EDITORIAL TEAM

Editor-in-chief

Birinder Singh

(Advocate, Punjab & Haryana High Court)

Co-Editor-in-chief

Prateek Mahajan

(Advocate, Punjab & Haryana High Court)

Managing Editor

Ivan Khosa

(Advocate, Punjab & Haryana High Court)

Senior Editor

Praduman Garg | Shivali Garg | Malkiat Singh Hundal
Advocate | Advocate | Advocate
P&H High Court | P&H High Court | P&H High Court

International Advisory from Other Streams
Adishail Gupta | Akhil Gupta | Nisha Ajmani
MBA, UIAMS, PU | MIM | M.PHIL
University of Maryland USA

<table>
<thead>
<tr>
<th>National Executive</th>
<th>International Executive</th>
<th>Student Assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mansi Singh</td>
<td>Manisha Ajmani</td>
<td>Rohit Singla</td>
</tr>
<tr>
<td>BA.LLB (HONS)</td>
<td>MPHIL</td>
<td>LL.B</td>
</tr>
<tr>
<td>UILS, PU</td>
<td>Glasgow Caledonian University UK</td>
<td>Dept of Laws, PU</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Student Editors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanya Singh</td>
</tr>
<tr>
<td>5th year</td>
</tr>
<tr>
<td>UILS, PU</td>
</tr>
<tr>
<td>Ajay Pratap Grewal</td>
</tr>
<tr>
<td>4th year</td>
</tr>
<tr>
<td>UILS, PU</td>
</tr>
<tr>
<td>Student Editors (2018-2019)</td>
</tr>
<tr>
<td>-----------------------------</td>
</tr>
<tr>
<td><strong>Pooja Kapur</strong></td>
</tr>
<tr>
<td>Amity Law School</td>
</tr>
<tr>
<td>Amity University Singh</td>
</tr>
<tr>
<td><strong>Siddharth Baskar</strong></td>
</tr>
<tr>
<td>Amity University</td>
</tr>
<tr>
<td>Noida</td>
</tr>
<tr>
<td><strong>Dixita</strong></td>
</tr>
<tr>
<td>Banasthali Vidhyapith</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Abhinav Verma</strong></td>
</tr>
<tr>
<td>Campus Law Centre, Faculty of Law, University of Delhi</td>
</tr>
</tbody>
</table>
DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of Supremo Amicus. The Editorial Team of Supremo Amicus holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of Supremo Amicus. Though all efforts are made to ensure the accuracy and correctness of the information published, the Editorial Team or the Publisher of Supremo Amicus shall not be responsible for any errors caused due to oversight or otherwise.

© Supremo Amicus, All Rights Reserved
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.
# TABLE OF CONTENTS

1. ADJUDICATION OF CASES OF DISQUALIFICATION BY AN INDEPENDENT QUASI-JUDICIAL AUTHORITY  
   By Aakash.P and Hariharan.R ................................................................. 1

2. SECTION 377: A BATTLE OF LGBT COMMUNITY AGAINST THE STEREOTYPICAL SOCIETAL NORMS  
   By Aarchi and Soumee Roy ................................................................. 12

3. CRIMINAL THREAT OF CYBER DATA THEFT: AN ANALYSIS UNDER THE INDIAN CRIMINAL LAW  
   By Aarushi Chopra ................................................................. 23

4. RIGHTS OF POOR PRISONERS IN COMPARISON TO ELITE CLASS OFFENDERS  
   By Abdeali Kothawala ................................................................. 32

5. A STUDY ON CRISIS IN INDIAN JUDICIARY: AN ANALYSIS OF THE PERIODIC SYNDROME OF DELAY, PENDENCY AND ARREARS  
   By Abhishek Sharma ................................................................. 42

6. THE PARALLEL PANDEMIC: A SOCIO-LEGAL ENQUIRY INTO CASES OF DOMESTIC VIOLENCE AMIDST COVID-19 AND ITS INTERNATIONAL RESPONSE WITH SPECIAL REFERENCE TO INDIA  
   By Aditi Saini ................................................................. 55

7. FREEDOM OF SPEECH AND EXPRESSION IN THE REALM OF DIGITAL MEDIA  
   By Adyasha Kar ................................................................. 72

8. THE DISREGARDED DILEMMA OF OCEAN DUMPING  
   By Akanksha Sharma ................................................................. 78

9. HATE CRIMES IN INDIA: AND NEED FOR A SEPARATE LEGISLATION TO COMBAT HATE CRIMES  
   By Amina Ali ................................................................. 91

10. DOWRY SYSTEM – A CURSE TO INDIAN SOCIETY  
    By Amisha Shrivastava ................................................................. 96

11. DYNAMICS OF REFUGEE PROBLEMS AND POSSIBLE SOLUTION  
    By Anamika Singh and Khyati Kumari ................................................................. 101

12. LEGAL DEFENCES IN FINANCIAL DISTRESS IN BANKING SECTOR IN INDIA
13. RIGHT TO PROPERTY: EVOLUTION FROM A FUNDAMENTAL RIGHT TO A HUMAN RIGHT
By Anirudh Grover ................................................................. 113

14. REGULATING ARTIFICIAL INTELLIGENCE: AN INDIAN STANDPOINT
By Annanay Goyal ............................................................... 122

15. COMBATING CARTELS AND POLICIES WITH REFERENCE TO COMPETITION ACT, 2002
By Anuj Kumar Bassi ........................................................... 129

16. MOBOCRACY LYNCHED DEMOCRACY
By Anusha Bhatt and Zahra Naqvi ........................................... 140

17. UNIFORM LAWS AND ANALYSIS OF FAMILY LAW PAPER BY LAW COMMISSION (2018)
By Anushree Belwariar .......................................................... 151

18. BLOCKCHAIN TECHNOLOGY AND CRYPTO ASSETS: CURRENT LEGAL POSITION IN INDIA
By Anushruti Shah ............................................................... 162

19. DEPORTATION OF ROHINGYAS WITH CONTEXT TO LAW
By Arnav Sharma ................................................................. 168

20. LEGALIZATION OF ABORTION: HOW IS ABORTION TREATED BY LAW?
By Arundhati Banerjee .......................................................... 174

21. CHILD RIGHTS AND PROTECTION: THE LEGAL PERSPECTIVE
By Arushi Chopra ................................................................. 183

22. ‘FORCE MAJEURE’ HIRING OF LAWYERS POST COVID-19
By Arya Vilas Patil ................................................................. 189

23. CROSS EXAMINATION AND THE INDIAN JUDICIARY
By Athul V. Vadakkedam ....................................................... 193

24. VICTIM COMPENSATION IN INDIA: NEED FOR A COMPREHENSIVE LEGISLATION
By Avnip Sharma ............................................................... 198
<table>
<thead>
<tr>
<th>Number</th>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>A CRITICAL ANALYSIS ON THE ROLE OF WORLD HEALTH ORGANISATION IN RELATION TO INTERNATIONAL LAW</td>
<td>Ayushi Jhawar</td>
<td>210</td>
</tr>
<tr>
<td>26</td>
<td>COMMENT: UTTAM V. SAUBHAG SINGH &amp; ORS. (2016)</td>
<td>Bhargavi Shukla and Swagat Sanyal</td>
<td>230</td>
</tr>
<tr>
<td>27</td>
<td>CONCEPTUAL ISSUES IN PATENTING OF LIFE FORMS</td>
<td>Daksh Dhawan and Divyanshi Saxena</td>
<td>227</td>
</tr>
<tr>
<td>28</td>
<td>THE ROLE OF SOCIAL MEDIA IN ENSURING THE SOLIDARITY OF THE NATION</td>
<td>Dhananjai Singh Rana and Sahil Goel</td>
<td>239</td>
</tr>
<tr>
<td>29</td>
<td>CHILD TRAFFICKING – A CANCER TO BE CURED</td>
<td>Dhivya U and Sandhiya K</td>
<td>252</td>
</tr>
<tr>
<td>30</td>
<td>CASE STUDY: JAORA SUGAR MILLS V. STATE OF MADHYA PRADESH AND OTHERS</td>
<td>Dhruvi Anajwala</td>
<td>264</td>
</tr>
<tr>
<td>31</td>
<td>URBAN WARFARE AND INTERNATIONAL HUMANITARIAN LAW; CAUSES, CONSEQUENCES, AND CHALLENGES</td>
<td>Dhruvi Anajwala</td>
<td>268</td>
</tr>
<tr>
<td>32</td>
<td>TERRORISM: EMERGENCE OF NIA AND ITS INCOMPATIBILITY</td>
<td>Dipti Gabriel and Priyam Kumar Sinha</td>
<td>278</td>
</tr>
<tr>
<td>33</td>
<td>CULTURAL, EDUCATIONAL, POLITICAL AND SOCIAL RIGHTS OF NON-CITIZENS</td>
<td>Divya MB</td>
<td>284</td>
</tr>
<tr>
<td>34</td>
<td>HUMAN RIGHTS VIOLATIONS OF THE TIBETANS BY CHINA AND INDIA’S REFUGEE POLICY</td>
<td>Doreen Ann Jacob</td>
<td>295</td>
</tr>
<tr>
<td>35</td>
<td>ENDEAVOURS TO PROTECT WOMEN FROM SEXUAL HARASSMENT AT WORKPLACE</td>
<td>Dr. N. Krishna Kumar and Manu Krishna S.K.</td>
<td>305</td>
</tr>
<tr>
<td>36</td>
<td>UCC: A DIFFERENT MODEL OF IMPLEMENTATION</td>
<td>Eashaan Agrawal</td>
<td>316</td>
</tr>
<tr>
<td>37</td>
<td>OFFENCE OF RAPE SHOULD BE GENDER NEUTRAL IN INDIA</td>
<td>G. Priyadarshini</td>
<td>326</td>
</tr>
</tbody>
</table>
38. TRANSCONTINENTAL SECURITY LANDSCAPE OF INDIA: THREATS AND RESPONSES
By Garima Singh and Sharvin Vats ................................................................. 337

39. COVID-19 OUTBREAK: CHALLENGES IN IMPLEMENTING THE RESOLUTION PLAN
By Gauri Suri and Dyuti Pandya ................................................................. 350

40. SHOULD SEXUAL OFFENCES BE GENDER NEUTRAL?
By Gayathri V ................................................................. 357

41. POSITION OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE INDIAN LEGAL SYSTEM
By Gazal Ghai ................................................................. 365

42. HUMAN RIGHTS AND TRANSGENDER
By Gazal Gupta and Aditya Gupta ................................................................. 375

43. NEED OF SPECIAL PROVISIONS FOR CYBERBULLYING IN INDIA
By Harsh Vardhan Rathi ................................................................. 388

44. ARMED FORCES PERSONNEL AT THE ALTAR OF JUSTICE: IS JUSTICE SEEN TO BE DONE? (NEED FOR AN INDEPENDENT AND IMPARTIAL INDIAN MILITARY JUSTICE SYSTEM AND TIME TO DISCONTINUE SUMMARY COURT MARTIAL)
By Harshika Kapoor ................................................................. 394

45. SEXUALITY AND IDENTITY
By Harshit Jain ................................................................. 407

46. DREADFUL EFFECTS OF FOOD ADULTERATION AND THE NEED FOR BETTER IMPLEMENTATION IN THE EXISTING LEGISLATION
By Ilakkiya K and Gowshini Athreya D ................................................................. 414

47. LAW OF ARBITRATION IN INDIA - THE CHANGING LANDSCAPE
By Jangyadatta Pradhan ................................................................. 421

48. POCSO – AN EFFECTIVE ACT OF THE ERA
By Jidnyasa Kshirsagar ................................................................. 428

49. WAR OVER LANGUAGE: CRITICAL ANALYSIS OF THE MOST CONTROVERSIAL PART OF CONSTITUTION THROUGH CONSTITUENT ASSEMBLY DEBATES
By Kartik Gupta ................................................................. 436

50. ENTRY OF WOMEN IN SABRIMALA TEMPLE, A RIGHT OR A RIGHT IN DISGUISE
<table>
<thead>
<tr>
<th>Issue</th>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>51</td>
<td>THE IMPACT OF AGE OF MINORITY DURING SENTENCING TO DEATH IN THE</td>
<td>Keerthana.R.Chelluri</td>
<td>451</td>
</tr>
<tr>
<td></td>
<td>CONTEXT OF DIFFERENT COUNTRIES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>52</td>
<td>LEGAL STATUS AND RIGHTS OF WOMEN IN INDIAN CONSTITUTION</td>
<td>Khushal Khatri</td>
<td>458</td>
</tr>
<tr>
<td>53</td>
<td>UNDERSTANDING THE POSITION OF COMPETITION LAW IN THE TIME OF</td>
<td>Kunal Singh</td>
<td>465</td>
</tr>
<tr>
<td></td>
<td>COVID-19: INDIA &amp; THE E.U.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54</td>
<td>PHOTOGRAPHY AS AN ARTISTIC WORK UNDER COPYRIGHT LAWS</td>
<td>Malvika Pal</td>
<td>471</td>
</tr>
<tr>
<td>55</td>
<td>A COMPARATIVE STUDY OF SABARIMALA ISSUE VIS-A-VIS THE ROLE OF</td>
<td>Manas Ranjan Padhi and Riya Shrivastava</td>
<td>481</td>
</tr>
<tr>
<td></td>
<td>JUDICIARY FOR THE PROTECTION OF RIGHTS OF WOMEN</td>
<td></td>
<td></td>
</tr>
<tr>
<td>56</td>
<td>LEGAL ASPECTS OF EUTHANASIA</td>
<td>Mansi Gohar</td>
<td>488</td>
</tr>
<tr>
<td>57</td>
<td>LABOUR LAW REFORMS: DECODING CODE ON WAGES AND INDUSTRIAL</td>
<td>Mathivadhani.C and Madhumita Christina Jegaraj.A</td>
<td>493</td>
</tr>
<tr>
<td></td>
<td>RELATION CODE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>58</td>
<td>CLIMATE REFUGEES: A GLOBAL ENVIRONMENTAL AND LEGAL CRISIS</td>
<td>Megha Gautam</td>
<td>507</td>
</tr>
<tr>
<td>59</td>
<td>ROLE OF JUDICIARY IN CYBER CRIME</td>
<td>Mehak Aneja</td>
<td>519</td>
</tr>
<tr>
<td>60</td>
<td>BATTERED WOMAN SYNDROME AS A LEGAL DEFENCE IN CASES OF SPOUSAL</td>
<td>Mili Vakil</td>
<td>526</td>
</tr>
<tr>
<td></td>
<td>HOMICIDE: AN INDIAN PERSPECTIVE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>61</td>
<td>ALTERNATE DISPUTE RESOLUTION AND CONCILIATION IN INDIA</td>
<td>Milind Jain</td>
<td>539</td>
</tr>
<tr>
<td>62</td>
<td>ETHICS IN TECHNOLOGY: INTERNET ACCESS AS A HUMAN RIGHT IN THE AGE</td>
<td>Milind Malhar Sharma</td>
<td>550</td>
</tr>
<tr>
<td></td>
<td>OF INFORMATION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>63</td>
<td>DOES ANTI-DEFECITION LAW REQUIRE STRICT IMPLEMENTATION?</td>
<td>Mohammad Shadab</td>
<td>563</td>
</tr>
</tbody>
</table>
64. LAY PERCEPTION OF PSYCHOPATHS AND ITS EFFECT ON LEGAL JUDGEMENT
By Moulya Reddy.................................................................568

65. DEVELOPING CRIMINAL JURISPRUDENCE WITH REFERENCE TO SEXUAL OFFENCES AGAINST MEN
By Muskaan Singh and Rebecca Mishra........................................579

66. RIGHT TO WHOLESOME ENVIRONMENT UNDER INTERNATIONAL ENVIRONMENTAL LAW
By Nabanita Sarma...............................................................591

67. RESTORATIVE JUSTICE
By Nandini Menon...............................................................596

68. THE GROWING NEED FOR LEGALLY ADOPTING THE PATIENTS’ RIGHTS CHARTER IN INDIA
By Nandini Menon...............................................................609

69. ANALYSING FREE SPEECH IN A DEMOCRACY: A COMPARATIVE ANALYSIS OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 19(1)(A) OF THE INDIAN CONSTITUTION
By Nandini S Patil.................................................................618

70. GIAN KAUR V. STATE OF PUNJAB: CASE COMMENT
By Neha Samji........................................................................631

71. DOMESTIC VIOLENCE: THE SHADOW PANDEMIC
By Prabhav Pandey.................................................................634

72. DATA ENCRYPTION AND SURVEILLANCE
By Prabhjot Singh.................................................................639

73. COVID-19: THE CATALYST TO AN E-JUDICIARY
By Pragya Jha and J Nayak....................................................644

74. CRIMES AGAINST WOMEN: LAWS ABOUT THE MENANCE IN THE SOCIETY
By Prenita Ranjan..................................................................654

75. DNA-BASED TECHNOLOGY (USE AND REGULATION) BILL, 2019: PRIVACY V/S SPEEDY JUSTICE
By Priyanka Prasanth..............................................................664

76. WHETHER THE PRIVATE SECTOR ENJOYS A DISCOUNT ON THE INDIAN WHISTLE BLOWER LEGISLATION?

www.supremoamicus.org
77. WITNESS PROTECTION
By Rahul Jaggi ................................................................. 695

78. WIELDING STRIKE: SHOULD BE CONFERRED A FUNDAMENTAL STATUS IN INDIA? AN ANALYSIS OF A PARADOXICAL APPROACH
By Ramandeep Sohal ............................................................. 707

79. SPORTS LAW- PROBLEMS AND PERSPECTIVE
By Rashi Jha ........................................................................ 717

80. DOCTRINE OF FRUSTRATION UNDER INDIAN CONTRACT ACT & COVID-19
By Rashika Bajaj and Divya Prakash Mishra .................................. 724

81. APPLICATION OF DOCTRINE OF RULE OF LAW BY JOSEPH RAZ IN INDIA
By Rishabh Vyas and Moksh Ranawat ........................................ 735

82. AN ANALYSIS OF THE EFFECT OF COVID-19 PANDEMIC ON LABOUR LAWS IN INDIA
By Sagarika S Kanakannavar, Aishwarya Prasad and Shamitha Padmanabhan .......... 745

83. AFFINITIES OF INTELLECTUAL PROPERTY RIGHTS IN SPORTS
By Sai Hasitha and Ayush Kumar Jain ........................................... 752

84. MARCHING TO GLORY: INDIA, THE FRACUTRED SOLDIER WE THE NATION - THE LOST DECADES: A REVIEW
By Saisha Bacha ...................................................................... 757

85. HEART OF THE CONSTITUTION DURING PANDEMIC
By Sakshi Goyal ...................................................................... 760

86. ANALYSIS OF THE CONSTITUTIONAL FREEDOM OF PRESS IN INDIA WITH RESPECT TO FREEDOM OF SPEECH AND EXPRESSION
By Saloni Suhalka ..................................................................... 765

87. DECODING THE SUPREME COURTS CRYPTOCURRENCY JUDGEMENT - INTERNET AND MOBILE ASSOCIATION OF INDIA V. RESERVE BANK OF INDIA
By Sana Banyal ...................................................................... 776

88. WOMEN-THE ULTIMATE WARRIORS: ERAS CONTRIBUTIONS IN THE EMPOWERMENT OF WOMEN, EDUCATION OF WOMEN AND ENACTMENT OF POWERFUL LEGISLATIONS: EARLY VEDAS TO THE 21ST CENTURY
By Sangeeta Basu ...................................................................... 780
89. JUDICIAL APPOINTMENTS: OF COLLEGIUMS AND MORE  
By Sanika Gadgil .................................................................792

90. POST BREXIT AN ENVIRONMENTAL RISK ANALYSIS  
By Sarthak Sharma .............................................................804

91. LETHAL AUTONOMOUS WEAPONS: A CONUNDRUM OF MORALITY AND LEGALITY  
By Saurabh Saket ...............................................................815

92. LEGALIZATION OF CRYPTOCURRENCY  
By Sayanti Dey ....................................................................825

93. PATENT PLEDGES: A BRIDGE BETWEEN EXCLUSIVITY OVER PATENTED INVENTIONS AND PROMOTING INNOVATION  
By Sayee Tandale ...............................................................842

94. INCEPTION OF INDIA’S PRIVACY LEGISLATION  
By Shaheen Banoo ..............................................................849

95. COMPARATIVE ANALYSIS OF WILL UNDER HINDU LAW AND MUSLIM LAW  
By Shantanu Seth ..............................................................860

96. DOMESTIC VIOLENCE: A FORGOTTEN AGENDA AMID LOCK DOWN IN INDIA  
By Shaurya Gupta ............................................................870

97. ILLEGAL WILDLIFE TRADE: IS IT NECESSARY TO CURB THROUGH NATIONAL POLICIES AND LEGISLATIVE PROVISIONS?  
By Shibanee Acharya ..........................................................875

98. FAMILIES & CRIME  
By Shivang Khanna ...........................................................883

99. ARTIFICIAL INTELLIGENCE IN LEGAL PROFESSION  
By Shivani .........................................................................895

100. A CRITICAL ANALYSIS OF DIGITAL SAMPLING OF MUSIC AND THE NEED FOR A CHANGE IN COPYRIGHT LAW IN INDIA  
By Shrikanth R Kashyap ......................................................901

101. THE EFFECTS OF COVID-19 ON THE HEALTH AND SOCIO-ECONOMIC SECURITY OF SEX WORKERS IN INDIA  
By Shruti Gupta .................................................................912

102. DEMERGERS AND MINORITY RIGHTS: REGULATORY FRAMEWORK  
By Shubham Dimri ............................................................924
103. MASSACRE BY MAJORITY IN THE NAME OF THE MOTHER
By Surbhi Agrawal and Saloni Maheshwari

104. INHERITANCE RIGHTS OF ADOPTED CHILDREN IN CHRISTIAN LAW
By Tanya Antony

105. SOCIAL MEDIA AND FREEDOM OF SPEECH AND EXPRESSION: CHALLENGES BEFORE INDIAN LAW
By Tanzim Surani

106. THE NEW BEHEMOTH DATA PROTECTION LAWS FOR THE 21st CENTURY: THE GENERAL DATA PROTECTION REGULATION
By V Adharsh

107. TECHNOLOGY IN UPGRADING INDIAN COURTS
By Vanathi Krishna K and Shobika K

108. COMPLICATIONS WITH RELATION TO PROCEDURE OF SFIO AND THE PROSECUTION AND CRITICAL ANALYSIS OF BAIL PROVISIONS UNDER THE COMPANIES ACT, 2013
By Vanya Agarwal

109. TIMES OF LOCKDOWN OR TIMES OF OPPORTUNITY?
By Y. Keerthana Reddy

110. JURISDICTION OF LAW OF TORTS IN INDIA
By Yash Jain, Aman Monga and Tanishka Valecha

111. RAPE: THE (UN)JUSTIFIED HINDRANCES SERVING (IN)JUSTICE IN INDIA
By Yashika Kuntela

112. WOMEN PRISONERS- AN OBLITERATING COMMUNITY
By Yukti Mahi Bawa and Khwaja Umair

113. UNIONIZATION OF SEX WORK IN INDIA
By Yuktika Sriya Kadali
ADJUDICATION OF CASES OF DISQUALIFICATION BY AN INDEPENDENT QUASI-JUDICIAL AUTHORITY

By Aakash P and Hariharan R from SASTRA Deemed to be University

ABSTRACT
The Supreme Court had, once, opined that the office of the Speaker which was attached with great dignity should not be made the target of bias since his tenure is dependent on the will of the majority of the House. This view has still not changed, even today, and the Supreme Court, in a recent case, went to the extent of suggesting the Parliament to amend the Constitution to constitute a quasi-judicial authority, like a Tribunal, to adjudicate disqualification cases under Tenth Schedule and substitute the relevant powers of the Speaker on the Tribunal as the Speaker continues to belong to a particular political party, either de jure or de facto. The settlement of disqualification disputes should be made by an independent mechanism outside the House to ensure that it is decided both swiftly and impartially. This paper has discussed the Constitutional powers of the Speaker and the sharp contrast manifested in practice. The recent disastrous and unprecedented instances of bias of Speaker that has made the Supreme Court reiterate the constitutional values, dignity and impartiality of the Office of the Speaker, which are, unfortunately, either lacking or diminishing and the conspicuous bias and abuse of powers by the Speaker for his personal or party gains are also explained in detail in this paper. The suggestions for a possible set up of the Tribunal including its composition, jurisdiction, locus standi, time for settling disputes and appeals are also discussed in this paper. This is a welcoming and necessary approach which upholds the constitutional impartiality of the Speaker and gives real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy.

Keywords: Tenth Schedule, disqualification, defection, Model Speaker, Quasi-Judicial Authority, Tribunal

INTRODUCTION
In the contemporary democratic world, almost all parliamentary democracies have faced the threat of defection. It is an act of changing the allegiance from party on whose ticket they have been elected to another party or voting against the direction of the existing party. It poses a serious threat to democracy by creating a chaotic political environment. Defection is not a new phenomenon to India as it had faced numerous cases of elected representatives shifting from one party to another. This became a common menace across party lines, which necessitated the government to add the Tenth Schedule to the Constitution through the 52nd Constitutional Amendment to prevent the breach of trust of the electorate and ensure stable governance and a healthy political environment. It gives powers to Speaker or Chairman of the House to decide on the cases of disqualification of members on the ground of defection and makes him an ultimate arbitrator whose decision is final, binding and usually non-justiciable. This makes us question the impartiality of the Speaker and the purpose of conferring unlimited powers on him. The effectiveness of anti-defection law in serving its purpose or, on the contrary, posing a threat to democracy is also questionable. This warranted an analysis on the Constitutional powers vested on the Speaker regarding disqualification of members of the legislature due to defection and the position
of the Speaker as an impartial arbitrator on deciding it from case to case.

CONSTITUTIONAL POWERS OF THE SPEAKER
The Speaker/Chairman of the House is a constitutional office holder. The Constitution, Conventions and Procedure and Conduct of Business Rules of the respective Houses have provided the Speaker with adequate powers to ensure the efficient conduct of Parliamentary proceedings.

Tenth Schedule to the Constitution provides certain powers to the Speaker to curb the evil of political defection:

- Except when the Speaker is subject matter of disqualification, he shall decide on the cases of disqualification of members on the ground defection and his decision is final.
- The Speaker is empowered to make rules relating to the implementation of the provisions of the Tenth Schedule including the procedure in which the cases of disqualification on the grounds of defection are to be decided.
- The Speaker can order that any wilful contravention of the rules of the House by any person, as a breach of privilege of the House.
- All proceedings relating to disqualification of member on the grounds of defection are considered as the proceedings of the House and cannot be questioned in a court of law. Furthermore, Tenth Schedule explicitly provides for the bar of jurisdiction of courts in this regard.
- The Speaker is exempted from the definition of defection, when he has to withdraw his membership in the party by the reason of being elected to such office and rejoins when he ceases to hold the office.

In *Kihoto Hollohan v. Zachillhu*¹, the Supreme Court, while upholding the constitutional validity of the Tenth Schedule, has observed that it is an experimental legislation where line of constitutionality cannot be drawn so easily to differentiate which is constitutional and which is not. The Speaker’s authority is similar to that of a tribunal and the finality clause does not oust the jurisdiction of the courts. However, it is limited to those proceedings tainted by illegality or perversity. It doesn’t absolutely bar the jurisdiction of courts and the power of the Speaker under the Tenth Schedule is a judicial power which is subject to judicial review.

A BITTER REALITY OF NORMS
The Speaker occupies a paramount position in parliamentary democracy. The conventional prerequisite for a person holding the office of Speaker is to be an honourable, impartial and independent person, stepping out of party politics once he assumes office. Though the Speaker is elected mainly by the ruling party, there is a healthy convention where an informal consultation of other parties is taken to ensure that he enjoys respect and be impartial towards all the sections of the House. The powers of the Speaker are expected to be exercised only to uphold the constitutional values of the House. But the bitter truth is such powers are used only to the advantage of the party which elected him. The worst of all is the defection laws being unscrupulously taken advantage by the Speaker to help the ruling party in maintaining their majority. These depraved acts of the Speakers are often condemned by the courts.

---

¹*Kihoto Hollohan v. Zachillhu, A.I.R. 1993 S.C. 412*
CONTRARIES AND JUXTAPOSITIONS OF THE SPEAKER – SOME INSTANCES

In the decades-old rich history of the Constitution of India, Speaker holds a significant position both in terms of parliamentary spirit and structure of federalism. It is said that the Speaker is, and should be, an impartial arbitrator in all cases concerning the membership of MLAs in the House. However, as stated earlier, the real practice is in sharp contrast to those motives expressed and procedures mentioned in paper. The Speaker had misused his constitutional authority for his party’s benefits and, at times, been warned by the Supreme Court about the wrong implications it would have on the constitutional functioning and dignity of the Office of the Speaker. The country has witnessed and experienced disastrous instances where a Speaker vehemently exploits his Constitutional authority and powers either for personal or party benefits and makes the whole exercise of deciding on disqualification petitions a mockery of the Constitution.

ARUNACHAL PRADESH CONSTITUTIONAL CRISIS

The first and the most recent instance of such malfeasance happened in Arunachal Pradesh in 2015. Supreme Court had to adjudicate such a constitutional crisis not only in light of constitutional provisions and also on the basis of the real object of such provisions and the real intentions of the concerned parties behind such decisions. All these were necessary to be considered in Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly², in which, even the apex court had felt that the impression given out in the case was that the sequence of facts relating to the affairs of the House and the MLAs, by itself, would be sufficient to establish that constitutional responsibilities were exercised in such manner as would be sufficient for the Court to strike down the same. Any layman could have had the same view if he had witnessed or made aware of the events that unfolded rightly and chronologically³.

The crisis began to crop up when a notice of resolution to remove the Speaker, Mr. Nabam Rebia, was moved by the Opposition Party, BJP, under Article 179(c) read with Article 181 and Rules 151 and 154 of the Rules of Procedure and Conduct of Business of Arunachal Pradesh Legislative Assembly. On the other hand, a notice of resolution to remove Deputy Speaker, Mr. Tenzing Norbu Thongdok, was moved by the Congress Party, which was also the ruling party. The Chief Government Whip filed disqualification petitions against 14 MLAs of his party, on which the Speaker gave them a notice period of 14 days to reply for it. Taking the above events into account, the Governor of Arunachal Pradesh, in exercise of powers conferred upon him under Article 174 (1), issued an order preponing the session and also sent a message stating that the resolution for removal of Speaker shall be the first item on its agenda and the Deputy Speaker shall preside over the House on that resolution, according to Article 181(1). He further stated that until the session is prorogued, no Presiding Officer shall alter the party composition in the House.

² Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 S.C.C. 1

Amidst this predicament brewing within the precincts of the House, the Speaker went on to disqualify those 14 MLAs by the constitutional powers vested on him when a resolution against him was in consideration. Stating the unconstitutionality of such an order, the Deputy Speaker had quashed the disqualification order, even though he himself had been unseated through it, for not only infracting the constitutional and legal procedures but also for lack of competence to do so since a notice of resolution for removal of Speaker was pending. He also mentioned the order of the Governor not to change the composition of the House until the session is prorogued which provided him cogent reasons to revoke the disqualification order.

As this power tussle came before the Supreme Court, it had held, inter alia, that it would be constitutionally impermissible for a Speaker to adjudicate upon disqualification petitions under the Tenth Schedule, while a notice of resolution for his own removal from the office of Speaker is pending. This is because such an exercise would conflict with the express mandate of Article 179(c) which contains the words “all the then members of the Assembly”. It prohibits the Speaker to disqualify members as the same would negate the effect of those words. It expressed definiteness and any change in the strength and composition of the Assembly when the resolution for removal is pending, is against the constitutional objective of that article. The purpose of Tenth Schedule is clear and distinct from that of Article 179(c).

The Supreme Court went on to interpret that it could seriously prejudice MLAs facing disqualification if that is dealt with by the Speaker before his own removal. If the Speaker faces the motion first, both constitutional provisions would have their independent operational space preserved as neither of them would interfere with the free functionality of the other.

Finally, the apex Court opined that the constitutional purpose and harmony would be maintained if a Speaker refrains from adjudication of disqualification petitions whilst his own position as Speaker is under challenge.

This had clearly manifested the partisan attitude of the Speaker and the political vendetta undertaken by the Speaker for the benefit of his personal incumbency by exploiting the powers vested on him by the Constitution.

POLITICAL CRISIS IN KARNATAKA

The Supreme Court had noticed another such delinquency very recently from the Office of the Speaker in 2019, but this time, it is from the Speaker of Karnataka Legislative Assembly, where the incident still stays fresh and lingers in the minds of all MLAs, politicians and people of the State. There was high-voltage political drama revolving around Raj Bhavan and Vidhana Soudha which had shown not only the massive exodus of MLAs resigning from the Assembly but also the Speaker’s abuse of power to pass disqualification orders that are ultra vires to his authority and jurisdiction. Supreme Court was adjudicating a case based on these circumstances in Shrimanth Balasaheb Patil v. Hon’ble Speaker, Karnataka Legislative Assembly⁴, where it had

⁴ Shrimanth Balasaheb Patil v. Hon’ble Speaker, Karnataka Legislative Assembly, 2019 SCCOnline S.C. 1454
reiterated the virtues of a Speaker and his role in upholding the constitutional functions and values of his Office without letting his mind favour the position of his party in the House.

It all started when the results of the 15th Karnataka Legislative Assembly Elections were declared. Though the BJP was the single largest party, its attempt to form the Government was not successful, resulting in a coalition government of Congress and JD(S). The resignation letters submitted by 15 MLAs to the Speaker had started the controversy posing a threat to the majority support of the government led by Mr. H.D. Kumaraswamy. However, the Speaker did not decide on accepting those letters. Having submitted the resignations, they did not attend the session, leading to the defeat of trust vote and resignation of Mr. Kumaraswamy from the post of Chief Minister of Karnataka. The Government had a short life of about 14 months. After having successfully conducted the trust vote, the Speaker, after giving sufficient notice period and due inquiry, passed an order rejecting the resignations and disqualifying 17 MLAs till the end of the term of the House.

When the Supreme Court was approached, the Court, though validating the disqualification order, had held, inter alia, that that the Speaker, in exercise of his powers under the Tenth Schedule, does not have the power to either indicate the period of disqualification, nor to bar a disqualified member from contesting elections until the end of the term of the House. This is because both Article 191(2) and the Tenth Schedule of the Constitution do not specify the consequences or period of disqualification. Similarly, Articles 164(1B) and 361B also show that disqualification under the Tenth Schedule does not bar a person from contesting elections. The phrase “for being a member” used in Article 191(2) and the disqualification under the Tenth Schedule are constitutionally different and, thus, implies that a bar for contesting re-elections is neither contemplated under the Constitution nor under the statutory scheme. When the express provisions of the Constitution provide for a specific eventuality, it is not appropriate to read an “inherent” power to confer additional penal consequences, for it would be against the express provisions of the Constitution. In N.S. Vardachari v. G. Vasantha Pai, it was held that a person cannot be barred from contesting elections if he is otherwise qualified to contest the same. Even in case of expulsion, the expelled candidate cannot be barred from contesting re-election.

The Supreme Court had also opined that there is a growing trend of the Speaker acting against the constitutional duty of being neutral. Being a constitutional functionary, the Constitution requires the Speaker and his actions to uphold constitutionalism and constitutional morality and is expected to imbibe Constitutional values in everyday functioning as merely taking the oath to protect and uphold the Constitution is not sufficient.

The apex Court opined further that constitutional morality should never be replaced by political morality in deciding what the Constitution mandates. The

---


---

7 Indra Sawhney v. Union of India, 1992 Supp. (3) S.C.C. 217
constitutional responsibility endowed upon the Speaker has to be scrupulously followed and his political affiliations cannot come in the way of adjudication. If he cannot disassociate from his party and behaves contrary to the spirit of neutrality, he does not deserve to be reposed with public trust and confidence.

This clearly shows the Speaker’s affiliation towards his party that made him to take decisions that are beyond his capacity and authority, rather than working as a constitutional functionary and protecting the dignity of the Office of the Speaker of the House.

UNPRECEDENTED POLITICAL TWISTS AND TURNS IN TAMIL NADU

The people of Tamil Nadu had witnessed a thrilling political stunt which was highly dynamic with minute-by-minute changes becoming conspicuous in its political environment. The changes were imminent and also became very indispensable, in the sense that, it had even casted a doubt on the existence of the Government. This time, it is for the Madras High Court to adjudicate on the order passed by the Speaker of Tamil Nadu Legislative Assembly to disqualify 18 MLAs of the House.

The issue started when Mr.O.Panneerselvam was elected as Legislative Party leader of AIADMK and also sworn in as Chief Minister of Tamil Nadu (hereinafter referred to as “CM”), after the death of former CM, Selvi J.Jayalalithaa. After his resignation, he was succeeded by Mr.Palaniswami. When he faced a floor test wherein 122 MLAs, including the 18 MLAs in question, voted in favour of him in line with the direction issued by Chief Government Whip (hereinafter referred to as “the Whip”), 11 other MLAs headed by Mr.O.Panneerselvam (hereinafter referred to as “11 MLAs”), voted against him, with one abstained member. However, Mr.Palaniswami won the floor test and some disqualification petitions were filed before the Speaker, Mr. Dhanabal, for disqualifying those 11 MLAs under Paragraph 2(1)(b) of the Tenth Schedule for having voted against the party directive.

Then, a dispute had arisen before the Election Commission of India on the true and genuine composition of AIADMK, claimed by both the O.Panneerselvam and T.T.V.Dhinakaran – Palaniswami factions, and the resultant allotment of “Two Leaves” party symbol. The Commission passed an order freezing party symbol, so that, neither of them could use it.

Later on, both factions reunited after burying their differences. Thereafter, those 18 MLAs met the Governor of Tamil Nadu and submitted written representations withdrawing their support to Mr.Palaniswami as CM due to their lack of confidence in the government. They also requested the Governor to intervene and institute the constitutional process as the Constitutional head of the State.

Consequently, the Whip moved a petition for initiation of proceedings under the Tenth Schedule read with Rule 6 of Disqualification Rules, 1986 for disqualifying 19 MLAs, initially, including those 18 MLAs, on which, the Speaker issued notice, calling upon them to reply within seven days. After such period, the Speaker was not satisfied with their reply and passed an order dismissing the petition against Mr.S.T.K.Jakkaiyan, who retracted his allegations by issuing letters to Speaker and Governor, and disqualifying the
remaining 18 MLAs from their membership to the Tamil Nadu Legislative Assembly.

The High Court was approached to adjudicate the position of disqualification of 18 MLAs in **P. Vetrivel v. P. Dhanabal**⁸, popularly known as the 18 MLAs case. While the Speaker had cited the cases of **Kihoto Hollohan v. Zachillhu**⁹ and **Ravi S. Naik v. State of Maharashtra**¹⁰, on implied and voluntary resignation of membership, and other similar authorities, the 18 MLAs heavily relied on the landmark case of **Balchandra L. Jarkiholi v. B.S. Yeddyurappa**¹¹, popularly known as the Yeddyurappa case, decided by the Supreme Court, to which the present case was squarely applicable, holding that submission of letters by MLAs to the Governor expressing lack of confidence in the governance of a particular person as CM does not amount to voluntary resignation of membership and, as such, fails to attract disqualification. The High Court criticized the action of the Speaker even though it had ultimately upheld the constitutional validity of the order of disqualification. The minority opinion is of vital importance, which mirrored the flagrant behaviour of the Speaker on account of malafide and political exigencies, by placing lone MLA Mr. S.T.K. Jakkaian on a different footing compared to other 18 MLAs, and also opined on the quintessential virtues of a Speaker through a specific term called “Model Speaker”.

This has been done so by drawing inspiration from three cases:

1. In **Jagjit Singh v. State of Haryana**¹², Supreme Court had clearly laid down the nature of high office of the Speaker and the complete impartiality expected of him, though this judgment was cited for principles of natural justice.

2. In **Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly**¹³, Supreme Court had held that the level of dispassionate approach and impartial dispensation required of a Speaker is very high. It is seen not only as a legal principle, but also as a code for a model speaker.

3. In **Dr. Wilfred A. De Souza v. Tomazinho Cardozo**¹⁴, Bombay High Court held that confidence in the impartiality of the Speaker is an indispensable condition for successful working of a democratic system.

The High Court went on to opine that the Office of the Speaker is so high that the degree of neutrality required of the Speaker, particularly in disqualifications, must be high that it should not give scope for even a shred of doubt that the view has been taken owing to political exigencies.

This clearly shows the Speaker cannot be a person above pressures and he can also abuse his power for malafide purposes only for his party. Due to political exigencies, he fails to be a person of dignity and nobility and offends his Office of Speaker through his delinquent decisions.

**WHIMS AND FANCIES OF THE SPEAKER OF THE HOUSE IN MANIPUR**

---

⁸ P. Vetrivel v. P. Dhanabal, AIROnline 2018 Mad. 1580
⁹ Supra. Note 1
¹¹ Balchandra L. Jarkiholi v. B.S. Yeddyurappa, (2011) 7 S.C.C. 1
¹³ Supra. Note 3
¹⁴ Dr. Wilfred A. De Souza v. Tomazinho Cardozo, 1998 SCCOnline Bom. 400
The Supreme Court has yet again adjudicated on an issue of vital importance on the constitutional position of the Speaker as an impartial arbitrator. It also reiterated its own judgements on the requisite high virtues of a Speaker as a constitutional functionary and the nobility it should hold by taking non-partisan stands and not indulging in abusing the constitutional authority for existing political exigencies. This was the case in Manipur that led to the case of Keisham Meghachandra Singh v. Hon’ble Speaker, Manipur Legislative Assembly.\(^{15}\)

The election for the 11th Manipur Legislative Assembly produced an inconclusive result as none of the political parties were able to secure majority in order to form the Government. The Congress Party emerged as the single largest party with 28 seats and BJP coming second with 21 seats. Respondent No.3 contested as a candidate nominated by the Congress Party and was duly elected as such. Immediately after the declaration of the results, he met the Governor of Manipur, along with various BJP members, in order to stake claim for forming Government. Then, the Governor invited BJP-led group to form Government and Respondent No.3, along with 7 other MLAs, was sworn in as a Minister.

The Speaker of Manipur Legislative Assembly received 13 applications for the disqualification of Respondent No.3 under paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India, on which he sat and no action was taken even after a reasonable period for adjudication.

When it had appeared before the Supreme Court, it directed the Speaker to decide the pending disqualification petitions within a period of four weeks and allowed any party to the proceedings to apply for further directions if it is still left undecided. A disqualification under Tenth Schedule must first be decided exclusively by the Speaker and cannot be decided by this Court, given his inaction. Courts cannot interfere in a proceeding under Tenth Schedule before the Speaker gives a decision.\(^{16}\) Even the directions of the High Court given while disqualification petition was pending before the Speaker were set aside.\(^{17}\) Judicial review should not be interdicted in aid of the Speaker in deciding on disqualification under Tenth Schedule.

The apex Court had expressed that, in the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against his decision to any independent outside authority. This is a reverse trend and violates the basic feature of the Constitution since the Speaker cannot be treated as an authority contemplated for being entrusted with the function of adjudicatory disposition by the Constitution, notwithstanding the great dignity attached to that office with the attribute of impartiality.

This vividly manifests the Speaker’s partisan attitude by using his absolute constitutional authority as the ultimate arbiter in disqualification proceedings to take perverse and delinquent decisions to keep his rivals and naysayers in an incredulous and disadvantaged position. This yet again shows his biased actions to...

---

\(^{15}\) Keisham Meghachandra Singh v. Hon’ble Speaker, Manipur Legislative Assembly, AIR Online 2020 S.C. 54: (2020) 2 SCALE 329

\(^{16}\) Indian National Congress v. State of Goa, 2017 SCC Online (Bom.) 8817


www.supremoamicus.org
benefit his party, rather than functioning in an impartial way to preserve and uphold the dignity and integrity of the Office of the Speaker of Legislative Assembly.

QUASI-JUDICIAL AUTHORITY FOR DISQUALIFICATION CASES – A WELCOMING AND NECESSARY APPROACH

The need for a quasi-judicial authority for disqualification cases stems from the opinion rendered by Supreme Court in Keisham Meghachandra Singh v. Hon’ble Speaker, Manipur Legislative Assembly18, where it had suggested the Parliament to rethink whether disqualification petitions ought to be entrusted to the Speaker as a quasi-judicial authority under Tenth Schedule when he continues to be a partyman and should seriously consider amending the Constitution to substitute him with a permanent Tribunal headed by a retired Supreme Court Judge or some other independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the constitutional provisions. The same view was expressed in Kihoto Hollohan v. Zachillhu19, by stating that the power conferred on the Speaker under the Tenth Schedule is enormous and therefore, it is necessary to sustain the elevated position the Speaker constitutionally enjoys and also have room for constitutional propriety. The logic behind such an opinion was also stated in the same case that when the final authority for removal of a Judge of the Supreme Court and High Court is outside the judiciary, i.e., in the Parliament under Article 124(4), then, on the same principle, the authority to decide the question of disqualifications should be outside the House as envisaged by Articles 103 and 192.

Some suggestions as to the composition and powers of such a Tribunal are as follows:

- **Composition of Tribunal:** As specified earlier, the Tribunal should adjudicate only those disqualification cases under Tenth Schedule. It should be headed by a retired Supreme Court Judge as its Chairman and its members should also be retired judges of Supreme Court. They should sit only in odd numbers in a Bench.

- **Appointment, Tenure and Salaries of Adjudicating Authorities:** The Central Government may appoint the adjudicating authorities in consultation with Chief Justice of India. They shall hold the office for a term of five years or until they attain the age of 70, whichever is earlier. The salaries and other benefits should not be varied to their disadvantage during their tenure.

- **Resignation and removal of Adjudicating Authorities:** The Chairperson and other members of the Tribunal, by notice in writing under their hand addressed to the Central Government, resign their office. The Central Government may, in consultation with the Chief Justice of India, remove from office of the Chairperson or Member of the Tribunal only by an order made by the Central Government after an inquiry made by a Supreme Court Judge in which such Chairperson or Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The grounds for removal shall be the same as laid down in Section 417 of Companies Act, 2013 or in Section 10 of National Green Tribunal Act, 2010. The Central Government may suspend from office the Chairman or

18 Supra. Note 15

19 Supra. Note 1
Member on whom a reference of conducting an inquiry has been made to the
Supreme Court Judge until it passes an order on receipt of the inquiry report made
by the Supreme Court Judge on such reference.

- **Jurisdiction of the Tribunal:** It should be
a National level tribunal having jurisdiction
all over the country, similar to National
Company Law Tribunal or National Green
Tribunal. It should have primary or original
jurisdiction to hear disqualification cases of
members of both Parliament and
Legislative Assembly due to defection and
its orders are binding on that particular
member/members of the House.

- **Time of settling disputes:** The Tribunal
should take a maximum time of 3 months to
dispose cases before it, as interpreted by the
Supreme Court in *Keisham Meghachandra Singh v. Hon'ble Speaker, Manipur Legislative Assembly*.

- **Appeals:** All appeals to the orders of the
Tribunal shall lie only on Supreme Court
under Article 136, i.e., Special Leave to
Appeal or any other appropriate statutory
provision, within 90 days from the date
of such order.

- **Locus Standi:** If any member of a party
defects from his original political party
a) The Prime Minister or Chief Minister from
the ruling party or the Legislative Party
Leader or the Chief Government Whip
from the ruling party or even the leader of
the ruling party outside the House can file
petition against that member, if such member is a member of a party other than the ruling party.

b) The Legislative Party Leader or the Whip
of the party or even the leader of the party
outside the House can file petition against
c) If such member has been elected to the
office of the Speaker or the Deputy Speaker
of the House of the People or the Deputy
Chairman of the Council of States or the
Chairman or the Deputy Chairman of the
Legislative Council of a State or the
Speaker or the Deputy Speaker of the
Legislative Assembly and if he voluntarily
gives up his membership from the party
during his tenure or in the middle of his
term as the Deputy Speaker/Deputy
Chairman, the petition can be filed only by
the Legislative Party Leader or the Whip of
the party in which he was a member.
d) No Speaker or the Deputy Speaker of the
House of the People or the Deputy
Chairman of the Council of States or the
Chairman or the Deputy Chairman of the
Legislative Council of a State or the
Speaker or the Deputy Speaker of the
Legislative Assembly shall be disqualified
if he, by reason of his election to such
office, voluntarily gives up his membership
and rejoins such political party or any other
party after he ceases to hold such office
and no action would lie against him in the
Tribunal.

- **Powers:** All such powers of the Speaker or
Chairman of the House under Tenth
Schedule, both express and implied, for
effective adjudication of disqualification
petitions should be vested on the Tribunal
and other appropriate rules shall also be laid
down by the Tribunal as per its will.

- **Definitions:** All definitions defined in
Paragraph 1 of Tenth Schedule should be
construed by the Tribunal accordingly.
There can be no hard and fast rule as to what
is defection qua paragraph 2(1)(a) of Tenth
Schedule. Defection cannot be precisely
'defined'. It can at best be 'described'.

---

20 Supra. Note 15
21 Supra. Note 8
Therefore, the term ‘defection’ should be clearly defined. All these structural and procedural changes should be done by the Parliament through an appropriate Amendment to the Constitution and to other relevant and necessary Acts and Rules. It can even introduce and pass a new Act to name, constitute and appoint the members of the Tribunal and regulate its functions, if required.

**CONCLUSION**

The Constitution acquires life because of the men who control and operate it and India needs today nothing more than a set of honest men who will have the interest of the country before them. As the Speaker becomes the symbol of the nation’s freedom and liberty, in a particular way, it is an honoured position and should be occupied always by persons of outstanding ability and impartiality. In short, higher the office, more the rigor and degree of impartiality required. Some of the world democracies have necessary conventions on appointment of Speaker to manifest its impartiality. The Speaker of the House of Commons is a representative of the House itself, in its power, proceedings and dignity. There is also a general practice and Democrats-Labour-Conservative pact whereby major political parties will not field a candidate in the potential Speaker’s constituency. This is part of a long running convention to uphold the neutrality of the Speaker. In Australia, it has been long regarded as a rule that, Speakers have to be completely detached from government activities to ensure what can be justly described as high degree of impartiality in the Chair. The Speaker, being a neutral person, is expected to act independently while conducting the proceedings or adjudicating any petitions. He is expected to not be vacillated by the prevailing political pressures. But the reality is completely different. It can be said that a person can be taken out of the party but the party cannot be taken out of that person.

The above stated instances are the transparent examples of such flagrant behaviour and partisan attitude of the Speaker. From these many years’ experience of parliamentary democracy and proceedings of the legislatures in India, it is crystal clear that the Speaker cannot hold the Office according to the values enshrined in the Constitution. This demands the set up of a quasi judicial authority, at least to adjudicate the disqualification petitions on which the Speaker cannot do so with the disposition of rule of law containing the principles of natural justice and absence of bias. The same was reiterated long back by the Supreme Court during the advent of Tenth Schedule. Therefore, such an exercise is most welcome and absolutely necessary to make the Speaker devoid of bias and partiality and also to uphold the spirit of constitutionalism of the Office of Speaker/Chairman enshrined in the Constitution of India.

****

22 Speech by Dr. Rajendra Prasad, Constituent Assembly Debates
23 Speech by Pandit Jawaharlal Nehru, Report of Speakers and Deputy Speakers, Kerala Legislative Assembly
24 Id. At 21
25 Erskine May, Parliamentary Practice 20th and 24th Editions
26 Supra. Note 4
27 Supra. Note 1(Minority Judgement)

www.supremoamicus.org
SECTION 377: A BATTLE OF LGBT COMMUNITY AGAINST THE STEREOTYPICAL SOCIETAL NORMS

By Aarchi and Soumee Roy
From School of Law, KIIT University, Bhubaneswar

ABSTRACT
This article deals with the origin of section 377 of the Indian Penal Code, controversies regarding the same, issues raised against section 377 followed by discrimination and violations faced by LGBT community and an analysis of the LGBT rights in India. The word LGBT stands for Lesbian, Gay, Bisexual and Transgender. In this article the researcher has tried to discuss briefly about Section 377 of Indian Penal Code, 1860 which is followed by the concept of the rights of LGBT and subsequently the violation and discrimination of human rights including fundamental rights against LGBT community in India. This study highlights mainly upon the legal interpretation section 377 of IPC as well as legal framework on the rights of the LGBT community. There is still a certain percentage of the population in the country where it is believed that homosexuality is abnormal and a mental-illness. The researcher after studying various aspects would like to suggest that Government should implement a stricter provision which would protect this minority community from such exploitation and discrimination. The study was concluded by taking into consideration of various articles, theories, case laws, etc.

Key words: discrimination, human rights, homosexuality and exploitation

ORIGIN OF SECTION 377
Section 377 of Indian Penal Code was introduced during the British rule in India in late 19th Century. One of the grounds of introduction of this section was homosexuality or acts against the order of nature are condemned by the bible.

It was based upon the Buggery Act of 1533. This Buggery Act was passed by the parliament of England during the rule of King Henry VIII. Buggery literally refers to anal intercourse and also covers bestiality. This act was the first law in Britain that brought the offence of Sodomy from the courts of church to the state.

It described buggery as a sin and an act against the will of God. According to this act, any person found guilty was given a capital punishment.

This law came to India through the recommendation of the first law commission of India under Thomas Macaulay.

Sir Macaulay drafted the Buggery Act into the IPC of 1960 and embedded it in the act in the form of Sec. 377.

WHAT IS SECTION 377: A BRIEF FACTSHEET
The section 377 IPC reads as: “Whoever voluntary has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of either description for a term which may extend to 10 years and also liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse

---

28 Anal Intercourse
necessary to the offence described in this section”.

If we look into the definition of Unnatural Offences, it is not specifically described as to what extent it covers. This section not only confined to the LGBT Community\(^\text{29}\), rather it has a very vast ambit.

According to this section unnatural offence is any anal intercourse even between a male and female (i.e. Heterosexual couples) with their consent. The meaning of unnatural offence also extends to the insertion of penis in the mouth either of male or female or any male or female having intercourse with any animal is also an unnatural offence or even insertion of any object or any body part by any female in other female’s vagina, anus, or mouth are also considered as unnatural offences. And all such acts will be considered as unnatural offences and shall be dealt under section 377 IPC.

This section does not specify any difference between the consensual or coercive intercourse. Instead any sort of penetration is enough to constitute unnatural offence.

Also, this section even includes the anal or oral sex in a heterosexual context, i.e. within the marriage as unnatural offence under the act as a punitive provision. It is considered as against the order of nature.

**Meaning of Homosexuality**

It is defined as same sex attraction meaning physical, emotional and psychological towards persons of the same sex.

**Who are LGBT?**

LGBT is a community, which is an acronym and stands for lesbian, gay, bisexual and transgender. Initially LGBT was intended to emphasize on diversity of sexuality and gender identity-based cultures.

---

\(^{29}\) Lesbian, gay, bisexual and transgender

---

**CHALLENGES PUT FORTH AGAINST THE VALIDITY OF SECTION 377 I.P.C.**

There were many instances when the voice rose against the validity of section 377. On the one hand, the I.P.C. punishes any offender who does an unnatural offence whether it is done with consent or without consent, it is immaterial and on the other hand, the acts of police towards the accused persons who are in the custody are never brought into the lights. There are many instances when police in the course of their investigation torture the accused by penetrating any object or even sometimes their hands into their anus or mouth. But this act has never been counted under the definition of unnatural offence.

Also, the validity of section 377 leads to exaggerate and misuse many other provisions of law to harass the LGBT community. Such as:

- **Section 268 I.P.C.** Any person who is alleged accused U/s 377, he is also made as accused under this section for creating public nuisance or is guilty of an illegal omission which causes annoyance to the public or to the people in general. This section is ambiguous as the extent of nuisance among the public varies from person to person.
  
  For ex: If a lesbian or a gay couple are in relationship and are living together, people residing in their building/ apartment/ society might find it as obscene (as people believe that this is against the morality and Indian culture) and violation of peace in the surrounding and can make them accused under section 268 I.P.C along with Section 377 I.P.C.
Similarly, there are many such provisions which are being misused under the umbrella of Sec.377 such as:
Sec 294 I.P.C- Obscene Acts; Sec292/293 I.P.C- sale of obscene books, distribution of materials on safe sex practices for sexual minorities etc.

The Bombay Police Act (BPA), also contains some acts of policemen while investigation to extort from gay men in ‘cruising areas’. Examples: sec 110 BPA (Indecent behaviour in public); sec 111 BPA (annoying passengers in the street) sec 112 (Misbehaving)

ISSUES WITH RESPECT TO VALIDITY OF SECTION 377

1. The section mentions even the voluntary acts as punishable U/s 377 I.P.C. Therefore the section does not make any difference between the
   o Male adult seducers
   o Male who commits rape on the other male
   o Two males having consensual sex.
   The declaration of all homosexual acts as criminal whether consensual or non consensual, is nothing but considering all homosexuals as sexual perverts, thus demeaning their dignity. It does not take into account the sexual preferences of the person.
   Arguments behind this issue:
   o Critics who were against this law raised a question: “Should not the state allow consenting adults to make their own sexual choices. Everybody has the right to control their sexuality and their bodily integrity. If a person cannot enjoy his privacy then it hampers his right to dignified life assured by our Constitution under article 21.
   o Criminalising the consensual sex between homosexuals tantamount to reinforcing biblical beliefs in today’s era. While English law, from which this section origin is, has moved on, enacting in 1967, the

sexual offences act which decriminalised homosexual acts between the consenting adults. India continues its outdated form. Therefore now the time has come that we should learn from international experiences.

2. The section 377 lacks precise definition; the term carnal intercourse against the order of nature is not defined in the I.P.C. The only criterion being ‘penetration’ against the order of nature. As a result it has been subjected to various judicial interpretations. Initially it covered only anal sex and still later it included any form of non vaginal penile penetration.
   For ex: between thighs and folded palms
   Arguments behind this issue:
   o The spirit of the section is to punish those individuals who have intercourse with the individual of same sex so that pervert action could be kept in check. But even many heterosexual couples involve in anal or oral sex, which comes under the definition of this section. So the heterosexual couples can also face the criminal proceeding. Therefore this section is not just centred and limited at homosexuals.

3. (A) Article 14 ensures the right to equality as well as equal protection of law. But the section is not clearly defined as discussed above leading to the vagueness and uncertainty and the SC has held that a statute is void for ambiguity if its prohibition is not clearly defined.
   The rationale behind this is that: Such vagueness will lead to arbitrary application and the SC has clearly said in its various judgements that arbitrariness is always anti thesis of equality.
   Argument behind this issue:
   o Sec. 377 creates unreasonable division and distinction between persons who ‘indulge in carnal intercourse in the ordinary course of nature’. The basis of this classification is
the procreative nature of the act. However, this is an arbitrary classification as in the era of technology, it is very important to note that even the gay couple can have procreation with the IVF technology. So the classification is unreasonable. Moreover, the section does not distinguish between public and private acts, or between consensual and non-consensual acts; therefore, it does not take into account relevant factors such as age or consent, thus violative of article 14.

3. (B) Article 15(1) of the Indian Constitution provides that: ‘The state shall not discriminate against any citizen on grounds only on religion, race, caste, sex, place of birth or any of them’.

Argument behind this issue:
In the present scenario, the term ‘sex’ has a wider meaning and apart from biological sex it includes sexual orientation as well. The effect of Sec. 377 is that it disproportionately impacts homosexuals on the basis of their sexual orientation, thus violative of Art. 15 of the Constitution of India.

3. (C) Article 21 states “Right to life is most fundamental to existence”. The SC has said that the word life does not mean mere animal existence but a life where an individual could exercise his liberty to live a dignified life. In Bandhua Mukti Morcha Vs. UOI30 the honourable court held that: “There are minimum human requirements which exist in order to enable a person to live with human dignity and no state has right to take away action which will deprive a person of the enjoyment of this basic essential”.

Arguments behind this issue:
- Privacy, health, and a dignified life are basic essentials of a person’s life, obstructing an individual’s orientation in infringement of his right to privacy thereby affecting his right to dignified life. Further criminalisation of Sec. 377 has also hindered access to health services of the LGBT community.
- And above all, this section violates the basic features of the constitution i.e. Justice, Liberty and Equality.

Critics' arguments who were in the favour of Sec. 377
1. This section is not conducive to the overall health of the individuals.
2. Decriminalisation of this section leads to demean the sacred institution of marriage as homosexual marriage cannot maintain the moral and conducive atmosphere for the bringing of the children.
3. It will create mental disorder for the people who are going in the same sex relationship.
4. And importantly, our Indian culture does not support this.

Critics' arguments who were in the favour of decriminalization of Sec. 377

Every argument was described above was countered with the following arguments:
1. Marriage is regarded as a sacred institution and therefore it cannot be limited to opposite sex couples. It is more about love and togetherness which can also be shared by couples of same sex. In fact, limiting this institution to sex and procreation will demean the concept of marriage.
2. Further the argument that it is a mental disorder was disputed by various health organizations.
- The American Psychiatric Association removed homosexuality from its list of mental disorder back in 1973.
- WHO followed this suit in 1990
3. With respect to the last argument about the Indian Culture: It was said that, in Indian arts of Khujarao Temples we can witness

---

30 (1997) 10 SCC 549
various postures depicting homosexuality. Therefore it cannot be surely said that Indian culture does not support homosexuality.

THE LONG LEGAL BATTLE
The battle against sec 377 IPC first came before SC in 1994 where an NGO AIDS Bhedbhav Virodhi Abhiyan (ABVA) filed a petition seeking scrapping of the law. The petition came up for hearing in 2001, but by that time ABVA had been disbanded. But the controversy about sec.377 caught fire when Kiran Bedi, Inspector General of the Tihar Jail, Delhi refused to provide condoms to inmates saying it would encourage homosexuality admitting that inmates indulged in it. As a response to it ABVA filed the writ petition in Delhi HC demanding condoms to be provided free of cost and prayed to recognise Sec. 377 as unconstitutional.

1. The NAZ Foundation Case (NAZ Foundation Vs. Govt. of NCT Delhi)
NAZ Foundation is an NGO which deals with the health issues such as HIV, AIDS etc. The issue raised in this case was that whether we shall repeal Sec.377 I.P.C.? The court dealt this issue from two different angles:
- With respect to Art. 21: Court said that without dignity and privacy one person cannot enjoy the right to life.
- With respect to Art. 14 and 15: Court said that Sec. 377 is violative if Art 14 because it creates unreasonable discrimination. It discriminates homosexuals as a class and criminalises their consensual sex. And as per Art. 15; discrimination on the basis of sex is prohibited at this instance sex does not only mean biological sex but also includes sexual orientation.

2. Suresh Kumar Kaushal Vs. NAZ Foundation, 2013
In this case mainly two arguments rose:
- Homosexuality is a criminal offence and only Parliament has the power to decriminalise it and court cannot interfere into this.
- And thus this conclusion was brought forward that: Right to privacy cannot get extended to that extent wherein one can commit an offence. And hence, Right to Privacy will not cover homosexual acts.

3. NALSA vs. UOI and ORS. (2014)
This case unveiled the loophole in all the existing Indian Laws that all these laws are binary genders i.e. male or female oriented and thus the transgender community rights

31 160 Delhi Law Times 277
32 Civil Appeal No. 10972 OF 2013
are not protected under any of the provisions. This is the reason why transgender community are being discriminated. Dealing with this loophole SC recognised multifacets rights for this community people:

SC said that under Art. 14, right of every person is protected whether it is women, men or transgender. Along with this SC said that Art. 15 and Art. 16 prohibit gender based discrimination. So if on the ground of sexual orientation, discrimination is done, then it is violative of Art.s 15 and 16.

Subsequently, the most important argument SC said was regarding Art. 19; wherein privacy, gender identity and integrity all are protected within the ambit of Art. 19(1)(a). Thus this argument indirectly included Sec. 377 I.P.C.

Further, SC proceeded with respect to Art. 21 and said that right to live with dignity includes right to choose gender identity. We are required of having such provisions which focuses on the present day needs. Due to this case, self identity and gender identity got legal recognition.

4. Puttaswamy Case (2017) (Justice K.S. Puttaswamy vs. UOI)
Here in this case SC affirmed that right to privacy is our fundamental right. A historic 9 Judge Bench was constituted to decide this case. The judgement of this case was authored by Justice Chandrachud and it was held that SC has the responsibility to rectify the mistake done in Suresh Kaushal’s case and said that sexual orientation is an essential attribute of privacy and this attribute is protected within various rights under Part III of the Constitution of India such as Art. 14, Art. 15, Art. 21.

In this case, the idea of minuscule minority was rejected.

5. Navtej Singh Johar vs. UOI
This was the most celebrated judgments in the history of justice and this was the case that partially declared Sec.377 I.P.C. as unconstitutional.

The five Judges Constitutional Bench sat in this case comprised of Ex CJI Dipak Mishra, Justice Indu Malhotra, Justice Rohinton Nariman, Justice A. M. Kanwilkar and Justice D.Y. Chandrachud. In this case Justice DY Chandrachud applying the same logic as applied in Puttaswamy Case and supported Art. 14; SC said that criminalising two consenting adults sexual act only because they are homosexual, is neither a valid intelligible differentia nor has any rational nexus. Such traditional norms are wholly based on ambiguous and subjective test like morality.

In the contention of Art. 15, SC said that during NAZ Foundation, the approach of Delhi HC (i.e. sex includes biological and sexual orientation) was the correct approach and this approach reflects our improved understanding.

Supporting Art. 19, Justice Chandrachud said that we cannot narrowly define human sexuality. Discrimination against the LGBT community is unconstitutional. Art. 19 protect every person’s right to express his own identity freely.

Finally, in support of Art. 21, SC held that right to life and liberty includes privacy, dignity and autonomy; however these rights can be curtailed by putting reasonable restrictions but by applying Sec. 377 I.P.C.

---

33 WP (Civil) No 400 of 2012
34 WRIT PETITION (CIVIL) NO 494 OF 2012

www.supremoamicus.org
one cannot be denied from enjoying these rights.35

DIFFICULTIES FACED BY LGBT COMMUNITY
The LGBT face end number of difficulties in their daily life. In 21st century where we believe that our country is developing and so the mindset of the people living there, still there are certain percentage of the society who still persist in believing homosexuality as abnormal. Lesbian, gay, bisexual transgender faces racism and discrimination at every step of their life. Abuse is something which is very normal to them as they face it in their daily life. They still have to fight for their rights to which they are available to because they just belong to LGBT Community. There are more likely to experience intolerance, hatred, harassment and violence because of their identity. They face violence and harassment from people who mock at them because of their identity and make them realize that they are different from the normal people living in the society.

Such harassment and violence are more likely to affect especially the children, the teenagers and so on. Such people generally hide their identity out of fear such that they are not abandoned by their family members or caregivers or rises any issues or fights in their family. They are likely to believe that they will be misunderstood if they reveal their identity and people would mock at them. The students in universities, colleges, and schools hide their identities just for the fact that they will be ill-treated, harassed in different ways and will face discrimination which lead to depression, school drop-outs and homelessness. People at workplace do not reveal their gender identity in the fear of losing their jobs. In this way they are abandoned from many social welfare schemes. The parents don’t want their children to mingle or play with LGBT children to which the parents do not realize that these attitudes of them are leading to isolation and depression to the LGBT children. LGBT children face lack of communication which often ends up in fights or conflicts in the family. According to such situations and circumstances it is more likely that a teenager would develop mental problems or suffer from depression when they become adult as they are rejected by their family members or caregivers.

If the youth face such difficulties it does not relax the older people. They also face violations and racism too. They cannot avail the rights or the opportunities which a senior citizen has. Very less is understood about them due to widespread failure of governmental and academic researchers to incorporate questions on sexual orientation and identity in their studies of the aged. They had to hide their identity just for the fact that they do not become the victims of such violation, racism or harassment. Moreover lesbian, gay, bisexual suffers from poverty too. Such circumstances lead them to commit crimes or get addicted to drugs, alcohol, tobacco and etc. They face a lot of social and economic inequalities the reason for them being is their identity. They also try to attempt suicide and think it is better for them to finish their lives rather than to deal with such discrimination and rejection. There are countries where homosexuality is illegal and is often met with imprisonment or fine.

ANALYSIS ON THE RIGHTS OF LGBT COMMUNITY
On 6th September, 2018 the Supreme Court of India held Section 377 unconstitutional.

35 W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016
as it infringed on the fundamental rights of the autonomy, intimacy and identity, thereby legalizing homosexuality in India. It outlawed same-sex relations giving hope of equality for the LGBT community. The current period is one amongst the rapid advances in LGBT right in many countries and of a wave of anti gay laws and policies in others and there's a burden of HIV Risks and face stigma and there's key programs success in challenging context. Legal rights of the LGBT people in India is strategizing for the long run and right to marriage same sex people now became a International legal scenario but still in India there are civil laws which affect the lads and girls and gay rights. Human rights are the basic rights of each person, irrespective of culture or cultural standards and to convey access to well-being of the LGBT community.

Homosexuality was considered as an unnatural offense under section 377 of Indian Penal Code, 1860. Same-sex was stranded in the Indian society since 1970’s. Homosexuality was considered to be a disorder or psychological dysfunction or impairments. Later through various petitions it can be proved that homosexuality isn’t a disorder. On 2nd July, 2009, the High Court of Delhi stated that provisions of section 377 of IPC violates the country’s Constitution and International Human Rights Convention. However consensual sex among adults is legal which includes even gay sex. The Delhi High Court additionally stated that Section 377 of IPC is against human dignity. The Preamble to the Constitution of India mandates social, economic, and political justice, equality of status. The Constitution provides everybody an equal status before the law and an equal protection of laws within the territory of India. The word ‘any person’ here means every individual, with none discrimination supported any of the category which incorporates, caste, creed, religion, sex, etc. A transgender in India is included within the words ‘any person’ and is given equal status thereto of each cis-gender in India. The transgender community cannot be discriminated on the bottom of non-application of any of the laws within the state by reason of their differences and dividing them supported any arbitrary class. The key word with relation to the protection of Transgender is that the word ‘sex’. The interpretation of the word ‘sex’ includes these communities irrespective of them falling underneath the class of male or feminine.

On 15th April, 2014 it brought a ray of hope in Dark Age of an era. The discrimination on the ground of ‘sex’ under Article 14 and 15 of the Indian Constitution incorporates discrimination on the basis of gender identity. However the expression ‘sex’ is not limited to biological sex of a particular male and female rather it includes people who consider themselves neither to be male or female. For the first time, in the history of India ‘Third Genders’ were given officially recognition as another gender like other males and females in the society. Articles 15(2) and 16(4) has also been interpreted to supply social equality to those communities like equality public employment, it provides that the states shall have the power to create any special provision for the enhancement of those vulnerable minority who are now included

---

36 Navtej Singh Johar vs. Union of India(6th September, 2018)

within the category of socially and educationally backward classes.

The Supreme Court declared transgenders as socially and economically backward class who have the entitlement in the reservation for education, jobs and also directed the union and the state to frame welfare schemes for them. The Supreme Court additionally opined that non-appearance of law perceiving hijras as the third gender could not be proceeded as a ground to discriminate them in availing equal opportunities in education and education and employment. The Hon'ble Supreme Court of India in the case of National Legal Services Authority v. Union of India in its landmark judgment in 2013 created the ‘third gender’ status for hijras or transgenders. Earlier they were forced to write male or female when they have fill up any form or something but, after this judgment they can proudly describe themselves as ‘third gender’. The Court ruled that transgender people have a fundamental constitutional right to vary their gender with no kind of surgery, and called on the Union Government to make sure equal treatment for transgender people. This way the Supreme Court expanded the prohibited grounds of discrimination under Article 15 to include sexual orientation and thus Section 377 was held discriminatory under Article 15.38

In 2014, a protest was made by the transgender and gender activists in Madurai collectorate seeking permission and requesting the Government to implement necessary steps because the change in their names create confusion which disqualifies them from any jobs or examinations39. They also demanded that alternate genders to seem for examinations conducted by TNPSC, UPSC, SSC examinations and bank exams. However, S. Swapna is a transgender who cleared Group IV exams of Tamil Nadu Public Service Commission(TNPSC) in 2014.40

The Rights of Transgender person bill was passed unanimously by the Rajya Sabha on 2015, guaranteeing the rights and entitlements, reservation in jobs and education, pensions, allowances for the development of the community. It also contained a provision to prohibit discrimination on the basis of gender identity in employment as well as prevent of abuse, violations and exploitation of transgender people. However it did not gained clarity and contain lot of loopholes as to how to implement such provisions.

The transgender persons (protection of rights) bill 2016, was introduced within the parliament in 2016 and was re-introduced within the Parliament in late 2017. Some transgender activists opposed this bill because it did not contained provisions regarding problems of adoption, marriage and divorce of transgender people. The bill passed the Lok Sabha in 2018, with 27 amendment which included a controversial provision – prohibiting transgender from begging. The bill was sent to parliamentary committee but, was lapsed with dissolution of 16th Lok Sabha41.

41https://www.hindustantimes.com/delhi-news/transgender-rights-bill-might-be-
The right to settle on one’s own identity is one amongst the foremost essential right under this text to live life with dignity, and this aspect is enfold and guarded by this text because it symbolizes the most important right being a human, a right to live, which the State is required to safeguard from violation. The transgender communities have a right to dignified life which is one amongst the foremost important aspects of Article 21 of the Constitution of India. Recognition of gender identity provides the identification of their right to dignity and non-recognition violates the same, they need full right to manifest and live their life without concern.

In the year 2019, a government bill was reintroduced in the Parliament the Transgender Persons (Protection of Rights) bill, 2019 which was approved by the cabinet of India. The bill defines transgender persons as those "whose gender does not match the gender assigned to that person at birth and includes trans men or trans-women, persons with intersex variations, gender-queers, and persons having socio-cultural identities such as kinnar, hijras, aravani and jogta." A person would have the right to choose to be identified as male, female or "transgender". The bill prohibits discrimination in fields like education, employment and in welfare schemes. The transgender activists opined that the bill was silent on a true remedy or mechanism which merge transgender people into public spaces and improve their standard of life, or on how state intend to enforce this if, such discrimination occurs. The bill was also subjected to criticism as it did not consider the suggestion made by the activists. The bill aims to line up ‘National Council for Transgender’ that will comprise a bunch of state and community representatives, and is supposed to advise the Union Government on formulation of policies with reference to transgender persons, monitor and evaluate the impact of said policies, coordinate the activities of all departments addressing these matters and redress the grievances of transgender persons. A controversial clause that would have criminalized begging by transgender people was taken off from the bill. Another controversial clause that will have made transgender people subject themselves to certification by a region screening committee to be acknowledged as transgender has also been struck out. The legislation received further criticism concerning the difficulty of sexual assault; it provides for optimum two years' imprisonment for sexually assaulting a transgender person, whereas the minimum penalty for raping a cis gender woman is 10 years. The bill was passed the Lok Sabha on 5 August 2019 by a voice vote and by the Rajya Sabha on 25 November 2019. It had been signed into law by President Ram Nath Kovind on 5 December, becoming the Transgender Persons (Protection of Rights) Act, 2019.

reintroduced-this-parliament-session-say-mps/story-xeDqVuWnQ4Q8sAQYYGrqJ.html
https://indianexpress.com/article/india/cabinet-approves-transgender-bill-5824338/

Transgenders in our society have not been respected and often were subjected to humiliation. They were often beaten up by authorities in power and their significance in the society has been degraded. They are the worst victims of exploitation because of their degraded status in the society. The scope of development for them is very less due to lack of opportunities. These articles intend to protect them from such exploitation and provide them for a better standard of living, to live a life a life with dignity.

**CONCLUSION AND SUGGESTIONS**

Homosexuality is not a mental disease or disorder. This paradox of our society is extremely sorrowful. They are not sick or aliens came from different people. They have no human mind control. They have to face discrimination, humiliation and what not from people of our Indian society who make them believe that they are different from ordinary people. Today’s youth of our Country can still understand that it is as natural as heterosexuals but, the old generation people does not understand the same. The status of LGBT community is worst in Indian society. India is a developing country and it can boost the growth with by availing right opportunities to them for their development. The major setback for such status of the transgender people is that people don’t want to discuss about homosexuality freely. LGBT rights are human rights. The Government of India should take off its conservative ideas and can enforce stricter provisions for the protection of this community. There shall be implementation of stricter remedial action otherwise they will be subjected to more exploitation and harassment. The stereotypical view of the society must be addressed and eradicated; only then the so called postulated aspects of equality will be implemented on the ground level.
CRIMINAL THREAT OF CYBER DATA THEFT: AN ANALYSIS UNDER THE INDIAN CRIMINAL LAW

By Aarushi Chopra
From Amity Law School, Noida

Scope of the Research Project

Statement of problem:
This research paper highlights the issue of criminal threat of cyber-crimes with main emphasis on data theft in India and the lack of proper enactments to tackle the technological intricacies which are involved in the same.

Limitations:
Over the span of approving and examining resources that the researcher has depended upon, it has been unequivocally felt that the ambit of this zone of law is developing, particularly in India. In this manner, the researcher has found over the span of searching for data that the data is chaotic and dispersed. The researcher will be dealing with the accessible data to emphasize on the applicable issues relating to the point.

Abstract

With the increase in internet usage, Data has become an important resource that is now a part of our lives. Considering that data is one of the most critical piece of information or an asset for most of the organizations, crimes regarding stealing, hacking, deleting, removing it are prone to happen. a new series of cyber-crime has come up. This has made a new and different kinds of criminals, who plan to exploit the helplessness of computer programs and use it for their very own benefit or just to cause harm. So with the advancement of technology, where almost everything is getting digitized, data theft stays a huge danger to any organization or an individual. Hence, protection of sensitive data it at all cost has become extremely critical and more than any strong antivirus, which works as a preventive measure, what is also required is set of strong enactments to deal with the crimes as and when any organization or an individual faces it. A lot of countries have already come up with specific acts that help protect data like USA (US Privacy Act, 1974), UK (The Data Protection Act, 1984) and Singapore (Personal Data Protection Act, 2012), but India is still lagging behind in this critical areas. This paper intends to specifically focus on how India is dealing with Data theft and whether current Indian laws within the ambit of existing Information Technology Act and the Indian Penal Code have adequate provisions to safeguards organization from becoming victim of data theft.

Introduction

A century ago, the resource in question was oil. Now similar concerns are being raised by the giants that deal in data, the oil of the digital era. According to the Economist data is now the most valuable resource in the world, beating oil. It is the key to smooth functionality of everything from the government to local companies. Without data, progress would halt. 97% of businesses use data to power their business opportunities and 76% of businesses use data as an integral part of forming a
The internet is nothing but a compilation of millions of data being searched, saved, transferred, shared, bought, sold everywhere around the globe. Gigantic amounts of information are created each and every day by organizations working together on the web so as to extract value from separating the patterns that represent the moment of truth which make or break their organizations. It is an important weapon for corporates to capture large market share. Data possessed by an organisation includes personal data of clients, confidential data, financial data, in-house information produced over the span of the business, programming, trade secrets, and so forth. So any information/report in an electronic structure is more inclined to theft than any paper document. This is because they are portable and easy to copy. Not only that but the quantity in which it may be stollen is frightening. With that being said, let’s understand the definition of data.

“What is Data?”
“Under the IT Act, 2000, ‘Data’ means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.” According to the Personal Data Protection Bill, 2019, “data” “includes a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means.” In simple terms, data is the quantities, characters, or symbols on which actions are performed by a computer, which may be stored and communicated in the form of electrical indicators and recorded on magnetic, mechanical or optical recording media. Now that we’ve understood what data means, the next question that arises is what is data theft?

“What is Data Theft?”
Data theft in simple terms is an act of illicit/unapproved replicating, taking or removal of confidential, valuable or personal information from an association without its assent or information. It's the act of taking virtual data with an aim to compromise someone's privacy or to procure confidential data. It may be regarding taking or hacking passwords, banking data, personal data of customers, master card data or some other data, for example, trade secrets, source codes, programming, customer database and so forth of significance to any association, or hacking into government databases for taking confidential data and abusing them and a few more in accordance with these.

“Data theft is currently a new era of crime in India as well as everywhere throughout the world. With the sharp ascent being used of web and technology, a new series of cyber-crime has come up. This has made

47 Greg Siele, Data is the world’s most valuable resource, RingLead (April 18, 2020, 3:32 pm), https://www.ringlead.com/blog/data-is-the-worlds-most-valuable-resource/

48 The IT Act, 2000

a new breed of criminals, who plan to exploit the helplessness of computer programs and use it for their very own benefit or just to cause harm.”

“So with the advancement of computerized data and advanced trade, where our everyday lives are connected to the internet, exchanges based over E-messages and networking sites, e-shopping is the new trend, where organizations are built in a virtual space and everything is digitized, data theft stays a huge danger to individuals.”

“The term 'Data Theft' is in reality a misnomer. As per the Indian law, theft must be committed in regard of movable property. Information is anything but a movable property, and consequently the unapproved act of expulsion of information electronically (by method of E-messaging it to oneself or by hacking into a PC framework, for instance) isn't considered as theft. In any case, taking of information is no uncertainty a criminal offense, and is culpable under the law.”

“Sec 378 of the IPC, 1860 defines ‘Theft’ as follow:-
Whoever intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

Sec 22 of the IPC, 1860 defines ‘Movable Property’ as follows:-
The word movable property are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.”

Data is commonly stolen:

- By the personnel or the legally binding/administration merchants utilizing it during the course of their official work.
- Through hacking of computer frameworks.

In the principal case, it's advisable that the concurrences with the staff and temporary workers contain appropriate provisions which may build up a breach of trust for unapproved use and access of data. Such understandings should plainly express that there stands an entrustment of data to the parties and that they ought to limit the extension and technique wherein they could manage the data. For instance: If the personnel being referred to has consented to a Non-Disclosure Arrangement (NDA) regarding a particular project and afterward abuses that data by offering it to another person or utilizing it for his/her advantage, at that point he/she can be considered criminally responsible for breaking the terms under the NDA and from that point be seriously punished for the same.”

“What is the punishment for Data Theft?”

“The Indian law deals with punishments and penalties for data crimes in the IT Act, 2000, in this manner making a method of redressal for violations attempted with the help of technology through the web. This Act is the supreme law managing E-commerce and provides punishments for the following:

- “Unauthorized access of a computer framework,

50 The Indian Penal Code, 1860 // sec: 22, 378
• Destruction of computer framework programming,
• Unauthorized download or duplicating of data,
• Tampering with computer source codes,
• Hacking into unapproved computer framework,
• Accessing information kept in secured framework and abusing it. secured system data is that data which is expressed by the legislature as secured information,
• Breach of confidentiality and protection of data by a person who has been agreed powers under the IT Act."

“The IPC defines 'theft' and lays down punishments for theft of movable property which consolidates all corporeal property. This clarifies that data, which is impalpable, is beyond the extent of IPC. In any case, if the information is kept in a medium, for instance: floppy disks, CD, pen drives, hard drives, and so forth., and afterward on the off chance that that is taken, at that point the applicable Sec identifying with theft in the IPC can be applied and thusly the blamed will be arraigned in a criminal court and, if proved guilty, will be criminally charged for the same.”

“On the off chance that an issue emerges regarding data crime or any cyber-crime connected to misappropriation of information, at that point the affected individual can submit a complaint by method of a criminal complaint and furthermore a civil complaint according to the nature of the crime, within the police station or a cyber cell in their city.”

The country’s data protection laws mainly consist of:
• A legal arrangement for settlement of compensation for inability to protect sensitive personal data; and

• A criminal arrangement for exposure of private data without the data subject's information, assent or in breach of a contract.

However, both provisions apply as long as there is a outcome of a wrongful gain or loss from such disclosure or breach. Government-prescribed rules on privacy apply as long as the parties haven’t agreed to their own security standards and, even if they do apply, the sole consequence of non-compliance would be payment of compensation if the breach resulted in wrongful gain or loss.

We as of now have a circumstance where an assortment of offenses are penalised by both the IPC and the IT Act, despite the fact that the components of the two offenses are the same. There are exceptionally unobtrusive contrasts in punishments under these Acts, explicitly in viewpoints like whether the offenses are bailable or compoundable or cognizable.

“In the case of Gagan Harsh Sharma v. The State of Maharashtra, certain individuals were accused of theft of data and software from their employer and charged under Secs 408 and 420 of the IPC and also under Secs 43, 65 and 66 of the IT Act. Offences under Secs 408 and 420 of the IPC are non-bailable and cannot be compounded other than with the permission of the court. Offences under Secs 43, 65 and 66 of the IT Act are compoundable and bailable. Therefore, the petitioners pleaded that the charges against them under the IPC be dropped and therefore the charges against them under the IT Act be investigated and pursued. It had been further argued that if the Supreme Court's ruling in Sharat Babu Digumarti were to be followed, the petitioners could only be charged under the IT Act and not under the...
IPC, for offences rising out of the same actions. The Bombay High Court upheld the contentions of the petitioners and ruled that the charges against them under the IPC be dropped”.

“What are the charges which will be imposed against Data Thieves?”
Because of the absence of a different enactment to deal with cyber-crimes like data theft, the charges against the hoodlum are built on the statement of the person affected. Accordingly, it is imperative that the victim knows about the fundamental laws which identify with data misuse. The act is frequently reported and punished under the umbrella of different laws.
Cyber-crime is one among the chief significant issues looked by the nations over the world recently. It incorporates unapproved access of data and break security like privacy, passwords, and so forth of an individual with the utilisation of web. cyber theft is one of the pieces of cyber-crime which implies that theft directed by methods through PCs or the Web.

The most widely recognized classes of cyber theft incorporates taking of information or personal data by means for utilizing different strategies like Hacking, vishing, email spoofing, phishing, virus attack, carding, ransomware attacks and so on with the aim of:

a) Identity theft
   - Wrongful collection of personal identity of a person,
   - Wrongful utilization of such data with a goal of making legitimate damage to such an individual.

b) Password theft, theft of data, internet time thefts etc.
c) Intellectual Property Theft
d) Internet Time theft

The most significant provisions for this regard are as contained in the IPC, 1860 (IPC), the IT Act, 2000 (IT Act) and The Copyright Act, 1957, that can be conjured against the culprit are recorded underneath:

1. “Criminal breach of Trust (Sec 405 & 408 of IPC)” :
   “Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ‘criminal breach of trust’”
   “Penalty: Imprisonment of up to 3 years, or fine, or both. If committed by an employee (servant), it attracts imprisonment of up to 7 years, or fine, or both.”

2. “Criminal Breach of trust by public servant, or by banker, merchant, or agent (Sec 409 of IPC)” :
   “any person who is in any manner entrusted with property, or with any dominion over property in his capacity as a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may

51 Gagan Harsh Sharma v. The State of Maharashtra, 2018 BHC 1653

52 The Indian Penal Code, 1860 // sec: 405, 408, 409
extend to 10 (ten) years, and shall also be liable to a fine.”
**Penalty:** imprisonment for life or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to a fine.”

3. “**Penalty and compensation for damage to computer, computer system (Sec 43 of IT Act)**” :
   “If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network -
   (a) accesses or secures access to such computer, computer system or computer network or computer resource;
   (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
   (c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
   (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
   (e) disrupts or causes disruption of any computer, computer system or computer network;
   (f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;”
   “(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under,
   (h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,
   (i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means; (i) Steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.”
   **Penalty:** Compensatory penalty of up to Rs. 1 Crore.

4. “**Compensation for failure to protect (Sec 43A of IT Act)**” :
   “whenever a corporate body possesses or deals with any sensitive personal data or information, and is negligent in maintaining a reasonable security to protect such data or information, which thereby causes wrongful loss or wrongful gain to any person, then such body corporate shall be liable to pay damages to the person(s) so affected.”

5. “**Computer Related Offences (Sec 66 of IT Act)**” :
   “if any person, dishonestly, of fraudulently, does any act referred to in Sec 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.”
   **Penalty:** Imprisonment of up to 3 years, or fine up to Rs. 5 Lakh, or both.

6. “**Penalty for breach of confidentiality and privacy (Sec 72 of IT Act)**”:
“if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.”

7. “Punishment for disclosure of information in breach of lawful contract (Sec 72A of IT Act)”:
“any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.”

8. “Infringement of Copyright (Sec 2(o) and 63 of the Copyright Act)”:
“literary work” “includes computer programmes, tables and compilations including computer data bases”
Penalty: Monetary fine commensurate with the magnitude of the offense. Further, infringement of copyright is a criminal offence.”

The biggest issue with regard to Data Theft arises when cross border territories are involved involving multiple countries, for example a system may be accessed in Singapore, data manipulated in USA and results felt in India. The result of such an issue is that jurisdictions, rules and laws will become an integral factor which again is an alternate issue in itself.

Couple of challenges that generally arise in such situations
- Collection of evidences in such circumstances is again a separate issue since examination in three distinct nations, who may not be in talking terms to each other makes it incomprehensible alongside the absence of specialized expertise of our cops add to the demerits;
- Lack of coordination amongst different investigation offices.
- Lack of explicit laws in the nation dealing in such crimes. Because of this, regardless of whether the guilty party gets captured, he can without much of a stretch escape by finding different loopholes in our law.

“Does India have sufficient Laws for Data Theft?”
Indian data security laws are behind the universal bend. Despite the fact that the issue of Data Theft which is currently one of the major cyber-crime worldwide has pulled in a little attention of legislators in India, however not like the USA (US Privacy Act, 1974), UK (The Data Protection Act, 1984) and Singapore (Personal Data Protection Act, 2012), there is no particular enactment in India which can handle this issue. Be that as it may, India has The IT Act, 2000 to move toward the danger of cyber-crimes, including data theft. However, in all actuality our IT Act, 2000 isn't far reaching enough to handle the

53 The IT Act, 2000 // sec: 43, 43A, 66, 72, 72A
54 The Copyright Act, 1957 // sec: 2(o), 63
minute technological complexities engaged with such a crime. Though various amendments have been made under the IPC to deal with cybercrimes but still no such provision has been made which specifically covers cyber data theft. It can in this manner be presumed that the greatest cyber-crime "Data Theft" is out of the extent of criminal law in India and the IPC ought to be reasonably altered (to cover the entirety of the cyber-crimes, including data theft) at the most possible convenience of the law-making body. The good news is that a New Legislation w.r.t. Personal Data Protection Bill has been proposed now, with the intention to ensure that any data agency/company collecting personal data of an individual will hold such data with utmost care and will only use such data for the purpose for which it is collected. Such agency/company has a fiduciary liability in case of any breach trust on this ground. The bill clearly defines the Penalties that such agency is liable to along with the Compensation that the customer is entitled to in case such breach of trust happens. Relevant extracts from the bill is stated as below:

“Sec 57 of the Personal Data Protection Bill, 2019: Penalties and compensation” :

(1) Where the data fiduciary contravene any of the following provisions;
a) obligation to undertake a data protection impact assessment by a significant data fiduciary under Sec 27;
b) obligation to conduct a data audit by a significant data fiduciary under Sec 29;
c) appointment of a data protection officer by a significant data fiduciary under Sec 30, it shall be liable to a penalty which may extend to five crore rupees or two per cent. of its total worldwide turnover of the preceding financial year, whichever is higher;
(2) Where a data fiduciary contravenes any of the following provisions;
a. processing of personal data in violation of the provisions of Chapter II or Chapter III;
b. processing of personal data of children in violation of the provisions of Chapter IV;
c. failure to adhere to security safeguards as per Sec 24 or
transfer of personal data outside India in violation of the provisions of Chapter VII, it shall be liable to a penalty which may extend to fifteen crore rupees or four per cent. of its total worldwide turnover of the preceding financial year, whichever is higher.

Sec 2(13) defines "data fiduciary" as any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data.55

As we can see that this bill is definitely a need of the hour for India as it focuses on all aspects of personal data protection, however, there are still no particular provisions concerning data theft.

To Conclude
With increase in internet penetration and access to digital technology, our economy is quite vulnerable to white collar crimes including cybercrime and we’re sitting on a ticking time bomb, which can be really detrimental to any individual or any corporate or the economy at large. Though lot of initiatives have been taken to strengthen the judiciary action in the area of cyber-crime, yet at the same time there is still a great deal of inertia in enlistment and examination of cyber-crimes and hence lot of programs need to be run within the judiciary to guarantee that the people engaged with the framework comprehend the impacts of cybercrime and act quickly. The proposed bill need to be passed on a war footing to start recognizing cybercrime as a criminal offense and hence to be judged from an angle quite different from the current definition of “Theft”, using which the criminals get away easily. Laws need to be stricter and consequences need to be substantial so as to detrac people from committing such crimes.

References

1) Gagan Harsh Sharma v. The State of Maharashtra, 2018 BHC 1653

2) Greg Siele, Data is the world’s most valuable resource, RingLead (April 18, 2020, 3:32 pm), https://www.ringlead.com/blog/data-is-the-worlds-most-valuable-resource/


4) The Copyright Act, 1957 // sec: 2(o), 63

5) The IPC 1860 // sec: 405, 408, 409

6) The IT Act, 2000 // sec: 43, 43A, 66, 72, 72A

*****
RIGTHS OF POOR PRISONERS IN COMPARISON TO ELITE CLASS OFFENDERS

By Abdeali Kothawala
From Rizvi Law College, Mumbai

ABSTRACT

“The person who reads can bail, but the person who doesn’t fail”

-Gary Paulsen

Bail has become a matter of extreme concern in a country like India where bail is recognised as a Right only for elite class, the poor suffers the physical toil and mental agony. A stereotype that poor offender can’t be trusted with freedom or liberty needs to be taken into serious consideration and this bias needs to be eliminated from the society. A Recent Annual Prison Report shows that majority of prison population in India are under-trial and poor belonging to economically and socially backward classes. A concept of prima facie case takes away the right of an under-trial and poor prisoner to be enlarged on bail. Where the rich has to pass the triple test to earn the right of bail, the poor has to satisfy the fourth condition i.e. no prima facie case is made against him coupled with the passing of triple test. This has created an unreasonable classification between elite class on one hand and middle class and poor on the other hand taking away the very essence of Article 14 and Article 21 of Indian Constitution. On study and careful perusal of various Judgments delivered by various Courts in India it is transparent that there are different set of guidelines for different classes of prisoners. The Right of Bail has therefore become a luxurious Right that is conferred upon the higher class of the society by Indian Judiciary. Everyone wants to support the victim but someone needs to stand up for the Rights of innocent prisoners.

KEYWORDS: Bail, Under-trials, Triple test, Prima facie, Classification

INTRODUCTION

“Bail is rule, Jail is exception”- this principle has time and again being reiterated by the Supreme Court of India66 but the same is not being followed or applied by the Lower Courts and High Courts. Though it is the duty57 of the Lower and High Courts to follow and obey the order of judgment of The Supreme Court. This principle was laid down in order to protect the Rights of the Prisoners. It was introduced in consonance with a universally accepted principle i.e. “innocent until proven guilty”58. Every person who is charged with a penal offence is presumed to be innocent until proven guilty at the stage of trial and therefore, keeping the alleged offender behind bars for an unreasonably long time serves a punishment which is completely prohibited by law59. In India, “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”59

56 State of Rajasthan, Jaipur vs Balchand @ Baliay 1977 AIR 2447. 1978 SCR (1) 535
57 Article 141 of The Constitution of India 1949:

“The law declared by the Supreme Court shall be binding on all courts within the territory of India.”

58 Article 11 of The Universal Declaration of Human Rights:

59 https://theconversation.com/not-for-punishment-we-need-to-understand-bail-not-review-it-28651

In our system, condemnation and punishment should only ever happen after someone has been found guilty of an offence. Bail should not be used to
there are different factors being taken into consideration while dealing with different classes of prisoners. These classes are: Rich and Poor. There is an unreasonable classification made by the Courts while granting bail leading to infringement of Article 1460 and Article 2161 of Constitution of India.

The law is that while considering a Bail Application the adjudicating body has to satisfy itself that the alleged offender has passed the “triple test”. The Courts very well apply this principle while deciding a Bail Application of a renowned person belonging to the Elite Class. But when it comes to a poor person alleged of some offence, the fourth test comes into the picture and that is “test of prima facie case”. A lawyer while arguing a Bail Application of poor person has to argue the same as he is going to argue during the closing arguments of the case. It is laid down by the Supreme Court that Bail Matters are not to be looked into depth62 and only “triple test” has to be satisfied.

It is well known that grant or refusal of bail is a matter of Judicial Discretion. This discretion was conferred on the Courts to act in interest of Justice, but it has rather become an arbitrary power vested in the Courts. The Courts are using this discretion on the basis of economical and social background of the alleged offenders which leads and gives rise to arbitrariness and unfairness in the Judicial System.

Another reason why bail should be granted by Indian Courts is that the Prisons are over-crowded and there is not enough staff in Prison to take care and handle so many Prisoners. Over-crowding of prison eventually leads to violation of Human Rights.64 The recent Prison Report65 reveals that there are in total 1,339 Prisons in India having a total capacity of 3,96,223 inmates. According to the same report, the total number of inmates stuffed into these prison are 4,66,084. This figure itself shows that the prison is over-crowded and therefore leading to violation of Human Rights. In addition to this, report66 also reveals a very disturbing and shocking fact that out of 4,66,084 prisoners, 3,23,537 are under-trial67 prisoners awaiting their trials to end. This figure shows that 69.42% of the total population of prison in not even found guilty yet and are still languishing in jail suffering physical and mental trauma.

This research paper will deal with the Law of Bail in India, how it is applied for different classes of people, judgments

punish a person who is yet to be prosecuted for a crime.

60 Article 14 in The Constitution of India 1949

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

61 Article 21 reads as:

“No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

Anil Kumar Yadav
vs. State (NCT) of Delhi, (2018) 12 SCC 129

63 Shri Gurbaksh Singh Sibia and others v. State of Punjab (1980) 2 SCC 565

64 Re-Inhuman Conditions In 1382 ... vs State of Assam WRIT PETITION (CIVIL) No.406 OF 2013

65 Prison Statistics India 2018, Published By: National Crime Records Bureau (Ministry of Home Affairs) Government of India, Chapter 1: Prisons – Types and Occupancy pg. 2


67 supra note 10, Chapter – 2 Prisoners – Types and Demography pg. 33

68 In this paper the term ‘undertrial’ denotes an unconvicted prisoner i.e. one who has been detained in prison during the period of investigation, inquiry or trial for the offence s/he is accused to have committed.
supporting the views, statistical data of under-trial prisoners and relation of bail to fundamental rights. It is a matter of extreme concern, and the same shall be dealt by the Indian Judiciary as soon as possible in order to prevent the violation of Human Rights and respect the conventions relating to the prisoners to which India is a proud signatory.

In words of Justice Krishna Iyer68.

“Personal liberty is deprived when bail is refused, is too precious a value of our constitutional system, that the crucial power to negate it is a great trust exercisable not casually but judicially with lively concern for the cost to the individual and the community”

WHAT IS BAIL?

Before dwelling into the relevance of bail and provisions relating to the same, it is incumbent to understand what is Bail per se. In simple or layman language, when a person is arrested for a cognizable or non-cognizable offence, the police or Court respectively can release the alleged offender from its custody after imposing certain necessary conditions to ensure the presence of accused at the stage of trial.

---

68 Babu Singh and Others V. The State of U.P [1978 (1) SCC 579], para 8.
69 Section 2 (c) of CrPC- “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;
70 Section 2 (l) of CrPC- “non-cognizable offence” means an offence for which, and “non-cognizable case” means a case in which, a police officer has no authority to arrest without warrant;
71 Black Law Dictionary, 7th Edn., p. 135
72 Webster’s Dictionary of Law, Indian Edn., (2005), p. 41
73 Section 436 of CrPC- “whenever a person accused of a bailable offence is arrested without warrant and is prepared to give bail, such person shall be released on bail.”
77 State of Gujarat vs Salimbhai Abdulgaffar Shaikh (2003) 8 SCC 50 para. 6
78 Supra note 15
80 https://indiankanoon.org/doc/1783708/
Anticipatory Bail. Section 439 deals with regular bail.

**BAIL IN RELATION TO ARTICLE 21**

In India, one of the biggest flaws in the judicial system is delay of process. It takes a long time to decide a bail application once presented before the court. This exercise often leads to violation of Article 21 that guarantees every individual life and liberty and forces the people to draw adverse inferences against the Judiciary. It takes nearly 4-5 years for a trial to get over and pronounce the judgment, and during this period keeping the alleged accused behind the bars clearly infringes his fundamental rights. Also, speedy trial is an essential part of Article 21 though it has not been mentioned in the Article itself. A speedy trial also serves social interest and helps in drawing the people’s belief in Judiciary.

In *Hussainara Khatoon & Ors. Vs. Home secretary, Bihar*, Justice Bhagwati observed that-

“the unfortunate undertrials languished in prisons not because they were guilty but because they were too poor to afford a bail. Following *Maneka Gandhi v. Union of India*, he read into fair procedure envisaged by Article 21 the right of speedy trial and sublimated the bail process to the problems of the destitute.”

It was laid down in *Hussain and ors. vs Union of India (UOI) and Ors* that-

“speedy trial is a part of reasonable, fair and just procedure guaranteed under Article 21. This constitutional right cannot be denied even on the plea of non-availability of financial resources. Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. This Court has held that while a person in custody for a grave offence may not be released if trial is delayed, trial has to be expedited or bail has to be granted in such cases.”

On perusal of the above the mentioned judgments, it is very well understood that when accused is kept into the custody for an unreasonably long time without the trial moving forward, it leads to gross injustice and violation of personal liberty guaranteed by Constitution of India.

Life and liberty of the accused is universally accepted and the same cannot be curtailed for any reason whatsoever unless the gravity or magnitude of the crime committed by him is heinous and thereby releasing him on bail will not be step towards public safety. Most of the countries like United Kingdom, USA, West Germany, Japanese, Pakistan, and Bangladesh have recognised Right to Life and Liberty as Fundamental Right.

**United Kingdom:** “Right to life is the most fundamental of all human rights and any decision affecting human right or which

---

81 Imtiyaz Ahmad Vs. State of Uttar Pradesh & others, reported in A.I.R. 2012 SC 642
82 Supra note 6
83 Abdul Rehman Antulay & Ors. Vs. R.S. Nayak & Anr. [(1992) 1 SCC 225]
84 Supra note 25
85 1980 SCC (1) 98
86 1978 SCC (1) 248
87 (2017) 5 SCC 702
88 Supra note 6
89 Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694
may put an individual’s life at risk must call for the most anxious scrutiny.”

USA - "No person shall be deprived of his life, liberty or property, without due process of law.”

West Germany - “Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order.”

Japan - "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law.”

Bangladesh - "No person shall be deprived of life or personal liberty save in accordance with law.”

Pakistan - “Security of Person: No person shall be deprived of life and liberty save in accordance with law.”

### STATISTICAL DATA OF PRISONERS

India has a total number of 1, 339 prisons having a total intake capacity of 3, 96, 223. It is quite astonishing to know that despite having a capacity of 3, 96, 223, there were 4, 66, 084 inmates languishing in the Prison in the year 2018. This clearly shows that the prisons are over-crowded.

Due to over-crowding of prison the inmates do not even have sufficient place to sleep, they have to sleep in shifts. Whole idea of sending a person to prison is reformative in nature, rather than deterrent punishment. Over-crowding of Prison and keeping prisoners in such inhumane condition inevitably leads to violation of human rights and abuse of process of law.

The Report also reveals that out of 4, 66, 084 prisoners, 3, 23, 537 are under-trial prisoners awaiting their trials to end. This figure shows that 69.42% of the total population of prison in not even found guilty yet and are still languishing in jail suffering physical and mental trauma. From the 2013 to 2018 the population of under-trial prisoners has increased by 16.2%.

In the end of the year 2018, out of 3, 23, 537 under-trial prisoners:
- 1, 17, 012 inmates were lodged in various Prisons for upto 3 months.
- 69, 180 inmates were lodged in various Prisons for 3-6 months.
- 55, 349 inmates were lodged in various Prisons for 6-12 months.
- 40, 217 inmates were lodged in various Prisons for 1-2 years.
- 22, 359 inmates were lodged in various Prisons for 2-3 years.

---

90 Bugdaycay v. Secretary of State for the Home Department (1987) 1 All ER 940, also see: R on the application of Pretty v. Director of Public Prosecutions (2002) 1 All ER 1 wherein it was held- “The sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights.”

91 Fifth Amendment to the Constitution of U.S.A. (1791)

92 Article 2(2) of the West German Constitution (1948)

93 Article XXXI of the Japanese Constitution of 1946

94 Article 32 of the Constitution of Bangladesh, 1972 [3 SCW 385]

95 Article 9 Right to life and Liberty

96 Supra note 10


98 Sunil Batra (1) v. Delhi Administration, [1979] 1 S.C.R. 393

99 Supra note 9

100 Supra note 10, Chapter – 2 Prisoners – Types and Demography pg. 44

101 Supra note 10, Chapter – 6 – Prisoners- Sentences and Incarceration pg. 150
14, 316 inmates were lodged in various Prisons for 3-5 years.
5, 104 inmates were lodged in various Prisons for above 5 years.

The data is very upsetting in terms of so many under-trials are languishing in Jail without even being proved guilty. In addition to this, a total of 59, 357 undertrial prisoners were released based on acquittal on the first instance and 24, 651 undertrial prisoners were released subsequent to the acquittal on appeal102.

The Supreme Court103 has very well observed-

“The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

Every person, irrespective of class, creed, caste, age, gender etc. is presumed to be innocent in the eyes of law unless convicted by the Court of Law. Incarceration of a pre-trial104 detainee with hardened and notorious criminal may eventually disturb his mental psychology which may eventually turn even him into a criminal. It is also to be noted that majority of undertrial prisoners are poor and underprivileged belonging to rural and agricultural background105.

Acquittal rate is admittedly higher than the conviction rate106 and therefore, Police must be slow in arresting the accused when he is ready to co-operate with the investigation as the conviction rate is less than 10%.107 Investigating agency108 also has a duty conferred upon it by law to protect the rights of the accused. The job of investigating agency is not to arrest a person just to torture him but the arrest should be made to secure the presence of the accused. And if the accused is already co-operating with the investigating machinery, there seems no purpose being served by keeping the alleged accused behind bars.

UNREASONABLE CLASSIFICATION BETWEEN RICH AND POOR INMATES

The object of arrest and detention is primarily to secure the presence of the accused during the stage of trial109. If the court is satisfied that the accused has roots in society110 and he will not abscond and his presence will be secured at the stage of trial, it may release the accused on bail imposing

102 Prison Types and Occupancy, Prison Statistics India 2018, National Crime Records Bureau, Ministry of Home Affairs, p.11
103 Moti Ram and Ors. V. State of Madhya Pradesh AIR 1978 SC 1594.
104 Pre-trial detainee has the same meaning as that of under-trial prisoner.
107 Supra note 32 Para. 93
108 If someone, especially an official, investigates an event, situation, or claim, they try to find out what happened or what is the truth
109 J.M. Jain vs Ghamandiram K. Gowani (1979) 81 BOMLR 64
110 Sanjay Chandra v. CBI, (2012) 1 SCC 40
certain strict conditions\textsuperscript{111}. The Hon’ble Supreme Court in the year 1983\textsuperscript{112} held that there are only two primary considerations to be taken into account while dealing with a Bail Application and i.e.:

1. Whether the accused would be readily available for the trial?
2. Whether he is going to tamper with the evidence or intimidate the witnesses abusing the benefit granted in his favour?

The first consideration can be fulfilled if the accused provides his proof of permanent address\textsuperscript{113}, furnishes surety\textsuperscript{114} or personal bond\textsuperscript{115} as directed by the court, and proves that he has roots in society.

In order for the court to satisfy the second consideration, it has to go through the criminal record\textsuperscript{116} of the accused and check whether he is a history-sheeter\textsuperscript{117}. The Courts can also check his conduct while in police custody.

The Supreme Court in the year 2009\textsuperscript{118} delivered one more judgment laying down the points to be considered while deciding a Bail Application. There are three primary considerations:

1. Nature of accusation and severity of punishment in case of conviction.
2. Whether he is going to tamper with the evidence or intimidate the witnesses abusing the benefit granted in his favour?
3. Whether there is prima facie\textsuperscript{119} case against the accused?

By nature of accusation and severity of punishment the Court meant that if any person is accused of committing a serious offence punishable with life imprisonment or death, he stands on different footing than those who have allegedly committed cognizable offence which are not punishable with life imprisonment or death.

A person who is accused of committing a serious offence punishable with life imprisonment or death is not entitled to bail by the virtue of Section 437 of CrPC\textsuperscript{120}.

The concept of prima facie case often leads to contradicting judgments and unfairness. This principle is often used while deciding Bail Applications of poor and underprivileged prisoner whereas the rich and famous people are exempted from this consideration. This can be proved by perusing few judgments:

In a case\textsuperscript{121}, where a famous film actor was accused of raping his maid moved a bail application in the Hon’ble High Court of

\textsuperscript{111} Section 436A of CrPC
\textsuperscript{112} Bhagirath Sinh S/O Mahipat Singh ... vs State of Gujarat 1984 AIR 372, 1984 SCR (1) 839
\textsuperscript{113} Aadhar Card, Passport, Ration Card, Rent Receipt, Electricity bill, Phone Bill.
\textsuperscript{114} Definition of surety by Ministry of Attorney General, Ontario- A surety is a person who gives or promises security for another person. http://www.attorneygeneral.jus.gov.on.ca/english/j ustice-ont/criminal_law.php#info-sureties
\textsuperscript{115} A personal bond is a bond stating a criminal defendant will appear at all future court dates. The accused doesn’t have to post bail, but will forfeit the amount in the bond if the promise to appear is broken. It is also known as a release on recognition bond.
\textsuperscript{116} Gudikanti Narasimhu vs. Public Prosecutor of Andhra Pradesh AIR 1978 SC 429
\textsuperscript{117} History-sheeter means- A person with a criminal record.
\textsuperscript{118} Bhuvaneshwar Yadav vs. State of Bihar 2009 AIR (SC) 1452
\textsuperscript{119} Black’s Law Dictionary- Sufficient to establish a fact or raise a presumption unless disproved or rebutted.
\textsuperscript{120} A person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life
\textsuperscript{121} Shivey Suraj Ahuja vs State of Maharashtra MANU/MH/1984/2009
Bombay in the year 2009 wherein it the Court held that at the stage of bail only two factors are supposed to be taken into consideration and those are:

1. Whether he will abscond?
2. Whether he will tamper with the evidence and intimidate the witness?

The infamous 2G spectrum scam case wherein it was alleged that the politicians and private officials under the United Progressive Alliance coalition government in India were accused of committing a major scam of 2, 867, 800, 000, 000 rupees, but the gravity and magnitude of the offence were not considered rather it was freely expressed that-“The trial may take considerable time and it looks that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State Exchequer that, by itself, should not deter from enlarging the appellants on bail when there is no serious contention that the accused, if released on bail, would interfere with the trial or tamper with evidence. There is no good reason to detain the accused in custody, that too, after the completion of investigation and filing of the chargesheet.”

And the easy bail of Mr. P. Chidambaram, the then Union Finance Minister in the INX Media case which is an ongoing high-profile money laundering investigation in India. It involves the allegation of irregularities in foreign exchange clearances given to INX Media group for receiving overseas investment in 2007. The Court relied on the judgements far back and reiterated the principle of bail only to ensure attendance in Court and presumed innocence of the applicant, as abstracted from Nagendra v. King-Emperor and Emperor v. Hutchinson Then the Court concluded that the Applicant i.e. Mr. Chidambaram could not be considered as a ‘flight risk’ and there was no possibility of tampering the evidence or influencing/intimidating the witnesses and thereby giving due consideration to his time

Yet in another case of a political leader, the Hon’ble Bombay High Court while relying on judgment of Supreme Court in the case of Sanjay Chandra observed—

“We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI.”

122 Supra note 53 Para. 28
123 Chhagan Chandrakant Bhujbal vs Assistant Director, Directorate of Enforcement, 2018(3) RCR (Criminal) 125 Para. 27
124 Supra note 53
125 P. Chidambaram v. Directorate of Enforcement, Cr. Appeal no. 1831/19 in SLP (Cri.) No. 10493 of 2019
126 AIR 1924 Cal 476, 479, 480 : 25 Cri LJ 732
127 AIR 1931 All 356, 358 : 32 Cri LJ 1271

www.supremoamicus.org
spent in custody, it was deemed to be a fit case of bail and was released.

On perusal of the above-mentioned judgments, it can be clearly seen that even after Supreme Court laying down the factors requiring to be considered while deciding Bail Application, the Courts have completely ignored the factors like; nature of allegation and *prima facie* case. Only the *triple test* of bail was taken into consideration. Logically, a poor man won’t be able to intimidate the witness as he is already helpless and not resourceful whereas a rich man can be more influential increasing the chances of witness intimidation and tampering of evidence.

This creates an unreasonable classification between the poor and rich offender leading to travesty of justice and violation of Article 14. Due to this classification the rich are resting in their paradise whereas the poor is suffering the mental and physical torture in the Prison. It is extremely important for the Supreme Court to clearly lay down a law stating that at the stage of bail primary consideration should be given to the factors laid down in the case of Bhagirath Sinh and consideration may also be given to nature and gravity of offence as it would be highly risky to keep the offender committing an offence punishable with life imprisonment or death at the same footing with other offenders. The Supreme Court should clearly lay down that the primary consideration for granting bail to the offenders alleged to have been committed offence not punishable with life imprisonment or death should be:

1. Whether the accused would be readily available for the trial?
2. Whether he is going to tamper with the evidence or intimidate the witnesses abusing the benefit granted in his favour?

The government must increase the strength of the Courts by employing more judges in order to ensure speedy trial and early disposal of bail application which are essential facet of Article 21.

The courts should bear in mind two cardinal principles of law while hearing bail pleas and those are: “innocent until proven guilty” & “bail is rule, jail is exception”. Releasing under-trial prisoners is also necessary to reduce the overcrowding in jail and prevent the violation of Human Rights.

The Government of India can adopt a way of making the criminal offender wear an ankle bracelet while on bail known as “electronic tagging” which was introduced first in Britain in the year 1999. By doing that, the police will have complete track of his movement and can secure his presence at the stage of trial or whenever required by the Court. By doing that even the State can be relieved of the liability of taking care of the accused in the Prison.

**RECOMMENDATIONS**

1. The Hon’ble Supreme Court must lay down a uniform set of considerations to be followed while dealing with a matter of bail, irrespective of who the Applicant is in
order to uphold the sanctity of Article 14\(^\text{135}\) of the Constitution of India, 1949.

2. The Courts must lean in favour of granting bail to the applicants who are alleged to have committed offence not punishable with life imprisonment or death. The Courts while dealing with the Bail Applications must not go deep into the merits and stick to main point of concern and that is whether the accused will attend the trial if released on bail.

3. The Courts must make efforts to dispose off the Bail Application within a period of one month following the guidelines of Supreme Court given in the 2017 in the case of Hussain and ors vs Union of India\(^\text{136}\).

4. Improve the conditions of Jail creating a humane environment for the prisoners protecting the Fundamental Right to live in a clean and healthy environment\(^\text{137}\) enshrined in Article 21\(^\text{138}\) of the Constitution of India, 1949.

5. The Government must take initiative to increase the strength of the Courts by appointing more Judges to succeed the goal of early disposal of matters as currently each Judge is overly burdened to deal with 1400-1500 cases\(^\text{139}\).

6. The Government must take initiative to introduce the technology of Electronic Tagging\(^\text{140}\).

**CONCLUSION**

India is a democratic country and guarantees fundamental rights to every citizen irrespective of class, creed, race, religion and gender. The primary concern of the Courts and Police machinery should be securing the presence of the accused and to punish him by keeping him behind bars. Keeping a person in the Prison at the trial stage and denying him bail merely on the ground of *prima facie* case leads to travesty of justice and infringement of personal life and liberty. The Courts have the power to impose strict conditions while granting bail. The Courts also have the power to cancel the bail immediately if the accused breaches any one of the conditions imposed. Condition of Prison is also very bad and keeping the accused in such inhuman conditions also affects his Human Rights. The Supreme Court should lay down specific parameters to be considered while deciding bail pleas laying down more focus on the “Triple Test”. By giving poor their rights which they acquired as soon as they were born in India, the Courts will win back the confidence and trust of people in the Judicial System.

“It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted.”

-Justice Krishna Iyer

\(^{135}\) Supra note 5
\(^{136}\) Supra note 30
\(^{137}\) Shanti Star Builders vs. Narayan Totame 1990(1) SCC 520
\(^{138}\) Supra note 6

\(^{140}\) Supra note 77
A STUDY ON CRISIS IN INDIAN JUDICIARY: AN ANALYSIS OF THE PERIODIC SYNDROME OF DELAY, PENDENCY AND ARREARS

By Abhishek Sharma
From Chandigarh University

Little satisfaction but more discontent with the kind of judicial practice in India is a result of judicial delays. Large backlogs and litigations are passed over from one generation to another like a heritage. In actuality the Indian judiciary system is not only inconsistent but also extremely slow. Victims keep on waiting for Justice for years. Reasons for the delay and disposing off the cases is large no. of unfilled judicial vacancies and growing population. The large no. of pending cases has degraded the working of Indian judiciary. According to National Crime Record Bureau which will be subsequently analyzed in the paper, lakhs of people are waiting in jails for their pleas to be heard because they have spent more time in jail as required by law. People spend years waiting for justice standing at the doorstep of courts but often end up without getting justice. A systematic study is conducted about various possible reasons for Judicial delays along with recommendations of various commissions. Secondary data has been collected from various government, Supreme Court, India Justice Report and other official sources. The learned Advocates also projected reasons for judicial delays such as delay in forensic reports, witness delays, lack of good quality judges and strikes in courts. The grim concern is also because of poor salary to judges. Appeals in High courts against Quasi-Judicial bodies add further burden. We must not forget that we are into the business of justice, which is often delayed by court hearings and poor judicial infrastructure. The paper initially describes the issues with regard to judicial delays, consequences, comparison with other countries and solutions. Honest commitment of all the stakeholders in legal profession holds the key to solve this issue.

