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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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SEDIGATION, MISUSE & CONSTITUTIONALITY: VOICE OF DEMOCRAT OR FOUNDATION OF REPUBLIC?

By Aditendra Singh
From National Law University Delhi

Abstract

The law of Sedition (section 124A of Indian Penal Code) has always been in news because of its invocation in various cases. The law, which is said to be a symbol of colonial oppression, and is termed as inconsistent with the fundamental rights by various commentators. But conversely, it has been upheld by the Apex court of our country. So this paper aims to analyse whether sedition law, which is still a part of Indian penal system, per se leads to unconstitutional restriction of fundamental right to free speech or is it the misuse of the law by various political and governmental authorities which leads to unreasonable restriction of speech. In pursuance of this landmark cases in this field were deconstructed to have the reality check of constitutionality and analysis of recent cases, where this section was invoked, has been done to gauge the way in which the section is being used currently. It was found that interpretation of section by the courts in landmark cases had already narrowed the usage to such an extent where it has become very rare for the authorities to invoke it legitimately. From the analysis of recent cases, it is found that it is the unfettered use, or more appropriately misuse, of sedition law which is responsible for unreasonable restriction of legitimate speech. These findings have important implication as it goes against well-established narrative that sedition law should be scrapped for being misused by authorities.

Sedition, Misuse & Constitutionality: Voice of Democrat or Foundation of Republic?

Introduction

First and foremost thing which a society has to fight against is a crime. And for its prevention, there are laws which work as an instrument of social control.¹ But then the question arises: what is a crime? According to Russel, crime is creation of criminal policy adopted time to time by the that section of the society which is powerful.² So out of plethora of laws which are made by the law makers, for whatever reasons and not just the aforementioned one, law of sedition can also be stated as a penal provision which is used as a tool of subjugation of subjects, as was the case in India where this law was introduced by Britshers in late nineteenth century. The researcher will later on endeavour to prove the point as to how this law is subduing in nature, but for the sake of argument, we will assume it so. So, an apparent question would be that whether in a democratic setting, where government, in essence, is made by the will of the people, can such laws exist in the first place?

This question would be answered step by step in various chapters of this research paper. For this one needs to know in what context this law was made and in what context this law is read by jurist in India. And then researcher would analyse what is happening with the existence of sedition and why its usage is in question and then it would be deliberated as to whether right

¹ Justice K.T. Thomas, Ratanlal and Dhirajlal (Lexis Nexis, New Delhi, 34th edn./2010)
² JW Cecil Turner (ed.), Russel on crime p.18. (Stevens and Sons, London, 12th edn./1964)
measure would be to scrap the law, or to bring some changes in it, or something else.

**Interpretation and its Constitutionality**

When the section was drafted by Macaulay in 1837-39, the word of importance was exiting disaffection, which was later on interpreted in different ways by various cases. Most of the pre-constitutional cases involved an interpretation which was very narrow in nature. It was after the enactment of the constitution that this law was challenged before the court of law, different interpretations were deduced and then came the first constitutional amendment act. This brought about new words being added to Article 19 of the constitution, especially ‘in the interest of public order’. How the interpretation of courts changed afterwards has been discussed in the later chapters.

**Cases**

The present interpretation of sedition is of what was given in the case of Kedar Nath Singh v. State of Bihar\(^3\) which states that acts having the objective to stir up the government established by law and which incite disorder or tendency or likelihood of public disorder are only seditious in nature. Thus, it provides for an element of actus reus to be necessarily present to make an act seditious in nature. Thus, only a criticism of a government is not going to invoke charges under this section.

The same proposition was reiterated in the case of Bilal Ahmed Kaloo v. State of Andhra Pradesh.\(^4\) In this case, a Kashmiri youth was acquitted of a charge of sedition, which was put on him for the possession of lethal weapons and was alleged of incitement Muslim youths for liberating Kashmir from India. The court here held that there was nothing which the appellant did against the government established by law which can also incite violence for the uprooting the same.

Also, in the case of Nazir Khan & Ors. v. State of Delhi\(^5\) is a recent case where the definition of sedition clause was given an elaborate explanation. So, it is pertinent to note that it is the interpretation of Kedarnath which is still in use and has been upheld repeatedly or we can say it is the only one definition which has clearly passed the litmus test of constitutionality of such archaic and draconian law.\(^6\) But one more thing which all these cases, i.e., the cases which have upheld the constitutionality of this section, has emphasised on is the government established by law. On a nuanced reading of Kedarnath judgement, we would see how it states that it is the visible import of the state, and thus extending the power of states to impose reasonable restriction over the right to free speech of its people.

A citizen has the right to free speech and is protected against any unreasonable and unconstitutional bar until and unless it does not invade the rights of society in to-to.\(^7\) This can be ascertained from the explanation 2 and 3 of the said provision. Also, this interpretation is also very certain which should be the very prerogative of the courts to interpret in this way because this offence is against the state and convicting someone under this provision would educe

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\(^3\) AIR 1962 SC 955

\(^4\) AIR 1997 SC 3438

\(^5\) AIR 2003 SC 4427


\(^7\) S.P. Sen Gupta, Sarkar and Justice Khastgir on Indian Penal Code, 1860 (Dwivedi Law House, Allahabad, 2015)
higher standard of proof. Legitimate speech and expression of thoughts must be protected from the unwarranted powers of the state. Because it is this unwarranted and unquestionable power of the government which has the tendency to curb any dissenting voice. There has always been a potential of misuse of sedition law, as it takes with itself the parochial view of nationalism and jingoism aimed at any ‘alleged’ attempt to rebel against the state.

So, the question arises, whether the main essence of democracy, i.e., freedom of speech should be subject to reasonable restriction, or more appropriately, the restrictions which in the current state is in blatant misuse (which will be dealt in the next section of this paper) against the security of the state. What if the state in itself is totalitarian and dictatorial? If so, then who will safeguard individuals when they will raise their voices? This dilemma is long drawn where an upright and definite answer is still an illusion.

Comparative Analysis-
Also, one fact which needs to be known is that England, the country which introduced offence of sedition, has, almost ten years back, parted with such draconian law citing that it did not want to be an example of using such laws. Scotland also did away with the same in 2010. In the United states, the law of sedition says that there has to be anything which raises the presumption of overthrowal of state. Also, the American Supreme Court has said that active participation is an essential ingredient of making someone liable of seditious libel. In 2007, Indonesia declared sedition as "unconstitutional", saying it had been derived from its colonial Dutch masters.

But for the time being, what our focus is on the very existence of this law in a democratic setup where there exist responsibilities of state and citizen toward each other, and how this law is to be dealt in the present environment. So there looms a question of how to balance individuals’ rights between the most rudimental element of democracy and section 124-A. This question gets its importance from the fact that this section hits at the very root of any democratic setup and any such section also lowers down the authoritarian say, even though normatively. But then a sub-issue arises about the extent to which they want freedom. Do they want a state of laissez-faire? These questions are of also utmost importance.

Sedition and Recent Developments
Types of Cases seen today-
In recent times we have seen manifolds of instances where charges of sedition were slapped on people or institutions which are prima facie not aimed toward the objective which the provision inculcates. Various writers have segregated the cases, generally the recent ones, into three categories, i.e., ‘clear acquittal cases’, ‘grey area cases’ and ‘convictions.’ In such cases, as the name suggests, convictions are one where alleged people are convicted of the offence. Clear acquittal cases are one which clearly did not satisfy the requirements of the offence. Grey area cases are those which have a kind of ambiguity with respect to the fact that it involves people with the allegation of chanting anti-national slurs or saying things

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10 Coroners and Justice Act, 2009
11 Id. at 6
which may incite people against the very foundation of governmental authorities.\textsuperscript{12}

Now seeing the trend, it is imperative that we are seeing a lot of grey area and clear acquittal cases. The case of Dr. Vinayak Binayak Sen v. State of Chhattisgarh\textsuperscript{13}, JNU case\textsuperscript{14}, V.A. Pugalenthi v. State\textsuperscript{15}, Cartoonist Aseem Trivedi case.\textsuperscript{16} Arundhati Roy case, etc. all are recent cases where the prosecution doesn’t seem to make any case out of the complaints and all of these are, in one way or the other, are politically motivated, where the stake of some or the other, involved in politics, is there.\textsuperscript{17} But there’s a need to understand the root of this problem, i.e., why people are being charged under this draconian and stringent laws. One of the main reasons is the imposed jingoism by the ruling class where this law has become a convenient mechanism to stifle any voice which they think would go against their interests.\textsuperscript{18}

In the case of Balwant Singh v. State of Punjab\textsuperscript{19}, the court clearly explained what cannot be held as a seditious offence. This case included chanting of slogans in a casual public. Similarly, it was said in the case of Javed Habib v. State of Delhi that, ‘criticism of the government is the hallmark of democracy’. There are many cases which define what is not be construed as an offence under the definition 124-A. So, there is a dearth of examples for the public authorities to get an idea of meaningful application of this section. Then what possibility remains is that of unawareness about the rightful application of this section or there is a deliberate attempt of the authorities to charge people with such offences. To prove this further, the researcher would look into some of the recent case laws permeating in the domain of individuals’ fundamental rights.

**Misuse by Authorities**

The first, the foremost and the inevitable – JNU case. This case is famous in the sense that it was used as a tool of propaganda for stakeholders across the sides. But one point which is quite clear is that even if individuals chant strong criticism of the government or they voice anti-national slogans, hateful expressions, or contempt of national symbols, still it won’t attract charges to the said provisions because of the fact that it is not inciting violence.\textsuperscript{21} Delhi High Court rejected the dismissed the earlier petition on the grounds of arbitrariness and violation of principles of natural justice. It is very well evident that after the Balwant Singh case\textsuperscript{22} there is a need for clear and immediate incitement of violence. Celebrating countries defeat in cricket matches can’t be described as seditious, an inverse we frequently see, for e.g. in Madhya Pradesh and Kashmir two years back, when celebrating India’s defeat in champions trophy indicted few people of charges of sedition.

In Binayak Sen case\textsuperscript{24} it can be clearly seen how the judgement was politically motivated or was delivered with

\textsuperscript{12} Ibid.

\textsuperscript{13} 2011 (266) ELT 193 (Chhattisgarh)

\textsuperscript{14} Kanhaiya Kumar v. State (NCT of Delhi), (2016) 227 DLT 612.

\textsuperscript{15} Crl. O.P. No. 21463 of 2017

\textsuperscript{16} Sanskar Marathe v. State of Maharashtra & Anr., 2015 Cri LJ 3561

\textsuperscript{17} Nalin Mehta, “Redefining “Azadi” in India: the prose of anti-sedition” 7(3) SAHC 322–325 (2016 ).

\textsuperscript{18} Id. at 1

\textsuperscript{19} AIR 1995 SC 1785

\textsuperscript{20} (2007) 96 DRJ 693

\textsuperscript{21} Id. at 9

\textsuperscript{22} Id. at 26

\textsuperscript{23} Karan Thapar, “It’s not sedition” The Hindu, June 17, 2017.

\textsuperscript{24} Id. at 20
nationalistic fervour as the orders passed in that case show there was no cognizance of some relevant documents from the defence side, and there was galore of presupposition with regard to the fact that connection with Naxalites and Maoists was considered to be against anti-nationalistic.\(^{25}\) Even eminent jurist and lawyer such as Ram Jethmalani has said that no case under the said provision can be made out.\(^{26}\)

The most recent in this line is the charging of people under the said clause for the proposed Citizenship Amendment Bill\(^{27}\). The biggest name in this is of Assamese scholar Hiren Gohain, a Sahitya Awardee, for inciting people against the said legislation and describing it as a tool of persecution against a certain section of the society. It is a heavy-handed response to stringent political criticism. Here the law is used in its much narrow sense, where there is neither any incitement to violence nor any sloganeering against the state.\(^{28}\)

The case of Aseem Trivedi\(^{29}\) also holds a lot of value as it reiterates what does not constitute sedition. In this case, where national emblems and constitution was allegedly disrespected, court gave a clear difference between strong criticism and disloyalty. This case also held that commenting on government policies and agencies, which in way incite violence would not come under the purview of sedition. But still, due to police and political negligence, he had to face acute pain of going through the process of judicial scrutiny of such severe law.

The list does not stop here. Arundhati Roy and S.A.D. Geelani for advocating for a plebiscite in Kashmir, Uday Kumar, a Kudunkulam activist raising his voice against the building of nuclear reactors in the vicinity of residential and agricultural lands, Divya Spandana, a Congress chief communicator for calling prime minister ‘chor’ (thief), Kamal Shukla, a Bastar based journalist for sharing cartoon which made derogatory references to the judiciary and the government, Akhil Gogoi, farmers’ right leader, allegedly instigated people to take up arms against the government, and... The list is innumerable.

According to the National Crime Records Bureau, there were a total of 112 cases of sedition across the country, out of which only eighteen completed the trials and out of that, only two were convicted.\(^{30}\) Take the case of Assam, where from 2016, the total no. of sedition cases filed are more than 245!\(^{31}\) Except few cases of terrorism, most of the sedition charges are politically motivated. They are slapped against ones who are protesting or dissenting against the government and even the police knows what will be the outcome of putting people behind the bars for such charges.\(^{32}\) Therefore it can very well be inferred that this law has gone misuse from all the places where the power to use it is present. And this prohibition of people from exercising


\(^{26}\) Ram Jethmalani, “No sedition case against doctor Binayak Sen” Bar, Bench & Litigation. (December 2010)

\(^{27}\) Citizenship (Amendment) Bill, 2016

\(^{28}\) “Sedition, once more” The Hindu (15 January 2019)

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\(^{29}\) Id. at 23

\(^{30}\) National Crime Records Bureau, ‘Crime in India report’ 2016

\(^{31}\) Written reply in the Assam assembly by parliamentary affairs minister Chandra Mohan Patowary

their rights will possess’ grave danger to democracy.

Escalating Cases and Fate of Clause

Senior advocate Sanjay Hegde said that the primary reason for the towering high acquittal rates and abysmally low conviction rate for sedition cases is that the law is misapplied. The question over the existence of clause of sedition is not new. During Constituent Assembly Debates, many leaders stood in front of the continuance of this law vehemently. Shri M. Ananthasayanam Ayyangar, Shri K M Munshi, etc. are some names which said that anarchy would follow if such a law is given in hands of the government. Various authors have given their perspective as to what should be the correct step ahead with regard to this draconian law.

In his book of Republic of Rhetoric, Abhinav Chandrachud covers a wide range of issues relating the political dissent and how that is curbed by the unrestricted power invested in the government of the time. But one of the main issues which his book has covered is the misuse of sedition for pity political gain by various governments. Another book in line Anushka Singh’s Sedition in Liberal Democracies. She talks about how this law is used as an effective mechanism for silencing dissent and criticism. She also talks about the quantum of punishment which this law takes with itself, the political nature of law, etc. From these set of books, what the writer is trying to make a point is that sedition in itself, even if it passes the test of constitutionality, could not pass the test of its rightful and appropriate use. It is a sword by which government cuts the dissenting voices of the criticizers and that’s the reason why it should be scrapped.

In one of his articles, T.S.R. Subramanian, former cabinet secretary, says that the law of sedition is extremely nuanced, and needs to be applied with caution. In a way, he was with the continuance of the law even in the time of its misuse. In another article, Soli J Sorabjee, Former Attorney General of India, has in clear and vehement term stated that its misuse should not be the grounds for its deletion. He stresses on the constitutionality of the offence and what should be done to curb the misuse of this very law.

In the year 2011, a private member Bill titled the Indian Penal Code (Amendment) Bill, was introduced in the Rajya Sabha by Mr D. Raja and in 201, a Bill titled The Indian Penal Code (Amendment) Bill was introduced by Mr Shashi Tharoor. Both of these bills tried to revive the discussion on the interpretation of the very definition of the term sedition.

The researcher, from all these aforementioned examples, wants to show how diverse are the views with regard to the

33 Abhishek Dey, “Sedition in India” The Wire (December 2017)
34 Constituent Assembly of India, 1st-2nd December 1948; Constituent Assembly Debates Official Report, Vol.VII, Reprinted by Lok Sabha Secretariat, New Delhi, Sixth Reprint 2014
35 Abhivan Chandrachud, “Republic of Rhetoric: Free Speech and the Constitution of India” (Penguin House 2016)
37 T.S.R. Subramanian, “Should the sedition law be scrapped?” The Hindu (June 2017)
38 Soli J Sorabjee, “Sedition law should stay, but its interpretation must be specific and not wide-ranging as in British era” Times of India (February 19, 2016)
39 The Indian Penal Code (Amendment) Bill, 2015
continuance of the sedition as a part of our penal legislation. But one thing is very clear, that there is no clear theory we can adopt with regard to those laws where the right of the individuals is to be balanced with the right of the sovereign to curb the former right. And here we are dealing with that right of individual which is sacrosanct to the very essence of democracy.

In *Shreya Singhal v. Union of India*, court said that ‘the liberty of speech and expression “is a cardinal value and of paramount importance.”’*40* The Universal Declaration of Human Rights, 1948, in its Preamble and Article 19 declared freedom of speech as a basic fundamental right.*41* John Stuart Mill also argued that a society can only sustain if free flow of ideas and expression is permitted there.

So, the question becomes more intriguing, as any unreasonable and inappropriate restriction to the right of free speech and expression will destroy the whole idea of any democratic setup, as this is the very core value of any republic. In this condition, the existence of sedition law becomes more vulnerable, as it has been a handy tool for those in power to suppress the lifeline of democracy, where this law has been used to declare nationals and anti-nationals, where this law leads to more dictatorial approach towards its people.*42*

But then it is important to go back into history and the constitutionality debate of this law. When the country got independence from clutches of the tyrannical rule of Britishers, the government did not part ways with such draconian law, although there was some dissent with respect to this in the constituent assembly. Then the courts had to consider the same question. Now here the courts applied the doctrine of constitutionality of law. It means that if an interpretation of the section is constructed in a way which would make section a constitutional one from being ultra vires, then the former interpretation is bound to apply.*43* In 1959, after plethora of cases sending out an uncertainty with respect to the constitutionality of the law, the case of *Ram Nandan v. State* held this law has become void with the advent of constitution of India, as it was against article 19(1). Then *Kedarnath* judgment came which also invoked the doctrine of constitutionality and thus narrowed the scope of this particular law. This case kept this law on a different pedestal, saying: ‘Government established by law is a visible representation of the state and the very existence of state will be in jeopardy if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the State.’*45*

But it was the same case, which upheld its constitutionality, also curtailed its scope in its application.*46* Also looking at other narrative we find that there is a fallacy in their argument. They denounce this law on

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*40* AIR 2015 SC 1523
*42* Ashwani Kumar, “Protecting the dissenters” *The Hindu* (September 2018)
*43* The Indian Penal Code 1860
*44* AIR 1959 All 101
*45* Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955
the basis of its misuse, which in a way concedes the fact that there exist instances where use may be warranted. It is also well settled that while drafting a particular interpretation, courts need to look at the context, purpose and history of the legislation too.

So the moot question which still remains is whether the law of sedition, notwithstanding the question of constitutionality, can have a place in a democracy like ours, where individual rights are cherished and freedom of dissent has been the tool from which this nation has taken birth from the hands of colonial powers, especially in a scenario where the use of law is itself in question, or more appropriately, has become an instrument of those in power to suppress the voice which are antithetical to the voice of power. In an environment where there is catena of narratives with opinions for, against and for a change in the section, with no dearth of nationalistic fervour of government attached to it on one hand and peoples fundamental right on the other side, the question of its existence has seen dialogues, debates, discussions, demonstrations, disruptions but no development as to its answer.

Conclusion

There has been galore of cases decided on the question of interpretation and applicability of sedition and these have made clear the scope and very limitations of the clause. According to the construction given by Kedarnath judgment, the section strikes a correct balance between the individual’s right to freedom of speech and expression and state’s right to maintain public order and secure its existence. But when it comes to the authorities, who are entrusted with the duty of applying and enforcing this very section according to the limitations laid down and contours drawn by plethora of cases, the misuse and mismanagement are evident on the face. What this research paper has strived for is to examine the validity of section in the wake of its ostensible misuse.

While examining the validity of argument of deletion of sedition law, and after reading the context, i.e., history, objective of law, intention of law, what role does the law play for today’s regime, horizon of the clause, the researcher has reached on to the conclusion that mere misuse of law cannot be a ground for any law deletion, especially when that is, even though narrow, scope of use of law. What should be focussed on is to how the authorities are going to implement and enforce these laws, as the reasons for the incorrect use of law are very far-fetched. Reasons are such as unawareness about the correct usage, political motivations, nationalistic fervours, personal gains, etc, are not easy to eliminate and will need an approach targeting the very root of these problems from the scratch. Needless to say, that the state must allow a culture where diversity of opinions, spectrums of views can find their way to flow freely, but one must make a distinction between the free flow of ideas and absolute flow of ideas. Absolute flow can even make the state pay a price for it. So, as the law is construed in a very narrow sense it does not restrain any rights of the people. It is only devoid of utmost caution while exercising it. If misuse stops, then fortunately, we may preserve the idea of the free society.

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BRAIN DRAIN- THE MELANCHOLY OF GLOBALISATION: NEED OF CONCRETE LAWS IN DEVELOPING NATIONS

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Abstract
Brain drain or the exodus of potent minds has been a constant issue confronted by nation-states, particularly during this era of globalisation. This exodus is mostly observed in developing countries, where citizens, majorl

yyouth desires better opportunities, higher recognition of work and more monetary value of mind and efforts than their native developing nation would provide. Consequently, an exodus of brains to developed nations is observed. This leads to drain of potent brains which could have contributed to the advancement of their native developing state. This issue undeniably exists in the era of globalisation, where easy international access is always explicitly available. However, due to this exodus, the developing nations consistently loose those efficacious minds that have been nurtured by the nation to bolster the economy of their native state. It is even more desolate that the developed nations use these minds to upkeep the pace of their progress, thereby denying the availability of these human resources to the developing nations. There is a clear need for laws to function as a regulatory mechanism for brain drain. This paper explicates the concept, throws light on the problems that developing, or less developed nations confront as a result of this, and suggests viable and concrete solutions to substantially curb the ill effects of the same by way of legislation.

Keywords: brain drain, exodus, globalisation, advancement, economy, developing nations, laws, regulatory mechanism.

Introduction
Brain drain is the term used to define the exodus of potent minds from their native developing nation to a more developed nation in search of better opportunities, higher recognition and greater monetary value of their mind and effort, substantially more than their native developing nation could provide.

On the supply side, skilled workers in the developing countries continue to be interested in emigration for a wide variety of reasons, which relate both to the opportunities that individuals are able to pursue abroad and to the changing structure of the global economy. Any adequate explanation of the phenomenon of brain drain, therefore, needs to consider both its objective and subjective dimensions. To further simplify, the “Brain” that the developing nation has nurtured by its resources is being “Drained off”, in order to contribute to a more developed nation, thereby denying its potential to its native developing nation. The most common form of migration is the migration of doctors and engineers from their native land, as science remains a universal constant and does not

48 Fazal Rizvi, Rethinking “Brain Drain” in the Era of Globalization, TAYLOR & FRANCIS ONLINE (Aug. 15, 2006),


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depend much on the kind of milieu that adapts it. However, this mobility is not solely restricted to the intelligentsia. The current form of brain drain also includes skilled workers and persons of any constructive attribute originally nurtured by their native nation, now contributing to another nation more developed than their native nation.

This inter-boundary displacement lays its roots in the desire of materialistic advancement that people of all classes predominantly have. Given the fact that the developing nations lack proper facilities that could provide luxuriant thrift, people choose to offer their services, skills or intelligence to a place that could gratify their desire of extravagance in economic materialism. The era of globalisation further creates conducive fluidity for this exodus. Given the fact that international relations outrageously occupy a significant aspect in today's world and national assets are more recognised as global assets, this departure of brains becomes an even more obvious choice.

**Statistical elucidation:**

The last two decades have witnessed an exceeding increase in the migration of quality brains from their native countries. Statistics clearly reveal that this has become an obvious choice for brains, and is increasing with increase in time.

Among Asian countries, India continues its trend of top the list of immigrant scientists and engineers to the US, says the latest report of National Centre for Science and Engineering statistics, adding that with 950000 Indians out of Asia's total of 2.96 million, this report of 2013 represented an 85 percent increase from 2003. Overall, the number of immigrant scientists and engineers in the US has risen to 18 percent from an earlier 16 percent and 57 percent of those were born in Asia. From 2003 to 2013, the number of scientists and engineers residing in the US rose from 21.6 million to 29 million. This 10-year increase included significant growth in the number of immigrant scientists and engineers, from 3.4 million to 5.2 million, said the report from the National Science Foundation’s National Centre for Science and Engineering Statistics (NCSES).

The statistics are daunting, and there is a pristine need to consider this issue not merely for elaborate contemplation, but also for substantive solutions.

**Consequential Implications of Brain Drain**

Brain drain results in the concrete denial of capable contributors to the national economy. In addition to this, the unemployment rates become higher in those countries where the transnational mobility is greater. This is because the potent people, who choose to work for another nation, refuse to create opportunities in their native nation, which is already struggling for economic gratification of population.

These opportunities which the drained off brains deny to their native state could be in the form of startups, which most of the business schools in developed countries sufficiently teach. These could also be in the form of services like that of management, engineering, science etc. which people offer to more developed nations than their native nation. This is

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mainly because brainy students choose well recognized Universities for their post graduation, which is offered by the developed nations. Most of these people do not return to their native nation. They rather choose to offer their hard earned attributes to a developed nation. As an apt example, most of the Chief Executive Officers of global I.T. giants are of Indian origin, but offer their skills, brain, talent and brilliance to foreign sectors. Mr. Sundar Pichai, the Chief Executive Officer of IT giant “Google” (U.S.) is from Indian origin. Similar examples include the Chief Executive officers of Microsoft, PepsiCo, Hotmail etc. All these are originally Indian brains, nurtured by the best institutes in India, but available ultimately to the “Developed West”.

This further defeats the intent of globalization. Intense debate has revolved around the term ‘globalization’, but it has now been accepted as shorthand for the intense and deepened cultural, economic, political and institutional interconnectedness and interdependency that has developed between corporations, communities and states, particularly since the 1970s. However, presently, if a broader spectrum is considered, all the acumen and brainpower of the globe is concentrated to a few industries of even fewer countries. This creates a virtual rule and explicit dominance of developed nations, inflicting detriment on the intent of globalization. Intent of globalization, which is essentially to bring fluidity, accessibility and flexibility among rigid boundaries of nations, gets defeated with this concentration of brains within restrained boundaries. Therefore, for the true core and spirit of globalization to outshine, it is of immense significance that this concentration of brains is diluted. To simplify, this means that the brains available to the native country should take the best of resources, from the best of institutions that are available at their access owing to globalization, but after imbibing all these resources, should serve their native land, so that the essence of globalization could succeed, and wholesome progress could persist. For this, there is a dire need, specifically in the developing nations for explicit laws, which is presently not very appreciably observed.

Legislations as the concrete solutions

If there has ever been a concrete and drastic change that has created a widely perpetual impact, it has been by way of legislations. It is substantially because legislations contribute in bringing a concrete transition that is always the need of a particular society in a specific period of time. Therefore, legislations have to be dynamic in nature, pertaining to the fact that diverse changes in societal structure over a period of time give rise to varied needs that are required to be addressed.

It is high time now, that the developing countries consider the effective instrument of law to eradicate and exterminate this issue of brain drain before it turns the solidity of developing nations’ progress into hollowness.

Following are the possible solutions that could be manifested by the instrument of law to bring about a materialistic transformation in the existing ill-effects of transnational mobility:

Tax based approach:

The most viable way of providing economic compensation to a country is by way of imposing taxes. In the United States, a similar approach is used by the State to prevent its brain from draining off to other countries. The tax which U.S. imposes, however, is a credit tax, which means that the tax remains in the form of credit. A bit different approach can be viably used by the developing countries, where considering the dire need of economic growth, a non-credit tax could be imposed on citizens that contribute to the development another nation. It should be noted, that this tax is not analogous to the income tax. Income tax has to be paid by everyone, be it a non-resident citizen, or a resident one, if income exceeds a particular amount. In addition to this, there should be a tax imposed on the “drained off brains”, as the native country invests a lot of resources to nurture the brains that are eventually gripped by transnational mobility. However, there should be some criterions to identify whether the migrated ones are “brainy”, or just a result of salubrious international relations.

A first step in assessing this proposal is to understand to whom it applies. While the idea of “brain drain” is applied in many circumstances (such as, for example, graduates of universities or colleges in Philadelphia leaving the city, or better students in Kansas leaving the state to attend an out-of-state university or leaving after graduating from an in-state university), this proposal focuses on people from developing or least developed countries who meet the following conditions:

1) They have received higher education or skills training;
2) This training or education was provided largely or completely at public expense, either in the home country or abroad; and
3) The person in question has left the country to work in the developed world within a set number of years after completing education or training (perhaps five years, maybe as many as ten, depending on the nature of the training and education and the needs of the home country).

To understand the nature of the proposal, it is important to see who is not included in this list. Those who do not fall under the proposal include at least the following people:

1) People from middle-income or wealthy countries, regardless of whether they meet the other criteria;
2) People who self-finance their education, as opposed to those who are educated at public expense;
3) People whose education is financed via first-world government or university exchange programs.51

Taxing this specified stratum of people will make sure that the effect of brain drain is compensated without causing detriment to the liberty of individuals who decide to migrate to a more developed nation than their native nation.

Mandating the return to native states via legislation:
If individual liberty is considered, transnational mobility does not seem to be

inflicting any detriment. However, reasonable restraints can be imposed in order to maintain the pace of economic advancement of the native nation. These proposed restraints include the mandatory return to the native nation after completing higher education, as most of the “drained off brains” are ones that continue to thrive in more developed nations after their education, denying their availability to their native state. These are the ones that cause the greatest harm to the economy and materialistic advancement of the native state. The report of National Centre for Science and Engineering Statistics found that immigrant scientists and engineers were more likely to have earned post-baccalaureate degrees than their US-born counterparts. In 2013, 32 percent of immigrant scientists reported their highest degree was a master’s (compared to 29 percent of US-born counterparts) and 9 percent reported it was a doctorate (compared to 4 percent of US-born counterparts).\(^{52}\) This evidently proves that the desire to earn a master’s degree and stay in a developed country is mostly materialized by majority of exodus. Hence, the ones who attain a degree from a developed country should be bound by way of contract before entering into the visa formalities. The terms of the contract should include the post completion of degree and a practice of a specified time, the pupil should return to homeland and contribute in the advancement of their state.

This would further help nation-states to materialize the intent of globalization to its fullest, thereby preventing the restriction of brains to specific kind of states that generate monetary value in exchange of priceless brains that could voluminously contribute to the progress of their native state.

Conclusion

The real essence of globalization rests in the fact that it provides fluidity and accessibility of resources across transnational boundaries, without concentrating these within few specified nations. However, with factors such as brain drain, the serene intent of globalization is explicitly defeated, because the best of brains are available as a concentrated cluster within particularized outlines. The instrument of law is thereby assistive as a regulatory mechanism, in order to up thrust the advancement of developing native nations which brilliant minds leave, for sake of individual materialistic advancement. Therefore, concrete solutions taking into account the dynamic nature of law are pristinely viable to curb the ill-effects of transnational mobility, and to compensate for the “drained off brains”.

\(^{52}\) A. Sulthan, supra note 2.
INTELLECTUAL PROPERTY RIGHTS AND SPORTS

By Agrim Sharma
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With the commercialization of sports, the option of taking up sports as a career seems to be a much more realistic one than what it was a few decades back. Earlier, playing sport was considered to be a mere hobby and nothing more. Nowadays women’s are being treated at same level as men in sports. However, this is not a case anymore. With the amount of money involved in this field, the amount of name and fame attached to it, one may consider unconventional to take up sports as a career. Due to governmental support & initiatives parents are also encouraging towards their children, pursuing sports as a means of livelihood.

The various rights available in sports besides contractual rights to sportspersons and clubs can be classified as Copyrights, Patents, and Trade Mark and Design rights. A sportsperson can also sign a contract to endorse a product, using his goodwill or publicity through image rights. Thus, it can be said that in the arena of sports, the most significant IPR’S are the trademarks and copyrights, which are recognizable through various types of branding of sports events or teams by various logos and identification markings, which in turn attract consumer attention. IPR’s are acquired by various means. The use of Trade Marks in a particular class is acquired through registering the mark, logo, mascot etc. with the trademark registry. Copyright in a work is acquired as soon an original work is created within the terms of the Copyright Act. The use of these Trademarks and Copyrights can be assigned to another party for use in relation to certain articles and certain territories. While the assignment of the use of a Trademark takes place under Section 37, the assignment of a Copyright is governed by Section 19 of the Copyright Act. Trademarks have become a huge source of revenue in sports. Another form of Intellectual property right, emerging from sports events is a database rights.

The Delhi High Court in the case of Star India Private Limited v. Piyush Aggarwal recognized the importance of rights in live ball by ball commentary and held, while the right to disseminate news is available to all, the right of ball by ball is not. Commentary contemporaneously is not. Money is also made by selling of broadcasting rights to companies. In the Indian Premier League the right to broadcast was given to Sony Entertainment Television Network. The official broadcaster also acquires a license to use the trademark logo of various teams and sponsors participating in the event without any infringement. Besides, the Official broadcaster also acquires a copyright in his recordings for commercial use, subject to certain limitations.

Any confidential business information, that provides an enterprise, a competitive edge may be considered as a trade secret. In sports, where technology plays a significant role, like in the case of car racing or where design is of great importance and in cases of boat races, design or performance is of great relevance and can give a significant advantage to a team. It can be protected under trade secrets. Therefore be said with certainty that majority of the commercial rights that in sports fall within the ambit of Intellectual property right laws.

Sponsorship can be viewed as a part of the profit maximizing behavior of a firm. It is a very significant revenue generating practice.
for professional sports organization. For sports events there are two kinds of sponsors, the title sponsors and the main sponsors. A sporting per se is not protected under the Indian Copyright Act since it involves live events, where there is no fixed script and the result is not determined. Sponsorship & Endorsements contracts are protected in India under the principle of unfair trade practices. Any person falsely representing himself as a sponsor or misleading the public by endorsing a product, which he is not contractually authorized to, can be held liable. Besides the protection accorded under the Competition Act, protection could also be accorded in the form of trademark infringement, passing-off and copyright infringements.

CASE STUDY

Mahendra Singh Dhoni is the first and only Indian athlete to make it to the Forbes list of 100 world’s highest paid athletes. With earnings of USD 30 million and endorsements worth USD 26 million , only 4 million came as salary & prize money. This figure includes earnings from other sources like appearance fees, and licensing and endorsement fees. He owns a racing team, Football team and Hockey team. According to a report Dhoni endorses over 20 brands, charging approximately Rs. 13 Crore per brand. He has signed bat sponsorship deals with Spartan bats and Amity University. Dhoni is the most marketable player and he was also the most expensive player in the first IPL season.

Sports Merchandising

It is different from sports endorsements. Sports endorsements, by endorsing a product, lend his name to the product. This product may then have an insignia of the sportsperson. It is a global phenomenon that fans want to be associated with the teams and individuals they support. Replicas of T-shirts, caps and jerseys are sold to fans as official merchandise of the club. The insignia of the club can be registered as a trademark under the trademarks act.

Sponsorship

Sponsorship can be viewed as a part of profit maximizing behavior of a firm. The primary motive is increased sales. A large portion of sponsorship industry is sports oriented. Globally the sports sponsorship industry accounts for two-thirds of all the sponsorship activities. Sponsorship is a very significant revenue gathering practice for professional sports organizations. For a sports event there are two kinds of sponsors, the title sponsor and the main sponsor, whose name is associated with the particular sports or sporting event like ‘Pepsi’ IPL; and the others are secondary sponsors. They may be the official suppliers of team jerseys like Nike in the case of Indian Cricket team.

Brand Protection

Sports clubs, players and major sports event organizers spend a considerable amount of time and effort to make a brand name. In India, one of the legislations that protect sports branding is the Trademark Act, 1999. The act provides registration and a better protection of trade mark for goods and services and for prevention of the use of fraudulent marks. It prohibits the use of identical or deceptively similar trade marks to a registered trade mark on the same or closely related goods of a particular trade mark class, set out in Schedule IV of the trademarks Act, 1999. Thus, if a person tries to use a registered mark of any of the IPL franchise, or the mark of the 2010 Commonwealth games in Delhi, he could be preceded under Chapter 12 of the Act.
Ambush marketing

The term was coined by marketing guru Jerry C Welsh. It is when an unauthorized entity, having not acquired any license or a right from the event organizers, markets itself in such a way that it gives the general perception to the public at large, that the entity is associated with the event. This permits the unauthorized entity to suggest its involvement in a sporting event at the cost of official sponsor. Therefore, ambush marketing is also referred to as ‘parasite marketing’. This is because like a parasite the host does not receive any advantage from such kind of advertising, while the entity practicing ambush marketing gains from the wrongful association with event.

Brand Protection

The Copyright Act, 1957 forms an essential part of protection of sports brands. It protects the exclusive right of creator. Besides a copyright existing in logos and mascots of the teams, clubs and events, there exists a copyright in sport photographs, magazines, books, recorded programs and computer games. Leagues and clubs try to exploit the copyrighted material in order to enhance their brand image and earn revenue. Section 52 of the Copyright Act, has laid down what use of a copyright work is allowed, without creators permission.

The other legislations that could potentially provide protection to a sports brand would be the Monopolies and Restrictive Trade Practice, 1969 under Section 36A, which deals with unfair trade practices, protection of sporting designs under the Designs Act, 2000 & Consumer Protection Act, 1986 under ‘spurious goods and services’.

In the case of majority sporting events, it is generally seen around the world that a special act is legislated in order to protect the sporting event. This becomes more important since sporting events like the Olympics, Commonwealth Games, Asian Games, World Championships take place for a short period of time and considerable resources are invested in developing such brand. The legislations such as the Trademarks Act, Copyright Act, Patents Act and Design Act had been enacted in keeping in mind an industrial & commercial prospective. This is particularly true for trademark and design act where registration is required in different classes in order to protect goods, services and designs in that class. There are times when logos, mascots and catch phases are routinely modified or new ones are developed in order to further enhance the brand value of the game. In such cases, it becomes difficult to get registration in time under the ordinary process of the Acts. The second impediment that arises during these sporting events, which the legislature is unable to protect, is the protection afforded generic names, the protection of which cannot be sought under any Intellectual property rights laws. These phrases are gold, silver, Delhi, 2010.

CONCLUSION

Sports are essentially a social activity. It is popular and people watch it because they feel that they are associated with various sports due to their regional or national allegiance or other interests. It is only due to support of people that sports having become commercially exploitable and generates revenue. Hence, one can conclude that sports can be perceived as a viable and lucrative career option for many in India today.
There are several incentives attached towards taking up sports as a career. First of all, if the athlete represents the nation in some international event, and wins a medal for the nation, he/she is entitled to get several benefits from the government of India like cash money & job reservations. Women, now days are being treated at the same level as men in sports. The BCCI, which at one point, did not fund the women cricketers, has now taken women’s cricket under its umbrella, even though women cricketers are paid much lower than their male counterparts.

If we look at the incentives awarded by the advent of the new leagues, sky is the limit. With the advent of Indian Premier League, the Indian Super League, The Pro Kabaddi, The Indian Badminton League etc.

The amount of salaries being given to the players in various franchises is humongous. Not only are these athletes earning well by way of salaries, but also through endorsements and advisements. Those players, who are adjudged to be the best batsman or best goalkeeper or best player of the series, are entitled to other cash rewards or rewards in kind for example cars and bikes.

The Sports Ministry has also announced that all those who have been participants in the Olympic Games, will be directly recruited as coaches after their retirement. Talking of the post retirement plans, sportspersons could either take up the jobs offered by the government, become coaches or become sports analysts or commentators on various sports channels.

They could also be involved in sports management and marketing after they have retired from active sports. The contributions of NGO’s like Mittal Champions trust & Olympic Gold Quest are also very motivating for players to perform to the best of their abilities. It is not restricted to the players here; there is also a lot of money involved in the profession of sports consultancy firms. These firms carry out the management and representation of the sportspersons, including management of their endorsements.

Hence, one can conclude that sports can be perceived as a viable and a lucrative career option for many in India today.
HEAVY ENTRY BARRIERS, A BOON OR A BANE? AN EXAMINATION OF THE COMPETITION LAW POLICY IN INDIA IN LIGHT OF THE NATIONAL COMPETITION POLICY, 2011

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Abstract
A strong need for the creation of an inclusive and all-encompassing competition policy has been expressed by a multitude of economists and scholars around the world in the field of competition law. Similar need has been expressed by the law makers in India and, repeated attempts to implement such a policy have been taken from time to time, however, to no avail. The National Competition Draft Policy, 2011 is the culmination of the combined efforts of the numerous working committees and boards set up to reinforce the regulations and tailor them to suit the changing dynamics of Indian Markets.

This paper aims to examine and analyse the actions proposed in the said draft policy which has not yet seen the light of the day. The authors also study the application of the policy to modern day market which has witnessed a steady influx of technological based firms. The proposal of removal of heavy entry barriers shall also be discussed with emphasis on the possible factors the lead to the development of such entry barriers

Keywords: Competition, Anti – competitive agreements, national competition policy, Strategic barrier, economies of scale, economies of scope, barriers to entry.

INTRODUCTION
The term ‘competition’ stands undefined as under the Indian Competition Act, 2002 (‘Act’). However, this law aims at keeping a check on the different kinds of practices that are undertaken by the institutions in the market. The Act prohibits trade practices that are detrimental to the competition in India. The Government had rearranged for the Mahalanobis Committee of Distribution of Incomes and levels of living which submitted its report in 1960 highlighting growing income inequalities in India in the post-independence period. This in turn led to the formation of the Monopolies Inquiry Commission which gave its report in the year of 1965. On placing reliance on the same, The Monopolies and Restrictive Trade Practices (‘MRTP’) Act, 1969 was brought into force. This Act was designed in a manner as to full-fill the objective of both thwarting the intensity of private undertakings and safeguarding the interest of public in terms of various economic activities. With the introduction of various Economic concepts like liberalization and different kinds of reforms for the purpose of meeting the demands of globalization, another committee called the Raghavan Committee was formed in the year 1999. This committee was formed for the purpose of improving and understanding the needs of the growing Competition in India. The Raghavan Committee was of the understanding that the MRTP Act provided for the regulation of certain kinds of anti-competitive practices which was not the

http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=ebaae57c-b2aa-43b7-a9f- ac02d0a35b2&txtsearch=Subject:%20Commercial  
case in various other countries. The MRTP Act seemed highly insufficient in terms of promoting the competition in the market. Also, the existence of the law for the past 30 years had been considered of having a strong binding value. However, these interpretations were considered as insufficient by various Judicial pronouncements. With its report, the Committee implied the phasing out of the old MRTP Act and the introduction of a modern Competition Law.

The Indian Competition Law had been enacted by the Indian Parliament in the Month of December, 2002 and obtained the assent of the President on January 13, 2003. The Act, Provides for the following:

- Prevention of such Trade Practices that have an adverse effect on Competition;
- Promotion and Sustainability of Competition in markets;
- Protection of interests of the Consumers;
- Ensuring the freedom of Trade that is being carried on by various participants in India.

LITERATURE REVIEW

INCEPTION OF THE COMPETITION LAW REGIME IN INDIA

Competition Act, 2002 was enacted to replace the archaic Monopolies and Restrictive Trade Practices Act, 1969 (Hereinafter, ‘MRTP Act, 2002’). in light of the economic reforms adopted by India in 1991. Both Competition Act, 2002 and the MRTP Act, 1969 had been in place with concurrent jurisdictions until September 1st, 2009 on which date, the MRTP Act, 1969 was finally repealed and the MRTP Commission was abolished vide Section 66 of the Competition Act, 2002. While, the MRTP Act, 1969 aimed at imposition of penalty and curbing restrictive practices, Competition Act, 2002 was instituted to enable regulation and advocacy in addition to restricting anti-competitive practices in the market. These being the primary differences between the two acts, numerous attempts have been made to modify the existing competition act in India into an inclusive Competition policy.

EFFORTS UNDERTAKEN TO CREATE A CODIFIED COMPETITION POLICY

Competition Act, 2002, despite being formulated in 2002 and signed into force in 2003 has been enforced in various phases. Various committees have been set up to ensure the creation of a National Competition Policy (NCP). The first attempt has been in the form of the creation of a Working Group under the able guidance of Mr. Vinod Dhall, a member of the Competition Commission of India. The recommendations of this working group included among various others, a need for improvement of competition in domestic markets, synergy between the various sectors and framing of policies taking into view the best prevalent international practices. While, the entire list of recommendations has not been brought into force, a good number of recommendations have been included in the 11th Five Year plan. Pursuant to this, the Competition Commission of India was established in 2009, the Competition Act, 2002 was fully brought into force and the MRTP Act was finally repealed. The Competition

Draft National Competition Policy, 2011, Ministry of Corporate Affairs (June 21st, 09:43 P.M.).
Commission of India (Hereinafter CCI) was also finally set up in 2009. Since, the year 2009 numerous cases have been taken up by the CCI and the Competition Appellate Tribunal. Issues such as anti-competitive practices, tying agreements, formation of cartels etc have been taken up by these bodies.  

ANALYSIS

BARRIERS TO ENTRY UNDER THE COMPETITION ACT, 2002

There are certain regulations which are created upon the firms by virtue of government intervention or have been created by the firms. The role of entry barriers in the market is to ensure that there is minimum entry or exit from the market along with ensuring that the practices undertaken by these players are fair. In order to maintain the spirit of competition, these barriers ensure that the market pricing of the commodities and those imposed by the players are fair. In order to understand the durability of the firm in the market, the competition agencies examine the barriers and their possible effects on the timely entry of the firms in the market. It is also necessary for the new entry to be powerful enough to defeat the existing firm who is allegedly powerful. Therefore, this analysis must assess the likelihood in the light of cumulative impact of all such market barriers. There are three kinds of barriers; namely, structural, strategic and regulatory. These barriers are discussed as follows:

a) **Structural barriers to entry**- these barriers are a result of various supply factors such as the economies of scale, sunk costs, scarce inputs and various demand factors of the firm. Sunk costs are referred to the amount of money which spent in case of investments which pose as a necessity for the purposes of entry in the market. These investments act as a risk factor as it does not guarantee a profitable entry into the market. These costs include manufacturing facilities, research and development costs, costs in relation to research on the various consumers of the market. Another factor involved is the **Economies of scale** which takes place in situations when the per unit of cost of product declines with the increase in production of the commodity. This acts as a barrier by compelling fresh entries to either compete on a large scale by making small scale competitions unattractive. This, puts the investment at a high risk. In addition to this, **Economies of scope** is another factor which acts as a barrier as it amounts to a long-term reduction in the costs due to supply and distribution of multiple products. If this holds a significant weight, then a prosperous entry in a market might require a successful entry in several other market which will require higher investments to enter. Lastly, the **Reputation of firm** is essential for differentiated consumer products and is required for industrial products. The consumers might be accustomed to a certain product. Therefore, in order to make them purchase the new products extravagant marketing strategies is required to be undertaken by the new entrant. This calls for excessive investment.

b) **Strategic barriers to the entries**- these barriers are formulated for the purpose of imposing new sunk costs by depending


60 Abir Roy & Jayant Kumar, *Competition Law in India 220* (2nd ed. 2018).
upon the ability of the new entrant to cause delay in the ability of a new competitor to eliminate a material rise in the price. This behavior can occur pre- or post-entry into the market.\(^{61}\) However, this behavior does not imply an abuse of dominance and is an evidence to a pro-competitive attitude. Thus, it is necessary to understand whether this conduct amounts to an abuse of dominance in the market. Entry can be deterred by a significant player in the market by threatening to increase the output as a response to the entry made by the new player thereby reducing the prices and making the entry unprofitable for the new player. The incumbent’s existing contracts in the market will reduce the ability of the fresher to enter into the market by limiting the access to various supplies. In cases such an incumbent is vertically integrated, the access to scarce inputs or distributed systems to which the fresherers shall have a difficulty in gaining access. Thus, The incumbent holds the power to block such an entry by the means of denying access.\(^{62}\) Situations like competing of the incumbent against a new entry also deters the entry.

c) **Regulatory barriers to entry** - government and administrative regulations may restrict the number of firms, licensing requirements, IP rights and materializes into a statutory monopoly. The government regulations focus on factors that affect the public such as health and safety, environmental protection, urban planning. Thus, it is important for market players to conduct themselves in a manner that adheres to these goals as focused upon by the government. These circumstances may act as a restriction to enter the market. These regulatory standards do not act like a hinderance to entry in cases where it is uniformly applicable to all competitors and do not affect the costs for new entries in the market. Nonetheless, the costs of complying with these regulations may trigger a hike in sunk costs and economies of scale. **Licenses** are restricted in various sectors due to the availability of sufficient amount of resources. Telecom and air transport services are a classic example of the same. **Intellectual property rights** (‘IPR’) suggest a dominant position in the market when such commodity which is protected by an IPR corresponds to relevant technology or commodity and thus creates a legal monopoly. Therefore, in case where the product gains popularity as compare to the product protected under an IPR, it shall become highly unlikely that the IPR holder will still continue to hold a dominant position in the market. However, having a protection under the IPR regime may pose as an advantage to the same.

The three categories as mentioned above act as a strong deterrent. Along with this, the **power of a buyer**, **significance of the buyer to the seller**, **buying habits and procedures** act as a supplement in causing hinderance for new entries to the market.

**THE 2011 MCA DRAFT**

Competition policy has been defined by both the apex organisations regulating trade and competition at the international level. The definitions proposed by both, the WTO and the World Bank can be summarised as the complete extent of measures, rules and regulations adopted by any government to regulate enterprises in the markets within

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\(^{62}\) Supra footnote 3, Pg 222.
the confines of its economy. In the light of issues with respect to heavy entry barriers, the Ministry of Corporate Affairs decided to introduce the draft of 2011. An ideal policy ought to include policies to enhance and impose reasonable restrictions to curb anti-competitive measures.

The National Competition Policy was proposed with transparency, good governance and the creation of an inclusive national market transcending the invisible barriers which were a result of numerous policies in place at the state level. In addition to these, the competition policy has also been aimed at preservation of competition process, protection and encouragement of competition in the domestic market with a view to enhance competence. The premise on which a strong need for a national policy has been proposed is that, fragmented markets act as impediments to competition and this calls for a single national market.

Some of the measures already undertaken and reiterated in the Draft National Competition policy have been specified in Annexure I to the Draft NCP. Consumer Protection has been attributed utmost priority. Important measures include, creation of a single national accreditation and standards body across India so as to ensure uniformity. A National Consumer Protection Authority was suggested to be set up in addition to creation of awareness campaigns. It also encouraged investment in the private sector and removal of differences between the state and national policies pertaining to competition. It sought to make the competition law regulations uniform throughout the nation.

The draft NCP also mentions the parameters for undertaking competition assessment. These include: Limits on the number or range of suppliers through various methods such as granting of exclusive rights to a supplier, establishment of licenses, permits or other modes and processes of authorisation, creation of geographical barriers among others.

CONCLUSION

The Indian Competition Act provides for the regulation of competition in the Indian market and to prevent such practices that promote and healthy competition in the market and not have an adverse effect on the competition in the market. The Act prioritizes the interest of the consumers and ensures that there is a freedom to trade in the market. However, there are certain businesses that wish to keep the competition barriers high and undertake measures like paying large sum of money for the purposes of advertisement and marketing. The draft of 2011 seeks to rectify such issues by analysing the mechanism for assessing such heavy entry barriers for the new entries to the market. The 3rd Annexure as provided under the draft bill provides for the various modes of assessment of such barriers and has not yet been notified by the legislation. The question arises as to whether removal or reduction of these entry barriers would be

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63 Draft National Competition Policy, 2011, Ministry of Corporate Affairs (June 21st, 09:43 P.M.), gh';
feasible for the Indian economy. According to the authors, it would be feasible as it would not only promote the growth of the Indian economy, but also ensure a definite growth to the new players by giving them a chance to introduce new inventions that benefit our country. Being a developing economy, India requires new inventions in order to ensure a positive growth. As we say ‘practice makes a man perfect’ allowing new entries would also mean that there would be new business strategies that can be implemented thereby improving the skills of the existing businesses in the market and allowing them to flourish smoothly.

SUGGESTIONS
The authors seek to provide the following suggestions that could be implemented for ensuring a fair practice for the new entries.

a) The costs undertaken by marketing companies for advertising purposes can be reduced;
b) The concept of indirect penetration should be included in the draft policy of 2011 for the purposes of assessment;
c) The costs of compliance with regulatory norms should be reduced;
d) The procedure to obtain licenses and permits should be made less cumbersome.

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LAW AND RELIGION: SABARIMALA TEMPLE

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Abstract:
The right to freedom of religion of both individuals and groups is an intrinsic feature of a liberal democracy. The Constitution of India recognizes this freedom under Articles 25 and 26. Article 25 gives the citizens the right to freely practice, profess and propagate any religion subject to common exceptions of public order, morality and health, and also, crucially to, to the guarantee of other fundamental rights. Article 25(2)(b) creates a further exception to this right as it accords the state the power to make a legislation in the interests of social welfare and reform, throwing open all Hindu religious institutions to all classes and sections of Hindus. On the other hand, Article 26 accords to every religious denomination the right to establish and maintain institutions for religious and charitable purposes subject to similar exceptions as mentioned above. But here, in Indian Lawyers Association V. State of Kerala which focuses on Sabrimala Temple’s prohibition of women aged 10-50 years from entering the temple claiming that allowing young women to enter the temple would affect their idol’s “celibacy” and “austerity” witnesses a series of conflicting claims involving the temple’s right to decide for how its religious affairs ought to be managed, the rights of the community of devotees who feel that the ban on women is a religious custom which should be practiced and moreover, the rights of those women seeking to assert their freedom to pray and above all being treated as equals under the Constitution.

Introduction:
In our society for centuries women have had to struggle for an equal representation in public spaces. The struggle has not only been about representation but an ideological battle with the profound rooted norms and customs in patriarchal society that view women in a place of subordination. Whether it is the Shah Bano case, a case that invalidated the practice of instant triple talaq and laid the ground for protection of rights of Muslim women, or the entry of women inside Haji Ali Dargah in Mumbai, we have seen that the struggle has been an ongoing one and reformatory in its approach. The recent hearing by the constitution bench of the Supreme Court on July 27, 2018 on the entry of women to the Sabarimala Temple in Kerala is another long standing fight against the patriarchal dogma of the religious order which does not allow the entry of women into the temple.

The Ayyappa temple in Sabarimala region in Kerala has been in the news for its controversial provision of denying entry to women of menstruating age (ten to fifty years). Sabarimala Sree Dharma Sastha Temple is one of the most famous Hindu temples in India, located in the Pathanamthitta district of Kerala. The temple is managed by the Travancore Devaswom Board. Main stakeholders of Sabarimala Temple are Travancore Devasom Board, Tantri (head priest) family, Pandalam Royal Family, Ayyappa Seva Sangam etc. The shrine at Sabarimala is an ancient temple of Ayyappan also

known as Sasta and Dharmasasta. Unlike other Hindu temples in the state, Sabarimala Sree Dharma Sastha temple is not open the year-round. It opens for devotees to offer prayers for the first five days of every month in the Malayalam calendar, as well as during the annual ‘mandalam’ and ‘makaravilakku’ festivals between mid-November to mid-January. It is considered as one of the biggest pilgrimages in the world, with millions of people offering prayers at the temple chiefly from the five south Indian states. Most of the pilgrims arrive at the temple during the busy ‘mandalam’ and ‘makaravilakku’ festivals, after they undertake a rigorous 41-day vratham, or a vow of abstinence. During this 41-day period, devotees are required to wear only black or deep blue attire, address each other as ‘swami’, perform daily pujas, abstain from non-vegetarian food, liquor and sex and not wear footwear. However, it is not mandatory for everyone to observe the ‘vratham’ to offer prayers at the temple. The prohibition to temple entry for women can be traced in the legend that the deity of the temple Lord Ayyapa was a ‘Naishtika Brahmachari’ (who followed celibacy), and as per the supporters of the temple ban, women of menstruating age are regarded as “not pure” to enter the temple as that would disturb the celibacy of the deity. In the past three decades, this issue has drawn resistance and protests from diverse sections of society and has given rise to a legal dispute. The chronology of the long-standing petition in the Supreme Court on the ban of women entering temple can be traced back to 1991.

Background:
In 1991, this ban to temple entry for women was challenged before the Kerala High Court in S. Mahendran Vs The Secretary, Travancore. Kerala High court ruled in favor of the prohibition of women entering the temple and claimed that these restrictions have existed since time immemorial and not discriminatory to the Constitution. This order of the High Court was implemented and followed for the next 15 years. In 2006, the ban was challenged by the Public Interest Litigation filed by the Young Lawyers Association with the Supreme Court, claiming that rule 3(b) of Kerala Hindu places of Public worship (Authorisation of entry) Rules 1965 that states, “women who are not by custom and usage allowed to enter a place of public worship shall not be entitled to enter or offer worship in any place of public worship” is violation of constitutional ideals of equality, non-discrimination and religious freedom. On April 25 2016, the representative advocate of the Devaswom, K.K Venugopal said: “There is a reasonable classification by which certain classes of women are excluded”. The Supreme Court asserted if the statement was implying that menstruation was associated with purity of women. The case was then referred to the Constitution Bench by the Supreme Court.

The Supreme Court Verdict:
The Supreme Court verdict on September 28, 2018, paved the way for the entry of women of all ages into the Ayyappa temple at Sabarimala in Kerala. The five-judge constitution bench headed by Chief Justice Dipak Misra, in its 4:1 verdict, said banning the entry of women into the shrine is gender discrimination and the practice violates the rights of Hindu women. It said religion is a way of life basically to link life with divinity. The court observed that it can’t be oblivious to the fact of the case that a class of women is disallowed due to physiological reasons (menstruation).
The CJI said devotion cannot be subjected to discrimination and patriarchal notion cannot be allowed to trump equality in devotion. While Justices R F Nariman and D Y Chandrachud concurred with the CJI and Justice A M Khanwilkar, Justice Indu Malhotra gave a dissenting verdict.

Ironically, in the 4-1 verdict on Indian Young Lawyers Association & Others vs The State of Kerala & Others, the only dissenting vote was of the sole woman judge on the bench: Justice Indu Malhotra. Justice Malhotra, in her dissenting judgement, said that issues which have deep religious connotation should not be tinkered with to maintain a secular atmosphere in the country.

However, the Supreme Court verdict that the Sabarimala temple must be thrown open to women of all ages – should be seen as another victory for the cause of gender equality.

Justice DY Chandrachud termed the custom as a form of “untouchability” which cannot be allowed under the Constitution. “Article 17 certainly applies to untouchability practices in relation to lower castes, but it will also apply to the systemic humiliation, exclusion and subjugation faced by women.”

“Prejudice against women based on notions of impurity and pollution associated with menstruation is a symbol of exclusion. The social exclusion of women based on menstrual status is a form of untouchability which is an anathema to constitutional values.”

Views supporting the entry of women:

- Preventing women from entering the places of worship goes against Articles 14, 15, 19, and 25 of the Indian constitution, which deal with the right to equality, the right against discrimination based on gender, freedom of movement and freedom of religion.
- The excluded women claim that barring them access to the shrine violated their fundamental right under Article 25(1) to freely practice their religion.
- Right to manage its own religious affairs under Article 26(1) cannot “override the right to practice religion itself”, as Article 26 cannot be seen to overrule the right to practice one’s religion as guaranteed under the Constitution of India.
- Restricting the entry of women into places of worship is one of the ways of imposing patriarchy. Often the restrictions are based on patriarchy and not religion.
- Banning entry to the temple is discriminatory since it subverts the idea of everyone being equal to God.
- In April 2016, the Shani Shingnapur temple, which had prohibited women from entering its core area for over 400 years, allowed women to pray inside the temple following the court’s orders.

Views of those opposing the entry of women:

- Women are banned from entering the temples to preserve ‘purity’. The reason cited in Sabarimala case is that women during their menstruation period are not supposed to enter places of worship.
- Referring to the presiding deity Lord Ayyappa as a Naishtika Bramhachari, many point out that it is the celibate nature of the deity that forms the basis of the practice and not misogyny.

• Sabarimala was a separate religious cult with its own rules.
• Article 15 of the Constitution does not apply to religious institutions. Article 15(2) provides citizens with the right to access to places such as hotels, shops and so on but nowhere does it mention public temples.
• Some of those who oppose women entry argue that their actions are protected by Article 25(1).
• Article 25(2) pertains to only secular aspects and it is only pertaining to social issues, not gender or religious-based issues.

Protests after the Sabrimala verdict:
The dialectical materialism propounded by the Marxist-led Government of Kerala doesn’t seem to cut the ice with the die-hard spiritualism of the women devotees, or at least a sizable chunk of them. Many started campaigns like ‘Ready to wait’.

The SC verdict led to protests on 17 October 2018 when the temple was opened for the first time since the Supreme Court verdict came.

Even though some women of menstruating age tried to enter the temple they were sent back by Police after the protests turned violent.

Many women journalists were assaulted by the protestors and Police had to resort to lathi-charge to disperse them.

Sabarimala Karma Samithi, a relatively obscure organisation called for a state-wide Harthal. BJP-led NDA Kerala Unit and Shiv Sena Kerala Unit supported the Harthal.

Pandalam Palace directed the temple high priest (Tantri) to close the sanctum if any young women enter temple premises. The Tanri concurs with this view.

Kerala government must quickly find the golden mean between law and belief. Creating history, two women – Bindu (42) and Kanakadurga (44) – dressed in black attire entered Sabarimala early morning on 02-01-2019. They reached Sannidhanam under the protection of police officers, a few of them in mufti.

Conclusion:
In a country like India, society and religion are inseparable from each other. The Sabarimala case has brought this idea to the fore, with a controversy between religion Vs Fundamental Rights. The legal intricacies involved in the case are complex and multi-layered. The petitioners before the Supreme Court have argued that these reasons are discriminatory against women and go against the text and spirit of the Constitution. The defenders retorted back saying that the constitution grants to every religious denomination the right to determine its own rules. The debate here lies in the fact that what it means to be a secular state is to grant autonomy and freedom to the denominations, from state interference.

