the issue of sexual harassment at work place should be seen in the larger context of patriarchy and gender hierarchies which women are constantly subjected to\textsuperscript{392}.

Article 19(1) (g) states “Right to practice any profession or to carry on any occupation, trade or business”. The Supreme Court in vishaka’s case\textsuperscript{393} held that one of the logical consequences of incidents of sexual harassment at workplace is the violation of the women’s fundamentals rights. This exposes them to hazard and places them at an unfair position Vis-à-vis other employees.

Article 21 elucidates “No person shall be deprived of his life or personal liberty, except according to the procedure established by law”. Gender bias has been recognized as an obstacle to the full realization of right to life under Article 21. Supreme Court held that offences like rape were acts of aggression which aims to degrade and humiliate women to make them feel inferior. These acts were crimes against basic human rights. The court further held that “the dignity of women cannot be touched or violated”, and therefore this article include the right of women to live with dignity and to lead a peaceful life\textsuperscript{394}. Yet in another case Subha Rao, J., held that “Right to personal liberty in Article 21 can be defined as a right to be free from restrictions or encroachments on the person, whether those restrictions or encroachments are directly imposed or

\textsuperscript{388} Maneka Gandhi v. Union of India, AIR 1978 SC 597
\textsuperscript{389} Velamuri Venkata Sivaprasad v. Kothuri Venkataswaralu, AIR 2000 SC 434
\textsuperscript{390} AIR 1953 Bom. 311 , in this case, reservation of women in the election were challenged constitutionally.
\textsuperscript{391} C.B. Muthamma, IFS v. Union of India(1979) 4 SCC 260, in this case married women were discriminated under service rules under Indian

Foreign Services (Conduct and Discipline) Rules(1961)
\textsuperscript{392} D.D. Basu Commentary on The Constitution of India Vol. 2 (ed.8th 2011)
\textsuperscript{393} Vishaka and Others v. State of Rajasthan, AIR 1997 SC 3011
\textsuperscript{394} Bodhisatwa Gautam v. Subhra Chakroborty, (1996) 1 SCC 90, in a case man married a girl under a false marriage and compelled her to undergo abortion twice,
indirectly brought about by calculated measures.”  

**CAUSES AND ITS EFFECTS**

The provisions under our Constitution can safeguard career-oriented women and will expedite an ambitious woman to start her own business and encourages all others to join them in the work field. But once she entered into workplace there are a lot of predicament that she faces regularly, (consciously or unconsciously), which creates hindrances in her career path. Despite all the initiatives women are not making at the top of any profession anywhere in the world. A woman faces complex choices between professional success and personal achievements.

**CATEGORIZATION OF THE PROBLEM**

She faces numerous complications which can be broadly categorized into the Three heads:-

1. **GLASS CEILING**: it is a metaphor that represents a barrier that prohibits women from advancing toward the top of a hierarchical corporation. While women continue to outstand men at educational levels, women after graduation often choose the fields that pay low incomes. Psychological difference between men and women often account up to 10% of wage difference. Then house chores and child care often falls more on women than men which lead to more gap between their wages.  

2. **GLASS ESCALATORS**: This can be expound as how more men are joining fields that were previously occupied mainly by women, such as nursing and teaching, and within these job fields, the men are riding ahead of women and going straight to the top, similarly as if they were on an escalator and a woman was taking stairs. Men are being offered more promotions than women and even though women have worked just as hard, they are still not being offered the same chances as men are in some circumstances.  

3. **SEXUAL HARASSMENT**: The behaviour characterized by the making of unwelcome and inappropriate sexual remarks or physical advances in a workplace or other professional or social situation. It’s a social practice that had corrupted our lives.

**HISTORICAL PROSPECTIVES ON THE PRACTISE, PROTESTS AND REGULATION OF GENDER BIAS**

Since the antebellum period, there has been public discussion of women’s vulnerability to coerced sexual relations at work. Women are often judged and responsible for their own ‘downfall’ because of they were promiscuous by nature. This socio-economic understanding of sexual relations shaped the movement’s response to the trial of domestic servant Hester Vaughn in the aftermath of the Civil War. Vaughn was fired by her employer when she became pregnant by him; she gave birth alone, ill, and impoverished, and was found several days later with her dead infant by her side, adjudged guilty of infanticide, and

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398 Black’s Law Dictionary, 7th ed., p.1379  
399 “Ain't I a Woman: Black Women and Feminism”, By Bell Hooks (1981)
sentenced to death\textsuperscript{400}. As Elizabeth Cady Stanton, Susan B. Anthony, and other woman's rights advocates publicized the Vaughn case, they pointed to a variety of gendered injustices that cumulatively sealed Vaughn's fate. For the woman's rights movement, the Vaughn case\textsuperscript{401} presented an occasion to protest the economic arrangements and social understandings that visited the judgment of death on Vaughn for a predicament the woman's movement judged society as a whole-and men in particular- culpable. The woman's rights movement responded to Vaughn's case with wide ranging social critique and an equally wide-ranging remedy. The movement drew on Vaughn's case to protest the injustice of women's exclusion from jury service and suffrage and, after persuading the governor of Pennsylvania to pardon her, turned the Vaughn episode in the direction of its larger quest for political empowerment.

The fusion of labor and feminist advocacy agendas in the progressive era bore critical fruit. For example, in 1916 socialist-feminist Emma Goldman elaborated the "legal prostitution" in her influential essay "nowhere is woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she would pay to keep a position in whatever line, with sex favors". Sexual harassment is 'discrimination on the basis of sex'\textsuperscript{402} (The doctrine of sex-plus)\textsuperscript{403}. In Harris v. Forklift systems\textsuperscript{404}, here the plaintiff worked as a manager of a company that rented heavy equipment to construction companies. And continually made the plaintiff the target of comments such as: "You're a woman, what do you know" and "We need a man as the rental manager."

These comments were interspersed with a variety of sexualized interactions. Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw, objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris 'and other women's clothing. And the Apex court acknowledged that sexual harassment is a discriminatory practice. Harassment at workplace is a practice that had negatively influenced our lives, institutional lives and semiotic lives.

In India before 1997, the law against sexual harassment non entia, any women facing sexual harassment at workplace had to lodge a complaint under either Section 354\textsuperscript{405} or Section 509\textsuperscript{406} of the Indian Penal Code, 1860. Medio Tempore, 405 Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

406 Word, gesture or act intended to insult the modesty of any woman,—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

\textsuperscript{400} Ellen Carol DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America.
\textsuperscript{401} Hester Vaughn v. U.S (1868)
\textsuperscript{402} Catharine MacKinnon's analysis in Sexual Harassment of Working Women
\textsuperscript{403} Doctrine of Sex-Plus: If the law against sex discrimination means anything, it must protect employment opportunities for those groups of women who most need jobs because of economic necessity. Judge Carswell, justified discrimination against such women by a peculiar doctrine of "sex plus," which claimed that discrimination which did not apply to all women but only to women who did not meet special standards—standards not applied to men—was not sex discrimination.
\textsuperscript{404} Harris v. Forklift Systems 510 U.S. 17
Bhanwari Devi case\textsuperscript{407}, in which a woman of low caste tried to prevent child marriage as a part of her work but was raped by the landlords of Gurjar community and didn’t get justice. After which Vishakha and other women’s group filled the PIL\textsuperscript{408} in Supreme Court resulting in \textit{vishakha guidelines} regarding workplace. It was for the first time in Indian judicial history, the court has recognized sexual harassment at workplace is a reoccurring phenomenon. The hon’ble Supreme Court took initiative to define it in a formal legal manner in \textit{Vishaka v. state of Rajasthan}\textsuperscript{409}. These guidelines were to be implemented until legislation is passed to deal with this significant issue. The aim of apex court was to ensure ‘\textit{Rule of Law}\textsuperscript{410}’, at work environment on one hand and completely eliminate situations or possible where the protector could abuse his trust and turn predator on the other. The person in charge of the workplace, in public as well as private sector, was directed to take appropriate steps to prevent sexual harassment. The guidelines are as following-

1. \textit{Duty of the Employer or other responsible persons in work places and other institutions:} It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. \textit{Definition:} For this purpose, sexual harassment includes such unwelcome behaviour (whether directly or by implication) as:
   
   a) Physical contact and advances;
   b) a demand or request for sexual favours;
   c) Sexually coloured remarks;
   d) Showing pornography;
   e) Any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these act is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. \textit{Preventive Steps:} All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

   a) Express prohibition of sexual harassment as defined above at the work

\textsuperscript{407} Smt. Bhanwari Devi v. State of Rajasthan, 1997(1)WLC 42
\textsuperscript{408} Public Interest Litigation
\textsuperscript{409} AIR 1997 SC 3011
\textsuperscript{410} The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.
place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee—woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings: Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action: Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism: Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee: The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its member should be women.

Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative: Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness: Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.
10. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the **Protection of Human Rights Act, 1993**.

The definition was closely in pari materia with that of CEDAW\(^ {411}\). In view of Vishaka guidelines, National Commission for Women (NCW) formulated a code of conduct for work place in 1998. This code was circulated amongst the apex bodies of the corporate sector like FICCI, ASSOCHAM, etc and to media.

**AFTERMATH OF THE CASE**

Referring to Vishaka guideline on sexual harassment, the Question of Fact was: Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment? Is physical contact with the female employee an essential ingredient of such a charge? Does the allegation that the superior tried to molest a female employee at the place of work, not constitute an act unbecoming of good conduct and behaviour expected from the superior? These are some of the issues besides the nature of approach expected from the law courts to cases involving sexual harassment which come to the forefront and require our consideration. The apex court in Apparel Export Promotion Council v. A.K. Chopra\(^ {412}\), held that “There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India”. And court accepted that even an attempt to molest meant sexual harassment and that outrageous behavior of the employee is sufficient enough to constitute sexual harassment and actual assault or touch is not necessary to prove it\(^ {413}\).

**RECENT INCIDENTS**

*Tarun Tejpal’s case*\(^ {414}\): Tehelka editor-in-chief Tarun Tejpal has been booked under section 354-A, Section 376 and 376(2) (k) of IPC. A female colleague had complaint of sexual assault and rape upon Tejpal. Police recorded the statements of victim, three witnesses and Tehelka’s former editor Shoma chadhury, sworn before a judicial magistrate.

*Justice A.K. Ganguli’s case*\(^ {415}\): A young lawyer on her blog accused a recently retired Supreme Court judge of sexually harassing her while she was interning with him in Delhi 2012. The chief justice of India took immediately actions. Constituting a three member panel. The

\(^ {412}\) AIR 1999 SC 625  
\(^ {413}\) Sexual Harassment at Workplace-Detailed Analysis of the Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013  

\(^ {414}\) Tarun Tejpal v. State of Goa (2012)  
\(^ {415}\) Justice Asok Kumar Ganguly is the former Chairman of the West Bengal Human Rights Commission and a former Judge of the Supreme Court of India who delivered judgment in some high-profile cases like the 2G spectrum case.
panel submitted its report which indicted justice for “unwelcoming behavior” and “conduct of sexual nature” towards the intern.

**Chief Justice of India alleged case**[^416]: The biggest event which shook the court this summer was the sexual harassment case of Chief Justice of India Ranjan Gogoi by a former court staff. After drawing criticism for the initial procedure adopted by the court in reacting to the allegations, the apex court constituted a committee to probe the allegations. Though the complainant chose to withdraw from the proceedings, citing lack of confidence in its impartiality, the panel continued the proceedings to give a clean chit to the CJI.

**Sexual Harassment at Workplace Act 2013**

As per the old maxim “*Ubi jus ibi remedium***[^417], the women rights against sexual harassment were given remedy when finally this act was formed. The act came into force in 2013, almost after 13 years after Vishaka guidelines came into existence. The highlight of the act is:-

- The Act defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.
- The Act also covers concepts of “*quid pro quo harassment***” and “*hostile work environment***” as forms of sexual harassment if it occurs in connection with an act or behaviour of sexual harassment.
- The definition of “*aggrieved woman***”, who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organised or unorganised sectors, public or private clients, customers and domestic workers as well.
- An employer has been defined as any person who is responsible for management, supervision, and control of the workplace and includes persons who formulate and administer policies of such an organization under Section 2(g).
- While the “*workplace***” in the Vishaka Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, the Act goes much further to include organizations, office, branch unit etc. in the public and private sector, hospitals, educational institutions, sports institutes, sports complex and any place visited by the employee during the course of employment including the transportation, etc.
- The Committee is required to complete the inquiry within a time period of 90 days. On completion of the inquiry, the report will be sent to the employer or the District Officer, as the case may be, they are mandated to take action on the report within 60 days.
- Every employer is required to constitute an Internal Complaints Committee at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level.
- The Complaints Committees have the powers of civil courts for gathering evidence.
- The Complaints Committees are required to provide for conciliation

[^416]: https://www.livelaw.in/top-stories/sexual-harassment-allegations-against-cji-144404

[^417]: Where there is right, there shall be a remedy.
before initiating an inquiry, if requested by the complainant.

- The inquiry process under the Act should be confidential and the Act lays down a penalty of Rs 5000 on the person who has breached confidentiality.
- The Act requires employers to conduct education and sensitization programmes and develop policies against sexual harassment, among other obligations.
- Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine of up to rupees 50,000. Repeated violations may lead to higher penalties and cancellation of licence or deregistration to conduct business.
- Government can order an officer to inspect workplace and records related to sexual harassment in any organization.
- Under the Act, which also covers students in schools and colleges as well as patients in hospitals, employers and local authorities will have to set up grievance committees to investigate all complaints. Employers who fail to comply will be punished with a fine of up to 50,000 rupees.

**LOOPHOLES OF THE ACT**

This act if implemented well would go a long way in protecting woman employees. Media coverage of the complaint against Tarun Tejpal, justice Ganguly or CJI alleged case have brought home the fact that most people are clueless about the stringent new provisions of sexual harassment of women at workplace act. The veracity is that several times repeated complaints about sexual harassment to immediate seniors and human resource department yield no interest. Frequently these complaints are pay no heed to, and on the odd junctures encourages as well. These complaints are even at occasions backed and supported by the companies by footing their ‘legal bills’. The definition of ‘aggrieved woman’ in the act doesn’t make a reference to victimization on part of the employer of the employee who has made the complaint, which is very common in such circumstances.

Some words like ‘verbal, textual, physical, graphic, or electronic actions’ should have been added in the definition of sexual harassment as the world is also covered with cyber crimes.

**CRIMINAL AMENDMENT**

Following 16TH December Delhi gang rape and subsequent protests, the government brought acts of sexual harassment under the criminal law. In Indian penal code, 1860 amendments for sexual harassment were made in Section 354(A): which states sexual harassment and punishment for sexual harassment-

1. (i) Physical contact and advances involving unwelcome and explicit sexual overtures; or
2. (ii) A demand or request for sexual favours; or
3. (iii) Showing pornography against the will of a woman; or
4. (iv) Making sexually coloured remarks;

Shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) Or clause (ii) Or clause (iii)

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418 Sexual Harassment at Workplace Act, 2013- Understanding Pros and Cons for Women
Of the sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

GOVERNMENT INITIATIVES-

The MSME419 ecosystem in India is an overflowing well of innovative ideas and creative solutions to a number of problems. But the aggregate of women entrepreneurs and business owners is much lower than male entrepreneurs. Governments at the central and state levels have launched financial schemes for micro units, which could go a long way in boosting women entrepreneurship like:-

1. Mudra Yojana Scheme
This general government scheme for small units is also applicable to women who want to start a small enterprise such as a beauty parlor, tuition center, tailoring unit, etc. It is also useful for a group of women who want to startup together. Loans from Rs 50,000 onwards and up to Rs 50 lakh are sanctioned under this scheme. Collateral and guarantors are required only if the loan amount exceeds Rs 10 lakh.

2. Mahila Udyam Nidhi Scheme
Offered by Small Industries Development Bank of India (SIDBI), this scheme provides financial assistance of up to Rs 10 lakh to set up a new small-scale venture. It also assists with upgrading and modernization of existing projects.

3. Stree Shakti Package for Women Entrepreneurs

It is offered to women who have majority ownership (over 50 percent) in a small business. The women also need to be enrolled in the Entrepreneurship Development Programmes (EDP) organized by their respective state agency. Under the scheme, an interest concession of 0.05 percent can be availed on loans above Rs 2 lakh.

4. Udyogini Scheme
Women entrepreneurs between the ages of 18 and 45, who are involved in agriculture, retail and similar small businesses, can avail loans up to Rs 1 lakh under this scheme. Further, her family’s annual income should be below Rs 45,000 in order to avail the loan.

ANALYSIS-

There are miscellaneous factors that lead us women to lean back rather than leaning in and focus on our career success. In all ways, (micro and macro), we hold us back and making it harder for women voices to be heard. The panacea I think to the problem is that “MORE WOMEN IN POWER”. But the question is how are we going to encourage women to pursue more leadership roles?

BRAVERY- Career progression depends upon taking risks and advocating for oneself traits that girls are discouraging from exhibiting, that explains why women academic results doesn’t translates into more women in top level jobs. ‘Trepidation’ is the root of so many barriers that women face. “Anxious of not being liked, distress of being judged, horror of failure, fear of being a bad draughts/mother/wife, timidity of not standing on the expectations of the society” is some examples. It’s more often observed that women are not focusing on having it all rather they are worried about losing it all, like losing their jobs, children’s health,

419 Ministry of Micro, Small and medium Enterprise

www.supremoamicus.org 180
families which creates a regular indecisiveness between becoming a good employee and a responsible parent. This trepidation is created from a norm that is infused in us since childhood to be phenomenal and to play safe. In a survey it was seen that men apply for job only if they meet 60% of qualifications while women apply for jobs only if they meet 100% qualifications. I solely believe that teaching a girl bravery early in their lives and careers when they have the most potential to create an enormous impact to their lives and lives of others is an answer. BRAVERY is something our society forgets when it comes to girls. By teaching girls to be audacious, we tend to raise a generation who knows how to hold power and be fearless.

Sheryl Sandberg, in this book ‘Lean In: Women, Work and the Will to Lead’ provides solution to the various pressing issues like race, caste, gender identity and guides women on how to find the perfect balance in life. She describes specific steps women can take to combine professional achievement with personal fulfillment, and demonstrates how men can benefit by supporting women both in the workplace and at home. She delineate that we are centuries ahead of countries where women are denied their civil rights. But knowing that things could have been worse should not stop us from trying to make them better. When suffragettes marched on the streets, they envisioned a world where men and women would be truly equal. But the reality is that men still run the world. Of 195 independent countries, only 17 are led by women. Women hold 20% seats in parliament globally.

In spite of wonderful educational achievements, women had ceased to make real progress at the top of any industry. This proposes that when it comes to making the decisions that most affect the world, women’s voices are not being heard.

The BOOK deals with the question as how to put more women in power. Her strategies incorporates advocating for oneself traits, taking risks, sit at the table, don’t leave before you leave, mentorship, and so on. And I think at so many levels Lean In is a revelatory, inspiring call to action and a blueprint for individual growth that will empower women around the world to achieve their full potential.

In an another book by Sophia Amoruso, the founder of Nasty Gal and the founder and CEO of Girlboss. Sophia was never a typical CEO, or a typical anything, and she’s written #GIRLBOSS for other girls like her: outsiders (and insiders) seeking a unique path to success, even when that path is windy as all hell and lined with naysayers. #GIRLBOSS proves that being successful isn’t about where you went to college or how popular you were in high school. It’s about trusting your instincts and following your gut; knowing which rules to follow and which to break; when to button up and when to let your freak flag fly.

CONCLUSION-

Incertitude is a common concerning factor that affects women’s performances. Women needs to learn how to negotiate for themselves or else with the current trend of glass ceiling it will take women 150 years to fulfill the goal of ‘equal pay for equal work’. Being undaunted and venturous are the qualities she needs to get her hands on.

A flexible parental policy can help increase the efficiency of all employees at work.
And women actually need to learn to apportion household responsibilities equally with their spouse, in order to achieve “work-life balance”.

Women need to help each other in this revolution to make women reach at career heights and leadership roles. Moments like “#METOO”\(^{420}\) had been a great success to expose the sexual harassment women faces at Workplaces.

When more women work, an economy grows. Women economics empowerment boasts productivity, increase economic diversification and income equality in addition to other positive development outcomes\(^{421}\).

True equality is long overdue and will be achieved only when more women rise to the top of every government and industry. For this we need to encourage women to Dream Big, forge a path through obstacles and achieve their Full Potentials. In order to make law work in their favour, women need to be vigilant about their rights and fight for themselves \(ex\ aequitate\), (As per the old maxim “Vigilantibus, non dormientibus, jura subveniunt”)\(^{422}\).

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\(^{420}\) The Me Too movement (or #Me Too movement), with a large variety of local and international alternative names, is a movement against sexual harassment and sexual assault

\(^{421}\) IMF(2018): Pursuing Women’s Economic Empowerment

\(^{422}\) The law assists the vigilant and not those who sleep over their rights.
NEED FOR FORMATION OF SPECIAL COURTS IN RAPE TRIAL

By Omansh Gupta and Siddham Nahata
From Amity Law School, Noida

INTRODUCTION

Problem of Rape in India

We all know that the problem of rape is quite prevalent in India and is on an increasing run. Lack of education, distrust in the society, the excessive use of social media and the ever changing mentality of people towards females and others are some of the major causes of this shameful situation. While the murderer tarnishes the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. It can be said that rape is rather becoming another form of terrorism. The shock that a person undergoes due to this heinous crime is tremendous and the victim suffers a tremendous amount of pain over many years. Time has come to stand against this horrible situation and take strict action against the culprits behind it. In India, it has been said that rape is the fourth most common crime against women. According to the data collected by the National Crime Records Bureau, as many as 3,37,922 cases of crimes against women were registered in 2014. This is an increase of 9.2% from the registered crimes against women in 2013. Crimes committed under the Indian Penal Code (IPC) against women, as proportion of total crimes, have increased to 11.4% in 2014.

HISTORY OF SPECIAL COURTS IN INDIA

A number of special courts were at first set up by the Central Government to solve a long number of pending cases, particularly instances of special courts, over an assortment of topics utilizing a concede from the eleventh Finance Commission (2000-2005). According to the plan for which the grant was endorsed, a sum of 1,734 such exceptional courts were built up all over the nation. The term of this grant reached an end in 2005, and was reestablished by the twelfth Finance Commission for the support of 1,562

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423 Table 5.1”, Crime in India 2012 Statistics National Crime Records Bureau (NCRB), Ministry of Home Affairs, Government of India, p. 385, archived from the original on 20 June 2014
425 Bill No. 318 of 2016 p.no 4 available at http://164.100.47.4/billstexts/lsbilltexts/AsIntroduced/3450.pdf
existing fast track courts for an additional 5 years, up to 2010\textsuperscript{427}.

Amid the 2000s, the possibility of these courts appreciated much fame, with the Law Commission of India making suggestions for the foundation of various types of fast track courts. For instance, the 188th report of the Law Commission issued in 2003, suggested setting up a most optimized plan of a speedy track business division at each High Court as a changeless speedy track system to manage high esteem business question\textsuperscript{428}.

In 2008, the Law Commission of India prescribed the setting up of special courts and other fast track courts, which it saw as the best way to address the excess of check ricocheting cases – this time, however, they were suggested as a specially appointed measure just for the freedom of accumulations of cases and not as a perpetual element\textsuperscript{429}.

The finish of that decade saw a move in the view of special courts, which started to be viewed as simply impromptu systems for managing case pendency. In April 2011, the Central Government quit financing extraordinary courts, after which the vast majority of them were twisted up\textsuperscript{430}. Essential thing to note here is that the unique courts were set up by the Government in an impromptu way with no administrative arrangement backing it which neglected to emphasise what the reason for the courts would be or if they somehow happened to take after any exceptional systems and compliances.

Over a year later, the December 2012 'Nirbhaya' rape case prompted across the country contemplation on the subject of the standardization of brutality against women and the issues that survivors of rape experienced while crossing the criminal equity framework. One such exercise was the investigation of our lawful framework did under the authority of (Retd.) Justice J.S.Verma. The Verma Committee distributed its 'Report Amendments to Criminal Law' on January 23, 2013, which noticed that fast equity and justice was basic to securing the authenticity and adequacy of the lawful structure, and in addition to fill in as a successful hindrance to wrongdoing\textsuperscript{431}.

It likewise noticed that basic to this allotment of justice was the way the courts treated complainants and proof, including therapeutic discoveries, and focused on the significance of having judges and prosecutors who were sharpened to the issues included. Following the suggestions of the Verma Committee Report and open notion favoring expedient justice, States were asked for to set up special track courts for admitting instances of rape, by using the extra judges named in accordance with the

\textsuperscript{427} “Particulars of Organisation, Functions and Duties of the Department of Justice” The Department of Justice, Ministry of Law and Justice, July, 2011, available at http://doj.gov.in/?q=node/141&page=show
\textsuperscript{430} Brij Mohan Lal v. Union Of India & Ors.[2012] 5 S.C.R. 305.
Supreme Court choice on fast track courts in Brij Mohan Lal’s case\(^{432}\).

**SPECIAL COURTS**

What is a Special Court?

Bodies which are within the judicial branch of government that generally address only one area of law or have specifically defined powers are referred to as Special Courts.\(^{433}\) These courts exist for both civil and criminal disputes. These kinds of courts do not include the many administrative law courts that exist at both the federal and state government. These courts do not have a very wide jurisdiction to entertain cases, hence their jurisdiction is limited to a certain number of cases. The judges who are serving in such courts are as varied as the special courts themselves. They do not obtain their positions through merit, rather they obtain it via elections. In addition to this, the majority of special court judges are not lawyers. Examples of such courts could be Probate Courts, Juvenile Courts, Family Courts, Small Cause Courts and many more.

Need for establishment of Special Courts

Time has come to ask the Government when the fast track courts will be established in rape cases. Inadequacy of the existing procedural laws which prolong the trial resulting in a very low conviction rate defeats the fundamental right of the victim to live with integrity and dignity. Speedy trial can result in reduction of rape cases against the women and would meet ends in justice. Some statistics reveal that criminal and civil cases pending before District and Subordinate courts regarding rape is about 190 lakhs and 82 1/4 lakhs respectively, hence criminal being about two and a half times more than civil\(^{434}\). The largest number of cases are from Uttar Pradesh, Maharashtra, Orissa, Bihar, West Bengal and Rajasthan. Rape trial run is a gimmick and even after a prolonged trial there are situations when the accused is acquitted for some reason or the other. The long rape trial and the humiliating questions asked by the defense counsel destroys the victim completely both in court and in the eyes of the society, ruining her whole life. Thus there is an urgent need for the speedy trial in rape cases with formation of Special Courts which can give due attention and resolve the matter and deliver justice to the suffered promptly and adequately.

**Causes for Delay**\(^{435}\)

Certain causes for delay before the cases reaches the court for trial are-

- Inaction and apathy on part of the police authorities in registering the FIRs and taking up the investigation in earnestness.
- Police are hesitant to proceed with the investigation against important and influential persons.
- Corrupt police officials with a casual attitude is affecting the timely and qualitative investigation.
- When the FIR is not registered within a reasonable time, there is no

\(^{432}\) Lok Sabha unanswered question number 572, answered on 07.08.2013.

\(^{433}\) Definition of Special Court, available at https://legal-dictionary.thefreedictionary.com/Special+Courts

\(^{434}\) Law Commission of India, 239th Report on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities (March 2012)

\(^{435}\) Supra note 4, (Law Commission of India)
internal mechanism to check this problem effectively.

- Lack of periodical exercise to upgrade the skills of personnel as well as of investigation.
- Sufficient priority is not given to investigate the crimes.
- Sanctions for prosecution are unduly delayed by the Governments.
- Inadequate judges strength.
- Lack of physical infrastructure.
- Large influx of cases into courts.

Women’s Commission Recommendation

Some of the recommendations to avoid delay in taking legal action and for timely completion of the trial and for counselling of victims have been made by the Kerala State Women’s Commission to the Government. These are as follows:

- **In case of the services of reputed lawyers provided by the Government to handle the case of the victim, if possible, the person being appointed as the prosecutor for the victim should be one the basis of those suggested by the victim.**
- **The Government must take up rehabilitation of the victim and, if needed, that of the child.**
- **House and other assistance like self-employment should be made available by the government through the local bodies.**
- **A relief fund should be set up by the government to help the victims.**

A special counselling and medico-legal service should be set up to offer assistance to the victims.

A doctor, advocate, police officer, psychologist, and a social worker should be in the team being set up to offer assistance.

**PROVISIONS IN THE INDIAN PENAL CODE, 1860 REGARDING RAPE**

Chapter 16 of the Indian Penal Code, 1860 deals with the Offences affecting the Human Body under which Rape is covered. The following are the provisions regarding rape:

Rape—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

1. **(To start with) — Against her will.**
2. **(Besides) — Without her assent.**
3. **(Thirdly) — With her assent, when her assent has been acquired by putting her or any individual in whom she is keen on dread of death or of hurt.**
4. **(Fourthly) — With her assent, when the man realizes that he isn’t her better half, and that her assent is given since she trusts that he is another man to whom she is or trusts herself to be lawfully hitched.**
5. **(Fifthly) — With her assent, when, at the time of giving such assent, by reason of

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437 Section 375 available at https://indiankanoon.org
unsoundness of psyche or inebriation or the administration by him by and by or through another of any stupefying or unwholesome substance, she can't comprehend the nature and outcomes of that to which she gives assent.

(Sixthly) — With or without her assent, when she is under sixteen years old.

Clarification.— Penetration is adequate to constitute the sex important to the offense of assault.

(Special case) — Sexual intercourse by a man with his own better half, the spouse not being under fifteen years old, isn't rape.

Punishment for rape

(1) Whoever, aside from in the cases accommodated by sub-segment (2), commits assault of rape should be rebuffed with detainment of either portrayal for a term which might not be under seven years but rather which might be forever or for a term which may stretch out to ten years and should likewise be at risk to fine unless the women assaulted is his own particular spouse and isn't under twelve years old, in which cases, he should be rebuffed with detainment of either depiction for a term which may reach out to two years or with fine or with both: Provided that the court may, for sufficient and unique motivations to be specified in the judgment, force a sentence of detainment for a term of under seven years.

(2) Whoever,—

(a) being a cop confers assault—

(I) inside the cutoff points of the police headquarters to which he is appointed; or

(ii) in the premises of any station house regardless of whether arranged in the police headquarters to which he is selected; or

(iii) on a woman in his authority or in the care of a cop subordinate to him; or

(b) being an open worker, exploits his official position and submits assault on a woman in his guardianship all things considered open hireling or in the care of an open worker subordinate to him; or

(c) being on the administration or on the staff of a prison, remand home or other place of authority set up by or under any law for now in constrain or of a woman's or youngsters' institution exploits his official position and submits assault on any prisoner of such correctional facility, remand home, place or organization; or

(d) being on the administration or on the staff of a healing facility, exploits his official position and confers assault on a woman in that doctor's facility; or

(e) confers assault on a woman knowing her to be pregnant; or

(f) confers assault on a woman when she is under twelve years old; or

(g) confers pack assault, should be rebuffed with thorough detainment for a term which might not be under ten years but rather which might be forever and might likewise be obligated to fine: Provided that the Court may, for sufficient and extraordinary motivations to be said in the judgment, force a sentence of detainment of either portrayal for a term of under ten years.

438 Section 376 available at https://indiankanoon.org
Clarification 1.— Where a woman is assaulted by at least one of every a gathering of people acting in advancement of their basic aim, every one of the people should be regarded to have conferred posse assault inside the importance of this sub-segment.

Clarification 2.— "Women' or children foundation" implies an organization, regardless of whether called a shelter or a home for disregarded woman or childs or a dowagers' home or by whatever other name, which is built up and kept up for the gathering and care of woman or childs.

Clarification 3.— "Healing center" means the regions of the doctor's facility and incorporates the areas of any establishment for the gathering and treatment of people amid recovery or of people requiring medicinal consideration or restoration.

Punishment for repeat offenders
Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person’s natural life, or with death.

THE SPECIAL COURTS ACT, 1979

The Special Courts Act, 1979( 22 of 1979) was enacted by the Parliament in the 13th year of Republic of India. The main objective of this Act is to provide speedy trial of certain class of offences. Certain provisions of the Act are as follows-

Name/Title and Extent. This Act is to be called The Special Courts Act, 1979 and it is applicable to the all parts of India except the state of Jammu & Kashmir.

Definitions. “Code” in this Act is referred to as the Criminal Procedure Code-1973 (2 of 1974). " Declaration", with meaning attached to an offence, means a declaration given under section 5 of this Act with respect to such offence. " Special Court" means a Special Court formed under Section 3 of the Act. Any words and other expressions used but not clearly stated or defined in this Act but stated in the Code will have the same meaning(s) as in the Code.

Establishment. Special Courts are to be established by the Central Government on giving notification to the Official Gazette and establish such number of courts as it may.

Composition. The Special Court shall have a sitting judge of High Court who is nominated by the Chief Justice of High Court with the concurrence of the Chief Justice of India.

Cognizance. A Special Court will take cognizance of or allow any cases that are laid before it or given to it.

Jurisdiction of Special Courts as to joint trials. A Special Court has purview to try any individual concerned in the offence in

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439 Section 376 available at https://indiankanoon.org
440 Ins. by Criminal Law (Amendment) Act, 2013, sec 9 (w.r.e.f. 3-2-2013)
441 Section 1 available at https://indiankanoon.org/doc/701797/
442 Ibid. Section 2
443 Ibid. Section 3
444 Ibid.
445 Supra note 11, Section 4
446 Ibid. Section 8

www.supremoamicus.org
regard of which a declaration has been made, either as main, backstabber or abettor and every single other offense and blamed people can be mutually attempted at one trial as per the Code.

Powers and Procedures

- The Court will in line of such cases follow the procedure as laid down by the Criminal Procedure Code. Sections of the Code shall apply as long as they are uniform with the provisions of the Act.
- The Court with a view to obtain evidence of any person who has been suspected of any offence may grant a pardon to the person on the exception that he fully discloses the entire incidents that are to his knowledge true and correct. Any pardon so tendered shall for the purposes of section 308 of the Code be deemed to have been tendered under section 307 thereof.
- The Court will likewise have the ability to go upon any individual indicted by it, any sentence approved by law for the punishment of the offence.

Power given to Supreme Court to transfer cases. The Supreme Court may transfer cases starting with one Special Court then onto the next in the event that it appears to the apex court that a request or a pronouncement under this area is convenient for the ends of justice.

Appeal- An appeal to the Supreme Court may be filed on any order(not being interlocutory), sentence or judgement of the Special Court on both facts and on law.

Power to make rules. The Supreme Court can by notification in the Official Gazette make any such guidelines as it might consider fundamental for completing the purposes of this Act.

Notifications falling under section 3 and declarations made under section 5. Such notifications are to be laid before the Parliament. Likewise every notification made under sub-area (1) of segment 3 and each assertion made under sub-segment (1) of segment 5 should be laid, when might be after it is made, before each House of Parliament.

FORMATION OF SPECIAL COURTS UNDER THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

The Protection of Children from Sexual Offences Act 2012( 32 of 2012) was passed June 2012 by the Parliament in order to protect children from offences of sexual assault, sexual harassment and pornography and to provide establishment of Special Courts for trial of such offences. Chapter 7 of this act deals with provisions regarding Special Courts. These are as follows-

Establishment- Such Court shall be established by the State Government in consultation with the Chief Justice of High Court and by notification in the Official Gazette designate for each district such court.

Application of Code of Criminal Procedure. While trying an offence under this Act, a Special Court might likewise entertain entry of an offence other than the offence alluded to in 5.1, with

\[452\] Ibid. Section 9
\[453\] Ibid. Section 10
\[454\] Ibid. Section 11
\[455\] Ibid. Section 12

\[456\] Ibid. Section 13
\[458\] Ibid. sub clause(2)
which the denounced may, under the Code of Criminal Procedure, 1973, be charged at a similar trial.

**Procedures, Powers and Duties**

- The Court may take cognizance of any offence without the accused being committed to it for trial, upon receiving complaint of facts which constitute such offence.
- The Court will make a youngster neighbourly climate by permitting a relative, a watchman, a companion or a relative in whom the child has trust or certainty, to be available in the court.
- The Court will guarantee that the child won’t be called for rehashed addressing and irritated from that point.
- The Court will not allow forceful addressing or character death of the child.
- The Court will guarantee that the poise of the child is kept up.
- The Court will guarantee that the character of the child isn't revealed whenever over the span of examination or trial.

**Recording of Evidence**

- The proof of the child shall be recorded within a time of 30 days of the Court taking cognizance of the offence and if there are any reasons for delay, the proof of the statement shall be recorded by the Special Court.
- The Court will have to finish the trial within 1 year form the date of taking cognisance of the offence.

**Punishment**

- Penetrative Sexual Assault on a child — Not under seven years which may stretch out to detainment forever, and fine.
- Disturbed Penetrative Sexual Assault — Not under ten years which may stretch out to detainment forever, and fine.
- Rape i.e. sexual contact without infiltration — Not under three years which may reach out to five years, and fine.
- Disturbed Sexual Assault by a man in authority — Not under five years which may reach out to seven years, and fine.
- Sexual Harassment of of the Child— Three years plus fine.
- Utilization of Child for Pornographic Purposes — Five years and fine and in case of ensuing conviction, seven years and fine.

**MEGHALAYA SPECIAL COURTS ACT, 2014**

Due to the increasing number of criminal cases against women and the delay in the disposal of cases of critical and sensitive nature, the State government has a special law, the Meghalaya Special Courts Act, 2014 which enables a provision for the formation of special courts for expeditious trial of wrongs. The above mentioned Act was passed by the Meghalaya Legislative Assembly on 24th June, 2014. Some important provisions of this act are as follows-

**Operation and extent** - It will extend to the State of Meghalaya.

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454 Supra note 22 at 11 Section 33  
455 Supra note 22 at 12 (Section 35)  
456 Supra note 22 pg 3-7(Section 4-15)  
Definitions- “Code” under this act refers to the Indian Penal Code, 1860 and the Code of Criminal Procedure Code, 1908.

Charge Sheet- Charge sheet of any offence to be tried by a Special Court must be completed within 60-90 days.

Power to make rules- The State Government will have the power to make rules in order to fulfil the purposes of this Act.

**THE SPECIAL COURTS FOR TRIAL OF OFFENCES AGAINST WOMEN BILL, 2016**

The above bill has been drafted by Shrimati Supriya Sule, M.P and has been introduced in the Lok Sabha for approval. The bill seeks to provide for constitution of special courts in order to take up cases of sexual offences against females. The bill aims to ensure speedy disposal of such cases and matters connected therewith. Some important provisions of the bill are as follows-

Operation and Extent- This bill will extend to the whole of India except the State of Jammu and Kashmir.

Definitions- Sexual Violence covers the following sections of The Indian Penal Code- 292, 354, 354A, 354B, 354C, 354D, 375, 376, 376A, 376B, 376C, 376D, 376E and 509. (Hence rape is covered)

Constitution of Special Courts- Upon the enactment of this bill, the Government shall constitute a special court in each district exclusively to try any case regarding sexual violence.

Selection criteria for judges- Judges will be appointed by the Government in consultation with the High Court of the State.

Number of Judges- Considering the backlog of cases, the High Court in consideration with the Government appoint as many judges as it may seem necessary for effective disposal of cases.

Assistance of law students- The Government shall allow final year law students from recognised Law Colleges to intern at special courts.

Time limit for deciding cases- The cases will be decided within 120 days from the date of filing of chargesheet.(This is to ensure speedy redressal and to avoid accumulation of cases)

Increasing Awareness- The Government will take such measures to increase awareness amongst women about the legal safeguards against, and the legal provisions relating to eve-teasing and sexual violence.

**RECENT FORMATION OF/PROPOSALS TO FORM SPECIAL COURTS IN INDIA**

There are quite a number of special courts in India although an exact number is difficult to obtain. These include Juvenile Courts, Probate Courts, Small Claims Courts, Family Courts and many more.

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458 Bill No. 318 of 2016 p.no 1-3  available at http://164.100.47.4/billtexts/lsbilltexts/AsIntroduced/3450.pdf
Recently in keeping with the Supreme Court’s guidelines, the Gauhati high court on has formed five special single-bench courts to deal dedicatedly with pending rape cases in the High Court. At present, there are at least 196 rape cases pending at various stages in the HC. Gauhati high court judges Hrishikesh Roy, N Kotiswar Singh, Ujjal Bhuyan, Biplab Kumar Sharma and Indira Shah are to headed these five special courts.\(^\text{459}\)

Also in an affidavit to the Supreme Court, the Centre proposed setting up 12 special courts to try “1,581 criminal cases” pending against legislators across the country. The government, however, has said that it does not have data on how many of these cases have been decided and whether any new case has been filed against an MP or MLA between 2014 and 2017. The Centre submitted that Rs 65 lakh would be required for setting up each court, adding up to a total of Rs 7.8 crore.\(^\text{460}\)

The Delhi High Court on 19th December, 2012 decided to establish 5 special courts to handle sexual assault cases against women. Maharashtra also has similar number of courts and Orissa opened its special court in 2012 in Cuttack to try cases of sexual assault. The first state to establish such a special court was Rajasthan which established it in Jodhpur in 2005.\(^\text{461}\)

The Karnataka High Court has issued a notification regarding creation of special courts in 10 places (including Mangalore) for speedy trial of rape cases. According to the notification dated 26th November 2013, the High Court has designated the new 6th Additional District and Sessions Court as the special court for trying cases of rape registered in the name of Dakshina Kannada. The notification states that the charge of the 6th Additional District and Sessions Court judge will be held by the 4th Additional District judge till the time a new judge is appointed. The notification was not clear on whether the special court will try all pending cases of rape or those registered afresh.

Two special courts were proposed to be set up in Bangalore City and one each in Bangalore Rural, Belgaum, Gulbarga, Madikeri, Mandya, Mysore and Ramanagara. In September 2013, the State Government proposed setting up 10 special courts in the State. Law Minister T.B. Jayachandra had said that stringent laws and speedy disposal of cases could act as a deterrent and bring down the number of crimes against women. Every special court would be provided with a District Judge and 36 other personnel. The proposal was formed following activists’s demand for speedy trial of rape cases as done by a Special Court in Delhi. The Delhi Court on September 13 sentenced four persons to death for raping a girl on December 16, 2012.

Criminal Law (Amendment) Ordinance 2013\(^\text{462}\)

On February 3, 2013, the President of India(Pranab Mukherjee) signed an ordinance adopted by the cabinet which


\(^{462}\) Ibid.
sought to impose harsher penalties for the offence of rape, which is replaced with the crime of sexual assault. This ordinance was prompted by the gang rape and assault of a twenty three year old student who was travelling in a bus. Her male friend was also beaten quite severely in the attack. On the student’s subsequent death on 29th December 2012 led to mass nationwide demonstrations which resulted in the formation of a three member commission by the Central Government. The commission was headed by a former Supreme Court Chief Justice of India, J.S Verma. The commission aimed to review the present laws so as to provide quick and speedy redressal of rape cases and to provide enhanced punishment in cases of aggravated sexual assault.

The Code, the Ordinance, and the 2012 bill all provide a minimum punishment of seven years, a maximum punishment of life imprisonment, and a fine for the offence of rape (in the Code) or sexual assault (in the newer documents). However, the Code allows the court to impose a lower sentence while the bill removes this power of the court. Neither the Code nor the amendment bill contain a provision that specifically addresses sexual assault resulting in the victim’s death or persistent vegetative state.

The Verma Report

This vast and detailed report consisting of 631 pages cover not only specific recommendations but also include suggestions on judicial, political and cultural reforms. The report argued that the government needed to increase police accountability and also to impose harsher penalties for persons found guilty of sexual assault, though it did not advocate death penalty for those convicted of rape. The report also gave recommendations regarding formation of special courts to handle rape cases, increased enforcement of laws against human trafficking and also allocation of judicial resources to further speedier trials and appeals regarding rape cases.

Does creation of Special courts violate Article 14 of the Indian Constitution?

Article 14 of the Indian Constitution states that each and every person is equal before the law and there shall be no discrimination on the basis of caste, creed, gender, religion. It has been said that special courts interfere with the flow of law in terms of the evolution of jurisprudential aspect of law. The question is- why does a certain subject matter deserve a different kind of treatment? It seems on the face of it that creation of special courts is violative of Article 14 since creation of special courts mean giving special treatment to those covered under the law to avail benefits of these courts. However, Supreme Court has laid down that laws can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. Hence formation of special courts is not violative of Article 14 of the Constitution of India.

CONCLUSION

464 Ibid.
With the increase in the number of rape cases there is an urgent need to establish special courts for their speedy trial. We all know that courts are facing a huge backlog of cases and are unable to cope up with it. This is because people resolve to court for trifle matters which can be resolved via arbitration and mediation and also because the strength of judiciary with respect to the judges is limited in number. The formation of these special courts will deal only with rape cases and hence deliver justice timely and adequately. All citizens completely depend on judiciary with the hope that they will get justice but their trust on it is reducing gradually because our judiciary is losing its strength each passing day. Special courts can reduce the mental suffering, pain of the victim by awarding an accused the maximum punishment at the earliest so that victim can have a sigh of relief and can start rehabilitating, as during a prolong trial the victim cannot rehabilitate because she has to come to the court to answer humiliating questions asked by the defence counsel not only once but multiple times. Post the “Damini Gang Rape Case” which has shocked the whole nation, a new amendment came into force but in reality no statutory provision has been formed yet for formation of special courts. With the formation of the special courts in the form of day to day hearing can give sigh of relief to the rape victims and justice can be better served and the people will not lose the faith in the criminal justice system. In India we have no separate speedy trial act and there is no limitation when the trial can be finished, so its high time for a government to look in the plight of victims of rape cases and there is urgent need for more number special courts in cases of rape.

In highlighting the above topic and problems we discussed how fast decisions and appropriate steps can be taken to improve the trial regarding rape victims in India. For criminal justice a speedy recovery is very important. It is a crime which is very terrible that harms the victim internally and externally and also somehow degrades her status in the society which. Rape cases are on the rise in today’s era which is why there is need for urgent formation of special courts for the speedy adjudication of rape cases. It is the victim’s fundamental right under Article 21 of the Constitution of India which gives every individual “Right to Life and Personal Liberty” from which every citizen hopes to live with dignity. There are already so many cases pending in our courts due to which citizens are losing trust in their own judicial system to get justice in a specific time period. It is of paramount importance that urgent relief is given to a rape victim who has already suffered tremendous physical and mental pain and that is why special courts must be established to give serious punishment to man who is violating the law. Although various laws provide for establishment of special courts these laws have not specified the minimum number of special court in each District or State. We believe that there must be at least 5 special courts in every State and they must adjudicate in a time bound. These courts must have special procedures and powers and must not be bound by the rigid procedure followed in civil courts. These courts must operate independently and flexibly in order to ensure that justice is not denied. The Government is also trying to establish 1000 fast –track special courts to deal with the rape cases across the country.

SUGGESTIONS

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COMMERCIAL ACTIVITIES AND THE IMPLEMENTATION OF SPACE LAW

By Oviya. S
From School of Excellence in Law, Tamil Nadu Dr. Ambedkar Law University

INTRODUCTION:
All the space activities operate within a framework of international law which includes bilateral and multilateral treaties as well as conventional international law. All the countries, except North Korea, which are space competent are the party to the Outer Space Treaty. Other than this treaty, most of the nations are party to the ARRA, the Liability Convention and the Registration Convention. Apart from these treaties, there are several soft laws including UN Resolution and agreements. How well these states implement these treaties is of great concern.

No new space law treaty has been adopted since 1979. This clearly indicates that the age of formal space law have been paused. In such a situation, commercial use of space, by both governmental and non-governmental entities, requires regulation by national legislations not inconsistent with international law. Countries that do not have specific space legislation are also encouraged to enact such space regulation through OOSA and COPUOS. In this article, an attempt has been made to analyse how, within the constraints of their constitution, some space states have arranged such matters.