Key Words:- National Crime Record Bureau, Judicial delays, India Justice Report, Quasi-Judicial bodies

Introduction

The Indian constitution through its Preamble guarantees to its citizens ‘Justice’ – economic, political and social and mandates for the timely relief by giving justice is undeniable. Right to speedy trial is a constitutional and fundamental right guaranteed to every citizen by Article 14, 19, 21, 32, 226. Universal Declaration of Human Rights\(^{141}\) in Article 10 has recognized the right to free, fair and speedy trial as an integral part of human rights. To further add, Article 9(3) of the International Covenant on Civil and political Rights\(^{142}\) which India ratified on 10 April 1979 has also accentuated on the importance of timely justice. It is also a Directive Principles of state policy articulated in Articles 38(1), 39, 39A to provide justice to its citizens. In Babu v. Raghunathji\(^{143}\), supreme court has declared that ‘social declaration-human-rights/ (Last visited 30 May 2020)


\(^{142}\) AIR 1976 SC 1734

www.supremoamicus.org
justice means legal justice’ and the administration must provide cheap, expeditious and effective legal system to every section of society irrespective of their social or economic background. To further buttress the Fundamental rights in regards with International treaties, the supreme court of India has addressed this in jurisprudence of Constitution of India through a handful of judgements. Some of them are Vishaka and Others v. State of Rajasthan and Others¹⁴⁴, Nilabati Behera v. State of Orissa¹⁴⁵, People’s Union for Civil Liberties v. Union of India¹⁴⁶. Public must have a sense of confidence in courts for which the constitution has granted special powers to the Supreme Court in Articles 141, 142, 144 and 145(1)(c).

Economic survey 2018-2019 expressed concern over large pendency of cases in the Indian courts due to shortage of judges, according to which India needs additional 8,521 judges in the next five years to clear the backlog that India is facing. Even Former Chief Justice of India Dipak Misra had raised same concerns over a year ago when 3.3 crore cases were pending. That figure increased to 3.53 crore on July 1, 2019, with all high courts and lower courts short of 5,535 judges.¹⁴⁷ We must not forget that we are into the business of justice, which is often delayed by court hearings and poor judicial infrastructure. Therefore, it is vital to systematically and comprehensively discuss and analyze the state of Indian Judiciary.

The Magnitude of the problem

The table below shows the official data from Government of India on pending cases

<table>
<thead>
<tr>
<th>S.NO</th>
<th>NAME OF STATES/UTs</th>
<th>CASES PENDING AS ON 31.12.2016</th>
<th>CASES PENDING AS ON 31.1.2019</th>
<th>PERCENTAGE OF INCREASE/DECREASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Assam</td>
<td>258639</td>
<td>284344</td>
<td>9.93</td>
</tr>
<tr>
<td>2.</td>
<td>Andhra Pradesh</td>
<td>1077944</td>
<td>522853</td>
<td>52.2</td>
</tr>
<tr>
<td>3.</td>
<td>Gujarat</td>
<td>1822311</td>
<td>1659335</td>
<td>(8.943%)</td>
</tr>
<tr>
<td>4.</td>
<td>Goa</td>
<td>42074</td>
<td>43825</td>
<td>4.30</td>
</tr>
<tr>
<td>5.</td>
<td>Jharkhand</td>
<td>342768</td>
<td>353670</td>
<td>3.18</td>
</tr>
<tr>
<td>6.</td>
<td>Bihar</td>
<td>2128325</td>
<td>2439139</td>
<td>14.60</td>
</tr>
<tr>
<td>7.</td>
<td>Chandigarh</td>
<td>38907</td>
<td>42980</td>
<td>10.46</td>
</tr>
<tr>
<td>8.</td>
<td>Chhattisgarh</td>
<td>290434</td>
<td>257782</td>
<td>(11.24%)</td>
</tr>
<tr>
<td>9.</td>
<td>D &amp; N Haveli</td>
<td>3766</td>
<td>2465</td>
<td>(34.54%)</td>
</tr>
</tbody>
</table>

¹⁴⁴ 1997 (6) SCC 241
¹⁴⁵ 1993 (2) SCC 746
¹⁴⁶ 1997 (3) SCC 433
Government of India\(^{148}\)

India has been experiencing docket explosion of pending cases pending cases across various States and Union territories. Around 3 crore cases are pending at the end

---


www.supremoamicus.org

44
of 2018 and beginning of 2019. Between the time frame of 2 years more than 15 Lakh cases have added to the existing burden. The most severe impact of huge arrears could be seen in the state of Andhra Pradesh with 52% increase in the pending cases. Tripura has 65% increase but the numbers are not so scary considering it be a very small state in comparison with Andhra Pradesh. West Bengal has shown significant improvement but with over 22 lakhs pending cases, the situation doesn’t seem to be bright. only few states have shown improvement but it should be worth mentioning that they are either the small states or the improvement is very minimal. While in various High courts more than 43 lakh cases are pending. Even the apex court doesn’t have an answer to tackle this issue. While in few states and UTs the data is not available. Supreme Court Pending Cases If we imagine that Supreme court takes no fresh cases then it would need a period of about 7 months to clear all the cases. Now think of no. of years High courts will require to dispense all the cases. It would be more difficult to imagine the time period for lower courts which may exceed over 2 years in most of the states.

<table>
<thead>
<tr>
<th>Year</th>
<th>Pending cases</th>
<th>Percentage increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>62791</td>
<td>-</td>
</tr>
<tr>
<td>2015</td>
<td>59272</td>
<td>(6.60)</td>
</tr>
<tr>
<td>2016</td>
<td>62537</td>
<td>5.50</td>
</tr>
</tbody>
</table>

Factors Attributing to Explosion and Arrears in Pending cases

1. Lack of adequate Infrastructure: There is Poor infrastructure in lower courts. The data from 665 courts in a survey reflected poor washroom facilities, deteriorated rooms and complete absence of other basic facilities.

2. Inadequate strength of Judges: Despairingly India face an acute shortage of judges. Successive governments which

---


150 Ibid., 8

151 Official Website of Supreme Court of India, read more at https://main.sci.gov.in/statistics, (Last visited 27 May 2020)

come into power has not only failed to increase no. of vacancies but also has failed to fill the existing vacancies. At present in India, the High Courts have a combined strength of around 725 judges, whereas there are 128 more vacancies left to be filled up. One magistrate has a pressure to deal with thousands of people waiting for justice. For instance, in Mumbai, 50 magistrates have a burden to take care of 1.2 crore citizens.

3. Lack of adequate resources
   a) Lack of staff attached to various High courts
   b) Inadequate accommodation and other basic facilities
   c) Low level of budget
   d) Unsatisfactory level of judges

Percentage of vacancies in various High Courts

Source: Supreme Court of India

4. Societal causes
   a) Increase in population
   b) Litigation explosion
   c) Burden on account of election petitions

5. Advocates
   a) Speculative appeals
   b) Unnecessary adjournments
   c) No use of ADR

6. Government
   a) Appointing sitting judges to various commissions and enquiries
   b) Wasting time of Apex Court by bringing unnecessary bills and petitions
   c) Imperfect and hasty legislation

7. Successive heritage of handing over of cases: Percentage of cases pending for years

Source: National Judicial Data Grid

8. Other reasons
   a) No adequate forum for appeal against quasi-judicial orders

---


b) Granting unnecessary adjournments

c) Delay in disposal of criminal matters

d) Strikes and non-appearance of lawyer

Under-trial Prisoners Facing Challenges Due to Delay in Justice

1. Prison Violence: In *Sunil Batra v. Delhi Administration*,¹⁵⁶ the court had directed the authorities not to physically mishandle the prisoners and provide them medical and basic health facilities.

2. Under-trial prisoners: A report published by National Crime Records Bureau shows that at the end of 2016, there around 4,33,033 people in prison and sadly 68% of them were under-trials. India's under-trial remains highest in the world. This indicates the unnecessary arrests and ineffective legal aid during remand hearings. This further fills the jails with extra burden.¹⁵⁷

3. Data on prisoners: Under 436A of CrPC allows undertrials to be released on personal bond in case they have undergone half of the maximum term of imprisonment they would have faced if convicted. Prison officials are frequently unaware of this section. This further adds extra burden on the jails. In 2016, out of 1,557 prisoners were eligible to be released and only 929 were released.¹⁵⁸

Findings of Committees and Reports on Pendency of Cases

Rankin Committee 1924

Various committees have contributed and came up with their findings but nothing had significantly contributed towards minimizing the impact of judicial backlogs. First of its kind was the Rankin committee under the chairmanship of Justice Rankin.¹⁶⁰ This committee was appointed to give effective solutions to bring in more speedy and economical trials. Delay in dispatch of cases for over 2 years was the main concern. The committee had identified lack of adequate strength in some of the High Courts. The committee does not hold any usage in today’s world.

Justice S.R Das committee 1949

The report under the chairmanship of justice S.R Das highlighted the inadequate delay in filling up the vacancies in the various High courts. Considering the volume of work, the delay should not be avoided. It focused on increasing numeric

¹⁵⁶ *1978* 4 SCC 409


¹⁵⁹ Ananya Bhattacharya, *Some Indian states have more than twice as many prisoners as they can house*, 7 November 2019, available at https://qz.com/india/1743852/overcrowded-indian-prisons-are-understaffed-underfunded/ (Last visited 28 May 2020)

¹⁶⁰ Sir George Claus Rankin (12 August 1877 – 8 April 1946) was a British judge in India.
strength of the lower courts which is crucial in meeting the congestion of work.

Then it was the Trevor Harris Committee in West Bengal in the year 1949 followed by the Wanchoo Committee in Uttar Pradesh in 1950, Justice J.C. Shah Committee 1972, Arrears committee in 1987, Satish Chandra Committee (1986) which was subsequently followed by first Mallimath Committee (1990). Furthermore, the Law Commission has timely addressed this issue many of its reports since the very inception of independence. This issue has been dealt in 14th, 79th, 80th, 120th, 121st and 124th reports by the law commission. Talking about recent reports regarding this issue, various reports by law commission such as 221st, 222nd and specifically the 229th report, dealt with issues of docket explosion of judicial delays. The second Malimath Committee submitted its findings in the year 2003. Various Conference of Chief Justices and Chief Ministers, both the Prime Minister and the Chief Justice of India raised their concerns to strike and ensure economic and speedy justice. The discussion also revolves around with a Vision presented at the National Consultation and its ambitious plan on reducing down the average pendency of cases from 15 years to 3 years. As evidenced by the National Consultation virtually all sectors of stakeholders and participants in the system have now recognized it is time to take forward the serious business of overcoming pendency and delays. As evident from the discussion, most of the committees, reports and conferences focused regarding the strength and vacancies of the lower courts and High courts. Here, in addition to the recommendations there are various modern techniques given by several scholars which will solve the problem to certain extents. Though diagnosis of the issue does require a more systematic and modern approach using current, modern and disaggregated data. The techniques may have an everlasting and fruitful impact on the Indian Legal System. Some of these modern techniques will be subsequently discussed in next half of the paper.

What can be done?
1. Judicial Procedure: Judicial procedure is very complex and especially for poor which cannot afford to pay heavy fees to the litigants. Therefore, to avoid delay and make things easier, we can adopt a) ADR (Alternative Dispute Resolution) b) Appointment of Ad Hoc Judges to dispense off the pending cases c) Dividing the apex court into four regional parts d) Raise the retirement ages of judges of High Courts and Supreme Courts e) Modern Techniques f) Fines for filing false and frivolous cases

2. Frequent access to Informal justice in India
Informal justice has been considered useful and lingered in the minds of legal intellectuals such as Justice V.R Krishna Iyer, Justice P.N Bhagwati. Right from independence, Gram panchayats has served an important dispute resolution mechanism. Lok Adalats is the most salient deliberation which has emerged from such discussions. These alternative Informal justice mechanisms includes:- a) Lok Adalats b) Gram Nyayalayas c) Family Courts d) Mobile Panchayats e) Nyaya Panchayats f) Gram Panchayats
3. Structural Changes:  

a) Increase the strength of judges at all levels because India has 19 judges per 10 lakh people, according to current law Minister Ravi Shankar Prasad. 

b) Many districts lack good hygiene, slow and sluggish websites, cleanliness 

c) 42nd Amendment was passed to setup tribunals for faster services. Courts must be digitalized. The central government is implementing eCourts project, the project is aimed at providing necessary hardware and software applications to enable the court to deliver faster services. 

d) Complexities in the Indian Arbitration and Conciliation Act, 1996 must be take care of 

4. Public Interest Litigation 

60% of the civil cases in the country involve government as one party or both parties. Criminal cases involve 100% government as one party. A great no. of them are appeals and the result of these appeals is law itself. A simple procedure must be set up to cut down the no. of government appeals and thus reducing the burden on higher judiciary. 

a) PIL has helped in a no. of ways but it is criticized for adding extra burden on the Supreme Court and wasting its limited time 

b) All India Association v Union of India is a landmark case in which the supreme court expressed its desire that the number of judges be increased in a phased manner in 5 years so as to raise the Judge-Population ratio to 50 per million. 

b) In another landmark case, P Ramachandra Rao v State of Karnataka in Para 11 court clearly mentions that “The root cause for delay in dispensation is poor judge-population ratio” 

c) In India there are 19-20 Judges on approximately 10 lakh people, this comes out as 2 judges per 100,000 people

---


164 AIR 2002 SC 1752 

165 (2012) 9 SCC 430
6. Increase the number of courts
   a) India judiciary has insufficient funding which is hurting the growth of Indian Judiciary
   b) No State/UT in India except Delhi has more than 1% total spending of GDP on judiciary. Delhi has 1% of total spending on judiciary¹¹⁶
   c) Spending by the government on Legal aid is only 75 paisa per person as per study¹¹⁷
   d) Number of courts must be increased

Steps taken so far: What has been done

1. Code of Criminal Procedure 1973
   • Plea bargaining: It is an arrangement between prosecutor and defendant whereby the defendant pleads guilty to a lesser charge in exchange for a more lenient sentence or an agreement to drop other charges. In the Criminal Procedure Code, 1973¹¹⁸ a new chapter i.e. XX1A was introduced. Plea Bargaining is a term which can be can be defined as pre-trial negotiations between the accused party and the prosecution, where the accused pleads guilty in exchange for certain concessions by the prosecution. This concept has become a part of India’s criminal jurisprudence. It has gained wide popularity in United States and restrictively used in Australia and United Kingdom. However, considering its various disadvantages the concept hasn’t gained much popularity in India. But this concept can certainly help to clear the backlog of pending cases.
   • Section 165 of CrPC relates to recording confessions by police officers via electronic means.
   • Proviso to section 275(1) relates to recording evidence of a witness to be recorded by electronic means in front of the advocate representing the accused.
   • Section 260 deals with theft and robbery, covering the increased value of property up to Rs. 2000
   • Section 309 of CrPC restricts the power of courts to adjourn cases

2. Legal services Authorities Act of 1987
   • Section 20: Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. This act further broadens the jurisdiction of Lok Adalats from ‘petty matters’ to ‘any matter’.

¹¹⁶ Data available at https://www.theatlas.com/charts/V1aMwcnYx (Last visited 23 May 2020)
¹¹⁸ Ibid., 23
¹¹⁹ Code of Criminal Procedure,1973 (Section 265A to 265L)
3. Specialized Tribunals

- **Article 323A** provides that a law made by the parliament may provide for establishment of an Administrative Tribunal for the Union and a Separate Admin
- Debt Recovery Tribunal (DRT), these are set-up to recover debt due to banks and financial institutions. Currently there are more than 30 such tribunals

**Family Courts**
- Granting Divorce as per law.
- Ordering Interim maintenance.
- Ordering litigation expenses.
- Ordering Custody of children.
- Visiting rights

**Labour Courts**
- Industrial Disputes Act, 1947.
- Cases under workmen compensation.
- Employees State Insurance Act.
- Factories Act.

**Consumer Courts**
- Motor Accident Claims Tribunals
- Central Administrative Tribunal
- Income Tax Appellate Tribunal
- Customs, Excise and service Tax Appellate Tribunal (CESTAT)
- National Green Tribunal (NGT)
- Competition Appellate Tribunal
- Securities Appellate Tribunal

4. Arbitration, Mediation and Conciliation

- Alternative Dispute Resolution techniques and pre-trial counseling or dispute resolution measures can lower down the burden on the Indian courts. Courts may also take resort to Section 89A of the Civil Procedure Code, 1908 in order to ensure that litigants first exhaust all modes of alternative dispute resolution.
- This will decrease litigation cost
- Save courts time

5. Lok Adalats

- the first Lok Adalat was held in Gujrat in 1982
- accepts cases pending in regular court under their jurisdiction
- the Lok Adalat are presided over by Members of Lok Adalat; they have the role of statutory conciliators only and do not have any judicial role, therefore they can only persuade the parties to come to a settlement
- main condition of the Lok Adalat is that both parties in dispute should agree for settlement
- they are staffed by retired judges, senior advocates, volunteers

6. Amendments in Civil Procedure Code, 1908

- section 138 entitles the court to fine a party if it fails to take the necessary step for which it had obtained an adjournment
- under section 89, courts have the power to transfer cases to Lok Adalats, arbitration, conciliation and mediation

7. National Litigation Policy (NLP)

- it was launched on 23 June 2010 and recognized government as the biggest litigant in the courts and various tribunals
- It is formulated by the Ministry of Law and Justice of the Government of India which is aimed at bringing down the litigation from government agencies by making them more responsible in filing the cases.
- To make government an efficient and responsible litigant by cutting down unnecessary litigations
8. Case Flow Management Rules: Case flow management rules consist of a set of practices and rules that ensures that a judge or an officer of the court creates, adheres and implements the time frame for the lifecycle of a case.

- **In Salem Bar Association v. Union of India**, SC directed to form a committee known as ‘Case Flow Management Rules’
- On the basis of recommendations, around 21 State Judiciaries has opted this concept
- In spite of adoption of the same, there is serious lacunae in the actual application due to workload and non-substantive hearings

9. Budget allocation for setting up more courts and prisons:

<table>
<thead>
<tr>
<th>Budget utilisation at prisons in mid- and large-sized Indian states</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Bengal</td>
</tr>
<tr>
<td>Kerala</td>
</tr>
<tr>
<td>Karnataka</td>
</tr>
<tr>
<td>Gujarat</td>
</tr>
<tr>
<td>Tamil Nadu</td>
</tr>
<tr>
<td>Haryana</td>
</tr>
<tr>
<td>Uttar Pradesh</td>
</tr>
<tr>
<td>Telangana</td>
</tr>
<tr>
<td>Maharashtra</td>
</tr>
<tr>
<td>Odisha</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
</tr>
<tr>
<td>Punjab</td>
</tr>
<tr>
<td>Uttarakhand</td>
</tr>
<tr>
<td>Chhattisgarh</td>
</tr>
<tr>
<td>Bihar</td>
</tr>
<tr>
<td>Jharkhand</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
</tr>
<tr>
<td>Rajasthan</td>
</tr>
</tbody>
</table>

**Source:** India Justice Report 2019

**Overall Ranking of Indian States: A sui generis report by Tata Trusts**

![Overall ranking of states](image)

**Source:** India Justice Report 2019

---


171 (2005) 6 SCC 344


Suggestions and Conclusion

The position of Indian Legal system is not very satisfactory. Studies across various platforms clearly indicate the lack of Judges strength has added extra burden on increasing no. of pending cases. The Indian Legal system seems to be obeying the rule of ‘Justice delayed is justice denied’. The United States has 151 judges for each million of its population. Even China, despite its 1.3 billion plus population, has a far higher ratio of 170 judges per million people. Whereas India has a very poor ratio of only 20 judges over a million of people. Lakhs of people keep waiting for justice.

The involvement of court personnel in ADR activities should reinforce trust while not diverting resources from the needs of litigation. Motivating and Encouraging ADR measures, pre-trial counselling and other dispute resolution measures can lower down the pressures on the court system. The 77th and 129th law commission report recommended the concept of neighborhood justice centers. The same concept has been developed and partially implemented. Judges are not only for delivery decisions but they are the chief architect in shaping the judiciary. Judge must come up with some recommendations and sound decisions. Judges should also charge the advocates for delaying the judicial process. The most direct way to get a defendant to internalize the costs of delay is to ensure that damages awards include a provision for pre-judgment interest.

14th Law commission highlighted various amendments to scrap old and outdated laws. The most direct way to get a defendant to internalize the costs of delay is to ensure that damages awards include a provision for pre-judgment interest. 14th Law commission has highlighted certain amendments to scrap old and outdated laws. Urgent amendment in the Arbitration and Conciliation Act, 1996 is needed to enable various tribunals to settle the matters without too much of the interference from the courts. Safeguards should balance the rights of litigants with their interest in finality. Tu further modernize the Indian courts; the development of a case management system is needed to separate and allocate time to simple or complex cases. Case Management as already discussed in the paper is to Facilitate Settlement of Claims Decentralization which provides provision of adequate training, conducting of periodic assessment, administrative support. Recruitment of new judges and filling up the present vacancies cannot be ignored.

Parliament under Article 312 of the Constitution of India is empowered to establish an All India Judicial Service, which is even suggested by a number of Law Commission Reports. The creation of All India Judicial Services would be extremely helpful in tackling with this issue. Along with this a revision in salary structure is also needed to attract young and intellectual mind who are often perceived by the high income in litigation. As per a report by CCR, district courts needed 2,279 additional judges to clear the backlog. Justice Lokur, former Judge of High Court of Delhi has suggested introduction of Internet technology in reduction of paper work.

Fast track courts, Special Court Rooms, good infrastructure, additional buildings and other infrastructure must be provided which will also solve the purpose. It must be remembered that increased infrastructural support must be considered on a war-footing. National Litigation Policy (NLP) and National Arrears Grid must be taken seriously.
As per a report India spends currently spends about Rs12,000 crore a year on the judiciary. This amounts to about 0.01% of the gross domestic product (GDP). Whereas the percentage spent on defense is 2% of GDP. In a stark reminder of ground realities, out of the special grant of Rs5,000 crore by the 13th Finance Commission for improving judicial infrastructure and services, almost 80% remained unspent.174 Talking commercially, India continues to lag on the indicator for enforcing contracts, climbing only one rank from 164 to 163 in the latest report of EODB, 2018, the report depicted that (EODB )Ease of Doing Business rankings of the World Bank. Despite a number of steps taken to improve the contract enforcement regime, still, economic activity is certainly being affected by the long shadow of delays and pendency across the legal landscape in the Country. Along with all the ‘what can be done’ measures discussed in the paper, the government needs to wake up and realize the importance of tackling this issue. It is high time and urgent attention must be paid to come up with appropriate remedial measures before the situation goes beyond our control. We must and show now because tomorrow will be too late.

THE PARALLEL PANDEMIC: A SOCIO-LEGAL ENQUIRY INTO CASES OF DOMESTIC VIOLENCE AMIDST COVID-19 AND ITS INTERNATIONAL RESPONSE WITH SPECIAL REFERENCE TO INDIA

By Aditi Saini
Advocate

This article briefly attempts to look at the prevailing worldwide conditions relating to Domestic violence in COVID-19. It highlights major laws of various countries for the same, accompanied by the steps that have been taken by such countries to eradicate domestic violence. It further explores the psycho-social circumstances under which India finds itself and analyses how those circumstances could have been a contributing factor towards an upsurge of such cases. This article explores both the social as well as a legal scenario given this prevailing parallel pandemic. There has been a fair attempt to understand both the sides of this issue—the social factors that lead to domestic violence and the legal scenario for the victim; to avoid undue bias. A special section is dedicated to recent government responses. Lastly, the author has suggested a few quick-fix ways through which this nation-wide problem could be handled.

In this aspect, the essay makes three substantial contributions. First, it highlights the prevalent psycho-social factors in India. Secondly, it briefly touches upon the laws and the responses towards this violence on an international scale. Third, it explores Indian laws and recent steps taken by the government to mitigate this problem.

1. INTRODUCTION

On 23 August 2005, The House of People (Lok Sabha) spent hours deliberating upon the “Protection from Domestic Violence Bill” of 2005175. Ironically, the cases of domestic violence have since increased176. It certainly doesn’t help to know that less and less number of women ended up seeking government assistance in this regard.177 In all debates held for

---

175 Former Central Minister, Mrs. Kamal Singh, while introducing the “Protection of Women from Domestic Violence Bill, 2005”- hereinafter DV Act) mentioned two main reasons-first, that societal lens looks at women in an extremely demeaning way. She spends all her life looking for her identity in phrases such as ‘Liability upon her father’ and ‘Child bearing object’. Second, Patriarchy had dug its way into Indian minds so profusely, that anyone or anything that stood up against it was thwarted by this orthodox society. It was amongst the worst forms of violence against a woman. Not only was it perpetrated by a woman’s own family member but it also brought with it, a higher degree of social stigma upon the women. According to Former Speaker, Mrs. Sumitra Mahajan, most of the laws eventually suggested divorce as the penultimate solution. Most of the women didn’t actually want a divorce. They also were reluctant towards the idea of their husbands going to jail. Instead, they just wanted the violence to end. See, Lok Sabha Debates (2005) <http://164.100.47.194/debatetestext/14/22-08-2005.pdf> accessed 5 May 2020. 13 Years hence, the Supreme Court in “Indian Young Lawyers Association vs. The State of Kerala” also attacked patriarchy in following words- “to treat women as children of a lesser God is to blink at the Constitution itself” See, Poongkhalali B, ‘Sabarimala Verdict: In Striking Down Patriarchal Tradition, SC Paves Way For Positive Interference In Religious Affairs’ (First Post, 29 September 2020) <https://www.firstpost.com/india/sabarimala-verdict-in-striking-down-patriarchal-tradition-sc-paves-way-for-positive-interference-in-religious-affairs-5284671.html> accessed 5 May 2020.

176 This also included Cruelty by husband or his relatives under (Section 498A) and dowry demands and deaths. Domestic violence can be termed as a symptom of these crimes. See, Ministry of Home Affairs, ‘Crimes In India - Statistics’ (National Crime Records Bureau 2018) 195-294.

177 As per NFHS-4 (National Family Health Survey) report of 2016, only 14% of women who ever experienced Physical or sexual violence
implementing this legislation, none focused upon the psychological factors or the social constructs under which domestic violence occurred. Why culprits of this offence behaved the way they did? What possible factors – social, psychological, emotional, could lead them to behave so irrationally. 14 years hence, we entered the year of 2020 with a major setback. As Covid-19 began taking lives, many people were forced to abandon public spaces and take refuge within their homes. However, this had an adverse impact upon the women surviving domestic violence. Before, women had an option to step out of their houses and seek shelter/rehabilitation at a different place. The entire legal system was at their disposal. In cases of such violence, it is suggested that the best way to mitigate is to isolate oneself from the perpetrator and his/her social circle. But if your family is the perpetrator and you are unable to go out, what options do you have? COVID-19 has indeed led to the birth of another pandemic.


various district authorities have formed rescue teams, yet it is highly unlikely that helpline numbers and rescue teams would be able to reach the remotest corners of India. Moreover, many domestic violence victims could potentially be threatened and further tortured, to restrain them from contacting the authorities. Moreover, India doesn’t entirely reside in posh, well-connected urban and metropolitan areas where help teams are just a few kilometres away. It is also found in semi-urban and rural areas where help could be difficult to reach. The rural areas then become susceptible to this social evil, more so than the urban areas. Hence, as a measure of foresightedness, we must first understand why domestic violence continues to be a menace and then perceive solutions that suit the Indian context.

2. PATRIARCHY IS NOT THE ONLY CAUSE

To many researchers, the idea of ‘patriarchy’ as the root cause seems appealing. Take any women-centric problem in India and at least one of the many explanations would consist of ‘patriarchy’. However, these simple explanations fall short of providing a practical solution. How does one curb patriarchy? An echoing solution comes in the form of women joining hands together and putting up a united front against orthodox men. If the solution were to be that easy, we wouldn’t be witnessing an increase in violence cases against women. Hill mentions about the complexity of this problem and how multi-layered it is. Most of the legislations hand-pick a single problem, isolate the victims of such problem from social parameters and then offer solutions in compensatory form. The idea of considering that a system is not different from its participant becomes a constraint in finding practical solutions. In this way, men end up taking the blame, whether they contribute towards the tenets of patriarchy or not.

The word patriarchy symbolises control and domination. It is our very nature to subdue our surroundings to our will to thrive. This aspect of our nature is gender-neutral. In the


184 Investigative Journalist Jess Hill mentions how easy it is to follow the feministic Model of Violence that asks ‘Why do men beat their wives’, but she argues that this is just one model that explains the outcomes. The psychopathology model doesn’t take patriarchy into consideration. It asks ‘Why did this Man beat his wife’. This Model is more popular in United States than in other parts of the World; See, Jess Hill, See What You Made Me Do (Black Inc Books 2019).

185 Ibid.
ancient era, women were subdued essentially to determine the paternity of the child they were carrying\textsuperscript{186}. As years passed and this practice passed onto generations, it bore a more vicious character and led to a downright disregard of women. However, to say that men and patriarchy are the same is to blindside the plight of men who are trained to act more masculine to conform to the societal standards of patriarchal domination. Sometimes, women physically torture women. A woman may also mentally abuse another woman. Based upon all these observations, it is ludicrous to regard patriarchy as the sole cause behind any gender-based crime. Men and patriarchy cannot be placed upon the same pedestal.

Therefore, we must examine the psychosocial factors responsible for a human’s aggression and how lockdowns are contributing to the escalation of its symptoms. These observations are strictly limited to the Indian context.

2.1 ECONOMIC STRESS AND SOCIAL ISOLATION

Studies have shown that women in rural areas are comparatively more susceptible to spousal violence than their counterparts living in urban areas. This also has a direct correlation to the educational and financial status of a woman\textsuperscript{187}. The more educationally qualified and financially independent a woman becomes, the less likely she is to become a victim of domestic violence. However, this lockdown has not only made it difficult to step out of one’s house but also economically weakened many families. A domestic violence victim generally seeks familial support. However, given the economic conditions, sheltering another person may be financially draining. This could either force the victim (especially if she is financially dependent) to stay and survive the violence or be rendered homeless. Seen from a ‘Masculine’ point of view, men who undergo economic stress commit Intimate Partner violence (hereinafter IPV)\textsuperscript{188}.

Adawi and Bahlani (2007) mention Social isolation as classic perpetrator behaviour for IPV Abusers\textsuperscript{189}. With lockdowns firmly in place, the victim might normalise threatening signals such as raising fists, shoving, pushing, name-calling, demeaning the victim as part and parcel of her/his daily life. This would not only induce the abuser to increase the intensity of his violence but would also damage the victim’s self-esteem. As Sabri and Campbell (2015) rightly point out, women are lauded for suffering in silence and not abandoning their roles\textsuperscript{190}.

\textsuperscript{186} Katherine Anne Gabriel, ‘Performing Femininity: Gender In Ancient Greek Myth’ [2016] Bard Digital Commons. 16-18

\textsuperscript{187} Ibid (n-3) 568-569

\textsuperscript{188} Economic Stress and Joblessness are closely associated with a sense of powerlessness as per ‘Masculinity’ Norms. Even during Marriages, Indian parents often look at the Economic Status of a Man before giving away their daughter. Normalization of such norms lead to a predisposition towards feeling ‘loss of power’ whenever the financial crisis set in. See, Priya Nanda, Abhishek Gautam, Ravi Verma, Aarushi Khanna, Nizamuddin Khan, Brahme Dhanashri, Shobhana Boyle and Sanjay Kumar [2014] ‘Study on Masculinity, Intimate Partner Violence and Son Preference in India’ (New Delhi, International Centre for Research on Women) 36-37


\textsuperscript{190} Indian women are exposed to intimate partner violence due to factors operating at multiple contextual levels in their lives. For instance, in India, factors such as cultural practice of dowry, growing up witnessing violence, presence of multiple children in the family, forced sex, partner’s threats of harm, jealousy and controlling behaviours and residence in areas with high murder rates have been


192 “Biological correlates of IPV perpetration can be categorized into the following domains: head injury and neuropsychology; psychophysiology; neurochemistry, metabolism, and endocrinology; and genetics. Head injury rates among abusers have been consistently higher than those of the general population. Abusers have been distinguished from non-abusers on the basis of their performance on several neuropsychological measures, particularly those of verbal intellectual ability, executive functioning, and attention. Abusers’ poor performance on these measures reflects frontal lobe dysfunction, which head injury alone cannot fully explain”. Lavinia A. Pinto and others, ‘Biological Correlates of Intimate Partner Violence Perpetration’ (2010) 15 Aggression and Violent Behavior <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3564655/> accessed 9 May 2020.

193 Ibid.

contributory towards incurring financial debts and burdens. Work-related stress and alcohol consumption together become major factors in domestic violence. With the government opening liquor shops at select areas, the problem of domestic violence can be expected to increase by threefold.

2.3 SOCIAL STATUS
The rural population of India (as reported in 2018) was 65%\(^\text{195}\). As already stated above, women of rural areas are a greater target than the woman in urban areas. It has been reported that “Men living in rural areas are more prone to perpetrating IPV than men living in urban areas”\(^\text{196}\). This is also true for wealth. In India, nearly 75% of rural Indians survive on Rs.33 per day\(^\text{197}\). Given the standstill that has halted India, it is highly likely that it could also increase the pace of domestic violence. Another reason could also be less exposure to quality education in rural areas. Hitting a woman is considered ‘normal’ in many villages. However, this problem has always managed to permeate all social boundaries. It does not discriminate between rich and poor now. The only difference lies in the underreporting of such incidents in rural areas (due to normalization) as compared to urban and semi-urban areas.

3. LEGAL SCENARIO

3.1 INTERNATIONAL ASPECT
The first known use of this term was by Lord Ashley. While addressing the parliament in 1973, he stated that the term meant violence in the home. Since then, the UK model of law addressing domestic violence [Hereinafter DV] has evolved. Now, The Cross-Government departments across the UK define DV as –

Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality\(^\text{198}\).

Furthermore, the “Domestic Violence, Crime and Victims Act 2004” especially deals in providing support and legal supervision to the victims of this crime. For the homeless, it means a “sub-category of violence as violence or threats of violence from a person associated with the victim”\(^\text{199}\). However, it was interpreted by the Supreme Court to mean “physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may have caused harm to the other party or to the

---


\(^{196}\) More than two-fifths of men (42%) belonging to poorest wealth class reported perpetrating violence in the past 12 months, whereas only a fourth of men amongst a higher strata of wealth reported doing so. Ibid.

\(^{197}\) Saumya Tewari, ‘75 Percent Of Rural India Survives On Rs 33 Per Day’ (India Today, 2015)


\(^{199}\) Housing Act, 1996, s.177 (1A)
child or which may give rise to the risk of harm.” The European Council, in 2002 had already adopted a recommendation (no. 5) for protecting women from cases of violence. A separate monitoring department was set up owing to such recommendations in 2005. Later, the Istanbul Convention of 2014 also helped in developing the roots of criminal jurisprudence against violence on women in all its forms. Recently, Home Secretary Patel further assured that Domestic violence helplines were operating and that women shelter homes would remain open during the lockdown.

Despite many efforts, COVID-19 resulted in an upsurge of Domestic abuse cases by 20%. The local cops ended up arresting more than 100 people in a single day. However, the National Centre for Domestic Violence assured that they were closely monitoring the situation. The perpetrators of such crimes were promptly being arrested.

3.2 UNITED STATES’ LAWS

The American congress of 1994 passed the “Violence against Women Act” which makes domestic violence a federal offence. According to the Act, it’s a federal crime to “cross state lines or enter or leave Indian country and physically injure an intimate partner; or Cross state lines to stalk or harass or to stalk or harass within the maritime or territorial lands of the United States (this includes military bases and Indian country), or to cross state lines to enter or leave Indian country and violate a qualifying Protection Order.”

Furthermore, the “Gun Control Act of 1968” makes it a crime – “to possess a firearm and/or ammunition while subject to a qualifying Protection Order; and to possess a firearm and/or ammunition after conviction of a qualifying misdemeanor crime of domestic violence.”

These Acts not only make sure that the perpetrator gets an adequate punishment but also provide for restitution. The damages can be covered to include psychological, medical and physical damages to body and property.

In Giles vs. California, the Supreme Court of the United States suggested various ways through which this problem could be tackled.

Domestic violence is an intolerable offence that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns.

Furthermore, the “Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para Convention)” of 1994 does not use the term in its texts but has been construed into the document by judicial interpretations. For instance, in the

---

200 Family Division Practice Direction (Residence and Contact Orders: Domestic Violence and Harm) (No 2) [2009] 1 WLR 251


203 [2008] 554 U.S 353
case of “Maria da Penha Maia Fernandes v. Brazil”\(^{204}\), Article 12 was utilized for filing a complaint to IACHR. Despite such well-meaning legislation and laws, many countries in the US saw an upsurge in Domestic violence cases since March. As per a report published by NBC News-

Houston police received about 300 more domestic violence calls in March than they did in February, a roughly 20 percent increase. Charlotte-Mecklenburg, North Carolina, police fielded 517 additional calls about domestic violence in March compared to the same month last year, an 18 percent jump, while Phoenix police received nearly 200 more calls, an increase of nearly 6 percent.\(^{205}\)

Figure 3: Depicting the decline in crime reporting owing to the perpetrator being in the same vicinity as the abuser; however DV reports saw an increase.\(^{206}\)

3.3 AFRICAN RESPONSE

Africa brought in “The Domestic Violence Act, 1998”. According to it, DV means and includes-

physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant’s residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.\(^{207}\)

There have been many emblematic cases that have further helped in developing the African jurisprudence on Domestic violence. For instance, in \(S\ vs.\ Bolayi\)^{208}, it was unanimously accepted that eradicating DV is a constitutional obligation that the government and the citizens ought to follow.

Also, the Protocol Of “African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (Maputo Protocol) in 2003 does not directly use the word “Domestic Violence”; but in the contextual capacity of its Article 1(b), it mentions “all acts perpetrated against women which

---

\(^{204}\) Rep. No. 54/01 of 2001


\(^{206}\) Author Unknown, ‘Domestic Violence cases have increased during Coronavirus lockdowns’ (The Economist, 22 April 2020) <https://www.economist.com/graphic-detail/2020/04/22/domestic-violence-has-increased-during-coronavirus-lockdowns> accessed on 3 June 2020

\(^{207}\) Domestic Violence Act 1998, s.1

\(^{208}\) [2000] SA 425 (CC)
cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts.” However, fake news and wrongly reported cases have deterred many African women to seek help. Africa has already seen a massive surge of cases in 2019. Hence, data available for 2020 might be undermining.  

3.4 AUSTRALIAN LAWS

While there is no single accepted definition throughout the continent, the meaning and interpretation behind all such definitions are usually the same. A DV protection order can be obtained from one’s local court. For instance, the “Domestic and Family Violence Protection Act, 1989” defines it as-

An act [which includes]: – wilful injury; – wilful damage to the other person’s property (such as wilfully injuring a de facto’s pet); – intimidation or harassment; – indecent behaviour; – threatening to commit such acts; or – procuring someone else to commit such acts.  

In R v. Wilkinson211, the court took a liberal view for ascertaining the causes of DV to cover the maximum ground for domestic violence liability- The causes of domestic violence are multiple. It has been recognised that relevant contributing factors include immaturity, mental illness, abnormal personality disorders, inhibition through drug abuse, poor anger management and lack of counselling and support. Courts have identified all of the above as common causative factors in modern times.

However, such measures have all fallen short of delivering justice in the times of COVID-19. Underreporting has taken this continent by the storm. Although there have been no signs of an upsurge in phone calls upon the helplines, the number of complaints that include domestic violence has increased rapidly. According to the Interim chief of DV New South Wales, COVID-19 has led to the perpetrator and the victim of such crimes living under the same roof. Hence, direct contact via phone calls could aggravate the abuse.  

3.5 INTERNATIONAL LAW INSTRUMENTS

Domestic violence/abuse was not recognised as a standalone offence or crime for quite some time. It was included in part as violence. There was a customary obligation that the basic norms of international law must be interpreted to encompass all human right violations. However, the phase of 1990s suddenly put a sharp focus upon this hidden evil. This began with Recommendation 19 of CEDAW213 and the confirming DEVW of 1993.  

Later, the “Special Rapporteur on Violence against Women” in June of 2015 also contributed to developing a platform for the during Covid-19 crisis’ (The Guardian, 4 June 2020)  


211 [2008] SASC 172


213 Committee on the Elimination of all Forms of Discrimination Against Women, 1992

214 Declaration of Elimination of Violence Against Women ,1993
development of criminal jurisprudence upon the matter. A crux of the rights associated with various instruments can be summarised as follows.

It all began with UDHR. Although legally not binding, it gradually gained a worldly status of a human rights Bible. All instruments followed suit. This declaration doesn’t expressly bar domestic violence; however the same has been construed in customary practice. It states “Everyone has the right to life, liberty and security of person.” This also echoes in ECHR’s Article 3 that states that every person has a right to be free from degrading, inhumane treatment. This article has been extensively interpreted by ECHR to construe domestic violence. For Instance, in “Bevacqua and S v. Bulgaria”, “A. v. Croatia” and “Kalucza v. Hungary”, the court interpreted Article 3 to include domestic violence. Furthermore, ICCPR, 1996 also guards the life and liberty of a person. This also means protection from all such means that lead to an act of violence. ICSECR also includes rights such as protection of law and maintenance of decent standards of living. Ergo, member state parties have an implicit obligation to uphold such rights. Similarly, CEDAW, just like the rest of the instruments, does not expressly state domestic violence. However, its Recommendation No. 19 specifically prohibits DV acts- both publicly and privately.

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

It further states-

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

This recommendation mentions that DV is in contravention of “right against torture and cruel, inhumane and degrading treatment”; as enshrined under Article 5 of UDHR and Article 7 of ICCPR. This

---

215 Universal Declaration of Human Rights 1948, art.3
216 European Convention on Human Rights, 1953
217 Appl. no. 71127/01, Judgment of 12 June 2008
218 Appl. no. 55164/08, Judgment of 14 October 2010
219 Appl. no. 57693/10, Judgment of 24 April 2012
220 International Covenant on Civil and Political Rights 1966, art. 6 and art. 9
221 International Covenant on Social, Economic, and Cultural Rights 1996
222 Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), at ¶ 6
223 Ibid. at ¶ 23
thought process is also backed by the Torture Convention which defines the word it as “any act which causes severe mental/physical pain and is intentionally inflicted”.  

4. INDIAN SCENARIO

As mentioned earlier, DV cases in India have increased during the lockdown. In a study conducted by the Planning Commission, it was found that nearly 84% of all Indian women had been subject to violence within their homes. To combat this evil, there are a few legislations that could be interpreted to include domestic violence within their ambit. However, this section will highlight the major Indian laws that could be brought forth while fighting against DV.

4.1 THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT (2005)

This Act (Hereinafter DV Act) is the birth child of Article 15(3) of the Indian Constitution which empowers the government to make special laws for woman and children. Its uniqueness is reflected in the specific crime attribute assigned to the act. According to section DV Act, Section 3 - Any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned; or otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Although drafted with a narrow scope of application, this act has been interpreted widely to accommodate every facet of DV and/or its apprehension in physical, emotional, mental, sexual or even economic forms. The Act provides the victim with a right to share household space and its accompanying commodities. It further allows a victim to seek protection and request the court to grant protection or residence orders. Relief can be granted in the form of monetary or compensation orders. In cases where children are involved, interim custody can also be granted. By a judgement dated 8th September 2019, the Delhi HC increased the scope of this Act to provide interim maintenance even to those victims who had earning capacity and were qualified.

In another judgement dated 5 June 2019, the SC held that the victim (wife) was eligible to not only file the case against the main perpetrator but also against the relatives of such person following Sec. 2 (q) of the DV Act.

In yet another judgement dated 20 May 2019, Delhi HC empathised with the victim’s inability to sustain herself with the maintenance granted under Section 125 of Criminal procedure Code. Ergo, the

---

224 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987, art. 1

225 Indira Sharma,’ Violence against women: Where are the solutions?’ (2015) 57(2) IJP


court held that despite an earlier order for maintenance. The wife could approach another forum under the DV Act to request for maintenance. This maintenance under this Act, however, would be granted in adjustment to the earlier order for same.\(^228\) However, in a scope-limiting judgment, Bombay HC stated that if the victim had already been divorced at the time of filing for a petition under DV Act, she would not be eligible to utilise any provisions of the said Act.\(^229\) This was primarily because the DV Act requires the nature of an existing marriage (or its kind) between the complainant and abuser as a pre-requisite.

4.2 SECTION 498 A OF INDIAN PENAL CODE
This Section indirectly punishes for committing domestic violence. Due to the existence of another special law in this regard, there have been no changes in IPC to accommodate it. However, this section deals with cruelty in all its forms. The section reads-

Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

It is sometimes called a weapon and other times- a shield. It is not a stand-alone section. It has to be read with other laws to paint a complete picture. This section is usually read with section 304B of IPC; which empowers an executive magistrate to conduct an inquest in case a woman dies within first 7 years of marriage or commits suicide under circumstances that raise a “reasonable suspicion” that someone else has committed an offence. It is also read with Section 113B of the Indian Evidence Act, 1872 which empowers the court to presume that “if a woman was subjected to cruelty or harassment just before her death, it would amount to Dowry death”. As already mentioned in the meaning of “Domestic Violence”; dowry acts as one of the major reasons for the commission of this act. This is a crime punishable under “Dowry Prohibition Act, 1961”. Section 4 states-

If any person demands directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine which may extend to ten thousand rupees: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

Both sections- 498A and 4 have similar intentions. However, both these sections are mutually exclusive- meaning they do not lead to double jeopardy under Article 20(1) of Indian Constitution. A perpetrator committing domestic violence can be punished under both sections separately.\(^230\) Cruelty and its sub-category of domestic violence have no local boundaries. In this way, a series of offences together connote this crime. It is a continuing offence.\(^231\)

\(^{228}\) Vikas Bhutani v. State and Anr. [2019]3 RCR 198 (CRI)


\(^{230}\) Inder Raj Malik v. Sunita Malik [1986] Del 1510 (CrLJ)

\(^{231}\) Criminal Appeal 917 of 2011
Despite the availability of every legal remedy, COVID-19 has rendered the victims of DV completely helpless. It is partially due to their inability to go out. Unlike the UK, there are few shelter homes available for women seeking protection against domestic violence. Most of these institutions are not well-maintained and could further pose a threat to the health of all those who seek refuge in these homes. With poor infrastructural capacity and lack of resources, no concrete response has been received to combat this social evil. In this regard, the next section will highlight the Indian government’s response to domestic violence in COVID-19.

5. INDIAN RESPONSE

![Figure 4: Depicting an increase in complaints related to domestic violence and other gender-based crimes.][232]

The Health Department of Tamil Nadu has been pro-active in ensuring that DV victims are taken care of. It has put up a response team in place which shall work with community women at the village and urban levels. The Anganwadi workers have consented to act as co-ordinators to such rescue teams. Women in certain communities were provided mobile phones so that they could stay in touch with such co-ordinators. Transport services and emergency passes were also provided to Protection Officers so that cases could be dealt expeditiously.

Similarly, on April 18, 2020, the HC of Delhi directed the present ruling party in Delhi (AAP) to address the rise of DV cases amidst lockdown and explore possible options to mitigate this shadow pandemic. In reply, The Women and Child Department of Delhi informed the court that 24*7 helplines were available and operating. Upon reception of a distress call, Quick actions were being taken immediately. Interestingly, The DCW had noticed no spike in calls related to DV. The Commission explained-

On the contrary, the number of cases reported to the helpline has decreased. While no definite conclusion can be drawn, this is probably due to the circumspection on the part of victims in reporting such

---

232 Ashwani Deshpande, 'In lock down India, women fight coronavirus and domestic violence’ (Quartz India, 16 April 2020) <https://qz.com/india/1838351/indias-coronavirus-lockdown-leads-to-more-violence-against-women/> accessed on 29 May 2020

incidents due to the presence of the perpetrators in the house and the fear of further violence if such attempts to report were made known to the perpetrator.\(^\text{234}\)

Jammu and Kashmir HC, referring to the eye-opening data presented by National Commission of Women, took a suo-moto cognizance and issued the following directions (as an act of pro-activeness) on 18 April 2020-

1. Creation of dedicated funding to address issues of violence against women and girls as part of the COVID-19 response by the Union Territories of the Jammu and Kashmir and Ladakh;
2. Increased availability of call-in services to facilitate discreet reporting of abuse;
3. Increased telephone/online legal and counselling service for women and girls;
4. Designated informal safe spaces for women, say grocery stores and pharmacies, where they can report domestic violence/abuse without alerting the perpetrators.
5. Immediate designation of safe spaces (say for instance empty hotels/education institutions etc) as shelters for women who are compelled to leave their domestic situation. These shelters must be treated as accessible shelters.
6. Giving urgent publicity to information regarding all of the above measures as also the availability of the facilities for seeking relief and redressal against the issues of domestic violence.
7. Increasing awareness campaigns on all aspects of the issues.

It further dedicated special funds and appointed local convenience stores where a DV victim could report sans the abuser in her vicinity.\(^\text{235}\)

The Karnataka HC also issued various directions such as providing Legal Aid and assistance to “One Stop Centres” via State Legal authorities. Two women lawyers were assigned to every District Legal Authority who shall not only provide legal aid but also counsel the victims at such centres.

Uttar Pradesh Police also launched a special helpline number to assist victims of DV. It further advertised another helpline number that could be used to report such cases. Upon reception of complaint, designated women police officials would be sent immediately to the provided address. Similarly, “Haryana State Women Commission” also launched a Whatssap helpline number by the name “Ayog Sakhi” wherein women could report the abuse.\(^\text{236}\)

Despite these measures, this issue has not been given the requisite attention it deserves. Till date, no National Advisory has been issued by the government in this regard. State governments have shown


\(^{236}\) Shubhra Pant,’ 78% rise in crimes against women in Haryana during lockdown’ (Times Of India, 4 May 2020) <https://timesofindia.indiatimes.com/city/gurgaon/78-rise-in-crimes-against-women-during-lockdown/articleshow/75524329.cms> accessed on 5 June 2020
minimal effort in this regard. No importance has been laid to the multi-dimensional approach to mitigate this issue. In this regard, the next suggestion shall attempt to suggest a few grass-root level steps for eradicating DV in this Lockdown.

6. WHAT CAN BE DONE?

6.1 ONLINE COUNSELLING

Men/ Women who are perpetrating domestic violence must not only be reported via helplines but also counselled. Upon receiving a report, it should be made mandatory that the abuser would have to attend online counselling, failing which, he/she could attract severe penalties like confiscation of property. Basic Online Counselling (Discouraging patriarchy, embracing one’s emotions, ways to meditate and remain calm in Lockdown) could also be shared on a public video domain and made free of cost. The counselling could ideally be done telephonically or through video-conferencing, whichever is suitable in the abusers local/regional language. The abuser must be made aware of what the future holds if he continues down to his destructive path. This must not be construed as an alternative to sentencing, even for first-time offenders. Punishments of less than 5 years must be handed over to local and sub-local executive authorities so that they may take swiftest possible action.

Men should also be discouraged from Alcohol abuse. Separate online counselling could be set up for people struggling with alcohol abuse. To say that Alcohol could be sold “One per consumer” or “banned” is to invite bribery and black-marketing into an already crumbling system.

Moreover, it is also suggested that few interactive tutorials or videos that highlight the social evils of patriarchy could be introduced in school curriculums. Boys, from an early age, should be taught to accept their emotions and process them through healthier channels. Interactive Video Courses that discourage Gender-stereotypes must be made a part of school/college curriculums. We should keep trying prevention programs, study upon the ones which show positive results and then develop them further.

6.2 PROPER FUNDING

The funding and resources required to tackle domestic violence are low and minimal. NGO’s and other organizations depend solely on charities to help shelter women. This leads to their dismal

Figure 5: Depicting ways in which government could help women and children amidst lockdown.


www.supremoamicus.org
conditions. Hence, whichever organisation seems promising should be funded by the government. In fact, given the present scenario, if airports could be opened and transport facilities resumed, government-funded shelter homes must also be opened for women, given that they take all precautionary steps to prevent the outbreak of Covid-19. For those women who are not able to report or seek help, this could go a long way in isolating them from their abusers.

An average amount of funding (based upon the standard of living in the state) could be given to those people who shelter such women, be it a family or next-door neighbours until proper help arrives. This could help the victim escape the clutches of his/her abuser even in remote corners of India. Precautionary measures such as penalty twice the grant, if found guilty of misuse, can also be placed. This would also ensure timely contact with authorities as more funds would outflow with the passage of time. Such funds could then be added to the compensation to be borne by the abuser, in addition to maintenance and other costs. Tackling COVID-19 also requires Community policing. Growing insecurity and patriarchal pressure have led women to first few signs of an aggravating crime. In time, such ignorance could lead to physical injuries. Ergo, it is imperative to adopt community policing. The local Municipal Corporation could accord the task of community policing to honourable individuals. Such individuals would directly report under State Commissions monitoring domestic violence activities. The Criminal procedure Code already accords the power of citizen arrest.\textsuperscript{238} This power could be extended to other social offences to monitor and eliminate the situation from the grass-root level. They could further work with NGO’s and other agencies to provide healthcare, food and shelter to women seeking refuge from such atrocities.

6.3 DISPENSE OF INFORMATION
As for dispense of information, we must first make sure that India has sound internet connectivity even in the farthest parts. Given that this pandemic may well take a year to properly take off from India, internet-connectivity must be made available to all sections of society. Based upon this pedestal, a website, solely dedicated to combating domestic violence with the state, district and sub-district based helpline numbers could be established. Procedures to file an E-Complaint in one’s regional language or upload a scanned copy of it could be included upon the portal itself. Motivating tools and articles encouraging women to come out of their shells and embrace an abuse-free lifestyle, with links to government-backed portals for learning skills to become financially independent could also be included. This website could either be nationwide or state wise.

Given the current circumstances, all of these suggestions are remotely feasible and can be done in a way that utilises minimum human interaction.

7. CONCLUDING REMARKS
“What are you going to do? Are you going to live in the dark, locked in here? Afraid to look out, answer the door, leave? Yes, he's there, and he's clearly not going to leave you alone until one of three things happens: he hurts you and gets arrested, or he makes

\textsuperscript{238} The Code of Criminal Procedure, 1973 § 43.
a mistake and gets arrested, or you stop him.  

Domestic violence, resolved from a purely legal perspective has not brought much success. This is evidently because violence, in general, is ingrained in human psyche from the time when all of us were Neanderthals. As the society grew, women were left embracing their basic human traits of femininity while men were forced to abandon emotions and pursue a well-structured, dominating lifestyle. Witnessing a mother do home chores, getting beaten by one’s father or any member in dominance, only cements the idea that women are weak and gullible. This idea needs to be uprooted, and all evils born out of this idea get uprooted too. Understanding the trigger factors of an abuser and placing checks upon them is possible with proper government support and funding. Overall, humanity should never bow down to accommodate the saving of humanity.

****

239 Hence, the phrase- Homo Humini Lupus (A man is a wolf to a man) ; Ibid (n-14)

FREEDOM OF SPEECH AND EXPRESSION IN THE REALM OF DIGITAL MEDIA

By Adyasha Kar
From Symbiosis Law School, Pune

INTRODUCTION
Article 19(1)(a) of the Indian Constitution provides for the freedom of speech and expression. However, this freedom is not absolute and is subject to reasonable restrictions in the interests of the sovereignty and integrity of India, friendly relations with foreign states, public order, decency or morality or with regard to contempt of court, defamation or incitement of offence. Digital space covers within its ambit a variety of electronic media and digital platforms. This paper would specifically deal with social media platforms.

Social Media began thriving as the most preferred platform for communication only about a decade and a half ago. The content available on social media can be classified into two primary types – high level and low level.

1) **High level communications** are mostly professionally produced with the intent of providing information to a wider audience. Such information is generally expected to be well researched and well verified for its veracity. One can expect such information to exist in the form of newspaper articles or informative pieces.

2) **Low level communications** are more casual and amateur in nature, comprising conversations in the chat box, remarks in the comments’ column or expression of personal opinion on a particular issue. This paper would specifically deal with low level communications in digital space. Digital space has become synonymous to a safe space where people can put across thoughts, however diverse in its subjects, without a second thought. At the same time, uncensored communications in social media can have grave outcomes.

WHY FREE SPEECH IS ESSENTIAL TO SOCIAL MEDIA?
Social media has always been a safe space for voicing one’s opinion in a personal capacity. Of course, it essentially operates as a space where individuals share snippets of their personal lives but in the recent times, social media sites have emerged as a popular forum for creation and persistence of narratives that are political as well as social in nature. An individual need not be associated with a publishing house or news network; an individual does not need a license to publish his views online, neither is the number of words he posts or the subject he chooses to write upon is regulated in any manner. Not only written words but poems, pictures, short movies, posters, caricatures have found their due space for expressing strong ideas. Social media is a platform that has now concretised living room discussions or even casual conversations with friends in the internet space as well as mobilised these words to reach ends of the globe. Be it Facebook, Instagram, Twitter or Reddit, the information disseminated in any of these sites transcend borders to reach people.

---

243 Ibid.
across the World. A by-product of globalisation, social media sites have championed universalisation of ideas. A strong example would be the Me Too Movement which gained momentum on social media and saw women across the world uniting and voicing a common evil.

RIGHT TO INFORMATION
When we discuss about freedom of speech and expression on social media, a collateral right is the right to be informed. Advocates of free speech have often expressed how freedom of speech and right to information go hand in hand. Unrestricted speech welcomes criticisms, dissipation of unpopular opinions, broadcasting hushed truths and publicizing general complaints, troubles or issues that people may face on a daily basis. With scenarios of embedded journalism or news houses ‘playing too safe’ in fear of legal ramifications or to avoid the wrath of the majority or the powerful, low level communications have been a major source of information.

Right to be informed has been considered to be essential for the working of the institutions of the State. Where a democratic institution envisages change in the government, the Indian Courts have also held that social media plays an important role to keep the citizens informed. In the case of S. Khushboo v. Kanniammal & Anr, it was asserted that in spite of the right to free speech being not absolute, it was necessary for tolerating unpopular opinions. Further, it was averted that the right requires unhindered flow of ideas which attribute to the collective sustainability of the citizenry. Most importantly, the judgment highlighted that an informed citizenry is indispensable to “meaningful governance, culture of open dialogue and is generally of social importance.”

There are various facets to truth, often more than just two extremes, often what popular media might refrain from telling. The truth must reach people for them to understand an issue completely, by the presentation of different perspective on the same issue. It is normal for high level communications to be sources to such perspectives but social media and low level communications have amplified the number of perspectives available to particular topics. The questions raised during the release of the Bollywood movie, Kabir Singh’ saw debates sparking across social media sites and unleashed views and opinions of diversified nature, coupled with personal incidents that opened up an avenue to ponder upon various issues related to patriarchy. Even during the wake of the passing of the Citizenship Amendment Act, 2019, facebook, Instagram and twitter bustled with strong opinions that, though were confined to larger brackets of ideologies, displayed different inputs from all users that stimulates those reading them to know, to think and to form an opinion.

DISCUSSION, ADVOCACY AND INCITEMENT
In the case of Shreya Singhal v. Union of India, the court analysed various facets of low level communications in digital media. The Court acknowledged social media as a facilitator of free speech and a market place of ideas. At the same time, the Court also highlighted the potential threats posed by unregulated communications in social

246 Sakal Papers (P) Ltd. & Ors. V. Union of India [1962] 3 SCR 842.
248 Shreya Singhal v. Union of India, AIR 2015 SC 1523.
media. The threats are attributable to the easy accessibility of information on social media sites. A single click can publish any sort of content on social media, making it available to billions of people. Low level communications on the internet can further be classified into discussion, advocacy and incitement and stressed upon the fact that discussion and advocacy, notwithstanding its unpopularity, lies at the heart of Article 19(1)(a) of the Indian Constitution.

In Whitney v. California\textsuperscript{249}, imminence of danger was considered as a reasonable ground to curtail freedom of speech. It was further highlighted that there may be cases where the line demarcating advocacy and incitement would be bleak. However, it was asserted that irrespective of how morally reprehensible advocacy of a certain idea may be, it would be unjustified to curtail free speech as long as it falls short of incitement and nothing is incitement if it does not call for immediate action.

The point of concern here is the acute subjectivity of the matter. In Whitney’s case, the Court specified ‘imminence of immediate danger’ as the recognizing factor of incitement. Hence, the Courts look for words that call for immediate action that can have serious repercussions. However, the Courts have ignored the idea of building up a narrative that finally results in unforeseen action.

\textsuperscript{249} Whitney v. California, 71 L. Ed. 1905.


claimed nearly 50 lives and forced about 40,000 people to flee from their homes.\textsuperscript{254}

- Circulation of tailored videos on child snatchers and alleged cow poachers in whatsapp saw an unprecedented rise in lynching cases in India over the last two years, with 33 killed and 60 instances of mob violence between January 2017 and July 2018.\textsuperscript{255}

- Recently during the anti-CAA protests, a number of inciting materials were circulated online, mostly in the form of memes. The content called for hatred towards a particular community such as rebuking the ones protesting against CAA as defenders of a religion that propagates violence or even absurd arguments such as India was originally not meant to be a secular nation since the word ‘secular’ was introduced in the preamble in 1976.\textsuperscript{256}

**ANALYSIS OF RELEVANT LEGAL PROVISIONS**

The Court has upheld the constitutionality of creation of penal provisions with regard to content posted online but also struck down section 66A of the IT Act for being too vague\textsuperscript{257}. The Courts have endeavoured to maintain balance between free speech and its restrictions and so have the laws. Section 153A of IPC\textsuperscript{258} which penalises promoting enmity within classes and section 295A of IPC\textsuperscript{259} which penalises the act of outraging religious sentiments are wide enough to cover all kinds of hate speech pertaining to the prescribed subjects, including content posted on social media platforms. Section 79 of the IT Act\textsuperscript{260} exempt the intermediaries from liability for any information or content disseminated by a third party but holds the intermediary responsible if it abets or conspires the commission of an unlawful act or if it fails to remove any information from its domain that an agency of the government directs to be removed.

Section 67 of the IT Act\textsuperscript{261} makes it an offence to publish or transmit or cause to be published or transmitted in electronic form, any matter that might be considered as obscene. The words used in the section attribute to obscenity refers to material that may likely deprave or corrupt individuals, under particular circumstances. The question that now surfaces is whether a person who merely shares a piece of information causing its spread but not contributing anything to the original information can be held liable under this section or in simple words whether such a person be considered as a publisher. Section 230 of the Communications Decency Act, 1996, a US legislation, gives immunity from liability to users for merely sharing a piece of information. Section 230 has been worded with definite terms that leave scope only for literal interpretation. Besides like section 66A, the provision is vague and makes it rather subjective to determine what material may ‘deprave’ or ‘corrupt’ individuals. With changing social dynamics, the provision seems rather couched with words that serve majoritarian comforts.


\textsuperscript{256} Shreya Singhal v. Union of India, AIR 2015 SC 1523.

\textsuperscript{257} Indian Penal Code, Act no. 45 of 1860.

\textsuperscript{258} Ibid.

\textsuperscript{259} Information and Technology Act, (No. 21 of 2000).

\textsuperscript{260} Ibid.
Section 69A of the IT Act\textsuperscript{261} empowers the central government or any officers specially authorised by it to direct any agency to block information from public access if it is satisfied that it is expedient to do so in the interests of the defence and security of the state, maintenance of friendly relations with foreign states and most importantly, for public order and the prevention of \textit{incitement of commission of any cognizable offence related to the aforementioned heads}. Even though the Act contains provisions for taking down of material that may cause incitement, which is the third facet of communications in digital media and warrants immediate curtailment, it empowers only the Central government to do so and also makes it conditional upon the \textit{satisfaction of the Central government or the officers appointed by it}. The provision does not empower the Court to direct blocking of any information from public access or to take down any content that may cause incitement to real world crimes which also translates to the fact that individuals have limited opportunities to bring related issues under scrutiny of the Court and cause the information to be taken down in cases where it does not affect them personally but incites the commission of acts of violence.

**CONCLUSION**

Internet operates as a market place of ideas. The paper has previously explained how freedom of speech is a necessity as well as an evil. For the same reasons, it becomes particularly difficult to determine the standards for the curtailment of free speech. General jurisprudence warrants curtailment of free speech only when it incites immediate violence but the examples stated above show how a very thin line exists between advocacy and incitement. A major question that persisted in most cases where aggressive advocacy of a particular ideology translated into violence is why nothing was done to take down the content. There is scepticism as to how well equipped even the Indian laws are to take down offence that incites violence. Any content that calls for acts of violence poses a grave risk for the strong impact that words have. Can a normal citizen file a complaint, stating that online content poses grave risk to the security of his community? Would such information be taken down and would the creator, if identified, be apprehended by law enforcement authorities?

A constant vigil or policing of social media sites would raise questions of infringement of privacy. Besides, it would result in excessive power in the hands of particular agencies and rise up the probability of filtering content based on their own subjective satisfaction. Sure enough, no objective test can be constructed to determine what content is potentially dangerous, there has to be certain degree of subjectivity. What is required is ample opportunity for vigil citizens to bring potentially dangerous content under the scrutiny of the Court and the scope for the Court to take down such content. The law in New Zealand provides for civil as well as criminal ramifications. The Harmful Digital Communications Act envisages penalties that range from supervision to eleven months of imprisonment. The civil remedies only include removal of noxious content. It is definitely a safe structure that can be adopted by the Indian law. Non-inclusion of damages in civil remedies is a guarantee against potential chilling effect.

Nevertheless, the last safeguard lies on the constant awareness of the viewer or the reader to understand when the content viewed can be manipulative and to not act

\textsuperscript{261} Ibid.
upon such information. Post the cases of lynching in India on the basis of whatsapp forwards, several advertisements were aired on television as well as on radio asking people not to be affected and convinced by whatever they read on social media sites. This is an effective approach to tackle the problem at hand.

Lastly, a differentiation needs to be drawn between a free speech advocate and a free speech absolutist to understand the problem at hand. Varied rights rest with individuals and with the broader society. Regulations come into picture to determine non-conflict of such rights. In a society that is shared by people who nurture differences, as much as it is important for them to propagate their own culture and associated ideologies, the cost paid must not be innocent lives of people who happen to be different.

REFERENCES

16. Indian Penal Code, Act no. 45 of 1860.
17. Information and Technology Act, (No. 21 of 2000).
THE DISREGARDED DILEMMA OF OCEAN DUMPING

By Akanksha Sharma
From School of Law, UPES

Abstract
The ocean is a compound and interwoven ecosystem with each biotic and abiotic part influencing every other component directly or indirectly. However, it has become a tin for significant quantity of waste produced on land. Among all types of activities that adulterate the ocean and impedes the marine health and ecosystem, garbage debris and other waste material dumping, tops the list. Dumping includes accumulation of all types of waste materials from factories and industries, sewage waste materials, tankers and ships into the water bodies. This paper will define ocean dumping by also covering its current status national as well as internationally. The Author will try to understand the laws on ocean dumping and how it has evolved in the modern times with variant approaches of climate crisis in our lives. Where it constitutes as a major cause for water pollution and contamination, some of the substances emitted by the industrial and sewage wastes contain matters like mercury, cryolite and Dichloro Diphenyl Trichloroethane (DDT) also threatens the lives of aquatic animals. Even minute amounts of substances like radioactive materials from these wastes tend to have an offset effect on not just the ocean, but the environment at large. Through this paper the author will attempt to scrutinize, analyze and review the causes and effects of ocean dumping in India.

1. INTRODUCTION
“The ocean is our resource; It is not our Garbage depot. It is our life-sustaining reservoir. If man alters it useless once, We may then return back to Abiotic, God-less world.”
-Momiji

We all know the established fact that more than two-third of the Earth is covered with water. Now imagine that much area being covered by plastic, sludge and other solid wastes. Such an indispensable and crucial part of our existence is on peaky threat and the major reason behind it, is human intervention and the continuous exploitation of the water resources. Topping the causes of such threat is the act of Ocean Dumping.

As defined by the Organisation for Economic Co-operation and Development (OCED), Ocean Dumping is defined as “the deliberate disposal of hazardous wastes at sea from vessels, aircraft, platforms or other human—made structures. It includes ocean incineration and disposal into the seabed and sub-

The increase in the level of contamination of not just the surface of water bodies but also the beds and other ecological organisms living under water are therefore creating an imbalance in entire ecosystem. Ocean Dumping of wastes, chemical or biological, organic or inorganic degrades the habitation of a number of aquatic species and affects their well being adversely.

Oil spillage, plastic waste disposal, mercury wastes and pesticides are some of the common examples of wastes that are dumped in the water bodies. The worst of all is issue of plastic debris. A report indicated an accumulation of nearly 414 million plastic bits in the India Ocean and even remote islands are not excused from this debris.

Another important factor for increasing cases of water pollution is oil spillage. Ships or vessels from different ports take the waste oil from heavy industries and construction sites to dispose it off at the sea. It also includes waste oil spill from ships that are already in the sea. These industrial and sewage dump like DDT and other chemicals have huge negative impact on the sea water.

Apart from the huge loss to marine ecosystem that Ocean Dumping causes, one of its very ill effects is eutrophication. Eutrophication, also known as the growth of the algae in the water bodies, is basically due to excessive nitrogen and minerals which might also result in decreasing the level of oxygen in water. This leads to toxicity in fishes and other living creatures and thus, rises higher up in food chain creating an imbalance to the entire ecosystem.

Another important contributor to the hazards of Ocean Dumping is the unstoppable port activities that persist by the cargo. The slag, coal and sometimes, limestones are removed as wastes from the cargo by sweeping from the ships. After they leave the port, these wastes are, without a thought, dumped into the water. Similar is the case with the metal ore, when the mining get done is removed and discharged into the nearby water body.

As wastes gets blended with the sea water, a number of chemical processes takes place including acid-base neutralization, dissolution or precipitation of waste solids, particle adsorption and desorption, volatilization at the sea surface which ultimately results in changing of the oxidation state and the one that settles at the seabed encounter distinct geochemical and biological activities. Hence, it all results in creating an imbalance in the marine ecosystem.

---

267 Id.
In India, the major wastes that get disposed into the water body is agricultural wastes and it is very unfortunate that water bodies have become a dumping base for our human civilisation.\textsuperscript{269} The chemicals and other non biodegradable substances from farms deposit into the water and increases the probabilities of fatal marine health. Rivers in our country are prayed as holy deities and are the main source of human fulfilment in every way but human activities, industrial discharges, toxic effluents and other pesticides are increasing with the same pace as the population of our country.

Disposal of waste pollution is indeed a problem in India, just like any other country on the globe. As much as the government is trying their level best to work out a land-fill method, it is getting difficult because of decreasing availabilities and uptake land rates. Beaches on the shore of the ocean have strikingly become a major reason for Marine litter as well. With increasing number of tourists per year on the beaches of different shores around the country, the increasing cases of litter are on its peak too. After being treated as an ‘out of sight, out of mind’ matter, the government have finally started to work towards the awareness of threat that has been posed to the water bodies of this country. The estuaries, beaches and continental shelf are on its prime target and several measures have been taken to protect its marine environment\textsuperscript{270}.

There has been a number of public institutionalised action plans dealing with the problem of marine litter like the National River Conservation Plan, National Marine Litter Policy and other initiatives signed by government. Keeping at par is various private institutions fighting ocean dumping in its own way. Keeping in mind this positive note, the author has tried to deal with changing trends of laws internationally and in India and has drawn a theoretical difference between laws of other countries and that of India.

2. INTERNATIONAL CONVENTIONS AND BODIES

CONVENTION ON INTERNATIONAL MARITIME ORGANISATION, 1948: The 1948-Convention on International Maritime Organisation adopted in Geneva, Switzerland embarks the history of International Conventions on Maritime Environment Protection. Article 37 of the Convention calls for all the members of the Convention to assemble forming, ‘The Marine Environment Protection Committee’. Article 38 is concerned with restraining and supervision of the pollution caused by the ships. It provides for accession of scientific, technical or any other empirical knowledge for such prevention of pollution. Through Article 39, the Committee is required to submit proposals, recommendations, guidelines and finally a report of states under the organisation working towards the same. The convention came into force in next 10 years of its adoption. Further, one of its amendments\textsuperscript{271} talked about how oil spill is one of the major causes of marine pollution and techniques to deal with it.

\textsuperscript{269} Marci L. Bortman, Id.
\textsuperscript{270} R. A. Malviya, Marine Pollution Control: An Appraisal, COCHIN UNIVERSITY LAW REVIEW, 244, 227-245 (1984).
INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION OF THE SEA BY OIL (OILPOL), 1954: OILPOIL, 1954 was a Treaty signed in London with its main objective as to regulate the water pollution caused by the ships via oil spills. It ceases and imposes penalty for oil or any other oil mixture spillage done by ships or cargo into just the prohibited zones or territorial waters but the entire maritime. Other than the oil-hinged pollution, the Convention takes into account the supervision of hazardous substances into the water bodies and accounts for parties to work towards the same.

1ST UNITED NATION CONFERENCE ON THE HIGH SEA, 1958: Held at Geneva in 1958, the Convention on the High Sea mainly dealt with the territorial waters. It takes into account proper measures to steer the water pollution. It further concurred to consider prevention of water pollution by dumping radioactive materials and other harmful agents outside the water bodies. Excluding the coastal state organisms, the conference through including Article 24 did talk about the resources attached directly to the bed of the sea while taking into account the prevention of contamination of water bodies.

INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION, 1960: Introducing the concept of Sustainable Development in the “ocean and the coasts”, the Established in 1960 by the UNESCO, IOC came out to be the only competent consortium for marine science within the UN body. Intergovernmental Oceanographic Commission focussed on climate change by talking about healthy ecosystems of the Ocean. Some major works of IOC includes conducting conferences and reviews on how to prevent and mitigate the after-effects of environmental hazards.

UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (STOCKHOLM CONFERENCE), 1972: Safeguarding the environment was final declaration of the Stockholm Conference. Amongst the 26 principles of the Conference for the protection of the Environment, prevention of Oceanic Pollution was one. It makes it mandatory for the states to take all possible initiatives for stopping harm to marine life and resources done by polluting the sea.

CONVENTION ON PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTERS, 1972: Also known as the London Convention, 1972, it was the first official convention made specifically for tackling the problem of dumping of wastes into the water bodies. The London Convention had an objective to promote prevention of ocean dumping, however, did not include discharges from dumping radioactive materials and other harmful agents outside the water bodies.

---

272 Elizabeth A. Wilman, External Costs of Coastal Beach Pollution: An Hedonic Approach 72 (Routledge 2015).
274 Kamil A. Bekiashev & Vitali V. Serebriakov, Intergovernmental Oceanographic Commission (IOC), Springer Link (March 20, 2020).
land-based sources of pollution\textsuperscript{278}. It follows the approach of segregating the states under grey and black list in order to regulate ocean dumping by them. The items under blacklist are prohibited from dumping and the ones under grey list is required to seek special permission under special circumstances by a designated authority\textsuperscript{279}.

**LONDON PROTOCOL, 1972:**
Adopted as a protocol to Convention on Prevention of Marine Pollution by Dumping Wastes and other matters, London Protocol note only modernized but ultimately, replaced the London Convention in 1996. Coming into force in 2006, unlike London Convention, it prohibits all dumping wastes except the ones mentioned under ‘reverse list’\textsuperscript{280}. It added a transitional period of 5 years for allowing developing countries becoming contracting states for its binding. Further, taking a step forward, London Protocol added new approaches of ‘Polluter Pay Principle’ and ‘Precautionary Principle’ to address the problems of Ocean Dumping\textsuperscript{281}. Although, London Convention was the first ever International Convention to deal with the problem of Ocean Dumping, London Protocol has succeeded in solving the issue at hand more effectively.


\textsuperscript{280} Id.

\textsuperscript{281} Gi HoonHong & Young JooLee, Transitional measures to combine two global ocean dumping treaties into a single treaty, 55 MARINE POLICY 47, 47-49 (2015).

\textsuperscript{282} The International Convention for the Prevention of Pollution from Ships (MARPOL), 1973: Adopted by IMO in 1973, MARPOL is a combination of convention held in 1973 and a protocol implementing its recommendations in the year 1978\textsuperscript{282}. It basically deal with the maritime pollution caused by ships into the oceans and the seas and targets cutting back of accidental discharge of harmful substances by them.

**CONFERENCES ON THE LAW OF THE SEA, 1973-1982:**
The conferences on the Law of the Sea had a wider ambit including sea bed and floor of the ocean regime, divergent jurisdiction of Exclusive Economic Zone, territorial water and the continental shelf. The third Conference however, had to deal just with the preservation of marine life. United Nations Convention on the Law of the Sea (UNCLOS) turned out to be an end-product of the 3\textsuperscript{rd} conference on the Law of the Sea, adopted by the United Nations in 1982\textsuperscript{283}. Amongst other laws working towards the impeding of degrading marine health, cleaning and forestalling water pollution came out to be the final consideration of the Convention.


THE MARINE ENVIRONMENT PROTECTION COMMITTEE (MEPC), 1974: Implementing the Precautionary Principle in the Maritime Law, MEPC is a subsidiary of International Maritime Organisation. The Committee basically inscribes marine environment protection under IMO’s umbrella.

REGIONAL SEAS PROGRAMME, 1974: An aftermath of the Stockholm Conference (UNEP), Regional Seas Programme has been a milestone for sound environmental management. This programme works with Global targets, Action Plans and Regional Activity Centres for its functioning. The contracting parties are legally binded by a convention and other conventions of UNEP.

THE GLOBAL PROGRAMME OF ACTION FOR THE PROTECTION OF MARINE ENVIRONMENT FROM LAND-BASED ACTIVITIES (GPA), 1995: Adopted by 108 governments since its inception, GPA mails deals with the impact of land-based activities like sewage, persistent organic pollutants, radioactive substances, heavy metals, oils (hydrocarbons), nutrients, sediment mobilization, litter, and physical alteration and destruction of habitat on the aquatic environment. Not just governments, the programme inspires the private ventures, NGOs, and various environmental committees to come forward and work towards this common goal.

UN’S CLEAN SEAS CAMPAIGN, 2017: An initiative launched by the International Maritime Organisation (IMO) and covered under the UNEP, Clean Seas Campaign is tool to reduce and finally, ban the major cause of marine litter i.e. plastics. It encourages not just the government, but also private sectors and general public to come together and fight against this issue. By giving a consortium for developing creative ideas and new innovations, this initiative brings a wholesome community of activists and leaders to share experience and build effective system for tackling the problem. Implementing the trending #CleanSeas on the Social Media platforms, the campaign has been a success all over the globe.

Laws of Ocean Dumping in India

The first legislation that talked about water polluting laws can be traced back to The Water (Prevention and Control of Pollution) Act, 1974 which aims to keep a check on Water Pollution by creating Pollution Control Boards, both at National as well as State levels. Keeping at par with the Public Trust Doctrine, the Act imposes penalties and imprisonment for people not abiding by its laws.

THE TERRITORIAL WATERS, CONTINENTAL SHELF, EXCLUSIVE ECONOMIC

---

289 Water (Prevention and Control of Pollution) Act, Act No. 6 of 1974, §3.
290 Id, §4.
291 Id, §41, 42, 43, 44.
Zone and Other Maritime Zones Act, 1976 make specific laws for protecting the territorial waters\(^{292}\), continental shelf\(^{293}\) and EEZs\(^{294}\) from getting polluting. In order to protect the marine environment, the act provides for jurisdiction to the Government to take any necessary action to control the contamination\(^{295}\). The Coast Guard Act, 1978 is the only act which caters to constituting an official armed force of the Union\(^{296}\), one of whose duties is to take actions for the protection of maritime environment\(^{297}\). Framing punishments in relation to the Water (Prevention and Control of Pollution) Act, 1974, The Water (Prevention and Control of Pollution) Cess Rules, 1978 was implemented. Not later in time, India ratified the United Nations Convention on the Law of the Sea (UNCLOS), 1982 as soon as it was adopted. It not only created obligation on the state to protect the marine ecosystem, but also its related resources. Amendments made in the year 1983 in The Merchant Shipping Act, 1958 enforced the polluter pay principle by providing for civil liability incumbent against the contamination of not just coastal areas, but also the territorial waters and its adjacent areas by oil\(^{298}\). It also included the preventive principle by incorporating mandatory law for issuance of Pollution Prevention Certificate from the Central Government.\(^{299}\) The Environment Protection Act, 1986 was enforced as the agglomeration for saving environment of all life kind. Amongst the laws incorporated to safeguard the nature, the act provides for constituting bodies, analysing reports and taking preventive measures by the Government for the same. In the year 1993, the committee of secretaries approved the National oil spill Disaster contingency plan (NOS-DCP) specifically for combating oil pollution into the water bodies.\(^{300}\) Implemented by the Earth System Science Organisation (ESSO), Indian National Centre for Ocean Information Services (INCOIS), 1999 is an autonomous body of Government of India whose one of the main objectives is to sustain ocean life and encourage other private and government bodies towards this objective.\(^{301}\) Under the 17th Law Commission, 2003, the proposal of constituting environment courts were put forward under 186th report by Law Commission of India, which would indeed be a new beginning for laws to deal with ocean dumping too.\(^{302}\) The rules in regard to water pollution under The Merchant Shipping Act, 1958 was introduced, these were:

- Merchant Shipping (control of Pollution by Noxious Liquid Substance in Bulk) Rules, 2010\(^{303}\)

---
\(^{292}\) The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, Act no. 80 of 1976, §4.
\(^{293}\) Id. §6.
\(^{294}\) Id. §7.
\(^{295}\) Id. §15.
\(^{296}\) The Coast Guard Act, Act No. 30 of 1978, §4.
\(^{297}\) Id. §15.
\(^{298}\) The Merchant Shipping Act, Act No. 44 of 1958, INDIA CODE, §352G.
\(^{299}\) Id. §356C.
\(^{303}\) Merchant Shipping (control of Pollution by Noxious Liquid Substance in Bulk) Rules, 2010.
• Merchant Shipping (Prevention of Pollution by Harmful Substances carried by Sea in Packaged Form) Rules, 2010

• Merchant Shipping (Prevention of Pollution by Sewage from ships) Rules, 2010

• Merchant Shipping (Prevention of Pollution by Garbage from Ships) Rules, 2010

• Merchant Shipping (Prevention of Pollution by Oil from Ships) Rules, 2010

These rules impacted the culture of dump by ships in the best effective manner. A major revolution brought up in the history of environment protection laws was the constitution of National Green Tribunal (NGT) in 2010. NGT, as its function, handled cases of water dump in the most effective and prompt manner. In the case Abhay Dahiya & Others v State of Haryana, NGT ordered dumping of solid waste and discharge of untreated water as an act of water pollution and requested necessary action to be taken against it by the authorities in charge.

In Naresh Kumar Parmar v Union of India & Others, the NGT ordered the authorities in charge to submit reports for dumping of mining overburden in Banas Kantha, Gujrat.

In 2017, NGT had put an absolute ban on dumping and burning of solid wastes on the flood plains of river Ravi as it was the paramount source of serious water pollution and adverse bad health of people living near its bed.

Facilitating corporation and mutual assistance of the South Asean countries, India braced the South Asia Cooperative Environment Programme (SACEP) for protecting and preserving the aquatic environment in March 2018. Only after sometime, Prime Minister Narendra Modi announced Shared Vision of India-Indonesia Maritime Cooperation in the Indo-Pacific, 2018 considering the issues of Marine Environment safeguarding the well being of oceans and seas. It also talked about the plastic litter on Bay of Bengal.

---

304Merchant Shipping (Prevention of Pollution by Harmful Substances carried by Sea in Packaged Form) Rules, 2010.
305Merchant Shipping (Prevention of Pollution by Sewage from ships) Rules, 2010.
307Merchant Shipping (Prevention of Pollution by Oil from Ships) Rules, 2010.
Under the UN’s Clean Seas Campaign, India launched a National Marine Litter Policy in 2018 to monitor plastic waste sliding into the ocean. The Prime Minister, Mr Narendra Modi and the Minister of Environment, Forest and Climate Change, Dr Harsh Vardhan claims it to be the first step towards making ‘Dream India’ as the cleaner state.314

India has been working determinedly in order the curb the problem of ocean dumping and some of its very important strategies involve collaborations made with the developed countries like Germany and Norway in 2019. “Cleaner Air, Greener Economy: Capacities and Technologies for Implementing NDCs315 and SDGs”316 is the title given to the collaboration made under 3rd Indo-German Environment Forum. The Indian Minister of Environment, Forest and Climate Change has announced marine litter as one of its major focus. The India-Norway Ocean Dialogue has decided to work closely on oceans maintenance, thus introduced the concept of ‘Blue Economy’. It will comprise of the statistics and analysis on Indian Ocean region’s maritime economic activities and will work for its sustainability with not just government, but also, private corporations.317

315 Nationally Determined Contributions (NDCs) is a term used under the United Nations Framework Convention on Climate Change (UNFCCC) for reductions in greenhouse gas emissions.
316 Sustainable Development Goals (SDGs) were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.
Further, the penalties or punishment charged by the Act is so low that the offenders choose pay them and continue their acts instead of taking any precautionary course of action towards restoring the environment.\textsuperscript{320}

2. Downsides of The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976:

The Act provides “exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution”\textsuperscript{321} to the Union. While doing so, there is no prescribed limit as to what values or standards will the effluents and discharge of pollutants into the territorial waters, continental shelf, EEZs or other Maritime Zones will be responsible to cause the water pollution. The Act formulates no rules towards procedure or time limit for the water purification or cleaning of such discharges before it exploits a wider area of such zones. A substantial part of territorial waters includes beaches and organised public bathing spaces. There is no specific demarcation done in order to separate the two of them and hence, no divergent rules for them. The act does not provide for any installation or maintenance of any agencies taking care of investigation or surveillance in cases of water pollution.

3. No Specific law dealing with Ocean Dumping in India:

The US legislation Ocean Dumping Ban Act, 1988 which amended the Marine Protection, Research and Sanctuaries Act (MPRSA) or the Ocean Dumping Act, 1972 is a law which regulates the concerns in relation to Ocean Dumping. It segregates the matters causing water pollution to ones that don’t and makes specific laws for areas that require priority consideration.\textsuperscript{322} The Act incorporates rules for maintenance and surveilliance by the US Environmental Protection Agency (EPA) in order to address the problem of Ocean Dumping.\textsuperscript{323} In India, there are various zone of water bodies which makes the ambit of Ocean Dumping very wide and thus, makes it difficult to address the issue with a great deal of contrasting laws. With one specific law for the regulation of Ocean Dumping, covering not just water bodies, but also Territorial Waters, Coastal Areas, EEZs, etc, the problem could be easily tackled under the same umbrella which would then, increase the efficiency of the working.

4. Inconclusive nature of Definition:

When we say Ocean Dumping, the first thing that comes into our minds is dumping wastes into the ocean. The word, however, covers much more than just its literal interpretation. Ocean Dumping is not just about Oceans, but is considerable towards other water bodies including seas, coastal water bodies, territorial waters etc. This problem of inconclusiveness of its definition makes it difficult for the researchers and other scholars to work upon the matter and pose solutions towards the issue.

5. Government Oversight and Unchecked Water Pollution:

\textsuperscript{320} R. A. Malviya, \textit{supra} note 9.

\textsuperscript{321} The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, No. 80 of 1976, §6.7.


With tonnes of plastic accumulation over the surfaces and bottoms of the water bodies which continues to spread their deterioration, the government being inactive towards the same has been a trend since forever. While the events of climate change are increasing in both frequency and intensity, the government’s stance on the issue was more alarming. When the matter of unchecked water pollution comes into picture, no voice is ever represented by the House or the government, which ultimately leads to activists knocking the doors of Judiciary. The Judiciary has, no doubt, dealt the issue in the most effective way, but the entire process of litigation is prolonged and extensive. The current government has been a little more active when it comes to solving the problems of ocean dumping with their recent implementations, but the problem, when it was overlooked for a longer time, has created some major irreversible problems to the marine environment.

Conclusion and Suggestions

The boost in the number of cases of ocean dumping or marine litter is been on rise since a long time back and in order to achieve a better place to live in, mere words would not matter until actions does. There have been a lot of local approaches that are dealing with the problem of ocean dumping in their own creative, yet effective manner. A small chain of juice in Malleshwaram, Bengaluru became India’s first zero-waste juice bar, committed to cutting out plastic cups, cutlery and straws and using fruit’s natural shell instead. This innovative idea not only works towards sustainability, but also prevents the need of water for dish washing. Further, a fisherman from Kollam, India has innovatively made an entire road by using just the plastic after pulling the waste into a net, setting the most creative precedent of recycling plastic waste. Another such example is initiated by a global company UCO Gear, under the guidance of Steven Reinhold who have worked upon towards a new trend on social media, challenges people to come forward by using #trashtag and clean the litter around the beaches and other natural resources. These local approaches are not just commendable, but when implemented on a larger scale can impact the ecosystem in its entirety.

Being the major cause behind the Ocean Dump and having extremely subversive effects on the environment, plastic usage must take the edge off. With consultation to the general public, the environment officials in UK have decided to put a complete ban on plastic usage as an urgent need to conserve and restore the

Footnotes:

325 As cited under footnoting 53 and 56.
environment. A similar step was taken by governments in Philippines and Victoria. A lot of other countries have already banned the single-use plastic items. In the month of November 2019, the Indian Government too has banned 8 single-use plastic items completely including plastic cutlery, plastic bags and certain Styrofoam items. Even though our country has a long journey to cover, but every step counts and this step by the government to work towards the minimisation of plastic use would definitely bring a change.

US has its own special law dealing with Ocean Dumping only. The water resources in and around India are very widespread and substantial at the same time, and thus, requires a distinct legislation. The persisting acts dealing with water pollution have quite a number of loopholes and very weak punishments. To curb this problem, India, too, needs to draft laws dealing with the problems of Ocean Dumping only. A legislation that would not just stop and prevent marine litter and other water pollution, but also look over the process of maintaining and installing agencies taking care of investigation or surveillance in such cases. With such distinct legislation, the better and stricter penalties and punishments must be imposed so that people could not get away with the harm they do to the environment. There must be a bridge between functioning of the government and functioning of other agencies, working directly or indirectly towards the similar goal. Like in Netherlands, a teenage boy Boyan Slat founded a non-government funded organisation called ‘The Ocean Cleanup’ that works to extract plastic out of the water bodies. Founded in 2013, the organisation is using its best advanced technologies for the same. In India too, a Delhi-based technological company called ‘Omnipresent Robot Tech Pvt. Ltd.’ uses its ‘Ro-Bo-T’ to collect all the waste and sludge from the Holy waters of Ganga and Yamuna by environment friendly techniques to detect and eliminate these wastes. Another example is the Guided Ultrasonic Monitoring of Pipe Systems (GUMPS). Founded by a college student Daniel Raj David, this machine is the first ever to monitor industries and detect oil leaks from pipelines near the Ganga river. In today’s era, environmental

---


regulations need not to remain confined within the purview of national government. The Government, on the other hand, needs to build an interconnected web combining the local approaches, the public as well as private operational agencies in order to produce desirable results.

Another most important system to be implemented is the system of timely check of deteriorating standards of marine resources and other water pollutions. With proper techniques and global connection through internet and satellites, a proper government check-ins is the need of the hour.

Public opinion and a responsible human conduct is directly proportional to mass education and thus, awareness plays a major role in dealing with environmental concerns. Effective means of communication like television, radio and the super trending social media should be used as a toolbox for promoting the need and importance of saving the water resources from the wastes and litter. More chains like #trashtag must be promoted and suitable slogans preventing Ocean Dumping must be broadcasted.

The Judiciary works in its most effective way when it comes to cases of water pollution. As seen in various cases like, K.N. Unnikrishnan v Cochin Port Trust, where a plea was filed in the Kerela High Court against waste discharged from ships on the public places and nearby the Cochin Port, the court has issued necessary directions towards prohibiting the disposal of plastic anywhere into the sea or near the port and to carefully manage other garbage and wastes. establishing the relationship between health and sustainability, the Supreme Court, in the case M.C. Mehta v Union of India has issued directions to install sewage treatment plants in a time-bound manner. But the issue of lethargic court proceedings continue to create a problem and that is the reason that the change, majorly, depends on how the legislative and executive bodies work upon it. Over the years, both of these bodies have not turned out to be most effective when it comes to environmental governance. The two major implementation of these bodies include Article 51A(g) of the Indian Constitution which thrives a fundamental duty on the citizens of the country to protect and improve the natural environment and have compassion for the living creatures and Art 48A as a Directive Principle of State Policy(DPSP) directing the state ‘to protect and improve the environment and to safeguard forests and wildlife of the country’. But even with these laws being implemented, these organs have not put in their best efforts to conserve environment. Therefore, just judiciary cannot work entirely and the three pillars have to work together to bring out the best for our environment.

Currently, with the present conditions of our country, solving the problem of Ocean Dumping looks like a far-fetched dream, but a step forward is still a step closer to success.

****

338 R. A. Malviya, supra note 9.
339 supra note 66.
340 K.N. Unnikrishnan v Cochin Port Trust, 2001 CriLJ 4558.
342 INDIAN CONST., Art. 51A(g).
343 INDIAN CONST., Art. 48A.

HATE CRIMES IN INDIA: AND NEED FOR A SEPARATE LEGISLATION TO COMBAT HATE CRIMES

By Amina Ali
From CNLU, Patna

Introduction

Looking at the present social unrest in India, instances of hate crimes are on a list high. There has been reporting of an alarming increase in the incidents of violent crimes driven by extreme grounded religious or ideological prejudice against the members of particular communities.

The Federal Bureau of Investigation, a federal law enforcement agency of United States has defined Hate crime as a “criminal offence against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”

‘Motive’ is the determinative element which distinguishes hate crimes from other Criminal offences mentioned under Indian Penal Code of 1860. A hate crime is always motivated, by bias or hatred of an individual or social group against another individual or social group. Unlike victims of other criminal acts, hate crime victims are selected based on their membership of a particular group, on the grounds of what they represent rather than who they are. The message that is conveyed is intended to reach not just the immediate victim but also the larger community of which that victim is a member.

The notion of prejudice-motivated violence is not unique to India and perhaps that was the reason the lawmakers expressly addressed the customary practice of Untouchability as not only constitutionally illegitimate but also a punishable offence. The Court in its verdict on 1984 anti-Sikh pogrom, recognized a familiar link of religious violence, referring to some gruesome incidents of mass violence such as the 1993 riots in Mumbai, Kandhamal violence in 2008, Muzaffarnagar riots in 2013 and the Gujarat riots of 2002 and expressed its concerns over targeting of minorities and its discontentment over the inadequacy of national legal framework in India dealing with Hate Crime and Genocide.

Present Database & Incidents reported of Hate Violence

According to a report by Amnesty International India’s website ‘Halt the Hate’, total 902 incidents of alleged hate crimes were reported between September 2015 and June 2019. The victims suffered harm on account of their Dalit identity followed by Muslims, Adivasi, Christian and persons belonging to the LGBTQ community. The website was launched in September 2015 after the incident of lynching of Mohammad Akhlaq, a 52-year old Muslim resident of Dadri, Uttar Pradesh who was murdered on the suspicion of

---

346 State Through CBI Vs Sajjan Kumar & Ors, CRL.A. 1099/2013.

eating beef. Similarly, in September 2019 in the aftermath of the Pulwama Attack, at least 14 episodes of mob attacks on Kashmiri Muslims were reported.

Crimes regarding lynching are unremarkably known in India by many different names – mob violence, mob lynching, cow vigilantism and others. It is imperative now that new amendments to be made in the Criminal provisions to determine these incidents as what they are: Hate crimes. Many incidents of hate crimes are not reported to the police, and even when they are, many do not make it to mainstream media. In some cases, criminal investigations are also initiated, but several perpetrators of such offences go unpunished because of the loopholes in our judicial system.

In May 2019, The Indian Express reported an incident where a mob of 200-300 individuals belonging to the dominant castes of Hindus, attacked the home of a Dalit couple in Vadodara, on an alleged social media post updated by the husband stating that Govt. does not allow the village temple to be used by the Dalits.

In late 2017, a National platform “Documentation of the oppressed (DOTO)” was released for the collection of verified data on Hate Violence. The incidents recorded on the database are post the year 2014. Currently, the database has 1118 incidents in which 22605 victims are reported. More than 80% of these victims are Muslims and other victims include Christians, Dalits etc. The database records different categories of violence, the majority of which includes:

- Murder/Lynching - 89
- Physical Assault - 165
- Attack Against Religious Infrastructure - 131
- Communal Violence - 186.

Out of these 89 incidents of murder/lynching, 40 are related to cow propaganda, 22 because of religious identity and others are related to work/ideology of the person/Inter-religious marriage. The database also tries to record the identity and organizational affiliations of the perpetrators. The political orientation of the majority of perpetrators is related to right-wing Hindutva ideology.

Amid the controversial law, passed by Government of India in December 2019, marking a serious shift away from the country’s secular and religious tolerant system. The Citizenship Amendment Act (CAA) advanced both pro and anti-CAA protests nationwide. The atmosphere in Delhi, that sustained protests for weeks, became exceptionally separated on religious grounds. As a result, India witnessed its worst spasm of religious violence in years, leaving at least 51 dead, majority of them being Muslim. During the violence, Muslims were burned alive in their homes or dragged out into the streets and lynched by Hindu mobs. In streets where people from both the communities

---

348 Ibid
351 DOTO - Documentation of The Oppressed Dotodatabase.com (Jun 12, 2020,2:45 PM), https://dotodatabase.com/.
had lived peacefully side by side, dead bodies were laid down alongside discarded and burned-out cars, bikes, shattered glass and smouldering shopfronts. Many Mosques and Shrines were set ablaze across Delhi by Hindu vigilantes. The police have been accused of enabling, encouraging or even joining in with the mobs.

The photo of Md Zubair, a Muslim man being beaten ruthlessly by the Hindu mob, shouting slogans “kill the bastards Muslims” and “Jai Sri Ram” became the defining image of the religious riot of Delhi. Though the victims were both Hindus as well as Muslims, it was the Muslim community of Delhi who was overwhelmingly targeted by Hindu mobs in their tens of thousands.

As of now, there is no separate law against hate crimes in India, however, provisions in various statutes handle matters related to lynching and mob violence, where a person can be charged for an act of group attack on some other person. A perpetrator of hate crime can also be booked under the provisions of Indian Penal code for Murder, Culpable homicide not amounting to murder, attempt to murder, voluntarily causing hurt or grievous hurt, acts done by several persons in furtherance of common intention, Criminal Conspiracy, or for the offence of ‘rioting’.

The existing provisions have failed to efficiently address and punish individuals or groups associated with such crimes. Though these provisions deal with offences motivated by hate but are still not fit to be classified as hate crimes unless the victim was chosen based on his actual or perceived social identity/protected characteristic. It is necessary for the Penal statute providing punishment for hate crimes to explicitly enumerate the characteristics in respect of which such crimes are perpetrated.

Why India needs a separate law on Hate Crime?

To understand the necessity for a separate law to deal with incidents of hate violence, the history of The United States in the enactment of separate legislation for Hate Crimes is an eye-opener. Till the 1970s, there was no concept of hate crimes in the U.S, though such crimes were a part of the world at large. Some of the eminent examples of which is the Persecution of Christians under the Roman Empire and the genocide of the Jews by Nazis. Violence against minorities both in the U.S. and India is fueled by the same factors of hate and biasness. Lynching in India in several cases has received the sanction of the State in the same way as the U.S. Senate remained silent for decades when black African Americans were being lynched.

After the enactment of the Civil Rights Act of 1968, the department of justice started prosecuting cases of Federal Hate crime. The Civil rights act covered certain crimes committed on the basis of race, colour, religion, national origin, sexual orientation, gender, gender identity, or disability. But, in the year 2009 congress widened this law by passing the “Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act”.

353 Criminal Procedure Code 1973 § 223(a).
354 Indian Penal Code 1860 § 307.
355 Indian Penal Code 1860 § 304.
356 Indian Penal Code 1860 § 307.
357 Indian Penal Code 1860 § 323, § 325.
358 Indian Penal Code 1860 § 34.
359 Indian Penal Code 1860 § 120B.
360 Indian Penal Code 1860 § 147.
Act” named in the memory of two victims of Hate Crime, Matthew Shepard, a gay college student who was tortured and murdered in Laramie, Wyoming, and James Byrd, Jr., an African-American man who was dragged to death in Jasper, Texas.\(^\text{361}\)

Considering the actual political character of the criminal justice system in India, and negligence of the State in minority affairs, despite the guidelines laid down by the Supreme Court of India in the case of *Tehseen S. Poonawalla V. Union of India and Ors*, there is an urgent need of a law that explicitly delineates the insidious nature of mob lynching and hateful sentiments.

“The Hon’ble Supreme in its judgement emphasized on the prevention of these crimes at the initial stage. The Court suggested for the formation of a special task force to procure intelligence reports on subjects likely to commit or incite such offence. The Director-General of Police and Secretary of Home Department of the States were directed to take regular meetings at least once a quarter with all nodal officers and State Police Intelligence heads. The Court also recommended the Parliament to create a specialized offence for mob lynching and allocate strict penalization to offenders for the same. Despite the Court’s inclination for a special law, the Centre which is responsible for legislation in Parliament did not implement the Court’s recommendation”.\(^\text{362}\)

Despite the recommendation made by the apex court, there are only three states in India: Manipur, West Bengal and Rajasthan which enacted laws against mob violence and lynching. Even, National Crime Records Bureau (NCRB) of India, that collects data on a wide range of crime committed across the country, does not count hate crimes—mainly because there are no specific laws to deal with such crimes.

**Conclusion**

Even in the midst of a pandemic, hatred and intolerance continued to manifest themselves unabated. Once the news of the convention held by the Tablighi Jamaat, a Muslim religious group broke out, rumours concerning the spread of the coronavirus took a communal hue. Several videos on different social media platforms got viral, showing Muslims spitting on food, licking plates and sneezing in unison to spread the virus. All these videos were later debunked as fake news. All the individual belonging to the Muslim communities were blamed for the spread of coronavirus and were termed as ‘anti-nationals’ by certain news channel and organizations.

In several places, this got translated into violence. Many Muslims including those who did not attend the Tablighi congregation were also attacked. Muslim vendors were abused and stopped from selling their goods because of their religious identity. A village named Kailancha in Karnataka banned the entry of Muslims in their village area. Muslim migrant worker faced discrimination and hunger in several parts of India and even had to beg for food. Three Kashmiri labourers were attacked in Barot village in the Mandi district of Himachal Pradesh by a group of unidentified locals and were threatened to return to their homes. A hospital in Ahmedabad where coronavirus patients were being treated, beds that had been set aside for COVID-19 got


A pregnant woman in Rajasthan in urgent need for medical help was denied access to the hospital, following which she lost her baby.  

The enactment of a separate hate crimes legislation has been long overdue but its necessity has particularly increased owing to the current circumstances. There is no doubt that these acts of discrimination based on the religious identity of a community are violative of Article 14 and Article 15 of the Constitution of India. India is a democratic and secular country and its citizens have certain fundamental rights that the State is bound to protect and ensure. The effects of hate crime are deeper than those of other crime such as Murder and assault, as they not only impact the victim but also the community with which the victim identifies.

India acceded to International Covenant on Civil and Political Rights (ICCPR) on 10 April 1979. According to ICCPR “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

The same view is also reflected under Article 21 of the constitution which states that “no person shall be arbitrarily deprived of his life and personal liberty except according to a procedure established by law.” When a person or group of persons are attacked on grounds of language, religion, race, ethnicity, nationality, or any other similar common factor, it is a clear violation of their right to life and personal liberty. Enacting effective laws on hate Crimes would demonstrate to the whole world in no uncertain terms, that India is serious about its international law obligations and is committed to securing human rights.

Acknowledging the ongoing incidences of hate crimes, I would like to conclude my Article stating that hate crimes are fundamentally different from other types of violent crime, and it is expected that Parliament wakes up to the current reality sooner rather than later. In line with my suggestion, instead of addressing the incidents of hate crime within the existing sections, this national offence should be dealt with by introducing new amendments in the justice system. At the individual level, the administration may take steps to confirm speedy justice, registering First Information Report (FIR) without delay, provide relief and fair compensation to the victims or their family for the loss suffered by them and the victims may be provided with free legal aid to secure justice. The Parliament should immediately without any further delay draft a separate hate crime legislation which will be applicable across the country, offering maximum sentence to the lynchers along with the officials who directly or indirectly take part in such violence.

-----

363 DOTO - Documentation of The Oppressed Dotodatabase.com (Jun 13, 2020, 8:45 AM), https://dotodatabase.com/.
364 International Covenant on Civil and Political Rights, United Nation Human Rights (Jun 13, 2020, 2:30 PM).
365 ICCPR. art.6(1).
366 ICCPR. art.9(1).
367 INDIAN CONST. art 21.
DOWRY SYSTEM – A CURSE TO INDIAN SOCIETY

By Amisha Shrivastava
From Jagran Lakecity University, School of Law, Bhopal

INTRODUCTION
India, a country having so many religions and cultures, which lead to more and more traditional customs which are further followed by the Indians. One of such culture is Dowry System. Dowry system is nothing but a system or a kind of tradition in India where the bride’s family give or transfer any type of goods or property, money and real estate at the time of marriage to the bridegroom’s family or their relatives. The meaning of dowry system has been changed by time to time according to societal mindset. In ancient era, dowry was a kind of gift and present which were given to a girl by her parents at the time of her marriage, as she was going to start her new life. But in course of time, it became a kind of crude custom or practice where the bridegroom and his family torture and humiliate the bride and her family in order to get dowry which resulted in female infanticide, domestic violence, suicide, bride burning, rape, extortion, homicide and other related cruelties. This problem is not only faced by lower class or middle class but by the upper classes as well, both in rural as well as in urban areas. Due to the patriarchal mindset of our society where men hold primary power and have male dominated society, the women here suffers the most and therefore it can be seen in the dowry system as well because even though the dowry is from and for the bride, the bride get excluded and possession of such dowry is in the men’s hand due to his power.

Dowry system is a kind of social evil which are still prevailing in the Indian society due to which dowry related harassments and deaths are increasing day by day. These crimes and offences have created an atmosphere of insecurity among women in the society. To tackle this there have been laws and Acts that have been enacted and incorporated by the legal system of the country. On the other side, various campaigns and awareness programs have been initiated by the Governmental and Non-Governmental Organisations against the dowry death and dowry system in India. Protection of young women against harassment and cruelty by her husband on account of dowry is the responsibility of the State (Government). Legislature has come up with many laws and acts to protect women from such offences. Therefore, parliament has enacted acts and provisions in view to eliminate this horrible act of dowry system from India. Though giving and demanding dowry is an offence and prohibited by Indian Legal System but the custom of dowry from the bride’s family still prevails in our society.

EVOLUTION OF DOWRY SYSTEM IN INDIA
Dowry system can be traced way back in the ancient India and existed even before the British Rule. Wedding in India are surrounded by many type of tradition and culture and therefore there are multiple rules and religious requirements that need to be fulfilled in order to make it legitimate or binding by those religious ceremony. One of such traditions that has been passed down in time and still continue is the system of dowry. Initially in the ancient system of dowry, bride’s parents used to gave all wealth to her daughter in a way to help her daughter (bride) to be financially independent after going to her husband’s home. It was just like how parents used to give a part of wealth to their sons, so did
they give it to their daughters too during the daughter’s marriage. But the wealth here was given to the bride and not to the groom or his family. In simple words, we can say that the dowry wealth which was given by bride’s family was continued to be owned by the wife (the daughter) and not by her husband or his family. This gave the required financial independence to women after going to her husband’s home.

In the ancient marriage rite in the Vedic period are associated with kanyadan or the ceremony of giving away the bride (according to Hindu Shastras), the meritorious act of dan or ritual gifts are incomplete till the receiver is given a Dakshina. So when a bride is given over to the bridegroom, he has to be given something as Varadakshina. This Varadakshina was offered out of affection and did not constitute any kind of compulsion or consideration for marriage. It was a voluntary practice without any coercive action. The gift which was given by the parents to her daughter according to Hindu Dharamashastra suggest as the bride’s own property i.e. Stridhan over which she enjoyed complete right and which would provide her financial protection in adverse time.\(^{368}\)

Hence, during the Vedic period, marriage was a holy bond and there were some very basic and simple rules that people followed at the time of marriage but there is still no mention of Dowry or such traditions which are now days followed by the society. So, in the original system of dowry prevalent in India, dowry was completely a voluntary gift given by her parents and women were gifted wealth from their parents during marriage and this served as a tool of financial independence for the bride even after the marriage. Today it is a way for a groom to extort money from a bride and her family.

**DOWRY SYSTEM WHICH LEAD TO DOWRY DEATH IN INDIA**

Existence of one the worst system in our country i.e. the dowry system has caused many deaths of bride’s and affected many women out there who directly or indirectly get affected because of this system. Here, dowry means the transfer of parental property, money or estate by the bride’s family to the bridegroom’s family or their relatives at the time of marriage or after the marriage. Dowries include money, property, jewellery, vehicles, furniture, appliances, clothing or any kind of gift. In sort it includes anything from money to assets, movable and immovable property and etc. Dowry death can be defined as an unnatural death of the wife due to demand for dowry by the husband or his family in abnormal circumstances. Dowry death is related to bride’s suicide or killing by his husband and his family soon after the marriage in relation to dowry or demand of the dowry soon after the marriage. Women are either killed by the husband or by his family, if their demand and greed for the dowry are not get fulfilled or the woman itself ends her life i.e. commit suicide because she could not face the harassments anymore over the fulfilment of the dowry.

With passing years cases related to dowry deaths in India are gradually increasing. Also cases of cruelty towards the wife by a husband or his relatives are increasing which is prominently caused by the demand for dowry and wife’s inability to fulfil it. According to the last updated statistics

---

\(^{368}\) DIWAN PARAS, DOWRY AND PROTECTION TO MARRIED WOMEN 9-10, 311 (ed. 1985).
given in the NCRB Report, 2018\(^\text{369}\), total number of reported cases related to suicide due to dowry related issues in the year 2018 was 2,416 and total number of reported cases related to cruelty by the husband or his relatives to the wife in the year 2018 was 110,478. India holds the highest number of dowry death cases in the world.

**Laws to Protect Victims from Dowry System**

As it is the responsibility of the State to protect their people, so with the increasing number of dowry death cases in India, the Government has laid some guidelines to deal with such cases and the laws have also been enacted and amended time to time for strengthening the legal system to protect and support the victims who come under the cases of dowry deaths or cruelty. We have The Indian Penal Code (I.P.C.), The Indian Evidence Act (I.E.A.) and The Dowry Prohibition Act (D.P.A.), to protect the women from being subjected to dowry deaths or cruelty arising out of disputes related to dowry.

**The Dowry Prohibition Act, 1961**

The Dowry Prohibition Act was enacted on May 1, 2016 with a view to prevent giving and receiving of dowry and to provide relief to the victims of the dowry in the country. This act contains a total of 10 sections and following are the brief overview of those sections:

1) **Section 1** – It deals with the short title, extent and commencement of the Act. This Act is extended to whole of the India except Jammu and Kashmir.

2) **Section 2** – This section provide definition of dowry. According to this section dowry is any kind of property or gift given by one party to other party at, before or after marriage.

3) **Section 3** – It provide penalty for giving or taking dowry. Any person who found guilty under this section will be punished with imprisonment for a term not less than five years and with fine which shall not less than Rs 15,000 or amount of dowry whichever is more.

4) **Section 4** – It provide penalty for demanding dowry. Under this section a person shall be punished with imprisonment for not less than 6 months but can be extend to 2 years and with fine which can be extended to Rs 10,000.

5) **Section 4A** – This section provide ban on such advertisement in any kind of newspaper, journal, etc, where any person offers any kind of interest in property, etc as consideration for marriage and any person who prints, publish or circulate any kind of such advertisement shall be punished with imprisonment for not less than 6 months but can be extend to 5 years and with fine which can be extend to Rs 15,000.

6) **Section 5** – According to this section any agreement for giving or taking dowry is void.

7) **Section 6** – This provision states that any kind of dowry received by any person other than the woman in connection with whom such dowry is received, that person shall transfer that dowry to such woman and if he fails to do so, then he will be punished with imprisonment of not less than 6 months but it can be extended to 2 years or with fine of not less than Rs 5,000 but which can be extend to Rs 10,000 or with both.

8) **Section 7** – This section provides cognizance of the offence. According to this section, no court inferior to

---

\(^{369}\) Crime in India, 2018 – National Crime Records Bureau, Ministry of Home Affairs, New Delhi, India.
Metropolitan Magistrate or a Judicial Magistrate first class shall try any offence under this Act. Court will take cognizance upon its own knowledge or a police report or upon a complaint of any person aggrieved by the offences.

9) Section 8 – According to this section every offence under this Act shall be non-bailable and non-compoundable.

10) Section 8A – This section states that any person who has taken or demanded the dowry than the burden of proving that he had not committed any offence under this Act is on him.

11) Section 8B – According to this section State Government can appoint Dowry Prohibition Officer as many as it think fit and specify the area where the use their jurisdiction and power. This section also specifies the powers of such officer.

12) Section 9 – According to this section powers to make rules for carrying out the purpose of this Act lies with the Central Government.

13) Section 10 – State Government also has power to make rules for the respective state for carrying out or fulfilling the purpose of the Act according to this section.

THE INDIAN PENAL CODE AND THE INDIAN EVIDENCE ACT

Dowry death is one of the heinous crimes. The demand of the dowry has every time caused death of a woman who get tortured and harassed for not fulfilling their demands and hence end their lives. The Indian Penal Code and The Indian Evidence Act deal with dowry death and the presumption as to dowry death.

1) Section 304-B of the Indian Penal Code deals with Dowry Death. According to this section if following essentials get fulfilled which are mentioned under this section, then the death of the woman will be considered as a dowry death and whoever commits dowry death shall be punished with imprisonment for not less than 7 years but which may extend to imprisonment for life:

- The death of the woman should be caused by burns or bodily injury or under abnormal and suspicious circumstances.
- Death must occur within 7 years of marriage.
- It must be revealed that soon before her death she was subjected to cruelty or harassment by her husband or any of his relatives.
- The cruelty or harassment on her should be in connection with the demand of dowry.

2) Section 498-A of Indian Penal Code deals with husband or relative of husband of a woman subjected her to cruelty. This section says that if a woman is subjected to cruelty or harassment and such harassment or cruelty should be done by the husband or by his relatives, then they will be punished with imprisonment for a term which may extend to 3 years with fine.

3) Section 113-B of Indian Evidence Act deals with presumption as to dowry death. It says that when the question is whether a person has committed the dowry death of a woman and it shows that soon before her death such woman had been subjected to cruelty or harassment by such person in connection with any demand for dowry then the court shall presume that such person has caused the dowry death. This section can only be applied if the essential ingredients of section 304-B of Indian Penal Code is fulfilled.

LANDMARK CASES AND JUDGMENTS

In Meka Ramaswamy v. Dasari Mohan and others, the Hon’ble Supreme Court held that if the wife dies within 7 years of the marriage and there was no demand for...
dowry and no cruelty or harassment or any kind of ill-treatment is not there, then the husband and his family is not held liable under section 304-B of Indian Penal Code. However, if a woman commits suicide or has been killed in relation to dowry and it happens soon before her death then section 304-B can be invoked\(^{371}\).

In Balwant Singh and others v. State of Himachal Pradesh\(^{372}\), it was said that the person who is acquitted under Section 304-B of the Indian Penal Code can also be convicted under Section 498-A of the Indian Penal Code as both of the section cannot be held as mutually inclusive.

In Harjit Singh v. State of Punjab, the court held that if there was no evidence that the woman was subjected to cruelty or harassment by the husband then the husband was get acquitted under Section 304-B of Indian Penal Code and the provision of Section 113-B of the Indian Evidence Act cannot be inflicted against him\(^{373}\).

In one of the landmark judgments against dowry death, the apex court held that the proof of demand of dowry as shown by the prosecution should not be too old from the death of the woman. The propinquity of dowry demand and the death of the victim should be established to evoke the expression of “soon before her death” and charge the accused under the Dowry Prohibition Act as well\(^{374}\).