While, on the other side, the same religion is seen as a public matter which strictly determines an individual’s social and moral standing in the community. This critical domain cannot be left untouched by constitutional ideals. If we look at our history, the Dalit movements for civil rights in the 20th century had the issue of temple entry at its centre. This gained massive prominence since in a religious society, temple bans for “untouchables” were not solely about denying them the right to worship but it was a matter of subordination and exclusion. It was thus, crucial to address it to acquire equality and membership of the community. As BR Ambedkar said, “the issue is not entry but
equality”. Decades later the issue of equality remains central to our society. We are still living in those times where women are discriminated against by rules and customs. The attempt to get the entry for women inside the temple is a struggle not so much about putting down the religious faith or to disturb the celibacy vow of Lord Ayyappa, but it is a struggle to ensure that we do not continue to deny equal membership to women by associating ideas of purity and pollution.

We live in a country that calls itself independent; we aspire for increasing the GDP. However, where we still fail as a society, as a nation, is in eradicating the deep-rooted patriarchy in the minds of its citizens. The result of such an ideology continues to exist in all spheres of our life affecting women specifically. Even today women are discriminated on grounds of gender, sex and in the recent case they have been discriminated on grounds of purity and pollution. The feminist movement and other schools of thought that support human rights have come a long way in achieving representation of women across public spaces. However, the psychological and patriarchal mindset continues to rule the majority of the population and it will take continuous reforms and development to achieve a just and equitable society. When we talk of reforms, law is the ultimate authority which derives its validity from the constitution of India; hence constitutional reforms are essential in societal reforms. In this context, the judgment is radical in its approach to rationalize religious practices prevailing in Indian society. It also ensures individual liberty and protects women’s rights in public places.

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WOMEN, VIOLENCE AND GENDER JUSTICE: A HUMAN RIGHT ASPECT

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Abstract
Women is considered as the most vulnerable and weaker section of the society and used as a commodity which can be used, re-used and abused. This paper highlights the status of women in the society and the nature of the violence taking place against women across the world. It describes various kinds of violence such as domestic violence, female foeticide, child marriage, rape, sexual harassment at work place, trafficking and prostitution. It also highlights different causes of violence against women such as lack of education, poor economic condition, lack of awareness of their rights. Various forms of legislation enforced in India for the protection of women against violence.

Key words: protection of women, discrimination, violence against women, domestic violence.

1. Introduction
Women have been the most vulnerable and weaker section of the society. They are deprived of their rights, beliefs and existence. women have always been dependent on men for their livelihood ,mainly involved in domestic work. In the current time of globalization, women are now well educated and demanding equal status to men. But women are still faced with discrimination, cruelty, violence at every step inside their home as well as at their workplace. women are often dominated by men in the society and thus violence against women has also increased.

2. Women and violence
Violence against women is increasing day by day due to the ignorance of the available rights of women and lack of education. It leads to murder, rape, intimidation, workplace harassment, trafficking and forced prostitution. Violence against women includes child marriage, rape, female circumcision. These all are committed by the dominating class of men who violate the fundamental rights of the women.

3. Kinds of violence against women
Women became prey to violence even before their birth when the parents abort their unborn child because it’s a female in the hope of giving birth to the male child. female foeticide is rapidly increasing in the world especially in the developing countries such as India. It is very severe in many parts of the country. At the domestic level, the women are often victims of domestic violence, rape, sexual abuses which results in traumatized condition i.e mentally, physically and emotionally or in some cases lead to death.

Following are the various kinds of violence against the women:

1. Domestic violence
Domestic violence occur in both developed as well as developing countries. It has been noticed that husbands endeavour unreasonable force and dominance on the wives to conquer their violence and rights and take to method of violence. They beat up their wives, abuse them, torture them physically, mentally and emotionally and lower the dignity of human being.

2. Female foeticide and Infanticide
Female foeticide is a serious problem in our society. The preference for son in the family is one of the major reason for violence against women. Many women abort their child when they came to know that the foetus is a female. The study has shown that female foeticide and infanticide has reduced the male: female sex ratio in many countries such as Japan, Cuba, china.

3. Child marriage
Child marriage is another offence and a kind of violence against women which fully violates the human rights. Girls below the age of 18 are married to men who are often double their age. These girls married without their consent, forcibly and are not mature enough physically, mentally and emotionally to handle the pressure and outcome of such marriage.

4. Rape
Rape is another form of violence against women. It can take place anywhere in the world, at home, workplace, outside the home. Rape has become the fastest growing crime in the world and the lack of proper understanding and enforcement of laws to prevent such violence against women.

5. Sexual harassment at work place
Sexual harassment is an area of great concern. Employers abuse the female employees and use their authority. It is often seen that women who protest and refuse are faced with consequences such as termination from the job. But in recent time, women come forward and protested such violence and many laws have been enforced to prevent such kind of violence against women. The sexual harassment of women at workplace Act, 2013 has been enforced for the protection or women against violence.

4. Various legislation for the protection of women
It is a truth that women across the world are beaten up, raped, trafficked and also killed. Such abuses and violation of human rights not only impose a threat to the existence of status of women in the society but also apart the entire society. But now there is a growing concern for the women and to protect the women against such violence. The international community has come forward for the effective response to violence against women. various countries of the world have obligation under the international law to enact, implement and enforce.

5. Legislation in India
In India various legislation has been enacted for providing the rights of women. Article 14 of constitution of India deals with Right to equality, Article 15 deals with Right to non-discrimination, Article 19(1)(g) states that Right to practice one’s profession and Article 21 deals with Right to life.

Apart from these rights provided by the constitution of India, various other specific legislation have also been enacted and enforced to prevent violence against women. They are as follows-

1. Abolition of sati in 1829
2. Hindu widow’s remarriage Act, 1954
3. Special marriage Act, 1954
4. Child marriage restraint Act, 1929
5. Prohibition of child marriage Act, 2006
6. Hindu women’s right to property Act, 1937
7. Dowry prohibition Act, 1961
8. Indecent representation Act, 1986
10. Pre conception and pre natal diagnostic technique (PCPNDT) Act, 1994
11. Protection of women from domestic violence Act, 2005

Apart from the above mentioned legislations, there are certain other enactments pertaining to industry which contain special provisions for women such as workmen’s compensation Act, 1921, payment of wages Act, 1936, Factories Act, 1948, Maternity benefit Act, 1961, Minimum wages Act, 1948, Employees state insurance Act, 1948, Pension Act, 1987.

All the above mentioned legislation have been enacted and enforced with a common goal of protecting women, their fundamental rights and to prevent women from violence. It is also important for the government machinery to conduct various awareness programmes and provide education and all other facilities to the women so as to develop skills, build confidence, develop leadership qualities. The states and government must need to work for the welfare of the women and to maintain equality among men and women and reduces violence and crimes taking place against women.

Conclusion

Women and the growing violence against them have become more prevalent in the society. Despite having so many enactments and legislation at international level and regional level which deal with women, the poor condition of women have not been improved and they are still facing all types of violence and abuses. This proves that failure of legislation executive and judicial machinery in the country to protect the women to improve the status of women in the society and to prevent the violence against women and to protect them is the need of the hour. Since the traditionalist social thinking as deeply rooted in the society, there is a need that such legislation should to be enacted with the support and public willingness and belief.

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BANGALORE WATER SUPPLY AND SEWERAGE BOARD V/S A. RAJAPPA

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Abstract
The definition of industry is in question since times immemorial and a lot of cases have occurred over the past years. Some of them played an important role in establishing an appropriate definition for Industry. One such case is the famous case of Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Others,\(^ {68}\) which has laid down some tests and new principles and has become a landmark case, which has overruled many other cases and acts as a precedent for many cases to come in the future. This paper is about the case and the outcomes occurred after. In this paper the author has selected this landmark case and has also given her own opinions regarding the case as to how by time the definition of the term industry has evolved. The author has tried to highlight the different aspects in relation to this case.

Introduction
Bangalore Water Supply case is the landmark case in labor laws. In the said case, the definition of industry is determined under Industrial Disputes Act, 1947. The case has overruled the judgments of several cases. The definition of industry could be divided into 2 parts. First part provides any business, trade, undertaking, manufacture or calling of employers, and the second part provides any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. As the definition under the act, is not meant to provide more than a guide. It raises a doubt, as to what, calling of employers could mean. Even, if any business, trade, undertaking, manufacture could be found capable of being more clearly delimited. However, there is no mention of any profit motive. The word calling of employers could not be interpreted, the term employers necessarily postulates employers without whom there can be no employers. But the second part of the definition makes the concept more indefinite. This part relating to workmen must necessarily indicate something which may exclude employers and include an industry consisting of individual handicraftsmen or workmen.

Some principles were mentioned under the case, known as the triple test and the dominant nature test. Triple test it has stated as, where there is a:
- Systematic activity,
- Co-operation between employer and employee,
- Production /distribution of goods and services to satisfy human wants.

The following points were also emphasized in this case:
- Industry does not include spiritual or religious services geared to celestial bliss.
- Absence of profit motive and gainful objective is irrelevant, be venture in the private or public sector.
- The decisive test is the nature of the activity with the special emphasis on the employer-employee relations.
- If the organization is any business or trade it does not cease to be one

\(^ {68}\) AIR 1978 SC 548
because of philanthropy animating the undertaking.

The dominant nature test: Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi Case\textsuperscript{69} or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur\textsuperscript{70}, will be true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.\textsuperscript{71}

Background
In this case, the employers (respondents) were fined by the appellant for misconduct and various sums were recovered from them. Claim application was filed u/s 33C(2) of IDA, averring that the said punishment was imposed in violation of natural justice.

The appellant board raised an exploratory objection, a statutory body performing regal functions by providing basic amenities to the citizens is not an industry as per sec 2j of the IDA, and consequently the employers were not workmen and the labor court has no jurisdiction to decide over this.

Objection being overruled, appellant filed 2 writ petition before Karnataka HC. The Division Bench of HC dismissed the petition and held the appellant board an industry u/s 2j of IDA.

Judgment
In this case, it was decided that, any organization which fulfils the condition ordered in Triple Test, will be considered as an industry, whether it being a Hospital, Educational Institution, Government Department.

The majority judgment, was delivered by Justice Krishna Iyer, he had expanded the definition of industry for the purposes of interpretation of sec 2j of the IDA, to cover employer-employee relationship, irrespective of the objectives of the organization concerned. In 1982, Parliament amended the IDA, to exclude many kinds of establishments from the definition. In 2005, a five Judge bench, headed by J. Hegde, N.Santosh, referred the case to a larger bench, in State of U.P. vs. Jai Bir Singh\textsuperscript{72}. The Hegde bench favoured the 1978 judgment, because it felt it carries an “overemphasis on the rights of workers” in industrial law, and that this has resulted in payment of “huge amounts as back wages” to workers illegally terminated or retrenched and that these awards sometimes “take away the very substratum of industry”. The Hegde bench also assumed, an over-expansive interpretation of the definition of industry might be a deterrent to private enterprise in India where public employment opportunities are scarce.

ANALYSIS
After all these judgments, there is still chaotic situation regarding the definition of industry under IDA. Despite having the working principle there is still problem in deciding the definition of industry. Such conflict arose in Chief Conservator of Forest v. Jagannahth Maruti Kondare\textsuperscript{73} and

\textsuperscript{69} University of Delhi vs. Ram Nath, AIR 1963 SC 1873
\textsuperscript{70} Nagpur Corporation vs. Its Employers, AIR 1960 SC 675
\textsuperscript{71} Bangalore Water Supply vs. A.Rajappa, AIR 1978 SC 548
\textsuperscript{72} (2005) 5 SCC 1
\textsuperscript{73} AIR 1996 SC 2898
State of Gujarat v. Pratamsingh Narsingh Parmar, where in the former case forest department of State of Maharashtra was held to be an industry and in the later case it was held that forest department of State of Gujarat is not an industry. The learned judges in the Bangalore Water Supply Case seem to have confined only such sovereign functions outside the purview of ‘industry’ which can be termed strictly as constitutional functions of the three organs of the Parliament. After 2005, again in 2017, a nine-judge constitution bench was deciding whether or not to review the definition of industry as interpreted by Justice Krishna Iyer in Bangalore water supply case, a seven-judge bench has ruled.

CONCLUSION
The SC has recurred judicial discipline and thereby prevented an unnecessary court-initiated convulsion in the area of labor law by giving a judgment in Bangalore Water Supply Case. Seven Judges of the Apex Court had given a widely ranging definition of industry under the Act and ever since, the case has been applied as law throughout the country. In the current scenario industries have become one of the most vital parts of the society’s smooth run, when there is no harmonious relation between workmen and employee it leads to dysfunction. When the law itself is not clear regarding the term industry it will definitely affect the industry on a large scale. The law in force presently is the interpretation of the original S. 2(j). Focusing solely on the merits of the case it is judgment which has taken into consideration. After the Jai Bir Singh case there is no such astonishing judgment, which has altered the definition. A crucial step should be taken to clear the lacuna.

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74 (2001) 9 SCC 713
ABSTRACT

Islamic Banking as a concept has been debated time and again to be a part of the Banking System in India as proposed by RBI under Raghuram Rajan. However, it took a more political than a financial angle in the country. Successfully operating in the Non-Islamic countries, Islamic Banks however have not found a way into the Indian Banking system yet. Few Muslims on the other hand, are unable to avail the banking facilities in India because of it being “haram” in Islam. India is not ready to accept this system and is unable to understand the importance and ease in the Islamic Banking method for the minorities and an addition in the financial investment opportunity for others.

RESEARCH QUESTIONS:

1. What is Islamic Banking?
2. Why was the Islamic windows’ proposal rejected by the Government in power?
3. Whether incorporation of Islamic banking would be a solution for the Indian Economy and financial system as it is in the other non-Islamic countries.

LITERATURE REVIEW:

1. Pakistan: Islamic Finance - More than Window Dressing?, Axis Law Chambers, Mondaq

Islamic finance is one of the fastest developing areas of finance which has grown at between 10 to 15 percent annually over the last decade. In addition to Muslim majority states, Islamic finance continues to expand into an increasing number of non-Muslim countries. Over the past decade, legislative reforms have been introduced in several jurisdictions, including major financial centers such as the UK, Hong Kong and Singapore, to place Islamic finance on an equal footing (from a regulatory and tax angle) with its conventional counterpart. Islamic finance is considered as being a more ethical form of finance. It could be argued that on a practical level, Islamic finance is not different from its conventional counterpart and has the same economic effect as a conventional loan. However, at a conceptual level, the principles and transactions in Islamic finance make it an altogether different form of finance.

2. India: India’s Islamic Finance: The First Steps Forward, Juris Corp, Mondaq

In September 2015, the IMF estimated that the aggregate financial assets, held in Islamic accounts, were above US$2 trillion globally and that they would outperform the growth of conventional finance in many countries. Renowned Indian economist MS Swaminathan, who is also the pioneer of green revolution in India, stated that Islamic finance could be an effective solution for resolving farmer suicides in India. Though Islamic finance has been sluggish in its traction in the Indian economy, there have been developments from an Indian context which provide hope for the future.

3. Dropping the Idea of Islamic Banking in India Will Leave Millions Shortchanged, The Wire

The RBI had in February last year sent a copy of the IDG report to the finance
ministry and recommended an “Islamic window” in conventional banks for gradual introduction of Sharia-compliant banking. The Reserve Bank of India (RBI) has decided not to pursue a proposal for introduction of Islamic banking in the country. Replying to an RTI query, the central bank said the decision was taken after considering “the wider and equal opportunities” available to all citizens to access banking and financial services.

The RBI under Raghuram Rajan introduced the concept of Islamic Windows in India so as to grow the economy inclusive of all communities. However, the proposal was rejected by the Government because of the existence of other schemes of similar kind and taken into account the wider and equal opportunities available to all citizens to access banking and financial services.

HYPOTHESIS:

H: Incorporating Islamic Banking through “windows” will be beneficial to the Indian Economy

RESEARCH METHODOLOGY: - The paper would be a doctrinal research which would include opinions of various scholars and financial experts.

INTRODUCTION

The Islamic Financial System works on the principle of not charging interest and thereby works in accordance with the Shariat. The Islamic law prohibits paying any fee for renting of money (called Riba) for specific periods of time. This research paper will majorly deal with how the Islamic Banking came into existence and how it has been incorporated in non-Islamic countries as well through “windows” in countries such as United States, Singapore, UK, etc. Strangely enough, the Islamic Banks not only function efficiently but are also popular among users. The paper will thereby try to analyze the adoption of Islamic Finance System into conventional Islamic Banking System. According to RBI, India might benefit from the incorporation of Islamic Banking System; however, the recent proposal of RBI for opening an Islamic Banking window has received a more political angle instead of financial one. It shall be determined in this paper that banking system shall prove beneficial irrespective of the tag being religious. For every other it will just be an additional financial investment opportunity. The latter part of the paper shall also describe that Islamic banking system aims to be more transparent and fairer system of finance for both Muslim and non-Muslim users.

WHAT IS ISLAMIC BANKING?

Islamic banking is basically a form of finance that rules out receipt and payment of interest and fees.75 The rules forbid profiting from money lending. So, for instance, Islamic banks buy properties for clients, and then sell them back at a profit, allowing clients to pay back installments. Another route is structuring profit-sharing agreements between the borrower and the bank. Leases and hire purchase are allowed.

75 Islamic Banking. Qudsia Iqbal Hashmi Economic and Political Weekly, Vol. 46, No. 28 (JULY 2011), pp. 4-5
Shariah provides guidelines for aspects of Muslim life, including religion, politics, economics, banking, business, and law. They are guided by the Quran, Islamic banking also does not allow money to be invested in speculative, “non-productive” investments, like gambling, liquor, tobacco and weapons. They only permit ethical investments. Parties involved in a financial transaction must share both the associated risks and profits. Earnings of profits or returns from assets are permitted so long as the business risks are shared by the lender and borrower. The major pillars of Islamic Banking can be summed as – prohibition on Riba (interest), profit and risk sharing, prohibition on haram investments, prohibition of speculative or uncertain transactions and existence of an underlying tangible assets.

After discussing the different principles of Islamic banking, this is an attempt to explore the feasibility of Sharia banking in India. To get rid of this concept and save the nation from the clutches of interest, suitable amendments should be made in the Banking Act. The majority of the unorganized sector; workers, semi-skilled persons, small farmers are all non-bankable. Access to finance by the poor and the vulnerable groups is a prerequisite for poverty reduction and social cohesion. The Indian banking sector has opened up considerably in the past decade or so and openness to interest-free banks is a logical next step. Islamic banking is one way to restructure the disadvantaged classes.

PROPOSAL OF THE RBI AND REASONS FOR ITS REJECTION

The Proposal

In 2008, the financial sector reforms committee of the RBI, led by Raghuram Rajan, had recommended setting up of interest-free banking facilities in India for financial sector reform. However, it did not mention Islamic banking or Sharia banking. The committee on medium-term path on financial inclusion recommended an “open, specialised, interest-free window with simple products like demand deposits, agency and participation securities, and offering products, based on cost-plus financing, deferred payment and deferred contract.”

In its Annual report 2015-16, it again raked up the issue as in absence of non-interest banking, a section of the population was not being able to take part in the banking system. The non-availability of interest-free banking products (where the return to the investor is tied to the bearing of risk, in accordance with the principles of that faith) results in some Indians, including those in the economically disadvantaged strata of society, not being able to access banking products due to reasons of faith. This non-availability also denies India access to substantial sources of savings from other countries in the region.

77 Islamic Banking: A Rejoinder, Shariq Nisar Economic and Political Weekly, Vol. 46, No. 29 (JULY 2011), pp. 4-5
interest. Towards mainstreaming these excluded sections, it is proposed to explore the modalities of introducing interest-free banking products in India in consultation with the Government.”

While interest-free banking is provided in a limited manner through NBFCs and cooperatives, the Committee recommended that measures be taken to permit the delivery of interest-free finance on a larger scale, through the banking system. The Committee proposed to create an Islamic “window” in the existing banks.

Meanwhile, the CPM in Kerala toyed with the idea, and after getting a go-ahead from the RBI, launched in July 2017 Cheraman Financial Services Limited80, a cooperative on the lines of the practice of the Islamic banking system, with a corpus of Rs 250 crore. It was established with equity participation of Kerala State Industrial Development Corporation (KSIDC) and private investors, mostly Gulf-based NRIs.

In Maharashtra, too, Lokmangal Cooperative bank Limited81 launched a Sharia-compliant transaction window in 2016. Interestingly, state BJP minister Subhash Deshmukh was behind the idea.

So, the concept of interest-free banking, which could have boosted the economy by inviting huge investment from the West Asian countries, is not new to India.

However, the Reserve Bank of India has dropped the proposal for introduction of Islamic banking in the country. The idea, once pushed by former RBI governor Raghuram Rajan has completely been out of the picture, given the amount of resistance it managed to create. It seems that the reason for doing away with the proposal is more political than financial. In a reply to an RTI query by a PTI correspondent, RBI said, “Taking into account the wider and equal opportunities available to all citizens to access banking and financial services, it has been decided not to pursue the proposal further.”82

Interestingly, it was the same “wider opportunities” rationale for which Islamic banking was initially proposed, to include many Muslims who do not prefer the regular banking system because of religious beliefs.

The Reasons for the rejection

Interestingly the proposal of the RBI was rejected in and around the change of Government in India. So is there a political reason behind the change of stance83 on allowing Islamic Banking?

Virtually ruling out introduction of Islamic banking, the Finance Ministry said it has "no relevance" as the government has already introduced a host of financial inclusion schemes like Jan Dhan. The Minister of State for Finance Santosh subramanian-swamy-muslim-law/story/1/20560.html

82 RBI Says No To Islamic Banking In India
Reserve Bank of India (RBI) decided not to pursue the proposal of Islamic or Sharia banking further after taking into account the wider and equal opportunities available to all citizens to access banking and financial services
Business | Press Trust of India, November 13, 2017 07:29 IST
Available at : https://www.ndtv.com/business/rbi-says-no-to-islamic-banking-in-india-1774366
Kumar Gangwar said in a written reply to Lok Sabha that the objectives of the financial inclusion for which Islamic banking was explored by RBI has no relevance, as government has already introduced other means of financial inclusion like Jan Dhan Yojana and Suraksha Bima Yojna for all citizens.

He further said RBI had set up an inter-departmental group on Islamic Banking and the entire exercise was aimed at promoting financial inclusion, accessing huge market potential to attract finance from Gulf countries for infrastructure development but that would require various legal changes. Apart from this no financial logic has been given since then.

Another reasoning given by our “competent” media was the "terrorism" controversy related to Islamic banking and terror-funding. Though there is no proven connection between Islamic banking and terror-funding, some US financial institutions in the past, had expressed concerns about a possibility of Islamic banking transactions channeling funds to terrorist organisations, though that’s a miniscule portion of the overall funding architecture that the extremists world over avail.

Therefore, the about-turn of RBI, without offering a substantial and financially sound logic to dropping the proposal that would have brought in billions of dollars worth investment and remittance into the mainstream, significantly boosting India’s ailing economy, is a plain and simple political decision. Giving a green signal to allowing Islamic banking at an official and national scale, letting major public and private banks to open interest-free, Sharia-compliant banking windows in addition to existing services, would fly in the face of the government’s perceived anti-minority stance.

FUTURE SCOPE OF THE “WINDOWS” IN INDIA

The potential for Islamic Banking in India lies in two points namely; (a) India could be a significant market for Islamic Banking Institutions due to its large Muslim population; and (b) However, it is still subject to a favorable change in regulatory environment and increased awareness among Muslims and India.

Banking products which comply with Islamic law are becoming increasingly popular, not only in the Gulf countries and far eastern states like Malaysia, but also in other developed markets such as the United Kingdom. Reputed banks like Standard Chartered, Citibank, and HBSC are operating interest free windows in several West Asian countries, Europe and USA. There is a huge potential market in India for Islamic banking products.

A bank in India cannot raise deposits without promising a specified rate of return to depositors, but under Sharia, returns can only be determined post-facto depending on profit. Also banks have to maintain a Statutory Liquidity Ratio (SLR), which involves locking up a substantial portion of funds either as cash, gold or in government

86 Dr. Jeet Singh & Dr. Preeti Yadav, Islamic Banking In India - Growth And Potential, International Journal Of Marketing, Financial Services & Management Research ISSN 2277- 3622 Vol.2, No. 4, April (2013)
securities. Such cash will not get any return, keeping it in gold is risky as it could depreciate and government securities come with interest. Moreover, Islamic banking can eliminate unaccountable economic activities, as every economic activity has to be financed through legal contract and physical verification of real assets under contract. There is no room for diversion of funds. Therefore, investment in consonance with Islamic banking principles will surely boost the engine of economic growth in our country.\textsuperscript{87}

Islamic banking has unfortunately been misunderstood in India as a religious charitable venture restricted to the country’s poverty-ridden and economically downtrodden Muslim community. Even years of successful Islamic banking operations and its phenomenal growth around the world have failed to demolish this myth. The potential benefits of allowing Islamic banking include decreased economic disparity between the haves and the have-nots, better integration, and consequently accelerated economic growth. The Government can leap a step closer towards the fulfillment of a healthy economy by allowing Islamic Banking in India.

**Inclusive Economic Growth:** The advent of Islamic Banking in India will throw open fresh avenues of inclusive economic growth, not only for the Muslim community, but also other fellow countrymen through novel instruments of finance based on equity and not interest. This might also help improve the poor socio-economic status of the Muslim community and the glaring economic disparities, which is an indication of the lack of inclusive economic growth.\textsuperscript{88}

**Growth of FDI:** The introduction of Islamic banking in India will offer Muslims a socio-religiously acceptable mode of finance and investment, motivating not only retail investors, but also beneficiaries of various Shariah-compliant schemes. Doors will be opened to foreign direct investment (FDI) and foreign institutional investment, particularly from renowned business houses of Gulf Cooperation Council countries.

**Availability of Funds for Business:** While Shariah-compliant, equity-based microfinance organisations at the grassroots and apex levels will be able to provide much needed financial inputs by way of tools, equipment and machinery under the Ijarah Wa Iktina (lease-cum-purchase), the murabahah (cost-plus financing) instruments of Islamic finance can be used to provide funds for trading and raw material purchases for manufacturers.

**Free from Exploitation:** Renowned scholars and senior adviser who have sound knowledge about the Islamic Banking system have stressed the need for implementing Islamic Banking and economy system for setting up a true welfare state. By adopting true Islamic system of economy and banking, a welfare society could be created where people were saved from exploitation and their basic needs were met.

**CONCLUSION**

Islamic banking is at a budding stage even in those countries wherein it has existed long time because of the unclear concept of

\textsuperscript{87} Legal Talk, ISLAMIC BANKING IN INDIA, Syed Burhanur Rahman, 28 January 2009. Available at: https://yourstory.com/2009/01/islamic-banking-in-india-2

\textsuperscript{88} Seema Rao, What is Islamic Banking and why does the RBI want it in India? 27 November 2016. Available at Scroll.in
its working. The existing legal framework in India does not permit Islamic Banking due to the existence of the Banking and Regulation Act which works on the system of interest which is completely absent in the Islamic Banking. With some flexibility and modifications in the regulations, these statutory barriers can be addressed with a better financial model; but ultimately depends upon the political will. Islamic Bank of Britain, Islamic banks of Thailand, Singapore and USA may be glaring models for Indian bankers. The reputed domestic and international banks along with the collaboration of RBI should be involved in the process of determining and implementing Islamic Banking products.

Also the political parties need economic rationality and a clear financial logic. Islamic banking is not introduced to please Muslim voters but to genuinely boost faster and inclusive growth for the Indian economy. Obnoxious politics in the name of religion needs to be avoided. It would be smarter to refer ‘Islamic Banking’ as ‘Interest Free Banking’ so that it could be looked through the broad economic viewpoint and not a narrow religious angle.

With only minor changes in practices, Islamic banks can offer a clean and efficient interest-free banking. This is an additional service that Islamic banks offer over and above the traditional services provided by conventional commercial banks. Such a system will offer an effective banking system where Muslims in India may invest in pursuant to Islamic principles and the rest may have an alternative to interest bearing conventional banking. Both systems can co-exist. Let the people of the largest democracy decide democratically which one they should bank upon. Hope the new RBI Governor will consider it to control liquidity and inflation. When Islamic banking reaches Indian shores, it will be welcomed as a vibrant, modern and progressive alternate financial system, not as a rudimentary, indigenous and outdated method of finance. Today, Islamic banking is the buzzword in the global financial world with all the essential ingredients of modern day banking—sans interest. RBI and the Ministry of Finance should examine Islamic Banking as a viable alternative to tackle the macro economic problems we are presently confronted with.

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CRITICAL ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 WITH SPECIAL EMPHASIS ON MAINTENANCE

By Apoorva Kinra
From UILS, PU

ABSTRACT
India is a diverse land which abounds in personal laws. Every religion in personal matters is governed by its own laws. The controversy regarding the status of Muslim Women in legal jargon is taking place since time immemorial. When a divorcee offers emotional fractures then it is the duty of the Govt. to provide adequate facilities and securities to her. Consequently, the role of maintenance comes in to play. Maintenance signifies all those things which are necessary for the support of life and includes suitable food, raiment and lodging. Law of maintenance is personal as well as legal and constitutional right in nature and it arises from the very existence of relationship between the parties. Women strata of Muslim community have suffered immensely and are also still at the receiving end because of the dirty political tricks being played in India. The Muslim jurists have not kept legal and moral obligations distinct. The moral and legal duties are almost inextricably mixed. The right to maintenance is not merely a moral but also a legal obligation. Muslim Law firmly believes that a man can take care of himself whereas the women cannot. Hence, the wife’s right to maintenance is a debt against the husband. “For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty; on the righteous.”

Keywords: Talaq; Iddat period; Shah Bano Case; Maintenance; S.125 Cr.P.C.

INTRODUCTION
Family is the footing of a society which is considered as the most vital religious rite in all religions of the world. Quran expresses Nikah (marriage) in the form of Zauj (equal partner) which literally means getting absorbed in each other the way rain water absorbs in the earth. If the relationship is imbalanced and differences occur then the religion allows both of the sexes for Talaq (divorce). But, the Quran Mrs. advises the husband and wife to reconcile their differences amicably on their own and if the two fail to do so then it describes an elaborate process to seek a mutually agreed solution. After the divorce, both of them are free from the bond and can freely marry someone else provided the wife would wait for iddat period to get over which is three months and if she is pregnant then she has to wait till the delivery. The reason behind the traditional period of three months is to find out if the lady is pregnant with the child of the former husband. The old age tradition is carried on because of the sole reason that no one challenged this logic in the modern era. During this time, the husband is responsible for all her expenses. The question comes forth is what about the maintenance provided by husband to his wife after the iddat period? Unlike other religions, the obligation of Muslims to provide for maintenance arises only when the wife has no property or resources to maintain herself.

90 Quranic verse 2:241
91 Quranic verse 4:35
Divorced Wife’s Right to Maintenance

The Muslim Law of Maintenance comes into play only if the claimant (wife) has no means or property with which she can maintain herself. The givers of Muslim law lay down different rules regarding the claim of maintenance by wife when the marriage is dissolved by death or when it is dissolved by divorce. When the marriage is dissolved by death, the wife is not entitled to maintenance during the period of iddat.92 When the marriage is dissolved by divorce, the wife is entitled to maintenance during the period of iddat. If the divorce is not communicated to the wife even after the expiry of the period of iddat, she is entitled to maintenance till it is communicated to her.93 A Muslim husband is bound to maintain his wife as long as she is faithful and obeys him but he is not bound to maintain her if it contra. Maintenance of the wife is incumbent on the husband because this is the precept both in the Quran and the traditions.94 The wife is absolutely entitled to get maintenance from the husband even though she may have means to maintain herself.95

In the case of Arab Ahmadia v. Arab Bail96, the Gujarat High Court held that a divorced muslim wife is entitled to maintenance even after the period of iddat and under Sec. 125, Code of Criminal Procedure. She is entitled to reasonable and fair amount of maintenance where courts should ensure that she gets sufficient means of livelihood after divorce and that she does not become a destitute or is not thrown on the streets without a roof over her head and without any means of sustaining herself and her children. The same has been ordained by Quran:

“For divorced women maintenance should be provided on a reasonable scale. This is duty on the righteous. (Ayat 241) Thus, doth God make clear His songs to you: In order that you may understand. (Ayat 242)”97

“And for the divorced woman also a provision should be made with fairness in addition to her dower. This is a duty incumbent on the reverent. (1964 ed.)”98

“Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year’s maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way. Allah is All-powerful. All-wise, likewise, the divorced woman should also be given something in accordance with the known fair standard. This is an obligation upon the God fearing people.”99

92 The authority for this proposition is Badruddin v. Aisha, (1957) All LJ 300.
93 The authorities of this proposition are: Marian v. Kadir, AIR 1929 Oudh 527; Asmtulla v. Khatunnissa, AIR 1937 All 592; Rashid v. Anisa (1932) 59 IA; Ahmed v. Khaun, ILR (1939) 59 Cal 833; Munisa v. Noor Md., AIR 1965 AP 231.
94 Hed. 140.
95 Said Ahmad v. Sultan Bibi, A.I.R. 1943 Pesh. 73 at p. 75.
96 AIR 1985 SC at 952
97 The Holy Quran by Usuf Ali, 96.
98 The Running Commentary on the Holy Quran by Dr. Allamat Khadm
99 The Quran, 38.
100 Meaning of the Quran, Vol. 1.
Shah Bano Case\textsuperscript{101}

The case of Mohd. Ahmed Khan v. Shah Bano Begum\textsuperscript{102} alias Shah Bano Case\textsuperscript{103} agitated the ego of masculine counterpart and it was then the society realised that the Muslim divorcees should be given their rights. The judgement was not the first granting a divorced Muslim women maintenance under the Code of Criminal Procedure, 1973, it was the first where the Hon’ble Supreme Court narrated the Muslim law in depth. In April 1978, a 62-year-old Muslim woman, Shah Bano, filed a petition in court demanding maintenance from her divorced husband Mohammed Ahmad Khan, a renowned lawyer in Indore, Madhya Pradesh. Mohammed Ahmad Khan had granted her irrevocable talaq later in November. The two were married in 1932 and had five children—three sons and two daughters. Shah Bano’s husband had asked her to move to a separate residence three years before, after a prolonged period of her living with Ahmad Khan and his second wife. Shah Bano went to court and filed a claim for maintenance for herself and her five children under Section 125 of the Code of Criminal Procedure, 1973. This section is secular in nature and it provided for a legal obligation on the husband to maintain his wife if she has no resources to maintain herself. However, Ahmad Khan contested the claim on the grounds that under the Muslim Personal Law in India, a divorced women could be awarded maintenance only during the iddat period and not latter. In case if she wants maintenance then she will have to be given maintenance by the other relatives. His arguments were widely supported by the All India Muslim Personal Law Board which contended that courts take the liberty of interfering in those matters that are laid out under Muslim Personal Law, adding it would violate the Muslim Personal Law (Shariat) Application Act, 1937. The board said that according to the Act, the courts were to give decisions on matters of divorce, maintenance and other family issues based on Shariat. This judgment was widely criticised by the Muslim community throughout the country. After detailed study, the decision was rendered by the Supreme Court of India in 1985 that Code of Criminal Procedure, 1973, would apply to all Indian citizens regardless of their religion as it is secular in nature.

Justice Y.V. Chandrachud said in his decision: “Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual’s obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion.”

Therefore, it was held that although the Muslim Law limits the husband’s liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the

\textsuperscript{102} ibid.
\textsuperscript{103} ibid.
situation envisaged by section 125 of the Code of Criminal Procedure, 1973. The Court came to the conclusion that if the divorced wife is unable to maintain herself, the husband’s liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to section 125 of the Code of Criminal Procedure, 1973. The benefit of the generous jurisdiction under Section 125 of the Code of Criminal Procedure, 1973 is available to the wife irrespective of the question whether the divorce was anterior or subsequent to the coming into force of the Code.

Then the Rajiv Gandhi Congress government, elected in 1984, passed the Muslim Women (Protection of Divorce Act), 1986. This statute overturned the verdict in the Shah Bano case and it was enacted that the maintenance can be made liable for the iddat period only. It also said that if a woman wasn’t able to provide for herself, the magistrate had the power to direct the Wakf Board for providing the aggrieved woman means of sustenance and for her dependent children too. Then, Shah Bano’s lawyer Danial Latifi challenged the Act’s Constitutional validity. The Apex Court, though upholding the validity of the new law, said the liability can’t be restricted to the period of iddat. Thereafter, Shah Bano withdrew the maintenance claim she had filed.

Maintenance of wife under the Section 125 of Cr.P.C.:

Section 125 of the Code of Criminal Procedure, 1973 which was earlier Section 488 of the old Code, conveys that a wife, whether Muslim or not is entitled to claim maintenance against the husband on the ground of the husband’s refusal to maintain her.

Under Cr.P.C., only wife (a woman who has been divorced by or has obtained divorce from her husband & hasn’t remarried) can claim for maintenance. The said section defines ‘wife’ as including a divorced wife, containing no words of limitation to justify the exclusion of Muslim women from the scope. The ambit of wife is defined irrespective of the religion professed by her or by her husband. A wife who refuses to stay with her husband due to legal grounds such as Bigamy, adultery & adultery has the right to special allowance under this Act. But a wife does not possess right to claim maintenance if she’s living in adultery or she’s living separately by mutual consent. The various sections of Cr.P.C. are criminal in nature and are used for the criminal charges. The benefit of the generous jurisdiction under Section 125 of the Code of Criminal Procedure, 1973 is available to the wife irrespective of the question whether the divorce was anterior or subsequent to the coming into force of the Code.

The Section 125 of the Cr.P.C. states the provisions as follows:

“S.125 Order for maintenance of wives, children and parents.
(1) If any person leaving sufficient means neglects or refuses to maintain
(a) His wife, unable to maintain herself, or
(b) His legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or


The provision under Cr.P.C. explains that if the husband having sufficient means neglects or refuses to maintain his wife who is unable to maintain herself, or his legitimate or illegitimate minor child, whether married or not unable to maintain themselves provided a married daughter and the major child who is abnormal either physically or mentally unable to maintain oneself, a Magistrate of the first class may, order to husband to pay a monthly allowance such as the Magistrate thinks fit.

In the case of Bai Tahira v. Ali Hussain,107 J. Krishna Iyer explained that every divorcee, wife, Muslim or non-Muslim, was entitled to benefit of maintenance allowance and the distribution of the marriage under personal law makes no difference to this right. The rights vested under S. 125 of Cr.P.C. is not taken away by the new Act, in the absence of any provisions under the new Act creating a bar for enforcement of the order passed under S. 125 of the Cr.P.C. before coming into force of this Act, a Mohammedan wife who obtained an order of maintenance under S. 125 of Cr.P.C. is entitled to enforce the said order of maintenance. In view of this position of law, the recovery proceedings initiated by a divorced Muslim wife are perfectly maintainable in law and, therefore, the petition challenging the legality of the recovery proceedings initiated before the Judicial Magistrate First Class were dismissed.108 A person against whom an order under S. 125 (3) Cr.P.C. is made does not become liable to imprisonment on passing of an order of maintenance, his liability to suffer imprisonment only starts if, he fails to respond to a warrant issued under S. 125 (3) Cr.P.C. for payment of maintenance.

The Muslim Women (Protection of Rights on Divorce) Act 1986
The landmark legislation, namely, the Muslim Women (Protection of Rights on Divorce) Act 1986 was passed by the Rajiv Gandhi Government on 19th May, 1986 to protect the rights of Muslim Women in regard to Divorce after the decision of Shah Bano’s Case was challenged before the Hon’ble Supreme Court. Progressive Muslims and others dubbed this enactment as a great setback for Muslim women. The vital essentials of the Act are

(i) Right to maintenance during the period of iddat;
(ii) Right to fair and reasonable provisions for her entire life;
(iii) Right to receive alimony for the child till two years from divorce;
(iv) Right to receive maintenance from the State Wakf Board in some exceptional circumstances.

The Act provides the Muslim-divorced woman a reasonable and fair provision of maintenance within the iddat period by her former husband and in case she maintains the children born to her before or after the divorce, the period shall extend to two years from the date of the birth of the children. She will also be entitled to mahr and all the properties given

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to her by her relatives, friends, husband and the husband’s relatives. If all of these benefits are not provided to her at the time of divorce, she is entitled to apply to the magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or the delivery of the properties. Secondly, if a Muslim-divorced woman is unable to maintain herself after the iddat period, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to the Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay, the shares of these relatives also. But where a divorcee has no relatives or such relatives or any one of them who has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.\textsuperscript{109} In the case of \textit{A.A. Abdulla v. A.B. Mohmuna Saiyadbhai}\textsuperscript{110}, the court held that a divorced Muslim woman is entitled to maintenance and that this maintenance is not limited to iddat period. The decision was based on Section 3(1)(a) of \textit{The Muslim Women (Protection of Rights on Divorce) Act, 1986}, of India\textsuperscript{111}. It interpreted this Section as on or before the expiration of the iddat period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife, not that the maintenance is to be given only during the iddat period. It concluded that to interpret the provision otherwise would be to abrogate the rights of Muslim women under other laws.\textsuperscript{112}

In the case of \textit{A.A. Abdulla v. A.B. Mohmuna Saiyadbhai}\textsuperscript{113}, the court held that a divorced Muslim woman is entitled to maintenance and that this maintenance is not limited to iddat period. The decision was based on Section 3(1)(a) of \textit{The Muslim Women (Protection of Rights on Divorce) Act, 1986}, of India\textsuperscript{114}. It interpreted this Section as on or before the expiration of the iddat period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife, not that the maintenance is to be given only during the iddat period. It concluded that to interpret the provision otherwise would be to abrogate the rights of Muslim women under other laws.\textsuperscript{115}

According to the said Act, the husband, at the time of divorce, should pay the mehr and make one-time provision for her as provided for in the Quran and give three months’ maintenance. Therefore, a woman has to get a lump sum amount at the time of divorce. The first judgment to provide the same was given by the District Magistrate of Lucknow, Ms. Rekha Dixit. Even after the Act being in place several Muslim women across the nation filed cases for maintenance under Section 125 of the Cr.P.C.

\textsuperscript{110} A.I.R. 1980 Guj. 141.
\textsuperscript{111} Annual Review of Population Law, Vol. 13, 1986, Section 320
\textsuperscript{112} https://www.ncbi.nlm.nih.gov/pubmed/12289669
\textsuperscript{113} A.I.R. 1980 Guj. 141.
\textsuperscript{114} Annual Review of Population Law, Vol. 13, 1986, Section 320
\textsuperscript{115} https://www.ncbi.nlm.nih.gov/pubmed/12289669
A couple of years ago, the Bombay High Court awarded a woman maintenance for life under the provisions of the 1986 Act. The Judge's interpretation of the new Act was that the woman should be given enough within the iddat period to maintain herself for life.\(^{116}\) It totally depends upon how the courts interpret the vague and ambiguous Act that was passed by the Congress Government.

The Calcutta High Court Judge tried to interpret S. 3 of the 1986 Act widely stating “A divorced Muslim woman is entitled to maintenance after contemplating her future needs and it is not limited only up to the iddat period. The phrase used in Section 3 (I) (A) of the Act, 1986, is reasonable and fair provisions and maintenance has to be made to see that the divorced woman gets sufficient means of livelihood after divorce and that she does not become destitute or is not thrown out on the street.”\(^{117}\)

The Act mandates that no provision has been made in the Act for the purpose of obtaining maintenance from her husband till the date of divorce, therefore till that date the provision of Cr.P.C. shall be applicable. The Act came in play on 19th May, 1986, therefore till 18th May, 1986 whether a woman was divorced or not she was entitled to maintenance under S.125 Cr.P.C. reason being that the Act is not retrospective in nature. The Act allows the Muslim husband to regain freedom of avoiding the payment of maintenance even in the iddat period if he claims that he is financially unfit to do so which is contrary to the principles of Muslim Law as the liability to maintain his wife during iddat period is unconditional and compulsory under any circumstances.

Section 3 of the Act does not apply if there is a decree order of a Court granting maintenance to a wife earlier as the section does not start with a non-obstante clause.\(^{118}\) In the case of Danial Latifi v. Union of India,\(^{119}\) some guiding principles were laid down—

(i) a Muslim husband is liable to make reasonable and fair provisions for the future of the divorced wife. This includes the period beyond iddat period in terms of S.3 (1) of the Act.

(ii) Liability of Muslim husband to his divorced wife arising under S.3 (1) (a) of the Act to pay maintenance is not confined to iddat period.

(iii) A Muslim divorcee who has not remarried and has no means to maintain herself after the iddat period can proceed as provided under S.4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay such maintenance.\(^{120}\)

After divorce, a Muslim wife is entitled to maintenance from her former husband during the period of iddat and until her delivery of she is pregnant. However, the Muslim Personal Law does not speak of two separate things, one, by way of a reasonable and fair provision, and two payment of maintenance. The words ‘provision’ and ‘maintenance’ seem to convey the same meaning. The

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\(^{116}\) The Hindu  
\(^{117}\) The Hindu  
\(^{118}\) Sirazuddin Ahmed Saheb Bagwan v. Khatija Sirajuddin, 1996 (II) D.M.C. 449 at p. 451 (Bom)  
\(^{120}\) Mustafirani Bibi v. Abdul Rasid Khan, 2003 (2) H.L.R. 98 at pp. 98-99 (Orissa).
words ‘a reasonable and fair provision’ in S.3 (1) (a) though ostensibly may appear to be distinct, but in reality they are one and the same thing.121 Right to get maintenance from her husband is a vested right of a woman of any religion and there is absolutely nothing in the Act which tends to take away this right. On the contrary, the Act recognizes the said right available to Muslim woman even under the Personal Law.122

Under Muslim law, Mehr or dower means a property which the husband is obliged to pay to his wife in consideration of her marriage. The wife can refuse to live with her husband and deny him to sexual intercourse so long as the prompt dower is not paid to her. The fair and reasonable provision mentioned in the Act should not be substituted with Mehr or dower. It cannot be a consideration for divorce. It is an obligation of a husband arising from a contract, or otherwise imposed by law or custom on the husband as a token of his respect for his wife.

The drawback to this Act is that when the Act is silent only then the provision of S.125 Cr.P.C. is applicable only when the divorced Muslim woman and her former husband agree. Then, there is no direct applicability of Waqf Board to contribute for making the payment of maintenance to any destitute lady. The Board has got its own finances and only from those funds the maintenance is to be paid. The Act provides that the Magistrate can order the Board to pay maintenance of the divorcee when she is unable to maintain herself and she has no relative or the relatives are bankrupts.

Conclusion

121 Abdul Haq v. Yasmin Talat, 1998 (2) H.L.R. 318 at p. 319 (M.P.)

“In the theatre of life, it seems, man has put the autograph and there is no space for a woman even to put her signature.”123 The personality of a Muslim woman is considered to be the soul of the Muslim men in literal sense, who is tied to the apron strings of the rules formed by the patriarchy. The Rajiv Gandhi Govt. did create a law to regulate the pattern and provide reasonableness to the muslim divorcée but still the strings were left in the hands of the powerful former husband because according to the Act if they refused to let the petition be filed in S. 125 Cr.P.C. then the women may be deprived of their rights. It totally depends upon the discretion of the Magistrate how s(he) interprets the said Act so that the divorcée can live a secured life. The whole scenario signifies that religious traditions have more weight than gender equality and the only way to stop this is having a uniform law. The vibrations of Uniform Civil Code would lead to a positive impact on the Muslim personal law. It would allow the Muslim divorcées to claim maintenance for her lifetime. But the said issue is facing immense opposition and uproar by the Muslims on the ground that it would encroach upon their personal law and the Hindu law would supersede over their personal law. Even though it has already been signified that the Uniform Civil Code is a secular legislation.

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123 Indian Young Lawyers Association vs The State of Kerala; Writ Petition (Civil) No. 373 of 2006.
ONE MAN'S MEAT IS ANOTHER MAN'S FOREARM: CASE COMMENT ON STATE OF GUJARAT V. MIRZAPUR MOTI KURESHI KASSAB JAMAT, (2005) 8 SCC 534

By Archit Mishra
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ABSTRACT
India is a country of 1.324 billion population having numerous religious communities residing in it and is governed by one single sacrosanct text i.e. Indian Constitution. Our constitution is divided into different parts and each part deals with different issues in which some are enforceable in courts and some are not. From time to time we have witnessed that there have been different clashes between Fundamental Rights (enshrined in Part III) conferred to all citizens by our constitution and Directive Principle of State Policies (enshrined in Part IV) which lays down guidelines which will help in governance of the nation. India is a place where cow slaughter and man slaughter are considered to be the two sides of the same coin. The decision of Hon'ble Supreme Court in 2005 in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat124 is a welcome step in clearing jurisprudence related to cow slaughter in India. It revisits the case of Mohd. Hanif Quareshi v. State of Bihar125 & Abdul Hakim Quraishi v. State of Bihar126 and laid down the law which will deemed to be fit seeing the current standards of our society and also found the pitfalls which were existing in these judgments. This judgement upholds the constitutional validity of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994, which had introduced amendments to Section 5 of the Bombay Animal Preservation Act, 1954 (as applicable to the State of Gujarat) as per which even the slaughter of bulls and bullocks of any age whatsoever was completely banned in addition to the complete ban on the slaughter of cows. In this article an attempt has been made to understand the background of this case and later issue wise analysis has also been done to understand the entire case in a holistic manner. The philosophy underlying these laws is explained, their main provisions are explored, and future directions that could move the ethic forward and further rationalize the laws are sketched. This work increases our understanding of laws corresponding to slaughter of bulls and bullocks and one can easily comprehend them; and I hope this project will contribute to future research on similar topics also.

INTRODUCTION
This case arises from different form of appeals in a similar matter dealing with slaughter of cows, calves, bulls, and bullocks. In addition to this issue, this case revolves around different issues related to fundamental rights127 [Articles 14, 19(1)(g), 19(6), 37], fundamental duties (Articles 51A), directive principle of state policies128 (Articles 37, 48, 48A). Apart from these constitutional provisions, the real controversy arose by a legislation passed by Gujarat state assembly. The parent act Bombay Animal Preservation Act, 1954 as amended by Section 2 of Bombay Animal Preservation (Gujarat Amendment) Act, 1994 amends subsections (1A) and (3) of Section 5

127 Part III, Indian Constitution.
128 Part IV, Indian Constitution.

www.supremoamicus.org
having the effect of slaughtering bulls and bullocks. The Hon’ble Supreme Court initially heard this case with three judge bench but later it was decided that a constitutional bench of at least five judges will hear this case and hence the bench of seven judges was constituted and this bench by a majority decision of 6-1, upheld the constitutional validity of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994, which had introduced the aforesaid amendments in Section 5 of the Bombay Animal Preservation Act, 1954 according to which even the slaughter of bulls and bullocks of any age whatsoever was completely banned in addition to the complete ban on the slaughter of cows.

BACKGROUND
The history of the impugned act is quite long and it dates back to 1954. With a view to conserve the cattle wealth of the State of Bombay, the state government enacted the Bombay Animal Preservation Act, 1948 and prohibited slaughter of animals which were useful for milching, breeding or agricultural purposes. This Act was substituted by the Bombay Animal Preservation Act of 1954. Later the State of Gujarat was formed in the year 1960. The state government of newly formed Gujarat enacted the Bombay Animal Preservation (Gujarat Extension and Amendment) Act, 1961 whereby the Bombay Act was extended to the State of Gujarat in order to achieve uniformity in law in different parts of the State with regard to this subject.

The whole controversy came in front of the court when a writ petition was filed in the Gujarat High Court challenging the validity of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994. By this amendment the age of bulls and bullocks below the age of 16 years cannot be slaughtered was deleted. By this amendment, the age restriction was totally taken away and that means that no bull and bullock irrespective of age shall be slaughtered. This amendment was challenged before the Gujarat High Court. The Gujarat High Court after dealing with all aspects in detail held that amendment is ultra vires. Hence, the present petition along with the other petitions came up before this Court by Special Leave Petition. The matter was listed before the three Judges’ Bench and after this the Constitutional Bench realized the difficulty that there are already Constitution Bench judgments holding the field and having the effect right now, referred the matter to the seven Judges’ Bench for reconsideration of all the earlier decisions of the Constitution Benches. Hence this case came before seven Judges’ Bench.

ISSUES IN THE PRESENT CASE
This complete case deals with many different issues. All these issues are mentioned below:-

- Clash of Fundamental Rights and Directive Principles of State Policy i.e. Articles 14, 19 (1) (g), 19 (6), 37 & Articles 37, 48, 48A.
- Meaning of “Milch” and “Draught Cattle” in Article 48.
- Are the statement of objects and reasons of parent act in consonance with the scheme of the Constitution?
- Does “Regulation” or “Restriction” includes Total Prohibition or Partial Restraint under Article 19(1)(g)?
- Does slaughter of cow progeny comes under the ambit of public interest?

ANALYSIS:-
This case deals with different issues and each issue has its own importance so I would prefer to do an analysis of all these issues one by one.

- **Clash of Fundamental Rights and Directive Principles of State Policy i.e. Articles 14, 19 (1) (g), 19 (6), 37 & Articles 37, 48, 48A:-**

  Fundamental Rights are enshrined in Part III of our Constitution and Directive Principles of the State policy are mentioned in Part IV of our Constitution. Directive Principles are not enforceable in any court of law.\(^{129}\) Thus, it is inevitable that Fundamental Rights which are conferred to citizens through part III of the constitution clashes with the Directive Principles which are fundamental guidelines for the governance of the country. The entire credit of providing two types of rights in our Constitution goes to Sapru Committee which in 1945 suggested two categories of rights: one justiciable and the other in the form of directives to the State which should be regarded as the basic norm in the governance of the country.\(^{130}\)

  The real intention of the framers of the constitution while incorporating Directive Principles of the State policy as a part of the constitution is that the legislature and the executive both must pay regard to these directives while framing and implementing any policy for the best result and output of that policy.\(^{131}\) For example, Article 37 states that Directive Principles of the State policy are not enforceable in the court of law, but those directives are very essential and basic for the better governance of the country. The important and operating part here is fundamental in the governance of the country and it should always be read with Fundamental Rights and they should be given more importance because they act as guidelines for government to make laws and rule. In the State of Madras v. Srimathi Champakam Dorairajan\(^{132}\), it was held that the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. But this is also a fact that disobedience to Directive Principles cannot affect the legislative power of the State.

  The Hon’ble Apex Court in I.C. Golak Nath and Ors.v. State of Punjab and Anr.\(^{133}\) held that there should be no conflict between fundamental rights and DPs and made a request to the legislature and the judiciary to maintain a balance between fundamental rights and the directive principles to achieve the holistic development of the society. On a bare perusal it is obvious to say that Article 19 (1) (g) which is a fundamental right and Article 48 which is a Directive Principle are contradictory to each other. But this is also an undoubted fact that no one can go to court and ask the court to direct the state to govern according to Article 48 as it is not enforceable in court as mandated by Article 37 of the constitution.\(^{134}\) In each case, maximum effort is made to reconcile the overlapping interests of all groups and people in the society covered by different fundamental rights and DPs.

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\(^{129}\) Minerva Mills Ltd. & Ors vs Union Of India & Ors, 1981 SCR (1) 206.


\(^{131}\) Akhil Bharatiya Soshit Karamchari Sangh (Railway) V. Union Of India & Ors., 1981 SCR (2) 185.


\(^{133}\) I.C. Golak Nath and Ors.v. State of Punjab and Anr., 1967 SCR (2) 762.

\(^{134}\) V N Shukla’s Constitution of India, Mahendra Pal Singh, 12\textsuperscript{th} Edition.
State shall certainly implement all the directive principles of state policy but it would again be very unfair and unreasonable if it violates the fundamental right of any citizen. The Hon’ble Apex court while dealing with the similar question in Kesavananda Bharati and Ors. v. State of Kerala and Anr.\textsuperscript{135}, held that the onus is on the legislature to maintain the balance since the legislature is in the best position to have the clear insight of the needs of requirements of its citizens. The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature.\textsuperscript{136} Thus it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles.\textsuperscript{137} Therefore, the restrictions which can be placed on the rights listed in Article 19(1) are not subject only to Articles 19(2) to 19(6); the provisions contained in the part IV on Directive Principles can also be pressed into service and relied on for the purpose of adjudicating the reasonability of restrictions placed on the Fundamental Rights.

- **Dominance of Fundamental Rights over Fundamental Duties and Directive Principles (Articles 37, 48, 48A, 51A).**

This is the appropriate time to discuss the case of Mohd. Hanif Quareshi v. State of Bihar\textsuperscript{138} which came in front of the Hon’ble Supreme Court in 1958 and that was the time when the socio-economic condition of our country was way different than it is today. In this case, the Hon’ble bench which adjudicated this issue faced difficulties while upholding a complete ban on the slaughter of she-buffaloes, bulls or bullocks (cattle or buffalo) after they are not naturally sound enough to yield milk or of breeding or performing their function as a draught animal. Moreover, the bench also concluded that the ban is completely unreasonable and clearly it is against the public interest. It is pertinent to mention that this case is one of its kind and when this matter came in front of the court then at that time Articles 48A and 51A were not present in the constitution as it happened later in 1976 through (Forty-second Amendment) Act, 1976\textsuperscript{139}.

Article 48 has two parts and second part deals with “for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle” and if we read it with Article 51A (g) then the picture is more clear as it enjoins a fundamental duty of every citizen “to have compassion for living creatures”, which in its wider fold embraces the category of cattle spoken of specifically in Article 48. In AIIMS Students’ Union v. AIIMS and Ors.\textsuperscript{140}, a three judge bench of the Hon’ble Apex court has explicitly held that fundamental duties though not enforceable in the court of law but carries a huge significance as it provides immense support while interpreting the constitution in its true sense and again in T.N. Godavarman Thirumalpad v. Union of India, 1993 SC 2178.

\textsuperscript{135} Kesavananda Bharati and Ors. v. State of Kerala and Anr., (1973) 4 SCC 225.
\textsuperscript{136} Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.
\textsuperscript{137} Unni Krishnan, J.P. and Ors. vs. State of Andhra Pradesh and Ors., AIR 1993 SC 2178.

\textsuperscript{139} Forty Second Amendment Act, 1976 to the Constitution of India.
\textsuperscript{140} AIIMS Students’ Union v. AIIMS and Ors., JT 2001 (8) SC 218.
India and Ors.\(^{141}\), Hon’ble court read these two aforesaid provisions together i.e., Article 48-A and 51-A together to expound the jurisprudence related to environmental law and held that

“This day, the State and the citizens are under a fundamental obligation to protect and improve the environment, including forests, lakes, rivers, wild life and to have compassion for living creatures”.

- **Meaning of “Milch” and “Draught Cattle” in Article 48.**

Article 48 of the constitution employs the expression “cows and calves and other milch and draught cattle”. The question is whether when Article 48 precludes slaughter of cows and calves by description, the words “milch and draught cattle” are described as a like species which should not be slaughtered or whether such species are protected only till they are “milch or draught” and the protection ceases whenever, they cease to be “milch or draught”, either temporarily or permanently? What meaning is to be assigned to the expression “milch and draught cattle”?

It is an undeniable fact that cow ceases to be “milch” after attaining a particular age. Yet, the cow has been held to be entitled to protection against slaughter without paying regard to the fact that it has ceased to be “milch”. This constitutional position is well settled. So is the case with calves. Calves have been held entitled to protection against slaughter without regard to their age and though they are not yet fit to be employed as “draught cattle”.

What court here did is something new as the Hon’ble bench constructively followed the same pattern here also and held that the words “calves and other milch and draught cattle” have also been used as a matter of description of a species and not with regard to age. This reasoning is further strengthened by Article 51A(g) of the Constitution. The State and every citizen of India must have compassion for living creatures.

In my opinion, a species of cattle which is milch or draught for a number of years during its span of life is to be included within the said expression. On ceasing to be milch or draught it is very indifferent on the part of humans to pull it out from the category of “other milch and draught cattle”.

- **Are the statement of objects and reasons of parent act in consonance with the scheme of the Constitution?**

This particular question was specifically dealt by the Hon’ble bench to delve into the real intention of the legislators when they passed this impugned act. One strange thing which is also part of this case is that statement of objects of parents act were not kept in front of the High court and the High court did not adjudicate upon this matter by analyzing it through this perspective. In State of West Bengal v. Union of India\(^{142}\), the Hon’ble Supreme Court approved the use of Statement of Objects and Reasons for the purpose of understanding the background and the antecedent state of affairs leading up to the legislation. As held


\(^{142}\) State of West Bengal v. Union of India, [1964] 1 SCR 371.
in Querashi’s case\textsuperscript{143} by the Hon’ble Apex Court that

“it is accepted, and the courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.”

What I think is that though legislature understands the interests of the public by enacting laws\textsuperscript{144} but the ultimate responsibility for determining the validity of the laws must rest with the court.\textsuperscript{145} The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the Preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved. Thus after reading full judgment, it is also very clear that the object sought to be achieved by the Ordinance or any Legislation which is a significant policy decision must be considered as a sole ambit of legislature to determine, and the propriety of that determination is not open to question in courts.

Does “Regulation” or “Restriction” includes Total Prohibition or Partial Restraint under Article 19(1)(g)?

The Hon’ble court while adjudicating this matter has faced the issue of interpreting the word “restriction” under Article 19. The real controversy is revolving around the meaning of the word “restriction”\textsuperscript{146}. The way it is interpreted is very significant. Three propositions of the law related to this are well settled and they are mentioned below:

- “restriction” includes cases of “prohibition”\textsuperscript{147};
- the standard for judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate\textsuperscript{148}, and
- Whether a restriction in effect amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right.\textsuperscript{149}

In Madhya Bharat Cotton Association Ltd. v Union of India\textsuperscript{150} a large section of traders were completely prohibited from carrying on their normal trade in forwarding contacts. The restriction was held to be reasonable as cotton, being a commodity essential to the life of the community, and therefore such a total prohibition was held to be permissible.