OUTER SPACE TREATY AND ITS OBLIGATION
In contrast with the traditional expectations, space activities at present are carried by both state and private entities, purpose ranging from scientific research to highly commercial. Even so, the farsightedness of the drafters of Outer Space Treaty has helped to counter such a change.

Outer Space Treaty Article I provides for the freedom of exploration of space by all states without discrimination of any kind on the basis of equality and in accordance with international law.

Article II excludes sovereignty in outer space or as to celestial bodies.

Article VI of Outer Space Treaty provides “States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.” It is clear that the

466 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including Moon and Other Celestial Bodies, 1968
467 Agreement on the Rescue of Astronauts, the Return of Astronauts, the Return of Astronauts and Return of Objects Launched into Outer Space, 1968
468 Convention on International Liability for Damage Caused by Space Objects, 1972
469 Convention on registration of Objects Launched into Outer Space
470 United Nations Office for Outer Space Affairs
471 Committee On Peaceful Use of Outer Space
472 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including Moon and Other Celestial Bodies, 1968
concept is in singular and the drafters intended only one state to authorise and supervise and therefore be responsible for a particular private activity.

Article VII of the treaty states “Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies”. This provision for further extended by the Liability Treaty 473. This liability extends only between the parties to Outer Space Treaty, which is 109 at present.

According to Article VIII, an OST state retains jurisdiction and control over a space object and their personnel that has been entered n its registry while object is in outer space. Such objects are to be returned to the state of registry if found elsewhere. Article XI requires the users of space shall be careful and protective of interests of other users.

USE OF SPACE BY PRIVATE PARTIES
When a state permits private users to have access to outer space, that access will be subject to numerous restrictions including licensing. The date, time, and the location of launch, the orbit and radiofrequency are usually determined by the state. Countries such as US, UK and Australia have adopted legislations conferring rights of access to qualified private launch operators. But in India there are no such national legislations and they provide license to private operators based solely on international treaties.

Certain issues were not foreseen by the drafters of international treaties. One such issue is transfer of private ownership of satellite in orbit. A huge problem can be caused if a privately owned satellite is transferred to a new owner located in a state different from the launching state. This problem was experienced during privatisation of INTELSAT when ownership of several satellites of INTELSAT was acquired by New Skies NV of Netherland and Netherland refused to register the satellite under the Registration Act. 474

The international space treaty arrangement was framed to deal with rights and duties of single integral ownership of satellites. In the modern time, the concept of multiple ownership or joint ownership arises where the owners are of different nationalities. This issue could be solved by making necessary amendment in the multilateral treaties or by entering into bilateral treaties by which all the owner state can assume responsibility under the Article VI of OST and other liabilities under the Liability Act.

REGULATION BY PARTICULAR STATES
Several articles have been cited which provides information about the attitudes of states in regulating the space activities.

AUSTRALIA
The progress of Australia towards space has been erratic. But the Australian Space Industry Centre for Commerce (ASICC) is active in the support of the development of an Australian space industry. The

473 Convention on International Liability for Damage Caused by Space Objects,1972
474 Convention on registration of Objects Launched into Outer Space
Australian Space Activities Act was passed in 1998 and amended in 2002. The purpose of this act is to implement the Australian obligations under the space treaties, to attract investors in outer space, to offset the liability of the Australian government under the Liability Convention by transferring much of it to private launch operators, and to create a safe environment for launches.

The Space Launch Act specifically applies to launches or attempted launches to an altitude of at least 100km above the sea level. It provides for authorisation and supervision of private space activities through the issue of licenses, permits and exemptions. Launches are registered according to the Registration Convention. Australia has entered into a number of bilateral co-operation agreements which are also implemented by the act. Violation of the act may result in penalties. Launch accidents will be investigated.

An applicant for a space launch license must also comply with a number of other legislative provisions, including

1. The Australian Radio communications Act, 1992: to obtain authorisation of necessary radio frequency
2. The Civil Aviation Safety Regulation 1998: for access to clean air space for the launch or re-entry route.
3. The Transport Safety Investigation, 2002: regarding investigation of accidents
4. Special regulations regarding Christmas Island Launch Centre

The act regulates commercial launches by Australian nationals both in Australia and abroad and launches from Australian territory by non-Australian entities. The act governs both launches to and re-entry from outer space, and it requires an overseas launch certificate for a launch outside of Australia by an Australian national. Special authorisation is required for the return to Australia of a space object launched overseas. Finally, a launch operator may obtain an exemption certificate for emergency launches.

CHINA

The Chinese space programme is funded completely by the government. It is administered through the China National Space Administration. China also provides launch services at cheap and favourable prices in its launch centre at Xichang, which attracts many foreign operators.

Though China has ratified the four basic international space law treaties, it has not yet ratified the 1979 Moon Agreement. It has not yet adopted any national space legislation as in Australia and US and completely relies on international treaties for the regulation of commercial space. China has promulgated national procedures for the registration of space objects. The registration office is maintained by the Chinese Commission for Science, Technology and Industry which in turn passes the registration information to the ministry of foreign affairs for registration with the United Nations, as required by the Registration Convention.

The commission has also issued interim regulations under which the commission issues licenses for non-military launches.

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475 Sec 8, ‘Definition to “launch” a space object means launch the object into an area beyond the distance of 100km above the sea level or attempt to do so.

476 A spaceport in Christmas Island to be used by an Asia-Pacific Space Centre.

An application for the non-military launches and the launch permit itself must contain the following information:

1. Time of launch
2. Place of launch
3. Duration for which the permit is required
4. Office issuing the permit

The licensee must first obtain a permit for the space object to leave the point of manufacture. The permit must be obtained six months before the planned launch. The Science, Technology and Industry Commission’s interim measures are linked to possible civil and criminal penalties for fraud, for unauthorised launches and for abuses leading to liability of and damage to the state.

**INDIA**

An **Indian Space Commission** and **Department of Space** were first set up in 1972. Now the Indian Space Programme is administered directly by the Office of Prime Minister. Within this framework, the Indian Space Commission establishes national space policy which is implemented by the Department of Space through four agencies:

1. Indian Space Research Organisation (ISRO)
2. National Remote Sensing Agency (NRSA)
3. Physical Research Laboratory (PRL)
4. National Mesosphere-Stratosphere-Troposphere Radar Facility (NMRF)

In 1992, the Indian government established the **Antrix Corporation** as a government corporation to facilitate commercialization of space activities.

**RUSSIA**

Russia was the main inheritor to the USSR space launch capability. During the economic crisis in Russia post cold war, its unique space launch capability provided a great economic advantage. Its space launch capability was offered to the Western commercial operators at very attractive prices. Ultimately, Russia became a major commercial launch operator aggressively marketing private launches.
The Russian Federation Law on Space Activity entered into force in 1993. Its primary purpose is to implement and enforce the International space treaties to which Russia is a party. Other purposes include the development of entrepreneurial activity, the maintenance of safety, environmental protection, the protection of intellectual property and the promotion of science and national security.

The Russian law differs significantly from the Australian and US commercial space laws as to the licensing of private operators. The focus of Russian law is to give legislative authority to state agencies to engage in state activities and to control participation by non-Russians. The Russian Space Agency is responsible for space activities. In conjunction with the Russian Ministry of defence the agency allocates all budgetary resources for use in outer space activities. The Agency has authority to license outer space activities. The Ministry of defence is responsible for military uses of outer space and, in cooperation with the agency, establishes and implements the Russian Space Programmes.

Liability is extensively regulated under the Russian law. Compulsory insurance is required for space activities in order to cover possible liability to third persons and private parties. Operators of space object must therefore obtain liability insurance in the amounts required by the Russian government. The proceeds of insurance policies will be applied to compensate for direct damage resulting from outer space activities. Full compensation must be paid by the responsible commercial companies and individuals. The purpose of this compulsory insurance requirement is to cover Russia’s potential liability as the launching state under the contracts to launch foreign space objects.

UNITED STATES
In the US two strands of regulation deal with space. One strand governs the governmental agency, which is the National Aeronautical and Space Administration established by the National Aeronautical and Space Administration Act of 1958. NASA deals with the authorisation and supervision of US governmental space activities, it does promote a number of private activities in outer space where these are of governmental interest. For example, in 2010, when the Space Shuttle retired, NASA has awarded US $500 million to two companies to develop private spacecraft to replace the shuttle.478

The US Commercial Space Launch Act as amended requires the Secretary of Transportation not only to regulate commercial launches and re-entries, but also to promote the commercial launch industry. The statutory functions of the Secretary of Transportation under the Commercial Space Launch act have been delegated to the Federal Aviation Administration (FAA), the largest administration within the Department of Transportation (DoT). The FAA has extensive resources and expertise regarding aviation safety, much of which can inform safety regulation of space vehicles.

Last we note that the US Commercial Space Launch Act only regulates the launch and de-orbiting of space objects. It does not regulate operations in outer space after a

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478 Berger, ‘NASA Places $500 million bet on two very different firms’, Space news, 28 august 2006
launch in the absence of a clear casual connection to a licensed launch or re-entry, operations or occurrences in orbit would not be part of FAA statutory responsibilities.

**CONCLUSION**

It has been observed that the Outer Space Treaty requires the State Parties to the treaty to exercise continuing supervision over the activities of their nationals in engaging in commercial parties in outer space. The national legislation of some countries like Australia and US do not regulate space objects while in space, thus leaving a possible vacuum in their national oversight.

Also, the boundary issue in commercial activities in space has not been fully solved. COPUOS has not arrived at a consensus on the matter. Knowing where the space legislation applies would add a useful legal certainty and predictability for commercial space activities.

It is suggested that steps should be taken adequately to cope with the transfer of Outer Space Treaty duties and authority between states in the event of a change of ownership of a space object in space. This should be done on a universal basis with the help of multilateral agreement. If not, the individual states involved must sort this issue out by bilateral treaty between them.

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PARDONING POWERS IN INDIA: 
ANOTHER TUSSLE BETWEEN THE 
EXECUTIVE AND THE JUDICIARY

By Raghav Kansal 
From National Law University, Odisha

HISTORICAL DEVELOPMENT

A pardon is simply an act of forgiveness or mercy. The very concept of pardon has been prevalent in the world, among various societies, communities and civilizations having no contact with each other and it has been traced back to the era of monarchs who had absolute powers to punish or acquit anyone under their jurisdiction. The Code of Hammurabi, one of the oldest codified set of laws known to us today also contains and describes the practice of pardon and states certain situations and circumstances where the punishment could be mitigated. It even goes on to state that this power could be exercised at any point before, during or after the proceedings had taken place. Such powers, in earlier times were a symbolic representation of the “Divine Power” theory of the monarchs as it gave them the somewhat supreme control over the life and death of their subjects. The power to pardon anyone found guilty or convicted for the commitment of any crime or offence was vested with the British monarch during the era of British rule in India. From the year 1935, that is, via the Government of India, 1935, this power was given a legal status through its provision in Section 295 of the said act. Today we find that this power is still provided for much more authoritatively, especially in India through Articles 72 and 161 of the Indian Constitution. Article 72 grants the power of pardoning to the President but it does not restrict this power to that only, rather it extends to “suspend, remit or commute sentences in certain cases” Prof. Kenny has stated that the power of remission of any sentence shall reside with the crown, it is to exist at all. India, however, is a democracy and the president is the executive head of the state and hence the power to grant pardon shall reside with him (and the governors since they are the executive head of the states).

As can be observed from the ancient eras as well, the power to pardon has been held by or conferred upon the monarch or an individual who was considered the supreme authority of the land. In India, the President, who is the head of the State, holds this extraordinary and unique power, is however, not the only in possession of this power. The Governor of each and every state in India also holds this power. This power has been given to the Governors via Article 161 of the Indian Constitution. The consequences and meaning of a pardon is not that it overturns the decision of the court of law as it cannot do so; rather it merely mitigates or completely eliminates the effect or the outcome of the court’s decision without undermining the validity of the same. Ram Jethmalani, a senior advocate

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in the Supreme Court of India does not concur with this definition of a pardon. According to him, the power of pardoning is a constitutional power of the president to disagree with the courts both in its findings of fact and law, and should not be confused with or regarded a plea of mercy. 487

JUDICIAL REVIEW OF PARDON

The Constitution of India has conferred the pardoning powers on the President and the Governors of all the states through articles 72 and 161 respectively. What these sections provide for is that the President and Governors shall act on their own discretion, intellect and understanding when a case or situation shall come to their notice or if an appeal is made to them. It is also provided in the Constitution that the President shall act on the aid and advice of the council of ministers headed by the Prime Minister. 488 Any ambiguity regarding the binding nature or any such advice tendered to the President by the council of ministers was done away with via the Forty-second Amendment Act (1976) which stated that the shall, “act in accordance with such advice” which implies that the President shall be bound by the advice. In situations where an appeal is made to President for pardoning or alteration/mitigation of any sentence pronounce by a court of law in India, the President shall once again be compelled to act on the aid and advice of the council of ministers, even though there is no express provision for the same and thus there is nothing to stop the council from interfering in such matters. 489 In Dhana v State of West Bengal, the SC held that the powers under Articles 72 and 161 were to be exercised by the central and state governments, and not by the President or Governors or their own. 491

A similar situation exists with regard to the powers of the Governors as well. There exists a council of ministers headed by the Chief Minister or the state to aid and advice the Governor of that particular state. 492 There is however an exception to this convention that in certain cases the Governor need not work on the aid and advice of the council of ministers where he is required to act on his or her own discretion under the Constitution itself. 493 Here however, there is no statement which expressly categorizes the pardoning power of the Governor as a discretionary power and hence once again the executive can interfere in these matters.

The Epuru Sudhakar case: the facts of this case are that a PIL was filed challenging the order of remission passed by the then Governor of Andhra Pradesh, Sushil Kumar Shindhi, of a convicted congress activist. The main contention was that the relevant material was not placed before the Governor and that the decision was taken without any scrutiny, thinking or application of mind. The question here arose whether the pardon of any sentence came under the jurisdiction of the courts.

488 Article 74(1), The Constitution of India
489 Presidential Pardon and Judicial Review, <https://www.gktoday.in/gk/presidential-pardon-judicial-review> as accessed on 27th March 2019
490 (1994) 2 SCC 220
492 Article 163(1), The Constitution of India
493 Ibid 14
494 Epuru Sudhakar and Anr v Government of Andhra Pradesh and Ors, AIR 2006 SC 3385
and whether it could be judicially reviewed or not. Justice Pasayat firstly states the very need for the existence of a provision such as a Presidential pardon or a pardon by the Governor. He states that such a provision is necessary as it helps in achieving the goals of social welfare of the society. He says, that a person convicted and sentenced by a court of law seems in all rationality to be reformed person and not and someone who create a harmful impact on the society, then such person(s) shall have the option of availing this remedy since even though they are supposed to be punished under the provisions of law which they have violated, what we must remember is that a major object of law is not only to deter but also to reform and if the reformation has taken place without having to go through the prescribed punitive process, then such a pardon would help in achieving the goal of social welfare through law.

The Hon’ble Justice has then compared the concept of pardoning with other countries. He states that in India, this power is a responsibility given by the Constitution and must be exercised with great care and discretion, whereas in England it is exercised as an act of grace and in the United States it operates mainly as a constitutional scheme. He then goes on to differentiate between the judicial power of the courts to hear a case and pronounce a judgement and the act of giving a pardon after scrutiny of the facts and material by the President (we must include the position and power of the Governors as well) which is constitutionally given power and is exercised in the capacity of the their position as a part of the executive wing of the State administration. He reiterates that these two should under no circumstances be compared or considered similar in any regard.

The President does have the power to look into the merits of a case irrespective of the fact that the courts have already pronounced their decision on the matter. The question then arose whether the pardon by the President could be regulated, supervised or would be completely free from any review? The judgement of the SC in the Maru Ram case was relied upon where the court had said that Article 72 shall be used arbitrarily or with a mala fide intention. A similar observation was made in Swaran Singh v State of U.P. It was held that the order of the President can be reviewed strictly according to the limitation as laid down in the case.

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499 Kehar Singh v. Union of India (1988) 4 SCC 75
500 Ibid 21
501 Maru Ram v. Union of India AIR 1980 SC 2147
502 Vijayshankar Na, “Power to pardon should be subject to mandatory judicial review” <https://www.naavi.org/wp/power-to-pardon-should-be-subject-to-mandatory-judicial-review/> as accessed on 30th March 2019
503 Ibid 23
In the Tata Cellular case, it was decided that when the court reviews a presidential pardon, it does not act as a court of appeal but as a court deciding the legality of the act done, reviewing the manner in which the decision was made. The main concern of the court would be to determine whether the President has exceeded/abused his power or committed a blatant mistake or breached the principles of natural justice. Justice Pasayat goes on to state that the scope of Article 72 is very wide and it is not specific in nature. Also the President shall act reasonably while the courts must also not be looking to usurp the discretion given to the President by the constitution. The test of reasonability is proposed by the SC but Harold. J. Kent argues that only when the President’s decision shocks the conscience should there be a scope of review. He further goes on to say that since President’s have often imposed certain conditions upon the beneficiary of their pardon, the society must be understanding enough to accept a person released early or not imprisoned at all at certain conditions instead of accepting only those who have completed their sentence.

As has been stated earlier, the act of pardoning a convict by the President or a Governor is an executive action independent of any judicial or legislative aspect. What we must keep in mind here is that both the President and the Governors are to work on the aid and advice of the council of ministers. Now since it has been established that when the SC decides the validity of a pardon, it does not do so in the capacity of a court of appeal. Then by what authority can the SC review this decision, since a pardon is given after the courts have passed their decision? It has been held in the SR Bommai case that the though the decision of the President shall not be judicially reviewed, the material on the basis of which such decision was reached can be reviewed. A similar observation was made by the SC in Syed Haqshbandi v State of J and K. If we compare the reviewability of the pardoning power in other countries, we see that in both the United States of America and Pakistan, this power is conferred upon the president of the respective nations by the constitution in the absolute sense thereby leaving no scope for scrutiny. The only consequence of an allegedly wrongful pardon given by the President of the U.S is that impeachment proceedings may be initiated against him, but there can be no question raised as to the validity of the act in a court of law.

DISTINCTION BETWEEN POWERS OF THE PRESIDENT AND THE GOVERNORS

The powers of the President and of the Governors as laid down in Articles 72 and 161 of the constitution are constitutional in nature and have been described as

504 Tata Cellular v. Union of India 1994 (6) SC 651
505 Supra 17
506 Ibid 26
508 “Conditioning the President’s Conditional Pardon Power”, California Law Review Vol. 89, No. 6
509 Ibid 30
510 Supra 10
511 Supra 14
512 S. R. Bommai v. Union of India [1994] 2 SCR 644
513 1977 110 ITR 217 J K
514 Article II, Section 2, The U.S Constitution
515 Article 45, The Constitution of Pakistan
516 Supra 5
517 Supra 5
“residuary sovereign power” by the SC. Thus it is established that the powers are not executive in nature and therefore such powers of the Governor cannot be infringed, curtailed or interfered with by the President or the centre via an executive decision. Hence, the provisions of Article 257 shall be inapplicable when it comes to the pardoning powers of the Governor. If we speak in terms of which article provides greater power to the holder, then Article 72 is the one which gives the President much wider powers to be exercised and in cases of much more gravity and influence. The President can grant a pardon to those tried and awarded a Court Martial and also those who have been awarded the death penalty.

CONCLUSION

The laws in any country are set or enacted for mainly deterrence and to ensure maximum social welfare. Judges decide cases based on the law, and it is their duty to pronounce their judgements accordingly; but the laws are not always just nor are the judicial processes and methods the flawless way of securing justice. Here is where the need of Pardon is justified and therefore vesting such power in an authority other than the judiciary has been recognized.

What the official pardon does is that eliminates only the effects or the consequences of a court’s sentencing decision, not its findings, that is, it does not take a stance as to whether the court was correct in finding the person guilty of the crimes he or she was accused of.

The power to pardon lies with the executive and it is not listed or provided for not only in Articles 72 and 161 but also in the Criminal Procedure Code, 1973 and the IPC, 1860. The act of pardon is subject to different kinds of scrutiny or no scrutiny at all in various countries. In England, there is a very limited scope for a judicial review of a pardon but in India the scope is not very narrow. It has been repeatedly held by the SC, in the case of William Wells that the power can be subjected to review if it seems that it has not been used judiciously, and used arbitrarily and with mala fide intention.

Also the power and authority of judicial review has been recognized as a part of the basic structure of the Constitution by the case of Minerva Mills v Union of India.

Time and again, the SC has clarified, as it did again in the case of Mansukhlal Vithaldas Chauhan v. State of Gujarat that when reviewing a pardon decision, the SC does not function as a court of appeal.
but a court sitting to determine the procedural validity of the decision.\textsuperscript{533} The courts however must also interfere as little as possible in these matters for the executive to exercise its powers given to it by the constitution.\textsuperscript{534}

The powers of the Governor are similar to that of the President’s as has been enumerated in Article 161 though its scope is not as wide\textsuperscript{535}. The instance of a judicial review even in the Case of a Governor’s pardon shall arise only when the Governor’s act seemingly violates the procedure laid in Maru Ram\textsuperscript{536} case as it is for the President.\textsuperscript{537} Although the Governor’s power is restricted to his state only, and only it narrower in scope when compared to the President’s power, this power granted to the Governor is still constitutional in nature and thus it can’t be altered, reversed or interfered with by an executive overriding decision by the centre via the order of the President.\textsuperscript{538}

\textsuperscript{533} Supra 17  
\textsuperscript{534} Supra 47  
\textsuperscript{535} Supra 13  
\textsuperscript{536} 1981 SCR (1)1196  
\textsuperscript{537} Dr Subhash C Kashyap, “Constitutional Law of India”  
\textsuperscript{538} Supra 43
DYNAMICS OF PALM OIL INDUSTRY: BALANCING ECONOMY AND ECOLOGY THROUGH A SUSTAINABLE RE COURSE

By Rhea Joshi, Yash Patidar
From University of Petroleum and Energy Studies (UPES), Dehradun

INTRODUCTION

Palm Oil Paradox: Importance and Sustainability Issues of Palm Oil

India is the largest consumer of Palm oil in the world at 15.2% of the total world's consumption\textsuperscript{539}. It imports majority of its share of palm oil from countries like Indonesia and Malaysia, one of the key players in the palm oil sector. The ecological impact of palm oil cannot be ignored. It has led to increasing concerns of palm oil sustainability. India being the largest consumer of palm oil in the world, has not made significant progress in ensuring sustainable palm oil by making responsible import choices in terms of the source and method of obtaining palm oil.

Meaning of Sustainable Palm Oil: It is a set of principles and practices which are followed for growth, procurement, cultivation and manufacturing of Palm Oil. These include environmentally sound practices such as ‘no deforestation’ etc. It includes commitment to environmental responsibility for conservations of biodiversity and natural resources. It also extends to the principle of commitment to transparency and compliance with applicable laws and regulation.

With the advent of industrial revolution around the world and gradual development of capitalism, the doctrine of laissez faire was propounded implying non interference of government in the free market. This led to decreasing role of government intervention and with time, issues of sustainability began to rise. The growth of palm oil industry is a classic example of this.

Conversely, the economic benefits of Palm oil are multifold and cannot be ignored. It is an efficient oil producing crop using about less than ten percent of world’s oil farming land yet accounting for about 32% of production. It is also very versatile in nature being used in a variety of commodities. It has helped in lifting millions of people out of poverty in countries like Indonesia. Of all the vegetable oils in the world, palm oil accounts for a whopping 32% of worldwide supply. Its price, versatile nature and texture makes it an essential ingredient in variety of products ranging from toiletries like shampoos and soaps to edible items like spreads and chocolates and cosmetic items like lipsticks, lotions and lip balms.\textsuperscript{540}

Even though palm oil has been an almost indispensable ingredient for households, industries and small businesses, the unrestrained and lack of regulations for the cultivation of palm oil has significantly impacted the environment around the world. The harm is not limited to environmental degradation but also extends to human rights violation including violation of workmen rights with regard to working conditions, mal-practices of child labour and so on. Companies clear forests for the cultivation of palm oil in order to fulfill the growing demand. Various studies

\textsuperscript{539}http://www.greenpeace.org/india/Global/india/docs/palm_oil_report_2012.pdf

have also reported that with rampant growth of the palm oil industry. The issue with palm oil sustainability (commonly referred to as the palm oil paradox) is in its inherent complexity owing to the fact that while palm oil industry has led to severe environmental damage and workmen exploitation. Palm oil is still one of the most viable option to use in a variety of products. Over the past few decades, demand for palm oil has globally increased owing to rising population and food demand. The Palm oil paradox arises from the struggle of finding a balance between economic development and sustainability. Palm oil remains to be the least expensive oil crop to produce. It is also the highest oil yielding crop having a four times better productivity per unit area than other oil crops. Various financial institutions and Palm Oil users (upstream) and financial institutions have committed to forest protection and sustainably grown palm oil.

The central theme and issue which would be dealt with, in this research paper is various existing and possible measures to ensure sustainability of the Palm Oil which is a leading cause to the global deforestation and reduction of green cover. The research paper focuses on Asian countries like India, Indonesia, Malaysia which are global leaders of palm oil industry, in either consumption or production.

Research Questions
The research question which are aimed to be answered through this paper are:

1) whether there are equally feasible and income-generating substitutes to palm oil

so economies like Indonesia which are highly dependent on production of palm oil as a source of their income and economies like India, which is highly dependent on its consumption, can do away with palm oil industry?

2) Whether there are methods and practices to ensure sustainability of palm oil for an ecological economic growth?

3) What are the legal, policy and personal initiatives taken domestically and internationally to ensure sustainable palm oil?

Indian Palm Oil Sector and Sustainability: Policy, Legal and Institutional Measures
India is the largest consumer of palm oil in the world. Over 96% of palm oil consumed in India is imported mainly from Malaysia and Indonesia. India being the largest consumer of Palm Oil in the world, has a long way to go to insure sustainable palm oil.

Various non-government actors have sufficiently contributed in raising sustainability concerns in the palm oil sector. There have been growing regulations in both buyer and producer market. Companies like VVF Ltd and Adani Wilmar agreed for 100 percent sustainable Palm Oil procurement. India depends on palm oil imports as it does not meet its internal demand through domestic production. It should thus insure that the source of palm oil imported is sustainable and meets environmental standards and certification.

Existing National and Global initiatives on Palm oil sustainability

541 Unilever commitment by Paul Polman, 2018
542 Unilever commitment by Paul Polman, 2018
Today, various sustainable palm oil commitments exist at national and global level. This also includes a global shift in the mind set of people about consumption of palm oil. These commitments can be categorized into industry led commitments involving initiatives of stakeholders and government led commitments. Such a categorization can be further elaborated:

- **India and Bilateral Trade with Palm Oil Producing Nations**: Indonesia is leading the way and has become the largest trade partner of palm oil to India in the ASEAN region. The bilateral trade between the two nations have increased from US$4.3 billion in the year 2005-06 to US$15.9 billion in the year 2015-16.

  Methods and practices for the cultivation and procurement of palm oil is one of the biggest concerns with regard to palm oil sustainability. Various forests have been cut down for the cultivation and procurement of Palm Oil leading to large spread deforestation around the globe. The Indonesian Ministry of Agriculture has established a set standard in order to implement certification standards for the production of palm oil called as Indonesian Sustainable Palm Oil (ISPO). The Indonesian government has successfully enacted laws against deforestation in various regulated zones in Indonesia with an aim to protect the existing primary forests. However, though the objectives of the "no deforestation" law are well placed, actual monitoring and implementation has been criticized globally. Out of the total palm oil acreage, just about 12% is ISPO certified which is an alarming situation keeping in mind that Indonesia, globally account for a huge share of Palm Oil production.

- **India and Malaysia**
  India and Malaysia have good trade relations and both the nationals have signed various agreements such as the Comprehensive Economic Cooperation Agreement (CECA) and Free Trade Agreement (FTA). However, Malaysia does not have specific laws for regulating the Palm Oil sector. This sector is governed by various social protection and environmental laws. These include the Land Acquisition Act of 1960, Environmental Quality Act of 1978, Protection of Wildlife Act of 1972, Pesticides Act of 1974 and Occupational Safety and Health Act of 1960. Apart from this, Malaysian Sustainable Palm Oil (MSPO) was also made compulsory by end of the year 2019. Conversely, standards such as MSPO and ISPO are also criticized as they fail to ensure environmental sustainability in the long term and are not robust enough. These standards also lack implementation.

  India has also taken various steps to encourage domestic production and avoid wrong import choices with regard to import of palm oil. It has raised import duty to 30 percent for importing crude palm oil and a 40 percent levy on the refined palmolein in order to curb cheap shipment of unsustainable palm oil and protect domestic refiners and processors. In the year 2018, these figures were increased to 44 percent raise for crude palm oil and a 54 percent


545 http://www.thehindubusinessline.com/economy/agri-business/import-tax-on-edible-oils-raised/article9965984.ece
raise to refined palm oil. There are various Domestic policy actors in India contributing towards palm oil sustainability. These include:

1. Ministry of Commerce and Industry: It is responsible for development, promotion and regulation of commerce and international trade.
2. Ministry of Agriculture and Farmer’s Welfare: The ministry closely works on Indian agriculture and uptake of oil crops such as palm oil by the farmers of India. The Trade Division within the Ministry is bestowed upon with the responsibility of forming policy recommendations on import and export of agricultural products. It also coordinates and formulates responses on World Trade Organization's Agreement on Agriculture.
3. Ministry of Environment, Forest and Climate Change: The ministry works on planning coordination oversight and promotion of India's policies and programs on environment and forestry. The Ministry is guided by principles of sustainable development enhancement of wellbeing for humans while implementing the policies and programs.
4. Ministry of Consumer Affairs, Department of Food and Public Distribution - The department has divided "oils" into various categories and it then manages the country's edible oils by assessing the domestic demand of edible oils and their availability through domestic sources. In order to maintain their prices, any mismatch in demand and supply is balances through imports of such edible oils. Even the prices of edible oils are monitored in the market and any required policy measures are initiated.

**Domestic Policies for production of Palm Oil:**
- National Mission on Oilseed and Oil Palm: A national mission was put in place in India in order to increase production of vegetable oils, tree borne oilseeds as well as palm oil. This initiative helped in significantly increasing the production of oilseeds thus, reducing dependence on imports.
- Oil Palm Area expansion (OPAE): This scheme was launched to bring in about 60 thousand hectares of land under palm oil cultivation. The program also focuses on providing incentives and loans at low interest rates.

**Various Voluntary Initiatives**
Under the Bureau of Indian Standards, a draft dated 15th April 2014 with specification on Palm Oil. Such standards was published in 1977 for the first time. It was later amended in order to launch scheme for labeling of products that are environment friendly. This mark came to known as ECO Mark.

- Indian Palm Oil Sustainability Framework: This framework is a bunch of social criterias and environmental criterias for the production and trade of sustainable palm oil, applicable in India. It is developed by Solidaridad and Society for Promotion of Oil Palm Research and Development which comes under (IOPR) Indian Institute of Oil Palm Research of the Government of India and The Solvent Extractors Association of India in consultation with...

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547 http://envfor.nic.in/about-ministry/about-ministry
548 http://www.bis.org.in/sf/fad/fad13_2634c.pdf
various key stakeholders across India. Apart from this, there are various Indian Companies and Multi National Companies in India which have committed to ensure sustainable Palm Oil. Deforestation free profiles and portfolios are generally common among famous brands and big manufacturers like Nestle, Unilever, Proctor & Gamble to name a few. This has led to emergence of various corporate commitments related to sustainability. North American and Europeans companies rank the first on highest number of environmental commitments. In the year 2016, the World Wide Fund for nature Palm Oil Buyer Scorecard looks into 137 companies from Canada, US, India, Europe, Australia and Japan who buy the maximum quantity of Palm Oil. These include mega giants like Walmart, McDonald’s etc. Focusing on the Indian perspective, there were three Indian companies which were evaluated by the Scorecard. These were Godrej, VVF and Emami Ltd. The Ferrero Group stood as a top scorer globally. Full commitments to hundred percent sustainable palm oil are not common by Indian Companies. However there have been various companies globally which pledged to consumers for using 100% certified Palm Oil. Furthermore, companies like Adani Wilmar, VVF Limited, Godrej Ltd. and AAK Kamani Pvt Ltd have all made public commitments to ensure sustainable palm oil in India.

**Way Foreword: Recommendations and Viable Measures to Ensure Palm Oil Sustainability**

In order to ensure palm oil sustainability, there is an ardent need to focus on some strategic areas some of which are:

- **Biofuels**

  India is an energy deficit country importing about 81 percent of the total oil consumption of the country. India is also amongst the top ten contributors to carbon emissions. The Indian Government has thus realised the difference biofuels can make to ensure India’s energy needs and reduce carbon emissions. Biodiesel is a non petroleum based fuel which is produced by various feed stocks including animal fats, algae or vegetable oils. It can also be blended with petro-diesel to run engine vehicles emerging as a better alternative and a renewable form of energy for a more sustainable and cleaner environment. It burns about 75 percent cleaner than other diesel fuels produced through fossil fuels and does not emit carbon dioxide in the atmosphere. In context of the Palm Oil industry, The Palm Fat Acid Distillate is the by-product which remains after refining of palm oil physically. This has for long been used to make soap and also as a raw material in oleo chemical industry. For production of Bio Diesel, PFAD is an effective feedstock. As India’s energy consumption is rapidly increasing, India has mapped out plans to boost the domestic bio fuel market rapidly in the coming years. Indian government has also unveiled a National Bio-fuel Policy (2018) which aims to encourage and incentivise the generation of bio-fuel. Thus integration of sustainable bio-fuels in the palm oil

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chain is an essential step towards ensuring sustainable practices.

- **Promote Domestic Production of Palm Oil through sustainable practices** - The Indian Government has drawn up strategy in order to encourage palm oil cultivation on a large scale in order to ensure sustainable palm oil through a program on Palm Oil Area Expansion.

- **Scaling up the demand for RSPO (Roundtable Conference on Sustainable Palm Oil)** is a global standard to certify sustainable palm oil. To ensure sustainable palm oil, all the RSPO member that take legal ownership and handle/produce RSPO certified palm oil require RSPO certified products in a price sensitive economy like India, where a large section of population is below poverty line or poor, the price of a commodity takes precedence over concerns of environmental sustainability.

**Conclusion**

In the present Palm Oil market scenario of India various solutions such as increasing awareness amongst the middle and upper class of buyers in order to promote sales of only sustainable palm oil, marketing palm oil as a sustainable brand, promoting better quality palm oil at feasible prices, setting targets which are time bound for the RSPO members are some of the innovative measures. Effective measures should take place to ensure the active engagement of RSPO with the owners and retailers in India. Reducing certification cost can insure participation of industry actors to certify their products. Above all, In the context of India, it is highly important to overcome the perception of consumers that labels like 'clean', 'cruelty-free' and 'sustainable' automatically imply 'expensive'. Hence, increasing awareness should begin from the grass root level in order to succeed in accomplishing any of the above measures.

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RESOLVING COMMERCIAL DISPUTES THROUGH PRE-INSTITUTION MEDIATION AND ITS CHALLENGES: INDIAN PERSPECTIVE

By Ritika Ghosh
From Amity Law School, Amity University, Kolkata

ABSTRACT
The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, known as the Commercial Courts Act of 2015, has inserted the provision of mandatory Pre-Institution Mediation and Settlement under Chapter III A under Section 12 A of the Commercial Courts Act, 2015. This section was inserted with aim to resolve the commercial disputes through mediation at the initial stage. It provides that when any suit does not contemplate for any urgent relief would not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation and settlement in accordance to The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, made by the Central Government. This amendment intends to incorporate the most successful and widely used opt-out model in India to resolve the commercial disputes. This model is been used by many countries like Italy, Lithuania, Luxembourg, United Kingdom, Greece, Turkey, Ireland for resolving their disputes mainly in civil and commercial matters. This a thoughtful move of the Legislature as they have stepped in the right direction to ensure the commercial disputes find a quick, cost-effective, time-saving appropriate resolutions. Mediation is indeed an effective and appropriate mode of dispute resolution especially in commercial matters where the parties will become partners in solution rather than partners in problem while resolving their disputes in their best interest. The practical effectiveness of this model faces few challenges in the Indian scenario.

KEYWORDS
Mediation, Commercial Disputes, Resolution, Pre-institution mediation, Settlement.

INTRODUCTION
The Commercial Courts Act, 2015, has been amended by The Commercial, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, to provide for an efficient means of resolution of commercial disputes which is consistently rising day by day. This Act has established Commercial Courts below the District Judge level in every jurisdiction except in areas where the High Courts have ordinary civil jurisdiction and also Commercial Appellate Courts at the District Level to hear appeal from the Commercial Courts below the level of district judge. The other major amendment that follows is the insertion of Section 12 A under the Chapter III A of the Commercial Courts Act, 2015. It introduces mandatory pre-institution mediation before filing of suit in the Court, where in case no urgent relief is to be sought by the parties. It also tries to provide for a speedy disposal of the commercial disputes and hence a deadline of 3 months (extendable by 2 months), within which the mediation has to be completed whether settled or unsettled, has been provided by the amendment of 2018.551

551 The Commercial, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 (April 19, 2019), https://www.prsindia.org/billtrack/commercial-
A mediated settlement has the same status that of an arbitral award under Section 30(4) of the Arbitration and Conciliation Act, 1996, which can be enforced as an arbitral award. The Commercial Courts Act of 2015 and The Commercial Courts (Pre-Institution Mediation and Settlement) Rules of 2018 provides a facilitative mediation model based on the principles of voluntariness and self-determination. The ethical standards of the mediator with regards to the confidentiality of the mediation process are also prescribed. The Commercial Courts Rules of 2018 provides for the procedures for such pre-institution mediations. In order to initiate the mediation, the plaintiff has to file an application with the State or the District Legal services Authority established under the Legal Services Authorities Act, 1987. After receiving such application, a notice will be issued to the opposite party by the Authority asking him to appear within ten days of receiving the notice and consenting to participate in such mediation. If the Authority receives no response from the opposite party within a period of ten days of the receipt of such notice, then as per the Rules the Authority will issue a final notice to the opposite party. If the opposite party refuse or fails to comply or appear after receiving the final notice then the mediation process will be treated as a non-starter and accordingly prepare a report to that effect. If the opposite party accepts and agrees to participate in the mediation process, it will lead to the initiation of the mediation proceedings. Following the dialogues, negotiations and after crossing the different stages of mediation, if the parties arrive at a settlement, the mediator will formulate the mediation settlement agreement which shall be binding on the parties.

Most of the Jurists, Scholars, Hon’ble Judges are of the view that in the contemporary era, where the Courts are already over-burdened with innumerable commercial matters, the best alternative dispute resolution is Mediation. The Pre-institution Mediation lessens the burden of Commercial Courts as well as improves India’s Ease of Doing Business Index. In a special leave petition in the matter of Mr. Vikram Bakshi & Ors. v. Ms. Sonia Khosla (Dead) By Lrs., where the seeds of mutual distrust and lack of faith gave rise to more than 80 cases which are pending between the parties. The view of the Apex Court in this matter was that “there is always a difference between winning a case and seeking a seeking a solution and via mediation the parties will become partners in solution rather than partners in problem”. The Court further emphasized that mediation leads to a state of peace in the society, the economic, commercial and financial benefits for the growth and development of the country were also underlined. Where it is seen that the Court had preferred mediation as an appropriate way of resolving the dispute in this commercial matter involving a long legal battle.


553 2014 (II) CLR (SC) 385
DECODING SECTION 12 A OF COMMERCIAL COURTS ACT, 2015

In Section 12 A (1) of the Commercial Courts Act, 2015, it is clearly provided that the plaintiff cannot approach the Court to file a suit unless the plaintiff has exhausted the alternative method i.e. pre-institution mediation and settlement. The Court will hear and adjudicate the case on those facts which has been tried out in pre-institution mediation. The Section also provides an exception when the plaintiff can directly approach the Court without going for pre-institution mediation. Only when the case contemplates any urgent relief under this Act, the plaintiff can directly approach the Court. This provision stresses on the importance of forming an environment for the development of alternative modes of resolution of disputes in commercial matter.555

There has also been a reduction in the value of dispute, previously before the passing of the Ordinance of 2018, the value was brought down from Rs. 1 Crore to Rs. 3 Lakhs. This reduction will result into the increase in number of disputes arising amongst the small and medium sized companies.556 This will further saddle the Commercial Courts which are currently as per figures quite less. This Act has established Commercial Courts below the District Judge level in every jurisdiction except in areas where the High Courts have ordinary civil jurisdiction and also Commercial Appellate Courts at the District Level to hear appeal from the Commercial Courts below the level of district judge.

The legislature’s intent while framing this provision was based on several objectives. The primary one was speedy recovery of commercial cases. If such cases are dragged on for years and years then it will have a number of adverse effects on the economy of the country as well as the investors. This will also lessen the burden of Courts. This provision has been a step towards right direction but the legislatures have left the provision open for challenges from various angles. For instance, what is meant by “urgent interim relief” has not been described, many can take the ground of urgent interim relief and approach the Court directly without exhausting the remedy of pre-institution mediation. There are many other such ambiguity and practical challenges in executing this provision in India. No doubt insertion of this provision will be a game changer in the years to come if all the practical and technical challenges are addressed properly. If we take the example of Italy, it is important to take a note of the fact that Italy had reformed its legal system to adapt its judicial system to enforce mediation and thereby reducing the burden of Courts. There was a well thought out policy and the implementation of opt out model lead to Italy’s Ease of Doing Business Index over past years.557 The essence of taking this example is to advice that India should also learn from this system


and the ordinance of Commercial Court pre-institution mediation and settlement of 2018 to come up with a concrete plan which would address the various issues that arises from the lacuna persisting in the said provision of Section 12 A of the Commercial Courts Act, 2015.

TECHNICAL CHALLENGES IN EXECUTION

There is no doubt that the pre-institution mediation mode of alternative dispute resolution in especially commercial matters have been successful in many countries namely like Italy and Turkey. This vision of the legislature remains unquestionable. The major obstacle comes into play at the time of its execution. To start with the primary one, Section 12 A (2) of the Commercial Courts Act, 2015, have authorized the Authorities established under the Legal Services Authorities Act, 1987, for the purpose of pre-institution mediation. The Legal Services Authorities Act, 1987, is a benevolent legislation mainly aimed at “ensuring fair and meaningful justice to the marginalized and disadvantaged sector of the society”.  

The Authorities under this Act mainly concentrates on providing free legal aid to the needy ones by providing legal representation, legal literacy and awareness. The other main task is to enforce the system of Lok Adalat and other alternative dispute resolution modes. The main question that arises is that whether the Authorities constituted under the Legal Services Authorities Act, 1987, will be able to do justice to the commercial matters that are highly technical issues and they are or may not adequately trained in this subject matter. Most of them might not be a trained mediator particularly not being an accredited and trained commercial mediator. These issues impose serious hindrance in the application of the pre-institution mediation model in India.

The Bill of 2018 which amended the pecuniary value of commercial disputes from Rs. 1 Crore to Rs. 3 Lakhs and broadening the scope of the definition of Commercial matters. This will thereby increase the number of cases being referred for pre-institution mediation and the number of applications will pile up at the National, State and District Services Authorities. This will increase the already overburdened Authorities. Thereby the main objective of speedy recovery of commercial disputes will not be achieved leading to delay in delivering justice to these commercial matters. The underlying object will not be ultimately achieved for which the opt-out model has been legislated. For instance referring to an incident that took place at Delhi, where within a week of the introduction of Pre-institution mediation Rules 2018, Delhi High Court had issued a notice in a petition that challenged the constitutionality of Section 12 A of Commercial Courts Act, 2015. The petitioner had raised the grievance that there is no effective mechanism in place currently to implement the provision of mandatory pre-institution mediation. This has left most of the parties remediless. The Legal Service Authority (the Authorities under Section 12A) had directed to inform the parties that there is no introduction and establishment of any mechanism .till date despite the Rules having been notified on 3rd July, 2018.

The second primary issue with regards to its implementation is lack of infrastructural development in India. There is a lack of

http://www.mondaq.com/india/x/727214/Arbitration+Dispute+Resolution/Mandatory+PreInstitution+Mediation+Commercial+Courts

558 National Legal Services Authority (May 5, 2019), https://nalsa.gov.in/content/vision-statement
559 India: Mandatory Pre-Institution Mediation: Commercial Courts (May 5, 2019),
infrastructural facilities which causes a hindrance in facilitating the commercial dispute resolution. There are very few number of Commercial Courts and all don’t have original civil jurisdiction. There are no properly established mediation centres. Inadequate number of training centres to provide training to the Commercial Courts Judges and the Authorities who perform the mediation are also not well trained in commercial mediation.

The Legal Services Authorities who are entrusted with the duty to conduct pre-institution mediation of commercial matters, lack relevant and adequate proficiency and experience to mediate commercial matters. They mainly handle disputes pertaining to family, labour and insurance disputes, which are less technical that matters relating to commercial matters like Intellectual Property Right disputes and many more. If a mediator is trained in commercial mediation it is always a plus point as they are able to open an effective dialogue understanding the underlying issues of the parties and finally are able to draw out a workable settlement. It is not that the mediator has to be very well versed with all commercial laws and be highly qualified, it is just that a basic minimum training in and exposure to commercial mediation leads to effective resolution of commercial disputes. It is more necessary in a country like India where the masses are having very minimal idea and knowledge of mediation and hence they rely on the mediator to guide them through the whole process.  

Moving to the next obstacle, lack of imposition of any sanction when the other party defaults in participating or reciprocating to the mediation process which leads to non-starter or delay in the mediation process. The provision of Section 12 A itself provides the opposite party with an opportunity to refuse to participate in the pre-institution mediation process. This is also a major hindrance towards proper implementation of pre-institution mediation. As there are no sanctions attached to the refusal, non-attendance or appearance of the opposite parties, they tend to avoid the mediation process and prefer to litigate. This leads to non-fulfillment of the objective of the pre-institution model in India.

Thus, these are the major challenges in execution of the pre-institution mediation. The technical challenges involved impose serious challenges to the smooth implementation of this opt-out model. The question that arises next is that whether India is at a pre-mature stage to implement the mandatory pre-institution mediation model in commercial matters.

A WAY FORWARD
The initiative of the Legislature to incorporate this opt-out model is commendable. The efforts need to be injected in the right direction and at the right time in order to overcome the practical difficulties in execution. It is natural to face some challenges while adapting to a new system. A lot of work needs to be done to implement the model in a successful manner. India can always refer to the opt-

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out models that have been successfully implemented in the other countries. There are few explanations and clarifications that are necessary to be incorporated by the Legislatures to remove the ambiguity that prevails. The provision of Section 12 A also requires few further amendments to ease the implementation of the mandatory pre-institution mediation model. There Government has to focus on the infrastructural development of the Commercial Courts, Mediation centres, and Mediation training centres for the Authorities by whom the disputes will be resolved and the Commercial Courts Judges. The resources should be utilized by the Government in order to facilitate the smooth implementation of the mediation process. The Legal Services Authorities should also take active measures to spread the legal awareness about commercial mediation among the masses.

The major requirement is that there has to be a provision for implementation of sanction for non-appearance or non-attendance. In other countries like Turkey, where the party fails to attend the initial mediation sessions they are made liable to pay the litigation cost, even it succeeds later on. The case is same in Italy, where the Judge can sanction the party for his or her non-attendance in the initial mediation meetings. Such provision does not exist in Indian scenario that’s why the parties are ignorant about the same as they know they would be punished for their non-appearance and they are responsible for delay and the case remains pending for years in the Commercial Courts.

There requires a more enhanced explanation of the term “urgent relief” under Section 12 A of the Commercial Courts Act, 2015. The parties can directly approach the Court in cases of urgent relief, but there lies no definition and illustration as to the situations or circumstances that can fall under the term “urgent relief”. It has been left to the whims of the parties to approach the Commercial Courts taking the plea of urgent relief and the rest depends upon the wisdom of the Judges to decide as to whether there is any urgency in the plaintiff’s case. This ground can potentially be misused by the parties to delay the entire process and cause harassment to the opposite party. This would defeat the very objective of this provision.