**CONCLUSION**

To conclude, it can be stated that the Government of India have been successful in laying down guidelines and enacted stringent laws keeping in mind the welfare of the society as well as full protection to the victims against one of the heinous practice (Dowry System) happening over the year. Though there are laws enacted to prevent such system but yet it needs a lot of efforts from the Government, Judiciary and from the society as well so as to eliminate such practices from our society which are prevailing even today. Dowry system always remains threat to woman and will always create imbalance in the society. We need to educate each and every person about this evil system and about the laws which are there to protect the society from such social evil system through social awareness programmes, campaigns, free legal aids, educating the youth, road plays and shows etc. To eliminate the dowry system from India, we need public will, efforts and commitment as to remove this social and materialistic evil greed for dowry.

**BIBLIOGRAPHY**

**Websites Referred**
- [www.worldwidejournals.com](http://www.worldwidejournals.com)
- [www.ncrb.nic.in](http://www.ncrb.nic.in)
- [www.blog.ipleaders.in](http://www.blog.ipleaders.in)
- [www.shodhganga.inflibnet.ac.in](http://www.shodhganga.inflibnet.ac.in)
- [www.gktoday.in](http://www.gktoday.in)

**Legal Search Engine Referred**
- Indian Kanoon
- Manupatra

**Acts Referred**
- The Indian Penal Code, 1860
- The Indian Evidence Act, 1872
- The Dowry Prohibition Act, 1961.

374 Suresh Kumar Singh v. State of UP, (2011) 1 SCC (Cri) 989.
DYNAMICS OF REFUGEE PROBLEMS AND POSSIBLE SOLUTION

By Anamika Singh and Khyati Kumari
From KIIT School of Law

Abstract

A refugee is someone who has been forced to flee his or her country because of prosecution war or violence. They have fear of persecution based on reason of religion, nationality or membership in a particular social group. The refugee crisis is one of the most extreme matters concerning the international community. This paper focuses on Dynamics of refugee problems and there three basic features of refugee crisis such as political tensions resulting in refugee/ migrant crisis, social tensions resulting in refugee/ migrant crisis and lastly economic tensions resulting in refugee/ migrant crisis. This paper further deals with climate change refugee and there connection between water and conflicts in Syria. Further more this paper mention about possible refugee problems like statelessness, lack of documentation, problems related to personal laws, accessing equality learning, formal education and skill building opportunities are also are the current problems. In some locations, they also highlight police harassment as well as arrest and detention, because of poor access to sensitive health care, including psycho social support, young refugees highlight concerns about gender inequality and discrimination as challenges for themselves, including for LGBT community. This includes child and forced marriage, sexual assault and rape. The Humanitarian crisis and there solution to this refugee crisis problem needs to be Humanitarian in nature to counter the problems. We have discussed about the four key objective of the refugee compacts. Legal support should be provided to the refugees to help them with the legal challenges as well as to help the migrants with proper documentation which will help then to find jobs and a way of livelihood. Lastly I conclude this paper by explaining the role of technology in helping to fight the challenge of large and unmanaged refugee crisis. Some areas where technology might be helpful for the refugees are health care, Online portal for jobs and documentation, unique identification number for all the displaced refugees.

Introduction: Dynamics of Refugee Problems

The refugee crisis is one of the most extreme matters of concern for the international community. United Nations High Commissioner of Refugee (UNHCR) reported in 2018, that number of refugees were historically high (25.4 Millions) at the end of 2017. Migrant/Refugee crisis maybe internal or external in nature. Internally displaced and Externally displaced refugees. United Nations High Commissioner of Refugee (UNHCR) reported in 2018, that number of refugees were historically high (25.4 Millions) at the end of 2017. Migrant/Refugee crisis maybe internal or external in nature. On the other hand In sovereign levels nations are divided

---

375 UNHCR Report on The Refugee Crisis

376 Internally displaced and Externally displaced refugees
https://www.unrefugees.org/emergencies/refugee-crisis-
over their approach towards refugee/migrant crisis.^

**Dynamics of Refugee Problems**

Who is a Refugee?
A refugee is someone who has been forced to flee his or her country because of persecution, war or violence. A refugee has a well-formed fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely they cannot return home or are afraid to do so. War and ethnic; tribal and religious violence are leading causes of refugees fleeing their countries. Two thirds of all refugees worldwide come from just five countries. Syria, Afghanistan, South Sudan, Mayanmar and Somalia. These refugee/migrant crisis originates due to political, social and economical instability. Climate change may be a triggering catalyst for all political and socio-economic tensions. The total number of refugees when combined reaches to an unprecedented 68.5 million people around the world have been forced from home. There are also an estimated 10 millions stateless peoples.

**Basic features of Refugee Crisis**

There are three basic features of refugee crisis:-

A. Political tensions resulting in refugee/migrant Crisis.
B. Social tensions resulting in refugee/migrant crisis.
C. Economic tensions resulting in migrant/refugee crisis.

A. Political tensions resulting in migrant/refugee crisis: Political tensions whether internally or externally results in refugee problems. Persecution for holding different political opinions and political ideology has been common throughout the history. Also the fear of war which might be internal or foreign leads to creation of refugee problems. Political tensions may also arise from clash between two superpowers, global balance of power or internal clashes. In recent times we can see USA and Russia fighting a war in Syria. Syria has been a battleground for both superpowers. Both superpowers are clashing for dominance over the strategically important Syria. In Syria the conflict started due to an uprising against the Bashar Al-Assad regime. Uprising became violent when security forces killed some of the protestors. This killing
instigated the uprising into a revolt against the government which further escalated in civil war in Syria. Years later the Syrian uprising has now resulted in a full-fledged war in Syria for five years. The exodus in Syria has now resulted in an unprecedented number of refugees from the Syrian crisis. Over 5.6 million people have fled Syria since 2011, seeking safety in Lebanon, Turkey, Jordan and beyond. Millions more are displaced inside Syria and, as war continues, hope is fading fast. Global balance of power also impacts upon the refugee crisis. In Yemen, two regional powers with their allies are fighting for dominance and hence trying to change the balance of power. Iran and Saudi Arabia both regional giants are fighting a war in Yemen. This war has resulted in a large chunk of migrants/refugees being displaced from the region. The refugee crisis in Bangladesh in early 1970s started after an internal uprising after being forcefully curbed by the Government of Pakistan gained momentum and escalated into war first internally in favor of the liberation of Bangladesh and later against India. India was supporting the Muktiwahini. This war fought because of the aggression of Pakistan followed by the defense of the Indian to retain the balance of power in the subcontinent. More than 10 millions of refugees took asylum in India. On March 25, 2010, the International Crimes Tribunal was established after the Awami League won a 2/3 majority. The party had pledged during the 2008 general elections, that if they come to power they will set up a war tribunal to try the war criminals. presently, the tribunals have delivered judgement s in 32 cases against 83 war criminals. among them 52 were sentenced to death. Presently, Bangladesh is struggling to cope up with the pressure of hosting 1 million Rohingya refugees.

B. Social tensions resulting in Refugee/migrant crisis: Social tensions inside a state can also result in creation of refugees in an area. The refugees may be displaced internally or externally. Genocide, Rape, Murder, Ethnic Cleansing, Religious Extremism, Group Egoism etc. are verities of social tensions. In the Indian subcontinent predominantly communal violence, racism, linguistic discrimination, social stratification, group egoism often leads to conflict between different strata of the society and are hence responsible for the creation of the refugee/migrant crisis. During the partition of India and Pakistan the social tensions between Hindus, Muslims and Sikhs led to the unmanaged refugee crisis throughout the subcontinent. More than 15 Million refugees were displaced due to religious and social disharmony. Similarly, in Rwanda the conflict between the Hutus and the Tutsis has resulted in many wars between the groups. In 1993 after the assassination of the Hutu president led to a series of violence against the Tutsis. In Barundi where the tutsis were in majority killed hutus. These social conflict lead to a huge influx of refugees in the african continent. The countries of Uganda, Barundi, South Africa etc. were mostly affected by the disolaces refugees. Internally displaced persons fleeing R Pf incursions into the northern Rwanda from Uganda in 1990 and 1993. The state department estimated 3500,000 Rwandans(predominantly Hutus, but also tutsis) remained displaced. More than 250,000 Syrian refugees have been relocated in the Kurdish region of Iraq. these refugees are displaced due to social

384Syria Emergency , UNHCR
https://www.unhcr.org/syria-emergency.html

www.supremoamicus.org
conflict between the Iraqi and the Kurdish groups. These conflicts are inspired due to ethnic tensions, cultural tensions, religious extremism and group egoism. During the early 1993, conflicts in Bosnia and Herzegovina started due to social tensions between the Muslim Bosniaks and the Catholic Croats. Over 2.2 million people were displaced and more than 100,000 people killed in the war. An estimated 12000-20000 women were raped, most of them Bosniak. The International Tribunal of Prosecution of persons Responsible for serious violations of Humanitarian Law committed in the territory of the former Yugoslavia since 1991, more commonly referred as the International Criminal tribunal for former Yugoslavia (ICTY), was a body of the United Nations established to prosecute serious crimes committed during the Yugoslav wars, and to try their perpetrators. The tribunal was an ad-hoc court located in The Hague, Netherlands. According to the report of United Nations High Commissioner for Refugees on South Sudan emergency Dated 15feb. 2019, “since the december, 2013, brutal conflict in South Sudan has claimed thousands of lives and driven nearly four million peoples from homes. While many are displaced inside the country, more than millions have fled to neighboring countries in a desperate bid to reach safety.” In Sri Lanka, ethnic clashes between the majority Singhala community and the minority Tamilians. There are more than 100,000 Sri Lankan refugees continue to live in Tamil Nadu, thirty years after the outbreak of the Sri Lankan civil war. Social tensions might originate from legal problems in the society. In Myanmar the government changed the citizenship law of the nation which forced many Rohingyas living in the Rakhine state of Myanmar bordering Bangladesh. These social problems left many civilians being displaced, stateless or without any means of livelihood. Social conflicts create a refugee/migrant crisis unmanageable in nature which are mainly found particularly in Africa and Middle East. Yemen presently is one of these social crisis that has resulted in large numbers of unmanaged refugee crisis which has affected countries like Clashes between Houthi rebel fighters and forces loyal to the internationally recognised president Abd-Rabbu Mansour Hadi, who last month fled to Saudi Arabia, have triggered the exodus. So far, more than 600 people have been killed in the conflict. At least 10,000 Yemenis had been killed by fighting, more than 40,000 casualties overall. Near about 3 million people has been displaced in the Yemeni crisis.

C.Economic Tensions resulting in Refugee/Migrant crisis: - Economic tensions often causes the creation of economic refugees. An economic refugee is a person whose economic prospects have been devastated and seeks to escape the oppressive poverty across the globe. As in tend to belong from the low-income countries, people from third world countries, mainly due to the economic injustice around the globe.

Climate Change Refugees:

Climate change feeds armed conflict in Somalia in three ways: by exacerbating tensions between clans; boosting the ranks and role of terrorist groups, including al-Shabaab; and increasing migration. climate

change has received relatively little attention when compared to anti-terrorism and security sector reform. Global and regional powers and international organizations have focused on fighting terrorism and piracy in the Horn of Africa. Neither the Paris Agreement nor last November’s United Nations Climate Change Conference in Bonn, Germany, have addressed the links between climate change and armed conflicts. They also haven’t offered recommendations on how to build resilience in this area in fragile states. This is particularly worrisome because even a slight change in the global temperature is enough to provoke a set of weather calamities. Conflict-affected countries, which are socially, politically and economically vulnerable, encounter considerable obstacles in addressing the effects of climate change. Instability, low state capacity and prioritizing more immediate goals tend to sideline climate change issues. This is despite the fact that climate change exacerbates existing problems and intensifies violence, as in Somalia’s case.

Additional connections between water and conflicts in Syria:

In addition to the role that hydrologic conditions and water availability and use play in contributing to economic and political disruptions, there are examples throughout history of the intentional and incidental targeting of water systems during conflicts that start for other reasons, or the use of water and water systems as weapons and tools of conflict (Gleick 1993). As unrest in Syria developed, violence worsened and impacts on urban water distribution systems were reported together with specific, intentional attacks on water systems because of their strategic value. During fighting around the city of Aleppo in 2012, the major pipeline delivering water to the city was badly damaged and in September the city of about three million people was suffering shortages of drinking water (BBC 2013a). In late November 2012, anti-Assad Syrian rebels overran government forces and captured the Tishrin hydroelectric dam on the Euphrates River after heavy clashes (Mroue 2012). The dam supplies several areas of Syria with electricity and is considered of major strategic importance to the Syrian regime. In February 2013, anti-Assad forces captured the Tabqa/al-Thawrah dam, which is the largest hydroelectric dam in the country and provides much of the electricity to the city of Aleppo (BBC 2013b). These kinds of secondary impacts of conflict—the targeting of water systems—highlight the strategic value of water supply, hydroelectricity, and flood control in water-short regions.

Possible Refugee Problems:

Here are some of the probable refugee problems mentioned below:

- Statelessness: Refugees around the world have to face the consequences of war or they have to flee the place either out of the fear of war or persecution he/she is facing, or if he/she is facing persecution based on religion, race, creed, political opinion etc. They often have to abandon their property, state, nation to take refuge. Statelessness often forces a refugee to be on the mercy of the nation receiving them.

- Lack of Documentation: With no proper International Statute on refugees, the refugees have to face the challenges of the documentation which is not universal and changed from one state to another.

- Problems Related to Personal Law: Refugees also have to deal with the problems of applicability of personal laws...
Syrians are much more likely to experience problems related to proof of marriage; basically, marriages conducted in Syria. This has consequences for newborn children, who cannot be properly registered without proof their parents are married.386

### Difficulty in accessing quality learning, education, and skills-building opportunities:
Young refugees consistently identify the difficulty of obtaining recognition for their existing qualifications as a serious challenge. Accessing quality learning, formal education, and skill-building opportunities are also recurrent problems.

### Few employment and livelihood opportunities:
Refugees emphasize they would rather work than depend on humanitarian aid and express frustration at the limited employment and livelihood opportunities available to them. Refugees express concern about safety, security, and freedom of movement linked to xenophobia and their difficulty obtaining documents. In some locations, they also highlight police harassment as well as arrest and detention.

### Poor access to sensitive Health care, including psycho social support, gender inequality, discrimination, exploitation, and violence, including for LGBT:
Refugee youths highlight a lack of access to quality health care as a major concern, and particularly note the need for youth-sensitive sexual and reproductive health care and psycho social support. Young refugees highlight concerns about gender inequality and discrimination as challenges in and of themselves, but also as underlying causes of sexual exploitation and gender-based violence (SGBV). This includes domestic violence, child and forced marriage, sexual assault, and rape.

### Possible Solutions To Refugee Problems:
Refugee crisis is a humanitarian crisis and the solution to this problem needs to be humanitarian in nature to counter the problems. So first of all, we all have to understand the dynamics of the refugee problems and also the challenges refugees face in day to day life. People donate to help the refugees and also help the organization that are tirelessly working to help out the refugees. United Nations High Commissioner on Refugees The global compact on refugees (GCR) is a new international agreement to forge a stronger, fairer response to large refugee movements and protracted situations. It grew out of the historic New York Declaration for Refugees and Migrants of September 2016 and its comprehensive refugee response framework, followed by two years of intensive consultations with UN Member States, international organizations, experts, civil society, and refugees.387 The four key objectives of the refugee compact are to: (1) Ease pressures on countries that host refugees; (2) Build self-reliance of refugees; (3) Expand access to third countries for refugees through resettlement and other pathways of admission; (4) Support conditions that enable refugees voluntarily to return to their home countries.

World leaders also needs to take responsibility for saving life first. Nations also needs to be clear about their roles. Thousands of people fleeing persecution in Myanmar suffered for weeks on board boats while Thailand, Malaysia and Laos refused to take them in.

---

386 The Legal Problems Of Refugees ; Written By-Paul Prettitore
https://www.brookings.edu/blog/future-development/2016/02/04/the-legal-problems-of-refugees/

387 Global Compact On Refugees
https://www.unhcr.org/5c10c1604.pdf
Indonesia bickered over who should help them in May 2015. States can stop this by investing in search and rescue operations and immediately helping people in distress. Resettlement is a vital solution for the most vulnerable refugees – including torture survivors and people with serious medical problems. All countries should investigate and prosecute trafficking gangs who exploit refugees and migrants, and put people’s safety above all else. Survivors whom Amnesty met in Southeast Asia said traffickers killed people on board boats when their families couldn’t pay ransoms. Others were thrown overboard and left to drown, or died from because there was no food and water. Governments also need to stop blaming refugees and migrants for economic and social problems, and instead combat all kinds of xenophobia and racial discrimination. Doing otherwise is deeply unfair, stirs up tensions and fear of foreigners, and sometimes leads to violence and even death. UN has received less than half the funding it needs to support Syria’s 4 million refugees. This is now forcing 80% of refugees living outside camps in Jordan to do dangerous, degrading jobs or send their children out to beg.

Legal support should be provided to the refugees to help them with the legal challenges as well as to help the migrants with proper documentation which will help them to find jobs and a way of livelihood. Nations also needs to be clear on the stand of managing the refugee crisis. In recent times many countries have voted the political opinions that are pro anti-immigration. Europe was divided over the matter of refugees but countries like Canada, Turkey, Pakistan, Norway, Lebanon, Germany, Austria, Bangladesh, have done exceptionally well in receiving a large number of refugees and helping them to rehabilitate and provide basic amenities.

Role Of Technology
In Fighting Refugee Crisis:

Media also needs to understand its role in helping to fight the challenge of large unmanaged refugee crisis. Media provides a platform for the refugee problems. The Incident in 2015 where 2 boats of refugees were sent back by the Thai authority was watched throughout the world on media as well as social media. The brutal killings of Rohingya in Myanmar also seen throughout the globe. The rapid change in technology has impacted on the way we see the refugee problem.

Some areas where technology might be helpful for the refugees are:

1. A unique identification number for all the displaced refugees. The unique identification number may be given to the refugee by the United Nation High Commissioner of Refugees or by any other International Organization.
2. Health care – With the help of technology, the doctors in the refugee camps may take a second opinion from a doctor far away from the camp.
3. Online portal for documentation- Refugees may use the portal to register all the required document required for immigration.
4. Online portal for jobs for refugees: Occupation and means of livelihood are very basic necessities of the refugees.

****
LEGAL DEFENCES IN FINANCIAL DISTRESS IN BANKING SECTOR IN INDIA

By Anand Kumar Maurya
From Chandigarh university

Abstract:
Finance is the capital that the world is striving for, it is required in every situation of a business without finance nothing could be possible in today’s situation, each and every bank is serving on the basis of finance only. There is the greatest demand for higher accumulation of assets sand liquidity for all time but nothing is fixed. The present market situation is dynamic for every one so banking survives is also demanding for more liquidity that could give more profit to them but banking survives are in distress because of the unpredictable situation like fraud and misrepresentation. That leads to the conflict in the banks weather externally or internally, that all things when reaches to extreme level leads to the bankrupt that is the final thing that are happening to the banks so finical distress is not confined to only one point it has variety of points that are interdependent on them. In present condition every bank are suffering because of the finical distress, like not earning a good liquidity not able to maintain stability and debt commitment in the finical periods of bank for the long run that will lead to the financial distress in banking sector so, with references of all this problem we could find the conclusion of the present situation. That conclusion can be a legal expression and its measures. That are helping in all the ways.

Introduction:
Development of any provision, there is the requirement of adequate and acceptable economic policies and legal services that will lead the nation in the developmental process the supportive pillar of any economy is law & banks, bank that is required every were from one hand business to large scale business. It is the particular demand of the nation that need to be meet in fair and clear way and on the basis of LAW only the economic policies run.

Banks are the fundamental part of any economy that is inherent from developed country to developing country. But whenever there are any financial disturbances from internal to external environment than the Banking sector need to suffer a lot because of the imbalance in the economy. The stability and fragility of the banks is suffering day by day in today’s portfolio. The important factors here is that the Central Bank are the guardian of the other Banks that need to be taken care so that other private bank could survive in this competitive world where nothing is stagnant for a while the central bank need to take care that other small bank are able to survive or by keeping keen eye on them. In a simple way financial distress is a difficulty in performing any task in related to companies finance in a corporate way this type of problem occur every time in any business ,the same thing is happen in our banking sector that banks are not able to maintain their profits and not able to survive in the Dynamics environment . They need to understand the banking laws clearly and reduce the lope holes with the help of legal services and interactive solution.

Distress in banking sector:
Distress the word itself speaks the suffering that is so vast in itself ,that is not only related to physical scene but related to every situation of the business and even for the financial institution like banks , so distress is every were but when we are relating to economic terms that is financial
distress, that is the risk that is present, that can affect any time in this dynamic environment. When we are relating to the banking sectors, they are the problems which are present in between the work. The financial distress that are occurring every time in the banking sector they need to be taken care in both public and private sector with proper establishment in long run and amending the Acts for the latest developments.

Public sector Banks:
Generalisation in job:
Presently the situation is worst in banking sector people are getting jobs on the bases of the paper that is so called competitive papers for which the millions of the people are striving for but when they get the job in the banking sector they think that they can do anything which they want because of that only proper specialisation in lacking behind and task is getting more difficult to handle for example there should be a proper situation criteria let say that for big merchant A/C related problems there should be a CAS and for conditional problem there should a MBA graduates so that they can handle every situation in a broad way.

More bad debts:
Public sector banks usually don’t lent loans because they have to follow their condition which are to formal and complete as well. What happen usually public sector banks are over crowed for granting of loans but bank does not grant to everyone, but here the situation is different banks are already over-borrowed by the people so from where he could grant the loans. So, public sector bank needs more clearly with bad debts and legal situations.

Lack of competition:

In today world the competition is at the pick people can do anything to get excel in there way from any means but in PSB people are to relax and they follow their own way they are not reluctant they think that within time they will get the promotion so why they need to think for that. This is the lack of competition because people fell that they are stable and they don’t need any kind of multi dynamic workloads.

Social burden:
Whenever the government make any policies or scheme for the common people at large all the policies go through the public banks only there is no other option present if the government could divert the process of the polices formation than it could be more easier for the banks and is only leading to the social burden on the banks.

Job security:
Without job security job in nothing, job is defined only when there is job security ironically in public sector bank there is job security but that job security is only responsible for the low productivity of the public sector banks in India because employs are not only willing to take any kind of risk in their work that will somehow affect them.

Public sector Banks:
Regulatory procedure and deadly in work:
Private sector banks are suffering because of the restriction on them only the government has made such laws so that the private sector banks have to suffer. The government need the clarity of each and every thing that leads to the deadly of the work. that is unexpectable for the business point of view.

Needless control:
Control are needed every were for the betterment of the work but when the control is unnecessary the control will lead to the problem the same thing is happening the private bank of the country.

Extreme level diversification:
Competition in the market and target to compete with other lead to the diversification, it is nothing but the wart expansion that expansion is somehow disturbing the banking sector as well. Un invited problem are present in every sector (private or public) public sector bank is suffering because of some region and private bank is also suffering because of some situation. there are many problems which are faced by everyone related to profit or capability and others.

Financial viability of Indian commercial banks:
Viability for each and every business is required from small scale business to large scale, everyone is working for stability, profitability and fame. In the business world viability it simply say that to become successful in all the ways and when we are relating viability to financial terms it relates to profit and growth for any commercial bank profit is the main motive for that only they are working to become self-sufficient and competitive they need to work in such a way that there competency and business skills should speak everything for expansion in the global market, commercial banks are working in all the way to earn more and more customer. They need more and more variety and banks are making different ways to attract the customer.

- Technological development
- Artificial intelligence
- Banking services in phones
- Easy viewing policies
- Customer rating and support
- Easy communication and loan
- Legal consultancy

So, this all are the ways through which commercial banks are trying to earn more and more liquidity, profitability, solvency, stability and growth in long run prospective. The different ways to attract the customer will only serve the need of the commercial banks so that they can generate the sufficient income to meet the organisational need in all the ways. This only speaks about the financial viability of the country its competency power and laws.

Impact on the economic development:
Development is the most important factor for which the economy is running. Development doesn’t mean that you can use any means to gain profit you can use only those factors which are important in the situation.

The Revolution which came in banking sectors when digitization came, that has transformed the banking sectors, that has reduced footfall in the banks, that has reduced the customers in the banks, because of the digital media all the polices and processors are available on the online portal only.

Process of transaction is becoming more shorter and convent, that is somehow increasing the misuse of the digital media within a minute’s fraud are easily committed.

With the introduction of new cheque processing system that is MICR this has become of the most usable means but has increased the chances of misuse and cheat. (Unstructured supplementary services data) USSD was launched by the government so that people could axes their bank account without visiting the branch and without internet but that also have led to the
distraction in the process as well because of the easier process the crime could be easily committed.

More transparency in transaction has led to the exchange of information in more easier way that has led to the misuse in all the ways.

For minimizing the scope of frauds in the banking sectors double authentication passwords was use, that was also not sufficient because in transparency in transaction has led to the halcyon in the process and frauds are easily committed. Economy has to developed with the help of banking sectors but here the economy is suffering because of the advanced banking sectors, daily misuse of bank account is happing and even the big business man are using the loop holes of the banking system. Evacuating our banking system with the fraud in their mind. That has a vast impact on the economy and RBI has to focuses on all the issues, so that the society could not be morally bankrupt.

Legislation governing insolvency and restructuring in Indian Jurisdiction
1-There are various Act and provisions that are present for the banking sectors are:
   - Insolvency and Bankruptcy code 2016
   - The companies Act 2013
   - The sick industrial companies Act 1985
   - Banking regulation Act 1949
   - The presidency towns insolvency Act 1909
2-The new committee was set up and drafted the code on resolution of financial firms. That was related to draft bill-the financial resolution and deposit insurance bill 2016 so that the public could understand the drafted code in more clear way to avoid insolvency problems. That includes banks, insurers, financial market infrastructure, payment system and financial service providers in distress.
3-The financial sector legislative reforms commission to review and rework legislation that are governing Indian financial system. They have started their work in 2011 and report came in the year 2013, that has clearly analysed the regulatory regime.
4-Furthermore the amendment came in the year 2017 for the banking regulation ordinance, so that the problem of surmounting bad debts and non-performing assets in Indian banking system could be solved.

Conclusion:
Banking sector is one of the most import pallor at all times in the financial development, social welfare and in technology upraising. Advance banking services requires best legal services that only helps the country to maintain good relation and reputation in the diplomatic world of conflicts. when there is a situation of loss that could be the batter only when we will be able to minimise the loss for survival. The same thing has to be done with the banking sector because the situation demand for the solution the solution for the financial distress that are taking place in every bank of the country. There is the requirement of prudent and will understandable law and processor’s so that before being indulges in conflict on the matter they should understanding it clearly by taking the legal consultants and what will be the upcoming circumstances as well, the disturbance are not same in all the conditions some are political some are legal and other are financial techno as well so to cope up with the situation they need to prepare the predefined solution so that no one could cheat or misrepresent the data and operate the account . Economy of our
country is already under threat and when the bank will become bankrupted our economy will be in very bad condition so there is the requirement of the economic-legal leadership way to figure out the financial distress in our banking system.

References:
https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/02SPE03062283D244B578E69F7B7FD5A2980.PDF
https://economictimes.indiatimes.com/industry/banking/finance/a-major-crisis-may-be-brewing-for-indian-banks/articleshow/70458734.cms
https://shodhganga.inflibnet.ac.in/bitstream/10603/88986/11/11_chapter%205.pdf
https://www.lexology.com/library/detail.aspx?g=e0de32ec-c4ce-4d0e-a567-1d1e29912068

*****
RIGHT TO PROPERTY: EVOLUTION FROM A FUNDAMENTAL RIGHT TO A HUMAN RIGHT

By Anirudh Grover
From Jindal Global Law School

INTRODUCTION

The Basic Structure Doctrine emerged from Kesavananda Bharati v State of Kerela, the most celebrated case in the legal history of India. This doctrine holds that the power to amend the Constitution guaranteed under Article 368 must not damage or destroy the basic features of the Constitution. The following features have been identified by the Supreme Court as being a part of the basic structure:

1. Judicial Review
2. Democracy
3. Secularism
4. Rule of Law
5. Harmony and Balance between Fundamental Rights and Directive Principles of State Policy
6. Limited Amending Power
7. Equality
8. Independence of Judiciary

Fundamental rights guaranteed under Part III of the Constitution are also included in the basic structure. Even though the Right to Property is merely a statutory right under Article 300A, it should be a fundamental right and hence, included in the Basic Structure Doctrine because of various social, political and legal factors which operate in the Indian context.

This paper aims to understand the history and background of the property law in India. It seeks to analyse the evolution and development of the right to property from being a fundamental right to being demoted to merely a statutory right. Further, it seeks to provide social, political and legal reasons as to why it should be a fundamental right in India and hence, included in the Basic Structure Doctrine. The paper concludes by providing a comparative analysis of the property law provisions of India and USA.

HISTORY AND BACKGROUND

• UNDER BRITISH INDIA

The concept of property is one which is dynamic and keeps on evolving over time. The legal framework regulating property also keeps changes depending on the evolution of the concept of property. If we trace the history and background of the right to property in India, it would be pertinent to look at the right to property under the rule of the British. The report of the Joint Committee on Indian Constitutional reforms recommended that the land should be taken only in cases of public interest and compensation should be paid to the owner i.e. essentially the principle of eminent domain should be...
included. Based on the recommendations and certain changes in the amendments, section 299 of the Government of India Act, 1935 provided certain safeguards against a compulsory acquisition of land property and for payment of compensation in the event a property is acquired for public purposes.  

*** UNDER THE INDIAN CONSTITUTION ***

After independence from the British Rule, a Constituent Assembly had been formed with the purpose of framing the Constitution for India. Driven by the goal of social justice, the draftsmen of the constitution created separate chapters for the basic justiciable tenets i.e. Fundamental Rights and for values that India would cherish i.e. Directive Principles of State Policy. Right to Property was included as a fundamental right and was dealt with by two provisions. Firstly, Article 19(1)(f) declared that all citizens shall have the right to acquire, hold and dispose of property. Secondly, Article 31 was included which basically reiterated the section 299 of the Government of India Act, 1935 and preserved the principle of eminent domain, thereby providing certain safeguards against compulsory acquisition of individual properties by the sovereign. Soon after the Constitution came into force, there was a plethora of litigation concerned with the constitutional provision of right to property. Majority of these cases dealt with challenging laws on the grounds of violation of property rights and also invoking the right to equality guaranteed under article 14. The courts all across India dealt with these cases in a somewhat similar fashion, by striking down the various acts as unconstitutional and restricting the government from acquiring land from private owners. As a result of these decisions, the Government was concerned with the fact that the courts were challenging their authority and this was evident by the letter which Prime Minister Nehru wrote to the Chief Ministers which said that “If the Constitution itself comes in our way then surely it is time to change that Constitution”.  

*** ANALYSIS OF VARIOUS CASE LAWS HIGHLIGHTING THE EVOLUTION OF RIGHT TO PROPERTY ***

The First Amendment was brought in the year 1951 and it inserted Articles 31A and 31B along with the Ninth Schedule in the Constitution. The amendment was brought by the central government as it felt that the judicial pronouncements may endanger the whole zamindari abolition programs. Article 31A smoothened the process of zamindari abolition and Article 31B along with Ninth Schedule
operated with retrospective effect such that any laws included in the Ninth Schedule could not be challenged as being violative of fundamental rights. This was done to prevent judicial intervention with acts which intended to promote social change thereby fulfilling the constitutional goal of egalitarianism.\(^{399}\)

The discussion of the following case laws and the amendments becomes important to understand how the interpretation of the right to property changed overtime:

In the case of *State of West Bengal v Bela Banerjee*\(^{400}\), the acquisition of urban land for resettlement of refugees was in question. The court held that it is the prerogative of the Parliament to enact laws that fix the amount of compensation to be provided or specify the principles on the basis of which the compensation would be decided. The judiciary or the courts have no role in this context. However, the role of the courts comes into the picture in deciding whether the compensation provided is ‘just equivalent’ of what the owner has been deprived of.

After the above judgment, the Parliament reacted by introducing the Fourth Amendment in 1955 which inserted clause (2-A) wherein the Parliament excluded the right of the courts to decide upon the level of compensation. Later, in 1964, the 17th Amendment was introduced to further extend the scope of Article 31A.

In the case of *Vajravelu Mudaliar v Special Deputy Collector*\(^{401}\), the act in question discriminated between taking land for housing purposes and for public purposes. The court held that it cannot question on the adequacy of the compensation but if the compensation provided is illusory or if the principles on the basis of which compensation is to be decided are irrelevant then the legislature commits a fraud on its powers. The new formula was somewhat different from the Bela Banerjee’s view but still the courts claimed a foothold in the area of compensation and did not completely vacate the field.\(^{402}\)

Following the same new formula discussed above, the court in the case of *Union of India v Metal Corporation*\(^{403}\) held that the act in contention which provided that the unused equipments of a company were to be valued at the actual cost and the used equipments were to be valued at the written down value was invalid as it does not provide compensation within the meaning of Article 31(2).

The view changed with the case of *State of Gujarat v Shantilal*\(^{404}\) wherein the court repudiated the idea of ‘just equivalent’ and held that the court would interfere only if the compensation was illusory or the principles were irrelevant and thereby it held the Bombay Town Planning Act, 1955 as valid. This case ensured greater freedom to the legislature and the scope of judicial review was restricted to the extreme situation of abuse of legislative power.\(^{405}\)

\(^{399}\) Id.

\(^{400}\) *State of West Bengal v Bela Banerjee*, (1954) AIR SC 170.

\(^{401}\) *Vajravelu Mudaliar v Special Deputy Collector* (1960) AIR SC 1080.

\(^{402}\) *Supra note 10.*

\(^{403}\) *Union of India v Metal Corporation* (1965) AIR SC 1017.

\(^{404}\) *State of Gujarat v Shantilal* (1969) AIR SC 634.

The final case which again changed the interpretation of the word ‘compensation’ was the Bank Nationalisation case wherein the Banking Companies (Acquisition and Transfer of Undertaking) Act 1969 was held invalid as the principles on the basis of which the compensation was to be determined were irrelevant and thus, the compensation was not within the meaning propounded by Article 31(2). This decision was criticised on two grounds, firstly, it runs counter to what the fourth amendment is designed to achieve and secondly, that the court had interpreted the meaning of compensation in various different ways which caused confusion.

As a result of this case, the government was scared of the fact that such an interpretation would create difficulties in the government’s socio economic programme. Thus, the Parliament introduced the 25th Amendment Act which replaced the word ‘compensation’ with the word ‘amount’ so that the interpretation offered in the Bank nationalisation case could not be used and the scope of judicial review gets compressed.

· PRESENT POSITION

The above case laws highlight the constant tussle between the legislature and the judiciary. The Parliament, on one hand wants freedom in acquiring land and thereby fulfilling the socio-economic objectives which lead to formation of a welfare state. On the other hand, the judiciary is concerned with upholding the fundamental right of individuals. This can broadly be construed as a tussle between Directive Principles of State Policy and Fundamental Rights. The fundamental right to property was a fore front of controversy for over 25 years before it was resolved by the Janata Government by the 44th Amendment. This amendment repealed the Article 19(1)(f) and Article 31 as a result of which the right to property was no longer a fundamental right but merely remained a statutory right under Article 300A. Thus, any person could no longer approach the Supreme Court directly under Article 32. The only remedy would be approaching the high court under Article 226 or a civil court. Also, the Article 300A is based on the language of Article 31(1) and it does not expressly provide the obligation to compensate the owner.

Regarding the principle of eminent domain, the court in the case of KT Plantation Private Ltd v State of Karnataka held that the principle of eminent domain is enshrined in the Article 300A even though there is no express mention. As a result, the public purpose condition and the compensation obligation are to be followed. Finally, in P.T. Munichikkanna Reddy v Revamma, the court extended the scope of right to property and held that it is not just a statutory right but is also a human right.

SOCIAL, POLITICAL & LEGAL ASPECTS

Indians do possess the right to property, but many Indians are not aware of...
the fact that what the right means to them and how the right adequately protects their land. Apart from this, there exist several other regulatory restrictions that can protect individuals from freely utilizing their piece of land. In the absence of secured property rights and regulatory restrictions on property, it has affected the poorest in India. While the rich people mostly living in the cities have comparatively secure titles to their property, the poor people living in farms, villages and forests do not. If the property rights can be secured by the poorest in India, then it will help the country to eradicate poverty and prosper as a whole. The property rights of millions of people in India are neither secured nor well defined. The following points can be taken into consideration in order to strengthen the thesis of this research paper:

1) Compulsory acquisition: From the past few decades the state has extended the scope of compulsory acquisition; leading to displacement of many helpless people without adequate consideration. This problem has been one of the major sources of discontent amongst the people in the country and thereby influencing many movements in order to secure their rights.

2) Insecure titles: Tones of people in India do not have a clear title to their respective lands, and it is hard to determine the title of one’s land even though the person is living on the piece of land for many years.

3) Poor land records and Administration: The state has not only failed its responsibility in recognizing the land rights of many citizens but also has failed in creating adequate mechanisms for determining the title of people’s property. The land laws are poorly maintained plus the laws are numerous and cumbersome and extremely hard to comply with. Hence the land or property laws needs to be well defined so that the people are not exploited in relation to their respective property.

4) Limited Scope of Legal Procedure: Due to the omission of Article 31 of the constitution, the illiterate population of the country has been exploited at various stages of the legal process. For instance, if the petitioner wants to appear in the court on the ground of right to property then the petitioner will have to comply with the provisions of Article 226 wherein the petitioner can only appear in the High Court or any civil court. However previously the position was different as the petitioner could also appear in the Supreme Court just by complying with the provision of Article 32. This change has led to a lot of inequality amongst the citizens of the country which was not the stand of the constituent assembly at the time of framing of the constitution.

The following legal aspects are of prime importance while discussing the right to property as a fundamental right:

• BASIC STRUCTURE DOCTRINE

In the case law of Kesavananda Bharti vs State of Kerala, Justice Khanna held that no article of the Constitution is immune from the amending process because it is related to a fundamental right and is contained in the part III of the constitution. Justice Khanna was of the view that the right to property cannot be

---

414 Id.
415 Id.
416 Id.
417 Id.
418 Supra note 1
considered as a basic feature of the constitution. However, this view was not
sought for, neither supported by the other majority of judges. As a matter
of fact, the judgement of Kesavananda bharti was delivered at the time when the
Right to Property was a part of the constitution and majority of the judges in
the case believed that the fundamental right were never supposed to be beyond the
scope of Basic structure of the constitution. Thus, it is impossible to read the decision of
Justice Khanna so as to make the fundamental rights beyond the scope of the
Basic Structure. The court went ahead and observed that the basic structure was
reflected in the Article 21 along with Article 14 and Article 19. These Articles comprised the core values of the
Constitution and if allowed to amend then it would completely change the nature of the
Constitution and would nullify the essential elements on which the constitution was framed. In the following case of M.Nagaraja, the court held that the
"fundamental rights are not gifts from the State to its citizens, but are basic human
domains of intrinsic value. Part III of the Constitution merely confirms their
existence and gives them protection." Any legislation which abridges such rights would be violative of the basic structure
doctrine. Even the Right to Property is considered as a human right and thereby
placing it on the same pedestal from which it had dislodged. Human rights are
considered to be one of most integral and essential principles on the basis which a
society is formed and if property rights are also considered as basic human rights then it cannot possible be said that it is not a
basic feature of the constitution.

- EMINENT DOMAIN

Article 31 of the constitution is the representation of the principle of eminent
domain in India. With such a great history and firm establishment of the principle, there was little reason to amend the
legislation. The idea of formulating the principle of eminent domain in the
Constitutional Assembly was developed due to common understanding between the
drafters for the reasons specified. From the time that Runnymede was made famous till the House of Lords upheld the English
regent's to acquire saltpetre for his ammunition and thereafter, it has been
universally the state that has the right to acquire private property for a public
purpose, recompense. Originally the Article 31 consisted of 6 sub clauses, wherein the first sub clause laid
down the protection against deprivation without complying the procedure specified
by law. The 2nd sub clause provided with necessary compensation in situations wherein the principle was applied. This
provision extended to both movable and immovable property. However, post the 44th amendment act the Article 31 was
deleted from the Part III of the constitution with the intention of placing it in some
other part of the constitution. However only the 1st clause of Article 31 was

https://www.jstor.org/stable/pdf/43239608.pdf?ab_segments=0%2Fdefault-
2%2Fcontrol&refreqid=search%3Ad9e56d9d740b3fdd4ded465a412a26f8.
420 Id.
421 Supra note 1
422 Supra note 31
423 Id
424 Id
425 M. Nagaraj v. Union of India, (2006) 8 Supreme Court Cases 212
426 Supra note 31.
427 Id
428 Id
429 Id
reincarnated as Article 300-A, while all the remaining sub clauses were deleted.

Many experts of the Indian constitution have heavily criticised the omission of the various provisions under Article 31 of the constitution. They believe that the decision was implemented just to fulfil an electoral pledge of the Janta Party.\textsuperscript{430} Due to circumstances explained above the level of discrimination between the majority comprising mainly of actual tillers and personal holders of land and the minority i.e. mainly the rural poor. This situation is not only anomalous, but also is wholly against the ideals of the constitution enshrined in the directive principles, especially in relation to economic and social justice.\textsuperscript{431} Such inequalities between the majority and minority would strike at the root of the equality code and thereby damaging the basic structure of the constitution.\textsuperscript{432}

COMPARATIVE ANALYSIS BETWEEN USA AND INDIA

The present position regarding property rights in India has been discussed at length above concluding that it is available only as a legal right under Article 300A and not as a fundamental right. As far as the United States of America is considered, their views were strongly shaped by the English constitutional traditions and they referred the Magna Carta as a safeguard against the arbitrary government.\textsuperscript{433} The right to property is dealt with by the Fifth Amendment. It protects the right to property in two ways.\textsuperscript{434} Firstly, it takes into account the concept of fair procedures by providing that any person may not be deprived of property by the government without the due process of law. Secondly, it encompasses the principle of eminent domain i.e. provides for the ‘public purpose’ condition and the obligation of ‘just compensation’. Article 21, paragraph I of the America Convention on Human Rights provides that “the law may subordinate such use and enjoyment to the interest of society”\textsuperscript{435}, thus, it basically gives power to the government to acquire any property just by declaring that it is in the interest of the society. This lacuna has extended the scope of acquiring property even for private purposes under the garb of public use.

In 1954, the U.S. Supreme Court nearly erased the public use clause from the Constitution in the case of\textsuperscript{436} Berman v Parker. The court held that the power of the Congress is not limited by the Fifth Amendment to seize private property with just compensation to any specific purpose.\textsuperscript{437} Later, the principle was extended in the case of\textsuperscript{438} Hawaii Housing Authority v Midkiff, wherein the Supreme court held that the Parliament was correct in acquiring land from private owners essentially to redistribute it to a wider population of private owners.\textsuperscript{439} Finally, in 2005, in the case of\textsuperscript{439} Kelo v City of New Haven, the Supreme Court limited the concept of public use to “regulatory takings” in the case of\textsuperscript{440} Kelo v City of New Haven.

\textsuperscript{430} Id
\textsuperscript{431} Id
\textsuperscript{432} Id
\textsuperscript{435} The American Convention on Human Rights.
\textsuperscript{437} Id.
\textsuperscript{438} Hawaii Housing Authority v Midkiff (1984) 467 US 229.
\textsuperscript{439} Id.
London\textsuperscript{440}, the Supreme court took a broad view of public purpose and held that a public purpose of economic development that might directly benefit the private parties is included therein.\textsuperscript{441} This judgment did not go down well with the public as it essentially gave the government a free hand to acquire property even for private purposes and thereby, do something which is violative of the Fifth Amendment. Thus, as a matter of constitutional law, the public use clause is a dead letter.\textsuperscript{442}

It can be seen that the property rights in USA have paved the way for using the principle of eminent domain aggressively by acquiring private property for private use. American courts have diminished the judicial recognition of constitutional protection of property rights.\textsuperscript{443} It can be said that the future remains uncertain and there is very little prospect for relief from the Supreme Court or the Congress in the short run.\textsuperscript{444} The position in India has been better than that in the US as even though the right to property is not a fundamental right, it still remains a legal right. The most important point of diversion is that in India the courts have not done away with the public purpose condition. Even under Article 300A, the court has interpreted that both the conditions i.e. the use should be of public purpose and there should be just compensation needs to be followed. The deletion of right to property from the Part III has certainly had drastic impacts but it still remains a legal right and the judiciary has been proactive in upholding the individual rights.

\textbf{CONCLUSION}

In the end we would like to conclude by saying that the Right to Property should be a fundamental right in India since the right to live with human dignity is also a fundamental right which flows from Article 21 which assures life and personal liberty to all the citizens of India and the right to live with human dignity naturally insures to the citizens some basic rights like shelter, environment and even livelihood. India being a country wherein the level of inequality is extremely high, the omission of the right to property as a fundamental right would make the situation even more worse than before and this would strike the roots of the basic structure doctrine. Also, even though the Supreme Court of India has rejected the PIL which was filed in 2007 to include right to property as a fundamental right, the fact that people are aware provides a ray of hope that the future of property rights in India is not bleak.

\textbf{BIBLIOGRAPHY}

2. Jugen Bast, Verfassung Und Recht in Ubersee/ Law and Politics in Africa, Asia and Latin America, vol. 44 no. 2, 273-276. https://www.jstor.org/stable/43239612?search=yes\&resultItemClick=true\&searchText=structure\&searchText=doctrine\&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dbasic%2Bstructure%2Bdoctrine%26amp%3Bgroup%3Dnone%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff&ab_search=yes&ab_resultItemClick=true&ab_searchText=structure&ab_searchText=doctrine&ab_searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dbasic%2Bstructure%2Bdoctrine%26amp%3Bgroup%3Dnone%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff&ab_search=yes&ab_resultItemClick=true&ab_searchText=structure&ab_searchText=doctrine&ab_searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dbasic%2Bstructure%2Bdoctrine%26amp%3Bgroup%3Dnone%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff&ab_search=yes&ab_resultItemClick=true&ab_searchText=structure&ab_searchText=doctrine&ab_searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dbasic%2Bstructure%2Bdoctrine%26amp%3Bgroup%3Dnone%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff

441 Supra note 24.
443 Id.
444 Supra note 45.


11. Union of India v Metal Corporation (1965) AIR SC 1017.


*****
REGULATING ARTIFICIAL INTELLIGENCE: AN INDIAN STANDPOINT.

By Annanay Goyal
From IIMT (School of Law) affiliated to GGSIP University, New Delhi

Defining AI
Artificial Intelligence does not have a working definition for the regulation, but it is a common problem in the legal system to have an over-or under-inclusive definition of an imprecise term especially relating to foreseeability or proximate causation as the technologies are bound to evolve.\textsuperscript{445} Even the scholars in the field of AI are unable to come to a consensus for a working definition of AI. Attempts made have tended to relate the definitions to human characteristics as they are the only beings said to possess intelligence among life forms. These features establish AI as machines doing man-like tasks that involve “common sense” or require intelligence.\textsuperscript{446} McCarthy firmly believed that there can be no solid definition without relating it to human intelligence as “we cannot yet characterize in general what kind of computational procedures we want to call intelligent”.\textsuperscript{447} Artificial Intelligence is an umbrella term which involves numerous viewpoints which discuss various aspects of AI and try to coin a definition that can be used in its entirety. A leading introductory book on AI defines artificial intelligence by putting them under four different categories\textsuperscript{448} and these definitions are bound to be used by the scholars in the research community as they project their importance in understanding AI. A basic definition of AI needs to be coined which should be regularly updated with the development of AI to avoid out dating.

Concerns of AI Regulation
With AI on the surface having no working definition for the regulators to work with exhibits actually how tough it is to regulate a technology which can be omnipresent in an internet-based device and has no necessary or compulsory metaphysical infrastructure. AI is a technology which presents the outcome based on the patterns it identifies from the data it is fed. It is difficult to hold corporations liable for a robot having no body or soul to punish which has perplexed courts for a very long time,\textsuperscript{449} which depletes the applicability of criminal liability on the AI-based tech.\textsuperscript{450} Moving over to primary hindrances in the regulation of AI.

Autonomy, Foreseeability and Control
The world has already seen technology performing varied tasks with minimal or no human assistance from driving a car to defeating the best human chess player.\textsuperscript{451}

\textsuperscript{446} SEMANTIC INFORMATION PROCESSING v (M. Minsky ed. 1968).
The autonomy of AI is the most prominent feature which is also the most challenging when coupled with the unforeseeability of the AI machines. If an AI harms a person during its normal functioning, can we blame its designer even if the machine unexpectedly operated using its consciousness? Can we blame the designer for not being able to predict this move from the machine he specifically designed for being creative? What are the parameters to establish a legal liability or proximate causation for such actions of AI? It will be hard to establish the degree of liability or fault when multiple potential actors are involved from creation to working of an AI.\(^\text{452}\) Also, it can’t be foreseen when and how the injury will occur and the deliberate intention or knowledge of harm will be even more complicated to establish.\(^\text{453}\) The autonomy of AI also raises the possibility of creators or operators losing control which may pose a public risk.\(^\text{454}\) AI hell-bent on completing the assigned objective may go rogue and might even cause physical harm.\(^\text{455}\) The owner of AI can be completely oblivious of the fact that AI has caused such harm and negligence can’t be appropriately applied to this scenario. Conventional foreseeability tort laws can’t be directly applied to the realm of robotics and AI. Regulators will need to look beyond the conventional concepts of foreseeability to be able to optimally regulate AI harm.

### Research and Development


\(^{453}\) Id.

\(^{454}\) Scherer, supra note 1, at 366-67.

\(^{455}\) See Hallevy, supra note 6, at 13.


\(^{457}\) See scikit-learn: Machine Learning in Python, GITHUB, https://github.com/scikit-learn

In 2009, Professor John McGinnis wrote that “artificial intelligence research is done by institutions no richer than colleges and perhaps would require even less substantial resources.”\(^\text{456}\) But the actual reality is far from this as any person having a device with an internet connection possessing the required skill and knowledge can easily contribute to the development of AI. Further one of the bothersome tasks for the regulators will be to detect the source or point of origin of the software due to the open-source platforms who let the developers anonymously contribute to the development of AI.\(^\text{457}\) Multiple platforms can be used to develop AI systems which make it difficult to ascertain the identity of the developer. Also, AI tech deals with components that are not readily susceptible to the operators. The level of the incomprehensibility of AI systems will not only be a hurdle for the operators but also for the regulators to hold a manufacturer or developer liable for downright undetectable faults.\(^\text{458}\) The sheer number of participants in the functioning of an AI system will make it nearly impossible to blame any one of the components involved. This multiplicity of defendants hailing from different geopolitical locations will hamper the process of apportionment of liability by the courts.

### The Pacing Problem

It refers to the situation where the development in innovation is so rapid that it creates a gap and the regulation fails to

\(^{458}\) David C. Vladeck, Machines Without Principles: Liability Rules and Artificial Intelligence, 89 Wash. L. Rev. 117, 148 (2014). (citing the potential for “undetectable failure” in the components of automated driving systems as a drawback to holding manufacturers primarily liable for defects in autonomous vehicles).
effectively govern the technology.\textsuperscript{459} As by Marchant and Wallach, ‘at the rapid rate of change, emerging technologies leave behind traditional governmental regulatory models and approaches which are plodding along slower today than ever before’.\textsuperscript{460}

The last two decades offer multiple examples of such regulatory struggles: genetically modified food, biotechnology, applied neuroscience and more.\textsuperscript{461} This generally results in the situation where the regulations might become obsolete with the ever-growing technology and need revision every now often. Regulations can also hamper the growth of the technology as in the case of AI which is relatively new and is being developed to be applied more inclusively in an average individual’s daily routine. Adopting rigid regulations at the nuance stage of development of AI will restrict its advancement but not having supervision can make it cause havoc.\textsuperscript{462} It is worth noting that regulation falling behind innovation does not amount to failure but it is the inherent nature of regulations to evolve and adapt to the changing socio-economic environment and the same is true for AI regulations.\textsuperscript{463}

\textbf{Present Regulations India}

With the Digital India initiative by the Union Government\textsuperscript{464}, development and promotion of AI policy in India will and is one of the top objectives of the current government. AI has found its place in the healthcare sector allowing breakthroughs in medical research.\textsuperscript{465} India currently has no comprehensive legal framework for the regulation of AI. On July 27, 2018, the government of India’s Committee of Experts (also known as the Justice B.N. Srikrishna Committee) released a Draft Protection of Personal Data Bill\textsuperscript{466} along with an accompanying report titled A Free And Fair Digital Economy Protecting Privacy, Empowering Indians.\textsuperscript{467} Although the Committee envisions an ex-ante accountability model to provide a remedy against any kind of violation of human rights\textsuperscript{468}, it is silent on establishing any set of rights to protect against automated decision making in the Data Bill.\textsuperscript{469} Ex-ante model is rather useful but where it is laborious to promulgate or amend a rule, an ex-ante rule may not affect before the harm

\begin{flushleft}
\footnotesize{\textsuperscript{459} Anna Butenko & Pierre Larouche, Regulation for Innovativeness or Regulation of Innovation?, 7 L. Innovation And Tech. 52, 72 (2015).
\textsuperscript{460} Marchant, G. E., Wallach, W., Innovative Governance Models for Emerging Technologies 45, (Gary E. Marchant et al. eds. 2013).
\textsuperscript{461} Id.
\textsuperscript{463} See Anna Butenko & Pierre Larouche, supra note 15, at 66-67.
\textsuperscript{468} Id., at 74-5.
\textsuperscript{469} Supra note 22.}
\end{flushleft}
AI laws are at the nascent stage in the Indian ecosystem where the main area of concern for the government to form regulation is where the engagement is primarily of government and industries but not of civil society. AI adoption in India will impact various sectors from competition to consumer laws and imperative amendments will be needed to adjust to the changes brought by AI. India is moving forward with a clear goal to actively involve AI in the current working of the society with the Data bill being the first step towards a digitally empowered nation.

**International Scenario**

The Indian government has selected benchmark countries while approaching AI development in the nation, so we must look into the developments of these countries in the field of AI for a better comparative analysis. China is taking leaps in the field of AI by developing a regulatory system and strengthening intellectual property protection while promoting AI development in the country. On July 20, 2017, China released a comprehensive plan for the development of AI, dividing it into stages up until 2030. It aims to achieve breakthroughs in the field of AI and become world-leaders in AI theories and its application ultimately making China the world centre for AI-based innovation. It has an institutional arrangement diving into many aspects of AI-based development ranging from regulatory and ethical frameworks which aims to bring civil and criminal responsibilities against the harm caused by AI to creating a security supervision system aiming to prevent data abuse and violations in the field. It estimates AI will contribute up to 26% of its GDP by 2030.

The United States is the world leader and is continuously engaging in the development of AI and its regulations as multiple bills are being introduced in congress. On the federal level, AI has been constituted in many forms over the past couple of years mainly in defence and transportation industries. State legislatures have been experimenting in the field of AI regarding autonomous vehicles and as of April 2017, twenty-eight states have introduced some form of regulation for the same. It has created a national

---

470 Scherer, supra note 1, at 387.
472 Supra note 23, at 16.
474 Id. Part II, item (3).
475 Id. Part V, item (1)-(4).
strategy to promote and develop AI aiming to encourage rapid advancements in the field. Laying principles for AI to promote liberal approach in regulation to avoid hampering the growth of the technology.\(^{479}\) This comes as a surprise as the administration earlier projected that it had no intention to get involved in the development of AI to let the technology flourish itself. This initiative is suspected to be taken in conjunction with governments around the globe making significant advances in this regard.\(^{480}\) It has effectively laid down principles to understand the impact of AI in society and to assess the risks involved and to mitigate the same. The similar approach taken in the field of autonomous vehicles is to be taken as a foundation in formulating regulations in other fields of operation.

**France** under the leadership of President Emmanuel Macron is competing in the race of being a world leader in the field of AI by investing heavily to promote its growth.\(^{481}\) Its most notable step was to set up a commission headed by Cédric Villani to formulate AI policy for France. Villani pointed out that France already has a law for protection against fully automated decisions from 1978 and gave some creative approach for AI regulation.\(^{482}\) The report proposes to amend existing laws to support AI development and set up an expert panel to regulate AI and research on its ethics. Emphasis was laid upon the opening of ‘black box’ of AI to understand why an algorithm comes to a certain conclusion. France aims to create an AI policy promoting fairness and public participation.

**Japan** also established a council to research and development of AI for its industrialisation. The panel submitted its report in March 2017 laying down the strategy of managing five national research institutions which will focus on the priority areas of healthcare, productivity and mobility. Advisory board will look into the issues and challenges that can arise relating to AI with a multi-stakeholder point of view. Japan considers legal issues should contribute to the acceptance of AI in society. The locus of responsibility in case of an accident caused by autonomous vehicles is of key concern while regulating AI. It plans to establish the right of high-value data generated due to interaction between the AI system and its user and also protection against exploitation by an AI system. It believes some revision is necessary for the existing laws to adapt to AI-based collaboration.\(^{483}\)


\(^{481}\) Mathien Rosemain & Michel Rose, France to Spend $1.8 Billion on AI to Compete with U.S., China, REUTERS (Mar. 29, 2018), https://www.reuters.com/article/us-france-tech/france-to-spend-1-8-billion-on-ai-to-compete-with-us-china-idUSKBN1H51XP.


\(^{484}\) Report on Artificial Intelligence and Human Society, Advisory Board on Artificial Intelligence and Human Society (March 24 2017).
motion to create a safe environment for automated driving vehicles to operate by 2020.485

The United Kingdom is another nation continuously investing in the development and research of AI to be implemented in society to boost the GDP. In 2017 it invested nearly £75 million for the research of AI.486 The UK has already incorporated AI in its society primarily through self-driving cars and enacted a law for the same in case of accidents due to the AI system.487 Although enacted it is yet to be brought into force. It plans to involve AI in the healthcare sector and education. It has denied use of AI in weapons for defence and claims that there will always be a human control in defence systems.488 The UK aims to regulate AI systems by establishing standards for the systems which will be based for regulation. Other major developments are of European Union which enacted the GDPR and creating a legal status of AI systems by giving them electronic personalities.489 Canada focuses more on research rather than regulation but still has laws regulating self-driving cars.490

Conclusion

AI is set to transform society as its development will affect nearly all human endeavours. With that, there is an unprecedented risk as we can’t predict the scale of impact of AI-based systems in our society. I have enumerated primary concerns that every regulator will face regarding AI regulations and how these issues will affect the governance of supplementary fields to AI.491 The biggest issue for the nations is the locus of responsibility in case of harm caused by AI systems as multiple people are involved in working on AI. From an innovator to a manufacturer and user all have substantial inputs in the working of AI, and it will be tedious for a regulator to devise a criterion to ascertain the liability. Further, if the harm is caused by AI while carrying out its primary functioning, can the blame be thrown at the creator after the AI system has cleared the standards492 (if any) established by regulators? Regulators will need to find optimal regulations which promote the development of AI without hampering its growth and implementation in the society. It is ubiquitous with disruptive innovation like AI to be defying regular standards of law. Data based regulation which involves


486 Anthony Cuthbertson, UK Government Developing Flying “Killer Robots”, Investigation


490 Supra note 27.

491 Supra note 42.
start-ups and established companies, regulators, experts and the public, which will help in creating flexible and more inclusive laws, is one way to go. AI is inevitably going to have a large scale impact, which will transform our society. Regulators need to formulate an advanced strategy to effectively regulate AI and its accompanying changes in the society.

*****
COMBATING CARTELS AND POLICIES WITH REFERENCE TO COMPETITION ACT, 2002

By Anuj Kumar Bassi
From Vivekananda Global University, Jagatpura, Jaipur

ABSTRACT

Globalization and progressive liberalization of trade during last decade opened a widening atmosphere giving rise to certain inevitable tasks and challenges for every country Around the Globe. It, therefore, became imperative for many countries to have a new line of rethinking on the existing pattern of policies on trade, customs and usages. The world trade Organization’s (WTO) treaties and agreements, their implications on trade and commerce have already compelled many countries to review their competitiveness of trade and economic policies not only within their economy but across the frontier of other countries also. In India the law which originally enacted to deal with Market and Competition (i.e. The Monopolies and Restrictive Trade Practice Act 1969) addressed the problems concerning to Monopolistic, Restrictive and unfair Trade Practices only. But for the Economic development of the India the Competition Act, 2002 was enacted for the purpose of to prevent practices having adverse effect on Competition, to promote and Sustain Competition in markets, to protect interest of Consumers. And to ensure freedom of trade carried on by other participants in markets as in India and for matters connected therewith or incidental thereto. The present Article is brief study of Cartel and its impacts and policies under the Competition law in relation to Competition Act 2002, that what is the Cartel and what are their types and how the effect the Competitive healthy market by making an Anti-Competitive Agreements and Bid rigging for doing an Abuse of Dominant position in the market and malpractices. The Objective of this Article is also to analysis that if any cartel or Any Anti-Competitive Agreement formed then what are the legal steps taken by the Competition Commission of India to stop such Anti-competitive Agreements and Abuse of Dominant position in the market by way of set up an Enquiry Commission and giving punishments and impose penalties as prescribed in the Competition Act 2002.

INTRODUCTION

In today’s Competitive market some firms or Industry or Companies try to restrict the competition in the market by making formal or informal agreement among them, it is known as a cartel. Such agreements can be achieved by the means of setting a certain price of the product or service, setting product output or capacity limits or limitations on the type of product, dividing markets geographically or by restricting new entrants in the market by setting agreed measures to create monopoly in the industry. Such cartels can exist in any type of industry, be it related to goods or services and can exist at any level- procuring, manufacturing, distribution or retail. Such anti-competitive cartels are formed to have control of sales and prices in the industry. By and large, the industries in the same line of business, form a cartel, which in turn having the potential of restricting competition in the market, is considered as unlawful conspiracy and thus is challenged in the court once identified.

MEANING OF CARTEL:
In the basic understanding point of view, a cartel is a group of industries/firms which collectively attempt to affect the market prices by controlling production and marketing. According to Wikipedia, a cartel is a formal agreement among competing firms. It is formal organizations where there are a small number of sellers and usually involve homogenous products.

Cartel members may agree upon:

a) Price fixing
b) Total industry output
c) Market shares
d) Allocation of customers
e) Allocation of territories
f) Bid rigging
g) Establishment of common sales agencies
h) Division of profits or combination of the above.

The World Trade Organization defines the term as, an arrangement between firms to control a market – for example, to fix prices or limit competition between members of the cartel.

Cartel as defined by the European Commission for Competition is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.

In terms of Trade Finance, any group that comes together to monopolize a market, agreeing which of them is to preside over which area of operation. As well as applying to companies it can also apply to the group of individuals, as for example, when they act in unison to lower the price of unpaid and uncollected goods being auctioned off at a dockside.

The Supreme Court defined the term as, “the cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. It amounts to an unfair trade practice which is not in the public interest.”

The problem with cartels is that they are very difficult to detect. In fact, it is near impossible to gather enough information about them through usual investigatory channels.

**HISTORICAL BACKGROUND**

The term primarily originated for alliances of enterprises roughly around 1880 in Germany.

Later in 1930s, the English Economic structure imported the term, prior to this words like association, combination,
combine or pool were used.499

The term was later given its due importance during the Great Depression in the United States of America. During which cartels (then referred to as ‘Depression/ Crisis Cartels’) were legalized. However, with the two World Wars the term owing to its Germanic origin was casted as enemy and therefore negative in nature.

With the objective of ‘protecting the consumers by preventing arrangements designed, or which tend, to advance the cost of goods to the consumer’500, the Sherman Act, 1890 also known as Anti-trust Act was enacted.

Over a period of time the concept of cartels has evolved and has attained great precision, fuller content and a more regulatory meaning. A notable and a fully worked out example of this term is provided by the OECD Council Recommendation of March 1998, specifically entitled Effective Action Against Hard Core Cartels. The Recommendation couples an explicit recognition of the objectionable character of cartels as: ‘Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.’501

Kinds of cartel:

Cartels can be broadly defined as

a) Public cartel: Where a government is involved to enforce a cartel agreement and the government’s sovereignty shields such cartels from legal action. This can be further explained through:

Depression Cartel: these are permitted by many countries in industries deemed to be requiring price and production stability and/ or to permit rationalization of industry structure and excess capacity. E.g., In Japan the arrangements permitted for steel, aluminum smelting, ship building and chemical industries. These saw their genesis from the Great Depression when some cartels were allowed so as to bring about price and production stability.

i. International Commodity Arrangement: These cover products such as coffee, sugar, tin and more recently oil (OPEC) are examples of international cartels with publically entailed agreement between different national governments.

ii. Crisis Cartel: These are organized by the government for various industries or products in different countries in order to fix prices and ration production and distribution in periods of acute shortage.

b. Private cartels: These are subject to the legal liability under the anti-trust laws. Their primary purpose is to benefit only those individuals who constitute it. Private cartels entail an agreement on terms and conditions that provide members mutual advantage, but that are


500 Quote by John Sherman describing the purpose of the Act.

501 OECD Paris, 27-28 April 1998 (C(98) 35/Final)
not known or likely to be detected by outside parties.

CARTELS UNDER COMPETITION ACT, 2002

The term cartel is defined under the Competition Act, 2002. Section 2 (c) of the Act when dissected can be iterated as:

1. Association of producers, sellers, distributors, traders or service providers who
2. By agreement amongst themselves
3. Limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

The definition primarily indicates any association that tries to “limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services” byconcerting among themselves. But such arrangements are usually not that easily visible. The term cartel like an agreement has been given in an inclusive meaning. Thus an association for welfare of trade or formed for any other purpose not mentioned in aforesaid definition will not be cartel. Therefore an attempt must be made to analyze the section under the light of section 3 and section 4 of the Act.

Section 3 of the Competition Act discusses the ambit and nature of anti-competitive agreements. Section 3(1) talks about any enterprise or association that enters into an agreement with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services. Such an agreement is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of aforesaid prohibition shall be void.

Enterprise in this section shall mean and include a person or a department of the Government. Therefore a cartel can be formed by sovereign or by companies.

Further, the conduct of a cartel is also determined by the Section, this can be ascertained from the reading of the Section 3(3) which states explicitly any cartel formed, “engaged in identical or similar trade of goods or provision of services, which -

(a) Directly or indirectly determines purchase or sale prices;
(b) Limits or controls production, supply, markets, technical development, investment or provision of services;

more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space”.

Sec 2(h) Competition Act, 2002.
(c) Shares the market or shares of production or provision of services by way of allocation of geographical area of market, or types of goods or services, or number of customers in the market or any other similar way;

(d) Directly or indirectly results in bid rigging or collusive bidding.\(^{504}\)

Therefore, conduct of cartel can be forwarded as:

a) **Price fixing** occurs when competitors agree on a pricing structure rather than compete against each other. Essentially an agreement among competitors to rise, fixes, or otherwise maintains the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law.

b) **Bid rigging** means any agreement, between enterprises or person engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

c) **Output restrictions** occur when the participants in an industry agree to prevent, restrict or limit supply. The purpose is to create scarcity in order to increase prices (or counter falling prices) while also protecting inefficient suppliers. Any business may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output. Generally, the action needs the support of key market participants to achieve the cartel's desired result.

d) **Market sharing** occurs when competitors agree to divide a market so participants thus circumventing from competition laws. By allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products or territories among themselves. For example, one competitor will be allowed to sell to, or bid on contracts let by, certain customers or types of customers. In return, he or she will not sell to, or bid on contracts let by, customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

Finally another aspect of cartels can be understood by interpretation of section 3(4) of the Act. Section 3(4) speaks of agreement between the parties at either different stage of production chain in different markets such an arrangement can be by way of –

1. **Tie** – in arrangement;
2. **Exclusive supply agreement**;
3. **Exclusive distribution agreement**;
4. **Refusal to deal**;

\(^{504}\) Section 3(3) Competition Act, 2002.
5. Resale price maintenance.

Provided that there is an appreciable adverse effect owing to such an arrangement.

The basic difference between Sec 3(3) and 3(4) is the nature of the agreement on the basis of which the cartel is formed. While S. 3(3) talks about the horizontal agreement, S. 3(4) speaks of vertical agreement.

Apart from section 3 cartels can further be understood from the perspective of S. 4 of the Competition Act. Section 4 related to the “abuse of dominant position”. The section begins with the line “No enterprise shall abuse its dominant position.”

The term “enterprise” is defined under section 2(h) to mean and include “person or a department of Government”. An association that forms an agreement can be treated as a person and therefore such a person can assume a dominant position. The section does not restrict the presence of a dominant position but rather tries to stop abuse of such dominant position. Therefore, if a cartel assumes a dominant position and thereby if it goes ahead and abuses such a dominant position then the cartel falls within the ambit of section 4. The abuse of dominant position takes place if such an enterprise:

1) Directly or indirectly imposes unfair or discriminatory-
   a) Condition in purchase or sale of goods or services;
   b) Price in purchase or sale (including predatory price) of goods or services.

2) Limits or restricts–
   a) Production of goods or provision of services or market thereof;
   b) Technical or scientific development relating to goods or services to the prejudice of the consumers
   3) Practices resulting in denial of market access
   4) Entering contracts subject to acceptance of supplementary obligations of the other party;
   5) Entering a relevant market

The Commission is empowered to inquire into any alleged contravention of the provisions contained in section 3(1) or section 4(1). In case the Commission is convinced that prima facie case exists against a cartel or such kinds of agreements, it shall direct the Director General to inquire and furnish report. Director General for the purpose of inquiries is vested with the powers of civil court besides powers to conduct ‘search and seizure’.

The duty of the DG is to assist the commission on investigation into any contravention of the provisions of the Act, or any rules or regulations made there under. The DG while reaching to his conclusion for holding an operator liable for forming a cartel has an inclination towards primary evidences - that is mostly agreements. But apart from these, DG also has the authority to adopt econometric models which it is unable to utilize to the fullest because of lack of understanding of underlying assumptions.

On receipt of a complaint or a reference, cost, as may be determines by regulations, of production of goods or provisions of services, with a view to reduce competition or eliminate the competitors.

505 Sec 4(1) Competition Act, 2002
506 Predatory price means the sale of goods and provision of services, at a price which is below the
the Commission has to first satisfy itself of the existence of a prima facie case. A complaint can be filed under Section 19 of the Act; whereas, a reference from a statutory authority may also be directed to be investigated by the director-general. The Commission has also adopted the policy of Suo Moto cognizance. The prima facie existence of an agreement is essential. Any agreement, formal or informal, written or verbal would provide adequate proof for beginning investigation. In ITC Ltd v MRTP Commission\(^{507}\) (- Three essential factors have been identified to establish the existence of a cartel, namely agreement by way of concerted action suggesting conspiracy; the fixing of prices; and the intent to gain a monopoly or restrict/eliminate competition.

In the recent order in, Builders Association of India v. Cement Manufacturers’ Association and Ors., Section 2(b) of the Act has been interpreted. Section 2(b) defines agreement as under, “Agreement” includes any arrangement or understanding or action in concert irrespective of whether formal /written or otherwise or intended to be legally enforceable.

Common Characteristics of Cartels
- Usually cartels function in secrecy.
- The members of a cartel, by and large, seek to camouflage their activities to avoid detection by the Commission.
- Perpetuation of cartels is ensured through retaliation threats. If any member cheats, the cartel members retaliate through temporary price cuts to take business away or can isolate the cheating member.\(^{508}\)
- Another method, known as compensation scheme, is resorted to in order to discourage cheating. Under this scheme, if the member of a cartel was found to have sold more than its allocated share, it would have to compensate the other members.\(^{509}\)

CONDITIONS CONDUCIVE TO FORMATION OF CARTELS

If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are\(^{510}\)
- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion

\(^{507}\) (1996) 46 Comp Cas 619


\(^{510}\) The Competition Commission of India (General) Amendment Regulations, 2009 as amended by the CCI(General) Amendment Regulation, 2009.
DETECTING CARTELS
The fight against Cartel is legally and practically a demanding task as:-

- Cartels being secretive and cartelists taking pain to conceal it necessitates the Competition Authorities to undertake great efforts to detect concealed cartels,
- Competition Authority needs extraordinary powers and skill to collect sufficient evidence to mount a viable case against uncooperative defendants,
- Cartels are conspiracies and to destabilize them, Competition Authority needs to heavily bank upon “Leniency Programme” or to encourage and motivate whistleblowers,
- the jurisdictional reach is often a restraint and constraint in the investigation and enforcement of overseas cartels; and
- The ever increasing trend to heavily penalize & criminalize cartel conduct has necessitated for Competition Authority to adopt a high standard of proof and procedure.
- Cartel busting requires certain specialist skills which differ from the skills required for investigation and prosecution of other infringements of competition law. In case of cartels the focus lies on proving the existence of the arrangement itself rather than demonstrating its impact on the market in economic terms. An increasing number of Competition Authorities, therefore, have set up special cartels branches and the motivation to do so is to develop centers of excellence with respect to expertise required in organizing search and raids, interviewing witnesses, covert surveillance beside successful implementation of leniency programs. There is an obvious need for intensive & extensive coordination and cooperation with other specialized agencies such as sector specific regulatory authorities, tax authorities, police, and ministries dealing with corporate bodies.

INQUIRY INTO CARTELS
The Commission is empowered to inquire in to any alleged contravention of the provisions contained in section 3(1) or section 4(1) either on its own motion or on:-

a) Receipt of any information in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
b) A reference made to it by the Central Government or State Government or a statutory authority.

Under the Act, the Director General, in discharge of his duties, has been vested with powers as are in a Civil Court which inter-alia includes; namely–

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits; and
(d) issuing commissions for the

511 Cartel under section 2(c) of the competition Act,2002
512 Section 46 of competition Act,2002
513 Section3(1) of Competition Act,2002
514 Section4(1) of Competition Act,2002
examination of witnesses or documents

The Director General including any person investigating under his authority is also having powers as are vested in the 'Inspector' in terms of Section 240 & 240 A of the Companies Act, 1956. These powers inter-alia include -

i) production of documents and evidence in the custody of body corporate/other bodies corporate, and

ii) search of place or places and seizure of documents with the approval of the First Class Magistrate/Presidency Magistrate, having jurisdiction, when there is reasonable ground to believe that books, papers or documents may be destroyed, mutilated, altered, falsified or secreted.

POWERS OF THE COMMISSION:
The Commission is empowered to inquire into any cartel, and to impose on each member of the cartel, a penalty of up to 3 times its profit for each year of the continuance of such agreement or 10% of its turnover for each year of continuance of such agreement, whichever is higher. In case an enterprise is

A 'company' its directors/officials who are guilty are also liable to be proceeded against.

In addition, the Commission has the power to pass inter alia any or all of

the following orders 515:

- direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- Direct the enterprises concerned to modify the agreement.
- Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- Pass such other order or issue such directions as it may deem fit.

LENIENCY SCHEME
Section 46 516 of the Act empowers the Commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The scheme is designed to induce members to help in detection and investigation of cartels. This scheme is grounded on the premise that successful prosecution of cartels requires evidence supplied by a member of the cartel. 517

Similar leniency schemes have proved very helpful to competition authorities in successfully proceeding against cartels. The Commission has notified the Competition Commission of India (Lesser Penalty) Regulations, 2009 laying the process 518, procedure and methodology for granting leniency to the cartel members who breaks the ranks of the cartel and becomes helpful

515 Section 27 Competition Act, 2002
516 Section 46 of Competition Act, 2002
517 Amit Sanduja, Report on Leniency Programme: A Key Tool to Detect Cartels available at
<http://cci.gov.in/images/media/ResearchReports/leniencyproject_amitsanduja11032008>

518 Regulation No. 4, The Competition Commission of India (General) Amendment Regulations, 2009 as amended by the CCI(General) Amendment Regulation, 2009
to the Commission and instrumental in busting that alleged cartel.\textsuperscript{519}

**INTERIM ORDER**

Under section 33\textsuperscript{520} of the Act,\textsuperscript{521} During the pendency of an inquiry if Commission is satisfied that an act in contravention of (1) of section 3 or sub section (1) of section 4 or section (6) has been committed and continues to be committed or that act such act is about to be committed the commission may by order temporarily restrain any party from continuing with the alleged contravention, until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems it necessary.\textsuperscript{521}

**PENALTIES**

- **CONTRAVENTION OF ORDERS OF COMMISSION (SECTION 42)\textsuperscript{522}**
  
  If any person without reasonable clauses fails to comply with orders or directions of the commission issued under sections 27, 28, 31, 33, 34, 42 and 43 of the Competition Act 2002, he shall be punishable with an fine which extend to rupee one lakh for each day during which such non compliance occurs, subject to maximum of rupees ten crore, as the commission may determine.

- **COMPENSATION IN CASE OF CONTRAVENTION OF ORDERS OF COMMISSION(SECTION 42A)\textsuperscript{523}**

Any person may make an application to be appellate tribunal for an order for recovery of compensation from any loss or damage shown to have been suffered, by such person as a result of said enterprises violating directions issued by commission without any grounds any decision or order of commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made, or granted under this act or delaying in carrying out such orders or directions of commission.

- **POWER TO IMPOSE PENALTY FOR NON-FURNISHING OF INFORMATION OR COMBINATION(SECTION 43A)\textsuperscript{524}**
  
  If any person or enterprise fails to give notice to the commission under sub-section (2) of section 6\textsuperscript{525}, the commission shall impose on such person penalty which may extend to one percent of total turnover or the assets, whichever is higher, of such a combination.

- **PENALTY FOR MAKING FALSE STATEMENT OR OMISSION TO FURNISH MATERIAL INFORMATION(SECTION 44)\textsuperscript{526}**
  
  If any person being a party to a combination makes an statements which is false in any material particular, or knowing it to be false or omits to state any material particulars knowing it to be

---


\textsuperscript{520} Section 33 of Competition Act, 2002

\textsuperscript{521} Regulation No. 2, The Competition Commission of India (General) Amendment Regulations, 2009 as amended by the CCI(General) Amendment Regulation, 2009

\textsuperscript{522} Section 42 of Competition Act, 2002

\textsuperscript{523} Section 42(A) of Competition Act, 2002

\textsuperscript{524} Section 43(A) of Competition Act, 2002

\textsuperscript{525} Section 6 of Competition Act, 2002

\textsuperscript{526} Section 44 of Competition Act, 2002
material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extends to one crore, as may be determined by the commission.

APPEALS:
The Competition Appellate Tribunal (CAT) is established under section 53A of the Competition Act 2002, to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act. And to adjudicate on claim for compensation that may arise from the findings of the commission or orders of the appellate tribunals in an appeal against any findings of commission. An appeal has to be filed within 60 days of receipt of the order/direction/decision of the Commission.

CONCLUSION
The availability of explicit definition of 'Cartel', incorporation of a leniency programme for a member of a cartel to defect, the power to impose deterrent penalty linked with profits or turnover on each member, unique wing was set up by the Competitive Authority, proceedings of investigation should be more expeditious, Gigantic punishment ought to be imposed and penalized the person or entity engaged in forming Cartel which hampers the market, and explicit provisions to exercise jurisdiction in respect of overseas acts having adverse effects on competition in India coupled with provisions to enter into cooperation agreement with contemporary overseas competition agencies along with efforts to build strong competition culture including encouragement to public to submit information by ensuring confidentiality, coordination with Government Departments & sectorial regulators and by stressing the need for strong sanctions in view of irredeemable harms caused, the Competition Commission will be able to effectively combat domestic as well as cross border cartels.

*****
MOBOCRACY LYNCHED DEMOCRACY

By Anusha Bhatt and Zahra Naqvi
From Government Law College, Mumbai

“When any core group with some kind of idea take the law into their own hands, it ushers in anarchy, chaos, disorder and, eventually, there is an emergence of a violent society”

Former CJI Dipak Mishra

On June 17th 2019 in Jharkhand, a young man named Tabrez Ansari was tied to a pole at around midnight and was brutally beaten by a mob till six in the morning. Tabrez was then rushed to a hospital where he succumbed to his injuries four days later. A mob of similar nature killed Inspector Subodh Kumar Singh in Bulandshahr, while he was trying to control a mob that was fuelled with anger because some cow carcasses were found in the nearby jungle. The above incident took place in 2018 and back then lynchings happened in the name of cows. However, when the same cows were starving to death in official shelters, these cow protectors abandoned the cows. Now, the project of propagating fear and violence has shifted towards the slogan of ‘Jai Shri Ram’. The mob battered Tabrez to chant ‘Jai Shri Ram’, and even though he did, it did not help him save his life.

‘Mob’ is not just a word. It is made up of tens, hundreds, thousands of people. People who beat and kill; who record the beating and killing on their phones; who stand and watch but do not speak. It was no ordinary event when shouts of ‘Jai Shri Ram’ rang in the Lok Sabha while Asaduddin Owaisi took his oath. The chants were not for the love of Ram rather they were to intimidate and mock Owaisi. The provocation and the reaction was an affirmation that communalism is being legitimized as patriotism.

Origin of Lynching

The Cambridge Dictionary defines the term ‘lynching’ as ‘The act of killing someone without a legal trial, usually by hanging’. There are multiple definitions of this word available, but the gist remains the same i.e. a man being killed sans legal approval and defying the due process of law. There have been speculations regarding the origin of the term ‘Lynching’, where some believe it to be derived from the name of Charles Lynch, an American revolutionary who used to preside over an irregular court which was formed to punish the suspected loyalists who were uprising in Southwest Virginia.

His unauthorised punishments, called the ‘Lynch Laws’, included whipping, property seizure, etc. Though the origin of the term remains disputed till date, the act of lynching as we understand today can be traced back to the year 1835 where a man named Francis L. McIntosh was brutally killed by a mob in St. Louis, Missouri. However, the rise of lynching was witnessed majorly after the American Civil War, where the whites in the United States of America felt the need to enforce their supremacy over the African Americans and, hence subjected the latter to brutal and inhuman lynching which acted as a tool of suppression.

Statistics show that from 1882-1968, a total of 4,743 registered cases of lynching occurred in the USA out of which 3,446
people belonged to the African American Community. False accusations of raping white women, murder, theft were some of the chief justifications given by the mob who lynched. A notable African American Journalist Ida B. Wells, was one of the very few people who took the initiative to expose the most prevalent myth about the black men raping white women. In a speech given by her in the National Negro Conference, she emphasised on three major points. First- “Lynching is a colour line murder”; Second- “Crime against women is the excuse and not the cause”; Third- “lynching is a national crime and requires a national remedy”.

The whites in the United states were acculturated and socialised into seeing blacks being tortured, abused, mistreated, burnt alive in front of many. No one questioned anyone or anything, for they believed that the blacks deserved it and black lives did not matter. History echoes with the fact that the African American community has lived in pain for many years and is still going through that pain day by day.

History of Lynching in India
India, a beautiful country is one of the most religiously and ethnically diverse nations in the world. With the Forty-second Amendment of the Constitution of India enacted in 1976, the Preamble to the Constitution asserted that India is a secular nation. Despite the Indian Constitution being secular and religiously tolerant, India has witnessed multiple cases of religious violence since its independence in the year 1947. The Partition gave rise to religious violence in the form of mob attacks. The victims of such attacks were the minorities in India as well as Pakistan.

Muslims, who constitute about 14% of the Indian population have faced brutal acts of mob violence since the partition and Independence. Another major cause of hate crimes in India is the deep rooted casteism. The Dalit or Scheduled Caste/Tribe segment of the Hindu population has been facing atrocities ever since they were classified as Dalits by the Aryans.

The gravity of the heinous acts towards the Dalits can be understood when one reads about the Khairlanji case. On September 29, 2006 four members of the Bhotmange family belonging to the Mahar community were killed by a mob of 40 people belonging to the politically dominant Maratha Kunbi caste in Khairlanji, a small village in the Bhandara district of Maharashtra. The Bhotmanges were stripped naked and paraded to the village square where the sons were ordered to rape their mother and sister. When they refused to do so, their genitals were mutilated and they were brutally murdered.

It is evident that religious violence in India has existed for a long time, but the phenomena of ‘lynching’ has witnessed a rise in the last decade. Of these, mob lynchings in the name of ‘Protection of Cows’ or “Cow vigilante” constitutes the most. Many vigilante groups say they feel empowered by the victory of the Hindu Nationalist BJP in the 2014 elections.

Khairlanji Massacre
https://en.wikipedia.org/wiki/Khairlanji_massacre
BBC News article

528 NAACP Report https://www.naacp.org/history-of-lynchings/
529 Ida B Wells Reported Speech ‘Lynching is color-line murder’: the blistering speech denouncing America’s shame
530 Khairlanji Massacre
531 BBC News article
new India” observes Gopalkrishna Gandhi, grandson of Mahatma Gandhi who worries about a second partition, a division this time not of the country but of the mind.532

Rise of Lynching in India
Since the past ten years, India has experienced an unusual rise of mob Lynchings. The horrendous act of beating or stoning a person to death publicly, escalated from the year 2014, the time when the Bharatiya Janata Party won the Lok Sabha elections. It was due to the rise in religious intolerance and influence of Hindu nationalist ideology on the masses that increased the instances of mob lynching across the country.

One of the striking incidents that shook the country took place on September 28th, 2015, in Dadri, Uttar Pradesh. Mohammad Akhlaq was accused of consuming and storing beef in his house and because of this accusation, Akhlaq, along with his two sons, was lynched by an enraged mob. The sons survived to live through the horror of that night their entire lives, however, the world lost another soul to lynching that day. Reason: a mere false accusation.

One of the cardinal principles of criminal law states that no one is guilty until proven. This is the reason why there is a procedural law regarding the illegal activities that take place in the society. This is the reason why we have honourable jurists to impose penal actions for the wrong done by others. But what happens when people take law in their own hands, set their court of law in public, and masses become mere spectators?

It leads to annihilation of law. The same rule of law that protects the sanctity of our country and its citizens.

According to an analysis conducted by ‘India Spends’ in June 2017, 97% of the attacks of mob lynching occurred after Prime Minister Narendra Modi won the 2014 Lok Sabha elections.533 More than 84% of the attacks were inflicted on Muslims and the rest were on Hindu, Christian, LGBTQ minorities and other vulnerable groups. What is horrifying is that most of the Lynchings were based on rumours. A mere hearsay was capable of inciting rage that killed or grievously injured the victim.

In June 2019, Amnesty International Organization published a report which documented a total of 902 incidents that took place between 2015 and 2019 which were based on hate crimes. A total of 619 and 612 incidents of hate crimes were forced upon Dalits and fuelled caste inequalities.

Out of those 902, a total of 113 alleged hate crimes were motivated by cow vigilantism, of which 89 were directed towards Muslims.534 The image ‘Figure 1’ below shows hate crimes committed across the country between September 2015 to June 2019 categorized according to the identity of victims.535

532 Quartz India article https://qz.com/india/1518868/lynch-mobs-in-india-are-sowing-the-seeds-of-another-partition/


535 Halt the Hate, Amnesty International India, http://haltthehate.amnesty.org.in/
The crime statistics further implicate the BJP led government, because the highest number of cases came from the BJP ruled states. Without any doubt, Uttar Pradesh was leading amongst others with 216 cases of hate crimes against vulnerable groups. The State of Tamil Nadu, Gujarat, Haryana, Rajasthan and Karnataka followed the list with 80, 79, 61, 59 and 48 incidents respectively. Shockingly, the highest number of alleged hate crimes took place between January 2019 to June 2019 in India. ‘Figure 2’ given below depicts the State wise data of crimes committed against minorities in the country.536

Rise of Cow Vigilantism

The onset of Bharatiya Janata Party in 2014 brought with itself a wave of religious nationalism and propagated hatred towards other factions of the society. The ideologies of few political leaders and their parties instituted a sense of pseudo nationalism in the minds of the majority Hindu class. This in turn, created fear in the minds of other minorities, which is why 98 percent of mob lynching incidents fuelled due to bovine related rumours, have occurred after 2014.

On 18 March 2016, two Muslim cattle herders were attacked and killed by a group of cow vigilantes while they were on their way to sell bulls in an animal fair that was being held in the State of Jharkhand. Mohammed Mazlum and Imteyaz Khan were wrongly accused of selling cattle for slaughter due to which they were miserably beaten to death.

536 Amnesty International India, supra note 4
These bovine related attacks across the country have been led by cow protection groups (Gau Rakshaks) supposedly affiliated with Hindu militant groups that have ties with the BJP. Hindus consider cows sacred due to which these cow protection groups have been boldly attacking minorities, mostly Muslims and Dalits all across the country.

According to a survey conducted by New Delhi Television (NDTV)\(^\text{537}\), there was a 500 percent increase in the use of communal divisive language between 2014 and 2018, 90 percent of which came from the elected members of the BJP. Their speeches had a common theme that revolved around cow protection, thereby creating a rift between Hindu and Muslim communities.

Rumour Has It
India has in various instances fallen prey to rumours since before independence. It was the rumour regarding the cartridges that instigated the first war for independence, popularly known as the ‘Revolt of 1857’. Nowadays, technology acts as a medium for wider and faster spread of rumours.

The Northeastern exodus in 2012, the Muzaffarpur Riots in 2013 and the lynchings that have taken place post 2014 have occurred due to rumours spread across social media platforms. It was in 2018, that the rise of fake news and messages that instilled violence among the masses increased rapidly.

A number of alleged hate crime cases were happening due to social media platforms, primarily Whatsapp and Facebook. The home delivery of hate messages against vulnerable groups on our phones is reason enough to incite a faction of people to project violence towards the accused. It is because of these social media platforms, young hearts are being filled with flames of hatred, they are being transformed into human bombs walking in our midst. Such human bombs trapped in the vicious circle of rumours become a participant of the crowd that kills a Pehlu Khan or Mohammad Akhlaq or Junaid Khan or any other innocent life that belongs to one of the vulnerable groups in the country.\(^\text{538}\)

Another reason for mob lynching has been the increase in amount of child-lifting rumours. On 16th April 2020, two Hindu Sadhus along with their driver were lynched by a group of vigilantes in Palghar district of Maharashtra.

The incident took place while the country was in complete lockdown and was instigated due to a Whatsapp rumour that was being spread among the people of the vicinity. Since 2014, there have been a total of sixty nine mob attacks due to child lifting rumours in which thirty three people have lost their lives.\(^\text{539}\)

In all these cases, the victims were assaulted on accusations that were later proved to be baseless. The Home Ministry in 2018 directed all the states to keep a check on rumours being spread through social media platforms.

---


social media. However, in the first six days of July itself, the country witnessed nine cases of mob violence over child lifting rumours. The image Figure 3 below depicts the number of cases of mob lynching related to rumours of child lifting as well as deaths occurred in the same between 2017 and 2018.\footnote{IndiaSpend, supra note 8}

Figure 3

Response of the Judiciary- Tehseen Poonawalla v. Union of India

To address the rise in mob lynching cases occurring across the country, the Hon’ble Supreme Court delivered its judgement in two writ petitions filed by Tehseen Poonawala and Tushar Gandhi.

The Hon’ble Court laid down certain guidelines pertaining to preventive, remedial and punitive measures in order to curb the atrocities of lynching. The first petition filed by social activist Mr. Tehseen Poonawala challenged the constitutionality of the “good faith” clauses laid down in cow protection legislatures where the action of private citizens are awarded legal immunity.\footnote{‘Cow Vigilantism’, Supreme Court Observer, https://www.scobserver.in/court-case/cow-vigilantism/cow-vigilantism-case-plain-english-judgment} The second petition was filed by Mr. Tushar Gandhi who sought the intervention of the Union Government to curb the increasing incidents of cow vigilantism. The three judge bench headed by Former CJI Dipak Mishra, comprising Justice A.M. Khanwilkar and Justice D.Y. Chandrachud, heard the petitions and on 22 July 2018, laid down certain guidelines for limiting the increasing incidents of mob lynching in India.

Former CJI Dipak Mishra stated that in Krishnamoorthy v. Sivakumar & Ors. it was held that “the majesty of law cannot be sullied simply because an individual or a group generate the attitude that they have been empowered by the principles set out in law to take its enforcement into their own hands and gradually become law unto themselves and punish the violator on their own assumption and in the manner in which they deem fit”.\footnote{Tehseen S. Poonawalla v. Union of India and Ors, (2018) 9 SCC 501} He also emphasized on the responsibility of the State Administration in association with the intelligence agencies of both the State and Centre to prevent recurrence of communal violence in part of the State.

The learned counsel for the petitioner Ms. Indira Jaising quoted Martin Luther King Jr. and stated that “the law may not be able to make a man love him, but it can keep the man from lynching him”. She stressed on identifying areas like highways where the crime could take place and implementing patrolling in sensitive areas during the night.
time. Mr. Hegde, learned counsel for one of the petitioners highlighted the need for preventive, remedial and punitive measures and placed reliance on the recent judgement rendered in Shakti Vahini v. Union of India & Ors.

Analysis and Implementation of the Judgement

The guidelines laid down under Section 153 and 295A of the IPC by the three judge bench in Tehseen Poonawala v. Union of India have been discussed below:543

(i) Appointing a Nodal Officer (NO), not below the rank of superintendent of police, in each district to function as the head of a special task force and to procure intelligence reports about the people who are likely to commit such crimes and keep an eye on people who are involved in spreading hate speeches, provocative statements and fake news.

(ii) Identification of sensitive areas in the village/district, where instances of lynching and mob violence have been reported in the recent past.

(iii) The Nodal Office has been directed to conduct regular meetings, in order to identify the existence of tendencies of vigilantism, mob violence or lynching in the district and take steps to curb the same.

(iv) It is the duty of the Nodal Officer to disperse the mob if it has the tendency to cause violence or disrupt public tranquility.

(v) Central as well as State Governments should broadcast messages and relevant information on radio and television and other media platforms, including official websites of the home department and police of states regarding lynching and mob violence and aim at preventing the occurrence of same in their respective areas.

(vi) It is the duty of the central and state governments to take steps to curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which have a tendency to incite mob violence and lynching of any kind.

The apex court further directed the State Governments to prepare a mob lynching compensation scheme for the victim within one month of the judgement. The Court also directed the Centre to form a specialized offence for mob lynching and allot adequate punishment for the same. The Supreme Court reflecting on the punitive measures held that a police officer who neglects his duties will have to face departmental action within six months.544

As a remedial measure, the court directed the jurisdictional police station to immediately lodge an FIR under the relevant sections of the Indian Penal Code, without undue delay. Surprisingly, in reference to the trial courts, the court held that the lower courts should award maximum sentence as provided for various offences related to mob lynching under the sections of the IPC.

A year later in July 2019, the apex court issued notices to the Centre and various State Governments asking them to submit a report of the steps taken by them towards implementing the measures laid down in the landmark judgement. A bench headed by the then Chief Justice of India Ranjan Gogoi sought responses from the Centre and various State Governments about a petition that was filed claiming the failure of implementation of guidelines laid a year

543 Supra note 11

www.supremoamicus.org 146
ago by the Hon’ble Court. However, the response of the Government was disappointing. Former CJI Dipak Mishra in the landmark judgement stated that “in the times of chaos and anarchy, the State has to act positively and responsibly to ensure the protection of the constitutional promises to the citizens. The horrendous act of mobocracy cannot be permitted to inundate the law of the land”. He held that the State cannot turn a deaf ear to the growing rumbling of its people, where its primary concern, quoting Woodrow Wilson, must ring with the voices of the people.

Tardiness of the State Governments
The Apex court vide its order dated 17 July 2018, directed the State Governments to assume the responsibility of legislating their own state laws within four weeks to curb the rising cases of mob violence. To much of our surprise, out of 28 states, only 11 states so far have acted in accordance with the directives of the Supreme Court. Almost two years have passed by and the lethargic effort of the State Governments has clearly shown their minimal concern regarding the rise of these odious crimes in their respective states.

Here is the list of the states that have taken measures in accordance of the issued guidelines:

Manipur
Manipur, a small state in the North East was the first to respond to the directives of the Apex court. In November 2018, the Governor of Manipur promulgated an ordinance in lines with the guidelines of the Apex court and soon after that the State Legislature passed the ‘Manipur Protection from Mob Violence Act’.

West Bengal
In August 2019, the Government of West Bengal had passed ‘The West Bengal (Prevention of Lynching) Bill, 2019’ which majorly incorporated most of the guidelines laid down by the Supreme Court. The bill proposes a maximum punishment of life imprisonment and fines ranging from Rs 1 lakh to Rs 5 lakh for any offences committed within the ambit of the act. It defines lynching as any attempt or act of violence by a mob on the “grounds of religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation, ethnicity, or any other ground”.

Rajasthan
In August 2019, the Parliamentary Affairs Minister Mr. Shanti Dhariwal had introduced the ‘The Rajasthan Protection from Lynching Bill, 2019’. The bill provides for life imprisonment and a fine from ₹1 lakh to ₹5 lakh to those convicted in cases of mob lynching leading to victim’s death. Abiding by the guidelines laid down by the apex court, the State Legislature also

---

545 Indian Legal Live, supra note 13
546 Tehseen S. Poonawalla v. Union of India and Ors, (2018) 9 SCC 501
empowers the State police chief to appoint a state coordinator of the rank of Inspector General of Police to prevent the incidents of lynching in the State with the district Superintendents of Police acting as the district’s coordinator, to be assisted by a Deputy Superintendents of Police, for taking measures to prevent incidents of mob violence and lynching.

As stated by the Parliamentary Affairs Minister Mr. Shanti Dhariwal - “After 2014, 86% cases of mob lynching reported in the country happened in Rajasthan. The State is considered a peaceful State and such incidents have put a blot on it”.

Uttar Pradesh
According to Amnesty International India’s ‘Halt the Hate’ report, Uttar Pradesh has recorded the highest amount of hate crimes between September 2015 to June 2019. The total number of crimes in the aforesaid period was 218. Despite the increasing rate of crimes in the state, the government of Uttar Pradesh is yet to come up with an Anti Lynching law.

In July 2019, a 128 page report was drafted by the Law commission of U.P chaired by Justice (Retd.) A.N Mittal and submitted to the Chief Minister of Uttar Pradesh. According to the records, 50 incidents of mob violence have taken place in the State since 2012. Eleven of the 50 victims have died in the attacks. Half of these incidents dealt with cases of major assault, including those by cow vigilantes. Due to the rising cases Sapna Tripathi, the Secretary of the Law Commission, observed- “In the backdrop of this situation, the commission took up the study suo motu and accordingly recommended the State government the need for having a comprehensive law to combat lynching,”

Bihar
Till date, the state government of Bihar has not passed any law regarding the lynching. The state has remained ignorant towards the directives issued by the Apex court.

However, instead of legislating, we see the state adopting a different approach to deter a capable offender. The State government has announced that those accused in lynching cases will no longer be eligible for government jobs and if in case the offender already holds a position in a government office, then they will be removed from the same. Approaches like these may deter people to some extent but it cannot rule out the necessity of a permanent law.

Need of the Hour
As there is no central legislation on lynching, the odious act of lynching is currently governed by the relevant provisions of the Indian Penal Code which are: Section 302 (Murder), Section 307 (attempt to murder), Section 323 (Causing voluntary hurt), Section 147 (Rioting), Section 148 (rioting with deadly weapon), Section 149 (Unlawful Assembly).

One may ponder as to why do we need an additional law for lynching when there are provisions of IPC that can be applicable to a case of lynching and enacting a separate law would not only increase the amount of laws but could also result in overlapping of laws. To answer this, it is weighty to mention that the enactment of The Scheduled Castes and Tribes (Prevention of Atrocities) Act has resulted in decrease in the number of crimes against the SCs and the STs as the act clearly lays down the punishment for the offenders.

A clearly laid down law on a subject clears the ambiguity and acts a deterrent for the
future offender. In 2017, the National Campaign against Mob Lynching proposed a new law called Manav Suraksha Kanoon (MASUKA) to tackle the problem, however, it could not emerge as a solid law and still awaits its implementation.

Article 21 enshrined in Part III of the Indian Constitution states that, “No person shall be deprived of his life or personal liberty except according to procedure established by law” which lays the foundation for other rights on similar lines. Life is a prerequisite for other available rights to enjoy. For a person whose life and liberty have been deprived, for him, all other rights would be meaningless as the latter only adds quality to the former. Therefore, Article 21 is considered to be the primary right and all the other rights help in the enhancement of life of an individual.

Recent events of lynching have portrayed our democratically elected government as a mere spectator. The statistics clearly shows the dire need of lynching laws with stringent penalties because the act of spreading hate towards a particular community, instilling fear in the minds of vulnerable groups and ultimately bashing them to death violates the fundamental rights of victims.

As stated in Shakti Vahini v. Union of India547, the bench laid stress on the unconstitutionality of mob lynching in reference to Khap Panchayat which has a similar structure as that of a mob. The bench stated that, “The ‘Khap Panchayats’ or such assembly should not take the law into their own hands and further cannot assume the character of law implementing agency, for that authority has not been conferred upon them under any law. For example, when a crime under the Indian Penal Code is committed, an assembly of people cannot impose it. They have no authority. They can neither affect others’ fundamental rights nor cover up their own illegal acts”.

Universal Declaration of Human Rights propagates basic and fundamental human rights such as inherent dignity and equal protection by law. Article 7 of UDHR provides for equal protection before the law and protects the citizens against any form of discrimination. The Indian Supreme Court in Railway Board v. Mrs.Chandrima Das held that the basic human rights mentioned in the UDHR have also been inculcated in Article 21 of the Indian Constitution.548 Therefore, the Government is under strict obligation to follow the rules of the UDHR and protect its citizens against atrocious instances of mob lynching that blatantly violate human rights.

Moreover, violation of international obligations does not end here. India further violates Article 20(2) of the International Covenant on Civil and Political Rights and Article 2 of International Covenant on Economic, Social and Cultural Rights which prohibit all forms of racial or religious discrimination or any kind of incitement leading towards discrimination and violence.549

547 Shakti Vahini v. Union of India (2018) 7 SCC 192
548 Gaurav Chaliya & Suvam Kumar, ‘Call for Red Letter- Explicating the Human Rights in the Backdrop of Mob Lynching’, Groningen Journal of International Law,
549 Groningen Journal of International Law, supra note 22

The instances of mob lynching are a big blot on our democracy and judiciary.

Our country, an epitome of cultural and religious diversity is leaning towards religious intolerance paving way for hate crimes against minorities. The very base of our country, our ideals of secularism are being defied and challenged by vigilante groups and various political parties. The media focuses its attention towards increasing the Hindu-Muslim gap and has been igniting hatred between the communities since the onset of 2014.

In fact, the Supreme Court in Subramaniam Swamy v. Union of India admitted to the fact that a crime is a moral wrong and which is inimical to the general moral sense of the community. The court stated, "A crime affects the society. When we talk of society, it is not an abstract idea or a thought in abstraction. There is a link and connection between individual rights and the society; and this connection gives rise to community interest at large. It is a concrete and visible phenomenon. Therefore, when harm is caused to an individual, the society as a whole is affected and the danger is perceived".

Lynching is not just a crime against the victim, the act also impacts the community at large to whom that person belongs. In an article, Indira Jaising, an Indian lawyer who is noted for her legal activism in promoting human right causes observes- "The public nature of the crime is intended to make it an impact crime, to teach not only the person lynched a lesson but to make an entire community afraid of exercising its civil rights".  

In a country like India, whose constitution guarantees every citizen fundamental right such as Right to Equality, Right to Freedom, Right to Freedom of Religion, no person should feel any sense of inferiority or fear. Vigilante groups have mushroomed over the years and the government is seen shirking its responsibility towards curbing the same. These groups claim to have a strong network of informers and say they "feel empowered" because of the ruling Hindu nationalist BJP government in Delhi. Statements like these draw a question mark on the executives.

The question arises: Why isn’t there a law already? Why is it taking so long for the State governments to pass a law despite having clear directives from the Supreme Court?

The silence of the government on this subject is worrisome for the country. One has to note that the enactment of a law on this subject is the need of the hour and the Centre should be answerable for its negligent attitude towards hate crimes.

---

550 Economic Times article Why government should make new law on lynching

551 BBC article Why the humble cow is India's most polarising animal
UNIFORM LAWS AND ANALYSIS OF FAMILY LAW PAPER BY LAW COMMISSION (2018)

By Anushree Belwariar
From Symbiosis Law School, Hyderabad

RESEARCH OBJECTIVES
The main objective of this research paper is to critically analyse the need of a uniform civil code in the country and also to discuss and point down issues and challenges which arise/may arise in its implementation. Hence following are the research objectives:

- To find out the need for implementation of a uniform civil code throughout the country.
- To point out the challenges in implementation of uniform civil code as well as analyse arguments against it
- To analyse the family law paper of 2018 by law commission of India
- To find out the reforms in the country which has taken place over the years pertaining to UCC

RESEARCH QUESTIONS
The central issues which arise for achieving the objectives of this research study are as follows:

- Whether there is a need for implementation of a Uniform Civil Code in the country?
- Whether there exist issues in implementation of a uniform civil code which can be regarded as challenges?
- Whether the law commission of India supports or disregards the Uniform civil Code at the present stage?

INTRODUCTION
India is the world’s largest democracy and one of the most populous nation in the world. India is a country which is known for its rich culture and diverse group of people. India follows secularism. There exist people from various religion in the country for example Hinduism, Islam, Christianity, and Buddhism are followed by the majority. The people of different religion follow their own personal laws and are governed by them in matters of marriage, divorce, succession, adoption etc. Since every other religion has its own set of rules and personal laws hence justice provided in different cases of different religious groups may not be same and uniform. The rules and personal laws of one religion aren’t same as the others therefore when deciding in matters pertaining to personal laws there is no confirmation that justice is served in uniform manner.

India is also known as a secular state. But in every religion, there exists some evils which are discriminatory in nature towards a gender. But if the country wants to ensure its secularism in true sense then there is a need to form a uniform civil code which will ensure this secularism. The Uniform civil code will govern people from all walks of life irrespective of their religion and ensure equal justice and duties and responsibilities to all.

History of a uniform civil code finds its place during the constituent assembly debates. The subcommittee formed for deciding upon the fundamental rights and its distribution concluded that the fundamental rights shall be divided into two parts which are (i) justifiable fundamental rights and (ii) non-justifiable fundamental rights. The uniform civil code was put in the latter which meant it was the part of the
fundamental rights which were not enforceable by courts.\textsuperscript{552}

On the 4\textsuperscript{th} of November 1948 Dr Ambedkar presented a draft of the constitution of India where the uniform civil code found its place in the Directive Principles of State Policy in article 35\textsuperscript{553}. On the 23\textsuperscript{rd} of November 1948, the topic of a Uniform civil code was debated upon and the constituent assembly was divided among two groups where the Muslims opposed the idea of a uniform civil code and others were in the favour of it and the Muslims believed that those who has their own personal laws should not be obligated to give them up\textsuperscript{554}.

In 1951 the topic concerning a uniform civil code throughout the country came up again because of the codification of the Hindu personal laws. Pandit Jawaharlal Nehru believed that it was not the right time to codify the Muslim personal laws as well as the Muslim community was not ready for such reforms just yet. He feared that a reform at scale could give a way to a civil war in the country\textsuperscript{555}.

Discussions on whether a uniform civil code should be brought up in the country were silent until the year 1981. In the year 1981, in the case of Mohd. Ahmad Khan V Shah Bano Begum and Ors\textsuperscript{556}. The facts of the case were as such that the husband divorced his 62 years old wife and only provided her maintenance of 5400 rupees as per the Islamic personal law. The wife in return filed a case against her husband under section 125 of the Code of criminal Procedure and stated that she should be paid a sum of 500 rupees per month. The court decided in the favour of the wife and held that a divorcee and a Muslim woman come within the purview of section 125 of the code of criminal procedure. The court stated that national integration is possible only removing different loyalties to laws which have conflicting ideologies.

In Ms. Jordan Diengdeh V S.S. Chopra\textsuperscript{557} the question of law arose whether the wife in this case divorce her husband on the grounds of his impotency. The court expressed its displeasure regarding the lack of uniform codes in the country to govern such matters.

In the case of Sarla Mudgal V Union of India\textsuperscript{558} a Hindu man converted into Islam for the purpose of marrying more than once. The question of law was to decide the validity of the second marriage. The judgement of this case encompasses serious viewpoints in support of a uniform civil code. The judgement stated when more than eighty percent of the personal laws (referring to Hindu personal laws) has been codified hence there should not exist any further delay for bringing a uniform civil code in the country.

In the case of Shabnam Hashmi V Union of India\textsuperscript{559} through the facts of the case the question of law arose that whether a Muslim woman is entitled to adopt a child.

\textsuperscript{552} Constituent Assembly Debates, Centre for law and policy research, (9:00am January 17 2020)
\textsuperscript{553} Ibid
\textsuperscript{554} Supra note 1
\textsuperscript{555} Supra note 1
\textsuperscript{556} Mohd. Ahmad Khan V Shah Bano Begum and Ors, 1985 AIR 945 (India)
\textsuperscript{557} Ms. Jordan Diengdeh vs S.S. Chopra, 1985 AIR 935 (India)
\textsuperscript{558} Sarla Mudgal V Union of India AIR 1955 SC 1531 (India)
\textsuperscript{559} Shabnam Hashmi V union of India, (2014) 4 SCC 1 (India)
The court held it affirmative and stated that it is the duty of every individual and also the state to honour the personal laws but it a legislation cannot be hampered when a conflicts arises between legislations and personal laws. The need for a uniform civil code was brought up in this case as well to conclude such irregularities arising out of no uniformity in personal laws.

The third phase of the Uniform civil code started in the year 2015 with the case of Shayara Bano V Union of India. The Supreme Court divided the case into two issues that are: uniform civil code and Triple Talaq. Though the practice of triple talaq is now prohibited but there is no uniform law yet to govern all the personal laws of the nation.

NEED FOR UNIFORM CIVIL CODE
The topic of codification of personal laws of different religious groups have always been a very sensitive topic and throughout its history has seen many protests, even when the Hindu personal laws were being codified, it witnessed strong opposition voices.

The purpose of a uniform civil code in the country is to bind the country together as a whole by providing same laws for every citizen, irrespective of his or her faiths in different deities, for the purposes of marriage, adoption, divorce, succession. Article 25 of the constitution of India provides freedom of religion. It guarantees every person the right to freedom of conscience and the right to profess, practice and propagate any religion (subject to public morality, health, etc.) hence the issue arises whether a uniform code for all will hamper this right provided by the constitution of India. Due to the huge population and diversified groups of people believing in different and unlike faiths it becomes difficult for the legislature to bring a code which can govern everyone equally without conflicting with the actual personal laws. A uniform civil code will not only answer India’s response to how its citizens accepts their own diversity but also will focus on gender issues pertaining to personal laws of different religion.

In Islam, the man can marry up to four times but his wife cannot and in case she chooses to do so she will be treated as an outcast and impure and in Hinduism, women are not coparceners (except in few states). This is one example of the discriminatory nature of the personal laws towards the feminine gender. Hence there exists a need for a uniform civil code to solve gender issues in the nation.

Gender justice is a very significant aspect when it comes to implementation of a uniform civil code. Especially when a uniform code has to be implemented in India. The patriarchal notions of the societies are not a foreign culture in the country. The male dominance in the country and the patriarchal discourse of powers via the personal laws gives rise to a need for a uniform civil code.

In our country, it is agreed that females, girls and women of different religion as well as different caste reside but, in the end,

560 Shayara Bano V Union of India (2017) 9 SCC 1 (India)
561 Krishnadas Rajagopal, what is the debate on Uniform Civil Code all about, T.H., September 09, 2018
563 Uniform civil code, Drishti, October 07, 2019 https://www.drishtiias.com/to-the-points/Paper2/uniform-civil-code
by hook or crook all of them face the same problem. Women are denied justice, respect and dignity and they are not aware of their rights which has been noticed in multiple occasions. The numerous numbers of family and personal law towards various aspects is confusing as well as different hence the class of illiterate women generally do not differentiate in what one calls culture, custom, religion, crime and patriarchy. Why shall be a Islam Practicing Aneesa be at a more disadvantageous position when compared to a Hinduism practicing Sita?

A woman is the one who gives birth to her child but under the Hindu personal laws before the amendment act, a woman had no right to adopt even if gained the consent of her husband. There were two problems with this why shall a woman be forbidden from adopting a child and if so why shall she need the permission of her husband. In the case of Malti Ray Chowdhury v. Sudhindranath Majumdar the court held the adoption made by a Hindu married woman as invalid. The adoption in the present case was made in presence of the husband and at no point was any objection raised by him while physically handing over the child still the court did not approve of the same.

There exist irregular laws with respect to gender in Muslim personal laws also. For example, a man following Islam can marry a more than one woman at once (up to four women in a marriage) but a Muslim woman is denied the same right. Under their personal laws if a woman marries more than one man she will be made liable for bigamy and shall be punished under the Indian Penal Code, under section 494.

Above mentioned two examples from two of the most practised religions of the country is illustrated to give a hint of understanding of the double standards which are prominent in the personal laws followed in the country. Many customs which are not given the eligibility of laws and legislations in the country are a part of personal laws of various religious groups present in the country. But how many of these are actually made in good faith with respect to honouring and respecting the female class and making them feel like an equal instead of treating them as mere objects in a patriarchal upbringing?

Gender equality is not the only reason why a uniform civil code should be enacted in India but there exist various reasons which point towards the need for a uniform civil code in the country. Enforcement of a uniform code would ensure national integration as there will be no discrepancies arising out of varying decisions of the court of law pertaining to different religions. The nation would emerge as one force as detachment between different assemblies would decrease significantly. The sense of unity among the citizens of the country would increase. The reason India is known as a diversified nation is because of the huge religious and culture integrity it offers to the people of the nation. Religions like Hinduism, Islam,
Sikhism, Christianity Buddhism etc are prevalent in the nation and offers various customs similar yet different from each other. The nation will be deemed as a national integrated place only after all the people of the communities present in the country start following the same set of rules as it will unite every citizen of the country and make them equals in the eye of law.\(^{571}\) Unity among the people will be guaranteed only when the set uniform rules are applied to everyone in matters relating to marriage or divorce or adoption or inheritance or every one of the listed subjects\(^{572}\). Such national integration or in standard terms the uniform codes in matters pertaining to above mentioned subjects shall be made irrespective of the religion and caste of the people who are going to follow it\(^{573}\). And also, litigation arising out of divergent personal laws would decrease since everyone would be governed by the same legislation. A uniform civil code poses as an ideal solution to protect citizen’s rights in the country as heir fundamental and constitutional rights would be preserved and safeguarded.

Many countries which are termed as developed nations and follow the path of modernity have a uniform civil code\(^{574}\). The implementation of a uniform civil code shall eradicate the ruckus of politicians exploiting the general public and gaining votes and winning elections in the name of religion. Though there exist rules and regulations which forbids the politicians engaging in religious norms and supporting a particular religious group or spreading their religious propaganda in the name of culture and religion but there has been instances in the recent past where the people holding sufficient power to influence a great and large class of public have used religious tools to manipulate them and gain their confidence in the name of religion.

If a uniform civil code is implemented in the country it would signify that the nation has moved ahead of the religious encumbrances\(^{575}\) and has made peace with the fact that everyone is equal and can justify their living by equating their personal and religious rights with others irrespective of the caste, creed, gender, religion followed by one. A uniform civil code of personal laws will ensure that people and their differences do not arise based upon the laws which govern them in family matters like marriage, inheritance, divorce, adoption etc.

The prime minister of the country has stated previously that his government will take steps to ensure that a uniform civil code is implemented in India as soon as possible and has also ensured that such implementation would not mean that people of all the religion follow the Hindu codified law\(^{576}\).

### ISSUES AND CHALLENGES

Even while the discussions on uniform civil code took place during the constituent assembly debates mainly two objections

---


\(^{572}\) Ibid

\(^{573}\) Supra note 16

\(^{574}\) Supra note 16

\(^{575}\) Supra note 16

were raised\(^{577}\) which are as follows: firstly, that the implementation of a uniform civil code in the country will be violative of the fundamental right of freedom of religion\(^{578}\) and secondly that it will affect the minority groups present in the country\(^{579}\).

On the downside, many fears that a uniform code for everyone would pose as a threat for minority groups and that it will swallow their ethnicity, customs and culture. The people opposing the inclusion of a uniform civil code believe that it is unconstitutional as it will take away the rights pertaining to religion and culture which was envisioned by the framers of the constitution of India. A secular state can be interpreted in two ways. One that the state has a uniform civil code that is subject to everyone and the second that a state in which different ethnicities can enjoy and follow their personal faiths and beliefs.\(^{580}\)

In the year 2019, the minority groups of the country have voiced their opinion of being against the idea of a uniform civil code being applied in India\(^{581}\). Zayafab Jilani, a member of the All India Muslim Personal Law Board has expressed his views and stated that the honourable Supreme Court shall not give any government advice about the technicalities of the uniform civil code\(^{582}\).

Another argument raised against the implementation of a uniform civil code throughout the entire territory of the country is that it will affect the secularism\(^{583}\) present in the nation and will also take a toll on diversified culture present in India.

India as a country takes pride in its diversified culture. It is known as a land of cultural integrity and such diversity can be continued in the nation only when all the citizens of the country as well as the central and the state government learn to respect the customs and practices followed by minority communities of the country\(^{584}\) and also that the people and authorities in power give such minority communities enough space to exist while following their own rituals and customs. The government must respect the sentiments of the minorities present in the country and take it into consideration while deciding upon the status of a uniform civil code in the country\(^{585}\).