In the present case, what I think is that the issue is related to a total prohibition imposed on the slaughter of cow and her progeny. There is an absolute ban with

\textsuperscript{144} Raj Sahiban Shersingh vs. The State of Rajasthan, AIR 1954 Raj 65.
\textsuperscript{145} Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.
\textsuperscript{146} Saghir Ahmad v. The State of U.P. and Ors., AIR 1954 SC 728.
\textsuperscript{147} Khoday Distilleries Ltd v State Of Karnataka, 1995 SCC (1) 574.
\textsuperscript{148} Indian Hotel and Restaurant Association (AHAR) and Ors. v. The State of Maharashtra and Ors., 2019 (1) SCALE 433.
\textsuperscript{149} Ramliila Maidan Incident v. Home Secretary, Union of India (UOI) and Ors., (2012) 5 SCC 1.
\textsuperscript{150} Madhya Bharat Cotton Association Ltd. v. Union of India, AIR1954SC634.
regard to the slaughter of one particular class of cattle. The ban is not on the total activity of butchers or slaughterhouses; they are left free to slaughter cattle other than those specified in the Act. I think it is permissible to place a total ban amounting to the prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of the general public, yet, in the present case banning the slaughter of cow is not a prohibition but only a restriction.

Does slaughter of cow progeny comes under the ambit of public interest?
The cow is a very sensitive topic in India as the touch of religious personality is inextricably involved with it. As earlier held in Quareshi’s case\(^{151}\), that the restriction amounting to the total prohibition on the slaughter of bulls and bullocks was unreasonable and was not in public interest. Thus the only question left in this case is to examine the evidence available on record which would enable the court to answer questions with regard to the “reasonability” of the imposed restriction qua “public interest”. At the same time it is also true that cow and her progeny sustain the health of the nation. In our Indian society, we use cow dung for so many useful processes and the dung of the animal is cheaper than the artificial manures and extremely useful of production of biogas. Agriculture is the backbone of Indian society and cow, bullocks, and their progeny are the binding system which helps in maintaining the balance between agricultural and economic system. The economy of our country is still predominantly agricultural. In a country like India which is majorly depending on agriculture use of animals in the form of milch, draught or other purposes is very important. The weakening of any cattle is inevitable with the passage of the time but at the same time a cattle still continues to provide us the dung, manure and biogas, and thus forms the significant part of our food chain.

Thus according to me, it is highly irrational to slaughter cows as they always help humans in all the aspects and also helps us in surviving. Moreover, in State of West Bengal and Ors. v. Ashutosh Lahiri\(^{152}\), Hon’ble Court has noted that sacrifice of any animal by Muslims for the religious purpose on BakrI’d do not include slaughtering of the cow as the only way of carrying out that sacrifice. Slaughtering of cow on BakrI’d is neither essential nor necessarily required as part of the religious ceremony performed by the Muslims on BakrI’d.

Thus the views accepted by Supreme Court are contrary to the High Court. The Bombay Animal Preservation (Gujarat Amendment) Act, 1994 is held to be intra vires the Constitution by the Hon’ble Supreme Court of the India.

CONCLUSION
Thus, the aforesaid analysis of the provisions of the Constitution and judgment in this case pronounced by the Hon’ble Supreme Court of India unequivocally shows that a total ban on the slaughter of cows and its progeny is absolutely constitutional. The court clearly held that such a ban is not a prohibition but only a restriction, because the slaughter of certain other animals is still legal and hence there is no infringement of a fundamental right to occupation, trade or business. The court


\(^{152}\) State of West Bengal and Ors. v. Ashutosh Lahiri, AIR 1995 SC 464.
analysed the judgement with a different outlook also. The Hon’ble had observed that the preservation of cow is essential to fulfill the objectives of the economy of the nation. Moreover, in the present time, many States / UTs in India have already banned cow slaughter either totally or partially; and such ban has been upheld by the courts. In this entire case comment, I have made an attempt to confine my analysis on the legal questions and issues which are raised and linked with this case and I have refrained myself from making any conclusion on the basis of religious issues. In this case the Hon’ble Apex court justified ban on cow slaughter on the basis of the constitutional provisions present under part III of the constitution which deals with the fundamental rights and also explicitly held that the legislature is competent to enact such issues. This case is the classical example which tells us that the harmonious interpretation of the constitution is must for the holistic development of the nation and the legislature must keep in mind that directive principles should always be considered as the fundamental guidelines to govern the country but while doing so it should not abridge the fundamental rights of any citizen.

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PRIVACY IN INTERNET ERA

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INTRODUCTION

“Information privacy is a social goal, not a technological one. To achieve information privacy goals will require social innovations, including the formation of new norms and perhaps new legal rules to establish boundary lines between acceptable and unacceptable uses of personal data.” Pamela Samuelson

WHAT IS PRIVACY AND INTERNET?
Privacy is a concept that is neither clearly understood nor clearly defined. Of all Human Rights in the International catalogue, privacy is perhaps the most difficult to define. It is a fundamental human right recognized all over the world, enshrined in numerous international human rights instruments. It protects human dignity and other values such as freedom of expression, information and association. Thus, it has become one of the most important human rights in modern age.

In most of the countries Privacy is fused with Data protection, which interprets privacy as management of personal information. Privacy is the interest that individuals have in sustaining a ‘personal space’, free from interference by other people and organizations. People enjoy having private spaces, and want to keep them. In rather strict context, Privacy protection is seen as a way of drawing a line of how far a society can intrude a person’s affairs.

Ability of others to access and link databases, with few control on how they use, share or exploit the information, makes individual control over information about oneself difficult. Privacy in cyberspace is the most flagrantly violated right of the individual. It has multiple dimensions, including privacy of the physical person, privacy of personal behavior, privacy of communications and privacy of personal data. The last two are commonly bundled together as ‘information privacy’.

Dataveillance or intellectual privacy is the systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons. Universal Declaration of Human Rights defines Right to Privacy under Article 12, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8) are expressed similarly.

Internet offers many benefits. Web sites provide a vast world of information,

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155 Marc Rotenberg, Protecting Human Dignity in the Digital Age (UNESCO 2000).
156 Clarke, Roger, Information Privacy On the Internet Cyberspace Invades Personal Space.
157 “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”
entertainment, and shopping at our fingertips. Electronic mails, instant messaging, and chat rooms enable us to communicate with friends, family, and strangers in ways we never dreamed of a decade before.

The internet has become an indispensable tool for data retrieval, communication, and business transactions. Companies increasingly look to the internet to attract potential clients and customers and to stay in contact with current clients and customers. But with the ease in collecting and processing information, there exists the danger that Internet Business transactions can render party’s information susceptible to interception, misappropriation, or even loss.

Internet exposes Companies to the danger that third parties may access private, confidential client data, resulting in potential liability to those companies. The privacy and security concerns generated by its usage increase the importance of a company’s privacy policy.158

Internet privacy involves the right or mandate of personal privacy concerning the storing, repurposing, provision to third parties, and displaying of information pertaining to oneself via the Internet.159 Internet privacy is a subset of data privacy. Privacy concerns have been articulated from the beginnings of large-scale computer sharing.160

**RISKS TO PRIVACY**

Companies are hired to watch what websites people visit, and then use that information, for instance by sending advertising popups based on one's web browsing history. There are many ways in which people can divulge their personal information, for instance by use of "social media" and by sending bank and credit card information to various websites. Moreover, directly observed behavior, such as browsing logs, search queries, or contents of the Facebook profile can be automatically processed to infer potentially more intrusive details about an individual, such as sexual orientation, political and religious views, race, substance use, intelligence, and personality.161

Several social networking websites try to protect the personal information of their subscribers. On Facebook, for example, privacy settings are available to all registered users: they can block certain individuals from seeing their profile, they can choose their "friends", and they can limit who has access to one's pictures and videos. Privacy settings are also available on other social networking websites such as Google Plus, Twitter etc. The user can apply such settings when providing personal information on the internet. The Electronic Frontier Foundation has created a set of guides or guidelines so that users may more easily use these privacy settings.162


162 "Protecting Yourself on Social Networks". Surveillance Self-Defense. Last seen on 04-06-2019.
In late 2007 Facebook launched the Beacon program where user rental records were released in the public for friends to see. Many people were enraged by this breach in privacy, and the *Lane v. Facebook, Inc.* case ensued.\textsuperscript{163}

Children and adolescents often use the Internet (including social media) in ways which risk their privacy: a cause for growing concern among parents. Young teenagers also may not realize that all their information and browsing can and may be tracked while visiting a particular site, and that it is in their own hands to protect their own privacy.

They must be informed about all these risks. For example, on Twitter, threats include shortened links that lead one to potentially harmful places. In their email inbox, threats include email scams and attachments that get them to install malware and disclose personal information. On Torrent sites, threats include malware hiding in video, music, and software downloads.

In 1998, the Federal Trade Commission of USA considered the lack of privacy for children on the Internet, and created Children Online Privacy Protection Act (COPPA). COPPA limits the options which gather information from children and created warning labels if potential harmful information or content was presented. In 2000, Children's Internet Protection Act (CIPA) was developed to implement safer Internet policies such as rules, and filter software. These laws, awareness campaigns, parental and adult supervision strategies and Internet filters can all help to make the Internet safer for children around the world.\textsuperscript{164}

**LAWS RELATED TO PRIVACY IN INDIA**

There was no mention of right to privacy within the context of communication surveillance and data protection in the National Report submitted by India. The right to privacy was not raised as an issue of concern neither by UN Member States nor external stakeholders.

The Constitution of India does not contain any provision granting a general right to privacy. But ‘Right to Privacy’ has been recognized by the Indian Judiciary as implicit in Article 21 and Article 19 (1) (a) of the Constitution in many cases. Right to Privacy has many dimensions and the most likely aspect of privacy that would be affected in cyberspace is informational privacy. There are currently no laws in India requiring websites to disclose how the information they gather about visitors is being used; and online businesses are largely free to use data obtained on their websites without oversight by the consumer. In India, consumers have no statutory right to control the dissemination of their personal information to others by third parties.

Protection of privacy is one of the crucial issues that must be resolved. Will the “Digital Age” be one in which individuals may maintain, lose, or gain control over information about themselves? In the midst of this uncertainty, there are some reasons to be hopeful. Of course, individuals operating on the Internet can use new tools for protecting their privacy.

\textsuperscript{163} Grimmelmann, James (2009). “Saving Facebook”, Iowa Law Review

DATA PROTECTION LAWS IN INDIA

The Government of India has notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. The Rules only deal with protection of "Sensitive personal data or information of a person", which includes such personal information relating to:-

- Passwords;
- Financial information such as bank account or credit card or debit card or other payment instrument details;
- Physical, physiological and mental health condition;
- Sexual orientation;
- Medical records and history;
- Biometric information.

The rules provide the reasonable security practices and procedures, either the body corporate or any person who on behalf of body corporate collects, receives, possess, store, deals or handle information is required to follow while dealing with "Personal sensitive data or information". In case of any breach, the body corporate or any other person acting on behalf of body corporate, may be held liable to pay damages to the person so affected.

But it is not just individual’s self-interest leading us towards increased privacy protection. Lack of privacy protections is a major barrier to consumer participation in electronic commerce, businesses are beginning to take privacy protection seriously. Numerous efforts at self-regulation have emerged; such as TRUSTe\(^\text{165}\). A growing number of companies under public and regulatory scrutiny, have begun incorporating privacy into their management process and actually marketing their “privacy sensitivity” to the public. The collective efforts pose difficult questions about how to ensure the adoption and enforcement of rules in this global, decentralized medium. Government is also struggling to identify their appropriate role in this new environment.

RESTRICTIONS TO RIGHT TO PRIVACY

The constitutional right to privacy in India is subject to a number of restrictions. These restrictions have been culled out through the interpretation of various provisions and judgments of the Supreme Court of India:

- The right to privacy can be restricted by procedure established by law which procedure would have to be just, fair and reasonable.\(^\text{166}\)
- Reasonable restrictions can be imposed on the right to privacy in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or to an offence; (Article 19 (2) of the Constitution of India, 1950).
- The right to privacy can be restricted if there is an important countervailing interest which is superior.\(^\text{167}\)
- The right to privacy can be restricted if there is a compelling state interest to be served.\(^\text{168}\)
- The protection available under the right to privacy may not be available to a person

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\(^{165}\) TRUSTe, is an industry sponsored self-regulation watchdog group. TRUSTe: Building a Web You Can Believe In

\(^{166}\) Maneka Gandhi v. Union of India 1978 AIR 597, 1978 SCR (2) 621

\(^{167}\) Gobind v. State of M.P 1975 AIR 1378 1975 SCR (3) 946 1975 SCC (2) 148

\(^{168}\) Gobind v. State of M.P 1975 AIR 1378 1975 SCR (3) 946 1975 SCC (2) 148
who voluntarily thrusts her/himself into controversy.  

- Like most fundamental rights in the Indian Constitution, the right to privacy has been mostly interpreted as a vertical right applicable only against the State, as defined under Article 12 of the Constitution, and not against private citizens.

AREAS OF CONCERN

Communication surveillance in India is broad and fragmented. It is primarily regulated by two different statues The Telegraph Act, 1885 (“Telegraph Act”) (which deals with interception of calls) and the Information Technology Act, 2000 (“IT Act”) (which deals with interception of electronic data).

In India, there are at least sixteen different intelligence agencies that have been established. Most of the intelligence agencies in India do not have clearly established their oversight mechanisms other than the departments that they report to. For example, CBI and RAW report to the Prime Minister’s Office, Directorate of Revenue Intelligence reports to the Finance Ministry, and the Military intelligence agencies do not come under the purview of Parliament, the Right to Information Act, and their functions are not subject to audit by the Comptroller and Auditor General – despite these agencies being funded from the Consolidated Fund of India.

In 1996 the Supreme Court of India noticed the lack of procedural safeguards in the provisions of the Telegraph Act and laid down certain guidelines for interceptions. These guidelines formed the basis of the Rules defining the procedures of interception that were codified by introducing Rule 419A in the Telegraph Rules in 2007. These guidelines were, in part also reflected in the Rules prescribed under the IT Act in 2009. Section 69 of the IT Act, 2000 allows for the interception, monitoring and decryption of digital information in the interest of the sovereignty and integrity of India. The “IT Interception Rules” include safeguards stipulating who may issue directions of interception and monitoring, how such directions are to be executed, the duration those remain in operation, to whom data may be disclosed, confidentiality obligations of intermediaries, periodic oversight of interception directions by a Review Committee under the Indian Telegraph Act, the retention of records of interception by intermediaries and to the mandatory destruction of information in appropriate cases. Rule 3 allows the “competent authority” to issue directions for monitoring for any number of specified purposes related to cyber security.

THE AADHAAR DATA BREACH (2018)

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170 Zoroastrian Cooperative Housing Society v. District Registrar Appeal (Civil) 1551 of 2000
171 National Technical Research Organization; Research and Analysis Wing (R&AW); The Aviation Research Centre (ARC) and Radio Research Centre (RRC), which are a part of the Research and Analysis Wing (R&AW); Electronics and Technical Service (ETS), which is the ELNIT arm of R&AW; Intelligence Bureau; Narcotics

Control Bureau; Directorate of Revenue Intelligence; Central Economic Intelligence Bureau; Central Bureau of Health Intelligence; Denfence Intelligence Agency; Joint Cipher Bureau; Signals Intelligence Directorate; Directorate of Air Intelligence; Directorate of Army Intelligence; Directorate of Military Intelligence; Directorate of Income Tax (Intelligence and Criminal Investigation); Directorate General of Income Tax Investigation and Joint Intelligence Committee.
In Justice K.S.Puttasawmy v. Union of India\textsuperscript{172}, the Apex Court unanimously affirmed that the right to privacy is a fundamental right under the Indian Constitution. The Attorney General for India had stood up during the challenge to the Aadhaar Scheme and declared that the Constitution did not guarantee any fundamental right to privacy.

Aadhaar, which means ‘foundation’ is a 12 digit unique-identity number issued to all Indian residents based on their biometric and demographic data. The Unique Identification Authority of India (UIDAI), a statutory body that oversees the world’s largest biometric identity card scheme, following a report in The Tribune\textsuperscript{173} claimed unrestricted access to any Aadhaar number for a paltry sum of Rs. 500. Biometric data, unlike the UIDAI’S statement, is not the only privacy concern with this breach. The disclosure of demographic data, such as an individual’s name, date of birth, address, PIN, photo, phone number, e-mail, etc., is not any less of a privacy concern. This data forms the basis of many cybercrimes, be it publishing or identity theft.

**WHEN CAN GOVERNMENT INTERFERE WITH DATA**

Under section 69 of the IT Act 2000, any person, authorized by the Government or any of its officer specially authorized by the Government, if satisfied that it is necessary or expedient so to do in the interest of sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, for reasons to be recorded in writing, by order, can direct any agency of the Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource. The scope of section 69 of the IT Act, 2000 includes both interception and monitoring along with decryption for the purpose of investigation of cyber-crimes. The Government has also notified the Information Technology (Procedures and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, under the above section.

The Government has also notified the Information Technology (Procedures and Safeguards for Blocking for Access of Information) Rules, 2009, under section 69A of the IT Act 2000, which deals with the blocking of websites. The Government of India has so far blocked 2388 social media URLs in 2018 under the Rule 7 Section 69A of IT Act, 2000 as per the data maintained by NCRB (National Crime Records Bureau).\textsuperscript{174}

**CONCLUSION**

The importance of right to privacy for the maintenance of dignity and integrity of an individual is beyond explanation. The legislative measures are adopted in India in this regard though seem to be enough on

\textsuperscript{172} Writ Petition (CIVIL) No. 494 of 2012
paper but when it comes to implementation, lack of awareness amongst the users, the internet habits of the users in India and lack of expertise amongst the enforcement agencies are presenting serious challenges. In today’s privacy politics, the strong medicine of a privacy commission will be politically infeasible until weaker medicine has been tried. In the meantime, most of us could agree that policy makers and academics alike should work to improve public understanding of cyberspace privacy.

India need to work more for enduring an effective and concrete legislation for data protection. However, while creating the laws, the legislature has to be well aware for maintaining a balance between the interests of the common people along with reasonably handling the increasing rate of cybercrimes. Technological advancements such as micro cameras and video surveillance had a profound effect on personal privacy. Everyone, be it an individual or an organization has a right to protect and preserve their personal, sensitive and commercial data and information. India at this moment needs a dedicated law protecting the data and personal privacy of an individual. A national privacy policy is still missing in India. The laws should be made keeping in mind both the genders rather than protecting only female rights. A gender neutral is as crucial as a technological neutral legislation.

For privacy intactness, proper training and awareness, monitoring and auditing, and incident response is required. Expression through speech is one of the basic needs provided by the civil society and variances in the scope of freedom of expression, combined with more online communication, has produced concerns about censorship in cyberspace. Freedom of opinion and expression should be free from any kind of political, commercial or any other influences. It should be applied in non-discriminatory and non-arbitrary manner, and also should be supported by applying safeguards against any kind of abuse, hate speeches, religion biasing etc. Alan Westin (1967) in ‘Privacy and Freedom’ defined privacy as the “desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and behavior to others.”\footnote{Alan Westin, Privacy and Freedom, 25 Wash. & Lee L. Rev. 166 (1968) https://scholarlycommons.law.wlu.edu/wlulr/vol25/iss1/20/ last seen on June 6, 2019} The absolute protection of privacy on the internet is difficult to imagine and achieve. The self-restraint by the users on his ‘web-habits’ is the basic solution which may yield positive results in this direction.\footnote{Dr. Pankaj Kakde, Right to Privacy and its Infringement in Cyberspace https://www.academia.edu/5635495/Right_to_Privacy_and_Its_Infringement_in_Cyberspace last seen on June 6, 2019}
HUMAN TRAFFICKING AS A MODERN DAY SLAVERY”

By Arushi Agarwal
From Dharmashastra National Law University

ABSTRACT

“We came to the United States to find a better future, not to be prostitutes. No woman or child would want to be a sex slave and endure the evil that I have gone through. I am in fear for my life more than ever. I helped put these evil men in jail. Please help me. Please help us. Please do not let this happen to anyone else.” — Maria, trafficking survivor

One of the worst forms of exploitation on the globe is trafficking of human beings. Men, women and children are bought and sold as commodities and forced to cross national and international borders for exploitation. They are being taken away by the way of fraud, abduction, auction, fake marriages, coercion, deception, abuse of power etc. The Indian Constitution specifically bans the traffic in persons and their exploitation. Under the Fundamental Rights section of the Constitution of India, Article 23, prohibits ‘traffic in human beings and other similar forms of forced labour’. Though there is no concrete definition of trafficking, it could be said that trafficking necessarily involves movement / transportation, of a person by means of coercion or deceit, and consequent exploitation leading to commercialization. Trafficking in human beings is considers as criminal and exploiting practices among persons specifically among children and women. Women are considered to be most vulnerable to human trafficking. For purpose of sexual or commercial exploitation, women and girls are kidnapped, sold, and coerced in every country in the world. Trafficking of women for commercial sexual exploitation has become one of the greatest challenges of the new millennium. It has put into threat the basic dignity of women, exploiting them in the worst manner, destroying them physically, psychologically, socio-economically and in other respects.

One of the most common reasons for trafficking in women today is to fuel the prostitution trade. The women are often raped and abused by their recruiters, and then sent to brothels or underground prostitution rings. They also have to work in the sex industry.

Child trafficking is also high-risk organized crime worldwide. Boys and girls are coerced into forced labour, and being trafficked or exploited for sex trade and pornography, domestic labour, illegal & forced marriages, work in mines and factories by illegal means etc.

This research paper aims at highlighting the aftermath effects of child trafficking, laws on trafficking, loopholes in trafficking, some landmark judgment on trafficking of women and children. The paper will also highlight the need to develop the multidimensional approach to combat this grievous problem.

Key words- exploitation, commodities, organized crime, sexual exploitation, forced labour, slavery

I. WHAT IS HUMAN TRAFFICKING?

Definitions of Human Trafficking

Trafficking is defined in the term traffic as ‘trade, especially illegal’

The most widely accepted definition of human trafficking comes from the Protocol
to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which is also known as the Palermo Protocols. Adopted by the UN General Assembly in 2000 and accepted by over 150 countries, the Palermo Protocols. The United Nations defines human trafficking as:

“The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

II. THE PROCESS OF TRAFFICKING IN HUMAN BEINGS: PHASES OF COMMITTING THE CRIME

Using the definition of trafficking in human beings from the Palermo Protocol, the phenomenon can be structured in these three phases: recruitment, transportation, exploitation.

Phase of Recruitment

At this stage the victim is drawn into the trafficking chain. This occurs mostly through abuse of trust, internet, love, friendship, family ties, misuse of information, abductions, etc. Most victims are recruited through false job and other offers, usually by people the victim knows, simulating a love affair when the boy, after gaining her trust, invites a girl to go together and move to another country or another city to start a joint life. Common forms of recruitment are also job that offers in daily newspapers, social networks, internet and others. It sounds incredible, but the victim’s family also sells child because of hardships, poverty, or because of their “customs”.

Phase of Transportation

Transport to the place of exploitation, either within the country or outside the country of origin of the victim. While transporting the victim to the final destination false documents are often used, but it is possible to use the real documents too.

Phase of Exploitation

This stage involves the exploitation of the victims. Children are involved in the chain of begging, are forced into criminal activity, and may be exposed to sexual exploitation. Female persons are usually sexually and work exploited, while adult males are often exploited by working under harsh conditions. To achieve total control and prevent disobedience and escape of the victim, traffickers apply different methods that include the confiscation of personal documents, causing fear and the use of force; blackmail and threats are not rare, as well as the use of force towards the members of the victim’s family.

Identification of Human Trafficking (Process, Means, Purpose)

177 Exodus Cry, ‘What is Human Trafficking?’ Available at: https://exoduscry.com/about/human-trafficking/ (Last Accessed on - June 15, 2019).

178 Article 3(a) of the Optional Protocol to the United Nations Conventions on Transnational Organised Crime, also known as the Palermo Protocol.
179 United Nations Office on Drugs and Crime, ‘Human Trafficking’, Available at -

www.supremoamicus.org 60
<table>
<thead>
<tr>
<th>Process</th>
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<td>Giving and receiving of payments</td>
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- Traffickers use a variety of methods to create a vulnerable condition for the victims so that the victim do not have any other choice but obey the traffickers.
- One of the most common methods used by traffickers is debt-bondage in which the traffickers tell their victims that they owe them money relating to their travel and living expenses and that they will not be released until the debt has been repaid.
- Traffickers also use other methods including starvation, imprisonment, physical abuse (beatings and rape), verbal abuse, removal of victims’ identification documents (e.g. passport), and threats of violence to the victims and the victims’ families, and forced drug use.
- Especially in the case of cross-border trafficking, victims often do not speak the local language or do not have any social network to assist them so that they are depending on members of their own ethnic group receiving them in the destination country.
- Furthermore, victims’ illegal status makes it difficult for them to seek help from law enforcement, the healthcare system and/or other public services.  

### III. TYPES OF HUMAN TRAFFICKING

There are many forms of exploitation into which people can be trafficked and held in slavery. These crimes are happening in every corner of the world and can include any person, regardless of age, socio-economic background or location.

Source: UNODC (This table was shown in the PowerPoint presentation given at the Global Report on Trafficking in Persons launch event at Foreign Correspondents’ Club of Thailand on February 13, 2009.)


As a result, each case can look very different. Below are some of the most commonly reported forms of human trafficking and modern slavery.\textsuperscript{181}

1. **Sexual Exploitation**
Sexual exploitation entails any non-consensual or abusive sexual act performed without victim’s consent. This includes prostitution, escort work and pornography. Women, men and children of both sexes can be victims. Most of the victims are often deceived with the promise of a better life and then controlled through violence. “There is a culture of silence not because women are okay to put up with it, but because women do not draw enough confidence from the way the issue is going to be dealt with, because those in power continue to be men.” -NISHTHA SATYAM, Deputy Chief of UN Women in India\textsuperscript{182}

2. **Forced Labour**
Forced labour generally involves victims being compelled to work very long hours. These workers often work in inhuman working conditions without relevant training and equipment. They are also compelled to work beyond their physical and mental capacities. Forced labour vitally implies to the use of coercion for getting the work done. The workers further lack freedom of choice to work. These victims are frequently subjected to verbal threats or violence to achieve compliance.

3. **Bonded labour**
Bonded labour is a practice in which the employers give loans at high rates of interest to the labour who intern work at low wage rates to pay off their debts. The services and the duration of the services required to repay the debt are often undefined. Such bonded labour practices have a tendency of being passed on from generation to generation until the debts are finally paid off.

4. **Domestic servitude**
Domestic servitude refers to situations where the victims are forced to work in private households. Their movement is often restricted and they are forced to perform house-keeping tasks over long hours and meagre salaries. Such victims lead very isolated lives and have little or no freedom. Their often work in inhuman conditions and are also subjected to physical violence.

5. **Organ harvesting**
Organ harvesting basically refers trafficking of functional organs of individuals for transplant on high payments. The illegal trade is dominated by demand for kidneys and liver. These organs can be partly/wholly transplanted with relatively few risks to the life of the donor.

6. **Child exploitation**
Persons under the age of 18 are classified as children in most of the countries across the world. It is not astonishing to see young people getting caught up in criminal exploitation. Children are vulnerable to exploitation by traffickers and organized crime groups. They are deliberately targeted by criminals, or ruthlessly


exploited by the people who should protect them.

IV. EFFECT OF HUMAN TRAFFICKING

1. Emotional Effect: The victims who are trafficked into the commercial sex industry and are forced to have sex with many persons are broken with very low self-esteem, ashamed and are very angry if the perpetrator is trusted. Their feeling of severe guilt, depression, anxiety leads them to attempt suicide.

2. Physical/ Health Effect: Victims are physically abused by traffickers. They are capable to carry Sexual Transmitted Infections like HIV/AIDS. Physical torture and deprivation are applied on the victims for taking charge of them and preventing them from escaping.

3. Social Effect: As the victims of trafficking, are unable to lead a family life for a long period and are cutoff from normal social activities possible adjustment for them would be difficult. Their progress is delayed even when all is in place for their rehabilitation and reintegration because of the stigma put on them by the society.

4. Economic Effect: Although human trafficking is a high profit and low risk adventure, the perpetrators mortgage the life of adults and children for their selfish gains. Human Trafficking ruins the future of any society for which a large number of people cannot work effectively. The situation worsens when women and children are most affected.

V. CAUSES OF HUMAN TRAFFICKING

The main causes of Human Trafficking are as follows:

1. Poverty: Poverty is a major factor in human trafficking industry. The victims look for any means to get out of the curse of poverty. These helpless condition of the victims gives ample scope to the traffickers to entrap the victims in their nets. The traffickers lure the victims with better life facilities by way of moving to foreign countries.

2. Political condition: Political instability, militarism, generalized violence or civil unrest increase in trafficking as well. The destabilization and scattering of population increase their vulnerability to unfair treatment and abuse via trafficking and forced labour.

3. War: A large number of children who have lost their family members in war are vulnerable to trafficking. Armed conflicts lead to massive gross displacement of people.

4. Social and cultural practices: Most of the women and girls are generally exploited and abused due to social and cultural practices and are forced to live in perilous condition. They are more vulnerable to human trafficking as they get little opportunity of upward mobility. In our society a single mother, divorced woman, widowed and sexually abused woman and young girls are easy prey to the traffickers because of the social stigma.

5. Demand Of Cheap Labour: Demand of cheap labour particularly in restaurants and kitchens help Traffickers to exploit employees who are often initially promised a safe work space and a steady salary, though they are paid less than minimum wage and are forced to work on overtime. As the victims of trafficking are unable to protest for having very few alternatives, the business owners never cease to practice these illegal norms.
6. **Child Marriage:** In our country child marriage is the easiest way of human trafficking. In village community it is a matter of shame for the poor parents who are unable to arrange the marriage of their daughter. So they easily accept the offer of the traffickers who approach the poor families with marriage proposal without dowry, rather with cash rewards (between Rs. 1000- Rs. 5000 on an average). After marriage, the girls are sold and resold until they reach ultimate destination.

7. **Mutilation:** People are trafficked for their organs, particularly kidneys. It is a rapidly growing field of commercial activity. The life of the victim is at risk as operations are carried out in clandestine conditions with no medical care at all. According to NCRB (2015), 15 cases were registered under the Transplantation of Human Organ Act, 1994 in India.

8. **Sex-Tourism:** In recent time globalization has played an important role for the growth of tourism business and entertainment industries. As a result, sex related trades like sex tourism have grown rapidly.

9. **Child Labor:** Child labour means work performed by a child under the age of 14 for economic purpose. Children are deprived of their childhood and regular attendance to school.

10. **Migration:** Migration means the movement by people from one place to another with an objective mind. When people take irregular means for migration, they are easily victimized by human traffickers which poses a great danger to children and young woman in particular.

**VI. HUMAN TRAFFICKING IN INDIA**

Human trafficking has been a crime for centuries around the world. It is presently the 3rd largest global organized crime after drugs and armed forces, which is growing at an alarming rate. It has become one of the major issues of the twenty first century that has grown at a rapid pace. Human Trafficking is a crime that shapes all. It is a source, destination and transit country for trafficking of persons, including young girls and children. Child victims of trafficking in India are exploited in many ways- including as factory and agricultural workers, domestic servants and beggars. Girls in particular are vulnerable to trafficking for the purpose of forced marriages and commercial sexual exploitation.

**MAGNITUDE OF THE PROBLEM IN INDIA**

National Crime Record Bureau (NCRB) released that in 2016, a total of 8,137 cases of human trafficking were reported from across the country and in 2015, 6877 cases were reported, an increase of 18% in cases can be noticed here. The motive behind 7670 cases was sexual exploitation and 162 relates to child pornography. The numbers for human trafficking cases released by the National Crime Records Bureau (NCRB) put Rajasthan at an embarrassing number two position with 1,422 cases registered out of which 279 were females and children’s where 2519 in which 696 were girls. Total females trafficked are 975. According to NCRB data, the state’s share stood at 17.49% of the total 8,057 cases registered across the country. Rajasthan tops in the list of victims that were rescued in 2016. The list is topped by West Bengal with 3,579 cases.
In terms of cases reported Rajasthan ranks at 2nd position and in terms of rate Rajasthan ranks at 4th position. The NCRB notes that more minor boys were trafficked than girls. But, on the other hand, among adults, more girls were trafficked compared to boys.

VII. ROLE OF NATIONAL COMMISSION

NHRC on Women and Children

NHRC, India is committed for the protection of human rights of women and children due to their vulnerability in the society and therefore gives prior importance to In India, as elsewhere, women and children confront manifold violations of their human rights and are often discriminated against despite the fact that the Constitution of India provides for their survival, development, protection, participation and empowerment. India is also party to the international conventions which explicitly address the issues and advances human rights of women and children. The conventions were framed to ensure equality in the field of civil and political rights as well as economic, social and cultural rights.

The key international agreement on women’s human rights is the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which is ratified by 185 UN Member States. CEDAW encompasses a global consensus on the changes that need to take place in order to realize women’s human rights. Likewise, the key international agreement on children’s human rights is the 1989 Convention on the Rights of the Child (CRC). The CEDAW was ratified by the Government of India in 1993, whereas the CRC was ratified in 1992. Having ratified the CRC and the CEDAW, its provisions are reflected in numerous policies, laws, schemes and programmes being implemented for children and women by the Government of India.

However, the intergenerational cycle of multiple deprivation and violence faced by girls and women is amply clear by the adverse child sex ratio in children under 6 years of age. Hence it is important to work in the direction so as to provide protective and safe environment for women and children, including those from the most deprived socio-religious communities.

The paragraphs given below highlight some of the important activities undertaken by the Policy Research, Projects and Programmes Division, in short, Research Division of NHRC, on rights of women and children.

A. Constitution of the Core Group on Trafficking, Women and Children. The Commission has constituted a Core Group on Trafficking, Women and Children in November 2016183. The Members of the Core Group include experts on the subject representing Central Government, Police, Research Institutes, NGOs and Civil Society Organizations. The first meeting of the Core Group was held on 6 December 2016 under the chairmanship of Shri S. C. Sinha, Member, NHRC. The meeting was held to discuss the agenda prepared on issues related to Trafficking, Women and

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Children. The Core Group looked into the draft guidelines on Trafficking formulated by the NHRC and decided to re-draft the same. In the subsequent meetings of the Core Group held in the months of April, May and June the Core Group drafted a Standard Operating Procedures (SoP) and Guidelines for Combating Trafficking of Persons in India. The SoP comprises in great detail the concept of Trafficking, Collection of Intelligence for Prevention of Trafficking, Actions to be Taken Before Rescue, Rescue Process, Post-rescue Process, Rehabilitation and Compensation, Monitoring and Accountability, Law Enforcement and Legal Provisions which includes related provisions of Law relating to different aspects of trafficking. The Guidelines provides the policy and legal framework including international obligations and national framework, Situational Analysis of Trafficking in India. The guidelines further, look to establish a minimum standard in all processes leading to the prevention of trafficking; identification, rescue, repatriation, rehabilitation and prosecution of all the offenders involved. It talks about Resource Allocation, Capacity Building and Monitoring, Accountability and Transparency Mechanisms which needs to be developed for the better implementation of the existing framework.

VIII. ANTI TRAFFICKING BILL 2016

"Slavery was abolished 150 years ago & yet in current scenario there are more people involved in slavery today than at any other time in history"

The 2016 Anti-Trafficking Bill\textsuperscript{184} is a proposed bill addition to the existing Indian laws against trafficking. The bill in its current form will not achieve its objectives of preventing trafficking and providing protection and rehabilitation to trafficked victims. This is because there are various sets of laws applicable to the various manifestations of human trafficking: the Indian Penal Code the criminal law, the Immoral Trafficking Prevention Act, which is applicable to the contract labour, sex sector, interstate migrant and work several specialist labour legislations covering bonded labour. These different legal sources arise various ideas about what constitutes trafficking or extreme exploitation.

The differences of these approaches are visible in various respects. While the IPC and ITPA are related to prison, laws on bonded labour, contract labour, migrant labour envisage elaborate local-level administrative and labour law mechanisms. While on the other hand, criminal laws target persons like traffickers, whereas labour laws presume that exploitation is endemic and use both penal and labour law doctrines to impose obligations for better working conditions on all intermediaries.\textsuperscript{185}

While it is too soon to assess Sections 370 and 370A and the enforcement gap of labour laws despite activist judges, the NHRC and several dedicated IAS officers, it is a painful reminder of indifference on the part of the executive and society towards labour exploitation.

This Bill seeks to build an infrastructure around Sec.370. However, India needs


effective and a comprehensive anti-trafficking law that will not only consolidates the varied streams of anti-trafficking laws, but also it will consolidate the very different visions of extreme exploitation and the best regulatory means to address them. Unfortunately, the human trafficking Bill is that piece of legislation that does not consolidates.

GOOD, BUT INEFFECTIVE
The anti-trafficking Bill proposes a separate criminal law infrastructure on Human Trafficking. The district trafficking committee is the first helpline where social actors, governmental and other persons, can report a victim. It is unclear which agency undertakes the raid and rescue, but the victim is housed at the Shelter home where victim is provided food, protection, the special public prosecutor will initiate prosecution in a special court after police investigation of crime.

This raid-rescue-rehabilitation model is stranded in a strong criminal law system with severe penalties, burden of proof reversal, and provisions for take away traffickers by removing their assets and a parallel adjudication machinery consisting of special public prosecutors and special courts.

The Anti-Trafficking Bill thus proposes to make the prosecution of trafficking significant under Section 370. However, the Indian legal system has historically been unable to translate the law into action. The raid-rescue-rehabilitation model built under the ITPA has been a failure, protective homes under the ITPA have resulted in state officials sexually abusing women and colluding with pimps and brothel-keepers. Compounding the replication of the failed model of rescue and rehabilitation is the complete lack of clarity regarding how the proposed infrastructure is to interact with existing vigilance committees under the bonded labour laws and protective homes under the ITPA. Without any financial commitments from the government, the anti-trafficking bill is an empty gesture, meant to appease modern-day abolitionists and secure a better ranking in the Global Slavery Index, moving it away from its current hotspot status.

Worse, India has a robust history of sex work, policy framers have often seen trafficking purely through the lens of sex trafficking and sex work – whether it was the changes to the ITPA proposed or the bias in Section 370A towards users of sex trafficked victims. Several provisions of the trafficking bill highlight this continued emphasis on sex work, including the creation of offences under Sections 16 and 17 and rehabilitative measures to facilitate women exit from sex work.

Indian anti-trafficking NGOs are largely anti-sex work abolitionist groups, whereas the organizations which are working against the system of bonded labour find little resonance with the trafficking label. The bill thus seems to be primarily directed at victims of commercial sexual exploitation, a suitable distraction for the government from the millions of men and children severely exploited in, stone quarries, brick kilns, rice mills, construction sites, carpet workshops.. The Bill could have consolidated existing statutes and enforcement machinery and lent conceptual coherence to the term trafficking.186

186 Ibid.
IX. RECOMMENDATIONS

1. Due to lack of education people are not well aware of their rights. It also lacks public awareness. There should be direct interaction with children regarding their rights. They should be taught their rights in the school and by their parents. The school should build effective programs regarding trafficking and it should be communicated to children via plays, short movies etc. because children learn what they see. Persons involved in trafficking should be strictly punished.

2. In India, only laws are made on papers but their enforcement always lacks behind. Firstly, judiciary should look after the strict application and enforcement of the law. There should be legislative protection for trafficked victim. There should be strengthening of laws made on trafficking. There should be different ways developed by which awareness should be made in society regarding trafficking.

3. As we discussed earlier that poverty was one of the main causes of human trafficking because of which there is lack of education, it is very important that children’s access to education be increased and job opportunities for women be enhanced.

4. As we all know that people with no security or property are not easily provided with loans due to which they migrate to other places in search of better opportunities, government should provide flexible financing and access to credit, including microcredit at low interest.

5. During our entire research we came to know that all laws in India related to trafficking were for victim there was no law for the trafficker so we must have a law with stringent punishment and fines for the trafficker.

6. State should provide funding to establish Fast Track Courts that deals with all forms of human trafficking.

7. Subjects of child sexual abuse and trafficking should be included in the course curriculum.

8. Government should establish “Anti Human Trafficking Units” in all districts to prevent Human Trafficking.

9. Identification of victims and survivors and any intervention above all should do no further harm to any child or adolescent.

10. Members of state should ensure regular awareness raising and training for all the actors likely to come into contact with trafficked persons, especially the frontline police forces and other relevant officials.

11. The Supreme Court should lead the nation in implementation part of legal framework provided for combating the evil of human Trafficking rather than giving mere directives. The Supreme Court should effectively direct the implementation of existing laws by upholding constitutional norms, and recommend changes if existing laws are inadequate.

12. The Supreme Court should protect the various rights of the trafficked women and girls, such as freedom of movement, the right to life, the right not to be deported, the right not to be discriminated against or stigmatized, and the right to essential services.

13. There is extensive need in all over the world to bring all the agencies working in
the field of fight against trafficking to come together and give helping hands to each other in the fight.

14. A number of programs at National and International level should be arranged to address the causes of human trafficking. On a larger scale, host a human trafficking film festival.

15. The National Human Right Commission should conduct the extensive and valuable research throughout the country, organized a national workshop, and also contribute towards the implementation of the trafficking of law. The Government should also provide for shelters and schooling for orphans and street children to keep them away from traffickers.

16. Everybody must incorporate human trafficking information into their professional association, conferences, trainings, manuals, and other materials as relevant.

CONCLUSION

Trafficking is a complex phenomenon and it is viewed with different perspective, and the problem lies with the socio-economic conditions, legal factors, and poverty the major cause of trafficking. Human trafficking means buying and selling of humans as a commodity. Do you think we humans can be bought and sold as a commodity in the market? The reality of human trafficking is very saddening. The problem lies with the fact that culprit is trafficker about whom relatively little is known. This has to urgently given consideration as it is expanding unsteadily and it is a fundamental violation of human rights of the victim

Literature on trafficking in India is completely dominated by the issue of commercial sexual exploitation, so much so that trafficking as a distinct separate crime does not get highlighted. At times is almost reduced to insignificance in comparison to commercial sexual exploitation. Even though there seems to be considerable information available, one is unable to form a picture which reflects the reality of trafficking in women and children in India. To get the practical knowledge about the subject, I visited few NGOs, organization who are working really well to combat the human trafficking in India. I visited Sneh Aangan which is a one stop crisis center for children victims. Children are bought here and their counselling is done. FIR is also filed here only. The victims are not called to the police station. The police personnel visits the victims in civil dress. Then I visited TAABAR, Jaipur which is a shelter home for children. The victims are rehabilitated here. The victims are given proper education. They are always kept busy. Then I visited Railway Childline. Railway Childline (1098) is a wonderful imitative of the Railways. The childline through outreach tries to find out about the victims and traffickers.

The problem of the Human Trafficking is very huge. Human Trafficking is increasing at an alarming rate. As a budding lawyer, academicians, researchers, teachers etc., we should work to combat human trafficking.
BATTERED WOMAN SYNDROME- A RESULT OF SEXUAL AND GENDER BASED VIOLENCE

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ABSTRACT

The principle of battered woman syndrome in India although applied but partially as the trauma through which the deceased had gone that within a few years of marriage she decided to commit suicide. A woman expects love and care from her husband and when she didn’t get the same and in place of it gets to face too much torture all her dreams just become a nightmare. And she starts cursing herself. And as in the country like India where the bond of marriage is so sacred and the more responsibility of it is on the shoulders of the woman and she has have to bear all the pros and cons there are very little things which help them out in getting justice. A woman feels so shattered when she gets to face harassment at the hands of her husband that she ultimately kills herself shows the helplessness she’s suffering from as she don’t have that courage to kill the batterer.

The raising voice of women have been muted by the people in power since so many years, due to such helplessness only and to show the power they have woman acts in that particular way and also wants to teach a lesson to such abusers and harassers.

India is a country where womanhood has always been celebrated and worshipped as the life giver or life creator and each one of us must join our hands to not turn her in the life taker. It must be taken care of that no woman should feel cursed and bad for being a woman and taken birth as one.

BATTERED WOMAN SYNDROME- A RESULT OF SEXUAL AND GENDER BASED VIOLENCE

Anais Nin, an American-Cuban French Essayist once said that “And the day came when the risk to remain tight in a bud was more painful than the risk it took to blossom.” This explains why a woman faces Battered Women Syndrome (‘…battered women who may lose control slowly rather than suddenly’. Battered women kill to avoid further violence, not because they have lost control. “Fear” is more likely to result in controlled defensive action rather than uncontrolled violence. ‘…killing by battered women is the product of desperation in intolerable circumstances’) which was first recognized in an English case, Regina v. Kiranjit Ahluwalia. In the particular case the court tried to expand the functioning of the provisions of grave and sudden provocation. This was further explained in the case of R. v. Humphreys. Thus, it has been realized that if someone and in particularly as to be referred here when a woman has been so traumatized and has been ill-treated at the hands of her husband or any other person over a period of time that her sufferings turn into fear and then in anger and in result of it she has the feeling

187 https://www.google.com/search?q=anais+nin&oq=anais+nin&aqs=chrome..69i57j0i5.3915j0j8&sourcesid=chrome&ie=UTF-8

189 [1992]EWCA Crim 1
190 [1995]4All E.R.1010
of inflicting same harm on the person who has led her in that situation which results in seeking a pleasure and satisfaction out of the act done by her. It has to been seen that what led her to the act and to what all she dealt with over a period of time and not just before the act. The same has been discussed in the above mentioned cases. In the Ahluwalia’s case it was considered that the accused was ill-treated from the beginning of their marriage and also at the time of her both pregnancies, the time at which a woman needs full support and care of her husband which justifies her act of inflicting harm to her husband to which she too agreed but she never intended to kill her husband. In the latter case the accused was violently treated by the deceased throughout their living together and his last comment on her inability to commit suicide provoked her so much and as a result of his daily taunts she used to cut her wrists and at last to set herself free from his torture and ill-treatment she ended up killing him. The court considered her mental state while she was with the deceased who tortured her and this depicts the condition of a woman when she has become a tool in the hands of men and is suppressed by them and in result of it she does an act to take revenge and set herself free from the constraints of men. Hence, battered women syndrome became an exception to the act of murder in the English Law.

Through these cases it can be seen that how the sexual and gender based violence towards women by men lays not only physical impact but also mental illness. It shows that when things get summed up its result comes in a much unexpected way. With this it also gave direction to the courts that the ambit of provocation should be increased and must think about how the previous acts affected the state of mind of the wrongdoer. And basically the cases related to women as they are so vulnerable and always concerned about the well being of their family and when they did not get the same respect and are treated so inhumanely over a long period of time that one can’t even imagine their state of mind and how traumatized they feel and what led them to take so harsh step.

It was quite appreciable then, that English Law recognized battered woman syndrome as one of the basis of defense in cases of murder. Also, how the battle of Kiranjit Ahluwalia helped other women to live fearlessly and to seek justice if they have get ridden off their abuser. This has made people aware that how their inhuman act can affect a person’s mental stability and level of trauma they go through and in result of it what kind of crime they can do in order to inflict the same harm they have been through and make the other person to realize the pain they have been causing to them. So much harassment make women fearless and they get a pleasure in inflicting harm to the person who always ill-treated her and gave her mental stress that she gradually loses her self control and just want to end all the atrocities she’s being facing by finishing the person who is the cause of all of them.

Though English Laws recognized and accepted battered woman syndrome in 1992 but India is still not at that par. Currently, India is not seen as the safe place for women not even at their homes. India is a place where it’s been said that ‘wherever the women is respected at that place the God exists’ but it’s very heart wrenching that the place where such philosophies were followed now the same women have been a victim of sexual harassment and gender-based violence. Men in the country are moving them like puppets.
Although the Constitution has given equal rights to all, women has always been seen as the secondary to men either it be in public or at their personal spaces. The Constitution alone didn’t aided the safety of women and in order to assure the same several specific legislations have been made since the independence of India. Some of the legislations being The Dowry Prohibition Act, The Indecent Representation of Women (Prohibition) Act, The Commission of Sati (Prevention) Act, Protection of Women from Domestic Violence Act, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, etc. Also, there have been inserted several sections in Criminal Procedure Code, Indian Penal Code in order to protect women from the sexual or mental abuse.

But all these legislations have failed to understand the concept of battered woman syndrome. None of them have realized the situation of a woman where she wants to end all the atrocities she’s been going through and her willing to end all of them by making the inflictor of those atrocities to go through the same pain he been inflicting on her and get a peace of mind and live a life in self satisfaction.

It’s been seen that u/s-498A of Indian Penal Code, 1860 mental and physical cruelty towards woman is an offence but there the harm is caused by woman on herself or where due to such harassment she died and not that she killed the person who has done such harassment to her and is only a remedy for a married woman.

Also, section-300 exception 1 of the Indian Penal Code, 1860 recognizes grave and sudden provocation as one of the defenses for murder where if murder has been done by a person due to the act so provoking preceded it that the murderer murdered the other person but it has not recognized what in the situations where due to the series of acts (termed as ‘cumulative provocation’) a person gets provoked and in order to end all further pains in defense of oneself, murders the abuser or harasser.

But lately the Delhi High Court in State v. Hari Prashad (2016)\(^{191}\) partially applied the principle of battered woman syndrome. The case is as follows:

Hari Prashad (the accused) was married to Pushpa (the deceased) on 2-02-1990. She was ill treated by her husband after one month of the marriage. A male child was born out of their marriage on 25-11-1990. On the night of 31-05-1993 the ceased poured kerosene oil on herself and set fire to herself. The shrieks of her were audible to the neighbor Jaidev Sharma and his wife. On reaching the spot they saw the deceased in fire and the accused was pouring water on her and after that wrapped her in a sheet and took her to LNJP Hospital. She told to the doctor that she took this extreme step because of harassment done by her husband to her.

The accused was sent to trial on 27-04-1994 u/s-304B (dowry death) and 306 (abetment to suicide) of IPC. He said that he just brought her back home from her parental home 2-3 days back before the incident took place. He said that he never ill treated her and have he been the person behind the act done or instigated her to take such an extreme step why he would have taken her to the hospital. Also, he added that the deceased used to question him bout the

\(^{191}\) https://indiankanoon.org/doc/77210070/
relationship between him and one woman at his work place.

The witnesses in this case were the brothers of the deceased namely, Hari Prashad Pandey and Sanjay Pandey and their mother, Shashi Pandey. They said that the deceased was harassed by the accused a lot. She was approximately taken six times from their home by the accused on instance that he would not now ill treat her. But he always did the same. He did these acts as he was not satisfied with the dowry he received in the marriage from them. With that many times he used to beat her after consuming alcohol. On August 03, 1991 his sister was beaten so badly that she had to be given emergency treatment at Raj Clinic Kondli who referred her to GTB Hospital for an eye injury. She also made a call for complaining about her husband to women cell and in result to it the accused gave written assurance that he would not be repeating the acts of harassment. But he continued. To save her from further violence the couple took a rented house near the workplace of the deceased’s brother so that she feels safe but the deceased not stayed there for long time and returned to other home. Unfortunately the statements of the deceased were not recorded as she was held to be unfit and died within 2-3 days.

The learned judge convicted him u/s-306 i.e. abetment of suicide as the woman had been harassed too much and the trauma she had been through. She suffered from battered woman syndrome where the batterer was the deceased. The woman thought that the fear of her will only lapse when she will take her own life and there is more freedom in death than in life.

In this case the principle of battered woman syndrome although applied but partially as the trauma through which the deceased had gone that within a few years of marriage she decided to commit suicide. A woman expects love and care from her husband and when she didn’t get the same and in place of it gets to face too much torture all her dreams just become a nightmare. And she starts cursing herself. And as in the country like India where the bond of marriage is so sacred and the more responsibility of it is on the shoulders of the woman and she has to bear all the pros and cons there are very little things which help them out in getting justice. A woman feels so shattered when she gets to face harassment at the hands of her husband that she ultimately kills herself shows the helplessness she’s suffering from as she don’t have that courage to kill the batterer.

Indian courts are trying to understand that women how have been traumatized by their male counterparts and how the latter is suppressing the former in any possible way and in result of which they do such acts which shocks the conscience of the nation and is not expected in the wildest dreams of one.

But it is good to see that the mental state of women is started being recognized in India because of the way they are treated in cases where they are not able to be at par with the demands of their husbands.

In India women face domestic violence a lot and in result to it most of them commit suicide. The Indian law still has to recognize the law of battered woman syndrome and cumulative provocation as the women are so vulnerable that they have no other choice and they commit a crime in result to it. And they too have right to live with dignity which although our constitution states but is not able to provide to those women who are living a life of torture and assault.
So in coming years there is a hope that the Indian law will recognize the rule and will be able to provide justice to them and they will be freed from the male domination and will not be facing more cruelty, torture and assault.

Now, the opening words of the essay can be well understood and it could be seen that battered woman syndrome is an example of it which shows that woman sees that their life has so much risked that now they can take the risk of living freely without any violence and ill-treatment.

The raising voice of women have been muted by the people in power since so many years, due to such helplessness only and to show the power they have woman acts in that particular way and also wants to teach a lesson to such abusers and harassers.

India still has to travel a long way to cut out the sexual harassment and gender-based violence against women. There are talks on women empowerment and giving opportunities to women to showcase their talent and get the same respect as any other men gets. But this can only be achieved through creating such environment for them be it either in public or at their homes and what should be kept in mind is their mental state and through what all they are going through. The sufferings of women should be healed and they must be ensured that they are safe and everyone is pushing them towards the development and no pulling should be done in to restrict her mentally or physically.

India is a country where womanhood has always been celebrated and worshipped as the life giver or life creator and each one of us must join our hands to not turn her in the life taker. It must be taken care of that no woman should feel cursed and bad for being a woman and taken birth as one.

One must feel blessed that they have taken birth on this planet and make it a better place of living for all of us. In end would like to quote a poem by Ella Linero¹⁹²,

“What is gender?
Is gender an identity?
Certainly gender is not a choice.
But gender is shaped, molded to young new minds,
strings hang from children’s joints to dance
as society tells them
No matter man or woman, we are born into roles.

The woman, the one whose mind stands and pleads on her legs, bring about equality
But whose body reacts not out of her own accordance and moves
Moves, graceful, gentle, elegant, and FEMININE.
As society tells her, she is a woman, and that is her role.
Where she wishes to stomp, she stands on her tiptoes.
Where she wishes to thrash, she glides across the floor.
A puppet bound by the hands of society, pushing, pushing
To free herself, to change what being a woman means,
what (gender) equality means.

The man, he is to castrated by the hands to be a MAN.
What does that mean? Better put, what does that mean to society?
I don’t dance.
I am the example to others, and know how to do everything

¹⁹² https://www.powerpoetry.org/poems/gender-inequality
I don’t feel things, or at least show them, because that is not what I do. I am powerful and MANLY, funny that should be made into an adjective...
But, I am not one who should be played with like a puppet, much like the woman, I do have feelings, but they cannot be expressed for society tells me I will be seen otherwise, I don’t know everything even when I’m expected to, I have my pride as a man, and am no one’s puppet, I too wish to change the meaning of “man”.

But strip us down, wash away our skin, we are bare, we are the same, INSIDE
What makes us, us?
Is it our gender?
Is it society?
No, what makes us, what makes you, is ultimately your decision, and that’s something, not even society, can take away from you.”
EXISTENCE OF BIASNESS IN INDIAN LAWS BASED ON GENDER

By Bishal Roy & Pratikshya Parashar
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ABSTRACT
Gender biasness in the legal system is a cause for major concern in the country. Women have been ostracised to such a large extent in the country that laws which provide unlimited and unwarranted powers to them had to be made with the hope to bring them to an equal footing. However, it is often seen in the recent times that there are many women who use these sections for their undue advantage and use this against their male counterparts out of spite and vengeance. The country sees more of false cases of such sections than true cases, which poses a serious concern towards the well being of the nation. The provisions of the law provide such wide powers to the womenfolk that they go scot-free even when it is proved beyond doubt that they falsely implicated the case. This brings forward a great concern of injustice being meted out towards half of the country’s population. Men now have to think twice before having any physical contact or even verbal communication with the females as anything may be construed against them in the Court as harassment. This also proves to be a great burden on the already overburdened Indian Judiciary as these cases go through the full procedure of arrest, investigation, trial etc., before the Court comes to the conclusion and finds to its dismay that the whole case was built up in a sea of lies. It is of utmost importance for the judiciary and the legislature to amend such laws and provide some kind of penalty to the complainant if the complaint is found to be false, so as to discourage such malpractice. Also, with the incoming of the third gender, it is also possible that males may be the victims of such offences and hence, such sections must be made gender neutral so as to ensure that no crime goes unchecked and unpunished merely because of the fact that it has not been provided for in the law. The Parliament should give serious consideration to this matter to hold up Blackstone’s ratio that “It is better that ten guilty persons escape than that one innocent suffers.” 193

Key Words: Biasness, Discrimination, Laws.

INTRODUCTION
Discrimination against women and girls is an age-old problem that our country has been facing for a long period of time. From generations through generations, our country has tried its best to uplift the status of women through various laws and legislations. The country has made special laws in the country to bring about equality among the people in the country and to remove gender-based biasness among the citizens. But in the quest to equalize women with men the nation has come forward with such laws which has resulted in biasness against men and has provided women with unlimited powers. The purpose of this article is to put light on the prevailing discrimination that exists in the Indian legal system.

The judiciary of India lays down great emphasis on the phenomena of Constitutional Morality as it is one of the core principles of a constitutional democracy such as India. As India has the

193 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 359 (1753).
largest constitution in the world the following of the constitutional provisions is of the utmost importance for the nation. It cannot be denied that most women’s freedoms in this country are trampled on in the name of security. Women can’t be certain of their safety while stepping out alone in the dark, travelling far away from home is discouraged, public transport is unsafe, and male-dominated jobs invite predatory behaviour. These are serious constraints on a good life, and they are caused by one major issue—the state’s failure to provide security.

In the modern era where law needs to develop with time there are certain laws in India which create a gap between the gender and thus equality is not being maintained in the current law. Right to equality being one of the six fundamental rights in the Indian Constitution provides equality before law, prohibition of discrimination on the ground of race, religion, gender, and caste or birth place. It is simply to treat all the people at equal footing and not to give any special privileges to any individual or group of individual. But it is very much evident in the present law that equality is not being achieved and there needs to be certain amendments to bring the people of the country in equal footing.

LAWS WHICH ARE BIASED TOWARDS WOMEN
In the country of India, we have a general notion that the females are weak and that is the reason why they are prone to violence. The women are given powers under various gender discriminatory laws to lodge a complaint against men. This is mostly seen in family law where there exists no punishment for even filing of a false complaint. The women are given the power through these gender discriminatory laws to lodge multiple complaints for the same crime with different penal provisions which results in filing the same crime multiple times and exaggerating the statistic and which results in showing of false gender inequality. A few of such a vast majority of laws are mentioned below:

1. **Section 497 of the Indian Penal Code:** Although this section has been declared unconstitutional by the Supreme Court in its entirety, it makes its way to the list as it has still not been repealed by the Parliament and thus, is still very much, a law. According to this section, if a husband of a woman has sexual relationship with the wife of another man, he is bound to be penalised under this section. But there is no such punishment for the wife if she commits adultery with another man outside of her wedlock. This is one of the most discriminatory legislations owing to the fact that it creates a differentiation for the same act just on the basis of the gender of the person committing it. However, this section is now been repealed by the latest judgement of **Joseph Shine v. Union of India** the SC stated in para 18 that “(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution. (ii) Section 198(2) of the Cr.PC. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.”

2. **Section 354C of the Indian Penal Code:** This section penalises a man for clicking pictures of a woman when she is engaged in a private activity in a place where it is

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naturally expected of her to not be expecting the presence of any person. There is no reason to believe that a woman may not do the same to a man and hence, it is certainly discriminatory to excuse the female gender from this offence.

3. **Section 354D of the Indian Penal Code:**
   This section penalises a man for either following or trying to contact a woman for his personal interest even after she has shown clear disinterest in such contact, or keeping a track of her internet browsing, emails or any other electronic usage. In this digital age, every person, whether a man or a woman, knows how to use internet or other such technology. Though the first contingency of a woman following a man or trying to contact him after his repeated denial is a little uncommon, it can not be entirely scraped as being an unusual sighting. The second contingency, however, can very easily be fulfilled by a woman as it is very easy for a woman with basic technological knowledge to stalk a man’s internet or other browsing activities. In such a scenario, penalising only one gender while keeping the other safe for no apparent reason is clearly discriminatory.

4. **Section 375 of the Indian Penal Code:**
   This section criminalises one of the most heinous crimes i.e., Rape. However, this section only talks about forceful sexual intercourse by a man on a woman. But why can rape not take place on a man? There have been many cases where a woman, in her sound mind, has attempted and successfully managed to have sexual intercourse with a man when he is intoxicated. Due to non-report of such cases, the best way to understand this situation is to draw inference from the widely acclaimed Bollywood movie ‘Aitraaz’. In this movie, the female attempts to have sexual intercourse with a man against his consent, but goes free without punishment even when the offence is proved as there is no law penalising a woman for committing such an act. Moreover, after homosexuality being decriminalised under Section 377 of the Indian Penal Code in the widely popular case of *Navtej Singh Johar v. Union of India*¹⁹⁵, it is also possible that a man may commit sexual intercourse without consent on another man, or the same could be done by a woman on a woman. Thus, it is of great need to make both the victim as well as the perpetrator to be free of any gender bias so that such heinous crimes do not go unpunished merely because the perpetrator or victim did not belong to a specific gender.

Moreover, there have been many cases where a woman has falsely accused a man of rape due to her personal vengeance. In such cases, the man, as well as his family go through the torture of being called a rapist and even when it is proved to be false later, the stigma of him being a rapist does not go away from the minds of the people. On the other hand, a woman bears no consequence of filing a false complaint and making a joke out of such a grave offence. This makes it highly dangerous for man and provides an upper-hand to many such women.

5. **Section 493 of the Indian Penal Code**
   Cohabitation caused by a man deceitfully inducing a belief of lawful marriage shall be punished up to ten years and fine. No such provision to punish women.

In the case of Harish Kumar v. State where, the women had put allegations under section 376 and section 493 of the IPC stating that the accused used to have sexual intercourse with the petitioner on the promise of marriage, the court held that “prosecutor was aware that she was not married to Harish and marriage between her and Harish the respondent was yet to take place. She had developed intimacy and she herself was in love with Harish and she and Harish with consent of each other were enjoying each other’s body and having sexual relationship. Since it is a case of obvious consent of the prosecutor, who was aware that no marriage had taken place and marriage between parties was yet to take place, no case under section 376 or 493 is made out”. The court further held that “the F.I.R. registered against the accused is a gross misuse of powers and is hereby quashed”.196 From this case it is clear how the powers are misused.