There is a need for implementation of quality check methods and machineries. In India there exist no regulatory provisions which would govern the qualification of commercial mediators and no provision for their training and getting the mediators accredited. However, in Turkey it is seen that Turkish law lays down the quality check machineries over the entire mediation procedure and has established standards for training of mediators. This develops the confidence of the parties on the credibility of the mediators. In India, there is no binding rule and laws that would check the proper appointment of qualified and well trained mediators and no quality check mechanism or method. Hence the opt-out model that is successfully running in the countries of Italy, Turkey, Ireland, Lithuania, Luxembourg, United Kingdom and Greece, as these countries have taken strong approaches towards the implementation of the opt-out model.

Another amendment that needs to be incorporated in order to ease the

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563 Mandatory Pre-Institution Mediation in Commercial Matters: Is India Ready? (May 5,
implementation of the pre-institution mediation is by accrediting institutions apart from the Authorities constituted under the Legal Services Authority Act, 1987, to conduct the pre-institution mediation of commercial matters. Where the well trained commercial mediators would undertake the mediation process and carve out a practicable agreement. Thereby, it will enhance the implementation of the opt-out model.

Thus, the Legislatures should undertake a detailed analysis and make necessary amendments to the existing provision on mandatory pre-institution mediation in commercial matters. The whole issue including its practical implementation has to be dealt keeping in mind the various dimensions and possibilities. The reference of various successful opt-out models of other countries can guide the Legislatures in properly implementing it in India. Though it may take some time for the successful implementation of the opt-out model in India but it is not impossible to enforce it effectively in India. Addressing the existing ambiguity and technical challenges and spreading awareness, amongst the public especially the commercial players in the market, the commercial disputes will efficiently be mediated through the pre-institution mediation without approaching the Commercial Courts and thereby saving the time and money of both the parties and the Courts. This would eventually lead to increase India’s Ease of Doing Business Index and improve the economic condition as well.

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FLAWED 10% QUOTA

By S. Sandhya
From School of Law, SASTRA Deemed to be University

ABSTRACT
The concept of reservation is one of the most discussed and debated topics in the recent times. On January 14th 2019, the Constitution (103rd Amendment) Act, 2019 was brought into effect providing for 10% reservation in government jobs and educational institutions to Economically Weaker Sections (EWS) of General category. In India, owing to the destructive caste system, large sections of people have been historically stigmatized and discriminated on account of their castes. Thus reservation was introduced as a tool to redress historic injustices and provide for social upliftment of such backward classes. It was solely based on caste, since the latter was identified to be the predominant factor that contributed to social and educational backwardness. However, what started as a temporary measure has remained the same even after 70 years of independence. Caste-based reservation no longer fulfills the purposes for which it was introduced. They are only anti-secular and anti-progressive in nature. In today’s world, caste is no longer the only obstacle in the way of development of individual. The poor people, owing to their financial incapacity, have historically been deprived of opportunities in education and public employment. Thus economically weaker section reservation is considered to be the right step towards uplifting the weaker sections of the society. However, the criteria that apply to EWS quota are highly defective and flawed. When applied, almost 95% of the population (unreserved category) fall under the EWS category. Thus the very purpose for which the quota was introduced stands negated. Hence, it is imperative that in order to achieve the purpose for which EWS was introduced, the criteria on which it is based should be modified accordingly.

1. INTRODUCTION
Reservation is one of the most critically acclaimed measures devised to act against as well as to compensate for age-old social oppression and injustice faced by certain classes. Indian social framework is to a huge extent, a caste-based hierarchical framework. The presence of caste system resulted in a considerable section of the general public being denied the right to education, ownership of property and social equality. The system of reservation in India comprised of various governmental policies and programs, thus gave certain priorities in terms of reserving access to seats in the various legislatures, to government jobs, and to enrollment in higher educational institutions, to such groups that were considered underprivileged over the others. Otherwise known as affirmative action, reservation strives to enhance the status of historically disadvantaged castes and tribes such as the Scheduled Castes, Scheduled Tribes and Other Backwards Classes (OBC).

However, even after 70 years of independence, the demand for reservation has only increased owing to the vote bank politics that has eventually influenced the entire system.

The Constitution of India primarily governs reservation apart from statutory laws, rules and regulations. It prohibits untouchability and empowers the state to make special provisions for the backward classes.

The caste-based reservation dates back to 1902, when Shahu, the Maharaja of the
State of Kolhapur, brought in reservation in favor of non-Brahmin and backward classes in the field of education. However, the type of reservation system that exists today was initiated by British Prime-Minister Ramsay Macdonald in the year 1932, which subsequently resulted in the Poona Pact. After Indian independence, there were many changes in the reservation system. The important one was the institution of Mandal Commission in 1979 to assess the situation of the socially and educationally backward classes and provide for recommendations. After analyzing in depth the conditions of various communities, they identified backward classes and recommended for providing 27% reservations to such Other Backward Classes. But the report was put in cold storage and it wasn’t until the 1990s that such recommendations were implemented in Union Government jobs. Initially, the reservation was only intended to stay for a period of 10-15 years and was to be renewed for another few years if the need is still there, but ever since its implementation, it has only extended. Currently, around 15% of the seats are reserved for SCs, 7.5% for STs and 27% for OBCs, leaving just about 50% of the seats for the ‘general category’.

2. ECONOMICALLY WEAKER SECTION QUOTA

The status quo was disturbed when the Union Government passed the 124th Amendment Bill which paved way to the 103rd Constitutional Amendment Act on 14th January 2019. The Act amends Articles 15 and 16 of the Indian Constitution by adding a clause that empowers the state to provide up to 10% reservation in education and public employment for “economically weaker sections” (EWS) of citizens other than the SCs, STs and OBCs who were covered under the existing reservation system. It is over and above the existing scheme of reservations, increasing the total to 59.50%.

- **Article 15(6) states:**
  (6) Nothing in this article or sub-clause (g) of clause (1) of Article 19 or clause (2) of Article 29 shall prevent the State from making -
  (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
  (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

- **Article 16(6) states:**
  (6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.

Explanation - For the purposes of Article 16, “economically weaker sections” shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

The Centre via Office Memorandum no. 20013/01/2018-BC-II dated January 17,
2019 defined *Economically Weaker Sections* as persons whose annual household income is less than 8 lakhs, or owns/possesses agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified Municipalities, or residential plots less than 200 sq. yards in non-notified municipalities. As already mentioned above, Article 16(6) also allows states (defined under Article 12 of the Constitution) to notify EWS from time to time on the basis of family income and other factors of economic disadvantage, to be applied to respective state education and state public employment.

3. **WHY RESERVATION SHOULD BE BASED ON ECONOMIC CRITERIA**

The basis of the policy of reservation is not intended to be disparaged. But much water has flowed down since the conceptualization of the reservation system. Keeping aside the politics attached to the decision to introduce EWS quota, it’s an important step towards an era of income-based reservation though the transition wouldn’t be an easy one. It will instill a sense of correspondence between citizens.

It was in 1979 when the Mandal Commission, in its report, identified many communities that were considered socially and educationally backward and concluded that caste as a factor played a predominant role in contributing to their backwardness. However, after all these years, it’s almost as if such communities have attained an echelon in the society, that the focus should move to economic criteria considering the fact that one of the principle objectives of reservation is to bridge the gap between have and have-nots. Reservation based on economic criteria is a practical and realistic approach to combat the problems that the nation faces in current times.

The goal of reservation in India was to improve the welfare of socially and educationally backward classes. Though, caste-based reservation helped in the achievement of the same, since the time of its inception, a huge chunk of the benefits have also been captured by well-off groups from such backward classes like the Chamars from SC and others who have been economically better off right from the beginning. Latest trends indicate that there is a rush to get OBC/SC/ST status with many communities making attempts to get classified as backward so as to avail the reservation benefits. For e.g., recently, the Patels of Gujarat and the Jats, have been demanding caste-based reservation despite being a politically and economically dominant community with a considerably high living standard. Thus, over the last two decades or so, reservation has been highly misused. The first generation beneficiaries of reservation apart from utilizing the benefits just for themselves perpetuated it to their progeny too. This led to monopolization of the benefits by a few politically and socially dominant caste groups at the cost of more needy people. However, EWS quota stands on a better footing. By denying reservation to the creamy layer, it ensures the deprived and deserving people are able to avail the benefits rightfully.

Caste-based reservation also breeds indolence among individuals who, by virtue of their castes, take advantage of the reservation available to them. This ultimately results in degradation in the quality of workforce and hampers the growth of India.

It was in 1962, when the issue of determining backwardness first arose in the
The case of *M.R.Balaji v. State of Mysore*, wherein the constitutionality of Article 15(4) was examined by the Supreme Court. The court struck down a governmental order issued by the State of Mysore in which backward classes were solely identified on the basis of caste, by stating that only the words “classes of citizens” were used in Article 15(4) and not “castes of citizens”. It inter alia held that caste as a factor is inapplicable in many sections of the society that do not recognize caste system such as the Muslims or Christians and that ‘caste of a person cannot be the sole criteria for ascertaining whether a particular caste is backward or not’. It also observed that once a caste is considered backward doesn’t mean that it should continue to stay backward at all times and the test to reservation should be reviewed periodically to ensure classes that reach a state of progress are deleted from the list of backward classes. In *R.Chitralekha & Anr v. State of Mysore*, the court held that while caste may be a relevant indicator of backwardness, exclusion of caste as a factor does not damage the classification if other tests are satisfied. In *Jagdish Negi v. State of Uttar Pradesh*, the court decided that no class of citizens can be treated as socially and educationally backward always and the State is entitled to review the situation from time to time.

It can be understood that caste is not the only obstacle in the way of development of an individual. Factors like economic conditions, gender discrimination and lack of educational opportunities also contribute to denial of opportunities to an individual. Simply put, backwardness is found in various forms due to various reasons. Can it be said with certainty that the so-called backward classes have been uplifted because of reservation? No. Is the lifestyle found in North-Eastern regions even remotely similar to the lifestyle in metropolitan cities? No. After all, girls are discriminated right from the time of their birth. Such types of discrimination have been in practice for ages cutting across religions and caste lines. Thus, relying upon decades-old Mandal Commission report will only hinder the nation’s progress towards creation of an egalitarian society. It can be said that the measures and means, adopted by the nation, to achieve the development of all, have become an end in itself resulting only in fragmentation and division of the already caste-divided society. The current policy of reservation has virtually divided the society into two, namely, the Oppressors and the Oppressed by classifying classes on the basis of their caste. This is something that the constitution-makers wanted to avoid in the first instance. Individuals have been turned into epitomes of their respective castes irrespective of the multiple identities that they may carry. It has manifested an abhorrent social order at the social and structural level, to the extent that caste has become the only identity of citizens and the only factor for determining social identity. Economic based reservation by being secular and non-discriminatory in nature, is the need of the hour.

4. **FIRST BACKWARD CLASSES COMMISSION**

The first backward classes commission was set up under the chairmanship of Kaka Kalelkar to determine the criteria to be adopted to identify socially and educationally backward classes, prepare a list of the identified backward classes and

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also investigate their social, economic conditions.
In its report, Kaka Kalelkar opined that in the long run, measures such as reservation would not be in the interest of the society and nation. The principle of caste should be shunned out altogether to ensure justice to poor and deserving members of all communities. He wrote,

"122. Towards the end of our enquiry, we have come to the conclusion that caste, communal or denominational considerations need not be introduced in the educational policy. A progressive, modern welfare State, cannot afford to tolerate educational backwardness anywhere in the State. In most of the modern States more than 60 per cent of the scholars receive full educational aid. In India, it should be possible for the State to give educational aid to all the poor and deserving students in the country, irrespective of caste, sex or denomination. Whenever it is necessary to show preference it must be for women and for students of rural areas. The present preference for Scheduled Castes and Scheduled Tribes should be continued for some time, but the time has come when all the poor and deserving should, and could, be helped, so that no communal consideration need be introduced in the field of education."

At the time of tabling the report before the Parliament, Kalelkar mentioned that recognition of certain castes as backward may only lead to strengthening of the existing distinctions based on caste and perpetuity of caste as a deciding factor of social identity. Shri Govind Ballabh Pant, the then Home Minister stated:

"……..the emphasis on caste has further been highlighted by some of the minutes of dissent. The tone and temper displayed therein bring into prominence the dangers and of separatism inherent in this kind of approach. It cannot be denied that the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of specified castes as backward may serve to maintain and even perpetuate the existing distinctions of caste. There may be, besides castes, a large number of whose members may be classified as backward educationally and economically, but still there may be others among them who cannot be so classified. Similarly, among the so called upper and advanced classes there may be, and in fact there are, large number of those who are not less backward educationally and economically and even among the backward classes some castes are more backward than the others…"

However, like the powerful recommendations in the report, there were noticeable limitations too. Around three members of the Commission were against caste as a criterion for determining social backwardness. Kala Kalelkar, himself, before submitting the report, renounced it stating that the recommendations/remedies suggested in the report were worse than the evil it sought to curb in the first place since the recommendations were purely based on caste. He dreaded that it might increase caste consciousness among other things. No meaningful action was taken pursuant to the report as it was considered inefficient.

5. DISSSENTING OPINION IN INDRA SAWHNEY V. UOI

It is relevant to place reliance on the rationale endorsed by the minority in the case of Indra Sawhney v. UOI to understand

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why the caste-based reservation was an imperfect one. In the instant case, by a 9:3 majority the Supreme Court upheld the implementation of separate reservation for OBCs in central government jobs (recommendations of Mandal Commission report). Out of the dissenting opinion by 3 judges namely, R.M.Sahai, Kuldip Singh, Dr.T.K.Thommen, the opinion of R.M.Sahai was the most extensively reasoned.

- R.M.Sahai, J inter alia observed that:
  1. The Indian Constitution only uses the word “class” and not “caste”. Rudimentary principles of construction put forth that an interpretation leading to the identification of backwardness based on caste should be rejected.
  2. Providing for reservation under Article 16(4) not only destroys the very purpose of Article 16(2) but also goes against the rule of anti-discrimination on the basis of caste.
  3. Since the caste system does not exist in certain communities, caste-based reservation leads to denial of opportunities to socially, educationally and economically backward members of such communities. For e.g. Bhistis among Muslims.

- Kuldip Singh, J. agreed with R.M.Sahai, J and put forth that identification of backwardness should be based on a secular criterion such as occupation and income.

- Thommen, J. also apart from agreeing to R.M.Sahai, J, added that caste-based reservation may result in iniquitous reverse discrimination.

Thus it is concluded that caste-based reservation is contradictory to the constitutional vision of a casteless society and only reservation based on economic criterion can pave way for such a casteless society thought of by many constitutional makers.

6. THE FLAWED CRITERIA
As stated above, Economically Weaker Sections was defined as persons whose annual household income is less than 8 lakhs, or owns/possesses agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified municipalities, or residential plots less than 200 sq. yards in non-notified municipalities. It also allows states (defined under Article 12 of the Constitution) to notify EWS from time to time on a basis of family income and other factors. It be applied to respective state education and state public employment.

**Criterion 1:** A family whose household annual income is less than 8 lakhs per year, which translates to ₹ 66,666 per month. Here, the word family includes “the person who seeks the benefit of reservation, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years”. Also, income will include all sources such as salary, agriculture, business, profession, etc.

- As per the 2011-12 National Sample Survey Office report, key indicators of household consumer expenditure, throw light on the fact that the per capita income of the top 5% of the Indians stands at just Rs.4,481 in rural areas and Rs.10,281 in urban areas. Thus, even if a household consists of five members, the family monthly income won’t exceed Rs.51,405 which is way lower than the limit notified under the EWS quota. So at least 95% of Indian families fall under the 8 lakhs annual income limit. In addition, for the year 2018-19, the per capita income at current prices was estimated at Rs.1.26
lakhs p.a. Again assuming a family of five, that translates to around Rs.6.32 lakhs. Thus, a household that gets 8 lakhs a year would be well above the national average. Granting them economically weaker status is definitely ironical. Even as per surveys conducted by National Council of Applied Economic Research (Indian Human Development Survey), this 8 lakhs cap makes around 99% of households eligible.

- Arun Jaitley in one of his speeches put forth data that said tax returns of above Rs.5 lakhs were filed only by 76 lakhs people.
- Estimates suggest that as high as 80% (Bhalla) to 95% (Desai) of the general category households become eligible for EWS quota if the limit is applied.
- Further, during the year 2016-17, around 23 million individuals declared income of over Rs.4 lakhs. So, roughly one crore families would be over the 8 lakhs limit, if an assumption of two individuals per family is taken. It amounts to 4% Indians, out of a whopping Indian population. A thorough understanding of the above thus indicates that this criterion is faulty. It is only prone to wrong inclusion rather than addressing exclusion.

**Criterion 2:** Agricultural lands should be less than 5 acres.

According to Agricultural Census 2015-16, 86% of land holdings in India are smaller than the prescribed limit of 5 acres.

**Criteria 3 and 4:** Residential flat less than 1,000 sq. ft.; Residential plot less than 100 sq. yards in notified municipalities, or residential plots less than 200 sq. yards in non-notified municipalities

It is terribly evident that only less than 20% of the nation’s population might possess a residential plot of over 1000 sq. ft. The 2012 NSSO Report on housing conditions highlighted that only the richest 20% of Indians lived in houses with an average floor space of around 500 sq. ft.

Due to such flawed criteria, virtually 95% of the Indian population (as already stated above) who were not part of any reservation till now (to those whom EWS apply), become eligible to avail the benefits of the EWS quota. This may inevitably result in a vicious cycle with castes competing against castes and religions against religion within the reservation. At times communalisation of quotas may worsen the situation. In the end, it will only lead to the usual, i.e. the poor (having low income, say, Rs.1 lakh or less) will be clubbed with the wealthy without an option of opting out.

These preposterous paradoxical criteria, if not modified accordingly, will only worsen the opportunities available to the deserving youth. The very purpose and objective of economic criteria based reservation will itself be ruined.

7. **CHALLENGES**

In addition to the flawed criteria, there are a few challenges that can be faced during the implementation of the EWS quota. They include:

- Only a few non-SC/ST/OBC individuals have a caste certificate. Thus, it will be difficult for such individuals to lay claim to this reservation.
- Determination of the precise amount of income of households, in general, may pose technical difficulties due to the absence of proper records. In addition to this, there are plenty of chances that individuals may get fake income certificates.
The new law does not explicitly state whether the EWS reservation is horizontal or vertical. This may give rise to a fresh set of problems at the time of implementation.

8. CONCLUSION

Reservation on the basis of economic background has always been implicitly part of the constitution. Article 46 of the Directive Principles of State Policy states that the State shall promote with special care, the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The criteria provided under this reservation, despite being flawed, convey a poignant fact. At least 80% of the households belonging to the general category are economically weaker even though they are supposed to benefit the maximum in this fast-growing economy in the world.

Thus, the apparent truth is the creation of glaring income inequalities. The gap between the richest and the bottom lot is only growing at faster rates, with time, across castes. The inequalities are deep-rooted. The hopes that the situation of economically backward people will improve are only thinning and seem to be near impossible. As of 2019, around 46 million people in India live below poverty line. This poverty exists irrespective of castes and religious. To substantiate this, various estimates show unequal opportunities existing in employment and education cutting across castes and classes- due to economic as well as social reasons. The economically backward sections, due to their financial incapacity to compete with the economically privileged, have always been deprived of worthy opportunities with respect to education and employment. Yes, the social and educational backwardness can be attributed to the practice of caste system to a huge extent. But in current times, when all social categories are classified by their levels of income, one can observe a similar pattern existing in employment and education at particular levels of income across social categories. A person belonging to a low-income household will already have or will have access only to less salaried employment and poor or no higher educational attainment when compared to a person belonging to a high-income household. Caste-based reservation may have been the right step to eradicate social and educational backwardness and uplift them. But that was 50 years back. Now, for reservation to achieve the purpose for which it was introduced i.e. to solve the problem of unequal opportunities, it should target the poor, in general, irrespective of their castes. Excluding the creamy layer from obtaining benefits will only help out the marginalized and poor. The income criteria, thus, should be rationalized and fixed carefully. Otherwise, the proposed 10% quota will fail to address the problem of unequal opportunities and the very purpose for which it was introduced will stand negated.

To conclude, it is pertinent to rely upon the statement made by Shri Pundit Jawaharlal Nehru on the floor of the Lok Sabha on 13.6.1951.

“......After all, the whole purpose of the Constitution as proclaimed in the Directive principles is to move towards what I may
say a casteless and classless society……”.

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LET’S GIVE VOICE TO THE VOICELESS

By Sakshi Sharma and Shubham Agnihotri
From Lloyd Law College, Greater Noida

Earth, the only planet on which living organisms exist. Here everyone is dependent on each other in the form of food web. The most specific relationship if of Human Beings and animals. They both have a huge history with each other from the early age times. But in today’s time question have arisen whether there is a need of Animals Rights too just as the Humans are provided worldwide.

Why the question of Animal Rights? Because today, we, the Human Beings have considered each other superior to every one of them and even pretend as if we have the full right on lives of flora and fauna and specially the flora. The shocking number of animal cruelty cases reported every day is just till the tip of the iceberg—most cases are never even reported. Unlike violent crimes against the people, cases of animal abuse are not compiled by state or any federal agencies, making it difficult to calculate just how common they are.

In our day to day life almost every one of us have seen an animal whether in zoo or while petting them or while doing some of the domestic work of humans which is like really very common sight on road in India. Even while seeing of all this not a single person must have thought about what animals must be suffering from, kept in zoo while abducting them from their natural habitat, separating them from their herds and some of them also take birth in the zoo and don’t even know what their natural habitat is and will not even know about the fragrance of freedom. Human beings make them work as if they are our slaves UNPAID SLAVES treating them with cruelty making them lift or pull things on their back which are doubt to their weight. When did we all HUMAN BEINGS became so selfish that we can’t even see what all wrong we are doing to the organisms who can’t even express themselves like us. Not only talking about killing them for our own hunger but also why are we destroying their habitats oceans, forest etc. Though talking about cruelty, it has gone to the whole next level talking only about Mumbai in the last five years, 19,028 animal cruelty cases were recorded. But there were no arrests or convictions, data compiled by the Bombay Society for Prevention of Cruelty to Animals (BSPCA) revealed. The victims are dogs, cats, birds, goats, horses, bullocks, fowl and cattle.

In the absence of law it’s on us Human Beings to protect the animals as they are not able to talk like us. Though India have proper animal protection laws that, with certain amendments can completely change the scenario of how animals are treated in India. But at the end it is on us how we treat the animals and how we accept the laws. The laws are made but only accepted and applied by few.

ANIMAL CRUELTY : WHAT IS IT ??
Animal Cruelty is an act of omission towards animals like neglecting them or not acting in responsible manner towards them. It’s a kind of abuse not giving them food or water, beating them or terrorizing them. Animal abuse takes place in day to day world also its not only limited to the industrial animal agriculture. It can be happening in our neighbor or with stray dogs etc.

WHY IT’S BEING DONE?
Most of the people have seen animals like an object. Animals are used for the practical purposes where they are being exploited. The animal has no more significance than a tool or device. People who mistreat animals can separate themselves from the beings they hurt, so they don’t feel as though they’re doing anything wrong. For example, a hunter will see a deer as food, the food he’s going to cook for his family rather than the beautiful creature he’s captured in his rifle’s sights or will see the skin of the deer on which he will be trading and will make money out of it.

People still don’t agree that animals do have rights. Strange, but True. While cruelty to pets and animals is a punishable offence, the Prevention of Cruelty to Animals Act, 1960, levies a measly fine of just Rs10 to Rs100. With the fine so low, the law is not acting as a deterrent.

Animals are being bought because they are cute, as status symbols, or, as toys. This often ends in abandonment, neglect or abuse. Companion animals are left chained or caged alone for hours, without food or water. They are physically abused, abandoned, or even killed.

PETA People for the Ethical Treatment of Animals
People for Ethical Treatment of Animals popularly called as PETA, is a charitable organization. It is largest animal rights organization in world. It has more than 20 million members and supporters around the world. In India, it was launched in January 2000 and its main office is in Mumbai. It has affiliates in the United Kingdom, Germany, the Netherlands and the USA. The main objective of PETA India is to establish and defend the rights of animals. The basic principles under which PETA works are that animals are not food, not for wear, not for experiment and not for entertainment. PETA India's main purpose is to educate and aware policymakers and the public about animal abuse and promotes an understanding that like human beings, rights of all animals must be treated with respect.

ANIMAL CRUELTY STATISTICS IN INDIA
Animal cruelty is really a topic to worry. Animals are just voiceless they can’t express themselves so we, the human beings being the most sensible one should understand their needs too and must understand that even they have a right to live their life with dignity. But still there are so many people who abuses them they abuses them to the extent which is just un-explainable. Cases of Animal cruelty is increasing day by day though still there are cases which just went un-reported. Many times, police don’t even register the cases related to the animal cruelty or animal abuse. And why to blame them only even we support people who abuse them, like we go to circus “by paying charges” in order to see them getting abused and what do we even enjoy watching them getting them doing things which they trained and how by beating them or holding them captive far from their actual habitat.

General question, WHY IS THIS HAPPENING? And why there is no stoppage towards them because people are not aware of the law and all the rights given to the animals by Constitution, not even our local police officer will know about this. The cases of cruelty towards animals are increasing with the multiple of 1000. According to the reports of The Voiceless Animal Cruelty Index (VACI) India ranks Second in Animal Cruelty Index. Around
70 billion farm animals are butchered each year from our consumption on worldwide level. This means 191 million animals per day, approximately around 8 million per hour and 2200 per second. This number is just growing with the speed of light as even people are benefitted with this as the incomes are dependent upon this.

Now talking about India, recently more than 50 stray dogs were poisoned on the order of Sarpanch and dumped. This was called a mass poisoning by locals living there. And the strangest of all, even when people reported about that incidence, they saw another vehicle with the body of dogs, instead of controlling the population of the dogs by birth control methods they are poisoning them.

According to the Reports of 2015-2017 animal cruelty have increased with a speedy number as more than 24,000 cases have been reported till now under the Prevention of Cruelty to Animals Act, 1960. And the data does not even include sexual abuse towards them. The Ministry of Environment, Forest and Climate Change also informed the Parliament that poaching in India is now under controlled but going through the data provided by the State agencies the truth is far beyond that statement. Around 52% increase in poaching and wildlife crimes was there between 2014-2016, not only this the illegal trading also increased from 400 in 2014 to 465 in 2016. Despite the fact that the quantity of cases (2,406) enlisted under the Prevention of Cruelty to Animals (PCA) Act, 1960 out of 2017 are the most reduced since 2011, creature welfare activists state the law is a poor obstacle, with less feelings and immaterial fines going from Rs10 to Rs100. The more stringent Wildlife Protection Act, 1972 only fines up to Rs25,000. There have been zero conviction in Mumbai and Maharashtra for brutality, and not over 48 hours of prison time. Then why will anyone even report these crimes. The number of incidents where animals were rescued from dangerous and cruel situations has been growing, with 1,171 rescue cases in 2017, compared to 2013, when only 316 cases were reported from the city. Thereafter a gradual rise has been recorded every year with 459 cases in 2012, 740 in 2014 and 1,013 in 2016.

And strangely the reports of 2018-2019 are not even there.

WHAT CONSTITUTION OF INDIA SAYS ABOUT ANIMAL PROTECTION.

The Constitution of India recognizes the lives and welfare of animals by making it a fundamental duty of the citizens of India to respect and treat all living creatures with compassion.

- Animal rights are protected under the Constitution of India. Article 51A(G) makes it a fundamental duty upon every citizen of India to protect wildlife and have compassion for all living creatures.
- According to Article 48, the State has the duty to organize agriculture and animal husbandry on modern, scientific lines and to take steps for preserving and improving breeds, prohibiting slaughter of cows and calves and other milch and draught cattle.
- Article 48A provides that the State also has a duty to protect, safeguard and improve the forests and wildlife of the country.

Under these laws The Wildlife Protection Act, 1972 is another Central Act that provides for the protection of wild birds, animals, plants, etc.

For the prevention of animal cruelty, the parliament has passed The Prevention of Cruelty to Animals Act, 1960. In the statement of objects of the Act it has been
declared as “an Act to prevent the infliction of unnecessary pain or suffering on animals and for that purpose to amend the law relating to the prevention of cruelty to animals”.

The act under its section 4(1) provides for the establishment of Animal Welfare Board by the Central Government for the promotion of animal welfare generally and for the purpose of protecting animal from being subjected to unnecessary pain or suffering.

**Animal Cruelty: Statutory Provisions**

The Prevention of Cruelty to Animals Act, 1960 clearly characterizes what sort of conduct will add up to savagery to animals, under section-11, section-12 and section-13. A portion of the key clarifications of pitilessness when an individual will be regarded being savage to creatures in the event that he:

a) over-burdens, beats, kicks, abrogates, over-drives, tortures, or generally treats any animal to expose it to pointless agony or enduring or causes, or being the proprietor allows, any animal to be so treated.

b) utilizes in any work or any labor or for any reason any animal which, by reason of its age or any malady) ailment; wound, sore or other reason, is unfit to be so utilized or, being the proprietor, allows any such unfit creature to be employed.

c) Adamantly and absurdly directs any harmful medication or damaging substance to any animal or tenaciously and nonsensically causes or endeavors to make any such medication or substance be taken by any animal.

d) passes on or conveys, regardless of whether in or upon any vehicle or not, any animal in such a way or position as to expose it to pointless agony or enduring,

e) Keeps or limits any animal in any - confine or other container which does not gauge adequately in tallness, length and expansiveness to allow the animal a sensible open door for development or keeps for an irrational time any creature anchored or fastened upon a nonsensically short or preposterously overwhelming chain or string.

f) The Act additionally bans unapproved experimentations on the animal. The demonstration additionally sets out the principles for enrollment and the upkeep of performing animals.

g) Being the owner of an animal, neglects to give such animal adequate nourishment, drink or asylum.

h) Without sensible reason, deserts any creature in conditions which render it likely that it will endure torment by reason of starvation or thirst.

i) Persistently allows any animal, of which he is the proprietor, to go anywhere in any road while the animal is influenced with infectious or irresistible malady or without sensible reason allows any sick or impaired animal, of which he is the proprietor to kick the bucket in any road.

j) Offer available to be purchased or, with no sensible reason currently possesses any creature which is enduring torment by reason of mutilation; starvation; thirst; swarming or other sick treatment.

k) Disfigures any animal or slaughters any animal (counting stray Dog) by utilizing the technique for strychnine infusions in the heart or some other fundamentally brutal way.

**SOME HORRIFIC INSTANCES OF CRUELTY ON ANIMALS**

Human Beings and animals share this planet with each other but seems like being the superior one, we don’t consider other organisms have any share in this Earth. And
this can be proved from the following instances which have recently taken place.

1. **8 men raped a Pregnant Goat**
   This is the incident of Haryana of 29 July 2018, where 8 men raped the pregnant goat. The goat was first stolen and then abused by the accused and after this the goat died. Out of all 8 accused one even said that he had a nice time with the goat.

2. **Horses used in wedding ceremonies in India**
   In Indian culture, horses are used in wedding ceremonies and are mostly wounded and sick. This is also a way of employment for people in India. Using horses in their wounded conditions for others ceremonies and why only to blame them even we are equally responsible.

3. **100s of stay dogs are poisoned and dumped every year in different cities of India**
   Only on the order to Sarpanch or by the orders given by the Municipal Corporation stray dogs are poisoned and dumped. Recently this happened in Telangana.

4. **Sleeping Stray dog was left to die as workers poured hot tar on it**
   In 2018, while constructing a road workers poured hot tar on sleeping stray dog in Agra that caused half of its body to be buried alive and that was then left to die.

5. **Beagles confined in cages for scientific experiments**
   In Pune 21 dogs of beagle breed were rescued from some private research company where they were being used for laboratory testings. Now this was just from a single lab that too only from India, now let’s take a wider view all over the world hamsters are being used for laboratory testings. Over 115 million animals – mice, rats, dogs, cats, rabbits, monkeys, birds, among others – are killed in laboratory experiments worldwide for chemical, drug, food, and cosmetics testing every year.

6. **Illegal trading of wildlife animals**
   In January, the Special Task Force of the Uttar Pradesh Police seized 6,430 endangered soft shell and flap shell turtles from a house in Amethi district. 37,267 turtles seized between 2015 and 2016, which means the government seized an average of 100 turtles every day last year.

7. **As many as 3500 elephants are held captive for tourist entertainment**
   For the sake of Tourism or in the name of increasing our economy by Tourism, elephants are held captive to entertain the tourists.

**WHY TO ONLY BLAME LEGISLATION?**

Isn’t it really easy to say that “Government is doing nothing” and what about us are we really following the law or do we even know that there existed the law made by the Government related to cruelty against animals. In the population of 134 crores, not even 80% of that are having the knowledge of the Law created by our Legislation in favor of animals and who to blame for that Government? No it’s the lack of awareness. We, the people of India don’t even have the knowledge of the rights given by our constitution because nobody is interested in knowing what the Constitution is offering us. In 1960, the parliament passes an act The Prevention of Cruelty to Animals Act. Also after observing so much cruelty against animals, The Ministry of Environment, Forest and Climate Change has released four new Gazettes notifications under the Prevention of Cruelty to Animals.
Act to regulate the animal markets, dog breeders, “pet” fish owner and aquariums.

The rules are

- The Prevention of Cruelty to Animals (Dog Breeding and Marketing) Rules, 2017
- The Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017
- The Prevention of Cruelty to Animals (Aquarium and Fish Tank Animals Shop) Rules, 2017

But even after having all these rules still the dairy industry is not prevented from supplying animals for the purpose of beef. India’s beef industry is massive because its supplier, the dairy industry, is massive.

So, this is all what our legislation has done. Blaming Government “solely” is really not fair, the locals are responsible for increasing animal abuse.

Most of the people today have pets, which are breed dogs and why so, why the only preference of people are breed dogs because that uplifts their standard, wrong because pets are also used as a show piece, we love the dog in our home but not on streets isn’t this ironical. People are feeding the dogs in their home getting them vaccinated but not to the stray dogs. Take a minute and think what if we took care of street animas as our own and getting them vaccinated for birth control and for hygiene issues that would be a balanced way of people contributing to the society.

There are 15 Animal Rights that Every Citizen of India should know:-

1. Article 51A(g) – Fundamental Duty of every citizen of India to have compassion for all living creatures.
2. I.P.C. Section 428 and Section 429 – To kill or maim any animal including stray animals is a punishable offence.
3. P.C.A., 1963 Section 11(1)(i) and Section 11(1)(j) – Abandoning any animal for any reason is an offence and have to serve in prison for 3 months.
4. Rule 3, Prevention of Cruelty to Animals, (Slaughterhouse) Rules, 2001 and Chapter 4, Food Safety and Standards Regulation, 2011 – No animal including chickens can be butchered in any place other than a butcher house. Sick and pregnant animals shall not be slaughtered.
5. ABC Rules, 2001 – Stray dogs that have been operated for birth control and cannot be captured or relocated by anybody including any authority.
6. P.C.A. Act, 1960 Section 11(1)(h) – Neglecting an animal by denying her sufficient food, water, shelter and exercise or by keeping him chained/confined for long hours is punished by a fine or imprisonment of upto 3 months or both.
7. Monkeys are protected under the Wildlife (Protection) Act, 1972 and cannot be displayed or owned.
8. P.C.A. Act, 1960 Section 22(ii) – Monkeys, bears, tigers, panthers, lions and bulls are prohibited from being trained and used for entertainment purposes, either in circuses or streets.
9. Rule 3, Slaughterhouse Rules, 2001 – Animal sacrifice is illegal in every part of the country.
10. P.C.A. Act, 1960 Section 11(1)(m)(ii) and Section 11(1)(n) – Organizing of or participating in or inciting any animal fight is a cognizable offence.
11. Drugs and Cosmetics Rules, 1945 Rules 148-C and 135-B – Cosmetics tested on animals and the import of cosmetics tested on animals is banned.
Wildlife (Protection) Act, Section 38J – Teasing, feeding or disturbing the animals in a zoo and littering the zoo premises is an offence punishable by a fine of Rs. 25,000 or imprisonment of up to 3 years or both.

12. Wildlife (Protection) Act, Section 9 – 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 contribute to hunting and attracts a punishment of a fine upto Rs.25,000 or imprisonment of up to 7 years or both.

13. Wildlife (Protection) Act, Section 9 – Capturing, poisoning, trapping or baiting of any wild animal or even attempting to do so is punishable by law, with a fine up to Rs. 25,000 or imprisonment of upto 7 years or both.

Prevention of Cruelty to Animals, (Transport of Animal) Rules, 2001 and Motor Vehicles Act, 1978 – Conveying or carrying animals whether in or upon any vehicle, in any manner or position which causes discomfort, suffering or pain is a punishable offence under both of these Acts.

**INDIA’S RANKING IN ANIMAL CRUELTY GLOBALLY**

Animal Cruelty is a major issue in every country not only in India. But there are some places which are considered to be the safest for animals and also have given some of the rights in their Constitution as well. Let us go through some of the countries and their constitutions.

- Austria is considered as one of the best countries for animals all over the world. The Austrian Animal Welfare Act 2004 suggests that the protection and well-being of animals should be held to a value that is equal to humankind. The anti-cruelty law, one of Europe's harshest, bans pet owners from cropping their dog’s ears or tails, forces farmers to uncage their chickens, and ensures that puppies and kittens no longer suffer in pet shop windows. Violators are subjected to fines of $2,420, and in cases of extreme cruelty they could be fined up to $18,160 and have their animals seized by the authorities.

- Switzerland is a leader in improving the living and working conditions of animals. In 1992 Switzerland became the first country to constitutionally recognize animals, with a provision warranting the protection of 'the dignity of the creature'. Activities that are deemed degrading to the dignity of animals are forbidden here by law.

- The Animal Welfare legislation of UK has stricter penalties for both cruelty and negligence of animals. Punishments include a lifetime ban from owning pets, a 51 week maximum jail term, and fines amounting up to £20,000.

- The German Constitution reads, “The state takes responsibility for protecting the natural foundations of life and animals in the interest of future generations.” Germany thus became the first country in the European Union to give animals constitutional protection.

- The animal welfare laws in Hong Kong govern the welfare of food animals, companion animals, and laboratory animals. Cruelty can be inflicted in the form of abuse, neglect, inappropriate transport, and fighting. Those found violating the law are liable to a fine of 200,000 Hong Kong dollars and imprisonment for three years.

While India too has several laws in place for protection and welfare of animals, much still needs to be done for their right understanding & implementation. But still India isn’t the country for animal rights because the penalty for maiming, beating, burning, starving or breaking an animal’s
leg is just a measly Rs. 50 in India under the Prevention of Cruelty to Animals Act (PCA), 1960. “What is Rs 50 today?” Back in the 1960’s it was a huge amount but in current period it almost a joke so that you can do anything that you want to do with animals and get away by paying just Rs 50. There are many NGO’s who are working for animals and had urged for stronger punishment and their aim is to do the amendments under the act in increasing the fine for experimentation on animals from Rs 200 to Rs 10,000 and for illegally making animals perform to Rs 20,000.

Below is the chart which represents 20 counties with grade for their animal welfare:

<table>
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<tr>
<th>Rank</th>
<th>Country</th>
<th>Overall Grade</th>
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<td>1.</td>
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<td>2.</td>
<td>New Zealand</td>
<td>A</td>
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<td>3.</td>
<td>Switzerland</td>
<td>A</td>
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<td>4.</td>
<td>United Kingdom</td>
<td>A</td>
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<tr>
<td>5.</td>
<td>Chile</td>
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<td>6.</td>
<td>Denmark</td>
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<td>7.</td>
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<td>8.</td>
<td>Netherlands</td>
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<td>10.</td>
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<td>16.</td>
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<td>19.</td>
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<td>20.</td>
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This is where India stands. Well- deserved position though, as if the data recorded is noticed it can be seen that more than 25,000 animals suffer cruelty and still it’s not the exact figure as some cases go unreported.

**CONCLUSION**

Recently, there was a case of Mumbai doing rounds on internet which was supported by so many celebrities too, where a stray dog was beaten badly by the guard of the society on the orders of the residents just because he was trying to find shelter from rain and was just left to die. Currently, Bombay Animal Rights group are taking care of the dog. And FIR had been lodged under IPC sections 429 and 34, along with the Prevention of Cruelty to Animals Act, 1960. This is inhumanity at every level. Agreed, FIR had been lodged and necessary actions are taken against the offenders but why this happened in the first place. How a person can be so INHUMAN and INSENSITIVE towards other animals.

Though legislation have done their part by making laws. Now it’s the duty of the citizen to protect animals. Although a lot of very elaborate and specific animal protection laws have been passed in India, they are often not properly implemented. It is so because concerned citizens and NGOs do not often emphasize on taking the legal pathway to accomplish results. At the same time, it is imperative to realize that the legislation that we currently have in India is not sufficiently strong and reasonable so as to make great change. The general anti-cruelty parts in Section 11 of the PCAA can be made a lot more effective by increasing the punishment and fine to some extent.

The laws can be made more stringent and all-encompassing so that animals of all kinds, be it street animals, wild animals and animals residing in all types of habitat are protected and preserved. Its all based upon the awareness that we need to provide to
everyone that though animals are voiceless but we can teach people that animals can feel pain and they can suffer too. It is considered that dog is the most loyal animal then why are we doing cruelty against them, why are we making wild animals to dance on the command of humans in circus. We need to understand that this whole ecosystem is dependent on one another and with nature we need to respect other organisms too because it’s their home too.

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RIGHT TO INFORMATION: COMPARISON OF INDIA’S LEGISLATION WITH THAT OF UNITED KINGDOM AND CHINA

By Sandeepani A. Neglur
From School of Law, Christ University

Abstract

Right to know is a fundamental right that comes under Article 19 (1)(g) of the Constitution of India. In order for people to enable the people to enforce this right, the Government enacted the Right to Information Act, 2005 which was considered a landmark legislation in India to enable the people to access the information which is held by the public authorities and ensure that there is an atmosphere of accountability and good governance in the nation. After that, there were several RTI applications filed over the years on the various administrative bodies. But the replies or the information that was sent back lacked clarity and in many cases the applications were rejected through the exemptions as provided under section 8. This soon turned out to be a problem area for all those who wanted to ensure that the Government could be accountable and there is no arbitrary functioning of its activities. So, there arises an immediate need to ensure that there is a new system that is set in place that can ensure that public knows what the Government does. So, the legislations of the foreign countries must be looked at so as to understand their effectiveness of law and some of the procedures that can be borrowed from those nations so as to develop a better model. So, legislations of various countries have various defects which need to be highlighted using comparative analysis. The relevant legislations that will be compared are China, United Kingdom and India on the parameters of history, Suo moto disclosure of public body or authority and the process of obtaining information. The author by the means of doctrinal research aims to bring about that analysis.

KEYWORDS: Accountability, Good governance, Comparative analysis, Exemptions, Right to Information, Suo moto disclosure

Introduction

Citizens in a country always have a right to know about the various important information available which is important for the progress of any nation. Along with that right, the government also has a duty to ensure that the citizens are well informed of their rights and the means to access those rights. This is one fundamental right which ensures expeditiously that the Government is kept free of corruption and maladministration.569 If relevant information of this kind is withheld, the result will be a total absence of meaningful public debate and public participation in the affairs of the country.570 The first part of this paper will deal with the history of the laws. The second part of the paper will deal with the process of Suo moto disclosure. The third part will deal with the process of access of information. The fourth part is the conclusion.

1. History

Any legislation can only be fully understood by the history that goes behind


making that Act as the various problems and circumstances are highlighted in the history of that Act.

3. India
RTI movement in India started after the British left and the Official Secrets Act, 1923 was still in place and the various bureaucrats began misusing this act as it provided a veil of security under which these officials began to operate in a corrupt manner. However, the judiciary took it upon themselves to ensure free flow of information which was upheld in Romesh Thapar vs State of Madras. The right to information was later recognized and read into Article 21 of the Indian Constitution in the case of S.P Gupta v. Union of India. After that, movement for RTI grew in size and Mazdoor Kisan Shakti Sangathan (MKSS) movement was started in Rajasthan to bring in transparency in village accounts of Government spending. MKSS’s advocacy gave rise to the National Campaign on People’s Right to Information (NCPRI), to campaign for the right to information at the national level which worked with the Shourie committee to create the Freedom of Information bill which was passed in 2002. This bill was not notified and later, Right to Information Act was passed in 2005.

4. China
In the late 1980s, there were “open village affairs” at the village level to ensure disclosure of information which then led to a Two Disclosures and One Monitoring.” Which was campaign started by the Communist party to disclose administrative rules, procedures, and results and to accept public monitoring at every level of government. Since then, open government information practices have gradually spread among villages, townships, and cities. China’s first government information access legislation at the municipal level, the Guangzhou Municipal Provisions on Open Government Information, took effect on January 1, 2003. This legislation stated that all government information should be disclosed and there would be exceptions. In 2004, following the city of Guangzhou’s lead, Shanghai, Beijing, Shenzhen, Hang Zhou, Chongqing, Chengdu, and Wuhan all adopted local open government information policies. Building on developments at the lower governmental levels, a nationwide policy was put on the agenda of the State Council in 2003. The State Council of China approved the Regulations of the People’s Republic of China on Open Government Information on January 17, 2007.

5. British
The history of RTI can be traced all the way back to 1975 when the Labour party had promised a legislation to access information from the Government, but failed to keep up to its promise as it lost its office to the Conservative party in 1979. Before that, in 1960s the people began to realize that control of state over the information is detrimental to national growth and public

571 Romesh Thapar v. State of Madras, AIR 1950 SC 124
572 Indian Const. art 21
573 S. P Gupta v. Union of India, AIR 1928 SC 149
576 Id
577 Supra note 7
right to information was needed\textsuperscript{578}. Various CSOs civil society organizations and professional groups such as lawyers, journalists, academics and workers were the two main parties that advocated Access to information (ATI) on the basis that individual liberty was threatened by growth of administrative state and the lack of efficient mechanisms to protect that liberty and they were joined by health and safety campaigners, environmentalists to target the ill effect of massive industrializations\textsuperscript{579}. These two parties joined hands to form the Campaign for Freedom of Information (CFOI) in 1984. However, Margaret Thatcher was the Prime Minister and the party leader of the Conservative party and she opposed the ATI with all her might. However, in the 1997 General elections, the Labour party, won and Tony Blair was elected as the president, the bill was not presented as there was a shift in the cabinet power, and he ensure that the bill was presented before the parliament \textsuperscript{580}. It was presented in the year 1999 and it went through several amendments as various clause were objected by various lawmakers and it went through several amendments in the second and third reading before being passed in the year 2000\textsuperscript{581}.

6. \textit{Su\textsuperscript{O} Moto} Disclosure

The next parameter is the way in which the three countries make sure that their public authorities disclose all the information in a ready manner. For this, the definition of public authority is important as range of various bodies which have a duty or obligation to release information can only be ascertained from the definitions.

In India, section 2(1)(h) defines Public authority in such a way that only government owned, controlled directly or indirectly through substantial funding is only allowed to disclose information\textsuperscript{585}. So, a private body is excluded from the ambit of the RTI act, 2005. Section 4 lays down the various duties of these public authorities Section 4 of the act lays down the duties of these public authority where subsection (1) a) states that all the records must be duly indexed and catalogued in a computerized format so as to ensure that information is accessible. Subsection (1) b) states the different categories of information and keeps the deadline for providing the information\textsuperscript{583}.