The idea of channelizing the personal laws into one single code will snatch the unique identity each of the community holds and will force them to follow a set of rules which may or may not be consistent with the actual religious personal laws. In the case of S. R. Bommai v Union of India\(^{586}\) the apex court of the country held: “The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is part of the

\(^{577}\) d. c. manooja uniform civil code: a suggestion vol. 42 journal of the indian law institute 452, 448 – 475 (2000)
\(^{578}\) India Const, Art 25
\(^{581}\) TP Sooraj, Majority of minorities are against the imposition of uniform civil code, TNIE, September 15th, 2019

\(^{582}\) Ibid
\(^{583}\) Anubhav Pandey, arguments against implementation of Uniform Civil Code, Ipleaders Intelligent legal solutions, June 16, 2017 https://blog.ipleaders.in/arguments-implementation-uniform-civil-code/
\(^{584}\) Ibid
\(^{585}\) Supra note 28
\(^{586}\) S. R. Bommai v Union of India, 1994 AIR 1918 (India)
fundamental law and basic structure of the Indian political system."

The minorities have also raised the issue that on what basis will it be decided that which laws are needed to be reformed and which laws can exist independently. How will the distinction between good and bad be decided? For removal of all the alleged wrong personal laws will the people be forced to give up all of their personal laws? Whichever laws the government try to abolish, it will have to justify it on the basis of humanitarian grounds taking into consideration the human rights involved with it. The government will have to take care of the sentimental values attached to a specific personal law.

The uniform civil code discussions in the country are very politically driven. And many believe that by bringing the uniform civil code the nation would turn towards propagating “hinduvta” that is the Hindu ideology and minority social and cultural groups would lose their value. Several political parties’ belief that implementation of a uniform civil code throughout the entire country would be virtually impossible the reason being the rich and diverse cultural of people present in the country. Since not every group would agree to practice a uniform law and not everyone would agree to let go of their personal laws as these laws hold significant value in someone’s respective religion.

The Muslim community oppose the implementation of a uniform civil code in the country stating that its imposition would be equivalent to completely disregarding the personal laws states under Islam in the Holy Quran and it would be an irreversible change resulting into causation of damage to the personal laws of the above-mentioned religion. Many other minority communities are in support of this stance in order to stand up for the faith which they believe in.

The uniform civil code will have to be following the human rights. Thus, it will have to segregate the goods and bad in every religion and offer a solution which is accepted by all. Even after India achieved its freedom almost six decades back, the uniform civil code still is one of the most controversial issues in the country and continue to be so.

FAMILY LAW PAPER BY LAW COMMISSION OF INDIA (2018)
The law commission of the country has taken a vast amount of time, two years to be precise to put forth its view on the need of reforms and a uniform civil code in the country. Over the span of these two years (2016 to 2018) the commission has consulted various papers on this subject matter and finally came to a conclusion in the month of August of 2018. The paper has given numerous recommendations and has focused on the agenda of the uniform civil code. It gives emphasis to the point that it is necessary to preserve the religious and cultural rights of the minority groups of the country and their interests should be taken as one of the important issues for the purpose of forming a uniform code. The law commission of India believes that the legislature should focus on the discriminatory practices in various personal laws and should pass laws and legislations to prevent them but at this point of stage in

587 Supra note 28
588 Anubhav Pandey, Arguments against implementation of uniform civil code, Ipleaders, (9:10pm 17th Jan 2020)
the current social, economic and political scenario, the need for a uniform civil code is neither just nor desirable.\textsuperscript{590}

The law commission has urged and laid importance on the fact that the government and the legislature shall firstly sought to increase the equality among the people of different class and gender rather than jumping on the subject of equality among different and diverse communities in the country.\textsuperscript{591} The law commission has dealt with personal laws of different religion which are discriminatory in nature rather than focusing on the mere idea of a code which is uniformly applied on everyone.\textsuperscript{592} The diversity which the country has to offer should be respected and be celebrated and it shall be done in such a way that comparatively weak parts of the societies and communities there in shall not feel that they are being derailed and their personal rights are being snatched away from them as resolving difference in personal laws does not mean that one should be abolished and the other shall prevail.\textsuperscript{593} Hence the commission is dealing with laws whose nature is discriminatory in nature rather than imposing an undeviating legislation all together.\textsuperscript{594}

There exists norms and rituals which are looked down upon but are still prevalent in the society as they are being followed from centuries and are treated as customs but these social evils shall be eradicated from the purview of respective personal laws of different religions and beliefs. Though the personal law may state that a practice which is discriminatory in nature is essential to the personal law, still it should be erased and eradicated in the interest of the people who will have to suffer. The landmark judgement of Shayara Bano v Union of India,\textsuperscript{595} where the honourable Supreme Court of India, abolished the practice of Triple Talaq and deemed it to be unconstitutional, is the first step among many others where there shall be reforms in personal laws which are discriminatory in nature.

The law commission also asserts the importance of personal laws and states that it is necessary to preserve the sanctity of such laws. But the laws which are in contravention with the fundamental and constitutional rights of a citizen shall not be provided such safeguard. The law commission has suggested various changes which can be brought by amendments in personal laws and such amendments shall be made where it is necessary and also that amendments and suggestions are not limited to the religious personal laws of different faiths but also for legislations like the Special Marriage Act of 1954.\textsuperscript{596}

Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.

It has been seen in the recent years that most of the countries present in the world are

\begin{itemize}
\item \textsuperscript{590}Raghu Ohri, Unuform Civil Code: Neither Necessary nor desirable: law panel, ET, August 31, 2018
\item \textsuperscript{591}Shayara Bano v Union of India, AIR2017SC609 (India)
\item \textsuperscript{592}Consultation paper on reforms of family law, Law commission of India, Government of India, 16, 1-185, August 2018
\item \textsuperscript{593}Consultation paper on reforms of family law, Law commission of India, Government of India, 16, 1-185, August 2018
\end{itemize}
having a holistic view and are progressing towards identification of the differences. These differences in various religions and communities present in the country gives the nation the integrity it boasts and as well as is the key to the uniqueness present in India. The difference does not divide the citizens of India but in reality is a tool for increased democracy. Since until now the consensus on a uniform civil code has not been reached so it is in the interest of the state and its people to protect each individual’s personal laws.

REFORMS IN PERSONAL LAWS

In the colonial period, the people practicing Hinduism were governed by the Hindu Schools of Law which are Mitakshara and Dayabagha. But since these schools didn’t apply uniformly in the country, different groups of Hindu people derived their own personal laws. Muslim personal laws also had two school, namely Shia and Sunni, though both of it derived the knowledge from only one source that is the Holy Quran. Christians and Parsi personal laws were codified.

Dr. Ambedkar who was the first law minister of Independent India purported the idea of codifying the Hindu Personal Laws and subsequently the following acts came into existence within a few years of Independence:

- Hindu Marriage act, 1955,
- Hindu Adoption and Maintenance Act, 1956,
- Hindu Minority and Guardianship Act, 1956,
- Hindu Succession Act, 1956

From the year 1950 to 1956, the Hindu Personal Laws were codified and through it replaced all the personal laws which were not uniform in nature. Though Dr. Jawaharlal Nehru believed that the Muslim community was not ready for such unification of laws pertaining to the political scenario of the country, he believed that it could be a way of igniting a civil war in the country.

The next reform pertaining to the family and personal law in the country took place in the year 1986. Muslim Women (protection of rights on divorce) Act came into force after the Shah Bano Case. The act safeguarded the rights of Muslim women in terms of maintenance and situation after divorce.

An act which is uniformly applied throughout the country on every citizen of India is the Special Marriage Act of 1956. This act enabled people marry outside their religion without interchanging or renouncing their own religion or the faith which they followed and have been brought up in.

The law commission report of the year 2018 stated that presently there exist no need in India to enact. In the year 2019, law against Triple Talaq was passed which is a historic moment for reforms in the Muslim Personal law.

CONCLUSION

Though there exist a positive side to the implementation of a uniform civil code in the country but it does not out weighs the downfall which are there. To respect one’s

597 Consultation paper on reforms of family law, Law commission of India, Government of India, 7, 1-185, August 2018
599 Ibid
600 Christian Marriage Act, 1987 and Indian Divorce Act, 1869
601 Supra note 37
602 Mohd. Ahmad Khan V Shah Bano Begum and Ors, 1985 AIR 945 (India)
personal and religious rights shall be taken into consideration while deciding upon such matter. Regarding questions raised for biased and discriminatory practices in different religious laws, the answer to it is amendments in those specific discriminatory personal laws instead of imposition of a uniform civil code on everyone.

Even the law commission of India in the year 2018 has concluded that at this stage the need for a uniform civil code is not required. It is ambiguous to enforce one legislation on every one and thus depriving them of their personal laws. Personal laws also signify the religious history and customs which have been carried on from centuries and if a uniform code is brought into existence then such histories will be vanished and with it the religious ethnicities will also demolish.

**BIBLIOGRAPHY**

Books referred:

Online sources:
- Uniform civil code, Drishti, October 07, 2019 https://www.drishtias.com/to-the-points/Paper2/uniform-civil-code
- Anubhav Pandey, arguments against implementation of Uniform Civil Code, Ipleaders Intelligent legal solutions, June 16, 2017 https://blog.ipleaders.in/arguments-implementation-uniform-civil-code/
- Anuja, Gyan Verma, Law Panel Tables Consultation Paper on reform in Family Law, LivMint, August 31, 2018
- Raghav Ohri, Uniform Civil Code: Neither necessary nor desirable: law panel, ET, August 31, 2018
- Krishnadas Rajagopal, what is the debate on Uniform Civil Code all about, T.H., September 09, 2018

**Newspaper articles:**
- TP Sooraj, Majority of minorities are against the imposition of uniform civil code, TNIE, September 15th, 2019
- Anuja, Gyan Verma, Law Panel Tables Consultation Paper on reform in Family Law, LivMint, August 31, 2018
- Raghav Ohri, Uniform Civil Code: Neither necessary nor desirable: law panel, ET, August 31, 2018
- Krishnadas Rajagopal, what is the debate on Uniform Civil Code all about, T.H., September 09, 2018

**Research Papers and Articles:**
- Liela Seth, Uniform civil code towards gender justice, Volume 31, India international centre quarterly, 49, 40-54 (2005)
- d. c. manooja uniform civil code: a suggestion vol. 42 journal of the 160ndian law institute 452, 448 – 475 (2000)
- Consultation paper on reforms of family law, Law commission of India,
Government of India, 7, 1-185, August 2018


**Statutes:**
- Constitution of India, 1950
- Christian Marriage Act, 1987
- Indian Divorce Act, 1869
- Hindu Marriage act, 1955,
- Hindu Adoption and Maintenance Act, 1956
- Hindu Minority and Guardianship Act, 1956

**Cases:**

- Mohd. Ahmad Khan V Shah Bano Begum and Ors, 1985 AIR 945 (India)
- Ms. Jordan Diengdeh vs S.S. Chopra, 1985 AIR 935 (India)
- Sarla Mudgal V Union of India AIR 1955 SC 1531 (India)
- Shabnam Hashmi V union of India, (2014) 4 SCC 1 (India)
- Shayara Bano V Union of India (A17) SCC 1 (India)
- Malti Ray Chowdhury v. Sudhindranath Majumdar A.I.R. 2007 Cal. 4
- S. R. Bommai v Union of India, 1994 AIR 1918 (India)

****

www.supremoamicus.org
IMPORTANCE TO BLOCKCHAIN TECHNOLOGY

In layman terms, Blockchain is a chain of blocks that contains information. It was originally described in 1991 by Stuart Haber and W. Scott Stornetta who worked to build a cryptographically secured chain of blocks that was originally intended to timestamp digital documents so that it is not possible to tamper with them. However, it is in 2008 that the Blockchain History started to gain relevance when this unused concept was adapted by Satoshi Nakamoto (the name used by pseudonymous person or persons) who developed bitcoin, authored the bitcoin white paper, and created and deployed bitcoin’s original reference implementation. However, the identity of Nakamoto has remained a secret and one of the internet’s most tantalizing mystery.

Unlike the centralized fiat currency payment systems which were necessary to keep a track of spending and prevent double-spending of the same unit of currency, the technology behind the bitcoin was to distribute the ledger containing all the information among each user in the network. This is the reason it is also called ‘distributed ledger technology’.

It is in its early stage just like the internet was in the 90s and is indisputably capable of being as big as the internet. It isn’t the used case of the internet rather it is as fundamental and parallel to the internet. It possesses the potential to revamp currently existing processes to unlock new sources of efficiency and value. It is capable of revolutionizing interactions between governments, businesses, and citizens in a manner that was unfathomable just a decade ago.

Given the scale, diversity, and complexity of processes involved in the delivery of varied public services, the governance in India faces multiple and unique challenges. Thus, Blockchain Technology offers unique possibilities for addressing issues relating to improving governance.

Andhra Pradesh is the first state in the country to introduce blockchain in land records and is also setting up a Blockchain Centre of Excellence to set up India’s first Blockchain state. Other states like Maharashtra, Karnataka, Kerala, and Rajasthan are also following the lead. Most of the Financial Institutions, Tech giants, and MNCs have also started exploring its application not only in India but all across the world.

MODUS OPERANDI OF THE BLOCKCHAIN

To comprehend the applicability and legal implications of blockchain technology it is important to understand how it works. It is a ledger of transactions i.e. a diary which is almost impossible to forge. Unlike physical ledger which is typically maintained by a centralized authority, blockchain technology is a distributed ledger that resides on each participant’s device. Each block contains some sort of information (data), the hash of the block, and the hash of the previous block. Data stored inside depends on the type of blockchain for example Bitcoin contains the details about the transaction. The hash is the fingerprint of the block as it identifies the block and all of its contents and is always unique. Once a block is created, its hash is being calculated therefore a change in something inside the block will cause the hash to change. The hash of the previous block effectively creates a chain of blocks and it is this technique that makes it so secure.

So, a change in a single block will make all the following blocks invalid. But using hashes is not enough to prevent tampering since computers these days are highly fast which can calculate thousands of hashes per second so you could effectively tamper with a block and recalculate all the hashes of other blocks to make your bitcoin valid again so to mitigate this, blockchains have something called proof-of-work. It is a mechanism that slows the creation of new blocks. In case of bitcoins it takes about ten minutes to calculate the required proof-of-work and add a new block to the chain, this mechanism makes it very hard to tamper with the blocks because if you tamper with one block you need to recalculate the proof-of-work for all the following blocks so the security of a blockchain comes from its creative use of hashing and the proof-of-work mechanism. But there are more ways by which blockchain secure themselves and that is by being distributed instead of using a central entity to manage chain it uses a peer to peer network and everyone is allowed to join. The ledger copy of each individual is updated on the completion of a transaction or a set of transactions. The device of each participant is referred to as a ‘node’, which is a part of the network of nodes. It is unique because every node must authenticate every transaction in the network. This is why when a new node joins the network, the entire record of transactions is downloaded onto its system.

APPLICABILITY ACROSS THE INDUSTRIES

Most of the institutions offering financial services have been involved in exploring Blockchain technology in some or the other way and many other industries have also started to realize its potential as well as the new opportunities that it can create. Although cryptocurrency is the first application of Blockchain technology, it is not the only one.

Some of its possible applications are:

- Financial Services/Fintech: The banking industry is a huge potential market and has been investing in blockchain to simplify its record-keeping for payments.


Telecom Industry: The TRAI in July 2018 notified the TCCPR Regulations which mandates the usage of DLT by telecom operators to solve the problem of unsolicited commercial communications.

Smart Contracts: They are digital and self-executable contracts i.e. when certain conditions in the code of the contract are met, they automatically get deployed.

Real Estate and Government Services: Time consuming and bureaucratic real estate transactions can be revamped by removing the need of middlemen, disrupting existing ID verification processes, reduce the risk of fraud and track regulatory compliance by the property.

Intellectual Property: Blockchain for registration of IP will help the original owner to get clear copyright. Once registered online, the work will be evidence and tamper-proof. The owner will have overall authority over ownership and distribution.

Government Elections: The current manual system of voting possesses chances of fraud and security breaches hence, automating the entire process will provide a modern system through which these issues can be eliminated.

Identity Management: The DLT used in blockchain offers advanced methods of public-private encryption through which identity can be proved and digitized.

Supply Chain Management: Registering trades on a blockchain offers a way to check the history of a product. By feeding data on a blockchain it could be possible to have a transparent tracking mechanism and the risk in the supply chain is minimized.

Healthcare: With this technology medical history of the patients could be controlled and securely stored.

**BREAKTHROUGH TECHNOLOGY BEHIND THE BLOCKCHAIN: IS THE HYPE JUSTIFIED?**

Though the Blockchain technology remains the breakthrough of the internet, it may not be suitable for every situation as per the unnecessary hype. The core attribute of the blockchain is that it is a decentralized ledger i.e. a system of distributed account books which are recorded at different locations and synchronized continuously. This enables secure and transparent changes in the ledger without the need to trust a single centralized entity. Another characteristic of blockchain that may be a bit problematic is the character of immutability. This means that once a transaction is processed, it cannot be reversed, this results in a difficulty in reversing fraudulent and faulty transactions. This connotes that the blockchain should be used for very particular kind of transactions. One example of such transaction can be a situation where there is a multiplicity of parties and there is a lack of trust between parties like a global market which doesn’t have a trusted intermediary. Such a network can use the blockchain technology for secure and transparent transaction without the need of a trust factor. It is also very useful in situation where there is no regulatory framework for the protection of transactions. Transaction or operation time is also an issue with the technology as bitcoin has seen an average transaction time ranging from as little as eight minutes to as many as eight days. Its transparency is also a facet that can function as a double-edged dagger. In some blockchain entities such as bitcoin, every transaction that is made on the network is made available publicly. But from a consumer’s perspective there is a loss of financial privacy and from a commercial perspective a business may not be willing to share some information as it may lead to disclosure of its trading strategies. However, a few computer science researchers have criticized
blockchain technology to be just shared databases and nothing else and once the decentralized element is removed, the technology remains the same as the ones found in 1991. Therefore the hype regarding blockchain may be highly overvalued and due to this reason, during the implementation of this technology to any sector, points like the requirement of a decentralized, trustless and disintermediated system should be kept in mind or else other existing technology can better serve the same purpose and the extended cost of implementation of a new type of technology can be saved.

LEGALITY OF BLOCKCHAIN AND CRYPTOCURRENCY IN INDIA: A BRIEF TIMELINE

With the rise in demand and popularity all over the world, multiple cryptocurrency exchanges had started to function in India between 2012 to 2017. With the prices booming and the widespread popularity all over the world, regulators started taking notice of this new technology. In India the RBI issued a press release on December 24th, 2013 cautioning the users, holders and traders of Virtual Currencies (VCs), including Bitcoins, about the potential, financial, operational, legal, customer protection and security related risks that they are exposing themselves to. However, the actual purchasing and market rise of the cryptocurrency truly arose after the demonetization of the high-value currency notes on 8th November 2016, with the government’s focus towards online payment alternatives. This forced the RBI to release another press release on February 1st, 2017 recapitulating its concerns raised in the earlier press release.

⇒ On March 15th 2017, the then Finance Minister Arun Jaitley announced the formation of an interdisciplinary committee under the chairmanship of Dinesh Sharma, Special Secretary, Department of Economic Affairs (DEA) to look into the legitimacy of virtual currencies. While it is believed that the panel has submitted its report but the government did not make its recommendations public.

⇒ On October and November 2017, two PILs were filed in the Supreme Court of India, one by Siddharth Dalmia a Law student from JGLS along with his father Vijay Pal Dalmia a Supreme Court Advocate, and the other one by Dwaiapayan Bhowmick, the former PIL questioning the legality of Bitcoin and other cryptocurrencies and the latter seeking a regulatory framework for it.

⇒ On November 2017, the government of India constituted an Inter-ministerial committee under the chairmanship of Shri Subhash Chandra Garg, to examine policy and legal framework governing virtual currencies.

⇒ On December 2017, both the RBI and the Ministry of Finance issued a press release warning general public against the possible dangers and the risks associated with it, wherein the Ministry of Finance compared the cryptocurrency to Ponzi schemes.

⇒ On February 2018, the then Finance Minister Arun Jaitley, in his budget speech stated that the government is willing to do everything to discontinue the

---

609 Press Release: 2013-14/1261
610 Press Release: 2016-17/2054
use of bitcoin and other virtual currencies in India for illegal uses. He reiterated that India does not recognize them as a legal tender and will instead encourage blockchain technology in existing payment systems.

⇒ On April 6th, 2018, the RBI via a circular prevented Commercial and Co-operative Banks, Payment Banks, Small Finance Banks, NBFCs and Payment System Providers, not only from dealing in virtual currencies themselves but also directing them to stop providing services to all the entities which deal with virtual currency. As a result of this, the cryptocurrency exchanges, that depended on normal banking channels for transfers could not access any banking services within India. This affected their business operations since converting cash to cryptocurrency or vice versa was an important part of their operation. As a result of such an existential threat, several exchanges who were members of the Internet and Mobile Association of India (IMAI), filed a writ petition in the Supreme Court of India on May 15th, 2018, titled Internet and Mobile Association of India vs. Reserve Bank of India.

⇒ On April 18th, 2019, the RBI issued a draft framework for regulatory sandbox inviting innovative fintech product and services, including blockchain and smart contract applications and explicitly excluding cryptocurrency.

⇒ On July 22nd 2019, the Inter-ministerial committee formed in November 2017 published its report and the Draft Bill: ‘Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019’. It has recommended a blanket ban on all kinds of private cryptocurrencies beside a fine up to ₹ 25 Crore and imprisonment of as much as 10 years for anyone dealing with it. It also backed the use of blockchain in selected areas. However, the committee wants the RBI and the government to look at the introduction of an official digital currency.

⇒ On August 2019 the Supreme Court directs the RBI to reply to the petitioners’ May 30, 2019 Representation.

Finally, on March 4th 2020, the legality battle fought in the court for nearly two years resulted in what would be counted as a historical verdict, the Supreme Court of India lifted the blanket ban on all virtual currency including Bitcoin. The verdict also deemed the RBI circular issued on April 6th 2018 as unconstitutional. This means that the position prior to the imposing of ring fencing and banking restriction by the RBI shall be put back again and crypto-assets shall regain access to banking in India.

However, this verdict remains only an interim relief as it does not impact activities on the policy level. It exclusively addresses only the circular by the Reserve Bank of India. The Court apparently gave the verdict in favor of the cryptocurrency Ministerial%20Committee%20on%20Virtual%20Currencies.pdf

614 RBI/2017-2018/154DBR.No.BP.BC.104/08.13.102/2017-18
615 Internet and Mobile Association of India vs. Reserve Bank of India (04.03.2020 - SC): MANU/SC/0264/2020
617 https://www.prsindia.org/sites/default/files/report%20of%20the%20Interministerial%20Committee%20on%20Virtual%20Currencies.pdf

www.supremoamicus.org
166
industry as it operates in the grey legal area. This means that the judgment would not hold if there is an anti-crypto regulation in place and there might be re-thinking on the issue by our legislators. In other words, the draft bill could still be discussed and passed in the Indian parliament, despite the verdict by the Supreme Court.

CONCLUSION

In the light of above analysis, it can be inferred that although centralization brings with itself efficiency and accountability while decentralization is useful in cases where there is a multiplicity of parties who wish to transact with each other and do not have a trust factor or regulatory authority. This makes cross-border transactions between multiple untrusted parties suitable. This is the reason why the Bitcoin network has gained such a hype in the market.

Like any new technology or business model, the blockchain technology brings along with its rewards, a swarm of legal, strategic, and operational challenges. While a plethora of emerging cryptocurrencies such as Bitcoin is posing challenges to the efforts to combat money laundering and other illegal activities. But what makes them appealing also makes them extremely dangerous as they may be used to trade in illegal drugs, firearms, hacking tools, body trafficking, and toxic chemicals. On the other hand, the fundamental technology behind blockchain will most likely transform finance by making transactions fast and safe. Hence, from a futuristic approach, emerging technologies in any sector should be regulated and not banned, since banning is likely to be disadvantageous and may also lead to legal maladies.

An outright blanket ban on the ownership or trading of virtual currencies would affect the rights to trade, privacy and liberty, and to be free from excessive and arbitrary State action, as well as the right to property. Any restriction on the fundamental rights is required to be proportional and rational. Alternatively, less restrictive measures are available and misuse by a few should not warrant an extensive measure which intrudes on the rights of everyone. This is proved by the approach of other countries like Australia, Canada, the E.U., Japan, Singapore, South Korea, the U.S., and the U.K. These countries have opted against any kind of ban, and have instead intended to curb the risks associated with it. Thus, an extensive prohibition depriving the entire population to access a legitimate technological and financial opportunity, and leaving millions of people trapped with a ‘dead asset’, based on the threat of ill-use by some, is likely to be found inconsistent with the law. A prohibition may, therefore, face multiple constitutional challenges in the coming future. Thus, regulatory frameworks need to ensure customer protection and financial integrity while still supporting efficacy and innovation.

Therefore, in my view, a balanced regulatory approach should be taken to promote various benefits of the technology and mitigate the risks. As banning crypto-asset exchanges from the financial system will show side effects on the blockchain ecosystem. For instance, the absence of any clear definition of the term ‘Virtual Currency’ could impact any blockchain-based platform. Hence, the only feasible governmental stance should be a balanced regulation and not any form of prohibition, and the government should not consider a prohibition but recommend a detailed regulatory plan so that consumer interests can be protected while innovation and trade continue.

*****
DEPORTATION OF ROHINGYAS WITH CONTEXT TO LAW

By Arnav Sharma
From Chandigarh University

ABSTRACT

Rohingya are an ethnic group, largely comprising Muslims, who predominantly live in the Western Myanmar province of Rakhine. They speak a dialect of Bengali, as opposed to the commonly spoken Burmese language. Though they have been living in the South East Asian country for generations, Myanmar considers them as persons who migrated to their land during the Colonial rule. So, it has not granted Rohingyas full citizenship. According to the 1982 Burmese citizenship law, a Rohingya is eligible for citizenship only if he/she provides proof that his/her ancestors have lived in the country prior to 1823. As the illegal migration in countries are not allowed all refugees who migrated from Rakhine to India clearly violates the article 31 of 1951 convention relating to status of refugees. Article 31 states that refugees unlawfully in country of refuge. The countries are not bound to take care of refugees because they are illegal migrants and if someone who is illegally residing in another country in which they are residing are not legally bound to give the rights to illegal migrants United nation high commission for refugees. (UNHCR) they protect the rights of refugees. All the refugees are registered with UNHCR they are having separate identity card which UNHCR had issued to them. The card issued by UNHRC will help to authenticate the population of Rohingya refugee in India.

HYPOTHESIS OF RESEARCH

This research is been done to aware readers about Rohingya’s who are Rohingya’s why they took the refuge in India and nearby countries how Rohingya’s are helping the militant groups and affecting the security of country. The 1951 Refugee Convention defines a refugee as a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country. Article 1 of the UN Convention relating to the Status of Stateless Persons (Statelessness Convention) defines a stateless person as “a person who is not considered as a national by any State under the operation of its law.” The Statelessness Convention is the only international instrument that protects the treatment of stateless persons. Article 31 is violated of 1951 convention refugees. As India had not signed 1951 convention for refugees and 1967 protocol in safety of refugees.

DEPORTATION OF ROHINGYA’S MUSLIMS

Introduction: - Rohingya are an ethnic group, largely comprising Muslims, who predominantly live in the Western Myanmar province of Rakhine. They speak a dialect of Bengali, as opposed to the commonly spoken Burmese language.
Though they have been living in the South East Asian country for generations, Myanmar considers them as persons who migrated to their land during the Colonial rule. So, it has not granted Rohingyas full citizenship. According to the 1982 Burmese citizenship law, a Rohingya is eligible for citizenship only if he/she provides proof that his/her ancestors have lived in the country prior to 1823. As the illegal migration in countries are not allowed all refugees who migrated from Rakhine to India & neighboring countries clearly violates the article 31 of 1951 convention relating to status of refugees. Article 31 states that refugees unlawfully in country of refuge. The countries are not bound to take care of refugees because they are illegal migrants and if some group or person which is living illegally in another country, they will be called refugees or illegal immigrants. Countries are not bound to take care like India has not signed 1951 convention of refugees because India does not have a national refugee protection framework that’s why convention was not signed.

619 India has not signed 1951 convention for refugees nor refugee status protocol

1982 Burmese citizenship law deprivies the Rohingyas Muslims in Myanmar. Under this law, full citizenship is primarily based on membership of the “national races” who are considered by the state to have settled in Myanmar prior 1824. The date of first occupation of British.

They have their own language and culture and say they are descendants of Arab traders and other groups who have been in the region for generations.

REVIEW OF LITERATURE: - After reading 1951 convention of refugees we came to know that India has not signed 1951 convention for refugees nor India has signed 1967 protocol on refugees. 619 which comprises of 140 signatories due to absence of any domestic law or regional south Asian framework India has desisted from taking its rightful regional leadership role in the increasingly critical matter. Even India has not signed 1951 convention for refugees nor the refugee status protocol despite of this UNHCR has been allowed to operate in India since 1981. India does not have a national refugee protection framework that’s why convention was not signed.

The Rohingyas are helping some militants outfit to create social unrest & effecting national security of country like India. That’s why many countries don’t accept Rohingya’s.

The Rohingyas, who numbered around one million in Myanmar at the start of 2017, are one of the many ethnic minorities in the country. Rohingyas Muslims represent the largest percentage of Muslims in Myanmar, with the majority living in Rakhine state.

620 1982 Burmese citizenship law
Myanmar state, which was ruled by the military junta until 2011, has been accused of ethnic cleansing in Rakhine by the United Nations. They deported thousands of Rohingya to Bangladesh in the seventies and the citizenship law was also enacted by the junta. Things changed little for the Rohingya even after the political reforms in 2011 that eventually led to the first general elections in 2015, as the democratically-elected government-headed by President Hitin Kyaw has been unwilling to grant citizenship.

Sectarian violence between Rohingyas and Rakhine’s Buddhist natives began flaring up in June 2012, following the rape and murder of a Rakhine woman in a Rohingya-dominated locality. The riots, which were triggered as a result, went on for almost a month with causalities on both the sides. Another round of riots broke out in October, due to which the govt moved around a million Rohingya’s to refugee camps. Thousand fled their houses sought refuge in neighbouring Bangladesh, a Muslim – Majority nation. The ethnic conflict raised as a violence spreading other provinces of Myanmar finally it ended in 2013 after military intervention.

Now how India has threat with Rohingya’s?

On 25 August Muslim militants in Myanmar done a very coordinated and planned attack on 30 police post an army in state of Rakhine the group if Rohingya’s militants named Arakan Rohingya salvation Army (ARSA), the attack was instigated by the group claimed the responsibility of the attack later this group usually fought for rights of Rohingya’s this group is the biggest threat for India they usually have links with the militants. (ARSA) is an armed guerrilla outfit, which is active since 2016 claiming to fight for a democratic Muslim state for the Rohingya’s the group has been targeting Myanmar armed forces. Bangladesh and India have also claimed that (ARSA) group is creating the problem to us. The adverse effect of this militant outfit is found in the state of Assam.

In India many Indian states comprises of these people they usually trouble by begging at traffic signals and followed by false propaganda is been followed they use to do drama of getting hurt on leg, Arm etc. When we had done a survey to show sympathy with Rohingya’s we found that they were perfectly alright they are acting like they can’t walk or are injured.

"India calls Rohingya’s as threat to national security because Indian intelligence agencies suspect Rohingya’s in touch with Pakistan based militant groups they declined name because affidavit which is to be filled was not finalised yet”

STAND OF SUPREME COURT ON DEPORTATION OF ROHINGYA’S

The Supreme Court on 17th April slammed the Assam government for the delay in the deportation of migrants back to their country.

621 The Data is collected from the article on the Hindu www.hinduarticle on Rohingya’s
622 The Arakan Rohingya’s salvation Army (ARSA) Militant outfit of Rohingya’s (saves rights of their community)
623 The statement is given by lawyer in hon’ble Supreme court of India. From Govt. Times of India news.
The bench comprising of Chief Justice of India Ranjan Gogoi, Justice Deepak Gupta and Justice Sanjiv Khanna rebuked the government for not complying with its previous order with regard to the deportation of migrants. Prior to that, the Supreme Court had on January 28, 2019, directed the Assam government to disclose the details regarding the number of foreigners detained, who had been deported from the detention centres.

On January 3, 2019, India deported a Rohingya Muslim family of five, which had been in the Tezpur Detention Centre in Assam since 2013, to Myanmar. This was the second such group expelled in four months, after seven men who were lodged at the Silchar Detention centre in Assam since 2012, were deported to Myanmar in October 2018.

The UN has also expressed concern over the forcible repatriation of the Rohingya back to Myanmar. A UN fact-finding mission categorically accused the Myanmar army of committing acts with genocidal intent against the Rohingya in northern Rakhine. The violent military campaign ultimately led to the expulsion of more than 800,000 Rohingya men, women and children into neighbouring Bangladesh, triggering one of the worst humanitarian crises in modern history.624

The India don’t want to take Rohingya’s but they crossed the border it is said that they are threat to national security of country because in India also they are not getting citizenship. It is mentioned in citizenship act 1955 which is made in 1955 in it is mentioned no illegal immigrant will get the Indian citizenship under this act.

The Rohingya’s are threat to India as they are associated with ARSA which use to protect the rights of Rohingya’s in India the Rohingya’s don’t get equal rights for their rights they usually try to create social unrest in the country.

It is necessary to deport Rohingya’s from India so that there should be peace in upcoming time there should be no militant attacks in India which are done by ARSA. The Rohingya’s are settled in different states mainly in East India followed by Jammu and Kashmir they use create ruckus on roads by begging nearby signals this affect the traffic.

**CRITICAL ANALYSIS:** What caused Rohingya’s crises the main problem of this crises is stated below:

This crisis Beginning was in 2012, the first incident occurred when a group of Rohingya men were accused of the rape and murder of a Buddhist woman (Albert 4). Buddhist nationalists retaliated by killing and burning Rohingya homes. The international community responded by denouncing this “campaign of ethnic cleansing.”

After doing research deeply of this topic deportation of Rohingya’s I think it is possible to deport each and every Rohingya from the country if our government and honourable supreme court of India permit to do so Apart from all the sanctions imposed by united nation .As India has not signed the convention of refugees in 1951 followed by protocol of refugees was not signed by India in 1951 that’s why India has

---

624 The judgment of Supreme Court is taken from the Hindu newspaper www.hindunews.in/judgment by SC
full authority to deport Rohingya’s as they violated article 31 of refugee convention states that refugees unlawfully in country of refuge.

**Burmese citizenship law 1982**

Rohingya is eligible for citizenship only if he/she provides proof that his/her ancestors have lived in the country prior to 1823 as stated in Burmese law of citizenship. Rohingya are an ethnic group, largely comprising Muslims, who predominantly live in the Western Myanmar province of Rakhine. They speak a dialect of Bengali, as opposed to the commonly spoken Burmese language. Though they have been living in the South East Asian country for generations, Myanmar considers them as persons who migrated to their land during the Colonial rule. So, it has not granted Rohingyas full citizenship. According the 1982 Burmese citizenship law, a Rohingya is eligible for citizenship only if he/she provides proof that his/her ancestors have lived in the country prior to 1823. As the illegal migration in countries are not allowed all refugees who migrated from Rakhine to India clearly violates the Article 31 of 1951 convention relating to status of refugees. Article 31 states that refugees unlawfully in country of refuge. The countries are not bound to take care of refugees because they are illegal migrants and if someone who is illegally residing in another country in which they are residing are not legally bound to give the rights to illegal migrants. United nation high commission for refugees. All the refugees are registered with UNHCR they are having separate identity cards which are issued by UNHCR. The card issued by UNHCR will help to authenticate the population of Rohingya refugee in India.

On 25 August Muslim militants in Myanmar done a very coordinated and planned attack on 30 police post an army in state of Rakhine the group if Rohingyas’s militants named Arakan Rohingya salvation Army (ARSA), the attack was instigated by the group claimed the responsibility of the attack later this group usually fought for rights of Rohingyas’s this group is the biggest threat for India they usually have links with the militants. (ARSA) is an armed guerrilla outfit, which is active since 2016 claiming to fight for a democratic Muslim state for the Rohingyas’s the group has been targeting Myanmar armed forces. Bangladesh and India have also claimed that (ARSA) group is creating the problem to us. The adverse effect of this militant outfit is found in the state of Assam.

In India many Indian states comprises of these people they usually trouble by begging on traffic signals and followed by false propaganda is been followed they use to do drama of getting hurt on leg, Arm etc. When we had done a survey to show sympathy with Rohingyas’s we found that they were perfectly alright they are acting like they can’t walk or are injured.

That’s why it is necessary to take action regarding the refuge in India so that they don’t affect the national security of India. Atleast don’t help Pakistani militants to do the activities in India.

---

625 Burmese Citizenship law 1982
626 1951 convention for refugees
627 The Arakan Rohingya’s salvation Army (ARSA) Militant outfit of Rohingya (saves rights of their community)
SOLUTIONS ON PROBLEM DEPORTATION OF ROHINGYAS

- It is necessary to have a proper data of Rohingya’s so that they can be deported peacefully.
- Talks are going on with the two countries Bangladesh & Myanmar about the deportation plan.
- Both the countries should sit together to solve the extremely important crisis.
- Deportation of Rohingya’s is unlikely to control to big population of Rohingya’s as both the countries should take initiative from peaceful return the proper data should be scrutinized for it before deporting them.628

Conclusion

Now the research is towards the end of the topic deportation of Rohingya’s. Atlast as a researcher I concluded many things the first thing is it is possible to deport Rohingya’s who are illegally residing in India what we have to do is to just talk with the government’s from where they came in India is necessary to take of their people by the countries on their own as India is developing nation so it is impossible to give the citizenship to the illegal immigrants and India not in that situation too to feed each and every person who is staying illegally in India , they took the refuge in India and tried to create social unrest in India by giving proper information to the militant groups then were in link of some Pakistani groups followed by their ARSA group also tried to create social unrest in country in state of Assam and sent their militants from Myanmar .Now after noting there activities India decided to deport the Rohingya’s to their original country . So that there should be no effect on national security of country. Rohingya’s can be deported as Rohingya’s have violated Article 31 of refugee convention which was not signed by India and the reason behind it was India does have refugee protection plans.

REFERENCES

1) India has not signed 1951 convention for refugees nor refugee status protocol.
2) 1982 Burmese citizenship Law.
3) The Data is collected from the article on the Hindu www.hinduarticle on Rohingya’s.
4) The Arakan Rohingya’s salvation Army (ARSA) Militant outfit of Rohingya (saves rights of their community).
5) The statement is given by lawyer in honorable supreme court of India. From Govt. Times of India news.
6) The judgement of supreme court is taken from the Hindu newspaper www.hindunews.in judgement by SC.
7) Burmese citizenship law
8) 1951 convention for refugees.1967
9) The Arakan Rohingya’s salvation Army (ARSA) Militant outfit of Rohingya (saves rights of their community). the tribune.in/ARSA militants outfits related to Rohingya’s.
10) This data is self-Analysis and the reference is taken from united nation human rights commission www.unhrc/situation of India on deportation of Rohingya’s.

628 This data is self-Analysis and the reference is taken from united nation human rights commission www.unhrc/situation of India on deportation of Rohingya’s
LEGALIZATION OF ABORTION: 
HOW IS ABORTION TREATED BY LAW?

By Arundhati Banerjee
From Mewar Law Institute, Ghaziabad Uttar Pradesh

ABSTRACT
In a country like India, where people fight for reservation rights and the Right to equality every day, there is one right that needs the fight or movement is Abortion Rights under Article 21. This Right can change the economic, social, and psychological status of every woman in this country. In India it is only the married women who are given abortion rights under the Medical termination of Pregnancy Act, 1971 but that too under certain conditions which are mentioned under Section 3 of the MTP Act. This article provides a detailed review of the MTP Act and its amendments with the availability of new technologies for safe abortion. It also determines the right of a mother to abort unwanted pregnancy and the rights of the unborn child.

Keywords: Abortion, Medical Termination of Pregnancy Act, Pre-conception, and Pre-natal Diagnostic Techniques Act, Mother’s right.

INTRODUCTION
Globally, induced abortion—safe or unsafe, legal, or illegal—is a reproductive health service that is part of the lives of women, couples, and communities in both developed and developing countries. When faced with unintended pregnancies, especially in contexts in which women lack access to effective family planning, induced abortion is an important part of women’s reproductive health care. Ensuring the safety and availability of abortion services is critical to women’s health, and creating a supportive legal environment is one step in that process. In India, the second-most populous country in the world, abortion has been legal on a broad range of grounds since 1971.

WHAT IS ABORTION OR TERMINATION OF PREGNANCY?
According to the Merriam-Webster dictionary, an abortion is, “the termination of a pregnancy after followed by the death of the embryo or fetus, as the expulsion of a human fetus during the first twelve weeks of gestation-miscarriage.”

Abortion or miscarriage means the spontaneous or induced termination of pregnancy before the fetus is independently viable, which is usually taken as occurring after the 28th week of conception. Children born a few days before the 28th week are known to have survived with modern care. Medically, abortion means the expulsion of the ovum within the first three months of pregnancy; miscarriage, the expulsion of the fetus from 4th to 7th month; and premature delivery, the delivery of a baby after 7 months of pregnancy and before full term.

Legally, miscarriage, abortion, and premature labor are now accepted as synonymous terms, indicating any termination of pregnancy at any stage before confinement. Abortion may be classified into various categories depending

upon nature and circumstances under which it occurs. For instance, it may be either, (i) natural; (ii) accidental; (iii) spontaneous; (iv) artificial or induced abortion. Abortions falling under the first three categories are not punishable, while induced abortion is criminal unless exempted under the law.  

**ABORTION LAWS ACROSS THE WORLD**

Abortion laws vary across the world, and about 60 countries prescribe gestational limits. 52% of the countries in the world including France, the UK, Austria, Ethiopia, Italy, Spain, Iceland, Finland, Sweden, Norway, Switzerland, and even Nepal, allow for termination beyond 20 weeks on the diagnosis of fetal abnormalities. Some countries go beyond these limits with laws. In 23 countries—Canada, Germany, Vietnam, Denmark, Ghana, and Zambia—allow abortion at any time during the pregnancy at the request of the mother. The reasons could be either social or evidence of fetal abnormalities. In the United Kingdom, abortions are allowed at up to 24 weeks, with abortion guidelines formulated by the Royal College of Obstetricians and Gynecologists including procedures for termination of pregnancies older than 20 weeks. It states that, in pregnancy older than 21 weeks and 6 days, an injection to cause fetal death is given before the fetus is evacuated. Many other countries follow the same procedure for late-term abortions. The UK guidelines also take into consideration doctors who have an objection to abortion based on their religious or moral beliefs: While a doctor can refuse to perform an abortion, he is required to inform the woman of her right to see another doctor.

**MEDICAL TERMINATION OF PREGNANCY ACT**

The Indian Parliament passed the Medical Termination of Pregnancy (MTP) Act in 1971 to regulate and ensure access to safe abortion. As of this writing, this law permits only registered allopathic medical practitioners at certified abortion facilities to perform abortions to save a woman’s life or to preserve her physical or mental health; it also permits abortion in cases of economic or social necessity, rape, incest, fetal impairment or the failure of a contraceptive method used by a married woman or her husband. Consent for the abortion is not required from the woman’s husband or other family members, however, a guardian’s consent is required if the woman seeking an abortion is either younger than 18 or is mentally ill. The act allows an unintended pregnancy to be terminated up to 20 weeks’ gestation; however, if the pregnancy is beyond twelve weeks, a second doctor’s approval is required. There are exceptions to this rule: If the provider believes that abortion is immediately necessary to save a woman’s life, the gestational age limit does not apply and the second opinion is not required. Under the current abortion policy, Providers of Legal Abortion Services under the MTP Act, health care workers who are

---

not allopathic physicians are excluded from being trained as abortion providers or legally providing abortions. Only obstetrician-gynecologists and other allopathic physicians who have completed a bachelor of medicine/bachelor of surgery degree have undergone specific government-approved training in abortion provision and have received certification are permitted to legally provide abortion. To meet the government criteria, a training center must perform a minimum of 600 procedures per year and have all the necessary equipment. The recommended duration of training for surgical abortion is two weeks, and each trainee must observe at least 10 abortion procedures, assist with five, perform at least five under the supervision, and perform another five independently.

Abortion provision is allowed at all public hospitals, as long as the provider is certified in abortion provision. The MTP Act mandates that each state provide abortion services at tertiary-level health care centers (medical colleges) and secondary-level health care centers (district hospitals and first referral units) up to 20 weeks’ gestation. Private-sector facilities are permitted to provide first- and second-trimester abortion services after receiving government approval as a registered abortion facility. The Medical Termination of Pregnancy Rules and Regulations of 1975, which operationalized the MTP Act, define the criteria and procedures for approval of an abortion facility, which applies exclusively to private sector facilities. In addition to outlining the procedures for consent and confidentiality requirements, record-keeping and reporting is also necessary.

Amendments to the MTP Act

Since 1971, the government of India has taken steps to increase access to legal and safe abortion services by implementing policies designed to expand the number of legal abortion providers. Despite the legality of abortion provision in the public health sector, the actual provision at lower level public facilities (such as primary health centers) was scarce before 2000. In 2000, the National Population Policy officially recommended expanding the provision of abortion up to eight weeks’ gestation to all public health care facilities, including primary health centers. A decade later, community health centers continue to be the main providers of abortions up to eight weeks’ gestation, and provision at the lower level remains a challenge because most primary health centers are not staffed with certified abortion providers. Additional amendments to the MTP Act and Rules and Regulations were made in 2002 and 2003 to streamline registration of private doctors as abortion providers and thereby further expand access to safe abortion services. The 2002 amendment to the MTP Act decentralized the regulation of abortion facilities from the state level to District Level Committees and the subsequent amended Rules streamlined the facility registration process by creating facility inspection deadlines to which the district-level committees must adhere—policy changes that were expected to speed up the process of certifying private facilities. The Rules also changed the physical standards for facilities providing first-trimester abortion services: Facilities are no longer required to have the onsite capability for managing emergency complications but must have personnel trained to recognize complications and be able to refer patients to another facility for emergency care if necessary. After the decentralization of the registration and certification processes, local governments
became empowered to regulate abortion services. Operationally, however, implementation has been uneven because many District Level Committees are nonfunctional; also, the devolution to the local level implies there may be differences in regulations across states.

**Policies on Provision of Medical Abortion**

Another result of the 2002 amendment was the approval of medical abortion using a combined mifepristone-misoprostol regimen as a legal method for the termination of early pregnancy. The amendment allowed for registered medical practitioners to provide medical abortion up to seven weeks’ gestation in a facility approved to provide abortion. In 2003, an amendment to the MTP Rules and Regulations was passed to enable certified abortion providers to prescribe medical abortion drugs outside a registered setting, as long as emergency facilities are available to them. In 2010, the national training and service delivery guidelines of comprehensive abortion care were issued and included both surgical and medical guidelines. These guidelines mention (as a footnote) that medical abortion with mifepristone and misoprostol may be provided up to 63 days’ (nine weeks’) gestation; however, this protocol has not yet been incorporated in a modification to the MTP Act amendment.

**Proposed 2014 Amendment to the MTP Act**

For several years, sections of India’s medical community, advocacy groups, and government officials have been discussing an amendment to the MTP Act, which was officially proposed by the Ministries of Health and Law in 2014 and is now pending approval by Parliament. The 2014 draft amendment, which includes changes that would potentially improve access to legal abortion, proposes:

- expanding abortion provision to nurses, auxiliary nurse midwives and practitioners trained in the Indian System of Medicine with recognized qualifications in Ayurveda, Unani, Siddha or homeopathy;
- allowing abortion at a woman’s request up to 12 weeks’ gestation and increasing the gestational age limit for abortion to 24 weeks;
- clarifying the use of prenatal diagnostic technology by stating that the gestational age limit does not apply if the termination of pregnancy is necessitated by the diagnosis of a substantial fetal abnormality;
- replacing the term “married women” with “all women” and the word “husband” with “partner” in the contraceptive failure clause, in an attempt to clarify that abortion is legal for all women, not only those who are married; and
- mandating that the name and other particulars of a woman having an abortion remain confidential.

**PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES ACT**

Discriminatory practices against females in India are widespread and broadly rooted in cultural norms that value men over women. Sons are perceived as contributing to family income and bringing in dowry, while daughters are viewed as obligating families to pay for a dowry and other marriage expenses and are considered less likely to help their parents in old age. Although the average family size has decreased over time, the pressure to bear at least one son remains. The introduction of technologies in 1980 that allowed parents to determine the sex of the fetus before birth was embraced by many as a way to both achieve a smaller family and be assured of having at least one son. Widespread use of this
technology has elicited public concern over the discriminatory aborting of female fetuses and the resulting sex imbalance in the population. To address this issue, the government passed a law in 1994 to eliminate prenatal sex determination and associated sex-selective abortions and arrest the declining sex ratio in India. The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, amended in 2003, prohibits the misuse of antenatal diagnostic tests for sex determination. The Act also prohibits the advertisement of such tests, requires registration of all the facilities that use them, and prohibits in conducting the tests that reveal the sex of the fetus to the expectant parents.

Guidelines for Abortion and Post-abortion Care
In India, abortion guidelines have not always translated into practice. Despite the 2001 guidelines recommended that primary care providers use Manual Vacuum Aspiration (MVA) for abortions up to eight weeks’ gestation, whereas studies have found that providers commonly use more invasive Dilation and Curettage (D&C) procedures. In a government effort to improve access to quality services at the facility level, priority was placed on ensuring the availability of MVA technologies at all community health centers and first referral units and at least half of all primary health centers, which operate 24 hours per day, and seven days a week. New national training and service delivery guidelines for comprehensive abortion care were introduced in 2010 which included many elements from the 2003 World Health Organization (WHO) technical and policy guidelines for safe abortion. For instance, the new guidelines stipulate that pre-abortion counseling should include discussion of choices of termination method, contraceptive counseling and, services, should provide care after the abortion procedure, and follow-up visits, should reinforce the use of contraceptive and ensure the procedure’s successful completion. The national guidelines also advocate the use of Electric Vacuum Aspiration (EVA) and MVA up to 12 weeks’ gestation and mention that WHO recommends eliminating the use of D&C. The guidelines follow WHO recommendations for dosages and oral administration of mifepristone (200mg) and misoprostol (400mcg), including using mifepristone with repeated doses of misoprostol for second-trimester abortions; however this protocol is not approved by the MTP Act amendment. Instead, the legally approved medical method for second-trimester abortion uses ethacridine lactate (which is in short supply and not recommended by WHO); dilation and evacuation (D&E) is the approved surgical method. While laws, policies, and guidelines on abortion have generally moved in the direction of increasing access to safe abortion services, many providers lack in-depth knowledge of these guidelines for abortion and post-abortion care. Lack of awareness among women and deep-seated social, economic, and health system constraints have also had a dampening effect and act as barriers for many women who may need quality abortion-related information and services. Consequently, many women receive poor-quality abortion services from untrained or uncertified providers and experience negative health outcomes as a result.

SOCIAL ETHICAL ISSUES
Abortion touches social, religious, economic, and political aspects. Its impact on society can be studied both positively and negatively. In the earlier years of forming an abortion policy, the Western
civilizations disapproved of the practice. By the nineteenth century many nations passed laws banning abortion. It wasn’t until late in the twentieth century when the women's rights were given importance and abortions were made legal and safe.

In India, which is a country with immense social baggage supplemented by societal evils such as illiteracy and poverty, the impact of the MTP Act should be judged in the context of changing social circumstances, values, and attitudes. The legalizing of the MTP Act has had a positive stimulus upon the women in need of MTP and has shown a reduced incidence of suicide and betterment of health and safety. The acceptance of family planning methods has also witnessed wider acceptance.633

There are however, certain undesirable implications of the MTP and these lie in the inconsistency in following prescribed standards. This problem is rampant especially in rural areas due to the lack of awareness of the patients and the lack of surveillance by the government. The effectiveness and safety of these medical procedures still lie in dim light. The lack of proper cleanliness, staff, and facilities sometimes results in, infertility, menstrual disturbances, and pelvic inflammatory diseases. In a few cases, this results in death as well.634

The real problem lies in the implementation of the laws in the existing frameworks. It is the responsibility of the government to ensure that the MTP is done by qualified surgeons in registered clinics or hospitals. The concerned authorities need to deal with a major challenge and the genuine reason behind requesting termination of pregnancy. There have been cases reported wherein MTP Act is performed on a flimsy ground such as examinations, family weddings, holidays and tours, etc. such abortions are conducted by the medical practitioners for financial gains and go unchecked on most occasions due to fabricated reports. Such abortions have both long term and short term consequences. It is also unfortunate that abortion is often used as an alternative to regular methods of family planning.635

Issues such as this can only be addressed by government initiatives and awareness programs. It is the social responsibility of doctors to counsel all patients coming for termination of pregnancy about the use of some contraception. It should be emphasized that contraception use is much safer than the termination of pregnancy. To mitigate the ill effects on society, the balancing of the negative and positive aspects of this social legislation needs to be taken up.

In India, despite legislative and judicial control, ethical controversies surrounding medical termination of pregnancy continue. Though many people believe that medical termination of pregnancy is immoral but today it is a right of a woman that cannot be taken away.

EFFECTS OF ABORTION

Abortion can affect each woman differently. Emotional and psychological effects following abortion are more common than physical side effects and can range from mild regret to more serious complications such as depression.

Many believe that abortion should be legalized only for extreme cases, like pregnancy due to rape and incest. If a child is a product of violence, there is no need to protect his/her life while trying to heal the pain of the woman. This only guarantees further emotional stress for the victimized woman in the future.

MOTHER’S RIGHTS TO ABORT
‘Abortion’ is a woman’s individual choice, therefore, it must be a legal part of today’s society. Individual rights have an outstanding role in this controversial topic. The individual rights for abortion show rights of life, liberty, and pursuit of happiness. Women should be able to have the choice to choose to have an abortion or not to abort, for several important reasons. The right to make these decisions should lie in the hands of the “mother” as it concerns her own body.

Bringing unwanted children into this world, with no means of proper care and love, is restraining the pursuit of happiness in these children. If we as humans can’t give a child a healthy life; then the point to bring it into this world is not useful and causes lots more problems that should have never erupted in the first place. Should an individual have the obligation to go through a nine-month pregnancy, and childbirth, or the mental stress of raising or giving away the child? The individual rights a woman is not only for herself but also for the child relying on her to live. One of the woman’s most basic freedom is the right to control her own body and to determine if she wants to bear a child or not. She and only she can determine whether she is emotionally, physically, and economically ready at any given time to have and raise a child.536

Raising a child is not an easy task. It requires social & emotional commitment coupled with financial resources. As such if a woman feels that she is not ready for a child, it means the pregnancy is unwanted and resultant allowing a fetus to grow into a child is worse than abortion since the resultant child will grow in a non-conducive & destructive environment without the love, care and stability that a child needs to grow as a socially acceptable person.

Every woman has the right to do whatever she wants with their body aka Bodily Autonomy. As it is illegal to take organs from the deceased who have not signed off permission, it should also be unfair to let grow a fetus inside the body of a woman without her permission. If we continue with the right afterlife, why do we strip it from a pregnant woman? Why would we grant a dead person a right that we wouldn’t give to someone alive?

ABORTION: LEGAL OR ILLEGAL
A fetus is not legally or scientifically a person or human being, so abortion cannot be equated to murder or taking a life since the fetus is not a person. It is without a cerebral cortex and cannot think or feel.

We get right to life, liberty & pursuit of happiness only when we are born. The fetus does not have these rights until it is born. So abortion is not murder. It does not go against the rights of a fetus since it does not

536 Chicago Women’s Liberation Union
have any rights until and unless it is born literally.

If someone needs to donate something that he does not own, he cannot do it legally. This parallels to pregnancies because a fetus needs resources to grow and develop, but the mother is not legally obligated to keep giving her resources to the fetus. Secondly denying to give someone a part of one’s own body is not illegal, so terminating a pregnancy should not be illegal.

Thus, abortion should be legal but discouraged. Legally because it is a choice, and what grows inside the body of a woman is hers. But discouraged because there are other more effective ways to prevent pregnancy than abortion like contraception.

RIGHT TO ABORTION VS. RIGHT TO LIFE OF THE UNBORN

The validity of the abortion laws has been questioned on the ground of constitutionality of ‘right to life of an unborn’ vis-a-vis right of the mother to bear or not to bear a child. The mother, therefore, has become a subject of debate among advocacy groups belonging to one of two camps. Those who are against legal restrictions on abortion describe themselves as pro-choice while those who are in favor of prohibition of abortion are considered pro-life advocates. Pro-life individuals generally believe that human life should be valued either from fertilization or implantation until natural death. They advocate that it is God who is the giver of ‘life and death’ and not the parents. On the other hand “pro-choice” individuals believe that everyone has unlimited autonomy for their reproductive system as long as they do not breach the autonomy of others.

Pro-choice individuals accept that women should have complete control over fertility and pregnancy. It is the personal choice of a woman to have children as it affects her body, personal health, and future. These are two extreme views. One view opposes abortion and another gives freedom to the expectant mother to terminate her pregnancy even after the viability of the fetus. After making a careful study of the pros and cons of the entire issue and taking a pragmatic view of the socio-economic and legal problems involved in the case, it may be argued that a pregnant woman should have “personal liberty” to destroy any fetus of her own if she finds it intolerable. To force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her, or at least to infringe her sense of self-respect and dignity. The fetus may have a right to life, but not a right to be kept inside a woman’s body against her will. After all, the fetus is a parasite and has less claim to live, than the host i.e. the mother. Hence the fetus in utero is not in the ordinary sense another person, distinct from its mother. Even if the fetus is a person, it might be argued that the pregnant woman has the right to use self-defense to protect herself from the physical invasion of unwanted pregnancy. It is submitted that it is the mother next to God who provides the maximum and the best possible care to her child without any reciprocal favor. If she opts for abortion there may be some reason either due to ignorance, carelessness, or acts done willfully. Abortion is an issue best left to the decision of the mother. It is further

637 Available at: http://en.wikipedia.org/wiki/Pro-life.
argued that if there is no possibility of begetting a living child with all human potential it is better to prevent such a child to be born and thereby saving the child from earthly miseries.641

CONCLUSION
Contrary to expectations, the legalization of abortion has not been associated with an increase in the demand for abortion. In developed countries, medical abortion offers women an alternative to surgical abortion. In underdeveloped countries, even where abortion is legal, surgical abortion may not be an option because physicians may be unwilling or inadequately trained to perform the procedure.

In India, legalizing abortion through the MTP Act, which was done in 1971 has not yielded the expected outcomes. Despite the existence of moderate policies, the majority of women still resort to unsafe abortion. This contributes substantially to the burden of maternal morbidity and mortality. The MTP Act currently contains explanations to section 3 stating that terminations for rape and contraceptive failure are permissible because the anguish caused by each constitutes a “grave injury to her (the mother) physical or mental health.” The MTP Act needs to be recognized that a diagnosis of fetal impairment could likely produce distress constituting a severe injury to mental health and that such an exception must exist during the entire pregnancy period since certain fetal anomalies cannot be detected within the stipulated 24th week period of pregnancy.

It is natural for a mother to provide the best to her children. However, sometimes she

CHILD RIGHTS AND PROTECTION: 
THE LEGAL PERSPECTIVE

By Arushi Chopra 
From Symbiosis Law School, NOIDA

Abstract
“Children account for nearly 40% of the population of India. It is imperative to note that these children constitute a significant part of the human resource base of our country and it is necessary that they are able to realise their full potential for the economic growth of our nation.

The twenty-first century has seen a number of legislations and laws being framed in order to protect the children and ensure that sufficient resources are available for them to prosper. The article discusses the legislations that are framed in order to protect children and their rights. The article also attempts to critically analyse some of these legal provisions and point out the gaps or grey areas in these laws.”

Introduction
In the words of John Kennedy, “Children are the world’s most valuable resource and its best hope for the future”. With the advent of human rights, there has been a consciousness regarding rights and development of the children. Earlier, children were regarded as service takers from their fathers and no rights or power to make decisions were bestowed upon them. “It was a recognised principle that the father had absolute right over the children.” The world has seen a positive change in this regard and there has been a change in the status of children in the society. Children are now partners in the decision making process and there is an increase in the role of children and a growing need for protection and development of the future of the nation.

The United Nation Convention on the Rights of Child (UN CRC) is the primary human rights which embodies the rights of children. It was ratified by India in the year 1992 and thus India can make laws regarding child rights under the ambit of the CRC.

The laws regarding protection of children and their rights are enshrined in the Constitution of India which is the supreme law of the nation. Article 15(3) of the Indian Constitution provides for positive discrimination of children by formulating some special provisions for them. Also, all the fundamental rights provided under Article 14 to Article 18 of the Indian Constitution extend to all citizens of India including children.

As the consciousness regarding the rights of children increased, there was a struggle among masses for the right to education to be accorded the status of fundamental right. After a prolonged struggle in this regard, right to education was made a part of the fundamental rights and enshrined in the Constitution in 2002.

Who is a child?
“Child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.” An insight into this definition reveals that the legislative authority has
power to fix the age of majority as per the laws.

This was one of the major gap areas which led to a huge inconsistency regarding the definition of a child. In India, different legislations had different interpretations of the age of majority. For instance, the Criminal Procedure Code (CrPC) accords the age limit for being responsible for criminal acts to be 7 to 14 years. The Child Labour Prohibition and Regulation Act, 1986 provides that a child is the one below the age of 14 years while the juvenile justice Act, 2000 provides the age of majority to be 18 years. It was only after the amendment of the Child Labour Prohibition and Regulation Act in 2016 that people of the age from 14-18 years were included under the category of adolescents.

The age of majority hugely differed with respect to different legislations in India and this brought about huge inconsistency. This posed a serious problem for the judiciary especially where there was an overlapping of the provisions of two acts which can be applied. With different age of majority provided under different legislations, such cases led to conflicts while deciding upon the applicability of the provisions of minority.

The Indian Majority Act, 1875 was adopted in order to bring an end to the existing inconsistency and bring about uniformity with regards to the age of majority. “Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before”647. However, the age of majority was still not clear with regards to sexual intercourse. Therefore, the anomaly regarding the age of majority still exists in India as there is no single definition for the age of majority.

The Right to Education Act
The mass protest and campaigns led to the right to education being accorded the status of fundamental rights. However, there was a need for a comprehensive and clear legislation with respect to the right to education for the children in India. The right of children to free and compulsory education or the right to Education Act was enacted in 2009. It was made with an object to ensure right to education enshrined in the Indian Constitution as has been provided in the preamble to the Act.

“An act to provide for free and compulsory education to all children of the age of six to fourteen years”648

The RTE Act provides elementary education to all children irrespective of their economic or social background. Elementary education means education from class first to class eighth. It puts forward the obligation of the government to provide free and compulsory education to all children from 6 – 14 years of age649. It is the responsibility of the government to incur all expenses in relation to educating these children.

Even after so many years from the institution of the RTE Act, the government has not been able to fully achieve its goal of providing free and compulsory education to all children. There are certain grey areas in the operation of this Act which have been highlighted as follows. The RTE Act 2009, recognises four layers of education system i.e. the government

647 Indian Majority Act 1872, s. 3
648 Right to Education Act 2009, Preamble
649 Right to education Act 2009, s. 3(I)
schools, aided private schools, special
category schools and non-aided private
schools. However, this system leaves out
some of the schools from its purview and
children studying in these unrecognised
schools face various problems including
recognition of their education.

The RTE Act provides education to
children between 7 to 14 years of age
instead of operating according to the age of
majority i.e. 18 years provided under the
Indian Majority Act, 1875. Also, though the
act provides for free education to the
children, the goal has not been realised to
its full extent. This is because the act does
not keep into consideration the
transportation fees and other charges which
have to be borne besides the regular tuition
fee.

The National Commission for Protection
of child rights (NCPCR)
The NCPCR is a statutory body set up by
the government of India in March 2007 to
protect child rights. The commission
comprises of seven members of which at
least two are women. It ensures speedy trial
of offences that violate child rights. The
State government is empowered to declare
a court in the state as a children’s court and
appoint a public prosecutor for these courts.
The National Commission issues regular
guidelines for protection of child rights and
regularly reviews the different legislations
enacted. The Commission is regarded as the
premier institution of protection of child
rights in India.

Child abuse and crimes against children
Over the last decade, India has seen a
significant rise in the number of crimes
committed against children. There has been
nearly a 20 percent increase in child related
crimes in the year 2019-20. These crimes
may be emotional, sexual or physical.
While physical abuse deals with acts
including assaults, domestic violence and
corporal punishment vested upon the
children by the school, emotional abuse
includes all mental sufferings of the
children. Sexual abuse of children can be
deefined as a situation where a child is used
for sexual gratification by someone.

While the provisions of the Indian Penal
Code (IPC) deals with some of the crimes
against children and provide stringent
punishment in this regard, they are limited
in their scope and use. Hence, there was a
need for a new set of laws dealing with
child abuse and child protection.

Juvenile Justice Act
The Juvenile Justice (Care and Protection)
Act, 2000 is the primary law which deals
with child rights and protection of children.
It was amended in 2015. The Act divides
children in two categories i.e. children in
conflict with the law and children in need of
care and protection. While children in
conflict of law deals with the children who
have been charged with some or the other
offence, children in need of care and
protection are children who are victims
rather than offenders. However, our scope
of study is limited to the children in need of
care and protection.

Children in need of care and protection includes victimised children, children who
have no means of sustenance, child
labourers or children who are mentally ill.
These children are recognised as those who
are in need for special assistance due to
their prevailing circumstances. The act

650 How vulnerable are children in India to
crime’ (CRY Rep. 2019-20)

651 Juvenile Justice Act 2000, s. 2(14)
provides that the children under the ambit of this act be provided rehabilitation. For this purpose, there are many institutions recognised under the Juvenile Justice Act in order to provide sufficient support and facilities to the children in need of care and protection. These include shelter homes, children’s homes, After Care Organisations and Child Welfare Committees.

The amendment of the act in 2015 empowers the court to transfer the pending adoption cases to a district magistrate having jurisdiction so as to ensure that there is a speedy delivery of justice.

Sexual abuse of children and allied laws
The crimes relating to child sexual abuse has seen a significant upsurge over the past few years. There are regular reports of sexual abuse of children seen in the media reports. It accounts for nearly 50 percent of the child related crimes registered in India. Child Sexual Abuse or CSA can be referred to as the involvement of a child in order to provide sexual gratification by some person. It includes child harassment, child pornography and child marriage.

There are multiple legislative enactments dealing with the laws regarding the prevention of sexual abuse.

The Indian Penal Code, being limited with regards to child protection does not take into its purview, the laws relating to child sexual abuse. The Indian Penal Code only deals with the cases of rape\(^652\) and provides stringent punishment for the same while the other crimes are put under the bracket of outraging the modesty of the victim\(^653\) and thus not specifically dealt with. Also, the provision with regards to rape is also too limited in its scope and does not include similar sexual offences against boys.

In a view to provide a more comprehensive set of laws for child sexual abuse, the Protection of children against Sexual Offences Act was enacted in 2012. The above law has made sexual abuse of children a criminal offence and has set up specialised courts dealing with the matter of sexual abuse of children. The law provides stringent punishment to the offenders which is decided upon by the special courts according to the merits of the case. Also, unlike IPC, the law is not gender specific and hence takes into account sexual abuse of both boys and girls.

However, there are some shortcomings in the way this act is being implemented due to which the situation still prevails in our country. Ranging from administrative failures of not being able to set up the special courts to the lack of expertise to try the matter and the huge upsurge in pending cases, India is way behind to implement the law effectively.

Prohibition of Child Marriage Act, 2006
Prohibition of Child Marriage Act was enacted in the year 2006 and further amended in the year 2016 and supersedes the Child Marriage Restraint Act, 1929. The Act provides that the child marriages are punishable under the law and voidable at the option of the child who is getting married after he attains the age of majority. It also appoints special child marriage prevention officers to prevent child marriages and provide stringent punishment to the offenders.

However, there are certain failures of the Act due to which its intended goal and objective have not been achieved in its

\(^{652}\) IPC, s. 375

\(^{653}\) IPC, s. 354
entirety. These faults and gaps have been mentioned as under:
First, the traditional marriage communities are not provided with any directives or incentives to ensure that they do not indulge in the practice of child marriage. This is the reason why despite the appropriate law in place, there has not been a significant decrease in the child marriage cases being accepted by these communities.

Also, child marriage cases are voidable at the option of the parties. However, the child getting married is often coerced by their families and communities into accepting their marriages. It is often argued that child marriage should be void rather than being voidable at the option of the child. However, according to the act, child marriage is considered to be void only when there is some compulsion or trafficking.

**Child Labour Prohibition and Regulation Act**
The last few years have seen an increase in the number of child labour cases registered. However, the scenario is much worse than what is registered as most of the child labour cases go unreported. Child labour majorly occurs in the unorganised sectors where children are forced to work for long hours with very little wages in a bid to improve the financial condition of the family.

Child Labour Prohibition and Regulation Act (CLPRA) was enacted in the year 1986 with an object to reduce child labour and ensuring stringent punishment to the offenders and employers of child labourers. The Act provides that no child below the age of 14 years can work in hazardous industries or workshops like fire-crackers or bidi making industries\(^{654}\). It also provides the regulations for the children working in the industries apart from those mentioned in the Act. Special committees called the Child Labour Technical Advisory Committee\(^ {655}\) has been set up under this Act. *Section 17* of the Act provides that the inspector in charge should make sure that the employer of the child labourer pays Rs. 20,000 to the Rehabilitation-cum-welfare fund.

However, there are certain shortcomings in the Act due to which the intended goal of the act has not yet been reached. The major problem lies with the implementation and enforcement of these laws. Also, the law does not take into its purview the unorganised sector which accounts for the majority of the child labour cases. Children working in the agricultural sector are also not taken into account. The meaning of hazardous industries has not been defined clearly and many of the hazardous industries are excluded from the Act.

Due to the above listed shortcomings, the Act was amended in 2016. Both children and adolescents were included under the Act and the meaning of hazardous substances\(^ {656}\) was given some clarity to include mines, inflammable substances or explosives and hazardous processes.

**Conclusion**
It is often said that children are a vital human resource of our country whose development up to their potential is necessary to realise the planned economic growth of India. In order to ensure that the children are equipped with resources and

\(^{654}\) CLPRA, s. 3 read along Part A and Part B of the Schedule

\(^{655}\) CLPRA, s. 5

\(^{656}\) CLPRA amendment act, (No. 35 of 2016), *The Schedule*
opportunities for their growth and they are not victimised due to their dependency on the adults, there have been multiple legislations formulated with an object to ensure that the rights of the children are protected. In order to protect the children from being victimised, child protection laws have been formulated providing stringent punishment for the offenders.

Over the past few decades, India has seen an upsurge in the children-related crimes taking place. The statistics in this regard tells a gruesome story. There has been nearly a 20 percent increase in child-related crimes in the year 2019-20. What is the most disturbing is that such situations continue to exist even after so many years of the enactment of the child protection laws. While such laws have been successful to a great extent, the numbers indicate that these laws have not been able to fully achieve its intended goal and there is a need to bring about another set of laws in this regard or ensure effective implementation of the existing laws for “there is no greater inhumanity in the world than hurting or belittling a child”.

References
Child Labour Prohibition and Regulation Amendment Act 2016, Ministry of Law and Justice, GOI
Child Labour Prohibition and Regulation Act 1986, Ministry of Law and Justice, GOI
‘Child Rights: A gist’, (Smile Foundation)
‘How vulnerable are children in India to crime’ (CRY Rep. 2019-20)
Indian Majority Act 1875 (Act 9 of 1875), Ministry of Law and Justice, GOI
Juvenile Justice (Care and Protection of children) Amendment Act 2015, Ministry of Law and Justice, GOI
Juvenile Justice (Care and Protection of children) Act 2000, Ministry of Law and Justice, GOI
Right to Education Act 2009 (No. 35 of 2009), Ministry of Law and Justice, GOI
United Nation Convention on child rights, Resolution 44/25 (1990)

*****
‘FORCE MAJEURE’ HIRING OF LAWYERS POST COVID-19

By Arya Vilas Patil
From Government Law College, Mumbai

Introduction

The 2019 novel coronavirus (COVID-19) is attacking the health, financial welfare, social order and political stability of nations across the globe. In a very short duration, the coronavirus pandemic has sparked major changes in the legal industry. Owing to the dynamic situation that the pandemic has given rise to, we are witnessing corresponding reactions and response from business entities that are opting to recruit lawyers. It is predicted that there will be many areas of professional services that will suffer over the coming months. However, there is expected to be a steady workflow for lawyers because a lot of legal work is counter-cyclical or a business necessity for clients. Market difficulties, regulatory responses, stimulus programs, changes in employment, and other legislative obstacles provide potential sources of demand for legal services.

From advising employers on how to respond when an employee tests positive for coronavirus to counselling clients about their area of practice, lawyers are working around the clock to help clients navigate the uncharted territory of COVID-19. There is plenty of work heading towards law firms and the industry overall. This could include assisting clients seeking to address supply chain disruptions or those who require guidance on an out-of-court debt restructuring amid financial challenges. The cancellation or postponement of major conferences, sporting leagues and other large events will also generate legal work that will extend beyond the timeline of the pandemic. A post-Covid world is bound to be packed with delays, payment defaults and a failure or refusal to perform contractual promises and stipulations. Long after this health crisis is over, courts will be grappling with an endless number of disputes ruling on whether parties are excused from the performance of their contractual obligations due to this health crisis. The litigation finance industry is gearing up for a steady stream of Coronavirus-related activity.

Whatever might happen of COVID-19 and the declared nationwide lockdown, companies are going to have to face the harsh reality of receiving little to no revenue in the foreseeable future. They are going to have to make some bold and risky decisions regarding finances required to honour contracts with employees, vendors or third parties? Covid-19 has triggered a shortage of raw material, disturbed consumption behaviour and influenced the stipulated deadlines negatively. This has led to a situation where companies are now exploring a route to avoid their contractual obligations. The term that has recently assumed relevance in the contractual context nowadays is “Force Majeure”.

How this term will be interpreted in a contract owing to the pandemic is circumstantial for individual contracts and cases. This clause in a contract might typically include an exhaustive list of events such as acts of God, war, terrorism, biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms?from=mdr

---

earthquakes, hurricanes, acts of government, explosions, fire, plagues or epidemics or a non-exhaustive list wherein the parties simply narrate what generally constitute force majeure events and thereafter add "and such other acts or events that are beyond the control of parties". It is usually found in various contracts such as power purchase agreements, supply contracts, manufacturing contracts, distribution agreements, project finance agreements, agreements between real estate developers and home buyers, etc. This provision is important for businesses as it relieves the parties from performing their respective obligations and consequential liabilities, during the period that force majeure event continues. All the types of dispute resolution & litigation will require parties, lawyers and ultimately courts to construe contracts to ascertain whether there is an exclusion clause that covers the consequences of an epidemic such as COVID-19.

Sectors That Will Engage Lawyers During And Post COVID-19

1. Hospitality & Tourism: While most sectors are facing challenges, some sectors directly affected by physical-distancing measures (such as airline, hotel and retail) are experiencing unprecedented declines in demand. Hotels & restaurants are hiring lawyers for reviewing their current insurance policies to ascertain the nature and extent of cover for business loss on account of the current pandemic and the lockdown. Most of the policies cover physical damage of the property on account of Act of God but do not cover a pandemic situation or government declared lockdown situation. Businesses are also looking to examine their liabilities in case any guest contracts COVID-19 within the hotel premises and makes a claim against them. Steps that can be taken to avoid them, for example, waiver/relinquishment forms for guests at the time of check-in and its legal implications are being considered. Other technicalities such as licenses of the hotels that require renegotiation also call for legal service demand.

2. Commercial Real Estate & Lease Agreements: It may be inappropriate to say that tenants must not pay rent at all, because they continue to use the premises by not completely vacating the premises. Neither party is benefiting from the premises in the manner that was agreed upon. Tenants are requesting for rebates and deferment while the owners want the contractual obligations to be carried out unhindered. The agreements are going through a phase of ongoing and unending renegotiations. Naturally, a huge amount of cases are going to proceed to litigation or get referred to an arbitrator. This will require hiring legal representatives for consultancy.

3. Infrastructure: The restrictions on construction activities, decreased workforce and supply chain disruptions will have a cascading impact on contractual obligations relating to infrastructure projects. Complex & implicating contractual arrangements with independent contractors are very common in the infrastructure sector in India. Lack of revenue & backup cash and no government relief in sight, it is difficult for the private sector to stay afloat. The central government has vaguely directed the employers in all the industries to pay their workers without any deduction during the period of lockdown. States have issued their varied versions of this direction. All the legislative orders to the private sector are based on the colonial era Act- the Epidemic Diseases Act, 1987 or Disaster Management Act, 2005. Due to these
perceived Catch-22 situations and ambiguous orders, businesses are dialing up lawyers to ascertain what decisions they can or cannot take relating to their workforce while being equally careful of the collateral damage & additional compensation. As large infrastructure contracts have multiple stakeholders, a developer needs to ensure that subcontracts have adequate back to back arrangements to mitigate the risks & to avoid prolongation costs.

4. **Healthcare**: As Indian healthcare professionals are fighting this health crisis, numerous disturbing incidents of violence against healthcare professionals have come to light. An immediate response to violence against healthcare professionals is usually prosecution under harsh laws which requires lawyers. Other concerning factors that have emerged are regarding access to ventilators and prohibitive costs in private hospitals. These correspond to identified reasons which include high cost of procedures, medication, and hospital stays; inconsistent quality of treatment based on patient's ability to pay, perceived corruption of the doctor-pharmaceutical company nexus, among others for which legal remedies are sought, especially nowadays when the entire country is relying on our healthcare ecosystem.

5. **Education**: Whether institutions can be held liable for students, faculty and staff members contracting COVID-19 on campus is one of the major factors hindering reopening plans, but that's not the only legal obstacle that they will have to duck. Colleges and universities have to confront the fact that they too are employers. They're going to have to deal with similar employment issues as the rest of the employers. There are a plethora of legal issues that educational institutions might have to face post lockdown. Like students, faculty and staff too will be concerned about their safety on campus. There will be contract complications due to the continuous evolution of administrative methods and adaptation to the digital age. Lawsuits demanding partial refunds on fees are anticipated too. Most educational institutions will have to hire legal advisory teams to tackle these obstacles proactively.

**Disputes That Will Require Lawyers Across All Sectors**

Employment-related disputes related to rehiring, layoffs and furloughs are likely to spike in the near term. Reviewing Contracts for Force Majeure provisions and property damage coverage in insurance policies are also getting particular attention. Additionally, a nosedive by the economy might generate much more activity in the bankruptcy & insolvency space. Risk advisory consultants are also expected to be in demand across all spheres and sectors, especially around business impact assessments. They will be hired to measure the real and immediate impact of this crisis, as well as putting the right plans and strategies in place for the future. It is also natural to expect that litigation and restructuring practice areas will do well while transactional practices will suffer.

**Renegotiation**: However, in cases where the performance has become difficult but not impossible, parties could consider using this opportunity to renegotiate the contract instead of suspending the contract altogether due to viability and feasibility. Some parties may also consider this as an opportunity to put an end to a bad bargain by assessing their options to terminate the contract.
Dispute Resolution: Ultimately, if a Party fails to agree on the event being a Force Majeure event, or fails to comply with the applicable provisions of the Agreement, parties will need to look into the contract and assess legal risk and remedies. That might lead to intervention by a mediator or arbitrator to settle the dispute arising out of such disagreement.

Supply Contracts: It is observed that a lot of supplier contracts are one-sided (the force majeure clause applies only to the supplier and not the buyer). The buyer's only obligation is to collect goods and pay. Therefore, the only party who can claim protection under force majeure is the supplier. It may turn very problematic if orders have been placed in anticipation of costly material, for instance, steel & cement by a real estate developer. The chances of buyers not showing up or reneging on contracts are very high. This could result in a string of bankruptcies working backwards along the supply chain. Disputes in concession agreements with port or airport authorities are also likely to follow.

Conclusion

We are faced with a pandemic and the legal industry happens to be in the eye of the storm. Businesses, individuals and institutions are turning to their lawyers for steering them through these testing times. Uncertainty is everywhere and we are all having to adapt to the change. Lawyers who have been slow to adapt to the use of technology must learn to embrace it. Once the dust begins to settle and the full economic impact is felt, there will be a wave of litigation that would create a great deal of work for law firms. Technology, such as video conferencing, will enable them to stay more connected to their clients until things return to normal. We are all suffering the consequences of the world’s collective unpreparedness for the COVID-19 crisis. As writer and philosopher George Santayana wrote, "Those who cannot remember the past are condemned to repeat it." 658 Once this phase passes, lawyers and law firms must learn from the actions taken in response to this crisis to improve for the future. Business plans must be upgraded and battle-tested.

With growing disputes between contractual parties due to the pandemic, ample opportunity will be available to legal practitioners for advising clients to arrive at an amicable resolution or litigation. It is needless to say that due to all the adversities brought about by Covid-19, prospective clients and potential litigants will be looking for legal counselling & conflict strategy making. Advice and guidance by those having specialized knowledge in dispute resolution may be looked at favorably for cost and time-saving. This will apply particularly for mediation, out of court settlement, negotiation, conciliation and even time-bound arbitration. At a time when millions are fighting to survive the illness, financial hardship, political upheaval, and other existential threats, lawyers must take the role of mediators and counsellors to resolve issues with a spirit and not prolong the crisis unnecessarily.


CROSS EXAMINATION AND THE
INDIAN JUDICIARY

By Athul V. Vadakkedom
From Faculty of Law, Delhi University

Witness as Bentham said are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer constitutes a fair trial.

The order by which a witness would be examined by both the parties to the lis is prescribed under Section 137 of Indian Evidence Act. As per the same a witness who has been produced by a party to prove his case will be examined by such party in the chief examination which would be followed by a cross examination by the adverse party for challenging the veracity of the evidence adduced by such witness during the chief examination. Thereafter the party who is producing the witness can conduct a re-examination for clarifying the ambiguities arising out of the evidence of such witness during the cross-examination. Ordinarily a party who produces a witness expects the witness to give evidence in the party’s favour. But there are instances where the witness who was called by a party gives his/her evidence in contrary to the interest of such party. He can turn against the party during his/her chief examination itself or can resile from his stand made during his chief examination, while he/she is cross examined. In such a case, the party calling such a witness will have to get rid of the adverse evidence which was adduced by his witness. If not, such adverse evidence can be binding and can in turn be detrimental to the interest of such party to the lis who produces the witness.

It can be squarely held from the wordings of the section that, whether or not to give permission to a party to cross examine the witness according to this provision is completely the discretion of the courts. Are there any conditions or principles which may govern the permission being provided for cross examination under S.154 of the Indian Evidence Act?

The section confers a judicial discretion on the Court to permit cross examination and does not contain any conditions or principles which may govern the exercise of such discretion. However it is a well settled dicta that this discretion must be judiciously and properly exercised in the interests of justice.

To confine the operation of section 154 to a particular stage in the examination of a witness is to read the words in the section which are not here. The three judge bench of the Hon’ble Supreme court made in Dhayabhai Chhanganbhai Thakkar v State of Gujarat is required to be noticed in regard to the same:
“S.154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination in chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To confine this power to the stage of examination in chief is to make it ineffective in practice.”

A perusal of the court’s position in the above mentioned case would show that the witnesses had categorically stated before the police and the chief examination that the accused had committed the murder, but in the cross examination they resiled from that statement and made out a new case before the Court wherein accused was innocent. Thus it is made clear that before a party is given permission to cross examine his witness, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross examine its own witnesses cannot be allowed. Therefore the Court must distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

Arriving at the truth is the essential function of the court, because the truth of the matter may unravel at any stage of the case, such a function cannot be curtailed to any stage or period. The discretion conferred by section 154 on the court is unqualified and untrammelled and is apart from the question of hostility. It is to be liberally exercised whenever the court from the witness’s demeanour, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice.

It can be clearly inferred from the above mentioned extracts that though it is difficult to lay down a universal application as to when and in what circumstance the court will be entitled to exercise the discretion vested in them. The courts are under a legal obligation to exercise this discretion in a judicious manner by proper application of mind and in keeping view of the circumstances.

Whether in Indian courts the grant of permission to cross examine one’s own witness by a party is conditional on the witness being declared “adverse” or “hostile”?

Mere permission to cross-examine is not equivalent to a conclusion that the witness is a hostile one. In determining the element of hostility in a witness the courts would have to be very cautious and should enquire into the inner psyche or idiosyncrasies of a witness. The court ought to discern this element of hostility from:

1. His/her temper, demeanour, bearing etc. in the witness box which shows an indication of aversion to the party calling him/her.
2. He/she is adverse and hostile when he/she is making statements contrary to his/her oath, knowledge, earlier deposition in front of a court or any authority etc.
3. The cues and signs that the witness is not desirous of giving evidence and trying to suppress the truth in order to help the other party.
The position of the Indian law with respect to declaring a witness as “hostile” or “adverse” which is different from the English law has been rightly held by the Hon’ble Supreme Court of India in Gura Singh vs The State of Rajasthan where it states that under the English Act of 1865, a party calling the witness can cross examine and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be ‘adverse’. As already noticed, no such condition has been laid down in S.154 the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the ‘hostility’ or ‘adverseness’ of the witness.

The fallacy underlying the view pertaining to declaring of witness as hostile or adverse prior to the permission granted under S.154 of the Indian Evidence Act come from the supposition that the only purpose of a cross examination is to discredit a witness. This supposition ignores the hard truth that another equally important objective of cross examination is to elicit admissions of facts which would help build the case of the cross examiner. That is when a party with the leave of the court confronts his witness with his previous inconsistent statement, he/she does so in the hope that the witness might revert to what he/she had stated previously because the act of resiling from his/her previous statement may not be deliberate but due to faulty memory or a like cause. If that is the case, there is every possibility of the witness veering round to his/her prior statement. Thus, showing faultiness of the memory in the case of such a witness would be another objective of cross examining. In short, the rule prohibiting a party to put questions in the manner of cross examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all his credibility but because from his animus attitude or otherwise, the court feels that for doing justice, his evidence need further elucidation and in the process the truth more effectively extricated. Therefore his/her credit is more adequately tested by the questions put forth, in a more pointed, penetrating and searching way.

Should the evidence given by a “hostile witness” be excluded altogether by the Indian courts?
The deposition of a witness who has turned hostile in the observations of the court is not to be excluded entirely or rendered unworthy of consideration. And whether the testimony of such a witness should be rejected in whole or accepted in part would entirely rest on the result of cross examination.

The Full bench of Calcutta High Court in Prafulla Kumar Sarkar's case was of the opinion, the fact that a witness is dealt with under S.154 of the Evidence Act, even when under that section he is ‘cross examined’ to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence.

But however because the credit of the hostile witness is shaken, it is not safe to rely on it totally and requires closer scrutiny. Judicial interpretations of the Hon’ble Supreme Court of India in this regard show that the following evidence can be safely relied on by the court:

1. If there are some other material on the basis of which the said witness can be corroborated.
2. The part of the deposition which supports the prosecution version of the incident.

In Bhagwan Singh v. State of Haryana\textsuperscript{11}, Bhagwati, J. speaking for this Court observed that the fact that the Court gave permission to the prosecutor to cross examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

The Hon’ble Supreme Court in Bhajju @ Karan Singh v. State of M. P\textsuperscript{12} states that S.154 of the Act enables the Court to exercise its discretion to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the many judgments of the Hon’ble Supreme Court\textsuperscript{13}.

From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross examined and contradicted with the leave of the court by the party calling him/her, his/her evidence cannot as a matter of law be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he/she may after reading and considering the evidence of the witness as a whole with due caution and care, accept in the light of the other evidence on the record that part of his/her testimony which he/she finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned and in the process, the witness stands squarely and totally discredited, the Judge should as matter of prudence, discard his evidence in toto.

Conclusion:

Witnesses being the eyes and ears of the court when turned hostile becomes detrimental to a fair trial, this in fact affects the constitutional mandate of due process. It is inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a fair one, not mere farce or pretence. A fair trial is one that helps to extract the truth and prevent the miscarriage of justice. But when the witness himself/herself is incapacitated from acting as the eyes and ears of justice due to negligence, ignorance or some corrupt collusion, the trial would no longer produce the desired outcome. These instances if allowed to perpetuate further would undermine and destroy public confidence in the administration of law and subsequently pave way for anarchy and injustice, resulting in the complete breakdown of the edifice of rule of law enshrined in the constitution of India. The fundamental principle behind cross examination is to assist the courts in handling such circumstances, it aids the court when faced with adversities and hindrances in
extricating the truth and thereby upholding justice.

**Works cited and consulted:**
1. Indian Evidence Act, s.143
2. Indian Evidence Act, s.145
3. Indian Evidence Act, s.146
4. Indian Evidence Act, s.155
5. AIR 1964 SC 1563
6. Para. 10, 1977 SCR (1) 439
7. Para. 37, Air 1976 SC 294
8. AIR 2001 SC 330
9. Para 41, Air 1976 SC 294
10. AIR 1931 Cal. 401
11. 1976 (1) SCC 389
12. 2012(4) SCC 327
14. Para. 51, Air 1976 SC 294

*****
VICTIM COMPENSATION IN INDIA: NEED FOR A COMPREHENSIVE LEGISLATION

By Avnip Sharma
From Bharati Vidyapeeth New Law College, Pune

INTRODUCTION:
“Law should not sit limply, while those who defy it to go free and those who seek its protection lose hope”659

The foremost duty of the criminal justice system in any country is to safeguard the rights of the individual and the state against premeditated infringement of the basic norms of the society by deceitful persons. This duty is sought to be thru by ensuring that the accused is penalized in accordance with the law, in the process of which every measure is to be taken to ensure that the rights of the accused are safeguarded. However, it is repulsive to note that the system does not give much similar apprehension for the victims of crime, who are the “by products of the crime”. The carriage of justice is often misjudged to halt at the signature on a judgment; however, the true destination lies at the lap of the victim. While it is the courts that preserve the sanctity of justice, it is the paramount obligation of the state to safeguard the rights and people of the state to support the pillars of the Justice. Victimology correlated jurisprudence has been contested extensively on where to place the ball of accountability – Question arises, does the responsibility of state ends simply by registering the case of the victim, conducting the requisite investigation, commencing the prosecution and sentencing an accused or whether apart from these requisite steps, the state has a furthermore accountability towards the victim. In any criminal case, the victim is considered only as an informer for the substantial source of evidence and in most cases, as an Informant, the victim sets the criminal proceeding in wave by reporting the crime to the police. But thereafter he has no further role to play unless the police consider it necessary. Similarly, there is quandary whether there lays a duty towards the court to provide compensation to the victim irrespective of the conviction of the accused. Nonetheless, it remains that victims of a crime, including her/his kith and kin carry an authentic expectancy about whether the State will ‘catch and punish’ the guilty and compensate the aggrieved. Even in the unfortunate event of failing of the justice machinery to ascertain the accused or be deficient in assembling and presenting requisite evidence to ensure suitable sentencing of the guilty, still, the duty remains to compensate the victim. The framework of justice in India has been largely unconscious as to what would institute true evidence to the victim. The sphere of justice has been hooked to merely provide for the conviction of the accused. This has exempted complete failures in terms of the blemished investigation, pitiable efforts of the prosecution, and the dubious integrity of those who are involved in the process. Furthermore, there has also been a lack of infrastructure to support or accommodate the development in the process. This drawback turn distress the eminence of justice offered to the victim. Justice must be reformatory for the wrongdoer and restorative for the survivor.

Thus, there is a valid expectation of the victim that he/she must be given restorative support together with monetary compensation.

Such compensation has been bound to be paid in public law remedy with reference to Article 21. The jurisprudence under Article 21 has grown drive since the turn of the century and now extends to rehabilitating the victim or her/his family. The Hon’ble Supreme Court has in several cases, done justice to the victims, through the directed payment of monetary compensation as well as a restorative settlement where State or other authorities failed to safeguard the life, dignity, and liberty of victims. Though, the scope for the remedy to the victim in terms of restorative purpose was inadequate before public law by way of writ jurisdiction. Therefore it was of the utmost importance to introduce a specific provision that shall be focused on providing restorative measures to the victims irrespective of the result of criminal prosecution. As a result, Section 357-A was introduced in the Code of Criminal Procedure, 1973.

1. History and Development of Compensation as Criminal Remedy

Restitution has been working as a compensatory measure throughout the history of criminal jurisprudence. Ancient societies never visionary separated the realm of criminal and civil law, but reflexively desired the offender to reimburse the victim and/or the family for the loss if any, originated by the commission of the offense. However, the primary purpose of restitution was misdirected since it was established to safeguard the offender from ferocious retaliation by the community or the victim as opposed to compensating the victim. It was an instrument used by the offender to revert the destruction or disturbance in peace that has been intruded by the offenders' action.

In earlier common law the word "restitution" was used to denote the return or restitution of a particular thing or condition. The scope in contemporary legal usage has also been expanded to include not only the restitution or return of something to the rightful owner and the return to the status quo, but also compensation, recovery, compensation or reparation for losses gained from, or for loss or damage caused to, another. Over time, principles of law gradually demarcated the allocation of punishment in the case of civil tort and criminal offenses. Compensation was then amalgamated as the victims' right in civil cases as contrasting to a remedy in a criminal case, although there was merely a remedy provided to the victim, rather than imprisoning the offender. Thus, criminal law was purged of the burden of compensation to rehabilitate victims since where the law stood from there the criminal

---

662 Code of Criminal Procedure Act, 1973 [hereinafter “CrPC”]
justice was either to reform or retribute the criminal offender, as opposed to being regenerative with regards to the victim. This Orthodox position of the law has been undergone numerous changes, as the societies over the world felt an increasing need for the awareness and preferences for the victims’ rights that have been ignored by the legislatures and the courts regarding criminal cases.

However, a program based on restitution provided by the offender to the victim is, for the most part, problematic as it is imperative for the wrongdoer to be detained and convicted, thus on another angle, the victim needs to afford the resources for the same. Such a scheme also gives rise to a possibility where the victim is denied compensation since the offender is a debtor and cannot raise money in prison. Thus due to this challenging situation, the most appropriate solutions seem to be to have a state fund from which the victims are instantaneously compensated after the crime. If and when the offender is convicted, he may be ordered by the court to restitute a certain amount to the State.

This principle is adopted to ensure that victim compensation is not at a standstill either due to the offender’s inability to pay, an acquittal because of lack of evidence or due to the long judicial process.

Therefore, this legislation has been implemented by several states including Canada, Australia, England, New Zealand, Northern Ireland, and the USA providing for restitution by courts governing criminal justice.

2. History and Development of Victim Compensation in India

The history of Indian penal law can be traced to the times of colonization and the era of British rule. Though it can be believed that ancient Indian History is a witness to the fact that the victims of crimes have sufficient provisions of restitution by way of compensation to injuries.

“It is, however, remarkable that in as much as it was concerned to be the duty of the King to protect the property of his people if the King could not restore the stolen articles or recover their price for the owner by apprehending the thief, it was deemed to be his duty to pay the price to the owner out of his treasury, and in his turn, he could recover the same from the village officers who because of their negligence, were accountable for the thief’s escape.”

In the ancient Hindu law, during the Sutra period, the awarding of compensation was treated as a royal right. The law of Manu clearly stated the offender to pay compensation and pay the expenses of a cure for the victim in the case of injuries to the sufferer.

The very first trace of restitution in Indian legal system can be originated in sub-clause (1)(b) of Section 545 in the Code of Criminal Procedure of 1898, which provided that courts may direct:

“payment to any person of compensation for any loss or injury caused by the offense,”


666 Fresneda v State (1977) 347 So.2d 102; People v Becker (1957) 349 Mich. 476; State v Elits (1980) 94 Wash.2d 489

when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court”.

3. The Law Commission Report and Section 357 of the CrPC

Now accepting that there is no uniformity in the legal system in the country to address the issue of compensation to the victims of crime, it is expedient to discuss the legal position in respect of compensation to the victims of the offense. Post-independence, criminal proceedings were governed by the Code of Criminal Procedure 1898 and then Code of 1973 (“Cr. PC”).

Until 2008 there was a more or less identical clause in both the crime victims’ insurance codes which is section 545 of the old code and section 357 of the new code. The 41st Report of the Law Commission of India was submitted in 1969. This discussed Section 545 of the Code of Criminal Procedure of 1898 extensively. The report specified that the importance of the recoverability of compensation should be enforceable in a civil court parallel to the public remedy available to tort. However, the Law Commission questioned the demarcation since the discretion to apply the provision in cases was used scarcely by the courts in directing compensation for victims.

Based on the recommendations made in the above report by the Law Commission, the Government of India introduced the Code of Criminal Procedure Bill, 1970, which aimed to revise Section 545 and reintroduce it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows: “Clause 365 (now Section 357) which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the court imposes a fine; the amount is limited to the amount of fine. Under the new provision, the compensation can be awarded irrespective of whether the offense is punishable with fine or fine is imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and the court shall have due regard to the nature of the injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors”

Henceforth the compensation sum in no account can outstrip the fine amount. Moreover, the quantum of fine would depend upon the limit to which the fine can be imposed for that particular offense and also upon the extent to which the court is empowered to impose the same. The CrPC subsequently incorporated the changes proposed in the said Bill of 1970. In the Statement of Object and Reasons, it was stated that Section 357 was “intended to provide relief to the poorer sections of the community” whereas, the amended CrPC authorized the court to edict payment of compensation by the indicted to the victims of misconducts “to a larger extent” than was formerly allowable under the Code.

Section 357 brought about significant changes in the framework. Further to new sub-sections were inserted Sub-section (3) and Sub-section (4). Sec357 (3) is more liberal and it provides that compensation can only be awarded when the court imposes a sentence in which fine is not a part of the conviction sentence.

But it would appear that the liberal clause of Sec 357 Subsection (3) only applies if the fine sentence is not enforced. If the penalty
is levied the compensation can only be paid out of the penalty sum. While subsection (4) outlined the jurisdiction and powers of courts concerning the section. It states that an order granting compensation may be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

- **Other Provisions in the CrPC**
  While studying the law of victim compensation, it is very vital to also discourse other aspects of what would be interpreted as compensation to aggrieved. This requires the perusal of the other sections of the CrPC such as section 358, section 372. Section 358 addresses a substitute interpretation of who is a ‘victim’ and what would be established ‘compensation’ for that purpose. In the context of strictly defining a victim, the Supreme Court has observed that –
  “The term 'Victimization' is defined neither by the Central Act nor by the Bombay Act. Therefore, the term 'Victimization' has to be given a general dictionary meaning. In Concise Oxford Dictionary, 7th Edn., the term 'Victimization' is defined at Page 1197 as follows: make a victim; cheat; make suffer by dismissal or other exceptional treatment.”

Section 358 says that there shall be compensation provided to anyone who has been a victim of an arrest that is finalized without reason. Section 358 states that in such a case, the Magistrate may award compensation to the victim to the extent of ₹1,000/- who has been arrested wrongfully without the reason. However, according to this section, it is obligatory for a direct connection to existing between the arrest and the complainant. In order to a case to fall under this provision, the arrest must have been accomplished by the informant without reasonable grounds.

Similarly, section 359 of CrPC says that whenever any complaint of a non-cognizable offense is made to a Court and the court then convicts the accused. Then It provides that a Court of Session, an Appellate Court, or the High Court while exercising their revisional jurisdiction can order payment of costs in such situations. While in addition to the penalty imposed upon him, the court may also order the accused to pay to the complainant, in whole or in part, regarding the cost incurred by him in a judicial proceeding, and in furtherance, the court may also order that in the event of default of payment, the accused shall be sent to simple imprisonment for a term not exceeding thirty days, and these costs may also include any costs incurred in respect of evidence and pleaders' fees which the court may find appropriate.

Further Section 237 similarly has been provisioned towards providing compensation to the victims. The CrPC also takes into account occurrences where the accused may be a victim to false allegations. In light of the same, Sections 237 deals with compensation to such unusual victims. Section 237 empowers the Court of Session to take cognizance of an office under section 199 (2) of the CrPC. Further under the sub-section 3 of section 237 –

“If in any other case, the court discharges or acquits all or any of the accused and finds that there has been no fair basis for charging them or any of them, by its order

---

668 Sarwan Sing v State of Punjab (1957) AIR 637, 1957( SCR 953)

669 Colour-Chem Limited vs A.L. Alaspurkar & Ors on 5 February 1998
of discharge or acquittal, it may direct the person against whom the offense was alleged to have been committed (other than the President, the Vice-President of the Governor of a State or the Administrator of a Union Territory) to explain why he should not pay compensation to that accused or to any of those accused when there are more than one of them”.

If the court is beyond reasonable doubt and considers that there is a lack of reasonable ground for the allegation imposed upon the accused, it is empowered to the court that the complainant to pay compensation of an amount not exceeding ₹1,000/-to the victim of false accusation, after recording the reasons for awarding the compensation.

4. Victim Compensation and Interplay with Fundamental Rights

The 154th Law Commission Report on the Code of Criminal Procedure570 devoted an entire chapter to “Victimology” in which the growing emphasis on victim's rights in criminal trials was discussed extensively. It was observed that the interest of criminologists, penologists, and reformers of the criminal justice system had progressively been directed towards victimology, to gain control over victimization, and the protection towards the various victims of crimes. It highlighted that crimes often entailed substantive harm to people, and this harm was graver than just the representation of its apparent effects in the social order. Consequently, it was also observed in the report the needs and rights of victims and that they should be prioritized in the hierarchy of the process

of justice in dissecting a crime. Compensation to the victims was proposed as a recognized method of protection that offered immediate support to the victim. Such compensation could also be extended towards the family member of the victim or the loose incurred in the act of the accused in certain instances.

The principle of payment of compensation to the victim of the crime was evolved by the Hon'ble Supreme Court on the ground that the welfare state has to protect the fundamental rights of the citizens not only against the action of the social agencies but it is also responsible for hardships on the victim. It has been stated on the ground of obligation of social welfare, duty to protect its subject, etc. It should be remembered that the State's reimbursement for its official conduct was established by the Hon'ble Court against the doctrine of English law: "King can do no wrong" and it was specifically mentioned in the case of Nilabati Bhera v. the State of Orissa: In this case, it was clearly stated that the doctrine of sovereign immunity shall be only applicable in the case of a tortuous act of government servant and not where there is an actual violation of fundamental rights and hence it is stated that in criminal cases where there is a violation of the fundamental right this doctrine will not be applicable571

Further according to the 154th Law Commission report it was sketched out in the report the foundation of principles of victimology of Indian Constitutional Jurisprudence. Part III of the Indian Constitution which consists of fundamental rights and Part IV which deals with the

571 Smt Nilabati Behera Alias Lalita Behera V State Of Orissa And Others, Air 1993 Sc 1960

Directive Principles of State Policy, form a defensive wall for “a new social order where social and economic justice would flourish in the national life of the country”, 672. It also mandates, inter alia, that the State makes effective provisions to ‘ensure the right to public assistance in cases of disability and other cases of undeserved need’. 673

Similarly, it has been observed, Article 51-A makes it a fundamental duty of every Indian Citizen, inter alia “to have compassion for living creatures’ and to ‘develop humanism’. The Law Commission interrupts to assert that if the jurisprudence of these Articles is ‘emphatically interpreted’ and ‘imaginatively expanded’ they can form the constitutional underpinnings for victimology. The law commission also regretfully noted that the scope for victim compensation awarded in Indian criminal law is rudimentary. However, Section 357 of the CrPC is the point of reclamation of Indian law, since it unites victim supportive jurisprudence by the modem of empowering courts.

5. Malimath Committee Report

Finding

To evaluate the mechanism of criminal justice in India, in 2003, the Committee on Reforms of Criminal Justice System was constituted under the Chairmanship of Justice V.S. Malimath. The Malimath Committee Report made observations regarding the history of the criminal justice system and how it was apparent that it mostly protected the ‘power, the privilege and the values of the elite sections in society’. It evaluated the way crimes are defined in the modern era. The administration of the system demonstrated that there is an ingredient of the truth of such a narrow perception. 674

The principal postulation in the functionality of a criminal justice system is that it is the prerogative and principal function of the state to protect all the citizens from impairment to their person and property. The state is believed to symbolize this by “depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriate sanctions”.

The Malimath Committee report argued that the state becomes a victim itself when a citizen commits a crime and as a consequence destabilizes its authority and breaches norms of society. It is this victimization that shifted the focus of attention from the actual victim of the crime, one who suffered the injury but to the accused and how he is to be handled by the state and the state provision.

Concerning the criminal, the Report noted that criminal justice has matured to comprehend the intricacies of the vehicle of crime: Criminal justice came to comprehend all about crime, the criminal, the way he is dealt with, the process of proving his guilt and the ultimate punishment was given to him. The civil law was supposed to take care of the monetary and other losses suffered by the victim. Victims were ostracized and the State stood forth as the victim to indict and penalize the indicted. Since victims were ostracized and defenseless, the State stood forth in the

672 Art.38, Constitution
673 Art. 41, Constitution
674 6.7.1, Committee On Reforms Of Criminal Justice System Government Of India, Ministry Of Home Affairs
shoes of the victim to impeach and chastise the perpetrator.

Concerning the rights of the victim, the Report contemplated - “6.7.2., "What happens to the victim's right to bring justice to the damage he has suffered? Well, if the State successfully gets the criminal punished to death, a jail sentence or a fine, he can be satisfied. Where will he seek redress if the State refuses to do so? Could he seek compensation from the State for the injury? In such a situation, that should, in principle, be the logical consequence; but the State which makes the law absolves itself”.

The principle of compensating victims has been ignored and more often it has been recognized as a token relief than as a primary punishment to the offender, or a substantial remedy to the victim offered by law. It is also stated, the right to participate as the dominant stakeholder in criminal proceedings was taken away from the victim. The victim has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making. However, provisions in the procedural law of crime in India provides for a sentence of fine imposed both as a sole punishment and as an additional punishment according to the wisdom of the court. However, this provision is only invited when the perpetrator is convicted of the charges he is accused of.

In 2008, substantial amendments were made to the CrPC that focused on the rights of victims in criminal trials, particularly relating to sexual offenses, circumstances of when there is no identification of the accused but there has been an actual injury to the victim then also victim’s can retrieve compensation. Although the amendments left Section 357 unaffected, they introduced Section 357-A which authorizes the court to order the State to pay compensation to the victim in cases where ‘the compensation provided under Section 357 is not sufficient for such rehabilitation, or where the cases result in acquittal or discharge and the victim has to be rehabilitated’.

Section 357A subtly recognizes compensation as one of the prominent methods to protect the interest of victims. These provisions were amalgamated on the recommendation of the 154th Report of the Law Commission. The focus of the provision is on the rehabilitation of the victim even if the accused is not tried. In such instances, the victim is required to make an application to the State or District Legal Service Authorities as the case may be, for. The jurisprudence of this provision and the obligation of courts have been defined by the Hon’ble Supreme Court: "While awarding or refusing compensation under Section 357 of the Code of Criminal Procedure may be within the discretion of the court in a particular case, there is a compulsory duty on the court to apply its judgment to the issue in each criminal case. Application of mind to the question is best disclosed by recording reasons for compensation award/refusal." 


675 Sec. 357, Code of Criminal Procedure, 1973
676 Inserted by Code of Criminal Procedure Amendment Act (2008)
677 Sec. 357A, Code of Criminal Procedure Act (1973)
678 AnkushShivajiGaikwad v State of Maharashtra (2013) 6 SCC 770
As per the Criminal procedure code Amendment Act, 2008, Section 357 A was inserted that was specifically concentrated on the recognition of the victim's right to compensation. The said provision stipulates that

"357-A. Victim compensation scheme.-
(1) Each State Government shall, in coordination with the Central Government, prepare a scheme for the provision of funds for compensation purposes to the victim or his dependents who have agonized harm or injury as a consequence of the delinquency and who necessitate rehabilitation.
(2) Where a recommendation for compensation is made by the Court, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide on the amount of compensation to be awarded under the scheme referred to in sub-section (1).
(3) Unless, after the trial, the trial court is satisfied that the compensation provided under Section 357 is not sufficient for such rehabilitation, or whether the cases result in acquittal or discharge and the victim has to be rehabilitated, a request for compensation can be made.
(4) Where the offender is not traced or identified, but the victim is identified, and where there is no trial, the victim or his dependents may apply for a compensation award to the State or District Legal Services Authority.
(5) The State or the District Legal Service Authority shall, upon receipt of such advice or application under subsection (4), award appropriate reimbursement by completing the inquiry within two months after the due inquiry.
(6) The State or the District Legal Services Authority, as the case may be, “To discharge the agony of the victim, it might order instantaneous first aid services or curative benefits to be made available free of charge on the police officer's certificate not below the rank of the police station or Magistrate of the area concerned, or on any other temporary relief as the appropriate authority deems necessary”.

The code of criminal procedure (Amendment) Act, 2008, has made a remarkable contribution in filling the gaps in the law as far as the victim's rights are concerned. Apart from providing for various protection schemes for victim/witness protection especially in rape cases, the Act also provides for a, to counsel for the victim, right to appeal against adverse order passed by the trial court and also incorporated Section 357 A which provided for a victim compensation scheme.

7. Role Of Government
The theory of State responsibility pins the blame of crime on the State as having failed to protect the public against crime. It propounds that compensation is, therefore, a consequence of such failure. Although modern jurisprudence accounts for individual deviance as being no fault of the State, it supports the factum that the State must assist the vulnerable as a matter of public policy.

679 Inserted by Code of Criminal Procedure Amendment Act (2008)
681 J. Culhane, California Enacts Legislation to Aid Victims of Criminal Violence, (1965), 18 STAN L REV, p.266-272
The Central Government has approved measures to realize the accessibility of compensation to the victims. The Criminal Law (Amendment) Act, 2013 was enacted on 2nd April 2013 to address the inadequacy in the law relating to sexual offenses regarding women and children. It led to the creation of a dedicated fund known as the Nirbhaya Fund. According to the guidelines released on 25 March 2015, the Ministry of Women and Child Development is the nodal ministry to evaluate and recommend the proposed schemes under the Nirbhaya Fund, it also reviews and tracks the progress of approved schemes in coordination with the ministries/departments in question.

The central government also set up the Central Victim Compensation Fund Scheme [hereinafter: CVCF] vide the notification dated 14th October 2015 by the Ministry of Home Affairs. The Central Victim Compensation Fund Scheme aims at supporting and supplementing existing victim compensation schemes notified by states and union territories and decreasing the disparity in the quantum of compensation notified thereof. It defines the scope for budgetary allocation and provides for accounting and audit. It also opens public participation by inviting funding.

The Ministry of Women & Child Development has also launched the ‘One Stop Centres’ [hereinafter: OSC] Scheme, to be piloted with one Centre in each state. The objective of the OSCs is to provide an integrated range of services including medical care, legal and psychological support under one roof to women and girls who face violence. The Scheme also envisages that a lawyer and police facilitation officer associated with the OSC will support the woman during the recording of her statement under Section 164 (5A) of the CrPC.

All states and union territories have notified victim compensation schemes. However, the schemes in each state operate differently. For instance, the Mizoram (Victim of Crime Compensation) Scheme, 2011 states compensation would be given to the victim and his/ her dependents in the event of loss of property worth more than ₹1,00,000/- and in the event of death or permanent incapacitation of the victim who was the sole breadwinner of the family through the act of crime, whereas the Himachal Pradesh (Victim of Crime) Compensation Scheme, 2012 provides for certain cases, where the compensation shall not be paid at all.

The method of disbursing compensation proposed in each state scheme is also very different. According to the Karnataka Victim Compensation Scheme, the compensation amount should be paid through cheque, while the Himachal Pradesh Scheme delivers that the compensation amount awarded should be made to the bank account of the applicant. Further, there is no consistency in the category of offenses for which the compensation is approved. In light of such disproportion, it is important to echo the perception of the Supreme Court observing the need for uniformity in the manner of

---

683 Central Victim Compensation Scheme Guidelines, Ministry of Home Affairs, 2015 https://mha.gov.in/sites/default/files/CVCF_revised_27072017_0.PDF
684 Index of Notification of Victim Compensation Scheme, Ministry of Home Affairs, 2013
685 Gazette of Mizoram (Dec. 5, 2011)
686 Gazette of Himachal Pradesh (Sept. 6, 2012)
687 Gazette of Karnataka (Feb. 22, 2012)
8. Indian position

In India, as we follow our hoary system of the trail, wherein the state and the accused competes to get the court decision in their bowl, Hence victims' right gets itself plunge in the public interest in prosecution and conviction of the offender. Fair trial rights of the accused are given the prevalence in the Criminal justice administration in the country and hence the victims do not get their due attention regarding their injury and their position. This state was emphasized even by the Supreme Court in “Rattan Singh v. The State of Punjab” wherein it was observed that –

“It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of the law. Reparation for the victim remains the vanishing point of our criminal law. This is the system weakness, which the legislature must rectify.”

As far as the victim’s participation goes into criminal justice proceedings, his role is limited to that of an informant. Though investigating a case is the sole prerogative of police the role of the victim is always decided by the police and thereof in the process of information extraction from the victim, the victim of the case is merely harassed. Similarly, the victim also does not have any say if the magistrate on receipt of the final investigation report from the police recommending the dropping of the case is inclined not to take action against the accused. The Code of Criminal Procedure does not require the magistrate to hear the victim in this regard. In the case of Bhagawant Singh v. Commr of police, the apex court reiterated that such an opportunity of being heard is a must. During the time of prosecution also, the victim does not have much of a voice in the proceeding. Even concerning the matters that affect his rights and interests like that of bail decisions, withdrawal of prosecution,

Victim’s rights in India came into the focus of researchers only by the late 1970’s studies. Initiatives by the University of Madras in the early 1980s concluded in the foundation of the Indian society of victimology, which drafted a Bill on victim assistance in 1996. Apart from various recommendations of law commissions and the National Commission to review the working of the constitution, an important epoch concerning the victim’s right to compensation is recommendations of the Malimath Committee on reforms of the Code of Criminal Procedure.
criminal justice system in 2003. The committee recommended a holistic “justice” for victims of crime by allowing them to seek compensation for the loss or injury as a matter of right in criminal proceedings as well.

*****
A CRITICAL ANALYSIS ON THE ROLE OF WORLD HEALTH ORGANISATION IN RELATION TO INTERNATIONAL LAW

By Ayushi Jhawar
From Symbiosis Law School, Hyderabad

ABSTRACT

The World Health Organization (WHO) is one of the 16 specialized agencies of the United Nations established in 1948 to supplement international cooperation for improved public health conditions. After the realization of the importance of international public health, the WHO was formed and established and this structure has been discussed in this article. Although it inherited specific tasks relating to epidemic control, quarantine measures, and drug standardization from the Health Organization of the League of Nations, WHO was given a broader mandate under its constitution to promote the attainment of “the highest possible level of health” by all people. The constitutional principles under the WHO and its functions under the public health have been described in the article. The role of the WHO as an agency under the United Nations is required to maintain peace and security among nations through their workings. The contribution by WHO on matters related to international law shall include setting up of agendas and framing treaties and negotiations and thus act as a collective management system and coordinate the activities relating to health between nations. This role performed by the WHO as role player in under United Nations has been highlighted. The active participation of the World Health Organization in the field of international law has contributed in the present world by eradicating and combating various communicable and non-communicable diseases. Out of the various achievements few have been discussed in this article that has made a huge impact in the health aspects of the world. The role of the WHO in respect to the international law has been significant but there is scope for more improvement. The role and contributions of the WHO have been analysed in this article.

Keywords: World Health Organization, public health, function of WHO, contribution and achievements of WHO.

INTRODUCTION

The World Health Organisation is an international agency under the United Nations for the purpose of coordinating health around the globe. In 1920, after League of Nations was formed, a health organisation under the League of Nations was established. Immediately after the World War II, the UN incorporated all health organisations to form the World Health Organisation. “The WHO was constituted on 7th April, 1948 which is celebrated as World Health day all around the world.”

The WHO became the first specialised agency of the United Nations to whose constitution all the member states signed.

The World health Organisation strives to provide for a better and healthier future to the people all around the world. The WHO has played a vital role in the field of international public health policy. “The most prominent achievements from its

inception have been the eradication of smallpox in 1979. But its inability to control HIV/AIDS is also visible. However, the role of WHO is more than eradication of deadly diseases.

The WHO currently has 194 member states that adopt and help in the formulation of guidelines to be followed to combat diseases which are beneficial for all of these member states. The aim of the WHO is to fight diseases like influenza, HIV, cancer or heart related diseases. The main role of the WHO is to coordinate the international health under the United Nations. Also, another important responsibility is to establish health systems, the response as to the functioning of such systems and prepare for any future contingences. With this the mission of the WHO is universal health coverage. For this the WHO tries to provide access to quality services, frame policies that can be adopted by the member countries and also be ratified, availability of medicines for chronic disease in underdeveloped nations, etc.

The WHO’s prequalification programme has tried to establish global standards of air and water quality. This is due to the increase in pollution in the world which affects the health and safety of individuals. Through vaccines an improvement in health or prevention for diseases has been possible. There have been guidelines framed to prevent and treat conditions of asthma, hepatitis, zika or malnutrition.