6. Section 498A of the Indian Penal Code:
This section is a safeguard provided to a woman under which, she can complain against her husband and his family for subjecting her to cruelty. Though this provision is a great relief for multiple women who are subjected to cruelty daily for some monetary demand or for any other demand, it is also not untrue that this section has been widely misappropriated. There have been many cases where the daughter-in-law has a conflict with her in-laws and she files a complaint against them under this section. The police, in such case, have no option but to abide by the section and immediately arrest all those against whom such complaint has been made, even though there is no concrete proof or evidence that has been provided by the lady. Such erroneous and false complaints ruin the life, dignity and reputation of the husband’s family, but it does not bear even the slightest consequence on the woman. Although, this law had been derived from the United States, but the law the law in US does applies the law to all genders. But, in India this law is certainly biased towards the female gender.
In April 2010, Shoaib Malik who is a Pakistani cricketer was accused under this section just prior to his marriage to Sania Mirza. He was accused of cheating by Ayesha Siddiqui but in this case The Save Indian Family Foundation released a statement which was in support of Shoaib Malik and thus, his passport was returned. The foundation also raised concerns about the misuse of the powers given to women under this section197.

But it is a relief to see that in the case of Arnesh Kumar, “the court restrained police officers from automatically arresting the accused in a complaint under section 498A and made action in such complaints subject to magisterial oversight”198 the men were caused not be arrested without magisterial oversight.
Finally, in the case of, Rajesh Kumar & Ors. V. The State of U.P199 it was finally held that in every district one or more family welfare committees needs to be constituted by the District Legal Services Authorities preferably consisting of three members and every complaint under Section 498A received by the police or the magistrate must be looked into by such committees and committees after looking

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196 Harish Kumar v. State, 2009 Cri MC 3877 (Delhi).
197 Shoaib Malik finds support from an NGO, Indian Express, April 6, 2010.
into the case may communicate to the parties and after that they may send a report to the police to make an arrest if they deem it to be fit.

7. **Section 509 of the Indian Penal Code:** This section criminalises a male for disrespecting the modesty of a woman by using words, gestures or act. Though not see commonly, it is but obvious that such acts could be also done by a woman on a man, by a man on a man or by a woman on a woman. But no section in any Act provides for such consequences.

8. **Section 37 of the Special Marriage Act:** Under this section, only the wife can claim permanent alimony and maintenance in case of a divorce or separation, while the husband is not allowed to do so. This is highly unfair more because of the fact that the Hindu Marriage Act allows even husbands to claim such alimony.

9. **Hindu Adoption and Maintenance Act, 1956:** This Act in its entirety, is highly gender biased. For starters, it talks about provision of maintenance to widowed daughters-in-law but nothing of that sort is provided to the male counterpart. Also, a boy under this Act is entitled to maintenance until he attains the age of 18 while a girl is entitled for it till she gets married. In an era when gender stereotypes are being broken and men and women are getting jobs and pay scales at a similar age and rate, this provision is grossly unfair. Also, a person barely passes his 12th standard at the age of 18, which is certainly not a good enough degree to provide him with a job that could sustain him.

10. **Section 112 of the Indian Evidence Act** – states that “a child born during a marital bond or where the spouses have access to each other or within 280 days of divorce will be considered as legitimate child from the marital relation no matter whether s/he was born out of marital bond.”\(^{200}\) An illegal activity which is done by a woman is legalized by this act without her being punished and thus prostitution is promoted. If the same immoral act was done by the husband, that would not only attract legal prosecution against the husband but also would have caused heavy financial burden of the wife in the form of maintenance. Although, the reality of the society has changed in manifold since 1872 but the law still remains same and thus encourages women. Section 112 of the Act violates the right of the party which is disputing paternity to a fair trial by not allowing them to present evidence to prove their contentions. The reason that moral considerations are not to be put above the rights of people or fairness in the justice system, thus it stands to reason that the section must be amended. In the case of Gautam Kundu v. State of West Bengal, the SC set out three guidelines which were to be followed regarding the approval of DNA testing –

   “(a) Courts cannot order a blood test as a matter of course,

   (b) There should exist a prima facie case in that the husband must establish ‘non-access’ in order to dispel the presumption arising under section 112 before a test can be ordered, and

   (c) The Court should carefully analyse with respect to what might be the outcome of requesting the blood test; whether it will have the impact of marking a child as

\(^{200}\) The Indian Evidence Act, 1872, s. 112.
"a bastard and the mother as an unchaste woman."²⁰¹
The list of sections and articles which are biased towards men is unending and there are more than 50 women friendly provisions and serious require amendments to bring in equality to the present legal system.

VARIOUS STATUTORY BODIES AND ACTS FOR UPLIFTMENT FOR WOMEN
Article 15(3) of the Indian Constitution permits the legislature and the Government to make any laws or regulations for the upliftment and betterment of the women folk of the society. However, this article has led to the formation of many commissions and legislations which have made Indian legislature dangerously biased. The exception provided via Article 15(3), like any other exception-based provision in the Constitution, provides for only reasonable exception, but it can be seen that it has been grossly misused and many laws resulting out of it are violative to the provision of Equality as given by Article 14 of the Constitution and the provision banning discrimination as given by Article 15 of the Constitution itself. Many of these Acts give such wide and unlimited powers to women that they are used more for wrong purposes than right. Most of these laws, which claim exception under Article 15(3) of the Indian Constitution, provide free flowing powers of cruelty, abuse, extortion, legal damage etc. to women, sometimes just by the virtue of their marriage. Some of these legislations are-

1. NATIONAL COMMISION FOR WOMEN- Formed via the National Commission for Women Act 1990, this Commission functions and works exclusively for the benefit and upliftment of women. But there are no such commissions for the male population of the society.

2. PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE ACT, 2005- This law protects only women from domestic violence at home from her husband and his family with complete disregard to the fact that domestic violence can be caused by a wife on her husband also. Domestic violence also includes emotional abuse, which can easily be committed by a woman on her husband and in-laws. Women are given such wide range of power through the Domestic Violence Act that they can cause the eviction of the husband and his family from their own home. The State even provides a Protection Officer also at its own cost. The wife can even claim custodial rights for any child that has arisen in the course of the marriage during the proceedings of the case of domestic violence. The most dangerous fact is that there is no penalty or obligation put on the woman if it turns out that her complaint was false. This causes a huge problem as many women file such a complaint as such complaints by creating self inflicted injuries and cause the arrest and societal embarrassment for her husband and in-laws, just out of spite and vengeance. The complaints do not even require any evidence to be registered as in many occasions, proof of physical, mental or even sexual violence can not be collected or determined. Though these provisions are made for the aid of women in distress, more often than not fake cases come up which put a burden on the already burdened Indian Judiciary.

PROTECTION OF MEN FROM THE BIASED LAWS

For the protection of men’s right so that they can be saved from the biased laws there is an existence of men’s right movement in India. It is composed of various men’s rights organisations which operate in the entire India. The organisation, basically works for the support of the introduction of the gender-neutral legislation and work towards the repeal of laws which are considered to be biased against men.

The Real Indian men’s right movement was started in the year 2000 in Bombay in order to protect males from the false claims of dowry harassment by wives. This movement’s name was changed to “Save Indian Family” by the unification of a number of family’s right organisations which are present across India.

There are various organisations which work for the welfare of the men across India. Some of them are:
1. Save Indian Family Foundation
2. All India Front Against Prosecutions by wives
3. Child’s Rights and Family Welfare
4. Purush Hakka Sanrakshan Samiti
5. Gender Human Rights Society
6. Men’s right Association

As per a study by the Save Indian Family Foundation, it is claimed that suicide rate of married men is almost as twice as that of women, because they are not able to withstand the verbal, emotional, economic and physical abuse from their wives.

CRITICAL ANALYSIS ON THE MISUSE OF POWERS BY WOMEN

In a recent case against the Chief Justice of India, CJI Ranjan Gogoi, a woman who was employed as a junior court assistant submitted an affidavit to all the Supreme Court judges in which she accused the CJI of making sexual advancement while she was working in his office which was in the CJI’s residence. These allegations were found to be false by the Supreme Court and were held baseless. However, the woman, whose name has not been disclosed, has put serious allegations on the quorum who decided her matter, saying they were biased towards the CJI. There have been multiple cases which spell out the danger of false accusations. In the case of Manju Ram Kalita v. State of Assam, the wife had alleged physical and mental torture on the husband under S. 498A IPC, and got the husband convicted by three lower courts also. However, the Supreme Court found and held that there was no cruelty administered and hence the charges against him with respect to S.498A IPC was dropped. Again, in the case of Bibi Parwana Khatoon, the sister-in-law and brother-in-law of the deceased were falsely accused by the lower courts in the charge of dowry death, when the Supreme Court observed that there was no evidence of their presence at the crime scene and that they lived in another village. In the Arnesh Kumar case, the court observed that “There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a


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dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bedridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested.”

In the case of Amali Arockia Selvi v. Maria Michael\(^2\)\(^0\)\(^6\), the appellant accused the respondent of rape under S.376 IPC stating that he had sexual intercourse with her on the pretext of marriage, which he later refused. The Madras High Court held that the parties had such relations on weekends for around five months and each time, with the appellant’s consent and the complaint came only when the respondent was approached for marriage and he refused. Thus, the respondent was acquitted of all the charges.

CONCLUSION

From the above findings, we can see that more often than not, the sections made for the upliftment of women are used by them as an undue advantage over men. Males and their family members are condemned to humiliation as a result of such undue advantages as they find themselves helpless in situations like these and face societal anxiety. Though it is a fact that women have been ostracised and harassed for a long time and that these sections are of utmost importance to ensure that justice is meted out to them, but the fact that males are also unsafe because of the possibility of false implications in these matters also cannot be disregarded. These types of sections are important for the punishment of such heinous crimes, but in view of the recent developments and events, they should be made gender neutral and should also stop giving such unwarranted and unlimited powers. There should be a measure of check and balance to ensure that false complaints do not come up and if such matters of false implications do come up, a proper penalty or punishment is prescribed. This would ensure that the sections are used for the benefit of the women actually in peril and would prevent misuse. Such sections require modification and rectification accordingly as otherwise, the judiciary and the world will not be in balance and injustice will continue to prevail.

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SALES OF GOODS ACT, 1930

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Introduction:

We are living in a global village. Both the activities of trade and commerce cross the boundaries of the nations. We cannot adopt a single law that will be applicable on the terms of business. Though the principles relating to sale of goods are so connected with law of contract, law of negotiable instruments, law of insurance, law of carriage of goods (i.e., sea, air, land) do not covers all other aspects in this Act.

The Sales of Goods Act, 1930 governs the contracts relating to the sale of goods. It applies to the whole of India except the state of Jammu and Kashmir. This law was earlier dealt by the Indian Contract Act, 1872. It is a Mercantile Law, came into picture on 1st July, 1930. In 1930, sections 76-123 of Indian Contract Act was repealed and a separate Act known as Sales of Goods Act, 1930 was passed.

The term “contract for sale” includes:

1. Sale and Agreement to Sale (Section 4)
   - The contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part owner and another.
   - A contract of sale may be absolute or conditional.
   - Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell.
   - An agreement to sell becomes a sale when the time elapses; all the conditions are fulfilled subject to which the property in the goods is to be transferred.

Examples:

1. A agrees to buy a haystack from B on B’s land with liberty to come on B’s land to take it away. This is a sale and B cannot revoke the license given to A to woo on his land. (Wood Vs Manley 1839)

2. Agreement by A to buy 20 tonnes of oil from the seller’s cisterns. The seller has many cisterns, with more than 20 tonnes in them. This is merely an agreement to sell. (White Vs Wilks, 1813)

3. Agreement for sale of a quantity of nitrate of soda to arrive at a certain ship. This is an agreement to sell at a future date subject to the double condition of the arrival of the ship with the specified cargo on board. (Johnson Vs Macdonald 1842)

4. A customer who picks up goods in a self-service shop is merely offering to buy them and the sale is not complete until they are paid for. (Pharmaceutical Society Vs Boots, 1952)

Agreement to sell and sell:

The Supreme Court distinguished these two classes of contract –An agreement to sell is a contact pure and simple whereas a sale is a contract plus conveyance. By an agreement to sale a jus in personam is caused by a sale a jus in rem also is transferred. Where goods have been sold and the buyer makes the fault, the seller may sue for the contract price on the count

207 Sales of Goods Act, 1930
of ‘goods bargained and sold’ but when an agreement to buy is broken, the seller’s normal remedy is an action for unliquidated damages.6

General Principles of Sales of Goods Act, 1930

- Meaning of Contract of Sale of Goods: According to this Act, is a contract in which the seller agrees to transfer the goods to the buyer for a price. The term “Contract of Sale” is a general term and comprises of: (I) “Sale” and “Agreement to Sell” where the seller transfers the property in the goods immediately to the Buyer there is a sale. (II) But where the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

- Essential Elements of a Contract of Sale of Goods:208
  1. Two Parties: There must be two parties - a buyer and a seller to form a contract of sale. For example, a person buys goods from a shop who is run by them on a corporative basis, there is contract of sale between them.
  2. Transfer of property: The object of contract must be the transfer of movable property. The term “general property” refers to the ownership of goods. A Latin maxim says: ‘Nemo dat quod non habet’ which means that “no one can give what he doesn’t have”.
  3. Goods: As per section 2(7) of the sale of Goods Act, 19307, goods means every kind of moveable property, apart from actionable claims and includes stocks, shares etc. Items includes in the term “goods” as described by the Act are: Actionable claims, Money, Sale of immovable property. [Sale of immovable property is governed by Transfer of Property Act], Labor, Stocks, shares and securities.

As per section 3(36) of the General Clauses Act 1897,8 “movable property” is defined as “property of every description except immovable property.” Section 3(26) of the same Act reads as, “Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.”9

Case Law: Tata Consultancy Services vs State of Andhra Pradesh (271 ITR 401)10
  Held: It was held that software, which is incorporated on a media, would be goods and therefore, liable to sales tax. Karnataka HC in Samsung held that TCS decision was in the context of Andhra Pradesh Sales Tax and could not be relied upon to determine whether payment for software amounts to ‘royalty’ under the Income-tax Act or DTAA. Delhi HC on the other hand in Ericsson referred to TCS judgement and observed that “A fortiorari when the assessee supplies the software which is incorporated on a CD, it has supplied tangible property and the payment made by the cellular operator for acquiring

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208 Wood Vs Manley (1839)
3 White Vs Wilks (1813)
4 Johnson Vs Macdonald 1842
5 Pharmaceutical Society Vs Boots, 1952
6 Sales of Goods Act, 1930
7 section 2(7) of the sale of Goods Act, 1930
8 section 3(36) of the General Clauses Act 1897
9 Section 3(26) of the same Act

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10 Tata Consultancy Services vs State of Andhra Pradesh (271 ITR 401)
11 Tata Consultancy Services vs State of Andhra Pradesh (271 ITR 401)
12 Section 2(14) of the Act
13 section 2(6) of the act
14 Case of Associated Power Co. v. R.T. Roy
such property cannot be regarded as a payment by way of royalty.”

The goods that are present at the time of contract are termed as existing goods. In section 6 of the Act, those goods which are in legal possession of the seller at the time of formulation of the contract of sale. The existing goods are further of the following types:

- **Specific Goods:** As per Section 2(14) of the Act, those goods that are “identified and agreed upon” when contract is formed. For example: I want to sell a jug. I have put an advertisement with its picture and information. The jug in this case is a specific good.

- **Ascertained Goods:** This term is used for specific goods, selected from a larger set. For example, you have 50 dozens of banana. You want to sell 20 dozens out of the total, thus you need to separate them from 50 (larger set). Thus to specify the 20 dozens from a larger set. Now these 20 dozens are now ascertained goods.

In section 2(6) of the act, future goods can be have been defined as the goods that will either be manufactured or produced or acquired by the seller at the time the contract of sale is made.

Contingent goods are a subtype of future goods in the sense that in contingent goods the actual sale is to be done in the future. These goods are part of a sale contract that has some contingency clause in it. For example, if you sell your apples from your orchard when the trees are yet to produce apples, the apples are a contingent good. This sale is dependent on the condition that the trees are able to produce apples, which may not happen.

4. **Price:** The consideration for a contract of sale must be money consideration called the “Price”. If goods are sold or exchanged for other goods, the transaction is barter, governed by the Transfer of Property Act and not a sale of goods under this Act.

5. **Formation of the Contract of Sale:** The contract may provide for the immediate delivery of the goods or immediate payment of the price or both or for the delivery and payment by installments or that the delivery or payment or both shall be postponed. Electricity does not come under the definition of “goods” as per English law. In India, however, the situation is quite different. In the Calcutta High Court, *Case of Associated Power Co. v. R.T. Roy* it was held that electricity comes under the ambit of ‘goods’ under the article 366 (12) of the Constitution as well as Sec 2(7) of the ‘Act’. This proposition was affirmed in a Madras High Court case where the learned judge held that electricity was under the definition of ‘goods’ since it is capable of delivery, and it does not matter whether it is a tangible or intangible form of energy.

**Formalities of a contract of sale:** Section 5: Contract of Sale - how made

1. A contract of sale is made by an offer to buy or sell goods for a specified price. It may provide for the immediate delivery and payment of the price or both.

2. A contract of sale may be in writing or by the words of mouth or may be implied by the conduct of the parties.

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15 article 366 (12) of the Constitution
16 Sec 2(7) of the ‘Act’
17 Section 5: Contract of Sale
Sub-section 1 emphasis that a sale is complete if there is no immediate delivery and payment. In a contract of sale, the title of goods passes immediately after the payment of price. While for an agreement to sell, the title of goods does not pass immediately after the payment but passes on after the fulfilment of certain conditions prescribed in the deal.

**Transfer of Property as Between Seller and Buyer: Section 18**

**Goods must be ascertained:** No property in the goods can be transferred unless it is ascertained.

**Synopsis**
1. Transfer of property
2. Property cannot pass until the goods are identified
3. Part of a specific whole
4. Property and risk
5. Identification of goods

**Transfer of Property:**
The five following sections of the Act deal with the question foreshadowed by section 4 of the Act and lay down rules which assist in deciding the question when the object of the contract of sale, namely, the transfer of the property in the goods to the buyer has been affected.

**Property cannot pass until the goods are identified:**
It is a condition precedent to the passing of the property that, the “individuality of the thing to be delivered” should be established. Where according to the terms of the contract, the seller was to supply waste coal ash as and when it was discharged from the bunkers of the powerhouse, it was held that the contract was for the sale of unascertained goods and, therefore no property passed to the buyer till the goods were ascertained. *(Tej Singh Vs State of Uttar Pradesh and others 1981).*

**Part of a specific whole:**
It is obvious that if the contract is merely for the sale of goods by description, such as a contract for sale of a certain quantity of malting barley, or future goods, the necessary condition is not fulfilled. Nor is it fulfilled even if the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. “The parties did not intend to transfer the property in one portion of the stock more than in another, and the law which only gives effect to their intention does not transfer the property in any individual portion” *(White Vs. Wilks 1813).*

Where the ascertainment of the goods depends upon their being separated from the bulk by the seller or a third party or the buyer, by their being severed, weighed or measured or some other process, no property can pass until this is done *(National Coal Board Vs. Gamble 1959).*

**Property and Risk:**
In this class of case, it is necessary to distinguish the passing of the property from the transfer of the risk; the risk usually passes with the property, but may pass independently of it. Thus, acceptance of the delivery warrant for a certain quantity of spirit out of a larger bulk which was liable to deteriorate in storage was held to put the risk of deterioration on the buyer,
although he had acquired, not property but only undivided interest in the whole bulk. Equally, it would seem that there can be none in an individual part of a chattel, such as a tree which has been felled, of which a marked portion was sold, and of which the other portion is to be retained by the seller.

Identification of the goods:
In *State of Karnataka Vs. The West Coast Paper Mills Ltd.* AIR 1986 it was held that where under a contract a company was permitted to remove bamboos from the forest area at Rs.10/- per ton, and the government by a subsequent order enhanced the price to Rs.20/- per ton, it was held that the enhanced rate was no applicable to the bamboos cut although not removed prior to the date of the government order, because on the bamboos being cut and extricated, the goods being ascertained and in a deliverable state, the property had passed to the company.

Section 20 (Specific goods in a deliverable state)
Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of or the time of delivery of goods, or both, is postponed.

Examples
This section may be illustrated by the following examples:
- Sale on the 4th January of a haystack on the seller’s land at the price of £145 to the paid on the 4th February, the hay to be allowed to remain on the seller’s land until the 1st May: no hay to be cut until the price was paid. The property in the haystack passed on the making of the contract and on the stack being destroyed by fire, the buyer must bear the loss. *Tarling Vs. Baxter* (1827)
- Sale of a specified number of bushels of oats, the contents of a bin in a warehouse. The seller gives a delivery order to the buyer, addressed to the warehouseman, authorizing delivery of the oats to the buyer, and asking the warehouseman to weigh them. The warehouseman accepts the order and enters it in his books. The property has passed to the buyer, as the weighing was not necessary to identify the oats or to ascertain the price, but was merely for the satisfaction of the buyer. *Swanwik Vs. Sothern* (1839).

Deliverable State
Section 20 and 21 of the Sale of Goods Act 1930 elaborate on the concept of ‘Specific goods in a deliverable state’ and ‘Specific goods to be put into a deliverable state’ respectively.

‘Deliverable state’ refers to the condition of the goods such that the buyer under the contract is bound to accept the goods delivered to him by the seller according to the contract. ‘Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of or the time of delivery of the goods, or both, is postponed’.

Condition
‘A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated’.

A condition is referred to as, an essential element attached to the subject matter of an agreement which is mentioned by the buyer to the seller and is either expressed or implied while entering into the contract. The buyer can refuse to accept the goods
delivered by the seller, in case of non-
compliance with the condition mentioned
by the seller in the contract. The condition
may be express or implied.

If while entering into a contract, the buyer
mentions (in words or writing) that the
goods are to be delivered to him before a
given date, the date is taken as a condition
to the contract since the buyer expressed it.
Whereas, if a buyer contracts to buy a red-
colored saree for her ‘wedding’ which is to
be held on a date mentioned to the seller, then the time is the implied condition for
the contract. Even if the buyer doesn’t
mention the date of delivery (but has
mentioned the date of the wedding or
occasion), it is implied on the part of the
seller that the garment is to be delivered
before the mentioned date of the
wedding.211

Warranty
‘A warranty is a stipulation collateral to
the main purpose of the contract, the
breach of which gives rise to a claim for
damages but not to a right to reject the
goods and treat the contract as
repudiated’26
A warranty is referred to as extra
information given with respect to the
desired good or its condition. The warranty
is of secondary importance to the contract
for its fulfilment. Non-compliance of the
seller to the warranty of the contract does
not render the contract repudiated and
hence, the buyer cannot refuse to buy the
good but can only claim compensation
from the buyer.

Implied Condition
Condition as to Title [Section 14(a)]27

Section 14(a) of the Sale of Goods Act 1930
explains the implied condition as to title as
‘in the case of a sale, he has a right to sell
the goods and that, in the case of an
agreement to sell, he will have a right to sell
the goods at the time when the property is
to pass’.

This means that the seller has the right to
sell a good only if he is the true owner and
holds the title of the goods or is an agent of
the title holder. When a good is sold the
implied condition for the good is its title, i.e.
the ownership of the good. If the seller
does not own the title of the said good
himself and sells it to the buyer, it is a
breach of condition

CASE LAW: Rowland v Divall, 19221028
The plaintiff had purchased a car from the
defendant and was compelled to return it to
the true owner after having used it for a
while. The plaintiff then sued the defendant
for the purchase money, since the defendant
didn’t receive the consideration as per the
case of title of ownership.

Sale by Description (Section 15)
Section 15 of the Sale of Goods Act, 193029
explains that when a buyer intends to buy
goods by description, the goods must
correspond with the description given by
the buyer at the time of formation of the
contract, failure in which the buyer can
refuse to accept the goods.

Sale by Sample (Section 17)30
When the goods are to be supplied on the
basis of a sample provided to the seller by
the buyer while the formation of a contract
the following conditions are implied:

25 Swanwik Vs. Sothern (1839)
26 Condition as to Title [Section 14(a)]
28 Rowland v Divall, 192210
2212 Warranty defined
• Bulk supplied should correspond with the sample in quality
• Buyer shall have a reasonable opportunity to compare the goods with the sample
• The good shall be free from any apparent defect on reasonable examination by the buyer.

Sale by sample as well as Description (Section 15)³¹
When the sale of goods is by a sample as well as a description the bulk of the goods should correspond with both, i.e. description and sample provided to the seller in the contract and not only sample or description.

Implied Warranty
Enjoy Possession of the Goods (Section 14(b)]
Section 14(b) of the Act mentions ‘an implied warranty that the buyer shall have and enjoy quiet possession of the goods’ which means a buyer is entitled to the quiet possession of the goods purchased as an implied warranty which means the buyer after receiving the title of ownership from the true owner should not be disturbed either by the seller or any other person claiming superior title of the goods.²¹³

Goods are free from any charge or encumbrance in favor of any third party [Section 14(c)]
Any charge or encumbrance pending in favor of the third party which was not declared to the buyer while entering into a contract shall be considered as a breach of warranty, and the buyer is entitled to compensation and to claim damages from the seller for the same.

Conclusion

²⁹ Section 15 of the Sale of Goods Act, 1930
³⁰ Sale by Sample (Section 17)

Through this course of this research paper I tried to identify the major arguments surrounding certain commodities and their inclusion in the definition of “goods” as per Section 2(7) of the Act.³² This paper helped me understand and prove that “electricity” comes under the ambit of goods.

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³¹ Sale by sample as well as Description (Section 15)
³² Section 7 of Sales of Goods Act
THE (UN)MAKING OF ARTICLE 370 AND 35A OF INDIAN CONSTITUTION

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ABSTRACT:
The Constitution of India is a living instrument, with capabilities of enormous dynamism made for a progressive society. Working of such Constitution depends upon the prevalent atmosphere and conditions. One who has to study the Indian Constitution today may come to grief if he has in his hand only a text of the Constitution as it is promulgated in November, 1949, for, momentous changes have since been introduced not only by numerous amendment acts but by scores of judicial decisions emanating from the highest tribunal of the land. One such evolved topic over the years has been the issue of Jammu & Kashmir. Everyone who goes through the pages of the Indian Constitution will be struck by the peculiar position of the Jammu and Kashmir state. It is one of the twenty nine states which make up the Union of India and is enumerated as number 15 state in Schedule 1 of the Constitution. Part VI of the Constitution deals with these 29 states. But the very first article (i.e. Art. 152) of this part reads as follows:

"In this part, unless the context otherwise requires the expression, 'State' does not include the state of Jammu and Kashmir."215

An attempt has been made in this paper to explain and justify the causes for this special treatment and whether these articles should be repealed in the light of federalism. This issue has been one of the most important agendas of the national political parties over the years. The first term of NDA Government just ignited the dying flame by promising the abrogation of Article 370 and 35A of the Constitution in their election manifesto.

Keywords: Article 370, Article 35A, Constitution, Instrument of Accession, Jammu and Kashmir, Special Status.

INTRODUCTION:
The state of Jammu and Kashmir holds a peculiar position under the Constitution of India. It forms a part of the territory of India as defined in article 1 of the Constitution. In the original Constitution, Jammu and Kashmir was specified as a Part B state. The States Reorganization Act, 1956 abolished the category of Part B states and the Constitution (7th amendment) Act, 1956 which implemented the changes introduced by the former act, included Jammu and Kashmir in the list of the Union of India all of which were now included in one category. Nevertheless, under article 370 of the Constitution the state of Jammu and Kashmir enjoys a special Constitutional position so that all the provisions of Constitution of India relating to the states in the first schedule are not applicable to Jammu and Kashmir even though it is one of the states specified in that schedule. Also

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214 DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA, 22ND EDITION, 2015.
its relation with the central government somewhat differs from that of other states. This is because of certain commitments made by the Government of India with the ruler of State of Jammu and Kashmir at the time of accession to India. The instrument of accession signed by the Ruler of was accepted by the Governor General of India on 20-10-1947. Under this instrument only three subjects- external affairs, defence and communications were surrendered by the state to the dominion. The two characteristic features of the special relationship are:

i. The state has a much greater measure of autonomy and power than enjoyed by other states;

ii. The centre’s jurisdiction within the state is more limited than what it has with respect to other states.

Due to these special features not all the provisions of Indian Constitution apply to the state some of the provisions apply, some do not apply at all, while others apply in a modified form. The Constitutional position of the state has not remained static since it became a constituent unit of the Indian union. It has been growing since then towards a closer affinity of the state with the Indian union.

POLITICAL AND LEGAL HISTORY OF JAMMU AND KASHMIR:
Kashmir has a very huge background of politico legal history. It dates back to the 14th century when Buddhist and Hindu rulers ruled over it. After four centuries of Muslim rule it was conquered by Maharaja Ranjit Singh of the Punjab in 1819. Soon after his death in 1839 the East Indian Company defeated the then Sikh ruler of the Punjab who ceded Kashmir to the Company in lieu of Rupees One Crore (about two million dollars), the war indemnity imposed upon him. The Company sold Kashmir to Raja Gulab Singh, the Dogra Governor of Jammu. The Dogra dynasty ruled over this state till 1949. Kashmir had almost the same political relations with the Paramount Power (the British Crown) as the other native states of India. These relations came to an end on the 15th August, 1947, when the British handed over the governance of India to the two new dominions of India and Pakistan.

On quitting India the British government gave freedom to the Indian states to accede to India or to Pakistan or to set up as sovereign independent states. By the 15th August, 1947 all except three states having geographical contiguity with India, had acceded to India on the three subjects of Defence, External Affairs and Communications. The three states which had not acceded to India were Junagadh, Hyderabad and Kashmir. All these acceding states had also entered into standstill agreements with India. The Ruler of Kashmir offered to enter into standstill agreements both with Pakistan and India. Pakistan signed such an agreement but India did not show much anxiety to do so. India had announced that it would enter into standstill agreements only with those states which had signed the Instrument of Accession. Kashmir had not acceded to India, so there could be no Stand still agreement with it. Then circumstances, too strong for the ruler of Kashmir compelled him to accede to India.

On the 22nd October, 1947 tribemen who were assisted by soldiers and officers of the Pakistan army invaded Kashmir. On the

216 M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 7TH EDITION, 2014.
24th, the Maharaja felt quite helpless and requested the Government of India for help against this naked aggression. On the 26th he requested the Governor General of India, to accept the accession of his state to India. This request was supported by the leaders of the National Conference, then present in Delhi. Lord Mountbatten, the Governor-General of India accepted the accession of the state but said that the accession would be finally settled after a reference to the people of Jammu and Kashmir. Thus Kashmir became a legal part of India in the same way as the five hundred and fifty and odd other native states had become, viz. through their rulers signing an Instrument of Accession and its acceptance by the Government of India.

India sent its forces to defend Kashmir. The tribal raiders and their helpers had to flee from the Kashmir valley but because of the mountainous nature of the territory fighting continued for about fifteen months. On the 31st December, 1947, India took the matter to the Security Council. The Security Council appointed a Commission who were successful in persuading Pakistan and India to order a cease fire effective from January 1, 1949. Both India and Pakistan also accepted the proposals of the Commission contained in their resolutions of the 13th August, 1948, and 5th January, 1949. According to these resolutions the future of Kashmir was to be decided by a free and impartial plebiscite under the United Nations auspices. But the plebiscite was to be held when Pakistan and India had withdrawn their troops from the state territory. Pakistan was to withdraw its troops first. But Pakistan has not withdrawn its troops up to this day. The so called Azad Kashmir troops are in illegal occupation of one third of the state territory and so no plebiscite has been held so far. Since Pakistan has not allowed India to carry out its plighted word, India has been forced to make special provisions in its Constitution for the state of Jammu and Kashmir.²¹⁷

**INSTRUMENT OF ACCESSION AND ITS LEGAL IMPLICATIONS:**

The Governor General of India Lord Mountbatten accepted the Instrument of Accession. It was no different from that executed by other 500 states of India. It was unconditional, voluntary and absolute. It was not subject to any exceptions. Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the legal implications of the accession of the state to India we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of accession. The first thing to be noticed as such it bound Jammu and Kashmir legally and irrevocably a part of the territory of India and that the government of India was entitled to exercise jurisdiction over the state with respect to those matters to which the Instrument of Accession extended. Therefore there is no doubt regarding the legality of the accession in the judicial sense. If, in spite of this, the Government of India had given an assurance to the effect that the Accession or the Constitutional relationship between India and the state would be subject to confirmation by the people of the state, under no circumstances can any third party take advantage of such extra legal assurances and claim that the legal act had not been completed. The accession was confirmed by the people of the state through their constituent assembly on November 17, 1957. Section 3 the

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²¹⁷ Supra note 2.
Constitution of the Jammu and Kashmir state says that the state of Jammu and Kashmir is and shall be the integral part of the Union of India. Thus at the time of the commencement of the Constitution, the position of the state of Jammu and Kashmir was different and therefore article 370 was inserted in the Indian Constitution. Under article 370 the President is empowered to issue orders. The President thus acts as a legislature in issuing orders under this article.\(^{218}\) It has been held by the Supreme Court in the case of Puranlal Lakhanpal v. President of India\(^ {219}\) that the President may by orders extend certain provisions of the Constitution to that state with such modifications and exceptions as he thinks fit. The President may subsequently make amendments and modifications in such orders as stated in the case of Sampat Prakash v. State of Jammu and Kashmir\(^ {220}\) by the Supreme Court.

**CONSTITUTIONAL STATUS OF JAMMU AND KASHMIR:**

In the Indian Constitution which was adopted on 26-11-1949 and which went into force on 26-1-1950 the territory of India was to comprise the territories of the states specified in Parts A, B and C of the I Schedule of the Constitution and of territories in Part D of this Schedule. The state of Jammu and Kashmir was one of the eight states specified in Part B of this Schedule. All these Part B states were governed by Article 238 of the Constitution. But the Jammu and Kashmir state was not so governed. For this state the Constitution-makers drafted a special article - Article 370. According to Article 370 the Parliament of India can exercise limited law-making power so far as the Jammu and Kashmir state is concerned. In the case of the other 13 states 9 as reorganized on 1-11-1956, the Indian Parliament can make laws on all subjects enumerated in the Union and the Concurrent lists. But for the Jammu and Kashmir state the Parliament can make laws only on those matters in these two lists which in consultation with the government of this state are declared by the President to correspond to matters specified in the Instrument of Accession of the state and on such other matters in the two lists which the President may, with the concurrence of the state government, specify in his order.

Article 370 also stipulates that only two articles (viz. Art. 1 and Art. 370) of the Indian Constitution will apply in full to this state and that other provisions of the Constitution will apply to this state with exceptions and modifications specified by the President in his Order and that all such Orders of the President shall be issued either in consultation with or the concurrence of, the government of the state. The President can, however, by public notification declare that Article 370 ceases to be operative from a particular date. This means that this is a temporary provision and will be withdrawn as soon as the people of the state have given their verdict on the issue of accession. Only two authorities acting together can amend or abrogate Article 370. These authorities are the President of India and the Constituent Assembly of the state. That body ceased to exist after it had enacted the State’s Constitution on 17 November 1956 to come into force on 27 January 1957. One of the reasons for the temporariness of this article is that in 1949 India was committed to a plebiscite. No reason for the temporariness is valid any longer. Plebiscite is rightly

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\(^{218}\) Dr. J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA, 48TH EDITION, 2011.

\(^{219}\) AIR 1961 SC 1519.

\(^{220}\) AIR 1970 SC 1118.
ruled out and the State’s constituent assembly is gone.221

GENESIS OF ARTICLE 370 AND WHAT DOES IT PROVIDE FOR:
The amendment to the constitution relating to Jammu and Kashmir was moved in the Constituent Assembly by Gopalaswami Ayyangar, a prominent member of the Constituent Assembly, former Prime Minister of Jammu and Kashmir under the Maharaja and India's representative at the United Nations. While introducing the amendment, he expressed his hope that it was a prelude to the state's full integration into the Union of India.

"The discrimination is due to the special conditions of Kashmir. That particular State is not yet ripe for this kind of integration [that of the other princely states that had merged with the Indian provinces directly administered by the British]. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States. At present it is not possible to achieve that integration."

He outlined the special conditions in the state as follows:
1. The war within the state - a ceasefire had held since the beginning of the year but conditions are still "unusual and abnormal", "normal life" not yet restored. 2. Part of the state is still in the hands of "rebels and enemies". 3. "Entanglement" with the United Nations over the issue of J&K and the Government's commitment to giving the people of the State the opportunity to decide for themselves whether they wish to remain with the Republic or to leave it (including a plebiscite if the right conditions prevail) 4. Agreement that the will of the people, through a constituent assembly, will determine the constitution of the state and the sphere of Union jurisdiction over the state.

Gopalaswami Ayyangar did not mention the distinct nature of Kashmir's society or culture as a reason to grant the state a special status, although the fact that Jammu and Kashmir had a Muslim majority and sat on the border between India and Pakistan lay behind the disputed status of the state. There was only one intervention in the Constituent Assembly debate at which the state's special status was enshrined in what was then Article 306A of the draft Constitution and what remains today as Article 370 of the constitution. The unique circumstances of Kashmir's position within the Union were difficult to contest. No other state in the Union was embroiled in a war involving a foreign country or was the subject of a United Nations resolution. All other princely states had by this point decided to join the Union, or their decision had been secured through the use of force (such as Hyderabad, where the Muslim ruler of a majority Hindu state had held out against accession to India). Article 370, then, recognized Kashmir's distinct position at the moment of constitutional design, but it was intended as an interim measure before the convening of a Constituent Assembly in Kashmir and/or the holding of a plebiscite. A major area of controversy surrounding Kashmir's constitutional position was over the state's exemption from the Fundamental Rights and Directive Principles of the constitution. Sheikh Abdullah, the National Conference leader to whom Maharaja Hari Singh had handed

221 V.D. KULSHRESHTHA, LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY, 11TH EDITION, 2017.

over power after his accession to India, had sought such an exemption in order to be able to see through the redistribution of land without compensation promised by the National Conference in the Naya Kashmir ('New Kashmir') manifesto published in 1944 (the Fundamental Rights, which were justiciable, included a "right to property"). Sardar Patel, Indian Deputy Prime Minister and Home Minister wrote to Gopalaswami Ayyangar on October 16th 1949 to express his concern about this: "You can yourself realise the anomaly of the State becoming part of India and at the same time not recognising any of these provisions." He continued, however, "Any question of my approval does not arise. If you feel it is the right thing to do, you can go ahead with it."

That Kashmir's exemption from the legal protection to the right to property was one of the most controversial aspects of Kashmir's constitutional status. The tenor of the debate at the time of the adoption of Article 370 reflected the fact that differential autonomy had not been granted to Jammu and Kashmir as a final settlement of ethnopolitical conflict by recognizing a distinct religious or regional identity. The Indian government regarded Article 370 as a prelude to the state's full integration. It soon became strikingly clear that Article 370 did not protect Kashmir's relationship with India as a "union of equals" despite the distinctive history of popular mobilization in Kashmir. The history of center-Kashmir relations since 1953 has been one of increasing central intervention, including both an erosion of constitutional autonomy and involvement of the central government in the state's democratic processes.\footnote{223 Louise Tillin, United in Diversity? Asymmetry in Indian Federalism, Publius, Vol. 37, pp. 45-67, https://www.jstor.org/stable/4624781.}

According to some jurists Article 370 of the Constitution is one of the most controversial but least studied provisions. As discussed throughout the paper article 370 provides for the autonomy of the state with the least intervention from centre. To recapitulate what its effects are: the Parliament, except for matters pertaining to defence, foreign affairs, finance & communications needs the state governments concurrence for application of any legislation. The entire set of laws governing citizenship, ownership of property and most essentially fundamental rights are different in J&K as compared to rest of India. Indian Citizen from any other state cannot purchase land or property in J&K. The Government of India cannot declare Financial Emergency under Article 360 in the state of J&K. Emergency can only be declared in state of external aggression and war. No amendment of the Constitution of India shall extend to Jammu & Kashmir unless it is extended by an Order of the President under article 370(1). The provisions of Art. 368 of the Constitution of India are not applicable for the amendment of the State Constitution of Jammu & Kashmir.\footnote{224 Supra note 1.}

DELHI AGREEMENT AND SUBSEQUENT ORDERS:

The next major step was the Delhi agreement between Nehru and Abdullah in July 1952 on topics like the Supreme Court’s jurisdiction, financial integration, limited emergency powers and conduct of elections of Parliament, etc. It was an Agreement between the Government of India and of the State at Delhi in June, 1952 as to the subjects over which the Union
should have jurisdiction over the state, pending the decision of the Constituent Assembly of Jammu and Kashmir. The Constituent Assembly of Jammu & Kashmir ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the state with India, early in 1954. In pursuance of this, the President, in consultation with the State Government, made the Constitution (Application to Jammu & Kashmir), Order, 1954, which came into force on the 14th May, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. According to this Order, in short, the jurisdiction of the Union extended to all Union subjects under the Constitution of India. This Order was amended in 1958, 1963, 1964, 1965, 1966, 1972, 1974, 1986 and these subsequent orders deal with the entire Constitutional position of the State.225

INDIRA - ABDULLAH AGREEMENT OF 1975:

Under the Indira Gandhi – Abdullah Accord of February 1975, the state could review only those posts 1953 Central laws which were in the Concurrent List and related to welfare measures, cultural matters, social security and personal laws. Meanwhile, Supreme Court had delivered the judgement in 1968 in Sampat Prakash case.226 It ruled that even after the State Constituent Assembly had ceased to exist, the President could, with the concurrence of the State Government – ungratified by that body – add to the Union’s powers. In 1968 the court opined that “the situation that existed when this article was incorporated in the Constitution has not materially altered”. It ignored completely his exposition of Article 370 itself that the Assembly alone had the final say. The court said that since the Assembly made no recommendation that Article 370 be abrogated, it should continue. The Supreme Court totally overlooked the fact that on its interpretation, Article 370 can be abused by collusive State and Central Government’s to override the State’s Constitution. Notwithstanding the liberal measures introduced in the State by the adoption of a separate State Constitution, the pro-Pakistani elements in Jammu and Kashmir continued their agitation for the holding of a plebiscite to finally determine whether the State should accede to India or Pakistan and there were violent incidents initiated by the ‘Plebiscite Front’. Sheikh Abdullah got involved in these anti-Indian movements and went on criticizing the Indian policy towards the State, as a result of which he had been placed under preventive detention from 1955 and externed from State in 1971. This was followed by a series of negotiations and an agreement was finally reached. All Abdullah wanted was “maximum autonomy” for Kashmir as a unit of the Federation. The net political result of this agreement was that the demand for plebiscite was abandoned by Abdullah and his followers and, on the other hand, it was agreed that the special status of the State of Jammu and Kashmir would continue to remain under the provisions of Art. 370 of the Constitution of India.227 It should however be mentioned that owing to differences over matters arising out of the Agreement, it has not been implemented by issuing a fresh Presidential Order under Art. 370.

225 Id.
226 Supra note 7.
227 Supra note 8.
ARTICLE 35A:

Article 35A is a provision incorporated in the Constitution giving the Jammu and Kashmir Legislature a carte blanche to decide who all are ‘permanent residents’ of the State and confer on them special rights and privileges in public sector jobs, acquisition of property in the State, scholarships and other public aid and welfare. The provision mandates that no act of the legislature coming under it can be challenged for violating the Constitution or any other law of the land. Article 35A was incorporated into the Constitution in 1954 by an order of the then President Rajendra Prasad on the advice of the Jawaharlal Nehru Cabinet. The controversial Constitution (Application to Jammu and Kashmir) Order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which extended Indian citizenship to the ‘State subjects’ of Jammu and Kashmir. The Presidential Order was issued under Article 370 (1) (d) of the Constitution. This provision allows the President to make certain “exceptions and modifications” to the Constitution for the benefit of ‘State subjects’ of Jammu and Kashmir. The March 1961 judgment in Puranlal Lakhanpal v. The President of India discusses the President’s powers under Article 370 to ‘modify’ the Constitution.

The parliamentary route of lawmaking was bypassed when the President incorporated Article 35A into the Constitution. Article 368 (i) of the Constitution empowers only Parliament to amend the Constitution. So did the President act outside his jurisdiction? Is Article 35A void because the Nehru government did not place it before Parliament for discussion? A five-judge Bench of the Supreme Court in its March 1961 judgment was silent as to whether the President can, without the Parliament’s knowledge, introduce a new Article. This question remains open.

ANALYSIS OF CASE LAWS:

As mentioned above there were two important case laws which threw some light on the issues concerned with article 370 and 35A. They mentioned what were the powers granted by these articles. After the interpretation by the Supreme Court as to what was granted in these article there arose many issues, which gave rise to filing of many writ petitions and PILs.

A writ petition filed by NGO We the Citizens challenges the validity of both Article 35A and Article 370. It argues that four representatives from Kashmir were part of the Constituent Assembly involved in the drafting of the Constitution and the State of Jammu and Kashmir was never accorded any special status in the Constitution. Article 370 was only a ‘temporary provision’ to help bring normality in Jammu and Kashmir and strengthen democracy in that State, it contends. The Constitution-makers did not
intend Article 370 to be a tool to bring permanent amendments, like Article 35A, in the Constitution.

The petition said Article 35A is against the “very spirit of oneness of India” as it creates a “class within a class of Indian citizens”. Restricting citizens from other States from getting employment or buying property within Jammu and Kashmir is a violation of fundamental rights under Articles 14, 19 and 21 of the Constitution.

A second petition filed by Jammu and Kashmir native Charu Wali Khanna has challenged Article 35A for protecting certain provisions of the Jammu and Kashmir Constitution, which restrict the basic right to property if a native woman marries a man not holding a permanent resident certificate. “Her children are denied a permanent resident certificate, thereby considering them illegitimate,” the petition said. Attorney-General K.K. Venugopal has called for a debate in the Supreme Court on the sensitive subject. Recently, a Supreme Court Bench, led by Justice Dipak Misra, tagged the Khanna petition with the We the Citizens case, which has been referred to a three-judge Bench. The court has indicated that the validity of Articles 35A and 370 may ultimately be decided by a Constitution Bench.²³⁰

LEGAL HURDLES IN REPEALING ARTICLE 370 AND 35A:
Article 370(3) provides that notwithstanding anything in the foregoing provisions of this article, the President may, by public Notification, declare that the article shall cease to be operative. But the President cannot issue such a notification without the recommendation of the Constituent Assembly of that State. Since the Constituent Assembly of the State no longer exists, the President’s power appears to be unfettered now. Therefore, if any modification is to be made to article 370, recourse will have to be had to article 368 regarding amendment of the Constitution. The hurdle here is whether any amendment made to article 370 under article 368, without the concurrence of, or consultation with, the State Government will be effective. Article 35A is a recognition of the conditional accession of J & K into India. Article 35A says that no law in J&K regarding restrictions imposed on employment under the State government, or acquisition of immoveable property, or settlement in the State, or scholarships and aid given by the State government shall be void on the ground that it is inconsistent with any fundamental rights in the Constitution. Because of the limited accession of the State of J&K and the relatively greater autonomy given to the State, Article 35A is only a recognition of the conditional accession of J&K into India and the restrictions placed on both Parliament and the Constitution that the normal powers of Parliament to make laws will not apply to J&K. It is Article 370 that restricted the application of certain provisions of the Constitution to J&K. It is pursuant to Article 370 that Article 35A was inserted by way of the 1954 Presidential Order. All that it says is that the laws made by the state regarding settlement and acquisition of property will prevail and not be struck down on the ground that they violate fundamental rights. Incidentally, Himachal Pradesh and Uttarakhand have laws which say that no outsider can buy land. Strictly speaking, these laws are unconstitutional and violate...
two fundamental rights — the freedom to reside and settle in any part of the territory of India and the freedom to practise any profession, trade and business. Those laws are void. But because the accession of J&K was conditional to their being given their rights, their sovereignty with regard to matters concerning land and settlement are preserved. Therefore, it cannot be challenged on the ground that it violates fundamental rights or the basic structure of the Constitution because it is pursuant to an original part of the Constitution and pursuant to the limited accession signed with J&K.

Kashmir never acceded fully to India. Therefore, it is a quasi-sovereign State. It is not like any other State. Article 35A follows the Instrument of Accession and the guarantee given to the State of J&K that the State’s autonomy will not be disturbed even by the Constitution.231

TERRORISM AND CONFLICT: ONE OF THE REASONS

During 1989, a widespread and armed insurgency started in J&K. After the 1987 state legislative assembly election, some of the results in elections were disputed which resulted in the creation of militant groups which laid the foundation of the Mujahadeen insurgency, which continues to this day and the main conflict is between various Kashmiri separatist and the Government of India. In J&K some groups back for complete independence of Kashmir (Azad Kashmir), while others pursue Kashmir's full control to Pakistan. Though an age-old demand of the BJP to repeal the special status accorded to J&K, the ruling party has now a imminent opportunity to scrap of Article 370. Due to this rage between the groups and the armed forces of India the rise in violence takes place and situations like infamous massive stone-pelting towards the security forces, everyday protests violence etc. are on the rise. The attack on a CRPF convoy in Jammu and Kashmir's Pulwama district that killed at least 40 jawans is the biggest terror attack in the past five years. However, data released by the BJP government on February 5, 2019 reveal that J&K has been viewing regular terror attacks in the past five years. The responsibility for the Pulwama Feb 14, 2019 attack was claimed by the Pakistan-based Islamist militant group Jaish-e-Mohammed. The Hon'ble Supreme Court of India has accepted the urgent hearing of a PIL 232 challenging the constitutional validity of the infamous Article 370 of the Constitution of India, which grants special status to J&K and limits the Parliament's power to make laws for the J&K state. In the present PIL, which was raised in September 2018, it has contended that the Article 370 special provision was temporary in nature at the time of framing of the Constitution.

The PIL also prays for declaration from the Supreme Court that the separate Constitution of J&K is arbitrary and unconstitutional on many grounds, including that it is against the supremacy of the Constitution of India. The Constitution of J&K is invalid mainly for the reason that the same has still not got the assent of the

232 Ashwini Kumar Upadhyay V. Union of India, Writ Petition Civil No.1162 of 2018

www.supremoamicus.org
President, which is a mandatory as per provisions of the Constitution of India.\textsuperscript{233}

**CONCLUSION:**

Kashmir has enacted its own Constitution, it has its own flag, it has its own separate administration, Indian laws do not apply to it and it has its own laws all these thing have encouraged them to nurse an impression that they are independent of India and India is their treasury where from they may draw as much as they wish without accountability. One must understand that secularism is at threat in Kashmir. This all arguments pave way to the solution as to which option is better a complete Azad Kashmir as Pakistan proposes or an autonomic state. There is no better option than autonomy given that plebscice is not a possibility, it is the best option for both the State and the Central government. Where Indian state would respect human rights and work for economic development. The central government will have to win over the people of Kashmir and convince them that their interests are safe in India and that they enjoy the fruits of democracy and autonomy within the Indian federation. This is the real challenge before the Indian leadership and any talk of abrogating Article 370 would further alienate the people of Jammu and Kashmir from India. We cannot invoke the sanctity of the Constitution when it suits us and call it a mere technicality when it does not suit us. If the Constitution is sacrosanct, and we are willing to negotiate with terrorists within its framework, we must not talk of abrogating Article 370 which is a part of that framework. In fact, those who are interested in solving the Kashmir issue should use the present provisions of Article 370 to assure the people of Jammu and Kashmir that even if the Indian Parliament wants, with an overwhelming majority, to undo Article 370, it would not be able to do so except with the Concurrence of the state government.\textsuperscript{234} But the people of Jammu and Kashmir must be informed that this is not merely a matter of the good will of any government in power. The Constitution of India does not allow any government to unilaterally abrogate Article 370. This will go a long way in assuaging the fears of the people of the state. One of the most controversial topics on the manifesto of BJP was abrogating article 370. Recently they even made a plea that the President should declare that article 370 shall cease to operate. It was faced with huge criticism for its inept handling of the issue at hand. Presently the top most priority in the state is to restore normalcy. The state has been without an elected government almost for a year now. Enough lives have already been laid down and the time has now come for the government to finally take its stance as to complete integration or autonomy. Any decision taken ultimately should be for the benefit of people and safeguarding their rights. The Supreme Court’s urgent hearing of the PILs gives us the weight of the situation. The central government should also think faster before it’s too late that human rights are violated to their farthest extent and people are tired of democracy and seek other means like terrorism to


improve their lives. Democracy is at threat in Kashmir, and it’s complicated to decide. Finally any choice lies with the people of Jammu and Kashmir and it is for the State to decide.

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CASE COMMENT ON TIPS INDUSTRIES LTD. V. WYNK LTD.

By Mohit Kar
From Maharashtra National Law University, Aurangabad

BACKGROUND

The Copyright law in India saw a huge breakthrough in 2012 vides The Copyright (Amendment Act), 2012 which came into effect on June 21, 2012. The main schema of the amendment was to correct the legislative imbalance of rights assigned to composers and lyricists and was a path-breaking remedy for the copyright regime in India.

One of the most important changes brought in by this amendment was the provision of Section 31D, which gave leeway that any broadcasting organization which wants to broadcast a literary, musical or sound recording already published may do so subject to various conditions mentioned in the section. Due to widespread growth of internet all over the globe, 'communication to public' via internet is much more prevalent and thus, on September 05, 2016, the Department of Industrial Policy and Promotion (DIPP) issued an Office Memorandum clarifying the scope of Section 31D of Copyright Act, 1957 by construing that "any broadcasting organization desirous of communicating to the public" may not be restrictively interpreted to be covering only radio and television broadcasting, as definition of "broadcast" read with "communication to the public" appears to include all kinds of broadcasts including internet broadcasting.

Therefore, bringing 'online broadcasting' under the ambit of section 31D of Copyright Act, 1957.

This section has been heavily criticized, and has been a matter of constitutional challenge on various grounds such as

- Not allowing commercial negotiations to determine royalty rates favors broadcasters at the expense of the copyright owners.

- The copyright owners are not given the authority to negotiate terms of royalties with the broadcasters.

- The provision is violative of Art. 19 (1) (g) of the Constitution as it provides the Appellate Board the power to fix rates for radio broadcasting. This is not a reasonable restriction.

BRIEF FACTS

The Plaintiff - Tips Industries Ltd, had claimed to be the owner of the copyright in over 25,000 sound recordings. The Defendants owned and operated WYNK, an Over the Top Service available on the internet, smart phones and smart media. Through this service, upon payment of a subscription fee, the Defendants’ subscribers could access numerous sound recordings and audio-visual recordings including, inter alia, the Plaintiff's Repertoire. Tips’ Repertoire was earlier licensed to the Defendants by the copyright society - Phonographic Performance Limited. After the end of the aforementioned license, negotiations ensued between the Tips and Wynk to arrive at terms for a renewed license but

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there was a failure to do so. On or around 22nd March 2017, in a meeting between the Wynk and Tips’ representatives, a License Fees of Rs. 4.5 crores towards the Tips’ Repertoire was agreed upon for a term of 2 years i.e. Rs.2 Crores for the first year and Rs.2.5 Crores for the second year. Wynk disputed that the said figure of Rs.4.5 Crores was never agreed upon. According to Wynk, the said figure was not acceptable to the company as the same was excessive and hence the same was rejected. Wynk then invoked Section 31-D of the Copyright Act, 1957 by claiming themselves to be a broadcasting organization. In short, Wynk claimed that they were a broadcasting organization and that they were entitled to a statutory license under Section 31-D of the Act to communicate the work to the public by way of broadcast of the Tips’ musical work and sound recordings. This was the main bone of contention for the both parties during the subsequent hearings.

ANALYSIS OF ARGUMENTS AND THE JUDGEMENT

The Ld. Senior Advocate for Tips’ had submitted that Section 31-D of the Act does not contemplate a right or entitlement to commercially rent out or sell copyrighted works. The said section only contemplates a statutory license for ‘broadcasting’. He submitted that Section 31-D of the Act does not enable or permit a person to sell or commercially rent out sound recordings. He submitted that even otherwise, broadcast is a species of activity that falls within the scope of ‘communication to the public’. Ld. Advocate for Tips’ submitted that the right to commercially rent / sell sound recordings is a separate right carved out under Section 14(1)(e)(ii) of the Act and is independent to the right to communicate to the public as provided in Section 14(1)(e)(iii) of the Act. It was submitted that if there is a combined reading of Sections 2(dd), 2(f) and 31-D of the Act along with Section 14(1)(e) of the Act, it can be made clear that intention of the Legislature to exclude the right to commercially rent / sale of sound recordings from Section 31-D is apparent and what is covered is only the communication of sound recording to public. Meanwhile, seeking to claim benefit of Section 31-D, Wynk’s representatives had contended that they were a broadcasting organization and that they were communicating to the public by way of broadcast of the Tips’ Repertoire over the Internet.

Hon’ble Justice S.J. Kathawalla stated that he was in agreement with Tips’ that the provisions of Section 31-D read with Rules 29 to 31 coupled with the legislative history preceding the passage of Copyright Amendment Act, 2012 clearly supported the submission that Section 31-D contemplates only television and radio broadcasting and not internet broadcasting and thus the suit filed by Tips’ was allowed by the court.

CONCLUSION

This judgment has been considered as an extremely important decision for the entire recorded music industry existing in India, and IMI, the trade body which represents the benefits of the music industry in India, has welcomed the verdict. This decision confirmed IMI’s consistent stand that INTERNET streaming services are not covered under Section 31D of the Copyright Act, 1957. The intention of the Parliament was to provide involuntary licensing benefits under the Copyright Act, 1957 and it is very encouraging now that the Hon’ble Court has clarified the intention of our lawmakers which did not include streaming services under the statutory licensing scheme.

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ODR: NEED OF THE HOUR

By Mohit Kukadia
From Faculty of Law, Maharaja Sayajirao University, Vadodara

1. Introduction
2.6 Crore! That is the number of cases that are pending in our District Court237, 42 Lacs Pending in High Court and as of 01/11/2017, 55,259 cases are remaining pending Supreme Court238. To Fast process disposal of cases we had established Fast track court but after the central funding stopped 50% of them stopped functioning239. Even after having the world’s largest judicial employees, we only have 17 judges for 1 Million people (Recommended is 50 per Million)240. Even if India fills the Vacancy of Judges, India lacks proper infrastructure for courtrooms241.

In this era of Globalization and as India is slowly becoming a major power in International scenario, this problem can turn into a major obstacle for India. Yes, there is increase in rate of disposal but at the same time due to increase in population and literacy rate, the filing of cases albeit slowly has also increased243. The need for an efficient dispute resolution is now or never. This is where Online Dispute Resolution(ODR) comes into play. ODR isn’t just an efficient method to resolve cases but when we include both Online Court and ODR into one component India has a highly efficient solution to the problem. Alternative Dispute Resolution(ADR) is also a viable solution but it can be a costly and a lengthy affair than ODR.

Further my idea of ODR isn’t just restricted to conducting court hearings across video links or online tracking of the progress of trials to be ODR. I believe in a wider view that has been implemented and is been in practice around the world. What I think is that ODR shouldn’t be just restricted to resolving disputes online but it should be used in resolving for small claims in direct business to consumer transactions. ODR is already being used for consumer and e-commerce related disputes but my idea is that by setting up a Internet-based court service, we can use ODR system as a basic DR process for petty cases where there is some tangible and monetary remedy sought by the parties. I understand that ODR is not appropriate for all classes of dispute but, on the face of it, is best placed to help settle high volumes of relatively low value disputes – robustly, but at much less expense and inconvenience than conventional court.

This article will focus first on the problem of pending cases before the court, then further will explain why the current dispute resolution system isn’t as efficient and why the implementation of ODR into ordinary court proceedings will be the solution to tackle the pending case problem. It will begin with analysis of why the current dispute resolution system is failing to tackle this issue.

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238 http://supremecourtofindia.nic.in/statistics
241 245th Law commission report
2. Why the current Dispute Resolution solutions aren’t efficient anymore?

Judicial Dispute Resolution and Extrajudicial Resolution are namely two most used solution to resolve disputes around the world. The most common form of judicial dispute resolution is litigation. Litigation is initiated when one party files suit against another. Proceedings are usually done in established court are governed by rules such as Indian Penal code etc. that are established by the legislature. Extrajudicial Resolution solution has just been limited to ADR only that is, extrajudicial processes such as arbitration, collaborative law, and mediation used to resolve conflict and potential conflict between and among individuals, business entities, governmental agencies, and (in the public international law context) states. ADR generally depends on the agreement between both parties.

Both of these resolution process have been in practice in India for a long time. Still, none of them hasn’t been able to solve the problem of pending cases. Being the world’s largest democratic society, our judiciary must be the best but we are currently ranked 66 on world’s law and index rank. It isn’t that judiciary hasn’t taken step to tackle the problem. For the past few years, the Supreme Court has been disposing off cases at a faster rate, in line with Chief Justice T.S. Thakur’s publicly stated ‘top priority’ of reducing judicial pendency. The number shows that the there is decrease in the number of pending cases in SC.

<table>
<thead>
<tr>
<th>Number of Pending Cases in the Supreme Court</th>
<th>At the end of –</th>
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<tbody>
<tr>
<td>59468</td>
<td>19-02-2016</td>
</tr>
<tr>
<td>62281</td>
<td>30-06-2015</td>
</tr>
<tr>
<td>65970</td>
<td>30-06-2014</td>
</tr>
<tr>
<td>66603</td>
<td>30-09-2013</td>
</tr>
</tbody>
</table>

The data says it all :-

244 Ethan Katsh, “Dispute Resolution in Cyberspace,”

245 http://www.livemint.com/Politics/wYzhEZxwsG5X6Dq2AM3iN/India-placed-66th-in-rule-of-law-index-fares-poorly-in-civi.html
past three years – 40,189 in 2013, 45,042 in 2014 and 47,424 in 2015\textsuperscript{246}. The same trend can be seen in the High court also:

<table>
<thead>
<tr>
<th>Number of Pending Cases in the High Courts</th>
<th>At the end of –</th>
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<tbody>
<tr>
<td>4005704</td>
<td>30-6-2015</td>
</tr>
<tr>
<td>4107524</td>
<td>30-9-2014</td>
</tr>
<tr>
<td>4589920</td>
<td>30-09-13</td>
</tr>
</tbody>
</table>

As of 31 December 2014, about 18% of the cases had been pending for over 10 years or more in the High Courts. The number of cases pending in the District and Subordinate Courts has been around 2.6 crore for the past two years\textsuperscript{247}. Further to tackle the problem, the establishment of Fast track courts was done. It worked quite efficiently as they disposed of 30.7 Lac cases out of 36 Lacs that were given to them.