In China, the definition of public body is not directly given as Article 4 and 6 states that the peoples government and its administrative organs must disclose information in a prompt manner and article 36 and 37 supplement the meaning of public authority by stating that organization managing public affairs or providing public services would come under the obligation to disclose information\textsuperscript{584}. The regulations also lays down a list of information that is

\begin{itemize}
  \item \textsuperscript{578} Implementing the Right to Information, a Case Study of the United Kingdom, World Bank, 2, 2012, https://www.right2info.org/resources/publications/publications/wb_implementing-rti__2012
  \item \textsuperscript{579} Supra note 10 at 3
  \item \textsuperscript{580} Supra note 10 at 4
  \item \textsuperscript{581} University College London, What is Freedom of Information and Data Protection, https://www.ucl.ac.uk/constitution-unit/research/freedom-information-and-data-protection/what-freedom-information-data-protection
  \item \textsuperscript{582} Right to Information Act, 2005, No 22, Acts of Parliament, 2005
  \item \textsuperscript{583} Id
\end{itemize}
to be disclosed as per Article 9, 10, 11 and 12 which relates to government structure, procedures, functions as well as information that affects the vital interests of the public and the matters that society broadly need to about or participate in and its procedure is through gazettes, websites, press conferences and other mean as per Article 15 and 16585.

In UK, the definition of public authority is in Schedule 1 consists of Government departments, the Houses of Parliament, the Northern Ireland Assembly, the National Assembly for Wales, the armed forces, local government bodies, National Health Service bodies, schools, colleges and universities, police authorities and Chief Officers of Police and it does not apply to elected officials of the Federal Government, including the President, Vice President, Senators, and Representatives or the Federal judiciary586. Also, as per the amendment in 2013 any company which is wholly owned by the Crown, by the wider public sector or by both the Crown and the wider public sector also includes public authority587. Section 19 states that each public authority must maintain as set of publication scheme so as to specify the different classes of information that needs to be published and it must be in electronic form with the approval of the Information commissioner588.

7. Access of Information
In India, every public authority must have a public officer at central or state level who will provide information to the people requesting for it. A request can be made only by a citizen to be made in writing to the officer along with the fee prescribed by the office as per section 6589. The public officer must process that information and provide it within 30 days and in case it is third party information, he must send a request to that party for permission to disclose as per section 7 and there are various categories of information which is specified in section 8 under which any request can be denied and information shall not be furnished. Any appeal against the officer for the denial of information or furnishing wrong information will be heard by public officer higher than the one to whom a request was made or to the information commission established by the Central or the state government within 30 days of receiving that request or denying it as per section 19590.

In China, the citizens, legal persons or organizations can file request to the office of information created as per Article 4, in writing to the office as per Article 4 and the request for information must be for the information laid down in article 12 which include policies, expense and funds and other plans which is very limited in nature. So, juristic persons can file a request under the regulations which is absent in India. The office may provide an on-spot reply or can reply within 15 days of receiving the request as per Article 24. Any information apart from the one’s specified in article 12 and state secrets, commercial secrets and individual’s privacy cannot be furnished as per Article 13591. This is an important article as China always uses this article to hide its administrative defects and control

585 Open Government Information regulations, 2000
586 Freedom of Information Act, 2000
587 Id
588 Supra note 18
591 Open Government Information Regulations, 2007
the access of information and there is no free flow of information in any manner and the Government uses the excuse of state secret to refuse or turn down the application. An internal system of appeal is available to citizens as per Article 33, but it does not specify which body or time limit and remains ambiguous in its interpretation and is often not provided to the citizens.

In UK, Section 8 of the Freedom of Information Act, 2000 states that the any person can make a request in writing to the public body or authority along with the specified fee as per Section 9 and as per Section 1 the person must be communicated whether the public body has the information or not and that response must be sent within the twentieth working day of receiving that request as per Section 10. The presence of any person is an important phrase here as any person who is not a citizen or can be interpreted to mean a juristic person as well. This aspect is missing in Indian laws, but it is present in the Chinese laws. A code of practice must be issued by the Minister or the Cabinet office which is the desired procedure to be adopted so as to ensure the disposal of requests.

This code of practice is unique as it lays down a standard for the public bodies to follow in case they are, for some reason, unable to conform to the sections in the Act due to difficulty of interpretation. There are various exceptions under this law which go from section 23 to 44 and no information from these sections can be furnished. These exceptions are in tone with the long reigning policy of secrecy in the nation. However, very few information is withheld and the percentage of requests that are denied because of exemptions is less than 10% except in the cases where information is requested on investigations which is exempted as per section 30. There are three sets of appeals, the first one goes to the public body, second one goes to the Information Commissioner and the third one goes to the special information tribunal and a further appeal lies to the courts under the Act which is beneficial for the information seekers as there is a faster disposal of cases in the court and there are no pending cases unlike those in India.

So, the system of appeals in UK and India are in a way similar, though the bodies are different.

8. Conclusion
The information system of Britain is remarkable with respect to the accessibility, exemptions and the appellate authority. The laws made by China is also satisfactory, but the country does not serve any information in any way whatsoever and the legislation over there is quite useless as the courts have also used various ways so as to uphold the non-disclosure of information and the public still remains unsatisfied with the lack of information and the atmosphere of secrecy that prevails. However, the process of appeals and the lack of secrecy which is only restricted to security matters is one aspect that India can implement with sufficient amendments brought to the RTI.

595 Freedom of Information Act, 2000
596 Supra note 10 at 20
598 Supra note 24 at 266.
Act. However, one aspect that the UK laws lack is with respect to the Suo moto disclosure that is needed to be done by the public authorities which is not followed in an adequate manner similar to that of China whereas India fares better here. The three legislations have a problem of implementation in key areas which will require stronger executive and bureaucratic will to ensure that all the citizens have the right to access information.

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IPR AND BIODIVERSITY: AN AMALGAMATION"

By Savyasaachi Wable
From Amity law school, Amity University, Noida

Introduction
The objective of this paper is to develop a rudimentary understanding of the concept and significance of biodiversity and its relation with biotechnology and intellectual property rights and also explain the extension of intellectual property protection to biological resources and its implications on biodiversity.

Concept of Biodiversity and Biotechnology

The word biodiversity is a portmanteau of the phrase biological diversity. As defined in the Convention on Biological diversity, the Biodiversity is the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic eco-systems and the ecological complexes of which they part- this include diversity within species, between species and of ecosystem. Though the study of environment and ecology is quite old, the term biodiversity was first coined by Walter Rosen in 1986.

The term biotechnology is an abridgement of the term biological technology. It implies both biochemical engineering and biomedical engineering. It is defined as the application of scientific and engineering principles to the production of biological organisms and to the processing of materials by biological agents to provide goods and services for the benefit of man.

According to Convention on biodiversity, Biotechnology” means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use. However, it does not include the traditional cross breeding of plants to improve their yields, taste, or quantity and increase their activity to withstand pests, diseases, and inhospitable environments.

Biotechnologies are both old and new and have been used for many generations now and can be classified on the basis of generation. Thus the first generation includes traditional technologies like beer brewing and bread making. These go back at least to the Sumerians of ancient Mesopotamia. The second begins with the microbiological applications developed by Pasteur and continues with the mass production by fermentation of the antibiotics. Tissue culture and modern plant and animal breeding also fall within this generation. The third generation includes techniques like recombinant DNA, monoclonal antibodies, polymerase chain reaction (PCR), and animal cloning whose emergence was triggered by post Second World War advances in molecular biology.

Technological Value of Biodiversity in Biotechnology
Biodiversity constitutes the very raw material in the biotechnology industry and the modern science of biotechnology is relevant to various areas of agriculture including crops, animals, fisheries, agro forestry and agro processing.

Undiscovered biogenetic resources in the richly endowed developing world have massive economic potential and biotechnology uses biological organism or their constituents to transform inputs into commercial outputs and provides prospect to convert biological resources into economic wealth.

Biological products are genetically manipulated in order to develop new commercial products, optimizing production and ensuring the integrity of the product. The application of biotechnology can result in new ways of producing existing products, the use of new inputs, and also in the production of new products. In the former category falls gasoline which is produced from ethanol, which is in turn produced from sugar. In the latter category, mention may be made of insulin, produced using recombinant DNA technology.

Impact of IPR on Biodiversity

Intellectual Property rights, as the term suggests, are rights over ideas and information, which are used in new inventions, processes, literally works, compositions etc. These rights empower the holder to eliminate clones from the market for a definite time. The stated purpose of IPRs is to stimulate innovation, by offering monopoly over use of product in the market and the economic gains received by its use.

IPRs such as copyrights, patents, and trademarks are many generations old, but with the onset, development and economic growth in this sphere, the provisions of IPRs have extended to the living organisms and knowledge/technologies related to them.

This topic is of immense debate among various countries; although reliable data and information has been produced regarding the social and economic impacts and importance of IPRs in developing countries, there is limited information that actually exists regarding impacts of IPRs on conservation and sustainable use of biodiversity per se. But on the other hand a few negative impacts of IPR(Patent) can be verified for example on the principle of sovereign rights of countries over their genetic resources, such as direct and indirect misappropriation of biological and genetic resources and traditional knowledge or what has been called “biopiracy”.

The term biopiracy can also be defined as the practice of commercially misusing naturally occurring biochemical or genetic material, especially by obtaining patents that restrict its future use, avoiding equitable distribution and failing to pay fair compensation to the community from which it originates. Over the years there have been many cases of biopiracy such as:-

- **Patenting of Neem (Azadirachta indica)**-
  The people of India in a variety of ways have used neem, since time immemorial. Indians have shared the knowledge of the properties of the neem with the entire world. Pirating this knowledge, the USDA and an American multinational company W.R. Grace in the early 90s sought a patent (No. 0426257 B) from the European Patent Office (EPO) on the “method for controlling on plants by the aid of hydrophobic extracted neem oil.”
patenting of the fungicidal properties of Neem was an example of biopiracy.\footnote{http://www.simplydecoded.com/2013/07/14/biopiracy-related-issues/}

- **Patenting of Basmati** - Basmati is a long-grained, aromatic variety of rice indigenous to the Indian subcontinent. In 1997 the US Patent and Trademark Office (USPTO) granted a patent (No. 5663484) to a Texas based American company Rice Tec Inc. for “Basmati rice line and grains”. The patent application was based on 20 very broad claims on having “invented” the said rice. Due to people’s movement against Rice Tec in March 2001 the UPSTO has rejected all but three of the claims.\footnote{http://www.simplydecoded.com/2013/07/14/biopiracy-related-issues/}

With increase in such cases, many international accords such as Convention on biodiversity, Nagoya Protocol etc. have been signed by various states to keep such a problem in check but another problem that appears from such an action is that states who are signatories to various International accords and not all provisions of these said accords can work in coherence with each other as sustainability / protection of biodiversity and economic prosperity rarely go hand in hand. One such major example of such a conflict is that between Convention on biodiversity and TRIPS agreement.

There is conflict of objective as Convention on biodiversity intends to strengthen developing countries capacities to conserve, use and enjoy their resource base through equitable benefit sharing and informed consent whereas agenda of TRIPS revolves around promoting trade and securing rights over intellectual property which leads to bioprospecting and even biopiracy. There is also conflict of system of rights as IPR under TRIPS is recognized on the basis of novelty whereas rights under Convention on Biodiversity are founded on preexisting right of the community. By not considering the traditional knowledge and rights of the community, TRIPS will systematically negate wider historical contribution made by the communities and undermine their rights.

Both the treaties are legally binding for the signatories but obligations pulls the countries polls apart, CBD recognizes that states have sovereignty over their biological resources whereas TRIPS tries to introduce private rights over them.

Though mostly favoring IPR regimes and their further expansion, there are some provisions under TRIPS that can be used by countries for protecting their interests. Article 27(2) of the TRIPS agreement allows for exclusion, from patentability, inventions whose commercial use needs to be prevented to safeguard against "serious prejudice" to the environment.\footnote{https://enb.iisd.org/journal/kothari.html} With the help of this provision it would get tougher to get private rights over biological resources and the ecosystem can be kept away from catastrophic exploitation and degradation. Article 27(3) allows countries to exclude plants and animals from patentability, and also plant varieties, so long as there is some other "effective" form of IPR to such varieties.\footnote{https://enb.iisd.org/journal/kothari.html} As the word “effective” is open to interpretation in this article, strong arguments can be made by the countries by coming up with completely different sui generis systems to avoid patentability of biological resources. Article 22 of TRIPS enumerates that a member shall, ex officio if its legislation so
permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin. With the help of this article communities of such countries under whose territory the geographical location actually exist can safeguard their economic gains by selling products sold on the USP of their geographical indication.

Apart from all these loopholes, Convention on biodiversity has many other provisions that help promote economic gains out of biological raw material while conserving biodiversity and preexisting community rights. Article 8(j) places obligation on the contracting parties to respect, preserve, maintain knowledge of indigenous people and embody their traditional systems relevant for conservation of biodiversity and it also encourages equitable sharing of benefits arising from utilization of such resources and wider application of such resources with approval of the holder of the resources. Article 15 talks about access to genetic resources, and recognizes sovereign rights of state over their natural resources. As per this article contracting parties shall develop and carry out scientific research based on genetic resources provided by one of the countries and in return the other country is obligated to share the research & development and the benefits arising from its commercial use. Article 16 talks about transfer of technology, under this parties to the convention are required to facilitate access and transfer of technology and such access is on the terms which recognizes and considers adequate and effective. The term “technology” under this article is not exhaustive in its meaning but such tech should be relevant to the conservation of biodiversity.

Another important aspect of the Convention on Biodiversity is the Bonn Guidelines. They were adopted by the Conference of the Parties to the Convention on Biological Diversity (CBD) in 2002. It is comprehensive legal framework binding the signatories under its triple objective of conserving biodiversity, sustainable use of biological resources and fair and equitable benefit sharing. These guidelines are expected to assist parties and governments in developing overall access and benefit sharing strategies and in identifying the steps involved in the process namely establishing administrative and policy measures. These guidelines under section IV(c) and IV (d) identify steps which lay emphasis on obligation of contracting parties to seek prior informed consent of the providers and mutually agreed terms respectively. They also cover other elements such as incentives, accountability and means for dispute settlement.

The will and objectives of these guidelines were reinforced by the call of the World Submit on Sustainable Development in 2002 where countries negotiated within the framework of the convention, an international system to endorse and defend the fair and equitable sharing of benefits.

Nagoya Protocol

605 http://www.cptech.org/ip/texts/trips/22.html

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) is a supplementary agreement to the Convention on Biological Diversity. It was adopted on 29 October 2010 in Nagoya, Japan and entered into force on 12 October 2014, after receiving its 50th instrument of ratification by Switzerland.

Protocol helps the governments to establish their own national framework which ensures that access and benefit sharing happens in a fair and equitable way. This protocol is also important as prior to this there were virtually no measures for benefit sharing from the countries utilizing the genetic resources. The Protocol generate greater legal conviction and for both the parties by establishing more reliable conditions for accessing genetic resources. It also helps to ensure benefit-sharing for the country providing the genetic resources. By helping to ensure benefit-sharing, the Protocol creates incentives to conserve and sustainably use genetic resources and therefore enhances the contribution of biodiversity to development and human well-being.

To meet the criteria and obligations of CBD, India enacted Biodiversity Protection Act, 2002. The Act has provisions for regulated access to biological resources for various purposes including for scientific research, for commercial utilization for bio survey or for bio utilization. These conditions of access are put in place to ensure conservation of biological diversity and fair and equitable sharing of the benefits arising out of the commercial use of biological resources and associated traditional knowledge. Its objectives includes respecting and protecting knowledge of local communities and the traditional knowledge related to biodiversity, it also includes formation of national, state and local biodiversity funds for conservation of biodiversity.

The Protocol brings us a safeguard where the contracting Parties are required to provide for mutually agreed terms for the sharing of the benefits arising out of the utilization of the genetic resources.

Indian Scenario

India accounts for about 7-8% of the world’s recorded species and the copiousness of traditional knowledge, it is recognized as one of the mega diverse countries with a rich biologically diverse resource pool and hence International accords focusing on biotechnology and conservation of biodiversity such as CBD, Nagoya protocol etc. are very essential to make best use of available resources and avoid biopiracy.

607 https://www.sprep.org/project/abs

608 https://www.worldseed.org/our-work/plant-breeding/genetic-resources/#nagoya-protocol

www.supremoamicus.org

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resource and fair equitable sharing of benefits of use.  

Section 18 provides for functions and powers of the national biodiversity authority, its primary function is to regulate access to biological resources occurring in India and to ensure such access and to ensure fair and equitable sharing of benefits from use of such biological resources. Foreigners, non-resident Indians are required to seek prior approval of the NBA to obtain any biological resource and associated traditional knowledge from India for research, survey, commercial utilization. Further prior authorization of the NBA is required to transfer the results of research using biological resources occurring in India. NBA also issues access and benefit sharing guidelines which are to be followed by the State Biodiversity Boards while finalizing any agreement.

**Conclusion**

Over centuries man has given preference to his economic wellbeing at the cost of the very environment in which he lives and that has resulted in degradation of all forms of biodiversity. But in recent times conservation of environment is of mammoth importance and thus it is important to find a balance between economic wellbeing and conservation of environment and biodiversity.

There is a need for sui generis systems and alternative regimes that priorities conservation of environment while still taking in consideration the scientific and economic aspect of it as innovations in biotechnology are very helpful for sustenance and wellbeing.

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609 http://nbaindia.org/content/16/14/1/introduction.html
EXIGENCE: THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS

By Shashwat Bhutani
From Faculty of law, University of Allahabad

ABSTRACT
Fundamental rights are the basic human rights that should be protected at all costs. Together with the Directive Principles of State Policy, they are known as the 'Conscience of the Constitution'. Thus, these rights must be protected at all costs. Article 12 defines the state and Article 13 prohibits it from making any law that takes away or abridges the fundamental rights of citizens and protects them through judicial activism. Even the former Chief Justice of India, Dipak Misra asseverated that the protection of Fundamental Rights is the "sacrosanct duty of the judiciary".

After the globalization of economy, the strong private actors also started to pose a major threat to the Fundamental Rights of the citizens. Now the question arises as to whether Fundamental Rights can be imposed against private entities? The answer is still indeterminate.

This lack of clarity has created a chaotic situation. At one hand, the Fundamental Rights of the citizens are being violated and on the other, the idea of socialism is also being slaughtered. Both these principles form a part of the basic structure of the Constitution.

Thus, it is high time to give these Fundamental Rights a horizontal application to enforce them against private entities as well. In this paper, we will analyse the aforesaid issues and the intent of the judiciary towards giving these Rights a horizontal effect. At the end of this paper, we will also try to find ways in which these rights can be horizontally applied with reference various countries of the world.

INTRODUCTION
“The aim of all political association is the preservation of the natural and imprescriptible rights of man”

The Fundamental Rights are considered as the Magna Carta of the Indian Constitution. They were inserted in our constitution with a view to protect certain elementary rights from the transient of political majorities. They are the limitations imposed upon the powers of the government to preserve the rights of an individual. In the words of Justice Bhagwati “These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a "pattern of guarantees on the basic-structure of human rights" and impose negative obligations on the State not to encroach on individual liberty in its various dimensions.”

The Supreme Court highlighted the objective behind having Fundamental Rights in the case of Moti Lal Vs State of Uttar Pradesh. The court said, the object of these fundamental rights is not merely to provide security and equality of citizenship to the people living in on land and thereby

610 Declaration of the Rights of Man – 1789. Approved by the National Assembly of France, August 26, 1789
611 A.K Gopalan vs State of Madras AIR 1950 SC 27
612 Hartado Vs People of California, 28 Led 232
613 Maneka Gandhi v. Union of India AIR 1978 SC 597
614 AIR 1951 All. 257.

www.supremoamicus.org
to help the process of nation-building, but also to provide certain standards of conduct, citizenship, justice, and fair play. The court further added to this by saying, in the background of the Indian Constitution, these rights intend to make all the citizens and persons appreciate the fact that the paramount law of the land has swept away the privileges and has laid down perfect equality between one section of the community with another in the matter of rights which are essential for the material and moral perfection of a man.

Hence, we can say that Fundamental Rights are necessary for an individual to attain his full intellectual, moral, and spiritual status. But now the question arises as to against whom these rights are enforceable? The Constitution of India confers a duty upon the state to shelter these rights. Article 12 defines the state and Article 13 prohibits it from making any law that takes away or abridges the fundamental rights of citizens. Thus, natural inference is that these rights are enforceable against the state. However, after the Globalization, privatization and liberalization of India’s economy in 1991, the factors affecting individual rights significantly changed. Now, the powerful private sectors pose a major threat to the rights of an individual. In many developing countries, globalization has resulted in shrinking of public spaces, violation of human rights and commoditisation of citizens. This highlighted the need of having a check upon the powers of private corporations just like the one available against the state and the practice doing so, is popularly known as the Horizontal Application of Fundamental Rights.

As we have already seen, Fundamental Rights are specifically applicable against the state. However, there are still certain Fundamental Rights that have horizontal applicability e.g., Article 15(2),15(5), 17, 23 24 are all directly enforceable against private individuals or bodies. Apart from these, there are certain provisions which are ambivalent about their enforceability, like Article 19 which can be enforced through judicial activism. However, in the early days of judiciary, the intent of court doesn’t seem to be much in favour of applying these Fundamental Rights against the private bodies. For Example, in A.K Gopalan vs State of Madras the apex court negated all the possibilities of applying Fundamental rights against the private individuals by saying:

As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law.

Again, in case of P.D. Shamdasani v. Central Bank of India, the Supreme Court ruled out the applicability of fundamental rights under Article 19 (1)(f) and 31 against private individuals. The court held that, “the language and structure of Article 19 and its setting in Part III of the


617 Supra note 2, at p1, supported by the court in Shrimati Vidya Verma v. Shiv Narain Verma 1956 AIR 108. The court has said, as a rule, constitutional safeguards are against the State and the protection against violation of rights by individuals must be sought in the ordinary law.
618 1952 AIR 59
Constitution clearly show that the article was intended to protect those freedoms against the State action.”

However, at latter stages, the court in some cases involving the violation of fundamental rights by private individual/authority, gave the relief to the affected party without going into the question whether the violator was the state or not. Under the modern outlook, we can classify the horizontal enforceability of Fundamental Rights under four heads depending upon the remedy available to the aggrieved party.

- Assimilation under Article 12
- Positive rights enforceable against the State
- Indirect horizontality
- Direct horizontality

But a remedy under the aforesaid principles is very difficult. So, even today, when our Democracy and Judiciary has mellowed so much, the fate of horizontal applicability of Fundamental Rights remains equivocal.

**JUDICIAL INTERPRETATION**

As we have noted earlier, the Judiciary in its earlier days was not inclined towards including private actors within the meaning of state under Article 12. Though tests were evolved to identify whether a body is an instrumentality of the state, they were hardly applied to private actors. The Apex Court, for the first time in case of *M.C. Mehta vs Union of India* gave favourable indications towards including private corporations within the meaning of ‘state’. The Court began by highlighting the need of protecting the Fundamental Rights at all costs and that too against anyone. It said, ‘equal relevance to us today, especially considering the fact that the definition under Article 12 is an inclusive and not an exhaustive definition. That concern is the need to curb arbitrary and unregulated power wherever and howsoever reposed.

The Court also mentioned the judgements where the need for applying Article 12 against private parties was felt. Answering to the argument that the inclusion of private entities within the definition of Article 12, would strike a death blow to the policy of private enterprise, his Lordship opined:

> The purpose of expansion has not been to destroy the raison d'être of creating corporations but to advance the human rights jurisprudence. Prima facie we are not inclined to accept the apprehensions of learned counsel for Shriram as well-founded when he says that our including within the ambit of Article 12 and thus subjecting to the discipline of Article 21, those private

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621 Ramana Dayaram Shetty vs The International Airport Authority 1979 AIR 1628

622 1987 SCR (1) 819

623 Sukhdev v. Bhagat Ram (“the emerging principle appears to be that a public corporation being an instrumentality or agency of the 'State' is subject to the same constitutional limitations as the 'State' itself”). Ajay Hasia v. Khalid Mujib AIR1981SC487, (“Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool for constitutional law must seek the substance and not the form”.)
corporations whose activities have the potential of affecting the life and health of the people, would deal a death blow to the policy of encouraging and permitting private entrepreneurial activity.

However, the Court left this question unanswered because of laxity of time.

1) Private body assimilated to State under Article 12
From time to time, the court has laid tests to determine if a private body is an instrumentality of state. For example, in Zee Telefilms Ltd. Vs Union of India, the court upheld that if a private corporation discharges the functions of public nature, it will be considered state within the meaning of Article 12.

Applying the tests laid down hereinbefore to the facts of the present case, the Board, in our considered opinion, said description. It discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfil the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor. We, therefore, are of the opinion that law requires to be expanded in this field and it must be held that the Board answers the description of "Other Authorities" as contained in Article 12 of the Constitution of India and satisfies the requisite legal tests, as noticed hereinbefore. It would, therefore, be a 'State'.

In many other cases also, private entities were bought within the meaning of other authorities in Article 12, if they had close assimilation with the state.

2) Indirect horizontality
It is applied to cases where the offender is a private entity, acting within its capacity. However, it is the laws, upon which it realises to justify its actions, is inapt. In such a situation, the Fundamental Rights surpass the Constitution, in a manner that they affect the private law and private adjudication. For example, the famous case of R. Rajagopal vs State of T. N. The petitioners sought to prohibit the respondent state from interfering with the publication of an autobiography of a prisoner, Auto Shanker, in its magazine. The prisoner was convicted of six murders and was sentenced to death. While in jail, he wrote this auto-biography and expressed his wish that it be published in the petitioners’ magazine. Before publishing the autobiography, the magazine announced its publication. The Prison officials then forced the prisoner to write to the magazine requesting that the auto-biography not be published. Petitioners then brought an action to prevent the respondents from violating the magazine’s and the prisoner’s Freedom of Expression. Thus, the issues before the Court were:

- Whether the state can impose prior censorship on a material that may be defamatory to it.

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624 Supra note 11
625 AIR 2005 SC 2677
626 1995 AIR 264
• Whether the publication of prisoners’ autobiography without his consent would infringe his right to life.

The Court found that the state and its officials do not have the right to impose prior restraints on the publications that may be defamatory to the state. Thus, no prior censorship can be imposed by the respondents on the autobiography of Auto Shankar. However, this does not mean that the state cannot sue for defamation once an article is published.

With regard to the second issue, the court held that the petitioners have a right to publish the autobiography of Auto Shankar so far it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, then it will be considered an invasion on his right to privacy and they will be liable for the consequences.

If we analyse this judgement, in the first part, we will find that the Court has modified the law of defamation (private law) to bring it in line with Article 19(1)(a) of the Constitution. Although the respondent was the state, yet the approach adopted was that of indirect horizontal application. In the second part of the judgement also, the ‘Right to Privacy’ of the prisoner was protected against a private corporation. Thus, the Court again extended the scope of the Constitutional rights.

3) Direct horizontality

Till now, we have seen the court applying Fundamental Rights against the private entities either indirectly i.e. by establishing a nexus between the Constitutional rights and private laws or by including them within the ambit of Article 12. But now, we shall look upon the cases where the private acts were challenged directly at the touchstone of the constitution.

In Consumer Education and Research Centre v Union of India628, the Apex Court ruled that the right of the employees to health lies against the private employer also and these private actors are bound by the directions under Article 32 of the Indian Constitution. The Court said:

The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and strength of the worker is an integral facet of right to life. Denial thereof denudes the workman the finer facet of life violating Art.21.

In Bodhisatwa Gowtham v. Subhra Chakraborthy629, the court said, Under Article 32 of the Constitution, it has the jurisdiction to enforce the Fundamental Rights guaranteed by the Constitution by issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari. Fundamental Rights can be enforced even against private bodies and individuals.

In Indian Medical Association v. Union of India630, the Court said, Article 15(2)631 of

627 In this case, the court held that Right to Privacy is guaranteed by Article 21 of the constitution.
628 1995 AIR 922
629 AIR 1996 SC 1992
630 (2011) 7 SCC 179
631 The Constitution of India, 1949. Article 15 (2) (No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject
the constitution has horizontal application that compels all the public and private entities to abstain from discriminating only on the grounds of sex, caste, race or place of birth. Thus, it prohibits the license holder of the hospitals, restaurant etc to disallow anyone on the above grounds. For this, the Court referred to D.R. Ambedkar’s speech in the Constituent Assembly in which he said:

To define the word ‘shop’ in the most generic term one can think of is to state that ‘shop’ is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. Certainly, it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word ‘shop’ used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.

On this basis, the court ruled that the word “shops” has a very wide import, and is referred not only to a physical “shop”, but to all the provisions of goods or services in the market. Thus, the Court held that schools came within the meaning of shops for the purposes of Article 15(2), and that consequently, private schools were subject to the non-discrimination guaranteed under the Constitution. At the heart of the Court’s reasoning was the understanding that the most pervasive forms of discrimination in Indian society had been horizontal, and took the form of excluding a section of society from the economic and social mainstream through boycotts and denial of access.

With regard to the applicability of reservation under Article 15(5) in private non-minority unaided medical colleges, the Apex Court held that the Article, has a clear nexus with the objective of the Constitution and hence is not violative. The Court said:

In this respect, the placement of clause (5) of Article 15 in the equality code, by the 93rd Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to truncating, an essential and indeed a primordial feature of the equality code.

In PUDR vs Union of India, the Supreme Court held that Article 17, 23 and 24 are also directly enforceable against private individuals.

Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24.

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public)

632 Constituent Assembly Debates (proceeding), Vol. VII, Dec. 9, 1948
633 Supra note 11, at page 3.
634 1982 AIR 1473
4) **Positive Rights enforceable against the State**

Usually, fundamental rights are negative covenants i.e., they prohibit the state from infringing upon certain rights of an individual. However, they do not impose any *positive* obligation upon the State to act in a definite manner. This practice is widely criticized by legal scholars as well as judges. That’s why the Indian Courts, in a number of cases, imposed an obligation upon the state (issued directions) to make laws on the issues which involve infringement of Fundamental Rights. Sometimes, in the absence of said laws, the court even went on to issue temporary guidelines or grant relief. The case of *Bharat Kumar K. Palicha and Anr. v. State of Kerala and Ors.* is one such example where the Kerala High Court, directly applied the Fundamental Rights against the political parties in the absence of a regulatory measure. The reason behind enforcing the said rights were given by the court as:

Section 24-A(5) compels the association or body seeking registration, to produce a memorandum or rules and regulations of the Association with a provision therein “that the association or body shall hear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy and would uphold the sovereignty, unity and integrity of India”. This would compel the political party to respect the fundamental rights of the citizens embodied in Part III of the Constitution and to recognise the fundamental duties enunciated in Article 51 A of the Constitution. In such a situation, we find that the jurisdiction of this Court under Article 226 of the Constitution should be exercised at least to the extent of considering the grant of declaratory relief to the petitioners regarding the right of the political parties to call for a bundh and to enforce it is they deem fit.

Many believe that the court directly enforced the Fundamental Rights against the political parties and so this case should fall within the category of direct horizontal application. However, it is submitted that the said orders were issued only because there was an absence of a regulatory provision and since the court views the breach of Fundamental Rights as a serious issue, it went on to give declaratory relief to the petitioners.

Another interesting thing that the Court pointed out was that it is not necessary that a criminal offence is made out when a Fundamental Right is violated. The Court said: *We do not think it necessary or proper to consider whether the enforcing of a bundh results in any offence under the Indian Penal Code being made out.* Again, in the case of *Vishaka v. State of Rajasthan* the Apex Court held that the State’s failure to pass a sexual harassment legislation for regulating public and private workplaces amounted to the violation of Petitioner’s constitutional rights under Articles 14, 19 and 21. The court gave three pointers that proved sexual harassment at workplace amounted to constitutional wrong. Firstly, as per the positive obligation on various organs of the state to

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635 AIR 1997 Ker 291

636 AIR 1997 SC. 3011
protect woman under Article 14 and 15, under right to life under Article 21 and her right to practice any profession under Article 19 (1) (g) and this sense of responsibility from the part of state is clear when the state was included as a party in the writ petition. Secondly, as per the Fundamental Duty under Article 51-A. Thirdly, under the obligations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Court then issued a set of guidelines, known as the Vishaka Guidelines, which were to act as temporary rules in the absence of any law in that regard. What is to be noted here is that it was the state which was the respondent. The Court, thus imposed an obligation upon it to protect the Fundamental Rights guaranteed under Article 14, 19 and 21 against the private actors.

The most recent judgement involving the enforcement of the positive rights against the state is the famous case of K.S. Puttaswami vs Union of India. In this case, the court has held that ‘Right to Privacy’ (against both state and private entities) is a Fundamental Right under Article 21 of the Constitution. Here also, the Court imposed a positive obligation upon the state to establish a legal framework for the free exercise of the right to privacy, which would again act as an additional layer of protection for the individual’s right. The Court said:

Rights such as informational privacy and data protection mandate that the state must bring into being a viable legal regime which recognizes, respects, protects and enforces informational privacy. Informational privacy requires the state to protect it by adopting positive steps to safeguard its cluster of entitlements. The right to informational privacy is not only vertical (asserted and protected against state actors) but horizontal as well.

The Court also justified the reason behind making ‘Right to Privacy’, enforceable against private entities and said:

Common law rights are horizontal in their operation when they are violated by one’s fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the ‘state’, as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.

Privacy has the nature of being both a common law right as well as a fundamental right. Its content, in both

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637 State action and Private actors, https://shodhganga.inflibnet.ac.in/bitstream/10603/91999/13_chapter%205.pdf
638 2017 10 S.C.C. 1

www.supremoamicus.org 257
forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

Another interesting fact about this Judgement was that it opened a discussion about the horizontal applicability of Article 19. During the suit, Justice Chandrachud asked if the state is under an obligation to legislate to protect privacy, seeing how Article 14 is a direct injunction against the state and Article 19 has a horizontal element, which Mr. Subramanium answered in the affirmative.

CONCLUSION
So far, we have seen that the Horizontal Application of Fundamental Rights, ejects a public-private division in the Constitutional law. In the modern era, Constitutional rights are threatened by the powerful private actors and institutions along with the governmental ones. Especially, the Globalization of a nation’s economy results in an increment in the role of private actors and a decrease in the role of state. So fundamental rights are violated more by the private enterprises than by the state. A reference in this regard can be made to India’s current economy. Since independence, India’s economy has been a mixed economy where the role of the state has been that of a regulator. However, after the Globalization in 1991, the role of private corporations increased by leaps and bounds. Now, the state acts as a mere facilitator and the corporations are in the main control. This has virtually slaughtered the socialistic principles, which formed a part of basic structure doctrine.

Socialism talks about equal distribution of resources, and its demise has resulted in class difference in India. Thus, in our Globalised economy, “The rich get richer and the poor get poorer”.

While the Courts in India have still understood the gravity of the situation, the Parliament seems to be insouciant. Many scholars allege that the Parliament has deliberately chosen this doctrine of inaction so that it can help Corporate houses to grow profusely. There allegation appears to be correct. Now-a-days, big Corporate entities finance the political parties to contest elections. After coming into power, these political parties, in-turn help these corporations to boost profits. In this process, individual rights are often dishonoured. For example, the Labour laws have been relaxed to a great extinct in order to provide cheap labour forces to these corporations. Moreover, they have been greatly excluded from the ambit of RTI. Relaxation of Land laws, taking over of media houses by Corporates in order to decide the nature and content of the information to the people, privatization of PSU’s (which are considered as social assets), etc are some other ways in which Corporate Houses are given unholy favouritism which has resulted in the horizontal violation of Fundamental Rights. Thus, a mere vertical application of Fundamental Rights may imperil the democracy in India.

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641 Rajiv Mabeshwaram, Perspective of the Judiciary to Economic Reforms vis-à-vis Rights of the Poor, ALL INDIA REP. J. 71-83 (2012).

642 Percy Bysshe Shelley, A Defence of Poetry, Letters from Abroad (1840)

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This problem has been globally recognised and many countries have also successfully unravelled it. For example, the Irish Constitution recognises the concept of constitutional torts. According to this theory, if a person’s fundamental rights has been violated by the other, then that person (victim) has a right to directly seek redress against the violator. Hence direct horizontality is achieved and it is expressly protected under the constitution.

Another case can be that of South Africa. The South African Constitution takes a middle way between the direct and indirect horizontality. Here, an invocation of law by one individual in a suit against the other, cause the enactment of Fundamental Rights on that law. This is because all the laws, whether regulating the relation between the individual and the state or among the individuals, is directly subjected to the Constitution.

Also, in Canada, the concept of indirect horizontality is prevalent. But, the position in United Kingdom is still ambivalent like India.

India, too, should incorporate this principle like these countries have done. The Parliament should come up with a law that can enforce Fundamental Rights against the private entities also. If not direct enforceability, then some law that can protect the Fundamental Rights against them. Because keeping in view the current violations, it is high time that these rights are protected.

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HOW FAKE BILLS MECHANISM IS CHALLENGING GST LAWS?

By Shivam Aggarwal
From School of Law, Lovely Professional University

ABSTRACT
One of the foremost and the most controversial tax reform that has been introduced in the recent past is GST or popularly known as Goods and Services Tax. The idea of One Nation and One Tax was the driving force behind this reform. Availment of ITC or Input Tax Credit is one of the essential features of this tax reform. But various anti-social agents are misusing this provision. They have created a fake bills mechanism and are duping government authorities.

Through this research paper attempt has been made to analyse that how this fake bills mechanism works under the nose of administration and causes loss worth of hundreds of crores to the governmental authorities. Various case studies have been taken from the newspapers to understand the extent of working of this mechanism. In addition to this various basic provisions of GST as well as penal provisions for engaging in the tax misappropriation have also been analysed and thereby mentioned in this article. This article focuses on understanding the numerous provisions of GST and the penalties that the offenders can be subjected to.

1) INTRODUCTION

1.1) WHAT IS GST?
Goods and Services Tax or infamously known as GST, became a part of the Indian Tax Structure on 1st July 2017 when the GST Act passed by the Indian Parliament came into effect. The main driving force behind this reform was the idea of One Nation and One Tax. GST is an Indirect Tax which has brought all the other indirect taxes under its wide umbrella.

As per Goods & Services Tax Law in India is an all-embracing and multi-stage tax i.e all the taxes have been incorporated within it and is applied at every stage wherever a transaction takes place. In addition to it is collected from the person who is the final consumer of the product. In other words, GST is an indirect tax levied which is levied on the supply of goods and services.

A number of indirect taxes had to brought under the single umbrella of GST. These taxes included; the VAT i.e the value added tax, Octroi tax, Entertainment tax, Luxury tax, Purchase tax etc.

1.2) STRUCTURE OF GST
Under the GST there are four types of taxes which are collected from the consumer depending on the place of consumption. Following is the structure of GST

- IGST (INTEGRATED GOODS AND SERVICES TAX):
Prominent Author VS Datey, in his 42nd edition of Indirect Taxes Law and Practice has given the following views about IGST.

“IGST is levied on all Inter-State supplies of goods and/or services. It is
governed by the IGST Act. IGST rate will be uniform all over the country." \(^{643}\)

Inter-state supply means when the location of buyer and seller is different i.e. they are in different states of India. Intra-state supply on the contrary to it means when the location of buyer and seller is same i.e when they are located in the same state of India.

As per Article 269A (1) of The Indian Constitution, “IGST collected by the Union will be apportioned between the union and states as per the law made by the parliament on the recommendation of GST Council.”

- **CGST (CENTRAL GOODS AND SERVICES TAX):**

  The CGST has replaced many taxes which were existent earlier like the Central Excise Duty and the Service Tax. CGST is levied on Intra State supplies of both goods and services by the Central Government and is governed by the CGST Act.

- **SGST (STATE GOODS AND SERVICES TAX):**

  This tax will replace the State VAT, Entry Tax, Octroi, Luxury Tax, Entertainment Tax etc. SGST is also levied on the Intra State supplies of both goods and services by the State Government and is governed by the SGST Act.

- **UTGST (UNION TERRITORY GOODS AND SERVICES TAX)***

  The UTGST or Union Territory Goods and Service Tax is applied when the supply of the goods and services supply takes place in any of the five territories of India. As per section 2(8) of UTGST act these Union Territories are, “Andaman and Nicobar Islands, Dadra and Nagar Haveli, Chandigarh, Lakshadweep and Daman and Diu.” \(^{644}\)


\(^{644}\) Section 2(8) UTGST Act

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2) **WHAT IS INPUT TAX CREDIT?**

2.1) **DEFINITION**

In simple words, Input Credit means that at the time of paying tax on sales, one can reduce the tax he has already paid at the time of purchases.

**NUMERICAL ILLUSTRATION:**

Radhika Traders supplied goods @ Rs 11500. Radhika Traders received goods
valued at Rs 10000. The supplier has charged GST in invoice. SGST and CGST rate on supply of goods is 9% each. Calculate the tax payable by Radhika Traders.

<table>
<thead>
<tr>
<th>DETAILS</th>
<th>SGST</th>
<th>CGST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax payable on supply of goods by Radhika Traders on 11,500@9%</td>
<td>Rs 1035</td>
<td>Rs 1035</td>
</tr>
<tr>
<td>Input Tax credit of taxes paid by supplier on input goods of Rs 10,000 @ 9% available in Electronic Credit Ledger of Radhika Traders</td>
<td>Rs 900</td>
<td>Rs 900</td>
</tr>
<tr>
<td>Net Tax payable by cash by Radhika Traders in Electronic Cash Ledger</td>
<td>135</td>
<td></td>
</tr>
</tbody>
</table>

**TAX PAYABLE = RS 1500**

**TABLE 1**

Input Tax Credit means reducing the taxes which have been paid on inputs from taxes which have been paid on outputs. Howbeit, it is interesting to note that the Input Tax each state and country is having different rules and regulations when it comes to the Input Tax.

2.2) WHAT IS THE TIME LIMIT TO AVAIL GST ITC?

ITC can be availed by any registered taxable person. For availing GST there are separate time periods depending on the specific situations. Following table summarizes these provisions:

<table>
<thead>
<tr>
<th>SITUATION</th>
<th>ITC CLAIM DAY</th>
</tr>
</thead>
<tbody>
<tr>
<td>A person liable to get registered or applied for registration or the one who has been granted registration</td>
<td>Day from when he is liable to pay taxes</td>
</tr>
<tr>
<td>Voluntary registration</td>
<td>Registration day</td>
</tr>
<tr>
<td>When benefit of composition scheme is no longer taken</td>
<td>Day from when he is liable to pay tax normally u/s 7 of the CGST Act.</td>
</tr>
</tbody>
</table>

**TABLE 2**

It is interesting to note that ITC can be claimed in the above mentioned situations only if it does not exceed one year from the date of issue of tax invoice.

In the situations other than the ones mentioned above, ITC can be claimed earlier of the following dates:

a) The date of furnishing of annual return or

b) Due date of filing return on monthly basis.
2.3) WHAT ARE THE DOCUMENTS AND FORMS REQUIRED FOR CLAIMING INPUT TAX CREDIT?

As per VS Datey and as per Rule 36 of CGST and SGST Rules 2017, “Each applicant is required to provide the following documents to claim Input Tax Credit under GST:

a) Supplier issued invoice for supplying the services and goods or both according to GST law.

b) A debit note issued by the supplier to the recipient in case of tax payable or taxable value as specified in the invoice is less than the tax payable or taxable value on such supplies.

c) Bill of entry.

d) A credit note or invoice which is to be issued by the ISD (Input Service Distributor) according to the GST invoice rules.

e) An invoice issued like the bill of supply under certain situations instead of the tax invoice, if the amount is lesser than INR 200 or in conditions where the reverse charges are applicable according to the GST law.

f) A supplier issued a bill of supply for goods and services or both as per the GST invoice rules.

3) INVOICE FOR SUPPLY OF GOODS AND SERVICES OR BOTH:

3.1) WHAT IS INVOICE?

If someone sells products or services to anyone in India, then he or she must issue invoice to his or her customers.

As per section 2(105) of CGST Act, “Supplier in relation to any goods and services or both shall mean the person supplying the said goods or services or both and shall include agent acting as such on behalf of such supplier in relation to the goods or services or both supplied.”

Recipient as per section 2(93) of CGST Act, “Recipient of supply of goods or services or both means

- Where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration.

- Where no consideration is payable for the supply of goods the person to whom the goods are delivered or made available or to whom possession or use of goods is governor made available

- Where no consideration is payable for the supply of services the person to whom the service is rendered.”

GST has a consistent invoice based reporting system that records all the important information which is related to the movement of goods from the place of origin to the place of destination.

The invoice is a crucial factor in the whole purchase and sale transaction, as it is the one which forms the basis of uploading returns as well as the fetching of the credit. It also helps in the strengthening of logistics chain. Thus in order to get smooth credits and a better working capital care must be taken in

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646 CGST ACT Section 2(105).
647 CGST ACT Section 2(93).
maintaining of the invoices, uploading of returns on a timely basis.

Under GST following are the various categories of invoices:

**GST INVOICE:**

As per section 31(7) of CGST Act, “The expression tax invoice shall include any revised invoice issued by the supplier in respect of a supply made earlier.”

As per section 31(3) of CGST Act, “Tax invoice may not be issued if value of goods and services or both less than 200 rupees subject to such conditions and in such manner as may be prescribed.”

As per section 7(1) of CGST act, “Supply means when there is a transfer, exchange, rental, lease, barter, disposal or license of goods or services made or agreed to be made for a consideration by a person in the course or furtherance of business.”

**FORMAT OF GST INVOICE**

A GST invoice should contain the following information. These have been specifically been enumerated under Rules 54 of CGST Rules. As per these rules the relevant information is:

1) “Name, address and the GSTIN of the supplier

2) The nature of invoice (tax invoice, supplementary invoice or revised invoice)

3) Invoice number (this shall be a consecutive alpha-numeric or numeric series, specific for a financial year)

4) Date of Invoice

5) Name, address and the GSTIN of the recipient

6) Where the value of the goods exceeds Rupees Fifty Thousand and the recipient is an unregistered person, then name and address of such recipient and the delivery address of the consignment.

7) Description of the goods or services

8) HSN code of the goods or the Accounting Code of the Services

9) Quantity of the goods or service

10) Total value of the goods or services

11) Rate of Tax on each item

12) Tax amount charged, on account of CGST, IGST, and SGST to be shown separately under different columns

13) Name of the supplying State and the place of supply

14) Place of delivery

15) A statement mentioning whether reverse charge is applicable or not

16) Trade Discounts not forming part of value of the goods, if any

17) Signature in physical form or Digital Signature of the supplier or an authorized person, duly certifying the invoice.”

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648 CGST ACT Section 31(7).
649 CGST ACT Section 31(3).
650 CGST ACT Section 7(1).
651 CGST Rules 2017 Rule 54,
CREDIT NOTES:
Credit note is issued in case of a downward revision of price. GST must be charged in the previous transaction. The credit note must be issued on or before the September 30th of the proceeding financial year or before filing of the annual return of GST, whichever is earlier.

SUPPLEMENTARY INVOICE OR DEBIT NOTES:
Debit note is issued when there is an upward revision in prices of a good or service which was supplied earlier was chargeable to GST. The said invoice must be raised within 30 days from the date of the said price revision.

BILL OF SUPPLY:
In case a supplier is registered under the composition scheme or he or she is making supply if exempted goods or services then he is required to issue a Bill of Supply in place of a tax invoice.

4) CASES OF FAKE BILLS MECHANISM REPORTED IN MEDIA:

CASE NO. 1

According to a report published in Business Today on May 22, 2018 in a GST Fraud,

“Fake bills have been used to claim input tax credit worth Rs. 450 crore. Just below the headline it was mentioned that Misuse of input tax credit is a serious concern for tax authorities as it seems to have created a hole in the system that the enforcement agencies are struggling to fix.”

In this case the Input Tax Credit worth 450 crore was taken from the government by a racket which was habitual in issuing fake bills.