The contributions of the World Health organisation to the International legislative process have been significant. A great impression has been put forward by the WHO when it comes to the aspect of development of international health law. The WHO has certain mechanisms to deal with the international problems including the deliberate and indecisive method of ratification by the states which gives a clear picture as to the uniformity in the application of a multilateral treaty. To deal with different issues the WHO has provisions under the constitution of WHO itself. This function of WHO has contributed in the development of international legal system and not only international health law per se.

From the past years the effectiveness of the WHO has been in question. With the increase in diseases, the demand for both global normative work and technical cooperation enhanced, where WHO functions more on coordination. Thus, the need to give importance to global functions has increased.

This paper will discuss about these ups and downs of the WHO and the role of WHO under the United Nations and in the development of International Health Law. The formation of WHO has had a great impact on the international health affairs, its constitution and functions have further given a debate as to the implementation of the policies are done effectively or there is a need of review to the policies in itself. These aspects will be discussed in the article with more focus on the WHO’S formation, functions, role under United Nations and role with respect to international law.

RESEARCH OBJECTIVES

To discuss the formation of the World Health Organisation.
To focus upon the powers and functions of the World Health Organisation.
To highlight the role played by the World Health Organisation under the United Nations.
To analyse the contributions made by the World Health Organisation under International Health law.

RESEARCH QUESTIONS

1. Whether or not the World Health Organisation has been formulated effectively?
2. Whether or not the powers and functions of the World Health Organisation sufficient for its functioning?
3. Whether or not the World Health Organisation has fulfilled its role under the United Nations?
4. Whether or not the World Health Organisation contributed to the development of International Health?

RESEARCH METHODOLOGY

This article is a doctrinal research and analytical in approach. The focus of the article is in critically analysing the role of the World Health Organisation in the international law development. The article is theoretical and historical and brings out the formation, functions and role of the World Health Organisation under the United Nations. The sources of data are secondary sources of data. These include information from various books, articles, journals, etc.

LITERATURE REVIEW

1. INTERNATIONAL LAW BY MALCOLM N. SHAW
This book on International law is an authoritative book with comprehensive understanding on international law. The book contains an expanded treatment of relationship between international and domestic law, the principles of international humanitarian law, and international criminal law alongside international economic law.

2. GLOBAL GOVERNANCE, INTERNATIONAL HEALTH LAW AND WHO: LOOKING TOWARDS THE FUTURE BY ALLYN L. TAYLOR
This article enhances the usage of international law to create a method of coordination between states. The article also focuses on the reasons and the challenges ensuring the rise of international health law. The article also shows such a huge responsibility in hands on one body such as WHO is unreasonable but an effort can be made. The article contains the evolution of international health law in relation with expanding globalisation. The article also contains the concept of global health governance and its limitations. The gap is that only the present scenario has been given importance to and the previous efforts have not been judged.

3. WORLD HEALTH ORGANISATION BY FRANK A. CALDERONE
This article contains the details on international health conference, entire history of the formation of World Health Organisation. It includes the formation of WHO, inclusion of various committees like the interim committees, expert committees, there functions, the constitution and
provisions under it and related aspects. The present article includes the history of formation of World health organisations, its functions and provisions under the constitution of WHO. The gap in the article is that only the formation has been included and has no analytical perspective since only facts are mentioned.

**FORMATION OF THE WORLD HEALTH ORGANISATION**

After the World War II and the failure of the League of Nations, an important international organization was sought to be developed which would prevent the world from another war. “As a result of the International Health Conference, also known as the San Francisco Conference, the United Nations organization was established in 1945 to maintain peace and security between the nations in the world.”

“In the coming sessions of this health conference, the idea of international organization extended towards the protection of food, drugs and biological product.”

Thus, World Health Organization was established as a special agency under the Economic and Social Council of the United Nations, where the constitution for the same was drafted and signed by 51 countries. “The World Health organization is a result and combination of all the health organizations that existed before its formation including the international sanitary conference, Pan American Sanitary Bureau, the Office International d’Hygiene Publique and the Health Organization under the League of Nations. It became the first specialized agency under the UN to which all members had given subscription.”

“The WHO was established on 7th April 1948 and the headquarters in Geneva to focus on health through a global perspective.”

This day is celebrated as the World health day The WHO had five regional offices to lower the burden of work. Twenty-six member states had ratified with the WHO then. The symbol of WHO known as the Rod of Asclepius, represents healing. The use of the word ‘world’ gives a sense of belongingness and mutual exercise of responsibilities between nations for betterment of health. The apex decision-making body for WHO is the World Health Assembly whose main function is to determine the policies of the Organization. “The Health Assembly appoints the Director-General, supervises the financial policies of the Organization, and reviews and approves the proposed programme budget.”

The Secretariat of WHO is staffed by some 7000 health and other experts and support staff on fixed-term appointments, working at headquarters, in the six regional offices, and in countries. “The WHO, initially, was given a budget of US$ 5 million under G. Brock Chisholm as Director General.”

“WHO had initially prioritized its responsibilities towards eradication of diseases like tuberculosis, malaria, STD’s, improvement of child and maternal health along with nutrition and environmental well-being.”

---

698 Neville m. Goodman, International Health Organizations And Their Work 46 (2d ed. 1971).
700 World Health Organization. (1948), Supra Note 5.
703 World Health Organization. (1948), Supra Note 5.
704 Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common
Today the WHO has continuously worked over seventy years since its establishment and promotes the purpose it constantly aimed to serve. The WHO governs on the principle of highest standards of health to all and claims health as an essential and inalienable right. The motive of WHO is better health for everyone and for it the WHO has made many progressive changes in the field of health.

FUNCTIONS OF THE WORLD HEALTH ORGANISATION

With the increase in the activities between the states forming a global village, as many as 150 country offices and six regional offices are required for the world Health Organization to perform its goal of Universal Health coverage among its 194 member states. The key function of WHO is to act as a coordinator under the UN on aspects of international health. They function to solve communicable and non-communicable disease along with lifelong health issues. The WHO also governs to be prepared for any disease outbreak and keeps surveillance on existing health issues and other corporate services. The WHO to extend its hand funds foundations and NGO’s to deal with health matters and conduct treaties between countries on the same aspects.

PRINCIPLES IN THE CONSTITUTION OF WHO

“The constitution of the WHO under its preamble lays down certain principles that are obligatory for this organization to maintain.

1. The WHO considers health to be more than just lack of diseases. It means an individual shall be mentally, physically and socially well.
2. Irrespective of race, caste, religion, gender, political, economic or social situations, all human beings have an inheritable and natural right to health and standard of health.
3. Only if the people and states cooperate with each other than highest standards of health can be achieved which is essential to maintain peace and security in the world.
4. If any state improves its conditions of health, then all nations collectively will benefit from promotion of such health aspects.
5. The matter of danger is the gap between developed and developing countries and the unequal status of the countries is a loophole in improvement of health all over the world.
6. Every person shall be aware of the right of health and benefits available with increase in development of medical, psychological or mental and other health issues.
7. A child shall always be given adequate health facilities when required for his development.
8. For betterment of health, all the people must cooperate, take part and adhere to the guidelines.
9. The governments of the nations are required to maintain standards of health for its public.”

ROLE OF WHO IN PUBLIC HEALTH
“In the Twelfth general Programme of Work, known as ‘Not merely the absence of disease’, the following are the main functions of the world Health Organization in respect to public health.”

- “Keeping track on health situations of various countries and asserting new health norms.”
- Give opinions on important matters of health and collaborate with organizations promoting the same when needed.
- Making agendas and spreading awareness among nations and citizens, therein, to improve standard of health.
- Establishing of rules and regulations to implement various health standards.
- Analysing ethical and safe options for changes in field of health
- Act as a change and provide support to put a strong front in challenging the health issues.

**ADDRESSING ISSUES BY WHO**

In view of promoting health and giving solutions to the problems of disease affected people, the WHO takes steps to promote the standard of health for better life and taking care of emergency situations.

- “Universal Health Coverage
  - Increase the availability of services of essential health care
  - Increase the production and availability of medicines
  - Skill and train the health staff
  - Maintain sustainable financing methods

Keep a check on betterment of availability of data on various health aspects.

Involvement of public by abiding to health norms.

- **Health Emergency**
  - Prepare previously for any emergency by identification and management of risk
  - Prevent emergency and develop technology to prevent any outbreak
  - Identify and solve heightened emergency
  - Set up to provide health requirements in delicate areas.

- **Health and well-being**
  - Deal with any social factors
  - Endorse intersectoral methods
  - In law regulations health should be made a priority

Thus, the issues addressed by WHO are human capital across the life-course, non-communicable diseases prevention, mental health promotion, climate change in small island developing states, antimicrobial resistance and elimination and eradication of high impact communicable diseases.”

**ROLE OF WHO UNDER UNITED NATIONS**

The United Nations functions with its chief outline to maintain peace and security in the world. This international organisation aims to solve conflicts that may arise in the world between nations and other issues that may cause trouble to the citizens. For solving and settlement of such conflicts, the UN health practice comes of age. J Health Polit Policy Law. (2016).


---

708 Burris S, Hitchcock L, Ibrahim JK, Penn M, Ramanathan T. Policy surveillance: a vital public
conducts various conventions and treaties between nations that may provide a win-win situation. To solve the obstacles in relation to health, UN relies upon its specialized agency the World Health Organization for this.

COORDINATION AND COLLECTIVE MANAGEMENT

The WHO being the largest health organisation in the world has the responsibility to facilitate as a coordinator for smooth and effective implementation of the health policies formulated around the world for the welfare of the people. “The agenda of WHO under UN is to communicate and act as a medium of linkage between various nations. This will ensure the enactment of rational health policies from the issues of health collected around the world and also, provide orderly implementation of these health policies around the world in a peaceful and united manner.”

Further, the WHO would enable to make settled collective agreements on health matters which can prove to be a legal regime and also will show collective health management. Through this the primary objective of peace and security between nations under the UN is protected and abided by the WHO is dealing with health concerns internationally.

AGENDA SETTING AND PROMOTING DIALOGUE

Given the position of WHO as a highly visible international organization, it has the opportunity to play a pivotal role in setting the international health law agenda and, thereby, to contribute to the articulate development of health law. Through setting up of agendas and other measures, WHO may promote global dialogue, build active partnerships. “Setting a priority list among matters of health law can kindle effective, and more coordinated, governmental and intergovernmental action.”

Thus, facilitating the role of UN, the WHO can serve as a neutral actor for all states participating in the negotiation exercise, while simultaneously maintaining the institution’s vigilance for protection of public health.

PLATFORM FOR TREATY NEGOTIATIONS

The WHO provides a platform to enter into treaties between nations to solve the problems relating to dispute, various trade agreements for medicines and medical services or the technology and formula for such medicine is shared or agreed upon. These treaties facilitate the workings of the WHO under the UN. The member states get a common space to deliberate upon topics and agendas to maintain highest standards of health and cure diseases. The member states don’t have to separately structure agreements on health aspects since they have ratified to the WHO. With this, any conflicts between nations on matters of health can be settled peacefully by WHO without any disruption to people and property and hence fulfils the objective of the UN, thereby performing its role.


CONTRIBUTION OF WHO TO INTERNATIONAL HEALTH

In the recent times, the world has seen global health pandemic issues. The unhealthy lifestyle of the people has contributed in many ways. With the rise in technology and medicines, the WHO has come up with solutions to combat many diseases, both communicable and non-communicable which were spread around the world. The collective management system of the WHO has proved to be effective. Some of the achievements of WHO include:

ERADICATION OF SMALL POX

“The fight with small pox resulted in the fee of $300 million worldwide. The WHO was successful in eradicating small pox and no case has been noted since 1979.” 712

This was the first victory of WHO against an epidemic and the success and performance of the WHO made believe that the establishment of WHO was a correct decision.

INITIATIVES TO CONTROL AIDS

The WHO has not been able to eradicate HIV/AIDS from the world completely due to the nature of the infection. However, many efforts have been put into by the WHO for its reduction which includes collaboration with the governments of all the nations. “The UN security council has considered the pandemic created by AIDS and in 1996, created a joint program on HIV/AIDS to prevent its spread by creating a strategy for its control.” 713

The WHO plays a crucial role in this program with suggestive measure to inculcate all norms and strategies for mobilization of resources for health policies. “As of 2015, there has been 50% reduction in the number of people between age group of 15 -24 years. Also, a 25% decrease in the deaths caused by HIV/AIDS and the scope of new HIV infection among children has come down to 90%.” 714

POLIO ERADICATION

Polio mainly occurs among children and paralyses them for life as the nerve cells of the brain and spinal cord are affected. With the initiatives taken by WHO, polio no longer is present among the world in large scale but continues to affect the poor sections of the society. “The Global Polio Eradication Initiative of the WHO in 1988 has reduced 99% cases of polio along with the support of UNICEF, Centre’s for Disease Control and Prevention and many more organisations. Polio is almost extinct after the Global Vaccination Drive of the WHO saving lives of millions of people.” 715

CONTROL OF TUBERCULOSIS

Tuberculosis (TB) is a bacterium that infects the lungs and is communicable just by coughing or breathing in the air. People with low immune systems have a higher

risk to be infected with this disease. “In 20 years from 1990 to 2010, there has been 40% less deaths due to TB. Furthermore, 46 million people have been treated and millions of lives saved due to the guidelines promoted by the WHO. In 2018, there was again a rise of 10 million patients with TB but this disease can be cured.”

COMBAT MALARIA

Malaria is a disease spread by bites of mosquitoes. “The intention of malaria eradication seemed too far-fetched by WHO, hence they started a Global Malaria Programme to control the malaria cases by keeping track. In 2012, there was a viable option for malaria vaccine but nothing has been found.” This health damaging insect continue to exist and further spread around the world.

THE SPREAD OF COVID-19

The spread of covid 19 has created a pandemic in the world. The daily routine lives of the people have come to a halt. Till now no cure for the virus has been found out and the nations have implemented lockdown as the only solution to prevent further spreading of covid 19. To combat the virus, the WHO has laid guidelines for the layman to follow on a daily basis to prevent attaining the virus. “These include maintaining sanitation, social distancing, washing of hands on a regular basis, use of alcohol-based sanitizers, stay at home, avoid going to public places and seek medical assistance when there are symptoms like cough, fever or shortness of breath.” The fight the deadly covid 19, the strategy update as of April 2020 of WHO includes the Strategic Preparedness and Response Plan and also the Global Humanitarian Response Plan.” The WHO has although spread the awareness regarding the difficulties in health caused by covid 19 and acted as a proper collective management system by incorporating the response from various nations but has not put enough efforts from the medical point of view to combat the virus.

SUGGESTION

The goal of the international health law is to act as a blueprint to the national health law for the attainment of well-being of people, globally. The current mechanism of health law has is not efficient to deal with large scale health problems. Furthermore, the WHO should increase the capacity of services offered due to change in the population structure over the years. Guiding the developing countries stuck in poverty to maintain hygiene is important for the WHO to prevent the risk of diseases in large numbers.

To maintain the health internationally, a global health jurisprudence should be followed for easy monitoring of health activities. This global jurisprudence on

---

health will facilitate the work of the WHO to maintain records of health and laws together. This role of WHO to formulate and monitor the global health jurisprudence will be a great development to the international law and be useful for the nations in general to follow laws on health matters that they don’t have legislations for. This development by the WHO will supplement the principle of the United Nations of peace and security on health matters for which this specialised agency was constituted.

CONCLUSION

The priority of the World Health Organisation from its very inception has been good health care for all people around the world. With universal health care as its agenda, the WHO has a constant system of monitoring the health status and activities of the people in the various nations. The WHO keeps in check with nations whether the International Health Regulations are being monitored or not. Since social, economic, environmental and mental factors play a role in causing disease among the people, WHO promotes health lifestyle as a key objective for the people to introduce good habits in their strenuous and hectic lives. Also, the increase in population demands for an increase in the supply of medical services and norms by the nations under the WHO. The WHO must achieve the health goals.

The WHO has been a leading example for all the health communities in world. It has inspired the way in which a health organisation should work and meet the health needs of the people, thereby living a social and economically productive lifestyle. The WHO functions to educate various organisations, countries and states to meet the health goals by providing regulations to be followed. The WHO with its collective management system has time and again proved, that the world can become a global village when the need so arises, to meet with the challenges presented by the diseases. The WHO acts hope and unity in times of health crisis.

Thus, in conclusion, The World Health Organisation is an extensive organisation with vast duties and responsibilities. The process of formation of the World Health Organisation apart from the core functions it is required to fulfil has been done sufficiently and effectively making the WHO the primary international organisation for public international health and related laws. With the changing times it is clear, that WHO has gone through many ups and downs while performing these functions. The WHO has focused on important agendas but shall be more alert to prevent any disease outbreak that may change the shape of the population and health. The role of WHO under United Nations which has been discussed should also be abided by keeping in mind the changing demands of international community. The contribution of WHO in the development of international health law has been significant. More and more achievements over time have been secured by WHO but there is still scope for more possible results to cure diseases and prevent the same.

REFERENCES

1. Journals:
   - Neville m. Goodman, International Health Organizations And Their Work 46 (2d ed. 1971).

2. Websites:
• Allyn L Taylor, Global Governance, International Health Law And Who: Looking Towards The Future, BULL.
COMMENT: UTTAM V. SAUBHAG SINGH & ORS. (2016)

By Bhargavi Shukla and Swagat Sanyal
From Gujarat National Law University

Abstract

The case deals with the concepts of the Mitakshara Coparcenary system and the Joint Hindu Family with regard to the law focusing testamentary and intestate succession. It focuses on the Sections 6 and 8 of the Hindu Succession Act, 1956 prior to the 2005 amendment. The question is with regard to the devolution of the deceased’s property as well as the status of the plaintiff/appellant in order to ascertain his claim. The court dealt with a number of issues such as a widow’s right as a tenant-in-common or a joint tenant subsequent to the death of her husband, entitlement of a son’s son in the property of a Joint Hindu Family among others. The Court laid down some basic differences between Survivorship and Succession while passing the judgment. The case comment, therefore, aims at analysing this judgment of the Court vis-à-vis previous judgments related to the two concepts.

I. INTRODUCTION

The Supreme Court of India, in the case of Uttam v Saubhag Singh, has summarised the law laid down in Sections 6 and 8 of the Hindu Succession Act, 1956 in relation to joint family property governed by Mitakshara School. The court has analyzed both the Sections in depth in order to reach a conclusive difference between the two and, therefore, between the concepts of survivorship and succession. Section 6 of the 1956 Act dealt with devolution of interest of a person in a coparcenary property in case he dies intestate. It provided that in case a person having interest in a coparcenary property dies intestate leaving only male heirs, such property will devolve upon his male heirs by survivorship. However, the proviso to Section 6 provided that if the deceased had left behind a Class 1 female heir, the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

In order to apply this section, it becomes important to determine the share of a person in the coparcenary property. This is done by giving effect to a fictional partition immediately before the death of such person. This share is then distributed between all the coparceners and the widow of the deceased person in order to give effect to the notional partition of the coparcenary property.

On the other hand, Section 8 of the Act comes into effect either by reason of the death of a male Hindu leaving behind self-acquired property or by the application of the proviso to Section 6. In the situation of Section 8 being applied, the property devolves only by way of intestate succession and not by survivorship. Moreover, Section 30 of the deals with testamentary succession and makes it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in coparcenary property can be disposed of by any form of testamentary disposition.

II. FACTS

---

720 2016 (4) SCC 68.
721 Hindu Succession Act 1956, s 6.
722 Hindu Succession Act 1956, s 8.
723 Hindu Succession Act 1956, s 30.
Jagannath Singh, the grandfather of the plaintiff, passed away in 1973 leaving behind his wife, Mainabai and 4 children including the plaintiff’s father. The plaintiff Uttam filed a suit for partition against his father who was defendant no.3 and his father’s brothers namely defendant no. 1, 2 and 4. The suit was for acquisition of his share in the suit property which according to him was ancestral property. He claimed that he was entitled to his share on the account of him being a coparcenary.

III. PROCEDURAL HISTORY

A. First Appeal

The suit was decreed, against which appeal was preferred. The appeal was allowed by the court of first appeal by dismissing Uttam’s suit on reasoning that the death of Jagannath Singh took place in 1973, after which his widow Mainabai was alive. Thus, according to the proviso to Section 6, the distribution of Jagannath Singh’s property would be done as per Section 8. The court of first appeal took into consideration the fact that once the application of Section 8 is done, the division of joint family property has to be carried out according to the rules of intestacy and not survivorship. In light of this fact, the court decided that there remained no JHF property to be divided when the suit for partition was brought by the plaintiff. It was further noted that the father of the plaintiff alone was the Class I heir of Jagannath’s property and was entitled to succession in his property and the plaintiff had no right as long as his father was alive.

B. Second Appeal

The Madhya Pradesh High Court held in the second appeal that the grandson had no right in the properties owned by the grandfather in view of Sections 4,6 and 8. He, therefore, cannot claim partition during the lifetime of his father.

It was observed that, ‘In the present case, it is undisputed that Jagannath had died in the year 1973, leaving behind respondents No. 1 to 4 i.e. his four sons covered by Class I heirs of the Schedule therefore, the properties had devolved upon them when succession had opened on the death of Jagannath. It has also been found proved that no partition had taken place between respondents No. 1 to 4. The appellant who is the grandson of Jagannath is not entitled to claim partition during the lifetime of his father Mohan Singh in the properties left behind by Jagannath since the appellant has no birth right in the suit properties.’ 724

IV. ISSUES

The Supreme Court, in deciding the given case, dealt with a number of important issues of family law such as:

1) Whether the joint family property retained its character as joint family property after the death of Jagannath Singh.
2) Whether the appellant, being a coparcener, had a right in the disputed property by birth.
3) Whether the appellant had a right to sue for partition while his father (Class 1 heir) was alive.

V. CONTENTIONS

A. Appellant

724 Uttam (n 1) [4].
Firstly, it was contended that as the widow of the deceased was alive at the time of his death, the case would be under the purview of proviso to Section 6. As a result of this, the interest of the deceased in the coparcenary property would devolve by intestate succession under Section 8 of the Act, and not by survivorship.

Moreover, it was argued that only the interest of the deceased in the coparcenary property would devolve by intestate succession and that the joint family property would not otherwise have any effect whatsoever. As a result of this, it was well within the plaintiff’s rights to sue for partition even while his father was still alive. The status of the plaintiff as a coparceener and his right of partition in the joint family property continued to exist even after the death of Jagannath Singh which in turn meant that his right to sue for such partition remained intact.

It was further argued that Section 8 of the Act would not bar such a suit because it would only be applicable at the time of the death of the plaintiff’s grandfather in 1973 and not thereafter to the plaintiff, who as a living, was entitled to a partition before any other death in the joint family occurred.

Finally, it was contended that the Act only abrogated the Hindu Law to the extent indicated, and that it is necessary to read Section 6 in harmony with Section 8. As a result, it cannot be concluded that the status of joint family property recognised under Section 6 is taken away upon the application of Section 8 on the death of the plaintiff’s grandfather.

B. Respondent

The primary contention was that the joint family property ceases to be joint family property once Section 8 is brought into application by reason of the proviso to Section 6 being applied. Such property can only be succeeded to by application of either Section 30 or Section 8, in case a will had been made or in case a member of the joint family dies intestate respectively.

As a result, the respondent supported the judgment given by the High Court and cited two cases in furtherance of his contention. These cases, namely Commissioner of Wealth Tax, Kanpur and Ors. v Chander Sen and Ors. and Bhanwar Singh v Puran, asserted that once Section 8 is applied to the facts of a given case, the property then ceases to be considered as joint family property. This being the case, no member of the family exercises the right to partition in a property which is no longer joint family property.

VI. REASONINGS OF THE COURT

The Supreme Court referred to some judgments where the proviso to Section 6 before the 2005 amendment and the Section 8 had been applied by the courts. Referring to Gurupad Khandappa Magdum v Hirabhai Khandappa Magdum and Shyama Devi (Smt) and Ors. v Manju Shukla (MRS) and Anr., the court said that in order to determine the deceased’s share in the joint family property under the proviso to Section 6 of the Hindu

725 Commissioner of Wealth Tax, Kanpur and Ors. v Chander Sen and Ors. (1986) 3 SCC 567.
727 Gurupad Khandappa Magdum v Hirabhai Khandappa Magdum (1978) 3 SCC 383.
728 Shyama Devi (Smt) and Ors. v Manju Shukla (MRS) and Anr. 1994 6 SCC 342.
Succession Act, a fictional partition is to be necessarily carried out just before the deceased’s death. Thus, the defendant’s property was devolved by intestate succession under the Act and not by survivorship. Explanation 1 to Section 6 was the main subject-matter of the dispute between parties in the case.

The court also stated that, ‘All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased’.\textsuperscript{729} It was held that explanation 1 should be given full effect while dealing with the proviso to Section 6.

In another case which was referred here, the Supreme Court had held that due to the application of explanation 1 of Section 6, the membership of a female, who inherits a share of the joint family property on the death of her husband, will not be affected after partition takes place.\textsuperscript{730}

It was also observed that, ‘Also, his case in the suit filed by him is not that he is entitled to this share but that he is entitled to a 1/8th share on dividing the joint family property between 8 co-sharers in 1998. What has therefore to be seen is whether the application of Section 8, in 1973, on the death of Jagannath Singh would make the joint family property in the hands of the father, uncles and the plaintiff no longer joint family property after the devolution of Jagannath Singh’s share, by application of Section 8, among his Class I heirs’.\textsuperscript{731} For this matter, the court referring to Commissioner of Wealth Tax, Kanpur and Ors. v Chander Sen and Ors.\textsuperscript{732} And Yudhishter v Ashok Kumar\textsuperscript{733} held that the preamble of the Act clearly envisions that the Act is to amend and codify the laws relating to intestate succession. It was noted that Schedule 1 did not include a son’s son but included a predeceased son’s son.

Additionally, in Bhanwar Singh v Puran\textsuperscript{734} the Supreme Court had held that according to Section 19\textsuperscript{735} of the Act, in the event of succession by two or more heirs, the property shall be divided among them per capita and not per stirpes, as also tenants-in-common and not as joint tenants. Accordingly, it was concluded that they did not continue to be joint coparcenary.

The Court therefore said that when a Hindu male, who has an interest in a Mitakshara coparcenary property, dies after the commencement of the 1956 Act, by virtue of Section 6, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary.

The exception contained in the explanation to Section 30 of the Act makes it clear that the interest of a male Hindu in Mitakshara coparcenary property is that which can be disposed of by him by executing a will or by any other form of testamentary disposition.

The aforementioned exception is provided for in the proviso to Section 6, which states that if such a male Hindu had died leaving behind either a female relative specified in Class I of the Schedule or a male relative specified in the same Class who claims

\textsuperscript{729} ibid [13].
\textsuperscript{730} State of Maharashtra v Narayan Rao Sham Rao Deshmukh and Ors. 1985 3 SCR 358.
\textsuperscript{731} Uttam (n 1) [15].
\textsuperscript{732} Commissioner (n 6).
\textsuperscript{733} 1987 1 SCC 204.
\textsuperscript{734} Bhanwar (n 7).
\textsuperscript{735} Hindu Succession Act 1956, s 19.
through such female relative surviving him, then the dissolution of the interest of the deceased in the coparcenary property would take place by testamentary or intestate succession instead of survivorship.

Additionally, on the death of a Hindu male coparcenary, by virtue of proviso to Section 6, the determination of share is to be done by considering that a partition had taken place immediately before his death. When a male Hindu dies leaving behind self-acquired property then under Section 8 and proviso to Section 6, such property would devolve only by intestacy and not survivorship.

Finally, on reading Sections 4, 8 and 19 of the Act comprehensively, it can be concluded that after the dissolution of JHF property according Section 8, the various persons who have succeeded to it hold the property as tenants in common and not as joint tenants.

It was conclusively held that the property was ancestral property and on death of Jagannath Singh, it ceased to be joint family property. Also, the widow and 4 sons were then tenants’ in common and not joint tenants of the property. The suit was held to be not maintainable and was dismissed with no order as to costs.

VII. ANALYSIS

The court, in its judgment, held that because Jagannath Singh died leaving behind a widow and 4 children, he fell within the proviso to Section 6 and Section 8 of the Act. The widow fell under Class 1 heir of Jagannath Singh under the Schedule 1. For instance, if the widow had not been there, proviso to Section 6 of the Act could not have been applied and the succession would have been by survivorship as per Section 6 of the Hindu Succession Act, 1956. Uttam would have the right over the property of his grandfather for being a coparcenary to the ancestral property. This means that every coparcenary has a right in the ancestral property under Section 6 unless the proviso is attracted.

The existence of coparcenary property and more than one coparcener are the essentials for application of Section 6. Therefore, a coparcenary cannot consist of single individual even if the property in his possession is coparcenary property. Section 6 prescribes devolution of interest in the coparcenary property but not distribution of property. Therefore, coparcenary property would remain intact till partition is given effect. It is only the interest of the deceased in the coparcenary property that is devolved by way of survivorship. Thus, the coparceners take shares in the interest of the deceased coparcener as tenants in common as per Section 19 of the Act.

Where a son inherits property owned by his father, the nature of the property is not ancestral. Even if it is assumed that grandfather’s property was ancestral in the hands of the father, the grandson would not have an interest in the property. The operation of the provision of the statute, thus interpreted with the existing Hindu Law and disrupted the accrued right by birth in the joint family property of the son’s son when the son is living.\(^ {737}\)

Further, the *Gurupad* judgment has been highly relied upon in this judgment and it

---

\(^ {736}\) Additional Commissioner of Income Tax, Madras v PL Karuppan Chettiar AIR 1979 Mad 1.

\(^ {737}\) Gurupad (n 8).

www.supremoamicus.org 225
means that even in case of notional partition, the JHF property is converted into separate property entirely. However, in Mulla\textsuperscript{738} and State of Maharashtra v Narayan Rao\textsuperscript{739} the concept of notional partition is dealt with differently whereby notional partition is seen as a mere calculation for the purpose of distribution of deceased’s property and not to be considered as dissolution of coparcenary.

Notably, the decision of Chander Sen\textsuperscript{740} has been relied upon wrongly because it cannot be used in this case to justify the fact that even ancestral property will devolve upon the son in his individual capacity. The case only talks particularly about how after the inheritance of father’s self-acquired property under Section 8, the son is not the karta of his own JHF but he takes the property in his individual capacity as individual property. Same is the problem with Yudhishter\textsuperscript{741} judgment where the question is with respect to self-acquired property and not ancestral property.

VIII. CONCLUSION

On the application of the principles laid down by the judgments of the Supreme Court, it was observed that on the death of Jagannath Singh, his property would be divided as per the proviso to Section 6 and a partition is said to have taken place immediately before his death. Due to this it was clear that the plaintiff would be entitled to his share in 1973. However, because the plaintiff had taken birth only in 1977 which was after the death of his grandfather, he was not entitled to anything.

\textsuperscript{738} Sir Dinshaw Fardunji Mulla, \textit{Mulla on Hindu Law} (Satyajeet A Desai ed, 21\textsuperscript{st} edn, LexisNexis Butterworths Wadhwa Nagpur 2010) 1107.

\textsuperscript{739} State (n 10).

\textsuperscript{740} Comissioner (n 6).

\textsuperscript{741} Yudhister (n 14).
CONCEPTUAL ISSUES IN PATENTING OF LIFE FORMS

By Daksh Dhawan and Divyanshi Saxena
From School of Law, University of Petroleum and Energy Studies

ABSTRACT

A patent as described in numerous legal texts is an intellectual property wherein a person is granted monopoly rights for inventing a useful, new or an improvement over an existing article or making of an article including its process. Initially in 1873, improvements in manufacturing and processing of yeast and beer was given as a patent in USA, Italy and France. It is to be noted that the importance of patenting of life forms only emerged after 1970’s during the booming period of biotechnology related to Hybridoma technology, DNA technology etc. It is only due to such technologies that the industries and researchers were able to exploit and use the biological resources for production of pharmaceuticals and agricultural products in a commercial and large-scale form.

Patenting of life forms as a critical and crucial issue is due to its commercial potential from usage of biotechnology. The subject matter in biotechnology patenting is different than that of patenting in machinery which are comparatively more traditional when compared to likes of plants, human cells, animals, genes etc. This paper will be tackling the issues of following standards in context of TRIPS agreement regarding the patenting of life forms.

Introduction:

A patent as described in numerous legal texts is an intellectual property wherein a person is granted monopoly rights for inventing a useful, new or an improvement over an existing article or making of an article including its process. Initially in 1873, improvements in manufacturing and processing of yeast and beer was given as a patent in USA, Italy and France. It is to be noted that the importance of patenting of life forms only emerged after 1970’s during the booming period of biotechnology related to Hybridoma technology, DNA technology etc. It is only due to such technologies that the industries and researchers were able to exploit and use the biological resources for production of pharmaceuticals and agricultural products in a commercial and large-scale form.

Patenting of life forms as a critical and crucial issue is due to its commercial potential from usage of biotechnology. The subject matter in biotechnology patenting is different than that of patenting in machinery which are comparatively more traditional when compared to likes of plants, human cells, animals, genes etc. This paper will be tackling the issues of following standards in context of TRIPS agreement regarding the patenting of life forms.

The idea behind Intellectual property is for the recognition and protection of the innovator, as it provides for reward for fostering the technical and industrial progress in the current economic and social structure. Any unnecessary encroachment on such innovations or inventions need to be protected for maximizing growth and development. The context is this is of much more relevance when talking about the huge strides being set in information and biotechnology technology. There has been a leap in the advancements being made in
biotechnological research including the pharmaceutical industry which calls out for mounting pressure on the parliament to encourage patenting of life forms to encourage development and research initiatives. Such a positive enforcement by the policy makers would contributes towards exploring unrecognized and undiscovered commercial usage of life forms. Creation of life forms like genetically modified animal species or plants, genes, etc. can be patented as bio-patents.\(^\text{742}\) Though it is evident that laws protecting and regulating such research and experiments are at an inchoate path. One such reason of this debacle is the difference in ethical and economical standing of the countries and supposed trade secrets under the provisions of World Trade Organization. The debate of the hour with respect to this is the limit for granting for protection. Therefore, a critical analysis of the current position and situation of law on patentability of microorganisms is vital for future prospectus of the biotechnological industry.

**Trips agreement on microorganisms:**

The TRIPS agreement, administered by the WTO\(^\text{743}\), is an international agreement for laying down minimum fixations and standards for trade forms of intellectual property regulation and is applicable to WTO members. He given agreement was negotiated under consensus of WTO members at the Uruguay Round of

GATT.\(^\text{744}\) TRIPS set the basic standard requirement for patentability and obliges to patent microorganisms\(^\text{745}\) to its members. Hence, the term “microorganism” requires an understanding to constitute its essential. Lack of a scientific definition creates unforeseen stigmas and restrictions in research. TRIPS agreement makes it mandatory to grant patents of microorganisms, but at the same time fails to define the term “microorganisms”. Therefore, creating a vague standard which can be interpreted by nations unequally and differently. A clarity on inclusion of naturally occurring substances and genetically modified organisms was required.

**Issues in patenting life forms:**

Traditionally patenting requires inventive step and disclosure of new invention with the requirement of proof whereas when it comes to inventions in biotechnology the subject matter already exists in nature. In patent law, it’s a well-accepted principle that naturally available matter is excluded as it doesn’t contribute anything new. Conversion of natural material into private property as done in biotechnology invention is rather considered as against public interest and unethical. Such deliberations raise ethical and moral issues to convert god made natural material to mere private objects using advanced technology. This further created difficulties for biotechnological inventions to be


granted patents due to the test of inventive faculty. Another issue was the written description as a practical requirement of production of samples and invention. However, developments and advancements in biotechnology helped in searching solution for the mentioned issues.

**Legal issues:**

The centered around legal problem on patentability of life form is whether it should be considered under the existing criteria or not. According to the legal interpretations in 1980s in USA, the patent rights eligibility denied all life forms as it was a mere discovery rather than an invention. The given decision was in Funk Bros. v. Inoculant Co. The claim of patent in this case was regarding the mixed culture of Rhizobia which were capable of immunizing seeds of plants belonging to cross-vaccinating groups. The Court held that “he who discover a hither of unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such a discovery it must come from the application of law of nature to a new and useful end. Even though it may have been the product of skill, it certainly was not product of invention.”

In the case of Diamond v. Chakrabarty, the Supreme Court of USA granted patent to bacteria which was genetically modified useful for clean-up of oil spills. The ratio decidendi centered on the inventiveness to modify the bacteria. The liberal interpretation according to the Court for the term “composition of the matter” and “manufacture” contemplated the wide scope of patent law to include thing made by man. It was held that the new bacteria had different characteristics than that found in nature and had potential utility in various fields. Hence, the discovery was stated as work of own and not of nature’s hand in Section 101, 35USC.

The case of Diamond v. Chakrabarty had opened gates to numerous applications to claim patent protection over higher life forms like plants. In the Judgement of In Re Hibberd, the patent right was fully extended and granted to plants and in the Judgment of ex parte Allen, the same to the animals. These decisions were purely based on the degree of interventions made by humans as a test of making the product and the constitutional mandate of protection for non-naturally occurring.

The differentiating line between invention and discovery has been a major difficulty especially considering DNA technique which isolates genetic materials. After the decision of Diamond v. Chakrabarty, the USA patent office granted patent for Onco-Mouse for cancer drug study. In these terms morality or public order wasn’t taken up as a criterion since human intervention was all that was needed.

**Moral and Ethical Issues:**

Patent grant on higher life forms such as genes, human cells, mice etc. has provoked and invoked a lot of various ethical objections to life forms being patented. Religious institutions claimed that patent of life forms mere reduction of God’s creature to material objects which degrades the

---

746 Funk Brothers Seed Co. v. Kalo Inoculant Co., 333 U.S., 127 (1948)
748 In re Hibberd, 227 U.S.P.Q. 443
749 In Re Allen, 846 F.2d 77 (Fed. Cir. 1988)
dignity of life by making it as a private property. Considering human beings were playing god using advanced technological development and patents. The European Court addressed this issue in the Relaxin case\(^{750}\). In this case, Relaxin encoded human gene patenting was being claimed. It was held that patenting of an individual human gene isn’t the same as patenting of human life and has nothing to do with it considering that it would be impossible to recreate an entire human being out of human gene cloning. And given that no individual human being confers such right of a patent. Under gynecological operations and consent the tissue is taken. Such substances are lifesaving ones and are applicable in industrial technical solutions to technical problems. Hence, its patentability is evident. A synthetic Relaxin was produced using the cloning DNA technique gene. Relaxin is a hormone which can relax uterus in events of child birth. It was held to be not a mere discovery as Relaxin’s isolation was necessary for gene coding. In case like Green Peace\(^{751}\), PGS, the transgenic plant patent was contested on the ground of morality and public order under the European Patent Law. For the first time, the technical board of appeal laid down definitions for “morality” and “order public,” and its applicability to be individual as opposed to together. Morality was defined as behavior considered acceptable and right in the European society and order public as the protection of environment and public security. Any other behavior not considered moral by the European Society was considered as wrong, and the given was framed on the standard inherited by the European Society and Civilization which were conventionally accepted. Any and every surveys and opinion polls presented by Green Peace were rejected by the board despite their relevance.

It can be said that inventions are propelled by necessity. In the era of advancements in biotechnology, inventions are being fueled by necessities but at the same time protect of rights is a responsibility as well. Transplantation of organs is considered a moral issue for biotechnological inventions. Organ transplantation is facilitated through biological inventions as opposed to religious faith and their intellectuals.

Claim of human body or its parts like organs is said to be unclaimable property under the Common Law due to the ethical and social concerns prevailed in Commonwealth society. A directive on biotechnology and its inventions was passed with the emergence of genetic material patent claims in 1998. The provision in the given Directive provided definitions on biological process, biotechnological inventions etc. and non-patentability of cloning human beings, including modifying genetics of humans and human embryos for commercial and industrial purposes. That being said, only discovery and isolation of that to the process can be patented. In Europe, many social activists mounted successful challenges against biotechnological patents, including genetically engineered plants like stem cell lines.

The European Patent Office considered that the rules laid down after the 2004 decision

\(^{751}\) Oliver Brüstle V Greenpeace., E.V C-34/10 (2011)
are more than interpretive in nature due to its large ambit. Further, new guidelines were provided pertaining to the pending decision on stem cells patents. This was given in Article 53(a) of EPO and the new rules.

Environmental issues:

The potential adverse effects are some of the concerns about new technology especially its effects on biological diversity and risks to human wellbeing and health. With GMO’s attaining risk to environment and human health, it has also remarked considerable uncertainties like impact on environment. Complete documentation as well precautionary measures are advised when there’s reasonable ground of concern. Without vital knowledge availability about the safety and commercial usage of GMO’s, countries should refrain from allowing patents considering the safety of GMO’s. The Court considered the purpose of the Onco-Mouse invention in respect to the possible risk to environment. As stated by the Court, the usage of the invention was to be exclusively under controlled laboratories with qualified staff. Onco-Mouse invention was in regard to providing animal test models with no release to the general environment. Blatant ignorance and intentional misuse of the qualified staff at such laboratories is the only uncontrolled release as a potential risk to the environment at large. The deciding factor whether patent should be granted or not can’t be decided on a mere fact of such acts being conceivable in near future without any substantial evidence to support otherwise.

Thus, executive and legislature should be responsible to frame environmental standards. Environmental, health and safety standards are to be set by the parliament according to the desires reasonable to getting GMO’s patented.

Patenting Standards of Biotechnological inventions in UK and US:

It is a complex task to apply the same set of parameters of the patent standards with the evolution of newer technology. In the situations of biotechnological inventions, the originality and subtle requirements are applied differently when compared to inventions relating to machinery or pharmaceuticals. The following can be sought with enlisted cases:

In the case of Amgen v. Chugai, pharmaceuticals, the issue of conflict was between two patents - one which was asserting for the gene or DNA sequence concealing a protein and another claimed that the protein in itself an extremely purified form. Amgen patent was in consideration with a purified and lone DNA sequence which encoded the human Erythropoietin and host cell alteration, with the help of which the potential treatment of chronic anemia could be possible. Amgen was the one who got its patent in October of year 1987 whereas Chugai got in in the June of 1987. However, Amgen was the one who conceived the DNA sequence of the protein while in the production of purified EPO. But the inventive concept regarding the isolation was present before but there were no signs of DNA sequence until

Amgen made it. The Court held that examination and reviewing method taken up by the Plaintiff is factor which differentiated between the invention from the previous art and held Amgen's invention as novel and credible.

As a result, the test of obviousness in Graham's case\textsuperscript{754} was weakened. The prima reason was that there was a level of predictability when we talk about this case. It is a fact that there wasn't a need for absolute predictability to exist under the condition mentioned in Section 103 of Patent Act, 1952. Thus, undetermined predictability in the case of biotech inventions can harm and meddle the non-obviousness standard which are generally followed. This is observed from the Court in Chugai's contentions that other method could have been used to clone and regenerate the EPO gene as mere theorizing. "Obvious to try" was certainly not the code of standard in order to determine the obviousness under Section 103 of US Patent Act, 1952. An invention is obvious when both the suggestion as well as expectation of success is found in the previous art and not in applicant's revelation. If there is a certain degree of reasonable expectation of positive outcome then test of non-obviousness must be contended. With reference to the biotech invention inventive concept means an absolute mental conception of the purified and lone DNA sequence forming the EPO and the method of preparation. Hence it can be concluded that the standard of skill accredited to a hypothetical person skilled in art i.e. Graham's test becomes absolutely unrealistic in the field of biotechnology. These certain high standard of skill of a hypothetical person for evaluating the inventive step adds to the difficulties for granting a particular patent in biotech inventions.

In the case of Biogen v. Medeva\textsuperscript{755} one can witness the approach followed by the court of UK.

The Plaintiff in this case got a patent for DNA molecules which encoded Hepatitis B Virus Antigen. When the date of patent application came, the said DNA was not sequenced. Biogen was the first person to present the protein of Hepatitis B Virus Antigen in the prokaryotic cell. The inventive step is the solution that someone had discovered in order to solve the problem and not the goal itself or any other general method of attaining it. Also, inventive idea could be understood as doing a new thing which is the idea of using an already existing thing in order to do something new which others have not thought of or an inventive idea might be similar to achieving solution to a problem. In this case, the Court held that "even though Biogen had taken the initiative something uncontemplated by others; it used available techniques and methods in research. They had not developed a new inventive process or had not discovered anything about those processes and it was only a business decision to carry out research to pursue an identifiable goal by known means". As a result, the biogen’s patent was held invalid. It can be concluded that both in Amgen and Biogen case issue is almost similar. But the Courts applied the different standards of inventive steps and non-obviousness. In both the cases inventive concepts was known to the world of science but in Amgen case when using probing and the screening technology resulted in wanted

\textsuperscript{754} Graham v. John Deere Co., 383 U.S. 1 (1966)

\textsuperscript{755} Biogen Inc v Medeva Plc, FSR 4 (1995)
result it not succeeded for the very first time and the Court claimed that it is non-obvious. But in the case of Biogen even though the prior art goal was known to scientific world as the technique used is already known to the users it was held that "it was obvious to person skilled in art" and hence it followed a higher standard than what was applied in the US Court in Amgen. Another point to be noted that the claimed invention in Biogen was extremely broad, not due to the inability of teaching to produce desired results, but to the fact that the similar results could be produced by other different means and one might not be allowed to monopolies every way of doing obvious needed and desirable product.

This method is followed in the case of Kirin-Amgen Inc v. Roche Diagnostics GmbH too. In this case, it was proclaimed that "the law of patents is ultimately concerned with practicality," therefore a prior art experiment which, when is performed, reliably produced a result "for more than 99 per cent of the occasions on which it is conducted" should be treated for the aim to disclose as "inevitably" leading to the result which is in question. It is followed that a claim which defines the "invention" by acknowledgment of the standard parameters, for instance, of a process or a certain product, is anticipated by a disclosure, which when is applied into practice would surely fall within the ambit of the claim, even if the disclosure is not in context with the parameters.

The Privy Council had followed the same way of dealing in the case of Ancare New Zealand Ltd.’s Patent and held that scientific view or opinion is out of accord with reference to what is done in the market. In the above case, the patentee argued that an inventive step laid in including the tapeworm agent because there was a certain kind of scientific hostility against treating tapeworms in sheep. However, it was very usual practice for New Zealand farmers to treat their lambs for tapeworm at the date of priority. The Privy Council, upholding the Judgments of the New Zealand High Court and Court of Appeal, which was to repeal the patent for obviousness and not to involve any inventive step on what was earlier used and known before the date of priority in the claim in New Zealand, held that the fact that scientific opinion may have thought of it as something not needed and useless or didn’t mean to practice it or have an idea to prepare it, was the inventive step. Otherwise, anyone who had adopted an obvious method for doing certain thing which was widely in the practice but to which the best scientific view thought was pointless could gain a patent.

In a recent case of KSR Int’l Co. v. Teleflex Inc. the honorable United States Supreme Court changed the way of analyzing the patent claims by the courts and the examiners, hence creating a brand new multi factor approach for the method of determination and to find the invention was obvious or not and to find that the it can be given a patent or not. According to the Court if some sort of motivation or suggestion existed in order to combine the prior art, then the new invention, is obvious and hence cannot be patented.

---

756 Kirin-Amgen Inc v Roche Diagnostics GmbH, [2001] EWHC 518 (pat)
757 Ancare New Zealand Ltd v Cyanamid of NZ Ltd, 3 NZLR 299 (2000)
The Court further stated that "the diversity of inventive pursuits and of modern technology counsels against confining the obviousness analysis by a formalistic conception of the words teaching, suggestion and motivation or by overemphasizing the importance of published articles and the explicit content of issued patents." The Court further observed that "When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product is not of innovation but of ordinary skill and common sense." The plethora of US judicial decisions from Graham to KSR and the landmark decisions of UK's Courts from Wind surfing to Kirin Amgen, A person can observe fluctuations in the standards and methods of patentability. It is quite evident that the Court is applying the common concept of obviousness and inventive step in the field of the new era of technology which may not be predicted when the statute was made. Therefore, there are different standards are being read into non-obviousness. Hence, it is the want of the definite criteria to judge the non-obviousness requirement in the case of biotech inventions which lead to much confusion.

It can be concluded that balancing and comparing the standards followed in the US and UK and in matters of patenting biotechnology inventions, it could be observed that in US the private interests are given more priority to alter the speed of technological advancement in the guise of promotion of science and technology thus lessening the space of public domain. But when we talk about the recent decision of US Supreme Court in KSR Intl Co. v Teleflex Inc, it gives a clear sign of change in their way of attitude by setting a much higher standards of patentability. It is also come to a realization that granting patent protection to advances that occur in a very usual course without any real innovation retards progress and it may, for patents combining earlier known elements, deprive the prior inventions of their utility and deserving value.

Whereas in UK such flexibility could not be seen through the cases and their priority seems to be more towards the public interest over the private so that they could keep a balance between private monopoly as well as public interest therefore keeping up the underlying philosophy of the very intellectual property. One can witness that Europe is experiencing more turbulence in the recent years over the matters of patents of genetically modified organisms. The ongoing fashion in United States is more likely to see an accelerating increase in challenges in the matters of biotech patents as advocacy groups are raising broad questions about the role of the public and the role of public interest in science and technology policy making.

Comparative analysis between Australia and China

AUSTRALIA – According to the Australian Patents Act (s18(1)(a)) claims that an invention which is patentable should be a “manner of manufacture.” Similar to that, the schedule to the Act defines the framework. Journal of Intellectual Property Rights 7: 211–221.

760 Sekar, S. and Kandavel, D. Patenting microorganisms: Towards creating a policy for technological advancement in the disguise of promotion of science and technology thus lessening the space of public domain. But when we talk about the recent decision of US Supreme Court in KSR Intl Co. v Teleflex Inc, it gives a clear sign of change in their way of attitude by setting a much higher standards of patentability. It is also come to a realization that granting patent protection to advances that occur in a very usual course without any real innovation retards progress and it may, for patents combining earlier known elements, deprive the prior inventions of their utility and deserving value.

Whereas in UK such flexibility could not be seen through the cases and their priority seems to be more towards the public interest over the private so that they could keep a balance between private monopoly as well as public interest therefore keeping up the underlying philosophy of the very intellectual property. One can witness that Europe is experiencing more turbulence in the recent years over the matters of patents of genetically modified organisms. The ongoing fashion in United States is more likely to see an accelerating increase in challenges in the matters of biotech patents as advocacy groups are raising broad questions about the role of the public and the role of public interest in science and technology policy making.

Comparative analysis between Australia and China

AUSTRALIA – According to the Australian Patents Act (s18(1)(a)) claims that an invention which is patentable should be a “manner of manufacture.” Similar to that, the schedule to the Act defines the framework. Journal of Intellectual Property Rights 7: 211–221.

760 Sekar, S. and Kandavel, D. Patenting microorganisms: Towards creating a policy
“invention” as any “manner of new manufacture the subject of letters patent and grant of privilege within section 6 of the Statute of Monopolies, and includes an alleged invention.” The formative case that provides some inner view is National Research Development Corp (NRDC) v Comm. of Patents.\textsuperscript{762}

It was discovered that if, on its frontal, a specification states an invention that cannot present any particle of inventiveness; it is not a “manner of manufacture” and is not patentable. In such certain cases, a court need not to go on to view the novelty and inventive step differently and separately. If it actually meets the basic sill, provided that it meets the other patent needs, the invention will be patentable.

With the respect to this, there is no certain “test” to determine whether or not any specific patentable manner of manufacture. However, certain few good rules of thumb are: (a) the invention must produce an artificial state of affairs (i.e. it must be a production of a human and not natural cause), and it must have a very wider commercial significance or (b) “the invention must involve the production of some commercially useful effect.”\textsuperscript{763}

\textbf{CHINA} – The article 25 of the Chinese Patent Law enlists the subject matter which are excluded from patent protection. The standard for applying Article 25(1) of the Chinese Patent Law is in consistence with listed international standards, which is, an object which is a mere discovery of living persona/nature is not patentable but might be given patent protection in case if it has been secluded or purified from its very own natural environment and has been characterized.\textsuperscript{764}

The article 25(3) of the Chinese Patent Law has various similarities to article 52(4) of the European Patent Convention. The similarities between both jurisdictions exclude the process and methodology of surgery, therapy, as well as diagnosis which is practiced on the human or animal body, all of which are quite commonly allowed in the United States. Certain examples of the excluded subject matter in China comprises, methods of treatment such as immunization, acupuncture and radiotherapy. The non-comprised ones are certain prominent methods of disease diagnosis such as the endoscopic and ultrasonic methods. To add to this, prophylactic treatment methodology of treatment of diseases or treatment of wounds or any method of contraception or the artificial insemination method, as well as embryo transfers are also completely excluded from patent protection in the country of China. These exclusions of patentability do not apply to methods not directly applied on the human or animal body. Therefore the methods of treatment and diagnosis which is applied to tissue and certain other biological materials which are separated and kept away from the body are patentable subject matter. The methods of analysis, treatment along with data collection to be applied to the body for purposes which are not relating to disease matters are also allowed, and so are the products and compounds which are used for

\textsuperscript{762} 102 CLR 252 (Dwyer, Dufty, Lahore and Garnsey, 1996)

\textsuperscript{763} Balachandra Nair, R., Ramachandranna, P. Patenting of microorganisms: Systems and

the therapy and diagnosis of certain diseases.  

Certain instances of patentable subject matter in China also include (1) the non-therapeutic hair treatment (cosmetic) methods. For example giving permanent waves or hair colouring/dyeing; (2) methods of sterilization Which is not immediately or directly applied to animal or; (3) the method which is used in order to store the dead bodies; and (4) methods of estimating physiological parameters only for the purpose of perfecting a medical implementation units. Article 25(4) of the Chinese Patent Law excludes the varieties of flora and fauna from patent protection. This barring is mainly directed toward living organisms mainly, hence the methods of reproducing and the outcomes which are derived from these organisms certainly remain patentable.  

Patenting of Life forms – The Indian Stand

Patent Act of India, 1970, Section 2(1), primarily defines invention as a contemporary, modern and useful method/manner of manufacturing or a substance produced by a manufacturer. No such specific definition of method of manufacturer or substances were given in the act per se. Therefore, the Patent Office approved a more reformed practice of interpreting a “manner of manufacture” as a patentable subject matter on the grounds if it results in a tangible non-living substance. Section 3, clause (j), of the said Act stated that plants and animals at entirety, or in parts comprising of seeds, varieties and vital biological processes for the production of plants and animals are excluded. Statutory obstacles created by the Indian Patent Act, 1970 are for fulfilling the patentability requirement criteria which are inventiveness, industrial application and novelty. Although there are numerous exclusions of some inventions given as well in Section 3 of Indian Patent Act, 1970. The existing system of Indian patenting marked its amendment after India joined the Budapest Treaty on 17th December, 2001 and further strengthened its hold by acquiring the status of an IDA on 4th October, 2002 in Microbial Type Culture Collection (MTCC) and Gene Bank of the Institute of Microbial Technology, Chandigarh. Furthermore, the position was made more substantial after the 2002 amendment of Indian Patents Act, 1970, in which it was stated that microorganisms can be patented provided they fulfil the other imperative requirements. The Patent Amendment Act, 2002, came into effect in May 2003, including microorganisms within the domain of patentability. Section 3(j) was formulated in terms of Article 27(3) (b). It stated that plants and animals in whole or any part henceforth should include seeds, varieties and species and essential biological processes for production or propagation of plants and animals should not be considered inventions other than microorganisms, in the context of the Act. It excluded

765 Id.

microorganisms from the exceptions to patent protection and allowed patenting of ‘processes’ pertaining to microorganisms as well as all sorts of non-biological and microbiological processes.

Subsequently, Patents Act, 1970 was again amended in the year 2005 to construct consistency with TRIPS. The latest amendment deleted Section 5 of the Act, which included only process patents. The provision covered inventions where only method or processes of manufacturing were patentable. Thus, the omission of this section paved way for product patents which was in complete opposition to the US approach that argued patenting of life forms can have immense advantages involved.

Despite the concerns against the patenting of microorganisms, this stance can be termed revolutionary for the biotechnology industry as it can help in its advent at an inevitable pace.

There was no patent protection on inventions of life forms in India before 2002. Calcutta High Court in a landmark judgement of Dimminaco A.G v. Controller, covered the ambit of the term “manufacture” even to living organisms in terms of patentability of a vaccine with live virus used in its process of preparation. Hence, the Court stated that an end product might be an invention even if it requires the containment of a live virus in the process of creating the final product which was a vaccine. Though there was not been even a single decision in India relating to the required standards and steps considered as inventive to the biotechnological patents.

The Section 3 of Patent Act, 1970 had been amended in light of the TRIPS agreement, Article 27 specifically. The definition of “inventive step,” “new invention,” and “invention” showcased a somewhat restricted portal to legal protection of life forms material. The patent office has to make crucial interpretations of terms like “animal,” “plant,” “non-biological process,” “essentially biological process,” “microorganisms” since there is an absence of definitions for the same. There is a safer reliance upon the rules and guidelines provided in the provisions of the TRIPS agreement since terms like microorganisms have various definitions including genetic material.

The establishment of burden of proof under Indian standards of patent grant of life forms states that the burden of proof is on the party which is supposedly claiming infringement on their invention. Whereas in other countries like the United States, the burden of proof is reversed.

The standard of patentability of biotechnology becomes lowered if inventive step is interpreted by considering only economic significance and technical advance which is another concern in Indian spectrum. Technical advance or economic significance of biotechnology has always been the primary considerations and never as a secondary consideration as well as for a basis of creating inventive step.

The patent office incorporated provision in a patent manual in 2008 which formed the basis of guidance to interpret provision of the patent act. In the draft manual of patent practice and procedure, 2008, certain

indicators of inventive step were considered such as surprising effect, commercial success, distance, failure of others, standing problems and a more economical product as a technological solution. Setting up of higher standards is decided by the patent office as well as implement certain objectives.

Conclusion:

Various dimensions of intellectual property rights are related in patenting of life forms in the world of industrialization with aspects of ownership, transfer, use and rights on knowledge. Globally, the TRIPS agreement states a mandate for the provision of patent protection of non-biological, microorganism and microbiological production associated with plants and animals. Biotechnology as a category is difficult to be excluded as inventions in developing countries due to such reasons and limiting the scope of such provisions should be a strategy.

Definitions of the word “microorganism” is not including under the TRIPS agreement and is considered a concern for patent protections of microorganism. Hence, it is necessary of for the parliament of a country to define the term “microorganism” by including virus, algae, fungus and bacteria as a part of it.

There is also a lack of the concept-based definitions of discovery and invention for the patent protections of biological material and is an important limitation. It is due to microorganism occurring in nature and its discovery cannot be stated as an invention. It’s the human input in genetically modifying such microorganisms which falls in the invention category. Patenting of a specific genetically modified microorganism results into the blocking of any external or further research on that microorganism as different genetically modified microorganism perform different number of activities.

To resolve the various concerns made over the patentability of microorganisms, the term “microorganism” shall be addressed by defining it in a more scientific and precise manner; substantiating the difference between invention and discovery; and granting patents exclusively to inventions which involve human involvement or substantial intervention like genetic engineering.

From TRIPS to Diamond v. Chakrabarty and beyond, the biotechnological industry is responsible for constant endeavor and innovation, with the aim to increase inventions for human welfare. The rationale of patenting life forms is deeply in embedded as the criterion of utility, whether it is useful for treating oil spills, vaccine to fight life-threatening diseases or infectious diseases. Without an effective patent protection, the enormous pool of vital information may stay as a trade secret, with low chance of being showcased into public domain. Thus, a substantial and sheltered patent protection system is much needed for protecting research on life forms and microorganism.

*****
THE ROLE OF SOCIAL MEDIA IN ENSURING THE SOLIDARITY OF THE NATION

By Dhananjai Singh Rana and Sahil Goel From Amity Law School, Noida

Abstract

Media plays an extremely important role in contributing to the solidarity of the nation. We often see that the media becomes more active during campaigns and elections to an extent that it seems like the media is favoring certain set of people or a group with a particular mentality. It is quiet strange that we either purposely or by design do not allow a political party to use our platform for electoral benefits? Were we fair to all political parties concerned in our newspapers and television coverage? Were we slanted? Are we partners in crime in the paid news business or did we try to put a check to this assault on democracy? Did we actually inform the readers so that they go to vote they do so with an informed judgment? After all, that is our primary role. Anything other than that is a public relations exercise, and, we are not in the PR business. There are always two sides of the coin as on one hand media is responsible for connecting masses and on the other hand it can be used as a weapon to manipulate the statements to benefit a particular group. What we need to work on is to strike a balance between freedom of press, freedom of action, freedom of speech and expression to compliment human solidarity and not work against it.

Introduction

As stated above, freedom of media and press draws its origin from Article 19 (1) (a) of the Constitution which gives to every citizen the right to freedom of speech and expression. This freedom however has no bounds to restrict its power. The words ‘reasonable restrictions’ are again subject to interpretation. Media self-regulates keeping in mind those restraints but often we it tailoring information according to those in power hence leaving their existence to be baseless.

Today we do not prefer to critique on the sensitive issues to either maintain our

---

774 The role of the media is to defend the Constitution and is to be regarded as its primary motive. What we can imbibe from the word Constitution is that it is the supreme law of the land and circumscribes the power of the three pillars of the democracy namely the legislative, executive and the judiciary.

773 https://www.eastmojo.com/opinion/2019/03/12/the-role-of-media-in-defending-the-constitution

positions or because of external threats to existence of a particular organization which leaves us with very little scope of critiquing and expressing our views on a particular sensitive issue in the form of a debate in the bulletin.

The judiciary interprets the Constitution for us and judgments given by courts are published by the media for public information. Similarly, the executive which is the government, although elected to provide good governance and to maintain law and order, often fails in its primary duty. It is the media which has to constantly be the judge and boost the government for its acts of omission and commission.

Today, MPs and MLAs are accused of taking their salaries and their sitting fees without actually performing the tasks assigned to them and without bringing the concerns of the people before Parliament or state assemblies. It is the media which ultimately becomes the savior and does the work which should actually be done by elected parliamentarians and governments because only an informed audience can stand up for a cause and stand up to the government against the wrong and demand justice. People can then vote according to the performance and not the age old ideologies. Hence, the media helps in the functioning of democracy by aiding the voters to make a wise choice.

The media is constantly enlightens citizens of their rights and freedoms under the Constitution and urging them to claim those rights. The media also highlights whenever constitutional rights are violated by those who run the country. Some rights therefore can only be claimed when the public is an aware public.

However, it would be unjust to avoid the fact that media is a transparent and independent entity that uses its powers to enhance or deepen democracy and to safeguard the freedoms of the public for their larger good. In a set up where the country is ruled by the people, the media is supposed to be free and independent. But several media houses are today have become propaganda machines.

This is disheartening because in a democracy where power is actually given to the people, the power of the media also flows from the people and should actually be used to give voice to that constituency which is powerless and voiceless. These categories of people are most in need of information so they can claim their rights and freedoms. That is where the media becomes the bridge between the public and those vested with power to dispense the public good.

Since the Constitution is a document given by the people of India to themselves, it is the duty of the people to respect it and safeguard its existence. People should respect the Constitution and make it work to their benefit. Alas! That public duty is largely absent. As custodians of the Constitution, the people of India cannot allow their rights and freedoms to be compromised by any authority however powerful. Here the media is constantly reminding people to remain alert until their freedoms are not eroded.

It is the role of the media to ensure that the three pillars of democracy do not interfere in each-other’s domain into. These days we hear of words like “judicial overreach” where the judiciary is pushed to decide on matters that should be executed by government. This happens because of the inclination of the executive to evade its responsibilities.
An important role of the media as a guardian of the Constitution is to act as the informer through use of the Right to Information Act. Hence the media calls out whenever constitutional rights are violated by those who run the country. Today, unfortunately, media is passing through testing times. While one accepts that we are not free from error in our day-to-day reporting, the role of the public is to bring those to our notice through a process and not through slanging matches on social media.

The journalists and reporters must constantly do a reality check and ask ourselves whose side we are on? Are we giving voice to the oppressed sections of the society and polity? Are we voicing the concerns of the ones affected or are we camp followers of political parties? In fact, the question here is whether media in our country is really free and independent.

With the assault of social media there are many who feel they don’t need the traditional media with its outdated news. They have a point, except that not everything on social media is verified. There are so many fake news portals which are like unguided missiles. To the unqualified mind, every piece of news appears like Gospel. Hence, we must have an agency to verify contents shared through social media.

Another issue is the climate of oppression under which media operates today. If media is expected to be the guardian of the Constitution, who will stand with the media when it is pounded by powers that seek to throttle our freedoms? For the most part, media persons fight lonely battles. However, that’s a journey we have consciously chosen and all that we face on a daily basis come with the territory. Like they say, “No issues about that because hopefully the Constitution will defend us!”

Review of literature

The research for the sake of understanding has been broadly divided under the various heads/chapters. Firstly, regulatory challenges of social media has been discussed and analyzed in the perspective of legal and regulatory measures. While doing so, the role and responsibilities of authorities concerned have also been discussed. Secondly, issues related to extra territorial jurisdiction in social media offences have been discussed. This part of the thesis has covered the basic issues and principles of jurisdiction and attempts to make an analysis of viable international jurisdiction mechanism. Thirdly, a comparative analysis has been made with regulatory systems of UK and US in order to find out the functioning of mischief addressing machinery in these countries. Fourthly, a study has been done of global internet governance regime and its implications for social media. This part of the thesis has covered in its ambit the working of international bodies which are instrumental in handling the internet affairs. In the last, few case studies have been selected (particularly those which made headlines in Indian media) and it has been analyzed to put forth the deficiencies and inconsistencies in the rules and regulations governing social media behavior in India.
Regulatory Challenges before Social Media

The greatest gift to mankind from the scientific community has been the invention of information technology and the associated communication technologies in the last decade of the 20th century. This technology is of utmost importance that it has been rightly termed as InfoTech revolution. These technologies have put entire human civilization on a fast forward mode by introducing unprecedented speed in information & communication via social media. Social media in particular has greatly impacted political dynamics on a global scale by enabling users to express themselves publicly in ways previously unavailable. This shift in power to communicate has spawned greater efforts to restrict and control the use of the internet for information and communication on political, moral, cultural, security and other dimensions. This effort of controlling the internet has led to legal and regulatory initiatives to mitigate risks associated with this new medium, ranging from privacy of users, intellectual property, national security, to frauds, pornography and hacking. Regulatory challenges of social media can be broadly addressed under two heads namely:

- Legal Regulation
- Moral and Ethical Regulation in the form of guidelines by various statutory bodies formed under the constitution.

Problems posed by social media

The basic architecture of social media platforms provide unique opportunity of interaction to the common masses, which have resulted in great problems to the society. With its proliferation social media has generated a lot of complicated social and legal regulatory issues which are as follows:

- **Pornography**
  Sexual depictions which constitute “pornography” or “obscenity” are regulatory concern by the government in both offline and online world. Social media in particular with its fast circulation of obscene and pornographic materials has made regulation more difficult. Various social media websites like YouTube, MySpace and Facebook are full of these materials, causing public authorities to work hard to stop this. The difficulty in regulation was well evident when Govt. of India filed a counter before the Supreme Court showing its inability to prevent pornographic and obscene materials on the internet and social media pages. It is however punishable under section 292 of IPC 1860.  

- **Hate Speech**
  The subject of hate speech has gained significance with the increase in communal outrages mainly causing communal hate campaigns over the social media websites. Hate speech can be understood as “…antisocial oratory that is intended to encourage persecution against people because of their race, color, religion, ethnic

---

775 https://go.forrester.com/blogs/13-07-31-five_common_legal_regulatory_challenges_with_s
ocial_media/

776 Kamlesh Vaswani v. Union of India [W.P.(C). No. 177 of 2013 (Supreme Court)], This writ petition was filed before the Supreme Court under Article 32 of the Constitution of India challenging Sections 66, 67, 69, 71, 72, 75, 79, 80 and 85 of the Information Technology Act, 2000 as unconstitutional on the ground that they are inefficient in tackling the rampant availability of pornographic material in India.
group, or nationality, and has a substantial likelihood of causing . . . harm”. It has several dimensions e.g. context/content/targets/tone and potential implications of speech.777

In India hate Speech does not find place under Article 19 (2) of the Constitution and therefore, does not constitute a specific exception to the freedom of speech and expression under Article 19 (1) (a). However, it is read under other specified exceptions under Article 19 (2) such as ‘sovereignty and integrity of India’, ‘security of the State’, ‘incitement to offence’, ‘defamation’ etc.

Some provisions of hate speech are:

☐ The Indian Penal Code, 1860 contains provisions which prohibit hate propaganda. Section 153-A penalizes the promotion of class hatred. Section 295-A penalizes insult to religion and to religious beliefs. Section 505 makes it a penal offence to incite any class or community against another.

☐ The Information Technology Act, 2000 contains several provisions which will apply to mitigate hate campaigns on internet. It includes Sec. 66-A (now unconstitutional), Sec. 69 etc.

Identity Theft

Identity theft is another problem generated by social media. Since, social media websites generate revenue with targeted advertising, based on personal information; they encourage their users to provide maximum personal/professional information. With limited regulatory oversight by government, industry standards or incentives to educate users on security, privacy and identity protection, they are exposed to identity theft.

Intellectual Property Issues

☐ Trademark infringement and dilution
☐ Copyright infringement
☐ Trade secret disclosure

Trade Mark Infringement and Dilution

Social media acts as a platform where users discuss, create content and interact with brands more than ever before. It often results into harmful information about goods/services which injure a brand mark’s strength/reputation/goodwill. A quick search for any major brand name on Facebook will often reveal hundreds of results, which typically include some official results (often labeled ‘official’) and many unofficial results. The prevalence of various contents/pages in the same name often attempts to tarnish the image of famous brands. There are very little measures to prevent an individual or entity from adopting a user name or sub-domain name that incorporates a third party’s registered trade mark. Taking remedial action can often be problematic for the trade mark owner, both from the sheer scale of the problem, to considering issues of adverse publicity that may make a bad situation worse.779

Copyright Infringement

The Copyright Act, 1957(Act No. 14 of 1957) dictates the applicable rules & laws related to the subject of copyrights in India. The Copyright Act complies with most international conventions and treaties in the field of copyrights.780

777 Alexander Tsesis, ‘Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements’ (NYU Press 2002), 211

778 Provisions as per IPC 1860


C. Trade Secret Disclosure

Social media and trade-secret protection represents a new dimension – one with relatively little case law, but with substantial implications. A customer list is the most notable area in which social media can affect a company’s protection of its confidential information. Employers often motivate their employees to use LinkedIn or other social media sites to establish and strengthen relationships with actual and potential customers. But sometimes this relationship raises question regarding ownership of that social-media account when salespeople leave and go to a rival company? The sales personnel leave the company with a de facto customer list. It is likely that the names and contact information of some or all of a salesperson’s key client relationships will be fed on that social-media account.

Modes of Regulation

The regulatory authorities exercises two methods in regulating internet and social media websites-

A. Content Regulation

B. Access Regulation

Content Regulation

Content regulation of the internet is a controversial issue of which both govt. and internet users are concerned about. Govt. takes initiatives to take down the objectionable content from social media websites when it finds the content against the laws of state. ISPs at the instance of govt. put filtering software on their servers to restrict the distribution of certain kinds of material over the Internet. Terminate TCP (Transmission Control Protocol) is the mechanism which detects certain number of controversial keywords.

Access Regulation

Access regulation is a broader term which connotes different notions of preventing access to internet. It may be partially allowed access or completely prohibited access. Access regulation is related to state directed implementation of national content filtering schemes and blocking technologies affecting internet access. State and ISPs uses various methods such as take down, result removal or technical blocking to give effect to state mandated filtering.

Types of access regulation:

Internet Protocol (IP) address blocking: through this mechanism access to a certain IP address is denied. If the web site which has to be blocked is hosted in a shared hosting server, every website on the same server will be blocked. It affects IP-based protocols such as HTTP, FTP and POP. However this mechanism can be avoided by using proxies that have access to the target websites, but proxies can also be jammed or blocked.

Network disconnection: A technically simpler method of access regulation is to completely cut off all routers, by turning off machines & pulling out cables. This method immediately disconnects all the machines from internet. It appears to have been the case on 27 January 2011 during the 2011 Egyptian protests, which has been illustratively described as an “unprecedented” internet block. Full blocks also occurred in Myanmar/Burma in


et al, Blogging and Other Social Media, (Gower Publishing Limited 2009)
2007,147 Libya in 2011,148 and Syria during the Syrian civil war.

Portal censorship and search result removal: Search engines and major internet portals may exclude those web sites which they would normally include in their search results. This makes a site invisible to people who do not know where to report for any activity suspicious in nature.

Recent Steps taken by the Central government to regulate social media intermediaries:

1. Interception and monitoring of Emails and social media content: Under sec 69 of the IT act, the central gvt has authorized 10 central agencies to intercept, monitor and decrypt any information which is generated, transmitted, received and stored in any computer resource. Further, the gvt. is also aiming at intermediary regulation and sec-79 of the IT act,2000 deals with intermediary liability regime in India.

2. Linkage of Aadhar with social media platforms: Recently no. of petitions have been filed in various high court, these petitions are seeking to link aadhar no. with social media and this is being sought in order to facilitate the traceability of the fake news in social media platforms. Sec-79 of the IT Act deals with the intermediaries in India and the gvt. has proposed to amend this sec and these are termed as intermediary guidelines amendment rules.

Proposed Amendments & the issues linked with them:-

a) It aims at monitoring of Content: - The rules propose that online platforms must deploy appropriate technologies to proactively identify, remove or disable the access to unlawful content.

b) The gvt aims to do this because the unlawful content threatens critical information infrastructure in India. The critical information includes power sector, banking financial institutions and insurance, governance etc. However the issue with such monitoring of content is that the emerging technologies like artificial intelligence and machine learning is making it difficult for the authorities to monitor the content online. Further the proactive censorship of the content stands against the freedom of speech, guaranteed under article 19 of constitution. Also it is against the right to privacy under Article 21 of the Indian Constitution.

3. Traceability of the Content: -The gvt is imposing responsibility and liability on the intermediaries and they will be enabling tracing out of originator/ source of unlawful content on its platform. The issue with this is that if this rule is implemented it will break end to end encryption provided by these intermediaries which would lead to breaking of the privacy of the users on these social media platforms.

4. Corporate office in India: - The gvt has made it compulsory for intermediaries with over 50 lakh active users in India to have a permanent registered office and appoint a nodal person to coordinate with law enforcement agencies to ensure compliance. However the challenge is that in India where there are more than 350 million internet users, it will become difficult to assess who is an active user or not.

should-give-govt-access-to-private-chats/article29766900.ece
5. **Ensuring Compliance:** - The draft rules require that the company will have to inform their users at least once every month that in case of non-compliance, their accounts and content would be removed. Issue with this rule is that it shifts the onus or responsibility to ensure compliance to private parties, such as intermediaries from gvt.

**Suggestions**

The examination of legal and regulatory issues indicates that the challenges posed by the social media are unlikely to be solved merely by adapting and extending existing legal concepts. The new ways of communicating via the social media raised legal questions which are fundamentally different for one of the two reasons. Firstly, the concept of freedom of speech and expression in online era is entirely different in contrast to offline world. Secondly, the cyber world demands new set of rules to be governed. Both of these issues have been highlighted in the Shreya Singhal Case. It can also be concluded that India's Information Technology Act, hurriedly amended in 2008 and updated with rules for Internet intermediaries in 2011, is ill suited to deal with ICT innovations such as social media and user-generated content, with negative consequences for intermediaries and users alike.

It has also been observed that hate speeches on social media platforms are the biggest problem for social unrest and it need to be addressed on priority basis. However, till date there are no effective mechanisms to deal with it neither at international level nor at national level. Though, few mechanisms are working very hard but in the absence of a proper institutional setup and funding, they are facing problems in implementing their policies. Keeping in mind above conclusions, following suggestions are being made:

- there is a strong need to protect the freedom of expression online the consonance of International Human Rights regime.
- there is a need to enact a law covering the rights, duties & responsibilities of social media agencies/users/ISPs. This law should be drafted keeping in view the international scenario of the related laws. The law should also make harmony with the existing laws which are presently governing the various issues of social media in India.
- there is a need to have a designated body which is totally devoted to regulate the functioning of social media. Social media labs, which have been established in few Indian cities, can be a viable option to monitor the online activities.
- A legal, moral and ethical code should be devised for social media application developers and there should be a body for granting approval to properly devised social media applications.
- The organizations such as International Network Against Cyber Hate (INACH) and Governments across the world should unite to work against cyber hate. The problem of cyber hate can only be tackled by private public partnership.

In the matters of extra territorial jurisdiction, it can be concluded that the transnational character of social media behavior has resulted in mainly following things:

Firstly, the national law controls on dealings in information, such as information assets and personal data, become less meaningful and in particular hard (or impossible) to enforce. Secondly, the multiplicity of overlapping applicable law and jurisdictions can lead us to
situations where an activity is subject to multiple and contradictory regulation, or to no regulation at all. In the last, the absence of an international treaty on jurisdiction is causing a serious harm to the otherwise potentially beneficial communication medium. Thirdly, in India the provisions under Criminal Procedure Code for investigation of a crime in foreign countries under Section 166 A & 166 B are not easy and are inconsistent with cyber crimes.

Because of the complex nature of cross border jurisdiction, this issue is being left open ended. Suggestions are being made to strengthen the existing mechanism till the time international community come at an understanding.

☐ To meet extra territorial challenges the global system of laws has to develop new legal concepts and devise techniques for eliminating cross-border conflicts.

☐ Till the time the scholars may reach at some mutually accepted terms, they may formulate principles-like Common Concerns of Freedom and Liberty Principle (CCFLP) - on the suggestive lines of CHM principle- so that a common agreement on the protection of basic freedoms and liberties may be argued for the coming times.

☐ An international committee could be created with the sole purpose of implementing universal standards created by the Treaty designed to bring order to and create jurisdictional rules for the social media

☐ There is necessity that India should sign Mutual Legal Assistance Treaties (MLTs) with more number of countries till necessary amendments are made in the Criminal Procedure Code.

The developed system like U.K. & U.S.A. are providing/devising new mechanism to address the issue primarily at their territorial level, but there is a pressing need for immolating these legislative measures effectively at international level. It can also be concluded that ISPs liability for the content on their server is not protected well in many countries. Various countries have imposed liability on Internet Service Providers if they do not filter, remove or block content generated by users that is deemed illegal. Others have imposed notice-and-takedown policies that often lead to the removal of content from the Internet and which are "subject to abuse by both State and private actors."

The basic restructuring and reorganization of social media/internet governance need to be done as per following principles:

☐ A common global commitment which may be incorporated in the form of a treaty/protocol or convention.

☐ Effective legislative measures to be devised at domestic level to better support and enforce the global commitment.

☐ Designing and developing the authorities/organization and other similar mechanism both at national and international level so that the watchdogs may be effective and vigilant for ensuring better global commitment for protecting common freedoms and liberties of mankind.

☐ Devising the models for better international coordination among different authorities both nationally and internationally.

On the basis of the research it can be concluded that multi stakeholder approach of governing the internet is very effective.
These bodies with the help of private organizations, civil society, governments and others have been able achieve their respective goals. However, in the absence of any power to implement their policies these bodies are facing failures. The internet governance provides a fertile ground for the states to respond with positive national and international commitments to address the mischief which is increasing by leaps and bounds day by day.

The concept of net neutrality is essential for the survival of fair and competitive internet environment. Though practically, it is followed by every internet service provider but there have been many attempts to violate this principle in many countries including India. Simultaneously, the principle of ‘right to be forgotten’ is not guaranteed by social media websites in many countries. This behavior of social media agencies is violating the privacy rights of users. In this regard following suggestions are being made:

- There is a need for an international agreement that when international bodies involved in governance of internet arrive at certain conclusion after due consultation, it should be made compulsory for the participating nations to follow the conclusion.

- Concept of net neutrality should receive an international legal recognition.

- Principle of ‘right to be forgotten’ should also be implemented worldwide in order to protect the privacy of the users.

This is also clear that any attempt by the Government to filter online content before it is posted, will not only be against the principles of free speech but also impractical to implement. Pre-publication crackdown is difficult, even unwarranted and, instead, efforts should be made to strengthen the existing IT laws. That includes making majority of the cyber-crimes non-bailable and amending and tweaking the legislation to keep pace with emerging platforms and newer devices. The approach towards a comprehensive regulation of social media has to pave way to a more balanced realization that lets us look at the IT Act which is outdated. It was last amended in 2008. In the case of social media, the subjects need to be given a clear picture of examples of online defamation & other crimes. The issue is not to give the discretion to the service provider to determine whether or not something is an offence, but to let the government come up with illustrations. The Indian Penal Code defines an offence along with illustrations. If those illustrations could be given, they’ll be a guiding principle.

**Comparative Study b/w social media regulatory mechanisms of UK & USA with India**

On comparing the regulation of social media in India with United States, many differences arise. The ground realities of India vary from USA and UK in terms of implementing the laws, policies and rules relating to social media. Though, the legal systems of both countries don’t offer a dedicated law to regulate the social media but its still regulated in a better way than in India.

Starting with US, all electronic communications are regulated by the Federal Communication Commission which regulates interstate and international communications by radio, television, wire, satellite and cable whereas in UK, Regulation of Investigatory Powers Act, 2000 confers power of intelligence agencies to intercept any communication. However no such regulation is seen in India.
For protection of privacy of employees, laws i.e. Stored Communications Act, 1986 & Social Networking Online Protection Act (SNOPA) have been enacted in US, to prevent the employer from asking username, passwords of employee’s social media accounts & making it unlawful for an employer to have unauthorized access to an employee’s private social media accounts whereas in UK, Protection from Harassment Act, 1997 protects the victims of harassment. It protects all victims of the harassment whether stalking behavior, racial harassment, or anti-social behavior by neighbors or harassment over social media pages. The laws in this field in India are still silent.

The Computer Crime and Intellectual property Section (CCIPS) of US Dept of Justice is responsible for preventing, investigating & prosecuting computer crimes by working with other gvt. agencies, academic institutions & foreign counterparts whereas in India, Computer Emergency Response Team works only for crimes related to computer. For an IPR violation matter’s it has no power.

Cyber Crime Unit (CCU) of every U.S. State Police engages personnel having expertise in detecting cyber crime which covers offences committed on social media as well whereas, in India Cyber Cells are limited to specific regions and their power and functions are more investigatory in nature. They don’t have much prohibitory powers to control the social media mischief.

The Computer Fraud & Abuse Act, 1984 (CFAA) has been invoked for creation of fake user accounts on social network sites, email spam, email phishing, robotic data mining, and unauthorized hard-drive wiping whereas in India no such statute has been passed.

The Digital Millennium Copyright Act (DMCA) provides a mechanism that provides protection to online service providers such as Facebook, Youtube etc from monetary damages for infringing materials posted or stored by their users whereas in UK, The Malicious Communications Act 1988 (MCA) makes it illegal in England and Wales to "send or deliver letters or other articles for the purpose of causing distress or anxiety". It also applies to electronic communications. In US, The Communications Decency Act, 1996 Act regulates the pornographic material on the internet. It regulates both indecency and obscenity in cyberspace whereas in UK, The Communications Act 2003 makes it an offence to send a message that is grossly offensive or of an indecent, obscene or menacing character over a public electronic communications network. Also in In England and Wales, the main pieces of general obscenity legislation are the Obscene Publications Act 1959 and 1964, which make it an offence to publish an obscene article. However, in India, there’s no such act.

From the above study, it appears to be clear that there is no single statute/authority for regulation of social media in UK and USA. The safe harbor provisions coupled with complete protection of free speech in USA has given ISPs a free hand to work independently and without any substantial interference from the government. However, in India, ISPs immunity provision is ill drafted.

For various reasons, the legal systems of these countries have not enacted a single statute to deal with social media regulation. Different sets of laws have been enacted for different kind of offences committed over social media pages in India, United States and United Kingdom. Almost all these laws
provide for safe harbour provision to intermediaries like facebook, youtube etc. All of these legal systems are more favourable for ‘regulation’ rather than ‘monitoring’ of social media behavior.

Conclusions
These days, even the most distracted social media user is forced to spend a couple of clicks to set the privacy settings of his beloved platform. To comply with the impending GDPR rules, social networking websites are asking users to accept their new privacy policies. Probably, many users will not completely disregard the emails and banners they receive. Maybe the most curious ones will even open the privacy policy of their platform. However, there is no doubt that even these diligent users will eventually accept the terms of service of their social networking website of course, they could eventually not consent to Facebook’s facial recognition, but for the rest they will not have any choice. Take it or leave it. And leaving is not an easy choice, notwithstanding the new option of data portability offered by the GDPR. Indeed, leaving would essentially mean to be excluded from a world, from a significant part of our society, in which today people interact together.

Are a couple of clicks sufficient?
What all tech savvies are asked to do these days stimulates a series of reflections. Firstly, are a couple of clicks enough to accept the rules which affect a significant part of our life? The motive behind asking this question that today social media represent another space, parallel to the physical one, where individuals perform numerous actions, from finding their job, to recognizing their faith, which form the basis of democracy. It is therefore seemingly evident that the way in which social networking websites are shaped and regulated influences the exercise of our fundamental rights. By distractedly consenting to the new terms of our social media platform, we are undoubtedly underestimating the impact of our choice. We click on ‘accept’ while we are on the bus, at work, watching the TV; there is no polling station that gives us the impression that we are making an important choice, but in reality we are molding a critical vote that will influence several aspects of our life.

Can we still trust social media companies?
Impossibility is that we are essentially forced – unless we decide not to be ‘social’ – to accept a series of rules established by social media companies, which, seemingly, we do not trust any more. The scandal involving Facebook and Cambridge Analytica has been the tip of the iceberg. We have even seen Facebook’s CEO apologizing before the US Congress, and the European Parliament, still leaving crucial questions unanswered. Moreover, beyond the question of trust, why should users simply consent the rules authoritatively established by private companies? When users agree to use a social networking website, they also agree in regard to the rules set by the owners of these virtual precincts. However, analyzing the effect of social media on fundamental aspects of our life, one could object that this situation is not fair and that users should have a say on these rules or, at least, establish a series of basic rules that no platform should infringe.

A constitution for social media
The lawyers will immediately criticize you when suggesting such an idea. The constitution is a document which is firmly imposed to the nation state. The constitution is a document that strikes a balance between the powers of the state and that protects citizens against those powers. Social media are mere private companies,
subject to the law of the state and apparently, their terms of service are simply contracts between private parties. Nonetheless, at first glimpse, the idea that social media companies are similar to states seems to work. These websites are platforms with their own domain; their own population, the users; and, of course, their own law, the terms of service. Why should they not have a separate set of rules to govern the activities in their domain?

Bills of rights of social media users
This is probably the idea that motivated the authors of a series of texts which interestingly define themselves as ‘bills of rights of social media users’. These documents do not have any binding legal value, and are merely the output of single individuals or non-governmental organizations.

Facebook’s terms of service
Interestingly, this strange combination of norms guiding social media and the constitutional province does not seem to be an isolated occurrence. From a brief look at the terms of service of the main social networking websites, it is immediately possible to perceive that Facebook’s show a peculiar configuration. Its terms are called ‘Statement of Rights and Responsibilities’ and refer to Facebook’s Principles, a separate set of rights and freedoms broadly addressing the ‘People’ and ‘Every Person’. In this case, one could unquestionably consider Facebook’s adoption of this ‘constitutional tone’ as a mere way of legitimizing the arbitrariness of social media’s governance or even a simple tool of marketing, rather than thinking that it could reflect a real constitutional function.

An alert sign for national constitutional law
Indeed, both the bills of rights of social media users and Facebook’s terms are in fact weakened by a series of significant shortcomings, if regarded as constitutional mechanisms. Basically, the bills are not enforceable, and Facebook’s terms are intrinsically biased and undemocratic. Nevertheless, the fact that these texts are evoking the constitutional dimension is indisputable. Especially with regard to the bills of rights of social media users, pointing at a mere marketing strategy could not explain the emergence of these texts. This circumstance allows us to consider the further option that these documents are emerging to compensate a failure of the existing constitutional system. Why should one write a constitution for social media if we already have plenty of these texts at national level?

Towards a multilevel system
Indeed, it is evident that the phenomenon of social media overtakes national boundaries, constantly evolves and creates new threats for our fundamental rights. Is the existing constitutional law able to cope with that? Do we need a specific constitution for the global environment of social media? The answer, in line with jurists’ tradition, is: it depends. In this case, it depends on the strength of existing constitutional law. If this law, which represents the pillar of our society, will be able, once again, to evolve, following the incessant development of technology, the answer is: no, we do not need a constitution for social media. However, there is no doubt that this time the route ahead for constitutional law is rising, and very fast. Therefore, in the meantime one cannot exclude an intermediary solution, a multilevel constitutional mechanism where innovative constitutional instruments flank existing constitutional law.

*****
CHILD TRAFFICKING – A CANCER TO BE CURED

By Dhivya U and Sandhiya K
From Sastra University

ABSTRACT
Childhood is the most beautiful of all life seasons. It is the age where creativity and imagination blossoms in one’s mind. Unfortunately, in today’s era millions of children are exploited and their lives have fallen prey to greedy men who abuse and engage them in immoral activities for financial gains.

Child trafficking has become a serious problem in India. This is unfortunately an organized crime which acts behind the screen and gives an impression of a petty issue that we encounter in our day to day life. Such children are abducted, trained, maimed and even drugged malnourished to gain the crowd’s sympathy. There is not only abuse of children in such form of forced labor but severe aftermath effect is created. In India, by official statistics, roughly 60000 children disappear every year. In spite of a number of policies and laws set up for these purposes of helping such children, the government failed to curb this due to lack of political will. Some of it is covered as a crime under IPC, Articles in Indian Constitution and various Acts.

This paper will discuss various forms of child trafficking and the laws in India that prohibits the crime along with a brief insight about international conventions like Geneva Declaration of Rights of the Child adopted by League of Nations, Declaration of the Rights of the Child adopted by the UN General Assembly. Through observations and case study suggestions will be arrived to effectively combat and protect child rights.

Keywords: child trafficking, child rights, international conventions, human rights, child.

INTRODUCTION:
Child trafficking: A short definition
A child has been trafficked if he or she has been moved within a country, or across borders, whether by force or not, with the purpose of exploiting the child.\(^{783}\)

Child trafficking can be defined as the process through which a person below the age of 18 years, is transported or relocated with the intention to exploit them. Undoubtedly it is a human right violation. Along with being exploitative it greatly endangers children’s physical, emotional and overall development. This problem is predominantly found in developing and under-developed countries due to flimsy and ambiguous laws and brittle border issues. Such children are physically and sexually abused and are raised in a hostile environment deprived of their basic human rights. In India, the number of such incidences is rising at an alarming rate.

Child trafficking is a grave issue that has spread like wildfire in India. As per a report published by the U.S. Department of State, “India is a source, destination and transit country for trafficking”\(^ {784}\)

The 2012 Global Report on Trafficking in Persons released by United Nations Office on Drug and Crime (UNODC) has revealed


\(^{784}\)Narayan Lakshman, “India is a source, destination and transit country for trafficking”, THE HINDU, Washington, Tuesday, July 28, 2015, p. 10.
that 27 per cent of all victims of human trafficking officially detected globally between year 2007 and 2010 are children.\textsuperscript{785} Child trafficking happens for immoral activities such as child prostitution, child labour and in the recent past, as child beggars. Another area of concern is the gender-based child trafficking, as the MHA data reveals. 2010-2014, out of the 3.85 lakh children who went missing across the country, 61% were girls.\textsuperscript{786} Children who are often trafficked belong to poor and marginalized communities. Most of the cases involve parents who are deceived or coaxed for better livelihood options into selling their children or sending them for daily wages. The courts in India have stated that a child cannot be treated as an inanimate object or like a property by the parents.\textsuperscript{787} Many children sent out for adoption to various nations usually end up in not getting shelter or a family. Some are exploited as sex slave and fall prey to the organ trade, drug trade, or get trained for Jihad, among other wrong reasons. This issue is burning globally.

REPORTS:

Fortunately, India is not mentioned in the list of Tier 3 countries by the \textbf{Trafficking In Persons Report} (TIP) even when India has a large number of women and children trafficked every year. Our country comes under the category of the Tier 2 as per the US government’s TIP report.\textsuperscript{788} This report explains the ground zero scenario of human exploitation and trafficking. Most of this happens within the national borders. Among the different forms of exploitation, the most widespread ones are trafficking of young women and girls for sexual exploitation and young boys who work as bonded labour in industries like coal, handlooms, brick, etc. These children are oftensexually exploited or tortured and beaten by their owners in case of non-compliance.

Young boys are abducted mainly for factory work, while young girls are sold for sex trade. Kolkata has become a major passage and spot for girls coming from Nepal and Bangladesh and Raxaul and Gorakhpur have become their transit points.\textsuperscript{789} The network of such traffickers are very complex and deeply rooted in the country which involves officers working under the government, police at the borders and the states and various politicians, all of whom share a sum of money as profit from this unruly business that works underground.

India has also become a hotspot for boys who are sent to Middle- Eastern countries for camel racing. Such boys are kept as bonded labours and brutally exploited. Another recent trend is child beggars in India. This is such an organized network and a billion dollar industry. In fact, children are frequently kidnapped to Saudi Arabia, especially during Haj, for this purpose. In India, begging gang bags often maim children and put them on to streets to get maximum collection from them.\textsuperscript{790}


\textsuperscript{786} IANS,”One in every five missing children comes from West Bengal: CRY” HINDUSTAN TIMES, May 24,2016.


\textsuperscript{788} Department of State, United States of America, “Trafficking In Persons Report, June 2019”p.48.

\textsuperscript{789} Neeraj Chauhan, “Well oiled network gets 50,000 Bangladeshi girls trafficked into India every year”, Times of India, Wednesday, January 10, 2018.

According to the National Human Rights Commission of India, over 40,000 children are reported missing every year of which over 11,000 remain untraced. This report assisted in exposing trafficking in Kerala. Children from various states were being brought into Kerala by train. At the station, they were stopped and the persons who were escorting them couldn’t come up with an acceptable reason as to why they were being brought into Kerala. All escorting adults were arrested and now the Kerala High Court has ordered a CBI investigation into the matter.  

**TYPES OF CHILD TRAFFICKING:**

- **Child Labours**
  Child is defined under the Child Labour (Prohibition and Regulation) Act 1986 as a person who has not completed the age of 14 years. It is an age-old tradition in India where children help their families and support them by engaging in domestic and farming activities. Thus, this issue becomes sensitive under certain social circumstances.

  Child labors in India could be mainly classified as:

  1) **Industrial Child Labor**
  India’s industrial sector is the largest employer of child labour. Approximately, over 10 million children between the age group of 5 to 14 years are working in informal or small industries, including around 4.5 million girls. Since most of the industries that constitute a large number of children under the age of 18 are unorganized and operate in rural areas, they have become difficult to regulate. They employ so since it is easy to handle and affordable.

  2) **Domestic Child Labor**
  This includes mainly girls under the age of 14 years who are sent by their parents willingly and domestically employed by families to look after their domestic chores. Such children are deprived of proper education, time to play with friends and even adequate rest they require at their age.

  3) **Bonded Child Labours**
  This form of labour has significantly declined during the recent times due to stricter laws and increased supervision by authorities. Although this form of labour is banned, it is quietly being followed in certain backward places. The significant reduction was made possible due to laws banning child labor and a compulsory child education along with the efforts of UNICEF, various non-governmental organisations and other agencies.

- **Child Beggars:**
  Begging is defined in Indian law as soliciting or receiving alms in public place by exposing wound, injury, deformity or disease whether of himself or of any other person or animal. It is the practice of imploring others to grant a favor, often a gift of money, with little or no expectation of reciprocation.

  Crippled and malnourished children are twice more likely to receive sympathy and alms as compared to the fit child beggar. Child beggars are a distress to the society. Child beggars are the most profit making

---


792 Child Labour (Prohibition and Regulation) Act 1986.
form of begging among others. Such kidnapped children are allocated to far off places from their homes so that they remain untraceable lifelong. These kids are abused severely, drugged and even trained to beg in public places. Such children lack love, affection and security and some die while some others grow up to be social misfits and criminals.\textsuperscript{795} To curb this menace, we need to stop giving alms

- **Sex Trafficking**

Child prostitution refers to the sexual exploitation of a child for remuneration in cash or in kind\textsuperscript{796}. It is usually organized, but at times a family member, procurer or even a parent may sell the child into this vicious circle. Often these girls are between the age 11-18 years but sadly kids are even sent at toddler age of 6 years. Due to their poor familial conditions these children agree to come to work unaware of the abuse that they have to face. About 15\% of the prostitutes in Mumbai, Delhi, Madras, Calcutta, Hyderabad and Bangalore are children. Sadly, many of them become commercial sex workers before completing minority.

Child prostitution is closely connected with child pornography. It refers to any visual depiction of sexually explicit conduct involving a child which includes photograph, video, digital or computer-generated image i.e. indistinguishable from an actual child.\textsuperscript{797} Conservative estimates state that around 300,000 children in India are suffering commercial sexual abuse, including work in pornography. It must be noticed that forced migration of children occurs for the purposes sex trade.

Other forms include Sex tourism, pornography, engaging in illegal activities like organ trade, Drug peddling/smuggling, labor such as Agriculture labor, garment industry, fish export in formal and informal economy. Children engaged in circus, dance troupes Camel jockeys for entertainment purposes can also be included to the list.

Currently various steps and measures to prevent child trafficking are being taken in India. These steps are multidimensional, and it involves both national and international agencies efforts to take the necessary steps. Also, there are a number of non-governmental organisations that work to address various forms of this problem.

**INTERNATIONAL CONVENTIONS FOR PROTECTION OF CHILDREN:**

- **International Convention on the Rights of the Child**

**Article 33**
States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

**Article 35**
States Parties shall take all appropriate national, bilateral and multilateral measures


\textsuperscript{796} Elaine Chase and June Statham, \textit{“Commercial Sexual Exploitation of Children and Young People in the UK - a review”} Child Abuse Review 14: 4: 4-25 (2005).

\textsuperscript{797} Protection of Children from Sexual Offence amended in 2019.
to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

- The Convention against Transnational Organized Crime; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the Protocol against the Smuggling of Migrants by Land, Sea and Air, which supplement the Convention against Transnational Organized Crime. The Committee recommends that the State party:
  Establish an elaborate and systematic data collection mechanism, on child trafficking based on region, sex, national, ethnic origin, socio economic status, with emphasis on those from vulnerable situations.
  Conduct awareness-raising activities in order to make parents and children aware of the dangers of both internal and external trafficking;
  Further strengthen its cooperation with South Asian countries to combat trafficking in children across states, including through the conclusion of bilateral and multilateral agreements.

- Convention on Protection of Children and Cooperation In Respect of Intercountry

Signatory states recognizes that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin, recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin, convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.

- The United Nations Convention on the Rights of the Child is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. The Convention defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation.

- Optional Protocol to the CRC on the sale of Children Child prostitution and Child pornography

This was enacted to ensure protection of children from sex exploitation especially in the form of pornography especially young girls and from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

- Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United

---


800 UN Treaty convention on the Optional Protocol to the CRC on the sale of Children Child prostitution and Child pornography.
Nations Convention against Transnational Organized Crime

This convention declares that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human right.

- Universal Declaration of Human Rights

  Article 3. Everyone has the right to life, liberty and security of person.
  Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.
  Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

- South Asian Association for Regional Cooperation


  The South Asian Association for Regional Cooperation (SAARC) deals with the problem of trafficking. The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution of 2002 was signed by India. The main purpose of this Convention is to promote cooperation amongst Member States so that they may effectively deal with the various aspects of trafficking in women and children, i.e. the prevention of the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination, the repatriation and rehabilitation of victims of trafficking.

STATUTES IN INDIA:

- The Criminal Law (Amendment) Act, 2013 provides a definition of trafficking in persons whereby an element of force or other forms of coercion, abduction, fraud and deception is required, including in the case of children, and it does not expressly exempt victims of trafficking from criminal prosecution.

- Recovery and reintegration of victims


  The Committee is particularly concerned at:
  a. The lack of adequate facilities;
  b. The lack of a method of accreditation for the registration of institutions, and

---


802 Universal Declaration of Human Rights.


c. the lack of adequate counselling services and psychological support tailored to the needs of children;
d. Inadequate standards of care, supervision and commitment in institutions;
e. The lack of effective provisions for regular review and re-consideration of the child’s placement in an institution;
f. Limited re-integration assistance for victims, once they leave an institution.  
   • The Transplantation of Human Organ Act, 1994.
   • The Prevention of Illicit Traffic in narcotic Drugs and Psychotropic Substances Act, 1988.
   • The Child Marriage Restraint Act, 1929.
   • The Bonded Labour System (Abolition) Act, 1976.
   • The Goa Children’s Act, 2003.
   • The Bombay Prevention of Begging Act, 1959.
   • The Immoral Traffic (Prevention) Act 1956, amended in 1986 to extend the scope of the law to bring both sexes exploited in commercial activities and intensifies penalties for offences engaging children. It includes overarching provisions for rescue, protection, treatment of victims of prostitution and punishes inducing, procuring persons to involve in it, keeping a brothel, living on prostitution income.
   • The Juvenile Justice (Care and Protection Act of Children) Act 2000. This law deems it a crime to engage children in any hazardous employment or in bondage. It provides for juveniles ‘conflict with law’ and children in ‘need of care and protection’ by providing for their developmental needs and proper rehabilitation.
   • Child Labour(Prohibition and Regulation) Act 1986, equally prohibits employment of children in some specified occupations and sets down conditions for children at work. The main object of this act is to prohibit employing children below 14 years in hazardous occupations identified in a list by this act. This list was expanded in 2006 followed by 2008.
   • The Factories Act, 1948 prohibits child labour. This act provides protection to children against exploitation. It prohibits the employment of children below 14 years of age in any factory outlets. It also provides guidelines on who can employ, when and how long can a pre-adult between age of 15 and 18 years be employed in factory.
   • Karnataka, Devadasi(Prohibition of Dedication) Act, 1982 for eliminating prostitution.
   • The Children’s Act, 1960. This act as well prohibits engaging children in begging and exploiting a child in any form of employment.

**MAGNITUDE OF VICTIMS:**

In India 70% of trafficked women are employed in prostitution out of which 20% are children sadly. About 2.3 million girls and women are reported to be working in sex industry and more than 2 lakhs persons are trafficked within or through country every year.  

Unfortunately India has 19% of world’s child population and International Labour Organization(ILO) estimates that India has the largest child labour force comparing to any part of the world. Official Indian stats gathered the

---


number to be around 11 million full timers and 10 million part timers.\textsuperscript{807} Both boys are girls are the victims of trafficking though girls constitute more, who are engaged for sexual purposes. 60\% of the estimated 2.3 million women and child commercial sex workers in India come from scheduled castes or tribes, other backward classes and according to International Labour Organization (ILO) estimates, 15\%-20\% of them are children.\textsuperscript{808} Every year thousands of tribal girls under 18 years of age are migrated from the states like Jharkhand and Chattisgarh to the Metropolitan cities of the country. Even the survey conducted by People’s Awakening for Traditional Revival and Advancement (PATRA) concludes that every year over 2500 to 3000 tribal girls moved from Jharkhand alone.\textsuperscript{809} Every fourth day a child is trafficked from Jharkhand-a State that is striving to keep its children away from child labour and give them schooling. The latest National Crime Records Bureau (NCRB) report, released in 2016 estimates that a total of 90 children were trafficked from Jharkhand alone in 2015. Though this number is huge it can be tip of the iceberg, actual numbers much higher.\textsuperscript{810}

The inability to address this serious problem of child trafficking has developed India into an easier catch for the traffickers to proceed further their heinous activities exacerbated.

\textsuperscript{808} See, Child Protection in Eleventh five year plan (2007-2012), Ministry of Women and Child Development Government of India, p.32.
\textsuperscript{809} See, Child Protection in Eleventh five year plan (2007-2012), Ministry of Women and Child Development Government of India, p.32.
\textsuperscript{810} Every fourth day a child trafficked from Jharkhand: NCRB, The Pioneer (India), September 9, 2019.
\textsuperscript{812} Thakural, Enakshi Ganguly (ed.), CHILDREN IN GLOBALISING INDIA, CHALLENGING OUR CONSCIENCE,2003, p.261.
rather than calling it traumatic. Some of the common symptoms of psycho-social disorders of children who are engaged in sex industry are severe depression, powerlessness, guilt, and deflated self-esteem, lack of trust, loneliness, multiple phobias, poor memory, and fear of unknown, lack of belief in everything.

The definition of ‘child’ under different Indian legislations:
According to Indian Penal Code 1860, "Nothing is an offence which is done by a child under age of seven years[ Sec. 82 IPC ]. The age of criminal responsibility is further raised to twelve years if the child is found to have not attained the ability to understand the nature and consequences of his/her act’[Sec. 83 IPC].

According to Juvenile Justice (Care and Protection of Children) Act 2000, ‘Juvenile’ or ‘child’ means the one who has not completed eighteen years of age.

According to Child Labour (Prohibition and Regulation) Act 1986, ‘child’ means a person who has not completed his fourteen year of age. Hence it is evidently clear those variations in defining a ‘child’ exist.

Trafficking:
In India the only national legislation on trafficking amounts to The Immoral Traffic(Prevention) Act,1956 . It does not define what trafficking is but treats it on par with prostitution. But Goa Children’s Act, 2003 which is one and only state legislation specifying and defining ‘child trafficking’.

LEGISLATIVE PROVISIONS IN INDIA:

In India, kidnapping is a crime under sections 360, 361, 384, 363, 363 A (kidnapping for begging), 366, 367, 369 of IPC.

Article 15(3) of the Indian Constitution enables the state to make special provisions for children.

Article 24 deals about prohibition of child labour and their hazardous employment.

Article 39(f) further directs the state in its policy towards the welfare of the children.

Article 39(c) tender age children should not be subject to abuse and should be given opportunities to overall development.

Article 45 makes provision for free and compulsory education for children.

Article 47 explains duty of the state in raising the level of nutrition ,standard of living and in improving public health .

Article 23 of Constitution of India prohibits traffic in human beings and forced labour and any contravention of this provision is considered as an offence punishable by law.

Article 39 directs the State to secure children are not abused or forced due to economic constraints to be employed in unsuited works to their age, strength and that children, youth are protected against abandonment.

Section 361 Indian Penal Code 1860, deals with the kidnapping of a person from lawful guardianship.

Section 366A of the Indian Penal Code 1860, deals with procuration of minor girl child I e. any person who induces a girl below 18 years with intend to engage her.

815 Indian Penal Code 1860.
816 Section 2(k) of The Juvenile Justice (Care and Protection of Children) Act 2000.
817 Section 2(ii) of The Child Labour (Prohibition and Regulation) Act, 1986.
for forced illicit sexual intercourse shall be punished for ten years imprisonment and liable to fine.

Section 366B of the Indian Penal Code 1860, deals with importation of girl child below age of 21 years of age i.e. any person who imports such a girl with intention to engage her for illicit sexual intercourse shall be punished with ten years imprisonment and liable to fine.

Section 369 of the Indian Penal Code 1860 deals with kidnapping and abducting a child below 10 years of age with intent to steal from its persons, shall be punished with imprisonment of seven years and shall be liable to fine.

Section 370 of the Indian Penal Code 1860 deals with punishment for trafficking of person where any person recruits, transports, harbours, transfers, or receives, a person or persons for buying and disposing any person as slave, shall be punished with seven years rigorous imprisonment and liable to fine as well.

Section 371 of the Indian Penal Code 1860 provides punishment of ten years imprisonment or life with fine, for any person who habitually deals with slaves.

Section 372 of the Indian Penal Code 1860 provides punishment for persons engaged in selling of minor girls for prostitution or any form of illicit intercourse shall be punished with ten years imprisonment and shall be fined as well.

Section 373 of the Indian Penal Code 1860 prescribes punishment for any person who buys, hires or obtains possession a minor for prostitution or illicit intercourse shall be punished with imprisonment extending to ten years and shall be liable to fine.

Likewise Section 374 of the Indian Penal Code 1860 provides punishment extending to one year imprisonment with fine, for unlawfully compelling a person to labour against his will.

CAUSES:

Although the government has taken several initiatives to cure this cancer, the root cause still needs to be addressed. Children who are dropouts from school and children who are focused more to run the livelihood of family by earning are more likely to be trafficked. Unhappy children who leave their homes due to family troubles are also equally susceptible. Poverty leads to malnutrition and poverty also leads to trafficking and child labour. Child marriage also amounts to major reason. Girl children should be encouraged to pursue their education and not fall into child marriages which are a trap. Understanding it as a complex problem it can be eliminated completely by first attacking at its roots.

The root causes of trafficking in children can be varied as poverty, lack of employment opportunities, globalization, illiteracy, demand for cheap labour, growing demands for adoption, low socio-economic status, lack of medical and educational facilities, and awareness. Other factors include political uprisings and local cultural factors which are perennial factor which lead to prostitution, bonded labour etc.

JUDICIAL RESPONSE TO CHILD TRAFFICKING:


The Indian judiciary has played a commendable role in protecting children from various causes of trafficking and has been instrumental in providing suitable rescue and rehabilitation to the affected victims. In State v Freddie Peats and Others, this is an important case that brought a spark in the minds of Indian society and public, addressing the seriousness of child sexual abuse which is undeniably lasting in our society. The Sessions court held Freddie Peats guilty for offences punishable under Section 292, 293, 342, 355, 328, 337, 323 of the Indian Penal Code 1860, Section 9 of the Immoral Traffic (Prevention) Act 1956, Section 20 and 43 of the Juvenile Justice Act; Section 27 of the Drugs and Cosmetics Act 1940. Freddie Peats was held guilty with life imprisonment with his appeal dismissed by the court.

In Public at large v. State of Maharashtra and Others; based on an article of newspaper which brought to light about minor girls who were illegally confined and forced to be sex workers, a suo moto was taken by the Bombay High Court. A raid was carried out and about 473 minor girls and children engaged as sex workers were rescued and kept in juvenile homes. A committee was constituted on court’s direction for rehabilitation of the rescued children.

In Vishal Jeet v. Union of India, the Supreme Court issued directions that all state governments must direct the legal executives to take speedy steps against commercial sexual exploitation and set up advisory committees for suggestions and measures for eradicating child prostitution, provide rehabilitative homes for rescued girl children.

Likewise in Prena v. State of Maharashtra and Others, the petitioners, a registered organization working in red light area of Mumbai to prevent trafficking of women and children, filed a PIL to protect children and minor girls from brothel keepers and shrewd pimps. The girls rescued from the sex trade were provided rehabilitation.

SUGGESTIONS:

This issue of child trafficking involves common victims such as girls from the poor socio economic background and disadvantaged families, children living in rural or sub-urban areas who are trapped either in the name of employment or marriage without dowry. These children end up in brothels and red light areas through a well organized mafia groups. Some of the critical measures to overcome this cancer are stated below.

1. Foster the spread of education
   Due to high dropout rates and low literacy rates, people are driven into false pretexts of better livelihood in urban cities and trafficked. However educated children and their families are better aware and mature in comprehending the risks of child trafficking comparing to uneducated children.

2. Encouraging business not to engage in child labour
   When business enterprises are not given silent approval to exploit children in their businesses, instances of child labour can be kept at minimum or removed completely.

3. Strict and stringent laws to prevent child trafficking

---

820 Session Court No. 24/1992, Criminal Appeal No. 4/1996.
821 1997(4) Bom. CP 171.
823 Criminal Writ petition No. 788 of 2002, Mumbai High Court.
Effective laws and policy making backed by research, findings of need for reforms, engage with government agencies. Various statutes like Protection of Children Against Sexual Offences Act (2012) and Immoral Traffic (Prevention) Act, have been successful in demonstrating how legal acts and its proper execution can curb child trafficking.

4. Creating awareness among parents, families, communities
Due of lack of awareness situations arise where traffickers can exploit. Awareness about their rights guaranteed under the constitution and various offences relating to children can end this social evil to an extent. Parents and society which are more prone to such evil should be well educated and advised about the after effects of child trafficking. They should also be encouraged in educating the children and guiding about possibilities of better life in future.

CONCLUSION:

India is a prime area for child trafficking to happen. We still have many children trafficked to work in industries and farmlands for a meagre amount. Apart from this, horrific stories emerge daily about girls as young as 9 years old being forced into the sex trade. Children are also sold by their parents to work in factory and industries that are highly dangerous with toxic environments. The severity of the problem demands effort from government as well as NGO’s to spread greater awareness. The suggestions mentioned above can be implemented for effectively curbing this menace. Hence with a hope that one day child trafficking will be eliminated completely not only in India but globally, let us strive to protect every child from the hands of evil predators.

*****

CASE STUDY: JAORA SUGAR MILLS V. STATE OF MADHYA PRADESH AND OTHERS

By Dhruvi Anajwala
From Gujarat National Law University

INTRODUCTION
In the concerned case, Jaora Sugar Mills v. State Of Madhya Pradesh And Others, deals with the scope of parliament's residuary power under article 248 read with entry 97 of list 1 (Union List) of the Indian constitution. Deviation from the other traditional federal countries, where residuary powers are allocated to the states, Indian constitution confers residuary powers in favour of the Centre.

ANALYSIS

FACTS OF THE CASE:
State of Madhya Pradesh (Respondent) made the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958, and the Jaora Sugar Mills (Appellant) is doing business in the business of production and sale of sugar since 1955. Sugarcane cess was made payable under section 23 of the Madhya Pradesh Act. Payment of commission to the Cane Development Council is given under section 21 of the said Act. This act purports to validate the imposition and collection of cesses on sugarcane. Under the said Act respondents demanded the cesses on sugarcane from the appellant as sugarcane factory was treated as a ‘local area’. Parliament passed the Sugarcane Cess (Validation Act 1961) as many states’ act suffered infirmity, this act was passed in September 1961 with the assent of President. By S.3, all the assessments and collections made before its commencement under the various State Acts and laid down that all the provisions of the State Acts, as well as the relevant notifications, rules, etc. made under the State Acts, would be treated as part of S. 3. Further, the said section was to be deemed to have existed at all material times when the cess was imposed, assessed, and collected under the State Acts. Appellant challenged these demands as they were asked to pay the cess at the rate prescribed by them for the years 1959-60 and 1960-61. They challenge the levy in the writ petition before the high court but it was dismissed by the high court. The appellant came with the certificate to the court.

A question arose that whether the decision of the High Court was right in holding that the act is constitutionally valid or not?, whether central legislation is valid or not? Also, another question arose concerning the demand for commission for the year 1959-60.

CONTENTION OF APPELLANT:
1. It alleges that demands of the respondent were invalid because the act under the authority of which they implied have been made, was itself ultra vires and unconstitutional. Cane Development Council was constituted on August 26, 1960, and the respondent demanded cess which was fairly not permissible as it did not exist during the period covered by the demand for the year 1959-60.
2. What the validation of the Act had done was to attempt to cure the legislative incompetence of the State Legislatures by validating State Acts which were invalid on the ground of absence of legislative competence in the respective State Legislatures. The whole contention is based on what he regards to be the true scope and

---

effect of Section 3 of the Uttar Pradesh Sugarcane Cess (Validation) Act.

3. It was contended that the act was the colourable piece of legislation because the motive of the levying cess was enabling the respective states to retain the amounts which they had illegally collected.

4. The act had not been passed for the motive of the Union of India and the recoveries of cesses which were retrospectively authorised by it were not likely to go into the consolidated fund of India.

➢ CONTENTION OF RESPONDENT:

1. It was contended that the validity of S. 23 of the Madhya Pradesh act was challenged before the MP High Court under Article 226 of the constitution, and they relied on Bhopal Sugar Industries v. State of Madhya Pradesh826. Article 226827 empowers High Courts to issue directions, orders or writs like habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Therefore according to Article 226 of the Constitution in the High Court of Madhya Pradesh for a writ restraining the State of Madhya Pradesh from enforcing the Bhopal State Agricultural Income-tax Act, 1953, claiming that the Act contravened the respondent's right.

2. Where a challenge to the validity of legal enactment is made on the ground that it is a colourable piece of legislation, K.C. Gajatpati Narayan Deo & Ors. v. State of Orissa828 was referred for this issue.

3. It was further contended that the validity of an Act must be judged in the light of the legislative competence of the legislature. Therefore it was impermissible to contend that the Act was invalid because the funds in question would not go into the Consolidated Fund of India.

4. The functions of the Cane Development Council as prescribed by Section 6 of the Madhya Pradesh Act show that the Council is expected to render service to the mills like the appellant and so it can be safely assumed that the commission which was authorised to be recovered under Section 21 of the Madhya Pradesh Act is a ‘fee’.