Fast Track Courts were started in 2005 but in 2011, the Centre cut off funding and made it the State’s responsibility to fund the FTCs out of their own budgets. Since then 60% of these courts have shut down.\textsuperscript{248}

Our Judiciary System has tried their best to dispose pending cases either by implementing FTCs or by working more efficiently but India has a population of 1.3 billion that is increasing every day, further by having the largest youth population, people are more informed than ever. Globalization, Education and Internet are the main reasons that has led to increase in filing of cases around the country. For example, Kerala gets 28 new cases per 1,000 people. It has a literacy rate of over 90%. Jharkhand, which has a literacy rate of around 53%, gets four cases per 1,000\textsuperscript{249}.

It is time time we change the system and by Implementation of ODR into ordinary court service might just be an answer as cyberspace is nothing else just a mirror

\textsuperscript{246} http://thecompanion.in/tli-pendency-in-indian-courts/
\textsuperscript{247} Ibid 10
\textsuperscript{248} https://www.saddahaq.com/fast-track-courts-might-help-reduce-pendency-in-courts-but-are-the-governments-interested
\textsuperscript{249} https://www.youthkiawaaz.com/2016/05/judiciary-pending-cases-india/
3. Why Online Dispute Resolution?

Before I explain that Why ODR is the best system for India. Let’s see what ODR is exactly or how it works and its objective or Is it compatible with our Indian legislation or not. Further to see what is the opinion of judiciary on using Internet and ODR in court based system.

3.1 Online Dispute Resolution.

Online Dispute Resolution (ODR) "refers to a wide class of alternate dispute resolution processes that take advantage of the availability and increasing development of internet technology."251 It is a set of DR processes that allow for the resolution of disputes via online mechanisms such as the Internet or some form of technology that allows for virtual communication without requiring the parties to be in a room together. At present, the main application for ODR is extra-judicial dispute resolution, outside the ordinary court system but many countries are slowly implementing the idea of Internet-based court service252.

3.2 Objective Of ODR

The primary purpose of ODR is to allow the parties to resolve their dispute with the use of electronic technology. It may occur in “real time” or unroll in an asynchronous manner, depending on the rules of the ODR Provider, as well as the wishes of the parties. Often, this process is more convenient and cost efficient than face to face meetings in order to negotiate,

250 Definition by David Gelernter, a computer scientist
252 https://www.judiciary.gov.uk/reviews/online-dispute-resolution/
253 Court-based Mediation for Civil Cases: An Evaluation of the ADR Centre, Julie Macfarlane, November, 1995,

254 ODR, as a process, may involve various types of dispute resolution including: dispute prevention; ombudsman programs; conflict management; assisted negotiation; early neutral evaluation and assessment; mediationconciliation; mediation-arbitration (binding and/or non-binding); arbitration; expert determinations; executive tribunals; consumer programs.

Supremo Amicus
mediate, or otherwise resolve existing disputes.\textsuperscript{256}

It is conceived as a means to achieve some of the most powerful legal ideals of the legal tradition, which include:

1. Resolution of disputes in a civilized (i.e. peaceful) manner between private parties
2. Legal Certainty: In making individual plans, decisions, and choices everyone is entitled to know what the law is in advance.
3. Access to Justice: Everyone involved in a dispute shall be entitled to an easily accessible redress mechanism that provides for a timely resolution and effective remedies at reasonable cost.
4. To reduce the cost: Use of networked technology and general accessibility (i.e. avoidance of travelling costs) makes dispute resolution much cheaper. Also, the use of intelligent software might reduce other costs such as costs for translation or for obtaining legal advice.
5. To increase the rate of court disposal: One of the major objectives of ODR is increase in speed of disposing cases and convenience of use.\textsuperscript{257} Again, this factor is one of the advantages of ODR compared to offline court action. This is confirmed by the Consumers International survey, which concludes that most ODR providers meet the criteria of timeliness and convenience.\textsuperscript{258}

3.3 How Does ODR Work?

India is still trying to understand and slowly implementing concept of ODR, most of the West has begun taking bold strides in this direction. To Understand how ODR works, we need to understand it via EU platform as they have implemented it.\textsuperscript{259}

In 2013, the EU famously enacted the ADR directive\textsuperscript{260} and the ODR regulation\textsuperscript{261}. Through these, it attempted to facilitate faster dispute resolution for the benefit of consumers in the EU. It set up an ODR platform for the Union, for the resolution of disputes arising from online transactions. Complaints are to be filed electronically and free of charge and can be made in all official languages of the EU. This platform will connect all the existing ADR entities. Once the complaint is made, the opposite party (trader) will be notified, following which they will select a competent ADR entity. The ODR Platform will subsequently transmit information and facilitate the resolution of the dispute. The ODR Platform also provides for a free case management tool that enables the ADR entity to conduct the ADR procedure through the ODR Platform. All of this is to be done within a period of 90 days.\textsuperscript{262}

3.4 Are there any Legal Issues for ODR in India.

India is since long trying to usher alternative dispute to the centre stage. Since the last

\textsuperscript{256} http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/rev/drg-mmc/10.html#ti
\textsuperscript{258} Ethan Katsh and Janet Rifkin, Online Dispute Resolution, www.disputes.net/cyberweek 2001/OnlineDisputeResolutionIntro.htm; Henry H. Perritt, Jr., Dispute resolution in Cyberspace: Demand for new forms of ADR, www.innovationlaw.org/pages/probing_perritt.htm
\textsuperscript{259} http://escsr.sk/en/clanok/how-does-odr-platform-work/
\textsuperscript{261} http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R0524
\textsuperscript{262} http://www.osborneclarke.com/connected-insights/publications/online-resolution-intellectual-property-disputes/
decade or so there has been a paradigm shift in the legislative structure for ADR to be the first Dispute resolution solution for cases. Let’s see some developments in legislation:

A) The Code of Civil Procedure, 1908

By the CPC (Amendment) Act, 1999, Sec 89 of CrPC has made it clear that for any suit to proceed in court, it will first have to go through some mode of ADR. It should be noted that the statute does not make it mandatory for parties to actually resolve a dispute using ADR but it makes it mandatory, for parties seeking redress in a court, to first try to get their disputes resolved through an ADR mechanism of their choice. The court’s direction in this regard, as per the Rules, would come at the stage of hearing the suit after the recording of admissions and denials. It is only when ADR fails then the Court will have power to entertain the claim and act accordingly.

This legislative act is one of the biggest in kind to solve the delays in dispensation of justice.

B) The Arbitration & Conciliation Act, 1996

This act was introduced to bring all the acts related to arbitration into one umbrella. It is drafted on the lines of the UNCITRAL Model Arbitration Law and the UNCITRAL Conciliation Rules and for the first time statutorily recognizes conciliation by providing elaborate rules of engagement. This provision hence affords parties the flexibility to hold their proceedings anywhere, even in cyberspace.

C) Information Technology Act, 2000

The Information Technology Act, 2000 Act (the 2000 Act) was enacted with a view to facilitate and encourage e-commerce and hence gives legal recognition to electronic records and digital signatures. The enactment of this Act has also brought with itself amendments to several other Acts. It is a law meant to be “applicable to alternatives to paper based methods of communication and storage of information”.

Section 4 of the 2000 Act states that a requirement of any law for information or matter to be in written, printed or typewritten form shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and is accessible so as to be usable for a subsequent reference.

Section 5 of the 2000 Act gives recognition to digital signatures by providing that the requirement of any law for authentication by a person’s signature shall be deemed to have been satisfied if such authentication is done by means of a digital signature.

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263 Sec 89(1) of CrPC: Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for – arbitration; conciliation; judicial settlement including through Lok Adalat; or mediation.


266 The Indian Penal Code, 1860; The Indian Evidence Act, 1872; The Bankers’ Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934

With all these aforementioned legislature in place, it is now upto Indian Government to set up ODR and we already have ADR-friendly procedure, the statutory recognition and the technology to make

Judiciary and ODR

In an decision\textsuperscript{268} it held that “When an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties.” In this case, the contention was that the two arbitrators appointed by the parties should have met in person to appoint the third arbitrator.

So, Judiciary has also approved use of technology for ordinary court proceedings\textsuperscript{269}. Both Legislature and Judiciary are willingly ready for more inclusion of ODR into Indian court proceedings. We already have a very friendly environment for ODR to implement. I think we should now focus on the awareness and how much efficient is ODR.

3.5 Why ODR is Most Efficient solution for India.

As it has been clearly proved that where and why the current dispute resolution has failed us, and why it is not enough for the time to come. Then the question is that why ODR.

I think ODR is the future as in a few decade we have seen tremendous technological advancement done in cyberspace. In 1996 Ethan kash wrote in his paper\textsuperscript{270} that someday in future we will have an exotic equipment, such as headgear that allows one to feel like one is leaving physical space and entering a new space i.e. VR\textsuperscript{271} that is now a reality. My point is that we have all the technological advancement needed for ODR based court system.

ODR will not just save time but will save be cost efficient, it has no-border barrier, all the records are accessible anytime anywhere further there will be no travelling cost etc. Let’s see in depth the merits of ODR:

A) Speedy Resolution

Where offline ADR may help settle a matter in days or months, as compared to the years it may take to resolve litigation, online ADR promises settlement of disputes within days or even hours. Further, most of these ODR service providers are functioning round the clock. Interested parties can merely visit the provider’s website and speed up the process.\textsuperscript{272}

B) Cost Saving

One of the biggest benefits of online dispute resolution is that such systems can

\textsuperscript{268} Grid Corp. Of Orissa Ltd. V. AES Corp. 2002 A.I.R. (S.C.) 3435
\textsuperscript{269} State of Maharashtra v. Dr. Praful B. Desai (2003) 4 SCC 601
Grid Corp. Of Orissa Ltd. V. AES Corp. 2002 A.I.R. (S.C.) 3435
Sil Import, USA v. Exim Aides Exporters, Bangalore (1999) 4 SCC 56
\textsuperscript{270} ADJUCTION RESOLUTION IN CYBERSPACE by M. Ethan Kashi [FN1]
\textsuperscript{271} It is a headgear that anyone who wears it, feels or enters a virtual world which feels as a physical world.
drastically decrease the cost of getting a dispute resolved; thus allowing the opening of the doors of the justice system to traditionally disadvantaged groups.\(^\text{273}\) As compared to filing suit in a court, the cost of online dispute resolution is a “mere trifle.” There is even a fairly significant difference between the costs of using online dispute resolution as compared to using other forms of alternative dispute resolution.

C) **Avoidance of Complex Jurisdiction Issues**

A key advantage of resolving disputes through the use of cyber-mediation is that it avoids the issue of whether a particular court has jurisdiction over the dispute.\(^\text{274}\) Since disputants can bind themselves to resolution through an agreement, jurisdictional issues can be avoided altogether.\(^\text{275}\)

D) It may also be argued that more thoughtful, well-crafted contributions result from the ability of the parties to edit messages prior to sending them: “Asynchronous Internet communications have the advantage of being edited ‘best’ communications in sometimes contrast to ‘first’ (often impulsive) responses that can take place in real time face-to-face mediation discussions.”\(^\text{276}\)

These type of merits can effectively tackle the pending case problem of India. These are not some theory or some sci-fi story, ODR is a reality and is in practice at many places. Websites such as Cybersettle,\(^\text{277}\) Settlement Online,\(^\text{278}\) and clickNsettle\(^\text{279}\) offer services that are entirely online and focus primarily on negotiating monetary settlements. These websites serve as a neutral arena to exchange settlement offers. Further some of the live examples of Internet based Courts where disputes are resolved are eBay, Canadian Civil Resolution Tribunal or Youstice and much more.

eBay for example solves around more than 60 millions cases a year regarding disputed via ODR. There are two main processes involved. For disputes over non-payment by buyers or complaints by buyers that items delivered did not match the description, the parties are initially encouraged to resolve the matter themselves by online negotiation. They are assisted in this by clearly structured, practical advice on how to avoid misunderstandings and reach a resolution. Guidance is also given on the standards by which eBay assesses the merit of complaints. If the dispute cannot be resolved by negotiation, then eBay offers a resolution service in which, after the parties enter a discussion area to present their argument, a member of eBay’s staff determines a binding outcome under its Money Back Guarantee.

Whereas has a Canada has taken a step forward and implemented Internet based court service into regular court proceedings. It is a public scheme,


\(^{276}\) See Gibbons et al., Supra note 45, at 42; see also Friedman, Supra note 44, at 711.

\(^{277}\) See Cybersettle, At http://www.cybersettle.com

\(^{278}\) See it on http://www.settlementonline.com/

\(^{279}\) See http://www.clicknsettle.com/
The online tribunal will be available as an alternative pathway to the traditional courts for resolving small claims through a process that is expected to be more convenient and less costly. It will deal with claims (under 25,000 Canadian dollars) relating to debts, damages, recovery of personal property, and certain types of condominium disputes.

So, we can see that this is not just some theoretical approach., Internet based Court system that are using ODR as a basic dispute resolution process are a reality and slowly many countries are trying to implement it. What I am saying is that we have the technology and means to make Internet courts a reality that can solve our problems.

4. ODR Based Court

It may look like a new approach but in reality ODR is very easy to establish and implement it in ordinary court proceedings. As, We saw before that Indian legislature as well as judiciary has made great strides for ODR to work in India. So, the Internet based court proceedings will be done same as it is done in ODR process\(^{281}\), there will be some changes like introduction of online judge that I propose in my model. Herewith I propose a model that has been recommended by United kingdom for Internet based court\(^{282}\).

---Tier One will provide Online Evaluation. This facility will help users with a grievance to classify and categorize their problem, to be aware of their rights and obligations, and to understand the options and remedies available to them.

---Tier Two will provide Online Facilitation. To bring a dispute to a speedy, fair conclusion without the involvement of judges, this service will provide online facilitators. Communicating via the Internet, these individuals will review papers and statements and help parties through mediation and negotiation. They will be supported where necessary, by telephone conferencing facilities. Additionally, there will be some automated negotiation, which are systems that help parties resolve their differences without the intervention of human experts.

---Tier Three will provide Online Judges – full-time and part-time members of the Judiciary who will decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online pleading. This process will again be supported, where necessary, by telephone conferencing facilities.

The establishment of Internet based court system will require two major innovations

\(^{280}\) http://www.leg.bc.ca/39th4th/3rd_read/gov44-3.htm

\(^{281}\) See 3.3 (How does ODR work)


\(^{283}\) https://martinpartington.com/2015/02/
in the justice system of India. The first is that some judges should be trained and authorized to decide some cases (or aspects of some cases) on an online basis. The second innovation is that the state should formally fund and make available some online facilitation and online evaluation services.

5. Conclusion

In summary, there is a problem in India and how do we tackle a problem? By a solution. Currently India is facing a problem of pending cases that will not stop and we have tried by implementing many new approaches to tackle the problem, but we are not succeeding. So, the need is a drastic change in the system itself. The Solution as we read the implementation of ODR into court proceedings. For that we read the ODR is the most efficient solution to our problem as it is not only cost-efficient, speedy but also has no-border barrier that helps for International Proceedings further it also increases access to justice as everything is away just a click away. How does it help India? As all the merits of the ODR biggest one is its speedy yet effective work as we saw the real-life example where it was implemented in eBay or in Canadian Judiciary system or EU. All of this examples proves that how much effective and speedy is the process. By Implementing it we will be solving the backlog of case problem. How to Implement it? I recommended a tier based system that has been proposed by UK. India is showing tremendous growth in every aspect of a nation only thing we are lacking any growth is judiciary and by Implementing ODR into court proceedings will not just solve the backlog problems but also we can make sure that in near future we will not suffer from the same problem.

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WHETHER TRANSFER OF PROPERTY MADE IN VIOLATION OF INJUNCTION ORDER IS VALID?

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INTRODUCTION
In the Indian law, an injunction is considered as the equitable remedy identified in the form of the court order that compels a party or refrains them from doing a specific act. It is a kind of court order that refrains one of the parties for the purpose of equity or refraining from act, which is causing injustice to the other party. Therefore, a certain type of the conduct is forbidden through the injunction. Evidences have shown that injunction is considered as the equity that originated from the English courts of equity and traditionally this remedy is awarded when the wrong could not be remedied through the money. Injunction is to provide the right to someone, whose right have been violated by the other party. Therefore, while providing injunction the questions of good faith and fairness are also considered by the court. Injunctions given in the case of transfer of property will be discussed in this article and whether they are valid or not.

II.2 TYPES OF INJUNCTIONS
Injunctions can be given by the court in different cases, in order to prohibit the further violation of the law and the rights of the people. Such cases may include, the trespass to the personal property, infringement of a patent or transfer of the property. On the basis of the conditions, situations and time, injunctions can be classified as the “temporary injunctions” or “perpetual injunctions”. An injunction that requires a certain conduct to be conducted by the parties is classified under the “mandatory injunctions” and one that prohibits the conduct are considered as the "prohibitory injunction". Some of the injunctions are both, which means mandatory as well as prohibitory, because they may require certain conduct or act to be conducted and some to be forbidden.

“When an injunction is given, it can be enforced with equitable enforcement mechanisms such as contempt. It can also be modified or dissolved (upon a proper motion to the court) if circumstances change in the future” Therefore, these are some significant features of the injunctions that allow the courts to manage the actions and behaviour of different parties. The law of injunction in the Indian legal system are mainly governed under the Order XXXIX, as well as under the section 36 and 42 of the Specific relief Act. The supplemental provision for granting a temporary injunction is also considered under the Section 94(c) of the Civil Procedure Code.

A plaintiff can obtain the temporary injunction in the case, when the defendant threaten to dispose the property, harm the plaintiff or transfer the property in violation to the right of the plaintiff. In the case of the

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immovable property, the Court may refrain the act and prevent the dispossession of the property of the plaintiff in order to prevent any kind of harm that can be cause to plaintiff in relation to the property and the property dispute. Therefore, a temporary injunction is considered as the provisional remedy that can be claimed by the plaintiff and also helps in preventing the dissolution of the rights of plaintiff\textsuperscript{287}. In the landmark judgment of a case, the Court had established certain guidelines that are to be considered for granting temporary injunctions\textsuperscript{288}. In this case the court had established that it is significant to apply the test of prima facie, secondly whether the balance of convenience is in favour of plaintiff and thirdly whether the plaintiff may suffer the irreparable injury if the temporary injunction is disallowed\textsuperscript{289}. It has also been identified that temporary injunction cannot sought from some right that may arise in the coming future, which means that injunction could not be prohibit a party from filing a suit\textsuperscript{290}.

III.3 INGREDIENTS FOR GRANT OF TEMPORARY INJUNCTION

The Respected and concerned Court has to keep in mind the various factors before grant of an temporary injunction in any case pending before the Court. The property is an hard earned asset and an investment for life for any person. Section 94 of Civil Procedure Code also makes it very clear from the wordings of the section itself that such powers are given to prevent the ends of justice from being defeated. Hence, if there is any apprehension or trepidation that the defendant may by his action change a state of things in respect of the subject matter of dispute in such a way that a decree eventually passed would become meaningless or ineffective or difficult to execute the Court can exercise the power of granting an injunction to prevent such an intended on apprehended action. For example, in the cases of specific performance of an agreement for the sale of an immovable property, the court may grant an temporary injunction on the sale of the property or alienation of the property in any manner by the parties involved in the case. These situations were considered by the Hon'ble Apex Court in the case of Dalpat Kumar V/s Pralhad Singh\textsuperscript{291} and the Hon'ble Court laid down the guidelines as to what are the three ingredients that have to be present and satisfied in order to grant an temporary injunction, which are prima facie case, balance of convenience and irreparable loss.

PRIMA FACIE CASE

Prima facie case has been given various definitions by various courts. But, in the case of Prakash Singh V/s State of Haryana\textsuperscript{292}, it was explained by the Court that Prima facie case does not mean that the plaintiff should have a very clear and direct case which will in all probability succeed in trial and will be in the favour of the plaintiff. Prima facie case means that the contentions which the plaintiff is raising,
require consideration in merit and are not liable to be rejected summarily as that would be unjust and against the principles of law.

The court has to consider whether the party who has approached to court has a valid and plausible case and what is the possibility of such a case succeeding at a trial. Therefore, the case of the plaintiff should be free of any technical flaws and also have merit in it. For example, the initial plaint before the court should be free of any flaws and technical aspects like jurisdiction, maintainability, limitation, court fees etc has to be taken care of.

**BALANCE OF CONVENIENCE**

In Agricultural Produce Market Committee Case, the Hon’ble Apex Court has held that "a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction and there has to be an balance between the remedy sought by the plaintiff and the situation and condition of the defendant." It is very important to maintain an balance between the relief given to the plaintiff against the injury that will be done to the defendant. Also in order to ensure an balance of convenience, it is necessary that the case of parties is compared and an comparative balance has to be made between the mischief or inconvenience which is likely to be caused will be greater or the withholding of injunction will cause greater loss to the party than granting it.

**IRREPERABLE LOSS**

In the case of Best Sellers Retail India, The Hon’ble Supreme Court of India observed that the court will first of all have to examine what is the amount of loss that would be caused to the applicant if the order is not passed and also whether it is reparable by monetary compensation i.e. by payment of cost. Then it will examine the damage suffered by respondent if the order is passed and thereupon it has to see which loss will be greater and irreparable. The party who would suffer greater loss would be said to be having balance of convenience in his favour and accordingly, the court will pass or refuse to pass the order.294

There are many damages which cannot be repaired but every court do not regard them as 'irreparable'. For example any act which outrage the feeling or cause an loss of thing of sentimental value can be said to have caused mental injury or loss. On the other hand there are injuries which in their nature may be repaired but still treated as irreparable. Ordinarily injury is irreparable when without fair and reasonable address of Court, it would be denial of justice. Irreparable damage does not mean that the damage can never be repaired or brought in the original state. It only means that the damage caused cannot be adequately compensated by money.295

Further, an injury is irreparable where it is continuous and repeated or where an remedy can be sought of under law by a multiplicity of suits. Sometime, the term irreparable damage also refers to the difficulty of measuring the amount of damages inflicted. However, a mere difficulty in proving injury does not establish irreparable injury.

**IV.4 ANALYSIS OF THE VALIDITY OF TRANSFER**

293 Agricultural Produce Market Committee V. Girdharbhai Ramjibhai Chhaniyara, AIR 1997 SC 2674.

294 Best Sellers Retail India (P) Ltd. v. Aditya Nirla Nuvo Ltd., (2012) 6 SCC 792.

295 M. Gurudas and Ors. V. Rasaranjan and Ors.,AIR 2006 SC 3275.
Whether the transfer of property, after the injunction order has been passed, can be justified under the court of law or not as an question was considered by the court in the case of Keshrimal Jivji Shah And Anr. vs Bank Of Maharashtra And Ors. The questions to be considered by the Division Bench in this case was exactly as to whether the transfer of an immovable property in contravention of a prohibitory or injunction order of a Court is illegal or void? Various contentions were brought forth by the learned counsels of both the parties and one of the contention brought forward by the counsel of petitioners was this that once the law do not make such provision, then it is not permitted for the Courts to hold that transfer in favour of petitioners is void. Now it had to be decided by the court that does the right, title and interest in the immovable property come to an end merely because a restraint is placed by Court of law on its alienation or disposal. Further it was also an issue that transaction, which is entered into either to defeat the order of Court of law or to violate it cannot confer any right, title or interest in favour of the transferee.

A similar condition was brought before the Hon'ble Supreme Court in the case of Sujit Singh & Ors. Vs. Harbans Singh & Ors., Wherein it was held by the Hon'ble Court that "if there is no restraint on the transfer of property even after the injunction order, and it was supposed to let go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise".

Further it has also been observed by the division bench of Maharashtra court in the case of Ramchandra Ganpat Shinde Vs. State of Maharashtra, that "it is the courts and not in the legislature that our citizens primarily feel the keen, the cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the short comings of every other branch of the Government; but if they lost their respect for the work of the courts, their respect for the law and order will vanish with it to the greater detriment of society".

Therefore to summarise the contentions put forward by the various counsels and the judgements given by other division benches of various high courts, the Apex Court in the case of Satya Brata Biswal Vs. Kalyan Kumar Kisku & Ors., It was held that if the transfer of property made even after the injunction order has been passed against the same property is held as valid, the consequences of nullifying such transaction not being provided by the statute, would lose its legal efficacy and would be considered as an utter disregard to or in violation of or breach of prohibitory order or order of injunction issued by a Court of law. Such an act would reflect that parties can breach and violate Court orders openly and neither they nor the beneficiaries shall suffer any consequences. It is high time that principle that transfer of immovable property in violation of an order of injunction or prohibition issued by a Court of law, confers no right, title or interest in the transferee, as it is no transfer at all is

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297 1995 (6) SCC 50.
298 Punchhi, M.M, Sujit Singh & Ors. Vs. Harbans Singh & Ors.
300 Mr. Justice Arthur J. Venderbilt.
301 AIR 1994 SC 1837.
recognised and is made an legal norm by issuing an valid legal sanction for the same. It shall be made an compliance guideline that the transferee cannot be allowed to reap advantage or have any benefit from such transfer merely because he is not party to the proceedings in which order of injunction or other prohibitory direction or restraint came to be issued. It shall assumed to be enough if the transferor is a party to the current case and the order was in force. These two conditions being satisfied, the transfer must not be upheld. If this means is not adopted, then the tendency to disregard the orders of courts which is increasing its pace day by day can never be cured or curbed. It shall be understood that the Court exercises its powers on the foundation of reverence for its authority by people who come to the Court with their grievances and opt the course of litigation. Further this shall be kept in mind that people will lose faith and trust completely if the Court does not control and take steps and measures to control this tendency. The note of caution of the Supreme Court must be consistently at the back of everybody's mind.

V.5 PROBLEM WITH INJUNCTION AND TRANSFER OF PROPERTY

In the case of Shri. Prakash Gobindram Ahuja vs. Ganesh Pandharinath Dhonde & Ors, the Court focused on understanding if the transfer of the property in violation of the injunctions is void or not and whether the section 52 of the Transfer of Property Act is sufficient to protect the parties from such violation. In the case of Keshrimal Jivji Shah And Anr. vs Bank Of Maharashtra And Ors, it was argued by the counsel that there is no provision in the Indian legal system or the Civil Procedure Code (CPC) through which the transfer of a immovable property done in violation of an injunction can be considered as null and void.

It was also identified in the case that the parties may have to face the penalties for the violation of the court orders. For example, according to the Code Of Civil Procedure, 1908-Order-XXXIX, Rule 1, the temporary injunction can be obtained, if the suit is in danger, property being wrongfully sold or damaged, or the defendant threatens to sell the property and cause injury to plaintiff. According to Rule 4, injunction can restrain the defendant from such act, while according to Rule 2A the breach of the injunction granted under the Rule 1 and 2 can result in considered defendant as the guilty and can be detained in civil prison. However, the main problem is that transfer of the property or the transaction is not considered as null and void or have no legal effect.

Therefore, it can be argued that when the law do not null or void or reject such transfer of the property in violation of the injunction, then the Court could not hold such transfer in the favour of the plaintiff. In the case of Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd., (2013), the court had also held that there is no reason that violation of the injunction could make the transfer or sell of the

302 Shri. Prakash Gobindram Ahuja v. Ganesh Pandharinath Dhonde & Ors. [04.10.2016]
304 Code Of Civil Procedure, 1908-Order-XXXIX.
property as ineffective. Therefore, in the case of Keshrimal Jivji Shah And Anr. vs Bank Of Maharashtra And Ors, the learned counsel had stated that the interest, title or the right in any kind of immovable property could not be considered as void or could not be ended because of the injunction or the restraint placed by the Court on the transfer or the disposal of the property.

VI. 6 REMEDIES
The evidences and the case examples have informed that Section 52 of the Transfer of Property Act does not place any kind of restriction on the subsequent transfer of the property not this section in any form declares that such transaction is null and void. But, this section states any kind of the equitable claims are subjected to the authority of the court. However, it has been established that Court can deny the impleadment of the applicant, who has entered the transaction o the transfer of property even after knowing that the Court had injunction in the pending suit and had prohibited or restrained further transaction. However, in the case of Kasturi v. Iyyamperumal & Ors. 2005(6) SCC 733, “an application by the subsequent purchaser for impleadment in a suit for specific performance by a prior transferee does not alter the nature and character of the suit and such a transferee has a right and interest to be protected and deserves to be impleaded in the suit.” Therefore, in the case of violation of the injunction, the defendant can be considered as liable for the violations and can also be placed with penalties, but could not take action for the transferee. The party committing the breach under the CPC and the Transfer of Property Act are liable for the punishment, but the sale of the property or the transfer of the property would be considered as legal and void. However, one significant suggestion has been identified in the case of Savitri Devi v. District Judge, Gorakhpur and Others (1999) where the Court considered that conducting the transfer of property even after knowing the temporary injunction can result in causing the transferee as the defendants in the suit and case will be heard against them. The Transfer of the Property in violation of the injunction could be considered as null and void if the transferee knows about the temporary injunction over the property and that there are relevant facts for establishing it. Section 52 of the Transfer of Property Act takes care of the pendentile transfers, but may not completely consider plaintiff’s interest. Therefore, the Court can provide the equitable relief.

VII.7 CONCLUSION
In the Indian legal system the law related to the Injunction are specified under the Specific Relief Act, 1963. Section 37 of this act informs about the temporary injunction. This article discussed whether the transfer of property under the violation of the injunction order is valid or not. He evidences informed that transfer of the property in violation of the injunction can be considered as valid because there is no rule or Law that could void such transfer of property. However, under the example of various cases, it has been identified that

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307The Transfer of Property Act, 1882, Section 52.
although the transfer or sale of the property in injunction is restricted, but the transferee who do not have knowledge regarding the injunction are not liable and the transfer or property could not be cancelled. Therefore, the Court have to decide the interest of the plaintiff and the transferees. Further, it can also be concluded that an injunction is an equitable remedy and as such attracts the application of the maxim that he who seeks equity must do equity. Granting of injunction is entirely in the discretion of the Court, though the discretion is to be sound and reasonably guided by Judicial Principles.

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INTRODUCTION

The source of law of guardianship and custody are certain verses in the Quran and a few Ahadis. The Quran, the Ahadis and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor, the guardianship of the person is a mere inference. Guardian includes any person having legal custody or control over child. Under Muslim Law, the notion of guardianship is subsisting from the beginning. Its source is found in some verses of the Quran and Ahadis though a little is found about guardianship of a person. For example, according to Ruddul-Mukhtar, the right of guardianship of the minor’s property belongs to the father and in his absence to his executor, but if an executor has not been appointed, then to the grand-father. After the death of grandfather, the right goes to grand father’s executor, and if the executor has not been appointed by him then to the Kazi who may himself act as such, or may appoint someone to act on his behalf.

Tahir Mohmood states that: "Guardianship of a person in relation to a child belongs primarily to its father, the mother’s being only a pre-emptive right to keep the father away for a legally prescribed period only from a particular aspect of the guardianship of person, namely, the custody and physical upbringing of the child’’.

It may be said therefore, that mother has a right to the custody of her child for some time, because except her, no one can handle and nurse a child during its infancy. But her custody of the child is subject to the supervision of the father who, as a legal guardian, is under an obligation to provide means for the upbringing of child.

In this paper we will understand the different possibilities and move of our legal system for every circumstances arising regarding guardianship under Muslim law.

MEANING OF GUARDIANS

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decision for another (the ward). Guardianship were designed to protect the interest of incapacitated adults and elders in particular. A person who is authorized under the law to protect the person or property of a minor, is called a guardian. Simply custody of the child upon a certain age. Under Muslim law, is called HIZANAT311.

Qualification for family members or friends who serve as guardians and conservators tend to be minimal. For example, National Probate Courts Standard (Standard 3.3.11) recommend that courts appoint a guardian or conservator “suitable and willing to serve...”

Before we proceed with the detailed study of the subject it is important to distinguish between the terms ‘Custody’ and

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310 www.eldersandcourts.org/guardianship-basics.aspx
'Guardianship'. Though these are used interchangeable, both have different implication in law.

In Arabic language guardianship is termed as ‘Wilayat’ and custody as ‘Hidhanat’. Custody means physical or material possession of the children, whereas its Arabic equivalent Hidhanat literally means training or upbringing of the child. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its arabic equivalent wilayat literally means to protect or to defend.

According to Guardians and Ward Act312 of Pakistan as ‘A person having the care of person of minor or of his property or his person and property’.

According to the principle of established Muslim jurisprudence, father is the natural guardian (wali) of the person and property of the minor child313. Whereas custody (hidhanat) is a right of the child and not either of the parents, or any other person claiming through them. The basic consideration is to give a child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of society.

Law of hidhanat in sharia has been framed keeping in view the roles of both parents. That is why mother are given preference while deciding custody of the children out of the wedlock during child’s initial year (till 7 years). There is consensus of all sunni schools of thought on this. Schools of fiqh differ in custody laws for boys and girls after 7 years of age.

In the context of family responsibilities towards a child the muslim law speaks of four different concepts:

(a) Hizanat (custody of child)
(b) Walayat-e-Nafs (guardianship of person)
(c) Walayat-e-Mal (guardianship of property)
(d) Walayat-e-Nikah(marriage-guardianship)

Nature
The term guardianship cannnotes guardianship of minor i.e a person who has not attained puberty. Puberty is assumed to have been attained at age 15 years in general. However, as far as guardianship is concerned, a muslim will be governed by the Indian majority act of 1875 which provides that the age of majority is 18 years and 21 years if the minor has been appointed a guardian by the court. A guardian will be appointed by court under the guardian and wards act of 1890 for the welfare of the minor.

Kinds of Guardians recognized by Muslim Law
(1) Natural or Legal Guardian
(2) Testamentary Guardian
(3) Guardian appointment by court or statutory guardian
(4) Defacto guardian

NATURAL GUARDIANS:
Natural guardian is a person who has a legal right to control and supervise the activities of child. Father is recognized as the natural guardian of his child under all the schools of Muslim law. The father’s right to act as guardian of the minor is an independent right, and is given to him under the substantive law of Islam. Natural guardian is also called Dejure or the legal guardian. As stated above, only father is the natural or

312 Guardians and wards act 1890, sec 4(2)
313 PLD 1963 Lah.534
legal guardian of his child. As stated above, only father is the natural or legal guardian of his child. But in the absence of father, the father’s executor may also act as legal guardian. Executor is a person who is appointed by father or grandfather to act as a guardian of his minor child on his behalf. In absence of father or his executor, paternal grandfather or paternal grandfather’s executor acts as legal guardian.

Father, Executor of father, parental grandfather, Executor of parental grandfather, in the absence of any of the above mentioned persons, nobody else is recognized as the natural or legal guardian of a minor.

According to Shia Law in the absence of father only parental grandfather may act as natural or legal guardian. Father’s father is known as parental grandfather, the father’s executor has no right to act as legal guardian of a child. Since the mother is not the legal guardian of her minor children, she has no right to enter into the legal guardian minors property. The question of her being the natural guardian during the life time of the father does not arise. The father’s right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father’s right to control the education and religion of minor children is recognized. He also has the right to control the upbringing and the movement of his minor children. So long as the father is alive, he is the sole and supreme guardian of his minor children. The father’s right of guardianship extends only over his minor legitimate children. He is neither entitled to guardianship nor to custody of his minor illegitimate children at any time, even after the death of the mother, though it is a different matter that he may be appointed as guardian by court.

In muslim law, the mother is not a natural guardian even of the minor illegitimate children, but she is entitled to their custody. Among the Sunnis, the father is the only guardian of the minor children. After the death of the father, the guardianship passes on to his executor. Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor, the executor of the father becomes the guardian only in the absence of the grandfather.

**TESTAMENTARY GUARDIAN:**
Testamentary guardian is a person who is appointed as guardian of a minor under a will. Only father or, in his absence, paternal grandfather has right to appoint a testamentary guardian. No special formality is required for the appointment of testamentary guardian but, as is obvious, such a testamentary guardian must be competent to act as guardian. That is to say he should be adult and sane person. A non-Muslim and a female may also be appointed as a testamentary guardian. According to shia law a non-muslim cannot be appointed as testamentary guardian.

Among the Sunnis, the father has full power of making a testamentary appointment of a guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian.

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317 Gohar Begam v Sugg 1960 1 SCR 597  
318 This is in accordance with Mohammed’s views which is followed by the shias
Among the Shias, the father’s appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a testamentary guardian. No other person has any power of making as appointment of testamentary guardian. Among the both the shias and the sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of the property of her minor children, both legitimate and illegitimate viz., first when she has been appointed a general executrix by the will of the child’s father, she can appoint an executor by her will, and secondly, she can appoint an executor in respect of her own property which will devolve after her death on her children.

The first exception is more apparent than real; any executor of the father has the power to appoint an executor by his will; this provision applies to all executor. The latter exception, too, has little significance, since every person is free to appoint an executor of his or her own property.

The mother can be appointed a testamentary guardian or executor by the father, or by the grandfather, whenever he can exercise this power. Among the sunnis, the appointment of a non-muslim mother as testamentary guardian is valid, but among the shias such as appointment is not valid, as they hold the view that a non-muslim cannot be a guardian of the person as well as the property of a minor.

According to all muslim authorities, a non-muslim alien cannot be appointed as a testamentary guardian; if such an appointment is made it is null and void. It seems that the appointment of non-muslim fellow subject is valid, though it may be set aside by the kazi according to the Malikis and the Shaif law, a zimmi can be validly appointed testamentary guardian of the property of the minor, but not of the person of the minor. The shias also take the same view.

The Durr-ul-muhtar states that if a minor, a bondman, non-muslim or a fasik, is appointed as a testamentary guardian, then he should be replaced by kazi. But any act done by them before their removal, will be valid.

Further, if disability ceases to exist before their removal, they cannot be removed. The Fatwai Alamgiri also takes this view, but holds that the appointment of a minor or insane person as guardian is void, and therefore any act done by them before or after his removal will be void and non-effective.

There is some controversy among the muslim jurists on the point whether a person, who was a minor at the time of his appointment but who ceased to be so before his removal, can be removed on the ground that when his appointment was made, he was unqualified. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian. It is only in two cases in which the mother can appoint a testamentary and illegitimate viz., first when she has been appointed a general by the will of the child’s father, she can appoint an executor by her will, and secondly, she can appoint an executor in respect of her own property which will devolve after her death on her children. The mother can be appointed a testamentary guardian or executor by the father, or by the grandfather whenever he can exercise this power. Among the Sunnis, the appointment of a non-muslim as testamentary guardian is valid, but among the shias such as appointment is a valid, as they hold the
view that a non-muslim cannot be a guardian of the person as well as the property of a minor. According to all Muslim authorities, a non-Muslim alien cannot be appointed as a testamentary guardian: if such an appointment is made it is null and void. It seems that the appointment of non-Muslim fellow subject is valid, though it may be set aside by the Kazi. According to the Malikis and the Shafii law, a Zimmi can be a validly appointed testamentary guardian of the property of the minor, but not of the person of the minor. The Shiias also take the same view.

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The Muslim jurists of all schools agree that a profligate, i.e., a person who bears in public walk of life a notoriously bad character, cannot be appointed as guardian. However, all acts done by contrary to the interest of the minor.

Acceptance of the appointment of testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship is accepted, it cannot be renounced save with the permission of the court.

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians.Appointment may be made in writing or orally. In every case the intension to appoint a testamentary guardian must be clear and unequivocal. A testamentary deposition made by a testator may be invalid, but appointment of the testamentary guardian of minor children will be valid. The appointment of the executor may be general or particular. The testator must have the capacity to make the will at the time when it was executed. This means that the will he should be in full possession of his senses. The executor of the testamentary guardian is designated variously by Muslim law givers, indicating his position and powers.

He is commonly called wasi or guardian of the minor children whenever he is appointed as testamentary guardian.

GUARDIANS APPOINTED BY COURT:
In the absence of a natural and testamentary guardian, the court is empowered to appoint a guardian for the protection of the minor’s person or property or for both. The appointment of guardians by court is governed by the Guardians and Wards Act, 1890 which is applicable to all the Indians irrespective of their religion.

319 The Fatwai Alamgiri VI, 214; see also Md. Amereooden v Md. Chundroonbeen
320 This is so according to the juma ushshitat
321 the durr-ul-muhtar, 835
322 The Fatwai Alamgiri iv, 214.
India, the court appoint the guardians for minor’s person or property under this statute. Therefore, such guardian are also called statutory guardians.

It may be noted that no provision has been made under this act for the guardianship for marriage. The result is that except the guardian for marriage, the guardians for a Muslim minor’s person or property may be appointed by a court of law. In some cases, there may be conflict between muslim personal law and the guardians and wards act. In cases of such a conflict, provisions of the guardians and wards act will prevail over the provisions of muslim personal law. Court here means court of the district judge. Section 17(2) of the Act provides that in considering the welfare of a minor, the court shall have regard to the age, sex and religion of the minor; the wishes, if any, of a deceased parent and any existing or previous relation of the proposed guardian with the minor or his property.

In Smt. Farzanabai v Ayub Dadamiya, the Bombay High Court observed that under guardians and wards act, the personal law of the parties is a factor which is to be kept in mind by courts subject to the interest of the child. However, as the central idea should be the welfare of the minor; therefore, the rules of muslim personal law may be considered by court only where they are conductive to his welfare.

Under the Guardian and Wards Act, 1890, the power of appointing or declaring any person as guardian is conferred on the district court. The district court may appoint or declare any person as guardian of a minor child’s person as guardian of a minor child’s person as well as property whenever it considers it necessary for the welfare of the minor, taking into consideration the age, sex, wishes, of the child as well as the wished of the parents and the personal law of the minor.

In Rahima v. Sabujianess, the gauhati high court said that when mother had remarried after the death of her husband, she should not be appointed a guardian of her minor daughter. The paternal grandmother would be a preferable guardian and the court appointed her accordingly, M. Sharma, J.said:

The disqualification to be guardian is, if the mother married second time. As regards the mother or a female guardian, marriage to a person not related to the child within the prohibited degrees is a bar to guardianship. It is further provided that the mother does not lose the custody of her infant children merely because she is no longer the wife of her former husband, but where she marry a second husband, the custody of such children normally belongs to her former husband.

In that case other relations failing the mother, by absence or disqualification, the following female relations are entitled to custody in order of priority-

(i) Mother’s mother, how high so ever,
(ii) Father’s mother, how high so ever and
(iii) Full sister and other female relations including aunts.

DE-FACTO GUARDIANS:
A de facto guardian is a person who is neither a legal guardian nor a testamentary or statutory guardian, but has himself assumed the custody and care of a child. According to Tyabji a de facto guardian means an unauthorized person who, as a matter of fact has custody of the person of a minor or of his property. It may be said that a defacto guardian is a person having no authority for the guardianship but under the
circumstances has taken responsibility to act as the guardian of a minor.

(1) Guardianship of persons of the minor for custody (Jabar)
(2) Guardianship of persons of the minor custody (Hizanat)
(3) Guardianship of property which is divided into three sub groups:
   a) De jure guardianship
   b) De facto guardianship
   c) Certified guardianship

Guardianship of the person of the minor for custody

Under Sunni Law the mother is entitled to the custody of a male child up to years 7 years and a female child till she attains puberty. Under shia law she has custody of male child till age of 2 years and female child till the age of 7 years; she is the de facto guardian; under Sunni law failing the mother the custody of a boy up to 7 year and girl up to puberty goes to the following female relatives in order:

(i) Mother’s mother how highsoever;
(ii) Father’s mother how highsoever;
(iii) Full sister;
(iv) Uterine sister;
(v) Consanguine sister;
(vi) Full sister’s daughter;
(vii) Uterine sister’s daughter;
(viii) Consanguine sister’s daughter;
(ix) Maternal aunt in like order as sister;
(x) Paternal aunt in like order as sister;

In default of mother and female relatives, the custody goes to following:
(i) father;
(ii) paternal grandfather;
(iii) full brother;
(iv) consanguine brother;
(v) full brother’s son;
(vi) consanguine brother’s son;
(vii) full brother of the father;
(viii) consanguine brother of the father;
(ix) son of father’s full brother;
(x) son of father’s consanguine brother;

Under Shia law the custody goes to the father and failing him to the father’s father.

Under Sunni law the father is entitled to custody of the boy over 7 and an unmarried girl who has attained puberty and Shia law to the custody of a male child over two year and unmarried girl of 7 years. The custody of an illegitimate child goes to the mother.

Rights of Hizanat.

In the case of Imambandi v.Mustad AIR 1987 SC 554 The property in the suit belonged to Ismail Ali Khan. It was alleged by the plaintiff that on his death he left three windows one of whom, Zohra, acting on behalf of herself and her two minor children purchased the share in the suit for the possession of which they brought action. The reliefs sought were

(i) declaration of the title and status of plaintiff’s vendors;
(ii) a decree for possession of shares covered by the sale deed;

The defendants contended that Zohra was not a married wife and that the children were not legitimate and that the shares did not pass under the sale. The Privy Council held that Zohar and her children were entitled to the shares. The important question was whether the plaintiffs
acquired any title to the infant’s share under the sale by the mother. The defendants contended that the mother had no power to convey her children’s interest to the plaintiffs. It was held that although the mother is entitled to the custody of the person of the minor, she is not the natural guardian and the father alone or if he is dead his executor is the legal guardian. The mother has not power to deal with the minor child’s property. She may incur responsibilities but can impose no obligation on the infant. This rule is subject to certain exception provided for the protection of a minor child if there is no de jure guardian i.e., the court may appoint the mother pledges the properties of the minor child it is unlawful unless she is the executrix or is authorized by the guardian of the minor or by the judge. Then it is lawful and the right of possession and user is established in the Murtahali without the power of sale.

Termination of Hizanat

Disqualification of the Hizanat can be categorized unto 5 heads:

- General disqualification - a minor cannot act as a guardian of any minor other than his own wife or child, a non-muslim parent etc.
- Disqualification affecting females - the mother or female’s relatives can be disqualified on the following courts-
  a. she leads an immoral life-
    i. adultery;
    ii. becomes a prostitute;
    iii. has committed criminal offence
    iv. is a professional singer or mourner
  b. she neglects the child
  c. she marries a person not related to child within prohibited degrees (Rahima Khatoon v. Saburjanesa)
  d. during subsistence of marriage she goes and resides at a place at a distance from the father’s place;

- Disqualification affecting males – no male relative, outside of prohibited degrees, is allowed to have custody of an unmarried girl.

Disqualification affecting parents-

- Mother gives up custody of boys after 7 and girls after puberty (Sunni law) and boys after 2 and girls after 7 (Shia law). The mother does not lose her right to custody by divorcing the father.
- The father is a natural guardian but will be disqualified by the court for –
  o Cruelty to wife or children;
  o Felony;
  o Adultery;
  o If he is unfit in character and conduct;
  o If he is unfit as regards external circumstance;
  o If he waives his right of custody;
  o If he enters into an agreement to the contrary;
  o If he goes out of the jurisdiction of the court or if intends to go abroad;

- Disqualification affecting husbands - husband is not entitled to custody of minor wife unless she attains puberty or such age that would permit consummation of marriage. In this circumstance, the mother is the guardian. However, the minority of the husband does not deprive him of his right to guardianship.

In the Hanafi school of Sunni law and the Ithna Ashari school of Shia law both girls and boys who have attained puberty can marry by their own free will and without the involvement of their guardians. They can, of course, voluntarily act through their guardians; and a guardian can surely persuade any such person to desist from contracting a marriage if his interest so requires. But no guardian can act in any case without the consent of the girl or boy, as the case may be. If his or her consent is obtained by misrepresentation of material
facts by the guardian the marriage will be unlawful, but it can be ratified by the person concerned by the words or conduct. This last rule is based on the policy of Islamic law to preserve marriages rather than allowing their disintegration on technical legal grounds.

In the Shafei school of Sunni law and the Ismaili school of Shia law major girls also need guardian’s intervention for marriage but, based on worldly wisdom of the time, the rule was meant only to protect them against exploitation in the marriage market. Very rightly, the courts in India have not strictly enforced it. The following cases may be seen on this point:
1. Hassan Kutti v Jainaba AIR 1928 Mad 1285
2. Sayad Mohiddin v Khatijabai AIR 1939 Bom 484
3. Adam v Mammad (1990) 1 KLT 705

As regards those who have not attained biological maturity, maturity, Muslim law gives their guardians the authority to permit the marriage of such a person. Exercise only in exceptional cases and strictly in the interest of the ward, the authority is based on an expectation that the guardians would necessarily act the interest of the minor; it is not meant to clothe the guardians with an unrestricted or arbitrary power to impose a marriage on a minor. Marriage guardianship under Muslim law is indeed a sacred trust placing the guardian and the ward in a fiduciary relationship.

By providing that the order of marriage-guardianship cannot be jumped and no remoter guardian can act out of turn, the law puts an additional check on the minors in the matter of marriage. The courts in India recognize this principle of the Muslim law. e.g., Ayub Hasan v Akhtari AIR 1963 All 525.

The Shafei school of Sunni law and the Shia law appreciably make things further difficult for the minors by providing that only the father or the grandfather can approve the marriage of a minor girl or boy. In all these laws the marriage guardian’s job is to protect the minor’s interest by denying or giving consent for marriage.

In most Muslim counties the minimum age for marriage has now been raised by legislation.

The Guardians and Wards Act 1890, which does apply to Muslims, does not specifically refer to guardianship in marriage.

In Muslim law the mother is the mother of her child, not just his father’s wife. The ups and downs of the relatives between a mother and her husband will not therefore adversely affect the mother’s custody rights. A divorced mother remains the
mother of her children and her right to their custody remains intact. Her remarriage will also not ipso facto terminate her custody rights, but if in such a case interest of the child so demands its custody may be taken away from her. Applying this principle, a grown up girl's custody may be handed over to someone else if her divorced mother has married a person who is a complete stranger to the girl.

Khadija Begum v Gjulam Dastgir (1975) 2 AWR 194
The difference between guardianship and custody under Muslim law was noted by the supreme court in the recent case of Athar Hussain v Syed Siraj Ahmed (2010) 2 SCC 654. On the rights to custody of children under muslim law reference may be made also to the following cases:

(i) Rafiq v Bshiran AIR 1963 Raj 239
(ii) Enamul Haq v Taimunnisa AIR 1967 Pat 344

The Guardian and Wards Act 189 which empowers the courts (a) to declare who is the legal guardian of a minor under the law applicable and, (b) to appoint a guardian for any minor, is fully applicable to the Muslims and has in its life of over 120 years been applied to them in numerous cases.

Conclusion
Guardianship is a concept or relationship arising from the natural incapacitates of infants and persons of unsound mind and sometimes other category of persons to manage their own affairs. A guardian is a person who has the authority and the corresponding duty to care for the personal and property interests of another person, called a ward. Usually, a person has the status of guardian because the ward is incapable of caring for his or her own interests due to infancy, incapacity, or disability. Most countries and states have laws that provide that the parents of a minor child are the legal guardians of that child, and that the parents can designate who shall become the child's legal guardian in the event of death.

Reference
(1) Muslim Law in India and Abroad Tahir Mahmood and Saif Mahmood
(2) Muslim Law in Modern India Paras Diwan
(4) www.legalserviceindia.com/article/135-guardianship.html

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ADDING RAINBOW COLOURS TO MARRIAGE AND PARENTHOOD: A RESEARCH ON CIVIL RIGHTS FOR LGBTQ

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PART I
INTRODUCTION

“Every young person — no matter who they are or what they look like or what gender they identify as — deserves to be valued and loved for who they are”

– Barack Obama, 44th President of The United States

When I was a child, I always felt that my closet was a dark scary place filled with demons. When I grew up, I slowly realised that the very closet is a place where people tried to hide with their very own self-perceived monsters, not allowed to come outside to see the beautiful world through their unique identity and eyes. They were homophobic of themselves because they were again and again led to believe that it was, they who were the monsters and they themselves were abnormal, unnatural and moreover sin.

Yes, living in a closet is dark and scary, it is like living in the shadows of one who you can be and want to be but are not allowed to be and no one, I repeat, no one should be made to live their life partially by being just a part of who they really are.

No one deserves to live in that closet fearing that the world outside wouldn't let them be who they truly are but this closet was the reality for around 4.2% of the US327 (2018) and 2.6% of the UK328 population who identify themselves as a party of the LGBTQ+ community, until the laws changed in several parts of these country recognising them and giving them active civil rights regarding marriage, civil unions, employment, joint adoption and several other broad protections329 but what is the stance of the Indian government in development of the community now that it has decriminalised them.

This paper aims to understand the LGBTQ Community, their struggles, the Indian and the global position as well as the the need for the establishment of proper human rights and civil laws for the LGBTQ community regarding same sex marriage and joint adoption.

Further, the paper consists of six parts; Part I of the paper introduces the paper, Part II of the paper introduces the LGBTQ community the evolution and the discrimination they faced, Part III of the paper relays the global position with Part IV painting the Indian scenario, Part V discussed the marriage and adoption right with finally Part VI concluding the paper

PART II

“No matter who you are, where you’re from, your skin colour, gender identity: speak yourself.”

327 UCLA, LGBT Proportion of Population, (June. 23, 2019, 12 PM) https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density
Who is the LGBTQ+ community?
LGBTQ+ an Ever-Evolving unrestrictive term, each letter “L” “G” “B” “T” “Q” describing a distinct community that are diverse with respect to sexual orientation, colour, race/ethnicity and socioeconomic status.

It is an initialism of the phrase “lesbian, gay, bisexual, transgender and queer or questioning” with “+” to portray the unrestrictive nature of the initialism as well as its evolving and expanding further including the terms “intersex, asexual and ally”

Lesbians, gay men, and bisexual men & women are defined in accordance to their sexual orientation typically conceived in terms of sexual attraction, behaviour, identity or some composite of these. This grouping of “non heterosexuals” i.e. individuals whose sexual orientation is not confined to exclusively heterosexual includes; women and men, homosexual or bisexual; people who have labelled themselves under the umbrella or lesbian, gay, bisexual among other terms; and people who didn’t adopt any such labels but nevertheless adore experiences of same sex attraction or behaviour.

In contrast to the above, transgender people are understood according to their gender identity, expression and presentation. This group embraces individuals whose gender identity differs from the sex given to them at birth or whose gender expression varies from those associated with that gender as well as individuals who reject the traditional dichotomy of gender into men or women.

Queer or questioning is an individual still exploring is gender identity or sexual preference

History and evolution of LGBTQ+ community
Every century or so there has been struggles, unrest and fights against discrimination and equal rights.

There was for equality on basis of gender, then equality on the basis of colour or race and now it’s for equality on the basis of love and gender identity, a right to let people be who they are and love who they wish to, though this is the struggle of this era it is not a recent phenomena both in the terms of struggles as well as people who belong to this community

We will not be going in depth in the history of LGBTQ+ movements as they are long ranging in many different countries and is not the aim of this paper

The first record of a same sex relation dates as far as 2450 BCE where two Egyptian royal servants were buried together in a tomb with inscription “joined in life and joined in death” on it with many more immortalised through paintings and poems over several decade.

The emergence of the first LGBT movement started rising after the criminalisation of same sex relations, after the world war II a number of homosexual rights groups emerged in the western world.


331 Ibid

332 LGBTQ history, GLSEN (June. 24, 2019, 3:10 PM) https://www.glsen.org/article/lgbtq-history-1
publications demonstration and marches in support of transgenders and same sex relations become very common. A 1962 gay march held in Philadelphia, marked the beginning of the modern gay rights movement soon after which same sex relations were decriminalised in several countries including England and wales. The next step was the gay liberation movement between 1969-1974 in which “homosexuality was removed as a mental illness from diagnostics manual in America.

The LGBTQ rights movement after the 1970s asking for proper rights and opportunities for the community as well as laws against discrimination and abuse this community has suffered, in some there has been victories and in some the struggle for equality still persists.

Discrimination and abuse

“Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere.”
— UN Secretary-General Ban Ki-moon to the Human Rights Council, 7 March 2012

The LGBTQ community is not alien to discrimination, physical or even sexual abuse they face deeply homophobic and transphobic behaviour along with no legal protection against such discrimination on the basis of the gender identity or sexual orientation. They face discrimination in markets, schools, hospitals, at work maltreated and even disowned by their families. They are targeted for physical attacks – beaten, tortured, sexually violated or even killed. In some 70 countries, prejudicial laws criminalise consensual private same sex relations exposing them to further risk of imprisonment, further abuse, arrest, prosecution – even in few countries, the death penalty.

LGBTQ people suffer through plethora of appalling transgressions including torture, rape, wrongful detention, harassment, killings, abduction, mental and physical assaults, bullying and many similar hate crimes.

United Nations Human rights mechanism has repeatedly expressed concerns over such violations as well as has stressed a need to spread awareness, many countries have adopted LGBTQ friendly laws but the efforts are still to be seen more worldwide for laws against discrimination and protection of this community.

PART III

International/ Global Position

"Openness may not completely disarm prejudice, but it's a good place to start."
--Jason Collins, first openly gay athlete in U.S. pro sports

While we have discussed how the LGBTQ+ has gone through a lot of struggle to get recognized in different parts of the world. The most recent development at global arena was the reclassification of gender congruence by the World Health Organisation where transgender people will not be considered “mentally ill” anymore.338 According to the New Global Acceptance Index for LGBT339, amongst the 141 countries ranked on the basis of laws and acceptance more than half of the countries have an increase in the acceptance ratio whereas around 10% remains unchanged and the rest have experienced a decline.

They sure have come a long way; however, their journey still goes on. Being recognized was not the only struggle, as their existence and them being able to come out from their closet, was not the only thing they wanted. Recent research also shows that the strongest relationship between acceptance and legal inclusion where found in democracies with a responsible free press and the rule of law is practised.340

Marriage plays a very important role in their relationships as well as it does to any other heterosexual relationship and the society. Their rainbow union also needed legal colors to help them get a married life. The concept of family starts with the union of marriage but does not end there. Part of having a family is also about having children and the same-sex couples seek for adoption to fulfil that dream of becoming parents. This struggle story also started getting having an impact at the global level almost two decades ago.

It all started with Netherlands, in 2001, which became the first ever country in the world to legalize same-sex marriage leading 1.4 such couples who tried nuptial knots in Amsterdam by the mayor that very midnight. Not only was Netherlands the first country to provide legal marriage rights to same-sex couples but it also granted them adoption rights.341

From that till the latest landmark development at Taiwan on 17th May, 2019342 making it the 1st Asian nation to give legal recognition to same-sex marriage/amended its marriage definition wherein including same-sex couples to be legally married as well. Also including custody rights, taxes and insurance. However, it has given just limited adoption rights for them. With that a total of 28 countries, partially or throughout the nation, have allowed same sex marriages.

339 Andrew R. Flores, Andrew Park and M.V. Lee Badge, New Measures of LGBT Acceptance and Inclusion Worldwide, Published on
340 Supra 12.
342 Taiwan: Same-sex marriage legalised in first for Asian country, Skynews, (June 23, 2019 1 PM), https://news.sky.com/story/taiwan-same-sex-marriage-legalised-in-first-for-asian-country-11721986

www.supremoamicus.org
PART IV
India’s Position

“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality...”

-Justice Malhotra

When the British colonised India they introduced their laws including section 377 of the Indian penal code in 1871 which criminalised and penalised sexual activities “against the order of nature” bring persecution against any consensual same sex relations as well.

They decriminalised consensual acts in 1967 with the introduction of the sexual offences act 1967 but it took us more than 50 years for India to strike down a law which was accepted as arbitrary by those themselves who created and introduced the law in India.

Section 377’s historical reading down
Earlier in 2017, The supreme court of India, gave the LGBTQ community the freedom to freely and safely express their sexual

Full adoption rights have been given to same-sex couples in 29 countries. With that also comes a question of what about marriage rights relating to the other members of the LGBTQ+ community and not just same-sex couples. Even though changes are taking place, there is a lot of work that needs to be done to improve the global position of the LGBTQ+ Community.

According to the 13th ILGA Homophobic Report, there are 70 countries that criminalizes same-sex sexual activities. Talking about the extremities, there are six nations who impose death penalty, five nations that may end up sentencing to death and around twenty-six other nations where the punishment can be given anything from 10 years imprisonment to life-time imprisonment for the same-sex consensual activities. Freedom of expression in regard to gender identity and sexual orientation issues have been legally curbed in 32 States. These are just some of the extreme things practiced around the world that we have emphasised on while discussing the Global Position of LGBTQ+ Community. There are other issues as well that exist in societies that are beyond legislation but laws do have an impact on the society and this dynamicity of societies should also have laws backing it parallely for positive development.

343 Starinsider, these countries allow joint adoption by same-sex couples, (June 23, 2019 2 PM) https://caen.starsinsider.com/travel/367309/these-countries-allow-joint-adoption-by-same-sex-couples
345 Supra 10.
346 Navtej Singh Johar And Ors Vs. Union Of India And Ors., MANU/SC/0947/2018
orientation including an individual’s sexual expression and orientation under the ambit of the country’s right to privacy law but didn’t directly overturn or strike down the laws criminalising same sex relations. In 2018, the revolutionary Supreme court judgement introduced an era of greater freedom and equality for the community by decriminalising consensual same sex relations putting an end to a 16-year long fight.

The court’s decision didn’t only decriminalise but also acknowledged the responsibility of the state to end this oppression and discrimination against the community, it also addressed the disowning of the child and called for mechanisms that will allow reconciliation of the shunned individuals of the community into the society.

The massive judgement spanning up to almost 500 pages talked in depth about the rights of the minority about discrimination of the social attitudes on individuality as well as on transgender rights. Justice Misra in the historical 2018 Supreme court judgement on transgender rights.

“The very existence of section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression, and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.

Firmly embedding the rights of the LGBTQ community under the constitution in this judgement had opened the doors for further evaluation of civil rights such as marriage, adoption, maintenance right as well as family insurance policies for same sex partners.

Aftermath and effect of the judgement

This ruling of the Indian supreme court has transnational significance and value and will compel common law countries having similar laws to re-evaluate the lawfulness and legality of such provisions the criminalise same sex relations but the fear of discrimination is still there and it will persist till the stereotype attached to the community and the lack of understanding persists.

Justice Dhananjaya Y Chandrachud addressed the issue of homophobia and stereotype in the country against community because of the archaic section 377 as well as lack of awareness about sexual minorities.