CASE NO. 2

In another news story published in Business Standard on January 11, 2019,

“GST Intelligence unit busted Rs 100-crore fake invoice racket in Gujarat

In a yet another racket of fake Goods and Services Tax (GST) bill being issued without actual supply of goods for claiming input tax credit (ITC) fraudulently busted in Gujarat, the Ahmedabad Zonal Unit of Directorate

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General of GST Intelligence (DGGI) arrested three persons. There have now been nearly half a dozen cases of fake GST invoices being busted by state and central GST officials running in hundreds of crores of rupees.

In this case on a number of occasions fake invoices regarding supply of goods were issued on a number of occasions. When the offences committed by all are taken in summation then the ITC fraud amounting to 70 crore was done. The value of fake invoices added up to 400 crore INR.

CASE STUDY 3: 654
According to a news story published in DNA on February 14, 2019,

“Bogus GST bills worth Rs 478 crore have been unearthed in Gujarat.”

In this case Fake companies were created by the accused and bills were issued in name of them. The fake bills added up to 478 crore. Over these bills ITC was claimed and loss to state exchequer was caused.

5) HOW THIS MECHANISM WORKS
The people who wish to cheat the government and take benefit of ITC create fake companies. Once the fake companies come into existence then bills are issued in their names. On these Fake Bills, Input Tax Credit (ITC) is claimed. The owners of these fake companies take unjust benefit of ITC which is worth millions of Indian Rupees.

In order to create the fake companies, documents like Aadhaar Card, PAN Card and other identity proofs are taken. These documents may belong to the company owners themselves or to the laborers or the other people working in the nearby areas. Once these documents are received fake companies are registered companies in their names.

In some cases fake invoices are issued i.e. even there is no purchase of goods or services, it is shown that the goods and services worth millions have been purchased by someone just to get the benefit of ITC.

For Example: Mr. A never purchased inputs worth 1 crore but brings into existence the fake invoices regarding these with the help of a fake company registered under the name of his employee and claims ITC from the government for the inputs that he never purchased.

654Gujarat Bogus GST Bills Worth Rs 478 crore Unearthed. DNA India, (February 14, 2019, 9:00 AM),

6) OFFENCES LISTED UNDER GST LAW IN INDIA

OFFENCES

There are 21 offences mentioned under GST Law. The offences which are provided under the GST law are mentioned in section 122(1) of CGST Act. As per this section, following are the offences:

1. “Missed to issue an invoice or has issued a wrong invoice for a supply;
2. Did not supply anything but still issued invoice;
3. Failed to pay collected TCS for a period exceeding 3 months;
4. If TCS is collected against the law but not paid to the government within 3 months;
5. Non-collection, lower collection or non-payment of TCS under section 4;
6. Failing to deduct TDS or submit TDS;
7. Availing input tax credit without receipt of any goods or services;
8. Committing fraud to obtain refund;
9. Getting input tax credit illegally from a distributor;
10. Furnishing wrong information, financial records, etc. while filing with the intention to evade tax;
11. Failing to pay tax;
12. Furnishing incorrect information at the time of registration;
13. Causing hindrance while an officer is performing his duty;
14. Failing to send required documents while transporting goods;
15. Not showing the actual turnover which results in tax evasion;
16. Failing to maintain documents or books of accounts as prescribed;
17. Not providing information asked by an officer during any proceeding;
18. Supplying such goods which need to be confiscated.
19. Using someone else’s TIN to issue invoice;
20. Destroying and damaging an evidence;

TCS: Tax Collected At Source (Tax collected by e-commerce operator from the consideration received by it on behalf of the supplier of goods and services who makes supply through operator’s online platform.

TDS: Tax Deducted At Source (It is a mechanism to track the transaction of supply of goods or services or both by making the recipient of such supply to deduct a small percentage of amount to be paid to the supplier of such goods and services and deposit the same with the government. In such cases the supplier has to take into account the amount so deducted and make the payment of balance of tax to the authorities.

7) PENALTIES UNDER GST

Penal provisions have been specifically made for each and every kind of offence under the GST law. The law has also mentioned various principles on which these penalties are based on.

657 Tax Payer Identification Number.
658 CGST ACT Section 122(1).
7.1) GENERAL PRINCIPLES FOR IMPOSING PENALTIES:

7.1.1) NO PENALTY FOR MINOR BREACH:
The unintentional mistakes which might amount to a fraud or an attempt to tax evasion are penalized as per the following principles:

- In minor breach the error in tax is less than Rs. 5000 or it is exactly Rs. 5000. As per the law no penalty is imposed in this case.
- In case it is possible to rectify the breach then no penalty should be imposed.

7.1.2) PENALTY SHOULD ALIGN WITH SEVERITY OF BREACH:
Penalty imposed should be in accordance with the breach of law which is decoded by carefully analyzing the existing facts along with the circumstances.

7.1.3) REASON BEHIND PENALTY SHOULD BE DISCLOSED
It is prime duty of taxation authorities to provide this information to the concerned individual regarding the reason of imposing penalty as per the principle of natural justice.

7.1.4) LOWER PENALTY ON VOLUNTARY DISCLOSURE OF BREACH

In case a fixed amount has not been imposed as a penalty then in such a case if a person reveals the breach which has been done by him then a lower penalty is imposed on such individual after taking into account this fact.

7.2) AMOUNT OF PENALTY AS PER GST LAW

- As per Section 66(1) of CGST Act, “In case of any tax evasion the concerned individual should be punished with a penalty which should be higher than the amount of tax which has been evaded by him.”
- As per Section 66(2) of CGST Act, “A person should be penalised with Rs 10,000 or 10% of tax deficit, whichever is higher.”

PENALTY IN CASE NO SEPARATE PENALTY IS PRESCRIBED

- As per Section 67 of CGST Act, “If a person commits any offence for which separate no separate penalty has been prescribed in the law, then the quantum of penalty can go as high as upto Rs. 25,000.”

PUNISHMENTS AS A RESULT OF PROSECUTION
As per section 73(1) of CGST Act, “In case a person is convicted of any offence then he should be given the under mentioned punishments:
<table>
<thead>
<tr>
<th>Amount of Tax Evaded</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Between Rs.25 lakh and Rs.50 lakh</td>
<td>1 year imprisonment + fine</td>
</tr>
<tr>
<td>2. Between Rs.50 lakh and Rs.250 lakh</td>
<td>3 years imprisonment + fine</td>
</tr>
<tr>
<td>3. More than Rs. 250 lakh</td>
<td>5 years imprisonment + fine</td>
</tr>
</tbody>
</table>

TABLE 4

8) HOW TO VERIFY FAKE GST BILL AND GST NUMBER?

8.1) CHECK GST NUMBER

GSTIN is a 15 digit unique code which is assigned to each and every taxpayer under GST.

As per Rule 10(1) of CGST Rules 2017, “The structure of 15 digits GSTIN (Goods and Services Tax Identification Number) looks like below:

First two Digits-The first digit of GSTIN is state code as per Indian Census 2011. The state codes are as below.


Next 10 Digits-It is the PAN number of a business entity like your shop, mall or company.

13th Digit-It indicates the number of registrations as a business entity has within a state for the same PAN. It will be an alpha-numeric number (first 1-9 and then A-Z) and will be assigned on the basis of the number of registrations a legal entity (having the same PAN) has within one state.

14th Digit-It will be by default as Z.

15th Digit-The last digit will be a check code which will be used for detection of errors.”

In order to verify whether GST number is genuine or not one can access the below mentioned link:

662 GST ACT Section 73(1).
After checking the genuineness of GST Number the taxes which have been applied must be cross checked. The rates are available at the following link:

https://services.gst.gov.in/services/searchtp

If one is familiar with rates, then it is fine. Otherwise, one can check it by visiting

https://cbec-gst.gov.in/gst-goods-services-rates.html

8.2) COMPLAIN AGAINST SUCH FAKE OR FRAUDULENT PRACTICES

In case bill or GST number is not found to be correct then a complaint must be lodged with the relevant authorities. Even if the tax rates are not in right format the complaint can be lodged. Complaint can be lodged at the following links:

Email: helpdesk@gst.gov.in

Phone: 0120-4888999, 011-23370115

9) CONCLUSION AND SUGGESTIONS

The businesses acquire fake bills issued on transactions that never happen and on the basis of these fake transactions and invoices claim ITC.

In the recent years the reports of fake ITC claims are on a rise. ITC is an important feature of GST as it allows the taxpayers to claim credit for the taxes that they have paid while purchase of inputs. ITC reduces the tax burden on the end customer and in addition to it helps the seller get back money which eventually reduces the price of goods and services.

But fake bill mechanisms which are operating are causing losses to the exchequer worth crores of Indian Rupees.

Therefore it is necessary to bring some reforms in the GST mechanism to tackle this problem.

SUGGESTIONS FOR REFORMS:

- PROVIDING OF EVIDENCE
  It should be made imperative for the traders to provide evidence of the transactions which have been made by them and also to produce the necessary documents for any kind of evidence. This can include legitimate invoices for each and every purchase that has been made along with the GSTINs as well as a unique invoice number.

- FAKE GST INVOICE COMPLAINT FILING:
  The GST regime which has been crippled with tax evasions as well as fake since its implementation in July 2017 will come out of such a situation if complaints against fake GST invoices can be filed.

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PROTECTION OF MEN AGAINST SEXUAL HARASSMENT- NEED OF THE HOUR

By Shivam Sharma and Aneisha Kaushik
From School of Law, University of Petroleum and Energy Studies

INTRODUCTION
Sexual violence can happen to any soul, no matter what your age is, your sexual attitude, or your gender identity. We usually perceive and see harassment or rape cases related to females only and this is the reason that legislations are made only for the women victims. But, this doesn’t mean that men are away from the evil of sexual harassment or rape. Now days, males face one in ten cases of exasperation also. Men and boys who have been sexually pestered may have many of the identical feelings as other survivors of sexual assault, but they face many additional challenges because of ‘social ridicule’ and ‘stereotypes’ about men masculinity.

While the sexual harassment of females has consistently declined in the past few years, as government has made some very efficacious legislations in India. But, sexual harassment of men is increasing at a very lofty rate. Today, the main area where males are facing this evil is at their workplaces. Mostly, the harassment at workplace is done by male colleagues or by female bosses. Out of all wars, this is one of the darkest one. At workplaces, sometimes the female bosses asked the male colleagues to lift their shirts and show their muscles as well as shout at them and humiliate them in front of co-workers. These kind of executions pushes the male colleagues to become the victims of sexual assault and harassment.

According to Roberta Chinsky Matuson “Many people mistakenly believe that harassment is something that is limited to females,”

Also the perpetrators against the victims are using physical force, psychological force or many other emotional coercion tactics. At workplaces, males sometimes are mentally tortured for the sake of their job. If a male needs a job and he is not having any other substitute then he although unwilling to accept sexual advances, have to accept from females or male colleagues. But, these kinds of brutal incident not only physically ruin the body of the victim but also destroy his soul.

Sexual harassment at workplaces also consists of rape, which can either be female-on- male rape or male-on- male rape. The rape of men by men has been recorded as a weapon of terror in warfare. So, other than at offices or workplaces male rape is also very common in prisons, schools, coaching centres, also sometimes at home. But, due to the lack of any legislation or statute these rape cases remain unreported. According to Justice Krishna Iyer, “A murderer kills the body but a rapist kills the soul.”

The actual first question which demands to be put forward is who will protect men from sexual harassment? In India, the legislations talks only about sexual harassment and rape of women. There is no law, no statute to shield males from the bloodthirsty act of harassment and rape. Under Indian law, there is only one section 377 of Indian Penal Code which talks about ‘sodomy’. Except this section, all other laws and sections are meant only for females.
We can say that there is unfair access to justice. When we talk about India, we pick out that much importance is given to rights of the people but why there is violation of ‘Right to equality’? Our Indian Judiciary, society and legislations all talks about equal rights and equal treatment of men and women. But, dolefully these loopholes and misfiring to make any laws for sexual harassment, sexual assault or rape shows uncut violation of ‘Right to equality’.

INTRODUCTION

Nobody is born to become the victim of one’s bullying and nobody is born with a right to take over one’s dignity and harm one’s mental health. Sexual harassment, which can take place anywhere with anybody at any age, is one serious offence and a mere act that leaves a major psychological effect on the victim. Unlike any physical wound, the impact of sexual harassment left on the victim has almost no medicine to it. It takes just one act to shatter a person’s confidence that is build over the years. Such harassment can happen to any gender. However, when it comes to practicality, why is it that there are no laws protecting males or why is it that the country witnesses a meagre percent of complaints by men?

When heard about sexual harassment, it often is women, who, comes to our mind assuming that men being muscular aren’t harassed. But is it really that no complaints and laws brings us to a conclusion that no harassment against men exists or is it that a preconceived notion about a man’s physical strengths and later mocking on getting harassed by a women or for that matter men, makes them not file a complaint, because if it’s the latter situation, sadly, there would be so many souls who would have suffered, may be suffering now and could suffer if the importance of protecting men from sexual Harassment if not taken care of. When it comes to harassment of a woman, almost entire nation comes up in her support, which is a good thing until we give a thought that the same society who stands with a woman, doubts a man’s physical abilities, since they are considered to be the ‘mards’. A man, when sexually harassed bears the act, its mental effects where he loses his entire confidence and becomes a prey to the gossiping and judging habit of the society.

There are high chances that boys have a deeper psychological effect on them, when faced any harassment, being at a sensitive age, than men, who are more mature to handle its after effects and better ability to get over the incident. Men are not considered to be vulnerable to sexual harassment and that any such act would bring shame to the gender as a whole. However, there is a need to understand that harassment leaves the same impact on both the genders. In fact, men are more vulnerable to the disbelief of victimisation and a social stigma as a result, male victims hardly show up to medical, mental health or legal assistance. According to a research, male victims feel the loss of manliness. Despite of such serious consequences, harassment against men isn’t taken seriously.

SEXUAL HARASSMENT - DEFINITION AND SCOPE

663 Pazrizia Riccardi, Male Rape: The silent victim and the gender of the listener, (5th April, 2019, 20:15 IST),

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3067991/#bib1
Men can get harassed too for so many reasons. For example, the power of harassing comes from the position a person holds at the workplace. It would not be new to witness a low level employee getting harassed by a female boss. The actions could vary from physical abuse such as physically holding a man’s crotch to verbal abuse such as teasing or use of undesirable language. **Sexual harassment** has been broadly defined as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." The Equal Employment Opportunity Commission (EEOC) has issued guidelines which state that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" may constitute sexual harassment. The term is divided into different terms and forms for example –

**Sexual coercion** is an act that takes a form of job-related threats or to force the employees to enter into a sexual relationship where harasser bribes them. For example, employer threatens to fire the employee if he does not have sex with the harasser.

**Unwanted sexual attention** is sought through unwelcomed offensive sexual advances by the harasser towards someone else in the workplace. It can take a form of unnecessary sexual touching or forcing for a date which involves bribing and threats.

**Gender harassment** is the form of bullying the undermining workers because of their gender. It includes violent threats, offensive comments, sensitive jokes, violent threats, mocking etc.

Unwelcome actions such as the following are inappropriate and, depending on the circumstances, may in and of themselves meet the definition of sexual harassment or contribute to a hostile work environment:

- Sexual teasing or sexual jokes and pranks in person or otherwise;
- Sexual nature abuses verbally;
- Sexually getting physical like touching or grabbing;
- Standing too close to a person making him uncomfortable;
- Sexually making suggestive gestures;
- Forcing a person to stay in touch during non-working hours;
- Posting sexually offensive cartoons, pictures other materials at work;
- Off-duty, unwelcome conducts of a sexual nature that affects the work environment.

The above mentioned interpretation to sexual harassment has been done by the 'department of state' which is a federal executive department of the US. It protects both men and women and recognizes the victims of sexual harassment of both all genders. It includes same sex harassments as well where the harasser can be a co-worker, supervisor, co-worker, employee, or a non-employee having a business relationship.

The court US Supreme Court in a **Oncale v. Sundowner Offshore Services** explained the constitution of sexual harassment to include not only an overt sexual advance conduct, which means the harasser need not

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666 Ibid.


www.supremoamicus.org
have a desire to have sex with the victim but to include any overtly sexual and sex based conduct as prohibited by Title VII’s protection against workplace discrimination "because of... sex". It will also include the harassment based on gender stereotypes: a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex. The court also found to include the name-calling, the references to sexual assault, and the intrusive, intimate touching as a part of the harassment.

Sexual harassment has a long term effect on one’s life. Victims tend to suffer from PTSD i.e. post trauma stress disorder, anxiety, depression etc leaving an effect on their careers as well. According to a doctor’s research, "An experience [with sexual harassment] can either trigger symptoms of depression and anxiety that are new to the person; or it can exacerbate a previous condition that may have been controlled or resolved. Patients may also see a worsening of symptoms, and that sexual harassment early in one's career in particular can [cause] long-term depressive symptoms."668


ANALYSIS OF SEXUAL HARASSMENT OF MEN ACROSS THE GLOBE

GERMANY:

According to a research, in Germany, about 17 percent female employees and 7 percent male employees claim to have been already harassed sexually at their workplace and around 50 percent of each group, women and men, state that they have already experienced this kind of situations once.669

Though most of the cases come from women, the research includes the harassment of men as well. ‘The Protection of Employees Act’ provides the managers and employers to protect the employees against sexual harassment at the workplace and also both male and female employees can file a complaint if they are sexually harassed and all the employees affected can complain to a responsible person in the department if they feel that they have been sexually harassed.670

THE UNITED KINGDOM:

A four year average research of the ‘Crime Survey for England and Wales’ done from 2007-2012 depicts that 0.4 percent males and 2.5 percent females have confessed that they had been harassed sexually which includes attempts which means our of 473,000 adults being victims of sexual offences 72,000 are males on average per year.671 There was no provision under

670 Hariharan Kumar, Sexual Harassment at Workplace: Legislations in different countries, (7th April 13:11 IST), https://blog.ipleaders.in/sexual-harassment-legislations-different-countries/
English laws that protected males from harassment until 1994 when ‘The Sex Offences Act (1956) got amended in the Criminal Justice and Public Order Act (1994) in order to include male rape (latest amendment: sexual offenses act, 2003). The new provision of rape and sexual assault as offences becoming gender-neutral was appreciated and has promoted a greater recognition of male sexual victimization.  

THE UNITED STATES:

According to a 2005 research done by the U.S. Centers for Disease Control, on San Diego Kaiser Permanente HMO members, one out of every six men have experiences assault or harassment either in their childhood or as adults and reported that 16% of males were sexually abused by the age of 18. The federal law that protects victims from sexual harassment in the workplace is Title VII of the 1964 Civil Rights Act, often just called “Title VII.” It is a gender-neutral law that applies to all the employers, employment agencies, labor organizations, joint employer-union apprenticeship programs having 15+ employees etc, which means victim of any gender can file with the federal Equal Employment Opportunity Commission (EEOC). Out of 6,758 complaints of sexual harassment received by the EEOC in 2016, around more than 16% were filed by men.

NETHERLANDS:

According to a research, around 6% men have been a victim to sexual violence including 1% who had been raped. If unwanted touches and kisses are to be included under the term of sexual harassment, 19% of men have become a victim to it. 5 percent women and 2 percent men have experienced sexual violence before they had turned 12 years old. In Netherland, there are provisions of ‘The Dutch civil code’s General Equality Treatment Act (GETA) and ‘equal treatment of men and women’ (ETA) that provides for the prohibition of harassment and sexual harassment to both men and women. Other than the above mentioned countries, the following are few of those countries that provide, within their own legislations, under sexual harassments laws, an equal opportunity to all genders to protect themselves.

CYPRUS:

Sexual harassment at the workplace is a gender-neutral law that is provided under ‘the Equal Treatment of Men and Women in Employment and Professional Education Law’ 2002 (205(I)/2002).

DENMARK:


ibid
Man and woman are considered equal, and any act of changing status with the differences in sex as a tool, is also considered as sexual harassment. Out of the three Danish statutes that prohibit sexual harassment, the most important provision is the Danish Act on Equal Treatment of Men and Women as regards Access to Employment.678

GREECE:

The prohibition of sexual harassment in the workplace in Greece is provided under the Law 3986/2010, which was incorporated Directive 2006/54/EC laid on the principle of equal opportunities and equal treatment of men and women in areas of occupation and employment.679

UKRAINE:

Ukrainian laws on ensuring equal opportunities and rights for both men and women defines sexual harassment of sexual character, which is expressed either physically or verbally, humiliating or offending an individual who is in relations of labor, service, financial or any business subordinate. Further, the Criminal Code of Ukraine puts a liability for sexual coercion of individuals who are of service or financial subordination (and not vice versa).680

SEXUAL HARASSMENT AGAINST MEN IN INDIA- A CRITICAL ANALYSIS

While the citizens of this country are witnessing the enlightened activities of gender equality for protection of women’s dignity and rights, a right that is crave for, by many silent victims, a right, that needs to be given a thought and an action, is left behind. Harassment is a matter of big concern for almost everybody but for not even meager percent of the population when the victims are males. It is an outdated concept that it is only females who are targeted for harassment.

Absence of legal provisions protecting men from harassment makes the scenario in an Indian society even worst. Neither is there any strong law nor a strong support from the society. The society has a genuine misconception that men are powerful enough to tackle any such situation and are not weak enough to let anyone harass them. In a male-dominating society, it becomes a matter of shame rather than sympathy when a man is harassed. The only thing by which a victim can be motivated to come forward to raise their voice against the assault can happen only by making the laws gender-neutral and accepting the fact that men can also be subject to sexual harassment and assault and that it is high time that the dignity of men is kept at par with the dignity of women and law protects both of them. The bill ‘sexual harassment of women at the workplace which was passed in 2010 was originally gender-neutral that later, on the contravention of WCD ministry and other women NGOs got women strict law.681

Now this is an issue of serious concern if the activists themselves ignore the present scenario of gender neutral suffering and pain.

679 ibid
680 ibid
Though there is no accurate way of determining the number of male survivors in India, however, if we look at child sexual abuse survey of 2007, it is reported that of all people experiencing severe sexual abuse, including rape or sodomy, 57.3% were boys and 42.7% were girls. These stats become more horrific after realization of the fact that there are no laws to protect men except for the law against ‘sodomy’. In a recent survey conducted by the Delhi-based Centre for Civil Society, it was found that around 18% of Indian adult men have been coerced or forced to have sex out of which 16% were female perpetrator and 2% claimed a male perpetrator. Now understanding the stats how difficult is it to believe that women too can harass a man out of desire, anger or revenge and there have to be laws to ensure that this does not go on.

Section 375 of the Indian Penal Code, which provides for rape and its definition is codified as it is something that only a man can do to a woman. As per the law the men have impliedly taken as monster perpetrators and women as victims. It provides for no room to adult men victims, much less female perpetrators. Although the Protection of Children from Sexual Offences Act 2012 protects children of both the sexes, current rape laws leave out a large swathe of male victims, who cannot come forward due a lack of legal recourse and fear of societal stigma. At present Indian legislation provides for section 354 and section 509 which prohibits sexual assault only when women are the victims. The entire concern of these sections is to protect the modesty and dignity of a woman. Now the question that needs to be answered is, do men not have modesty and dignity or is it not at stake? And if, the answer to these questions is evident enough by the stats provided in this paper, why are the law makers silent about the rights of men?

The legislation fails to understand that the dignity they are trying to protect, which is derived from article 21, is provided to men as well. So who is going to protect men’s dignity if violated by their harassment? To men, the only recognized sexual wrongdoing is sodomy, for which they are protected under section 377 IPC. However, it protects only men-on-men assault. What if a man is assaulted by a woman? Let’s say a female boss harassing her weaker subordinate. Absence of laws protecting female-on-male harassment, or the other way around the non-applicability of section 354 and section 509 to male victims is a clear violation of article 14 of the constitution.

We need to consider this issue as a matter of grave importance and the sooner we realize that the entire essence of Article 14 is being compromised if the laws of this country meant for the protection of the countrymen are unable to protect one entire section of the society.

SEXUAL HARASSMENT- A GENDER NEUTRAL SUFFERING

Sexual harassment is not only physical and mental torture or trauma but also murder of someone’s dignity which is possible to happen to anyone irrespective of gender, age, sexual attitude or identity. The mere notion that is without the consent of a person and makes him or her uncomfortable

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682 Centre for civil society, (7th April, 2019, 18:04 IST), https://ccs.in/indias-law-should-recognise-men-can-be-raped-too

683 ibid
and compromise with his/her self respect is enough to elaborate that anybody can be forcefully brought into that compromising situation where they become helpless and obnoxiously a victim. This can happen to anyone, be it a woman, a man, a girl child or a boy child, or even the third gender.

The decision of the Hon’ble Supreme Court in Vishakha v State of Rajasthan was an eye opener for the society and a call of duty to the Indian Legislature to formulate adequate laws to protect the women in the country. But the irony is even after hundreds of such sexual harassment and sexual abuse incidents against men the Indian Legislature is still waiting for an eye opener by the judiciary or the worst case scenario in the society before it realizes that the dignity of men needs to be safeguarded too.

Although the incidents of sexual harassment against women have become the most dangerous social evil and on the other hand such incidents against men do not get prominently reported, either due to the fear of society looking down upon a victim as a matter of shame or the absence of laws are to be considered as a major factor. But this does not imply that men cannot be subject to sexual harassment by women or other men or the third gender at work or elsewhere. In a survey done by Economic Times called the Synovate survey 527 people were surveyed across Chennai, Delhi, Hyderabad, Bangalore, Pune, Mumbai and Kolkata 19% submitted that they have already been a victim of some kind of sexual harassment at workplace. 51% people from Bangalore claimed to have been victimized, whereas in Delhi the graph showed to be 31% and in Hyderabad it was 28%. Over 38% of the people surveyed across the surveyed cities believed that in today’s scenario men are as vulnerable to sexual harassment as women are.

Multiple countries across the world like United Kingdom, Denmark, Australia and Switzerland ensure that their sexual harassment laws serve males as well as it serves female. Considering a report by United Nations Economic Commission of Europe on sexual harassment at workplace it is important to note that around 25 countries like Austria, Belgium, Cyprus, The Czech republic, Denmark, Estonia, France, Sweden, Spain, Portugal, Luxembourg, Poland, The Slovak Republic, Finland, Malta, Slovenia, Hungary, Italy, Ireland are gender neutral as far as their policies for sexual harassment are concerned.

Most countries in the world which are suffering from this social evil understand the evil not be inclined towards one specific gender and have laws that protect the dignity of both men and women but India has failed to appreciate this scenario and hence the evil seems to stop no sooner.

There might be arguments that our country is different from the west in terms of socio-economic milieu but what we need to keep in mind is that the patriarchy in this country also impliedly stereotypes men as perpetual

684 Vishakha v State of Rajasthan (1997) 6 SCC 241
685 Kritika Kapoor, “Men too are victims of sexual harassment” 15-9-2012 Times of India (7th April, 2019, 23:09 IST)

www.supremoamicus.org 278
aggressors. Therefore, this evil needs to be treated notwithstanding the gender as an obstacle as the problem is making both the genders suffer.

The laws in India are formulated with a basic misunderstanding that the evil of sexual harassment certainly begins with a male and is aimed at the opposite gender. The provisions specifically use ‘women’ whenever there is any question of laying protection. Considering the status quo of the laws in the country is will not be wrong to say that ‘woman’ is being treated synonymous to ‘victim’ and men are considerably being treated synonymous to ‘monster’. Ironically the laws in the country effectively exclude the possibility of men being victimized.

What needs to be understood here is that with the evolution of time and modernization even the dominance of men in this patriarchal society has come down. In this wave of feminism women have not only put in all their efforts in order to come at par with men but also have become dominant in certain aspects. The number of women at workplaces has rapidly increased in the past couple of decades and therefore incidents of men being brought down in a compromising situation by their female bosses has also comparatively increased. Men in such situation become very uncomfortable and helpless. They cannot openly speak up against this because the society as a whole does not openly accept women to be that bad. This mentality of the society is the reason why no laws could be formulated believing that due to this patriarchal nature of the society only men can sexually harass women and the vice versa cannot happen.

Another aspect of this scenario is that the men are sexually harassed by other men. This is way too common that the society accepts it to be. Due to the growing desire of men towards women and their incapability to be able to convince one, they find it difficult to control their desire. And since not all men can successfully control their feelings and desires to be with a woman, they either go on to forcefully harass a women, and in this scenario rapes happen or they forcefully go on to harass a man in order to get their desire fulfilled, and in this scenario sexual harassment of a male happens. The latter scenario might be less prominent but the existence of such a scenario cannot be denied. Such incidents are more frequently supposed to happen to children as they are neither physically strong to fight it nor emotionally strong to speak against it.

Rape cases of men by men are not only too prevalent in workplaces and offices but its existence in prisons, schools and colleges, coaching centres’ and even homes are considerable and a matter of concern. This problem cannot be curbed by doing anything before its existence is socially accepted. And once the society is open to this scenario the question that needs to be answered is ‘who is going to protect the men of this country from sexual harassment?’ Since laws in this country only emphasize on protection of women from rape and sexual harassment, it needs to be considered that there are no legislations to protect and safeguard men from the evil of harassment and rape. Except for section 377 of IPC which talks about ‘sodomy’ all other sections are meant only for the women.687


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687 Prashanti Upadhyay, Sexual Harassment of Men (5th April, 2019, 9:40 a.m.), www.supremoamicus.org
The concept of equality in the country guaranteed under Article 14 of the Constitution of India which orders the state not to deny any person equality before the law is being compromised and losing its essence by being unable to protect the sufferings, distortions and pain of men and children while it is busy protecting the dignity of women in this country.

I will further elaborate on my argument that sexual harassment is a gender neutral suffering by highlighting upon an incident. ‘Hiren’ a 20 year old boy was in college and was sexually harassed by his professor who was a gay. When Hiren tried to retaliate and denied to agree to his professor’s terms, the professor failed him in his subject. Tortured by the incident and not having the courage to step up and raise his voice, ‘Hiren’ committed suicide. This is just one incident where the victim could not speak up fearing social stigma and shame but numerous incidents like this go prominently unreported and this has been making men suffer silently.

A survey by Drinkaware reveals that majority of students in United Kingdom want their colleges to do something extra about sexual harassment. Over 50% students suggest counseling sessions for victims and over 60% want campaigning by the college. Out of 1853 students surveyed (aged between 18-24) more than 50% of ladies and over 14% men claim to have been sexually harassed or being victims of inappropriate comments or unwanted touch. Frankly speaking, the issue is more prevalent against women but it also brings light upon the fact that sexual harassment is putting a negative effect on men too.

**MYTHS REGARDING MALE VICTIMS OF SEXUAL HARASSMENT**

There are various myths and misunderstandings about men victimization which makes this issue look not as grave as it is for women. It minimizes the impact on male victims. These myths also affect on the wary these victimized men think about themselves and the way society treats them. Firstly, there is a misconception that men cannot be assaulted sexually which is a result of the patriarchal nature of the society whereas the truth lies in the fact that men today are victimized every day. Sexual harassment can possibly happen to anyone irrespective of his appearance, strength, size or sexual inclination. No place is safe as it is only about for the perpetrator to believe that he can do it and get away with it. It is more than obvious for even a male to freeze due to fear or shock in most cases. Since very few men believe in its possibility therefore most victims are always unprepared.

Secondly, there is another great misconception that only gays can be sexually harassed and not men because of their power and strength to retaliate. But the reality is, that the possibility of such a thing happening to a gay male might be more but the possibility of it against a normal male is also proportionately existent.

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688 The Constitution of India, 1950
https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text
689 Christopher Blunt, Male Victims of Sexual Harassment are suffering in silence, (6th April, 2019, 14:25 IST),
https://www.unilad.co.uk/featured/opinion-is-sexual-harassment-really-always-a-one-way-street/
690 ibid
Thirdly, there is a general notion in the society that only gay men sexually harass other men and heterosexual men never engage themselves into it. The truth on the other hand is that the majority of offenders claim their identity to be heterosexual. The psyche that encourages men to sexually harass other men is the greater feeling of power, strength, dominance and control that they find less in assaulting a woman. We need to understand that incidents of sexual assaults are less inspired by lust and attraction and more inspired by violence, anger and, revenge therefore is highly possible that men can target men.

Fourthly, there is a very vague understanding of the situation as a vast majority of people believes that men who suffer sexual abuse as a child go on to become sexual harassers themselves. This in no way can be considered to be true. Although it can be believed that such horrible sexual experience as a child may lead to profound emotional damage but the contention of the society that victimized boys repeat what happened to them is just a myth. Most probably, men who sexually abuse other men had actually suffered physical or emotional abuse or were witness to some miserable domestic violence while growing.

Fifthly, the worst of the myths existent in the society is that men cannot be a victim of sexual assault by women. Women certainly have the strength to sexually assault or harass men but such incident prominently goes unreported due to the fear of societal stigma. If emotional blackmail is inclusive as a way of forcefully getting a guy to submit to sex, then the existence of such incidents rapidly increases. Although the sexual assault by a lady cannot involve penetration, there are various other methods to attain mental satisfaction, like use of sex toys and various other foreign objects on non-consenting man.

Sixthly and most significantly the myth that men getting an erection or ejaculating while being into sex forcefully means that even they wanted it and had their consent. This is a misconception towards which not only the society but even the legal system seems to be inclined. This misunderstanding causes real issues of guilt among victimized men. What needs to be understood here is that physical stimulation is something that can definitely lead to erection to a man even when he does not wish for it. Putting pressure in the prostate gland may lead to the same situation. An erection in such a situation for even ejaculation, cannot automatically be understood as consent when it is an involuntary physiological reaction. Usually men are unaware of this unwanted physiological bodily response in such a situation and therefore do not report such incidents out of guilt and confusion.

Seventhly, the myth that if the initiator is a female, a male or a teenager must be happy about it because he will probably experience an exciting sexual situation. This is a miserable thought process which will never let us reach a solution if so dominantly exists. When the issue is of sexual harassment it automatically becomes a matter of dominance and control and the existence of pleasure and happiness eradicates. No matter who initiates such a sexual abuse against a man, is it a male or female, the idea of being used as a sexual object and being forcefully dominated is so disheartening and traumatizing in itself. Forced sexual harassment can in no way lead to a happy go lucky situation when it always causes depression, anxiety, anger, guilt and various other psychological issues.
Eighthly, the belief that the suffering of a man can never be at par with a victimized female as men do not have the risk of getting pregnant is not only a misconception but also sounds vague and funny. For a simple understanding of this situation we need to study the psychological reactions which are more or less the same in all the victims irrespective of their gender or sexual attitude. Reactions such as depression, fear, anxiety, helplessness, anger, numbness, shame, confusion and then all this leading to suicidal thoughts do not target a victim based on his/her gender but are common amongst all victims. Victimized men are at a higher possibility of committing suicide due to social stigma and fear of being portrayed as weak. Since, men cannot become pregnant therefore the possibility of internal damage is more existent in men which leads to higher chances of HIV infection.

Lastly, the misconception that gay partners do not sexually assault or harass each other is just a myth as in there paradigm too the same problems exist which exist in a husband-wife relationship. And since sexual assault can happen in a male-female relationship it is very much possible even in their relationship. By use of physical power, emotional blackmail and psychological coercion, gay men force their partners to get involved in unwilling sexual acts as men force their wives into such acts after marriage irrespective of their consent. The thought that gay men in a relationship are sex objects to each other is in itself a great cause of misery.691

691 Association of Alberta Sexual Assault Services, Men and Sexual Assault, (5th April, 2019, 9:35 a.m.), https://aasas.ca/support-and-information/men-and-sexual-assault/
himself from the outside world. The feeling that if he speaks up the society will judge him and question his sexual identity might make them more fearful and confused. Since the trauma is far more grievous than we understand it to be, there are flashbacks, which might keep changing the victim into numb and hopeless person.

The victim in such a scenario starts feeling helpless and might start blaming himself. It might make a man feel guilty about not being able to fight the situation. The shame makes the person so weak it might lead to sexual dysfunction and in a lot of cases it also leads to suicidal feelings as the victim finds himself option less.

What needs to become a genuine matter of concern is what started from a feeling of weakness and a question on masculinity might end in causing death of the victim. The emotional setback is very grave and if nothing is done about it, the situation is going to be only worst.

It is very natural for men to become more hostile and aggressive in order to hide the fear and guilt. Sometimes the depression hits them so hard that they start questioning their own sexual identity or inclination. There have also been instances where victims thing that if they have been sexually harassed or assaulted by men, they have become incapable of being with a woman. Our society does not actually understand the gravity of the situation. If an individual somehow finds the courage to disclose such an incident if happened to him, people start taking him as guilty and not the perpetrator. It is very general that male victims do not get the support of family and friends and most of the times have to fight it out alone. They also have to confront unsympathetic attitude if they speak up.

**HOW TO SUPPORT MALE VICTIMS**

If ever a victim has the courage to disclose such an incident to us, we should never question if it actually happened or not. We should neither blame the victim for whatever happened, even if he was drunk or was in a relationship with the perpetrator. We should understand that no one wants to be in that position and that such an assault or harassment without the willingness of the victim can never make the survivor guilty.

We should never pressurize a victim to do what is right according to us. The freedom to think and do what they think is right should always be given to them. Let them choose their path to recovery. The option that they choose might be different from what our opinion is, but no path is right or wrong if you are a sex victim. Emotional recovery is the only important thing irrespective of how it is attained.

Always make the victim feel comfortable and make him believe that you are ready to listen to him. It is a sign of relief for the victim if he has somebody to talk to. Never force your own opinion or start questioning him in the midst of the conversation. Your job is not to let him feel isolated or out of the world. Caring attention to a victim can help him recover faster.

It is very important to understand what the victim has been through and that he is in phase of fear and distortion. We should not assume that a hug or a gentle touch will

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692 Association of Alberta Sexual Assault Services , Men and Sexual Assault, (5th April, 2019, 9:35 a.m.), https://aasas.ca/support-and-information/men-and-sexual-assault/
make the victim comfortable. Always ask before you touch the victim or at least signal him your openness by coming in an open posture. We should ensure that the victim gets a lot of space and his reactions should not offend us.

It is also suggested to call a sexual assault service for help and counseling. Counseling will certainly help the victim and might let them regain their control over themselves sooner. The friends and family of the primary victim become ‘secondary victims’ and might also need counselling to get out of this phase.

Finally, it is necessary for people working in treatment sector not to be biased by the victim’s sexuality, even if the victimized person is below the legal age of consent, while dealing with cases where a male victim is assaulted or harassed by the female gender. People treating sexually abused victims need to ensure that the sexual preference does not induce negative attribution biasness towards few victims more than others. Victims of such offences, regardless of their age, sexuality, or their gender or the gender of their perpetrator, need to be taken into confidence that they will receive positive treatment from those they speak to and will not be laughed at, and it is the duty of people working with such victims to ensure that this occurs for all, not one.

The severe psychological impact which results in anxiety, depression and even death of people is enough to tell us how badly we need laws to protect the dignity of men as we have laws for women. It is a situation where we either think reasonably or face the gradual problems.

CONCLUSION
There can also be the formation of a special commission which can take up all cases with respect to sexual harassment of men and resolve it from the investigation to the trial. It will open an opportunity to the victimized men to open up and report such an issue when they will realize that there is somebody ready to listen to them and do justice to everything inappropriate that happened to them.

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The word ‘lynching’ has been in the news for a while now in India. In simple words, it means killing of a person without legal approval. Past few years have seen a massive spate in the incidents of mob lynching in India. Recently, 49 famous personalities have written to Prime Minister Narendra Modi to take measures to curb the growing incidents of lynching in the country. First incident of lynching which drew widespread attention was killing of Mohammed Akhlaq by cow vigilantes in suspicion of cow slaughter. Number of such incidents has been soaring, since then, with reasons ranging from suspicion of victim’s indulgence in cow slaughter, or of being a child lifter to his denial of chanting slogans pertaining to a particular community. In the absence of enough penal provisions, there’s a threat that the perpetrators may go unpunished in several cases, and more so in the cases where perpetrators are a large group of people. Despite the Hon. Supreme Court’s judgement in favour of enacting anti lynching law, the State has not yet done much in this regard. This paper discusses the causes of rise in such incidents and also whether there’s a need for anti lynching laws in the country. The paper also discusses anti lynching laws enacted by certain states like Manipur and Rajasthan and the extent to which they address the issue.

INTRODUCTION

DEFINITION & HISTORY OF MOB LYINCHING

Lynching, a form of violence in which a mob, under the pretext of administering justice without trial, executes a presumed offender, often after inflicting torture and corporal mutilation. In common parlance lynching occurs when a group of people has pre-conceived notion that the person has committed a crime and punishes such person without any judicial trial or conviction.

Although the origins of the word ‘lynching’ are not very clear, it’s widely attributed to a late 18th century Virginia court judge named Charles Lynch, who was known to have regularly imprisoned British loyalists without a trial. Because they were never given a trial, and he didn't have the authority to imprison them, the practice became known as ‘lynching’. Lynching is sometimes justified by its supporters as the administration of justice can be done (in a social-moral sense, not in law) without the delays and inefficiencies inherent to the legal system. Victims of lynching have generally been members of groups marginalized, backward or vilified by society. Examples of lynching include public hangings, tarring and feathering, or other forms of extreme punishment or execution performed in public.
2. ANALYSIS OF LYNCHING INCIDENTS IN OTHER COUNTRIES

USA
Before the American Civil War 1861-1865, people who used to oppose slavery were lynched commonly by white southerners. In the United States, lynching was often motivated by feelings of white supremacy, which is the belief that white people are superior to other races. It continued to happen even after the abolition of slavery system and end of the civil war. More than 4,743 people were lynched in United States between 1882 and 1968. Undoubtedly, there must be many unrecorded incidents of lynching occurred during this period. During Reconstruction Era, the Ku Klux Klan and other white supremacists used lynching as a means to curb what they viewed as excesses within the Radical Republican Reconstruction government.694 Black people were lynched by these groups on false accusation which includes gambling, theft and even raping white women. With the end of Reconstruction in 1876, white southerners regained nearly exclusive control of the region’s governments and courts. Lynching declined, but were by no means brought to an end. This type of racially motivated lynching continued in the Jim Crow laws(late 19th century).695 According to these laws, Blacks couldn’t use the same public facilities as whites, live in many of the same towns or go to the same schools. Interracial marriage was illegal, and most blacks couldn’t vote because they were unable to pass voter literacy tests. These laws were brought as a way of enforcing subservience and preventing economic competition, and into the twentieth century as a method of resisting the civil rights movement (1950-1960).

ANTI LYNCHING LAWS IN USA
After centuries of failed attempts, US Senate finally passed a legislation on December 2018, to combat such despicable mob violence making it a federal crime. USA was first country who came up with an Anti-Lynching Laws. Similar bills have been introduced to congress for centuries, but always failed. Congress passed The Justice for Victims of Lynching Act unanimously.696 According to this Act Lynching is defined as “as an act that willfully cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person” as a federal hate crime.697 The law also says that “if two or more people are convicted of killing someone because of their actual or perceived race, color, religion, or national origin, they can be sentenced to jail for their lifetime.” And if the lynching leads to bodily harm then 10 years of imprisonment is to be imposed.698 Under the bill, lynching could be punished by a sentence of up to life imprisonment.

NIGERIA

694 ibid


698 ibid

www.supremoamicus.org
Mob Lynching in Nigeria is popularly referred to as Jungle justice. Though there are no official statistics on the prevalence of Mob Violence, it can be apparently seen in Media’s regular reports. A 2014 survey revealed that 43% of Nigerians had personally witnessed a lynching mob attack. Despite some Nigerian vigilante groups holding the potential for success, this jungle justice clearly poses a threat to the rule of law and due process. The brutality of the methods used, and the fact that victims may be innocent and merely in the wrong place at the wrong time, has led to widespread condemnation. But the perpetrators are rarely arrested and prosecuted. In fact, security officials themselves are sometimes implicated in extrajudicial killings. Alleged offences that draw mob lynching in Nigeria range from serious crimes such as murder, armed robbery, rape and kidnapping to petty theft, homosexuality, blasphemy and even witchcraft.

Anti Lynching law in Nigeria
In 2017, a Bill was introduced in the Nigerian parliament which aimed to change the act of extra judicial killing. The anti-mob lynching act recently passed its second reading in the Senate. It now needs to clear a third reading before being signed off and passed into law. The nature of mob violence can make it difficult to charge offenders under the laws that cover murder and assault. The new bill seeks to change that. It defines lynching as: Three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offence. Alongside lynching, the bill covers mob action that results in severe bodily harm, and riotous assembly causing destruction of property. A person found guilty of instigating any of these three criminal offences will be punished by imprisonment for life or not less than 25 years. The bill stipulates that a security officer who fails to make reasonable efforts to prevent an attack, or to apprehend a perpetrator, will be punished by up to five years imprisonment or face a fine of up to USD$1400. A security officer who takes part in, or conspires to an extrajudicial attack, would be guilty of a capital offence. Those who have failed at prevention would be subject to dismissal and 15 years imprisonment. These punishments could act as an excellent deterrent. However, the success of the bill will depend on police and judicial implementation. A legal system unable to deal with crime resulting in jungle justice may be unable or unwilling to prosecute the latter. Nevertheless, the emphasis on security officer complicity is promising, and formal recognition will allow tracking and prevention.

3. MOB LYNCHING IN INDIA

OVERVIEW
In the recent past, India has witnessed a massive surge in the incidents of mob lynching, especially in northern states like Rajasthan, Uttar Pradesh, Madhya Pradesh, Bihar etc. In foreign countries, mob lynching is mostly centered on racial and nationality issues, but in India the incidents of Lynching have largely been attributed to


700 Ibid
religion, caste and rumor mongering. The anguish against this recent mob violence has been palpable among a large section of the citizenry.

The rising incidents of lynching in the country have largely been termed a result of rising right wing extremism mostly after the Bhartiya Janata Party (BJP) came into power in 2014. According to data collected from media reports by Factchecker.in, a website that is tracking crimes based on religious hatred in India, Tabrez Ansari’s death in June 2019 takes the total number of such incidents in the country since the present government came into power to a staggering 266. In most cases, victims have been found to be Muslims and Dalits who are lynched by cow vigilantes in suspicion of storing and indulging in cow slaughter by them. Innumerable incidents of lynching have also happened as a result of victims being mistaken as child lifters, thieves, etc. Others being targeted include migrants, mentally challenged people, nomadic and denotified tribes, etc.

INCIDENTS OF LYNCHING IN INDIA
The recent spate of lynchings in India has left the country shocked. Following are a few of such incidents which shook the country’s conscience:

**Dadri mob lynching**-First major incident was reported in the year 2015 on September 28 where a 52 year old man, Mohammed Akhlaq was lynched by a mob of local villagers who suspected him of stealing and slaughtering cows. Since then, number of such incidents has only grown, cow vigilantism being the most common reason for it.

**Dhule lynching case**-The incident took place on July 1, 2018 at Rainpada village, 25 kms from Pimpalner in Dhule district of Maharashtra where 5 men were lynched on suspicion of being child lifters.

**Alwar lynching case**-On April 5, 2017, Pehlu Khan, a dairy farmer in Nuh district of Haryana was lynched by a group of 200 cow vigilantes in suspicion of being a cow smuggler at Ramgarh in Alwar district of Rajasthan. Six others who were with Pehlu Khan were also beaten by the mob.

**Junaid lynching case**-On June 22, 2017, 16 year old Junaid Khan was stabbed to death on a Delhi – Mathura train after an argument between two groups over seats turned ugly.

The Punjab and Haryana High Court in its order granting bail to one of the accused observed that the initial dispute between the victims and the accused was only regarding the seat sharing and abuses in the name of castes and nothing more. The court also observed that there is also no evidence of any preplanning to cause the incident deliberately or intentionally or to create disharmony.

**Hapur lynching case**-Qasim (45) and Shamiuddin (65) were thrashed by a mob on rumours of their involvement into cow slaughtering. The incident hogged headlines when a video showing both lying in a pool of blood and men from the mob shouting at them for facing the punishment for attempting cow slaughter surfaced.

**Guwahati lynching case**-In June 2018, two men were lynched by a mob in Nagaon district of Assam after they were suspected of stealing and slaughtering cows.