➢ DECISION

The Supreme Court held that:

1. As respondent rightly relied on Diamond Sugar Mills Ltd. v. The State of Uttar Pradesh and Bhopal Sugar Industries v. State of Madhya Pradesh court gave the decision in favour of respondents. The common characterised point of the charging sections in both the Madhya Pradesh and the Uttar Pradesh acts was that they authorised the respective State Government to impose a cess on the entry of cane into the premises of a factory for use, consumption or sale therein. Now here the question of local area arose in Diamond Sugar Mills Ltd of “local area” and was urged as per given in the answer to the question whether the impugned law was within or beyond the legislative competence of the State legislature depends on whether the law falls under Entry 52 of the State List- List II of the Seventh Schedule to the Constitution. It is quite clear that there is no other entry in either the State List or the Concurrent List under which the legislation could have been made. This argument was accepted by the majority in Diamond Sugar Mills case that the proper meaning to be attached to the words “local area” in Entry 52 of the

827The Constitution of India,1950
Constitution (when the area is a part of the State imposing the law) is an area administered by a local body like a municipality, a district board, a local board, a union board, a Panchayat or the like. So following this decision the Madhya Pradesh High Court struck down Section 23 of the impugned Madhya Pradesh Act in the Bhopal Sugar Industries case.  

2. In the matter of colourable piece of legislation, again the court decided in favour of respondents. In *K. C. Gajapati Narayan Deo and others v. The State of Orissa* it was held that “The idea conveyed by the expression colourable legislation is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretense or disguise.”

3. In the matter of demand made by the respondent for the payment of cess commission for the year 1959-60 court held it invalid and the notice to that extent must be cancelled. As a result, the appeal substantially fails and the order passed by the High Court is confirmed, subject to the modification regarding the demand for the payment of cane commission for the year 1959-60. There would be no order as to costs.

This case shows that the Union can generally, if it is so disposed, go to the rescue of the State to sustain invalid State legislation by invoking the residuary powers. This adds a new dimension to cooperative federalism.

**CONCLUSION**

From the above case analysis and a discussion of further judicial pronouncements, it tends to be concluded that the residuary powers which were supposed to have a very limited scope because of the elaborate enumeration of the topics of legislation in the three Legislative Lists in the Constitution have ended up to be not so limited. Specifically, in the field of taxation, the resort to residuary powers to justify wealth, gift, expenditure, etc. taxes shows that it has evolved a new extent to the Union power. Since the landmark judgement of the Supreme Court in *U.O.I v. H. S. Dhillon* a new approach in the constitutional interpretation of the legislative entries has been opened.

In India, the residuary power has received its due constitutional treatment, as an exclusive Union power which has primacy over the State and Concurrent powers. It is unlikely that a position similar to that of Canada will develop in India concerning the residuary powers. The residuary power in India has sharpened further the dominant position of the Centre. It is hoped that it will not encourage careless drafting of Union legislation.

**REFERENCES**

- **BOOKS:**

---


830 Supra 4.


**STATUTES:**
1. The Constitution of India, 1950

**WEBSITES:**
1. interstatecouncil.nic.in
2. indiakanoon.org
3. jstor.org
4. manupatra.com
5. westlaw.com

*****
ABSTRACT
This paper provides a general picture of historical development, causes, consequences, and urban warfare in International Humanitarian Law. This paper highlights critical areas of urban warfare, Urban warfare and the impact on civilians, Customary IHL obligations relating to the conduct of urban warfare, ICRC guidance and its application in urban warfare and doctrines, also a particular focus on the American armed forces and argues that IHL in its current form is unable to guarantee humanitarian conduct of the war in compliance with its principles of proportionality and precaution. A case study of the invasion of Iraq will also be covered in the paper. This paper focuses on the mutually constitutive relationship between urbanization, warfare and military doctrines to highlight the responsibility of occupying forces.

INTRODUCTION
For more than 10 years, pictures of war zones have been more and more characterized by wiped out urban areas and infrastructures, disclosing the ugly truth that cities have become the main concern of war. Whether in East Aleppo, the conflict between the Turkish state and Kurds in the Sur municipality in Diyarbakir during its furthest battles 2016, or the war in the Donbas in Ukraine, urban spaces have been converted into war zones. These pictures “prompt us to think about how organised human violence shape our spaces, practices, and identities.” The point of departure of this paper is the effect of such developments for the conduct of lawful warfare, leading to the central research question: how can lawful conduct of war be assured in urban centres? What is the nature of the tension between the urbanization of warfare and IHL, as the legal framework for the conduct of the war in order to limit its effects? By tracing the development both from a historical and theoretical perspective, this paper argues that codified IHL is no longer equipped to deal with the challenges that urban warfare poses. Instead, it is necessary to draw upon Customary IHL, which emerges from state practice rather than written treaties or conventions and stresses the principle of proportionality. This alternative perspective would allow us to include myriad discourses and analyses from legal, military and urban specialists into account, as each body of literature offers different insights into the complexity of contemporary urban warfare. This paper will develop this argument in three different sections: The literature review will focus on the theoretical framework and historical development of urban warfare showing the mutually constituting relationship between warfare and urbanization, by building on urbanism studies that critically engage with urban space as a historically and politically constructed site. This part will also analyse US military strategies that encompass urban warfare and the war on terror. The second section will be dedicated to the case of the 2003 US invasion of Iraq, with an analysis of military doctrine and discourse against the backdrop of this transformation of urban space. The last section will highlight challenges, St Antony’s International Review, vol.12, p.176-189, (February 2017).
challenges that emerge from urban warfare for IHL and advocate for the application of customary IHL in its place.

URBAN WARFARE AND INTERNATIONAL HUMANITARIAN LAW THROUGH HISTORY AND THEORY

Urban centres have come to occupy a central place in the conduct of war since the beginning, affecting military doctrines and thus, outlining new challenges for IHL. In the nineteenth century development of IHL has begun, the fourth Geneva Conventions of 1949 form the core of the law of armed conflict.

Pre-colonial eastern Africa provides an enthralling awareness into the co-constituting relationship between the processes of urbanization and warfare, where “military activity led to the creation of new settlements developed in response to particular circumstances.” According to this argument, it is critical to view warfare and urbanization as historically closely interlinked. With growing urbanization, the conduct of war changed, in turn redefining the course of urbanization. Such a procedure is built-in “depopulation and de-urbanization elsewhere”. In the Twentieth century, communist revolutionary theory engaged critically with the importance of urban centres in guerrilla warfare, with a debate about the relative benefits of first winning the countryside or the urban centre for the revolution to be successfully spread.

Concerning to US urban warfare, it is considered that the Battle of Mogadishu in 1993 to be a major turning point for American attitude towards urban warfare and thus a revision of military doctrine and laying the groundwork for the 2003 Iraq War was needed. This battle is a strong example because it points out the interlinking of three dimensions in urban warfare:

a. Population
b. Terrain, and
c. Infrastructure.

At that time improvement of combat efficiency and further development of appropriate military capabilities was needed, by this US military had to face several challenges.

According to Stephen Graham ‘processes of urban militarization do not form a simple clean break with the past. Rather, they include modern resolution to long term urban and militaristic transformations’.

As expected, with the ongoing urbanization of spaces, urban militarism has come to control military and security doctrines in which “the key ‘security’ challenges of our age now centre on the everyday sites, spaces and circulation of cities.”

The war zone regarding these developments:

---

“Battlespace” word was suggested by Stephen Graham. The term is broader than the “battlefield”. By these modern issues of employing military capabilities under the area of law. This also allows for attention to be drawn “on the changing powers of states to attempt the violent reconfiguration, or even, erasure, of cities and urban spaces.”

In the 19th and 20th centuries infrastructure, industrialization and urbanization were interlinked. Where the higher focus on infrastructures i.e. telegraph/telephone lines, railways, and road in urban areas turned the city into a military target “precisely because it hosted the technical systems that were necessary for the enemy to continue to wage war.

Historically, with the goal being to cut their supply routes and demoralize the enemy, the central targets were populations as well as logistics chains. Consequently, it is not an effort to target the civilian population, or to break the logistics of the enemy, but the very structure of urban life. It creates a form of dominance over the urban space, a very important psychological consequence of urban warfare.

Following these developments, it is logical that military research highlights on these new realities by developing “a widening range of ‘hard’ and ‘soft’ anti-infrastructure weapons.”

Contemporary geopolitical plan is therefore directed towards “the deliberate de-modernization of the entire suite of modern networked infrastructures.” If such plan succeed consequences for urban centres will be disastrous. In the post-cold war myriads of factors that provide to this new state of affairs, Graham suggested. John Warden’s ‘strategic ring theory’ of US Air force, which views the enemy as embedded into a system of five rings:

1. The centre,
2. Constituted by the leadership,
3. The organic essentials,
4. The infrastructure - followed by the civilian population and lastly,
5. The military fighting force.

This theory has had a major influence on all major US bombing campaigns since the late 1980s. In the Kosovo War and First Gulf War graphite bombs were used, which ejaculate graphite crystals to comprehensively disable electrical power and distribution stations. This shows strategically targeting the critical infrastructure of the belligerent. After this in Iraq it was impossible to reconstitute Water system.

It is interesting to see how, even though historical connections and developments, military strategists consider urban militarism as a novel form of warfare and suggest new approaches to render it more efficient. This confirms the suggestion that, despite the historical importance of cities and urban infrastructure in warfare, the modern urbanization of warfare has changed in nature. Moreover, the strategic language does not consider the long-term structural

838 Ibid.
transformations that will happen with this form of military urbanism.

IRAQ INVASION AND ITS VARIOUS CHALLENGES FOR INTERNATIONAL HUMANITARIAN LAW

The case of the Iraq invasion will help us understand the difficulties of the application of IHL, as well as the challenges and effects of urban warfare in general. Major Lee Grubbs' review of the *urban warfare doctrine* in the context of the Iraq invasion establishes major visions into the redefinition of the U.S Army forces in urban contexts.\(^{843}\) It is further suggested that the city is intentionally chosen as a battleground by the opponent, where civilians and militants merge and therefore the U.S military should not use irresistible force. Due to such circumstances, even though U.S has extraordinary technological advantages, U.S needs to adopt these new challenges. According to Stephen Graham, it is suggested that, recognizing striking similarities between the Israeli occupation of Palestine and the US invasion of Iraq, terming the engagement in Iraq “Palestinianisation.” In light of this, research advises that the main aim has highly come to occupy a central role in urban warfare. In the context of the Iraq War, “no other weapon or technology has done more to contribute to achieving strategic goals of providing security, protecting populations, establishing stability, and eliminating terrorist threats.”\(^{844}\)

What relevance does the Iraq case bear on contemporary techniques of warfare?

It is acknowledged that the creation of new threats like cyber warfare due to increased technological sophistication and it becomes contemporary challenges to IHL. Adding to this jurisdiction in cyberspace is not so clear. As suggested by the ICRC report from October 2015, urban warfare has immediate effects. The transformation and destruction of urban space leave the population behind with long-lasting and deep structural changes.\(^{845}\) The highlighted point from the Iraq invasion, especially on the crucial importance of concrete as a weapon of war, is likely to inform future conflicts.

Consequently, as this section attempted to show, the Iraq invasion proposes appealing perception into the central challenges of urban warfare, both for the occupying power and civilian population. The military discourse on the run-up to the invasion was at very first doubted with the difficult navigation of the urban space by the soldiers and pointed to a lack of specialized technology to meet strategic goals within an increasingly difficult urban environment. However, it overlooked the structural transformations for the civilian population.

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW OBLIGATIONS RELATING TO THE CONDUCT OF URBAN WARFARE

According to the estimates made in the Geneva Declaration’s report *Global Burden of Armed Violence*, in the period

---


2005–2007 civilian deaths in armed conflicts far exceeded combatant fatality rates, and three-quarters of all direct conflict deaths that occurred during that period were concentrated in ten conflict-affected countries, including Iraq, Afghanistan, Sri Lanka, India, Somalia, and Pakistan. The report also found that the significant increase in the global number of direct conflict deaths witnessed during that period was primarily due to the armed conflicts in these countries, and it is noteworthy that most of the major conflicts referred to in the report involved states, including the United States of America and Israel, that are not signatories to either Protocol I or Protocol II.

In addition to the reports and studies cited above, this report further demonstrates the importance of customary IHL. In comparison with civilians caught up in armed conflicts classified as non-international, Protocol I provides civilians caught up in international armed conflicts with a broader and more detailed framework of humanitarian protection, which is arguably better suited to regulating urban armed conflicts than Protocol II and common Article 3 because it includes rules on, inter alia, distinction, proportionality, and precautionary measures. Be that as it may, it is suggested that reliable evaluations of the precise dynamics of armed conflict can only be made from the vantage point of hindsight.

In view of the enduring humanitarian quandary of classification lagging behind the actual situation, the inherent substantive limitations of Protocol II and common Article 3, the non-applicability of treaty-based IHL to a range of contemporary asymmetric conflicts, and the grave risks posed by insufficiently regulated urban conflict, application of the ‘corpus of customary international law’ relating to precautions in attack, proportionality, and humanitarian assistance is warranted ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’. This body of customary law is ‘applicable to all armed conflicts irrespective of their characterization as international or non-international’ and thus avoids any substantive gaps in humanitarian protection that may precede a reliable evaluation and concomitant application of treaty-based IHL, especially where there is likely to be disagreement, doubt, or divergence as to the precise legal character of the hostilities in question inter

849 Protocol I, above note 21, Art. 48, 51(1)–(5), 52, and 57.
and intra parties to a conflict.\textsuperscript{853} As discussed above, this is especially so in relation to situations such as proxy wars and ‘low-intensity conflicts’ whose precise character can be hard to gauge as events unfold on the ground.\textsuperscript{854}

The advantage of applying the body of customary IHL when such uncertainty prevails is that it avoids parties to a conflict under-classifying a situation and subsequently being found to have violated a particular legal framework applied by a court of law on an ex post facto basis.\textsuperscript{855} Furthermore, it is in the strategic interests of parties to an armed conflict (major military powers in particular) to incorporate customary obligations into their military doctrine and practice when using military force in urban areas, as this can enhance the utility of force in contemporary asymmetric armed conflicts.\textsuperscript{856}

INTERPRETING INTERNATIONAL HUMANITARIAN LAW IN LIGHT OF URBAN WARFARE

IHL is a set of rules which aim to limit the effects of armed conflict, protect people who do not or no longer participate in combat, and restrict belligerents’ use of authorised means and methods of war. With a few exceptions,\textsuperscript{857} IHL contains no specific rules regarding urban environments. The fact that conflict is taking place in a city, however, can influence how existing rules are interpreted.\textsuperscript{858} Even though the use of explosive weapons in an urban environment is not expressly forbidden, their legality can be questioned in terms of two core principles of IHL: distinction and proportionality.

The principle of distinction aims to protect civilian populations and property, mainly by prohibiting attacks such as “those which employ a method or means of combat which cannot be directed at a specific military objective”\textsuperscript{859} as such means are too inaccurate. To clarify interpretations of this rule and its application to the use of explosive weapons in urban environments, it is possible to draw on the empirical data gathered by specialist NGOs. According to AOAV, even when an attack is launched against a military target, 56% of the casualties are civilians; this figure can rise to 82% when attacks are launched in densely populated areas. NGO Article 36 has modeled the impact of certain types of mortar widely used in Syria and Iraq.\textsuperscript{860} Their impact area – the zone where the explosives are likely to fall – can often be several hundred meters across. This level of precision now seems incompatible with the principle of

\textsuperscript{853}ICTY, The Prosecutor v. Bos’koski, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 245.
\textsuperscript{855}Andrew J. Carswell, Classifying the conflict: a soldier’s dilemma, in International Review of the Red Cross, Vol. 91, No. 873, p. 154–159, (March 2009).
\textsuperscript{857}For example, the ban on regarding a city as a single military objective, as cited in Article 51 of Additional Protocol I to the 1949 Geneva Conventions.
\textsuperscript{859}Additional Protocol I A.51, Geneva Conventions (1949).
\textsuperscript{860}Areas of harm: Understanding explosive weapons with wide area effects, A.36 & PAX (2016).
distinction, and morally unacceptable when these weapons are used in densely populated areas.

The use of explosive weapons in populated areas also challenges their respect for the principle of proportionality. This principle forbids attacks whose expected damage would be excessive when compared to the military advantage gained. Even though the binding force of the principle of proportionality is now well established, its interpretation in urban areas raises certain issues. When weighing military advantage against expected collateral damage, should the belligerents consider just the direct and immediate consequences of the attack (the number of dead or wounded) or all the expected effects, including indirect and non-immediate effects?

A detailed legal analysis reveals a growing consensus about the obligation to consider all the “foreseeable effects” of an attack, be they immediate or indirect. Naturally, it would be a fiction to think that all the consequences of an attack could be foreseen. However armed forces can implement a certain number of best practices.

Firstly, the principle of precaution requires them to gather the maximum possible amount of information to assess the effects of an attack (plans, areas of vulnerability, etc.). This assessment is facilitated by technological developments and also by the generation of empirical data regarding the use of certain weapons, available in Open Source. In this respect, certain civil society actors have gathered data about urban conflicts to model the consequences of armed violence on civilian buildings and to present this information to belligerents. Lastly, some military experts recommend, for example, that urban specialists be included in the military staff to facilitate the assessment of collateral damage.

There is no doubt that the use of explosive weapons in an urban environment is difficult to reconcile with IHL compliance, especially when these weapons are particularly inaccurate, as confirmed by the ICRC which calls upon belligerents to avoid using them: “Due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas.”

URBAN WARFARE: A HUMANITARIAN CHALLENGE

The principle of proportionality is defined in paragraph 2(a) (iii) of Article 57 of AP I. Foe the safety and protection of

---

865John Spencer, The army needs an urban warfare school and it needs it soon, Modern War Institute (2017).
867AP I, Art. 57(2)(a)(iii): “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the
the civilians it should be ensured that damages caused by warfare will be reduced to some extent. IHL is not prohibiting collateral damage but it can be minimized by IHL. Here challenge for IHL is to decide the cause of indirect collateral damage which is not easy to determine. There are practical limitations of implementations in urban areas. As all the information should be available when it is required.868 Another issue to be addressed is whether proportionality should be assessed for a single strike or for a series of strikes or even the entire military campaign869.

The latest data gathered, albeit patchy, suggests that urban warfare currently affects over 50 million civilians worldwide870, and kills on average eight times more than a conflict in a rural environment.871 The complex nature of urban sites is a major challenge for military and humanitarian aid operations given the population density and the fact that civilians and combatants intermingle. Joshua Baker, producer and director of the film Battle for Mosul872 relate the following account: “One commander told me that the fighting was so close that he could hear in the kitchen of one apartment and be exchanging fire with an enemy in the sitting room whilst there were civilians on the floor above.”873

Another major humanitarian challenge is the damage caused by the use of means and methods of warfare that were designed for use in open battlefields. These include the use of explosive weapons in densely populated areas; these are often indiscriminate in that they have a wide “impact area” due to their relatively inaccurate delivery system, their explosive power or the number of sub-munitions they contain. The ICRC, many non-governmental organisations (NGOs)874 and even states875 jointly condemn these practices, the use of which is steadily rising and which cause major damage among civilian populations. The NGO coalition, Action on Armed Violence (AOAV), which documents such use, claims that their deployment in an urban area kills on average twenty-eight people (90% of whom are civilians) compared with just three in a non-populated area.876

In addition to the direct damage caused by an explosion, explosive weapons can give rise to a myriad of indirect effects, “domino effects”, which affect the

population’s essential infrastructure. An attack on an arms depot, for example, could damage a nearby electrical transformer leading to power cuts which would cause problems for a hospital or a sanitation system, thus creating risks for the wounded and ideal conditions for the emergence of water-borne diseases. These consequences are more severe in an urban environment where the population is more dependent on essential services and the networks are highly interconnected, increasing the risk of malfunction or stoppage when one component part is affected by conflict. The clouser of several parts of an infrastructure can, affect thousands of people at the same time.

To deal these contemporary challenges, we propose two courses of action, one based on an interpretation of certain aspects of international humanitarian law (IHL), and another one based on adapting the actions of humanitarian aid organisations. Adding to this there must be frequent changes in Law and its practice, loopholes should be closed as early as possible.878

CONCLUSION

In conclusion, this paper has argued that codified IHL is no longer equipped to face the challenges of urban warfare. As the first section has analyzed through the lens of a critical urbanist approach, the historically co-constitutive relationship between warfare and urbanization renders the lawful conduct of war in contemporary settings difficult, both for civilians whose protection can no longer be ensured, as well as for soldiers on the ground who have to navigate through this urban space. This section further showed how the constitutive nature of warfare on urban environments is generally neglected in military strategies. Targeting critical infrastructures has become central to urban warfare, which at times can be subject to individual interpretation. According to this logic, electrical power and distribution stations can be defined as dual-use infrastructure, which deeply affects the urban structure and the lives of civilians. The Iraq invasion in 2003, which exemplified the challenges outlined above. It shed light on the techniques of the US military that were applied in order to create securitized military zones, which allowed for complete domination of the urban zones by the occupying power. Such operations are legitimized by discourses of security, which expose the loopholes of IHL by exploiting ambiguous definitions. This in turn means that the central principles of IHL, proportionality and distinction between civilians and combatants, can no longer be upheld. Therefore, in light of these discussions, this paper argues in favour of customary IHL, which emerges from state practice, to provide the legal framework for the conduct of war. Customary IHL can close the loopholes in IHL that might render targeting dual-use infrastructure lawful, by emphasizing precaution and proportionality through compliance with all feasible means to determine whether a target is a military. This can also prohibit increasingly sophisticated weaponry which could cause indiscriminate attacks.

Moreover, this paper suggests that in customary IHL the mutual relationship between urbanization and warfare becomes more explicit, which in turn can have an impact on military doctrines to promote a

877 ICRC, Urban Services.
878Camilla Waszink, Protection of Civilians under International Humanitarian Law: Trends and
better understanding of the structural transformation of urban space through war. In consequence, only customary IHL through its focus on state practice can meet contemporary challenges of lawful warfare.

BIBLIOGRAPHY
1. Articles:
   - International Committee of the Red Cross, *Treaty Ratification Table* (2010);
   - Nathalie Durhin, *Protecting civilians in urban areas: A military perspective on the application of international humanitarian law*

2. Books:

3. Cases:

4. Statutes and Convention:
   - *International Court of Justice*
   - *International Humanitarian Law*
   - Additional Protocol I, Geneva Conventions

5. Websites:
   - https://www.oxfordresearchgroup.org.uk/blog/urban-warfare-and-international-humanitarian-law
   - http://www.unhcr.org/refworld/docid/494a455d2.html
   - https://www.jstor.org/stable/26229179?read-now=1&seq=1#page_scan_tab_contents

*****
I. Abstract
“Terrorism is a significant threat to peace and security, prosperity and people.”

-Ban-ki-Moon

The Indian democracy takes a significant step for building a self-reliant economy being a developing country. The National Investigation Agency (NIA) which is the Indian central organisation to combat terror came into existence on 31st of December 2008 with the enactment of the National Investigation Agency Act in the same year. With the aftermath of a series of terror attacks which took place in Mumbai in the year 2008, the centre-state relations resulted in incorporating such agency. Being the Counter Terrorism Law Enforcement Agency the nation still observes mammoth terror attacks like those in Uri, Pulwama and the most recent in Kashmir. Terrorism is identical to not being confirmed by law or ‘being unlawful’. The Unlawful Activities (Prevention) Act, 1967 aids to curb the same. The recent amendment in both such legislations under the UPA government further empowers the power of NIA in India. Until now, the Unlawful Activities (Prevention) Act, 1967 allowed the government to proscribe terrorist organizations, but now allows the government to proscribe individuals as terrorists. The National Integration Council appointed a Committee on National Integration and Regionalization to look into, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the approval of recommendations of the Committee, the Constitution (Sixteenth Amendment) Act, 1963 was legislated to enforce, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. Hence this paper will be further covering the aspect of the threat to the economy which is a contrast even after the constitution and functions of NIA.

Keywords - democracy, NIA, terrorism, unlawful activity, sovereignty, integration

II. INTRODUCTION
The need for an Investigation Agency in India

The Central Counter Terrorism Law Enforcement Agency which comes under the ministry of Home Affairs mainly focuses to combat terror in India. With certain crimes, particularly terrorism; often having an interstate or international dimension, it is truly difficult for a law enforcement body to prevent or investigate such offences if it has a limited jurisdiction. The need for a national body that can coordinate and supervise the investigation of such criminal activities that have national or cross-border repercussions was essential. Additionally, in order to prevent such offences from occurring in the first place, sharing of substantial information and gathering comprehensive intelligence across many jurisdictions had to take place.

879 Quotes on terrorism, available at; https://www.goodreads.com/ last seen on 05/12/2019
as well. State law enforcement agencies, with their limited jurisdictions, looked forward for the creation of a national agency to remove such ambiguousness for the investigation of these crimes. The Supreme Court received materials from the National Human Rights Commission, the Soli Sorabjee Committee, the Bureau of Police Research & Development\(^{880}\) (BPR&D) and the Second Administrative Reforms Commission on the need and scope of a national investigation agency. Thus, it can be safely asserted that we do have a pressing need to declare certain offences having inter-state and international ramifications as “federal offences” to be investigated by a designated Federal Agency having the required level of expertise\(^{881}\).

**Constitutional validity of the NIA**

If we look into areas of public order and policing, it lies in the legislative competence of the States and not with the Centre. The legal validity of the National Investigation Agency can be traced in *Entry 93*\(^\text{882}\) List I of the Seventh Schedule to the Indian Constitution which gives power to the Centre to legislate regarding, “offences against laws with respect to any of the matters in this List.” This can be interpreted as the need to establish a national agency for investigation. But in the absence of such agency, Articles 249 and 252\(^\text{883}\) which particularly focus on the ‘powers of the parliament to legislate on the matters in State List, in the interest of the nation’ would play an important role.

According to the materials submitted by the Soli Sorabjee Committee to the Supreme Court, the Ministry of Law advised the Ministry of Home Affairs that ‘police’ comes under the jurisdiction of state and thus its functions can’t be conferred on an existing provision by Parliamentary Law or new Central Police Force except under Article 249 or 252\(^\text{884}\) of the Constitution”. Other suggestions which are put state that Entry 1of List I (the defence of India), read with Article 355\(^\text{885}\) of the Constitution, is sufficient to allow the Centre to legislate in this manner. However, even on this view of the matter, it appears that the Centre may only be able to legislate on matters relating to terrorism and not necessarily create a new national policing agency without amending the Constitution.

Ministry’s opinion that in the absence of a constitutional amendment the creation of a national investigation agency with enforcement powers must rely on recourse to Article 249 or 252 of the Constitution is correct\(^\text{886}\). When a national policing agency, like the Central Bureau of Investigation, is supposed to investigate in the matter of such cross-jurisdictional crimes, it can only proceed if there is the consent of the State concerned. By contrast, the newly created NIA can assume jurisdiction over a Scheduled Offence suo moto or on its own.

**NIA Functioning and its drawbacks**

---

\(^{880}\) The need and importance of Investigation agency, available at; http://www.bprd.nic.in/ last seen on 24/12/19

\(^{881}\) Notes on federal offences, available at; https://mha.gov.in/pdf last seen on 24/12/19

\(^{882}\) Constitution of India

\(^{883}\) Idib

\(^{884}\) Idib

\(^{885}\) Idib

\(^{886}\) Ministry of Home Affairs reports, available at; https://www.mea.gov.in/ last seen on 26/12/19
Powers mainly focus on investigating matters instead of prevention being regressive in nature

Section 3(2) of the National Investigating Agency Act\(^887\) states that the NIA has the power to investigate across India within its boundary of any offences listed in the attached schedule. However, the NIA has not been given the necessary powers to prevent the enumerated offences. In matter for any law enforcement body to prevent the crimes, it requires more powers than just enforcing and investigating crimes. Provision has to be made for the sharing, collection, collation, analysis and dissemination of intelligence. As pointed out by numerous committees, the failing of the CBI in relation to combating corruption has been that it is strictly an investigative agency. In order to make NIA effective to prevent a federal crime, it needs to be able to warehouse, process and coordinate the flow of critical information. By way of example, the U.S. Federal Bureau of Investigation was significantly restructured after 9/11 so that it could engage in, and collaborate with others on, counterintelligence activities. It is suggested that prevention can be observed by firstly focusing on the acquisition of information and then acting on that information\(^888\).

The NIA Act is silent on information sharing, how information and intelligence is to be obtained, and on the NIA’s relationship to other agencies that presently gather information. In fact, this oversight may severely compromise the NIA’s ability to investigate Scheduled Offences, let alone prevent them\(^889\).

The National Investigation Agency (Amendment) Bill, 2019\(^890\) thereby increases a quantum of powers to the said agency but again on investigating matters alone. By increasing the number of scheduled offences to be investigated and prosecuted by the agency, and also increasing its jurisdiction as well strengthening the special courts under the Act, the legislative efforts can be seen in a developing way as well.

But the question lies as to why to wait to investigate and prosecute the offences in the incidents when we have the resources and the manpower to not let that event happen in its first place?

The Act is schemed firstly, on the basis of the Central government determining that an occurrence or an event actually categorizes as a Scheduled Offence within the Act or not and then secondly, deciding whether it allows the NIA to investigate it as it focuses on investigation and not prevention. Also to mention that these determinations are solely made by the political executive instead of a professional expert who heads up the agency, again being a negative factor. The solution could simply lie if the matters are to be given to the professional expert to decide and not involved with politics.

The NIA will now be able to investigate offences outside India and this can be seen as an innovative step. The Indian Penal Code in any case extends to extra-territorial

\(^887\) The National Investigation Agency Act, 2008
\(^888\) Drawbacks of NIA, available at; https://www.nia.gov.in/our-legal-framework.htm last seen on 27/12/19
\(^889\) Functions of NIA, available at; https://www.humanrightsinitiative.org/ last seen on 26/12/19
\(^890\) NIA Amendment Bill 2019, available at; http://prsindia.org/ last seen on 26/12/19
crimes committed by Indians but the NIA will now be able to investigate such crimes even if no Indian nationals are involved and the offence does not fall to the territory of India. For example, people like Pakistani terrorist Hafiz Saeed is termed as accused by investigative agencies in India without any kind of specific provision, as the Code of Criminal Procedure allows any such crimes to be registered as long as the offence takes place within the territory of India or its consequence ensues in India. They are being inspected through the various agreements between the two nations and their international treaties. As of now, the amendment shall not bring any significant difference apart from India stating that the nation can now investigate any crimes at any place. Basically, this would depend completely upon cooperation from foreign states. Most of the foreign territories shall not permit a full-fledged investigation of their nationals by the NIA.

NIA and its Incompatibility

Generally we can observe the weakness of this agency despite the powers entrusted to it by the legislature. The recent cases can be seen, starting from, when a convoy of vehicles carrying security personnel were attacked in Pulwama district in Jammu and Kashmir, famously known as the Pulwama Attack of 2019\textsuperscript{891}, headed by Pakistan-based Islamist group Jaish-e-Mohammed (JeM). This even stated to be the deadliest attack, claiming 40 Central Reserve Police Force deaths. Four of the operatives of such attack were tried and a charge sheet was filed against them under Section 120 B\textsuperscript{892} being criminal conspiracy, Section 121 A\textsuperscript{893} being waging, or attempting to wage war, or abetting waging of war, against the government of India under the Indian Penal Code, and other sections of the Unlawful Activities (Prevention) Act\textsuperscript{894} (UAPA) and of the Explosives Substances Act\textsuperscript{895}.

As seen in the National Investigation Agency Act of 2008, particularly section 3\textsuperscript{896} the powers of NIA limit merely to the investigation matters and procedures instead of giving preventive measures, the agency being ‘investigation’ agency. This proves to be narrowed aspect as clearly investigation comes after a tragedy or an attack has occurred whereas prevention comes before it.

In the deadliest attack in Uri on the security forces in Kashmir which was again planned as well as executed by the Jaish-e-Mohammed, a massive fire caused by four terrorists resulted in 13 jawans being burnt alive instantly along with many others being burnt severely. The terrorists spoke Pashtun (one of the tribal languages spoken in Pakistan) which clearly indicated the assistance of Pakistan in such an attack. As what NIA would have done, it probed into the matter and inspected for the same. NIA reports said that a First Information Report (FIR) was registered as per under sections 16 (punishment for terrorist act), section 18 (punishment for conspiracy,) and also section 20 (punishment for being member of terrorist gang or organization) of the Unlawful Activities (Prevention) Act, 1967, also, section 302 (murder), section 307 (attempt to murder), section 436 (Mischief by fire or explosive substance with intent to destroy house, etc) and section 120B (criminal conspiracy) of the

\textsuperscript{891} Pulwama attack 2019, available at: https://timesofindia.indiatimes.com/ last seen on 28/12/19
\textsuperscript{892} The Indian Penal Code 1860
\textsuperscript{893} Ibid
\textsuperscript{894} The Unlawful Activities (Prevention) Act, 1967
\textsuperscript{895} The Explosive Substances Act, 1908
\textsuperscript{896} Supra 9
Indian Penal Code. The agency also inquired with the Jammu and Kashmir police and even looked forward in getting the DNA samples of those four terrorists.

As per the powers already vested with the agency under the Act, it acts reasonably but the flaw lies with the prevention matter which could be taken accordingly if we probe into all such attacks happened even after the constitution of this agency in 2008.

If we study the preamble of the National Investigation Agency Act 2008, it aims to ‘investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State’ so for the matters of prosecution of the offences in the interest of the nation itself, the task of prevention surely plays a massive role. As correctly said in the cases of the health of a person, ‘Prevention is better than cure,’ similarly, the case lies with our nation.

India and its counter-terrorism policy after Mumbai attacks

Being a constant target of the Islamist militants, India faces a lot of terror-based attacks. Despite all the national security institutions particularly like the National Security Council which aids the Prime Minister of the nation to take decisions in matters of security and strategic interest. National Security Advisory Board, Indian Police Services, Central Industrial Security Force and others along with important legislations like Unlawful Activities (Prevention) Act 1967 which obviously aims to prevent or to curb such activities as defined under section 2(o) of the act, which harms or disrupts the sovereignty as well as territorial integrity of India, also assist in curbing such attacks to a limit. Yet there is a huge factor which narrows the whole efficiency of such institutions that is, lack of coordination in the internal security system, poorly trained and equipped police personnel who are hired on the basis of political patronage and are involved in corruption. Instead of making efficient and effective use of the resources and established institutions, the departments keep themselves busy in activities like money laundering, bribing and being involved in other forms of corruption as well.

Even in the committees, intelligence bureaus and task forces act as coordinating mechanisms passing through Centre and State, yet they prove to be slow and burdensome.

Apropos the failure of India in its counter-terrorism, the recent amendments so made in the National Investigation Agency Act 2019 along with Unlawful Activities Prevention Amendment Act 2019 (UAPA) strengthens the government to curb terrorism and so indirectly imposes a restriction on the right to dissent of the people thereby empowering the internal security institutions of India. Yet again section 35 of the UAPA 2019 is highly debatable as it is clearly violating article 19 being freedom of speech and expression of the people under the Indian Constitution. Hence we can have a general understanding that the said amendments in these

---

897 Supra 14
898 Supra 9
899 Supra 16
900 India and its counterterrorism policy, available at; https://economictimes.indiatimes.com/ last seen on 28/12/19
901 Need to strengthen the counterterrorism policy in India, available at; https://thewire.in/government/e... last seen on 28/12/19
902 UAPA Amendment Bill 2019, available at; http://prsindia.org/billtrack/... last seen on 27/12/19
legislations couldn't prove a major role in curbing events like those of terrorism but merely improves the investigation process after the terror incident takes place and also goes to declare an individual as a terrorist under the amended UAPA act.

**III. Conclusion and Justification**

The extent of what the NIA will investigate is ironically unsatisfactory and potentially too broad. The offences which require national response under NIA shall not be empowered to investigate such transnational crimes. Offences like cyber crime, human trafficking, and drugs trafficking are recently shown in the Schedule of Offences to the NIA Act. It does not matter if these offences have a direct link with the terrorism or not, but the prevention and investigation of these offences are best dealt by a national response. The offences, like terrorism, are by their very nature, national or international in scope and design. Further, they might have overt or covert links to terrorism. The NIA serves to look at all national crimes and accordingly makes the necessary linkages. On the contrary, it can be seen that looking to the presence of the political discretions and the extent of activities now covered under the Unlawful Activities (Prevention) Act, the scope and functioning of the new agency is possibly much too wide and intrusive for comfort.

Apparently, the ultimate goal of the NIA is to make sure that Indians are secured by addressing the gaps in our present approach in preventing and investigating offences with a transnational character. However, the NIA can only work if it has the cooperation of State governments, irrespective of their political affiliation, and has the long term confidence of ordinary people. Unfortunately, there are serious questions about the constitutional validity of the NIA. In addition, the NIA has to overcome the fact that it was created in haste, it repeats the systemic shortcomings of other police agencies in India, it is potentially open to political interference and it arguably should have jurisdiction over additional offences that have a transnational character. The only way to potentially make the NIA different and much more effective is to debate its shortfalls openly and honestly, draw in a variety of voices, and incorporate checks and balances that will minimize the possibility of failure. Sections 23 and Section 24 of the NIA Act, which empower the Central government to remove difficulties and make rules, provide the opportunity to make considerable improvements to the NIA such as clarifying what “other relevant factors” can be considered in directing the Agency to investigate a Scheduled Offence. By mustering the requisite political will at both Centre and State levels, perhaps the NIA can become an exemplar for overall changes in future policing.

---

Sections 23 and Section 24 of the NIA Act, which empower the Central government to remove difficulties and make rules, provide the opportunity to make considerable improvements to the NIA such as clarifying what “other relevant factors” can be considered in directing the Agency to investigate a Scheduled Offence. By mustering the requisite political will at both Centre and State levels, perhaps the NIA can become an exemplar for overall changes in future policing.
CULTURAL, EDUCATIONAL, POLITICAL AND SOCIAL RIGHTS OF NON-CITIZENS

By Divya MB
From School of Excellence in Law, The Tamil Nadu Dr Ambedkar Law University

INTRODUCTION:

“Lost rights are never regained by appeals to the conscience of the usurpers but by relentless struggle...... Goats are used for sacrificial offerings and not Lions”.

Bhimrao Ramji Ambedkar “The rights of every man are diminished when the rights of one man are threatened”.
- John F. Kennedy

Every person should, by the virtue of their essential humanity enjoy all human rights. There may be exceptional distinctions made between the citizens and non-citizens only if they serve a legitimate State objective and proportional to the achievement of that objective. A citizen is a person who is recognized by a State as having an effective link with it. International Law allows each and every State to determine the qualification of its citizens. Citizenship can be acquired by being born in the Country (known as jus soli or the law of the place), being born to a parent who is a citizen of the country (known as jus sanguinis or the law of blood), naturalization or a combination of these approaches. A non-citizen is a person who has not been recognized as having these effective links to the country where he/she is located. Every individual including the non-citizen should have the freedom from child labor, unfair trial, arbitrary arrest, inhuman treatment, arbitrary killing, slavery, invasions of privacy, refoulement and violation of humanitarian law. Non-citizens are also having the right to marry; right to consular protection; right to equality; social, cultural and economic rights; right to assembly; right to protection as minors; labour rights (for example, healthy and safe working conditions, Collective Bargaining and Worker’s Compensation); right to peaceful association; freedom of religion and belief. As all human beings are entitled to equality, dignity and rights, States may draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement. In reality, there is a large gap between the rights that international human rights law guarantees to them and the realities that they face. Every non-citizen face official as well as non-official discrimination. They experience language barriers, sexism, xenophobia, lack of political representation, racism and unfamiliar customs; difficulty in obtaining identity documents; difficulty in realizing their cultural, educational, social and political rights – particularly the right to work, right to healthcare and right to education and lack of means to challenge the violation of human rights effectively.

The situation has worsened since 11th September 2001, as some Governments have detained the non-

---

903 Held in the judgment of the International Court of Justice of 6 April 1955 in the Nottebohm case (Liechtenstein v. Guatemala)
citizens in response to fears of terrorism. The narrow exceptions to the principle of non-discrimination which are permitted by International human rights law do not justify such persuasive violations of non-citizens.

In 1985 the United Nations publically announced the “UNITED NATIONS DECLARATION ON THE HUMAN RIGHTS OF INDIVIDUALS WHO ARE NOT NATIONALS OF THE COUNTRY IN WHICH THEY LIVE” This declaration ensured that the fundamental human rights were guaranteed to non-citizens.

WHO ARE NON-CITIZENS?

The persons who are residing in a country other than the one in which they were born are called as non-citizens.

The non-citizens include

- Refugees
- Stateless Persons
- Trafficked Persons
- Migrant Workers
- Immigrants
- Non-immigrants
- Asylum seekers
- Rejected asylum seekers

DEFINITION OF NON-CITIZENS:

Article 1 of United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 1985 defines a non-citizen as “any individual who is not a national of a State in which he or she is present”.

Non-citizens must receive the same treatment as the nationals of the country in which they live.

MEANING OF CULTURAL RIGHTS:

Cultural Rights refers to the rights related to art and culture. Every person should have access to the culture and to participate in the culture of their Election. Cultural rights are nothing but the human rights.

MEANING OF EDUCATIONAL RIGHTS:

Right to Education is also one among the human rights. International Convention on Economic, Social and Cultural Rights (ICESCR) recognizes the Right to free and Compulsory Primary Education to all.

Right to Education includes

- Right to access to education
- Right to free and Compulsory primary education
- A responsibility to provide basic Education for individuals who have not completed Primary Education
- An obligation to develop equitable access to higher education
MEANING OF SOCIAL RIGHTS:

Social rights refer to the rights which an individual is entitled within society in a social context. Social rights are the human rights.

Social rights include

- Right to an adequate standard of living
- Right to an adequate housing
- Right to adequate food
- Right to Education
- Right to Social Security

II. FOREIGNERS ACT, 1946

The Act regulates the entry of foreigners into India, their presence therein and their departure there from.

III. REGISTRATION OF FOREIGNERS ACT, 1939 AND THE REGISTRATION OF FOREIGNERS RULES, 1992

The Act and the Regulation mandates that certain categories of foreigners whose extended stay in India is more than the specified period, or as provided in their visa authorization, are required to get themselves registered with the Registration officer.

It includes:

- Arrival formalities
- Residential permit
- Report of absence from address
- Departure formalities
- Stay at hotels
- Prohibited places.

REGULATIONS APPLICABLE TO FOREIGNERS IN INDIA:

The extent Acts which are dealing with entry, stay and exit of foreign nationals in the country are:

I. Passport (Entry into India) Act, 1920
II. Foreigners Act, 1946
III. Registration of Foreigners Act, 1939

PROVISIONS IN INTERNATIONAL HUMAN RIGHTS LAW:

- ARTICLE 16 OF UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948
- ARTICLE 24 OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966
ARTICLES 7 AND 8 OF UNITED NATION CONVENTION ON THE RIGHTS OF THE CHILD, 1989

Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his or her nationality.

The Universal Declaration for Human rights (UDHR) has provided nearly 30 rights which is given in 30 articles, where it provides any person, without any discrimination, 30 rights, which every human being is entitled to.

The following rights must be granted to foreigners so long as they do not exercise any activities which are contrary to laws.

- The right to life and security of the person, including freedom from arbitrary arrest or detention
- Protection against arbitrary or unlawful interference with privacy, family, home or correspondence
- Equality before the courts, including the free assistance of an interpreter
- The right to choose a spouse, to marry, and to find a family
- Freedom of thought, opinion, conscience and religion
- The right to retain language, culture and tradition
- The right to transfer money abroad
- The right to leave the country
- The right to freedom of expression
- The right to peaceful assembly
- The right to own property individually or in association with others
- Liberty of movement and freedom to choose their place of residence within the borders of the country
- The right to join trade unions

The right to social services, health care, education, and social security
The right to equal pay for equal work
Protection from torture or cruel, inhuman, or degrading punishment
Freedom from being subjected to medical or scientific experimentation without the a foreigner’s free consent
Protection against arbitrary or unlawful expulsion from the country
The right to defend oneself from expulsion, except where compelling reasons of national security require otherwise
Protection from being arbitrarily deprived of lawful acquired assets
The right to communicate at any time with the consulate or diplomatic mission of the country of which he or she is a national.

FUNDAMENTAL RIGHTS GUARANTEED UNDER INDIAN CONSTITUTION, 1950:

The fundamental rights given to foreigners are given below:

- Equality before law and equal protection of laws (Article 14)
- Protection in respect of conviction for offences (Article 20)
- Protection of life and personal liberty (Article 21)
- Right to elementary education (Article 21A)
- Protection against arrest and detention in certain cases (Article 22)
- Prohibition of traffic and human beings and forced labor (Article 23)
- Prohibition of employment of children in factories (Article 24)
Freedom of conscience and free profession, practice and propagation of religion (Article 25)

Freedom to manage religious affairs (Article 26)

Freedom from payment of taxes for promotion of any religion (Article 27)

Freedom from attending religious instruction or worship in certain educational institutions (Article 28)

While the foreigners enjoy the above fundamental rights, however they are not entitled to enjoy the rights mentioned in:

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

Article 16- Equality of opportunity in matters of public employment.

Article 19- Protection of certain rights regarding freedom of speech, etc.

Article 29 - Protection of language, script and culture of minorities,

Article 30 - Right of minorities to establish and administer educational institutions.

The Supreme Court of India as recently reaffirmed that the right to life and liberty (Article 21) is available to foreign nationals besides the citizens of India in response to a First Information Report (FIR) filed by Police against three Uganda nationals.

The Supreme Court of India observed that “Article 21 of the Constitution [right to life and liberty applies to all citizens, whether Indian or foreign nationals. Their right to liberty could not be restrained by the police due to a business dispute.”

ARTICLE 21 OF INDIAN CONSTITUTION, 1950:

No person shall be deprived of his life or personal liberty except according to the procedure established by law.

DEFINITIONS INVOLVING THE TERM FOREIGNERS AND THE SIGNIFICANCES:

Asylum – Legal protection provided by another country to a person who is not a citizen of that country but who flees to that country in order to escape the persecution which is committed in the person’s own country.

Deportation – Deportation occurs when a nation expelling a non-citizen back to the country from which he or she came.

Detention – The exercise of physical restraint upon an individual depriving him or her of liberty and holding him or her in government custody for reasons other than to face criminal charges.

Everyone has the right to liberty and security of person; No one shall be subjected to arbitrary arrest or detention

2) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release

3) Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a court.

Discrimination – It is treating people differently because of their race, religion, ethnic group, colour, creed, political opinion, or other status or characteristic, when there is no legal justification for doing so.
**Migrant Worker** – A person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national. The definition for migrant worker is mentioned in [International Convention on the Protection of All Migrant Workers and Their Families (1990)](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---legal/documents/convconv.pdf).

**Refugee** – A person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality, and is unable to or, owing to such fear, is unwilling to avail himself or herself of the protection of that country or return there because there is fear of persecution.” ([United Nations Convention Relating to the Status of Refugees 1951 and Protocol 1967](https://www.unhcr.org/5b26be92c.html)).

**Undocumented Non-citizen** – A person who is in a country in which he or she is not a citizen, without any legal right or permission to be present, and can be removed by that country. They can also be called as illegal alien, undocumented worker, undocumented migrant.

**INTERNATIONAL INSTRUMENTS OF PROTECTION:**

1. **International Covenant on Civil and Political Rights (1976)**

   This Covenant further prohibits the expulsion of lawful foreigner from a nation without fair procedures, except when national security does not permit. The alien must also be provided with representation.

2. **Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (1985)**

   Establishes the rights of legitimate aliens to “security”, “privacy”, “to be equal before the courts”, “to choose a spouse, to marry”, “freedom of thought”, “the right to leave the country”, and the right to be joined by a spouse and dependent children (Article 5). Also, the Declaration makes clear that aliens have the right to a safe working environment (Article 8).

3. **Convention Relating to the Status of Stateless Persons (1960)**

   Establishes a state’s obligation to “facilitate the assimilation and naturalization of stateless persons” (Article 32) as well as a stateless person’s right to the basic freedoms.

**SECURITY DISCOURSE AND NON-CITIZENS:**

Security discourse has impacted upon the treatment and perception of non-citizens in many ways. Throughout the Cold-War, security terminology was applied in many ways, for example, in favor of refugees and asylum-seekers as they sought refuge from the East to West. With the growth in the international migration, including refugee movements from the global South towards the global North and the changing nature of conflicts from International to internal character in the 1990s, refugees, asylum-seekers as well as irregular migrants have become viewed by receiving states as threats to national borders and security perceived as criminals and terrorists and collectively as threats to international peace and security.
CULTURAL RIGHTS OF NON-CITIZENS:

Every individual including the non-citizens having the liberty to follow their own culture and tradition as it their right which they acquired from their birth itself. Only if it is opposed to the Public Policy or if it is contradictory to the law of the country in which they live, the non-citizens can be prevented from following their right to culture. In other words, “No person including the non-citizens shall be deprived of his or her right to culture except according to the procedure established by law”. 

ARTICLE 29 OF INDIAN CONSTITUTION, 1950:

Protection of interests of minorities -

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

EDUCATIONAL RIGHTS OF NON-CITIZENS:

“Education is for improving the lives of others”.

-Mariam Wright Edelman

Education is a tool which is being used to enlighten each person in the world. Irrespective of the caste, creed, sex and religion, education should reach the people. The duty is upon the Parents as well as the State whom we fondly called as the second parent, must provide the minimal or elementary education to each person in the society. Education is a boon which must be properly utilized by humans. As various Acts/ Enactments/ Legislations and Rules and Regulations provides that the Education should be free so that the persons who could not afford for it, it is only the “Conventions” which states that “Right to Education is a Human Right”.

ARTICLE 21A OF INDIAN CONSTITUTION:

The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

ARTICLE 29(2) OF INDIAN CONSTITUTION:

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

“Right to Life” includes “Right to Education”

“Right to Education” includes “Right to Free Education”

ARTICLE 45 OF INDIAN CONSTITUTION:

The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, or free and compulsory education for all children until they complete the age of fourteen years.
WHY THE RIGHT TO EDUCATION SHOULD BE MADE?

Every person in the world, they may be rich or poor; men or women or transgender, married or unmarried, young or old, citizen or non-citizen should be provided the basic right to education. But it is only upon the State to provide free or paid education. The growth and development of the Country is not depending upon the population rate and economic growth rate where it only depends upon the “literacy rate” of the States. Thus, The State of Kerala occupies the first place to hold a place of cent percent literate State.

Non-citizens also play an important role in every part of the Country. They constitute a major role. It is one among the duty/obligation on the part of the State Government or Central Government to provide education to all and to supervise whether every citizen and non-citizen is provided the right that is, the right to education. If not, the State/Central Government has to taken stringent policies and guidelines to make it more enforceable.

SOCIAL RIGHTS OF NON-CITIZENS:

Social Right is a basic human right which should be provided irrespective of the caste, gender, race and religion. Social rights include every human right that is right to education, right to adequate standard of living, adequate food, adequate shelter, etc.

It is on the part of the State to ensure whether all the persons who are residing in the State are provided the social right or not. Social rights include the following rights;

- **Right to Adequate Standard of Living:**
  - “Right to Life” includes “Right to Adequate Standard of Living”.
  - Citizens as well as the non-citizens should be given the right of adequate standard of living except certain persons like Fugitives, Offenders, Criminals, Terrorists, Prisoners. Adequate standard of living should be provided to
  - Non-citizens
  - Invalids
  - Public Servants, etc.

- **Right to Food:**
  - “Right to Life” includes “Right to Food”.
  - “Right to Food” includes “Right to Unadulterated Food”.

CONSTITUTIONAL PROVISION RELATING TO RIGHT TO FOOD:

- **ARTICLE 47**

  This article spells out that it is the duty of the State to raise the level of nutrition and standard of living of its people as a primary responsibility.

  As a developing Country like India, “Poverty” is the basic illness of the Country which should be eradicated only by means of providing this right that is, the right to food not only to the citizens but also for the non-citizens who left their own country and residing in the country which is not of their own.
In a Landmark case known as PEOPLE’S UNION OF CIVIL LIBERTIES VS. UNION OF INDIA, 2013 (10) SCC 1, it was held that the “Right to Life includes Right to Food”.

- **Right to Education as a Social Right:**

  As right to education is not only a basic human right, it is also one among the social right which is to be achieved only by providing the right to all for free.

- **Right to Shelter:**

  In a landmark case known as “OLGA TELLIS VS. BOMBAY MUNICIPAL CORPORATION AND OTHERS” 1985 SCC (3) 545 held that “Right to Life” includes “Right to Livelihood”. “Right to Livelihood” includes “Right to Shelter”.

- **Right to Social Security:**

  Social Security means the guarantee provided by the State through its appropriate agencies against certain risks to which the members of the society may be exposed. Right to Social Security is an important social right among all.

  In Indian Constitution, the Social Security provisions are enumerated in the

  - Preamble
  - Directive Principles of State Policy
  - Article 39(a) to (f)
  - Article 39A
  - Article 41
  - Article 42
  - Article 43
  - Article 45
  - Article 46 & 47.

  In a case called as CALCUTTA ELECTRICITY WATER SUPPLY CORPORATION VS. SUBHASH CHANDRA BOSE, 1992 AIR 573, the Supreme Court of India held that “The ultimate aim of Social Security is to ensure that everyone has the means of livelihood and hence Right to Social Security and Protection of Family are an integral part of right to life”.

  Thus, Social rights are not only meant for the citizens of the Country but also for the non-citizens.

**POLITICAL RIGHTS OF NON-CITIZENS:**

Political Rights includes the right of persons to form associations and to form assembly. Every non-citizen is having a right to form “peaceful association and peaceful assembly”. They are also holding the right to vote, which is the most important political right.

Right to engage and participate in Public affairs and Public Services is also one amongst the inherent right of political right.
Though political right is not an "Absolute Right", it should be given to both the citizens as well as the non-citizens in order to attain "Equality".

VIOLATION OF CULTURAL, EDUCATIONAL, POLITICAL AND SOCIAL RIGHTS OF NON-CITIZENS:

There are many instances where the cultural, educational, political and social rights of citizens itself are violated in every country. The procedure which the citizens of the country are following to enforce their rights are also applicable to the non-citizens in case of violation of their rights.

✔ TYPES OF FUNDAMENTAL RIGHTS:

➢ Fundamental rights only guaranteed to the citizens.

➢ Fundamental rights are guaranteed to all the persons irrespective of whether they are citizens or foreigners or legal persons.

• **Fundamental rights only to citizens:**

There are certain fundamental rights which can be guaranteed only to the citizens of the country and which can be enforceable only by the citizens of the country.

✔ **Example:**

Article 19 of Indian Constitution, 1950 which guarantees Protection of certain rights regarding freedom of speech and expression

• **Fundamental rights are guaranteed to all the persons irrespective of whether they are citizens or foreigners or legal persons:**

Irrespective of the caste, creed, sex, race and religion there are some fundamental rights which are provided by the State to the persons. Violation of the fundamental rights which are guaranteed to all the persons irrespectively are enforceable by any person.

✔ **Example:**

Article 21 of Indian Constitution, 1950 which talks about the Right to Life

PROCEDURE FOR ENFORCEABILITY OF VIOLATION OF FUNDAMENTAL RIGHTS ONLY TO CITIZENS AND PROCEDURE FOR ENFORCEABILITY OF FUNDAMENTAL RIGHTS GUARANTEED TO ALL THE PERSONS IRRESPECTIVE OF WHETHER THEY ARE CITIZENS OR FOREIGNERS OR LEGAL PERSONS:

✔ Article 32 of Indian Constitution provides WRIT JURISDICTION OF SUPREME COURT which states that a writ petition can be filed in India for the enforcement of fundamental rights.

✔ Article 226 of Indian Constitution provides WRIT JURISDICTION OF HIGH COURT which states that a writ petition can be filed in India for the enforcement of fundamental rights.

CONCLUSION:

Non-citizens are the persons who are residing in a country which is not of their own. They are facing huge difficulties like Gender differences, Educational differences, Employment difficulties, Identity Difficulties, etc. Instead of forcing the non-citizens to go back their own Country, we should invite them with a warm welcome and provide them the opportunity in Education, Employment, etc. It is not only the duty on the part of the Central and State Government, but it is also the basic human obligation on the part of us, to provide the non-citizens a basic standard adequate means of livelihood. Like the citizens, the non-citizens are also born in their own country but due to some
internal or external forces, they may have been subjected to trafficking and other kind of violence’s. In order to escape from all that chaos, they may flee from there. It is, therefore, every human right to protect them and prevent them from all sorts of discrimination. There may be some reasonable discriminations imposed by the State or the Central in order to protect its own people. The Indian Constitution as a groundwork of India should be respected and admired by every person of citizens as well the non-citizens. The Cultural, Educational, Political and Social Rights are not absolute rights even to the citizens.

They are subjected to some reasonable restrictions. Based on the principle that “Equals should be treated equal”, every State should enable every non-citizen to follow and practice their own Cultural, Educational, Political and Social Rights. Article 14 of Indian Constitution clearly provides that “The State shall not deny to any person equality before the Laws or the equal protection of the Laws within the territory of India”. Thus, the non-citizens should be treated just like the citizens of the Country. There are various Acts, Rules, Regulations, Conventions and Recommendations that the non-citizens should be treated in equal with the citizens of their own country. But, in practice, the non-citizens are not treated with due respect. Therefore, there should be Agencies and Organizations which should be established by every Country to regulate and supervise whether the non-citizens are rejected of any of their Cultural, Educational, Political and Social rights.

“I AM A CITIZEN, NOT OF ATHENS OR GREECE, BUT OF THE WORLD”
HUMAN RIGHTS VIOLATIONS OF THE TIBETANS BY CHINA AND INDIA’S REFUGEE POLICY

By Doreen Ann Jacob
From Amity Law School, Noida

Abstract:
Tibet, a state whose independence and sovereignty has continued to be a matter of dispute since its major turning point in history in the year 1949 when it came under the rule of China. As per international law, Tibet continues to be an independent state and has not lost its statehood. However, being under the illegal occupation of China, the state is incapable of exercising and carrying out its functions and providing its people with the security and stability needed.

Further, in spite of China being a member of the United Nations and signing multiple treaties and conventions including the Universal Declaration of Human Rights, a lot of basic human rights have been taken away from the people of Tibet resulting in extreme violations of such treaties. These treaties are a reflection of the customary international law and include basic rights of freedom of association, right to participate in the cultural life of the community, etc. which have explicitly been taken away the people.

India, which is currently the home to many refugee communities, also faced a mass influx of Tibetan refugees entering the country. However, India is a nation with not a single refugee policy set in place in spite of being one of the largest host countries. So what is to stop India from infringing on their rights and how can setting a refugee policy help?

This paper aims to critically analyze the relationship between the two states and the various infringements of Human Rights faced by the Tibetans along with a brief analysis of India’s measures taken in order to safeguard and protect the incoming refugees.

Introduction:
Human rights are inherent rights that one possesses from the time of birth till death. These are rights that cannot be taken away from an individual but may be restricted to a certain extent so as to allow each and every other individual to enjoy their human rights as well. These rights are prevalent with a person even if the person moves from one country to another and are continually possessed by the person regardless of their gender, religion, belief, place of birth etc.

Human rights have been recognized by the international community in various treaties and conventions such as The Universal Declaration of Human Rights, 1945, The European Convention on Human Rights, The Human Rights Act, 1998 etc. and member states to such conventions are bound by the protocols established by such conventions.

Before proceeding further, one needs to understand who a refugee is. According to the UNHCR in the Refugee Convention, 1951 a refugee is defined as, “owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as
a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Background:

Tibet, in 1950 was invaded by armies of communist China ending a long period of self-rule by the Tibetans. These communists wanted to have full control over the land and soul of Tibet. In spite of the promises that China had made to Tibet with respect to their religious institutions and their practices, all seemed to have been in vain. In 1955, Chou Enlai of China made a pledge to Tibet and joined in the declaration stating the five principles of peaceful coexistence among the nations during a conference held at Bandung and even came to agreement with India with respect to the status of Tibet in the year before. Nations of Asia and Africa stated that people were to be free and that imperialism could not have a place in this modern world.

Further, in 1956, His Holiness, the Dalai Lama was even permitted to travel to India so as to celebrate the birth of the Buddhist religion. Being a prominent figure, he was treated as a guest for several months in India and given respect from all over the world by leaders of all faiths. By allowing this celebration of the Buddhist religion, the world seemed impressed by China’s tolerance of different religious ideas in contrast to its own doctrine of violence and materialism.

However, what was hidden to the rest of the world, was the communists slowly infringing on the pledge that they themselves agreed upon to respect the local government along with its customs and gradually began imposing their will. This lead to a commune system which entailed slave labor, lots of families being separated, economic hardships, suppression of worship, etc. around the borders of Tibet. Multiple riots and revolts took place by the few Tibetans that were in the area so as to prevent such a scenario across the whole of Tibet.

In March 1959, there were many threatening moves made against the Dalai Lama and as there was a lot of clashes taking place, he fled to India. The Tibetans, in order to help themselves resorted to the use of arms in a cry for liberty. All over Asia, there were a feeling of anger and helplessness to the cries of the Tibetans. However, there was a slight feeling of relief among Tibetans upon hearing of the escape of the Dalai Lama to India. The Indian government helped by providing asylum and the necessaries. There were multiple accusations by the Dalai Lama about how China was interfering in Tibet’s affairs, its religion, destroying the properties and monasteries and just creating chaos along with using the Tibetan people as forced labor. However, all his efforts were met with the same mutual contempt from China. From then, till date, Tibet continues to be under the self-declared rule of China which has further led to multiple Human rights infringements of the Tibetan People.

Present Day:

As the importance of Human rights spread across the nations, multiple treaties and conventions were signed and ratified by countries promising to be bound by such principles and establishing the freedoms given to their people. In 1998, China signed the three covenants which formed a part of

---

the Bill of Rights, however they have not ratified it as of yet.

In spite of being a permanent member of the UN Security Council, and seeking a seat at the Human Rights Council, they are the only member yet to ratify the International Covenant on Civil and Political Rights despite repeated promises to do so. The ICCPR is one of the most crucial covenants that guarantees individuals various rights ranging from the right to trial before and independent and impartial court to freedom of expression and political participation by conducting free elections on a regular basis. China continues to take advantage of the position it has as a permanent member in the UN Security Council and fails to answer when discussions of human rights issue takes place.

China has been clearly violating rights that are clearly provided for by the ICCPR with regards to Tibet and yet no action has been taken.

Tibet has two major legal demands, one being the right to self-determination which is in itself a cardinal principle of modern international law. This principle in simple terms means the right to equal rights and equality in opportunity along with the right to choose their sovereignty and political status without any outside interference.

The right to self-determination in Chapter 1, article 1 (2) of the UN Charter states: “the purposes of the United Nations are: … to develop friendly relations among nations based on respect of equal rights and self-determination of peoples…” which is what the people of Tibet demand. China being a member of the UN has been asked to comply with this requirement in spite of repeated defaults.

Along with this, they also demand for the right to territorial integrity which implies that nations should not attempt to promote secession or border changes in the territory of other nations.

Rights that have been infringed by the Chinese

After the occupation of the communist in Tibet, the country resulted in complete turmoil. Most of the Tibetans were tortured and killed, the rich and wealthy were harassed, many parents were separated from their children, some were arrested and detained for no specific charge. Further Tibetans were made to starve and left with no clothes or money. It was very difficult for Tibetans to escape at that time as anyone caught leaving to either India or Nepal was shot and killed at sight. It was estimated that only about 5% of the population actually managed to escape.

- Right to Religion

The concept of religious freedom fails to exist in Tibet. Any form of religion expressed by the people results in brutal punishment. The Dalai lama who is the religious head of the Tibetans is incapable of even visiting Tibet in fear that the Chinese may imprison him. The Tibetans find their solace and comfort in the fact that their holiness is safe in another country, however some feel that only when the Dalai Lama comes to Tibet, will they be able to get their freedom as the people will come together.

China claims that Tibet has the right to practice their religion, however people are not even allowed to meet their spiritual head. On multiple occasions people who were caught possessing the Picture of the
Dalai Lama were sometimes arrested and the images being confiscated. Many monks and protestors self-immolate in protest of such rigid measures by the republic of China. Till date approximately 156 Tibetans have self-immolated in protest against the repressive measures of china and in demand for freedom.\textsuperscript{905} China has stooped to the level of even carrying out religious persecutions. Recently China issued a notice banning the elderly Tibetans and prohibiting them from performing the Kora and other religious observances. Tibetan Buddhism is considered a threat and in addition to being closely monitored, Buddhist monks are evicted and removed from temples.

Right to Culture and Language

In May 2018, Tashi Wangchuk who is a Tibetan language activist was sentenced to imprisonment for a period of five years in spite of already being in detention because he stood up to preserve the Tibetan language from the influence and dominance of the Chinese.\textsuperscript{906} Just as this situation, many others have been imprisoned or harassed and tortured for the mere fact that stood up to protect their culture and language from outside influence. Tibetan students are forced to learn Chinese in schools such that it is so difficult for the younger generations to even speak in the Tibetan language as they are not allowed to be taught it. It is as though the Chinese are completely trying to erase any existence of the culture. People who are employed are also further forced to communicate in Chinese rather than in their own mother tongue. Though there are multiple associations that have come up in Tibet to protect and preserve the language and culture, it is difficult as the risk of being exposed and penalized is always there.

Harassment of the Tibetan cultural rights also prevents them from displaying their national flag and singing their national anthem.\textsuperscript{907}

Freedom of Movement

According to a Tibetan blogger, “Getting a passport is harder for a Tibetan than getting into heaven. This is one of those ‘preferential policies’ given to us Tibetans by China’s central Government.”\textsuperscript{908} There is a complete restriction on the people to move within the region itself whereby people are stopped at multiple checkpoints and verification of lots of travel formalities. To travel internationally is in itself a laborious task and many a times Tibetans travelling on Chinese passports to India to attend His Holiness the Dalai Lama’s teaching in January 2018 were coerced to return early else they will face retaliation and their family members back home will suffer. China has also been using the hukou, a passport system, which limits access to public benefits depending the individual’s place of birth.\textsuperscript{909} Further the movement of

\textsuperscript{905} Self Immolation Fact Sheet, SAVE TIBET, https://savetibet.org/tibetan-self-immolations/.
\textsuperscript{907} Human Rights in Tibet, FREE TIBET,https://www.freetibet.org/about/human-rights.
\textsuperscript{909} Andreas Fulda, In China, there’s no freedom of movement, even between country and city, CITYMETRIC (Jan. 10, 2017), https://www.citymetric.com/politics/china-there's-no-freedom-movement-even-between-country-and-city-2697.
Nomads is completely restricted such that they are forced to stay within houses rather than move around to different places as their will desires. The Chinese have enforced strict measures in case of any such movement.

Other than these there are many more violations such as the environment being completely utilized for the benefit of the Chinese and destruction of Tibet’s rich natural resources. In Driru during the month of May 2018, there was a protest against a mining project on one of the sacred mountains and those who protested and published information on social media was arrested and detained.

China has also enforced multiple restrictions on the freedoms of these minorities in respect to their access to the internet and by banning any source that can circumvent the government’s censorship along with social media sites such as Facebook, YouTube, etc where any form of information can circulate.

Status of Tibet:
The status of Tibet as an independent state and that as an occupied region of China is yet to be determined. It can be looked at in two ways. One where Tibet is considered independent and the other when it is a part of China.

Looking at it from the first aspect, Tibet declared its independence in the year 1912 and continued to conduct itself as fully sovereign till the invasion of China. They had their own army and entered various treaties regarding trade and travel. The people of Tibet claim that the country is still sovereign and that China has illegally occupied the territory. If this claim is accepted then China has also clearly violated the provision of the Geneva Convention, 1949 which prohibits the transfer of a civilian population within a territory that is already occupied. This is a violation of the international protocols set for the member states to the convention. Further they have violated many more rights of the Tibetans such as the right to practice their religion, the right to maintain their own identity, culture and autonomy. In International law, states are also considered to be autonomous till it is otherwise proved. Though an agreement called the ‘Seventeen Point Agreement’ was signed between Tibet and China, whereby control of the external affairs were given to China, it was held void as it violated Article 52 of the Vienna Convention on the basis that the agreement was signed under duress.

However, if the second aspect is taking into consideration, the claims above fail. The Chinese claim that Tibet throughout all time has also been and continues to be an integral part of its territory. All of these claims are based on official histories of the Chinese that are in the interest of the communists itself and serve their purposes. The Chinese portrayed that all the other countries the emperor had relations with as vassals of the emperor but when a country’s sovereignty is to be determined, it is to be done based on its own history and not on the history of the country claiming it.

The Tibetans are a community being brutally harassed by the Chinese and are constantly being monitored. They have been suffering for the past five decades and are under threat. It is for the international community to take a stand now and help in improving the human rights conditions for these people.
Tibetan Refugees and India

Since the invasion of the communists into Tibet, a large number of Tibetans including His Holiness, the Dalai Lama fled towards India. It was quite clear that the option of repatriation was not possible at least for the coming future. It was the need of the time to ensure that these people who were now in India, are given the assistance and protection according to the standards set internationally.

One of the main ways in which India has helped the Tibetan refugees is by creating and allocating settlements along with the construction of monasteries in such a way that the Tibetans are able to protect and keep their core values in place. This was one of the desires of the refugees to have a place where they can freely celebrate and enjoy their culture, tradition, religion and identity which was further even encouraged as a policy by the government along with a form of delegated authority given to the Dalai Lama to have some authority over these Tibetan settlements.

Further the government has also helped by funding schools so that Tibetans may be able to avail the benefits of education free of cost along with a few reservations in universities and colleges. Also there were Tibetan schools created so that the children were well equipped with the knowledge from the teachings of modern education as well as the traditional Tibetan system thus helping to retain their identity.

The Indian government has made efforts to aid the Tibetans by providing them with a Registration Certificate (RC) which is a legal document permitting them to enjoy all the benefits and privileges that Indians have except for the right to vote and to work at government offices. Although this was initially not a problem, as years passed, from 1963, India stopped recognizing these Tibetans as refugees, making it even more difficult for them to gain access to a RC. This document allows the Tibetans to travel freely throughout India and is used merely as an identity card and is a necessity to obtain the Identity Certificate to travel abroad.

Initially land and housing was also given to the refugees who arrived earlier, but this is not a comfort enjoyed anymore. Further they lose out on a lot of job opportunities due to their statelessness and also because many employers prefer having their own nationals working in their organization. Hence they are challenged to find an employment that suits their qualifications. Other challenges include not being able to set up business or even taking a bank loan which has led to an overall increase in unemployment of these Tibetans.

The Delhi High Court in 2016 ruled that Tibetans who were born in India on January 26, 1950 to July 1, 1987 are Indian Citizens by birth and should be issued passports under the citizenship act. However most Tibetans do not take the Indian Citizenship because they feel it defeats their cause of Freeing Tibet but sometimes it becomes necessary because they have no other means to travel abroad or to be recognized because many face issues at immigration when countries don’t.

---

recognize the Identity Certificates that are issued. Hence this is also a major challenge. In 2014 a Tibetan Rehabilitation Policy\textsuperscript{911} was set which laid down certain benefits for the Tibetans such as allocating land as settlements for a period of 20 years as a lease, extending benefits from schemes like NREGA, National Rural Livelihood Mission (NRLM), etc., provision of basic facilities like roads and electricity, economic benefits like permitting the refugees to carry out the business they like by granting the necessary licenses, and other such benefits. However, this policy is just another executive policy for the states and is not a law by any means. There continues to exist a fear among the locals that if such policies are entertained, then all other refugee communities may demand for the same thereby taking away what really belongs to the citizens.

In reality however, in India, these Tibetans are not regarded as refugees rather looked at as foreigners for the mere fact that India refused to sign the 1951 United Nations Convention on Refugees. This is a critical problem as this creates a legal obligation on India to provide any refugee services or protection as mandated so in the convention. Further, this also becomes a problem because when there are no set policies, it may keep changing based on the current political interests. India argues that its refugee policy is in accordance with the international standards and that they do in fact perform their duties as a host country by providing the required rights and protection to these refugees. Other than the customary law of non-refoulement (which is the practice of not forcing the refugees to go back to the country where they may be persecuted) and the obligation enforced by Article 14 of the Universal Declaration of Human Rights to provide asylum, there are no other statutes or conventions internationally and regionally that bind India to their actions. Further, even the RC is given with a pre-condition that they abstain from any form of protest against china which is indirectly taking away their freedom of expression.

In spite of India claiming to provide the Tibetans with multiple benefits, the number of refugees from the community has spiked down from 1,50,000 to 85,000 according to the government’s data.\textsuperscript{912} The Tibetans have been travelling to other countries such as USA, Canada, etc. because getting jobs and surviving in India has become a difficult task with a lot of discrimination and preferences being given to the Indian citizens itself. The rights afforded to them are scarce as they cannot even purchase land here, nor get the citizenship easily. However, India has been trying their best and the burden can be taken off from them if they ratify to the international convention as they will be able to get a lot of assistance and services from the UNHCR and its member states.

Why should India bring a Refugee Law into force?

As noted before, India currently is not a party to any Refugee Convention and nor does it have any domestic laws to regulate the same. Matters related to refugees are taken care of by the


\textsuperscript{912} Rahul Tripathi, Tibetan Refugees down from 1.5 lakh to 85,000 in 7 years, INDIAN EXPRESS (Sept. 11, 2018, 3:23AM), https://indianexpress.com/article/india/tibetan-refugees-down-from-1-5-lakh-to-85000-in-7-years-5349587/.
government based on the domestic and bilateral political conditions while also considering humanitarian measures. In spite of India having served through the United Nations High Commissioner for Refugees in 1995, we still do not have any policies set in place for the refugees.

The lack of having a refugee law could be seen as a security threat to the country, given the fact that there is no proper legal structure documenting the presence of outsiders who are not nationals and who may not have a legitimate reason for staying here. Having a legislation will help curb the problems of Illegal migrants and any terrorists by keeping an account of the people who are actually refugees and help in such a distinction. This will also aid in avoiding diplomatic issues that may arise.

Further, since we do not have any laws to regulate refugees, they are governed by various acts such as The Foreigners Act, 1946, The Passport Act, 1920 and 1967, The Extradition Act, 1962 but these acts do not specifically look at the refugees as a different category of persons that are in need of protection rather they are regarded as foreigners itself. In the Foreigners Act, if any person found in the country carrying no valid documents they may be penalized and the authorities are also empowered to prohibit the entry of such foreigners. This becomes applicable on the refugees as well since there is no other legislation specifically made for them which indirectly could be seen as an infringement of the customary law of non-refoulement. Of course, India being a sovereign nation, has its own right to either take in a person and grant asylum or not to but they still have international obligations to uphold.

In India however, The Constitution itself provides various rights to refugees such as the Right to equality (Article 14), Right to life and liberty (Article 21) which includes the right to medical assistance and to live in dignity, Right to protection under arbitrary arrest (Article 22), Protection in respect of conviction of offenses (Article 20), Freedom of Religion (Article 25) and Article 32 which is the right to approach the Supreme Court. Although the fact remains that the Supreme Court and High Court have made multiple attempts to safeguard and protect the rights of the refugees by highlighting that same in multiple cases, along with the National Human Rights Commission they have aided in creating a secure environment to these refugees yet these are not enough and the time has come to set a proper legislation in place given the fact that we are now a home to not only the Tibetans but multiple other refugees such as the Chakmas, Afghans, Sri Lankan Tamils, etc.

By making a law that governs these refugees, they will also get a voice because it is often not taken into account that these refugees in reality have no country or state to call their own, no nation or party to represent their claims and by giving them a law they will at least get the deserved protection and an increased quality of life.

Further, when there is a legislation in place, one can at least ensure that all refugees are treated at par and there is no discrimination because over time it was seen that there was discrimination even within the same group such as amongst the Tibetans itself and other times it was seen as a case of preferential treatment of refugees which have sometimes lead to violation of human rights. An example of this could be when some groups get benefits like the permit to work while others don’t,
it in turn leads the less benefitted being put in a position where they may be subjected to harsh exploitation in the unorganized sector.

At least if a law comes into place it will clearly define who a refugee is, set out the rights and duties of the refugees, distinguish them from other persons as well as lay down the responsibilities of the host country. This would be a starting step for the better future of the refugees.

**Conclusion**

Tibetans are regarded as one of the most successful refugee communities and it is indeed true because in many ways, the Tibetans have managed to make themselves self-sufficient and over the past decades they have managed to live in peace among the locals.

But some might think, since the rehabilitation efforts towards the Tibetans have been comparatively better than the others, their struggles aren’t as significant and hence get undermined. Many don’t take into account and undermine the fact that these Tibetan refugees as well had to travel for almost a month just to cross the borders, some of who have even died enroute due to lack of food & water or even excessive fatigue, just to avoid getting tortured by the Chinese. Also, just as many other refugees, they too faced a lot of difficulties just adjusting to a whole new country, to the tropical climate India has, the language barrier etc. That being said, every refugee has suffered through some trauma and are in many ways disoriented, hence it becomes crucial to give due importance to all alike by not being subjective and choosing the one who is most affected or who deserves more attention. Help and support should be offered in any way possible by understanding the circumstances and rather, building an environment where such individuals are capable of living a life with dignity.

Further, India being one the largest refugee host must in particular start on the creation of a domestic law which regulates and protects these refugees. What happens to the refugees who are permanently incapable of going back to their country because of which they may have to reside in India itself? Are they going to always be tagged as a foreigner? In addition to a law, India should try to accept any aid that it may receive from the international community, UNHCR, NGO’s, etc. which benefits not only the country as a whole but the interests of the refugees as well. Indeed, India does play a magnificent role in its humanitarian efforts, yet having a separate law does always carry its own perks.

**References**

3. ‘Issues Facing Tibet Today’ (Central Tibetan Administration)

---


5. ‘Human Rights in Tibet’ (Free Tibet) <https://freetibet.org/about/human-rights>
12. Yeshi Choedon, ‘The Unintended consequences of India’s policy on citizenship for Tibetan Refugees’ (28 Feb 2018) <https://idsa.in/policybrief/unintended-
ENDEAVOURS TO PROTECT WOMEN FROM SEXUAL HARASSMENT AT WORKPLACE

By Dr. N. Krishna Kumar and Manu Krishna S.K
From Government Law College, Thrissur

Abstract
In the absence of legislative enactment to regulate the conduct of workers in a workplace; and non-availability of any policy regulations to protect women workers from sexual harassment, the Supreme Court’s ruling in Vishaka v. State of Rajasthan, has assumed importance in the current Indian Legal literature on the subject. The instant ruling may be rightly viewed as a milestone in this area. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene and to further ensure that there is no hostile environment towards women at work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment. The attitudes can be changed well through education like change in curriculum at school level by organizing social awareness camps, by evolving and gearing up State machinery for combating sexual harassment at workplace.

Key Words:
Sexual harassment, Gay, Academicians, Investigation, Pornography, Discriminatory, Perpetrator, Disciplinary action, Redressal, Counsellor, Complaints committee

Introduction
In the developing countries of the East, like India, with more and more influx of women into professions, which were conventionally and comparatively monopolized by men the sexual harassment at workplace is gradually surfacing and women have begun to experience the intensity of its bite. The problem has become grave because labour market, as a result of women participation has registered both qualitative and quantitative change. The Indian scene, as such, is not less disturbing. The surveys conducted in this regard present a highly disappointing picture, which shows that sexual harassment of women exists both in urban and the rural areas. The same is confirmed by a survey which reveals that out of the women workers from the cross section of the industry when interviewed 54 per cent complained that they faced sexual harassment of one kind or the other. A subsequent survey in five metropolitan cities has shown a startling 98 percent prevalence of sexual harassment of women at workplace.

The National Commission for Women has very recently observed that during 2003 alone it received as many as 5160 cases from women who sought justice against harassment. In the absence of legislative enactment to regulate the conduct of workers in a workplace; and non-availability of any policy regulations to protect women workers from sexual harassment, the Supreme Court’s ruling in Vishaka vs. State of Rajasthan has assumed importance in the current Indian

Bangalore where 250 men and women were interviewed.

915 Anuradha, Women Employees and Rural Development—Problems of Employed Women in Rural Areas of Bhoite (Delhi Gian Publishers, 1987).
916 The study being carried by Sakshi in New Delhi, Trivandrum, Bhubanashwar, Ahmedabad and

Legal literature on the subject. The instant ruling may be rightly viewed as a milestone in this area. All the same it is neither exclusive nor exhaustive on the subject, because new contours and nuances of sexual harassment have already come to light in the West and there is likelihood that the same might surface in workplaces in this country. Vishaka vs. State of Rajasthan was decided within the conventional social frame wherein harasser is usually viewed as a heterosexual male perpetrator and the victim a woman worker. The post-Vishaka events may thus expose the ability of the “heterosexual harassment” test laid down by the Supreme Court to cater to the needs of the times. Whether arguments of the Court shall have any meaning where victim is not a heterosexual male co-worker is an open question? What if a gay or an effeminate complaints harassment, does it not fall within the sexual harassment paradigm? These are the conditions that have to be looked into which shall go unanswered unless sexual harassment is properly understood and explained to a point of clarity by the courts and legal academicians. Although the debate on viability of the Supreme Court guidelines may not be questioned within narrow confines of heterosexuality yet it cannot be a substitute for legislation. Legislation, in this regard, has to be made because the problem is highly pressing and the issues involved are humanitarian and fundamental. The academicians shall have to stimulate the State to come out with a law to deal with this menace, more so, it should brace up its apparatuses to rise to the occasion and provide an appropriate and timely remedy to the victims of sexual harassment. Such urgency is already being felt in the West and we cannot afford to sleep over it.

The Supreme Court of India in Vishaka case has expressly admitted the same and hence it had to rally around the right to equality and right to life under the Constitution, as would the courts in United States take refugee to the Civil Rights Act of 1964. The observations of the Supreme Court appear to have been made after scanning the international legal material on the subject. That is why these observations correspond to the International Convention prohibiting all kinds of discrimination against women besides what the Supreme Court of the United States observed in Meriter Saving Bank vs. Vinson. This prompts one to study the legal issues generally arising out of sexual harassment in the United States. In consonance with the same the Indian Supreme Court has certainly pointed out at the acts that would constitute harassment of women if discovered at a workplace. To nip the evil in the bud the Court has laid down guidelines to prevent and investigate the cases of sexual harassment of women in workplace. It is debatable whether such guidelines alone would help us to fight sexual harassment at workplace? Nonetheless the Supreme Court of India has done the needful and the same should not pass incognito down the pages of sexual harassment jurisprudence in this country. The present study therefore desires to examine the syndrome of sexual harassment at workplace and finally leave it to the wisdom of individual readers to decide whether or not there is need to evolve our own jurisprudence on the subject underhand. The need arises because

919 See, Constitution of India, Arts. 14, 15(3), 16, 19, 141
920 477 US 64 (1986)
reverence of women is the hallmark of Indian cultural ethos and the meaning of right to equality and right to life has to be searched within the parameters of the calculus of reverence and not exclusively looked into within the periphery of the economics of utilitarianism. An effort shall be made to analyse the literature on the subject thus evaluate that how far the criteria laid down by the courts within Western setting might benefit us.

In *Vishaka vs. State of Rajasthan*922, the Supreme Court considered it necessary and expedient for employers in workplace as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

**DUTY OF THE EMPLOYER OR OTHER RESPONSIBLE PERSONS IN WORKPLACE AND OTHER INSTITUTIONS**

It shall be the duty of the employer or other responsible persons in workplace or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

**DEFINITION**

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(a) physical contact and advances;
(b) a demand or request for sexual favours;
(c) sexually coloured remarks;
(d) showing pornography;
(e) any other unwelcome physical, verbal and non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory, for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruitment or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

**PREVENTIVE STEPS**

All employers or persons in charge of workplaces, whether in the public or private sector, should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways;
(b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender;
(c) As regards private employers steps should be taken to include the aforesaid prohibition in the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946;
(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene and to further ensure that there is no hostile environment towards women.

922See supra n.4 p.2
at work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

**CRIMINAL PROCEEDINGS**
Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

**DISCIPLINARY ACTION**
Where such conduct amounts to misconduct in employment, as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

**COMPLAINT MECHANISM**
Whether or not such conduct constitute an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer’s organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

**COMPLAINTS COMMITTEE**
The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a Special Counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such complaints Committee should involve a third party, either NGO or other body, which is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employee and the person in charge will also report on compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the government department.

**WORKER’S INITIATIVE**
Employees should be allowed to raise issues of sexual harassment at workers’ meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

**AWARENESS**
Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

**THIRD-PARTY HARASSMENT**
Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

**PRIVATE SECTOR**
The Central/State Governments are requested to consider adopting suitable
measures including legislation to ensure that the guidelines laid down by this order are also observed by employers in the private sector.

RIGHT UNDER THE PROTECTION OF HUMAN RIGHTS ACT, 1993
These guidelines will not prejudice any right available under the Protection of Human Rights Act, 1993.

BINDING NATURE
It was directed by the Court that the guidelines and norms would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working woman. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.

The Supreme Court followed suit in Apparel Export Promotion Council vs. A.K. Chopra923 whose facts are as under:
The respondent was working as a Private Secretary to the Chairman of the Apparel Export Promotion Council, the appellant herein. It was alleged that on 10.8.2010, he tried to molest a woman employee of the Council, Miss X (name withheld by us) who was at the relevant time working as Clerk-cum-Typist. She was not competent or trained to take dictations. The respondent, however, insisted that she go with him to take dictations to the Business Centre at Taj Palace Hotel for taking dictation from the Chairman and type out the matter. Under the pressure of the respondent, she went to take dictation from the Chairman. While Miss X was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. She later on took dictation from the Director. The respondent told her to type it at the Business Centre of Taj Palace Hotel, which is located in the basement of the Hotel. He offered to help her so that her typing was not found fault with by the Director. He volunteered to show her the Business Centre for getting the matter typed and taking advantage of the isolated place, again tried to sit close to her and touched her despite her objections. The draft typed matter was corrected by the Director (Finance) who asked Miss X to retype the same. The respondent again went with her to the Business Centre and repeated his overtures. Miss X told the respondent that she would “leave the place if he continued to behave like that”. The respondent did not stop though he went out from the Business Centre for a while, he again came back and resumed his objectionable acts.

In appeal Export Promotion Council vs. A.K. Chopra924, it was held by the Court that where any of the acts mentioned in the definition of sexual harassment in Vishaka vs. State of Rajasthan is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work, such conduct can be humiliating and may constitute health and safety problems. Adverse consequences might be visited if the victim does not consent to the conduct in question or raise any objection thereto. The Supreme Court in all such cases has touched a very sensitive note.

Accordingly to Miss X, the respondent had tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift open. On the next day, that is on 16th August, 1988, Miss X was unable to meet the Director.

923 (1999) 1 SCC 759: 1999 SCC (L&S) 405
924 (1999) 1 SCC 759: 1999 SCC (L&S) 405
(Personnel) for lodging her complaint against the respondent as he was busy. She succeeded in meeting him only on 17th August, 1988 and apart from narrating the whole incident to him orally submitted a written complaint. The respondent was placed under suspension vide an order dated 18th August, 1988. A charge sheet was served on him to which he gave a reply denying the allegations and asserting “the allegations were imaginary and motivated”.

An Enquiry Officer was appointed to enquire into the charges framed against the respondent. The Enquiry Officer concluded that Miss X was molested by the respondent at Taj Palace Hotel on 12th August, 1988 and that the respondent had tried to touch her person in the Business Centre with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with effect from 18th June, 1989. Aggrieved by the order of removal from service, the respondent filed a departmental appeal before the Staff Committee. The Staff Committee considered the entire issue and came to the conclusion that the order terminating the services of the respondent was legal, proper and valid. The appeal was dismissed and the removal of the respondent for causing “sexual harassment” to Miss X was upheld.

The respondent, thereupon, filed a writ petition in the High Court challenging the report of the Enquiry Officer, as well as the decision of the Staff Committee dismissing his departmental appeal.

The Judge allowing the writ petition opined:

that the petitioner tried to molest and not that the petitioner had in fact molested the complainant. The Court disposed of the writ petition with a direction that ‘respondent be reinstated in service but that he would not be entitled to receive any back wages’.

The appellant was directed to consider the period between the date of removal of the respondent from service and the date of reinstatement as the period spent on duty and to give him consequential promotion and all other benefits. It was, however, directed that the respondent be posted in any other office outside Delhi, at least for a period of two years.

The appellant being aggrieved by the order of reinstatement filed letters patent appeal before the Division Bench of the High Court. The Division Bench dismissed the LPA filed by the appellant against the reinstatement of the respondent, the Division Bench agreed with the findings recorded by the learned Single Judge that the respondent had “tried” to molest and that he had not “actually molested” Miss X and that he had “not managed” to make the slightest physical contact with the lady and went on to hold that such an act of the respondent was not a sufficient ground for his dismissal from service.

It was held by the Court that:

Where any of the acts mentioned in the definition of sexual harassment in Vishaka vs. State of Rajasthan(supra) is committed in circumstances hereunder the victim’s employment or work whether she is drawing salary, honorarium or voluntary, whether in government, public or private enterprise, such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruitment or promotion or when it creates a hostile
work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raise any objection thereto.

In Nilabati Behera vs. State of Orissa\textsuperscript{925} a provision in the International Covenant on Civil and Political Rights was taken recourse to, to support the view that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under Article 32 distinct from the private law remedy in tort. There is no reason why these international conventions and norms cannot, therefore, be used for constricting the fundamental rights expressly guaranteed under the Constitution which embody the concept of gender equality in all spheres of human activity.

The Supreme Court in all such cases has touched a very sensitive note and admitted the fact that sexual harassment at workplace is not only humiliating but may also constitute health and safety problems. Reporting a crime and misconduct puts the female employee in a disadvantageous position in connection with her employment (recruitment of promotion) and also creates a hostile environment, which is discriminatory. It was directed by the Court that appropriate preventive steps should be taken by employers to prevent such harassment and creation of hostile environment, it was further directed that the guidelines and norms laid down by the Court should be included in the regulations of government, public sector and in the Industrial Employment (Standing Orders) Act, 1946.

If, according to any employer or the person in charge, a conduct amounted to misconduct, disciplinary action/criminal proceedings (if it falls within the definition of a specific offence) can be initiated ensuring that victims are not victimized or discriminated against while dealing with complaints of sexual harassment.

Judicial activism is markedly apparent while Supreme Court decided the case of State of A.P. vs. Bodem Sundara Rao\textsuperscript{926}, where High Court of Andhra Pradesh had awarded meager sentence and the case came before the Supreme Court. The Apex Court expressed its sensitivity in the words that crimes against women are on the rise. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encouraging a criminal. The courts must not only keep in view the rights of the criminal but also the rights of the victims of the crime and the society at large while considering imposition of the appropriate punishment.

In Rupan Deol Bajaj v. Kanwar Pal Singh Gill\textsuperscript{927} the Supreme Court again expressed the seriousness of the problem. In this case, the FIR and private complaint filed in Court of Chief Judicial Magistrate, Chandigarh were quashed by the High Court of Punjab and Haryana where the victim was a senior IAS officer and the accused was a senior Police Officer. The Supreme Court set aside the order of the High Court and observed that the sequence of events culminating in slapping on the posterior of a women in a public function disclosed in the FIR amounted to prima

\textsuperscript{925} 1993 SCC (Cri) 527
\textsuperscript{926} (1995) 6 SCC 230, 232.
facie offence under Sections 354 and 509 of the Indian Penal Code.

COMPARATIVE POSITION IN USA AND UK
The first successful claim in sexual harassment is *Walker vs. Northumberland Country Council*[^228^], where psychiatric damages were awarded by the English Court arising out of occupational stress. In such a case action may be initiated against an employer for negligence. Mental harassment as different from physical contact theory.

The insult (harm) may be caused by verbal insult and may occur at mental level. Legal response is articulated and rigorously pursued.

England—154 of Cr.; Justice and Public Order Act, 1994 has inserted a new Section 4-A into the Public Order Act, 1994. Threatening abusive or insulting words or behaviour or disorderly behaviour.

These provisions were designed primarily to deal with incidents of racial violence and racial harassment.

In USA it was only in 1980 that the United States Equal Employment Opportunities Commission defined sexual harassment. It is basically the same definition as was adopted by the Convention on the Elimination of All Forms of Discrimination Against Women (1979). Thirdly, where such conduct has the effect or purpose of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.

In United States of America, the legislation is not sufficient to deal with the problem. The Federal Criminal Code, 1986 punishes sexual contact and harassment at work place as sexual harassment is a form of sex discrimination. In *Merritor Savings Bank vs. Vinson (Michell)*[^229^], the legal issue facing sexual harassment is a form of sex discrimination that is actionable under Title VIIth ? The Court’s decision set a precedent for sexual harassment cases involving hostile work environment claims where the victim suffers no tangible or economic loss. An important point made by the Court is that an employee’s apparent consent to sexual activity does not necessarily negate a claim of sexual harassment. The employees’ submission to a sexual relationship cannot be considered truly voluntary if the harasser has the power to fire, demote, or blackball an employee, or deny raises, bonuses or promotions. The Court’s ruling firmly established the working definition of sexual harassment and the kinds of workplace conduct that may be actionable under Title VIIth Judiciary has been vigilant about the problem. Interest of State was upheld by the Court as employer to improve efficiency by eliminating adverse conditions in place of work[^30]. The US Supreme Court agreed with the argument of the American Civil Liberties Union (the appellant in this case) that same sex sexual harassment is equally covered under Title VIIth of the Civil Rights Act of 1964 and that motive of harassment is of no relevance[^31]. The Supreme Court and the Equal Employment Opportunity Commission recognize two types of sexual harassment claims under Title VIIth. One type is the economic “quid pro quo” sexual harassment i.e. unwelcome sexual advances, request for sexual favours and

[^229^]: Ss. 2241, 2243, 2244
other verbal or physical conduct of sexual nature in exchange for a job benefit and other type is “hostile environment” sexual harassment which occurs when the harassment has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment. Position of women in USA is not normal as stated by Prof. Cynthia Bowman in an article that one of eight American women have been raped in offices, public places or their homes. About the instinct behind rape, study of Diana Russel reveals that there is rape testing by which miscreants test vulnerability of victims and their resistance. Well-known case of President Bill Clinton (USA) and Monica reveals the problem at highest desk. As per report of US Merit System Promotion Board 42 per cent of women institute establishes that 20 to 60 percent face verbal harassment, 50 to 60 percent complain of unwanted flirtation and invitation of dates, pinching and so on.

The European Commission Recommendations on the Protection of the Dignity of Men and Women at workplace reveals … conduct of sexual nature, or other conduct based on sex affecting the dignity of women and men at work … unacceptable if a) such conduct is unwanted, unreasonable and offensive to the recipient, b) is used … as a basis for an (employment decision) and c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient.

In United Kingdom, the Sexual Offences Act, 1965 used the expression “incident assault” for punishing the sexual harassment occurring in general community. Recently legislated, the Sexual Offences Act, 2003 uses the expression “sexual assault” to describe the sexual touching by the accused without the victim’s consent. However, discrimination on sex is prohibited under the Sex Discrimination Act, 1975.

Sections 6(2)(a) and (b) deal with quid pro quo form of sexual harassment. The Act holds the employer liable whether or not the harassment was done with his knowledge or approval. In the famous case of Strachlyde Regional Council vs. Porcelli, the distinction was drawn between the situation of harassment and sexual harassment. In this case campaign to drive Mrs. Porcelli to leave the school was started. The Court held that it is a case of mere harassment because sex factor is missing in it. The European Economic Community has adopted several instrument to face the problem of sexual harassment and exploitation of women.

FACTS OF D.S. GREWAL VS. VIMMI JOSHI

Respondent I, a female, was employed as a teacher in an Army Public School. She was subsequently appointed as Principal. Appellant, (D.S. Grewal) DSG, was the Chairman of the School and the other
appellant, (Hitendra Bahadur) HB, was the Vice-Chairman. HB, while on official duty at a distant place, wrote a letter to Respondent I expressing that he had “fallen in love with” her. Apart from admiring Respondent I’s qualities and beauty, HB, concluded the letter with the following invitation of help to her, “May I extend my hands towards you and hold your hands tightly and ask you to lean on my shoulder whenever you need me. It will be a great pleasure.” Respondent I and her father complained to the appellant, DSG, but DSG did not take any action to redress Respondent I’s grievance. Apart from this, Respondent I also alleged that HB was making advances towards her.

Respondent I’s services were terminated after receipt of two anonymous complaints. The High Court held that it was a clear cut case of sexual harassment and therefore directed Army Authorities to take disciplinary action against appellants, DSG and HB. The Supreme Court however found that the school authorities had not constituted a Complaints Committee, as directed in Vishaka case, to look into the grievance made by Respondent I.

Before the High Court the appellants filed their counter-affidavits inter alia contending:

(i) That the order of termination has nothing to do with the alleged sexual harassment.

(ii) Writing a letter merely appreciable in nature and by reason thereof no sexual harassment was caused by Hitendra Bahadur.

(iii) Hitendra Bahadur has nothing to do with the management of the school and that the letter having been sent from Sonamarg cannot be said to have any sexual harassment at the workplace of the first respondent.

In the words of High Court, “Therefore, the Secretary, Ministry of Defence, Government of India and the Chief of the Army Staff are directed to take disciplinary action against these two officers, as the case of sexual harassment is evident from the contents of the letter and the admission by both the officers followed by the termination of the petitioner.

We are passing this order in view of the law laid down by the Hon’ble Apex Court in Vishaka vs. State of Rajasthan942. The progress of the disciplinary action so taken in such a serious matter which even warrant the court martial proceedings of these two officers shall be submitted before this Court within a period of two months from the date of production of the certified copy of this order”.

The Apex Court furthermore placed on record that a first information report was also lodged against Respondent I by the School Management alleging financial irregularities. After investigation carried out in this behalf a final report was submitted exonerating her and the report has been accepted by the Chief Judicial Magistrate, Pithoragarh by an order dated 13.2.2006.

However, indisputably, in terms of the judgment of the Supreme Court in Vishaka certain guidelines have been laid down by the Court till an appropriate legislation is made in this behalf, some of them being disciplinary action, complaint mechanism and complaints Committee.

The Supreme Court, in modification, of the order passed by the High Court, directed:

---

942 (1997) 6 SCC 241: 1997 SCC (Cri) 932. supra n.4 p.2
That as no Complaints Committee has been constituted, which was imperative in character, the High Court may appoint a three-member committee headed by a lady and in the event it is found that the writ petitioner was subjected to sexual harassment, the report thereof may be sent to the Army Authorities for initiation of disciplinary action against the appellants herein on the basis thereof. All the expenditure which may be incurred in this behalf may be borne by the Army Authorities.

The unpublished survey conducted by SAKSHI reveals that sexual harassment at workplace has been on a gradual increase both in rural and urban India. As such it is not purely a western concept. In the rural areas the reason behind sexual harassment of women workers is their eagerness to fight conservative forces and push in developmental programmes, so that the attitude of the public regarding traditional practices and taboos change. That is why women working as family planning workers in villages, gram sevikas, nurses, midwives and other change agents working with woman social/rural development departments as, they face sexual harassment in order to deter them from undertaking such assignments. This is a unique kind of experience that shows peculiar characteristic of sexual harassment at workplace in rural India. In urban areas it may be the male reaction against women giving up stereotype roles and adopting modern attitudes, which includes picking up unconventional occupations, threat to masculine norms of the workplace, value conflict at workplace, individual psychological aberrations and threat of competitions because women have generally succeeded to display their submerged abilities. The problem is one that cannot be exclusively fought with legislation. For the same different measures need to be adopted to fight the forces of conservatism but the strategies should operate with spontaneity not that one should follow the other. The attitudes can be changed well through education like change in curriculum at school level by organizing social awareness camps, by evolving and gearing up State machinery for combating sexual harassment at workplace. It shall be highly helpful if the Grievance Redressal Committees in all institutions are empowered to investigate sexual harassment practices suomoto and also by evolving female NGO’s with such committees to prevent administrative intervention and ensure implementation of its findings in sexual harassment cases.  

References
Anuradha, Women Employees and Rural Development—Problems of Employed Women in Rural Areas of Bhoite (Delhi Gian Publishers, 1987)
Diana Russel, Politics of Rape (1975).
European Commission Recommendation on the Protection of Dignity of Men and Women at Work.

*****
UCC: A DIFFERENT MODEL OF IMPLEMENTATION

By Eashaan Agrawal
From National Law University, Delhi

Abstract
In this article, the author will address the question “Why do we need to implement the Uniform Civil Code?” and “Can the Opt-Out system be a feasible way to implement the Uniform Civil Code?”. The author will address these questions by first showing the need of Uniform Civil Code, then showing the various methods to implement the Uniform Civil Code and the problems inherent in it and then finally discussing the Opt-Out option of implementing the Uniform Civil Code.

Introduction
Article 44 of the Indian Constitution mentions the need for the Uniform Civil Code as “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”. The fathers of our constitution had varied aims behind inclusion of this article in our constitution. However even after about seventy years after independence and creation of the constitution we are still unable to implement the Uniform civil code in our nation. There is a lot of debate around the need of the Uniform Civil Code and way forward in implementing it leading to uncertainty and vagueness around the idea of Uniform Civil Code. In this article the author would like to argue that there is a need to implement the Uniform Civil Code and that the Opt-Out option is one of the ways forward in doing so. For the purpose of lucidity of the readers the whole paper has been divide into five parts. The first part discusses the need to have the Uniform Civil Code. The second part discusses various suggestions to implement it. The third part deals with the problems in the ways of implementation mentioned in the second part. The fourth part finally deals with the Opt-Out model of Uniform Civil Code.

Why there is a need to implement Uniform Civil Code?
The Uniform Civil Code was added as a part of the Directive Principles of State Policy in Part IV of the constitution. The initial reason for adding it was varied and faced extensive support as well as opposition from multiple sections of the society. As is evident in the Constitutional Assembly Debates the main aim of the drafters was to have a common code for the country, a civil code regime where the women were not subjected to the patriarchal laws of some religions inter alia. The aims of the Uniform Civil Code will now be discussed in further detail.

India follows the system where the issues like divorce, marriage, inheritance, succession and adoption are dealt not by a common code by the personal laws of various religions. These personal laws are based on religious texts and customs and are sometimes discriminatory and patriarchal in nature.

The example taken to prove the above argument is on The Hindu Succession Act, 1956. The HSA, 1955 under section 15(2)(a) mentions that in intestate

---

944 Constitution of India, 1950, Article 44
945 Constitution Assembly Debates, Volume VII, 23rd November, 1948

www.supremoamicus.org
succession in absence of any son or daughter the property of a woman goes to the heirs of the father. This section can be interpreted as a section against the personal rights of a woman as it does not recognize the family members of the woman. The reason often given behind this section is to prevent the property from falling in the hands of those who didn’t deserve it in the first place.

Another example is that of the Hindu Marriage Act, 1955. The HMA prohibits bigamy however Flavia Agnes in her article explains how the strict interpretation by the Supreme Court has led to many cases of bigamy being left scot free due to ambiguities in the HMA provision relating to marriages destroying the lives of women. All these cases tell us that personal laws are prone to being ambiguous and discriminatory.

The main aim for Uniform Civil Code was gender justice and women empowerment. Uniform Civil Code will remove these ambiguities and will provide a common code based on the principles of equality, justice and fairness, in matters related to divorce, marriage, succession and adoption. It would bring under its ambit those people who due to some reasons were outcasted from their religion. Therefore, we need Uniform Civil Code to further gender justice and welfare of the women.

Another rationale for the enactment of Uniform Civil Code was that it would help in national integration and thus remove inconsistencies within the law. Also, it would further the core tenets of the idea of secularism mentioned in our constitution. According to D. Sura Reddy in his article “Article 44: A Dead Letter?” not enacting Article 44 of the constitution is a fraud on the constitution and therefore it is the need of the hour to bring in the Uniform Civil Code. He also brings attention to the fact that in whereas cases like the Shah Bano case and Sarla Mudgal case the supreme court has time and again emphasised on the need for enactment for the Uniform Civil Code. The argument of national integration has also come under attack as it perceived as an attack on minority rights in the garb of implementation of the Uniform Civil Code. However despite the genuine concerns voiced by those from the minority the Uniform Code needs to be brought into force. As said by Leila Seth in “A Uniform Civil Code: towards gender justice” though the concerns of politicisation are correct the solution is not to discard the idea of Uniform Civil Code but to make Uniform Civil Code unpolitical.

Apart from the above two reasons the third residuary reason is India’s obligation to enact the Uniform Civil Code under the international treaties. Jyoti Rattan in her article “Uniform Civil Code in India: A Binding Obligation Under International and

---

947 Hindu Marriage Act, 1955, Section 17.
Domestic Law” mentions how India has ratified International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)\(^ {955} \) and is therefore bound to enforce the provisions of the convention. According to her India had ratified the convention on July 9th 1993 without any qualifications and is thus under the obligation to implement the treaty in totality. Also articles 5(a) and 16(1) are the relevant portion making it incumbent upon the government to enact Uniform Civil Code and remove the discriminatory personal laws system.\(^ {956} \)

How do we implement the Uniform Civil Code?
This section would describe the various models of implementing the Uniform Civil Code and highlight the problems inherent in implementing those models. There is a consensus of presence of three broad ways of implementing the Uniform Civil Code which are a) formulation of the uniform civil code based on the current laws b) the opt in system where the Uniform Civil Code would be made optional and people can thus choose between either the personal laws or the Uniform Civil Code, and c) waiting for the right moment before introducing the Uniform Civil Code so that people can adjust and adapt accordingly.

The first way to introduce Uniform Civil Code is simply to replace the existing personal laws with a common law which would be based on the Hindu laws or if not based then inspired good laws of all other personal laws. The Uniform Civil Code thus enacted would be an attempt to force upon the minorities and others the personal laws of a community other than their own.\(^ {957} \) Further while the laws can be rationalised to take into consideration the customs and practices of other religion it would still remain an issue due to the reasons mentioned ahead.

The model is based on the assumption that it would be either based on the Hindu laws or best of personal laws but such laws are homogenous. The first issue is that the current personal laws suffer from homogenisation.\(^ {958} \) According to this theory of homogenisation the personal laws were not taken as it from the ancient religious text instead they were formed by the Britishers through a process of interaction with the Indian population and detailed analysis of the religious text. The issue however was that the interaction was limited to the upper caste and the text were also interpreted with the help of upper-class priests or maulvis. This led to the law being given an orientation in accordance to the demands of the upper castes and ignoring of the culture and customs of the marginalised communities within a religion.\(^ {959} \) Thus this model would further strengthen the homogenisation of religious practices.

The second issue is that of the minorities. The minorities feel that they will be forced to accept the dictates of the majority in the form of Uniform Civil Code as it would be heavily influenced by the traditions and customs of the majority. Thus, they would


lose the touch with their personal laws and customs. The people also feel that the concept of Uniform Civil Code is antithetical to concept of right to freedom of religion granted by Article 25 of the Indian constitution. Article 25 thus forms on which the compulsory imposition of Uniform Civil Code is resisted. The issue of minorities has become more complex with the arrival of the politics on the lines of “Hindutva”. Zoya Hassan flags this as a serious concern and feels that it is a reason strong enough to not introduce the Uniform Civil Code in this form.960

The second way to introduce Uniform Civil Code is the opt-in way. In this instead of imposing the Uniform Civil Code it is made an option in lieu of the personal laws. This model would give the people a breathing space and increase voluntary acceptance of the Uniform Civil Code. Also, since the code would be optional religious bodies no longer have to worry about the problem of violation of their right to freedom of religion. It would give the communities an incentive to reform themselves so as to prevent the people from leaving their fold and instead adopting the Uniform Civil Code. The optional Uniform Civil Code will consist of provision similar to Special Marriage Act of 1957961 and will be religion neutral. Gradually the optional code will be made a compulsory code thereby achieving the aim of reform and uniformity in laws.962 However, this model too has many shortcomings. The model assumes that people troubled by the discriminatory personal laws would be able to shift with ease to the optional Uniform Civil Code. However practically it would be a very time-consuming process also the women from the marginalised section will not be able to exercise this choice as they won’t be having the necessary means and neither the discretion to make such a choice in the first place. The religious groups may also look at the optional Uniform Civil Code as a threat and may further discourage their followers to not exercise the said option. Thus, limited access to law and resources becomes a key hindrance in successful operation of this model. Also, another aspect which needs to be taken into consideration is that people might just be lazy to shift from the personal law regime to optional Uniform Civil Code therefore the primary purpose of the model gets defeated for there is no incentive to shift.963 The third model is that of reforming the religion from within and then waiting for the right time to introduce Uniform Civil Code in place of personal laws. This is different from the “incremental change” mentioned by Krishnayan Sen in his article which is a judiciary led process. In incremental change model judicial decisions gradually force the religion to adopt a more liberal approach and thus give more rights to women.964 This model is criticised on the grounds of judicial overreach and sometimes is considered as a religious biasness on the part of judiciary and is not a recommended strategy as it can lead to feeling of alienation among the minority from the judiciary.965 However the

961 Special Marriage Act,1957.
model in this case is different from the incremental change model. In this model the religious groups will somehow be incentivised to reform their own laws themselves and not through any judicial decisions or legislative pressure. This could be done by creating a consultative machinery within the communities. This would also involve granting some more autonomy to the religious groups.  

However, like other models this is also amenable to some vulnerabilities like the initiative has to be from within and not from any coercion or coaxing by either the legislation or judiciary otherwise the effects might be counter productive leading to further alienation of the minorities. Another issue with this model is that the time period for this model to succeed is too long and based on the assumption that religious groups are willing to change. However, this assumption is not a strong one for until there is no coercive action those in control of the patriarchal structure won’t find any incentive to change themselves.

What is the Opt-Out model?
The opt-out model is similar to the opt in model in a very rudimentary way. In this model like the opt-in model the citizens get to choose between personal laws and a set of uniform laws relating to the personal laws i.e. the Uniform Civil Code. However, there is an important distinction that distinguishes it from the opt-in model. Unlike the opt-in model in this model the Uniform Civil Code will be the default set of rules and the religious personal laws will be the optional code which would need to be consciously adopted by the citizens through various procedures declared by the legislature or any other authority as declared by the laws.

The model begins by creating a uniform set of personal laws for the citizens. These rights would be completely secular in nature and would not include the religious elements in it. Thus, the Uniform Civil Code will be on the lines similar to the Special Marriage Act, 1957. However to make it complete this model would also encompass other areas of personal laws including maintenance, divorce, adoption, succession and inheritance. The Uniform Civil Code would thus be a complete civil code applicable to all citizens in India by

---


968 Special Marriage Act, 1957.
birth. In this system if there are conflicts between the secular laws and religious personal laws the secular should prevail so that the interests of the society are upheld. 969

This model is not a very new idea and its variants are already existing. In some countries like USA and Canada where the registration of marriage is essential though the people can choose to marry also using their religious customs this is called the “parallel model”. However, once a dispute arises the civil courts can order decisions on the basis of civil law even if the dispute is of religious nature. The leading case laws on this principle are Avitzur v. Avitzur 970 in US and Bruker v. Marcovitz 971 in a Canadian court. This shows that the above-mentioned model is feasible though the suggested model is a bit different from the ones existing in US and Canada. 972 However in the opt-out model unlike the parallel model all the facets and aspect of the Uniform Civil Code will be covered and not limited to the registration of marriages. Now I would discuss how the model would be implemented. First of all, the parliament has to draft laws which are first of all completely secular and further gender justice and easy for the common public to comply with. This process has to be consultative in nature or it might lead to discontentment among the people from various sections of the society. Now this process may be time consuming but it is necessary to ensure that the social fabric is not disrupted and the interest of the society are adequately represented. This would ensure that the transition is actually successful. The next step is to create a mechanism where the people who still want to shift to the religious personal law system can do so. The legislature has to keep in mind that the process should be not very easy otherwise the point would be lost for people will simply start shifting, also the shifting can be disincentivised. The important thing to reflect is that in this model the courts will still have the power to declare discriminatory practices violative of the constitution as void and thus protect the rights who still choose to be covered by the religious personal laws. The third step is to create additional courts so as to handle the increased pressure of litigation in the area of personal laws, a result of creation of Uniform Civil Code. Apart from these steps lot of additional work needs to be done to make this model successful and practical. It includes sensitizing the public about how the code will be implemented and creating legal aid for those who cannot access the legal remedies. 973

After the model is implemented the option to switch to religious personal laws will be kept open for some time with the aim to gradually phase out the religious personal laws completely. Thus, people will gradually adjust to Uniform Civil Code without feeling being deprived of their right to freedom of religion or alienated. This model can therefore be one of the plausible ways of implementing the Uniform Civil Code in India.

How is the Opt-Out system better than other models?

After discussing the opt-out model at length we can see some patent advantages in the system. The first advantage in this system is that unlike the opt in system it makes the religious personal laws optional than the Uniform Civil Code. This provision makes a huge impact on success of Uniform Civil Code in our country. This is because in the Opt-In system the people will have to make overt and conscious attempts to switch to the Uniform Civil Code. The above case is problematic because of two reasons i) the people won’t have the necessary resources, legal knowledge or the time to actually make an attempt to switch and ii) even if people have the resources it won’t be easy for the women to actually exercise that choice independently considering that the patriarchal structure of family still exists in our country. The opt-out system by reversing the option ensures that all the people are subjected to Uniform Civil Code from the beginning and thus the onus is on the people to revert to personal laws of religion. This will ensure that women from marginalised community are given the benefit of the progressive laws. Also, it is much difficult to opt out of a system than remaining in the system.

Another benefit of this model is that the issues of minority will not be there. Since the people will have the say in the process of drafting of the Uniform Civil Code they can ensure that a law which oppresses them is either not enacted or more safeguards are included to protect their interests. The change in this method is gradual thus people won’t have the fear that their personal space is being intruded by the government. In case they feel so they can always switch to the religious personal laws and thus retain their touch with the traditions and customs of their religion. This would also satisfy those who feel that Uniform Civil Code will violate the right to freedom granted under article 25 of the Indian Constitution.

The opt-out system will also be a much quicker system than reforming the communities from within. The main drawback of waiting for the communities to reform themselves is that it may take forever and even then, the conditions might not be right to introduce a compulsory Uniform Civil Code. In contrast the opt-out system would encourage the religious communities to improve themselves in order to attract the people to go for religious personal laws, while at the same time people will get enough breathing space to get accustomed to the Uniform Civil Code and thereby accept it as the default personal law code.

The opt-out system thus can act as a real contender among the models that can be used to implement the Uniform Civil Code in India. We have seen how it better than the other models and thus can ensure the smooth introduction of a progressive Uniform Civil Code.

What are the limitations of this model?

In this part I will be discussing the limitations this model has and the other issues in relation that need to be addressed.

---


The primary limitation that this model has is that the power to enact the laws of the proposed Uniform Civil Code rests with the legislature. This means that even if the laws enacted are secular on the face of it there are chances that the law-making process will be influenced by the interests of the majority thereby excluding the voice of those marginalised. This will be a serious threat to the virtues of fairness, equality, justice, inclusive democracy and protection of the weaker section.

Next limitation of this model is that of logistics. In a country as big as India it will be a humungous task to shift from a system of personal laws based on religion to the Uniform Civil Code. It would require enormous resources and extensive and deep research so as to account for the vast diversity existing in our country. Also, the bureaucratic nature of government will make it a time consuming and lengthy process. All these factors will need to be taken into account before this model can be introduced in our country. Arbitrary and rash decisions can lead to disastrous consequences and create acrimony between the state and citizens or between different religious communities.

The issue of sensitisation is also very important. As mentioned above it is the duty of the government to ensure that people are sensitised and explained about the model and the repercussions of their choice on their lives. Despite this it is not practical for the government to implement this on a country wide scale efficiently. Also, this model can create confusion after its initial introduction thus, the government should be prepared for the teething problems after implementation of the opt-out model of Uniform Civil Code.

Another objection raised against this model is that legal definitions are not capable of dealing with family matters which are better dealt by the personal laws of different religions. As seen from the example of the strict interpretation of the term marriage by the court under the Hindu Marriage Act,1955 when deciding the case of bigamy, often legalistic interpretation can be counterproductive and lead to undesirable consequences.

All these were the various limitations and concerns attributed to the opt out model and need to be carefully analysed and addressed so as to find a better and smooth way to implement the Uniform Civil Code with as little hiccups as possible. The next section deals with how to avoid or resolve the issues in an amiable way.

What is the way ahead?
The previous section has mentioned the problems with the opt-out model. To ensure the smooth implementation of this model it is necessary that the mentioned problems are addressed as soon as possible and fears allayed. This section will discuss the practical way to deal with the above-mentioned issues and also be the concluding part of this theme about the opt out model of implementing the Uniform Civil Code.

The first issue was how the laws of the Uniform Civil Code will be formulated by the legislature. The concern was that the process might be hijacked by

---

977 Hindu Marriage Act,1955
majoritarianism. The solution to this issue is that a consultative process should be created so that the demands of the people can be effectively heard and be handled. Another thing that can be done is that the laws drafted should be after conducting widespread surveys keeping in mind the marginalised section of the society especially those from the lower castes. These can ensure that the process of law creation is balanced.

The second issue was that of logistics and time. The way to tackle this issue will be to first address the gaps in the bureaucracy and increase efficiency and accountability. There is no fixed solutions to issue like these for they have a widespread political and social impact and thus need to be carefully dealt with otherwise they may lead to chaos.

The third issue was that of sensitisation. The people gain have to play an important role in this. The role of non-governmental organisations and pressure groups can help create awareness. The government has to train a large number of people so as to make the dissemination of information easier, faster and reliable which cannot happen overnight and would take some time.