“The stereotypes fostered by section 377 have an impact on how other individuals

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348 Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors., MANU/SC/1044/2017
349 Supra 20.
351 Supra 20.
and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces, and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship.352

Although this battle has been won the war still hasn’t, proper laws need to be put in place to address the civil rights of the community, they have been given the freedom to express their individuality but the rights that make that possible are still not legally provided making the freedom hollow and futile.

PART V

Need and Effect of Legislation allowing them Marriage and Adoption

“The LGBTQ community has the same fundamental rights as citizens. The identity of a person is very important and we have to vanquish prejudice, embrace inclusion and ensure equal rights.”

- former Chief Justice of India Dipak Mishra

In a country like India where acceptance of the LGBTQ+ Community has been a very recent phenomenon with the 377-landmark judgement, as we have discussed. The society has slowly started to become more accommodating, however slowly but improvement is there.

Ensuring ‘equal rights’ to them irrespective of their sexual orientation or gender preference as stated in the judgement also includes the other basic rights of marriage, adoption, custody and not just mere decriminalizing their sexual intercourse. Right to life also include right to life with dignity which in the case of LGBTQ+ Community means being able to come out openly and live with dignity of their true identity. But that is far from being practised in most India.

Why Marriage should be Legalised?

“Marriage is about love, not gender”

- Scotland's Health Secretary Alex Neil

India being a place where marriage plays a very important role in society. Here, majority of the cultures consider or recommend that marriage should take place before sexual activity. The Supreme Court of India decriminalized Sec 377 of IPC allowing sexual intercourse between people of same-sex but still marriage, adoption, custodial rights amongst the LGBTQ has not been explicitly permitted to obtain civil partnerships. While introducing LGBTQ group it needs to be given attention to the fact that it does not include only the same sex relationships but also goes in the case of marriage as well.

Many people who belong to this category, it still takes a whole new level of courage to

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352 Supra 20.
353 Supra 20.
come out with their identities and their struggle is real as the social acceptance is still low. Laws can help a great deal for these people to come out as they will have something to back themselves with. Not only that, if legislations come up, it will result in more awareness and of course the fact no one can go against the law denying the fact.

In India, there are no laws stating same-sex couples or transgender marriages to have a legal sanction or registration but at the same time there is no law that strictly prohibits or makes it ‘illegal’ per se. Despite the decision of the Supreme Court in National Legal Services Authority (NALSA) v. Union of India\textsuperscript{354}, where the Central and State governments were required to amend laws to provide ‘right to marry’ for transgender persons, among other rights, “the open question still exists as to whether the un-amended marriage laws in their present state legally permit solemnization and registration of a marriage involving a transgender spouse.” All the Marriage Acts followed in India have pin-pointed that fact that marriage is between a ‘man’ and a ‘woman’, or ‘husband’ and ‘wife’, or ‘bride’ and ‘groom’ hence implying the gender specificity.

Recently in April, in Madras High Court case where a transgendered woman came to court because she was denied to get married to another man several times. However, on approaching the High Court allowed the marriage stating it as a ‘valid marriage ‘as transgendered woman is also a bride and hence the registrar is compelled to register their marriage.\textsuperscript{355} Not only are the same-sex couples denied legal recognition to their marriage, but the whole LGBTQ+ Community is suffering because of it in one way or another.

Here, when a transgendered woman who obviously qualifies as a woman has to go through so much to marry the she loves. Think about the same-sex couples who want to spend their lives by marrying their loved ones. Simply amending the personal marriage laws or just including the same-sex marriage in the Special Marriage Act will not only be revolutionary in itself but will also be a huge step forward towards providing them equal rights.

**Why Adoption should be Allowed?**

(Rainbow after dark clouds)

“\textit{What makes you a parent is not your ability to make a child, but the courage to raise one}”

-\textit{Barack Obama, 44th president of the United States}

Adoption laws are as ancient in India as India itself. Being parents or having children is not just about creating a progeny of their own because it is much more than that. It is the ability to raise one and have a family live together. Adoption processes are there in almost all the personal laws that exist within India. So, what if due to certain circumstances, someone or a couple is not able to conceive their own progeny. Their dream of parenthood can always be fulfilled with the process of adoption.

\textsuperscript{354} AIR 2014 SC 1863

\textsuperscript{355} ETB Sivapriyan, Marriage between man and transwoman is valid: Madras HC, (June 27, 2019, 6 PM)

Similarly, in the case of same-sex couples, like others, they also want to have a family and children. Then why would they not be allowed to adopt children and fulfil their dream of getting married, becoming parents and starting a family of their own.

Should there be a Separate Legislation?

“These are not just numbers, but laws that actually impact the daily lives of people of diverse sexual orientations around the world. Positive laws make all the difference: they can contribute to changing public attitudes, and they concretely tell people that they are equally worthy of rights.”

- Helen Kennedy & Ruth Baldacchino, Co-Secretaries General of ILGA

It is a well-accepted fact that moulding a society takes time, especially when it is a new issue to the whole world. Such a revolutionary yet sensitive issue where one’s gender identity and sexual orientation’s acceptance is debatable.

Many people who belong to this category, it still takes a whole new level of courage to come out with their identities and their struggle is real as the social acceptance is still low. Laws can help a great deal for these people to come out as they will have something to back themselves with. Not only that, if legislations come up, it will result in more awareness and of course the fact no one can go against the law denying the fact.

There is a need for a separate legislation for dealing with the issues of the LGBTQ+ community as there is so much that needs to be changed in order to give then equal rights and protect the from discrimination. That mere amendments in the existing laws cannot do so.

PART VI
CONCLUSION

“The civil rights of none shall be abridged on account of religious beliefs or worship”

- James Madison 4th US President 1751-1836

The LGBTQ+ community as a whole have come a long way, the destination not out of reach but still away. The first mark of this struggle was to acknowledge this community as human, as people the same as anyone else with nothing unnatural about them and once that was won the next mark is to recognise the rights that make humans, human because just acknowledging is not enough. The aim is not just providing only marriage and adoption laws for them. That sure needs to be given attention but rights such as nominating other same-sex spouse for insurance, tax and custodial rights, property are also something that needs to be given proper attention.

A society is made up of people and for a harmonious community acceptance is crucial, legal recognition is one side of the coin and sociological recognition the other. It is important for people to understand that LGBTQ+ individuals are no different from anyone else, they have the same rights and duties that everyone else was born with

The ultimate goal here is to make it such that there is no difference between any communities on the basis of their rights and on the basis of what they can do and they can't do.

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MULTIDIMENSIONAL FACETS OF DISPUTE RESOLUTION

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ABSTRACT

Here in this research article the discussion is on constitutional role, corruption in international investment treaties, and review of standard in international investment arbitration. The role playing by domestic and international spheres in state resolutions have discussed. Beginning from the treaty mechanism to the award in which it depends on the constitutional law. Without applying the constitutional law directly tribunals apply it indirectly through interpretations of principle of constitution. This research also exposed false testimony is enveloping at national and international tribunals and identified the causes for the same. Nevertheless, the documentation the scene is quite clear-cut to determine how to minimize it. For that I made some proposals for reducing those, by judge’s visit to the scene for perjury prosecution. There were also supporting arguments for the same in a logical manner. Whether to consider it or to address it in the international level is where international law canvases. Here this article depends on the locality of investment arbitration with domestic law and seeks to bring whether exchange of domestic law policies which relates to the political as well as policy issues. Analysis of these leads to two main conclusions one is macroeconomic policy is reasonable, other is review shall be completely standard. Also it is submitted here is that the goals of investment serves as conclusion which is fit with the polices laws of international vibrant.

INTERNATIONAL INVESTMENT ARBITRATION

As we are seeing in our daily life that the growth rate of global trade as well as investment is rapidly increasing at a high level. Legal firms and their terms are gradually showing their impact to address the issues or resolve the disputes between the foreign nationals. Though there were many ways to resolve the disputes of the cross borders issues between the parties the concept of international arbitration is day by day becoming accepted. Apart from the concept of international arbitration there is another concept called International Investment Arbitration that have collected the huge share of latest headlines. For instance, in a recent past, the tribunal of international arbitration held making Russian federation government liable for $50.2 billion for the action taken by the Russian Government in taking the assets of Yukos and making it to public use. Actually the claim was mainly based on obligations violated by the Russia under the Energy Charter Treaty by expropriation. This Yukos case is one of the landmark inspiring expansions of the concept of investment arbitration. In the last few years, there were a lot of firms which initiated the disputes with the host states, claiming that the independent bodies of government had violated investment treaties. There were many companies who brought their claims across the world like TCF, Vodafone etc. The amount in these disputes are also overwhelming amounts. Undoubtedly, there were more than hundreds of

356 U.N.C.T.A.D, Recent Developments In The International Investment Regime,
Investment arbitration disputes where every party is claiming over $100,000,000 in damages.\textsuperscript{357} This procedure is used for solving disputes between host states and foreign investors, which is termed as “Investor-State Dispute Settlement”. If there is any dispute, the foreign investors have authority to sue a host state and it will have an assurance to have admittance to independent and qualified arbitrators who will resolve disputes and reward an enforceable award.\textsuperscript{358} So that, it encourages the foreign investors to detour general jurisdictional aspects that might be apparent where it did not have sovereignty, and to solve the disagreement in agreement with the diverse types of protections afford beneath intercontinental treaties, and for initiating an ISDS, the respective state must have given consent for the same.\textsuperscript{359}

**CONSTITUTIONAL ROLE:**

The Investor-State tribunals may have authority to hear disputes whose facts are blend closely into the issues of Constitutional law.\textsuperscript{360} In international arbitration the domestic legal provisions are generally cognizable as facts.\textsuperscript{361} The constitutional law cannot directly trump obligations derived from international legal instruments. General international law does not permit States internal laws to justify the failure to perform such treaty obligations.\textsuperscript{362} The domestic legal provisions are generally cognizable as facts in international arbitration. Constitutional law cannot directly trump obligations derived from international legal instruments. General international law does not permit States internal laws to justify the failure to perform such treaty obligations. These above mentioned points formed two distinct obstacles to the international legal force of domestic law.

In spite of these hurdles, however there are issues stranded in national law may be raised in International Investment Arbitration beyond the circumstances. The relevance of international law does not exclude themselves the additional application of municipal laws; rather, international law may transfer or refer the cases or dispute to these domestic counterparts.\textsuperscript{363}

In one of the instances wherein international adjudicative bodies have the long resorted to domestic constitutional legal thresholds which concern the issue of the claimant’s or investors nationality.\textsuperscript{364} Yet the above analysis will however naturally involve constitution of the home state of investors, and then it is the laws of the host State that possess investment tribunals. Even the foundational principles of the constitutions can require a tribunal to

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\item Monique Sasson, Substantive Law in international investment treaty Arbitration, The disputed Relation Between domestic law and International Law (Wolters Kluwer 2010) 140-141.
\item Siag v. Egypt, ICSID Case No. AB/0 5 /15 .Award, 1June 2009.
\end{itemize}
measure up to international and domestic norms. There were some well-known arbitral constitutional issues have implied the wide scope of fundamental rights.

Against this background, some well-known arbitration have implied constitutional issues from within the wider scope of fundamental rights, which includes not only human rights but also general public rights as well as basic legal values on which host states depends upon when contracting with the investors. Therefore these principles may range from rule of law and the social justice local community rights regarding resource exploitation. Also when fundamental rights are not applicable to a dispute which is not found in treaties or customary law but were found in constitutional law, the constitution plays an important role in filling those gaps in international law. The field of investment arbitration had come up with these issues, particularly with reference to the applicability of the provisions of ICSID Convention. In this scenario, we can see that there are discretionary opportunities for arbitrators to blend together the two legal spheres that are often thought of as distinct. The links between domestic spheres and international spheres can have a vital role in establishing arbitral awards where in EC Hormones case the Appellate body described in remarkable terms as the real world where people live, work and die. An Ad hoc tribunal in the same year in case of Himpurna California Energy echoed that this sentiment in an investment context. Whereas when we come to the applicable norms in a cases involving bribery and serious offences of corruption the tribunal affirmed that it does not live in an ivory tower nor does it view the arbitral process as one which operates in a vacuity, separated it from veracity. Later after a year, under the (NAFTA) i.e. North American Free Trade Agreement the Myers S.D Tribunal had came front with this scrutiny into dispute resolution settlement. The main thing is it strained its approach as deferential to democratic processes. In a mean while, when it’s a time for appraisal of least standards of treatment, the tribunal affirmed that it don’t have full permission to the governments verdict, by discovery that the normal remedy for mistakes in contemporary administration is only from domestic politics, and also lawful processes.

CORRUPTION IN INVESTMENT ARBITRATION: The false testimony plays an important role in most of the international criminal tribunals; however documenting the occurrence of false testimony is somehow bringing a way to reduce it. There were many ways to reduce it like sending judges on visit to increase perjury prosecutions, for liability which minimizes the need for eyewitness testimony. There is a critical question as to whether address

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365 CMS GT v. Argentina, ICSID Case No. ARB/01/o8, Award, 12 May 2005, para. 114.
the false cases of which its nature is of false testimony in international criminal law or addresses the cases of false testimony in which public international law tribunal canvasses. For knowing answers we need to categorically look towards the kinds of which the evidence is involved, influence and power of the international court, nature of crime, nature of offender, and his role. In these years corruption eradication is the main focus of legal practice. The changes of international anticorruption drastically resulted in developing both national measures and international norms. World Bank (WB), and the Organisation for Economic Co-operation and development (OECD) are playing important role in developing the techniques and norms for fighting corruption. Corruption not only in domestic arbitration but also in international arbitration where the resolution brought by the foreign investors in opposition to the other states where the state violate a rapid growth of corruption on the part of investors as defense and prayed for dismissal of the investors claims depends on the unlawful conduct of the investors. Undoubtedly corruption remains as serious issues, and the tribunals given a high priority in order to tackle with it. The most important issues herein raised is how these tribunals will execute the policies showing in number of national and global norms encountering with the allegations of corruption and against corruption.

There were no specific provisions in the recent investment treaties which deal with the corruption, but some treaties had a provision stating that the investment is made in according to the laws of their host states. However in domestic law some provisions seem to be violated to strain out the claims on which investment is made through corruption and it’s a ground to dismiss it.

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There is a doctrine called as “Unclean hands”. This doctrine is used for dismissing the cases involved in corruption where there were no provisions in the treaties made by the states. Judge “Gunnar Lagergren’s” observation in ICCA 1963, “that corruption is converse to moral principles and it is an international evil; prevailing common in the community of nations”. The corrupt investments and investors will not give protection under these investment treaties and they shall not be protected. While giving a broader protection to those investors not only violate the domestic as well as international public policy where the soul object of these treaties is to promoting capital flows, economic development, creating a level of playing field to encourage investment. But this view is scarcely controversial. These tribunals are not criminal courts, because mechanism followed by the law enforcement authority and the departments is different in order to prove corruption by doing investigation. These tribunals used their powers to order to submit the documents and evidences, but this option is available when the authority ends. Hence the tribunal relies on the documents produced by parties, together with evidence of witnesses presented by parties at their hearings. These investors tribunals of course depends upon the findings of enforcement authorities of law but such dependence raises many questions as to whether it depends on those authorities

372 “United Nation Convention against Corruption”, GA Res.58/4 Dec 12 2018 11:45 AM.


374 Stark, Barbara , supra note 18.
because in many of the cases these authorities harassed the investors. Undoubtedly, these tribunals have conducted the criminal investigation as it is unfair on the part of tribunals to punish them for initiating disputes against state.\textsuperscript{375} Thus, the findings made by the judicial authorities would require a tribunal to take an approach in appreciating evidence. Further, what if no investigation had taken place for proving corruption? Then the tribunal should take merits on its own facts.\textsuperscript{376}

But this is not an end. As the investigation doesn’t takes there is a legitimate question arises as to why government has not taken steps to initiate investigation of cases involving corruption in the proceedings of arbitration. Although the domestic proceeding doesn’t take place the tribunal can on its own facts came to the own conclusions.

There were additional questions as to whom the burden lays to prove a case and what the evidentiary valve of the case is? The burden is on the person for proving on its claim, but this view is not contrary to common principles its applicability to prove is more complicated and value of evidence tells how much evidence is necessary to prove that claim.\textsuperscript{377} It is complicated in proving because of very less evidentiary value at the disposal of State-investor tribunals. Also there are some cases in which corruption is manifest like videotape of a meeting or admission by witness. Probably in most of the cases it is difficult to prove corruption as there were no direct evidences to obtain.

In those circumstances, investor-state tribunals recommended that representing the subsistence of “red flags” corruption is also enough to shift burden but some critics were there for this approach to arguing that shifting the burden is incoherent with the right of fair trial.\textsuperscript{378} The majority of the investor-state tribunals practically had seen the indicia to resolve the issue of burden can shifted from one person to another person or can shift the same burden from accusing person or party to accused if yes in which cases. The tribunal now came to the consideration that amongst such red flags the payments made to the other parties or to other individuals in the investment activities.\textsuperscript{379}

The following circumstances will take into account such as did it mingled with administrative proceedings and expenditure without proper evidence of contemplation and timing of such payments etc. Once tribunal finds, it as distrustful then shifts the burden from one party to another for the questions regarding those payments. This view was quite looking reasonable it never leave questioning as to the shifting burden of accused must meet in order to prove.

**STANDARD REVIEW:**

Here this part will explain the “Standard of Review” within Investment


\textsuperscript{378} Convention on Fighting corruption of Foreign Public official in International trade communication, S. TREATY DOC. No. 105-43, 37 ILM 1(1998).

\textsuperscript{379} Supra note 17
Arbitration. The International Arbitral Tribunal can determine the fact and or law which is produced or made by the Host state is understood in these general terms called Standard of review. For having a clarity, it is very important to differentiate the review standard from scrupulous methods of review, or the types of lawful tests which is used to make an equilibrium interests like , Balancing test and the grounds which made by adjudicatory review recognized by the investment treaties which are Equitable treatment and fair. From the above related questions influenced that what will come under the scope of adjudicatory review, ultimately it shows its impact on intensity of adjudicatory review these all include within the boundaries of standard of review. Further in the boundaries of international and domestic adjudication the review standards applied by the arbitrators can have different perspective on a different large species of information which is primarily produced by the primary makers at one hand and (DE NOVO) of the similar measures and its justification at other hand, there is also a concept called as Deference, it explains about the limitations provided in the level of tribunal for analyzing the related decisions made or determine by the state because the adjudicator shall respect the decision made for the reasons even it is of different appraisal.

The review made by the arbitrators of investment shall have an effect on the part of verdict and power of adjudicators other types of elected politicians, and the powers among domestic and international. The standard of review is a terrible concept in the international investment arbitration as this is specifically distributing the adjudication authority from local politics and control. Whereas this process gives direct authority to the investors to have an admittance in international arbitration usually without obligation to fatigue the local remedies, and governance by the state tribunals of investors in checking the conduct of government when compared to other internationals tribunals.

There is also other reason as to why the standard of review is a hectic one in the international level is that the binding factors contained in the treaties made by the host states which have been conventionally formulate in ordinary terms which is interpreted in a wider concept with regards to the host-state. Another frequent analysis in the existing literature is that the arbitrators regularly engaged in wrongful standards of review, in which it leads to facilitate state in a proper margin to determine and act various goals of policy, this leads to the authority in which they find by itself, which have failed to allow States a sufficient margin to determine and implement various policy goals, and this has contributed to the legitimacy crisis in which the investment treaty system currently finds itself. Consequently, there were many suggestions made by the arbitrators of investment.

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380 “INVESTMENT ARBITRATION AND PUBLIC LAW” (Gus Van Harten ed., 2007).
381 CHARLES DEBBASCH & FREDERIC COLIN, DROIT ADMINISTRATIF 127 (11th ed. 2002).
383 See Kingsbury & Schill, supra note 32.
385 “See Guido Santiago Tawil, On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine, 15 ICCA Congress Series 325 (Albert Jan Van den Berg ed., 2011) (on the internationalization of administrative law through consensus building mechanisms such as best practices and regulations)”. 

www.supremoamicus.org
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reviewers that using of different types of standards in the investment arbitration is also a way to minimize all those concerns in domestic and international systems. Undeniably, if we go further than the investment arbitration, some authors conditions as to when standard of review utilizes in sensitive cases which are democratically more important to decide certain issues. This is the appliance of principle called subsidiary. Also if that principle is followed it will weaken arbitration as self-governing bodies for adjudicating host state conduct which is the main key role of host-state386.

CONCLUSION

We are seeing in our daily life that the hurdle is application of domestic law in international disputes for resolution and the investment arbitration has an enabling provisions or precedents for the same as it is not surprising the other tribunal from their decree towards their judicial processes. The other paths find the way between constitution and investment arbitration. From the above area of discussion this paper suggests that the above mentioned question in scrutiny level which is undertaken by the tribunal is done only by transposition of local public laws and political laws. Analysis of these leads to two main conclusions one is macroeconomic policy is reasonable, other is review shall be completely standard. Also it is submitted here is that the goals of investment serves as conclusion which is fit with policy laws of international vibrant.

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386 See Kingsbury & Schill, supra note 32
THEORIES OF PUNISHMENT AND ITS APPLICABILITY IN MODERN SOCIETY

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Abstract:
Crime and punishment are two sides of a coin. The word punishment means sanction or undesirable or unpleasant outcome or retribution. To survive in a society there are certain rules, principles, norms are very much needed to be obeyed. Punishment is awarded to reduce crimes and to maintain peace within the society. Due to the action of the offender the offender is awarded with punishment which can be only pardoned by the aggrieved party and not even by the public servant. It is presumed that each and every person should know the law of their land "ignorantia non excusat" no person can use it as a plea to get exempted from punishment after commission of crime.

Introduction:
Punishment is most prominent feature of a criminal law. Every society has its own way of social control for which it frames certain laws and also mentions the sanctions with them. These sanctions are nothing but the punishments. Punishment is an outcome of unpleasant act that is committed by the wrong doer. Punishment are generally provided to render peace and avoid clash within the societies. Rules and regulation are generally backed up by sanction. Punishment provides equality in the society and provides justice to the aggrieved person. Simply punishment is the pain to the a person or his property who is found guilty in crime. Different scholars have defined punishment in a different manner.

As per professor Von Hunting he regards punishment as the established of artificial danger to avoid injury to humanity itself. Principle of ‘Laissez Faire’. All punishment is in itself a pain.

As Bentham in his theory of Punishment mentioned that the Punishment should go with the crime. That is, the amount of punishment should not exceed the amount of offence. If this is done then there will be no reform in the deviant and hence the deviant will never ever keep his faith over the Sovereign and its Commands.

In case AIR vs Dudley and Stephens\(^{387}\)
In this case three seamen namely Dudley, Stephen, brooks and the boy of 18year were crew in that English vessel. The ship strikes against a hill and resulted an accident three men and the boy escaped into an open boat. On the 20\(^{th}\) day, Of their travelling when they had no food and water for suddenly Stephen killed the boy to survive and to feed upon him. Later when they where picked up by a passing vessel. They where prosecuted and tried of murder of the boy the offender plead of nessesity. The Privy council held the person guilty of murder and convicted the person on the following ground

1. Self preservation is not absolute nessesity
2. No man has right to take someone life under any circumstance
3. No nessesity justifies homicide for The seamens where punished for committing Homicide and where punished accordingly.

Basudev vs state of Pepsu\(^{388}\)

\(^{387}\) AIR 1884 14 Q.B.D. 273

\(^{388}\) AIR 1956 SC 488
The accused in this case was a retired military officer. He was charged with murder of a 15 years old boy. The accused fired at the boy in his marriage lunch as he refused him to occupy the seat. Later it was found the retired military was drunk but was not under much influence. The trial court sentenced him life imprisonment and the same was upheld by the Pepsu high court. Then the appealeent went to Supreme court and filled a special leave to appeal rejected the plea under section 86 of Indian penal code and the reduction of charge from murder to culpable homicide was made. Supreme Court laid down the following rules for guidance

1. absence of understanding nature and consequence of the act whether produced by drunkenness or otherwise is a defense to the crime charged
2. Evidence act as huge to proof whether mensreaor the mental element was present or not that decides the intent of the person.
3. The evidence of drunken felt short and the person was charged for culpable homicide And his punishment was reduced from murder to culpable homicide

Need for punishment
With the change in society the need for punishment was felt within the society. As with change in time their took place a huge change in crime and the need was felt for ensuring justices and the need to equality was felt in the society with this the need the necessity to award punish meant was felt by the society.

Punishments are awarded to check the unpleasant behavior of a person
Punishment serves as a justice and protects the interest of person.

Types of punishment:
Before the commencement of Indian penal code 1860. People where government by different criminal laws of their beliefs. The punishment previously was based on principle of evidence. Their where mainly two types of punishment one was corporal and the other was non corporal.

Corporal punishment or physical punishment is a punishment intended to cause physical pain on a person who had committed the offence or is guilty of offence with the growth of humanitarian ideals since the enlightenment, such punishments were increasingly viewed as inhumane. On 20th century 389 the corporal punishment where eliminated from the legal system as they were opposing the humanitarian laws. In the 21st century it seen the human rights law where questioning the corporal punishment. And the human right law gave a huge blow to the corporal punishments in the home even punishment of children or teenagers by parents or other adult guardians, is illegal in most of the world. 58 countries, most of them in Europe and Latin America, have banned the practice as of 2018 390. School corporal punishment, of students by teachers or school administrators, has been banned in many countries, including Canada, Kenya, South Africa, New Zealand and all of Europe. It remains legal, if increasingly less common, in some states of the United States. Judicial corporal punishment, as part of a criminal sentence ordered by a court of law, has long disappeared from European countries. However, as of November 2017, it remains
lawful in parts of Africa, Asia, the Anglophone Caribbean and indigenous communities of Ecuador and Colombia. Closely related is prison corporal punishment or disciplinary corporal punishment, ordered by prison authorities or carried out directly by staff. Corporal punishment is also allowed in some military settings in a few jurisdictions.

Non corporal punishments are those punishment which are doesn't involves physical punishment rather the punishment creates more impact on a person then a physical punishment. Sometime words can speak louder then the action of a person similarly in this kind of punishment the word creates a huge impact on the person . As per . Imam ‘Ali, The Commander of the Faithful, says: “There are many types of punishments which have bigger impact than physical assault.

It is possible that these punishments might be more severe on the mind rather than the physical punishments. These punishments will injure the personality of the person and create elements of fear and restlessness in his nature. It has happened many a time that when a child is locked alone in a dark room, the effect on his nerves was so severe that he was not able to erase it from his mind for a major part of his life.

Their where five kinds of punishment by mohammedan criminal law as follows: Kisa(qisas)- it say that a person has to equally pay for his his sins. This means to retaliation. The offender here is given similar punishment based on the type of crime he has committed. For example a limb for a limb, hand for a hand and also a life for a life Diya( diyat)- it means blood-money. Diya symbolises that the offender can get rid from his liability by making a payment to the injured or aggrieved. For example if a person has killed a man he has to pay the amount in returns of his blood. Hadd - boundary or limit. In this the punishment is fixed and the judge didn't have discretionary power to award more or less punishment for example their was a fixed punishment for Zina(rape)the offender was awarded with death.

Tazeer- It means discretionary punishment in this the judge award discretionary punishment to the offender that is the punishment is different for different crime and the judge has discretionary power to decide. For example a man has killed a person with knife and a man has killed a person by burning him it is not always same punishment awarded for similar type of crime it depends on discretion of the judge Siyasat - it is a mode of punishment where king award punishment to the offender.

The punishment of Indian penal code 1860 is prescribed under section 392 of the Indian penal code. Death penalty : it is also called capital punishment some countries have abolished it. It is awarded in India in some exceptional cases some offence s are awarded with Death sentence includes 1. Wagging war against government of India under section 121 2. Attempt to murder by a person under life imprisonment under section 307 3. Giving false evidence against a innocent person and the person suffered with death under section 194 4. Punishment for causing death or resulting in persistent vegetative state of victim under section 376A.

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391 Criminal law by Dr rega surya rao
392 Section 53

www.supremoamicus.org 151
5. Dacoity accompanied with murder under section 396

Life imprisonment: The code of criminal procedure Act 1955 it substituted the word imprisonment for life with transportation for life it means the person is imprisoned for life that is till his natural death. but in India it is from 14 years to 20 years under section 57 of Indian penal code. The sentence for life imprisonment is provided in following offences:

1. Waging war section 121
2. Conspiracy against state section 121A
3. Aiding for escape of prisoner section 130
4. Abetment to mutiny section 131
5. Import and export of counterfeit coin section 255
6. Murder section 302

Imprisonment:
It means confinement or total deprivation of a person’s liberty. Imprisonment can be of two types:

a. Rigorous imprisonment
b. Simple imprisonment

a. Rigorous imprisonment- the offender in rigorous imprisonment puts large effort or labour such as for grinding, digging earth, drawing water and etc. there are some punishment awarded in case of rigorous imprisonment as per indian penal code.

1. Personating a public servant section 170
2. Punishment for bribery section 171E
3. Punishment for false evidence section 193
4. Causing miscarriage section 312
5. Punishment for voluntary hurt causing hurt section 323

b. Simple imprisonment – in this kind of imprisonment the offender is confined to jail and is not put in any kind of work. simple imprisonment are awarded in following situation

1. Wrongful restraint section 341
2. Continuance of nuisance after injunction to discontinue section 291

3. Defamation section 500, 501, 502
Misdemenor: Misconducting in public place by a drunk person section 510

Fine- the word is derived from the word finis because the payment puts an end to the offence for which it was imposed. generally a fine is an punishment that is imposed by tribunals it is the sum of money court orders for the offence committed by him. Fine can be imposed as punishment in following case:

1. Failure to keep election accounts section 171
2. Obstructing public way section 283
3. False statement related to election section 171G
4. Agent or manager of person in like situation section 156

Theories of punishments:
The kinds of punishment given are surely influenced by the kind of society one lives in. Though during ancient period of history punishment was more severe as fear was taken as the prime instrument in preventing crime. But with change in time and development of human mind the punishment theories have become more tolerant to these criminals.

Thus it becomes very important on behalf of the society to punish the offenders. Punishment can be used as a method of educing the incidence of criminal behavior either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. Theories of punishment, contain generally policies regarding theories of punishments. It is an punishment attempt to portray punishments as a method of
inflicting of unpleasant circumstances over
the offender.\textsuperscript{393}

The words of Salmond\textsuperscript{394}, “The ends of
criminal justice are four in number, and in
respect to the purposes served by the them
punishment can be divided as:
1. Deterrent
2. Retributive
3. Preventive
4. Reformative

Deterrent Theory\textsuperscript{395}
‘Deter’ means to abstain from doing at act.
The main objective of this theory is to deter
(prevent) crimes. It serves a warning to the
offender not to repeat the crime in the future
and also to other evil-minded persons in the
society. This theory is a workable one even
though it has a few defects.

Retributive Theory\textsuperscript{396}
Theory Retribute means to give in return.
The objective of the theory is to make the
offender realise the suffering or the pain. In
the Mohammedan Criminal Law, this type
of punishment is called ‘QISAS’ or ‘KISA’.
Majority or Jurists, Criminalists, Penologists and Sociologists do not support
this theory as they feel it is brutal and
barbaric.

Preventive Theory
The idea behind this theory is to keep the
offender away from the society. The
offenders are punished with death, imprisonment of life, transportation of life
e tc. Some Jurists criticize this theory as it
may be done by reforming the behavior of
criminals.

Reformative Theory\textsuperscript{397}

The objective is to reform the behavior of
the criminals. The idea behind this theory is
that no one is born as a Criminal. The
criminal is a product of the social,
economic and environmental conditions. It
is believed that if the criminals are educated
and trained, they can be made competent to
behave well in the society. The Reformative
theory is proved to be successful in cases of
young offenders.

Expiatory Theory
Jurists who support this theory believes that
if the offender expiates or repents, he must
be forgiven. This theory believes in
forgiving the offender if he has realized his
fault.

The Indian Penal Code is a combination or
compromise between the underlying
principles of all these theory
The application of the theories in the morden world \textsuperscript{398}

Generally the morden law condemn the
applicability of corporal punishment. These
aim at transforming the law-offenders in
such a way that the inmates of the peno-
rectional institutions can lead a life like
a normal citizen. The non corporal
punishment help to seclude of the criminals
from the society as an attempt to reform
them and to prevent the person from social
ostracism. Though this theory works
stupendously for the correction of
juvenilies. General the modern theories are
based the principle of preventing and
checking crimes without corporal or
physical punishment. Rather tries to reform
the behavior of the offender. Generally in
the morden world all the theories applied
except the theory of Retributive.

\textsuperscript{393} Indian penal code by BM Gandhi
\textsuperscript{394} Sir John Salmond a jurist and a legal scholar
\textsuperscript{395} www.legalserviceindia.com
\textsuperscript{396} www.lawnotes.com
\textsuperscript{397} www.wikipedia.com
\textsuperscript{398} Indian penal code by SN Misra
Conclusion
Punishments are generally provided to the offender if they are not abiding the law or breaking the rules and regulation of the society. Punishment is a method of inflicting unpleasant circumstances over the offender. There are certain theories of punishment but in modern society, the expiatory theory is followed as they believe in the reform of the offender rather than awarding punishment. The corporal punishment have abolished in the modern society.

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CHANGING DIMENSIONS OF TRIPLE TALAQ

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Abstract
Islam is one of those religions which is based on the holy book Quran and traditions of the Prophet. In Islam, marriage is the affirmed union which can dissolve by giving Talaq. Talaq is the part of the traditions and customary law for Muslim community, indeed promoted by the Prophet Mohammad but only when it is difficult for the parties to stay together. Talaq-al-biddat is one of the kinds for Talaq which are exclusively given to the husbands. The divorce is pronounced thrice in one sitting and sentence whenever the husband wishes or under haste, which is arbitrary in nature. This sudden pronouncement by the husband alienates the women from the society, leaving no room for her to go and raising the questions on her dignity.

This arbitrary act infringes the natural rights of the wife to live in relation and move according to her own wish. In the modern progressive society, where the people are treated to be equal, here still remains the discrimination in powers of a Muslim man and woman. This is infringing their rights for equal treatment in the society. Due to this activity, many countries which include Islamic countries have prohibited this dominating action by enacting the Muslim Personal codified laws for banning the Triple Talaq. Their laws have directly or indirectly impacted to the Muslim society which prohibits the three repudiation of ‘Talaq’ in one sitting and one sentence. Triple talaq by any mode is being banned by many countries through laws.

But in India where the Hanafi followers are in majority, the only Muslims who recognizes practice of Triple Talaq, has taken the step by enacting a Bill for prohibiting the action but it is yet to pass.

Moreover, it can be done by enacting effective legislation with the support of All India Muslim Personal Law Board (AIMPLB). This will not only gives the women equal rights but also allows the short tempered husbands to reconcile after realizing their indecent act. Thus, it will also indicate new direction to the Muslim community by making them aware about the procedure to be followed for divorcing the women and to know about the sin of the triple talaq. Hence, in this developing society, demand for the enactment of the effective laws is increasing as the women are getting aware of their rights which are protected by the Constitution of India.

Thus, the work critically analyses the act of triple talaq. The work also discusses the laws enacted by the countries for prohibiting such act and for the other solutions which are or can take in India for prohibiting the act.

Keywords:
1. Islam
2. Talaq-al-biddat
3. Muslim community
4. Discrimination
5. Dignity

Introduction
Islam is one of the only religions which have undeviating and simple rules based on the holy Quran and the traditions of the Prophet Mohammad. Muslims also have their own law, abided by the traditions and customs. Muslims have complete faith in the Quran which was supplemented by the
traditions of the Prophet Mohammad known as ‘Sunnah’ and later, leads to the formation of Islamic laws.

There arose the different variations due to the different place of revelations i.e. Mecca and Medina, which made the difference of opinion in the interpretation of the spiritual words of the Prophet Mohammad. This led to the establishment of the different schools under the Islamic law by different jurists. However, this marked to different interpretation of the jurists which generally came to known as Ijma. Ijma is applied when there is no law given in the Quran or Traditions of the Prophet Mohammad.

Marriage is the institution of a stable and affirm union of two different sexes which concords faith in each other. Under Muslim Law, marriage is a contract not the sacrament. Thus, the union is an affirm union under the Quran which ends on the death of either of spouse or by giving divorce. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by the law, divorce is the worst. Divorce dissolves the marriage when parties find it impossible to live together and find them to be tethered by the marriage which results in the dissolution of the marriage.

Generally both the parties to marriage have option of divorce but husband’s right is much greater than that of wife. Wife cannot divorce herself from her husband without his consent. If he wishes, then only the women (wife) can be delegated with the power for an agreement before or after marriage providing that she can divorce herself from her husband under certain special conditions. Such delegation of power is known as Talaq – e- Tafeez. In this dynamic society, nowadays, the husband gives the three repudiation of ‘Talaq’ in one sitting and one sentence which is irrevocable in nature. Thus, the act by the husband is tyrannical in nature.

Prophet disliked the practice of giving divorce, by the husband and treating her like the goods and cattle he owns. He set out to reform this practice and laid down the procedure, to be adopted in case of divorce between the couples, and told, “now onwards only twice in the whole life can a husband pronounce a Talaq and revoke it: Whenever he does so for the third time the marriage would be instantly dissolved, leaving no room for the remarriage between the divorced people.”

This statement means that the husband cannot give the divorce thrice in one sitting and sentence and if he does so, it will be a sin and complete violation of the Quran and the wordings of the Prophet Mohammad. Thus, the triple Talaq is against the Muslim Law.

**Origin of Triple Talaq**

Islamic Shariah was formulated many years ago after the death of the Prophet Mohammad. Many Caliphs and jurists came with distinct belief and vision related to many matters which also included the issue of “talaq” i.e. whether the talaq should be given in single repudiation or three in one sitting! This had evolved the complex influence of various jurists on the Muslim

399 Sunnah is constituted from the wordings and the silence of the Prophet Mohammad. It is believed that whatever the Prophet said, it was his own understanding which he interpreted from the words of the Gabriel.

400 Tyabji: “Muslim Law” P.143, Ed IV
society for the acceptance of the triple talaq in one sitting.

Triple Talaq was avoided during the period of the Prophet Mohammad. During the first Caliph Abu Bakr’s reign and for around more than two years during the second Caliph Umar’s time, triple talaq in one sitting was not promoted and was the disgrace activity against the Muslim women society. But during the period of Umar, he permitted it on the account of a peculiar situation. Arabs conquered Syria, Egypt, and Persia etc. where they found the beautiful women and got attracted to them. The women of Egypt, Syria, and Persia demanded the married Arabs that before marrying them they have to pronounce the Talaq thrice in one sitting to their existing wives. The women were unaware of the law that the repudiation imposed by the Arabs but not with the intention to enforce it permanently. Later, the jurists contemplated and declared this form of divorce as valid and referred to it. During the second century of Islam, Omayyad, the monarch, on finding that facility of repudiation imposed by the Prophet is being caprice; they escaped from the route of the strictness of law. Therefore, the Omayyad’s practice gave the validity to this divorce.

Later, in the *Britishers era*, this practice was nurtured as they were unaware about the personal laws; whatever the jurists said they made it the law, in the form of the judgments which are prevailing till today. This leads to the development and encouragement to the evil practice all over the world among the Muslim community. Indeed, this practice came to be a custom, is prevailing over the Muslim women society.

In this dynamic society, people are getting aware of their rights and have the knowledge of the good and evil practices. Hence, many countries have been imposing a ban on the practice of triple Talaq to reduce the dominating role of the men over their women. This has become a revolutionary point in the world as the Muslim community is getting aware of their rights and duties in respect to the Quran and traditions of Prophet Mohammad. Egyptian law is the first one to incorporate the Muslim Personal Codified law which abolished the practice of pronouncing triple Talaq. Later, the Sudan, Morocco, Iraq, Jordan, Afghanistan, adopted similar laws. Besides these, many other Muslim countries such as the United Arab Emirates, Qatar and Bahrain etc have also adopted Ibn Taimiyah’s opinion as the guideline for their personal laws related to triple Talaq. According to him “the Talaq which is uttered thrice should be considered as one and the husband thus will have the right to take his wife back within the ‘iddah period or go for nikah if the ‘iddah period has expired.

Thus, the steps have been taken for the abolishment of triple Talaq in many

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404 “Mohammad Munir”, Reforms in triple talaq in the personal laws of Muslim states and the Pakistani

legal system: Continuity versus change” 2 International Review of Law 2 (2013)
405 “Triple Talaq”, Ibrahim B. Syed, Ph. D., President, Islamic Research Foundation International, Inc
countries and indeed, India is also taking steps as out of the total population, around 14.2% are the Hanafi Muslims which resulted in the continuance of triple talaq.

**Different Nations’ Laws on Triple Talaq**

Many countries including the Islamic countries, have taken the legislative actions for the uniformity in the laws of Divorce because it is misused by the dominating society of man and differently interpreted by the jurists. There are around 22 countries that have enacted the Muslim Personal Laws and banned Triple Talaq. Scholars like Ibn e Abbas, Ikramah Tawoos, Ibn e Ishaq, Imam Razee, Imam Ibn e Taimiyyah etc encouraged the countries to ban such evil step as they had clearly opposed the practice of Triple Talaq and treated the three repudiation of talaq in one sitting as one. According to Allamah Ibn e Taimiyyah,

"If somebody gives three talaqs in one wording or in three wordings in one Tuhr (wife’s period of cleanliness) then it is haram (unlawful) to do so according to the opinion of the majority of ulema. But the question of its being effective is under dispute. One opinion is that three talaqs will be operative and another is that it will amount to only one talaq. And the latter is correct as it is supported by the Quran and Sunnah as has been described in detail earlier elsewhere."

406 Shams Pirzada; English translation Sultan Akhtar, “In the lights of Quran and Sunnah”, P. 22


First of all Egypt, in 1929, removed the principle of the effect of triple talaq and enacted a law stating that several talaq will be considered as one talaq which will be revocable in nature. (Egyptian Family Laws of 1929, Art.3)

“A divorce accompanied by a number expressly or impliedly, shall count only a single divorce, and such a divorce shall be revocable except when three talaqs are given, one in each tuhr."

In Sudan and Jordan408 also the position is similar that triple-talaq shall be considered as one409 under Section 3 of Sudanese Manshur-i-Qadi al Qudat, and Section 60 of Jordanian Code of Personal Status, 1976, respectively. The Sudanese law provides that pronouncement of all divorces by the husband is revocable except the third one. It also includes the divorce before consummation of marriage, and a divorce for consideration.410 The laws in Syria are the combination of Egyptian laws and Sudanese laws. It states that if a divorce is given in a number whether expressly or implied then not more than one divorce shall take place and as same in the Sudanese laws every divorce is revocable except a third divorce or a divorce before consummation or a divorce held with the consideration, and in this law such a divorce would be considered irrevocable.411 Many countries like Morocco, Afghanistan, and Libya etc, relied on same provisions as they adopted the same laws for banning the Triple Talaq (one sentence or in a phrase uttering in one sitting) in the society. Thus,

406 Shams Pirzada; English translation Sultan Akhtar, “In the lights of Quran and Sunnah”, P. 22


408 Section 3 of Sudanese Manshur-i-Qadi al Qudat, and Section 60 of Jordanian Code of Personal Status, 1976


410 Article 3, Shariah Circular No. 41/1935 of Sudan

411 Law of Personal Status of Syria, 1953, Article 92
for triple talaq the statutory provisions are enacted by the countries.

Countries like United Arab Emirates, Qatar and Bahrain have adopted the guidelines of the Ibn Taimiyyah while enacting their Muslim Personal Laws. Tunisia has also adopted the protected way so that the power cannot be misused by the husbands.

Under of the Tunisian Code of Personal Status, 1956, divorce pronounced outside a court of law will not have any validity whatsoever, and under also no divorce shall be decreed except after the court has made an overall inquiry into the causes of the rift and failed to bring about reconciliation.

Under the family law of the Malaysian state of Sarawak, a husband who desires to divorce his wife has to request a court to look into the causes of proposed divorce and advise the husband not to proceed with it. However, if the differences are irreconcilable, then the husband may pronounce one divorce before the court.

Similarly, Sri Lanka’s Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006, provides that a husband intending to divorce his wife “shall give notice of his intention to the Qauzi [sic.Qadi]” who shall attempt reconciliation between the spouses “with the help of the relatives of the parties and of the elders and other influential Muslims of the area.” However, if after thirty days of giving notice to the Qadi, attempts at reconciling the spouses remain fruitless, “the husband, if he desires to proceed with the divorce, shall pronounce the talak [sic Talaq] in the presence of the Qadi and two witnesses.” Thus, laws lay down in countries like Sri Lanka, and the Malaysian state of Sarawak seems to develop the relation by harmony and if the reconciliation doesn’t occur then only the Talaq can be given. The prior permission of the court of law is necessary for such procedure. Therefore, it reduces the misuse of the practice.

Apart from these countries, Pakistan and Bangladesh have also enacted the laws to prevent the act of Triple Talaq. Pakistan and Bangladesh have the same provisions in Muslim Family Law Ordinance Pakistan, 1961. The basic purpose of the Act is for the reconciliation between the parties by the

2. Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or both.

3. Save as provided in sub-section (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

4. Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about the reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

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412 Supra Note 4
413 Article 30, Tunisian code of Personal Status
414 Article 32, Tunisian code of Personal Status
415 Mohammad Munir”, Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change” 2 International Review of Law 3 (2013)
417 The Act defines, 1. Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.
way of issuing the notice to the Chairman. Issuing the notice to Chairman indicates for the reconciliation between the parties, one cannot divorce his wife arbitrarily. If the person doesn’t do so then the punishment is also defined within the Section 7 (2), MFLO, 1961 and also if the notice is not given to the chairman under subsection (3) amounts to revocation of talaq. S.A. Rahman J., \textsuperscript{418} gave the remarks which were interpreted and do make reference to Islamic law. “His clear ruling showed that he considered section 7 of the MFLO to have abolished triple talaq in one session and that any talaq under this section is not irrevocable. Moreover, according to his interpretation, the marital status of the parties does not change within the 90-day period provided for in subsection (3). The most controversial interpretation of Justice Rahman, however, is that failure to give notice of talaq to the chairman under subsection (3) amounts to revocation of talaq. Although this interpretation has benefited women who ask the courts for maintenance when their husbands pronounce talaq orally without giving any notice of it to the chairman, however, this has caused trouble for some women upon remarrying, as ex-husbands can very well accuse them of adultery.”\textsuperscript{419}

The Supreme Court of Pakistan also interpreted for the failure of notice by the parties to the Chairman and it was held\textsuperscript{420} while discussing the Gardezi rule, that

\begin{itemize}
  \item If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.
  \item Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time, so effective.
\end{itemize}

\textsuperscript{418} Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf

\textsuperscript{419} “Mohammad Munir”, Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change” 2 International Review of Law 7 (2013)

\textsuperscript{420} Mst. Kaneez Fatima v. Wali Muhammad PLD 1993 SC 901

\textsuperscript{421} Sirajul Islam v. Helana Begum 48 DLR (1996) 48
Divorce (Registration) Act, 1974. The court held that “mere non-service of notice upon the Chairman of the Union Council under section 7 of the Muslim Family Law Ordinance, 1961 cannot render the divorce ineffective if the conduct of the husband appears to be so.” The court relied on Pakistani cases Mrs. Parveen Chaudhry v. 6th Senior Civil Judge, Karachi. Thus, the case clearly states that if the notice not given it will not be said that divorce is ineffective. It is not mandatory to give the notice to Chairman but it is a direction of law stated under MFLO, 1961. The Bangladeshi case law is also very good in answering the question about the failure of the chairman to constitute an arbitration council as well as the failure of the council to take the necessary steps. Nevertheless, these countries’ legislations are very effective and lead to giving the equal opportunity to both the parties including the families. Indeed, India is also working on the legislation for the abolishment of this instant talaq.

**Triple Talaq in India**

India is also taking steps for the instant triple talaq as out of the total population, around 14.2% are the Hanafi Muslims which resulted in the continuance of triple talaq. Triple Talaq also known as Talaq- al-biddat or Talaq- al-Bain is uttered in single tuhr, thrice in one session; within one phrase as anti taliq thalathan (you are divorced thrice) or is pronounced in three sentences “anti ṭāliq anti ṭāliq anti ṭāliq.” This is the most condemnable form of Talaq in India. The apex court of India also acknowledges this form of talaq as the most evil of all, as similar to the views of the holy Quran and traditions of the Prophet Mohammad. This form of Talaq is recognized only by Indian Sunnis, not by the Shias. This is evil in nature because it cannot be revoked and if the husband wants to reconsider his marriage with the same wife due to his erroneous act then the wife needs to follow the “halala.” In spite of being recognized by the Sunnis, there are few scholars according to whom “the Talaq which is uttered thrice should be considered as one…” and the Maliki School who don’t recognize the validity of Talaq- al-Biddat.

Under Hanafi Law, the Talaq- al-biddat requires no proof of intention and divorce made under compulsion jest, inadvertently or mere slip of tongue is valid. Despite this, if the Talaq is pronounced under the compulsion, coercion, undue influence, fraud and voluntary intoxication etc, it is valid and dissolves the marriage, but if the Talaq is pronounced under the involuntary intoxication then it is void even under the Hanafi Law. In a recent case in the year 2006 where the husband pronounced a ‘triple talaq’ in the condition of the intoxication and after attaining the stage of consciousness, he realized his mistake. He agreed to live with the wife and three children but the Maulvee of the community had issued a Fatwa (religious order) that the divorced wife has to become somebody else wife after the duration of iddah and remarrying her only if and when she is lawfully free of the second marital bond.

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422 “Mohammad Munir”. Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change” 2 International Review of Law 10 (2013)
423 (you are divorced, you are divorced, you are divorced).
424 After pronouncing a talaq (for the third time) the person cannot revoke it anymore and cannot even remarry to the divorced wife right away; if he so wish then the person has to pay a penalty. The
couple cannot live together without observing the ‘halala’ by the wife. ‘Halala’ the procedure by which the wife can remarry the former husband. But the wife refused to observe ‘halala’ in this case. The couple was forced to live separately but later, they lived together and filed the suit in the Supreme Court. A bench comprising Ruma Pal J., C.K. Thakkar J. and Markandey Katju J., ordered the police protection as may be required the couple so that they could live together peacefully with their children. The court criticized the ‘religious order of Maulvees’ and observed that “in a secular country like India, communities should behave properly.” Therefore, in India also, Triple Talaq is violative in nature but the circumstances doesn’t allow abolishing this sinful act as taking it to be part of the customs.

The Prophet denounced the practice of giving talaq thrice and prohibited the practice of ‘halala’. The women can remarry the first husband without following the procedure of ‘halala’ stated under the verses 2:229- 2:30 of Quran. They say: “The divorce is allowed twice. So either remain equitably, or part with the kindness. It is not lawful for you to take back anything you have given to the women, unless you fear that they will not uphold God’s limits, then, there is no sin for what is given back.”

“So if he divorces her again, then she will not be lawful from him until she has married other husband. If the other husband divorces her, then they are not blamed for coming back together if they think they will upholds the God’s limit.”

Therefore, the Prophet clearly denounced the practice of giving talaq thrice due to reasons that if the pronouncement is made under aggression, haste etc then the husband has no chance to bring the wife back during the iddah or redress his err. India with the due aspect of banning the Triple Talaq wants to enact law so that this form can be abolished as followed by around 22 countries which include the Islamic countries as well. But due to the strong opposition by the AIMPLB and other Muslim communities in relation to decimalizing the Bill, it is still in question. The apex court and the subordinate courts in many of the cases decided the validity of the Triple Talaq cases and held it to be unconstitutional as in the case of Riaz Fatima v. Mohammad Sharif, the Delhi High Court held triple-talaq to be invalid in the eyes of law. However, the validity for the triple talaq was also questioned where it was argued that this form of divorce is against Quaranic law & court is not bound to give effect to the rule & it’s also opposite to tradition of Prophet. It was held that “The Quran verses have been differently interpreted by different schools.” Therefore, the court gave the interpretation that this form is not Quaranic Law which was also accepted in the case Rahmat Ullah v State of U.P. where it was held that an irrevocable divorce is unlawful because it is against the Holy Quran and also the Constitutional provisions of India. However, the court’s decisions are not taken in due consideration and being criticized by the Muslim people.

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430 Supra note 7
431 Quran 2:229
432 Quran 2:230
433 135 (2006) DLT 205
434 Fazlur Rahman v. Aisha (1929) 8 Pat 690
435 U.P. civil and rev. cases Reporters 1994 (1)
The court also believes that there should be reconciliation between the parties after pronouncing the divorce so that the affirm union couldn’t end by single sentence or phrase. The Division Bench has held the essence of Triple Talaq in India. “In our opinion the correct law of ‘talaq’ as ordained by Holy Quran is:

(i) That ‘talaq’ must be for a reasonable cause; and

(ii) That it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, ‘talaq’ may be affected.

In the recent case of 2010, Kunhimohammad v Ayishakuuyt, it has followed the same and held by the court that the Muslim husband is not obliged to give reasons for the divorce but the attempt is made towards the reconciliation between them by two arbiters. His mere arbitrary pronouncement of the triple talaq does not satisfy the procedural fairness injected by the holy Quran to terminate a marriage.

In India, the All India Muslim Personal Law Board (AIMPLB) is established so that the grievances related to Muslims can be considered by the Board which has qualified jurists, who are the interpreters of the Muslim Laws.

In Marium v. Md. Shamsi Alam, the court takes the pronounced Talaq in one Sentence in one breath to be treated as one. In this case, the husband had pronounced triple talaq to his wife and when he repented his action, he revoked the Talaq within the period of Iddah; she filed a suit for a declaration that she had been divorced by Alam. The Allahabad High Court it was observed by the court that in this case the Talaq was in Ahsan form, therefore, the Talaq can be revoked before the Iddah as the husband didn’t intend to divorce seriously. Therefore, in this case the court has interpreted the Muslim Laws liberally so that the hasty and evil act cannot be made.

As under the Sunni Law only Talaq-al-biddat is allowed, thus, it can be in writing also but the courts of India don’t consider the Triple Talaq in writing. In the landmark case of Shamim Ara v State of U.P., Shamim, the appellant, was married to Abrar Ahmad, the respondent, according to Muslim Shariat law. Four sons were born out of the wedlock.

The appellant on behalf of herself as ‘wife’, not ‘divorced wife’ & her two minor sons, filed applications for maintenance under sec 125 of Cr.P.C. complaining of desertion & cruelty on the part of the husband. The husband denied all averments made by wife. He pleaded that he has divorced his wife with triple talaq before 4-5 witnesses thus ceasing to be a couple. He also submitted that he had purchased house & delivered same to wife in lieu of dower & thus not entitled to pay dower. The learned judge of Family court at Allahabad refused to grant any maintenance to wife as she was already divorced however they granted Rs.150/- to one son till attains majority, the other one having become major during pendency of the proceedings. But the H.C. on revision held divorce was not given in presence of wife & no communication was given to her. But the

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437 AIR 2010 (NOC) 992 (Ker)
438 AIR 1979 All. 257.
439 AIR 2002 S.C. 3551
communication stand completed on 5 December 1990 with filing of written statement by husband. Thus wife is entitled for maintenance. Allowing Special Appeal of wife apex court held, to make it effective and must be formally pronounced and said:

The court discussed at length all the aspects of talaq under Muslim law applied in India, including Quran ch IV Sura 34 and allowed the appeal of wife. Therefore, apex court tacitly doesn’t approve and recognize the triple talaq as held in many of the leading cases.

Hence, many cases are being decided by the honorable courts of India which clearly favor the Quran and the traditions of the Prophet Muhammad for stating the Triple Talaq to be unconstitutional and vague but due to earlier, negation by the Personal Board of Muslim Laws i.e. AIMPLB for the judgments of the honorable courts’ decision, it has not been accepted in India and still in debate. Not only has this been favored by the court of justice but also the reconciliation between the parties by the arbiters. If the person gives the divorce through the triple talaq then the arbiters should be appointed so that the reconciliation can be there between the parties which would be speedy and much more effective, as stated in one of the case by the High Court.

The attempt at reconciliation which is recommended under the Shariat has been assigned a key role by the Supreme Court. The petition 440 was filed by one lady named Anwara Begum, for maintenance, Jiauddin alleged in his written statement before the Magistrate that he had pronounced talaq earlier and that Anwara Begum was no longer his wife. No evidence of the pronouncement of talaq was produced. When the matter reached the High Court, the question arose whether there had been a valid talaq? Baharul Islam J. observed that while a Muslim marriage was a civil contract, a high degree of sanctity attached to it. The necessity of dissolution was recognized but, only under exceptional circumstances. He held that:-

“talaq” must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family the other from the husband’s. If the attempts fail, talaq may be affected.

Therefore, the court also favors for the Arbiter counsel from the side of the parties so that the dispute can be resolved within four walls instead of going to the court. Indeed, this needs the people’s participation and contribution as this is the easy way to solve the grievances towards each other. This is also not violating the Quran and the traditions of the Prophet Mohammad.

Hence, the courts of India also recognize the words of The Quran and traditions of the Prophet Mohammad. These initiatives converted to the revolution in 2017 from the Shayara Bano vs. Union of India and others 441 judgment as the Supreme Court in a majority judgment of 3:2, set aside the practice of talaq-e-biddat. This gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation. It vindicated the position taken by the Government that talaq-e-biddat is against constitutional morality, dignity of women and the principles of gender equality. AIMPLB contended that it

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441 (2017) 9 SCC 1:2017 SCC OnLine SC 963
was not for the judiciary to decide matters but for the legislature to make any law on the same. They had also submitted in the Supreme Court that they would issue advisories to the members of the community against this practice. Thus, SC gave 6 months time to enact the legislation for the same.

It is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce. In the result, the Muslim women (protection of rights on marriage) Bill, 2017 is being enacted.

Though, the government of India made the instant talaq to be void and illegal, however, has not taken steps to the fullest extent by criminalizing the instant talaq. If the husband serves the instant talaq then he will be criminalized for 3 years and fine, also he has to give the subsistence allowance to the wife and children which can be impossible. The prior step can itself create complications by enforcing it as non-bailable and cognizable offence.

This could create the complications in the personal life of couples and families. Criminalizing the instant talaq the husband will be jailed for 3 years and fined. The subsistence allowance should also be given to the woman that is quite unequal to the man’s part. This Act could harm the rights of man as Right to Divorce. Criminalizing won’t be any solution for the marriage instead of affecting the affirm institution. Thus, the legislature before enacting this prominent legislature needs to reconsider the Bill for the safer zone.

**Suggestions and Conclusion**

Islam is the religion which is totally different and relies on the words of the holy Quran and the traditions of the Prophet. Islam, even though, accepts the concept of divorce but directs the parties for such step only in the certain circumstances where the parties find it impossible to live under the one roof.

The issue can be solved with the harmony between the apex court’s decision, legislature and All India Muslim Personal Law Board. Many countries all over the world have accepted the depravity of the Triple Talaq which the legislators should have the thorough study.

The validation of the triple talaq can be made effective if the talaq uttered thrice should be counted as one and can be made for the two times more. The husband pronounces one talaq in a tuhr; he must not pronounce talaq for a second time until the next tuhr. Thus, the Hasan form should be made be effective within the triple talaq.

The remedy should also be made for the husbands who under the haste and anger pronounces the triple talaq and realizes the mistake. They should be allowed to revoke the talaq during the period of Iddah. Thus, this act is not only evil upon the wife, many of the times the husband also suffers.

Rule for instant talaq cannot be enough as there is realization of his mistake and the husband wants to remarry the wife and live together happily then, the wife normally has to undergo ‘halala’. However ‘halala’ should be prohibited in India like all the other Muslim populated countries that allow the wife and husband to re- marry without following the procedure of ‘halala’.

442 In Hasan there are three successive pronouncements of divorce and in case of menstruating wife; first pronouncement should be made during period of tuhr, second during next tuhr & third during succeeding tuhr. Before the third pronouncement talaq is revocable but not after the third pronouncement.
and she needs not to be dependent on the decision of the second husband who needs to divorce her with free consent after establishment of the relation. It is the decision of the second husband by divorce, which will allow the women to re-marry her former husband after following iddah. It will also prevent her from mental torture and agony caused by ‘halala’ because she also needs to follow iddah after getting the divorce from the former and second husband. Therefore, the practice of ‘halala’ should come to an end.

Talaq - al - biddat shouldn’t be effective until and unless it is being communicated to the wife. Muslim husband should not divorce his wife at any time or for no reason. This practice was prevailed in the Pre-Islamic Arabia and criticized by Prophet as against justice, and cast down the women.

In Islam, the relationship between the husband and wife is pious and private who couldn’t conduct it outside the home because of which the Holy Quran ordains the proceedings for divorce and steps should be taken by members of both the families as the moderators, to have reconciliation between the spouses. If it fails to be effective then only the proceedings should start. This will lead the solving of differences within the four walls and non- involvement of any outsider. Thus, criminalizing the husband can be against the humanity.

In India, the Parliament could also give recognition to the legislation of Pakistan and Bangladesh, that there must be an arbitration council, appointed and headed by a Chairman for the purpose of reconciliation between the Muslim parties. It not only reduces the burden on the courts, since it is already dealing with so many cases, but also save time and efforts of the parties to file the suit and later for the proceedings. The Chairman should be granted with the powers so that his decisions should be effective in the society. This will help in delivery of fast and effective judgments as the arbitrator would be much more efficient and his judgment will be binding on both the parties.

Therefore, to eliminate the practice of triple talaq, it is necessary that, firstly the legislature should make laws to the effect of true Islamic laws of divorce. The legislature may take effect of the laws enacted by the Muslim countries that have reformed the triple-talaq in one form or the different. Secondly, it is very important that the Muslim community should accept the laws and adopt the proper method of divorce for ending the relation of marriage. Thirdly, the Muslim society should accept the decisions of the courts so that the path of justice can be followed. The society should be aware of the rights and duties as they are the main source for the development of the laws. Fourthly, the Muslim society should be made aware of their laws through the means of education, camps etc so that they could know about the sin of the triple talaq. Hence, the participation of the society is vital because the laws are made for the development of people and for their rights. Thus, at prior view they need to be social rather than political.

Thus, it can be concluded that the words of the Holy Quran and the traditions of the Prophet Mohammad should be followed by the Muslim community rather than the rule described by the third Caliph which deprave the women in the society and made this action to be arbitrary and dominating. There is the need for the enactment of efficient Muslim Personal Law by the Parliament after the suggestion of AIMPLB, jurists or others which will be binding all over the country. The affirm
union which was promoted by the Prophet Mohammad for the development of the Muslim community will remain same as per his wish if there can be reunion between the parties by the arbiters. This will set a new example for the women society and leads them to live with dignity.