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701 Mob lynching : 7 instances which shook India (21-07-2018)
https://www.dnaindia.com/india/report-mob-lynching-7-instances-which-shook-india-2639925

702 Junaid Khan lynching: Fight started over seat, caste abuses, says Punjab and Haryana High Court
of being cattle thieves. This was first incident of cow vigilante violence in the state of Assam.

**West Bengal lynching case**- On June 26, 2017, three youth belonging to the Muslim community were lynched in Durgapur village, West Bengal by a mob of cow vigilantes over suspicion of cow theft.

**Ayub Khan lynching case**- On June 23, 2017, Mohammed Ayub Pandith, a Deputy Superintendent of Police (DSP) of Jammu and Kashmir police was lynched by an angry mob after he allegedly opened fire at a group of people who caught him clicking pictures near the mosque.

**Jharkhand lynching case**- On June 22, 2019, a viral video did rounds on social media in which a young Muslim man was tied up, bleeding profusely all over his body, hand folded, was being lynched by a mob, they forced him to chant ‘Jai shri Ram’ and ‘Jai Hanuman’. The man was later identified as 24 year old Tabriz Ansari and was accused of stealing a motorcycle. The victim died as a result of injuries he suffered in the assault. The investigation revealed that negligence on the part of police and doctors’ lapses lead to his death.

**CAUSE ANALYSIS**

**COW VIGILANTISM** : The present government has repeatedly been accused by the opposition of giving a free hand to right wing outfits and of the oppression of minorities and Dalits. Most lynchings have been found to be perpetrated by mobs affiliated to Right wing Hindutva organisations accusing the victims, who are Muslims in most cases, of indulging into cow slaughter. It is primarily due to the fact that cow is considered holy among the Hindu community. Though cow slaughter in India is banned in around 20 states (out of total 29), illegal cow slaughter is prevalent in most states.

**INACTION OF GOVERNMENT AUTHORITIES** : The government did not take immediate actions to tackle the issue and remained a mute spectator while the incidents of mob lynching across the country continued to soar. Even after the Supreme Court judgement of July 2018 in which the apex court asked the parliament to enact a separate law to tackle lynching, no central law has been enacted or even proposed regarding the same. Only few states like Manipur and Rajasthan have enacted anti lynching laws as of yet.

**ROLE OF SOCIAL MEDIA** : A large number of mob lynchings have been found to have resulted because of rumour mongers and fake messages spread through social media and messaging platforms like Facebook and WhatsApp. Mental Health experts say that people tend to believe messages sent through platforms like WhatsApp as they usually are sent by a trusted source. “As a result, doubts regarding the credibility of the source of the messages tend to get diluted. And therefore we are inherently more likely to not think of rejecting the content of the message as being false or inauthentic,” says Sameer Parekh, Director of Department of Mental Health and Behavioural Sciences at Fortis Healthcare. Rumour mongering has increased exponentially because of easy accessibility of social media platforms nowadays.

**4. NEED FOR ANTI LYNCHING LAW**

703 Death by Social Media (02-08-2018)

<https://www.livemint.com/Politics/jkSPTSf6IIZ5vGC1CFVyzI/Death-by-Social-Media.html>
The incidents mentioned above are only a few of those occurred in the recent past. The National Campaign Against Mob Lynching (NCAML) had initiated a campaign for a law against mob lynching in 2017. Also known as ‘Masuka’, short for Manav Suraksha Kanoon (law to protect humans), a draft of the proposed legislation is since then up on the Internet, awaiting suggestions from the public.

The primary argument of the activists and lawyers advocating an anti-lynching law is that it fills a void in our criminal jurisprudence. It is true that at present there is no law that criminalises mob killings. The Indian Penal Code has provisions for unlawful assembly, rioting, and murder but nothing that takes cognisance of a group of people coming together to kill (a Lynch mob).

It is possible, under Section 223 (a) of the Criminal Procedure Code (CrPC), to prosecute together two or more people accused of the same offence committed in the course of the “same transaction”. But the provision falls far short of an adequate legal framework for prosecuting Lynch mobs.

The NCAML’s draft Protection from Lynching Act, 2017 defines, for the first time in Indian legal history, the terms ‘lynching’, ‘mob’ and ‘victim’ of mob lynching. It makes lynching a non-bailable offence, criminalises dereliction of duty by a policeman, criminalises incitement on social media, and stipulates that adequate compensation be paid, within a definite time frame, to victims and survivors. It also guarantees a speedy trial and witness protection.

The Supreme Court too in its July 2018 order emphasised the need for an anti-lynching legislation and observed “The law may not be able to make a man love him, but it can keep a man from lynching him.”

Thus, recognising this need, a few states have initiated the process of bringing such a legislation. In December 2018, Manipur became first Indian state to pass a law against mob violence. Subsequently, Madhya Pradesh approved changes to its Anti cow vigilantism law to curb mob violence by cow vigilantes in June 2019 and Rajasthan Assembly passed anti mob lynching bill in August, 2019. The Uttar Pradesh Law Commission has also submitted a draft bill recommending punishment up to life imprisonment for persons accused of mob lynchings in July 2019.

5. SUPREME COURT JUDGEMENT

The Supreme Court in July 2018, Tehseen S. Poonawalla v. Union of India & others judgment condemned the increasing number of incidents of mob lynching as “horrendous acts of mobocracy” and asked the Parliament to enact a law establishing lynching as a separate offence with punishment. The three judge bench led by the then Chief Justice of India Dipak Misra helps that it was the obligation of the state to protect citizens and ensure that the ‘pluralistic

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The apex court also gave a slew of directions including preventive, remedial and punitive measures to deal with the crime.

- The state governments shall designate a senior police officer in each district for taking measures to prevent incidents of mob violence and lynching.
- The state governments shall immediately identify districts, sub-divisions and villages where instances of lynching and mob violence have been reported in the recent past.
- The nodal officers shall bring to the notice of the DGP any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence related issues.
- It shall be the duty of every police officer to cause a mob to disperse, which, in his opinion, has a tendency to cause violence in the disguise of vigilantism or otherwise.
- Central and the state governments should broadcast on radio and television and other media platforms including the official websites that lynching and mob violence shall invite serious consequence.
- Curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms.
- Register FIR under relevant provisions of law against persons who disseminate such messages.
- Ensure that there is no further harassment of the family members of the victims.
- State governments shall prepare a lynching/mob violence victim compensation scheme.
- Cases of lynching and mob violence shall be specifically tried by designated court/fast track courts earmarked for that purpose in each district. The trial shall preferably be concluded within six months.
- To set a stern example in cases of mob violence and lynching, the trial court must ordinarily award maximum sentence upon conviction of the accused person.
- If it is found that a police officer or an officer of the district administration has failed to fulfill his duty, it will be considered as an act of deliberate negligence.

MANIPUR ANTI LYNCHING LAW
Soon After the supreme court judgement, Manipur became the first state to pass a remarkable law against lynching. It did this after an incident which stirred the whole state wherein a Muslim youth with an MBA degree was lynched and brutally beaten to death on mere suspicion of vehicle theft. Soon after the horrific incident, The Manipur Assembly has passed The Manipur Protection from Mob Violence Bill, 2018 against the so called ‘Mob violence’ of the country holds against mob violence. The court also observed that the growing numbness of the ordinary Indian to the frequent incidents happening right before his eyes in a society based in rule of law is shocking. The government should see the judgement as a ‘clarion call’ in a time of exigency and work toward strengthening the social order.

- To prevent incidents of lynching and mob violence, the state governments shall designate a senior police officer in each district for taking measures to prevent incidents of mob violence and lynching.
- The state governments shall immediately identify districts, sub-divisions and villages where instances of lynching and mob violence have been reported in the recent past.
- The nodal officers shall bring to the notice of the DGP any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence related issues.
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707 The Manipur Protection from Mob Violence Ordinance, 2018 <https://manipur.gov.in/?p=14788>
Justice’ to counter and punish such people who take law in their hands. The bill recommends life imprisonment for those involved in mob violence, if it results in the death of a person.

The Manipur law closely follows the Supreme Court’s prescriptions and introduced the anti-lynching law as per the guidance of Supreme Court. Some of the striking features of the bill are:

- It defines mob lynching as “any act or series of acts of violence or aiding, abetting such act/acts thereof, whether spontaneous or planned, by a mob on the grounds of religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation, ethnicity or any other related grounds.

- The law makes offences of mob violence cognizable, non-bailable and non-compoundable.

- The law states that if an act of mob violence leads to death of the victims, the offenders would be punished with rigorous life imprisonment and fine which may extend up to 5 lakhs.

- Anyone who creates hostile environment against people of the community who have been lynched will be punished with imprisonment of 6 months.

- It lays down the duty and responsibility of the State government to make arrangements for the protection of victims and witnesses against any kind of intimidation, coercion, inducement, violence or threats of violence.

- It calls for creating a nodal officer to control such crimes in every districts.

- The nodal officer has been mandated to form a special task force to procure intelligence reports about people likely to commit such crimes or have been previously engaged in such crimes.

- The law provides for special courts and speedy justice.

- The law makes provisions to hold police officers accountable for failing to prevent lynching and make them guilty of dereliction of duty. Such officer(s) will be liable to punishment of imprisonment of one year, which may extend to three years, and with fine that may extend to Rs. 50000.

- The law mandates the state to formulate a scheme for relief camps and rehabilitation in case of displacement of victims, and death compensation.

MADHYA PRADESH LAW AGAINST COW VIGILANTISM

The Madhya Pradesh assembly on July 17, 2019 passed the Anti Cow Slaughter Amendment Act, 2019 that ensures a jail term of six months to three years and a fine of Rs 25,000-50,000 for those who are convicted for committing violence in the name of the cow.

According to the Anti-Cow Slaughter Act 2004, no one was allowed to transport cattle through Madhya Pradesh and a special permission from a competent authority was required by those who passed through the state while transporting their cattle. This created problems and many cases of cow vigilantism were reported.

The new Act has amended this provision and now it would be possible to transport cattle from Madhya Pradesh to outside the state with the permission from a competent authority.

INITIATIVE TAKEN BY UTTAR PRADESH LAW COMMISSION

The Uttar Pradesh Law Commission has submitted a draft Bill recommending punishment up to life imprisonment for committing mob lynching. The chairman of the Commission, Justice (retd) AN Mittal, submitted the report on mob lynching, along with the draft Bill to Chief Minister Yogi Adityanath. The 128-page report has cited various cases of lynching in the state and recommended the immediate enactment of a law as per the recommendations made by the Supreme Court in 2018. The Commission said the existing laws were not sufficient to combat lynching and asserted that there should be a separate law to tackle them. It suggested a punishment ranging from seven years in jail to life imprisonment for the offence.

The Commission suggested that the law could be called the 'Uttar Pradesh Combating of Mob Lynching Act' and specified the responsibilities of police officers and District Magistrates, besides spelling out the punishment for failing in their duty. The panel said the law should also provide for compensation to the family of the victim for grievous injury or loss of loss of life and property. There should also be provisions for the rehabilitation of the victims and their families, it said.

As per the available data from 2012 to 2019, 50 incidents of mob violence have taken place in Uttar Pradesh. Of around 50 victims, 11 have died. Twenty-five of these were cases of major assault, including those by cow vigilantes. The panel studied laws of different countries and states, and decisions of the Supreme Court while preparing the draft legislation. It suggested punishment for conspiracy, aid or abetment in such cases, as well as for obstructing the legal process.

LYNCHING LAW IN RAJASTHAN

There has been a spate in the number of cases of mob lynching in Rajasthan. The Rajasthan Protection from Lynching Bill, 2019 was introduced in the Rajasthan Assembly on July 30, 2019 and was passed on August 05, 2019. The bill has put forth a wide definition of lynching that includes “dietary practices” and “sexual orientation” as grounds for assault. Lynching has been defined as “any act or series of acts of violence or aiding,abetting or attempting an act of violence whether spontaneous or planned by a mob on the grounds of religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation, ethnicity.”

It proposes setting up fast track courts, providing relief and rehabilitation measures, including free-of-cost treatment for victims, compensation, and establishment of relief camps. The bill also proposes the same level of punishment for conspiracy, abetment, aides or attempts to lynch.

Under the new law, lynching offences will be tried by a sessions court and be


cognizable, non-bailable and non-compoundable. A person who commits an act of lynching which causes the death of the victim will face rigorous life imprisonment and a fine of Rs1 lakh to Rs 5 lakh. In case of grievous hurt, the punishment will be jail up to 10 years and a fine of Rs 25,000 to Rs 3 lakh and for other injuries, the punishment is a jail term of up to seven years and a fine of Rs one lakh.

Obstructing arrest of the accused, creating hurdles in legal proceedings or threatening witnesses will attract a jail term of up to five years and penalty of Rs one lakh.

The law prescribes a procedure for the appointment of a coordinator at the state and district levels as directed by the Supreme Court and witness protection. Mob lynching cases will not be investigated by an officer below the rank of a police inspector.

Under the law, the state government in consultation with the chief justice of the high court will also set up designated courts to hear mob lynching cases. Victims will get compensation as per the Rajasthan Victim Compensation Scheme and will be rehabilitated in case they get displaced because of a mob lynching incident.

CRITICAL APPRAISAL

Laws enacted by states like Rajasthan, Manipur etc. to combat mob violence closely follow the guidelines of the Supreme Court judgement on the issue. The legislations provide a comprehensive definition of lynching in addition to creating new offence against the police officials for dereliction of duty. This would prevent cases where police officials arrive late deliberately, watch crimes being under way without restraining the mobs, delay in taking injured to the hospital or collude with the accused to defend him. If police officials know that they could be prosecuted an punished for these crimes (which would also put them at a risk of losing their jobs), it is very unlikely that they would act in this manner. They would then prevent, or stop in their tracks, these hate crimes, and protect the victims. Earlier, no court could take cognisance of such offence except with previous sanction of the government but now no prior sanction is required to register crimes against public officials who fail in their duties to prevent hate crimes such as lynching. Moreover there are certain provisions for the compensation and rehabilitation for the victims and their families.

There are though, some shortcomings in these legislations. For instance solitary hate crimes have not been taken into consideration and these laws are only constrained to crimes committed by mob. Although there are provisions for solitary hate crimes like murder but most of them require intention to commit the offence as an essential ingredient which is difficult to prove in most cases of lynching. Secondly, these legislations also fall short of specific provisions to curb incitement and fake news on social media platforms which is one of the major contributors to mob violence. Also, though there are provisions for compensation and rehabilitation but they are not clearly defined in any of the legislations.

CONCLUSION

711 ibid
The Supreme Court on July 26 this year on hearing a Public Interest Litigation filed by Anti – Corruption Council of India issued notices to the Centre, National Human Rights Commission (NHRC) and the states seeking response on the allegation that directions in its July 2018 judgement have not been implemented. The government had formed a Group of Ministers (GoM) last year to deliberate on the incidents of lynching and make recommendations which was headed by then Home Minister Rajnath Singh and would now continue functioning under present Home Minister Amit Shah. 712 A high level committee headed by Union Home Secretary Rajiv Garba submitted its report to GoM in September 2018, suggesting measures such as tightening of the law by inserting clauses in the Indian Penal Code and the Code of Criminal Procedure through parliamentary approval. After the Home Secretary’s report, the Centre held a series of meetings with social media platforms and asked them to take concrete steps to take down content that fuelled rumours and contributed to lynching. In May and June of 2018, more than 20 people were lynched based on fake posts or rumours of child lifting floating on social media platforms. The National Crime Records Bureau (NCRB) does not maintain data with respect to lynching incidents in the country and it is counted among crimes like murder.

There’s no doubt that the growing menace of mob lynching in the country needs to be curbed as soon as possible by bringing a central law against the same. The Supreme Court judgement provides good insights regarding the same and needs to be kept in consideration while framing such a law.

712 Amit Shah to head group to combat lynching – The Hindu (29-07-2019)
EXPLORING DISABILITIES WITHIN THE REALM OF HUMAN RIGHTS

By Shivani Vyas, Ridhima Chandani, Yaadvi Dhawan, Purusharth Saraf and Prithvi Paul Chatrath
From Manipur University, Jaipur

Abstract: Privileges of Persons with Disabilities is about more than ensuring that current human rights are connected to people with incapacity. It additionally quietly reformulates and stretches out existing human rights to consider the particular rights understanding of people with handicap. "Handicapped" or "contrasting abled" people by ethicalness of being human reserve the privilege to appreciate human rights to life, freedom, uniformity, security, and nobility. Be that as it may, because of social lack of concern, mental obstructions, a constrained meaning of "inability" entitling insurance of law. Simultaneously, at whatever point the legal executive finds a chance, it goes about as a genuine defender of debilitated people, yet isn’t possible to thump on the entryway of the legal executive for each solicitation. Strikingly, different common social orders and human rights activists have every so often stated the privileges of the debilitated. Contemporary status of incapacitated individuals with present laws however the researcher believes and argues that it’s not law which will provide solution to this problems, it is the people in the society that need to be more sensitive towards disable people and be more protective towards the condition of the disable people.

Introduction

“When you focus on someone’s disability you’ll overlook their abilities, beauty and uniqueness once you learn to accept and love them for who they are, you subconsciously learn to love yourself unconditionally.” — Yvonne Pierre, The Day My Soul Cried: A Memoir

The United Nations (U.N.) Convention on the Rights of Persons with Disabilities (CRPD) defines persons with disabilities as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." In many countries, disabled people as an inferior community excluded from the society. They are deprived of their rights and liberties and further are exposed to abuse and harassment. They are robbed of their right as equal citizens. – In India out of the 1.21 Crore population, 2.68 Crore persons are disabled which is 2.21% of the total population. Among the disabled population 56% (1.5 Crore) are males and 44% (1.18 Crore) are females. In the total population, the male and female population is 51% and 49% respectively. Whereas, conservative estimates place Indians with disability at between 5-6% of the total population. Majority (69%) of the disabled population resided in rural areas (1.86 Crore disabled persons in rural areas and 0.81 Crore in urban areas). In the case of total population also, 69% are from rural areas while the remaining 31% resided in urban areas.

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714 www.censusindia.gov.in


www.supremoamicus.org

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urban areas. The CRPD is the first treaty that comprehensively addresses all aspects of discrimination based on disability, including employment, education, privacy, and self-determination. Out of nearly 200 U.N. member states, 142 countries are signatories to the convention.\textsuperscript{716} The most recent two decades have seen an extreme change with regards to the methodology towards people within ability and guarantee their dynamic investment in political, monetary, social, and social life as it were that is aware and pleasing of their disparities. The debate about the rights of the disabled is therefore connected to a larger debate about the difference existing in society. In the new scenario, the disabled are viewed as individuals with a wide range of abilities and each one of them willing and capable to utilize his/her potential and talents.\textsuperscript{717} Although, legislation cannot alone radically change the fabric of a society in a short span of time, it can at least make a beginning by giving a socio-human consideration towards the needs and requirements of the disabled\textsuperscript{718}.

Overview of the International and National Instruments available for the protection of the rights of disabled people
There are certain resolutions which were passed to promote and protect the interests of the disabled people in the society such as “Declaration on the Rights of Mentally Retarded Persons”\textsuperscript{719}. This resolution states that such persons enjoy the same human rights as all other human beings and then list out the rights that are of special importance to them which includes education, training and rehabilitation, the resolution is focused on the need to protect the interests of such persons and to appoint a qualified guardian where necessary, “Declaration on the Rights of Disabled Persons”\textsuperscript{720}. The Declaration asserts that persons with disabilities have the same civil and political rights as other human beings. Further, such persons are “entitled to the measures designed to enable them to become as self-reliant as possible” The Declaration also identifies a number of economic and social rights that are of importance for the development of capacity and social integration. It also refer to “right of disabled persons to have their special needs taken into consideration at all stages of economic and social planning, the right to protection against exploitation and treatment of an abusive or degrading nature and the right of organizations of persons with disabilities to be “usefully consulted in all matters regarding the rights of disabled persons”, “World Programme of Action concerning Disabled Persons” (WPA)\textsuperscript{721}. The overall aims of the WPA are prevention, rehabilitation and equalization of opportunities and the WPA calls for the development of long-term national programmes to achieve the objectives of the Programme domestically, “Tallinn Guidelines for Action on Human Resources Development in the Field of Disability”\textsuperscript{722}.\textsuperscript{716} UN Enable. Accessed August 2019 at http://www.un.org/disabilities/
\textsuperscript{718}Chakraborty, Dr. Sanjit Kumar, Disability Rights in India: A Paradigm Shift from ‘Object’ to ‘Subject’ (June 15, 2009). Calcutta Law Times, Vol III, 2009
\textsuperscript{719} General Assembly resolution 2856 (XXVI) of 20 December 1971
\textsuperscript{720}General Assembly resolution 3447 (XXX) of 9 December 1975
\textsuperscript{721}General Assembly resolution 37/52 of 3 December 1982
\textsuperscript{722}General Assembly resolution 44/70 of 15 March 1990, annex
The basic idea underlying this document is that the development of the human resources of persons with disabilities has too long been neglected and should be viewed as a key means of enabling such persons to exercise their human rights and responsibilities like other members of society. Several strategies for human resource development are singled out. They include the participation of persons with disabilities in society (breaking down physical and communication barriers), strengthening of grassroots and self-help efforts, and promotion of education and training, employment, community awareness, and regional and international cooperation. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities are the main United Nations rules guiding action in this area and consist of four parts: Preconditions for equal participation, Target areas for equal participation, Implementation measures, and monitoring mechanism. They imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for persons with disabilities and although the rules are not compulsory, they can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law. The purpose of the Standard Rules is to ensure that girls, boys, men and women with disabilities, as members of their societies, may exercise the same rights and obligations as others. The Declaration specifically mentions women with disabilities as a group that is especially vulnerable to violence, and “Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.” It decides to establish an Ad Hoc Committee, open to the participation of all Member States and observers to the United Nations, to consider proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development.

Some of the core human rights treaties that were adopted to protect the rights of the disabled people are the International Covenant on Civil and Political Rights (ICCPR) 1966, which provides protection for a range of civil and political rights. It seeks to underpin the freedom of the individual and to ensure that he/she is enabled to exert influence over the political life of the polity, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 which seeks to ensure that freedom is buttressed by appropriate social rights and social provision. These two

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724 General Assembly resolution 48/96 of 20 December 1993
726 Id., Para. 15.
727 General Assembly resolution 48/104 of 20 December 1993
728 General Assembly resolution 56/168 of 19 December 2001
themes of freedom and appropriate social support for freedom are crucial for people with disabilities, The Convention on the Rights of the Child (CRC) 1989, it contains a very specific article on the rights of disabled children.\textsuperscript{729} The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) 1965, it is highly relevant to those who suffer double discrimination on grounds of race and disability, the Convention also provides for inter-State and individual complaints procedures.\textsuperscript{730} Also, the Universal Declaration of Human Rights (UDHR), 1948, is an important document which affirmed the rights of all people without any discrimination.

At the national level as well, many rights have been provided in The Indian Constitution and many legislations have been enacted to promote and protect the rights of the disabled people. Article 41 of The Indian Constitution states that, “The State shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.”, Article 46 states that, “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation”. Apart from these there are certain laws which have come into force such as THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995, it states that people with disabilities had the right to equal opportunities and full participation and it also provides the duties of the government at various levels and the other establishments under their control, it contains provisions providing the disabled people with proper education, employment and also have adopted measures to improve accessibility for people with disabilities, THE REHABILITATION COUNCIL OF INDIA ACT, 1992 it aims, ‘To standardize training courses for professionals dealing with people with disabilities’, ‘To prescribe minimum standards of education and training of various categories of professionals dealing with people with disabilities’, ‘To regulate these standards in all training institutions uniformly through out the country’, ‘To promote research in rehabilitation and special education’, and ‘To maintain Central Rehabilitation Register for registration of professionals’, THE NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM, MENTAL RETARDATION AND MULTIPLE DISABILITIES ACT, 1990, it aims to fulfill a common demand of families seeking reliable arrangement for their severely disabled wards and the main objectives of the Act are ‘To enable and empower persons with disabilities to live as independently and as fully as possible within and as close to the community to which they belong’, ‘To promote measures for the care and protection of persons with disabilities in the event of death of their parent or guardian’, and ‘To extend support to registered organizations to provide need based services during the period of crisis in the family of disabled covered under this Act’, THE MENTAL HEALTH ACT, 1987, it aims to regulate standards in mental health institutions and to make provisions

\textsuperscript{729}The Convention on the Rights of the Child (CRC) 1989, Article 23

\textsuperscript{730}Supra Note 5.
with respect to their property and affairs, it states that “No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty,”731 and “No mentally ill person under treatment shall be used for purposes of research, unless Such research is of direct benefit to him for purpose of diagnosis or treatment, or Such persons, being a voluntary patient has given his consent in writing or where such person (whether or not a voluntary patient) is incompetent by reason minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing for such research.”732 Also, the Indian Judiciary has played a significant role in developing the human rights of the disabled persons. In a number of cases, the Supreme Court and the High Court have interpreted the disability legislation in a way so as to achieve the objectives contained therein. In Javed Abidi v. Union of India733, the Supreme Court directed creation of 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. State734, the Supreme Court extended the equitable principle of preferential treatment to persons with disabilities to bring them to the mainstream of the society by giving them equal opportunity in the field of education, and in Sheela Bhave and Ors. v. Union of India735, 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 way various measures have been taken in the field of disability rights towards the protection of the human rights of the disabled persons.

**Implementation Gap**

Though various steps have been taken by the government in order to improve the conditions of the disabled people but still due to the ineffective and inefficient implementation of the laws the outcome for which the government is aiming is still not achieved. Firstly, there are no sufficient funds or financial backing provided to the local government for providing the facilities mentioned for the disabled people. Secondly, there is lack of awareness and sensitization due to which the general public is unable to contribute towards the needs of these people. Thirdly, many of the private firms and at times even the government sector refuse to provide them with employment stating their disability as the reason and lastly, due to the social barriers and a little difficulty in the implementation they are denied the basic public services. One of the examples relating to this issue is that “On 19th June, 2019 Disabilities rights activist Arman Ali, executive director of the non-profit National Centre for Promotion of Employment for Disabled People (NCPEDP), was allegedly off-boarded from an Uber cab in Chennai as the driver refused to accommodate his wheelchair, he said that though the Government talks about PWDs (persons with disabilities) being divyang (divine bodies), but we are being treated like third class citizens and like burdens on society.”736.

**Problems faced by the Disabled People**

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731 THE MENTAL HEALTH ACT, 1987, Section 81(1)
732 Id., Section 81(2)
733(1999) 1 SCC, 467
734 AIR 1971 SC 1762
735 (1993) 4 SCC, 204
736 The Hindu, 22-June-2019
Incapacity has numerous aspects, to start with, it is imperative to comprehend that there are a wide range of types and severities of hindrance which lead to disabilities. To name some are visual hindrance, hearing hindrance, development hindrance and subjective/language hindrance. Inside every one of these real kinds, there are numerous varieties and degrees of disability. Each of these may show various obstructions. People with disabilities face an expanded danger of being victims of violent crime. Ladies with handicaps in specific experience a high pace of abusive behavior at home and rape. Studies recommend that ladies with formative handicaps are 4 to 10 times bound to be explicitly struck than other ladies. Youths with disabilities are between 1.5 and 3.5 times more likely to have experienced abuse and neglect, and to be surrendered into the child welfare system.

There is restricted association or no contribution of Children with disabilities (CWDS), their folks or guardians in plan, dispersal and usage of the laws and approaches that identifies with them. More regrettable to that, even the relevant persons that deal with CWDS are likewise not occupied with the detailing, scattering and usage of such laws and arrangements. Notwithstanding the way that the privileges of CWDS are recognized, a portion of the arrangements to acknowledge them don't satisfy the guidelines expected by the CRC and the UN CRPD and accordingly. Insufficient data and guidance about how to enter the open work environment and get continuous help, there is no 'one-stop shop' for individuals with incapacities searching for data, guidance and progressing support. Now one of the major issues the arrives is inflexible working environment, difficulties with physical access to the workplace, and getting to and from work, inadequate adjustments and adaptations to workplace equipment and inflexible working hours one they find work for themselves. The Indian society has for long neglected the needs and aspirations of differently abled person. Their right to gainful employment has long been hindered by the lack of political will of successive government. When we specially talk about work environment for the people which have visual disability. Written operating instructions and other documentation may also be inaccessible if they are not provided in electronic or alternate form (e.g. Audio tape or Braille) and even then people may have difficulty accessing graphic or pictorial information included in documentation. Incapacitated people are in truth diversely abled people yet the generalizations and preferences appended to them by society makes them debilitated. Subsequently, they are separated on various checks. Disabled people don't feel sense of inclusiveness in our society. Lack of optimism creates obstacle in their self-empowerment. As we talk about employment for them we see that there is reservation for disabled people in the government service but no such thing in the private sector which resulted into the negligible share of disabled people in private sector and due to their disability, they have lesser access to educational facilities. They face numerous hurdles for gaining education such as the absence of proper administrations for individuals with incapacities is a noteworthy hindrance to

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social insurance. Affordability of health service and transportation are two main reasons why people with disabilities do not receive needed health care. School condition needs lodging for genuinely rehearsing comprehensive instruction. Notwithstanding, such lodging are not there in greater part of the schools, facilities like ramps, lifts, and directional cues etc. are mostly absent in schools. Due to their disabilities, earning a livelihood becomes difficult for them. Due to this, they are financially weak. The government has numerous schemes which offer them scholarships and grants to support them. The government also provides for their medical equipment’ special calipers (e.g. Jaipur foot) for them.

Recommendations

The Constitution of India fuses the standards of social equity and human rights. Handicap as the ground of separation isn’t disallowed explicitly in the Constitution. Be that as it may, the state could start programs for the handicapped based on ‘sensible order', which grants inverse individual ought to be. The future of the disabled individuals is not all that gloomy there is lot of scope for amendments to the existing legislation “THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995” in conformity with UN Convention on the Rights of Persons with Disabilities (2006) to which India a signatory. Disability is both a cause and consequence of poverty; it is a reason which can generate unemployment which can lead to numerous different difficulties that can further prompt financial hardship. The poverty rate for working-age people with disabilities is nearly two and a half times higher than that for people without disabilities, yet the intersection of disability and poverty is too rarely discussed. Policymakers have a number of policies and solutions at their fingertips that could have a genuine effect today. Growing Medical aid would make it workable for all the more low-salary Indians to get to preventive consideration, and diminish money related strain with disabilities. Guaranteeing paid leave assurance and paid days off would profit the two workers with incapacities and workers who care for relatives with disabilities. Raising the lowest pay permitted by law would help the wages of numerous specialists with disabilities, who are particularly prone to work in low-wage occupations. Likewise, boosting the Earned Income Tax Credit for workers without dependent children would benefit many workers with disabilities, who are less likely to have children. The Guiding Principles on Extreme Poverty and Human Rights, adopted by the Human Rights Council in September 2013, highlight the particular vulnerability of persons with disabilities to extreme poverty. They emphasize the importance of the progressive development of comprehensive national social security systems. Most countries have committed to protect the right to education for people with disabilities, which offers a reason for responsibility. In any case, surveying consistence with this privilege is muddled by obscured definitions and a lack of monitoring mechanisms. Associations of people with inabilities and networks can play a significant role in monitoring country commitments to the right to education. Measuring progress in education for children with disabilities requires also

739 UN Human Rights Council, 2012: Guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights
having measures based on nationally representative household surveys, rather than only on children who are in school. Governments should create comprehensive educational plans to help separate boundaries looked by youngsters with handicaps in the classroom. Isolating kids from their companions or families is unfavorable to their advancement and potential. Instructors must be upheld with preparing and educational apparatuses to achieve youngsters with exceptional needs. More teachers with disabilities should be hired. Along with this, Countries should enforce minimum standards on school accessibility for children with disabilities.

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. Accessibility is a key component to fighting discrimination against persons with disabilities. According to the Department of Transportation, only 55-60% of public transit buses are equipped with wheelchair lifts. In certain cases when you have extra needs and cannot use metro, train, bus, in these cases the government should introduce Taxi Transport Subsidy Scheme or community transport which can be specially provided for the disable people who wish to travel and work. Governments should introduce disability pass for traveling so that it is easy to access to public and private transport. A Twin track approach is required - incapacity explicit measures to empower those confronting specific such as women and girls with disabilities, persons with intellectual and psycho-social disabilities and others need to be introduced, alongside measures to promote the inclusion of persons with disabilities in programmers and services for the general population. Work open doors for people with handicaps to guarantee that they know about issues identifying with handicap consideration and the privileges of people with disabilities. As ladies and young ladies with disabilities are increasingly helpless against a wide range of misuse, they must be taken care off in all settings at all places including, home, care-houses, educational institutions, institutions, workplaces. The government can also include disabled people in the Make in India and Skill India drives, so as to make them financially independent. Making a mobile app which will enable the disabled to click pictures of the inaccessible areas and share them on the Accessible India Portal. Creation of Accessible ATM's, bank counters, police stations, hospitals and facilitating Accessible tourism across the country. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development. The separate teacher education programs for regular and special education do not equip teachers with an integrated knowledge of the expected roles, functions and responsibilities to meet the diversity of learning needs in the classroom. Therefore, a need is being felt for a new
Conclusion
Disability rights movement in India is very inept and has nothing to boast about. Except Kautilya, the Prime Minister of Chandragupta Maurya, who himself was physically disabled, had recorded one of the earliest laws against discriminatory language and sarcasm in the use of language, there has been no history of laws for the disabled persons. His dialogue of human rights for the people with incapacities can be made in an incredible detail, yet the issue is straightforward one. As people notwithstanding access to every single essential right, handicapped people need a protected, secure, advantageous, and gainful open condition which is deferential of their human pride. With a web of legal framework government has to an extent succeeded in protecting the differently-abled, but still a lot needs to be done to sensitize the government officials and society in large so that differently-abled are facilitated rather than discriminated. We know that the implementation of the laws still lacks efficiency and effectiveness but we need to fill the gaps required and focus on achieving the objectives for which the country is aiming and also make efforts to change the mentality of the people in the society. The disabled people should actively take part in the policy making regarding their rights so as to bring “Disability Rights” to reality.

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740 Singh, Dr. Yash & Anju Agarwal, Dr. (2015). ‘Problems And Prospects Of Inclusive Education In India’, accessed on August 3, 2019

ONE PERSON COMPANY - A NEED FOR CHANGE

By Somya Virk
From Symbiosis Law School, Pune

ABSTRACT
We live in the 21st Century where it is very difficult for small businesses to sustain themselves when multinationals are hunting like big fish in the sea. Governments all across the globe are making a genuine effort towards promoting small businesses by changing laws, shaping policies and giving them subsidies.

In the Indian scenario the bulk of business is undertaken by unorganised small-scale setups which do not get government loans or support like big companies. With the same hope of scaling up these companies the Indian legislature amended the Companies Act in 2013 and added new types of companies. This article will analyse the issues with the laws relating to One Person Company (OPC) using International case laws and legislations as a base for comparison. Towards the end suggestions will be listed for giving these companies advantage over other private companies in order to fulfil the objective with which these OPC were allowed to be incorporated.

Note- After extensive research for case laws on various websites like Manupatra, SSC Online and all the reference books not even one Indian case was found relating to OPC’s. Thus I filed an RTI application as guided by the faculty, which has been attached with this assignment. Therefore for reference all foreign courts judgments have been taken.

INTRODUCTION
‘In One Person Company, I am the CEO, the technical staff and the janitor’ - Mal Steifel

The Companies Act sloughed its skin in 2013 to form a more modern version of itself due to dire need of complying with the international standards and growing pressure in the economic ecosystem. Many new types of companies were included in its ambit and one of them was One Person Company (OPC). The amended laws are more flexible and encourage people to start companies over any other form of business like sole entrepreneurship etc.

One person Company is defined under Section 2(62)742 of the Companies Act, 2013 as any company which has only one member. The member in this case is also a subscriber to Memorandum of Association thus is also called a shareholder.

The foundation of this new type of company was laid in the year 2004 after Ministry of Corporate Affairs constituted a committee to look into this matter under the chairmanship of JJ Irani743. The committee submitted a detailed report in 13 chapters which discussed the classification of companies.

After the new act, now one person can incorporate a company, this concept of OPC dates back to the time when United Kingdom made efforts to promote sole entrepreneurship and also realised need for

giving it a legal entity; thus it resulted in the formation of first law with regards to OPC. The Solomon case is the birth father to this modern version of company law. Subsequently many countries adopted OPC and in recent times have allowed artificial entities to start OPC but in India only a Natural person can start an OPC.

**HISTORICAL EVOLUTION**

The *Salomon v Salomon & Co*, Limited Respondents case laid the foundation of concept of lifting corporate veil, it also becomes important while discussing the concept of OPC as Lord Watson while giving the dissenting opinion on judgement of Court of Appeals said that in the Companies Act 1862 the wording clearly represents that legislature’s intention to not give any minimum number of individuals who can incorporate a company. Hence One Man Company is not against any law.

The view was supported by the judiciary in New Zealand in the case of *Trevor Ivory v Anderson* the judges in this case stated the existence of One Person Company is not against any law, the creditors should take same level of precaution like they take while dealing with other private companies.

The first country in the world’s history to give OPC recognition was Liechtenstein which was followed by countries, all over the globe. They created different set of legislations and rules to regulate OPC’s existence in accordance to their respective economic frameworks.

Germany was one of the few European companies which had OPC’s in the 17th century. These companies were not in accordance with law but one single person acquired all the shares and started the company. Later in the 20th century these types of companies were officially recognized. Countries like USA, China and Singapore, Hongkong were pioneers of making modern law in this aspect.

As this concept of OPC is new in India the courts have not been approached on vagueness of certain section for clarification and interpretation. All the laws and rules regarding this type of company are based on case laws of other countries and their respective acts.

**INDIAN LEGISLATION**

Various provisions were added in the new amendment which define and regulate the functioning of OPC. Section 2(62) of the Companies Act defines One Person Company as ‘a company which has one member.’ Also it is given under Section 3(1)(c) that ‘Any single person can form a company for any lawful purpose.’

The objective with which this type of company was introduced in the Indian Economic System was twofold firstly to promote the small businesses; secondly to help entrepreneurs get all benefits of sole proprietorship and also free the promoters for the legal liability by giving this company an individual legal identity.

The next point to be noted here is that only natural person who is an Indian Citizen and resident in India shall be eligible to incorporate an OPC. Another unique feature about this type of company is that the sole member has to select a nominee which needs to be mentioned in memorandum thus leads to perpetual

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744 *Salomon v Salomon & Co* (1896), UKHL 1, AC 22.
746 *Sectary of Justice v Lee Chaug Ping*(1999) 2 HKC 103.
747 The Companies Act, 2013, Section 2(62).
748 The Companies Act, 2013, Section 3(1)(c).
succession; wherein the nominee becomes the member on death of the previous one and this goes on until company is dissolved. The person who is chosen as a nominee has to file written consent with the registrar at time of registration of OPC.

**Salient Features of One Person Company**

- OPC can be either limited by share or Company limited by guarantee or an unlimited Company.
- The turnover limit if exceeds Rs 2 Crores average for three previous consecutive years then the OPC has to mandatorily become public or private company under Section 18\textsuperscript{750} of the Act. There are restrictions placed on transfer of shares like any private company. They can do this in a general meeting as prescribed under Section 8\textsuperscript{751} of the Act.
- OPC cannot give public notices to subscribe for securities of the company.
- It has to be indicated on the sign board of the company that it is an OPC as mandated in these provision so that people getting in any kind of deal are aware of the prior arrangement.
- Section 122(1)\textsuperscript{752} of the Act provides that all rule and regulations relating to extra ordinary meeting etc are not mandatory for OPC.
- OPC’ have the law of perpetual succession which means even if the person who was sole member dies the nominee will take over the company and elect another nominee in this way the company lives forever until dissolved. In case of *Abdul Aziz Bin Atan v Ladang Rengo Malay Estate*\textsuperscript{753}, the court of Malaysia held that from the day of incorporation the promoter and the company are two distinct legal entities thus death of member should not lead to direct dissolution of OPC. The same law is valid in India and this judgment can be taken as a persuasive judgment.
- These are some of the main procedural aspects for OPC but the discussion in this article deals with the evolution. A limited liability clause further protects the owner; if in any case the company has to go through the process of liquidation then the owner’s personal assets cannot be attached in this case. The maximum directors that can be appointed are fifteen.
- There are some advantages of OPC from Section 96 to Section 111 of the Act it gives legal status to the company which is not the case with sole proprietorship and that of limited liability as discussed earlier. This limited liability was upheld by the court in the case of *T.R. Pratt v E.D Sasoon & Co Ltd*\textsuperscript{754} There are a lot of issues in the laws of OPC’s which will be discussed in details. Due to existence of these problems the main objective of promotion of business and incorporation of small businesses is being hampered. This limited liability does not extend to criminal deeds of a director as held in the case of *Pepper v Litton*\textsuperscript{755}.

\textsuperscript{750} The Companies Act, 2013, Section 18.
\textsuperscript{751} The Companies Act, 2013, Section 8.
\textsuperscript{752} The Companies Act, 2013, Section 122(1).
\textsuperscript{753} Abdul Aziz Bin Atan v Ladang Rengo Malay Estate SDN BHD (1985) 2 MLJ 165.
\textsuperscript{754} T.R. Pratt v E.D Sasoon & Co Ltd, AIR 1936 Bom 62.
\textsuperscript{755} Pepper v Litton, 308 U.S. 295 (1939).
Data collected on June, 2018 by an independent research team headed by Dr. P. Govidan in the Journal Pratidhawani.\textsuperscript{756} This bar chart shows the number of one person companies in India, the total of 18,531 have been incorporated till now. After the amendment of 2013 the government of India had envisioned a steep growth in the OPC ventures but the growth remained low due to issues in the legislation. This Chart also points out that the maximum companies are in the Service Sector thus if other than natural person even artificial person are allowed this graph will show sudden growth. The small businessmen in other areas do not prefer opening OPC due to lack of awareness and many Factors states below.

\textbf{ISSUES IN THE LAW}

- The first issue here is that the turnover of an OPC cannot exceed an average Rs 2 Crores in previous three financial years other conversion to Public or Private Company mandatory under Section 18\textsuperscript{757} of the Act. This restricts the growth of business directly, as soon as company exceeds this limit of turnover it is considered as any normal private company all the benefits given to this company are taken away. Thus the very purpose for which an individual started this company is gone plus the legislative intent of promotion of such business completely fails. Hence the promoters are not encouraged enough in investing in such ventures because of restriction on turnover.

- The other issue comes with the taxation policy imposed on these companies which is very similar to what is imposed on any private company at 30\% tax rate. In sole proprietorship the tax slabs are much more relaxed. This difference in tax slabs lead to firstly evasion of taxes by companies and

\textsuperscript{756} Dr.P.Govidan, A Study on Growth and Impacts of One Person Companies (OPCs) In India- A Innovative Business Vehicle for Small and Medium Scale Entrepreneurs, APRIJSS, 2018.

\textsuperscript{757} The Companies Act, 2013, Section 18.
secondly decreased interest in OPC venture.

- In the instances where there is contract between one person and OPC there are a lot of procedural formalities which is not a requirement if those contracts are in ‘Ordinary course of business’. This term of ordinary course of business is vaguely defined and requires interpretation by the judiciary. Lack of case laws leads to confusion and chaos, furthermore this leads to loopholes in formation of contracts. Thus increasing the pendency of cases relating to clarification.

- In India OPC can only be incorporated by Natural person unlike China, Singapore where artificial entities can own OPC’s this provision is given under Rule 2.1(1) of the draft rules under the Companies Act. The general clauses Act has clearly defined person as both natural and artificial but the legislature has restricted the meaning of person in the case of OPC.

  This clause restricts any public or private company to have solely owned subsidiary. Further in investments in this sector are affected, the big private companies can bring inflow of cash thus they can support the entrepreneurship ventures. If this clause is relaxed then many foreign national companies will invest bringing FDI’s in India. Due to this reason companies prefer countries like Singapore over India.

  Also when Company has been given a separate legal entity like any other company they should also be given a right to incorporate OPC.

- The laws regarding OPC discourage foreign nationals from investing in the country as there is a prerequisite to be an Indian citizen and resident of India for 182 days prior to incorporation of OPC. The legislative intent here was to promote small local businesses but in order to keep up with the international standards opening up in this sector will firstly increase the competition and bring impetus to the crawling growth of OPC’s. The investing capability with the foreign national is way beyond any resident thus this is the opportunity to gain trust of the creditors in these OPC ventures.

- One person can only incorporate one OPC and be a nominee of only one such company. This restriction does not exist for any other form of company. When the idea is to promote small companies then why does law restrict having more than one company? In India people having small business often have multiple ventures running side by side to increase their gross profits. Amending this law will encourage those people having multiple businesses to open different OPC’s.

  OPC’s cannot invest in other companies this basically means that any OPC cannot invest in any non banking functions, which is another hurdle for these companies to exist. The OPC’s cannot secure themselves by investing in other companies when on the other hand all the leading powers of the world have allowed these investments as they contribute in the growth. OPC’s have to inform the registrar about every contract that was entered because of existence of Section 193(2)758 of the Act. This creates extra procedural formalities and delay in the functioning of OCP’s.

Conclusion and Suggestion
After undertaking research on this topic it can clearly be noted that the amendment to companies Act 2013 has proved to be a milestone. Many types of new companies were introduced in this amendment out of which one was One Person Company. The legislative intent behind adding this type was to promote small businessmen and give impetus to the growth in this sector. But to

758 The Companies Act, 2013, Section 193(2).
the contrary these small advantages given to OPC’s have not been fruitful due to the reasons stated above. Certain changes in the policy will increase the number of OPC’s and also bring our laws at power with the international standards. These suggestions can be implemented in the Indian scenario after analysing several international judgments. The reason for these suggestions has been stated above.

**Suggestions**

- The turnover limit should be increased to Rs 5 Crores for OPC’s
- The tax rate should be relaxed for OPC’s bringing it to as low as for sole proprietorship.
- The vague terms in the legislation like Ordinary course of business should be brought to clarity either by amendment or judicial pronouncement.
- The term person in this law should include both natural and artificial person.
- The foreign national and non-resident Indians should be allowed to start OPC’s.
- One person should be allowed to incorporate more than one OPC.
- The OPC’s should be allowed to invest in other companies and participate in all the non-banking functions.

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GAME THEORY AND ANTI-COMPETITIVE PRACTICES

By Swati Narayanan
From Symbiosis Law School, Pune

Introduction

The preamble of the Competition Act, 2002 aims to prevent practices having an adverse effect on the competition in the market. The competition Commission is under a duty to eliminate such practices and uphold the preamble of the competition act.

As read in economics, there are different markets structures which models the different consumer producer behavior. A perfectly competitive market ensures the protection and well being of the consumer as well as attaining a utopian market. As evidences suggest, markets are vulnerable to manipulations and maneuvering by manufacturers and sellers who aim at maximizing their profit while the same being detrimental to the consumer. There are a wide variety of products and services available in the market. Most of which are complex in nature. Consumers have an imperfect knowledge. The supplier often has an entrenched position in the market vis-à-vis the buyer, who has either a little or no bargaining power in the market. Thus, the consumers/buyer is at the mercy of the supplies. Further, the supplier of goods and services desire to maintain their profit at a pre-determined level which motivates them to indulge in various illegal trade practice which are detrimental to the competition and to the interest of the consumers.

Consumers require and deserve legal protection against such trade practices that have adverse effect of preventing, distorting, restricting and suppressing competition. Thus, Competition law prohibits such kinds of activities namely anti competitive agreements, abuse of dominance and anti-competitive merger.