The last concern was that the law would lead to courts strictly interpreting the laws under the Uniform Civil Code regime which prove harmful for the people especially the marginalised communities. The counter to this is that the citizens always have the option of choosing the religious personal laws. Also, any law is bound to be interpreted in various ways, this should however be no bar on enacting and implementing new laws.

These were some of the various objections and concerns regarding the opt-out option of implementing the Uniform Civil Code and the possible solutions to it. Every model or idea has various advantages and equally important and crucial disadvantages. The aim is to ensure that all the concerns and limitations are heard to and addressed so that the issue does not grow enough to threaten the foundations of that very idea or model. The opt-out model like other model has its own frailties however from the discussion above we can say that it fares a bit better on some fronts than other models, to implement the Uniform Civil Code. The opt-out model thus can be used at an appropriate time and occasion in future to bring about a change in personal law system in India and usher the era of the Uniform Civil Code which is more progressive, rationalised and logical than the current existing system of religious personal laws.

**Conclusion**

The whole research paper has answered the two questions at length. “Why do we need to implement the Uniform Civil Code?” and “Can the Opt-Out system be a feasible way to implement the Uniform Civil Code?” were the questioned that were analysed and tried to be solved in detail. The first question was answered by first explaining the need of the Uniform Civil Code in India. The answer involved citing of discrimination in various personal laws, discussing how India is under an international obligation to implement the Uniform Civil Code and how it can help in national integration. Further the issue of how the Uniform Civil Code be implemented was discussed. This involved a study of three models of implementation which are 1) the Uniform Civil Code based on either Hindu personal laws or the best laws from other religious personal laws 2) the opt-out system and finally 3) the reformation of the religious communities from within and waiting for the right time.
to implement the Uniform Civil Code. Finally, the argument is concluded by showing the problems inherent in these models.

The second question was also addressed in the same manner. Firstly, the opt-in model was explained in detail. Secondly, the opt-in model was compared with other models and the advantages of the opt-in model were elucidated. Thirdly, the various limitations in the opt-in model were expounded at great length and finally the probable solutions to those problems and limitations were discussed.

The research paper thus tried to answer the two question in a way so as to keep the readers in the loop of what is the debate around the idea of uniform civil code and how there is probable solution to the issue and how feasible is that solution in practical situation. Also, the research paper gives a social perspective while recommending solutions and thus tries to adopt a holistic approach while dealing with the concept of Uniform Civil Code.
OFFENCE OF RAPE SHOULD BE GENDER NEUTRAL IN INDIA

By G. Priyadarshini
From CMR School of Legal Studies, CMR University

ABSTRACT
Most of the Indian laws have been drafted in the 19th century and in the recent years these laws have undergone a massive change to bring them in line with the existing social, economic and political environment. One such law that requires an overhaul is that relating to sexual crimes. The current definition of rape means that only those with a penis can be guilty of this offence, and only those with female genitalia can be a victim of such a crime. Despite use of the term in public vernacular being wider than the legal definition, little advocacy has been focused on reforming this law, although those in the trans and intersex communities recognize their experiences are not reflected in the description of rape. The current definition of rape means that only those with a penis can be guilty of this offence, and only those with female genitalia can be a victim of such a crime. Despite use of the term in public vernacular being wider than the legal definition, little advocacy has been focused on reforming this law, although those in the trans and intersex communities recognize their experiences are not reflected in the description of rape. It is necessary to note the importance, and difficulty, of making visible within the legislative framework both the gendered nature of sexual offending as well as the vulnerabilities of those who have non-normative bodies. This study helps to understand the need for which rape should be entirely gender neutral in India.

INTRODUCTION

According to Section 375 and 376 of the Indian Penal Code, only a man is capable of committing rape and a woman can only be a victim. The laws on stalking, voyeurism, and sexual harassment laws are also sexually specific, i.e. the perpetrator is always a man, while the victim is always a woman. But the law on acid throwing is, however gender-neutral since the word used is ‘Whoever.’ The Indian law is based on the belief that only a woman can be a victim of rape. This stems from the assumption that rape is an act of sex only to satisfy the perpetrator's sexual desire. There is, however, increasing awareness that sexual assault is not only an act of desire and lust but also an act of conquest or dominance of one’s caste, race, ethnicity, family, and acts of control and humiliation. If this is the reason, then there is no explanation for men to be an exception in the case of rape victims in India. The main question is why is gender, the only identity to be cared for when the suspect or the victim of a sexual assault is decided. There are other identities that divide society as caste, class, and religion. Does gender outshine all these identities? Or do we have to look at them all together?

Another question that arises while figuring what is gender-neutral is whether it is fixed to only two categories such as the "male body" and the "female body." The basic assumption is that human bodies are

obviously either male or female\textsuperscript{983} and everyone are blind to the violence suffered by the people who does not fall under that category. Everyone neglects the situation of the transgenic population in the Indian sense, which includes hijras and kothis\textsuperscript{984}, as there is no clarity considering their sexual organs.

The punishment for the dominant male committing aggravated rape is provided in Section 376 of the IPC. According to Section 114A of the Indian Evidence Act 1872 after the amendment\textsuperscript{985}, if a woman's evidence indicates that she did not consent to such an aggravated rape situation, she has shifted the presumption to him being guilty. Furthermore, it is incorrect to assume that people in strong positions can dominate only women and in other identities. One of the major questions should be addressed is- why coercive men on men intercourse is not included in the rape law? The only answer to this is India prefers discrimination between homosexuals and heterosexuals even after the decriminalization of homosexuality.

In its 172\textsuperscript{nd} report, The Law Commission of India recommended that the rape law should be gender neutral\textsuperscript{986}. It is argued that the principles of equality before law and equal protection of law, enshrined as fundamental rights in our Constitution must be applied to this situation as well.\textsuperscript{987} Prima facie, it can be said that the equal protection of all identities would result only from gender-neutral rape law. But the realities of the society in which we live must not be forgotten. It is impossible to deny that women are the most vulnerable part of the population. There were concerns that a gender-neutral rape law, both for the perpetrator and the victim, would open up opportunities for women who have already been marginalized to be more traumatized and humiliated and would thus be defeating the very purpose of the law.\textsuperscript{988}

**EVOLUTION OF RAPE LAW INDIA**

Before we turn to the gender neutrality aspect, it is important to understand the social context and attitudes of the people in India.

Since the 1980s, the Indian Women's Movement has revolved around the rape law reformation agenda.\textsuperscript{989} For a long time, women's groups have had difficulties in extending the definition of rape.\textsuperscript{990} Until 2013\textsuperscript{991}, the rape was limited to penile-vaginal penetration only.

The Mathura rape case\textsuperscript{992} has been a historical case of the Indian Movement for Women's Rights. In this case, the Supreme Court held that Mathura, the girl raped by three police officers, submitted and consented to sexual intercourse because her body was not injured by any resistance. It


\textsuperscript{984} Debjyoti Ghosh, Invisible Citizens, SJD, 9-12 (CEU eTD Collection, 2018).

\textsuperscript{985} The Criminal Law Amendment Act, § 375 (2013).


\textsuperscript{987} Aditya Anand, Gender Neutrality: Rights of one, abrogation of another?, Academike (Dec. 2, 7:18 PM).

\textsuperscript{988} Flavia Agnes, Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law, EPW, 844-847 (2002) [hereinafter Agnes].

\textsuperscript{989} Id.,

\textsuperscript{990} Sakshi v. Union of India, AIR 3566 (2004).

\textsuperscript{991} The Criminal Law (Amendment) Act, New Delhi: The Gazette of India (2013).

\textsuperscript{992} Tuka Ram And Anr vs State Of Maharashtra, AIR 185 (1979).
was found that no injuries indicate consent. Following this infamous case, four law professors wrote an open letter criticizing the case to the Chief Justice of India. The case created a requirement for the accused to submit the burden of proof regarding the consent once the prosecution alleviates from proving the sexual intercourse. Another demand from activists was that rape trials must be recorded in the camera and the identities of the rape victims should not be revealed to the press. Another request was to keep the sexual history of the victim irrelevant to decide whether or not the offender is responsible for rape. This led to substantial changes in the law on rape.

LAW REFORMS
In The Criminal Law (Amendment) Act of 1983, the CrPC was modified to allow for in camera rape trials. It was also an offence to reveal the identity of the victim. An expanded punitive provision was made under Section 376(2) of the IPC for custodial circumstances and the extension of Section 114-A to the Indian Evidence Act, 1871 enabled the assumption of the absence of consent in certain cases. In The Indian Evidence (Amendment) Act of 2002, the law prevented the prosecution from asking questions about the general moral nature and sexual history in cross-examining the prosecutor.

The report of the 172nd Law Commission recommended that both the victim and the offender are gender-neutral under the rape law. The Justice Verma Committee report recommended that the victim should have gender neutral laws but the perpetrator should have gender specific laws. None of them, however, were incorporated.

The Delhi gang rape case led to substantial changes to the Indian Penal Code in relation to rape laws. In The Criminal Law Amendment Act 2013, special provisions were put in place for acid attacks, sexual harassment, undressing a woman, voyeurism, stalking and trafficking. Laws on sexual harassment, stalking and voyeurism are all gender-specific. The laws against throwing acid are gender neutral. In addition to penile-vaginal penetration, the definition of rape was extended to include oral, anal and any object insertion into the vagina, urethra or anus of a woman. The punishment for rape was increased in extreme and non-intensive cases. Under the Act as per the Ordinances, the crime is not gender neutral. Only a man can therefore commit rape on a woman.

---

994 Agnes, supra note 10.
996 SC bars media from revealing identities of victims of rape, sexual assault, National Services Division (Dec. 2, 2019, 8:45 PM), http://newsonair.nic.in/Main-News-Details.aspx?id=356551.
997 Agnes, supra note 10.
999 Indian Penal Code, § 228-A (1860).
India has reformed its laws number of times to provide justice for the rape victims. But unfortunately, being a woman is the only criteria to get access to that justice.

**GENDER NEUTRALITY**

The fundamental feature of gender-neutral reforms is that the definition of rape is expanded to include male victims and female perpetrators. Therefore, they are ‘neutral’ but only in the sense that men and women are potential rapists and victims.

**NEUTRALITY CONCERNING THE VICTIM**

Traditionally, only ‘a woman’ was considered to be the ‘victim’. Sadly, India’s rape law still relies on the presumption that a rape victim can only be a woman. It is believed that rape is an act of sex purely to satisfy the perpetrator’s sexual desire. It is however increasingly clear that sexual attack are a form of dominance or superiority of one caste, class, religion or community over another, and are acts of power and humiliation, and not just an act of lust and desire. If this is the reason, then there is no justification of men being exempted from being a rape victim in India. Further, the word gender is widely understood to constitute only the set categories of the ‘male body’ and the ‘female body’. We assume that human bodies are clearly either male or female and turn a blind eye to violence suffered by those who do not fall under the normative understanding of what it is to be a man and a woman. We overlook the plight of the transgender community, which includes hijras and kothis in the Indian context and the intersex, a condition in which one’s sexual organs are ambiguous.

1. The transgender community

The term ‘transgender’ describes ‘people who do not comply with traditional concepts of gender identity, appearance and expression’. It includes hijras, kothis, and trans-sexuals. While some undergo surgery to transform into the opposite sex, others play the role of the opposite sex.

The history of trans-misogyny has created unique hazards for trans women, including street violence, sexual harassment, sexual assault threats and real sexual abuse within the public domain - All related to trans women as breakers of gender standards in some way. Trans people are subjected to violence, even in their intimate relationships.

Several studies have documented transgender-based sexual and physical violence. The Peoples' Union for Civil Liberties - Karnataka researched violations

---

1005 Feminist, supra note 3.
1006 Shashwat, supra note 4.
1007 Claire, supra note 5.
1010 Responding to Transgender Victims of Sexual Assault, Office for Victims of Crime (Dec. 4, 2019,
of human rights against the Bangalore transgender community. Sexual violence against trans-males, especially by family members and intimate partners, is high.

2. Male on male rape
For too long the same sex male rape has remained a ‘dark secret’ because of social pressures that prevent men from thinking about their sexual violence experience. When a man is coerced into unwanted sexual activity, he becomes a victim of a sexual attack. Rape doesn't mean sex, but the urge to dominate and hurt someone else. Even if the rape is not physical, it is a violation that forces anybody into unwanted physical acts.

Male-to-male rape perpetrators have an average age of 26 years. They are usually identified as heterosexual and typically participate in mutual sexual relations. Most men who assault men say the victim's gender doesn't matter. They rape to:

- “Control and conquer”
- Act out feelings of revenge
- Resolve conflicts about their own sexuality
- Gain status among similar men by being an aggressor"

Evidence shows that men who identify as heterosexuals are the perpetrators of sexual abuse on a massive scale. According to estimates, heterosexual men commit 96-98% of all sexual violence. Increased attention and awareness of sexual violence and, in particular, increasing recognition of male victimization have led to a rise in the number of studies on the prevalence of sexual assault on boys and men. Research indicates that there are wide estimates of sexual abuse perpetrated against boys and men ranging from one-fifth to one-eighth of men who report sexual assault. Most studies have shown that approximately 5-10% of boys and men in their lives will be raped.

NEUTRALITY CONCERNING THE PERPETRATOR
While there is a general consensus on the inclusion of the victim, it is widely discussed whether a woman can be a rapist or not. In its 172nd report, the Law Commission of India recommended that the law on rape be sexually neutral. The Criminal Law Amendment Ordinance 2013 neutralized the crime of rape. Nonetheless, in the Amendment Act 2013, the gender specificity has been maintained. Recently, in 2019, KTS Tulsi introduced a Bill before the Rajya Sabha to declare the sexual offences gender neutral.

1. Female on male rape
There are opinions for both, for and against women being the perpetrator.
People who oppose gender neutrality challenge women’s ability to rape. This is because a man must be sexually excited to have sex with a woman. When a woman tells a man that he should have sex with her, it won’t work because the man is so scared and disoriented that he won’t be aroused. In that case, the man will not be able to have sex with the woman in the correct physical mood. This argument assumes that men are stronger and can commit rape and women cannot because a woman does not have the ability to commit rape both physically and biologically. But this is based on the premise that rape only involves penile vaginal penetration. However rape is now no longer confined to penile vaginal penetration in India as it has been until now. It also involves item insertion, oral and anal penetration. Additionally, even if it’s penile-vaginal, the erection, i.e. the arousal of the penis, cannot be said to indicate consent. This argument is based on several studies that show that fear, anxiety and humiliation can lead to erection.

Rape has not only become a prerogative for men, but also a man’s fundamental weapon of strength against women. In spite of her physical protests and struggles, his forced entry into her body was the vehicle for his victorious conquest over her being, the ultimate test of his superior strength, the victory of his virility. Rape is considered to be an indication of men’s power and control over women. Most people are stronger, so they must be able to defend themselves from rape. An absurd impossibility is a man unable to defend himself. Questioning a man’s strength when he is subjected to rape is an extreme kind of discrimination. Men are stronger but that does not deny the fact they are also being raped. Recently, a 22 year old man was raped by 4 stalkers. Just because he was subjected to rape, it does not make him weaker. One man cannot fight against a group of perpetrators. It is assumed that women raping men is not an issue in the society. It is stressed by the critics of gender neutral that not in one instance a woman raping a man has occurred in India throughout history. Unless strong empirical evidence demonstrates that men were abused by women, a law cannot be made sex-neutral. On the one hand, this argument is based on the fact that women are being raped more often, but there are evidences to prove that, men are also being raped and that is mostly other men, sometimes by woman too. Various studies have shown that women


1025 Perera, supra note 45.

1026 Id.,
rape men, with sufficient empirical data. \textsuperscript{1027} Victim surveys conducted by the British men and by Mexicans showed that from 3 to 8% of the men in their lives reported the incidence of at least one adult sexual assault, with at least 5 to 10% of all male victims of rape. Male offenders are responsible for the majority of these crimes, but it is estimated that 6 to 15% of these sexual assaults can involve women perpetrators.\textsuperscript{1028} Male victimization has become increasingly recognized worldwide. Legislation introduced about gender neutrality includes the following jurisdictions: Canada and all Australian states; the Republic of Ireland, Finland England and Wales and the majority of the United States.\textsuperscript{1029}

It is a basic assumption that men and women experience sexual assault differently. Since men and women in our patriarchal society are treated differently, the effects of the sexual abuse are also different. It is true that the society searches for a chance to blame the woman even if she is the victim- ‘Why did she have to go out at night? She is a slut. She wore short cloths. She must have consented to it’. The remarks are interminable. At every point of the trial, her conduct is examined (Why doesn't she cry as she testifies? She is lying!). The verdicts declare that rape is a matter of “deathless shame”. \textsuperscript{1030} The so-called empathy of society towards the victim often decreases victim's self-esteem. She must follow certain standards. But there are no such standards to regulate men's behavior. No one asks a man whether he is a virgin while fixing marriages. A sexual assault therefore has a profound impact on a woman's psychological condition. Men don't have to deal with this.

Rapes have far-reaching consequences for a woman. This is based on the claim that the masculinity of men is challenged by rape, while “reinforces heterosexual normative women’s self-concepts on women” in women's cases.\textsuperscript{1031} In addition, the reactions of adult men and women to violations have important similarities. They refused to explore the entire spectrum of victim reactions including physical and emotional reactions and victim’s attempts to normalize or diminish the experiences of their victims. This does not mean that all victims had rape in the same way, but there are strong correlations, based on current literature. In the context of male rape, the effects of women's attacks can also be distinguished from those of men. In these cases, male victims tend to have fewer negative reactions than females, while men who are sexually abused by women can and do suffer severe traumas. It is also important to recognize that, like the female victims, men who are raped by partners or by friends are faced with certain problems that are not faced by men who are raped by strangers. This is a particular area that needs further study because this is probably “the most understudied subject of homosexual abuse.”\textsuperscript{1032} It has to be pointed out. Conversely, parallels between male and female victims are far clearer and well established where the attacker is male. Therefore male or female rape can be considered as a serious, long-term trauma to victim psychologically and emotionally. However, there is no clear justification for the contention that male rape should be classified differently from female rape by

\textsuperscript{1027} Michigan, supra note 36.
\textsuperscript{1028} Perera, supra note 45.
\textsuperscript{1029} 6 Philip Rumney, In Defence of Gender Neutrality Within Rape, SJSJ, 481-522, 486 (2007) [hereinafter Rumney].
\textsuperscript{1031} Rumney, supra note 51 at 507.
\textsuperscript{1032} Id.,
criminal law, despite discrepancies between men and women's experience (e.g. challenges to masculinity in the case of male rape). A further argument given by people not supporting gender neutrality is that woman's status in India has deteriorated over the years and the situation only worsens if sex-neutral legislation comes into force. The modesty of a woman is always seen as her greatest asset. People involved in sexual activity before marriage are considered immoral, especially woman. In reality, even our country's judges do not stop passing these remarks about the victim's character. The PV test for rape victims is profoundly invasive and humiliating. It is used to assess the victim's sexual history and continues to be performed rape survivors by doctors. Research has shown that reduced sentences for perpetrators have been levied in situations where a woman is sexually active before marriage, although the law does not allow for consideration of the past sexual background. The Court is allowed only under certain special circumstances to mitigate the punishment of a sex offender. Such conditions have not been established, so the judges have explanations like the perpetrator has lost his job, was humiliated in the society, couldn't resolve the fit of passion because of the young age and there is no much harm since during the trial the victim got married. The excuses are irrational, promoting stereotypes like "Men will be men," "Woman's fault," marriage is the key part of the life of women," etc. But none of this justifies the fact that men are ignored from being subjected to justice in case of sexual crimes, especially rape.

It is a myth that Gender-neutral laws will have a negative effect on women victims. It is an assumption that a gender-neutral rape law will allow opportunities to cause further pain, embarrassment and negate the very aim of changes on a vulnerable group. Women victims would be advised to withdraw their claims as the perpetrator could easily file a counter-claim. The women victims would even be afraid to lodge charges. Since many rapes are already unreported, bringing about sex-neutral legislation would only increase his number and prevent the woman from filing the complaints. Gender equality was perceived as a breach of feminist principles and a gender activist attack. Feminists have criticized it as a “feminism

---

1033 Id. at 508.
1034 Agnes, supra note 10.
1036 Mrinal Satish, Virginity and rape sentencing, Times of India (Dec. 6, 2019, 12:25 AM), https://nludelhi.ac.in/ UploadedImages/7c23fbeb-6b60-4587-a0b3-2c999bd996a.pdf.
1037 Id.,
1039 Id.,
1042 Agnes, supra note 10.
1045 Id.,

www.supremoamicus.org
backlash. The answer to this question, however, is that acceptance of male victimization does not negate the rape of women. In fact, a number of feminists have identified male victimization. For e.g., Susan Brownmiller also suggested that the offence cannot be linked with the gender of the victim in her Against Our Will: Men, Women and Rape. Essentially, gender-neutral law does not make female victims more vulnerable, it only acknowledges male victimization.

Parliament has passed the Protection of Children from Sexual Offenses Act, 2012, which protects children from sexual abuse. The Act describes a child as anyone below the age of 18 and is gender-neutral. This law shall cover all situations in which young men and young girls are sexually abused. Part III of the Constitution provides every citizen of India with fundamental rights. Article 15 provides for a ban on discrimination on the grounds of sex and Article 14 enshrines the right to equality before law. Consequently, men must have the same rights as women. While women's rape is less frequent than women's rape, the right to equality cannot be denied. The criminal law rule is definitely that all citizens should be equally protected from similar damage. The case for treating crimes of the same atrocity seems stronger than the one for making a distinction between the penetration of the female body and the penetration of the male body irrespective of the actor's sex.

The social stigma faced by women in India is a hard fact. But there is no reason why male victims of the same crime should not be protected. The consequences and social stigma faced by men are different. If a man claims a woman raped him, he is not treated as a 'real man,' because clearly men are higher and stronger than women, according to the patriarchal standard presumption. In fact, male dominance and the concept of patriarchy is why men don't come out of the shield to report rape. Consequently, men are even afraid of rapes. Their manhood is questioned; Society mocks and harasses him because he was "raped by a woman". It is considered to be his fault.

2. Female on female rape

In State Govt. v. Sheodaya (1956), Madhya Pradesh (M.P.) High court held that another woman, subject to Section 354 of the IPC, can outrage a woman's modesty. In the case of Priya Patel v. State of M.P, the Supreme Court answered the question whether a woman can commit gang rape. Section 376(2)(g) stipulates that anyone engaged in gang rape shall be punished and so on. Furthermore, the explanation states that if a woman is raped by one or more persons in a group that acts to promote their common purpose, they shall be treated as gang rape committed. Thus, the penetration

---

1046 1 Patricia Novotny, Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?, SJSJ, 742-756 (2002).
1047 Rumney, supra note 51 at 481.
1048 Id. at 491.
1049 Id. at 493.
1052 Rumney, supra note 51 at 484.
1053 Id. at 501.
act is not technically necessary for each group member to perform. Rather, the “common intention” is sufficient to condemn a person for gang rape. The court held, however, that a woman cannot have an intention to commit rape. It is therefore impossible for a woman to be able to rape another woman.\textsuperscript{1056} This reasoning is essentially flawed because the section only includes common intention. Why can't a woman be willing to rape another, even if we assume that she can't physically rape? While it has been widely discussed in the public domain whether a female is able to rape a male, scholars, and activists in India remained silent on this side of sex neutrality.

CONCLUSION

It cannot be denied that there is existence of male and transgender rape in India. Gender-neutral rape legislation is the direction we must strive to take. But the fear of abuse of the law creates a difficult situation. Here, the privileges of all identities must be balanced. Clearly, we need a law that protects all identity, namely males, females and the transgender community against sexual violence, on the one hand, and does not create a harmful environment for the most vulnerable segment of women’s society on the other. That's the road to India. This ensures that transgender and male victims are protected against homosexual rape. At the same time, there is no concern about counter complaints or prejudice against women. The law must include gender just, gender-sensitive and not against gender-neutral rape laws, as diverse feminists, queer groups and individuals put it. In case of gang rape and abetment to rape, the perpetrator must include a woman.

BIBLIOGRAPHY

7. Siddarth Narain, Being A Eunuch, Counter Currents.
10. Siddarth Narain, Being A Eunuch, Counter Currents.
12. Responding to Transgender Victims of Sexual Assault, Office for Victims of Crime.
15. Sally Moore, 'Rape Is a Crime Not of Lust, but Power,' Argues Susan Brownmiller, People.

\textsuperscript{1056} Id.,
17. Mrinal Satish, Virginity and rape sentencing, Times of India.
19. Rukmini S, India officially undercounts all crimes including rape, The Hindu.
23. 6 Philip Runney, In Defence of Gender Neutrality Within Rape, SJSJ, 481 (2007).
27. Saurabh Vaktania, Mumbai: Four stalkers use 22-year-old man's Instagram selfie to trace his location, rape him, India Today.

*****
ABSTRACT
Concern for the national security is as ancient as the nation-state idea itself. Man has also transformed with the evolution of civil society from state of war to state to nature to seek security for himself and his fellow beings. The term security has two elements, danger, and safety. These two elements are the epicentre of all the recognized definitions of national security. The term national security is a comprehensive term which involves protection of nation’s physical integrity and its citizens ranging from multidimensional threats and constraints. In this paper we neither ignored the strength of India’s emerging power nor the potential threats that India is continuously facing. Transnational Criminal Organizations have emerged as the non-traditional threat to sovereignty of India and are jeopardizing the economic development of India in the era of globalization. The linkage and alliances between terrorists and criminal groups are multifaceted ranging from mere coexistence in the same territory, development of business alliances based on their common financial interest and convergence of their respective enterprises. It has become strenuous for the Indian governments to ensure the security of nation from asymmetric forces that are often anonymous. Terrorism and insurgencies are such amorphous forces which gained worldwide recognition as significant dangers to national security after the infamous 9/11 attack.

KEYWORDS

1. INTRODUCTION
India as a country has a very wide national security landscape due to its large geographical terms; this national security may not always be vulnerable but is often susceptible to conflict with its surrounding countries most of which are not at friendly terms with India. This way India faces an overly complicated and strategically motivated environment, with its very neighbours developing rapidly in terms of military and technology. However, the models adopted by India for its military are less optimal which only adds to the difficulties faced by the Republic with antagonizing abilities, construction of essential facilities within the defence structure and finding integrative answers to tackle with the challenges faced by the central defence infrastructure. Not only India, all States across the Asian continent are facing huge amounts of risks to their security. The introduction of competition between States regarding their security is a result of the gradual shift of balance of power from the West world to the East world. Today, India has been confronted with a very wide range of intrastate and interstate security challenges with the increase in its economic and military power in the Indo-Pacific region.

In this context, it is noteworthy to keep in consideration the nature and scope of India’s military advancement in terms of both number and technology keeping pace with the types of challenges it faces. But, there also remains a great need for increased integration across the Indian security system. The Indian security system is a blend of interbranch arrangements.
regarding procurement processes and larger strategic thinking and planning. To analyse the different threats to national security, we need to understand what national security is first. This term has been used from an exceptionally long time by politicians as a rhetorical phrase and certain policy objectives have been described via this term by military leaders. However, in the present times it has evolved as an analytical concept and a field of study as adopted by social scientists. It generally means the ability of a nation to protect its internal values from external threats. A nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is able, if challenged, to maintain them by war.  

National security is something which cannot remain static and just like laws the concept of national security needs to be evolved with the change in time and requirements. It is very much evident by the definition given by Walter Lippmann that war was recognised as a method to preserve the security of a nation. However, in the 1960s Arnold Wolfers said, “National security objectively means the absence of threats to acquired values and subjectively, the absence of fear that such values will be attacked”. The involvement of threats is also inculcated in this definition with the addition of acquired values. In the span of late 1970s to early 1980s the definition of national security grew more specific and clearer in terms of what is national security, how to preserve it and what all may be considered as attributes to national security.

Harold Brown, US Secretary of Defence gave the definition “National security then is the ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside; and to control its borders”. By this time as clear from the definition of Harold Brown national security became a multi-dimensional concept including the foremost protection of territory and physical integrity, development of reasonable foreign policy and to avoid any outside disruption with secured borders. All these points are also clear by the definition given by National College of Defence, India in 1996. Whereby the institute said, “National Security is an appropriate and aggressive blend of political resilience and maturity, human resources, economic structure and capacity, technological competence, industrial base and availability of natural resources and finally the military might.”  

It is very well established that the nation’s legitimate interest, acquired values, physical integrity and territory, economic structure, technological structure, human resource, policies and above all a military might are the known attributes of national security. Any act which is a threat to these attributes is a threat to a nation’s national security. In India, the threats to national security can be terrorism and insurgency, Naxal or Maoist activities, organized crime.
However, it is equally important to note that in this era of globalization and interdependency of nations, threats to national security have become global. This is where the concept of transnational security emerges. India has dealt with various transnational threats since its independence from British colonizers. The main security challenges have come from neighboring countries like Pakistan and China, which have resulted in barriers against cooperative solutions which have further deepened the transnational threats. India is a major victim of terrorist activities by Islamic radical groups in Pakistan and problems of insurgency by Maoist and Separatist activities within its borders.

2. SIGNIFICANT THREATS TO NATIONAL SECURITY OF INDIA

2.1. TERRORISM

India is in an unstable and vicious region which is a victim of terrorist dominance for decades in one form or the other. Most of these terrorist attacks have been done by the radical Islamic groups allegedly harbored by its neighbors. It is in constant battles with these groups since independence. These activities are motivated to destabilize the State control over India and to hinder its economic, social, and military growth; also known as attributes of national security. The transnational threat of terrorism which is strongly associated to India and its national security is generally linked with Pakistan, the immediate neighbor. The terrorist and insurgent activities are operated by radical Islamic groups in Indian Kashmir, the north eastern provinces and the attacks which happen on major cities have ties with the extremist groups of Pakistan. It has consequently become crucial for the Indian security officials to place this security challenge against the known challenges.\textsuperscript{1061} However, the threat of terrorism is not new to India, there has been a substantial rise in fundamentalist along with radical Islamic groups outside the valley region.

Prior to the terrorist attacks on World Trade Centre, New York famously known as 9/11 attack, the forerunners of terrorism in India were the Kashmiri militants and Jihadi organizations, besides Naxal activities internally. But, in the post 9/11 era, both the global radical Islamic groups and the fundamentalist groups have established connections together along with the Pakistan based terrorist groups. With the increase in power of Al Qaeda from 2001 onwards the risk of Jihadi domination and threats have increased significantly particularly in Kashmir. This has led to a belief amongst the radical Indian Muslims that their final objectives are very much alike to that of the terrorist organizations like Lashkar-e-Taiba and Jaish-e-Mohammed. While the Kashmiri terrorist organizations are mostly region specific with a goal to target the valley only, the global organizations have focus on whole of India. The Parliament attack (2001), attack on US Consulate (Calcutta 2002) and the infamous Mumbai Attacks (2008) are all instances of wider focus of these groups. It is noteworthy that not only the area of these groups has widened but also the scale on which they attack leading to mass casualties.

Pertinently, the Indians that are aligning with ISIS’s ideology are the youths of the southern parts of the country which has never experience Jihadi infiltration. The youths got associated with the global terrorist groups with internet playing an instrumental role in this union. The use of internet has proved to be much more effective than the offline Jihadi recruiting structure operational in the pre internet era. The increased number of recruits made by the ISIS has made it evident that its propaganda and process of recruitment is much more effective and organised than that of Al Qaeda.

India is countering terrorist for decades now. But the security agencies are slowed down by their conventional counter terrorism methods. The need to adopt and implement new and effective mechanism of counter terrorism has now become a need for India to curb the threat of global jihadism that is looking it right in its eye. The rapid growing transnational terrorism has made it evident that it is unlikely to have more attacks like 9/11 or 26/11, rather India should be prepared for many more small-scale attacks on its civilians, economic and military structures. The reason why these small-scale terrorist activities are more dangerous is that the notorious terrorists have greater chances to escape the radar of the security agencies.

2.2. INSURGENCY

The Indian states of Orissa, Bihar, Jharkhand, Chhattisgarh, Maharashtra, Madhya Pradesh, Andhra Pradesh, and Telangana have always faced significant threat by the radical insurgent groups following Maoism, also known as Naxalites. Naxal terrorism’s focus is to force the departure of foreign enterprises doing business in the country such as mining. They subsequently aim to overthrow the government of India and launch attacks on the upper social strata of the society and upper castes. Naxals are known as the far-left radical communists who attract people especially from the tribal areas. These groups claim to represent the interest of poor and socially marginalised member of the Indian society mainly tribals and Dalits. For decades, they have engaged in war against politicians and security personnel to establish their operational base in remote areas of the forests. Some insurgent groups have attempted to work together for organised attacks to eliminate the chances of disputes with one another. The example of these joint operations is the Coordination Committee (CorCom) of Manipur insurgent organisations with Kangleipak Communist Party (KCP), Revolutionary People’s Front, PREPAK (Progressive), People’s Revolutionary Party of Kangleipak (PREPAK), Kanglei Yawol Kanna Lup (KYKL) and United National Liberation Front (UNLF).

The north eastern states of Assam, Tripura, Manipur, Nagaland, and Meghalaya are known for poor governance and therefore have high insurgent activities. The separatist sentiments have developed in these areas with several groups adopting to socialist or even Maoist ideologies as a result. The major concern and the distressing factor of the insurgent organisations is the primitive ideology that remains uniform. However, with time and advancement of technology their potential and methods to create threats to national

---

1062 Brig. Narendra Kumar, Decoding Threat to India from Terrorism and Insurgency, VIVEKANAND INTERNATIONAL FOUNDATION (Dec. 20, 2018),

security have increased. Their new and increased access to artificial intelligence, armed drones, weapons like chemical, biological, cyber, or even nuclear and the conventional firearms has increased the chances of them to execute acts of terror. Under these circumstances, it is only reasonable to eradicate the insurgents and this method has been adopted by the governments also. But to face the truth, killing of insurgents does not imply as killing the insurgent ideology.

Seventy-four security personnel along with twenty-two civilians were gunned down in 2008 in a Naxal attack in Orissa. As a result, two thousand one hundred special police officers were appointed by the state government to counter these activities. Four battalions of the Indian reserve police have been formed to tackle these insurgents. Bhupesh Baghel, Chhattisgarh CM has claimed to have achieved an unprecedented success in combating Naxalites. A decline of 39% is recorded by the Chhattisgarh government which signifies that there were only 210 cases in 2019 as compared to 344 cases till August in 2018. National and State governments of India have declared these Naxal groups as terrorist organisations hence making them illegal. However, there is always a lurking danger of revival of insurgency and militancy. Chances of rebirth of insurgency in Punjab, Mizoram and Assam is still possible because the ideology has not been completely defeated and decimated. In fact, overlap of crime and terrorism presents significant challenges to international and national security. Based on the example set by narco-terrorism as it originated in the 1980’s in Latin America, the use of violence has been an important element in terrorist development. For some point in time such a fusion between the insurgents / terrorists and the crime syndicates even acquires political ambitions. India must remain vigilant and avoid any ignition for insurgency / militancy revival.

2.3. ORGANISED CRIME
The primary field of operation in which organised crime groups operate is supply of illegal goods and services to their customers. It has the roots in legitimate business as well as in labour unions. It is based on illicit methods such as tax-evasion, extortion, terrorism, and monopolisation to gain legal ownership and control and to earn more illegal profits from the people. It has become surprisingly sophisticated by bribing corrupt government officials to avoid any interference in their working. With the evolution in time and technology, the crime syndicates have now entered into drug trafficking, illegal trading of arms, money laundering etc amongst their traditional businesses of extortion, contract killing, protection money, prostitution, smuggling and boot-legging. The money collected from these activities is used to invade legitimate business enterprises and other activities. Past experiences have shown that it also tends to disrupt the country’s democratic processes by way of influence and violence. In addition to this, organised crime sabotages the country’s economic prosperity.

The existence of these crime syndicates has now become a transnational threat and no longer viewed as a domestic problem. This is the inference drawn from their involvement in money laundering, drug trafficking, gun running, terrorism and illicit immigration rackets. Moreover, the development of science and technology has paved the way for organised crime to function with greater mobility and sophistication, resulting in the rise of its power. Organised crime is deep rooted and well associated with terrorist organisations in India and Pakistan. It is evident that the South Asian criminal enterprises have known connections with terrorists involved in international activities on different levels. It aids in logistics involving weapons supply, routes for operation, providing training and finance.

In recent times, drug trafficking has emerged as an imminent threat to India. Much of these activities include illegal supply of narcotics and other drugs by the golden triangle (Burma, Laos and Thailand) via India and Afghanistan, Pakistan and Iran also known as the golden crescent. The drugs are sent to destinations like Europe and Russia by the traffickers from Afghanistan to Pakistan and then by Southern part of India to the ocean from where the shipments finally reach other continents. While most of the opium is used indigenously, some part of it is rerouted to abroad by the organised crime.

Along with human trafficking, many young boys and girls are sold to Arab countries where the girls are used for sexual exploitation and boys are used as camel racers. Dubai is constantly a hub for Indian criminals for prostitution and human trafficking. These networks are easily used by terrorist organisations to transfer of manpower and arms.

The report of the UN Office on Drugs and Crime (UNODC) in 2018 shows trafficking trends from 142 countries. It states that now human trafficking has achieved horrific dimensions, with the main perpetrator being the victim’s sexual exploitation. A total number of 30% are children amongst the humans trafficked, with most of them being girls.

The money laundering operations also known as Hawala on South Asian region is also a prominent threat now a days. The origin of these hawala networks can be linked to the weak rural banking system. The common system which exists in South Asia and the middle eastern countries is based on trust between individuals and social networks. For instance, a simple transaction of an individual paying $5,000 in rupees to a street vendor and receiving $5,000 in Washington DC a few days later without negligible or no record of the transfer happened. The transaction so happened is of unknown scale, therefore resulting in the use of hawala by terrorist organisations of individual criminals to transfer illicit belongings. It is necessary to ruin an organised crime’s money network since it is the backbone and biggest strength of any organised crime.

3. IMPACT OF ORGANIZED CRIME ON NATIONAL SECURITY
National security is said to be a threat when the independence, sovereignty, integrity,

---

1066 UN OFFICE ON DRUGS AND CRIME, *GLOBAL REPORT ON TRAFFICKING IN*
and overall mechanism of a country along with its people is at peril. One of the most prominent challenges recognised to national security of a nation is organised crime in the present scenario. The organised criminal groups have taken advantage of cold wars to increase the pace of their activities and a significant hike in their money power base. The situations like decreased political and economic hurdles; fall of communal setups worldwide and newly established democracies have proved to be opportunities of great potential to the crime syndicates.

National security can no longer be viewed as mere territorial protection and the challenge of state security today surpass the traditional aspect of national security. The non-traditional risks have become transnational and have evolved to a level where they pose a much greater risk and have potentials to sabotage the state functioning. Therefore, the present national security challenge has grown into an issue of serious law implementation. The states have adopted a comprehensive approach to preserve both its security and citizens from any possible violence. However, the effect of the ever-growing technology and better communication infrastructure is two sided on organised crime. While, these developments have indeed made these organisations more flexible and securing them with better opportunities and maximised profits, it has also resulted in the eradication of almost all the paperwork and records. This has led to a criminal justice system with negligible amount of incriminating evidence against these organisations and hence a fall in the effective police action1067.

Although, it is evident from the latest trend that there has been a shift in the disposition of challenges to national security, which were earlier focused on collection of power, resources and territorial integrity but are now corresponding to collection and control of information. With immediate concern to this point, the security services are exposed to new susceptibility as the organised crime is using their access to information for expansion and effective control of the business. In addition to this, cyber space since its development has posed a stealthy threat to national security as it has rendered the traditional challenges to national security inadequate and has paved a way to transnational threats. It has no geographical boundaries and therefore the immediate need to reconcile conventional forms of security planning with the modern and meticulous economic, social, and technological advances.

The direct beneficiary of this synthesis is Transnational criminal organisations (TCOs). Their roots are cemented due to inadequate state authority and origin from globalisation and are so influential that cannot be neglected or undermined as a regular challenge to law and order. It is conspicuous that transnational criminal organisations especially the ones operating in drug trafficking and arms smuggling, constitute a crucial threat to national security.

4. LEGAL POSITION OF ORGANIZED CRIME IN INDIA
Organised crime has always existed in India in some form or another. It has, however, assumed its infectious form in current times

---

because of various socio-economic and political factors and advances in science and technology.

In India, there is no comprehensive law to control organised crime in all its dimensions and manifestations, there is, however, substantive law regarding criminal conspiracy. There are also penal provisions in various statutes against specific violations of those statutes.

4.1. CRIMINAL CONSPIRACY
India Penal Code deals with the punishment of criminal conspiracy\(^{1068}\). The punishment for the conspirator is the same as for the principal offender. It may, however, be emphasised that the criminal conspiracy by itself is a substantive offence. The conspiracy need not fructify and the mere proof of the existence of the criminal conspiracy is adequate to have the criminal punished for such criminal conspiracy.

4.2. LAW ON GANGSTERS
There is a vacuum of any central legislation to suppress ‘gang activity’ having countrywide applicability. The State of Uttar Pradesh has enacted Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, which is applicable in that State only. This Act has a wide canvass and purports to cover large areas of organised criminal activity. It is, however, different from laws enacted in foreign countries, in that, apart from criminalising money-making activities of the criminal gangs, it also criminalises infringement of election laws, causing obstruction or disturbance in the pursuit of lawful trade, business or profession and incitement to violence and disturbance of communal harmony etc. There is absence of any firm data available to prove the impact of the legislation. It appears that due to inadequate investigations and inordinately delayed trials by the courts, this legislation has not been able to make any dent on the criminal landscape of the State.

4.3. PREVENTIVE ACTION
The National Security Act 1980 provides for preventive detention by the Central Government or the State Government or by the officers designated by these Government. The detention order is issued for one year with a view to preventing a person from acting in any manner prejudicial to the defence of India or to the friendly relations with foreign powers. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 provides for detention of such persons. The Central Government or the State Government or designated officers of these Government, can pass an order for detaining a person with a view to preventing him from engaging in illicit traffic in narcotic drugs. The detention can be made for one year but in certain circumstances it is extendable to two years.

5. NEXUS BETWEEN TRANSNATIONAL CRIME GROUPS AND TERRORISM
Terrorist and criminal institutions, which have profoundly distinct motives for their crimes, may collaborate on specific tasks by networking or outsourcing when their goals of interest cross. A nexus between TCGs and terrorist organizations operating against India has developed since the early 1980s, for the following reasons\(^{1069}\):

\(^{1068}\) The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India). Section 120B

Reliance of terrorist organizations on cross-border TCGs for assistance in matters such as finding safe areas and timing of covert border crossings without detection by Indian security forces, transportation of weapons and ammunition across the border so that terrorists do not have to bring them, messaging couriers, acquisition of communications equipment, exploitation. The reliance of terrorist organizations on multinational TCGs for aid in matters such as the production of legitimate travel documents through their influence in the political leadership and security bureaucracy, the conversion of currency and the transfer of money, the transport of weapons and ammunition by sea, the covert transportation by air or sea to their training camps in Pakistan through third parties.

The TCG conjectures on terrorist organizations to procure narcotics from Pakistan and Afghanistan’s heroin barons.

Adopting the kidnapping of businessmen and other wealthy people for ransom by the TCGs and terrorist organizations to increase their sources of revenue and to meet their urgent / unanticipated demands for money.

The connection between terrorism and organized crime is derived from the relation between the two types of groups and the need for monetary gain. Terrorists use existing criminal logistics, including financial activities. Some terrorist groups even loot banks and create phony (shell) firms for money laundering, while others engage in secret arrangements and form alliances with organized criminals.

What we see now is a fusion of terrorist organisations and organized criminal networks to the degree that a single organization displays at the same time traits of violence and terror.

6. COMBATING

India’s government tackles the threat of terrorism and organized crime elements through better legal infrastructure and sharing of information. Moreover, India has passed legislation in the last decade that gives law enforcement the ability to expedite prosecution in organized crime cases.

Anti-terrorism law has long been in the limelight in India, largely attracting scrutiny and regular legal challenges for breaching the constitutionally of enshrined federalism principles in India. Whether it was the time when the parliament enacted TADA \(^{1071}\) and POTA \(^{1072}\), or the proposed establishment of a National Counter-Terrorism Centre, these arguments were at the political forefront. Thus, the induction of such laws into the Union Government’s legislative system was the major challenge to the country’s federal structure.

An analysis of anti-terrorism jurisprudence in India reveals that an act of terror is codified in multiple constitutional entries; in particular, Seventh Schedule entries listing offenses related to India’s Defence and offenses against the Union of India’s armed forces \(^{1073}\). Preventive detention related to Indian country defence, foreign affairs, and security is also mentioned in the schedule entries 1,2 and 9, respectively. The State List’s first and second entries offer guidance on issues relating to public


\(^{1073}\) INDIA CONST. sch. 7.
order and security, which are the state machinery’s influential roles. The institutions listed in the statement of police and public order are also used to investigate terrorism-related offences. The vague aspect is that in the first, second and third entries of the Seventh Schedule, which also specifies the Concurrent List, criminal law, criminal prosecutions and instructions on preventive detentions affecting public order are listed.

Ideologically, the Indian government has historically taken the view that religion must continue to be divorced from the notion of terrorism, to prevent the probability of the multi-religious communal violence from happening in the country. Terrorists are mere terrorists for the Indian Government regardless of their religious affiliation. In metropolitan cities, police are taking the lead around counter-terrorism activity, and attempts are being made to enhance interagency capacity. India has also expanded border defence with barriers, sensor systems, and additional security forces deployed.

6.1. TERRORISM

No country in today’s globalized world is immune to the threat of terrorism. Several South Asian countries, including India, have faced the threat of terrorism, and numerous acts of terror have occurred in the region in recent years. Many of these incidents have complex international connections and potential linkages with transnational organized crime. Terrorism is an emerging trend, with extremist groups constantly modifying their modus operandi, thereby leading to the complexities and threats encountered by practitioners of criminal justice. The ability to address these challenges successfully lies heavily in the ability of national criminal justice systems to manage fair and effective justice for terrorist crime perpetrators. National action, combined with regional and international collaborations, are key elements for effectively tackling terrorism.

South Asian Association for Regional Cooperation (SAARC) is the main body designed to answer these forms of transnational issues. SAARC has made progress in trying to tackle the challenges of exchange of information and legal issues concerning crime and terrorism across South Asian borders. SAARC countries signed an Agreement in August 2008 to provide mutual legal assistance. The Convention was meant to provide a basis for increased collaboration between the Member States’ security forces on the extradition of prisoners and terrorists from Member States.

Judicial approach in matters relating to national security has remained very consistent. It has shown due appreciation for the laws framed by the legislatures from time to time, while recognizing the fact that acts of terrorism constitute an ‘extraordinary crime.’ The courts have scrutinized closely the mechanisms and procedures set down under the current law, with sufficient attention being paid to maintaining citizen’s personal freedoms and individual human rights.

The following are the three most landmark cases of terrorism wherein the prosecution of the accused was done under anti-terror laws:

---

The Supreme Court has investigated the issue during these trials as to what constitutes as ‘Waging war’ and its current importance. All the three cases involved foreign citizens and charged parties had been sentenced by the trial courts under section 121 of the Indian Penal Code. The rationale was based on their intention to overawe India’s government through criminal force along with activities used to bring hate.

6.2. INSURGENCY
Out of India’s counter-insurgency strategy, there are three points worth noting. First, strategies have varied over time and space depending on the context and nature of the insurgency rather than abiding by a singular formula. Second, India has consistently departed for an extremely energetic and aggressive enemy-centred COIN from the conventional “hearts and minds” or population-centred COIN. Third, Indian success is never “clean” and always involves uncomfortable trade-offs, be it through criminal activity, overall organisational instability and corruption or further insurgency.

COIN responses from the central Indian and state governments have been strongly reactive, disregarding expectations of the local population. One Indian columnist said, “Overcoming Maoist rebels suspected of violence, paramilitary police tend to execute innocent men and women openly. Maharashtra and Andhra Pradesh are the two states which tend to be effective in growing or holding insurgency violence at bay. At the beginning of the decade, Maharashtra appears to have had relatively higher police-to-population ratio, potentially buffering it from the spill over from neighbouring Naxalite insurgency.

While the manpower ratio of Andhra Pradesh has risen much over the past 10 years, Indian analysts generally attribute its success in dramatically reducing Naxalite activity on the territory via a comparatively different strategy of forming a special elite task force known as the Greyhounds.

The Greyhound army, an elite anti-Maoist commando team, was created to conduct small team counter-guerrilla offensives against Naxalite rebels from within the Andhra Pradesh police starting in 1987. The Andhra Pradesh police, roundly thought to have been tremendously successful, have drawn inspiration from the iconic Selous Scouts of Rhodesia to punish the analogue of a “bush war” against the Naxalites. The 2,000-strong Greyhound force has better pays and are prepared to pursue, trace and kill rebel networks by modelling guerrilla operations than federal or state-run paramilitary forces with state-of-the-art arms and equipment, better trained in jungle warfare, and moves in nimbler, more

1076 Nazir Khan v. State of Delhi, AIR 2003 SC 4427 (India).
mobile vehicles. The Greyhounds are also well backed by all the state police force.

It is evident that the Greyhound model is so successful that many states are beginning to develop their own small unit commando police battalions. While the Indian government continues to deploy central paramilitary forces into the region (currently on the order of about 70 battalions), 10 Commando Battalions for Resolute Action (CoBRA) are also being raised and deployed alongside state and federal units.\textsuperscript{1081}

### 6.3. ORGANIZED CRIME

It is noticeable that the Indian Police, and indeed the Indian criminal justice system, are not sufficiently prepared to tackle the rising challenge of organized crime. In particular, the police lack (a) effective legal instruments, (b) specialized training, (c) prompt and accurate organizational structures, (d) technical support, (e) meaningful coordination with other agencies, and (f) proper intelligence to deal with organized crime. There is also no sense of urgency on the government’s part in remediying those shortcomings.

The Union Cabinet has granted ex-post-facto authorization of an agreement between the Republic of India’s Ministry of Home Affairs and the Republic of Uzbekistan’s Ministry of Internal Affairs on cooperation between the two for eradicating transnational organized criminals and global terrorism. The Agreement seeks to strengthen the efficiency of both countries in crime prevention and control, particularly terrorism-related crime and its funding and organized crime, and to create a mechanism for improving coordination between the countries’ intelligence officials and law enforcement agencies, in accordance with domestic law and international obligations.\textsuperscript{1082}

The Maharashtra government enacted the Maharashtra Regulation of Organized Crime Act (MCOCA) in 1999 with the aim of combating organized crime in the city. If any person on behest of a representative of an organized crime syndicate is in possession of, or at any time has been in possession of, movable or immovable property for which he cannot satisfactorily give account, he shall be liable to imprisonment for a term not less than three years but not less than 10 years, subject to a minimum of one hundred thousand rupees.\textsuperscript{1083}

Today, the approaches to organized crime at all main levels of the criminal justice system—investigation, prosecution and punishment, and the period of incarceration upon conviction—are insufficient and incomplete, both in terms of severity and reaction design. Substantive legislation, administrative law, and insufficient budgets for policing and prosecuting authorities to counter organized crime, and the elite’s willingness to frustrate investigations, all hinder the realistic likelihood of actually curbing organized crime.


\textsuperscript{1082} India-Uzbekistan sign pact on counter-terror cooperation, THE ECONOMIC TIMES (Nov. 22, 2019).

There are numerous explanations why it is important to view organized crime differently from conventional individual crime. First, the enormous power and influence of such organizations; second, the far greater potential for physical and economic harm caused by organized crime to society; and third, the enormity and seriousness of the implications of organized crime for the political, social and legal systems that are discredited by their presence.

7. WAY FORWARD
The terrorism challenge will continue to be difficult for India to cope fully with. Instances of domestic terrorist violence that emerge from disaffected Indian populations can be addressed more efficiently by strengthening stability and transparency in the areas involved. Moreover, greater emphasis on human rights issues and openness would create trust and confidence among populations, either in Mumbai and Kashmir, or the North Eastern separatist regions. The approach about transnationally funded operation is much more nuanced. Pakistani collaboration would be an important part of potential bans of militant organisations.

Organized crime can only be wrecked when the organization’s financial power is broken. This requires special skills in accounting and financial matters, a comprehension of wire transfer methods, including hawala deals, financial analytics acumen, etc. Such competence is yet to be built up by Indian police organisations. Such expertise within the department will never be fully available, and there must also be a system of partnership through which the required expert advice can be obtained from outside the policing set-up, and even on an international level.

Only when different task forces are formed to tackle organized crime and officers are granted appropriate tenures on the job will the necessary level of competence be established. No single policeman can investigate organized crime. It is really the special task forces that operate directly with the police departments, who will produce efficiency. The special task forces also need supervisory technological services, telephone supervision, IT experts, etc. Indian counterinsurgency has been and still is likely to persist to look brutal as well as inconclusive (by Western standards) because the incumbent is unwilling to counteract the types of institutional overhaul needed to quench insurgent impulses completely. If it is not the allocation of wealth that can be mended through economic growth that is the underlying problem, but rather the distribution of power dominated by state and elite cadres, instead the epidemic is structure. The cure can then threaten not only India’s growth engine, which has been dependent on land ownership and displacement for industries and mining, but also the Indian state’s power, structure and identity widening from local to state and national governments.
COVID-19 OUTBREAK: CHALLENGES IN IMPLEMENTING THE RESOLUTION PLAN

By Gauri Suri and Dyuti Pandya
From Army Institute of Law and University of Mumbai; respectively

Abstract
The corporate insolvency resolution process (CIRP) in India is a disparate process of recovery of outstanding debts. It formulates a resolution plan via which debt restructuring and satisfaction of liabilities in an expedited manner is possible. The resolution plan also ensures the revival of the corporate debtor.

As India starts recovering from the debilitating impact of the COVID-19 pandemic, it is pertinent to re-examine already approved resolution plans prior to the lockdown. The scenario revolving around resolution plan formulated an important means on how a business needs to continue its existence in such events. In the post-COVID lockdown India, the timelines for the previously approved resolution plan will no longer be practicable due to the changing set-up revolving around the bankruptcy and insolvency regime. The commercial viability under the existing economic circumstances has also changed and will continue to change. Consequently, this calls for a modification in the current schema where the approved resolution plans become incapable of implementation.

This paper throws light on relevant provisions of the Insolvency and Bankruptcy Code, 2016 to discern whether such resolution plans can be amended. Secondly, this paper counsels various suggestions and recommendations that may be incorporated into the existing framework by drawing a comparative analysis with other leading countries.

Keywords: Corporate Insolvency Resolution Process, COVID-19 pandemic, Approved resolution plans, Commercial Viability.

Introduction:
The Insolvency and Bankruptcy Code provides for a disparate resolution process to recover the outstanding debts. Under the Code, a resolution plan has been defined in Section 2(e) as the insolvency resolution process for corporate persons under Chapter II of Part II of the Code. In other words, a resolution plan envisages debt restructuring and reviving the company from its insolvent position in an expedited manner.

The economic impact of the nationwide lockdown is starting to pour in slowly. As India starts recovering from the debilitating impact of the COVID-19 pandemic, it is pertinent to re-examine already approved resolution plans prior to the lockdown. In the post-COVID lockdown India, the timelines for the previously approved resolution plan will no longer be practicable, and the commercial viability under the existing economic circumstances has also changed. Henceforth, multiple approved resolution plans may become incapable of implementation.

I. Insolvency Resolution Process
An eligible resolution applicant presents the resolution plan to the resolution professional. A resolution applicant, as defined under section 5(25) of the Code, denotes any person who submits a

---

resolution plan to the resolution professional and is not disqualified under Section 29A\(^ {1085}\). The Plan comprises the terms for the restructuring of business operations, keeping the company as a going concern, financing findings and decisions, conditions regarding repayment of debts, along with fixing timelines for the implementation of the Plan and the reimbursement of creditors. The resolution professional ensures the prerequisite specifications of a resolution plan as specified under section 30(2) of the Code is complied with, further presents the Plan to the Committee of Creditors (COC) for their approval. If the COC favors the resolution plan by the necessary majority vote of 66\(^ %\),\(^ {1086}\) the plan is forwarded for approval to the adjudicating authority. It is important to note that when the adjudicating authority, i.e. NCLT sanctions the resolution plan, it becomes final and binding.\(^ {1087}\)

II. Legal Recourse
Resolution Plan once approved cannot be modified

IBC does not comprise of any provisions for the re-initiation or resumption of the CIRP upon default of implementation of the resolution plan and accordingly intends to give supremacy to the binding nature of the resolution plan.

In Rahul Jain v. Rave Scans Ltd\(^ {1088}\), NCLAT held that once a resolution plan has attained finality, it cannot be modified by order of the tribunal.

In another case RGG Vyapar Pvt Ltd v. Arun Kumar Gupta\(^ {1089}\), the court opined that the Adjudicating Authority has no jurisdiction to reopen a resolution process under section 31.

Inherent Powers of the NCLT

Inherent powers of NCLT are stipulated under section 60(5)(c) of the IBC according to which NCLT has the jurisdiction to entertain/dispose of any question of law or facts in relation to insolvency resolution or liquidation proceedings. Furthermore, Rule 11 of the NCLT Rules, 2016 elicits the inherent powers of the tribunal. The NCLAT held that Rule 11 could not operate to reopen or modify an approved resolution plan by the NCLT under the guise of inherent powers of tribunal. After finality of the plan, the powers of the NCLT are confined to Section 60.\(^ {1090}\)

In the case of QVC Exports Private Limited vs RP Deloitte Touche Tohmatsu India LLP\(^ {1091}\), NCLAT held that NCLT could not be authorized to modify a resolution plan where the modification does not involve “any question of law, priorities or facts.”

In Rahul Jain v. Rave Scans Private Ltd\(^ {1092}\), the Supreme Court reiterated the same viewpoint that once an order that has attained finality it cannot be reviewed under the inherent powers of the Court except to correct arithmetical or clerical errors.

On account of the above, it can be asserted that the Adjudicating Authority does not have the power to alter an approved resolution plan.

Under the Insolvency and Bankruptcy Code, the following are the potential

---

\(^{1085}\) Supra
\(^{1088}\) (2019) 10 SCC 548
\(^{1089}\) Company Appeal No.509 of 2018
\(^{1090}\) RGG Vyapar Pvt Ltd v. Arun Kumar Gupta (2018)
\(^{1091}\) 40(IBC)40/2020
\(^{1092}\) (2019) 10 SCC 548
consequences wherein there is a failure to yield an approved resolution plan:

1. **Liquidation**
   Wherein the successful bidder defaults to honour its obligations under the approved resolution plan, liquidation of the company is one of the recourse available. Section 33 stipulates various grounds for the liquidation of the corporate debtor, and Section 33(3) enumerates liquidation in case of a failure to implement the resolution plan.

   This provision is restricted to occurrences wherein the corporate debtor contravenes the terms of the resolution plan. Moreover, this prospect is only available to persons other than the corporate debtor whose interest is prejudicially affected.

   The COVID-19 crisis has aggregated the financial stress across the spectrum, that will directly impact the feasibility and viability of the resolution plan; this will result in the liquidation of the company, which will jeopardize the interests of all the stakeholders.

   The authors would like to point out that liquidation stands in sharp contradiction to the objective of IBC, which is to encourage resolution rather than liquidation. The courts have held innumerable times that liquidation should be the last resort, and all attempts should be made to keep the company as a going concern. In the present circumstances, liquidation should not be an option as the intention behind the provision is manifest as being a resort against the malfeasance of the corporate debtor.

2. **Penal and criminal liability for contravention of the resolution plan**

   Section 74 prescribes a punitory measure for the contravention of the terms of an approved resolution plan. This provision endeavours to punish the corporate debtor, the creditors or any person on whom the resolution plan is binding, for deliberate and intentional violating the terms of an approved resolution plan. The specified penalty is imprisonment between 1 to 5 years or a fine between Rs. 1 lakh to Rs. 1 crore or both imprisonment and fine.

   Currently the regulations by the government only serve the time period till the approval of the plan. The bidder will be exposed to Penal actions for not adhering to timelines provided in the said plan. The authors contend that it’s extremely unjust for the bidders to face criminal action for the default caused due to the COVID-19 crisis. Therefore, the authors suggest there should be a provision for a concession or moratorium for implementation of the approved resolution plan.

   **Lessons from cross country comparisons:**
   Amidst the COVID-19, plans pertaining to the restructuring, recovery and resolution of the companies have been majorly affected. In order to protect the commercial viability and the feasibility of the financial system, measures have been taken to ensure that the insolvency regime is prepared for any potential failures. As we have witnessed, companies in India whose resolution plans were already approved prior to the pandemic are currently in a state of uncertainty and there is no concrete solution provided by the IBC or the government on how to mitigate ramifications under such circumstances.

   Whilst India has not focused on its banking and insolvency regime in the current state,
Business communities around the globe have made governments adopt several measures to ensure the continuity and sustainability of their ventures post-crisis. Following this, the governments have amended their insolvency legislation to prevent viable business entities from collapsing.1095

1. **USA**: The Small Business Reorganization Act (SBRA) came into existence in February 2020 and effectively brought a relief to the United States Bankruptcy Code. This particular Act has brought about an efficient, economical solution for reorganizing the businesses that are currently in debt (secured and unsecured debts). The Coronavirus Aid, Relief and Economic Security Act (CARES) came into existence in March 2020 and provided a way for debtors to have control over their businesses during the pandemic and post-crisis as well. Furthermore, this Act allows debtors to modify their already confirmed resolution plans depending upon the financial trouble they face during the crisis. This includes extending payments for seven years after the initial payment plan was already due.

2. **Singapore**: The Ministry of Law introduced the COVID-19 (Temporary Measures) Act 2020 to provide relief to businesses and individuals that will not be able to fulfil their contractual obligations due to the pandemic. This Act has provided relief in the form of a moratorium to fulfil the obligations that were to take place on or after February 2020. This has reprieved the small-scale retailers and SMEs to preserve the cash flow and keep the commercial viability intact. The insolvency and bankruptcy proceedings have been limited to only specific cases; this has been intended to last for 6 months and maybe extended till 12 months.1096

3. **UK**: Under the UK Government, a package of insolvency has been introduced that will prove to clarify the restructuring tools to be used amid the pandemic. The new restructuring tools would include a moratorium for companies to find rescue/restructuring options. It would further provide a new restructuring plan that will bind the creditors to it. This is a form of a fast track implementation of reforms implemented in the insolvency framework to protect businesses.1097

4. **Australia**: The government has announced the Coronavirus Economic Response Package Omnibus Bill 2020 (Economic Response Bill) whose objectives involve certain provisions under the Bankruptcy Act 1966. The time frame in which a debtor is protected from enforcement action by a creditor is temporarily increased to six months from 21 days. In order to keep businesses as a going concern amid the crisis, the companies have been provided with temporary relief from personal liability for insolvent trading.

If we are to focus on India, the insertion of Regulation 40C in the CIRP regulations has laid down the provision in pursuance of CIRP. This provision states that the period of lockdown will not be counted for the purpose of calculating the timeline for any activity in reliance on the resolution process. India has not taken adequate


measures to endow the insolvency regime amidst the pandemic. The nationwide lockdown has accelerated the concern revolving around the survival of business entities and made the resolution plans no longer commercially viable due to the extenuating state of affairs. The mechanism needed for the implementation of the approved resolution plan which is the desired culmination of every positive step taken under the Insolvency framework has been neglected. Whereas the foreign governments have already addressed the issues pertaining to approved resolution plans, India has failed to address the key problematic aspects, amongst others, primarily concerning commercial viability of already approved resolution plan and secondly, penalizing the defaulters for not adhering to the implementing timelines due to the COVID-19 pandemic. The authors believe that this would result in a floodgate of cases contending the impossibility of implementation of the plan as result of the lockdown and its aftermath on the equity market amongst other sectors of the spectrum. IMFs predicted a recovery in the year 2021 for countries who have taken measures in curtailing the virus spread and preventing the bankruptcy and layoffs simultaneously.India’s future here somewhat lies bleak after the government has decided to suspend provisions of IBC that would trigger the fresh insolvency proceedings. But the question here is whether this suspension will prove to be in parlance with the approved plans? The survival of already approved plans is in deep waters and the initiation of new proceedings after a year will likely result both the proceeding in coherence with the new measures taken by the government thereon,

One can argue on many factors as to how the measures need to be implemented but looking at the UNCITRAL model of insolvency, India needs to abide by the provisions and come up with a concrete solution on how to go about.

1. **Provision of certainty in the market to promote economic stability and growth:** India as a nation needed to bring about temporary legislations that would have promoted the restructuring of businesses and acted soon upon the closure and asset transfer of the failed ones in the wake of the pandemic. Since the measures to bring about these changes were administered later has proliferated an uncertainty in the market, the laws and institutions in the markets. This is due to the sudden halt brought to the supply chains around which have brought a sudden change in the economic stability and growth.

Maximization of value of assets: The entire objective of the insolvency framework is brought down to effectuate a manner in which avoidance provisions create requirements for treating prior transactions. This is usually done by treating creditors equitably and enhancing the value of debtor's assets by a recovery value for the benefit of all creditors. The balance has to be struck for not undermining the contractual obligations which are important for investment decisions in reliance with the objectives of an insolvency regime. The lookout on

---

implementing provisions for reorganizing the businesses which may end up generating more value for creditors in the long term. The repercussions brought by events not predicted need to be considered so the proceedings can be safeguarded and the maximization of value can be ensured.

3. **Striking a balance between liquidation and reorganization:** This balance is predicted on the economic theory that a greater value is usually obtained by keeping the businesses together. In the wake of a financial difficulty, the insolvency law should be prepared to provide different types of conversions of proceedings for creditors and debtors’ assets valuation.

4. **Ensuring equitable treatment of similarly situated creditors:** According to the policy of equitable treatment, it permeates many facets of an insolvency law. This includes application of the stay or suspension of provisions to set aside acts and transactions. Furthermore, to recapture the value of the entire insolvency regime. An insolvency law should be able to address problems that would prove detrimental to the very objective of the law in the wake of an economic crisis.

5. **Provision for timely, efficient and impartial resolution of insolvency:** And lastly insolvency law should address and resolve proceedings in an orderly, fast and efficient manner, with the main objective of avoiding disruption of business activities of debtors. The entire process needs to be considered to ensure maximum efficiency without sacrificing any sort of tractability. Therefore, one can say that India needs to adopt relevant measures in order to keep the maximization of assets intact.

---

**Conclusion:** The impact of COVID-19 has been a debacle apropos of the bankruptcy regime. The Indian government before implementing the blanket suspension should have focused on the impact of the ban on the lenders who relied on the Code for debt recovery. There is no viable solution laid down for the creditors on how they will implement the plans for the resolution process for debt recoveries. The move will delay recoveries, impose an unprecedented event on how to implement plans that were approved prior in the wake of new financial unstable scenarios. All of this will lead the corporate sector to compromise their capital adequacy and further impact the banks in context of resolution planning. The operational continuity of the insolvency framework would have been a feasible solution if these steps were taken in consideration of the debtors and the creditors and not otherwise. Multiple businesses around the world have already been witnessing the liquidity crisis and trade disruptions. Furthermore, the insolvency regimes of other countries have taken interim steps to prevent the complete shutdown of the insolvency system. The foremost objective of any bankruptcy and insolvency regime would be to keep the viability intact to ensure the competitions prevailing in the markets. It is an unchartered territory that we are currently witnessing; therefore, decisions taken should be in coherence with circumstances that will help in reviving the structure rather than pushing in the pitfall further. Systems around the globe that have not taken measures need to reshape the structure with the sole objective to surge the availability.

---

of credit and ensure maximization of assets. The countries whose financial sector is affected the most will need the central banks to provide them with greater liquidity so that the countries can perform basic credit evaluation (this would include India, Japan, South Africa etc.). Given the importance of a resolution plan in the insolvency regime, to keep the businesses as a going concern, it is essential to keep them interconnected by introducing temporary relief measures. Therefore, one should understand the significance of the resolution plan in such times and why we need to keep businesses running and not break the supply chain and create a hurdle in the system.
SHOULD SEXUAL OFFENCES BE GENDER NEUTRAL?

By Gayathri V
From Sastra university, Thanjavur

ABSTRACT
The main aim of law is to reduce crime rates by awarding punishments. Punishments are gender neutral except in “sexual offences”. The punishments are discussed under section 375 of Indian penal code. The amendment has been passed after the “Delhi rape case”. The section 376 of Indian penal code has many subdivisions after the amendment. The awareness among the people started after the incidents at Delhi and Rajasthan. In these cases, only the males are punished. The framers did not even mention the punishments for women. In these cases, women are not punished. In earlier days only women are considered as victims. In recent times men are also considered to be victims. Though the women are considered as abettors or instigators they are not punished. As per law no innocent or wrong person should be convicted. In these types of cases the victims are convicted though there is no fault on their part. It affects not only the individual part but also to the victim family. Equality should be considered while awarding punishments too. In our generation the crimes have been committed by both the gender. The “men victims” has been raised in huge number comparatively with the previous years. It should include both the genders because of the changing conditions and environment and should be without bias. So, the sexual offences should be made “gender neutral” based on our current situations.

Introduction:

As we all know law has been evolved in order to facilitate us and guide us to be in a proper path. The law makers had different view while they are formulating laws. It also includes punishments to correct us. It is a well-known fact that in order maintain discipline in the society punishment is necessary. A fear should be created in the minds of the people so that they will carry their duty properly and in order to make them more responsible. Law has many sub divisions and each one is created for easy understanding and convenience for the people. Each sub group deals with specific offences and their related punishments. One among them which is most noteworthy is Indian penal code of 1860. This essay deals with the particular part of Indian penal code which is nothing but sexual offences and their respective punishments. A view will be discussed elaborately ‘whether sexual offences should be gender neutral?’

Evolution of Indian penal code:
The Indian penal code has been drafted by ‘Lord Macaulay’ and it has been widely accepted by all in the year 1860. It consists of 511 sections. These are based on the earlier view and based on the current situation many amendments have been introduced. The reason for this is the dynamic change in the world and also in the minds of people. There are certain sexual offences under this code in which men alone are held to be punishable. The offences are nothing but rape which is read under section 375 of Indian penal code and its punishments are mentioned subsequently under section 376 of this code. The base for this section is section 354 of this code which deals with the ‘outraging the modesty of the women’ and section 509 of the Indian penal code which deals with the ‘insulting the modesty of a women’. These are considered to be main sections that deals with the sexual offences
and their respective punishments. Apart from this under section 497 which deals with ‘adultery’ in which men alone is punishable and women though she is abetted she is not held to be punishable. In the section 377 of the Indian penal code in which homosexuality is considered to be constitutional by the amendment and some part is considered to be unconstitutional. Apart from the Indian penal code, the criminal procedure code, the Indian evidence act and the domestic violence act also deals with sexual offences and their respective punishments. The major part among the all is played well by the Indian penal code.

**Objective of the sections:**
The main aim to establish this section is to regularise the people by granting punishment to them. It will create the fear in the minds of the people. In these sections only the male members alone are punished. Women are not even punished even for abetment.

**Meaning for the section 375:**
In this section 375 only the male person is punished and women is considered to be a victim. This section punishes a person only if the act has happened without consent of the women and in anyway consent is given by her in the way of force or by undue influence or by any threat. The men will not be punished under this section if sexual satisfaction happens between a husband and wife. And in the case of any medical termination which is clinically approved and consent is given by both the parties. In the above two exceptions a man cannot be held liable for any punishment.

**Punishments:**
The respective punishment for rape is mentioned in section 376 of Indian penal code. This section was framed by Macaulay by him at his era. The number of sexual harassment offences are considered to be very small in number in that period.

The above-mentioned information is based purely on the Indian penal code. Apart from this there are several punishments which are mentioned under domestic violence act and criminal procedure code. These laws are widely accepted by the Indian judiciary.

**Reason for amendments in sexual offences:**
As we all know amendments are considered to make the law to be flexible for the current

---

**Greek mythology:**
- History

---
situations in the dynamic world. The reason is that law should provide justice to all based on the prevailing circumstances and which are widely accepted by the people. The bill related to sexual offences has been passed in the year 2013. The reason for the introduction of the bill is the main incident that occurred in the year 2012.

2012 Incident:
‘Sexual harassment of women in a work place’ which is known as Vishaka vs State of Rajasthan or known as gang rape case. It created a great impact on the minds of the people. It created the feeling that women are not treated properly in the work place. It is considered to be violation of article 14 of the constitution which deals with the equality and equal protection of law to all the citizens. This created a great impact on all non-voluntary organisations and comities that are working for the upliftment and empowerment of women. The protest by the members of the ‘mahala committee’ for women created a great awareness. After this incident again a famous case which is considered to be an eye opener for all and acts as a basis for the amendment and a bill has been introduce by a famous advocate in the Rajya Sabha.

Effect of Nirbhaya case:
In the present world, many criminal law amendments have been passed after the famous case of ‘Nirbhaya’ case which is also known as ‘Delhi rape case’ in the year 2013 and granted punishment for rape and many subsections which includes A, B, C, D, E, section 377 of Indian penal code which was considered to be unconstitutional is declared as constitutional. Section 497 of Indian penal code declares no punishment for both men and women. This essay discusses about ‘the punishment for sexual offences should be gender neutral’.

Introduction of bill in the parliament:
In the year 2013 public interest litigation by KTS Tulsi was brought again in the parliament after the Nirbhaya Delhi rape case that sexual offences should be made gender neutral and many sub sections have been included in the section 376. It makes amendments not only in Indian penal code, Indian evidence act, criminal procedure code also. The bill includes any man or any woman to be changed as ‘any other person’. This word includes man, woman and transgender. This bill also includes apart from inserting any object in the genitals mere touching of genitals should be punishable. Punishment has been included under section 375A for mere touching of genitals.

Origin for the subsections under section 376:
The conditions in section 376 which deals with the punishment for rape has got its base from section 354 of Indian penal code which deals with the outraging the modesty of women and the subsections of 354 A, B, C, D which has been introduced by the criminal law amendment of 2013. And also, from section 509 of Indian penal code which deals with the insulting the modesty of women. From the above two sections are considered to be the source of punishment for rape.

‘Me too’ movement:
After the amendment has been passed and it has been widely accepted by all a


1103 Nirbhaya case – SCC Date of Judgement: - 5-04-2017
1104 Parliamentary bill by K.T.S. Tulsi
movement has been started following the happening of that incident. Every woman who felt ashamed to express that they have been sexually abused started to express their view. It made them to be bold and help them to face the situation. It makes the women to be open and after this incident, it created fear in the minds of men. It makes them to consider women with dignity. This ‘me too’ movement created a great awareness which is considered to be essential at that time.

In this way the criminal law amendment increased the punishment and included many sexual acts as offences. Apart from that amendment in 2013 two important amendments have been made in the Indian penal code which will be discussed below:

1105 **Amendment in section 377:**
This section of Indian penal code deals with sodomy or LGBTQ or homosexuality. Prior to this amendment this section is considered to be unconstitutional. After the amendment has been passed in the year 2018. Some parts of the section are declared to be constitutional. The parts include having sex with the same gender that is it may include men and men or women and women or others i.e. transgenders can have sex within themselves as it not considered to be against the natural order and the persons are not punishable which also recognises the ‘gay marriages. Some part is unconstitutional which includes any person having cardinal intercourse with any animal which is considered to be against nature. The persons committing this offence is held to be punishable under this section.

1106 **Amendment in section 497:**
This section of Indian penal code deals with adultery. When a married women is being adulterated by a man and he should have the knowledge that the women is being married and he is forcing the women to have sexual intercourse or she herself volunteers to have sexual intercourse with that men without the consent of the husband the men is said to commit adultery. In that case the men alone are held to be punishable. Even though the act is abetted by a woman the women is not held to be punishable. The men while committing this offence may be an unmarried person or a married person or a widower. The necessary condition to commit adultery is that women should undergone through the legal ceremony and lawfully married to another person. This is the condition prior to the amendment. After the ‘jose shine case’ an amendment has been made in the year 2018. This amendment declares that neither the men nor the women are held to be penalised or punished under this offence. This has been accepted by both constitution and the common people while some oppose the view. By this amendment it expresses the view of equality under article 15 of the constitution. The reason a ‘public interest litigation’ was passed with a view to declare punishment to both the men and women. But a bill passed and amended in the way that neither person is held to be punished. The framers of the constitution have included the word amendment and made a good decision and it shows that framers are the persons who had wide thinking regarding the future. The above said are considered to be an important amendment regarding sexual offences.

**Women are the victims:**
From early period women are considered to be victims for the sexual offences. Men are punished for that offences. Now particularly, we are talking about rape.
this offence earlier times women are considered to be victims. But as of now the mindset of people are also changing along with the advancement. Nowadays, men are also considered to be the victims of rape in the 21st century.

1107 Rapes in the past:
- The rise of Alexander the great has occurred by killing his father by his minister where Alexander father didn’t punish the servants of the minister for raping his lover. Instead of it, he gave promotion to his minister and paved the way to his own death. This kind of rape has happened during the Greek period.
- Another incident happened in Rome where the son raped his mother by killing his father and his name is Oedipus.
- The next event which is famously known as ‘rape of Lucretia’ where Serbian women were raped in order increase the population of women in the country called Rome.
- The subsequent incident happens at the Caribbean island were women of those island are given as slave to a great voyager Columbus and nearly he carried 1000 women with him.
- A famous happening known as ‘mutiny on the bounty’ where a 15 year old girl was raped by an old man in the year 1999 where there is no legal way of punishment or justice is not proper. It is the place where sexual harassment of children prevailed. Later, in the year 2004 a child was raped by seven men who is considered to be one third of population. Out of the seven only three persons were jailed. As of now we may say that the punishment is not appropriate and the judiciary in that locality is not set with proper guidelines.

The above said are considered to be some of the incidents which prevailed in the earlier period which are considered to be sexual offences. The history of rape is evolved in this way and in the earlier stages there is a lack of awareness. These kinds of offences are done only by the people of higher class and there is no punishment. Though punishment is given it is not severe to that extent.

Rape in the present:
In the past, this offence is committed by kings and after sometime this offence is committed by rich people, and then by people in the high society and finally in our century it is committed by a common person and in our future it is possible that this offence may be committed even by small children, or may be the people who is not even having maturity. This thing may happen sure in my point of view.

Sections as per Indian penal code:
Section 375 and Section 376 in the Indian Penal Code as per the definition and explanation with proper amendments as per today in the bare act, the exact words are explained prompt and in an appropriate way with proper subsections and their respective punishments.

1108 Section 375: Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

(First) — Against her will.
(Secondly) — Without her consent.
(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
(Fourthly) —With her consent, when the man knows that he is not her husband, and
that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. (Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. (Sixthly) — With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. Section 376 in The Indian Penal Code 1109 Section 376 of Indian penal code deals with the punishment for rape. —
(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever, —
(a) being a police officer commits rape—
(I) within the limits of the police station to which he is appointed; or
(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or
(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman’s or children’s institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution or
(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or
(e) commits rape on a woman knowing her to be pregnant; or
(f) commits rape on a woman when she is under twelve years of age; or
(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2. — “Women’s or children’s institution” means an institution, whether called an orphanage...
or a home for neglected woman or children or a widow’ home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3. — “Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.]

The above explained are the exact definition of rape and its punishments after the criminal law amendment has been passed as it is mentioned in the Indian penal code.

**Should sexual offences should be gender neutral?**
This is the question prevailing in the minds of the people of this generation. Many people have expressed their view that sexual offences can be made as gender neutral. I am expressing my opinion in this essay. As there is no specific discretion or specific set of rules that these are the only persons who should be punished in any act or law which has been formulated by the law makers. The difference in punishment for offences arises in the manner in which way they are committing the offence and only the punishable period and amount is deferable. They did not discriminate particularly that for these offences only men should be punishable and in certain cases only women are considered to be punishable. In certain offences a discrimination is made in the Indian penal code. It includes offences like dowry death and some sexual offences as mentioned above and sodomy. In all these cases only, the men are punishable and in any case the women are not considered to be punishable even for abetment women is not punishable. The reason for this kind of punishment in the sexual offences is in these cases women are considered to be the victim and men are the only persons who are considered to commit the offence. They expressed that view in relation to the past where women are the only affected people. But at present the offences related to sexual harassment is committed not only by the men but also by the women. The victims include both the gender that is men and women. And sexual offences are committed by many people even to the minors or children which existed in the past and its extent is greatly reduced today. But it is not completely eradicated. Regarding to the present situation, the offences including the sexual offences should be made gender neutral.

**Reason for the offence to be gender neutral.**
Our basic feature of the constitution under article 14 which expresses the view that there should be equality and equal protection of law. Under article 15 also there should not be any gender discrimination among men and women in all situations. So, as the reason of this in the eyes of law all are equal and should be treated with same respect and dignity in all the cases and circumstances. Apart from this according to the statistics the offence committed by women is increasing and nearly 50% of men in the total population is considered to be the victims for this sexual offence. In the 21st century without any partiality both the men and women are considered to be the victims of many offences where now only people are aware of the sexual offences.

**Conclusion:**
From this essay I shared some information which I gathered and considered to be true. This essay discusses the offences and their punishments in the legal world. The Indian penal code is widely discussed above with their apt definitions and their proper
explanations and their respective punishments particularly in the area of rape. In addition to that the information regarding the evolution of rape in India and its prevalence over the king era. The laws have been framed based on the early period. But to the present situation, the laws and punishments are altered in the way of amendment. Amendment has been introduced by the legal scholars with a view that it will result to alteration. In the 21st century many criminal law amendments have been introduced and particularly for the past 2 years many amendments have been introduced and by the ‘criminal law amendment act of 2013’ many acts are considered to be offences and many subsections have been included in the punishment for rape. In order to maintain the name that judiciary is functioning effectively and without any discrimination and partiality, the sexual offences should be made gender neutral. It will help us to maintain equality with all people or citizens of India and without any discrimination also. Neutrality is considered to be important in all aspect from the scholarly persons point of view. Another reason for sexual offences should be gender neutral men are considered to be victims of many offence and women are considered to an abettor in certain offences. In that case also only men are punished. In that case without any discrimination, if that offence is abetted by men both the abettor and the abetted person is held to be punishable. In the same sense women should also be punished as an abettor as of like a man. Without any partiality and bias all persons are equal before law. All offences should be made as gender neutral and which particularly includes ‘sexual offences’ should be made ‘gender neutral’ as soon as possible.

*****
POSITION OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE INDIAN LEGAL SYSTEM

By Gazal Ghai
From Amity Law School, Noida

ABSTRACT

With the emerging global trends the world has become a global village. With the expansion of Business’ across borders, cross border transactions have also multiplied. Sometimes the agreements and contracts executed between the commercial organizations may turn ugly and give rise to disputes which are not covered under the ambit of municipal laws of a particular country. Adjudication of cross border disputes requires expertise, especially when organizations in dispute hail from nations following different legal norms. India also opened its gates for foreign companies, and in this scenario the arbitration proves to be a successful dispute resolution mechanism. The Arbitration and Conciliation Act, 1996 based on the UNCITRAL model law governs the arbitration regime in India. In order to match the pace with the international fronts the Arbitration Act was amended in 2015 and 2019. The amendments brought by the Parliament are optimistic and provide a ray of hope to establish India as a preferred seat of arbitration. Both the Government and the Judiciary have taken steps to create an arbitration friendly environment and strengthen the position of domestic laws to build confidence at the international front. The current objective of the Government is to promote institutional arbitration in India and establish an independent body to govern the same. This paper will analyze the efforts of the government and the Judiciary and some landmark changes that have taken place in the past few years to stabilize the arbitration laws and make India a preferred seat for international commercial arbitration.

INTRODUCTION

Arbitration as a dispute resolution has not gained huge importance. But with the growing trends and globalization the need for establishing a platform to conduct fair arbitration proceedings and reduce the intervention of courts in arbitration proceedings. With various economic reforms and changing policies there is a need to bring changes in the driving force too. The obsolete arbitration Act required changes in order to keep pace with the growing trends. The Government has successfully taken steps in the positive direction to promote international arbitration and bring faith in the domestic arbitration regime. The paper seeks to address the various problems in the field of arbitration and how the government and judiciary have addressed the same by bringing amendments and various landmark judgments. The paper will provide an insight of the problems faced and the various solutions that can be adopted to provide for smooth working of arbitration tribunals in India.

INTERNATIONAL COMMERCIAL ARBITRATION AND ITS POSITION IN THE INDIAN LAW SYSTEM

CHAPTER I - HISTORY OF ARBITRATION IN INDIA

International arbitration has emerged as a key method to resolve disputes between States, individuals and corporations in almost every sphere of international trade, commerce and investment. The established centers of arbitration depict increasing activities, with each passing year. States have modernized their laws so as to be
recognized as ‘arbitration friendly’. Firms have established dedicated groups of arbitration specialists and the practice of international arbitration has become a subject for study in universities and law schools alike.

The origin of arbitration in India may be traced back to the ancient system of village Panchayats. The complexities of modern commercial transactions in the wake of globalization of economy have necessitated effective redressal mechanism for speedy settlement of domestic as well as international commercial disputes with a view to ensure uninterrupted flow of trade and commerce. Arbitration and Conciliation have been recognized as valuable adjuncts to the Court system. Overcrowding of court dockets and mounting arrears of cases awaiting disposal has shaken public confidence in court litigation and the public perception of delayed justice has raised a question mark on some basic assumptions on which the judicial system is rested.

In India the first statutory enactment in relation to arbitration law was the Indian Arbitration Act, 1899. The Indian Law on Arbitration was consolidated and redrafted in 1940 on the basis of English Arbitration Act, 1934. With globalization and a vibrant change in the economy’s dynamics, there arose a need to modify the existing statute on Arbitration laws. The Law Commission of India, proposed the need of updating the Arbitration Act of 1940. Presently, Arbitration and Conciliation Act, 1996 governs the Arbitration laws in the country which came into effect on 25th January 1996. The Act is based on the UNCITRAL\textsuperscript{1110} Model law. The need of updating the existing laws was to be more receptive towards the contemporary issues.

**TYPES OF ARBITRATION IN INDIA**

Section 2(1) (a) of the Act defines arbitration. The Supreme Court has interpreted arbitration as ‘judging of a dispute between parties or groups of people by someone not involved in the dispute and whose decision both parties agree to accept.’\textsuperscript{1111} Broadly there are 4 types of Arbitration that the parties may resort to settle their disputes. They are as following: Ad-hoc arbitration: these proceedings are not administered by any institution and the parties determine all aspects of arbitration. Contractual arbitration: to seek early settlement the parties chose to insert an arbitration clause as a part of the contract to refer to their existing or future disputes to a named arbitrator or arbitrators to be appointed by a designated authority. Institutional arbitration: the parties pre-decide that in case of any future disputes arising in course of their business, the matter will be settled by a named institution. Such institutions have their own published rules and guidelines. Eg: SIAC Statutory arbitration: in certain cases the parties are statutorily required to take arbitration proceedings according to the law of land. Eg: Indian Trust Act, 1882.

**CHAPTER II - AMMENDMENTS IN THE ARBITRATION LAWS OF INDIA**

Since 1996, the Arbitration and Conciliation Act has undergone tremendous transformations. The arbitration and conciliation Act was turning obsolete and incompatible to meet with changes due to globalization and increasing commercial disputes. The foreign parties as

\textsuperscript{1110} UNCITRAL United Nations Commission on International Trade Law

\textsuperscript{1111} Amar Chand v. Ambika Jute Mills, AIR 1966 SC 1036
well as the Indian party never preferred India as a seat of arbitration. Inadequacy of laws governing arbitration, the excessive intervention of the Indian Courts and exorbitant delay in the disposal of cases were some of the major reasons which induced the parties to opt for arbitration outside India. The foreign investors often got involved into never ending litigations. In the White Industries Case\textsuperscript{1112}, India was chastised by the arbitral Tribunal in a bilateral Treaty Arbitration as there had been a delay of 7 years in the Indian courts. This delay was considered equivalent to not providing a speedy and effective remedy and thus keeping the foreign investor in a disadvantageous position. The Australian Company successfully claimed a compensation equivalent to the amount of compensation from the Indian Government.

However the judiciary acknowledged the need of vibrant arbitration laws to improve its notoriety in the international front. Both the judiciary and the Government have shown support towards arbitration and have taken steps to change the landscape of arbitration. From 2012-2015, the Supreme Court delivered several judgments, showing positive attitude towards International Commercial Arbitration by minimizing judicial intervention in arbitration proceedings, refer a non-signatory to settle disputes of arbitration, explaining the scope of public policy in foreign seated arbitration, and even ascertaining fraud as arbitrable. Moreover the Government has made efforts to bring accountability in the sphere of arbitration and has focused on fast track proceedings.

The Government by bringing amendment in 2015 and 2019 amendments has taken a positive step towards making India a hub for International Commercial Arbitration.

\textbf{AMENDMENTS IN 2015}

Arbitration becoming the most viable option to settle disputes demanded certain changes in the existing act. On 23\textsuperscript{rd} October, 2015 the President of India assented to the Arbitration and Conciliation (Amendment) Ordinance, 2015 to amend the arbitration regime, 1996. Acting upon the recommendation of the 246\textsuperscript{th} law Commission Report, the bill was passed in both the houses of the Parliament, and was signed on 31\textsuperscript{st} December, 2015 by the President of India.

\textbf{REDEFINING THE EXPRESSION “COURT”}

One of the crucial amendments introduced is in respect to the definition of the word “Court.” It clearly distinguishes between a domestic arbitration and international commercial arbitration. With this amendment the authority of deciding disputes related to international matters has been vested in the High Courts for a speedy and efficient ascertainment of issues and their disposal. Lower courts will have no jurisdiction on international matters to ensure that the matters are disposed off without any undue delay, and by judges who are well equipped with the required knowledge of law.

This modification in the definition as well as its interpretation will now help in building trust of foreign investors in the Indian legal system and will help in making India as the preferred seat of arbitration in International disputes.

\textbf{APPLICABILITY OF PART I}

The Arbitration and Conciliation Act, 1996 has been divided into 4 parts where the first part deals with arbitration proceedings.

\textsuperscript{1112} White Industries Australia Ltd. V Republic of India, IIC 529 (2011)
taking place in India and the second part deals with International arbitrations.

The applicability of Part I of the Act has always been in dilemma. The Apex Court in Bhatia International v. Bulk Trading administered the application of Part I of the Act to foreign seated arbitrations. The Court while interpreting section 2(2) of un-amended Act, held that part I of the Act was applicable to arbitration proceedings taking place outside India, unless its exclusion has been expressed or implied by the parties. The court was of the view that if Part I was not applicable to arbitrations outside India, then the parties would have no remedy while seeking for interim reliefs as mentioned in Part I.

Later in 2012, the Hon’able Court in Bharat Aluminium and Co. v. Kaiser Aluminium and Co. overruled decision laid down in the Bhatia International Case and held that ‘Part I of the Act is applicable only to arbitrations taking place within the territory of India.’

The proviso added to section 2(2) strikes a balance between the plight created by the two judgments by extending the application of Part I of the Act to arbitration proceedings taking place in India, whereas the provisions of section 9 (interim measures), section 27 (taking of evidence) and section 37(1)(a) and 37(3) dealing with appealable orders shall apply to international commercial arbitration regardless of the seat of arbitration, unless parties to the agreement have exclusively agreed to the contrary.

EXPEDITIOUS PROCEEDINGS AND EMPOWERING ARBITRATION TRIBUNALS

Another significant amendment is to section 9, where 2 new sub-sections have been inserted in order to minimize judicial intervention and empowering the arbitration tribunals.

Section 9(2) has been inserted with an objective to invoke the arbitration proceedings within 90 days from the date of passing any interim order under section 9(1), to avoid intentional delays. This will promote an arbitration friendly environment and would help in minimizing the number of pending applications in the Courts.

Section 9(3) has been inserted with the objective of empowering the arbitral tribunals and giving them powers to grant interim reliefs. This will help in minimizing the role of courts in arbitration proceedings.

The amended Act provides for a time frame for completion of the arbitral proceedings. Section 29-A has been inserted with a view of speedy trial which provides for a span of 12 months for disposing the matters related to arbitration, which can be extended to 18 months, but only with the permission of the Court.

Section 29-B introduces Fast track procedures. This type of procedure can be executed when the arbitration proceedings are not very complex and evidence and facts of the case can be established easily within the documents so that the hearings can be omitted. This amendment is based on ‘documents only arbitration.’

1114 Bharat Aluminium and Co. v. Kaiser Aluminium and Co (2012) 9 SCC 552

1115 The Arbitration and Conciliation (Amendment) Act, 2015
These amendments will help in making the domestic arbitration powerful, and will build trust at the international forum. Resolving disputes invoking the fast track procedures and setting up a time frame within which the disputes need to be disposed off will strengthen the arbitration process in India and aid international arbitration in various ways.

AUTONOMY AND PROBITY

Section 12 of the principal Act was based on Article 12 of the model law, which gave a room to both the parties to carve their requirements accordingly in an arbitrator. The Fifth schedule has been added to the Act which spells out the grounds which would provide the sufficient reasons for justifiable doubts to independence and impartiality of the arbitrator. The circumstances provided in the schedule are exhaustive and any person not falling under the ambit of the said schedule is regarded as impartial and independent. This list is based on the Orange List of the IBA Guidelines on conflict of interest in International Arbitration.1116 This list comes into account when an arbitrator files a mandatory declaration about his independence and impartiality, and his ability to complete the proceedings within a span of 12 months.1117 Schedule VII enumerates a list for situations where a person who is to be appointed as an arbitrator if he shares a relationship with any party or the subject matter.1118

This particular amendment empowers the arbitrator as well as save the arbitration proceedings with and kind of bias, and prevents miscarriage of principle of natural justice. Earlier decisions by arbitral tribunal were tainted and were not taken care of due to the obsolete laws. With the changes and transformations in the existing laws, India has taken a step ahead in making it possible seat of international arbitrations.

THE SCOPE OF THE EXPRESSION “PUBLIC POLICY”

Section 34 of the principle act has been amended in order to limit the gamut of the term Public Policy. The said section of the Act provides that an arbitral award may be set aside on the grounds if it contradicts the expression Public Policy. Challenging awards on the grounds of public policy had become a popular way by which the losing parties could challenge the arbitral awards. The Apex Court in ONGC V Saw Pipes1119 had broadened the scope of the test of “public policy by including the scope of patent illegality.” As a consequence of the Saw Pipes Case the parties could present their case in the Courts, and the Courts had the power to re-evaluate the facts and evidences of the case, which eventually frustrated the idea of arbitration. Subsequently the Hon’able Court in Associate Builders v DDA1120 held that section 34 does not permit the Courts to reevaluate decisions of the arbitrators. However, the Apex court only analyzed, and did not put any restrictions on the law governing the expression public policy.

The Law Commission in its 246th Report advised to restrict the definition of public policy by Courts. Accordingly, in 2015 explanations were inserted to section 34, in order to limit the application of public policy while enforcing foreign awards.

---

1116 IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, IBA Council, International Bar Association
1117 The Arbitration and Conciliation (Amendment) Act, 2015, sec 12(1)
1118 The Arbitration and Conciliation (Amendment) Act, 2015, sec 12(5)
1119 ONGC V Saw Pipes (2003) 5 SCC 705
1120 Associate Builders v Delhi Development Authority 2014 (4) ARBLR 307
There should be a prima facie case to substantiate the need for any reconsideration by the courts and a provision to dismiss the case at the initial stage. Section 2A has been inserted to compensate for the intended consequences of the Saw Pipes Case, which mentions the distinction between a domestic award and a domestic award made in relation to International Commercial Arbitration.

While enforcing the foreign awards the Indian Courts often had a narrow approach and the courts upheld a very broad view of the expression public policy. There was a need to bring change in the archaic approaches by the Courts, and restrict the interpretation of public policy in order to yield the essence of arbitration, which was losing its significance by getting entangled in the obsolete laws.

This will encourage the foreign investors as now the enforcement of foreign awards will not face challenges in Indian Courts and the investors will not be languishing in courts awaiting enforcement of the awards.

FOREIGN AWARDS

Part II of the Act deals with enforcement of foreign awards. To record the amendment of section 2(e) of the Act, Section 47 and 56 have been amended. The amendment now facilitates a party with foreign arbitral award to directly approach the High Court which is well equipped to handle international matters. Both the sections determine a public policy test akin to section 34.

Section 34 deals with awards that are neither final nor executable whereas section 48 and 57 are concerned with the enforcement of a final and executable arbitral award. The patent illegality test laid down in the Saw pipes case was wrongly applied in Phulchand Exports v. O.O.O. Patriot where the Court held that public policy will be treated on parallel grounds under section 34 and 48. The Hon’able Court in Shri Lal Mahal Ltd. V Progetto Grano SpA, repudiated to apply the same test of public policy as under section 34.

The amendment narrows the approach of the expression public policy and lays down circumstances where foreign award will be in conflict with the public policy of India. This helps in streamlining the enforcement procedure, and makes arbitration the preferred means for a dispute resolution mechanism for foreign investors.

AMENDMENTS 2019

After getting passed by both houses of the Parliament, the Arbitration and Conciliation (Amendment) Act, 2019 received the assent of the President on 9th August 2019. This amendment was long awaited, after the 2015 amendment to rationalize institutional arbitration. The 2019 amendment summarizes various recommendations made by the High Level Committee constituted under the Chairmanship of Justice B N Srikrishna. The key objective of the Committee was to eradicate the challenges that were present in the Arbitration and Conciliation (Amendment) Act 2015. The Act focuses on making India a hub for international commercial arbitrations and promotes institutional arbitration.

APPOINTMENT OF ARBITRATORS

1121 The Arbitration and Conciliation (Amendment) Act, 2015, Sec 31(2A)
1122 Shri Lal Mahal Ltd v- Progetto Grano Spa (Civil Appeal No. 5085 of 2013)
1123 Phulchand Exports v. O.O.O. Patriot, (2011) 10SCC 300
1124 Shri Lal Mahal Ltd. V Progetto Grano SpA (2014) 2 SCC 433
Before the 2015 amendment the courts could exercise wide jurisdiction while deciding any matter under Section 11 to appoint an arbitrator. After the decision in SBP V Patel Engineering, the court could determine its own jurisdiction to adjudicate the arbitration petition and live claims. This power was narrowed down by the 2015 Amendment with the by introducing section 11(6A) and the power of the court was restricted only to examination of the existence of an arbitration agreement. In 2017 the Apex Court in Duro Felguera held that “after the amendment, all courts need to see whether an arbitration agreement exists—nothing more nothing less.”

The Amended Act has altered Section 11 of the Act, which discussed about appointment of arbitrators by Courts after submitting an application the parties. The Amendment authorizes the Supreme Court to delegate the appointment of arbitrators to arbitral institutions graded by the council in case of international commercial arbitrations and High Court in case of other arbitrations. Appointment of arbitrators should be completed within 30 days, after the application has been presented by the parties. Moreover, the arbitral institutions will have the power to regulate the fees of arbitrators as stipulated in the Fourth Schedule which shall be applicable to the arbitrator. With the delegation of the power to appoint arbitrators in context of section 11, being given to arbitral institutions, the Supreme Court will now directly take up matters, under Article 136 against the orders passed by the authorized arbitral institutions. The amendment in Section 11 aims to expand the growth of institutional arbitration in India.

**ALTERED TIMELINE**

After the 2015 Amendment, the arbitration proceedings were to be completed on fast track basis, by inserting a time frame of 12 months which could be extended up to 18 months with the permission of the Court. The said amendment faced criticisms on the grounds that complex matters relating to international matters could not be disposed off in such a short period of time.

The revised timelines according to the new amendment are mandatory only for arbitrations where all the parties are Indian. These guidelines are only recommendations for international commercial arbitration.

**ARBITRAL PROCEEDINGS**

The 2019 amendment envisages confidentiality of arbitration proceedings, under the ambit of section 42-A. The said clause is associated with confidentiality of information and inflicts an obligation on the parties to uphold the confidentiality of arbitral proceedings except where the disclosure of the award is necessary for its implementation. This amendment imposes a burden on the parties by not only to impede intervention of third party but also forbids them to unveil any information.

**THE ARBITRATION COUNCIL OF INDIA**

The Arbitration Council of India (ACI) is expected to “lay down standards, make arbitration process more party friendly, cost effective and ensure timely disposal of
The ACI will be entitled to grade arbitral institutions, elevate the status of institutional arbitrations, review and restore various norms to establish satisfactory level of arbitration. The key role of the ACI is to formulate uniform professional standards for regulation arbitration proceedings in India. The criteria’s for accreditation of arbitrators has been specified in the Eighth Schedule to the Act.\(^{1130}\)

The constitution of ACI manifests the legislature’s motive to promote the expansion of institutional arbitration in India. The ACI is entrusted with the power to make regulations in consultation with the Central Government. Though the intent of empowering the ACI is to promote effective institutional arbitration, but the 2019 amendment has added one more regulator to the list of this independent dispute resolution process.

**CHAPTER III - THE ROAD AHEAD**

The Act defines International Commercial Arbitration as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

\begin{itemize}
  \item [i.] An individual who is a national of, or habitually resident in, any country other than India; or
  \item [ii.] A body corporate which is incorporated in any country other than India; or
  \item [iii.] An association or a body of individuals whose central management and control is exercised in any country other than India; or
  \item [iv.] The Government of a foreign country,\(^ {1131}\)
\end{itemize}

India being a preferred destination for foreign investment and growing business, business disputes is also pie size and everybody wants to have a slice. According to SIAC India saw the most number of parties involved with 485, more than triple the number involved in 2018.\(^ {1132}\) Institutions in India are equally proficient as their global counterparts. India needs to promote an arbitration friendly environment, create awareness and most importantly prove its self sufficiency to resolve in India.

The amendments made in the Arbitration and Conciliation Act 1996 has brought about various changes in the sphere of International Commercial Arbitration. Revolution in the international arbitration regime is an optimistic step to strengthen arbitration in India. Though Indian Government and Judiciary is emphasizing on making India a hub of International Commercial Arbitration, there are certain gaps that need to be filled in order to achieve the desired goal.

**INCONSISTENCIES**

- Governmental supervision over the institutionalization process

---

\(^{1129}\) Press Release dated March 7, 2018, from Press Information Bureau of India, ‘Cabinet Approves the Arbitration & Conciliation (Amendment) Bill, 2018

\(^{1130}\) The Arbitration and Conciliation (Amendment) Act, 2019

\(^{1131}\) The Arbitration and Conciliation Act, Section 2(1)(f)

Inclination towards ad-hoc arbitration
- Often retired judges and technocrats head the arbitration proceedings, but they often lack international exposure
- Lack of knowledge about the existing arbitration institutions, laws and their functioning
- The choice of arbitrators is restricted by nationality
- Lack of human capital. Arbitration experts shall be indulged.
- The perception of arbitration needs to be changed amongst the legal fraternity. It should be seen as a whole time dispute resolution mechanism
- Promote arbitration culture. Include International commercial Arbitration in the curriculums and generate well equipped arbitrators.
- Lack of infrastructure and technology

The future of International Commercial Arbitration in India depends upon 5 I’s.

I - INSTITUTIONALIZATION

I - INDEPENDENCE

I - IMPARTIALITY

I - IN-YIME JUSTICE

I - INFRASTRUCTURE

The Road ahead to establish an arbitration friendly environment and attract maximum foreign investment is by promoting institutional arbitration. These Institutions provide a pre-determined arbitration procedure and are well updated in lieu of the latest developments. They provide an efficient panel of arbitrators and are experienced in the required fields. Though various arbitral tribunals exist in India like ICADR, MCIA etc. but still the people are reluctant to approach these institutions. Recently LCIA office in India closed as its caseload was in single digits1133. There is a need to create awareness amongst the business fraternity and bring them in parlance with the arbitration institutions India. The process has to start with the root level by introducing International Arbitration to the budding lawyers. It is essential that institutional arbitration in India is speedier and cost effective and receives support from the state in every possible way. In order to make India a hub of international arbitration we need to open ourselves to the outside world and integrate the best practices to establish world class Institutional and legal procedure. The lack of oversight over procedural aspects of arbitrations has often resulted in arbitral awards in arbitrations administered by such institutions being vulnerable to challenge in court.1134

CHAPTER IV - CONCLUSION

Change is the law of the nature. With changing trends the world needs to change and so does the law governing the world. The provisions of Arbitration and Conciliation Act, 1996 had turned obsolete and required reforms in order to match the speed of the growing world. The steps taken by the Government and the judiciary are very optimistic, but its success will depend upon its practical application. The judiciary has been very supportive towards the reforms made. The Supreme Court invoked section 11 of the Act1135 asked MCIA to appoint an arbitrator in an international dispute indicating a major boost to arbitration. The Judiciary has been

1133 "LCIA India to end operations", Herbert Smith Freehills – Arbitration Notes, 08.02.2016, available at https://hsfnotes.com/arbitration/2016/02/08/lcia-india-to-end-operations/ (accessed on 15.05.2020) (14:55)

1134 Speech by Dr. Justice S. Muralidhar at the Nani Palkhivala Arbitration Centre 9th Annual International Conference on Arbitration on Current Issues in Domestic and International Arbitration

1135 The Arbitration and Conciliation Act, 2015
constantly expanding the horizons of arbitration and giving pro-arbitration judgments.

There is a need to change the mindset of the people and introduce them to arbitration. The phrase “see you in court” has to change and the arbitration regime has to evolve as the new way to resolve. The coming time is going to witness foreign investment in the Indian Territory and we need to work on our arbitration regime. India is on the way to establish confidence in its legal system which is important to make India a hub of International Commercial Arbitration.

To establish an effective dispute resolution mechanism for international fronts India need to focus on the needs of the world. Foreign parties would choose India as a seat of arbitration if Indian law system offers them what they require. SIAC has emerged as place where the world arbitrates because of its versatility and engagement of arbitrators across the globe who have been exposed to the international front.

India has started to walk on the path of making India a hub for international arbitration, but it needs to pace up and compensate for the crucial times that have been lost. The Amendments introduced are definitely a step ahead but the arbitration regime of India need to scurry instead of taking baby steps.

The quality of our lives depends not on whether or not we have conflicts, but on how we respond to them.

-Thomas Crum

REFERENCES

- The Arbitration and conciliation act, 1996
- The arbitration and conciliation (amendment) act, 2019
- The arbitration and conciliation (amendment) act, 2015

- scc online.com
- Manupatra.com
- strengthening arbitration and its enforcement in India by NITI Aayog – resolve in india by bibek debroy and suparna jain
- Evolution of international commercial arbitration in India post amendments to arbitration and conciliation act 1996.
- Challenges and prospects of international commercial arbitration in India, by prasnijit kundu (2017)
- Speech by Dr. Justice S. Muralidhar at the Nani Palkhivala Arbitration Centre 9th Annual International Conference on Arbitration on Current Issues in Domestic and International Arbitration
- ‘LCIA India to end operations’, Herbert Smith Freehills
- Law Commission’s Report to revamp the Indian Arbitration Experience- Kluwer Arbitration Blog
**HUMAN RIGHTS AND TRANSGENDER**

*By Gazal Gupta and Aditya Gupta*

*From Manipal University Jaipur*

**ABSTRACT**

Transgender community consists of those people who have dissimilar sex and gender. They can be born as a male or female but they feel as if they are part of the “wrong body”. This paper follows an investigative pattern of research as it explores issues faced by transgenders. The 2014’s judgement and its effects on all communities having issues with gender have also been discussed to critically analyse the implementation of new laws and directions given by the Supreme Court on the transgender society of India. Further, human rights are taken into consideration to provide the “third gender” with these basic rights without any discrimination and the conflict between gender and class in India today has also been thoroughly discussed. This paper strives to bring into notice the real struggles of transgenders in general as well as in law and how to overcome them by taking small steps towards equality.

**Keywords** - Transgender, 2014 judgement, Human Rights, Third Gender, Struggles

**INTRODUCTION**

Over the years, the transgender population in the world has increased. Rigid laws are made and several actions are taken to provide the transgender community with the same rights as normal people. Some countries were successful but many still lag. Even after passing judgements where basic human rights were granted to transgenders and applying firm values like Yogyakarta principles the transgender were still overlooked and the discrimination was unmistakably evident.

In India, A landmark judgement was passed by the Supreme Court of India which recognised transgender as a third gender. It was passed on 15th April 2014 and was called National Legal Services Authority v. Union of India. Here several rights were given standardised for transgenders which ultimately went against them. This judgement also violated the basic nature of the constitution which will be discussed further.

Transgender community face gender struggle because of the lack of public acceptance and does not get any respect in the society. They face internal conflicts and uneasiness with others and laws which are not in favour are not helping the situation. Some general problems faced are lack of clinical training and shortage of transgender support groups so their psychological problems aren’t deal with.

**REVIEW OF LITERATURE**

Relevant literature have been assessed and evaluated in harmony with the present paper. Earlier the term “transgenderist” was used in a cross dresser movement in United States of America (Virginia Prince, 2008). The amount of discrimination faced by Transgender was explained in Environment by Corrine Munoz, Sandra C. Quinn, Kathleen A. Rounds (Volume 85). Then, transgender was determined as a “third gender” in 2014 and was included in socially and economically backward class by Supreme Court (NALSA v. Union Of Placed.
Before transgender being included in a class it was defined as “a homogeneous section of the people identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion” not mentioning gender in it (State of Andhra Pradesh and Another v. P. Sagar). Later in 2016, in the case Navtej Singh Johar v. Union of India a “transgender just because of his gender cannot be denied basic human rights” and here there was no mention of Lesbian, Gay, Bisexual and they were excluded from this framework.

RESEARCH OBJECTIVES

This paper is an attempt to analyse the transgender community in accordance with Human Rights, discuss the operation of laws and judgements made in India for transgendered humans, examine the affects of transgender status under socially and economically backward, scrutinise the issues and discrimination against transgendered people in regard to the leading judgement.

RESEARCH METHODOLOGY

This paper probes into the actual issues faced by transgender by using primary and secondary data throughout the paper. The primary data have been taken from legitimate government sources. Constitutional rights of transgender is analysed and obtained from the constitution of India, and section 377 of Indian penal code 1860 is discussed which denied fundamental rights to transgender but later in 2018 some provisions by supreme court altered it; The various judgments related to transgender has been taken from Manupatra and SCC especially the leading judgement i.e. NALSA v. Union of India and census data of transgender has been taken from government websites. The secondary data include the Transgender Persons (Protection of Rights) Act, 2019 which has been taken from prsindia, an independent organization and other secondary sources like previous researches, National Human Rights Commission reports, State Human Rights commission reports, legal journal and newspapers. The problems faced by transgender has been analysed by reading various newspaper articles from Indian Express, The Times of India and The Hindu.

ABOUT HUMAN RIGHTS

In recent decades Human rights have become popular and people are getting more aware about it. Human Rights are those rights which an individual enjoys from the birth. These are inherent to all individuals without any discrimination based on race, sex, nationality, ethnicity, language, religion or any other status. Human Rights include the right to work, right to education, right to life and liberty, freedom from slavery, etc. Human Rights are an indispensable part of society. Everyone is entitled to these rights without discrimination. Human rights law obliges governments to do some things and prevents them from doing others. Some frequently cited characteristics of human rights are: internationally guaranteed, oblige state, and cannot be waived and universal. Without Human Rights no person can develop its personality fully. Human Rights are recognised to ensure the physical, moral, and mental development of every individual.


1138 AIR 1968 AP 165

1139 2018 (10) SCC 1
Human Rights are an essential component of sustainable development goals. In the absence of human dignity, sustainable development can’t be achieved. Human Rights are driven by progress on all sustainable development goals, which are determined by advancements on Human Rights.

Universal Declaration of Human Rights sets out for the first time Fundamental Human Rights which are to be internationally protected. It integrates some important components i.e. all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood it prohibits slavery and slave trade in all forms. Other recognised rights under this declaration are right to nationality, right to seek asylum, right against arbitrary arrest, etc.

Human Rights were derived from two types of international source the ‘customary international law’ and ‘treaty law’. Customary international law is developed from general and consistent practice of States and treaty law is set out in various international agreements and all of these instruments are fully binding on states that are party to them.

In the context of India Human rights, they are needed because India is a vast country with huge religious and cultural diversities as well as financial and social disparity among different communities. It has a history of religious, caste, and gender discrimination i.e. rich and poor weren’t even allowed to drink water from the same vessel and untouchables weren’t permitted to enter into a temple as they were considered to be impure.

However, the constitution of India provides certain basic rights to all citizens in the form of Fundamental Rights in the constitution. Part III of our constitution provides for these rights. It covers all the traditional, civil and political rights enumerated in the universal declaration of Human Rights. Dr. Ambedkar defined fundamental rights as the most “citizen” part of the constitution. These fundamental rights ensure to every citizen the right to equality, freedom, right against exploitation, right to freedom of religion, and cultural and educational rights not taking into account their gender, religious inclinations, age, caste or ethnicity.

In 1993, the Indian Parliament enacted the Protection of Human Rights Act to effectively protect, promote, and fulfill the Fundamental Rights guaranteed by the Indian Constitution. Therefore the act has created various Human Rights. The central one is the National Human Rights Commission which has been established in 1993 as a statutory body to promote and protect the Human Rights of an individual. It is a watchdog of Human Rights in India. It looks after the rights related to life, liberty, equality, etc. It has been established in compliance with the Paris Principle of

---

1141 Stand up for Human Rights, ARTICLE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS | STAND UP FOR HUMAN RIGHTS | UN HUMAN RIGHTS

Human Rights in 1991 which was endorsed by the United Nations General Assembly in 1993.

ABOUT TRANSGENDER

In 2014 judgement Nalsa v. Union of India the term “Transgender” was given as a blanket term for ‘hijras’, ‘kothi’, ‘shivshakti’ and ‘aravani’. A transgender is a person whose gender is different from their sex. Sex is the label of a person by birth and gender is the behavioural norms decided by society considered suitable. These two are different orientations as sexual orientation is a person’s emotional and romantic on the other hand, gender orientation is the expected behaviour or activities by a person. Transgenders are born as male or female but they feel as if they are into a “wrong body”. Sometimes transgenders are also confused with people having intersex conditions. They may be similar but the difference is that people with intersex conditions have to change their gender identity at some point in time; however this isn’t necessary for transgender. Also, transgender include cross-dressers in India.

Universally, several terms are used to denote transgenders. One of them is cross-dressers. Crossdressers are those who traditionally wear clothes which are worn by the other gender in the society. There are various terms used for transgenders. Drag queens refer to men who dress as women. They usually entertain in events. Another one of them is Genderqueer. Genderqueer are those who is neither a man nor a woman; they fall between the quantum of both and want to be called as a “zie”. There are other categories too like multi-gendered, third gender, and more. They come from all cultures, communities and all walks of life.

The basic rights of transgender are usually denied and they face a severe identity crisis. Transgender issues are not only faced by people who identified themselves but those people too who are perceived as a transgender by the society. 96% of transgender are denied jobs, 60% of them are deprived of education and most of them are unwanted by society. Various legislative measures were taken to establish equality between all but they didn’t bring much difference apart from establishing transgender as a third gender.

In Nalsa judgement India, the fact that whether lesbian, gay, bisexual were included in the term “transgender” or not was very vague. However, after seeking clarification in regard with the problem it was held that transgender does not include those terms. This became a major difficulty as transgender were already being provided with reservation under “other backward classes” but lesbian, gay, bisexual did not receive it. Not just this, other problems like time-consuming certification process without which access to various places were prohibited and transgender who leave their houses has to go to rehabilitation centers also came into existence. The bill supports ‘right to self-identification’ and prohibition of

\[1143\] AIR 2014 SC 1863
discrimination in education and medical but has no mention of jobs.\textsuperscript{1146}

Transgender rights are still being violated across the country and the world. Laws and governmental actions are not able to minimise discrimination against them.

**LAWS AND CONSTITUTIONAL RIGHTS OF TRANSGENDERS**

Transgendered humans have to follow the same due process of any law as any other citizen. But this definition of transgender brings them into conflict between society and state. For example, they demand to be recognised as a different gender in all public aspects of life. Transgender also demands for legalising intercourse between same-sex in a marriage or without marriage, which is opposed by many. And also if a person wants to be seen as a different gender our laws and society do not allow so i.e. a voter card needs to have the gender of a person to be termed as either male or female. This applies to different licenses or permits that need to be obtained from the government. The main issue being the right to self-identification as being of another gender is provided by all.

The Preamble of the Indian Constitution gives Social, Economic, and Political Justice to every Citizen which means that Transgender community also has fundamental rights under Article 14, 15, 16, 19, 21, and 23.

Transgendered people have the right to equality as provided under Article 14 that they are treated the same as normal citizens and should be given the same rights as each citizen. Article 15 talks about the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. these are the foremost and most important rights that they deserve. Being a citizen of India they should not get discriminated against based on sex, gender, etc. Article 16 talks about the Equality of opportunity in matters of public employment. Transgender should also be treated equally concerning opportunity in matters of public employment. If we see their employment in the public or private sector then to they have very minimal or negligible share. Article 21 talks about the Right to life and personal liberty which enlightens that transgendered mankind have their liberty and as per K.S. Puttaswamy v. Union of India's\textsuperscript{1147} Right to life and personal liberty includes the Right to privacy and the right to privacy includes the right to consensual sex. Self-determination of gender is part of this right. Article 23 talks about the Prohibition of traffic in human beings and forced labour.