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PRIVACY V SOCIAL MEDIA

By Ritvik Garg
From ULS, PU

What is privacy?
If we define, privacy in a simple way it can be said a state of a person that cannot be disturbed or observed by the other people. A more comprehensive definition of privacy may be found in Black’s Law Dictionary that define privacy as “right to be let alone, right of a person to be free from unwarranted publicity and right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.” Even the word “privacy” has been defined in many judicial cases as the state of being free from intrusion or disturbance in one’s private life or affairs.

Privacy is a right of an individual to be left alone which is recognized by the common law. Right to privacy is a birth right. The common saying “your liberty ends where my nose begins” is reflective of the layman’s interpretation of their right to privacy. In the Indian legal context, the right to privacy is been implicit in the fundamental rights by the Article of Indian Constitutional Law. Right to privacy is not enumerated as a fundamental right in our constitution. However, in many Landmark judgements it has been inferred from Article 21.

Right to privacy under Article 21

Article 21 has been held to be the heart of the Indian Constitution, the most organic and progressive provision in our living constitution, the foundation head of our laws. In Indian Judiciary, many new dynamic dimension and different interpretation has been given to Article 21. As the result of different interpretation, one is the right to privacy. Is right to privacy is a fundamental right under Article 21 of Indian Constitution? This question was firstly answered in the case of Kharak Singh v State of U.P. where a strict interpretation of the word “life and personal liberty” was made and ruled that Right to privacy, was not part of the fundamental right guaranteed by the Indian Constitution. But, in the Maneka Gandhi v Union of India the Supreme Court ruled right to live under personal dignity under the purview of Article 21 of Indian Constitution.

Later on, different content and scope of the right to privacy was interpreted in many other landmark judgements. As in the case of PUCL v Union of India the Supreme Court held tapping of phone as the breach of the right to privacy unless procedure established by law under Article 21.

In 2017, in the case of K.S. Puttaswamy v Union of India the Supreme Court said right to privacy is a fundamental right under the constitution and is constitutional core of human dignity and this right is protected, as an intrinsic part of the right to life and personal liberty.

Emergence of social media

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443 “Privacy” Black’s Law Dictionary
444 Distt, Registrar & Collector v Canara Bank, 2005 (1) SCC 496.
446 Maneka Gandhi v Union of India, AIR 1978 SC 597.
447 People’s Union for Civil Liberties v Union of India, AIR 2004 SC 456.
448 K.S. Puttaswamy v Union of India, AIR 2015 SC 3081.
In the today’s generation, social media has been an important part of life not only for adult but also for all age group people. What is social media? In a simple way, it can be said as medium for interaction between friend and family. However, in a more complex way, it may be defined as computer-based technology that facilitated the sharing of ideas, thoughts and information through the building of virtual networks and communication. It is electronic communication of content, which includes personal contents, documents, videos and photos. The power of social media is the ability to connect and share information with anyone on earth or with many people simultaneously. Social media is not only one-way communication but also allow other people to comment and share views related to its. Like by sharing a photo by person “A” on social media allow other person also to comment and share it view related to that particular photo posted by “A”.

Today, we can say that Social media has become ever changing and evolving web based platform. Social media can become many forms of tech-enabled activities. Social media has not been become a platform for the various activities like sharing photo or exchanging text or uploading video and other stuff but now it has become a platform for some business activities also. As it can be used to form a large network, find people across the globe with their interest, thought, and feeling or help to make network career opportunities also. Not only this, now it been a tool for the different politicians to utilize social media to engage with the voters. Even, government use it to promote its various schemes and other policies.

The most popular social media tool and platform used by different people across the world is WhatsApp, Facebook, Instagram, Snapchat, twitter, YouTube, blogs. This list of tools and platforms are not exhaustive in nature as the time passes more and more platform and tools are build. These tools perform different function to maintain a social network like YouTube users video to build a social network, Facebook, Instagram snapchat users’ uses video and photo to attract people and to form social networks. WhatsApp which is worldwide global used tool to exchange text messages, videos, photo, audio recording across any part of world through a network.

Law and Social media

As social media has been a worldwide platform for different people across world. With the emergence of social media, there should be rules, regulation or law to regulate the activities related to the social media platforms and to protect the interest of public at large. Recently with the emergence of social media, there has been a rapid change in the Information and Communication technology. As, with the constant violation of regulation and rules related to social networking has resulted in civil and criminal cases which need urgent attention with the increase of fake news and trolling and infringing the privacy and other right of the people.

In India, the law related to social media are not sufficient. There are almost no judgement by court regarding social media content and other information. The law that exist are mostly related to the defamation and noting more. Various judgments can be interpreted in context of social media but there are not sufficient to give a clear picture of crimes done by different people through social networking sites.

In India, the Information Technology Act, 2000, regulates social media. This act was enacted to regulate the problem related to
usage of Information Technology. This act provides legal recognition for transactions through electronic communication. This act also penalizes various form of cyber-crime. In 2009, this act was amended and a new section was inserted, Section 66A which describes different crimes with respect to social media and other advance technology. Now, what does Section 66A of IT act say? This section criminalises the sending of offensive messages through computer or any other electronic form. Under this section, many people were arrested for posting offensive comment and post. However, many people misuse this law and lead to disproportionate arrest of many innocent people. Therefore, a Public interest litigation was filed for this provision as unconstitutional as it lead to violate fundamental right under Article 19 of Indian Constitution. Subsequently, SC issued guideline for arrest of people under Section 66A. However, no changes was made itself to Section 66A.

Related to Section 66A of IT act, Private bill and resolution was also formed to amend the section or to explain the scope of applicable of this particular section. However, both bill and resolution for the Section 66A was withdrawn. The main objective behind this Section was to stop the misuse of social media, and to prevent person from posting “offensive” content online. However, this Section was also misused by some authorities against whom citizen criticise the illegal act of these authorities. However, the PIL was filed to challenge the validity of section 66A. In the case of Shreya Singhal v Union of India449 the SC struck down Section 66A and said provision as “draconian” provision. There were two main reason behind this was firstly, it lead to violate the fundamental rights of people as which include right to know also and second it lead to unwanted arrest of many innocent people.

Right to privacy and Social media
However, the SC said that Section 66A lead to violation of Article 19 of Indian constitution as freedom of speech and expression but it’s forget to see how the freedom of one person can lead to violation of fundamental right of other person as can violate its right of privacy. If a person “A” posted a video or a photo, under his/her right of freedom of speech and expression and on the same time its lead to a violation of a privacy of person “B”. At this particular point of time it’s create a confusion in the mind of people that either Article 19 which give a right to a person to post such video will prevail or either Article 21 will be prevail. Rather than striking the whole provision as unconstitutional and making it open for the people to violate the right of other person who are effected from the post, the SC should interpreted the Section to that extend that neither it lead to violation of Article 19 as freedom of speech and expression nor its lead to violation of right to privacy under Article 21 of Indian Constitution.

While dealing with this type of situation, the SC should consider the reason and the motive behind posted such video/photo. If court satisfies that the uploading such type of video/post on social media is relevant to the extent to bring the attention of the public toward a unlawful act and illegal act of any person or authorities it’s should not be offence under cyber law. But, in case it just for the trolling or mocking purpose, than such time of content uploading on social

media should be declared as offence. This approach is better than striking whole proviso as unconstitutional.

Few months earlier, a video was made viral on social media about a middle aged woman commented on girl dressing-sense. We can say that whatever was commented by that lady was not even was not illegal act or an offence act which is not related to a public at large but a simple situation of defamation can be said that. However, rather than dealing with this situation privately the girl choose to viral the video/post of that woman without even hiding her face. The video/post not only lead to violation of right to privacy of a person but also can lead to danger the life of her and her family. Who will be the responsibility? If something happen to her or her family. Does government take any action regarding this? Does this act was stopped by cyber bureau on social media to protect her right to privacy?

Through various judgement and interpretation of Article 21 of Indian Constitution, many new aspect of right to privacy has been defined. However, Indian Judiciary has fail to define and interpret the law to the extent of social media. However, under the Information Technology Act, 2000 has enacted a provision related to right to privacy under Section 66E of IT Act 2000. However, this act has understand the word “privacy” by a literal interpretation and does not capture the essence of privacy as a concept. Section 66A refer privacy only to the extent of the physical privacy and not as a whole concept, which mean this provision has a limit to the extent to interpret the privacy of a person. If a person post a video or photo on social media or any social networking sites related to a person private area defined in this Section than only it violating the provision of this Section.

However, Section 79 of IT Act 2000 also state that the social media or social networking sites on which these video or photo is posted which violate the exciting law related to it will not held liable for the same. If person “A” posts a post of private area on Facebook than Facebook will not held liable for this.

There should be particular statue or a body like Consumer forum which only deal with problem related to consumer, which only deal with the crimes related to social media and should regulated these Social networking sites to protect people from the harmful and offence comment and post. These post and comment should be pre-censor to the social networking sites before posting and uploading on internet as if films are pre-censor before released to public.

**Screenshot and Privacy**

A screenshot is a photo of what is on device screen. As in the emergence of social media platform like WhatsApp, Messenger and other text exchanging, many friend or family member share their personal as well as other information which is too sensitive for their life. No only text but other data like photos or any video are also shared through these platforms. Some application comes with the feature that a particular messages or data will be deleted after a particular period. Screenshot help in storing these photo or messages in form of photo that is on the device screen. If a person “A” is viewing some message send by the other person then through the feature of Screenshot the message viewing on the screen can be stored in the form of photo in the device memory and same can be send to other person

Screenshot can be a useful feature for many people as save memorable photo of friend and family. It is also useful to save important text out of thousand-text in-group
or other personal. But there is also a negative use of Screenshot as many people use to screenshot there personal text which are exchanged in the name of trust but same are used to blackmail the other person. This is also one of the reason for increase crime rate in India as people are blackmail through Screenshot of their personal photos and text to influence them to do crime and other illegal activities. This can also be reason for the case of suicide as they have a fear in their mind that these screenshot will be posted on social media or will be exploited.

Screenshot can lead to infringe the privacy of the other person as can be used as weapon against them. There are few Social media platform which provide feature about notifies the other person who’s photo or chat screenshot has been taken. However, there always some lacuna related to one or other feature. As these feature can be bypassed through third party application. One of most used platform about notifies is the Snapchat where if a Screenshot is taken of chat or photo the same is notifies to the other person about the screenshot.

The legislation should make a law related to these Feature, which should be used only for bona-fide purpose and not to blackmail other person and use it as a weapon for influence them to do various crime. The feature of Screenshot in Social media platform should be banned or restriction should be applied as to protect the privacy of one parties.

**Conclusion**
In the field of Social networking sites and platform, the proposed changes and action should be taken:

1. A comprehensive Statute should be made by the parliament, which should cover various aspect of social networking sites and platforms.
2. The scope of Section 66A in the Information Technology Act 2000 should be revised to all the aspect of the privacy not only the naked photo.
3. Use of Screenshot should be restricted and Screenshot of personal data in the Social media platform or sites should be banned as to protect privacy of people.
4. Status Qua action should be taken to revise the Judgement of Shreya Singhal v Union of India rather than struck down as unconstitutional as completely.
LAW OF EXTRADITION

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Introduction:

It is quite possible for a person to escape from punishment to another state after committing a crime in his state. After the development of air traffic such cases started occurring more frequently.

Fugitive shall be tried in the country where he has fled away or the state where the crime has been committed is the question which arises. The fugitive where he had fled there is lack of jurisdiction. Hence the criminal is surrendered to the requesting state and this surrender of the fugitive is called as extradition.

Surrender of a person is opposite to the traditional practice of grating asylum of the state. Extradition has started since the last quarter of the eighteenth century.

Word extradition has derived from Latin words ex and traditum.

Generally it may mean 'delivery of criminals', 'surrender of fugitives', 'handover of fugitives'.

According to Oppenheim extradition is the delivery of an accused of or has been convicted of a crime, by the state on whose territory he happens for the time to be.\textsuperscript{450}

Requesting state generally requests for the fugitive through the diplomatic channel. Thus in extradition request of a person distinguishes extraction from banishment, expulsion and deportation.

Purpose of extradition:

It is necessary to extradited the criminal which will recreate a sense that by moving to another state will not amount he can't escape from the crime which he has committed. A criminal is extradited to the requesting state by the territorial state because of the following purposes:

1) Lack of jurisdiction and because of some technical rules of criminal law makes the process really difficult to punish the person or prosecuted in a state where he has fled away.

2) Extradition is like a warning to the fugitives that they can't escape punishment by fleeing to another state. Thus it has a deterrent effect.

3) To safeguard the interest of the territorial state criminals are surrendered.

For example: if a state adopts a rule of non-extradiction of criminals they would likely to flee to that state. Then the state would become a place for international criminals which will be indeed dangerous to people.

4) Extradition is based on reciprocity.

5) Extradition is the step towards the achievement of international cooperation in solving international problems of a social character.

It fulfills one of the purposes of the United Nations as provided under Para 3 of Article 1 of the Charter.

6) The requesting state would be having in a better position to try the offender because the evidence is more freely available in that state only.

Extradition law in India:

For the first time in India an Extradition Act was formed in 1902. Prior to the enactment of the act of 1962 extradition in India was regulated on the basis of the United Kingdom Extradition Act of 1870. Act of 1870 was applicable to whole British Empire.

The fugitive are surrendered amongst the countries of British Empire by another act i.e. the Fugitive Offenders Act of 1881. Different footing of extradition was treated to and from countries of British Empire to that of other counties.

The Indian Extradition Act of 1903 was enacted to give convenient administration in British Indian and in addition to provide supplement the Extradition Act of 1870 as it is modified time to time and to the Fugitive Offenders Act of 1881. Thus the act of 1903 provides supplementary to the above two acts.

The act of 1903 continued after the India became independent.

Section 2(d) of the Extradition Act of 1962 defines the term extradition treaty as a treaty (agreement or arrangement) made by India with a foreign state relating to the Extradition of fugitives made before the 15th day of August 1947, which extends to, and is binding on India.

Thus treaty prior to independence are still concluded by the India. Thus it is bound by all the Extradition treaties of India.

India formed a list of 45 pre-independence Extradition treaties which were in force in 1956.

But then question arises whether other contracting states other than which were in list should be considered themselves to remain bound by such treaties.

After inquiry it was found that only some countries considered themselves to be bound by pre-independent extradition treaties.

Many other states were not clear since they did not give replies to the query. In while time Germany and Portugal expressed the view that extradition treaties are not operative with India, but it was regarded by India that the pre-independence extradition treaties with these states are still operative.

When Abu Salem, an accused in Bombay blasts, fled to Portugal in 2002, it was found that at that time there is no extradition treaty between India and Portugal. Existence of pre-independence extradition treaty was not pressed by India. The same was held in the case of France. When it was suspected that Dharam Teja had fled to France, the PM of India declared in the parliament on August 24, 1966 that India has no extradition treaty with France and therefore extradition is not possible. But list of countries with whom India has extradition treaties includes France as a party to the treaty.

Similarly, When Quattrocchi, an Italian businessman and an accused in Bofors Scam fled to Argentina and in parliamentary session it was found that India didn't have Extradition Treaty with Argentina.

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452 Act IV of 1903.
453 Lok sabha Debates, 12th Session, 1956
treaty with Argentina but the opposition leader L.K. Advani that the treaty signed in 1899 by the British India is still in force as it has mentioned in the list of pre-independence treaties.\(^{454}\)

India itself is not sure as to which pre-independence treaties are operative. But in present time, India has extradition treaty with 47 countries and extradition arrangements with 9 countries\(^{455}\). Between 2002 to December 7, 2016 a total of 62 fugitives have been extradited to India by foreign countries on the basis of Extradition treaties.\(^{456}\)

Crimes for which they have been extradited includes murder, kidnapping, fraud, cheating and terrorism.

India has extradited 49 criminals to other states till 2016.\(^{457}\)

### Extradition and human rights violations:

The classical international law did not provide human rights safeguards at the time of extradition of fugitives. But in the recent past years human rights safeguards are taken into consideration. Many European countries such as Switzerland, Austria and Germany in their extradition treaty laws they have adopted the principle that extradition shall be refused if the procedure in the requesting state is contrary to the European Convention on Human Rights.

Although presently, the refusal of extradition on the ground of alleged violations of all the human rights is not accepted by the states extradition is refused, in case of certain violation of human rights such as Firstly, where there is a substantial ground’s for believing that if fugitive is extradited he will be given torture or will be given cruel, inhuman or degrading treatment or punishment.\(^{458}\)

Secondly, if the purpose of prosecuting or punishing of the person extradited is his race, religion, nationality or political opinion, or that person’s position may be prejudiced for any of these reasons.\(^{459}\)

Thirdly, the prosecution of the person will not be fairly conducted by the requesting state.\(^{460}\)

### Extradition of Foreign Nationals for crimes committed in Foreign countries:

Foreigners are not extradited for the offence committed in foreign countries.

Extradition is done when it has been thoroughly examined by the state (where the crime has been committed) regarding the impact and consequences of the offence in the requesting state. It is a point to be noted that extradition of foreigners committing crimes in foreign countries can there be substantial grounds for believing that they would at risk of being subjected to torture.

\(^{454}\) For instance Belgium, Chile, Netherlands and Switzerland.

\(^{455}\) Times of India, February 20, 2018

\(^{456}\) Times of India, February 20, 2018

\(^{457}\) Ibid.

\(^{458}\) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under Article 3 lays down that member States would not repeal, return or extradite persons to states if there are substantial grounds for believing that they would at risk of being subjected to torture.

\(^{459}\) The U.N. Model treaty on Extradition also contains a similar provision which adds ethnic origin, sex and status to the list of prohibited categories of discrimination.

\(^{460}\) Article 3 of the U.N. Model Treaty on Extradition.
only take place when extradition treaties include a provision regarding it. For example: extradition treaty between Canada and India has included this provision for the possibility of extradition for the extra territorial offences by stating under Article 2 that extradition shall also be granted is respect of an extradition offence..... committed outside the territory but within the jurisdiction as assessed by the requesting state, if the requested state would, in corresponding circumstances have jurisdiction over such offences. This is, of course an innovative provision which the two countries have inserted in the treaty in recognition of the fact that terrorist activities have trans-national connection and impact.

Extradition law, at present is holly based on the basis of bilateral treaties and national laws. Since many years they are practised in many countries, they can be stated as to have become general principle of international law. However, in any way, they are binding on all the states. It is possible that any extradition treaty or extradition law of state remains wholly silent on any of these points or they might contain provisions otherwise. While in many former case, difficulties are bound to arise, and latter would be regarded as violative to the general principles of international law. And they shall be binding on the parties.

In my opinion it is desirable that International Law Commission take up the topic of extradition for its consideration and codification. If the topic of Extradition once codified is likely to be of great help in the suppression of the crime and in achieving international cooperation in social fields which is one of the reason of the United Nations as provided under Para 3 of Article I of the Charter.

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Extradition of political offenders: Customary rule of international law is political offenders are not extradited. Or we can say they are granted asylum by the territorial state. During monarchy, political offenders are extradited very often. To avoid the intervention in the affairs of another state. Then in the beginning of the French Revolution this practice underwent
numerous changes.\textsuperscript{461} Perhaps for the first time, the French constitution of 1793 under Article 120 made a provision for granting asylum to those foreigners who exciled from their home country for the cause of liberty. Afterwards many states followed the principle of non-extradiction of the political offenders. Indian Extradition Act of 1962 also lays down similar provision under section 31(a).

At present times political offenders are not extradited has become a general rule of international law and therefore it is an exception of extradition.

**Basis for the non-extradiction of the political offenders:**

Consideration for the rule of non-extradiction of the political offenders are as follows-

2) First rule is based on the elementary consideration of humanity. State would not like to extradite a person who is not a criminal in the eyes of law. If it does so it will not be in compliance with the law of natural justice.

2) In case if the political offenders is extradited, it is feared that they would not be treated fairly. It is the duty of territorial state to ensure safeguards to the surrendered fugitives for a fair trial in the requesting state. Since it is difficult task, they are not extradited.

3) the rule protect extra-legal character which the requesting state might attempt to take against the political offenders.

4) the political offenders to take shelter in another country is same as those of the ordinary criminals.

5) political offenders are not that dangerous for the territorial state as may be in the case of ordinary criminals.

**Exceptions to the political offence exception:**

There are chances that, fugitives will take undue advantage of the principle of non-extradiction of political offenders by posing themselves as political offenders.

In 1856, Belgium introduced the attentat clause in its extradition law to keep a check to restrict the principle misuse. Article VI of the act provides that an attempt on the life of head of a foreign government or the members of his family shall not be considered to be a political offence, or an act committed with such an offence, when it is fact constitute murder, assassination or poisoning. Still Attentat clause\textsuperscript{462} is not a general rule of international law. For instance, the queen of England or the President of India may not be as powerful as the Prime minister.

A no. Of serious crimes at present for which the political offence exception is no longer accepted are:

2) Multilateral treaties like Genocide convention of 1948 and the convention on Apartheid of 1973

\textsuperscript{461} European Convection on the suppression of Terrorism.

\textsuperscript{462} The clause has found its way into many treaties. For instance, see Article 4(2) of the Extradition Treaty between Germany and Turkey of 1930; Article 4(2) of the Extradition Treaty between France and Czechoslovakia of 1928; Article 6 of the Extradition between Belgium and Poland of 1931.
expressly excluded it. The Genocide convention provides under Article VII that genocide, conspiracy to commit genocide, direct and indirect public incitement to commit genocide, attempt to commit genocide and complicity in genocide shall not be considered political crimes.

2) In case of customary international law crimes such as war crimes and crimes against humanity, political offence is not recognised as an exception to extradition. The extradition treaty concluded between India and Britain in 1992 also prevent the suspected terrorists from arguing that their offence are political to avoid extradition.

3) Multilateral treaties relating to hijacking, torture or hostage taking, injury to diplomats and grave breaches of the Geneva conventions on the laws of war and armed conflict have seriously undermined the exception by requiring states either to prosecute or extradite despite the fact that they will normally be politically motivated.

4) States have excluded the political offence exception in the case of some purely localized criminal offence by means of bilateral or multilateral treaties.

5) It has been held not to protect former government officials guilty of human rights abuses.

Extradition treaty between India and Canada concluded on February 6, 1987 provided under Article 5(1)(a) that extradition may be refused if the offence in respect of which it is requested is considered by the requested state to be political offence or an offence of a political character.

The question really is, whether, upon the facts, it is clear that the man was acting as...
one of a number of persons engaged in acts of violence of a political character with a political object, and as a part of the political movement and rising in which he was taking part....

His extradition was refused on the finding that his motive for the act was political. The deciding factor for an offence to be considered as political, according to the court was that the act should have been committed in the course of a political struggle or disturbance during which two or more parties in the state are contending and each party seeks to impose the government of its choice on the other. In other words, the act should be done against the established regime, by the other party, seeking to establish its own regime.

Re Meunier Case:

In the case of Re Meunier which came before the court 3 years after the case of Castioni, the principle laid down in previous case of Re Castioni was repeated once again. In Re Meunier, the petitioner was a French anarchist who was charged with causing explosions at a particular I and also in certain barracks in France, one of which resulted in death of two individuals. The principle laid down in Re Castioni and Re Meunier was followed for a fairly long time by other states as well. The federal court of the United States, in 1894 in Rec Ezta held that in order ‘to bring an offence within the meaning of the words’ political character’ it must be incidental to and form part of political disturbance. The Federal Tribunal of Switzerland in Re Pawan, the supreme court of Brazil in Re Benegas case also applied the strict principle laid down in the Castioni case. According to these decisions, an offence is considered to be political if it directed against the state or the constitutional order, or be otherwise ‘inextricably involved in conditions disturbing the constitutional life’ of the state. It should be committed by an organised movement to secure power in the state against the established regime.

Criticisms of the Re Castioni and Re Meunier cases:

Previously noted approach in defining the term political offence appears to be narrow and rigid. Many acts of individuals such as terrorist acts of personal vengeance or gain and acts having an entirely local impact are totally excluded from the category of political offence. It is defined if a group of people persuades the government to do any particular act, and in the course of their persuasion, they commit certain crimes, their object is not to overthrow the government, yet the crime may be considered as political. Further, the above view does not take account of the motive of the crime. An individual may fear of not getting fair trial from the government of his own state on social, economic, religious or cultural grounds which are inextricably woven with the policies of the government. Such persons are not treated as political offender according to the above approach taken in Castioni and Meunier cases.

Extradition and deportation:

Extradition and deportation both are the method by which an alien is required to leave the territory. However both differ from one to another. Firstly while extradition is primarily performed in the interest of the requesting

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467 (1891) 1 QB at p. 156 and 159.
468 (1894) 2 QB 415.
469 (1894) 62 Federal Court p. 972 at p. 999.
470 Annual Digest (1927-28) Case no. 29 p. 347.
471 Annual Digest (1948) p. 800.
state, deportation is performed in the exclusive interest of the expelling state. Secondly, extradition needs the consensual co-operation of at least two states, whereas deportation is a unilateral action apart from the duty of the receiving state to accept its own national.

Thirdly, extradition applies to criminal prosecutions and thus suppresses criminality, expulsion order may be issued to any foreign national on a number of grounds.

Fourthly, while extradition of a person takes place only on the request of another state, expulsion is an order of a state which prohibits a person to remain inside the territory of the ordering state.

**Law of extradition:**

Extradition is a topic which does not come exclusively under the domain of international law thus rules regarding extradition are not well established.

Law of extradition is a dual law.

It has 2 operations

1) National
2) international.

Whether the extradition or non-extradition of a person will be done or not it is determined by the municipal courts of a state, but at the same time it is also a part of international law because it governs the relations between two states over the question of whether or not a given person should be handed over by one state to another state.

This question is decided by the national courts but on the basis of international commitments as well as the rules of international relating to the subject.

In 1935 the Harvard Law School prepared a draft Convention on the subject. The International law association has also considered legal problems relating to extradition in the Conference held at Warsaw. In 1928 the Draft Convention extradition was approved but nothing has materialized in concluding a universal convention on extradition.

International law Commission has also not yet taken this topic for its consideration for codification despite the inclusion of the topic of extradition in 1949, in its provisional list of fourteen topics for codification. It is desirable if a multilateral convention is concluded so that general rules of international law may be settled regarding extradition.

Attempts have also been made by the states to conclude regional conventions on the subject. The Pan American Conference of 1902 produced a treaty signed by twelve states but it was not ratified. The Asian-african Legal Consultative Body also prepared a draft Convention on extradition at its meeting in Colombo in 1960.

In September, 1965, the Commonwealth Conference of Law Ministers and chief Justices expressed the desire for a Commonwealth Convention on Extradition. Some states, no doubt, are parties to schemes of extradition between a group of states having geographical affinity. For instance, the European Convention on Extradition was signed on December 13, 1957 by the members states of the Council of Europe, and the Arab League extradition agreement was approved by the council of the League of Arab states on September 14, 1952. Such regional conventions contribute to the trend of creating general rules of extradition.

In India, rules regarding extradition have been made in the Extradition Act of 1962 and the Extradition (Amendment) Act, 1993. Extradition is done by India only when the condition laid down in the Act are satisfied. Similarly, other states have extradition laws.
Extradition treaties:

Foremost condition of extradition is the existence of an extradition treaty between the two states. Some states such as the United States, Belgium and the Netherlands, requires a treaty as an absolute pre condition. The strict requirement of an extradition treaty may be regarded as the most obvious obstacle to international cooperation in the suppression of crimes. Since extradition treaties are politically sensitive and require careful and lengthy negotiations, States have few extradition treaties and the criminal can usually find a safe haven—that is a state which requires a treaty for extradition and has no such treaty with the state within whose jurisdiction the crime was committed. It is therefore, desirable that states conclude extradition treaties with as many states as possible to suppress the crime.

In order to provide assistance to states interested in negotiating and concluding bilateral extradition agreements, the General Assembly on December 14, 1990 adopted a Model Treaty on Extradition by adopting a resolution. India does not have any extradition treaty with Portugal. However, when Abu Salem, an accused in 1993 Mumbai blast and an underworld don fled to Portugal along with his wife Monica Bedi, Portugal, in the absence of a treaty, extradicted Abu Salem to India after the latter gave assurance that he would not be given death sentence. Later, high court of Portugal passed an order on July 14, 2004 along with reasons for his extradition to India. Abu Salem was extradited in 2006 on the condition that he will not be given death sentence. His wife has also ordered to be extradition to India.

Conclusion:

In cases where a crime is recognised in both the states, i.e. in the territorial as well as in the requesting state, but the crime for which the extradition is demanded is punishable by death in the requesting state and not in the territorial state, a further difficulty may arise in extraditing a person. Territorial state may hesitate to extradite such a person as it would offend its conscious if it has to extradite a person to whom death sentence would for that offence. In such case treaty provides a provision in that requesting state gives a assurance that they will not give death sentence to the fugitive.

A fugitive may be tried by the requesting state only for that offence for which he has been extradited. (rule of speciality).

472 Quattrocchi an Italian businessman and an accused in Bofos Scam could not be extradited to India from Italy in the absence of a treaty between the two countries. Negotiations for an extradition treaty with Italy were initiated in 2001 but two countries have not concluded any treaty as yet.
PREVENTION OF CRUELTY TO ANIMALS ACT, 1960

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ABSTRACT:

God created this planet with so much love and care so that cruelty doesn’t exist among the things created. The best creation among them is the human beings but we have lost all the love we had by acting selfish. Our selfishness led to the cruelty to animals. It is said we will never find peace among people whose heart finds satisfaction in killing living things. To curb the menace of cruelty against animals, various laws have been initiated by the central government, but one of the main laws in concerning prevention of animals cruelty are the “PREVENTION OF CRUELTY TO ANIMALS ACT, 1960”. This article gives an overview of the Act by explaining what is cruelty and what amounts to cruelty, the measures taken by the Government to prevent cruelty to the mute spectators. Thus, living things include human beings, animals, plants, etc and not only human beings so let us keep this in mind and try to prevent the cruelty caused to animals and not to act selfishly.

INTRODUCTION:

All living things have a right to live on this earth but, we very often become, totally, insensitive to their pain, only because animals cannot speak the language of humans, they don’t have a voice. When god created this planet he had a specific purpose for all living things and he did so to strike a balance in his creation. He wanted a world where harmony and peace prevailed and so he made the ‘food chain’ which maintains the ecological balance in nature but man in his greed has recklessly been plundering the natural abode of animals, killing them indiscriminately for pleasure, for food, for their skin and other parts of their body and some to serve his needs. Mahatma Gandhi once rightly said, “the greatness of a nation is judged by the way it treats its animals”. But in today’s world, no need is paid to basic morals and ethos and in a rat-race to earn more and easy money, animals become the targets. They are exploited since they are mute spectators and are incapable of raising their voice against these cruelties.

To curb the menace of cruelty against animals, various laws have been initiated by the central government, but one of the main laws in concerning prevention of animals cruelty are the “PREVENTION OF CRUELTY TO ANIMALS ACT, 1960”. Under this act, police have all powers to arrest an offender who is found to be involved in any illegal activity or in cruelty against animals. It also provides provision wherein a private individual under the provisions of Section 43 of Cr.P.C can detain or cause to detain such individual involved in any such act.

ANIMAL CRUELTY:

Animal cruelty refer to unwarranted cruel treatment of animals. Any unnecessary harm and pain inflicted upon an animal would amount to animal cruelty. The range of stakeholders involved in the animal welfare debates include industry and producer groups, science bodies and animal welfare non-governmental organizations and professional groups, including the

473 Section 43 of crpc.
veterinary and legal profession. Animal cruelty would be either due to negligence or intentional act. Negligence may be like failing in providing good food, shelter and care for animals. Sometimes the owner may not be aware of certain facts that makes the animal uncomfortable and unhealthy. Intentional Act like making them participate in commercial profit games like cock fighting, dog fighting and illegal slaughter house. Animal cruelty could be recognized when we see wounds on animal body, when there are several outgrown nails, extremely thin animals that are starving, while they limp, keeping animals out in extreme climate conditions, animals being crammed into tiny cages that are not their size. Kept in unhygienic conditions and so on.

PREVENTION OF CRUELTY TO ANIMALS ACT, 1960:

The prevention of cruelty to animals act, 1960 was enacted by the parliament in the eleventh year of the Republic of India on 26th December 1960. It consists of 6 chapters and 44 sections along with 16 Rules.

OBJECT OF THE ACT:

1. An act to prevent the infliction of unnecessary pain or suffering on animals.

2. It provides ANIMAL WELFARE BOARD OF INDIA, a committee for control and supervision of experiments on animals.

DEFINITIONS:

**ANIMAL:** ‘animal’ means any living creative other than a human being.

**CAPTIVE ANIMAL:** ‘captive animal’ means any animal (not being a domestic animal) which is in captivity or confinement, whether permanent or temporary, or which is subjected to any appliance or continuance for the purpose of hindering or preventing its escape from captivity or confinement or which is pinioned or which is or appears to be maimed.

**DOMESTIC ANIMAL:** ‘domestic animal’ means any animal which is tamed or which has been or is being sufficiently tamed to serve some purpose for the use of man or which, although it neither has been nor is being nor is intended to be so tamed, is or has become in fact wholly a partly tamed.

**PHOOKA (OR) DOOM DEV:** ‘phooka’ or ‘doom dev’ includes any process of introducing air or any substance into the female organ of a milch animal with the object of drawing off from the animal and secretion of milk.

**DUTY TOWARDS ANIMALS:**

Apart from the fundamental duty imposed on citizens of this country to have compassion towards living creatures, Section 3 of PCA confess a statutory obligation on persons having the care or charge of any animal to take all reasonable measure to ensure the well-being of such animal and to prevent the infliction upon
such animal of unnecessary pain or suffering.\textsuperscript{481}

**ANIMAL WELFARE BOARD OF INDIA:**

An animal welfare board shall be constituted for the purpose of protecting animals from unnecessary pain or suffering.\textsuperscript{482} The board is fully funded by the central government\textsuperscript{483} and consists of 23 members\textsuperscript{485} from different fields, including:

1. Inspector- general of forests- ex officio.
2. Animal husbandry commissioner to the government of India- ex officio.
3. Ministries of home affairs and education- 2 members.
4. Indian board for wild life- 1 member.
5. Association of veterinary practitioners- 1 member.
6. Practitioners of modern and indigenous system of medicine- 2 members.
7. 1-Member to represent 2 municipal corporations each.
8. 1-Member to represent 3 organization activity interested in animal welfare each.
9. 1-Member to represent each of 3 societies dealing with prevention of cruelty to animal.
10. 3-Members nominated by the central government.
11. 6-Members of parliament.

**FUNCTIONS OF THE BOARD:**\textsuperscript{485}

- Any matters connected with animal welfare.
- Matters related to animal hospitals.
- Amendments of the act to be taken time to time.
- Improvement of vehicle design to transport animals.
- Improvement of providing facilities to animals.

**Like :-**

1. Construction of sheds.
2. Water trough.
3. Veterinary assistance etc..

- Giving financial and other assistance to animal welfare organization.
- Giving advice to central government or other on methods of killing of animals and maintenance of animal house.

The Animal welfare board of India (AWBI), the first of its kind to be established by any government in the world, was set up in 1962 in accordance with section 4 of the act. Smt. Rukmini devi arundale pioneered the setting up of this board, with its headquarters in Chennai.

**ACTS OF CRUELTY AGAINST ANIMALS:**

We may have an understanding as to what may amount to cruelty against animals, the act provides an exhaustive list of offences which would amount to treating of animals cruelty and are punishable. Section 11 of the PCA enumerates the instances as:-

- Beating ,kicking, over-riding, over-loading, torturing or treating any animal in a manner that causes unnecessary pain or suffering.
- Employing any animal which is not fit for employment due to age, any disease,

\textsuperscript{481} Shantakumars introduction to environmental law, lexis nexis, 2nd edn, reprint2010,p.302.
\textsuperscript{482} Section 4 of PCA Act,1960
\textsuperscript{483} Section8,id.
\textsuperscript{484} Section 5,.id.
\textsuperscript{485} Section 9.id.
infirmity, wound-sore or other similar cause.
- Willfully and reasonably administering any injurious drug or injurious substance to any animal or attempting to cause such substance to be taken by any animal.
- Conveying or carrying any animal in any vehicle in a manner leading to unnecessary pain and suffering.
- Keeping or confining any animal in any cage or receptacle which does not measure sufficiently in height, length and breadth preventing reasonable movement of such animal.
- Keeping any animal chained for an unreasonable time.
- Being the owner of any animal and failing to provide such animal with sufficient food, drink or shelter or abandoning any animal without any reasonable cause which would result in pain due to starvation or thirst.
- Mutilation or killing any animal including stray dogs by using the method of strychnine injections in the heart or in any other unnecessarily cruel manner.
- For entertainment purpose, confining or inciting any animal to fight or bait any other animal.
- Performs any act for the purpose of increasing the lactation of any milch animal shall be punished with a fine which may extend to thousand rupees or imprisonment for a maximum term of two years or both.

**ACT NOT CONSIDERED CRUEL:**
The exceptions to cruelty to animals are

- The dehorning of cattle or the castration or branding or nose-roping of animal, in the prescribed manner.
- The destruction of stray dogs in lethal chambers.
- The extermination or destruction of any animal under the authority of any law for the time being in force.
- The commission or omission of destruction or such preparation of destruction of any animal as food for mankind unless such destruction or preparation was accompanied by the infliction of unnecessary pain or suffering.
- The act makes it lawful to kill any animal in a manner required by the religion of any community.

**EXPERIMENTATION:**

Section 14 of PCA experimentation of animals for the purpose of prolonging life or alleviating, suffering or for combating any disease, whether of human beings, animals or plants, then this act will be unlawful. The central government may constitute a committee for controlling and supervising such experiments if it wishes to. That committee has the power to

1. Constitute further sub-committees.
2. Prohibit experiments on animals after allowing the person conducting the experiment a reasonable chance to explain.
3. Conferred with power of entry and inspection.
4. Impose certain penalties on event of contravention of any of the orders given by the committee.  

ENTERTAINMENT:

The act prohibits exhibition and training of any animal, which is notified by the central government. If any person has registered with the prescribed authority for the purpose of exhibiting or training any performing animal he may exhibit or train subject to certain conditions. The act also provides the definitions of exhibit and train exhibit means exhibit or any entertainment to which the public are admitted through sale of tickets, and train means train for the purpose of any such exhibition. The court has the power to restrict or prohibit the training of such performing animals. The magistrates needs to be satisfied that the training or exhibition of any performing animals has not been accompanied by unnecessary pain or suffering. Any person authorized by the prescribed authority or police office not below the rank of a sub-inspector may enter and inspect any premises in which performing animals are being trained or exhibited or kept for and require the trainee or exhibitor to produce his certificate of registration.

EXCEPTION:

1. Training or exhibition of such animals for bonafide military or police purpose.

2. Exhibition of animals for education or scientific purpose by any zoological garden or by any society or association, which keeps the animals with the principal object of education or scientific purposes.

PUNISHMENT:

SECTION 11:

- First offence of cruelty (offence).
- Fine not less than Rs.10 which may extend to Rs.50 (punishment).
- Second or subsequent offence of cruelty committed within 3 years of previous offence (offence).
- Fine not less than Rs. 25 which may extend to Rs. 100 or imprisonment for a term which may extend to 3 months or both (punishment).

SECTION 12:

- Practice of phooka or doom dev (offence).
- Fine which may extend to Rs.1000 or with imprisonment which may extend to 2 years or both.

SECTION 20:

- Experimentation (offence).
- Fine which may to Rs.200 (punishment).

SECTION 26:

- Exhibits or trains any performing animal without registration or in a manner with respect to which he is not registered or any animal not be used or obstructs or willfully delays any person or police officer from exercising of power to enter and inspect or conceals any animal with a view to avoid inspection or fails to produce his certificate registration.(offence).

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494 Section 20, id.
495 Section 22, id.
496 Section 20, id.
497 Section 23, id.
499 Section 27, id.
- Fine which may extend to Rs.500 or imprisonment which may extend to 3 months or both.

**SECTION 38:**

- Contravenes or abets the contravention of any rules made by central government (offence).
- Fine which may extend to Rs.100 or imprisonment extend to 3 months or both (punishment).

**CASE LAWS:**

1. **N.R.NAIR V. UNION OF INDIA**

   ISSUE: The validity of section 22 of the PCA act and the notification issued under section 22 to the effect that ‘no person shall train or exhibit any animals specified therein namely, bears, monkeys, tigers, panthers, and lions’.

   **HELD:**

   The welfare of the animals is of the paramount consideration and it is only if the government is satisfied on the material record that unnecessary pain or suffering is inflicted on an animal during the course of training or at the time which it is exhibited that a notification is issued. The court has the duty to look into the matter that the government had arrived at the said decision after considering all the facts relevant for it to make that decision. The court was also satisfied that the impugned notification was within the parameters of the prevention of cruelty to animals act, 1960.

2. **ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA**

   ISSUE:

   Whether events of bullock- cart race that were being conducted in states of Tamil Nadu and Maharashtra were in violation of sections 3, 11 (1) (a), 21 and 22 of prevention of cruelty to animals act, 1960.

   **HELD:**

   Facts showed that during Jallikattu, many animals were observed to engage in flight response as they try to run away from arena when they experience fear or pain, since the area was completely enclosed. Jallikattu demonstrated link between actions of humans and fear, distress and pain experienced by bull. Also the court held that studies indicate that rough or abusive handling of bulls compromises welfare and for increasing bulls fear, often, they were pushed, hit, prodded, abused, causing mental as well as physical harm. Further held the organizes of jallikattu were depriving rights guaranteed to bulls cannot be used as a performing animals for jallikattu and bullock- cart race, since they are basically draught and pack animals, not anatomically designed for such performance. Therefore the appellant was right in their stand that jallikattu, bullock- cart race and such events per se violate sections 3, 11(1) (a), 21&22 of the PCA Act. Therefore, bulls cannot be used as performing animals, either for jallikattu events or bullock- cart races in state of Tamil Nadu or Maharashtra or elsewhere in the country.

**RULES MADE UNDER THE PREVENTION OF CRUELTY TO ANIMALS ACT, 1960:**

Section 38 of the PCA Act, has made the following rules:
1. PREVENTION OF CRUELTY TO DRAUGHT AND PACK ANIMALS RULES, 1965

The rules prescribed that:

a) the maximum loads for draught animals.
b) maximum load for certain animals.
c) maximum number of passenger for animal drawn vehicle.
d) working hours for draught and pack animals.
e) prohibition conditions for the use of spiked stick.

2. GENERAL CONDITIONS FOR THE USE OF DRAUGHT & PACK ANIMALS: 502

a) use any animal for drawing any vehicle or carrying any load.
1. for an average of more than 9 house in a day.
2. for more than 5 hours continuously without a break or rest for the animal.
3. any area where the temperature exceeds 37degree celcious during the period between 12 noon and 2 pm.

3. THE PREVENTION OF CRUELTY TO ANIMALS (LICENSING OF FARRIEES) RULES, 1956.

The rules prescribes.

1. the procedure for licensing of farriees. 503
2. persons entitled to apply for license.
3. term of licence and renewal.
4. cancellation of licence.


The rules prescribes

1. the capture of birds.
2. the capture of other animals.


These rules prescribes.

1. application for registration.
2. form of certificate of registration.
3. maintenance of register.
4. copies of certificate, etc. sent to animal welfare board.


Prescribes rules for

1. transport of dogs, cats, monkeys, cattle, equines, sheep and goats.
2. size and type of crate for transportation of dogs, cats etc.


Prescribes rules for

1. application of fines levied under the PCA Act.
2. fines, after deducting cost of collection to be made over to board.
3. application of fines made over to board.
4. principles to govern application of fines.

502 Section 6 the prevention of cruelty to draught and pack animals rules, 1965.

503 Farriers means a person who carries on the business of shoeing cattles.

504 Horses, mules and donkeys.
8. THE PREVENTION OF CRUELTY TO ANIMALS (REGISTRATION OF CATTLE PREMISES) RULES, 1978.

Prescribes rules for
1. registration of premises.
2. application for registration.
3. certificate of registration.
4. inspection of premises.
5. cancellation of registration.


1. controlled breeding.
2. immunization.
3. sterilization and licencing.
4. euthaniasia of street dogs.

10. PREVENTION OF CRUELTY TO ANIMALS (REGULATION OF LIVESTOCK MARKETS) RULES, 2017.

1. provides adequate facilities like housing, feeding etc. to animals.
2. apply only to animals which are brought and sold in the notified livestock markets and animals that are seized as case properties, and not on other animals.
3. envisage to protect the animals from cruelty and not to regulate the existing trade in cattles for slaughter houses.
4. advocate the trade of only healthy animals for agricultural purpose from the livestock market.

11. PREVENTION OF CRUELTY TO ANIMALS (DOG BREEDING AND MARKETING) RULES, 2017.

1. defines the breeding requirements/conditions for sale.
2. mandatory to register themselves with the state animal welfare board of the respective state governments.
3. defences the requirements to be med by the breeders and the establishments used for breeding.
4. every dog breeder is required to submit yearly report to the state board regarding animals sold etc.
5. mandatory for dog breeders to maintain proper records of both male and female dogs, their breeds etc.

CONCLUSION:

“Animals are not over to eat, wear, experiment on use for entertainment or abuse in anyway”.

In many religions, animals were worshipped in the past and any cruelty towards them was condemned by the society and so their rights were protected but, today we are becoming insensitive not only towards animals but also towards other human beings. Everything on this earth has a well defined purpose, thus, there is a need to have strong laws for protecting the rights of animals, only they can be saved from man’s greed and selfishness and balance of nature can be maintained. Thus, prevention of cruelty to animals act, was enacted to prohibit any person from inflicting causing or if it’s the owner, permitting, unnecessary pain or suffering to be inflicted on any animal. It is still not too late, let us together pledge to make a difference. Eventhough we have several organizations to prevent cruelty to animals, their voices are not raised properly and are ineffective. So it is everyones duty to not harm animals.

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505 Slogan of PETA.
INDIAN POLICE- AWAITING THE REFORMS.

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ABSTRACT
Police force is a body constituted of persons empowered by state to enforce the law, to protect people and property, to prevent crime and civil disorder. Their powers include the power to arrest and the legitimized use of force. The modern day Indian police system originated during the British rule in India. The purpose of setting up police stations and appointing Darogas was prevention of any conspiracy against the British Rule and prevent any revolt like that of 1857. For this sole purpose they appointed Indians as Darogas because after the Revolt of 1857, they had realized that they can never replace the home rulers and an Indian Daroga would be best suited to know any conspiracy against the British. The long spell of British Rule laid down the foundations of the Police and the Judicial Systems in India. The Police system of India is still governed by the age old Police Act of 1861.

In the direction of the police reforms, the following infrastructural issues need to be focused upon:
(A) The democratic nature of the Constitution of India does not get reflected in the organizational concept of the police.
(B) The political executive has asserted its executive power by the political influence of the police.
(C) The political parties, the press and the ideologies of the political leader have done very little to develop the Indian Police System as an efficient and responsible organization.

Police reforms in India have long been a topic of debate. Even after the apex court’s intervention in the matter, and recommendations given by the Hon’ble Supreme Court in Prakash Singh V. Union of India, the states have failed to comply with the same. As a result, ever since the inception of modern police system in the colonial era, the system remains largely stagnated and governed by age old Police Act of 1861.

The paper thus deals with the prospective reforms that can be brought about in the police system in India.

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The Indian police, being engulfed in such complex scenarios, finds it difficult to function efficiently and it has aptly been described as a “Prisoner of History” and “A victim of Social Change”. The police, in order to function properly as law enforcers and to maintain law and order, largely need public support and the public on the other hand needs to support the police in order to secure for themselves, a sense of security for body and property. The police and the public will fail without each other and the police inadequacies have largely been due to the communication gap between the police and the public.

**POICE IN THE ANCIENT INDIA:**
Although the mention of a law and order maintaining authority can be found in epics as well as the Vedas, but in the ancient India, the first mention of an organized, authoritative and accountable system can be traced back to the Mauryan empire. Dr. R. K. Mookerji in his book “Chandragupta Maurya and his Times” refers to Kautilya’s Arthashastra in which 18 great officers had been mentioned. These officers were (1) Mantrin, (2) Purohita, (3) Senapati, (4) Yuvaraja, (5) Dauvarika, (6) Antarvansika, (7) Prasasta, (8) Samaharta, (9) Sannidhata, (10) Pradeshta, (11) Nayaka, (12) Pauravyavaharika, (13) Karmantika, (14) Mantri Parishat Adhyaksha, (15) Dandapala, (16) Durgapala, (17) Antapala, (18) Atavika. Dauvarika was responsible for the maintenance of law and order of the outer life of the palace, and Antarvansika was in charge of the peace and security in its inner life. The Dandapala, the Durgapala and the Antapala were military officers but were discharging a good deal of police functions, they being in charge of the peace and order of the country at large. The Dandapala in later times became out and out a Police Officer; so also was the case of Durgapala, who in later times became known as Kotapala and subsequently as Katuala (or Kotwal). Kautilya describes the administration of criminal law as Kantaka Sadhana, the clearing of thorns, which means the eradication of the dangerous elements by criminal laws and police regulations. The police, system under Asoka consisted of Mahamatras, who were the highest executive officer in the province responsible for the maintenance of peace and order.

**POLICE IN THE MODERN INDIA:**
A new phase in the system of the police in India was opened with the annexation of Sind in 1843. Sir Charles Napier, who took the administration of the newly conquered province, organized the police system in Sind Police, may fairly be claimed as the parent of the modern Indian Police. It consisted of a military preventive police and a civil detective police. The Sind system was introduced in Bombay in 1853. In every district a Superintendent of police was appointed who, while generally subordinate to the Magistrate had exclusive control over the police. He realized that only under a recognized organization, the police could function properly and produce desired results. He reorganized the native police system on the basis of a colonial model of police, namely *Royal Irish Constabulary*. His system was based on two basic principles; first, the police must be completely separated from the military, and second, they must act as an independent body, assisting Collectors in discharging the responsibilities for law and order, but under their officers.

The events of 1857 necessitated an instrument to control the vast lands at an economical cost. After facing a real threat of losing power in 1857, the British rulers were determined to ensure complete
suzerainty and suppression of all challenges to their power. A Police Commission was appointed in August 1860 with the aim of making police an efficient instrument for the prevention and detection of crime. The commission was told to bear in mind that functions of a police are either protective and repressive or detective and that the line which separates the protective and repressive functions of a civil force from functions purely military, may not always be very clear.\textsuperscript{508}

The \textit{Indian Police Act} (IPA) of 1861 imposed a uniform police system on the entire country. The Act established organized police forces the responsibility of the various provincial governments. Within the provinces the police was to be recruited, trained, disciplined and control by British officers. The Act established Indian police (IP), a superior police service. It was conceived to relieve the District Magistrate of his duties to keep check over the local police and make it more professional in nature. Thus, police force became organized, disciplined and well-supervised. The Act instituted a system of policing in India which is still in force.

In the present day, the Article 246 of the Constitution of India and the Section 3 of the Indian Police Act, 1861, makes police system a state subject. The states are free to regulate the subject in the best interests of the state. In addition to civil and armed forces there are departments like detective police, traffic police revenue police, mounted police, fire police, and technical branches like prosecution branch, radio branch and intelligence police. The head of the police in the state is the Director General of Police. The following reforms can be suggested in the Indian Police System:

\section*{I. MODERNIZATION OF INVESTIGATION METHODS:}

In Prakash Singh V. Union of India\textsuperscript{509}, the apex court directed for the division of the police system into two branches, one that would be dedicated to the investigation purpose and the other that would work for the maintenance of law and order. It was noted that the investigation of cases, particularly of the heinous crimes and the specialised crimes such as bank robbery, forgery and the cyber crimes are flawed and half cooked. The Investigating officers are burdened with the maintenance of law and order, which takes overriding precedence over all other functions of the police. It was also found that the investigating officers were poorly trained in dealing with crimes that fall under the category of cyber crimes or the Narcotic Drugs and the Psychotropic Substances Act, 1985, cases of bank frauds and also the cases involving the interstate verifications. Such cases require specialised training that needs to be imparted to the Investigating officers at the grass root levels of their training, which is lacking in the present police system.

The states have grossly failed to comply with the directives of the Hon’ble apex court regarding the investigation process amendments.

\section*{II. PROSPECTIVE AMENDMENTS TO THE TRAINING:}

The training of the police officials is by and large, in the nature of physical fitness and weapon training. In the present scenario,

\begin{footnotesize}
\footnote{\textsuperscript{508}Imperial Gazetteer of India, Part IV, reprint 1909, p. 380} \\
\footnote{\textsuperscript{509}Supra note 2.}
\end{footnotesize}
where the evolution of cyber space has added a whole new dimension to the world of crime, such training process needs colossal amendments. The crimes these days operate beyond a specific jurisdiction and, thus, the police must be imparted with specialised training to deal with the cyber crimes, bank frauds and the similar.

Moreover they must be provided with periodical training sessions to keep the police system updated with the criminal trends and to ensure their efficiency. Meanwhile the Central Government provides for the regular training sessions to the police officers empanelled through the Union Public Service Commission, the states have failed to keep the state police machinery updated and in vogue of the criminal pattern, which is changing with the changing times.

According to the Malimath Committee: “There is, thus, a great need to develop and sharpen investigative skills of the officers through regular training programmes at the induction stage and periodical in-service training courses.”

Currently there are only three Central Detective Training Schools in India, in Kolkata, Chandigarh and Hyderabad. There are state training institutions, but according to the Malimath Committee these institutions seem to be unable to facilitate the required courses. The small number of qualified training schools complicates the possibility to send police personnel on continuous training.

III. MANUALS OF THE POLICE:

Police Manuals are antiquated and have not been updated ever since the commencement of the police system in India. The present era relates to the digital facilities and most of the functions such as ticket generations, payments and the bank activities, alongwith shopping have been made available online. Even in the police system, the registration of FIRs, and complaints regarding the harassment can be done through online portals such as the online complaints portal of the Ministry of Human Resource Development and the women’s helpline of 1090. But many basic functions that can be easily done online, such as sending summons, is still done personally by the policemen. Such lags result in the inefficiency of the system and they can easily be done away with the updates of the police manuals that the states have failed to provide, and the police manuals designed by the British continue to be in force, that require huge manpower for small works that may easily be done by modern technologies.

IV. POLICE AND THE GENDER SENSITIZATION:

The statistics show that:

- One case of violence against women took place every 4 minutes in 1998.
- One woman/girl was raped every 35 minutes in the same year. In 1995 there was one rape every 38 minutes.
- Some unfortunate woman got molested every 17 minutes.
- One dowry death took place every 75 minutes. In 1997 there was one dowry death every 87 minutes.

510 Committee on Reforms of Criminal Justice System Report Volume 1” (India March 2003) Government of India, Ministry of Home Affairs p. 101

There was one instance of torture every 13 minutes.

The gender insensitivity in the police occurs due to inadequate training at the grass root level and the masculinity that pervades through the structure of police organization. In spite of the shocking and frightening picture, the police response to violence against women continues to be grossly inadequate and inappropriate. Besides the reasons for the generally poor response to instances of crime such as increasing workload, lack of resources, pressure of political bosses to maintain crime figures at a low level, mal-practices in the organization, there are certain specific reasons for the lack of appropriate response to offences against women. The cult of masculinity prevalent in the department makes the police officers hold some stereotypes about violence against women. The stereotypes lead to certain standard patterns of police response. The basic training of the police must incorporate the training to shun these stereotypes and train a gender sensitive staff in the police system. For the gender insensitivity of the police instils a fear of harassment and humiliation in the mind of the women folk who dread to approach the police station.

Because of the several social factors, women are more afraid of crimes than men and fear of crime extends well beyond the women who have themselves been victims. Further, because of several socioeconomic factors, women victims are differently placed than their male counterparts. In view of the above, there is need for police to act in a gender sensitive manner in all cases relating to violence against women. The increase in violence against women calls for a prompt and proper response from the police on all such complaints. As gatekeepers of the criminal justice system, police enjoy wide discretion in enforcement of law. Differential law enforcement, indifferent police response and fear of police deny women the access to justice.

V. POLICE REFORMS VIS-À-VIS CYBER CRIME:

Cyber crimes provide a different dimension as they are committed incognito, with no boundary of jurisdiction. The Indian police remains largely untrained to the cyber crimes. Though many states have cyber crime cells but the conviction rates in such crimes remains by and large inadequate. Most states have not recruited competent professionals for properly understanding, appreciating and combating the nature and dimension of cyber crimes, the rates of which is on a voluminous increase.

A comment on any social media, or the harassment of victims by way of prying or blackmails, however traumatic it may be for the victim, the police system remains indifferent to these crimes that operate with no regional, state or national boundaries. Success in this field can be achieved by implementing the Hon’ble apex court’s directive, as propounded in Prakash Singh and Others V. The Union of India512, which instructed the state governments to set up Police Establishment Boards, that would ensure the proper cooperation and coordination between the police of different states.

VI. COMBATING POLITICAL STRONGHOLD OVER THE POLICE:

512 Supra note 2.
On 22 September, 2006, the Hon’ble apex court delivered a historic judgement in the case of Prakash Singh and others V. Union of India and others, instructing the central and the state governments to comply with seven directives for police reforms. Policing is an essential public function and the state is responsible to provide the citizens with the best police services possible. The Hon’ble Supreme Court recommended the following reforms for the police:

1) **State Security Commission:** The court directed the state governments to establish a State Security Commission in every state to ensure that the government does not exercise unwarranted control over the police. As per the court directive, the commission must be headed by the Chief Minister of the State or the Home Minister as the Chairman and the DGP as the Ex-officio Secretary.

2) **Appointment of the DGP:** The Hon’ble apex court held that “The Director General of Police of the State shall be selected by the State Government from amongst the three senior-most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and the range of experience. And, once he has been selected for the job, he should have a minimum tenure of at least two years irrespective of his date of superannuation. The DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission consequent upon any action taken against him under the All India Services (Discipline and Appeal) Rules or following his conviction in a court of law in a criminal offence or in a case of corruption, or if he is otherwise incapacitated from discharging his duties.”

The directive provided that the DGP must be selected from the three top most senior officers empanelled by the Union Public Service Commission, on the basis of tenure of service, very good record and the range of experience.

3) **Minimum tenure for other officers:** The court directed for the stability of tenure to other officers in the field. The directive included two year term security to the following officers:
   - Inspector General of Police
   - Deputy Inspector General
   - Superintendent of Police
   - Station House Officer

4) **Police Establishment Board:** To counter the prevailing practices of subjective appointments, the court directed all the states to establish a Police Establishment Boards that will deal with matters of all appointments, transfers, postings etc. The Boards was to comprise of the DGP and four other senior most officers of the department, to ensure that the decision making doesn’t rest in the hands of only one officer.

5) **National Security Commission:** The court directed the formation of a National Security Commission which was to consist of the Union Home Minister, Union Home Secretary and the other senior members of the Central Police Organisations. The objective to set up such a commission was to ensure proper and effective cooperation between the various police forces and improve the conditions of the Central Police Force and the Central Para Military force.
6) Police complaints authority: The court directed the setting up of a police complaints authority that would look into the complaints against the police officers. The court provided for a two-fold complaint system at the district and the state level. The district complaint authority would be headed by a retired district judge and the state authority would be headed by the retired judge of the High Court or the Supreme Court as appointed by the state government.

7) Divisions of the police system: The court directed for the division of the police into two branches. One for the purpose of investigation and other for the purpose of the maintenance of law and order in the society.

So far the directives of the Hon’ble apex court have not substantially been complied with by the states.

CONCLUSION:
In the words of August “Gus” Vollmer, “The policeman is denounced by the public, criticized by the preachers, ridiculed in the movies, berated by the newspapers and unsupported by the prosecuting officers and judges. He is shunned by the respectable, condemned while he enforces the law, and dismissed when he doesn’t. He is supposed to have qualifications of a soldier, doctor, lawyer, diplomat and an educator, with remuneration, less than that of a daily labourer.”

This quote pictures the true scenario of the policing in India. Such a system, with high threshold limit of expectations in pity remuneration, is bound to crash. The result is apparent, of which we are the witness. It is imperative that more needs to be done than mere structural changes.

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ABSTRACT

Gender justice is a constitutional goal contemplated by the framers. One of the declared fundamental duties contained in Part IV, is to ensure that women are not subjected to derogatory practices which impact their dignity. Gender equality and dignity of women are non-negotiable. People of India have in exercise of their sovereign will as expressed in Preamble, adopted the democratic ideals which assures the citizen the dignity of the individuals as a means to the full evolution and expression of his personality. Right to life includes the right to live with human dignity and all that goes along with it.

However, it is a harsh reality that women have been ill-treated in every society for ages and India is no exception. The irony lies in fact that in our country where women are worshipped as shakti, the atrocities are committed against her in all sections of life. She is being looked down as commodity or as a slave, she is not robbed of her dignity and pride outside her house but she also faces ill-treatment and other atrocities within the four walls of her house. They are discriminated at two levels, firstly they suffer because of their gender and secondly due to grinding poverty. This paper examines the Supreme Court verdict which could pave way and help for the implementation of Uniform Civil Code in order to ensure and achieve the constitutional goal contemplated by the framers under the head of Fundamental Duties in the Indian Constitution.

[1] INTRODUCTION

The Supreme Court (hereinafter referred as SC) ruling in Shayara Bano and others v. Union of India (hereinafter referred as U.O.I) and others, that arbitrary personal laws cannot seek refuge under the ‘Freedom of Religion’ right and that ‘Equality before Law’ is supreme, is likely to be a valuable touchstone for the Law Commission while handling contentious issues under the Uniform Civil Code (hereinafter referred as UCC).

With SC upholding the dignity of Muslim women by abolishing the discriminatory triple talaq, similar gender justice may be on the anvil for Christian and Hindu women. In light of the triple talaq judgment that has now criminalised the practice among the Muslim community, there is a need to examine the politics that guide the practice and reformation of personal laws in India. Personal Laws in India present a situation where abolishing them in the interest of gender justice also inadvertently benefits the reactionary side.