Anti Competitive agreements

Anti-Competitive Agreements under the Competition Act, 2002 are in the nature of Restrictive Trade practice under the extant MRTP' Act, 1969. Firms enter into agreements, which may have the potential of restricting, distorting, suppressing, reducing or lessening competition. A scan of competition laws will demonstrate that there are two types of Anti Competitive Agreement, “Horizontal” and “Vertical” Agreement prevalent in the industry. The Horizontal agreements are those wherein the competitors are in the same line of production while the vertical agreements are those wherein the parties are from different supply chain. Most competitors views Vertical agreements as more leniently than horizontal agreements, as the later has more severe and serious adverse effect on competition.

The legislative intent behind inserting provisions relating to Anti-Competitive Agreement into Competition Act, 2002 was to foster competition.

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759 The preamble of the Competition Act, 2002
760 S. 18 of the Competition Act, 2002
762 S 2(0) of the MRTP Act, 1969
763 The provision pertaining to Anti Competitive agreements have come into force with effect from 20th May, 2009
while promoting and protecting the interest and welfare of the consumers. The Competition Act, 2002 provides for a general prohibition against any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services, which causes or is likely to cause an substantial adversarial effect on competition within India by explicitly construing such agreements as anti-competitive in nature ad character. Any Agreement in contravention of the general prohibition is declared by the Act as null and void.

Prisoner’s Dilemma

The prisoner’s Dilemma is one of the best known strategy known in social science. It helps one understand the balance between cooperation and competition in business, politics, and in social settings.

The game was ideally developed in order to understand human behaviour when provided with different options. In the original game, the police have arrested two suspects and are interrogating them in different rooms. They are provided with two option, Each can either confess, thereby incriminating the other or keep silent. Notwithstanding, what the other suspect does, each can improve their own position by confessions.

If one suspect confesses, the other gets punished. If both keep silent then the avoid punishment altogether. If both confess, they both shall face punishment but of a less degree than anticipated. Thus, confession in either of the case, is the dominant strategy for each. But when both confess, the outcome is worse for both than when both keep silent. The principle pf Prisoner’s dilemma was developed by RAND Corporation scientists Merrill Flood and Melvin Dresher and was later formalized by Albert W. Tucker, a Princeton mathematician.

The prisoners’ dilemma has applications to economics and business. In order to have a deeper understanding, we shall consider the following example. Consider two firms, say Coca-Cola and Pepsi, both selling similar products in the market. Each must decide on a pricing strategy. Their profit would reach a maximum if they exploit their joint market power where they both charge higher price; However, if one of them sets a competitive low price, they would attract more customer than the competitors. The profit rises for one, and that of the rival falls. If both set low prices, the profit of each is normalized. Thus, the low-price strategy is akin to the prisoner’s confession, and the high-price akin to keeping silent.

The prisoner’s dilemma runs counter to Adam Smith’s idea of invisible hand. When a person in the game pursues his own interest, he does not promote the collective interest of the group. However, the cooperation of the group is not always the interest of the society. When firms colludes, it helps to keep the prices high. However, it is not in the interest of the society as the cost to the consumers by colliding is generally more than the increased profit of the firm. Thus, the companies who cheat by colluding often helps the society more than cooperation.

Analysis:

764 S. 3(1) of the Competition Act, 2002  
765 S. 3(2) of the Competition Act, 2002
**Effects of Prisoner’s Dilemma on Anti-Competitive Agreement**

“The detection, prohibition and punishment of cartels is one of the highest priorities of the Commission in the field of competition policy. The greatest challenge in the fight against hard core cartels is to penetrate their cloak of secrecy and counter the increasingly sophisticated means at the companies’ disposal to conceal collusive behaviour.”

Firms in the market for maximization of profit, acquiring a larger share in the market, to enhance growth and prevent new entry, they resort to illegal means. Thus, the competition and cooperation amongst the firm are not a matter of “price taking” i.e. acquiring the price which is decided by a perfectly competitive market but of “price making” which depends upon the demand strategy.

Strategizing the price for the demand of the commodity is where the game theory analysis is applied. The firms in the market decided on the price and advertisement that a commodity can be sold. The firms collude and maintain trust amongst each other and communicate the same when necessary, thereby creating cartels.

Cartels are one of the most universally recognized detrimental anti-competitive agreement. They do not provide for any economical or social benefit but provide a reason to the society and the consumers for the loss suffered.

A cartel agreement may have prisoner’s dilemma. All the members of the cartel would be in a better situation provided they do not derail from the fixed price and production of commodities. However, it would be advantageous for each member to cheat by reducing their price or increasing the production of quantities, thereby increasing their profit margin. Thus, they end up cheating to gain an advantage over the other firms.

By the increase in cartel and the utilization of the informing wrongly, there is a dire need for regulating and controlling of the competition. For enabling such control, prisoner’s dilemma can be further stretched and employed to achieve the desired result.

**Market Structure**

There are different kinds of market in an economy. It ranges from monopoly market where there are only one seller and many buyer to oligopolistic market where there are only a few seller or single seller. In economics, to understand these structure, we analyse the behaviours of the consumers and the sellers with respect to the different/changes in the price of the commodity, the nature of the commodity.

In a monopoly firm, there is a single seller who determines the price of the commodity on his own basis. Thus in the absence of any competition been the only seller, he dominates the market and the consumers are bound to purchase the commodity for the said price. Thus, the application of Nash Equilibrium shall fail in the said market as they need to collude or obtain information to avoid price war is absent in this structure.

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766 Press Release, “Commission adopts new leniency policy for companies which give information on cartels”, IP/02/247, 13 February, 2002
As far as a perfectly competitive market is concerned, there are same number of buyers and seller. In such a market, the competition does not exist as the buyers can purchase the same goods for the same price from different seller. Thus the applicability of Nash Equilibrium fails in this structure as well. However, an illegal mode of competition can exist in this structure through public revelation of private information.

As there are many players in the market, it is quite difficult to earn a competitive edge in the market by making use of the prisoner’s dilemma. If a firm increases its price, it might lose its customers and if it decreases its price, it might result in a huge loss to the firm. Thus, even the illegal use of the information would not help the firm.

The Prisoner’s Dilemma works efficiently in an Oligopoly market. In such a market, there are a few number of seller selling closely differentiated or homogenous products to the buyers. In such a structure, there is a natural tendency of the fir to trust and collude amongst them. In such structure, the behaviour of one firm affects the behaviour of the other firms. Thus, by colluding amongst themselves, the firm can avoid any behaviours that may be detrimental to its interest. Thus, the firms form a cartel. The reason for the formation of the cartel is to ensure that the commodity is sold at the price fixed by the firms. This allows the firms to coordinate the polices and strategize their output to ensure a higher profit margin.

When an individual firm decides to work together and colludes with other firm thereby limiting competition, the outcome of the collusion would be the same as the one arrived in a monopoly market. However, this structure provides for a competitive edge in prisoner’s dilemma i.e. they are aware and possess the information of their competitive firm. Thus, based on the assumption that the competitive firm may use the same pricing, the firm can align their price and structure their profit maximization accordingly.

**REGULATE AND CONTROL ANTI-COMPETITIVE AGREEMENT THROUGH PRISONER’S DILEMMA**

The need to regulate and control the increasing anti-competitive practises prevalent in the market. For such control, there are two different ways the prisoners’ Dilemma can be employed.

1. Either by taking advantage of the information obtained from other firms or cheating/ betraying the cartels

2. By providing incentive or minimizing the risk of paying exorbitant fines

Game theory is based on the nature of uncertainty i.e what the outcome would be based on different decision that a person/ various firm might undertake. However, it is quite hard to regulate and control such wrongful practises. Though prisoner’s dilemma ensures for the regulating wrongful activities, due to stringent policies and penal provision, the firms operating in anti-competitive agreement would fail to cooperate.

In order to control such behaviour and to undertake measures against the firm, the root cause of the illegal practise is required to be determined. Further, legal measures are required to be implemented in order to prevent future undertaking of such criminal activities.
The regulator can determine and control such activities by employing two broad traditions. Firstly, wherein he has all the sufficient information and is also bestowed with sufficient powers to criminalize the activities for Public interest. Secondly, where the regulator has insufficient information regarding the activities and requires information to be obtained through the firms. Thus, the regulator by employing prisoner’s dilemma can collect the requisite information by providing the option of cooperation or competition to the firms. By cooperating the firm reduces its risk of losing or being penalised and thus the regulator ensures control over Anti-Competitive Agreement.

In US, formation of Cartels is a criminal as well as a civil offence while in India such is a civil/economic offence. By applying prisoner’s dilemma, it is not possible to determine the nature of the offence but provides scope for analysing the circumstances and penalty that one might face when found guilty. For instances, here are two firms, Firm R and Firm S which are dealing in anti-competitive agreement. The firms may not provide any information by being silent thereby preventing any penalty that can be imposed on them. Or one of the Firm may confess and the other is penalised. Or if both confess, then they shall be penalised but the amount of penalty shall be less in this case. However, such option may be successful if it provides any incentive to the cartels members to betray the cartels. Thus, though such programs are available implantation of such is quite unrealistic in today’s world.

Conclusion

The implementation of economic reforms in 1991 brought about an economic reform in the Indian market which opened a floodgate for foreign investors. Due to the increase in competition in the Domestic market, there has been a few complains to the Competition Commission of India regarding cartelization, abuse of dominance etc to develop a law to eradicate and combat such issues. Though, a little progress has been made in the said field, using the concept of game, the competition commission can help eradicate the anti-competitive agreement prevalent in the market. The prisoner’s Dilemma has enabled one to understand the behavior of suspects and to provides a means wherein the CCI to obtain information against cartels as well as ensuring that fair competition exist in the market.

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IBC: A RAY OF HOPE FOR THE HOMEBUYERS

By Tanya Minocha
From National Law School of India University, Bangalore

In this piece I will argue about the status of homebuyers as financial creditors and the positive impact of the Insolvency and Bankruptcy Code (Amendment) Bill 2019 on the prevailing Corporate Insolvency Resolution Process in the real estate sector. Right to home is an essential part of Right to Life and enshrined as a fundamental right under Article 21 of the Constitution of India. The primary obstacle faced by the homebuyers before the promulgation of the IBC Ordinance was that they did not fit into the category of either Financial Creditors with the right to vote on the Resolution Plan or Operational Creditor who can attend Committee of Creditors (CoC) but cannot vote. In the present scenario homebuyers are categorised as financial creditors under the “Explanation” clause of Section 5(8) (f) of the IBC, 2016. This would give them representation in CoC and make them an important part of the decision making process. Also at the time of liquidation of the company, the homebuyers were entitled to very less amount since they were not secured creditors like the banks and other financial institutions. As per the present scenario the status of the homebuyers will depend upon the builder-buyer contract and there should be a clause in the contract determining the status of the homebuyers as secured or unsecured financial creditors. For the sake of more clarity, the definition of the secured creditors under Section 2(30) of IBC, 2016 should be altered and must include homebuyers also. The amendment elevated the status of the homebuyers and gave them the right to participate in the CoC meetings, but when the CoC fails, the homebuyers will be again treated as unsecured creditors. A resolution plan can be approved by 66% votes in favour, while in the Jaypee’s case, homebuyers formed 59.4% of the voting share and hence the agenda got rejected due to constant abstention of the homebuyers. In case there is no agreed interest rate between the parties, the voting share of the creditors will be in proportion to the financial debt, including an interest rate of eight percent per annum. A new section 25A has been inserted in the IBC which talks about the authorised representative (trustee/agent) having the right to participate and vote in the meeting of CoC on behalf of the financial creditors.

There has been no amendment in Section 53, IBC 2016. According to this section the sale proceeds from the liquidated assets will be spent on the Insolvency related costs first, then on the banks and secured creditors, then pay the workmen dues and unpaid wages to the employees, then clear off the unsecured creditor’s financial debt, then government dues, then remaining debts and at the end equity. Homebuyers will now be placed higher than the non-financial unsecured creditors. The law was amended to protect the interest of the homebuyers who are the highest stakeholder in the project. Insolvency and bankruptcy proceedings were started against various builders like Jaypee Infratech Ltd., Amrapali, Unitech, Parsvnath who denied the possession of flats to the creditors, even after accepting the huge investments and in some cases life savings of the homebuyers. Various changes are made to the Insolvency resolution process by the Insolvency and Bankruptcy Code(Amendment) Bill 2019 including restriction of the Corporate
Insolvency Resolution Process (CIRP) to 330 days including the litigation process and the company will be sent to liquidation if the 330 days condition is breached. Ensuring primacy of financial creditors over operational creditors in case of recoveries (waterfall concept) and the Committee of Creditors (CoC) will have the authority with regard to distribution of funds to various class of creditors and the power of liquidation of the corporate debtor.

While Justice S.J. Mukhopadhaya held that both financial and operational creditors must be treated at par with each other in the case of Essar Steel India Ltd. Case relating to the battle between the operational creditors and Essar Steel’s financial creditors for the larger portion of settlement amount. Also the application in relation to insolvency resolution has to be responded in writing by the adjudicatory authority within 14 days of its receipt. The Supreme Court cancelled the registration of the Amrapali group projects registered with Uttar Pradesh Real Estate Regulatory Authority Act (UPRERA) and ordered the arrest of Amrapali’s managing director, Mr. Anil Sharma and other directors like Mr. Shiv Priya and Mr. Ajay Kumar in connection with the FIR filed by the homebuyers for cheating. This arrest will act as a deterrence for the other builders as well. The Supreme Court entrusted the task of completing the construction of projects to the National Buildings Construction Corporation India Ltd. (NBCC) Enforcement Directorate will investigate alleged money laundering against the Amrapali officials. The homebuyers can initiate Corporate Insolvency Resolution Process (CIRP) and can approach the NCLT to recover dues from the errant developers under Section 7 of IBC, 2016. Firstly the homebuyers will approach RERA to claim refund or possession of the property, if RERA passes possession order in favour of the claimant and if the developer defaults in complying with the RERA orders then the homebuyers can approach the NCLT.

There is no specific provision relating to the retrospective applicability of the Ordinance. Thus according to the cardinal principle of construction – “Nova Constitutio Futuris Formam Imponere Debet, Non Praeteritis”- a new law ought to regulate what is to follow and not the past, there will be prospective applicability of the Ordinance. “Every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation”767. The latest amendment to IBC will further improve formalisation of the real estate sector, where only sound and structured developers would remain. This would also curb the entry of fly-by-night operators. The project would be completed in a reasonable time and investors would get their allotment quickly. Insolvency and Bankruptcy Code is in line with RERA which was implemented to bring justice to the aggrieved homebuyers, penalise the developers in case of delay in the projects and correct the default committed by the developers.

KASHMIR: WIN OF/OVER PEOPLE

By Upasana Acharya
From KIIT School of law, Bhubaneswar

This article outlines arguments for the relevance of the valorous decision taken by Narendra Modi-led NDA(National Democratic Alliance) government by rendering Article 370 and Article 35A redundant and integrating the State of Jammu and Kashmir which has been glorified nationwide. The Article granted a special status to the state through which the Indian Parliament needed the state government's concurrence in the application of all other laws except in cases of defence, foreign affairs, finance, communications and ancillary matters (matters specified in the Instrument of Accession). The Instrument of Accession, a legal document under the provisions of The Indian Independence Act 1947 agreeing to accede to the Dominion of India executed by Maharaja Hari Singh, ruler of the Princely state, on 26 October 1947.

While this decision, what seemed to be taken in a precipitous haste is actually a well calculated prudent action of the Government. "We are committed to overcome all obstacles that come in the way of development and provide adequate financial resources to all the regions of the state. We reiterate our position since the time of the Jana Sangh to the abrogation of Article 370," BJP had said in its 2019 election manifesto. The Union home minister Amit Shah reiterated that the decision was solely aimed at pushing the restive state towards development.

However, the nation is disintegrated with differential opinions about the revocation, while a portion of the population are convinced that Article 370 was set up as a temporary measure and along with it Article 35A being effective which protected the laws such as bar on the outsiders buying property in the state and women marrying non-kashmiris losing their property rights. While a section of population is not willing to acknowledge the revocation as the integration of the state with the rest of the nation needs to be carefully assessed. Not only the nullification will bring in cultural acclimatization but also “administrative, economic and social-psychological” integration. Firstly, the union territories of Jammu and Kashmir and Ladakh would be under direct rule from Delhi after relinquishing Art. 370 which administratively, would therefore result into complete integration with rest of India. Considering, the mismanagement oriented rapport between the central government and the state government of Delhi, it is evident that the relationship between the states would be quite unstable. While in the instances where since the commencement of the Constitution, the Union Government deployed the Central Reserve Police Force (CRPF) Suo motu on three occasions, viz., once in Kerala in 1968 for the protection of its offices and property there during the strike of Central Government employees, and twice in West Bengal in 1969, for the protection of Farakka Barrage and in connection with clashes between the workers of the Durgapur Steel Plant and the U.P. Provincial Armed Constabulary stationed by the Union Government at the Plant. Both Kerala and West Bengal were then ruled by the opposition parties, and the Congress Government at the Centre in the first two cases, did not agree with the demand of the State Government for the withdrawal of the CRPF, but in the third, case, agreed to do so. "In all these cases," observed the Sarkaria Commission, "It seems that care was taken by the Union..."
Government not to provoke confrontation with the State Governments concerned and precipitate a constitutional crisis."
However, the fact remains that in all these events there was sharp resistance from the State Government to suo motu deployment of Union armed forces which resulted in intense Union-State controversy on the role and use of the CRPF.768
Secondly, Prime Minister Narendra Modi stated that Article 35A and 370 held back development in Jammu & Kashmir "There must be investment and job opportunities in Jammu and Kashmir. Article 35A, 370 have been standing in the way of development.”
Adding the numbers to the present scenarios of lessened employment opportunities in the valley, data according to Centre for Monitoring Indian Economy’s (CMIE) monthly time-series data on unemployment, Jammu & Kashmir had the highest monthly average unemployment rate of 15 per cent between January 2016 and July 2019 among all the states. It is more than double the national monthly average unemployment rate of 6.4 per cent during the period. However, would the scrapping of Art 370 create employment opportunities in the valley still remains to be accessed. Naturally, economy would be willing to flourish in the favorable, yet now deprecated areas as Private companies and PSUs will be moved to invest. Apparently, as a result, manufacturing and services will suddenly flourish, and jobs will abound for Kashmiris but also others. However, would the state with few natural resources, poor infrastructure and a lack in skilled workers will be an acceptable condition for investments. Provided, the Land Acquisition Act and Law and order disturbances adding terrorism will discourage businesses and labour from moving into the state. However, looking at the other side of the same coin, Restrictive legislations like Art 370 and 35A preventing ownership of property in J&K as also prohibiting employment to “outsiders” (referring to the rest of India) has for long hampered smooth economic movement and social development in the state. Manpower and human skills within J&K have not been effectively tapped as is apparent from its poor economic development. It might improve the "ease of doing business”. There might be freedom to acquire land and invest in commercial ventures. As much as it seems to proceed in a certain direction, it is completely dependent on the active involvement of the nation provided with a peaceful scenario of acceptance of one another might pave it’s way towards integrated development. Thirdly, Would the valley psychologically integrate with the rest of the nation naturally, socially? While the people in the disturbed region were supposed to be given a chance for expressing themselves over the suppressed chances with disrupted internet connections, poor power supply and the threatening presence of military forces. The association which seems afar as an integration with an India increasingly hostile to Muslims – under a Hindu majoritarian party that looks set to rule for the next 30 years and an opposition that is divided. With increasing separatist insurgency and communal violence, a sudden unity would seem to bring in revolts and persistently overpowering majoritarianism mindset.

768 Sarkaria Commission “center-state administrative relations in respect of public order duties”
view that nullifying the provision would put the accession of the state to India in jeopardy because the nature of the accession of Jammu and Kashmir into the Union of India is totally different from the merger of all other states. Moreover, there is a debate over whether Article 370 is a part of basic structure of the Constitution and whether it can be amended. Moreover the amendment of the constitution by the parliament, according to Lok Sabha legislation rules, Money Bills and bills seeking to amend the Constitution can't be passed by calling a joint session of Parliament. According to the Constitutional provisions, it is stated in the statute that "Article 108(1) of the Constitution provides that when a Bill (other than a Money Bill or a Bill seeking to amend the Constitution) passed by one House is rejected by another House or the Houses have finally disagreed as to the amendments made in the Bill or more than six months lapse from the date of the receipt of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has lapsed by reason of dissolution of Lok Sabha, notify to the Houses by message, if they are sitting, or by public notification, if they are not sitting, his intention to summon them to meet in a Joint Sitting. The President has made the Houses of Parliament (Joint Sittings and Communications) Rules in terms of clause (3) of Article 118 of the Constitution to regulate the procedure with respect to Joint Sitting of Houses. So far, there have been three occasions when Bills were considered and passed in a Joint Sitting of the Houses of Parliament." And According to constitutional expert Rajiv Dhavan, "Article 370 can't be abrogated because if the government does away with it, the very basis of accession will be in jeopardy. But he asserts that accession of J&K to India is permanent.”

To scrap Article 370, the President needed a recommendation of the Constituent Assembly of the state. This amendment of Article 367 equated the Constituent Assembly to the state legislature, and the state legislature was made equal to the governor, and the abrogation was completed. The Constituent Assembly of Jammu and Kashmir was dissolved in 1957. Therefore, the provision of Article 370 may be seen as permanent and cannot be removed by a Presidential order because there is no Constituent Assembly to take consent from. Also, the state's Legislative Assembly cannot have the same powers that the Constituent Assembly had. “The reason why 'Constituent Assembly' was amended to 'state legislature' was to overcome the Supreme Court judgment in the Sampat Prakash versus State of Jammu and Kashmir case. The judgment held that "Article 370 was a permanent provision of the Constitution as the Constitution Assembly of J&K was dissolved". Under Article 368 of the Constitution, Parliament has the power to amend the Constitution. But in view of the Supreme Court's ruling in the Kesavananda Bharati case, Parliament can't amend the basic structure of the Constitution. Hence, obtaining the opinion of the Supreme Court is a must before going ahead with the abrogation of Article 370 and therefore the basic structure is beyond the Parliament’s powers to alter.

The decision, has been subjected to legal scrutiny on the basis of Firstly, the
presidential order using Article 367, an interpretive provision on August 5 that substituted the words “governor” for “the government of Jammu and Kashmir” and the “legislative assembly” for the “constituent assembly” was inherently flawed. The president cannot alter Article 370 using powers granted under the same article. Secondly, since the presidential order substituting the “governor” for the “government of Jammu and Kashmir” was issued during president’s rule, the concurrence of the governor to the changes made to Article 370 amounted to the Centre taking approval from itself to remove the state’s special status and reorganize it into Union territories. Lastly, the petition said that in substituting “constituent assembly” with “legislative assembly” to give concurrence to the move to render Article 370, the presidential order has assumed that the legislative assembly has such powers. This is flawed, because Article 147 of the Jammu and Kashmir Constitution prohibits such a move. Provided, any changes to the Jammu and Kashmir Constitution needs the approval of two-thirds of the members of the legislative assembly. The governor does not have the powers to make unilateral decisions on behalf of the people of Jammu and Kashmir without consultations as he is an unelected representative in the state. In the Rajya Sabha, the BJP might have been eight seats short of a majority, but the House passed the J&K Reorganisation Bill with a two-thirds majority. The BJP even had the support of political parties such as the AAP, TDP and BSP.

When the decision to scrap valley's special status hit the Valley, it was greeted with befuddlement and public anger over the abruptness of the move. Most people, however, were simply confused. As the nation is in a frenzy discussing and debating the issue in magnanimous proportions, one glaring voice remains unheard. The voice of the Kashmiri people. They have been silenced, and their democratic rights have been nullified for the foreseeable future. While there are many areas where Article 370 is posing a sense of hindrance in the progress of the state and its people, there is undeniably many paths of advances the rendering of the article has paved. There are many progressive legislations and provisions of the central government which cannot be extended to Jammu and Kashmir because they have not been legislated upon by the state government. However, it is a matter of being opinionated until it falls down upon the time and people to decide whether development actually manifested or not. Further, this abrogation and resulting bifurcation can be challenged for having been adverse in nature to the constitutionality of the code. The abrupt move made by government questionable and is kept under the eye of judicial scrutiny. The kashmiris are deprived of tranquility in their own land which they deserve along with an end to the cycle of militant attacks, repression, protests and more militant attacks that have devastated the economy. Hence, all in all, the question persists, whether it will be a “win of people” or “win over people”.

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770 Mohammad Akbar Lone and Hasnain Masoodi, The petition
JUDICIAL APPROACH TOWARDS THE RULE OF HARMONIOUS CONSTRUCTION IN INDIA

By Upasana Kalgotra
Advocate

INTRODUCTION

“Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing is pleasure.”

Thomas Jefferson.

A society runs through certain rules and regulations which are followed by the people living there. These rules and regulations in the society forms the law. It is very important that society and law must work together as law is for the society and society works through the law. At present, every country in this world has framed laws for them through which they govern their subject and maintain harmony and peace within them. Thus, law has become an important aspect of life.

In today’s era, it has been seen that we have laws with regard to everything whether it is for constructing any house or building or whether it is for food. Everything is regulated through law because absence of law would lead to disharmony and conflict as everyone thinks about its own selfish interest. This can be well explained through the theories of law which has led to the evolution of law where thinkers have propounded that in order to have a welfare state we have surrender ourselves to the state, to some extent for own protection (Social Contract theory) or it can also be related to the concept of self-preservation. These were the few instances which led everyone to abide laws. So, now we see law everywhere.

Need for peace and harmony has led to the framing of legal documents at different levels, whether it is national or international, according to which the countries are governed. We have domestic laws at national levels which are prescribed for a particular country and at international level, we have international laws to which different countries of the world are made party to it and they are made to follow those international laws. These laws are framed by the body known as legislature and there are different names for it in different countries. Legislature frames the law according to the demand of the situation. But one of the important legal document that every country has enacted is the Constitution which is considered as the source of others laws through which different bodies of the government derives its powers. This document contains certain principles according to which states are government. This may be written or unwritten but it is very important for a country to frame the Constitution for itself according to different bodies of the government are made bound to work for the welfare of its people and to provide for respect and dignity to them.

Likewise, in India, we also have Constitution which is considered as the supreme law of land. The preamble of the Constitution provides for the basic objectives of the Constitution. Unlike UK, the Indian Constitution is supreme and anything which is not in consonance with the provisions of the Constitution is considered as ultravires. So, everyone is bound by the Constitution. This Constitution is the lengthiest Constitution in the world as it has adopted the best features of different Constitutions of the

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world. As mentioned earlier, Constitution is a written legal document which provides for principles or framework for the government to implement laws in various fields. Under this, every person is guaranteed certain fundamental rights which can be enforced against the state but these rights are not absolute and apart from this, certain powers have been entrusted upon the states for forming a welfare state by adopting directive principles of state policy. Three organs of the government have been assigned their own field of works where they can exercise the powers in compliance with the Constitution of India.

Thus, it has framed rules for every authority which has formed an important part of the government. It contains Preamble, 22 parts and 12 schedules covering every aspect under which a country is governed. Preamble talks about the objective behind the framing of the Constitution, Part 1 of the Indian Constitution deals with the Union and its territories, Part 2 deals with the Citizenship, Part 3 with Fundamental Rights, Part 4 with Directive Principles of State Policy and likewise all Parts are provided with certain heading dealing with different authorities who are bound by this Constitution. Provisions are enumerated with regard to the powers of the states and their statuses, their competence for making laws on specified subject matters. Moreover, the Constitution has also provided for the powers for judicial review of the laws enacted by the law making bodies and there is a particular procedure which has to be followed for making laws. So, anything which is not done according to what has been provided by the Constitution is considered as unconstitutional and is struck down. This power to check the validation of any Act is also provided by the Constitution and such power is vested in Judiciary.

Despite of these well-defined powers and extent, there are certain gaps left by the framers of the Constitution which could not be foreseen by them and at present these gaps are giving rise to conflict within the provisions. In some provisions, these gaps have been intentionally made where it can be expressed from the text of a particular provision and thus, the power to fulfil those gaps have been given to Courts which can give out its observations regarding that particular provision according to the need of the situation. This is mainly done through interpretations which courts make out from the text of those conflicting provisions and there are certain rules and doctrines which have been propounded by the courts to apply at the time of making any interpretation of the provisions.

We have a separate set of principles according to which interpretations are done. Even Constitution also provides that in case of any conflict between the provisions of the Constitution, they are to be interpreted according to the rule and principles which have been evolved by the courts. So, therefore, there are different rules and in this research paper, the researcher has focused on one of such rules which could be invoked by anyone in the court to resolve any dispute of provisions. This rule is The Rule of Harmonious Construction. This rule has played an important rule is resolving the dispute with regard to overlapping of Constitutional provisions by harmonizing the conflicting provisions to the last resort without affecting the very objective of those provisions.

So, under this paper, the researcher has made an attempt to explain the concept of this rule by following the doctrinal research. This paper mainly focuses on the
basic concept of the rule of Harmonious Construction with the help of landmark judgements. Moreover, this paper also mentions the use of this doctrine before independence in Federal Courts and after independence, for the very first time it was invoked in maintain harmony between fundamental rights and directive principles. The main theme of this paper is based on the judicial approach towards this doctrine where different observations of the Courts have been discussed. Harmonious Construction has played a crucial role with regard to provisions of the Constitutional matters by justifying the very objective of the framers of the Constitution. Courts have applied this doctrine in many cases to maintain consistency within the provisions, therefore the cases have been discussed under this paper.

THE RULE OF HARMONIOUS CONSTRUCTION

This rule is one of the important principles for the interpretation of the constitutional provisions. Since there are certain situations that at the time of framing of constitutional provisions, certain gaps are left behind, which leads to conflicts between different provisions, so courts come up with their own interpretations with the help of applying these doctrines to make it understand to the public. Thus, harmonious construction plays such role. This doctrine has been formulated by the court with the aim of achieving harmony within the provisions of the constitution. This is a concept which has been evolved by the courts with the need of time after going through the intention of the constitution makers.

This intention can be generated from the general principles of interpretation under Article 367(1) of Indian Constitution. Even it is provided that the general principles of statutory interpretation are to be applied for the interpretation of the constitutional provisions. Thus doctrine of harmonious construction is also one of rule used by the courts in interpreting the constitutional provisions. This doctrine is mainly applied when there is a conflict between two or more statutes or between two or more provisions of the Constitution. So, harmonious construction is applied to avoid any kind of conflict between the provisions or between statutes and harmony is maintained within those provisions or statutes with the help of judicial interpretations. Thus, it can be inferred that the rule of harmonious construction is applied by the courts to fulfil two aims and these are: to maintain consistency within the enactments and to avoid any type of inconsistency or repugnancy between the various provisions and statutes.

The rule of harmonious construction can be termed as purposive approach and this rule has been explained by one of the thinkers that “Constitutional provisions should not be construed in isolation from all other parts of the Constitution, but should be construed as to harmonize with those other parts.” Thus it can be discussed that where there is a conflict between two provisions in a statute, they should be interpreted in the sense that those should be in harmony with each other to the last resort. Courts have to look that

771 Seth Jugmendar Das and Or. V State, AIR (1951) All 703, para 18
773 Ibid

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the provisions which are in conflict with each other should be interpreted to avoid inconsistency or repugnancy. Thus, the Supreme Court has explained that when two provisions of an enactment are not reconciled with each other, they should be interpreted to give the possible effects to both. It can also be said that this approach is used for harmonizing the different approaches of the constitution. These provisions should be construed in such a manner that their meanings may not lead to conflict with other Articles of the constitution and they should be in confirmation with the scheme of the constitution.

HISTORICAL PERSPECTIVES OF THIS RULE

The evolution of this rule under the Indian constitution can be analysed from the very first amendment of Indian constitution under the case of *Shankari Prasad v. Union of India* where there was the conflict between part III and part IV of the constitution. Fundamental Rights and Directive Principles of State Policy are two different parts of the constitution but they form the basic features of the constitution. The Supreme Court decided the issue with the help of doctrine of Harmonious construction and in applying so held that fundamental rights are the rights provided against the state where as the directive principles for the state policy are provided to the state to meet social and economical development of the country. So, as far as fundamental rights are concerned they can be taken away by the state in certain circumstances and in order to bring them in conformity, Parliament has the power to amend these rights. So the rule of harmonious construction was involved by giving preferences to both as they were considered as the two different sides of the same coin. They need to work together for the public welfare.

If we go more back for the history of this rule, in the case of *re C.P. and Bera Act*, the rule of reconciliation was propounded. Under this rule, courts have read the Entries of two list together so as to avoid any inconsistency by determining the extent of the subjects. Moreover, courts can interpret and modify the language of one Entry with the help of another. By applying this rule, court interpreted the Entry 24 and 25 of State list and observed that the court has the duty to reconcile and bring consistency between the Entries which are in direct conflict and may overlap with each other. Therefore, Supreme Court held that ‘gas and gas works’ of Entry 25 are different from ‘Industry’ under Entry 24. Thus, under this case, it was also observed that emphasis should be made on the language of the Entries and where there is direct conflict of Entries or where these Entries overlap with each other, the courts have the duty bring consistency between those Entries and reconcile them. After this case, there are number of cases which were resolved on the basis of this doctrine and they are very well interpreted by the courts. This doctrine can be well explained with the help of studying the judicial approach of the courts towards this doctrine.

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775 AIR (1951) SC 455
777 AIR (1939) FC 1
JUDICIAL APPROACH TOWARDS THIS DOCTRINE

The courts have made wonderful efforts in bringing harmonisation between different provisions of the statute by applying the rules of interpretation and with this they have tried to explain the intention of law makers for framing those provisions of the constitution as well as of different statutes. This can be illustrated with the help of number of cases.

The Supreme Court of India has given five principles of Harmonious Construction in the case of *CIT v. Hindustan bulk carriers*\(^778\) where three judges bench held by majority that

*where, upon the order of the settlement commission under section 245D(4), there arises a deficit in the payment of advance tax under section 208, the end point or the terminus of the period for which interest has to be paid under section 234B on the deficit is the date on which the settlement commission passes the order under section 245D(4).*

Thus, while delivering the Supreme Court gave five principles and they are:

1. The courts have to harmonize the contradictory provisions by avoiding a head on clash of these provisions.
2. The courts have to make every effort to see that the provisions of one section may not defeat the provisions of other, till its last resort.
3. In case where there is no chance of reconciling those contradictory provisions, then courts must interpret those provisions so that both should be given the effect.
4. Courts have to remember that the interpretation which make one provision less effect or makes it useless than it would be not considered as harmonious construction.
5. Moreover, it must be kept in mind that harmonizing must not lead to destroying of any statutory provisions.

Thus, by studying these principles we can easily infer the basic explanation of this rule which need to be applied while interpreting any provision of any statute or constitution.

In *Venkataramana Devaru v. State of Mysore*\(^780\), trustees of an ancient and renowned temple of Sri Venkataramana of Moolky Petta made an appeal in a suit under s. 92 of C.P.C. against the removal of disability of harijans from entering into Hindu temples under particular Act. They made the contention that the temple was not defined under s. 2(2) of that Act and sec. 3 of the Act was void as it was repugnant to Art. 26(b) of the constitution. Thus, appeal was made to the trial court whose decision was against appellants. But High Court passed a limited decree in their favour. Further, the appeal was made to the Supreme Court for resolving the dispute of two Articles. The issue before the court was

*whether the rights of a religious denomination to manage its own affairs under Art. 26(b) are subjected to Art. 25(2)(b)*\(^781\) Under this case, the court applied harmonious construction where it has tried to resolve such dispute by giving its interpretation to these two Articles of the Constitution. Thus, the court has observed that the right of a religious denomination to manage its own affairs under Art. 26(b) is subject to the law made by the state for...

\(^778\) AIR (2003) SC 3942
\(^780\) AIR (1958) SC 255
\(^781\) Ibid
providing social welfare as well as subject to Art. 25(2) (b).⁷⁸²

In the case of M.S.M. Sharma v. Krishna Sinha⁷⁸³, also known as Searchlight case, petitioner was called before the Committee of Privileges of the Assembly to issue a show cause notice for why an appropriate action should not be taken against him. It was alleged that he has breached the privileges of speaker for publishing a speech which was delivered by the member. Therefore, he was called upon by the Secretary of Patna Legislative Assembly. However, the petitioner contended that such action as well as the notice is in violation of his fundamental rights under Article 19(1) (a) and Art. 21 of the Constitution. But the respondent relied on Art. 194(3) of the Constitution. So the question for determination was "whether the privileges under Art. 194(3) prevail over the fundamental right under Art. 19(1) (a)?"⁷⁸⁴ The High Court held that judgement in favour of the Speaker. Therefore, petitioner made an appeal in the Supreme Court under Article 32 of the Constitution for violation of his fundamental rights. But the respondent relied on Art. 194(3) of the Constitution. So the question for determination was "whether the privileges under Art. 194(3) prevail over the fundamental right under Art. 19(1) (a)?"⁷⁸⁴ The High Court held that judgement in favour of the Speaker. Therefore, petitioner made an appeal in the Supreme Court under Article 32 of the Constitution for violation of his fundamental right whereby a statement was issued by the Speaker that the law of Speaker is to be obeyed as he is the law in the House. But the part where the Supreme Court has made the application of the rule of harmonious construction by the reference to the English situation where Parliament is supreme but in India, Constitution is the Supreme law, therefore, in this case, a person can be expunged from publishing the official records of the House and such this does not amount to complete prohibition of that person.⁷⁸⁵ But with regard to this judgement, a reference was made to the Supreme Court under Special Reference No. 1 of 1964⁷⁸⁶ wherein, with the help of application of rule of harmonious construction, it was decided that Art. 194(3) is subordinate to Articles 21, 32, 211 and 226.⁷⁸⁷

Another case where rule of harmonious construction has been applied by the court is Calcutta gas company pvt. ltd. V. State of West Bengal⁷⁸⁸. In an instant case, Oriental Gas Company Act was passed in 1960 by the state legislative assembly wherein the respondent sought to take over the management of the company. Therefore, the validity of the Act was challenged by the appellant on the ground of invalidity of the Act as state legislature had no power to enact such law under the Entries 24 and 25 of State list and this power lies with the Parliament under Entry 51 wherein the centre has already passed the Industries (Development and Regulation) Act, 1951 and thus, union has power to deal with industries. Therefore, the Supreme Court made an interpretation of these Entries by applying the rule of harmonious construction and thus, observed that there are certain subjects in three lists which may overlap with each other under the Constitution and there is a need to interpret those Entries by the court with the help of certain rules. Since, these Entries are in conflict with each other, they need to be harmonized by the court in order to avoid any conflict among them and all these Entries are to be given effect. As far as Entries 24 and 25 of State List are concerned, Entry 24 covers every industry excluding gas industry and gas industry is

⁷⁸² Supra 9
⁷⁸³ AIR (1959) SC 395
⁷⁸⁴ Ibid
⁷⁸⁵ Aditya Mishra, Milestone judgement on Parliamentary Privileges involving “Harmonious Construction”, ⁴ᵗʰ June, 2016 < lawmantra.co.in/milestone-judgement-on-parliamentary-privileges-involving-harmonious-construction/ Accessed on 27ᵗʰ July, 2019
⁷⁸⁶ AIR (1965) SC 745, p. 761 (para 36)
⁷⁸⁷ Supra 9
⁷⁸⁸ AIR (1962) SC 1044
covered under Entry 25. Entry 52 of Union list is corresponding to Entry 24 of State list. Therefore, with regard to gas industry, with the help of rule of harmonious construction it can be said that gas industry is a part of State list under Entry 25 and thus, state has full control over it.\(^{789}\)

In the case of *Gujarat University v. Krishna Ranganath Mudholkar*\(^{790}\) court has taken different approach towards this doctrine. Here, one of the respondents had joined the St. Xaviers’s College in First Year Arts Class and the college was affiliated to the Gujarat University and medium of instruction was English but later on, when he was preparing for the Intermediate examination, according to the framed provisions of the Gujarat University Act, 1949 and statutes 207, 208 and 209, the Principal of the college informed that he was refused admission without the sanction to the college. Thus, father of the boy moved to the Vice-Chancellor for granting sanction but it was refused and further he fired the writ petition in the High Court under Art. 226 to stop the authorities to not to enforce the sections 4 (27), 18(1) (XIV) and 38 A of the Gujarat University Act along with the Statutes. The Court allowed the petition but the State and University filed separate appeals to the Court by contending that under sec. 4 of the Act, the University had the power to impose Gujarati or Hindi as the medium of the instruction and examination under the Act because that clause did not indicate any such power of the legislature. Thus, appeal was made to the Supreme Court by the University and the State against the order of the High Court. With this, the Supreme Court has looked into Entry 11 of List II and Entry 66 of List I and observed the entire field of education entrusted to the state legislature. According to the Supreme Court separating education in two lists under the head of medium of instruction to Parliament and education dehors to state, is not reasonable. The medium of instruction related to specific Universities is also provided under the Union list, Entry 66 and that Entry has enabled Parliament to make laws to improve standards of education and provide financial assistance to backward Universities but under Entry 11 of State law, state can make law for imparting education. Therefore, the harmonious construction was invoked and it was found that parliament has specific competence over the subject and state has the general competence.\(^{792}\) Therefore, it was held that Parliamentary law should prevail and the University did not confer the power to impose any language as medium of instruction and examination is valid under Entry 66 of Union list of the Constitution.\(^{791}\)

So, here the High Court by studying the clause (27) of sec. 4 of the Act, decided that the University was not conferred with the power to impose Gujarati or Hindi as a medium of the instruction and examination under the Act because that clause did not indicate any such power of the legislature. Thus, appeal was made to the Supreme Court by the University and the State against the order of the High Court. With this, the Supreme Court has looked into Entry 11 of List II and Entry 66 of List I and observed the entire field of education entrusted to the state legislature. According to the Supreme Court separating education in two lists under the head of medium of instruction to Parliament and education dehors to state, is not reasonable. The medium of instruction related to specific Universities is also provided under the Union list, Entry 66 and that Entry has enabled Parliament to make laws to improve standards of education and provide financial assistance to backward Universities but under Entry 11 of State law, state can make law for imparting education. Therefore, the harmonious construction was invoked and it was found that parliament has specific competence over the subject and state has the general competence.\(^{792}\) Therefore, it was held that Parliamentary law should prevail and the University did not confer the power to impose any language as medium of instruction and examination.\(^{793}\)

In *D.A.V College Bhatinda, etc. v. State of Punjab and Ors.*\(^{794}\), petitioners were the educational institutions founded by D.A.V College Trust and registered


\(^{790}\) 1963 AIR 703

\(^{791}\) Ibid, para 52

\(^{792}\) Ibid, para 23-24

\(^{793}\) Ibid, para 62

\(^{794}\) AIR (1971) SC 1731
society. These institutions were affiliated to the Punjab University. Later, the state government issued a notification wherein under section 5(1) and (3) of Reorganization Act, certain districts were specified as the areas where University exercised its power and with the effect of this notification, petitioners were ceased to be associated with the privileges of the University. It was also mentioned that the central govt. under section 72 of that particular Act has directed that Punjab University would cease to function and operate in those areas as mentioned in the notification. Moreover, a circular was issued by the University to the colleges to declare Punjabi as the medium of instruction and examination including science group with effect from session 1970-71. Meanwhile many resolutions were passed to give effect to this and as a result of these notifications and resolutions it was purposed that the colleges have to teach all the subjects in Punjabi and even students have to write their exams in Gurmukhi scripts.

Therefore, the petitioners challenged such action of the University under Section 4(2) of that Act and contended that State legislature has no power regarding that matter under Entry 11 of State list and such power lies with Union under Entry 66 of Union list. They also offended the Articles 26(1), 29(1) and 30(1) of the Constitution. Therefore, Supreme Court while applying the rule of harmonious construction observed that such action by the University has violated the Arya Samajists to use their own medium for examination and teaching. Further, it was held that the compulsory affiliation of minority colleges by the University and forcing them to use Punjabi as their medium of teaching which is not their mother tongue, is violation to the fundamental rights of minorities. However, it must be remembered that even linguistic minorities cannot expect that University must conduct examinations in their language, similarly, University cannot force these institutions to affiliated themselves with the University and use their language as the medium of teaching. Therefore, as far as the act of State is concerned, the powers of the state are to be harmonized with regard to the use of language as a medium for teaching in the college. They can prescribe power to these institutions for the medium of instructions of their own choice or they can even allow these colleges to affiliate themselves to other Universities who have same medium as them, outside the state.795

One of the recent judgements related to this rule is Prof. Yashpal and Anr. V. State of Chattisgarh796. In an instant case, petitioner, who was an eminent scientist and former chairman of University Grant Commission, filed a writ petition under Art. 32 of the Constitution and challenged the validity of certain provisions of the Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002. Under section 5 of this Act, a notification was issued where State was empowered to incorporate and establish a university and such universities had power to affiliate any institution or college with the prior approval of state government as provided under sec. 6 of the Act. The main contention of the petitioner was that after commencement of this Act, within one year, about 112 universities had been established by the State government by

795 Sandesh Niranjan, The Rule of Harmonious Construction

http://www.academia.edu/8741055/harmonious_construction > Accessed on 26th July, 2019
796 AIR (2005) SC 2026
issuing notifications in the official gazette without any concern regarding the infrastructure, teaching facility or financial resources. The legislation was not in compliance with the UGC guidelines. Moreover, these private Universities were conducting professional courses without any prior permission of from regulatory bodies Medical Council of India or All India Council of Technical Education and such powers are provided under Entry 63-66 of Union list.\textsuperscript{797} The state government filed its counter affidavits under Entry 32 of State list. This would lead to huge loss to students as without such permission, their degrees and certificates would not be recognized by any professional organizations and such degrees would not be considered under UGC. Such institutions were not even inspected by the State government to check whether these institutions were complying with any norms laid down by the statutory bodies. Thus, here Supreme Court felt the need to protect the interest of the students studying in those institutions and rule of harmonious construction was applied to harmonize the UGC Act with Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002. However, the provisions of sections 5 and 6 were held to be invalid and were struck down by the court\textsuperscript{798} and directed the State to take certain measures to affiliate those institutions with the state universities and make the Act according to the UGC norms.\textsuperscript{799}

These are some of the famous cases where the Supreme Court of India has made an attempt to interpret certain provisions of the Constitutions as well as the Entries provided under the schedule VII of the Constitution of India with the help of applying the rule of harmonious construction. The main objective of the court in applying such interpretation to fulfil the gaps that have been made the framers of the constitution while making provisions of the Constitutions. This rule would bring consistency among different provisions which are in conflict with each other so that none of them get effected as all the provisions have been made to meet the necessities that might have arose in the past or in future.

CONCLUSION

We have been provided with certain provisions under statutes which need to be followed for the proper functioning of the administration as well as for the development of a nation. Similarly, we have Constitution which is considered as a supreme law of the land which guarantees rights and freedoms to its citizen and for the proper implementation of such rights and freedoms, it has assigned certain powers and functions to the different organs of the government. Thus, the Constitution covers the every aspect that country deals with and accordingly the framers of the framers of the Constitution enacted the provisions which forms a part of the administration of the government in different fields as well as for the meeting the objectives of the preamble which is considered as the main reason for the framing of the Constitution for a welfare state in order to attain uniformity in the country.

\textsuperscript{797} Ibid, para 20, 21, 24, 46
\textsuperscript{798} Ibid, para 29
\textsuperscript{799} Aditya Mishra, \textit{The Doctrine of Harmonious Construction: Case Analysis: Prof. Yashpal and Anr. V. State of Chhattisgarh (AIR (2005) SC 2026), 6\textsuperscript{th} June, 2016}
Since, the Constitution covers every aspect of the Country, it provides for provisions with this regard. So, if a document contains different provisions for different fields or bodies there are chances that such provisions may get into conflict with each other. Each provision is complete in itself with regard to its aim and object but if that particular provision is used in others field for which it is not meant, that would give rise to a conflict. These are due to the gaps left by the framers of the Constitution. So, it is very important to understand the true meaning of these provisions. So courts play very important role giving out the meanings of these provisions. This can be done with the help of applying certain rule and guidelines that are framed under the Constitution as mentioned above, the Constitution itself provides for the general principles of interpretation in one of its Articles. The rule of harmonious construction ids one of the way for interpreting the Constitutional provisions.

This rule can be explained as the rule which brings harmony between the different provisions of the Constitution which are in conflict with each other or which are inconsistent to each other. This harmony can be maintained by giving importance to both the provisions without effecting anyone of them. Thus, the courts by giving their interpretation with the help of application of this rule resolves the dispute between different provisions or within subject matters of different lists of the Constitution. The Supreme Court of India has provided for the principles which are to be taken into consideration while making any interpretation of the provisions which are in conflict and while making interpretation, it is very important to note that the Court has to make every effort to maintain the harmony between those conflicting provisions. There are five principles which are to be followed for making those interpretations and these principles are very explained by the researcher in the explanation the rule of harmonious construction.

Further, if we go through the historical perspective of this rule, we can see that this doctrine has been evolved since the 1st amendment of the Constitution as discussed above where the court resolved the issue, with regard to the conflict between fundamental rights and directive principles, with the application of harmonious construction. Thus, harmonious construction made that fundamental rights and directive principles are in conformity with each other and while maintaining consistency between both of them, both are considered as the part of the basic feature of the constitution. But this rule was not new rule to the court, it was very much in application in Federal Courts. The researcher has made an effort to study this rule with the view of Federal Court in one of the above mentioned cases. The rule of reconciliation was propounded by the Court to bring conciliation between conflicting Entries of the same list under different subject matters.

Thus, the court has made its interpretation with the help of rule so that both the Entries must be read in consonance with each other. This can be inferred that the application of such rule was in existence since the time of British rule and it was further followed by the Indian courts after independence and it was made part of the Indian Constitution. Similarly, the Indian courts also started to interpret the provisions to give importance to the intention of the Constitution makers as all the provisions of the Constitution were enacted to meet the needs of the people of India. Therefore, the Constitution was framed as a legal document and was considered as the supreme law of the land which has to be followed by the people of
India. But we must note that this document was not complete in itself it was amended many times in order to fulfil the gaps that were present in it. Such gaps are also overcome by the courts through their interpretations. So, the roots of this rule can be generated from the case where the Federal court has propounded the rule of reconciliation and at present, this rule can be termed as the rule of harmonious construction, in India.

The rule of harmonious construction can be well explained with the help of case studies where the Courts have played an important role in interpreting the various provisions of the Constitution which were in conflict. This can be seen from the time of commencement of the Constitution as mentioned above. In this research paper, the researcher has traced a list cases where the Supreme Court of India has made its observations and interpreted the conflicting provisions by applying this rule. The basic aim of the Court for applying this rule to maintain the importance of each and every provisions of the Constitution which has been enumerated by the Constitution makers as they have framed these provisions covering all the aspects and issues which a particular nation or a government deals. This could be only done through this rule and court has to make every possible effort to maintain such harmony within those conflicting provisions. The researcher has discussed the judgements of various cases with regard to the application of rule of harmonious construction and views of Supreme Court over it.

Our Constitution has guaranteed us six fundamental rights for achieving justice, equality and liberty but these rights are not absolute and thus, even Constitution provides for certain provisions where the state has the power to take away such rights but the state much exercise such power reasonably, as provided by the constitution. So in one of the above mentioned case with regard to “freedom of Religion, Article 25 (2) (b) and Article 26(b) of Indian Constitution”, the Supreme Court has held that these two Articles are subject to each other. In harmonising both these Articles, state has the power to make law for opening such institutions for all classes and all the temples are part of it for social welfare of the state. Thus, the rule of harmonious construction has been applied in case of fundamental rights and the powers of the state to reasonably curtail those rights for certain welfare of the state. Another instance where the Supreme Court had felt the need of use of this rule is with regard to the “Freedom of speech and expression under Article 19(1) (a) and Parliamentary Privileges under Article 194(3) of Indian Constitution “and the consistency between these two Articles was maintained. It was harmoniously interpreted that Article 194(3) must be exercised with regard to the official records and freedom of speech and expression must be exercised with certain limitations.

Harmonious construction has been a considered has a tool to bring consistency within the different provisions of the Constitutions in order to protect the aim and intention of the framers of the Constitution. Court have made every possible method to maintain such harmony with regard to every aspect. This can be inferred from the above mentioned cases where the Courts have made an approach towards this rule. Not only in case of harmonizing the provisions of fundamental rights but the Supreme Court has also made an important observations for the subject matters of different Lists under schedule VII of the Indian Constitution, whether it is the question of making laws relating to education lies with the state list or with the union list. The researcher has discussed few
cases related to the issues of subject matter that forma the part of state list to some extent and to other extent it forms the part of union list. So, here also court has made an attempt to harmonize the extent of powers on particular subject matter under different lists. After these cases, the researcher has also discussed an important case where the Court has invalidated Act which was passed by the state legislature for establishing private Universities but in order to protect the interest of the students studying in those Universities, the Court has applied the rule of harmonious construction and directed the state legislature to amend the law. Thus with this, it can be inferred that the Court are making every possible effort to protect the objective of each and every law which has been framed for the country and rule of harmonious construction is the tool in the hands of the Courts to protect so.

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FORENSIC PSYCHIATRY IN INDIA: AN OBSCURED TOOL OF CRIMINAL INVESTIGATION

By Vartika Prasad and Vishant Malik
From Amity Law School, Noida and Galgotias School of Basic and Applied Sciences, Galgotias University

Abstract

Forensic Psychiatry is an imperative yet overlooked branch of forensic medicine, which fills in the gap between law and psychiatry by way of application of psychiatric knowledge in untangling the legal issues.

This paper will throw light upon the role of forensic psychiatrist in untangling the scepticism between the state of sanity and insanity for determination of criminal responsibility, medico-legal aspect of forensic psychiatry and the urgent need of its applicability in criminal investigation for better administration of justice which is extremely obscured in the current legal system in India.

Furthermore, the intersection between forensic psychiatry and forensic psychology to unravel the concept of mad versus bad shall be discussed in light of the case, State v. Ravi & ors and with a glimpse into the psychology behind crime.

Keywords: Forensic Psychiatry; Sanity; Insanity; medico-legal; forensic psychology

Research Methodology:

- Primary sources: Interviews, Questionnaires, Judgments and Relevant Statutes.
- Secondary sources: Books and Internet.

Introduction

Forensic psychiatry is the implication of psychiatric knowledge in untangling legal issues and is a key to better administration of Justice. Psychiatry is the study of origin, identification and treatment of mental disorders, while the word forensic has its roots in a Latin word ‘forensis’ which means ‘of a forum’. Forum is generally referred to as a meeting or medium where people gather to exchange ideas and views on a particular issue.

Forensic psychiatry, a branch of forensic medicine and a sub-specialty of Psychiatry is an indispensible yet unnoticed gem in criminal investigation which creates a bridge between Psychiatry and law, hence connecting the dots of psychiatric study into legal issues which paves way for determining the criminal responsibility of an accused by identifying the state of sanity versus insanity.

The basic components which assemble the concept of forensic psychiatry are Crime, Insanity, Sanity, Mental illness and criminal responsibility.

- Crime: the word crime has its roots in the Latin word ‘crimen’ which means charge or accusation and a Sanskrit word ‘kri’ which denotes ‘to do’. Therefore combining the two indicates the act which is accumable in nature.

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801 KS Pillai, principles of criminology, TLL, 1920, p 6; access from: www.etymonline.com/word/crime

www.supremoamicus.org
According to oxford dictionary, ‘Crime is an act or omission which constitutes an offence and is punishable by law’\textsuperscript{802}

There are two essential elements which shall be present for an act to be regarded as crime, and they are:

- **Actus Reus**: It is a physical element which means an act or deed prohibited by law.
- **Mens Rea**: It is a mental element which denotes an evil intention.

- **Sanity**: The ability to behave, think and act normally and sensibly is known as the state of sanity.\textsuperscript{803} Sanity is the state of a sound mental health.

- **Insanity**: It is a state in which a person’s mind doesn’t function in a normal or sensible manner. According to oxford dictionary insanity is a state of mind which prevents normal conduct, understanding or social interaction\textsuperscript{804}

  The word, insanity neither hold place in law nor in medicine or psychiatry, rather it is a socio-legal term used to portray those people who are mentally ill and are generally segregated from rights and responsibilities.

  The term unsoundness of mind has its place in the Indian Penal Code and is synonymous to the terms such as insanity, madness, lunacy etc.\textsuperscript{805}

- **Mental illness**: It is a medical condition which disturbs a person’s ability to think, feel, relate and cope with things and can affect anyone irrespective of age, race, or any other factors. Mental illness is treatable and does not include mental retardation which in some degree might be permanent. Mental retardation is a condition in which a person’s intellectual capacity is sub normal and occurs either at birth or during the developmental period wherein there is incomplete or restricted development of the mind\textsuperscript{806}.

According to section 2(s) of the Mental Healthcare Act, 2017, “mental illness means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub-normality of intelligence\textsuperscript{807}.”

- **Criminal Responsibility**: The ability of the accused to understand the charges brought against and the act or conduct during the commission of any crime is known as criminal responsibility. The concept of criminal responsibility is related to the mental state of an accused during the time of commission of crime and therefore, it is necessary to understand the mental state as it could be intentional, knowing, wanton or negligent\textsuperscript{808} and only a guilty

\textsuperscript{802} Oxfords dictionary. Definition. Crime.
\textsuperscript{803} Collins Dictionary. Definition. Sanity.
\textsuperscript{804} Oxford dictionary. Definition. Sanity.
\textsuperscript{807} Section 2(s). The Mental Healthcare Act, 2017. 7th April, 2017
state of mind and act of an accused can be held responsible for the offence.

Forensic Psychiatry helps untangle the question of criminal responsibility of a person accused of a crime, by diagnosis of mental illness which helps in determination of sanity or insanity and helps identify the truth behind the defence of insanity as opted by the accused. An accused with an ill state of mind in which he is unable to understand the cause, conduct and consequences of his act or the one who cannot even stand the trial are treated as a person of unsound mind clinically diagnosed with mental illness of grave nature and is exempted from conviction and liability of crime.

Dr Priyaranjan Avinash, a psychiatrist also specialized in forensic psychiatrist stated that, “A forensic Psychiatrist after multiple session of interview, clinical and mental status examination certifies a person suffering from mental illness. However, the term insanity has no place in the domain of forensic psychiatry. Further, Circumstantial evidences collected from the inquest helps in determining criminal responsibility. Beyond the court system, forensic psychiatrists and psychologists are often recruited in prisons, for providing rehabilitative treatment and education to convict and are also hired by police departments as consultants and profilers.

Determination of criminal responsibility of an accused becomes easier when Forensic psychiatry collaborates with forensic psychology which assesses the mental state of the accused with respect to the crime and helps distinguish between mad and bad and identifies the psychology behind crime by way of research on criminal behavior and development of effective clinical treatments.

However, it is upon the judiciary to take the final decision on the basis of facts and issues of the case including the medical history and medical report of the accused as presented by the forensic psychiatrist or general psychiatrist. The opinion and statement of an expert witness such as a forensic psychiatrist and forensic psychologist also plays a role of utter importance in judicial determination by the court which further helps in taking the final decision in case when insanity is taken as a defence.

However, the question of exemption of an accused from criminal liability on defence of insanity has always been an intricate and elaborated matter and depends on case to case.

Evolution of Forensic Psychiatry

The case of R v. M’NAGHTEN popularly known as the M’NAGHTEN’s case opened the doors to the defence of insanity in the year 1843, by establishing the rules in the case when the accused pleads not guilty on the ground of unsoundness of mind. In this case, McNaughton, a 29 years old paranoid schizophrenic had morbid delusions that Robert Peel, the then Prime minister of England was falsely accusing him for the crimes he never committed by constantly sending spies who were following and torturing him and therefore made detailed plans to kill him but instead shot Edward Drummond, the private secretary of The Prime Minister, who died after five days. McNaughton pleaded not guilty on

809 House of Lords. Mews’ Dig. i. 349; iv. 1112. S.C. 8 Scott N.R. 595; 1 C. and K. 130; 4 St. Tr. N.S. 847. May 26, June 19, 1843

the ground of insanity. The medical evidence also suggested that a sane person or a person of sound mind may also be affected by morbid delusions.\textsuperscript{811} The rule of defence on the ground of insanity was incorporated and established by the House of Lords. It was stated that “Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.\textsuperscript{812}”

The questions put up by Queen Victoria in the case w.r.t., the defence of insanity was transformed into \textit{M'Naghten Rules (1843) 4 St.Tr.(N.S.) 847} which provides the legal definition of insanity and the grounds to be established by the defendant for taking the defence of unsoundness of mind or insanity.\textsuperscript{813} McNaughton was acquitted as he was proved to be insane and was later sent to Bethlem Mental Hospital for his whole lifetime.\textsuperscript{814} The English courts still follow M’Naghten’s rule in deciding matters on criminal responsibilities of insane. This rule ignited a spark among other countries to adopt the principle of insanity as a defence, however not every country still follows the rule of M’Naghten in its strict sense, however the defence of insanity has been adopted by several countries such as India, Canada, Australia, England and Wales, Hong Kong, the Republic of Ireland, New Zealand, Norway, Switzerland\textsuperscript{815} and most U.S. states etc with the exception of Idaho, Kansas, Montana, Utah, and Vermont\textsuperscript{816}.

M’Naghten’s rule was the first brick established in the history of forensic psychiatry, even though the usage of the term and appropriate application of the amalgamation of psychiatric knowledge into law saw the light of the sun in the year 1964 when the renowned forensic psychiatrist Dr. Lawrence Z. Freedman introduced the term ‘Forensic psychiatry’ as a sub-specialty of psychiatry in the Review Of Psychiatry 196\textsuperscript{4} in his article titled ‘Forensic Psychiatry after the spine chilling assassination of President John F. Kennedy in 1963.\textsuperscript{817} Even though the term was introduced in 1964, the contributions made by him in this field dates back to 1950 when

\textsuperscript{811} R v. M’NAGHTEN.House of Lords.Mews’ Dig. i. 349; iv. 1112. S.C. 8 Scott N.R. 595; 1 C. and K. 130; 4 St. Tr. N.S. 847.May 26, June 19, 1843
\textsuperscript{812} Holding of Lord Chief Justice Tindal in the case of R v. M’NAGHTEN.House of Lords.Mews’ Dig. i. 349; iv. 1112. S.C. 8 Scott N.R. 595; 1 C. and K. 130; 4 St. Tr. N.S. 847.May 26, June 19, 1843
also see: Jaising P Modi. 25\textsuperscript{th} Edition. Modi A Textbook of Medical Jurisprudence and toxicology. edited by Justice K Khanna. p 913 - 916
\textsuperscript{814} id. at 5.
\textsuperscript{815} Section 84. Singapore Penal code.
\textsuperscript{816} Wikipedia, the free encyclopedia. Mc’Naghten Rules. Article.available from: https://en.wikipedia.org/wiki/M%27Naghten_rules
Freedman along with Harold Lasswell, Ph.D., formed a committee on law and psychiatry at Yales and then in the year 1962 Freedman helped in up-gradation and drafting of Model Penal Code of the American Law Institute criminal code by recognizing the relationship and interface between law and mental illness. The assassination of President John F. Kennedy urged Freedman to study psychological and behavioral science of criminals which further contributed majorly in the field of criminology and forensic psychology. Many other rules also emerged which contributed in defence of insanity and hence forensic psychiatry.

Fourty four years after the case of M’Naghten, in the year 1887 another case emerged in the Supreme Court of Alabama which gave rise to the irresistible impulse test in the judgment of Parsons v. State which added a variation to the M’Naghten’s rule. In simple terms, this test discharged the accused from criminal responsibility even if he was aware of the unlawfulness of the act committed by reason that he was unable to control himself from committing such an act due to destruction of controlling agency or capacity ought of mental illness or disease. However, this test has much criticism and is never used as the only test for identifying insanity.

The Durham Rule of 1954 reformed M’Naughten Rule and stated that “An accused is not criminally responsible if the unlawful act as committed by him was a product of mental disease or mental defect. However this rule was rejected by the federal courts and was finally abolished in 1972 on the ground that the definition was too broad and also covered alcoholics, drug addicts and compulsive gamblers who often misused this defence.

The combination of M’Naughten and irresistible impulsive rule paves way for a better concept and rule w.r.t., criminal responsibility of a person of unsound mind which was inculcated by the American Law institute in its model penal code with the aid of forensic psychiatrist Lawrence Z. Freedman in the year 1962. The rule suggested that a person who lacks substantial capacity to either understand the wrongfulness of his conduct or conform his conduct to the requirements of law ought of a mental disease or defect shall not be responsible for such criminal conduct. However repeated criminals and anti-social conduct were excluded from this defence. The test became popular and was used by a majority of jurisdiction in USA for about a period of 20 years but then again in the year 1981 the acquittal of the John Hickey Jr of murder charge of the then U.S president Ronald Reagan’s press secretary James Brady on the ground of insanity bought an outrage among the public. The Congress removed the volitional condition of the A.L.I test and further in 1984 it passed the

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818 Id. at 6.
820 Ibid.
822 Section 4.01. Article 4- Responsibility.
Comprehensive Crime control act with the short title, **Insanity defense Reform act, 1984**, which made it clear that to attain defence by reason of insanity the accused must give clear and convincing evidence during commission of the crime he/she was under severe mental illness or defect and because of that was unaware of the nature and quality of the criminality of the act so committed. This change brought was a **turning back to the McNaughten’s rule**.

**Forensic Psychiatry in India**

It’s been a while since Forensic psychiatry has been introduced in India but not many are aware of its existence and practical applicability in the Indian legal system. Unlike many other developed and developing countries, forensic psychiatry in India, a very useful and appropriate legal weapon in criminal trial is at introductory, buoyancy and an infant stage and yet not fruitfully employed in the administration of justice. Though in terms of theoretical knowledge it has a role of utter importance but is not practiced in everyday scenario and only comes into picture either in the cases of defence on the ground of insanity or in legal matters of a very serious nature where forensic psychology also plays its part. Although a separate specialty section of forensic psychiatry has been formed by the Indian Psychiatry Society (IPS), the progress rate is developing yet lagging behind.

**Historical background:** Mental illness, its identification and treatment traces back to the Ancient India. The ayurvedic manuscripts included concepts of mental illness in the text such as the aharva veda which recognized mental diseases such as schizophrenia and bipolar disorders; The Siddha, medical system of southern India which identified various mental diseases; The Unani system of medicine which described seven types of mental disorders included Schizophrenia; depression, Organic mental disorder, paranoid state, delirium etc.; ‘Agastiyar kirigai Nool’, which identified about eighteen psychiatric diseases. Medical diagnosis of mental disorders was also carried by way of five senses and further interrogation. There was also a time before the identification of mental disorders when a person suffering from mental disorder was believed to be a result of witchcraft or possession by evil spirit and were treated inhumanly ought of such beliefs. The Buddhists kings were also the one who established a patronage of mental illness and its treatment.

Even though mental illness and its treatment were recognized in the country, the focus was on detention of the people.
with unsound mind rather than their proper treatment. There was no such law which focused on the defence of a mentally ill offender from punishment and such an offender was held responsible for his criminal acts.

It was only after the establishment of the section 84 of the Indian penal code by the British India that the defence of insane from criminal responsibility came into existence.

The Indian Penal Code was enacted way back in 1860 under the British rule in India which is still applicable in realm of criminal law, although several amendments have been made since its inception and post-independence from time to time.

It was a matter of less than two decades after the case of R v. M’Naughten when the Indian penal code as established by the British India legislative council was formed which also included insanity as a defence from the principles established by the M’Naughten Rules in the form of section 84.

Section 84 of the Indian Penal Code establishes unsoundness of mind as a defence from criminal responsibility by stating that, “Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.”

Although, unlike the M’Naughten’s rule, the word ‘insanity’ does not have a place in the Indian Penal code and is merely a sociological and common term.

The field of psychiatry and mental health laws were also established by the British India during its governance. The first three acts governing mental health in India were enacted in the year 1858 namely, the Lunacy (Supreme Court) Act, 1858 dealing with judicial inquisition as to lunacy in presidency towns, The Lunacy (District Courts) Act, 1858 with respect to proceedings outside of presidency towns, and The Lunatic Asylum Act, 1858 which focused on the confinement of the insane in asylums. Further in the year 1912 Indian Lunacy Act, 1912 which aimed in amending, assimilating and rearranging the laws related to the custody of lunatics although India had legislations w.r.t., mental illness but the basic aim of these enactments were to confine and get rid of the mentally ill people as they were not accepted by the society. However, the mentally ill offenders were acquitted and sent to mental asylum, if the defence of mental illness was established as per section 84 of the Indian penal code.

Before the stroke of midnight of 15th August 1947, i.e., on the eve of independence of the country, Indian psychiatric society was formed. For about 40 years after independence, the Indian lunacy act, 1912 was followed until mental health act, 1987 came into picture whose main aim was consolidation and amendment of the laws relating to treatment and care of mentally ill persons and further to make better provisions for their matters and property.

**Forensic Psychiatry in Present Scenario:**
The plea of insanity as a ground for defence established under section 84 of IPC and its criminal proceedings given under section 328-339 denotes that India has a strong hold in the provisions as established and theoretical grounds w.r.t., the forensic psychiatry in Indian Legal system. However, it is expedient to note that the

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829 Section 84. Indian Penal Code, 1860.

830 Id. at 9.
applicability and the awareness of the sub specialty of forensic psychiatry in its strict sense is diminished and shadowed in the present scenario in India and many other developing countries. Not many are well aware of the scope of forensic psychiatry and the indispensable role it plays in criminal investigation, even though the awareness of the defence of unsoundness of mind is present. The role of forensic psychiatrist and forensic psychologist in evaluations is generally done by general psychiatrist and psychologist who do not have sufficient training in the field of forensic psychiatry specifically. The Indian medical education lacks adequate infrastructure and training program for the sub-specialty of forensic psychiatry. The training program in psychiatry is for a period of 3 years wherein only 2 weeks are allotted to the training of forensic psychiatry as compared to Australia and UK, where there is a 3 year special course for forensic psychiatry which can be opted after previous 3 year course in Psychiatry.831 A post-doctoral course in forensic psychiatry exists at NIMHANS, Bangalore, however only one seat per year is available for the same in the whole country. Therefore, it can be seen that we are lagging behind in the field as compared to western countries and even Singapore, where there is a separate department of forensic psychiatry and the sentencing is basically focused on rehabilitation.832

The statutes like The Indian Penal code, 1860(substantial law), code of criminal procedure, 1973(procedural law) and mental healthcare act, 2017 consists of provisions with regard to mentally ill offenders which encompasses the involvement of forensic psychiatrists in criminal investigation and proceedings.

Legal Implications

Substantial aspect: Section 84 of the Indian Penal Code, provides unsoundness of mind as a defence from criminal responsibility. According to this section a person who commits a crime ought of unsoundness of mind where he/she is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, is exempted from criminal responsibility. However, insanity to be proved shall be legal insanity rather than medical insanity as in medical terms even an acute depression or an uncontrollable impulse to kill someone is considered as mental illness, but such minor aberrations amounting to madness or mental illness is not considered in the eyes of law.833

In the case of Yosef v. State of Maharashtra834, the Bombay sessions court stated that, Even though the accused was suffering from suspected epilepsy and severe personality disorder, it won’t be considered as unsound mind in terms of legal insanity.

Procedural implications and its medico legal aspects : It is pertinent to note that section 84 of the Indian Penal Code gives


833 Id. at 8.

the substantial rule of defence on the basis of unsoundness of mind, where on the other hand, Sections 328-339 of code of criminal procedure, 1973 gives provisions as to accused person of unsound mind. Section 328 talks about the procedure during inquiry while section 329 emphasizes about the procedure during trial. It is the duty of the magistrate, in case of inquiry to cause such person of unsound mind to be examined by the civil surgeon or other medical officer and if such medical expert finds the accused to be of unsound mind he shall refer such person to a psychiatrist or clinical psychologist who shall inform the magistrate if the accused is suffering from an unsoundness of mind or mental retardation835, while in case of a trial, the magistrate or court of sessions shall directly refer such person to a psychiatrist or clinical psychologist who shall diagnose such person to be either of sound or unsound mind and further report the same to the court or magistrate836.

The evaluation process by the psychiatrist, encompasses of three main stages, namely, i) Interview with the accused; ii) Use of forensic assessment instruments such as mental state at the time of offence screening evaluation and Rogers Criminal Responsibility assessment scale; iii) Third party information, which includes statements of victims and witness, reports of police etc.837

Further, when the accused is found incapable of entering the defence by reason of unsoundness of mind or mental retardation and the court finds that no prima facie case is made out against him/her, then the court instead of postponing the trial shall discharge the accused on the basis of bail where such person shall be under treatment as either an out-patient or an in-patient. In case of in-patient treatment, a friend or relative shall take the responsibility of taking the accused for regular out-patient treatment. However, in the case when the bail cannot be granted or any appropriate undertaking is not given, the accused shall be kept in a place where he can attain regular psychiatric treatment and such detention in a mental asylum shall be in accordance with mental healthcare act, 2017838. In case the trial or inquiry is postponed on the basis of the opinion of an expert i.e., a psychiatrist or clinical psychologist, its resumption will be done w.r.t., section 331 of the code. When further the accused is brought before the magistrate or court and the court thinks fit that the accused is capable of making his defence then the inquiry or trial will continue839. In case the accused is acquitted on the basis of unsoundness of mind, the finding in the judgment shall specifically state if the offence was committed by the person accused or not840 and further upon acquittal such person shall be detained in safe custody either in a place or manner the court thinks fit such as psychiatric hospital, psychiatric nursing home841 or mental asylum or at a friend’s or relative’s place842.

The mental healthcare act, 2017: The act was recently passed on 7th April, 2017 and see: section 328, 329 and 330 of code of criminal procedure.

838 Mental healthcare act, 2017 superseded the previously existing Mental health act, 1986. Also see: section 328, 329 and 330 of code of criminal procedure.
841 Id. at 8.
842 Section 335, 339. Code of criminal procedure, 1973
came into force on 7th July, 2018\textsuperscript{843} thus entering into the realm of medical jurisprudence while superseding the previous Mental Health act, 1986. Section 2(w) of the act defines “prisoner with mental illness” as the one who is an under-trial or convicted of an offence and detained in a jail or prison\textsuperscript{844}. This act consists of provisions with respect protection, treatment and transfer of mentally ill prisoners. These provisions as inculcated in the act are a boon in the field of forensic psychiatry. Section 103 of the act specifically lays down provisions with regard to prisoners with mental illness, wherein a mentally ill prisoner shall be admitted to a psychiatric ward in the medical wing of prison or jail or in case when there is no such psychiatric ward, he/she shall be admitted or transferred to mental health establishment with prior permission of the mental health review board\textsuperscript{845} with respect to an order under section 330 or section 335 of Code of criminal Procedure; section 30 of prisoners act, 1900 and as contained under section 103(1) of the mental health act, 2017.\textsuperscript{846} Duty is also imparted on the medical officer of the prison or jail to make sure that no mentally ill prisoners are still in prison or jail and thereafter send quarterly reports to the board\textsuperscript{847} and the Board may also visit the prison for verification of the same.\textsuperscript{848} The medical officer in-charge of a mental health establishment is under obligation to make a special report in every six months regarding the mental and physical condition of the detained mentally ill prisoners\textsuperscript{849} and such mental health establishment shall be registered under mental healthcare act, 2017\textsuperscript{850}. The act also makes a compulsion on the appropriate Government to setup mental health establishment in the medical wing of at least one prison in each State and Union territory and further makes it clear that the mentally ill prisoners should be taken care of.\textsuperscript{851}

A police officer on the request of medical officer or mental health professional in-charge shall find and take in protection of a prisoner with mental illness when he/she elopes without leave or discharge from the mental health establishment\textsuperscript{852}. Section 93(2), of the act further gives power to the State Government to make such general or special order in directing the removal of any prisoner with mental illness from the initial place of detention, to any mental health establishment or other place of safe custody.

Intersection between Forensic Psychiatry and Forensic Psychology and a glimpse in the Psychology behind Crime

Forensic psychology is the intersection between law and psychology while forensic psychiatry forms a bridge between Psychiatry and law and is related to criminology. Both are different sets of science but are inter-related and can work together to diagnose mental illness and treatment according to their respective methods. The forensic psychiatrist examines the accused through medical


\textsuperscript{844} Section 2(w). Mental healthcare act, 2017.


\textsuperscript{846} Section 103(1). Mental Healthcare Act, 2017.

\textsuperscript{847} Section 103(3). Mental Healthcare Act, 2017.

\textsuperscript{848} Section 103(4). Mental Healthcare Act, 2017.

\textsuperscript{849} Section 103(5). Mental Healthcare Act, 2017.

\textsuperscript{850} Section 103(7). Mental Healthcare Act, 2017.

\textsuperscript{851} Section 103(6). Mental Healthcare Act, 2017.

\textsuperscript{852} Section 92. Mental Healthcare Act, 2017.

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tests; lab results; psycho-diagnosis tools such as PGI battery, RORSCHACH, TAT; brain scans and imaging\textsuperscript{853} to determine mental illness associated and the criminal responsibility associated with it. Forensic psychologists on the other hand, also examines the mental and emotional disorders, but they use non-pharmacological or non-medicated methods to study the mind and behavior and further evaluates the patient’s emotional and mental health and the treatment includes counseling, psychotherapy, stress inoculation therapy to name a few\textsuperscript{854}.

Once collaborated they can help together during evaluation of a person accused of a crime by determining the state of mad or bad and by studying the risk factors associated with repeated criminal behavior. The member of the bar and legislature relies on both the experts who can read the mind of the dangerous among us in order to protect the society. Further both the experts together research the psychiatric and psychological aspects of psychopathic personalities to predict possible threats to society at large\textsuperscript{855}.

Psychopathy is a condition, where a person has uncontrolled, impulsive and severe anti-social behavior. Not all psychopaths but the aggressive ones are the one who commits crime\textsuperscript{856}.

In the spine chilling case of \textbf{State v. Ravi \& ors}\textsuperscript{857}, the Delhi High Court recognized the gang rape and murder committed by all the accused to be crime of psychopathic nature, wherein they came like predators to fulfill their lust and evilness and took the deceased from the society. In this case the court commented and concentrated on the concept of mad versus bad by stating that, “Psychopathic personality disorder occupies a position at the heart of both forensic psychiatry and psychiatric criminal jurisprudence. This is because psychopaths lie at the intersection between the so-called mad and bad- that is, between those who clearly warrant treatment (the seriously mentally ill) and those who should properly receive punishment. Psychopaths are thought to be peculiarly and inherently untouched by therapeutic or rehabilitative interventions - two of the commonly accepted diagnostic criteria for psychopathic personality disorder being a failure to learn from experience and a failure to show remorse. Psychopathy comprises forms of egotism, immaturity, aggressiveness, low frustration tolerance and inability to learn from experience that places psychopaths at high risk of clashing with any community that depends upon co-operation and individual responsibility of its members for its continued existence\textsuperscript{858}.”


\textsuperscript{854} Achieve wellness group, LLC. Understanding the Relationship Between Psychiatrists and Psychologists. April 8, 2016. Available from: http://achievewellnessgroup.net/uncategorized/relationship-psychiatrists-psychologists/

\textsuperscript{855} Supra note 54.
\textsuperscript{856} 2006 RESERVED. Rajpal Kaur. Forensic Psychology- Trends and Innovations. p 23.
\textsuperscript{857} DEATH SENTENCE REF. 1/2014

\textsuperscript{858} Paragraph-149. State Vs. Ravi Kumar and ors. DEATH SENTENCE REF. 1/2014
Psychology behind crime: Psychology in itself is not just a field of science, rather it is an amalgamation of philosophical and scientific study of the brain and its psychological functions and chiefly those affecting behavior, attitude and the thinking ability of the person. The professional who identifies the psychology of an offender behind a crime are known as Forensic Psychologists or criminologist, who endeavors to understand the mental function and social behavior and also deals with the delinquent people. Forensic Psychologist takes a great interest in human behavior as their main area of study which helps in criminal investigation to explore behavior and mental process including perception, cognition, attention, emotion (affect), intelligence, phenomenology, motivation (creation), brain functioning, and personality of the subject, that in what state of mind he was while attempting the crime.

From many decades, investigators have dug into the cause and root of crime and the psychology behind it. Many theories suggests that genetic orientation can be the reason for criminal behavior. However many criticsizes the same, whereas others suggest that environmental factors can give rise to the same. According to another research, it was stated that the link between intelligence and crime is directly proportional to each other where it was assumed that an individual with low IQ becomes criminals. However this theory was much debated and criticized. Some people have natural urge to commit crimes as they don’t have any control on their desires, like an individual become addicted towards nicotine and cant rid of it. Stress, emotional distress may result in a deviant behavior patterns.

Furthermore confessions obtained in the Nithari killings such as “even I felt the urge, the demon in me used to wake up” obtained in the influence of truth shows that the convict was not suffering from any mental illness or disorder but was a sexual psychopath, a necrophilic and a paraphilic wherein killing was rooted in the fantasy and overpowering compulsion to kill.

With a rise in the rate of sexual crimes, there is an urgent need to come with a solution. In the evaluation of sexual arousal pattern it was found that high level of testosterone hormone is responsible for irresistible impulse. Countries like Canada & USA uses chemical castration as a method of treatment which reduces the level of high testosterone in sexual offenders.

864 Paragraph 162. State Vs. Ravi Kumar and ors. DEATH SENTENCE REF. 1/2014
Conclusion

Forensic psychiatry plays a vital role in determination of the state of sanity versus insanity by medical diagnosis and examination of the accused. The scope of forensic psychiatry in India exists in terms of legal provisions w.r.t., section 84 of the IPC, sections 328-339 of Code of Criminal Procedure and sections 2(w), 103, 93(2) and 92 of the mental healthcare act, 2017. However, forensic psychiatry as a branch of forensic medicine & sub-specialty of psychiatry is not known to many. Although a separate specialty section of forensic psychiatry has been formed by the Indian Psychiatry Society (IPS), the progress rate is very slow. Clinical psychiatrists or psychologists plays the role of forensic psychiatrist ought of diminished knowledge, infrastructure and courses available.

Forensic psychology and forensic psychiatry although differs in their subject and approach are inter-related to each other. The intersection between the two specialties can lead a way in identification of the nature of repeated offenders and can further help in identification of a psychopathic personality which lies at the intersection between mad and bad. The psychology of an offender behind a crime can be identified by forensic psychologists or criminologist where different theories and factors exits. However, the answer lies in the case which must be identified to decrease crime rates for better administration of justice. . Punishment shall be given and death sentences shall be declared in cases of crimes of diabolical nature. However, steps should be taken to decrease crime rates with an aid of forensic psychiatry and psychology.

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ATTROCITIES OR PRIVILEGES OF MUSLIM WOMEN UNDER PERSONAL LAW (WITH SPECIAL REFERENCE TO TRIPLE TALAAQ)

By Zehra Saman
From Jamia Millia Islamia, New Delhi

ABSTRACT: Islam came to the world as resurrection and reawakening the world about the basic human rights in those barbaric times. It provided immense respect and place she deserved in the society. But in today’s world, the Muslim women are not in any better position to stand for her rights. Talking about discrimination, unfair treatment and violence against women, we cannot refuse to include these women from that catalog. The necessity to be verbalize about the right to education, right to marriage, divorce, provisions regarding domestic violence, triple talaq etc and see if they are really privileged or oppressed as the world sees them.

PURPOSE/MOTIVATION: Being judged and criticized as a Muslim woman gave me an open mind to research and investigate through this work whether Muslim women are being oppressed or are honored and advantaged under Islamic law and to explore what is their position in Islam, what rights do they have for real? This study aims to have a progressive approach towards the interpretation of the Holy Quran and Hadiths and by going through the relevant provisions in Indian Personal Law, Constitution, so called historical blunder of 1986, Sec.125 Cr.P.C. relating to the political, social and legal rights of women. This study will explore the status and rights of women in Islam by comparing and analyzing the different schools of thought and also by studying the reasoning and understanding of women’s role by Muslim feminists and to what extent they must be followed.

METHODS: Under a cross-sectional analysis, this study aims to analyze the men-women equality in Islam and Quran on special precepts for women and the legislation on women across the world, especially in India.

INTRODUCTION
The gender justice is the fundamental concept in Islam. The justice is the most desired purpose of the God as mentions, ‘And surely Allah enjoins justice and benevolence (to others)’865. Also, the other verse provides that, “And We desire to bestow a favour upon those who were deemed weak in the land, and to make them the leaders, and to make them the heirs.”866

Justice i.e., fairness and equal opportunity to all means making things reachable to everyone may or may not by same means. The Quran talks about justice and words like, adl, ihsan and rahmah are attributed to it. The Holy Quran talks about not only justice but distributive justice. In the Holy Quran, distributive justice is not in relation to economical matters in particular but also social and political matters for instance, the obligation of Zakaat on the rich people is an example of exclusively matchless model of distributive justice in the Quran. It not only provides economical rights to the poor section of the society but also other rights including right to respect and dignity and political rights as mentioned in the aforementioned verse that even a poor can be a king in Islam. For instance, if the man is given physical strength over woman then it comes with the duty to protect and maintain her. Whereas, cooking food for

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865. Quran, 16:90.

866. Quran, 28:5.
husband or nursing the children is not on
the woman as a duty.

As the gender justice is the central concept,
there are number of verses in the Holy
Quran which are addressed to both the
genders as nominat-momineen and
muslimat-muslimeen. None is given any
preference over one another and supports
the notion of gender justice. Also, there is
one chapter called, Surah Al Nisa (it’s an
Arabic word which means The Woman), in
the Holy Quran which is completely
dedicated to the women. But not a single
verse is for men.

The Prophet S.A.W was reportedly saying-
As regards the wives he told men, “The most
valuable possession of the man is a virtuous
wife. And the most virtuous among you in
the sight of Allah is he who is nicest to his
wife.

Here, we can see that if the wife is virtuous
then she’ll be the most valuable to the
husband but husband cannot be virtuous in
the sight of the God until and unless his
behavior towards the wife is nicest but if not
then he’ll be accountable for it.

When coming to the mothers, the Prophet
SAW was reported to be saying that
beneath the feet of mother is the bliss of
paradise. And in respect of the daughters,
the sayings of the Prophet (peace be upon
him) was in this way that, “blessed are the
parents to whom daughters are born and
they raised them up well without
discrimination between them and their male
children. There’s a great reward for such
parents”.

The Muslim women have their own
personalities, autonomous and self-reliant.
It can be reflected from these verses-
O women! Remember that the pious among
you will enter Jannah (paradise) before the
pious men.

The rights of women are mentioned before
the rights of the men, as men prone to their
nature and due to their strength can easily
snatch their rights from women.

And women shall have rights;
Equitably similar to the rights against them,
But men have a degree over.867
It is provided in the next chapters in the
Holy Quran that-

Men are the protectors and maintainers of
women because Allah has given the one
more (strength) than other, and because
they support them from their means.868

Here it’s evidently observable that they are
protectors because they are given more
physical strength than the women. That’s
their duty to protect women from any kind
of mischief, harm or hurt. But they are
maintainers because they have to provide
women out of their earned resources.

The light should be thrown at full verse
which says, “Men are in charge of women by
(right of) what Allah has given one over
the other and what they spend (for
maintenance) from their wealth. So
righteous women are devoutly obedient,
guarding in (the husband’s) absence what
Allah would have them guard…”869

So it’s observable that the above verse
which mentioned that “Men have a degree
over women” is further explained that how
men are a degree above than women
because they’re the protectors and
maintainers, in the latter verse. A degree
over them means in terms of rights. They

867. Quran, 2:228.
869. Quran, 4:34, translated by Sahih International.
both have equal and similar rights against each other. But as the man is maintaining the woman out of his wealth and protecting her, so the woman should remain loyal to the husband and do not deceive him in his absence. None other right is mentioned other than this. Not only this, a woman do not have an obligation on herself to maintain her or the family. She’s the Minister of home and manages the affairs. There’s additional verses to bring the attention at is, that the Holy Quran further mentions in the subsequent chapters-

The Believers, men and women, are protectors, one of another; they enjoin what is just and forbid what is evil: they observe regular prayers, practice regular charity, and obey Allah and His Apostle. Here both are called as the protectors of one another. It is unquestionably apparent that the term protector, here, is not used for the physical force and strength but to guard each other in the terms of practicing the Islamic duties towards God. Therefore, the expression ‘protector’ or ‘more strength than another’ cannot be measured as a superior quality. Rather, it is a duty on the believer man to protect the woman from any kind of injury and exploitation.

The Prophet (peace be upon on Him) in His famous “last Sermon” delivered at Mecca, he appendixes a warning in these words:

Fear God in the matter of women, Verily women have rights against you, As you have rights against them

It’s clear that the rights men have against women are similar and equal as the rights women have against them. But the duties they both have against each other are different due to the reasons attached to their biological, political and social factors. The concept of distributive justice plays crucial function in making things and rights available and accessible to all, including man and woman, poor and rich, old and young, master and slave, etc. The reason of putting more responsibilities and duties on the shoulders of man is not that a woman is inferior to him but due to the biological, socio-political and economical reasons. A woman can enjoy that status lavishly of being maintained, honored and protected but if she has none to maintain her in those circumstances, she is free to go out for her livelihood and other necessary engagements.

RIGHTS OF THE WIFE-

from the right to marry to choose the spouse and dissolution of marriage, the Islamic laws have provided provisions regarding these all. The Holy verses of Quran states that, “do not obstruct them from marrying their husbands, if they mutually agree in a normal way”. The women at the time of Prophet SAW were free to choose their spouses. In one incident, one woman reached at Prophet’s house and narrated that my father has married me to his nephew and I’m not happy with this. The Prophet SAW called on her father and entrusted the matter to her directly but she then allowed what her father did, once her father was present there. She further added that I wanted women to know that the fathers do not have anything in this regard.

Abu Huraira reported that the Prophet said a grown up girl should be asked before giving her away in marriage. If she remains silent, its permission from her but if she

870, Quran, 9:71.
871, Quran, 2:232
872, Al-Bukhari, Sahih, Nikah, bab yankih al-abu wa ghayru-hu al-bikr wa-l-thayyib illa bi-rida-ha.
denies then there should not be any compulsion on her.\textsuperscript{873}

The right to consent and right to contract marriage are same for both the men and women. The consent given in marriage by man or woman is equally essential. The Prophet SAW got revelation from Allah through the archangel Jibrael that the marriage of Fatima RA and Ali RA is fixed by the Allah SWT. The Prophet rushed towards his home soon after this and enquired Fatima RA in this regard for her permission and then only given her hand in the hands of Ali RA. Though there was a revelation from God in the same regard and who can understand this more than the Prophet, himself. But the concern behind this was to make people aware of the right a woman and a daughter have.

The system of dowry is totally forbidden in Islam. In its place, women are given dowry or dower, which is given not as a favor on her but as a token of respect. There’s no maximum value of the amount of dower a husband will provide to his wife\textsuperscript{874}. And give the women (on marriage) the dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.\textsuperscript{875}

Though the share of inheritance for the wife is one fourth but if the husband leaves child after him then one eighth. Whereas, a man gets the half of the property of his wife and if there is a child left after her in such case, one fourth. This difference is due to the principle of the distributive justice which is the fundamental base of Islam. The men are the maintainers of their wives and their families, as well. Notwithstanding the rights in relation to use and dispose off of property are same of both husband and wife. As said by Justice Aftab Hussain Saikia,\textsuperscript{876} that the marriage confers no right to any party over the property of other. The wife have similar rights like her husband, she can use, dispose off her property and make contracts in its regard without interference by her husband.

The Holy Quran orders the man to live with his wife on terms of love and equity. The kindest of his behavior should be for his wife. But the Holy verse which says, ‘Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next)- refuse to share their beds, (And last) beat them’ (Quran, 4:34) is criticized for being against women and promoting domestic violence. As the men are the protectors and maintainers of the women.\textsuperscript{877} She is not supposed to be subordinate or servitude but the women are supposed to be obedient and loyal to her and guard her chastity and property of her husband in his absence. This provision of beating the wife is not to injure her severely. It’s the last resort after trying the other ways out. When the wife is rebellious but still giving divorce is not preferable when she is not loyal. The man cannot be violent the scholars said that use stick of miswak or something which will not cause severe injury to her. However, it should be noted that this provision is limited to such circumstances only. A man cannot use it to beat her for stupid reasons or in any situation.

TRIPLE TALAQ AND MUSLIM WOMEN

\textsuperscript{873} Trimidi, Abu Daud.
\textsuperscript{874} Quran, 4:20.
\textsuperscript{875} Quran, 4:4.
\textsuperscript{876} Chief Justice of Indian Courts.
\textsuperscript{877} Quran, 4:34.
The Muslim Personal Law Act, 1937 allowed the husband to divorce his wife through pronouncement of talaq thrice in one sitting. The historical verdict by the Supreme Court was welcomed by majority in Muslim community. Triple Talaq was held as unconstitutional. But the recent bill which lately got assent by the President of India is controversial and contentious. In the survey done for the purpose of this study suggests that majority of the Muslims are supportive of the verdict regarding Triple Talaq when questioned if they support it or not. But the 62.2% believe that dowry system is greater evil than domestic violence which was voted by 45.9% but triple talaq was seemed to be the greatest evil of the society by only 13.5% of the population. On being asked that whether they think that they think that the divorced women must be maintained by the parents as instructed under the Shariah Law. They responded in yes by 54.1% however, 29.7% believe that the maintenance provisions under the Indian Personal Law are better but 16.2% responded in negative. Another question which was enquired was that whether they think that the punishment of the husband for 3 years of imprisonment is what in their opinion. 70.3% responded that it is further harassment of wife whereas, 29.7% believe it to be favoring the wife.

Coming to the Triple Talaq Bill is full of flaws and imperfections. It was initiated with good intentions but badly enacted. The needless staying in the marriage by wife when her husband is in jail for 3 years. While grounds for divorce includes the imprisonment of husband. The scope of reconciliation between husband and wife is diminished by sending the husband to the jail. Where the arguments surrounded that the marriage in Islam is civil contract it cannot attract criminal punishment, the bill aims to punish the husband for the pronouncement of talaq thrice in one sitting otherwise divorce is not punishable. But it is equally arguable in the light of natural justice, secularism and right to equality that special penal code cannot be made for a particular group or gender group of any specific community. The pronouncement of Triple talaq was declared as an offence which is cognizable and non bail able offence. The bill is nothing with the objective to punish the Muslim husband but a penal code for triple talaq which is against the Art.14 and 15 of the Indian Constitution.

The bill also come out as a propaganda as the Government states that in the Shayara Bano’s case the government’s position in the Supreme Court stands vindicated. The problem of the abandonment opportunity is every society and every man belonging to any religion. The bill attributes only to further harassment of the Muslim women and creating the gender lines to divide them and tearing apart their families. The bill provides anything for the economical empowerment of the wife. The Magistrate will give an order to provide her subsistence allowance where every secular law (whether it is the 1986 Act or Sec.125 Cr.P.C.) gives the woman provisions of maintenance. Hence it results in reducing her rights in comparison with her female counterparts of other religions.

CONCLUSION
The Islam talks about the gender justice rather than gender equality as the purposes of the man and woman are different from each other due to the biological, spiritual, political and economical factors. The kind of discrimination and inequality we see today is the mere outcome of the societal and cultural influence of the time. The Muslim wife is having similar rights against their husband. Where the husband can
divorce her by Talaq ul Ahsan and Talaq ul Hasan, the wife can choose the option of Khula. Whereas, the attempt to ban Talaq ul Biddat (Triple Talaq) was promising but the bill is not. The bill of 2019 is badly drafted with flawed language. The bill is against the fundamental rights, beyond the test of reasonableness, we do not require such law when we already have 1986 legislation, Sec.125 of Cr.P.C. The social reform and legal reform go together. There is need of reforming the laws from the core of the Muslim community regarding the triple talaq and maintenance.