Personal Law has the character of being binding on those to whom it applies and is enforced by State; hence it is law u/A 13. Personal Laws may be defined as that body of laws which apply to a person or to a

513 INDIA CONST. part IV.
514 INDIA CONST. art. 51A, cl (e).
516 INDIA CONST. art. 21.
517 Writ Petition (C) No. 118 of 2016.
matter solely on ground of his belonging to
or its being associated with a particular
religion.\(^{518}\) Mulla\(^{519}\) has described it as “the
Laws and customs as to succession and
family relations”. It is the law determining
questions affecting status and broadly
speaking, such questions are those affecting
family relations and family property.\(^{520}\)
There is no reason, in a secular republic, to
cull out personal law alone and exempt it
from the sweep of Art.13 and Part III.\(^{521}\)
Personal laws cannot claim supremacy over
rights granted to individuals by
Constitution.\(^{522}\)

[2.1] NARASU APPA MALI CASE IS
BASED ON FALLACIOUS
REASONING
In Narasu Appa Mali\(^{523}\), it was observed
that personal laws were not included in
expressions 'law' or 'law in force' as defined
in Art 13. This judgment has been criticised
by notable authors. With great reverence to
learned Judges, this reasoning appears to be
totally incorrect.\(^{524}\)

Art 372(2) gives to the President power to
modify laws in force and it was not the
intention of Constitution to give to the
President power to modify personal laws.
This reasoning is fallacious as SC has
interpreted “laws in force” to include not
only statutory enactments but also the entire gamut
of common laws of the land. It has been

held by SC in a series of decisions\(^ {525}\) that
“law in force” includes not only enactments of
Indian legislatures but that part of
common law of the land which was being
administered by Courts. Hence, personal
laws must be held to be included within
“laws in force” in Art 13 as also in Art 372.

Laws which are to continue in force u/A
372(1) include personal laws and these laws
are to continue in force subject to other
provisions of Constitution. Federal Court in
United Provinces v. Atiqua Begum\(^{526}\), while
construing the analogous expression “law
in force” in s. 292 of Government of India
Act 1935, observed that expression “applies
not only to statutory enactments then in
force, but to all laws, including even
personal laws, customary laws and case
laws.” While reading Explanation I, it has
to remembered that Art 372 uses the word
‘includes’, obvious implication being that
the definition is not exhaustive.\(^{527}\)

Moreover, expression “personal laws”
appears in Entry 5 List III making it clear
that State can enact legislation in relation of
personal laws. If State has power to enact
legislation for personal law, there is no
reason why it law cannot be subjected to
judicial scrutiny under Part III. The learned
judges also did not recognise personal laws
as “customary laws” and hence held that
personal law cannot come within Art

\(^{518}\)A.M BHATTACHARJEE, MATRIMONIAL
LAWS AND THE CONSTITUTION 4-7 (Eastern

\(^{519}\)MULLA’S, PRINCIPLES OF HINDU LAW 88

\(^{520}\)G.C. CHESHIRE, PRIVATE
INTERNATIONAL LAW 150 (Clarendon Press,
4thed., 1952).

\(^{521}\)Saumya Ann Thomas v. UOI, WP(C). No. 20076
of 2009(R) (Paras. 18 & 23-24) (India).

\(^{522}\)Hina v. State of UP, (2016) SCC Online All 994
(Paras. 9-10) (India).

\(^{523}\)State of Bombay v. NarasuAppaMali , AIR
1952 Bom 84 (India).

\(^{524}\)H.M. SEERVAI, CONSTITUTIONAL LAW
OF INDIA 401-403 ( Universal Law Publishing,
4thed., 2015).

\(^{525}\)Sant Ram v. Labh Singh AIR 1965 SC 314,
(Para.4) (India), Builders Supply Corp. v. UOL AIR
1965 SC 1061 (Para.20) (India), Superintendent &
Remembrancer of Legal Affairs v. Corporation of
Calcutta AIR 1967 SC 997, (Paras. 21-22) (India).

\(^{526}\)AIR 1941 FC 16 421( India).

\(^{527}\)Naresh Chandra Bose v. S.N. Deb AIR 1956 Cal
222 (Para.6) (India).
13(3)(a). Personal laws are to an extent based on customary law. Punjab Laws Act\(^528\) and Oudh Laws Act\(^529\) have clearly directed application of Hindu and Muslim Law and referred to them as law as has been modified by custom.\(^530\) References may be made to Mulla's Principles of Hindu Law.\(^531\) In case of Mohammedan Law also, custom is well recognised source and foundation of personal law. Did the Constitution framers intend that customary law should operate subject to Art 13 but not personal laws of which one of the major sources is custom? The answer to the question is too obvious. Constitution framers did not intend to exclude personal laws from ambit of Art 13.

Traditional personal laws are held to be subject to customary laws. If customs and usages having force of law are subject to fundamental rights, there is no reason why traditional personal law should not yield to fundamental rights.\(^532\) There is no difference between expression “existing law” and “law in force” and thus, personal law would be “existing law” and “law in force”.\(^533\)

**[2.1.1] CONTRARY VIEW OF THE CONSTITUTIONAL COURTS**

In *Krishna Singh*,\(^534\) SC ruled: “Part III of Constitution does not touch upon the personal laws of the parties”. It is submitted that the Bench however, in declaring Personal Laws to be untouched by provisions of Part III, has not spelt out any reasons for such view. To that extent, judgement of the court is not binding.\(^535\)

In a subsequent decision, it was held: “Personal laws are derived not from the Constitution but from religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Art. 13 if they violate fundamental rights.”

It is of considerable significance to refer to *A. R. Antulay v. R.S.Navak*,\(^536\) where it was held that Court could not pass an order or issue a direction which would be violative of FRs of citizens. It appears to be the modern trend of juristic thought that expression “State” as defined in Art 12 of Constitution includes judiciary also. Personal laws are not made by legislature but are enforced by Courts. The questions to be asked is as to whether Court can be asked to enforce a provision of personal law which appears to be repugnant to FRs. Personal laws shall have to yield to FRs and all laws, whether made by legislature or otherwise, must necessarily conform to Part III.

**[2.1.2] ART 225 OF THE CONSTITUTION OF INDIA**

Art 225 of Indian Constitution spells out the jurisdiction of High Courts. The expression “Subject to the provisions of the Constitution” and “the jurisdiction of, and the law administered in, any existing High Court” indicates that jurisdiction of the HC

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\(^{528}\) S.5(b) The Punjab Laws Act, 1872(Act IV of 1872) (India).

\(^{529}\) S. 3(2)(b) The Oudh Laws Act, 1876 Act No.18 OF 1876 [AS ON 1956] (India).


\(^{531}\) S.T DESAI, PERSONAL LAW 56, (16th ed.).

\(^{532}\) Sant Ram v. Labh Singh , AIR 1965 SC 314 (India).

\(^{533}\) AIR 1988 SC 1531 (India).
and the law administered by the HC is subject to provisions of Constitution. “Law administered” by HC includes Muslim laws declared by Privy Council and Federal Courts as such laws were being administered by the High Courts. Thus, all such laws are subject to provisions of Indian Constitution including Part III.

[2.2] SHARIAT ACT FALLS UNDER THE DEFINITION OF “LAWS IN FORCE”
The Muslim Personal (Shariat) Law Act, 1937 by virtue of being a statute falls under definition of “laws in force” u/A 13(3)(a) and 372 and thus can be challenged u/A 32 for being violative of fundamental rights. Muslim Personal Law is now enforced by application of the Act\(^{538}\), and is a “law in force” within Arts. 13 and 372. The said law is amenable to challenge if they violate FRs to the extent the impugned practices are recognized by State in the Act.

The Act not being repealed remains in force after the coming into force of Constitution and is hence “law in force” within Arts. 13 and 372. S.2 gives binding force to Muslim Personal Law enforceable by State and Courts and is hence “law” within Art.13. Being so, it is capable of challenge although actual content of Shariat remains uncodified. After passing of the Act, it is irrelevant whether said law is codified or uncodified, customary or non-customary, since it is the said Act which gives it the character of “law in force” and recognition by State. So long as the infringed provisions are part of an Act, it must pass test of constitutionality even if the provision is based upon religious principles.\(^{536}\) It must therefore pass the test of Arts. 14, 15 and 21.

[2.3] IMPUGNED PRACTICE IS VIOLATIVE OF FUNDAMENTAL RIGHTS
The Constitution of India is the supreme law of the land and there is nothing beyond the Constitution. According to the Kelson’s pure law theory the Constitution of India is the Grand Norm means, it is at the top and there is nothing beyond that.

No law whether made by a legislature or Judge-made, customary or otherwise, can be enforced by any Court in our country if it is inconsistent with or repugnant to guarantee of fundamental rights unless expressly saved under a specific provision\(^ {540}\) of Constitution itself. HCs and the SC have also held that after the advent of Constitution, customs and usages have to bow down to constitutional values of equality and dignity for all. Similarly, personal laws too have to bow down to constitutional values.\(^ {541}\) The impugned practice which practically treats women like chattel is not harmonious with modern principles of human rights and gender equality. Section 2\(^ {542}\) is violative of rights of Muslim women guaranteed u/A 14, 15 and 21 in as much as it gives protection to impugned practice.

[2.3.1] INSTANTANEOUS TRIPLE TALAQ IS VIOLATIVE OF ART 14
The practice of triple talaq is infested with the malady of inequality which goes against equality enshrined in Art 14. A woman has

\(^{538}\) S.2, Muslim Personal Law (Shariat) Application Act 1937 (India).

\(^{539}\) Mary Sonia Zachariah v. Union of India, 1995 (1) KLT 644 FB (Par.39) (India).

\(^{540}\) INdia CONST. arts 31A, 31B and 31C.


\(^{542}\) Section 2, The Muslim Personal (Shariat) Law Act, 1937 Act No. 26 of 1937 (India).
as much right to her freedom to develop her personality to the full as a man. When she marries, she does not become husband’s servant but his equal partner. Neither is above the other or under the other. They are equals.\(^{543}\)

[2.3.2] **INSTANTANEOUS TRIPLE TALAQ IS VIOLATIVE OF ART 15**

A. **Discrimination on basis of sex**

The impugned practices can be exercised unilaterally by the husband alone and it has a disparate impact on women alone, they are violative of Art 15 and the discrimination is based on sex alone. A Muslim husband can give divorce to his wife by simply uttering the word thrice where he is not responsible for providing any reasons for it, whereas a Muslim wife has to file a petition in competent court to get a divorce and also liable to provide reasonable grounds for the divorce.

B. **Discrimination on basis of religion**

Women belonging to any individual religious denomination cannot suffer a significantly inferior status in society, as compared to women professing some other religion. Muslim women are placed in a position far more vulnerable than their counterparts, who profess other faiths as they are still subject to the Shariat Act, which is silent on triple talaq, nikah halala and polygamy.

[2.3.3] **INSTANTANEOUS TRIPLE TALAQ IS VIOLATIVE OF ART 21**

The right of a woman to human dignity, social esteem and self-worth are vital facets of the right to life under Art 21. The impugned practice is in violation of Art 21 that guarantees the right to dignity and personal autonomy of a Muslim woman who wants to remarry her former husband who divorced her through *talaq-e-biddat*.


The impugned practice is unconstitutional. It does not enjoy any protection u/A 25, 26 and 29 and it is violative of International conventions to which India is a signatory.

[3.1] **IMPUNED PRACTICE IS NOT PROTECTED U/A 25, 26 AND 29**

The Impugned practice is not protected u/A 25, 26 and 29. Firstly, it is a secular activity resulting in civil consequences for women and hence is capable of being tested on touchstone of Arts. 14, 15 and 21. Secondly, it is also not a part of Islamic culture.

[3.1.1.] **IMPUNED PRACTICE IS NOT PROTECTED UNDER ARTICLES 25 AND 26**

Firstly, it is not an essential part of Islam. Secondly, it is violative of Fundamental Rights. Thirdly, it is contrary to morality. Fourthly, State can introduce social reforms by virtue of Art. 25 (2)(a).

[3.1.1.A] **NOT AN ESSENTIAL PART OF ISLAMIC RELIGION**

The protection u/A 25 and 26 of Constitution is with respect to religious practice which forms an essential and integral part of religion. This caution is necessary, otherwise even purely secular practices will be clothed with religious sanction and may claim to be treated as religious practices within meaning of Art. 25.\(^{544}\) Certain practices, even though regarded as religious, may have sprung from merely superstitious beliefs and may be only extraneous and unessential

\(^{543}\)Charu Khurana v. Union of India, 2015 (1) SCC 192 (India).

accretions to religion itself. Such practices are not protected and can be abrogated.\textsuperscript{545} What constitutes an essential part of a religion or religious practice has to be decided by courts on basis of evidence adduced with reference to doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.\textsuperscript{546} What is permitted or not prohibited by a religion does not become a positive tenet of a religion.\textsuperscript{547}

From the above discussion, following ingredients of an “essential religious practice” emerge:

- It should be religious and not secular in nature
- It should be sanctioned by the tenets of the said religion
- It should be regarded by the community as a part of its religion.

AA. MARRIAGE AND CONNECTED MATTERS ARE SECULAR IN NATURE
Marriage and divorce are not religious in nature, and thus are not protected u/A 25 and 26. Marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined u/A 25 and 26 of Constitution.\textsuperscript{548} Even though some religions lay down sacramental formalities for celebration of marriage or an obligation to marry for maintenance of lineage, modern societies regard it only as a secular activity. So regarded, it would come u/A 25(2) (a), and be liable to state regulation in the interest of general public.\textsuperscript{549} As regards Muslim community, an additional reason why law of marriage and divorce cannot be regarded as integral part of religion is that while Hindu scriptures regard marriage as sacramental and indissoluble, Muslim marriage is regarded as matter of contract\textsuperscript{550} and subject to divorce; and rules of conduct are contained in Quoran, according to exigencies of time.\textsuperscript{551} In Mohammedan Law, Marriage is Civil Contract. So far as relationship flowing from contract of marriage is concerned, including its dissolution, the area and field is secular in nature.\textsuperscript{552}

AB. TRIPLE TALAQ IS NOT SANCTIONED BY QUORAN OR SHARIAT
The Practice of Triple Talaq is not sanctioned by the Quoran or Shariat. Moreover, it does not form an essential part of Muslim law.

EVOLUTION OF THE CONCEPT
Triple talaq commands neither the sanctions of holy Quran nor the approval of Prophet.\textsuperscript{553} It was permitted by Hazrat Umar on account of certain peculiar situation. It was however a mere administrative measure to meet an emergency situation and not to make it a

\textsuperscript{543} Commissioner, Hindu Religious Endowments v. Laxmindra Swamiar, AIR 1954 SC 282 (India).
\textsuperscript{546} H.H. Srimad Swami v. State of Tamil Nadu, AIR 1972 SC 1586 (India).
\textsuperscript{548} Sarla Mudgal v. UOI, 1995 SCC (3) 635(India).
\textsuperscript{549} 3 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 3499 (8th ed., 2008).
\textsuperscript{550}Abdul Kadir v. Salima, (1886) 8 All. 149 at 154 (India).
\textsuperscript{551} 1 AMEER ALI, THE PRINCIPLES OF MOHAMEDAN LAW 8-9, (Allahabad Law Emporium 1983).
\textsuperscript{552} Abdul Rahim Undre v. Padma Adbur Rahim Undre, AIR 1982 Bom 341 (Para, 23) (India).
\textsuperscript{553} Once the Prophet was informed about a man who had pronounced three divorces at one time. He got up in anger, saying, “Is sport being made of the Book of Allah while I am (yet) among you? Reported by an ‘Nasal’".
law permanently. But unfortunately, Hanafi Jurists later on at the strength of this instant administrative order of Caliph declared this form of divorce valid and also gave religious sanction to it. It must have suited the needs of his own time, but in modern times it has resulted in great deal of harm. Much inconvenience is being felt by the Muslim community so far as this law is applied in India.

SANCTITY AND EFFECT OF TALAQ-E-BIDDAT
Both ahsan talaq or hasan talaq have legal recognition under all figh schools, Sunni or Shia. Triple talaq is classed as biddat (an innovation). It is accepted by all schools of law that talaq-e-bidat is sinful. "Bad in theology but valid in law" is often used in this context. The fact remains that it is considered to be sinful. It is definitely not recommended by any school. It is not even considered to be a valid divorce by Shia schools. There are views even amongst the Sunni schools that triple talaq pronounced in one go would be regarded as only as one talaq. This innovation may have served a purpose at a particular point of time, but if it is rooted out, such a move would not be contrary to any basic tenet of Islam or Quran or any ruling of Prophet.

AGAINST THE BASIC TENETS OF QUORAN

556Sarabai v. Rabiabai, (1906) ILR 30 Bom 537 (India).
557With regard to triple talaq, Fyzee comments: "Such a talaq is lawful, although sinful, in Hanafi law; but in Ithna ‘Ashari and the Fatimid laws it is not permissible’ 154.

There is no Quranic basis to establish that three divorces on a single occasion will amount to an irrevocable divorce. Prophet despised divorce and described marriage as his Sunnat. The view that Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. It says: “If they (namely, women) obey you, then do not seek a way against them." It is a popular fallacy that a Muslim male enjoys, under Quranic law, unbridled authority to liquidate the marriage. Muslim law as applied in India has taken a course contrary to the spirit of what the Prophet or Holy Quran lay down and the same misconception vitiates the law dealing with wife’s right to divorce.

Quoran lays down only two kinds of divorces. Third form i.e. Talaq-ul-Biddat, is considered to be the most sinful, innovated form of divorce as it is against the letter and spirit of Quran and was disallowed by Prophet himself. Islamic law gives to the man faculty of dissolving the marriage; but in absence of serious reasons, no man can justify a divorce, either in eye of religion or law. The instructive Quoranic verses do not require any interpretative exercise. They are unambiguous as far as talaq is concerned. Holy Quran has attributed sanctity and permanence to matrimony. In

559(Quoran IV:34).
561Ibid.
562Ibid.
563Ibid.
564Sura LXV of the Quran, Sura IV, versus 128/130; Sura II, versus 229/232; and Sura IV, verse 35.
extremely unavoidable situations, *talaq* is permissible. But an attempt for reconciliation and if it succeeds, then revocation are Quranic essential steps before it attains finality. In triple *talaq*, this door is closed. Hence, it is against basic tenets of Holy Quran.

**LAW REGARDING TRIPLE TALAQ AS LAID DOWN BY THE COURTS**

The correct law of *talaq* as ordained by the Holy Quran, is that it must be for a reasonable cause and preceded by an attempt of reconciliation between husband and wife by two arbiters. If attempts fail, *talaq* may be effected. An attempt at reconciliation is an essential condition precedent to *talaq*. The attempt at reconciliation recommended under the *shariat*, has been assigned a key role by the Supreme Court. *Talaq-ul-biddat* i.e. giving an irrevocable manner without allowing the period of waiting for reconciliation or without allowing will of Allah to bring about reunion by removing differences, runs counter to mandate of Holy *Quran* and has been regarded as sinful.

No person's status resulting in adverse civil consequence can be altered by a private person. Grant of divorce is a judicial function and can only be granted by a court of law. Women cannot remain at the mercy of patriarchal setup held under clutches of sundry clerics having their own interpretation of *Quran*. Faith cannot be used as dehumanizing force.

It has been specifically held by the SC in *Shamim Ara v. State of Uttar Pradesh*. It has no place in independent India under our Constitutional scheme. It has no legal sanction and cannot be enforced by any legal process.

569Rahmatullah V. State of U.P, II (1994) DMC 64 (India).
571ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 10, (5th ed., 2008).
572Hina vs. State of UP, (2016) SCC Online All 994 (Paras. 9-10) (India).
574Vishwa Lochan Madan Vs. Union of India, (2014) 7 SCC 707 (India).
that in the practice of talaq-e-biddat, there are usually no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq. It has to be particularly noted that conclusion by the Bench in Shamim Ara is made in agreement with the view of the HC's. In the light of such specific findings as to how triple talaq is bad in law on account of not following the Quranic principles, it cannot be said that there is no ratio decidendi on talaq-e-biddat in Shamim Ara. This judgment has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to tenets of Holy Quran.

B. MUSLIM THEOCRATIC STATES HAVE UNDERTAKEN REFORMS

The fact that a large number of Muslim countries or countries with an overwhelmingly large Muslim population where Islam is the State religion, have undertaken extensive reforms in this area and have regulated divorce law, goes to establish that practice in question cannot be regarded as integral to practices of Islam or essential religious practice. The Arab States, Southeast Asian countries and even India’s neighbours Pakistan, Bangladesh and Sri Lanka have enacted legislations against the practice, either banning or regulating it.

- In Algeria, where Islam is the official religion, divorce cannot be established except by a judgment of the court preceded by an attempt at reconciliation.
- In United Arab Emirates, where Islam is the official religion, if a husband divorces his wife after consummation of a valid marriage by his unilateral action, she will be entitled to compensation besides maintenance for Iddat.
- Moroccan Family Code (Doudawana), 2004, put husband and wife on equal footing. Neither of them can pronounce divorce unilaterally except under judicial supervision.
- Indonesia, Iran and Tunisia have de-recognized husband’s right to unilateral divorce by legislating that all divorce must go through a Court.
- In Bangladesh and Pakistan, where Islam is the official religion, the practice of talaq-e-biddat is done away with by way of an Ordinance and divorce carried out by intervention of an arbitration council. Contravention of the procedure is punishable.
- Incidentally, Sri Lanka too, which has a significant Muslim minority (like India), has adopted a model of laws that effectively abolished Triple Talaq.

3.1.1. VIOLATIVE OF FUNDAMENTAL RIGHTS

On a plain reading of Arts 25 and 26, the right to freedom of conscience is subject to public order, morality, health and the other provisions of the Constitution in Part III. Art 25 cannot be allowed to surpass rights u/A 14, 15 and 21. A cardinal principle of interpretation of Constitution is that all provisions of Constitution must be harmoniously construed so that there is no conflict between them. Arts. 14, 15 and 21 must be read harmoniously with Art 25 and 26 to prevent discrimination against women and to give effect to right of Muslim community to practice their religion. One

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576 Supra, footnote 28.
577 Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, UAE, and Yemen.
578 Indonesia, Malaysia, and the Philippines.
cannot cancel out the other on the ground that it is protected under Part III.

Whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the FR must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III or to provide for social welfare and reform.  

[3.1.1.C] CONTRARY TO MORALITY

The rights guaranteed u/A 25 and 26 are subject to morality. “Morality” shall be read to mean constitutional morality which includes gender justice, right to non-discrimination, dignity and personal autonomy of women at the very least. By reason of being violative of these values, impugned practice runs counter to the very notion of constitutional morality and thus cannot be protected u/A 25 and 26. The right u/A 25 and 26 is subject to constitutional goals of securing equality and dignity. The denomination sect is also bound by the constitutional goals.

[3.1.1.D] STATE CAN INTRODUCE SOCIAL REFORMS UNDER ART. 25 (2)(A)

The freedom u/A 25 is not absolute. The Article itself permits a legislation in interest of social welfare and reform. Marriage is the foundation of family and in turn of society without which no civilisation can exist. Marriage, succession and like matters cannot be brought within the guarantee enshrined u/A 25, 26 and 27. They may be associated with religious practice, and may even have religious origins in their form and content, but are not essential parts of religion. Even if it were so, they would be subject to state regulation in interest of public order, morality and health. Marriage is a social institution and therefore, an object of social reform and that to effectuate social reform the legislature, under the Constitution, can interfere with religious practices, such as polygamy even though the parties are Muslims.  

[3.1.2.] THE IMPUGNED PRACTICE IS NOT PROTECTED UNDER ARTICLE 29

The word “culture” in Art. 29 (1) must be read ejusdem generis with “language and script” and cannot include within it personal laws. In any event, a cultural practice which goes contrary to Arts. 14, 15 and 21 cannot be preserved, and must be abolished. Several examples can be found of practices justified as being based on religion and culture that have been abolished on being found contrary to the prevailing ethos or norms of civilised society including the abolition of Sati and child marriage. On a harmonious interpretation of Arts. 14, 15, 21, and Art. 29 on the other hand, it is submitted that only culture that does not violate the indispensable right to equality and life can be preserved as a matter of right. It is, therefore, submitted that the impugned practice cannot be held to be protected under Art. 29 as being part of “culture”.  

[3.2] THE PRACTICE IS IN CONFLICT WITH INTERNATIONAL CONVENTIONS

583SarlaMudgal v. UOI, 1995 SCC (3) 635 (India).
584 Ibid.
585 Cf. State v. Bhimsing, (1951) 6 DLR 174 (175) (Bom) (India).
587 Srinivasa v. Saraswati, AIR 1952 Mad 193 India).
In cases involving violation of human rights, courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the absence of domestic law occupying the field, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and human dignity in Arts. 14, 15 and 21 of Constitution of India. It is now an accepted rule of judicial construction that regard must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them. Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. India has ratified various international conventions and human rights instruments committing to secure equal rights of women. CEDAW mandates all State parties to overcome, dismantle and refrain from promoting gender discrimination. Discrimination against women based on sex and religion is in direct contrast with the mandate of achieving substantive equality. The practice of talaq -e-biddat is absolutely violative of CEDAW. It is submitted that it was rendered impermissible as soon as India accepted to be a signatory to international conventions with which it was in clear conflict. By not barring it, and knowingly allowing it to be followed, India is seen as persisting in what international community considers abhorrent.

[4] CONCLUSION

The Constitution declares that DPSPs are “fundamental in the governance of country”. It imposes social obligations on Governments to apply DPSPs while making and implementing policies. Art.38 r/w 44 of Constitution incorporates an obligation on State to secure a social order for promotion of welfare of people and expects from State to secure a UCC for all citizens of India. It is the FR of every one to live with human dignity, free from exploitation. The right to live with human dignity enshrined in Art.21, derives its life breath from DPSPs. In Mohini Jain, right to education was declared as FR. It was till then a DPSP. Art.44, though not legally enforceable, still carries the moral weight of the Constitution. Art.44 does not violate the FR to freedom of religion u/a 25 and 26, stating that subject to public order, morality and health, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. Matters of personal law are subject to restriction by the State in the larger interest of society. Uniform Civil Code is not violative of the personal law of any

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590 INDIA CONST. art. 15, cl(3).
592 Universal Declaration on Human Rights 1948.
595 Art. 2 (c), 2 (f) and Art. 16 (1) (c).
596 INDIA CONST. art. 37.
598 Mohini Jain vs. State Of Karnataka, 1992 AIR 1858, 1992 SCR (3) 658 (India).
599 Durgah Committee v. Hussain, AIR 1961 SC 1402 (1415) (India).
religion. ‘Personal law’ is neither synonymous nor coextensive with ‘religion’.

Object behind the implementation of a UCC is to effect integration of country. It brings together all communities on matters which are governed by diverse personal laws but do not form essence of any religion. Court must not adopt a doctrinaire approach which might choke all beneficial legislations.  

Different treatment for any religious group is violative of ICCPR and Declaration on the Rights to Development adopted by the world conference on Human Rights. Parliament should frame UCC without further delay, divesting religion from social relations and personal law. Another important fact which is always ignored in the clamour of reactionaries against UCC is that there already exists a State which has such a Code. If Goa can have UCC, then why not the rest of the country? Such a paradox should not exist in a single country.

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IS MARRIAGE A LICENCE TO RAPE?

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“Truth: Rape does indeed happen between girlfriend and boyfriend, husband and wife. Men who force their girlfriends or wives into having sex are committing rape period. The laws are blurry, and are in some countries marital rape is legal. But it still is rape.” – Patti Feuereisen

Rape is not merely a physical assault- it is often destructive of the whole personality of his victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The rapist is not always an outsider, many a times it is known and the most secured one is husband. The institution of marriage is considered as a certificate to do sexual intercourse with a wife by her husband, but when this is without wife’s consent it is marital rape.602

The patriarchal framework of society provided rape the shield of the wedding right to spouse even without the consent of other partner. By this we are noiselessly tolerating that ladies are only a protest of sexual satisfaction of her better half.

In almost 106 countries marital rape has been impeached and has been documented as desecration of human rights. Marital rape is illegal in 50 American states, three Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland, and Czechoslovakia. It was declared illegal and a criminal offence in 2006 in Nepal. Many countries have considered it as a special offence and some has categorised it in general rape clause. In many jurisdictions across the world, including India, marital rape is not recognised as crime by law and society. Even when countries recognise rape as a crime and prescribe penalties for the same, they exempt the application of that law when a marital relationship exists between victim and perpetrator. This is often called the ‘marital rape exception clause’. Across these jurisdiction there are four justifications advanced for not criminalising marital rape. The first justification stemmed from the understanding of the wife as subservient to her husband.603 In such scenario, it would not be possible to fathom a husband raping his wife since the husband was master to his wife, and enjoyed privileges over her body. Along with this the unity theory also existed which rested on the idea that after marriage, the identity of the women merged with that of her husband and whatever he wants, must get it though there is no will of other spouse.604

The United Nations has also recognised the concept of marital rape and has termed it as violence in its Declaration on the Elimination of Violence against Women 1993. It affirms that violence against women violates, impairs or nullifies women’s human rights and their exercise of fundamental freedoms. The Declaration gives a broad definition to the word

602 P Ramanatha Aiyar’s concise Law Dictionary (Lexis Nexis 5th Edn.).
604 To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) HARVARD LAW REVIEW, 1251-1256(1986).
‘violence’ and includes psychological harm inflicted on women. Violence against women according to Article 2 of the Declaration would encompass but not limited to: physical, sexual and psychological violence occurring in family including battery, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women. Non spousal violence and violence related to exploitation.

Even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that despite various instruments, extensive discrimination against women continues to exist. It recalled that the discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 titled "The elimination of violence against women", recommended that marital rape should be criminalized.

India and Marital Rape

In 21st century where practicality has been prioritise over customs and traditions, marital rape is still not an offence in India. Enactments in regards to marital rape in India are either non-existent or esoteric and dependant on the understanding by the Courts. Section 375, Indian Penal Code, 1860 enumerates the offence of rape. The word ‘rape’, which is derived from Latin word rapio, means ‘to seize’. Thus, rape literally means a forcible seizure. Section 375 defines rape and its Exception 2 says that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age is not a rape. The exception clause does not state any reason for the exclusion. In case of Independent Thought v. Union of India, Supreme Court held that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. “It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of the constitution can be preserved and protected and perhaps given impetus”, Justice Lokur said in his judgement. This landmark judgment criminalised marital rape with minor girl but still the concept of same in adult marriage is ambiguous.

The Protection of Women from Domestic Violence Act, 2005 gives protection to women against violence occurring within the family and for incidental matters but this Act also does not cover marital rape because legislators believe that marriage is a sacrosanct and inclusion of this concept will destroy the fundamentals of marriage institution. The provisions of the Act and of section 489A of IPC are considered as appropriate to provide remedy to the victims of domestic violence and it is believed they are given protection from offences like marital rape which is termed as form of cruelty. For the relief wife can demand divorce or legal separation in specified legislations, and there is no specific mention of marital rape as a crime or offence.

605 Mamta Rao, LAW RELATING TO WOMEN AND CHILDREN 48 (Eastern Book Company 3rd Edn. 2012).


Statistics of marital rape in country by NFHS 4: At an all India level, 9 out of every 100 men agree to the fact that a husband has the right to use force and have sex with his wife even if she doesn't want to. The survey further noted that, at an all India level, 11 out of every 100 men agree to the fact that a husband has the right to refuse financial support to his wife if she refuses to have sex with them. Five out of every 100 women in India reported that their husband had physically forced them to have sexual intercourse with him even when they didn't want it. The NFHS 4 reported that 36.5% of the ever-married women in the age 15-49 years who have experienced sexual violence ever suffered from cuts, bruises or aches due to the sexual violence committed by their husband on them.\(^{609}\)

The data collected from the survey clearly highlights the fact that marital rape is in existence and just because there is no law for the same it goes unreported and justice is denied to the victim. The data also highlights the fact that physical force is not always the precondition of offence and mental agony or psychological pressure may create undue advantage on the wife to submit herself to her husband. It is true that inspite of stringent rape laws in country, many cases are unreported but those few who report their case gets justice many a times and thus law is always necessary no matter how many people resort to it for the remedy.

Steps towards criminalising marital rape

The idea of criminalising marital rape is not new and was in mind of the law makers from very starting and many reports of Law commission portrays the fact that law regarding this matter is necessary and present laws are arbitrary. Even the chairman of drafting committee of Constitution, Mr. B. R. Ambedkar has expressed his view to legitimise marital rape, as he was ever of the future condition which will overpower the society, but legislators denied his expressions.

The Law Commission was directly faced with the validity of Exception clause in the 172\(^{nd}\) Law Commission Report.\(^{610}\) Here it was argued that the explanation (2) to draft section 375 (which says that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, does not amount to sexual assault) should be deleted. Forced sexual intercourse by a husband with his wife should equally be treated as an offence just as any physical violence by a husband against the wife is treated as an offence. Following the same logic, they submitted that the words "unless the person subjected to sexual assault is his own wife and is not under 15 years of age in which case he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both" in section 376(1) of the Law Commission's draft [adaptation of the existing section 376(1)] should also be deleted. Section 376A should also be deleted, they said, on the same reasoning.\(^{611}\)

Justice Verma Committee was constituted under Justice J S Verma (Retd.) who advocated the criminalisation of marital rape. The Committee recommended that the exception to marital rape should be removed. Marriage should not be

\(^{609}\) National Family Health Survey 4, 2015-2016.  
\(^{611}\) Id.
considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.\textsuperscript{612} This report had twofold recommendation, primarily of deleting the exception clause and secondarily of not providing defence of marriage to the accused, or making it relevant in matter of ascertaining the consent of spouse. The exemption given to marital rape, as Justice Verma noted, “Stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands”. Marital rape ought to be a crime and not a concept.

The judiciary is also not silent on the fact and in many case judges have expressed their opinion about criminalisation of the crime which is taking place in society then too ignored by everyone. Recently Gujarat High Court observed that the total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.\textsuperscript{613} Justice Pardiwala observed: “A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”\textsuperscript{614}

Unanimously striking down provisions of adultery under the Indian Penal Code (IPC), the Supreme Court said that “curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to Constitutional values.” Without directly delving into the issue of marital rape, Justice D Y Chandrachud observed that “any legislation which results in the denial” of Constitutional guarantees to women “cannot pass the test of constitutionality”. “In adjudicating on the rights of women, the Court is not taking on a paternalistic role and “granting” rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink. Women are equal citizens of this nation, entitled to the protections of the Constitution. Any legislation which results in the denial of these Constitutional guarantees to women, cannot pass the test of Constitutionality,” he


\textsuperscript{613} Editorial, Marital Rape Is Not A Husband’s Privilege But A Violent Act And An Injustice That

These judgements portrays the mindset of the present day lawyers, bureaucrats and judges who understand the reality of existence of offence and utter need of making law.

**Lacunae in present laws**

Though many steps have been initiated by legislators as well as members of Judiciary in the Country, due to some loopholes in the organs of the government and ideologies of the society and the representatives of people that view to decriminalise the marital rape is still a dream today.

**Article 14 - Right to Equality** – Article 14 embodies the general principle of equality before law and prohibits unreasonable discrimination between persons. Article 14 is the epitome of the noble ideals expressed in the preamble of the Constitution.

According to Dr. Jennings “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and to be prosecuted for the same kind of action should be same for all the citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence.”

Exception 2 of Section 375 IPC violates the right to equality enshrined in Article 14 insofar as it discriminates against married women by denying them equal protection from rape and sexual harassment. The Exception creates two classes of women based on their marital status and immunizes actions perpetrated by men against their wives. In doing so, the Exception makes possible the victimization of married women for no reason other than their marital status while protecting unmarried women from those same acts.

Exception 2’s distinction between married and unmarried women also violates Article 14 insofar as the classification created has no rational relation to the underlying purpose of the statute. In *Budhan Choudhary v. State of Bihar* and *State of West Bengal v. Anwar Ali Sarkar*, the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. But Exception 2 frustrates the purpose of Section 375: to protect women and punish those who engage in the inhumane activity of rape. Exempting husbands from punishment is entirely contradictory to that objective. Put simply, the consequences of rape are the same whether a woman is married or unmarried. Moreover, married women may actually find it more difficult to escape abusive conditions at home because they are legally and financially tied to their husbands. In reality, Exception 2 encourages husbands to forcefully enter into sexual intercourse with their wives, as they know that their acts are

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619 *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).
not discouraged or penalized by law. Because no rational nexus can be deciphered between the classification created by the Exception and the underlying objective of the Act, it does not satisfy the test of reasonableness, and thus violates Article 14 of the Indian Constitution.\textsuperscript{620} Article 21- life and liberty — Article 21 protects the right to life and personal liberty of citizen not only from Executive action but from the Legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with, first, there must be a law and secondly, there must be a procedure prescribed by the law, provided the procedure is just, fair and reasonable.\textsuperscript{621}

In recent years, courts have begun to acknowledge a right to abstain from sexual intercourse and to be free of unwanted sexual activity enshrined in these broader rights to life and personal liberty. In \textit{The State of Karnataka v. Krishnappa}, the Supreme Court held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.”\textsuperscript{622} Later, in \textit{Suchita Srivastava v. Chandigarh Administration}, the Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.\textsuperscript{623} In the landmark case of \textit{The Chairman, Railway Board v. Chandrima Das},\textsuperscript{624} the Hon’ble Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against the person of a woman; it is a crime against the entire society. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

Most recently, the Supreme Court has explicitly recognized in Article 21 a right to make choices regarding intimate relations. In \textit{Justice K.S. Puttaswamy (Retd.) v. Union of India},\textsuperscript{625} the Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.” Forced sexual cohabitation is a violation of that fundamental right. The above rulings do not distinguish between the rights of married women and unmarried women and there is no contrary ruling stating that the individual’s right to a privacy is lost by marital association. Thus, the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution.\textsuperscript{626}

Even though the judiciary has from time to time has given the judgement in relation to


\textsuperscript{621} Maneka Gandhi v. Union of India, AIR 1978 SC 597.

\textsuperscript{622} \textit{The State of Karnataka v. Krishnappa}, (2000) 4 SCC 75 (India).


\textsuperscript{624} \textit{The Chairman, Railway Board v. Chandrima Das}, (2000) 2 SCC 465.

\textsuperscript{625} \textit{Justice K.S. Puttaswamy (Retd.) v. Union of India}, (2017) AIR 2017 SC 4161 (India).

\textsuperscript{626} Supra Note 19.
marital rape phenomenon but still restricting itself from making a law and following this there are many petitions being filed in Delhi High Court to criminalise it. The above understandings will help the Court to decide the matter in case of RIT Foundation v. Union of India, which is still pending.

The sole reason for decriminalisation of marital rape is not only orthodoxial laws but also the ideologies of the government which does not want to bring change. The judiciary is not empowered to create a new law and for the same, work has to be performed by the legislators, but they are reluctant to do so. Until now, the stance of the Government has been that the term “marital rape” is oxymoron. The analogy which is sought to be applied by the government hinges on the statement that to get married is to give all time consent forever to sex with your spouse. What is in the mind of the legislature is that marital rape is completely unprovable. A wife accusing her husband of rape and pressing charges only demonstrates that the marriage is irrevocably over. It is considered that concept of marital rape, as understood internationally, cannot be applied in the Indian context due to various factors, including level of education, literacy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as sacrament” said Haribhai Parthibhai Chaudhary, a Union Minister, in written reply in the parliament, in 2015. Same argument was echoed by then Women and Children Minister Maneka Gandhi in written reply in Rajya Sabha in 2016. The government puts two arguments in its defence, firstly, marriage is sacred and its criminalisation will disbalance the Indian society and secondly, there would be large number of fake cases. These arguments are senseless as, if it is about the sacramental character of marriage then what is the justification of success of Protection of Domestic Violence against Women Act, 2005 which also interferes in the matters of marriage. On the other side every concept brings with it fraudulent cases no matter whether it is murder, dowry or any other case, but it does not mean that we will not make a law as it will bring dishonest cases. It is the duty of court to identify them and bring justice to the desired once by moulding the procedural laws.

### Draft for Criminalisation of Marital Rape

The aim of this article is not only to discuss the concept and problem in the matter of marital rape, it also focuses on the solutions to the problem by giving an idea of law which can be eliminated to bring the Marital rape in ambit of a crime in IPC. For this there is need of changing both the Penal Code and Evidence Act to provide justice to the victim without any harassment and to limit the fraudulent cases which can come up to the court and overburden their work. 172nd Law Commission Report by Justice Verma also provided framework and he suggested not only deletion of exception clause but also to mention that presumption of consent in marriage is no defence. A) there is need to specify that only removal of exception clause is not enough as it will be open to judiciary to deal with different cases accordingly and opposition from society will also influence the judgement. B) The existence of marriage should not lead to presumption of consent. However in

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practicality, the judiciary will undeniably look at some threshold of force to answer questions of consent. There are three ways to treat consent while criminalising marital rape. The first would be to presume consent, and put the burden on the victim to rebut that consent. The second is to presume absence of consent, and the accused will have to establish consent. The third would be to draw out a system especially for cases of marital rape, and this will require a review of existing principles of evidence law.\(^{628}\)

Amendment in Section 375 by removing exception clause and adding explanation clause which would say that marriage is not exception in case of offence of rape and secondly under Evidence Act, there must be clause that in cases of marriage consent will not be presumed and the accused must prove that he had free consent of the victim. Moreover as presently if victim says that there is no consent the onus is on accused, this must not be the same in cases of marital rape in order to limit the cases which proceeds on basis of revenge in marriage relation and other circumstantial evidences must also be given by the victim like use of force adopted by accused and then only the burden should shift on the defendant. This additional requirement will save the innocent husbands too and then only the law will be in equality to both the genders.

Conclusion
It is conceded that law on sexual offences is an alarming task and in country like India where there is so much class distinction between two genders there is utter need of criminalising such crimes which provides defence merely on basis of spousal relationship to do whatever one partner wants to do no matter what is the will of the other one. There is not only need to outlaw marital rape, but so to educate the masses about this crime as the real objective is to devaluate the myth that spousal relational is inconsequential. The time has come when various ally of this country should accept the fact that there is need to criminalise marital rape. After all “NO MEANS NO”, no matter where it is said. The law must uphold the bodily autonomy of all women, irrespective of their marital status. “She is my wife” should be no more a defence.

\(^{628}\) Raveena Rao Kallakuru & Pradyumna Soni, CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL
INTERNATIONAL CYBER LAW
2019- CYBER WARFARE IN CONTEXT OF INTERNATIONAL HUMANITARIAN LAW

By Vishakha Chaudhary
From UILS, PU

“Cyber war takes place largely in secret, Unknown to the general public on both sides”

Noah Feldmen

In January 2010, inspectors with the International Atomic Energy Agency while visiting the Natanz Uranium Enrichment Plant in Iran noticed that, centrifuges used for enriching the uranium gas were failing at an unprecedented rate. The cause was a mystery, apparently for the Iranian technician. After five months a computer security firm was called to troubleshoot a series of computers in Iran that were crashing and rebooting repeatedly. The cause of this was again a mystery, until the researchers found some malicious files in one of the computer systems and discovered the world’s first digital weapon Stuxnet.

Stuxnet worm was malicious software designed to infiltrate the factory computers. The virus was extremely effective in delaying the Iran’s nuclear program for the development of nuclear weapon. It is said that over fifteen Iranian facilities were attacked and infiltrated. And it all started with a random workers USB drive. It still remains unknown who was behind the Stuxnet attacks, although fingers have been pointed to the United States and Israel.

CYBER WARFARE - INTRODUCTION

As far as the definition of Cyber warfare is concerned there are number of definitions but no single definition is widely accepted internationally. Still it is worthy to state the position of International Committee of Red Cross in the context of cyber warfare as-MA means and methods of warfare that consist of cyber operations amounting to, or conducted in the context of, an armed conflict, within the meaning of IHL”.

Also Richard A Clarke, former special advisor to the National Security Council on cyber issues defines cyber warfare as “actions by a nation-state to penetrate another nation’s computers or networks for the purposes of causing damage or disruption”.

‘Cyber-attack’ is a wide term which can be referred as computer network attack (CNA) or computer network exploitation (CNE). The nature of cyber attack highly depends upon the various ways it is conducted, their consequences and also the

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633 See the NATO GLOSSARY OF TERMS AND DEFINITIONS (2013): CNA is defined as ‘Action taken to disrupt, deny, degrade or destroy information resident in a computer and/or computer network, or the computer and/or computer network itself’.
634 Ibid. CNE is defined as ‘Action taken to make use of a computer or computer network, as well as the information hosted therein, in order to gain advantage’. 

www.supremoamicus.org
skill of the attacker. Cyber warfare can present a multitude of threats towards a nation. At the most basic level, cyber attacks can be used to support traditional warfare. The attacker can overload a server with an ultimate goal of shutting down the network system, which makes it a Denial of Service Attack or can also send a malware to the system with intent to erase all the information contained in the hardware. Cyber Espionage, not being an act of war can also create serious tension between nations and are usually described as cyber attack.

Cyber Attack is a term with special meaning in International Humanitarian Law, and differs from other branches of law. Under Additional Protocol I (AP I)Article 49, attacks mean ‘acts of violence against the adversary, whether in offence or in defense’. The Tallinn Manual defines a cyber-attack as a ‘cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects’. A cyber operation is defined as ‘the employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace’. The main objectives behind these definitions are to differentiate cyber operation from cyber attack as all the cyber operations cannot be considered as cyber attack. It draws a line between the operations that results in inconvenience, and the ones that harms the target.

**CYBER WARFARE AND ITS RELATION WITH INTERNATIONAL HUMANITARIAN LAWS**

As increasingly more attacks are conducted by the nations against each other, the cyber warfare has taken the international spotlight, but the most important point is that there is lack of set of International laws which can regulate this new warfare species. Also the countries are perplexed with the questions as to whether follow the International laws of armed conflict to tackle cyber warfare and if so, till what extent these established rules regarding armed conflict can accommodate this new kind of war.

As we know, International Humanitarian Law (IHL) deals the rules that militaries must follow when participating in a war. These laws of war describe what actions may or may not be taken against non-combatants, soldiers, and unlawful combatants. A key point of IHL is that civilians and non-combatants may not be killed or treated inhumanely during times of war.

The International Criminal Court (ICC) was established in 1988 under the Rome Statute with the objective of repressing war crimes and cases related to International Humanitarian Laws. In the 21st century,

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636 The Tallinn Manual’s glossary defines malware as Instructions and data that may be stored in software, firmware, or hardware that is designed or intended adversely to affect the performance of a computer system. Page 260.
cyber warfare is also a part of military warfare concept as it can be equally destructive by using network system instead of conventional weapons and satellites providing more information than human spies. No international community has so far accepted publicly that any cyber attack has reached the threshold of armed attack.

There is no treaty that specifically deals with the cyber warfare under the International laws, there a number of sources which can be used like the customary international laws and general principles of law. However the problem is considered and discussed in various summits. The Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual) is a nonbinding manual on the law governing cyber warfare. In 2009, the NATO Cooperative Cyber Defense Centre of Excellence (NATO CCDCOE) invited an ‘International Group of Experts’ (henceforward ‘the experts’) to produce a nonbinding manual on the law governing cyber warfare.

The experts were legal practitioners, academics and technical experts. Three organizations were invited as observers, NATO’s Allied Command Transformation, the US Cyber Command and the International Committee of the Red Cross. The observers could participate in all discussions, but the unanimity that was required for adoption of a Rule was limited to the experts. The manual is not an official document but is considered as a persuasive document.

Besides, as far as dealing with International Humanitarian Laws, it is important to distinguish between jus ad bellum (rules for when states can go on war) and jus in Bello (rules of conduct of war). Article 2(4) and article 51 of the U.N Charter governs the use of force regarding jus ad bellum. According to it no state can resort to the use of force, besides in self defense or when the use of force in authorized by the Security Council. International Humanitarian Law does not consider the cause behind the armed conflict, whether it is just or not, it only limits the sufferings for those involved and the destructive effects of the conflict. If IHL is to be applied, there has to be an armed conflict. Armed Conflict refers to international and non–international conflicts. Various treaties and customary laws will apply depending upon the type of conflict. It means that a cyber attack would have to be deliberate in nature, and should amount to armed conflict.

The experts of the Tallinn Manual agreed that a cyber-attack has the potential to amount to ‘armed force’. The applicability of the law of armed conflict to cyber-attacks is expressed in Rule 20 of the Manual which provides that “Cyber operations executed in the context of an armed conflict are subject to the law of armed conflict.”

ICRC explains Cyber warfare as any hostile measure taken against an enemy designed “to discover, destroy, disrupt, alter, destroy, disrupt or transfer data kept in a computer, which is manipulated through a computer or transmitted through a computer network.” Simply it is an attack based on networks which is adopted by many countries to reduce their frustration and also

to avoid the real war situation. Chinese attack on US, Chinese attack on Google, attack by Ghost net spyware network upon confidential information of more than 100 countries are the examples which introduces the concepts of cyber warfare. Facebook has taught us that some-one is always watching our activities, but it is always acceptable when it is not a big boss.

IHL doesn’t specifically mention cyber warfare, the Martens clause which is associated with accepted principle of IHL, says that whenever a state of affairs isn’t coated by a global agreement, “civilians and combatants stay below the protection and authority of the principles of jurisprudence derived from established custom, from the principles of humanity, and from the dictates of public conscience”. Also it is the work of ICRC to look into the developments that need to be incorporated in IHL. Article 36 of I protocol to the Geneva Conventions provides that, “in the study, development, acquisition or adoption of a brand new weapon, means that or methodology of warfare, a High contracting Party is below associate obligation to see whether or not its employment would, in some or all circumstances, be prohibited by this Protocol or by the other rule of jurisprudence applicable to the High Contracting Party.” It means that, through general rules it regulates the legitimacy of all means and strategies of warfare. This rule also shows that general IHL rules apply to new technology.

However, there are still arguments’ inclining to the position that IHL provisions do not specifically mention cyber operations. Because of this, and because the exploitation of cyber technology is relatively new and sometimes appears to introduce a complete qualitative change in the means and methods of warfare, it has occasionally been argued that IHL is ill adapted to the cyber realm and cannot be applied to cyber warfare. It is noted that, the absence in IHL of specific references to cyber operations does not mean that such operations are not subject to the rules of IHL. New technologies of all kinds are being developed all the time and IHL is sufficiently broad to accommodate these developments.

The Tallinn Manual defines a cyber-attack as a ‘cyber operation… that is reasonably expected to cause injury or death to persons or damage or destruction to objects’, but it does not describes as what classifies as ‘damage’ to an object. The majority of the experts were of the view that interference with functionality qualifies as damage if restoration or functionality requires replacement of physical components, but were split over whether the ‘damage’ requirement is met when functionality can be restored by reinstalling the operating system. A few experts suggested that it does not matter how an object is disabled, and that it is the object’s loss of usability that qualifies as ‘damage’.

It is the violent result of a cyber attack that determines whether IHL will be applied or not.

646 Geneva Convention III, art. 4A they are entitled to this status as soon as they fall “into the power of the enemy”. Id. arts. 4A, 5
647 see http://en.wikipedia.org/wiki/Martens_Clause
650 Tallinn Manual Rule 30 page 106
not. For instance, if a cyber operation is conducted on the civilians of a state, and creates inconvenience which is not harmful in nature, will not come under the ambit of cyber attack that triggers the application of IHL. However, if a cyber operation is conducted on the civilians, and the consequences are violent causing damage and injury to the civilians, it will trigger the IHL. The main focus of IHL is to protect the people from any harm who are not the part of conflict, but it does not protect from inconvenience. Also, it is worth noting that most academics point out that the meaning of the legal term may shift over time, and that new treaties, new customary law norms might develop and give new understanding to the meaning of cyber-attacks.653

CYBER ATTACK IN CONTEXT OF CIVILIANS

As already mentioned, the main focus of IHL is to limit the sufferings of the civilians who are affected by a armed conflict. IHL prohibits the attack on civilians and civilian objects. The basic rules of IHL distinguish the civilians from combatants. It is considered customary international law that the parties to the conflict must distinguish between civilians and combatants.654 AP 1 has codified this principle in Articles 48 and 51(2), which state respectively that: “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.655 And “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” 656 Civilian objects shall also not be the object of attack.657

According to IHL, attacks can only be directed against military objectives, and civilians shall not be the object of attack.658 This requirement applies to all the means and methods of warfare. IHL does not guarantees that civilians will be unaffected by the military operation, but also does not excuses the intentionally directing cyber attacks against civilians. It does not matter if the attack has the power to end the ongoing conflict for example by conducting cyber-attacks against a civilian leader’s private property and damaging it to pressure him into capitulation.659 Although protected from being made the object of attack, civilians will lose this protection if they directly participate in hostilities. Civilians are protected against attacks by virtue of being a civilian. They are per definition not a member of the armed forces, and are non-combatants.660 IHL strives to offer them protection, and they are protected from direct attack and against the dangers arising from military operations661. IHL does not ban civilians from participating in the armed conflict, but does set out consequences for doing so. If a civilian takes a direct part in the hostilities, he or she will lose their protection for such time as he partakes in the hostilities.662

654 ICRC Study on Customary International Humanitarian Law, Rule 1
655 Ibid. Article 48.
656 Ibid. Article 51(2).
657 Ibid. Article 52(1).
658 Additional Protocol 1 Article 48 and 52(2).
660 Ibid. Article 52 (1).
661 Ibid. Article 51 (1) and (2).
662 Ibid. Article 51(3).
Those attempting to be ‘farmers by day and fighters by night’ lose protection from attack even in the intermediate time-frames punctuating military operations, if they assume a continuous combat function. The same rationale applies if an individual joins an organized armed group that partakes in hostilities, he would lose civilian protection for as long as that membership lasts, and may be targeted, even when not personally linked to any specific hostile act—simply due to his membership in such a group—as long as that membership endures. It means if a civilian joins a group of hackers that conduct cyber attack in armed conflict that will produce harmful effect will loose his protection under IHL.

Geneva Convention 3, Article 4A(6) provides for an exception for situations where a civilian can participate in an armed conflict, and qualify as combatant. That situation is referred to as ‘levee en masse’ and is considered a ‘long-standing rule of customary international law’. A levee en masse exists when "Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

CASES IN A CYBER ATTACK PRESPECTIVE

The real world examples of cyber operation will be helpful to establish more clarity on what can be classified as a cyber attack and whether those attacks trigger the applicability of IHL.

Estonia

At the end of April 2007, riots broke out in Estonia by youth groups of mostly Russian origin, after the government had decided to remove a soviet-era Second World War memorial. Not long after the riots, on April 27 web pages of Estonian government institutions and news portals came under a wave of cyber operations that lasted for more than three weeks. The means of attack used in the April-May 2007 events included denial of service (DoS) and distributed denial of service (DDoS) attacks, defacement of governmental websites, and large amounts of comments and email spam. Public propaganda, distributed on different Internet forums, and dissemination of attack instructions were employed to encourage, coordinate and aid in carrying out the attacks.

To prove that the attack was a cyber attack or armed conflict, the attack should be between governmental organization and organized armed group within the state, and the attack must resort to armed violence between states.

There was no proof that the Russian Federation was behind the attack, so on that basis it cannot be an International Armed Conflict. But if it would have been proved it still won’t reach the threshold of an armed conflict as the intent of the attack was hostile but defacing of governmental websites, sending of spam emails and distributing propaganda does not fit with.

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663 Dinstein, “The Principle of Distinction and Cyber War in International Armed Conflicts” page 276.
664 Ibid.
665 It is also considered customary international law, see ICRC Study on Customary International Humanitarian Law 387.
666 Geneva Convention 3, Article 4A(6).
the definition of cyber-attacks which requires a certain level of damage. Such attacks did not reach the threshold of the international armed conflict and created inconvenience. The attack was illegal in nature but it did not triggered the applicability of IHL.

**Wannacry Ransomware Attack**

On May 2017, a worldwide attack occurred which bought the cyber warfare attack again in the lime light. It was Wannacry Ransomware attack, which made the world realize that how much the cyber attack has developed and the magnitude of destruction it can cause.

The Wannacry Ransomware attack began on Friday 12 May, 2017, which affected between 2,30,000 to 3,00,000 computers in over 150 countries by encrypting computer files and demanding ransom from users in order to restore it. Later United States, United Kingdom asserted North Korea was behind the attack. For the sake of arguments if it is assumed that the attack was attributable to North Korea, can it trigger the IHL? There are mainly two questions to be dealt with. First being was the attack destructive and injurious and second, did the attack intervene into other states internal and external affairs.

The Wannacry attack falls into a grey zone in which the threshold for violation remains unsettled. It did disrupted many services like health care that could reasonably be viewed as use of force and with respect to sovereignty it did violated the sovereignty of a number of states, particularly in light of the significant disruption of functions like law enforcement.

**STATE ATTRIBUTION**

For the application of IHL, the degree of state responsibility should be proved. The most difficult task in the cyber warfare is to link an attack to a state. The ICJ and ICTY through various cases have tried to illustrate the different approaches with regard to attribution of state responsibility based on control test.

**Effective Control Test**

In the Nicaragua case, the ICJ dealt with the question of whether Nicaraguan rebels could be considered to be acting on behalf of the United States. The Court held that the financing, organizing, training, supplying and equipping the rebels was not enough. In order for the US to be responsible, the rebels either had to be so completely dependent on them that they had to be considered state organs, or the US had to have held effective control of the military or paramilitary operations in the course of which the alleged violations were committed. Under ICJ’s control test, for a State to incur responsibility it would have to exercise control over the non-state actors that launches the cyber-attacks.

**Overall Control Test**

In Tadic (1999), the ICTY looked at the legal conditions required for when individuals can be considered to act on behalf of a State. According to the ICTY logic dictates that the criteria for ascertaining responsibility is the same in the cases where the court wants to attribute the act of an individual to generate State responsibility, or whether the individuals are acting as de facto State officials, thereby rendering the conflict international and thus

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671 Ibid. Para 115.
672 Tadic Appeals Chambers 1999.
setting the necessary precondition for the “grave breaches” regime to apply. Since there are no specific legal criteria in IHL for when individuals can be said to work on behalf of a State and making it an international armed conflict, reliance must be had on the criteria for State responsibility. The Tribunal did not, however, find the Nicaragua test of ‘effective control’ to be persuasive. In its view, it did not hold up to the logic of State responsibility, nor with judicial and State practice.

The ICTY distinguishes between the control needed for individuals and organised groups. If an individual is engaged by a State to carry out illegal acts, it is necessary to show that the State has issued specific instructions, or publicly given retroactive approval. A generic authority over the individual would not be sufficient.

Acts of State Organs

It follows from ILC Draft Article 4 on State responsibility that ‘A State is responsible for the actions of its organs’. Under Article 7, such responsibility applies even if the organ exceeded their authority, or contravened instructions. This is only logical, as a State is made up by its organs. The act of individuals that lacks the status of State organs may still be attributed to the State under international law. For example, Draft Article 8 states that a person or groups conduct shall be considered an act of a State if they are in fact acting on the instructions of, or under the direction or control of the State carrying out the conduct.

Hacktivists

Hacktivists are usually dealt with under criminal law, and generally are not sponsored by a State. Since a hacktivist would be an individual, it follows from the Tadic case that the State must issue specific instructions or publicly give retroactive approval. The Tadic judgment (1999) also talked about ‘overall control’ over organized groups. Organized groups will normally have a structure, a chain of command and a set of rules as well as the outwards symbols of authority. The hacktivists must be organized in order to be a group. The fact that many hackers are attacking a State individually would not make them organized. If they are working under a leadership structure and operating cooperatively, things might be different.

If the hacktivists are organized, ‘overall control’ will be enough for attributing the conduct to the State. Individual hacktivists, however, require specific instructions to attribute the acts to the State.

CHALLENGES

access to hardware and/or software.

Ibid. Para 104.
Ibid. Paras 98 and 105.
Ibid. Para 115.
Ibid. Para 116.
Ibid. Para 118.
Draft Articles on State Responsibility Article 4, annexed in UN Res A/56/83.
Ibid. Article 7.
Draft Articles on State Responsibility Article 8, annexed in UN Res A/56/83.

The Tallinn Manual’s glossary defines a hacktivist as a person who gains or attempts to gain unauthorized.

673 Ibid. Para 104.
674 Ibid. Paras 98 and 105.
675 Ibid. Para 115.
676 Ibid. Para 116.
677 Ibid. Para 118.
678 Draft Articles on State Responsibility Article 4, annexed in UN Res A/56/83.
679 Ibid. Article 7.
680 Draft Articles on State Responsibility Article 8, annexed in UN Res A/56/83.
681 The Tallinn Manual’s glossary defines a hacktivist as a person who gains or attempts to gain unauthorized.
With the emergence of this new warfare species there are a few challenges which have to be dealt with. As cyber war is new and different from the traditional kinetic war, the challenges and concerns are also different. The researcher has identified and noted the following critical issues as far as cyber warfare is concerned:

- Countries lack laws against cyber warfare and lack of enforcement coupled with low cost attack allows anyone or any state to initiate cyber-attacks.\(^{685}\)
- As to the battlefield, there is only one cyberspace, shared by military and civilian users, and everything is interconnected. The key challenge is whether it is feasible to ensure that attacks are directed against military objectives only and that constant care is taken to spare the civilian population and civilian infrastructure.\(^{686}\)
- Cyber warfare makes the application of the Principle of Distinction difficult.
- One of the biggest challenges of cyber warfare is that the parties of the attack are not known and are unidentified.
- The other challenge is the inevitable Attitudinal and policy differences between major superpowers as to cyber laws treaty.
- Finally, there are no centralized monitoring mechanisms to govern cyber warfare so far.

**RECOMMENDATIONS**

The researcher has provided some recommendations regarding the challenges and for the suggestions for the way forward. First of all, there should be comprehensive and well-organized International legal machinery by enacting separate treaty document to govern cyber warfare. And since, most of the hackers would be civilians and remain protected under the IHL against direct attack. It is recommended that the notion of direct participation in hostilities should be on case to case that is if hackers take a direct part in hostilities by way of a cyber-attack in support of one side in an armed conflict. In such a situation, the hackers will be legitimately targeted.

**CONCLUSION**

The threat of cyber warfare is growing every day and it is important for the states to be aware of their responsibilities under International Humanitarian law, and recognize an established framework and rules applicable to it. Cyber attack has the potential of mass destruction and the states should be well aware of it. With time more states are adding cyber attacks to their arsenal, which is leading to the establishment of elaborate and cleaner rules. In future, it is hoped that the states will ban targeting the innocent civilians from cyber operations with context to International Humanitarian Laws.

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\(^{686}\) Ibid. Article 48.