Section 377 of Indian Penal Code states that\textsuperscript{1148} “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”. It was an anarchic law that prevented the lesbian, gay, transgender, bisexual community from enjoying their fundamental rights. It harmed their dignity and discriminated against them. But Supreme Court in 2018 has decriminalised section 377 of the Indian Penal Code and declared it unconstitutional.


\textsuperscript{1147} (2017) 10 SCC 1

penal code. Supreme Court observed the section 377 as irrational and arbitrary. The community including transgender also possesses the same rights as other ordinary citizens. It observed that sexual orientation if an individual should be protected and it is a matter of privacy, which has now also been declared a fundamental right, and protection of sexual orientation lies at the core of fundamental rights which was guaranteed by article 14, 15 and 21. Respect for a person’s choice is an essence of liberty under law.

In NAZ Foundation v. Govt. of NCT Delhi1149, the question was raised that whether section 377 should be removed or not, the court has dealt with this case in two angles, firstly the court states that without dignity and privacy no person can enjoy Right to Life under Article 21 and secondly they talked about Article 14 and Article 15. Section 377 violates Article 14 because it does unreasonable discrimination as it considered homosexual as a class and criminalises their consensual sex. And Article 15 which says discrimination based on sex is prohibited. The court stated that sex is not only a biological sex it also includes sexual orientation and in this case, Delhi High Court said that the part of Section 377 which criminalises the homosexual act should be declared unconstitutional.

In Suresh Kumar Koushal v. NAZ Foundation1150, two arguments have been raised, firstly, that homosexuality is a criminal offence and the only parliament can decriminalise it without any interference by the courts and lastly, you cannot extend the right to privacy to that extent that you start committing an offence in that. So right to privacy will not cover homosexual acts. Several international organisations have declared this step backward. Those who started disclosing their identity and expressing their sexual orientation freely after 2009, they were seen as criminals after this case.

In NALSA v. Union of India and ors1151. A loophole was highlighted that all existing Indian Laws are Binary Gender which means that they focus only on males and females and rights of transgender are not protected in any provision and on this basis transgender community is getting discriminated. In dealing with this loophole Supreme Court has recognised multi-facet rights, first that every person’s right is protected under Article 14 and include all men, women, and transgender, second that gender-based discrimination is prohibited under Article 15 and Article 16 so if discrimination is done based on sexual orientation then is in violation under Article 15 and 16. Third that privacy, gender identity, integrity all are included under Article 19(1)(a) and last that Right to live with dignity (Article 21) includes the right to choose gender identity and there is a need of bringing those provisions which focus on present-day needs. Because of this case, Self-identity and Gender identity got legal recognition.

In K.S. Puttaswamy v. Union of India1152 it was given that Right to Privacy is a Fundamental Right and in this case, Justice Chandrachud has rectified the mistake of Suresh Kumar Koushal case, he said that sexual orientation is an essential attribute of privacy and this attribute is protected by Article 14, 15 and 21.

1153 2018 case decriminalised all consensual sex among adults in private.

The NALSA case 2014 paved the way for the introduction of transgender bill 2014. But it didn’t pass. However the modified version of the bill has come twice i.e, in the year 2016 and 2019.

The key provisions of the transgender person (protection of rights) bill, 2019

The definition of transgender was given by this bill that a person whose gender does not match the gender assigned at birth. It includes trans-women, persons with intersex variations, other with socio-cultural identities and trans-men. Intersex variations are defined to mean “a person who at birth shows the variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of the male or female body.”

Any person who compels a transgender person into bonded labour, evicting a transgender from his/her place of residence, causing abuse in physical, social, verbal, economic, or in any manner can be penalised with imprisonment of not less than 6 months and extend up to two years. It also prohibits discrimination against transgender persons.

Bill provides that a transgender person shall have the right to reside with his parents and family members.

Bill provides that the government will make welfare schemes and programmes for transgenders.

Bill provides that the Government will facilitate sports, education, and recreational facilities for transgendered humans.

Separate HIV prevention centres and sex reassignment surgeries will also be provided by the government.

National Council for Transgender Person (NCT) will be set up by the Central Government.

The transgender protection bill has some limitations too i.e. it does not promise any rights and reservations to the transgender, it failed to differentiate between intersex and transgender, there are no other amendments in relation to marriage, property, etc. This bill does not provide about the awareness programmes for transgender and it has lack of clear mechanism.

Yogyakarta principles is a document about human rights in context of gender identity and sexual orientation. It is a result of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. Most of the principles proposed are similar to the fundamental rights of our constitution but are related to Lesbian, Gay, Bisexual, Transgender community. Yogyakarta principles:

1. The right to form a family.
2. Right to privacy.

1153 2018 (10) SCC 1

3. The right to participate in public affairs.
5. Right to equality and non-discrimination.
6. Right to recognition before the law.

These principles are important because the Supreme Court has also referred to them while ruling on cases that are related to transgenders and the extended community.

Even at International level a variety of initiatives have been taken:-

- The United Nations LGBTI core group has been established in 2008 which is an informal group of United Nations Member States to focus on LGBTI rights.
- A resolution was submitted in 2011 in United Nations Human Rights Council by South Africa to study on discrimination and sexual orientation. This was the first time that UNHRC approved the resolution and recognized the rights of LGBTQ people.
- United Nations Human Rights Council passed a resolution in 2016 to appoint an independent expert to locate grounds of violence and discrimination against LGBTQ people due to their gender identity and sexual orientation.
- The United Nations High Commissioner for Human Rights had released a report in 2011 which confirmed that around 76 countries have laws that criminalises people on the basis of gender and sexual orientation.
- The Joint UN Statement was released in 2015 on ending violence, discrimination and mistreatment against Lesbian, Gay, Bisexual, Transgender and Intersex individuals.

According to the 2011 census the transgender community constitutes 0.04 per cent of the total Indian population. They are visibly invisible population of the country. Though our constitutional fathers have put equality as a fundamental right in our constitution which declares equality for all but unfortunately transgenders are mostly discriminated and they are not treated equally as others. The transgender community is the most differentiated and disempowered in India. The discrimination against them has been a perennial issue for long. Though we achieved independence in 1947 but the transgender community is still caught up in the clutches of societal pressure and even today they haven’t attained independence. They have been considered as the most socio-economically marginalised community in the country. They face challenges in every aspect of their life. Challenges such as:

1. Social Acceptance: They face challenges since their birth. Even their own family disowns them, let alone society because of the attached stigma and taboo. Society doesn’t consider them as a part of the mainstream. These children live their life journeys alone or in search of individuals of their kind. Their journey is marked by hardships and abuse throughout their lives.

2. Health Issues: People from the transgender community don’t get proper health treatment. They are being discriminated in

---


health facilities as people ignore them and find ways to not treat them so they avoid going to hospitals and let their health deteriorate.

3. Education: Most members of the transgender community are school dropouts. The alienation and discrimination force them to leave education. When they go to school and colleges they face challenges from their peers. Soon, they start losing their self-confidence and feel depressed due to which their mental health depreciates. Proper education isn’t received by them which forces them to beg and turn into a sex worker to make a living. The lack of basic schooling is often the direct result of bullying and hence transgender communities are forced to leave schooling. School education remains incomplete for most of them harming their family.

4. Transgender community is one of the most vulnerable and neglected group of people. Proper government measures are important to be taken to tackle those problems faced by them but unfortunately there are none at the moment making their depression escalate day by day.

5. Although the government of India has come up with a transgender protection bill, 2016 to alleviate some pains of transgender. The bill has defined transgender and arrested the practice of abandonment by family by making it right of a transgender to reside in his/ her parent home. The same bill also laid down the provisions for a center.

6. Lack of Job opportunities/ Unemployment and Poverty: Transgendered people don’t get jobs easily and always get denied for employment because of being trans and this avoidance in getting jobs leads to poverty in the nation and they are not able to provide themselves with the necessary living which increases both internal and external conflicts.

7. Civil Rights: -Acceptance and recognition of civil rights is very essential for transgender because their legal needs stretch many conditions of life. These needs include the ID proof which directly informs about their identity, who they are and they get protection from discrimination in respect to employment and rights of immigration

8. There is a lack of political participation by them and their representation is almost negligible.

Since the 19th century they are being pushed to the margins of society, they have lost their socio-cultural position which they enjoyed once. They face extreme forms of social ostracisation and exclusion from human rights and dignity\textsuperscript{1158} . They face gender-based violence. The transgender person might be victims of sexual assault or rape as the Indian Penal Code recognises rape of man and woman as perpetrator and victim respectively.

Although the government of India has taken some steps such as Transgender protection bill 2016 to alleviate some sufferings of transgender, the bill includes the definition of transgender and prohibits discrimination against them\textsuperscript{1159} , the bill tries to arrest


the practice of abandonment by family by giving several rights to transgender i.e. right to live with their parents, the bill lays down the rules for the center and state to form a trust for transgender. Etc but the bill has left out many things which are essential to uplift transgender. It doesn’t give the provision of reservation for transgender and the principles of Yogyakarta (right to self-determination of gender) which harmlessly help transgender live a better life aren’t included.

Supreme Court in NALSA CASE\textsuperscript{1160} 2014 has recognised transgender as a third gender. Supreme Court also issued a directive, in this case, to extend all kinds of reservations to transgender by considering them as socially and educationally backward class. They should be given reservation under other backward classes of 27%. The national commission of backward classes also endorsed it in its recommendations to the social justice ministry in 2014 which lead to the successful implementation of this judgement. Even after the implication of this judgement the issues faced by transgender weren’t minimised and even after getting the recognition they were discriminated against and the process of this never-ending inequity still went on.

CONFLICT BETWEEN GENDER AND CLASS

After getting a recommendation from National Commission for Backward classes the transgender was given the status of Socially and Educationally Backward Classes. This judgement undoubtedly was given for the benefit of transgender and diminish the biases in our society but led to the opposite effect.

In 2014’s judgement The Supreme Court directed the Centre and the State Governments to take steps to treat them as SEBC and extend all kinds of reservations in cases of admission in educational institutions and for public appointments. However as mentioned before the scope of employment was not mentioned making this judgement unfavourable for transgenders in the job sector.

Further, section 2(g) of Central Educational Institutions (Reservation In Admission) Act, 2006 defines Other Backward classes as “the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government”.\textsuperscript{1161}

However, Transgender cannot be considered as a class because “class” as defined in the State of Andhra Pradesh and Another Vs. P. Sagar "class" means “a homogeneous section of the people grouped because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like”. Here there is no mention of gender therefore class cannot be mixed with gender as they both are two different concepts and cannot overlap each other. Also, it was held that all transgenders cannot come under SEBC as they can be of other castes by birth.\textsuperscript{1162}

\textsuperscript{1160} AIR 2014 SC 1863
\textsuperscript{1161} Mhrd.gov.in. 2020. [online] Available at: <https://mhrd.gov.in/sites/upload_files/mhrd/files/u

\textsuperscript{1162} News, I., 2020. OBC Quota For Transgenders Won’T Cover Gays, Lesbians: SC | India News - Times Of India. [online] The Times of India.
after having certain ‘common traits’ some of the people won’t be included in the class.

Therefore, By placing Transgenders into Socially and Educationally Backward Classes this judgement has undeniably questioned the judicial pronouncements.

Another one of the concerns include that at the initial stage the term “transgender” wasn’t clearly defined. However, when the clarification was sought in the case, Aslam Pasha v. State of Karnataka to issue further directions to safeguard the interest of ‘third gender’ the court held that Supreme Court has already decided the case and therefore the petition was dismissed. Nonetheless the government interpreted it and said that in no way transgender can include lesbian, gay and bisexual the mere reason given was that the rest of them depends upon the sexual orientation but transgender depends upon gender identity. This was contemplated to be wrong because universally Lesbian, Gay, Bisexual, Transgender (LGBT) is one term and is determined as one while making laws, rights, duties and other obligations.

Several judgements also came into existence like Navtej Singh Johar and ors. Vs. Union of India and ors it was held that “The discrimination on the ground of “sex” under article 15 and 16 includes discrimination on the ground of gender identity. It also said that the term “sex” also includes people who are neither male nor female and a very important point highlighted was that a transgender just because of his gender cannot be denied basic human rights. Here, the focus was only on transgenders and lesbians, gays, bisexuals were kept out of the context of coming under articles 15 and 16 of the constitution or having basic human rights.

As a result of the 2014 judgement lesbian, gay, bisexual didn’t make its way to sebc class and didn’t get a similar advantageous as transgender. Hence, the intersection of both gender and class wasn’t beneficial anymore and violated the spirit of the constitution.

SUGGESTIONS AND CONCLUSION

At this point, it is hard to comprehend the real situation of the Transgender Community. The NALSA judgement could be considered as an initial step but there can be some serious transformation in the laws and general well-being to support these people.

First, the term “Transgender” should be an umbrella term and include Lesbian, Gay, Bisexual too as across the world it is one term and our given similar or same rights undoubtedly.

Second, the concept of “Gender” and “class” shouldn’t be overlapped as they are two different notions and should be considered differently while providing benefits to transgenders and other communities.

Third, Transgender should not be included in other backward classes but there should be the creation of different reserves that do


1163 Writ Petition No. 11610 of 2013
not form part of socially and economically backward class and those should only be provided to people with gender identity and sexual preference issues with reasonable testing or screening.

Fourth, Protection should be given to those people as well who work in the employment sector and has gender recognition and sexual orientation difficulties.

Fifth, these people should be recognised and they should be provided with psychological help to deal with their internal issues and come in terms with their true identity without any societal pressure or prejudice.

Sixth, The National Skill Development mission launched in 2015 by Prime Minister Narendra Modi to train about 40 crore people in India taking into account different skills in which they can specialise and excel by 2022. It is being managed by National Skills Development Corporation of India. The transgender community should be provided skill training under this skill India campaign. It will not only provide skills to them but the campaign also helps in mitigating poverty, empower them socio-economically, reduce social challenges and ensure that they are included in economic growth.

Last, the LGBTQ+ community should be educated about their rights and there should be awareness in addition to sensitisation so they can enjoy their rights fully.

This is the most effective solution as there is a dire need to remove the stereotype behaviour related to the transgender community. Man is a social animal by nature and every individual including transgender is a part of society hence it is essential to create public awareness about the transgender community. There is a need to give equal rights under article 14 of the constitution.

There was a great western political thinker IMMANUEL KANT who said that every individual is equal and unique in him and has human dignity and no one has a right to harm other’s dignity. There is a need to create a National Commission for transgender on the lines of the National Commission for SC and National commission for ST.

As transgender faces discrimination in schools and colleges which leads to dropouts. To avoid these consequences and to avoid the obstacles in education for them, there should be transgender educational institute.

There is less than or equal to 1 percent representation of transgender in government employment. The government should include more and more transgender in the government jobs so that they can have their representation and can actively participate politically.

These small steps can benefit the transgenders enormously and help them lead a successful life with fewer hitches and difficulties.

Today, transgender still struggle and cope up with the difficulties of their everyday life. Fortunately, there are several organisations like the International Foundation for Gender Education, GATE, and World Professional Association for Transgender Health who are working day and night towards the welfare of transgender and constantly spreading awareness about their human rights.

Amongst all the complexities transgender community is striving every day to make a living and are continuing to fight the battle
of discrimination with fortitude, bravery, stubbornness, glory, and most importantly hope for a better tomorrow.

REFERENCES

• The Constitution of India
• Indian Penal Code, 1860
• Transgender Persons (Protection of Rights) Act, 2019
NEED OF SPECIAL PROVISIONS FOR CYBERBULLYING IN INDIA

By Harsh Vardhan Rathi
From Balaji Law College, Savitri Bai Phule Pune University

Abstract-
"Unless and until our society recognizes cyber bullying for what it is, the suffering of thousands of silent victims will continue." – Anna Maria Chavez

We live in an era where cyberbullying has become a vital issue, yet not being addressed adequately by our laws and society. The internet, which was meant to be a peaceful place to connect and educate them. It has become a graveyard for many innocent souls. With the internet came social media which has become such a meaningful necessity in our lives, to which we are hopelessly addicted. Though having its benefits, there is a large chunk of people who hide behind a mask of anonymity online and do not need direct physical access to their victims to do unimaginable harm, both mentally and socially. Even after having provisions for cyberbullying (not specifically of cyberbullying but cyber-attacks) in the Information Technology Act, 2008 and Indian penal code, 1860. Cases for cyberbullying are increasing every day which has led India to be ranked 1st in the world. Due to the lack of the provisions as they do not cover the wider scope of cyberbullying victims are not served justice. Thus, India requires new, special provisions against cyberbullying.

Introduction-
Term cyber is been defined as of, relating to, or involving computers or computer networks such as the internet. It also includes electronic devices such as a computer, smartphone, laptop, tablet, and other devices that support the internet. Bullying can be defined as misusing the power as verbal, physical, or social by an individual or more on one or more person/s with the intension of harming them physically, mentally, socially or even psychologically.

Cyberbullying, where any individual or group of individuals intentionally can harm some on verbally, mentally, physically, or even psychologically by using electronic devices such as smartphones, computers, or any other internet supporting devices. Through cyberbullying one can commit many crimes such as defamation, harassment, criminal stalking, etc., In India, we do not have any special provisions for cyberbullying. Looking into the graph below we can understand the need for special provisions of cyberbullying in India.


Ipsos conducted a survey in 2018 in around 28 countries. Out of 3 families, one family's kids were the victim of cyberbullying in India, hence India was ranked 1 in “countries in which cyberbullying is more prevalent”.  

Cyberbullying includes-
Cyberbullying needs some platforms such as Instagram, Facebook, Twitter, or even email, etc. On these platforms, one can commit certain types of cyberbullying by using the internet and any of the mentioned platforms or more than one platform. Cyberbullying is of certain types  

1) Texting- When a person to harass or embarrass or threatening someone on social media i.e. (platforms of cyberbullying) via texting. Text wars i.e. when bullies gang up and attack the victim by texting together.  

2) Impersonating- When a person takes advantage of someone else identity by making others believe himself as the victim and commit wrong pieces of stuff such as texting offensive to friends, posting obscene material on the victim's profile, etc., which also knows in other words Fraping.  

3) Sexting- When a person with malice intention uses his or her obscene pictures, videos, GIFs, etc. on social media, where it can go viral among thousands and lakhs of people within an hour.  

4) Creating phishing links- When a person via using phishing links gets personal information of the victim and using that information to harass or threaten the victim is also cyberbullying.  

5) Video shaming- By making videos and commenting on a person in that video which you believe that viewers will believe this person as a victim or you directly make a video of a victim to harass or embarrass that person.  

6) Trolling- Troll is not always cyberbullying but such trolls are been made with the intention of harming the reputation of any person or any artificial person will also be cyberbullying.  

Cases of cyberbullying in India-
As per the reports cyberbullying has risen by 36% of Indian women and teenagers. There are certain reported cases of cyberbullying in India such as-

1. Ritika Sharma (name changed) case

1.1. Facts- Ritika studies in the prominent school of Delhi, after being stalked on Facebook by the Facebook user whom she had befriended a month ago. As she had shared her contact details and other personal information to a man later who was caught using her fake id by using her
picture and other details. As that man was forcing her to go on a date with him repeatedly so after being annoyed Ritika blocked him and stopped answering her calls. So later he found using her fake id and sharing her contact details with other unknown people and asked them to call on odd times.

1.2. The action was taken- Delhi police made an FIR (first information report) against that person under provisions of Information Technology Act\textsuperscript{1170} and Indian Penal Code\textsuperscript{1171}.

2. Bois locker room case\textsuperscript{1172}.

2.1. Facts- An Instagram group of boys in which 13 to 19 age group was involved where they used to share obscene, nude pictures of girls. Also, some of the boys discussed how to rape a minor girl in their school. Some of the screenshots of those chats gone viral and that created panic in the society.

2.2. The action was taken- while investigation this group was found to be of Noida school students, police have identified 27 students from the group. A student of class 12th aged 18 years has been arrested.

3. Chinmayi Sripada (famous south Indian Singer) case\textsuperscript{1173} of Madras high court

3.1. Facts- She is a well-known singer in south India and CEO of my entrepreneurial venture-blue elephant. To connect with her fans she uses Twitter, Facebook, and Instagram. She suddenly started facing problems in twitter in which few individuals threaten to kill her, rape her, or assault her. Also, they have posted obscene pictures of her on different websites. Later she complained about this to cybercrime.

3.2. Held- In this petition it was requested to quash the complaint filed by the respondent i.e. Chinmayi Sripada was was rejected and the petition was dismissed and High Court of Judicature of Madras directed the police to complete the investigation. This judgment was pronounced on 5\textsuperscript{th} August 2019.

Social media’s guidelines for cyberbullying-

1. Instagram guidelines-

1.1. Reporting harassment or bullying on Instagram\textsuperscript{1174}. If an account is made to harass or bully any person; or if a photo or comment is posted to harass or bully any person; or if you know someone is intending to be you or someone else on Instagram kindly report it. Everything posted which would be against the community guideline of Instagram would be removed by Instagram.

1.2. Community guidelines of Instagram\textsuperscript{1175}. One should never any such information on Instagram which is extremely personal or private. Any post or comment which spreads hate against any community, religion, sex, caste, or race is against the community guideline.

2. Facebook guidelines-

2.1. Steps were taken when any person is getting bullied or harassed\textsuperscript{1176}. Always remember these 3 steps whenever you are getting bullied. Unfriend such person from your account; block that profile from your account; finally report that profile. There are some additional tips to prevent yourself

\textsuperscript{1170}The information technology Act, 2000
\textsuperscript{1171}Indian penal code, 1860
\textsuperscript{1173}P Saravananakumar vs State rep. by its and Chinmayi Sripada, Cr.I.O.P.No. 232 of 2013 (India).
\textsuperscript{1175}Ibid.
\textsuperscript{1176}Facebook, help center, https://www.facebook.com/help/116326365118751 (25\textsuperscript{th} May 2020, 08:53 P.M.).
from getting bullied. Never react to such a post or comment or message which is intended to harass or bully you; never keep it a secret, share with your family or teachers; always keep a screenshot of that post or comment or message. In case of imminent danger contact local authorities.

2.2. Special guidelines for parents and teachers-
In case to keep an eye and keep your child or student from such harassment or cyberbullies kindly go to this website which provides you all guidelines which will help. [https://www.facebook.com/safety/bullying]

Provisions of cyberbullying in India-
There are several provisions related to anti-bullying in the Information technology Act, 2000 and 2008, and in the Indian penal Code, 1860. Even after having provisions for cyberbullying India is facing many other problems in the Cyberbullying problem. It is because of a lack of enough provisions. Information technology Act, 2000 and 2008 have certain provisions related to anti-bullying are as follows-

<table>
<thead>
<tr>
<th>Section</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>66A</td>
<td>Sending offensive messages through communication services, etc.</td>
</tr>
<tr>
<td>66C</td>
<td>Punishment for identity theft.</td>
</tr>
<tr>
<td>66D</td>
<td>Cheating by impersonating someone’s identity.</td>
</tr>
<tr>
<td>66E</td>
<td>Whoever intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person. &quot;private area includes nudity or any obscene part of the body&quot;</td>
</tr>
</tbody>
</table>

67 Publishing or transmitting obscene material in electronic form.
67A Publishing or transmitting obscene material containing sexually explicit etc. in electronic form.
67B Publishing or transmitting obscene material depicting children in sexually explicit etc. in electronic form.

Indian Penal Code, 1860 also includes provisions related to anti-bullying. All those provisions were not initially related to cyberbullying. These provisions are just related to the subject matter of the type of bully which is done on social media. Those provisions are as follow-

<table>
<thead>
<tr>
<th>Section</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>499</td>
<td>Publishing defamatory material will attract the charges of defamation.</td>
</tr>
<tr>
<td>500</td>
<td>This section of IPC deals with Email abuse.</td>
</tr>
<tr>
<td>503</td>
<td>This section of IPC deals with sending threatening messages on Email.</td>
</tr>
</tbody>
</table>
This section of IPC deals with words, act, or gesture which is intended to insult the modesty of a woman.

Critical analysis of why we need special provisions for cyberbullying:

In India, the age of the majority is 18 years, and the age of marriage for males is 21 and for females its 18 years. As for the crime of Rape age of majority is 16 years the same way we should have the age of majority for different types of crimes.

Cyberbullying can be done by different methods and all those methods include different crimes, such as when someone posts any picture of someone which is intended to harass or bully such person can include the crime of defamation. So, we can't just identify any specific punishment for cyberbullying. There are some following reasons why we need to have special provisions for cyberbullying:

1. Cyberbullying includes different crimes- It can include different crimes such as defamation, mental harassment, etc.

2. All juveniles are not of the same mindset- According to WebWise survey which was done in around 13 cities which included 2700 students and 83.5% were of 6-18 years. So it should be clarified in the special provisions about the age of majority in specific crimes committed through cyberbullying by juveniles. So that they do not have ‘juvenile card’ to get out of the legal proceedings.

3. India is the hub of cyber-attacks- Maximum cyber-attacks cases are been reported in India, therefore our legislation should urgently insert the special provisions for cyberbullying in the Information technology Act.

In the case of Shreya Singhal vs Union of India\textsuperscript{1180} section 66A of Information technology Act, 2000 was held as unconstitutional which was “Punishment for sending offensive messages through communication service, etc.– Any person who sends, through a computer resource or a communication device,– (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but to cause annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; (c) any electronic mail or electronic mail message to cause annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine. Explanation.– For this section, terms —electronic mail and —electronic mail message means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message”

The Supreme court stated that certain terms in section 66A of Information technology Act, 2000 were too ambiguous and uncertain so it was declared as unconstitutional.

\textsuperscript{1178} 83.5 percent of kids from 6-18 years active on social media, https://www.newindianexpress.com/cities/hyderabad/2017/may/10/835-per-cent-kids-from-6-18-years-active-on-social-media-1603038.html (27th May 2020, 12:27 A.M.).

\textsuperscript{1179} Supra footnote 3

\textsuperscript{1180} Shreya Singhal vs Union of India, A.I.R. 2015 S.C. 1523 (India).
Section 66A was the only section that dealt with offensive messages and due to no substitution of this section, there has been a lot of cases in which justice is not delivered to the victim.

One such case of Karnataka high court is Sri. Tajinder Pal Singh Bagga vs State of Karnataka\(^{1181}\), in this case, the victim was mass trolled on social media and also got offensive messages in which the victim was abused based on her caste and religion. People quoted that as she belongs from a downtrodden society so she deserved to be humiliated. She charged under section 3(1)(x) of SC/ST Act\(^{1182}\) which is:

Sec 3- punishment for offenses of atrocities
(1) whoever, not being a member of a scheduled caste or a scheduled tribe-
(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view.

and section 66A\(^{1183}\) of information technology Act, 2008 but she was not able to exercise section 66A as it was struck down in the case of Shreya Singhal vs Union of India\(^{1184}\) and therefore it this petition was dismissed by Karnataka high court and justice was not delivered to her. Special provisions of cyberbullying have to be inserted by the central legislation so that victims in India don't suffer and a guilty person gets appropriate punishment. As still, we lack the provisions when someone is getting trolled or someone is getting body shaming. People have the defense of truth but speaking such truth is harassing and bullying someone so there should be appropriate provisions that cover all the context related to cyberbullying.

**Conclusion**-
Since the start of the research paper cyberbullying term is been used everywhere and there are so many sources that tell us why we need special provisions for cyberbullying. After understanding the concept of cyberbullying and statistics of cyberbullying done in India by the bullies is increasing rapidly and there are so many cases pending and courts are making decisions based on 'Justice, equity and good conscience' and sometimes due to the lack in the victim of the provisions do suffer a lot. Hence all the findings and analysis of those findings indicate that we are in the phase where good laws related to cyberattacks and especially against cyberbullying is very essential.

\(^{1181}\) Sri. Tajinder Pal Singh Bagga vs the State of Karnataka, Crl.P 1117 of 2016 (India).

\(^{1182}\) The scheduled castes and scheduled tribes (Preventions of Atrocities) Act, 1989

\(^{1183}\) Supra footnote16

\(^{1184}\) Ibid.
ARMED FORCES PERSONNEL AT THE ALTAR OF JUSTICE: IS JUSTICE SEEN TO BE DONE? (NEED FOR AN INDEPENDENT AND IMPARTIAL INDIAN MILITARY JUSTICE SYSTEM AND TIME TO DISCONTINUE SUMMARY COURT MARTIAL)

By Harshika Kapoor
From UPES, Dehradun

INTRODUCTION

Independence and impartiality is the essence of any Court of law and is the core essentiality of any legal system, be it any major international human rights instruments or our Indian Constitution or our books of Statute. The readings of these instruments confirm that the Tribunal must, in all cases, be independent, impartial, and be established by the law of the land. This guarantee of independent and impartial Court under the rule of law dispensing fair trial while adhering to due process at all stages, makes a party to any dispute sure that their case shall be adjudicated by a neutral body, be it judicial or quasi-judicial.

In the context of Indian Military Justice System it may be argued that it is a self-contained system with appropriate checks and balances. The wide discretionary powers of the Commanding Officer (hereinafter CO) or the Convening Authority to determine which cases to prosecute, makes him the dispenser of favor or fortune, thereby marring the image of impartiality and independence and thus the perception of fairness to the public and the soldier. The recently instituted Armed Forces Tribunal by the Armed Forces Tribunal Act (hereinafter AFT), 2007, has in all fairness, given the Forces’ personnel the right for further Appeal, but it shall be more effective when the Military Justice System from the inception has both subjective and objective elements of an independent and impartial Tribunal established by law.

When the public in general talks about justice, they associate it as a matter of giving each their dues. In this research study, when justice is talked about in the military context, it is the aspect of procedural justice which can be attained by making and implementing decisions adhering to due process of law by which citizen soldiers are treated fairly. It is not sufficient to say that due to the overriding importance of maintaining discipline, it is justified to apply lesser due process and consequently argue that if any illegality or capricious or arbitrary decisions are made by the judges conducting trial by Court-martial, the AFT or the High Courts or the Supreme Court are available to deal with such improper decisions. Military as an institution should be just as it will in turn instill a sense of stability, wellbeing and satisfaction in its members and avoid perceived sense of injustice which might lead to dissatisfaction and a rebellious feeling. According to Michelle (Maiese, 2004), the principle of justice and fairness is central to procedural justice. She maintains that when procedure adopted in adjudication of a case are according to tenets of fair trial, people repose their faith in the adjudicators even when results may be detrimental to them.\(^{1185}\)

\(^{1185}\) Michelle Maiese, Procedural Justice beyond Intractability, (Guy Burgess & Heidi Burgess eds., University of Colorado, Boulder, 2004), available at <http://www.beyondintractability.org/bi-

www.supremoamicus.org 394
It should be understood that discipline in the Armed Forces cannot be maintained solely upon the fact that the superiors wield the power to make or break the subordinate if there is lack of implicit obedience to his order, but when the personnel have a feeling that their system is Just and fair they would unquestionably lay their lives for the Country. Just because they have voluntarily submitted themselves to the existing system with all its defects, it would be wrong to conclude that no reform is called for. Justice and discipline has not been equally balanced so as to make the Armed Forces Personnel feel that they belong, not to a separate class of people, but are the citizens of India.

HYPOTHESIS
1. Court-Martial as an institution is not an independent and impartial Courts due to lack of independence of the members of the Court-Martial Assembly.

2. Summary proceedings are inherently unjust according to fair principles reflected in common and international law in the way they are administered with a reduction of due process.

EXISTING LAW
After 15th August, the need for a general revision of the Indian Army Act, 1911, the Indian Air Force Act, 1932 and the Indian Navy Discipline Act, 1934 was critically felt. The revision therefore was taken up and the code of discipline applicable to the Armed Forces were made which is self-sufficient and complete in all respects, to meet the special requirement of the Forces. While absolute uniformity was not desired in the codes for all the three branches of the Forces, glaring inequalities were removed, wherever possible. The revision of the Indian Navy Discipline Act 1934 was delayed as recommendations of a special committee constituted in U.K for the revision of the British Navel Code were awaited. Finally on 27th December 1957, the Indian Navy Bill was passed by the Parliament with the assent of the Presidents.

COURT- MARTIAL PROCEDURE-INDIAN
All laws relating to Armed Forces, like any other organized service under the State or private sector, provide for certain offences or misconduct, a procedure for their investigation and also a forum for their trial and punishment. Efficiency and discipline being the paramount factors for guiding the Armed Forces coupled with its primary role to defend the Nation in time of war as well as maintaining internal harmony in natural and other calamities, Military Law has evolved to attain the same by enforcing a particular degree of behavior among its members.

The three wings of the Armed Forces, namely, Army, Navy and Air Force are governed by separate special enactments. The object of Military Law\textsuperscript{1186} is to provide for the maintenance of good order and military discipline among the personnel and also sometimes on the people who live and work with them. It has also been enacted with an aim to regulate certain aspects of administration, mainly those which effect individual rights. In short, Military Law is a code enacted by the Parliament\textsuperscript{2} to regulate the conduct of the members of the Armed Forces.

THE LAWS REGULATING DISCIPLINE IN THE ARMY (The Army Act, 1950)

Trial by a Court-martial is one such facet of

---

\textsuperscript{1186} Gazette of India, Part V, 602 (1949).
a soldier’s life that none should wish to face it. When the Mutiny Bill 1749 was debated in the British Parliament, the Earl of Westmoreland, in a powerful speech, denounced the institution of trial of a soldier by a Court-martial in the following words:

“What makes the people of this country more happy and secure than they are in any other, is that valuable privilege of being tried by their peers and by judges who understand the laws of their country, who are bound to be of counsel with the prisoner at the bar and who are as independent as it is possible for men to be made, consistent with the nature of mankind and the support of the Government; but by this bill, and indeed every former bill of the same kind, the Officers and soldiers of our army are entirely deprived of this valuable privilege. If any of them be accused of a military crime, they are to be tried by a law which admits of no jury, nor of any challenge, and by judges who understand nothing of the laws of their country should choose to die by the order and bowstring of a bashaw rather than by the sentence of a Court-martial, from whom I should expect neither justice nor mercy."\(^{1187}\)

These views were expressed more than two centuries ago, when there was nothing like Human Rights movement, when slavery was still in existence and soldiers were nothing but slaves or fugitives released from jail on their volunteering to fight for the King. With Human Rights awareness growing by the day and for a country like India, which boasts of (in the Preamble of its Constitution itself) ensuring Justice & Equality to all, provisions for trial of a soldier by a Court-martial engrafted in all the statutes governing the Armed Forces of the Union are nothing short of means of making them suffer injustice and inequality at the hands of their superior. The basic tenets of fair trial are missing, which, to any person would seem that the whole trial is one with deep implication of arbitrariness. The various forums under which an accused may be tried are enumerated below;

GENERAL COURT-MARTIAL
The General Court-martial\(^{1188}\) (hereinafter GCM), is one of the most prestigious Courts known to the Army Act \((\text{hereinafter AA})\) due to the power invested in it to try any person subject to the AA for any offence punishable under the said Act, and to award one or more punishments enumerated under Section 71 of the said Act.

Composition of General Court Martial
The GCM, shall have a quorum of not less than five officers, who have been commissioned for not less than three whole years and of whom not less than four are of rank not below that of a Captain.\(^{1189}\) The Convening Officers, depending upon considerations such as likely protracted trial, may increase the number of officers beyond the minimum of five.\(^{1189}\) It is desirable for the convenience of obtaining majority view on the findings and sentence that the numbers of officers so appointed are uneven. The Officer, who has had the opportunity to serve in any of the three services, shall be eligible for counting his commissioned service for the purpose of reckoning three whole years. Ante date of

---
\(^{1187}\) Parliamentary History of England: From Norman Conquest in 1066 to the Year 1803 426, (Printed by T.C. Hansard, Peterborough Court, Fleet Street, 1813), available at http://books.google.co.in/books?id=2pc9AAAA

\(^{1188}\) AA 1950, §113

\(^{1189}\) Id. at Note 2 of §113

www.supremoamicus.org
seniority shall not be counted towards the commissioned service for making him eligible to sit as a member of Court Martial.

AR 40 lays down certain restrictions on the composition of the GCM. Accordingly, as far as it seems practicable to the Convening Officer, Officers of different Corps or department should compose the Court and in no case Officers exclusively of the same Corps or department to which the accused belongs. Further, for the trial of an Officer, all the Members shall be of a rank not lower than that of the accused officer unless Convening Authority is of the opinion that officers of such rank are not available due to exigencies of public service. Such opinion should find place in the convening order itself. Thirdly, a Field Officer cannot be tried by a member below the rank of a Captain.

In addition to statutory restrictions, certain administrative restrictions have also been placed on the composition of the GCM, which may be summarized as under:-

(a) Where an officer of the rank of Colonel and above is available to sit as presiding officer of a GCM, an officer inferior to him in rank will not be appointed. In an eventuality when officer of the rank of Colonel is not available, the convening authority must obtain prior sanction of his next superior authority and state so in the convening order.

(b) When a CO of a unit is to be tried by a GCM, as many members as possible will be Officers who have held or holding command equivalent to that held by the accused.

(c) When the trial is likely to be prolonged, the Court will normally be composed of larger number of Members than the legal minimum of five. Correspondingly, more waiting Members must be detailed to meet challenges to the Members.

HEARING OF CHARGE BY COMMANDING OFFICERS

Whenever a person subject to Armed Forces Law is charged with an offence, he is liable to be dealt with by his CO in terms of the laws relating to Armed Forces. Disciplinary proceedings provided therein are similar to proceedings under Cr. PC, 1898, which was applicable to all Criminal Courts in the year 1911, when Indian Army Act, 1911 was enacted and Rules were made by the then British Governor General In Council. The only variance that was incorporated was that powers and duties of the complainant, The Police Officer (Investigation), The Magistrate (for taking Cognizance & Committal to trial), The Judge (in the matters of trial and sentencing the person accused of a military offence) and the Jailor (in the matter of carrying out of the punishment), all rolled into one and were vested in the CO.

JUSTICE AND ESSENCE OF INDEPENDENT AND IMPARTIAL INDIAN MILITARY JUSTICE SYSTEM

For any Court to render Just decisions, the Judges have to be independent of any kind of pressure, especially from the executive and enjoy complete decision making liberty. There should not be any reasonable apprehension in the minds of informed and prudent observer that the position and integrity of the Judges has

1190 Army Rule (hereinafter, AR) 1954, r 40, (definition of Corps- AR1954, r 187(3)).

1191 RA 1987, ¶ 459.
been or can be compromised leading to any bias. For the Military Justice System to be Just, independence of judges is not enough. The individual adjudicator (Presiding Officer and Members of the Court-martial) must be seen to be objective and impartial. In *Findlay v The United Kingdom*, the European Court of Human Rights observed that manner of appointment and term of office were indicative of guarantee against outside influence, establishing the fact that the Courts were independent. Further according to the Court, impartiality entails that the tribunal be subjectively free of personal prejudice or bias and must be also impartial from an objective viewpoint so as to diminish any legitimate doubt of impartiality.

**PURPOSE OF INDIAN MILITARY JUSTICE SYSTEM: JUSTICE OR DISCIPLINE**

It may be a matter of argument whether Indian Military Law - whose entire goal has been to foster discipline within the forces, calculably for being in a state of readiness and willingness to obey any order for protecting our nation- be significantly concerned with justice. In furtherance of the argument, there is a need to analyses both justice and discipline based systems as brought out by Gaya (Gaya, 1678) (cited in Lederer& Hundley 1994), according to whom those who champion the cause of discipline envision a system designed only to ensure prompt and total obedience to orders through fear of punishments and those who want a justice based system want individual offenders to be punished with all fairness and not for a dereliction they did not commit. Both the systems have their own pros and cons. 

Gaya (Gaya, 1678) (cited in Lederer& Hundley 1994), further says that first preference of any Commander first would be discipline based system as it operates swiftly, efficiently and economically. The drawback being that, if discipline is perceived as unfair, the personnel will likely distrust the superior authority have diminished institutional loyalty and will prefer mutiny to continued performance of duty. Justice based system focuses on individual accountability where one is punished only for the wrongs committed and proven with accuracy along with proportional punishment. Thus this perceived notion of fairness encourages individual responsibility and institutional loyalty. The shortcomings of such a system is that, accuracy requires a significant procedural process which is usually slow and expensive and depending upon the burden of proof used, it may yield acquittals of guilty persons, thus potentially calling the system into disrepute and encouraging violation.

Geared by this hindsight, it is pertinent that justice and discipline be balanced as far as possible according to the given circumstances of a case. It is also important that personnel of the Armed Forces believe that justice shall be done by fair and impartial trials, by independent and impartial adjudicators and adequate due process shall be provided to the military personnel accused of criminal conduct. The 1960 Powell Report (cited in Gibson, 2012), to the Honorable Wilber M. Brucker, Secretary of the Army, on the Uniform Code of Military Justice, Good Order and Discipline in the Army - a study

http://www.unhcr.org/refworld/docid/3ae6b66d1c.html (last visited 10 Mar 2020),

1193 Gaya, supra, note 1.
of the Military Justice System, especially on the status of the Unified Code of Military Justice (hereinafter UCMJ), speaks about the fact that justice and discipline go hand in hand though the distinction between them is very thin. The report referred to discipline being a state of mind to obey any kind of order and undertake any dangerous task and such a state of mind is necessary being a goal of the Commanding Officer. Such preparedness is not a characteristic of a civilian. And to make the soldiers disciplined it follows that their actions should be corrected. Conversely this corrective action would require being fair and just. Therefore one can safely say that both justice and discipline are inseparable.

CONSTITUTIONAL VALIDITY OF SUMMARY COURT MARTIAL PROCEEDINGS

Article 21 of the Indian Constitution and its interpretation has brought about a richer meaning to the rule of law and has over the years gone beyond the concept of due process clause (originally an American doctrine) incorporating substantive and procedural due process under Article 14 and 21 of the Constitution. In the foreword of the book penned by Abhinav Chandrachud, Ex Justice R.V. Raveendran, of the Supreme Court, says that the Supreme Court in their judgments have brought about a semblance of parity between procedure established by law and due process of law, thus impliedly importing and incorporating fairness in trial, right to be heard before being condemned, judgment only after trial and deprivation of life and liberty only after due process, as part of Article 21. Its ambit has further been enlarged with the right to counsel, the right to legal aid, and the right to privacy, among others, as parts of substantive due process.

Article 14 of Indian Constitution enunciates equality before law and equal protection of law which is fundamental to the Rule of Law. Legitimacy of a legal system is determined when each and every person is subject to the same laws. This requirement is also central to Article 14(1) of the ICCPR which states that, „All persons shall be equal before the courts and tribunals, SCM seen in the light of Articles 14 and 21 of our Constitution may seem to go against the true spirit and object of the Article. India is a signatory to the ICCPR Convention and hence obligated to follow its provisions.

In light of the international requirements of equality it could be argued that members of the Armed Forces are subject to Article 33 of our Constitution by way of which Parliament is empowered to abrogate certain rights of the service personnel, but nowhere is it mentioned that under Article 33 Parliament has the right to discriminate among members of the Armed Forces. This is exactly what has happened as The Supreme Court of India has held that though due to national security and for maintaining discipline some rights have been abrogated for the Armed Forces personal but they are also the citizens of India. Personal liberty is a cherished right and it should be deprived only under fair, just and reasonable procedure by an independent, impartial

---


and unbiased Judge of high integrity.

UNLAWFUL COMMAND INFLUENCE AND INSTITUTIONAL CORRUPTION

Unlawful command influence (hereinafter UCI) manifests when an authority wields power and influence (in the context of this study, the Convening Authority), upon the Court Members, the Judge Advocate, the witnesses or any other personnel connected to the Court-martial proceedings. This use of undue influence undermines the judicial process as well as affects the morale and confidence of the personnel in this system. It is interesting to note that in the Indian Military Justice System the term UCI does not find any definition or description in the Statutes governing the Military, nor is there any kind of prohibition on such use of undue influence or coercion, making it next to impossible for the accused to object to its application even though they are subject to it.

Corruption can take any form including institutional corruption like police corruption, judicial corruption, political corruption, academic corruption but this paper shall attempt to investigate into the corruption in the self-contained Military Justice System. When a person wields power and authority and abuses this position to maltreat, influence and coerce his or her subordinates he is perpetrating corrupt practice which is not motivated by economic or financial benefits but just a sadistic pleasure of using power for power’s sake. This kind of corruption concerning the institution, i.e. the Indian Armed Forces shall be the focal point of this chapter. In a way, corruption mushrooms under UCI.

WHAT CONSTITUTES UNLAWFUL COMMAND INFLUENCE

Lawful command influence by the commander in the justice delivery system is permitted while unlawful command influence is forbidden. UCI can exist in a variety of forms like actual, apparent or perceived. Actual UCI occurs when, under the totality of circumstances, the evidence could lead a reasonable person to conclude that command influence affected the disposition of the case and prejudiced the officers conducting the court martial, against the accused. The Hon’ble Supreme Court of India has observed that Courts-martial are ad hoc in nature and are simply executive Tribunals wherein the adjudicators are from within the chain of command of the senior officer appointing them. These officers in turn are dependent for their promotions, postings and annual reports on this senior officer the members of a Court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.

One can thus assume that Military Justice is prefabricated and pre-judged according to the wishes of the Convening Authority who is empowered to select the judge, defense and prosecution. It implies that it is his wishes to prosecute or not to prosecute, which ultimately are detrimental to the

---


1198 Lt. Col. PPS Bedi v Union of India, AIR 1982 SC 1413; Reid v Covert, 354 U.S. 1(1956) at 1174.
accused and this in itself a corrupt practice. The irony is that the Convening Authority does not suffer any kind of prosecution for committing such corrupt practices which tantamount to obstruction of justice and are an offence in the Military Law itself.

Take a hypothetical equivalent system designed for the rest of the Indian citizens, where the Home Secretary orders the Court to assemble as and when needed, with his bureaucrats as judges. Home Secretary appoints the prosecution and the defense counsels in addition. All judges and prosecution and defense counsels are untrained in law. He appoints only one legally qualified person as JA to the Court but he has only advisory role and his advice is not binding on the judges. He has no say in the award of punishment. The decisions of the Court are not mandatory till it is approved by the Home Secretary. How great will be the independence of such a Court and how fair will it be to the accused? Analysis of the High Court of Australia Judgment13 makes it clear, that Court-martial are created by Act of Parliament but violate of the Constitution. (Union Judiciary in our case). Judges have no tenure or freedom from the executive. Judgments are effective only if confirmed by the executive. Courts-martial are part of the executive and not the judiciary. Exactly same arguments are entirely true in the Indian context too with more conviction because unlike Australia, we have not even created Courts like Australian Military Courts (hereinafter, AMC).

In the United States of America Article 37 of the Unified Code of Military Justice (hereinafter UCMJ)1199 clearly spells out as to what constitutes UCI and any act especially trying to influence the Court-martial Members, under it as unlawful. It is time for the Indian Military Justice System to come out of the implied mode and to explicitly make UCI punishable under its Statutes. Thus actual UCI affects the fairness of a trial, while the appearance of UCI merely affects the level of public confidence in the Military Justice System. UCI was illustrated in an appeal in the Delhi High Court1200, in which officers underwent Court-martial for alleged offences and the Honorable Court held:

Law reigns supreme and that is the constitutional mandate in this country. The Military Intelligence Directorate cannot, under the parameters fixed under the Constitution and under the provisions of the Army Act and Army Rules, assume the role of a prosecutor and a judge of its own cause. To give an air of verisimilitude the respondents (military authorities) had held the Court-martial proceedings which are wholly void”1201

INSTITUTIONAL CORRUPTION AND THE EFFECT ON THE RIGHTS OF CITIZEN SERVICEMEN

The Theory of Institutional Corruption as espoused in the Stanford Encyclopedia of Philosophy18 provides that to be corrupt, an action should involve the corruptor or the corrupted and holds that the corruptor does not only perform the action of corruption but is morally responsible for such actions. An action is corrupt when it has a corrupting effect on the moral character of

---

1199 Unified Code of Military Justice (hereinafter UCMJ), art. 37
1200 U.C Jha, the Military Justice System in India: An Analysis, 194 (LexisNexis, Butterworths Wadwa, Nagpur, 2009).

a person or undermines the institutional process. We can call an action corrupt only when the corruptor intends or foresees the harm the said action would have caused. There is an asymmetry between the corruptors and corrupted. The corrupted are also to be blamed for letting them in such a position and as such are no better than the corruptors though their beliefs and intentions may differ. Also the corruptors may not necessarily be responsible for their corrupt actions. The person who does a corrupt act under institutional corruption has to belong to an institution and so does the corrupted. Institutional corruption involves institutional actors who corrupt or are corrupted. In this research study, Armed Forces are an institution and the Convening Authority, with his vast powers, is the corruptor and the Members of the Court-martial who are under his chain of command, are the corrupted.

One can come to a reasonable conclusion that it is not necessary that private gain be the motive for corruption by people holding public offices. In the Military context, from the perspective of Institutional Corruption, corruption may be caused by the defective and archaic Statutes, structures, processes and/or the actions or omissions of the actors (in this case the Convening Authority) in the system who are required to act as per the expectations. Pressuring decision-makers and witnesses has to be precluded to avoid overt corruption of the Military Justice system which will in turn maintain and to foster confidence among the service personnel and the public. Failure to recognize the possible vulnerabilities, threats or risks of corruption in the criminal justice system of the Armed Forces, shall be detrimental in the long run to the security of the country itself.

The mere fact that the Convening Authority stresses to the adjudicators of a particular case before the trial that their sentence should send a message and should act as a detriment to others, the resultant effect can only be guessed. „With this mantle of command authority the adjudicators of the accused toe the line of action, as implicitly given by the Convening Authority and the accused is left without any hope of a feasibly fair trial.“1202 The general concern regarding UCI is that the Commander has the ability to influence judicial proceedings and participants in such a manner so as to deprive the accused of his right to a fair trial.1203 There is no provision in the statues governing Military Law which can hold the Convening Authority responsible and accountable for the use of such implicit or explicit opinion and perception which potentially effects the rights of the service personnel. „The rights of the servicemen cannot be abridged completely either by the constitution nor by the statutes beyond what is the minimum need for the proper functioning of the land, sea and air forces in a war like situation.‖1203 The Supreme Court of India has observed: Our Constitution envisages a society governed by Rule of Law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the antithesis of rule of law. Equality before law and the absolute discretion to grant or deny benefit of law are diametrically opposed to each other and cannot co-exist.‖1204

1202 United States v Stombaugh 40 MJ 2008 (C.M.A 1994). (The language actually predates Stombaugh, but it effectively became part of the test for command influence in Stombaugh).


1204 Sudhir Chandra v. Tata Iron and Steel Co. Ltd, A.I.R 1984, S.C 064
The military Commanders role is wide and powerful and with this comes the problem of him using it in an arbitrary manner. „Because of this, the words of commanders warrant the greatest scrutiny.” According to Lindsey Nicole Aleman (Aleman, 2006, 171), „By establishing such a dominant role for the Convening Authority, the Military Justice System presents the potential problem of a commander using his power and influence in such a way as to thwart the fairness, impartiality and integrity of disciplinary proceedings.

THE UNIFORM CODE OF MILITARY JUSTICE

UCMJ, which was effective from 31st May 1951, was the result of the intensive study undertaken by the Forrestal Committee. Standard of procedural fairness in military trials was strengthened. Control of the Commanders over Court-martial outcomes was minimized. Civilian Courts for Court-martial appeals were instituted and the rights of the servicemen accused of an offence was duly accorded. The elimination of Command Influence was a major thrust area of this committee. The Supreme Court was also prompted to supervise Courts-martial but till 1983 only cases pertaining to Habeas Corpus, or Court of Claims were taken up.

The Court of Military Appeals which finally decides questions of law was the Court of last resort for each of the Armed Forces. It also acts with the JAG in an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying the defects in the system and its administration.

The salient provisions in UCMJ designed to oust command influence and bring about fair trial are as under:

a. The accused was given the Right to a Counsel at the pre-trial stage.
b. A charge was prohibited if there was lack of sufficient evidence or which did not state an offence.
c. Legally trained counsel for both the prosecution and defense was made mandatory.
d. Compelling self-incrimination was prohibited.

PERCEPTION OF INDEPENDENT AND IMPARTIAL MILITARY JUSTICE SYSTEM

It is an interesting fact to note that though under the UCMJ many feel that Military Judges are not sufficiently independent owing to the fact that their annual assessment, posting and promotion are still in the hands of the JAG as well as they do not have a fixed tenure, but the Supreme Court has held otherwise in Weiss case of 1994 stating that “Congress has achieved an acceptable balance between independence and accountability.” It was a year before in 1993 that the Navy Court of Marine had another story to tell. They spoke about the perceived sense of an observer as to the independence of the Judges due to the system of rating of the Judges.

1205 Lieutenant Colonel Lawrence J. Morris, This Better Be Good: The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases, DA-PAM- 27-50-306
1206 Aleman, supra note 20 at 171.
1207 Beth Hillman , Review (Reform), Chains of Command, Legal Affairs, (May- June 2002),
1208 Judge Advocate Generals School, supra note 34.
1209 Id
1210 Weiss v. United States, supra note 277
1211 United States v. Mitchell 37 MJ 903 (N.M.C.M.R 1993),
Even after constant changes in the Military Justice System, there still remains a perception in the minds of people about the independence and impartiality of this Justice System. Cox Commission, an independent group convened in 2001 by the National Institute of Military Justice to study the military criminal justice group, in its report recommended that the role of the Commanding Officers considerably reduced, and that the commander who presses charges against a service member no longer be responsible for the selection of Jurors. The Commission also recommended that the authority and independence of military judges be increased by granting them guaranteed terms of duty, so that they cannot be removed summarily if they reach decisions that are unpopular with their military superiors. The Commission’s report was treated with disdain. Yet another Act, i.e. The Military Justice Improvement Act of 2013 (S 967) wherein Commanders role in prosecution, selecting Court Members and post-trial role has been limited, is still pending to be taken up as legislation.

ROOM FOR REFORM IN THE INDIAN MILITARY JUSTICE SYSTEM

Till 2007 when the Armed Forces Tribunal (hereinafter AFT) was established by the Act of the Parliament, the Indian Military Justice System had successfully resisted any kind of change It was not merely a case of oversight by the Government and the top military brass, but also their stoic belief that the system was perfect with all the checks and balances. The citizen servicemen in such a system were devoid of any right to appeal against the decision of the Court-martial.

This need for providing an effective and important right of appeal was raised during the passing of the Army Act, 1950 and the Air Force Act, 1950, which was duly rejected by the Government. Though the Navy Bill, 1957 was modelled after the Lewis Committee Report, 1946 of the United Kingdom, the provision for an appeal against Court-martial orders was missing as it was maintained that an effective review was being carried out by the JAG. The main idea behind such resistance was mainly due to the fact that the Armed Forces in their quest for maintaining discipline needed a speedy administration of justice and in such a case a right to appeal would mean a lengthy process whereby the service personnel would be away from their duty to tend to their own case.

Just like the Findlay’s case which brought about remarkable changes in the United Kingdom's Military Justice System, the decision of the Supreme Court of India in Lieutenant Colonel P.P.S. Bedi’s case, which was in sync with the development in other countries like the Military Justice System of United Kingdom and The United States of America, can be said to have shaken the Indian Government from their stupor and made them start formulating a new course of action to give the much needed right of appeal to the Indian Soldiers. While stressing on principle of Natural Justice to be accorded to service personnel, the Supreme Court in 1990 held that though recording of reasons for an order passed in the Court-martial cannot be insisted under the Army Act, but the same would be desirable.
CONCLUSION AND RECOMMENDATION

The difference between the procedure established in the Armed Forces and other sectors of organized services is that while in other sectors only Service misconducts and misdemeanors is investigated and tried by in-house tribunals, in the Armed Forces of the Union, even civil offences can be tried by a Court-martial. While in-house service tribunals in other organized service sector can impose penalties having a service consequence only, like, suspension, stoppage of increment, recovery of damages, loss of seniority for promotion, dismissal from service etc., a Court-martial can always try an offence under the Indian Penal Code and award up to death sentence to the accused before it. And this is when the adjudicators trying the accused are not trained judges who understand the finer points and intricacies of law but are only lay Armed Forces Officers who have been chosen by the Convening Authority and made to sit as jury on the Court-martial. It is this vital difference that makes the Court-martial, the most dreaded word among the members of the Armed Forces of the Union.

The right to a fair trial is an important component of the Rule of Law wherein each individual must be able to avail his procedural rights. Practical difficulties cannot be taken up as an excuse to deny Defense personnel equal access to justice as their civilian counterparts. The Indian Constitution under Article 14 guarantees equality before the law and equal protection of law. This may be seen to an extent in the General Court-martial proceedings but are normally amiss during SCM. The Code of Criminal Procedure also provides that for a trial to be fair, the Trial must (hereinafter, SCM) be in an open Court. Right to a lawyer is guaranteed to an accused under Article 22 of the Constitution of India. Decisions of the court made without the accused having been provided a lawyer are not valid.

Access to justice does not limit itself to mere facility provided to all to get access to the Courts or have access to legal expertise; it embraces the Principle of Legality which presupposes that matters will be adjudicated in a fair manner by adhering to legal rules and not in an arbitrary manner departing from the rules established by law. Institutional autonomy is one of the major requirements that any Court must possess to be rid of any kind of interference. It should follow laws which are just, procedurally fair, in accordance with International Human Rights standards, not suffer from institutional corruption leading to unlawful command influence and have adequate legal accountability.

RECOMMENDATIONS

1. During the selection process, all ranks in the Indian Armed Forces must be made aware of their rights and duties especially affected by the provisions of Article 33 of our Constitution so as to free them of ignorance and motivate them to give their whole hearted consent and assent to being part of this prestigious institution.

2. Basic study of military law as part of curriculum in the mandatory promotion examination for officers in their formative years does not imbibe in them any finer nuances of law and thus lack the expertise to deal with cases based on principles of law and its interpretation while adjudicating cases in later years.
An annual „Refresher Course in Military Law“ is recommended to be conducted under the aegis of Judge Advocate Generals (hereinafter JAG) Branch for all officers in the service bracket of ten to twenty-five years and for which they be reported and rated fit to serve as Members of the Court / Presiding Officer of the Court-martial.

3. Study of Military Law is incorporated as a mandatory subject of the curriculum in the Law Colleges under the graduate studies thus bringing in general awareness among future lawyers and judges about functioning of the Military Justice System and helps them in arguing / adjudicating cases brought before them in its right legal perspective.

4. Disciplinary cases arising out of administrative matters are adjudicated by the Convening Authority / Commanding Officer so as not to undermine his authority in maintaining good order and discipline among the troops which is his foremost task. Cases of criminal nature are dealt by legally qualified JAG Officers.

5. The JAG Branch be taken out of the executive chain of command of the Armed Forces and placed directly under the Ministry of Defense with attendant monitoring systems and duly chalked out checks and balances.

*****
SEXUALITY AND IDENTITY

By Harshit Jain
From Christ Academy Institute of Law, Bangalore

INTRODUCTION
Sexuality of a person plays an important role in his/her identity and sense of self. Sexuality often refers to a person's sexual orientation or sexual preference and it tells whom you emotionally, mentally, physically get attracted to, this may be same-sex (homosexual), opposite-sex (heterosexual) or bisexual orientation (most genders). People around the world have been facing violence and inequality, and sometimes torture or execution the reason being on whom they love, how they look, or who they are. Sexual Orientation and Gender Identity are an integral aspects or oneself and no one should be discriminated or abused on it. The issue of criminalization of section 377 and homosexuality has been debated all over the country from ages.

SEXUAL ORIENTATION

Sexual preference of a person (male or female) termed as Sexual Orientation or it can be said as to in which gender a person (HE/SHE) is sexually attracted. The act of person or his feeling are used in order to say about the sexual orientation of the person as either heterosexual or homosexual or bisexual. Sexual Orientation, understood as to refer to each person’s capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. Sexual orientation refers to a person’s sense of personal and social identity based on those attractions, behavior expressing them, and membership in a community of others who share them. Sexual orientation is refer to the erotic attraction of a person. As in the case of

1. Heterosexuals, to members of the opposite sex;
2. Homosexuals (gays and lesbians), to members of the same sex;
3. Bisexuals, to member of both opposite and same sex;

Supreme Court of India in case of National Legal Services Authority v Union of India held that:

Sexual orientation refers to an individual’s enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc.

GENDER IDENTIFICATION
On a common note, Gender of a person is identified on his/her birth, but it is on the person one’s own conception as to identify oneself as Male or Female or Both or Neither.

Gender Identity: A person’s deeply-felt, inherent sense of being a boy, a man, or

sometimes also extends to include transgender and intersex persons

1215 Under conventional classification, in reference to sexual orientation, a person may be heterosexual (people whose sexual attraction is primarily towards people of opposite gender), bisexual (primary sexual attraction to both men and women) or homosexual (refers attraction to the same gender). This term

1216 https://yogyakartapriniclbes.org/preambule/

1217 APA, 2015a, p. 862

1218 WP (Civil) No 400 of 2012
male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics. Since gender identity is internal, a person’s gender identity is not necessarily visible to others.1219

There are some aspects of identity that cannot be taken for granted, including sexual identity and gender identity. While most people are born prepared to feel comfortable with their body's gender, and to desire sexual contact with members of the opposite sex upon sexual maturity, there have always been a minority of people who do not fit this mold.

Supreme Court of India founded that the right to self-identify one’s gender (Male or Female or third gender), was an important part of the constitutional right to live with dignity.1220

SECTION 377 OF THE INDIAN PENAL CODE
Section 377 of the IPC deals with Unnatural offences.—whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine fixed by the law. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. 1221

In simple terms, it refers to sexual intercourse done by a man, a woman against the order set by the nature with either any man, or woman or animal shall held liable and will be punished with imprisonment for life or for a period that may extend for ten years, and will be held liable to fine.

The SC of India since 1860 has tried to interpret the section 377 as to what exactly the word carnal stands for as the scope of the section has kept on widening.

The major issues that the courts in India started facing when dealing with section 377 was whether the section violates the fundamental right guaranteed by the Indian Constitution through Article 14, 15, 19 and 21:

1. Does it violate the fundamental right guaranteed under Article 14:
The Supreme Court held that where an act is arbitrary in nature then it is violating Article 14 of the Indian constitution.
The section’s main objective is of penalizing the unnatural sexual activities, which has no rational nexus to the classification made in sexual acts and thus it is violative of Article 14 of the constitution.

2. Does it violates the fundamental right guaranteed under Article 15:
The Indian Constitution clearly states that “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them” and, Therefore section 377 of IPC is violative of Article 15 of the Indian Constitution as it discriminates a person on his sexual orientation.

3. Does it violate the fundamental right guaranteed under Article 19:


1220 WP (Civil) No 400 of 2012

www.supremoamicus.org

Every person of the India has the right to freely express himself and The CJI held that Section 377 in its present form violated Article 19(1)(a) of the Constitution that deals with freedom of speech and expression.  

4. Does it violets the fundamental right guaranteed under Article 21 Supreme Court finally in the case of Navtej Singh Johar ruled that Section 377 of the IPC violates the rights to Life, Liberty, Dignity and Autonomy of personal choice under Article 21 of the Indian Constitution.  

LGBTQ RIGHTS  

When we talk about the rights of people belonging to LGBT community, The Supreme Court of United states explained in Romer v. Evans that there is nothing “special” about laws which prevent Laws which prohibit discrimination simply give LGBT people that basic right to be equal participants in the communities in which they live.” 

The landmark judgements in case of NALSA v UOI gave the right Equality: apex Court ruled that non-recognition of their gender denying transgender persons equal protection of the law. There was a constitutional obligation upon which the State was bound with the duty to ensure such equal protection proactively. 

Non-Discrimination: according to the constitution of India, Discrimination is prohibited in the country on a number of specified grounds, which includes “sex of a person”. The Court mentioned the term “sex” to include “gender identity”. Dignity: The Court found that since gender constituted the core of one’s sense of being, as well as an integral part of a person’s identity, recognition of one’s gender identity lies at the heart of one’s fundamental right to dignity.  

Right given in other jurisdictions around the world are:  

1. The Criminal Justice (Scotland) Act 1980 states that: A gay or bisexual man over 21 years having sex with a man or woman was made legal and they will not be charged as charged for committing a criminal offence. 

2. Employment Equality Sexual Orientation Regulation Act 2003: This law makes discrimination and harassment on grounds of sexual orientation in employment, vocational training and colleges and universities illegal.  

3. The civil partnership act 2007: This law extended the privileges to marriage to same sex couples in all but home. 

Rights to same sex marriages:  

2. Eight countries give same-sex couples most or all rights of marriage, including Denmark (1989), Finland (2002), Germany (2001), Iceland (1996), Switzerland (2007), United Kingdom (2005), and New Zealand (2005). Another 12 countries give some, but not all of the rights of marriage.¹²３⁰

Yogyakarta principles: Yogyakarta principles totally intends to human rights in relation to gender identity and sexual orientation and identifies the states obligations to respect and fulfill them. Some important recognitions were:

- People of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination based on sexual orientation and gender identity.¹²³¹

OBSTACLES TO JUSTICE IN INDIA BASED ON SEXUAL ORIENTATION AND GENDER INDENTITY

In India, since 1860 when the clause of 377 was added in the Indian Penal Code, the concept of sexual offences against the nature’s order was added and was made illegal. The fact that institutions like the family, schools and hospitals often perpetuate discrimination and are frequently the sites of abuse increases the risk that queer people will be subjected to human rights abuse.

From the very beginning, Gender identity and sexuality have been important areas in defining the cultural and national identity of India. A country where culture is imbued with morality, religiosity, normative values, customs and ages old traditions, acceptance of homosexuality was a struggle and seemed to impossible for the LGBT Community.

The legal system in India has been inconsistent with the obligations under the international human rights law to prevent discrimination and violence based on sexual orientation and gender identity.

A society where the homosexuality being considered as abnormal and, abuse is considered as a daily routine for people who identify themselves as Gay or Lesbian and harassment tolerance can takes place any time due to their sexual orientation. Such abuse in form of ragging and torture, mental harassment etc. when are faced by the young children and adolescent in schools and colleges and university leads to depression homeless and school/college dropouts, making them vulnerable and develops stress and reduces their self-confidence and affects their morals.

CASES

Various cases have evolved in India and the final judgement of The Indian Supreme Court regarding the matters of sexual orientation and gender identity, which are:

- Naz Foundation v. Govt. of NCT of Delhi¹²³²

In this case, the Delhi high court on 2nd July 2009 by giving the landmark judgement stating that Section 377 of the Indian penal Code is violative of the basic fundamental rights.

¹²³⁰ https://shodhganga.inflibnet.ac.in/bitstream/10603/45127/16_chapter%209.pdf
¹²³² Writ Petition (Civil) No. 4755 of 2001
rights guaranteed under the Indian Constitution in Article 14, 15 and 21. As section 377 is arbitrary in nature, criminalizes the sexual acts of people in private and discriminate people based on sex, and harms their dignity.

- Suresh Kumar Koushal & ORS. V. Naz Foundation & ORS

In this case, Supreme Court overruled the judgement given by the Delhi High Court in 2009 in the case Naz Foundation (India) Trust v. Government of NCT of Delhi and Ors, and once again criminalizes unnatural sexual acts; Supreme Court also stated that section 377 does not suffer from the vise of the unconstitutionality.

- National Legal Services Authority v. UOI

In this case, Supreme Court of India looking forward to the violence and challenges faced by the transgender people (Kinnar Community) while accessing Justice gave the right to self-identification of their gender identity to transgender people based on India by upholding the fundamental rights given/guaranteed by the Indian Constitution via Article 14, 15, 19 and 21 (i.e. Right of Equality, non-Discrimination, Rights of Expression and Dignity).

Supreme Court in this case observed that Sexual Orientation of a person to the attraction (emotional or physical) to other person.

Court observed that Gender Identity in one of the most important fundamental aspect of life. Gender identity refers to each person’s individual experience as to his/her gender, which may or may not correspond with the sex assigned to him/her on birth.

Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other.

“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.”

- Justice K.S. Puttaswamy & Anr. V. UOI

In this case, the nine judge bench of Supreme Court went to the extent of making this judgement as landmark judgement on 24, August 2017, held that by upholding Article 21 under part III of the Indian Constitution (i.e. one of the Fundamental Right guaranteed to the citizen under the Constitution of India), that it is duty of state to carefully balance the privacy of an individual and legitimate aim, at any cost, the Fundamental Right cannot be given to or taken away by state/law and all act should be in accordance and should abide by the constitution of India.

SUPREME COURTS FINAL VERDICT

Navtej Singh Johar & Ors. Vs. Union of India & Ors.

This case become the landmark judgement as the Apex Court was ask to deliver its final verdict on the same sex relationship in the country. The five-judge bench in Supreme Court on 6th, September 2018 unanimously struck down section 377 of IPC (Indian Penal Code) to the extent that it criminalizes the relationship between people who are attracted to same sex.

---

1233 special leave petition (civil) no. 15436 of 2009
1234 writ petition (civil) no. 4755 of 2001
1235 writ petition (civil) no.604 of 2013
1236 (2014) 5 SCC 438
1237 (2017) 10 SCC 1
1238 (2012) 10 SCC 1
(homosexuals) consenting adults. Individuals belonging to LGBT Community being allowed engaging in consensual intercourse in India.

Facts of the case

In this case, the petitioner (Navtej Singh Johar) who is a dancer identified himself to be part of LGBT community, filed a Writ Petition in Supreme Court seeking inclusion of “right to sexuality”, “right to sexual autonomy” and “right to choice of a sexual partner” to be a part of right to life guaranteed by Article 21 of the Constitution of India.

The Writ Petition also prayed for upholding Section 377 of the IPC to be Unconstitutional, as the language of the section is vague and is violative of the basic structure of the Indian Constitution. The three Judge bench of the Supreme Court looked to the importance, depth and seriousness of the matter, then it was addressed to the larger bench (five-judge bench) of Supreme Court.

Major Issues before the courts

1. Whether the section 377 is violative of Article 14, 15, 21 of the Indian Constitution.
2. Whether all sexual orientation (heterosexual, homosexual or bisexual) are equally natural and are established on consent of two individuals (adults) and none of them constitute to be a medical issue.
3. Whether the approach of Supreme Court applied in the case of Suresh Kaushal v. NAZ Foundation was appropriate.

Case Analysis

Court while adverting the concept of discrimination stated that, if any discrimination based on sex takes place then it is violative of article 15 and 16 of the Indian constitution and includes discrimination on grounds of Gender Identity.

Court founded that Sexual Orientation of a person is immutable and cannot change when desired, therefore the sexual relationship with people of same sex is their own choice and section 377 insofar have been discriminating them on the basis of their Sexual Orientation which is violative of article 14,19 and 21 of the Indian Constitution.

Starting the vagueness of the Section 377 which is core of the case, as the section states that any sexual act other than heterosexual is against the order of the nature and that is supposed to be accepted by the society. Moreover, the reason why people who identified themselves as part of LGBT community denied from the basic human rights and were treated as criminals in the society

Court founded that the criminalization of Section 377 has the effect of criminalizing the entire class of LGBT persons since any kind of sexual intercourse in the case of such persons would be considered to be against the “order of nature”, as per the existing interpretation.

However, the Supreme Court was able to bring a change after the case of NAZ Foundation v. Govt. of NCT of Delhi, as the court legalized homosexuality in the country. But in the case of Suresh Kumar Kaushal v. NAZ Foundation Supreme Court’s decision was overruled by Delhi High Court on grounds, that Section 377 only regulated sexual conduct regardless of gender identity and sexual orientation, and such sexual acts can’t be given priority over

---

1240 (2016) 15 SCC 619 (India).
societal value. However, in this case Supreme Court struck down the grounds mentioned above, and stated that rights guaranteed by the constitution is for every individual in the country.

Court by decriminalizing Section 377 have allowed people belonging to LGBT community to live with dignity, respect and fear free and allowing them to be a part of society where they are not pressed on the basis of different Sexual Orientation and Gender Identity rather considered to be a part of society where every individual is same.

CONCLUSION
Different sexual orientation or gender identity does not refers to any mental disease rather all orientation (sexuality) is same. Any abuse or discrimination based on person’s sexual orientation or gender identity whether torture, denial of family, medical treatment, jobs or recognition in society is violative of article 14, 15, 19 and 21 of Indian constitution as per the findings of the Supreme Court in case of Navtej Singh Johar and any person doing so shall be punished. It will not be wrong to say that the battle for rights and recognition of LGBT people in society is over, and society have started accepting them as they are. The future India will be of full equality were all genders will be recognized as equal, and were people are not discriminated based on whom they are attracted to. The judgement of 6th, September 2018 has upheld the self-esteem and self-respect of people belonging to LGBT and have realized them that the struggle that they have faced over ages is now over and now they will not be judged on how they express themselves, how they identity themselves and what their sexual orientation is.

REFERENCES
8. https://shodhganga.inflibnet.ac.in/bitstream/10603/191572/13/13_chapter%201.pdf

*****
DREADFUL EFFECTS OF FOOD ADULTERATION AND THE NEED FOR BETTER IMPLEMENTATION IN THE EXISTING LEGISLATION

By Ilakkiya K and Gowshini Athreya D
From SASTRA Deemed to be University

Abstract:
Humans have different options for everything. Not all human beings think in the same way or have the same taste. But one thing is common with all Human Beings. And that is called Food. Food is something that no one will refuse or avoid to take. Food makes a person stronger and gives energy, protein, and nutrition. So, that should be pure. Food is considered to be the ultimate medicine for us. If we have proper food, our health won’t be ruined. As we all are living in a fast-growing world, everything is instantly made, so that, there is no delay in our time. But food is being adulterated due to various reasons. Why food is being adulterated, and what made people to do this, what are the measures taken by our government to prohibit the food adulteration, and did the process of food adulteration is stopped after the implementation of certain acts are elaborately discussed in this paper. Thus in this paper, the authors try to stress the need for stronger legislation to overcome this adulteration.

Keywords: Food adulteration, Section 272 and 273 of IPC, Article 21, Section 7 of The Prevention of Food Adulteration act, dangerous effect.

Introduction:
"Let food be thy medicine and medicine be thy food." This was a famous quote said by Hippocrates. But in today’s modern world we can see that eating habits changes rapidly. In the olden days, every Indian family used to cook in their home with fresh and healthy ingredients. They know what ingredients they are using in the meal. As a result, they lived for longer days both healthy and happy. But in present, the whole situation is completely different. Most of the people eat at restaurants and prefer readymade fast food with rising income and prosperity. To please and attract the purchasers these food items are cooked through poor quality ingredients. In India, nearly 25 to 30 percent of food products are willfully adulterated. This peril does not stop with outside alone, one can find it in each and everyone’s kitchen when they come to know the fact that even basic food items like milk, coffee powder, sugar, pepper, honey, etc., are adulterated. Food is considered to be an essential source. But these adulterated food ruins one’s life. For instance, from the morning coffee till dinner everything we eat is adulterated. As a result one becomes powerless. This reminds a popular saying “when health is lost everything is lost”.

Food Adulteration:
Adulteration in simple terms means “Mixing up the unwanted ingredients to the natural food”. Making something poorer in the quality by the action of adding some substances is called as Adulteration. Food adulteration is the process of lowering the quality of the food. Food adulteration can be made either by the removal of vital components or by adding some substances which lower the quality of the food products. Artificial sweeter, washing soda, etc are some of the adulterant products. The longer usage of adulterated food causes health problems. For red chili powder, they will use brick powder for more color. To increase the quantity of the food item in raw form or in a prepared form adulteration is
done which results in the loss of the actual quality of food item.

**Types of food adulteration:**
There are 3 types of food adulteration.

1) Intentional adulteration
2) Incidental adulteration
3) Metallic adulteration

1. **Intentional Adulteration:** This type of adulteration is done willfully and with an intention. This adulteration is done to increase the profit of the product. Eg. In Turmeric powder, the yellow soil is added intentionally so that the quantity of the product will be high and the seller will get a good amount of profit. In red chili powder, the adulterant products are sawdust and brick powder.

2. **Incidental Adulteration:** Here, the adulterant products are found in the food material due to ignorance of the person, negligence, or lack of facilities. Eg. Small stones will be found in the rice, it is considered to be incidental adulteration as no one will intentionally make the stone to be present in the rice, it is the wind which causes the rice with the stone.

3. **Metallic Adulteration:** In this adulteration, the metallic substances are added intentionally or accidentally in the food products. Eg. Lead from water, pesticides are used by the farmers to increase the production of the products and to avoid the attacks of insects which is intentional in this type of adulteration. Fruits and vegetables are sold on the roadside so that the dust from the vehicles, are coated on the products which makes accidental adulteration in the metallic type of adulteration.

**How did this practice come into Existence:**
In Indian society, Food Adulteration is considered to be one of the serious offences. Adulterated food is considered to be more dangerous because, it contains more chemicals, which reduces the consumer’s immune system. Mainly, the food we consume is being adulterated because the companies want to increase their profit margin. For their livelihood, they adulterate the food which is risky for all the people who consume which is considered to be an unethical practice. There is no accurate period of when this adulteration practice commenced in India. To control the food adulteration, the government has enforced the “Prevention of Food Adulteration Act” (PFA) in the year of 1954. So from this, we can understand that the food is being adulterated before 1950 which is still in practice. Although the PFA has enforced, still the adulteration is going on and there is no end to it. So, the central government amended this PFA in the year of 1986 to impose stronger punishments. And the government enacted another act called “Food Safety and Standards Act” (FSSAI), in the year of 2006.

**Malicious intention trailing this debauchment:**
Mainly in order to illegally add some of the Impure Ingredients or to Substitute a Cheaper Ingredient for a more expensive one adulteration is done. The Reasons for Food Adulteration are as follows:

1. **To make maximum profit with fewer investments:**
The milk can be adulterated with water. It can be identified that water is cheaper than milk. So, adulterating the milk with the water makes it to sell at a higher price. Generally, the adulteration will make the product profitable, while the fraud goes undetected. It is mainly for the financial basis.

2. **Food adulteration is practiced as a business strategy:**
This act will come to an understanding after reading this example. We will consume some contaminated juice with some flavors such as orange, pineapple, etc. Because, to get the flavor of the orange fruit or grapefruit, they will add amino acids to make the protein profile appear normal, citric acid to adjust the acid ratio, etc., and in apple flavored juice, they may add Malic acids and other acids as preservatives which are considered to be harmful to our health. Moreover, they will mention a date as the expiry date. The hidden meaning of that term is that, if the food material is not consumed within that date, the food will be rotten. Till that date, it will not get rot as some chemicals are added. And to get the fruit flavor they add some chemicals for it to get that flavor. So, the food is being adulterated for the business to go on well. Because, if the consumers love the taste of the product, it makes them buy it repeatedly, this in turn increases the market for the business.

3. To cope up with the rapidly growing population:
The resources are very limited, so we can’t get the food materials. As the human population is increasing rapidly, it is difficult for the manufacturers to sell the unadulterated food items. For this purpose, the adulteration is made in the products. To satisfy the consumer’s needs who are in large numbers, the manufacturers adulterate the food items so that, they make sure the food is consumed all across the world or country.

Gives an adverse reaction on human beings:
As discussed before, the main reason tracing this adulteration is less input with more gain. Being exceptionally sensitive, human health shows side effects like vomiting, diarrhea, and dysentery to this food adulteration. Some of the adulterated food items and their effects on the human body are listed below;

<table>
<thead>
<tr>
<th>FOOD ITEMS</th>
<th>ADULTERANT</th>
<th>EFFECT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milk</td>
<td>Detergent, diluted water, chalk, urea, caustic soda</td>
<td>Highest chance of causing stomach disorders</td>
</tr>
<tr>
<td>Black pepper</td>
<td>Papaya seeds</td>
<td>Causes severe liver problems</td>
</tr>
<tr>
<td>Sugar</td>
<td>Chalk powder</td>
<td>Highly toxic</td>
</tr>
<tr>
<td>Ice cream</td>
<td>Washing powder</td>
<td>Causes severe stomach and liver disorders</td>
</tr>
<tr>
<td>Tea/Coffee</td>
<td>Same colored leaves</td>
<td>Causes liver infection</td>
</tr>
<tr>
<td>Turmeric powder</td>
<td>Metanil yellow</td>
<td>Leads to stomach disorders since it is highly carcinogenic</td>
</tr>
<tr>
<td>Wheat</td>
<td>Ergot</td>
<td>Is utterly injurious to health as it contains a poisonous fungus</td>
</tr>
<tr>
<td>Sweets</td>
<td>Silver vark, starch</td>
<td>Cause severe health issues</td>
</tr>
<tr>
<td>Rice</td>
<td>Brown rice, polished rice, plastic rice</td>
<td>Regular intake can</td>
</tr>
<tr>
<td>Fruits and vegetables</td>
<td>cause cancer</td>
<td>Damages body tissues, blood cells, the liver and the kidneys</td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------</td>
<td>----------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Wax, copper Sulphate, calcium carbide | - Adulteration of food or drink intended for sale.—Whoever adulterates any article of food or drink, to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.  
- Sale of noxious food or drink.—Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drinks, knowing or having reason to believe that the same is noxious, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

<table>
<thead>
<tr>
<th>Chili powder</th>
<th>Brick-powder, sawdust</th>
<th>Stomach problems</th>
</tr>
</thead>
</table>

### Prevailing Laws governing adulterant in India:

Several acts govern the Indian food processing industry and Food adulteration in India, they are:

- Indian Penal Code.
- The Edible Packaging (Regulation) Order, 1967.
- The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967.
- Vegetable Oil Products, 1992.

Punishment for producing and selling adulterated food or drink in India is stated under sec 272 and 273 of Indian Penal Code, sec 7 of Prevention of Food Adulteration Act, 1954, Food Safety and Standard Authority of India, 2006.

---

1241 See 272 of Indian Penal Code.  
1242 See 273 of Indian Penal Code.  
(III) Any article of food for the sale of which a license is prescribed, except following the conditions of the license,
(IV) Any article of food the sale of which is for the time being prohibited by the Food (Health) Authority,
(V) Any article of food in contravention of any other provision of this Act or any rule made there under,
(VI) Any adulterant.  

And sec 16 of PFA act provides penalties to various acts of adulteration.

- The Prevention of Food Adulteration Act was repealed by the Food Safety and Standard Act in 2006. This act is an important act which supervises food safety and standards. Under this act, there are various punishments for various acts of importing, manufacturing, storing, selling, or distributing adulterated products. It includes imposing fine to a certain period of imprisonment which extends to six years or more according to various acts in FSSAI. The FSSAI has recommended more stringent laws before the Supreme Court to punish those who follow adulteration. As per the amendments proposed the person who adulterates should face life imprisonment and a penalty of Rs. Ten Lakhs. But the sad truth is that the above-recommended punishment has not come to practice till date. The FSSAI also recommends the ban on the sale of junk food to school students.

Though many laws came to control food adulteration in India, the evil practice of food adulteration did not stop. The only way to overcome this practice lies in the imposition of new legislation with more stringent punishment.

**Governing laws in other countries:**

Many countries across the world have taken steps to prevent food adulteration. They are:

- **United Kingdom**
  In the UK, food legislation sets a minimum standard to ensure about food safety for society. They mainly try to focus on the following main key purposes,
  - protecting fair competition
  - safeguarding the consumers and manufacturers
  - offering freedom of choice
  The Food Act, 1984 in the UK was one of the main acts which was imposed to bring a major change. It was consolidated with previous food safety provisions but ended up in failure. But the Food safety act, 1990 acted as a check to food adulteration. It brought major changes and gave additional legislative requirements to food quality, safety, and trading standards. Additionally, for food safety, the UK also has General food law Regulation which was approved by the European Union. It created new laws on food safety.

- **Australia**
  Australia is one of the countries where food fraud prevails too much but goes unknown outside. Food Safety Australia New Zealand (FSANZ) was a joint initiative of Australia and New Zealand for food safety. It is an independent statutory agency and a part of the Australian Federal department of the health portfolio. It aims to develop the standards that regulate the use of ingredients, colorings, vitamins, and minerals in the food. It also plays a role in removing a product from sale, if it declares to have safety issues.
  In 2010, due to kidney illness, approximately 300,000 infants and six people died as melamine was present in the milk to artificially increase the protein.

---

1244 Sec 7 of The Prevention of Food Adulteration Act.
After that incident, food safety was even more considered to be one of the main factors.

✅ Africa
Africa used to be one of the backward countries in food safety. To one’s astonishment every year nearly eight lakh children alone died in Africa due to adulterated food which caused diarrhea and dehydration. But Africa came up with a bang in FSMS which includes the following measures;

- Incorporated a National Food Safety Policy
- Development of National Food Standards
- Food safety measures based on science-based risks
- Inspection mechanism and schemes
- Laboratory support services
- Information network on food safety issues
- Training and education on food safety
- Consumer awareness raising coordination of food safety activities at the national level
- Bio safety concerns
- Epidemiological surveillance of food borne diseases etc.,

✅ United States
The health threat to consumers has led to increase the food safety concerns. A rapid Raman Hyper spectral imaging technique was found in order to detect the food adulteration. Thus various countries across the world has taken various steps to overcome the evil practice of food adulteration.

**International treaties:**

- World Health Organisation (WHO): Regarding health, the World Health Organisation is one of the specialized agencies. It works through ministries of health and is an Inter-governmental organization. It aims to provide leadership on global health matters, provides technical assistance to countries, conducts world health survey to collect data on global issues, sets international health standards, etc., WHO has 194 member states as of 2020, which includes Austria, Columbia, Germany, Ghana, Madagascar, Argentina, Finland, Indonesia, India, etc., In the year of 1948, India became a party to WHO Constitution. Being a member of WHO India must abide by the rules of WHO. In that manner, it is India's duty to take care of the health of the inmates.

- Universal Declaration of Human Rights (UDHR) and the International covenant on economic, social and cultural rights indicates that:

  1. “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care…”

- “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and to the continuous improvement of living conditions.”

Since India has signed and ratified these two treaties India has the duty to follow what is mentioned in it.
Protection of health under the Constitution:

No person should be deprived of his life and personal liberty except according to the procedure established by law. Under the basic rights, health is considered to be one of the important rights. When we see to Article 21 it gives many interpretations. In that way, Article 21 guarantees everyone’s physical and mental health. The right to live with dignity which is enshrined in Article 21 is derived from the directive principles of state Policy and hence includes the protection of health, declared by the Supreme Court.

Article 21 applies to every citizen of India and hence protection of health applies to all. Since food adulteration affects one’s health and does not ensure the protection of health, it is an act that violates Article 21.

Need for stronger legislation:

Though there are many acts implemented so far, till date the practice of food adulteration has become an unending practice. Health is a magnificent treasures which one first treasure. India being signed in many treaties regarding the protection of health it has to make sure that every citizen is hale and healthy. And also food adulteration affects the fundamental right of protection of health under Article 21. Hence, the need of the hour should be taken to eradicate food adulteration from the country by implementing more stringent punishments and to bring into practice the laws which were already implemented.

Conclusion:

“Good Health is True Wealth”. As every person as the right to have food, shelter, and clothing it is also necessary that every person should live with good health. No one has the right to affect another person’s health and ruin their life either directly or indirectly. It not only affects one’s health it also affects the income of the farmers who produce natural foods. Thus, the authors stress that the criminal practice of adulteration should be fully eradicated from our country.

*****

1247 Article 21 of The Indian Constitution.
LAW OF ARBITRATION IN INDIA - THE CHANGING LANDSCAPE

By Jangyadatta Pradhan
From University Law College, Vani vihar, Utkal University

INTRODUCTION
The law of arbitration in India has been evolving to complement the needs of India’s globalizing economy. India’s intent to elevate arbitration as the preferred mode of dispute resolution, for both international and domestic businesses operating in India, has been well documented in the recent past. Over the past few years, there have been catena of pro arbitration judgments passed by the various High Courts and the Supreme Court of India, as well as legislative amendments to the Arbitration and Conciliation Act, 1996 (“the Act”) through the Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”) (the Act, as amended by the Amendment Act, will be referred to as the “Amended Act”).

At the emergence of the new arbitral regime, we brought to you an analysis of amendments proposed under the Arbitration & Conciliation (Amendment) Ordinance, 2015. The Amendment Act eventually received the President’s assent on December 31, 2015, and the Amended Act retrospectively came into effect from October 31, 2015. After two abandoned attempts to amend the law of arbitration in India – in 2001 and in 2002, the Amended Act has been a remarkable step towards remedying the blemishes to the law of arbitration in India.

We have reflected on the recent changes in the arbitration landscape in India since the introduction of the Amended Act and analyzed the impact of these amendments in both legal and practical terms. Previously, a brewing cause of concern for litigants was the surge in court intervention in arbitration proceedings in India, particularly ad hoc arbitrations. Over the last two years, the courts have made a conscious effort to follow the policy of minimal intervention, portraying India as both an arbitration friendly jurisdiction and a viable seat for arbitration proceedings.

THE MEANING OF ‘COURT’ FOR THE PURPOSE OF “INTERNATIONAL COMMERCIAL ARBITRATIONS”
Prior to the Amendment Act, in cases where in the High Courts did not exercise ordinary civil jurisdiction, the Principal Civil Court (i.e. the court subordinate to the High Court) would qualify as the applicable “court” for international commercial arbitrations.

The Amendment Act has expanded the definition of the term “Court” to include the High Court as the court of first instance for international commercial arbitrations (where at least one party is a foreign party), instead of the lower judicial courts.

Hence, the High Courts shall now exercise jurisdiction in all cases of international commercial arbitration.

This amendment will ensure that court matters pertaining to international commercial arbitrations are heard expeditiously, by commercially oriented and experienced judges. The amended provision essentially spares a foreign party with little knowledge of the legal system in India from having to litigate in the lower judicial courts, in remote areas of the country.

1248 Section 2(1)(e)(ii) of the Amended Act
THE CONCEPT OF ‘JURIDICAL SEAT’ IN INDIA

Through *Indus Mobile* the Supreme Court applied the international concept of ‘juridical seat’ in cases of domestic arbitration in India. The Supreme Court ruled that once the seat of arbitration is designated under a contract, it is akin to an exclusive jurisdiction clause and held, that the moment the “seat” is determined, the fact that the seat is at Mumbai, would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between parties.

In *Devyani International*, while the arbitration clause in the agreement fixed the “seat” of arbitration as Delhi, it also vested the courts at Mumbai with exclusive jurisdiction. Interestingly, despite vesting courts at Mumbai with exclusive jurisdiction and despite the cause of action having arisen in Mumbai, the court solely relied upon the position taken in *Indus Mobile*, and held that since the seat of arbitration is Delhi, the courts at Delhi would have exclusive jurisdiction to adjudicate the dispute between the parties. In *Antrix Corporation*, the Delhi High Court has taken a contrary view and has distinguished *Indus Mobile* on the ground that in *Indus Mobile*, parties specified the seat of arbitration as well as expressly granted exclusive jurisdiction to the courts at Mumbai whereas, in *Antrix Corporation*, while the seat was Delhi, exclusive jurisdiction was not conferred on the courts at Delhi. Based on this distinction, the Delhi High Court held that since the cause of action arose in Bangalore, courts at Delhi as well as Bangalore would have jurisdiction.

In *Roger Shashoua*, the Supreme Court ruled that “venue cannot be equated with the seat/place of arbitration” and when a court finds there is prescription for venue, the court must adjudge the facts of each case to determine the juridical seat. The Supreme Court found that since London was designated as the “venue”, in the absence of anything to the contrary, the “seat” was also London.

In context of international commercial arbitrations, agreements which only designate the “venue” of arbitration and not the “seat” have often surfaced in Indian courts. In *Hardy Exploration*, the arbitration agreement fixed the “venue” for holding the arbitration sittings but remained silent on the “seat”. In an effort to lay down the principles in determining the “seat” of arbitration when the “venue” is predetermined in the arbitration agreement, the Supreme Court has referred the *Hardy Exploration* case to a larger bench.

While drafting arbitration clauses, parties ought to carefully choose the seat of the arbitration. Further, parties ought to specifically confer exclusive jurisdiction on courts of a particular place. In our experience, conferring exclusive

---

1249 Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
1250 Devyani International Ltd. v. Siddhivinayak Builders and Developers, 2017 SCC Online Del 11156
1251 Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
1252 Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., 2018 SCC OnLine Del 9338
1253 Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
1254 Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
1255 Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., 2018 SCC OnLine Del 9338
1256 Roger Shashoua v. Mukesh Sharma, 2017 SCC Online SC 697
1257 Union of India v. Hardy Exploration and Production (Inc.) India, 2018 SCC On Line SC 474
jurisdiction on courts of the seat of arbitration will reduce the possibility of conflict on this issue in the arbitral proceedings.

SCOPE OF “INTERNATIONAL COMMERCIAL ARBITRATIONS”
Section 2(1)(f) of the Act earlier listed the criteria for an arbitration to qualify as an “international commercial arbitration”. For an arbitration to qualify as an “international commercial arbitration”, under the earlier Act, one party was necessarily required to be a foreign party, i.e. a foreign national, a foreign resident, a body corporate incorporated outside India, or a company or an association or body of individuals whose central management and control is outside India.

Therefore, the criteria for a body corporate/company to qualify as a foreign party was obscure in the Act i.e. while the Act provided that the place of incorporation of a company was a determinant factor, subsequently the Act also provided that the place of central management of the company would be a determinative factor. The Amendment Act, has done away with the criteria that a company whose central management and control is outside India would also qualify as a foreign party for an “international commercial arbitration”, and clarified that the place of incorporation shall be the only deciding factor in determining the nationality of a company.

TERRITORIAL APPLICABILITY OF THE ACT
The famed Bharat Aluminium judgment specifically disallowed the availability of provisions of Part I of the Act to foreign seated arbitrations. This adversely impacted the ability of a foreign party to get interim relief against an Indian party or assets located in India, in support of a foreign seated arbitration. Section 2(2) of the Amended Act has now extended the applicability of certain provisions of Part I of the Act, namely, Section 9 (interim measures by court), Section 27 (court’s assistance in taking evidence), and Section 37(1) (a) and Section 37(3) (appealable orders), to “international commercial arbitrations” seated outside India, unless expressly excluded by parties through an agreement.

POWERS OF THE COURTS
The Amendment Act has redefined the scope and nature of the role of the courts while referring parties to arbitration. In the Amended Act, the acceptable judicial intervention is minimal and limited to examining the existence of a prima facie arbitration agreement.

With respect to the powers of the court to grant interim reliefs, the legislature has made provisions to preclude parties from unnecessarily seeking intervention of the court to grant interim measures. For instance, once the tribunal is constituted, a party shall not seek interim relief from the court, unless the tribunal is unable to grant an efficacious remedy.

REFERRING PARTIES TO ARBITRATION
Section 8 of the Act provided that a judicial authority must compulsorily refer the parties to arbitration in a matter which is the subject of an arbitration agreement, if the party seeking reference makes an application “not later than when submitting his first statement on the substance of the dispute.” However, the Act was not clear on

---

the scope of analysis required by the courts in deciding whether a valid arbitration agreement existed between the parties. In the new regime, Section 8(1) of the Amended Act specifies that unless the judicial authority finds that *prima facie* no valid arbitration agreement exists, it must compulsorily refer the parties to arbitration in a matter which is the subject of an arbitration agreement. Thereby, reducing discretion of the courts in determining whether a valid arbitration agreement exists, before referring the parties to arbitration. Indeed, courts can always leave it up to the arbitral tribunals to determine whether a valid arbitration agreement exists between the parties, under section 16 of the Act – based on the principle of ‘kompetenz-kompetenz.’ For now, all the courts need to see is that there is a *prima-facie* arbitration agreement – its validity is of no consequence and is for the arbitral tribunals to determine, based on evaluation of relevant evidence.

DEFINITION OF “PARTY”
It is also worth noting that Section 8 of the Amended Act also allows “any person claiming through or under him [the party to an arbitration agreement]” to file an application under this Section. Given the change in the language of the provision to allow a party and “any person claiming through/ under him” to file an application for a reference to arbitration, judicial authorities now have an option to allow non-signatories to be joined as parties in appropriate cases. While this amendment expands the definition of the term ‘party’ under Section 8 of the Act, the definition of ‘party’ has not been altered in relation to other provisions of the Amended Act, such as Sections 9 and 11.

TIME FRAME TO FILE AN APPLICATION UNDER SECTION 8
Previously, the Act provided than an application under Section 8 shall be filed “not later than when submitting his first statement on the substance of the dispute.”

The Amendment Act has clarified the timeline to file an application by substituting “not later than when” with “not later than the date of submitting his first statement on the substance of the dispute.”

The court has interpreted the impact of this change in language in *Parasramka Holdings.*

In *Parasramka Holdings,* a preliminary objection highlighting the existence of an arbitration clause was made in the written statement of a suit, filed before the courts. The Delhi High Court adjudicated upon the question whether the said preliminary objection in the written statement could be treated as an application to refer disputes to arbitration under the amended Section 8. The question arose in light of the change in language in relation to application for reference to arbitration in Section 8(1) of the Act, from “not later than when submitting his first statement on the substance of the dispute” to “not later than the date of submitting his first statement on the substance of the dispute.”

INTERIM MEASURES BY COURT
The legislature has taken steps to ensure that interim measures can only be granted if parties really intend to pursue arbitration.

---

1259 Section 7(4) of the Amended Act
1260 Parasramka Holdings Pvt. Ltd. & Ors. v. Ambience Private Ltd. & Anr., SCC OnLine Del 6573
Under the newly inserted Section 9 (2), the Amended Act provides that in the event a petition is filed in courts to obtain interim relief prior to initiation of arbitration, the party filing such petition shall commence the arbitration within a period of 90 days from the date it has obtained an order of interim relief.

The Amendment Act has also sought to rule out unnecessary intervention of courts during arbitral proceedings. As per the newly inserted 9 (3) of the Amended Act, once an arbitral tribunal has been constituted, the court shall not entertain an application for interim relief unless it finds that the interim relief sought from the arbitral tribunal under Section 17 of the Amended Act would not be efficacious.

In our experience, in the presence of a valid arbitration agreement between the parties, the courts are consciously referring applications filed under section 9 of the Amended Act before the court, to an arbitral tribunal under section 17 of the Amended Act. As time is of essence, while making an order converting the application filed under section 9 of the Amended Act before the court, to an arbitral tribunal under section 17 of the Act, the courts are even appointing the arbitrator with the consent of the parties.

The Calcutta High Court, in Bishnu Kumar, clarified that the court’s power under Section 9 (3) is not automatically barred by constitution of an arbitral tribunal and that the court may grant relief if it finds that an order of interim relief by the tribunal would be inefficacious.

INTERIM MEASURES PENDING ENFORCEMENT OF FOREIGN AWARDS

Adopting the pro-arbitration spirit of the Amended Act, the Bombay High Court in the case of Aircon Beibars has secured the amounts due from a judgment debtor under a foreign award, pending enforcement of the award in India, by way of Section 9 of the Amended Act. The Bombay High Court through this order sought to ensure that the interests of a foreign award holders are protected pending enforcement.

In TRAMMO DMCC, the Bombay High Court allowed the holder of a foreign award to apply for interim relief in the court which enjoyed jurisdiction over the assets of the judgment debtor. The decision saves the award holder from the unnecessary hassle of deciding which court to approach, i.e. the court which enjoys jurisdiction over subject matter of arbitration or the court which enjoys jurisdiction over the location of the assets to be used for enforcement.

EMERGENCY ARBITRATIONS

While the Amendment Act has sought to reduce the scope of the court’s role in granting interim relief in relation to arbitrations, it has failed to codify a globally recognised concept of emergency arbitrations, which, under various institutional arbitration rules, can be approached for interim relief before the arbitral tribunal is appointed. This omission in recognising emergency arbitrators and the awards granted by them is conspicuous, given that institutional arbitration rules in India provide for emergency arbitrations for e.g. Mumbai Center for International

1262 Bishnu Kumar Yadav v. M.L. Soni & Sons & Ors., AIR 2016 Cal 47

1264 Trammo DMCC (formerly Known as Transammonia DMCC) v. Nagarjuna Fertilizers & Chemicals Ltd., 2017 SCC OnLine Bom 8676
Arbitration (“MCIA”) Rules, 2016 and Indian Council for Arbitration Rules, 2005. While Indian courts have granted interim reliefs in relation to foreign seated arbitrations under Section 9 of the Act, in cases of enforcement of interim reliefs in a foreign seated emergency arbitration, for example in Raffles Design1265 and Avitel1266, the courts till date have ruled that eventually a suit may have to be filed in Indian courts for seeking enforcement of such awards, or the courts may consider granting similar interim relief as the emergency arbitrator, after scrutinizing the merits of the interim relief sought, under a separate Section 9 application filed in Indian courts.

PROPOSED ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018
The Union Cabinet on 7 March 2018, approved the Bill. The Bill aims to amend the Act to improve institutional arbitrations in India by establishing an independent body to lay down standards, make the arbitration process more party friendly, cost effective, and to ensure timely disposal of arbitration cases.

The Bill has proposed to allow parties to directly approach arbitral institutions designated by the Supreme Court for international commercial arbitration and in other cases the concerned High Courts, for the appointment of arbitrators.

FORMATION OF THE ARBITRATION COUNCIL OF INDIA
The Bill provides for creation of an independent body namely the Arbitration Council of India (“ACI”) to grade arbitral institution and accredit arbitrators by laying down norms, and take all such steps as may be necessary, to promote arbitration, conciliation, mediation and other ADR Mechanism. The ACI shall be a body corporate and shall maintain an electronic depository of all arbitral awards.

TIMELINE FOR ARBITRATIONS
The Bill proposes to amend sub section (1) of Section 29-A to exclude international arbitrations from the bounds of timeline, and to amend the timeline to make an arbitral award in other arbitrations within 12 months from the completion of the pleadings by the parties.

APPLICABILITY OF THE AMENDMENT ACT
With the proposed insertion of Section 87 in the Act, the legislature also seeks to clarify the issues surrounding the applicability of the Amendment Act. The bill proposes that unless parties agree, the Amendment Act shall apply only to arbitral proceedings including related court proceedings, which commenced on or after the date the Amendment Act came into force.

As highlighted above, the Supreme Court in Board of Control for Cricket in India1267 held that the amended Section 36, would be applicable to applications filed under Section 34 of the Act (i.e. court proceedings), even if such applications were filed before the date of commencement of the Amendment Act. Interestingly, the Supreme Court has directed the legislature to reconsider

1265 Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors., 2016 SCC OnLine Del 5521
1266 HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. & Ors, 2014 SCC OnLine Bom 102
1267 Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors., Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]
Section 87 of the Bill in light of its decision in Board of Control for Cricket in India. While the Bill has been passed by the Cabinet, if enacted, this Bill will contradict the ruling of the Supreme Court with respect to applications filed under Section 34 of the Act.

CONCLUSION

The Amendment Act, coupled with the efforts made by the Indian courts, is facilitating India’s image makeover as an arbitration friendly jurisdiction. Not only have the Indian courts consciously implemented the provisions of the Amendment Act, they have adopted and extended the pro-arbitration stance to the un-amended provisions of the Act which helps bolster arbitration practice in India. For example, the apex court’s decision in Centrotrade Minerals, upholding the validity of two-tiered arbitration structure which provided for an appellate arbitration reaffirms the principle of party autonomy. The Delhi High Court’s decision in GMR Energy, recognising the arbitral tribunal’s competence to pierce the corporate veil to include non-signatories to an arbitration, shows the courts’ inclination towards globally recognised concept of minimal intervention in arbitral process. Further, the courts inclination to involve arbitral institutes in the proceedings is visible from Supreme Court’s decision in Sun Pharmaceuticals, wherein the court directed MCIA to appoint an arbitrator in an international commercial dispute. The apex court herein delegated its appointment powers to an “institution designated by such Court” as per the Amendment Act. The foregoing decisions are welcome additions to the jurisprudence on the law of arbitration in India and read with the Amended Act, they visibly reflect the efforts of both, the judiciary and the government, to make India an arbitration friendly jurisdiction.

1268 Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors., Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]
1269 Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228
POCSO – AN EFFECTIVE ACT OF THE ERA

By Jidnyasa Kshirsagar
From Maharashtra National Law University, Nagpur

INTRODUCTION.

Sexual offences in today’s world is considered as one of the heinous crimes of the era. It’s been impossible to completely eradicate it from the world specially from the country like India. There are wide ranges of the sexual offences which are categorized in the paper also the punishments for such offences. The main focus of the paper will be the sexual offences against the children that is below the age of 18, and the special act enacted in the year 2012 that is the Protection on Children from sexual offences (POCSO), 2012. The act gives a clear and wide image about such heinous crimes and the punishments as well.

The researcher will add up about the Indian penal code sections also which can be applicable for such crimes in order to increase the punishments or make it more harsh as well. The researcher will also deal with the duty of the police officials when such crime or offence takes place, also the procedure of the trial conducted after the crime has been committed will also be discussed in the paper as well. The Amendments made in the POSCO act in the year 2019 will also be discussed in detailed and it’s significance as well.

As generally as person who goes through all these things it becomes very hard for them to forget about it and move on specially when we talk about the children who are just below 18 and who are the survivors it’s very tough for them to cope up from such crimes henceforth the researcher will also be discussing about the mental health of the survivors of the sexual offences as sexual offences has a long lasting effect on anyone specially the ones who are the survivors it affects their physical health as well as their mental health.

OBJECTIVE OF THE PAPER

The main objective of the research is to well understand the meaning of the sexual offences, its essentials and the punishments awarded to the convicts. Also mainly the researcher will be discussing about the Protection of children from sexual offences Act, 2012 that is (POCSO) at its best it’s procedure, the duty of the police officials and procedure of the trial conducted on such offences also what is the child welfare committee and its working as well.

RESEARCH QUESTIONS

1. What exactly is the POCSO Act and it’s essentials?
2. How is the trial conducted in such offences?

RESEARCH METHODOLOGY.

The following research is the doctrinal research. All the information that has been collected by the researcher is the secondary source of information. The researcher in this research has used various different primary as well as the secondary sources various news articles various different case law, books POCSO Act has been specifically referred by the researcher.

PROPOSED CHAPTER
CHAPTER I

SEXUAL OFFENCES

Sexual offences occur when someone does not give their consent to any act which may be sexual or not. This offences can refer to a very broad range of any sexual behaviour which makes the victim feel uncomfortable or threatens the victim. It includes mainly:

1. Rape
2. Sexual touch

What is consent?

Consent can be termed as basically the agreement between the two people who agrees to get into any sexual activity. In this context, consent can be defined as the communication of both the people and in order to have any sexual activity every time consent is required it is mandatory to have consent every time there are some exceptions to it as well. Specially, if a child is under 12 years of age is legally understood that the child is not regarded to give a consent for any such activity and is the child does it by default in the eyes of law it is considered as an offence as child is undermined to give consent for such activities.

This range of crimes is considered under the sexual crimes. Sexual offences can be in two ways in person which can also be called offline or physically or it can also be done online that can be termed as the by the social media. Sexual offences is considered to be the heinous crimes of the era or in the society no one can ever predict or assume who can or who cannot commit the sexual offences it can be anyone. The occurrence of the crime is generally done by the strangers, friends, family, ex partners, current partners. Or it just can be anyone one cannot really rely or trust on anybody. Sexual offence is basically eligible for both the genders the crime can be done against a man or women too but the rate of sexual offences happening socially in the country like India the majority of the crimes are committed against the women by men. In order to get the clear picture of sexual offences as gender neutral it is prosecuted as a part of CPS violence against women and girls in which the VAWG strategy is been used indistinctly. This can be called as the overarching framework that addresses and identifies then the crimes of sexual offences are exclusively not been committed only by men against the women. CPS is determined and specialized to secure the justice for all the victims it is gender neutral. It ensures justice for the victims both men and women as well.

There are the wide ranges of the crimes that are categorized under the sexual offences. Some of them are as follows:

1. Domestic abuse – Domestic abuse is something which is seen generally everywhere day by day it occurs specially in the family matters in the argument of husband wife or between any of the family members it is been seen.

2. Rape – This is the most harsh and very commonly seen crime in specially country like India the number of rape cases in India has always been increasing. In one of the survey it is been observed that daily in every hour there are 3 girls raped in an hour. Which is really a big disappointment for the country.
3. Sexual offences – it is anything in simple language it can be termed as the unwanted touch of making a person uncomfortable by the acts or the way you touch the person.

4. Stalking – this can be termed and done both online as well as offline stalking is something which terms to following the person in person or on social media without the knowledge of the person and his permission.

5. Harrasment – Harassing the person sexually or sometimes mentally or blackmailing the person because of something which creates problems to the person can be termed as the Harassment.

Honour based crimes are also included in the sexual offences as they are also related with the sexual assault of the person they are.

1. Forced marriage – this is also a common problem in the Indian society many girls even the boys are forced to marry without their will which creates problem for them sometimes it is also seen that many young girls who are below the age of 18 are also forced to marry which is illegal in our country.

2. Female genital mutilation – This is followed in many religions and traditions it is basically something where in the name of religion or something the females genital organs are removed or cut off it is illegal in many countries and this process is carried out non medically which is really risky with the life of the women.

3. Child abuse – when the children are constantly abused by anyone it can be whether any stranger family member friends etc. Abuse includes bad words, taunts, pointing out in every work, creating negativity among the children etc.

4. Human trafficking mainly focusing on the sexual exploitation – Human trafficking is basically the selling of the humans it can be children, girls, boys, senior citizens anyone. Mostly the trafficking of young girls is been observed for the sexual purpose they are used as the business objects for some people to sell and buy them in other countries or throughout the country as well.

5. Prostitution – it is something where the business of sex is carried out many girls are forced into this profession but it is illegal in many countries. Human trafficking victims are mostly found in this business are they are forced to do this.

6. Pornography – When the private pictures of the person the pictures basically which can cause damage to the image of the person or any videos can also be termed as the nude pictures and videos of the person leaked without the knowledge and permission of the person is termed as pornography.

Child abuse and the sexual offences are termed as very serious crimes that can have the long lasting effect on the victim as well as the survivors and sometimes on the convicts too.

CHAPTER II
POCSO ACT 2012

Protection of children from sexual offenses this act was made in the year 2012 and amended in the year 2012. It was basically made for the safety, security and dignified childhood for every child also the main aim of the act to be made was to make the provisions for the enhancements for the various offenses. Some of the salient
features of this act and it’s amendments are as follows
1. This act was made gender neutral with the best interest of every child at every stage of his childhood and also to ensure the physical, mental, social, emotional, development of every child.
2. Every child who is below 18 years is well defined in this act.
3. This act has also included different forms of the sexual abuse in a clear view it includes
   a) Penetrating offenses
   b) Non-penetrating offenses
   c) sexual harassment
   d) pornography
It also deems sexual assaults to be aggravated under various circumstances when
   a) When the child who is being abused gets mentally ill
   b) When the abuse is done to a child by or a child by a person who is in the position of or interest of trust it can include the family member of a child, any police officials or teachers or the doctor the trafficking of the children has been also included in this act for the sexual purpose harsh punishment has been awarded to a convict.
   c) Child pornography is also been defined any of the visual deflection of sexually explicit conduct of a person involving a child which majorly includes videos, photographs, digital or computer generated images also the actual child’s indistinguishable form and image created and modified or adapted but appears to depict a child respectively.
According to POSCO Section 3 the definition of penetrative sexual assault has been defined as if any one penetrates his penis at any extend into any ones vagina, mouth, urethra or anus of any child or makes the child to do so with himself or any person also if a person inserts any of the object or a part of his body into child’s vagina, urethra, mouth or anus, makes the child to do so with any other person also if a person manipulates any part of the body of the child which causes the penetration into the vagina, urethra, anus or any part of the body of the child and to do so with any other person also if a person applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so with any other person will be deemed as penetrative sexual assault.
Now sexual assault is also defined very clearly in the POCSO act in section 7 that any person who having a sexual intension if he touches the child’s vagina, penis, anus, breasts or makes the child to do so with himself or any other person which can also involve physical contact without ant penetration is said to commit the sexual assault.

CHAPTER III
PROCEDURE OF POLICE OFFICIALS.

There is a given specific procedure of the police officials according the protection of children from. Sexual offences act, 2012 (POCSO) respectively. As the concern is mainly about the children in the act so it becomes very important to handle such cases delicately in order to preserve the mental health and well being of the child who has been survived from such offence. There are various rules guidelines or can say duties of the police officials while handling the POCSO cases. Some of the duties of the police are given as follows.
1. As the rule 4 (1) of the POCSO act defines the main duty of the police is to provide all the information to the complainant when the police officials receive such information of the crime committed or where the crime is about to be done. The information that need to be provided by the police to the complainant is
   - Name and designation of the officer.
   - Address and the telephone number.
   - Also all the contact details, name, designation of the police officer who is being supervising the case.

2. As per the rule 4 (2) of the act when the information of the offence or where the offence is about to happen if such information is received by the police officials it’s the duty of the police official
   - To register the First information report that is FIR.
   - To provide a copy of the FIR to the complainant.
   - If there is an medical emergency of the child it is the duty of the police to provide the medical facility to the child as soon as possible.
   - The child should be accompanied with his parents, guardian or any person who is the position of trust with the child to the hospital.
   - To ensure the collection of the forensic examination as well.
   - To ensure that the child and his parents has all the necessary information about all the procedure also about the support person and legal advice and also the right to be represented as the lawyer as well.

3. The rule 4(3) of the POCSO Act it clearly states that when the child is being exploited by the person in position of trust of any family member or where the child is being residing or where the child shared the household also the child who is without any parental support is also eligible to seek the help of police to produce the child in front of the child welfare committee within 24 hours as it is mandatory also to provide all the information report in writing to the Child Welfare committee as well as to produce the child in front of the social court with the report of the information of the offence given by the support person in writing and in special court also it is mandatory to produce the child in 24 hours as well.

4. Rule 4(11) states that the it’s the duty of the police to inform about the developments of the case or the arrest of the accused and also various petition filed or application to the parents of the child or the support person or the Guardian respectively.

5. Rule 4(12) gives the basic information of the details that should be informed to the parents, support or the Guardian of the child are as follows.
   - All the available medical care.
   - Arrest of the convict.
   - Any release or the bail of the convict.
   - Available compensation for the victim.
   - Punishment awarded to the convict.
   - All the procedural steps that are involved in the criminal prosecution.

6. Rule 5(3) states that no medical practitioner will be demanding any legal magisterial requisition in order to render any medical service or care.

CHAPTER IV
TRIAL PROCEDURE.

There are some of the specific provisions for the procedure of the trial of the reported offences in the POCSO act
Establishment of the special courts for the trial of the offences has been implemented under the POCSO act.

- The procedure should be totally child friendly in order to report, recording the
evidence and investigation of the offence which also includes

- The recording that should be done of the child is mandatory to record the statement at the residence of the child or at any place the child chooses to do so.
- It is preferred that in order to record the statement a woman police official which will not be below the rank of sub inspector is preferred.
- The child will not be detained in the police station in the fight in any circumstances.
- The police official while all the recording of the statement should be in the civil dress.
- The statement should be recorded only in the language that the child is comfortable with or speaks the official can take the assistance of any translator or the interpreter or any expert as per the child needs.
- The assistance of the special educator is also available of the child is special or disabled.
- All the medical examination that is conducted should only done in the presence of the parents of the child or the Guardian or the support person or the person who is in the interest of position of trust respectively.
- The medical examination should be conducted by the women doctor if in case the victim or the survivor is a girl.
- Aggressive questioning to the child or any kind of character assassination is strictly prohibited of the child when the in camera trial is been conducted.
- A child can ask for break he is free to have 13 frequent breaks during the whole trial.
- The child cannot be called by anyone repeatedly to testify.

CHAPTER V
SPECIFIC LAWS

There are laws against such offences in both the POCSO Act as well as the Indian penal code as well. According to the POCSO Act, 2012.

- Section 3 that is penetrative sexual assault according to this section the convict is awarded the imprisonment not less than ten years it can also extend for the life imprisonment for life and fine. Specially if the assault is against the child who is below 16 years is punishable for the imprisonment of not less than 20 years and fine and also can be extended for the life imprisonment.
- Section 5 of the act that is aggravated penetrative sexual assault , the punishment of not less than 20 years is awarded and the accused is also liable to pay the fine and the imprisonment can also extend for the life imprisonment as well under section 6.
- Section 9 that is sexual assault it clearly states that any person who gets into a sexual contact with a child without penetration will be awarded punishment of not less than 3 years which may extend up to 5 years and will also be liable to pay the fine as well under section 8.
- Section 11 that is sexual harassment the punishment is awarded as three years imprisonment and liable to pay the fine under section 12 respectively.
- Section 14 that is use of the child for the pornography purpose in this the imprisonment is not less than 5 years and liable to pay the fine with the event of the subsequent conviction can extend up to 7 years and fine under section 14(1).
- Use of child for the pornographic sexual assault is also punishable with the imprisonment of not less than 3 years which may also extend up to 5 years.
The offences which are punishable under the Indian penal code sections are:
Section 166A, section 354A, section 354B, section 354C, section 354D, section 370, section 370A, section 375, section 376, section 376A, section 376C, section 376D, section 376E or section 509 respectively.

The Indian penal code provides the punishments with a greater degree for such offences. The act is an addition to such offences and not the derogation for may other provisions of any other laws. The POCSO Act is only applicable for the children below 18 and also applicable only for the child victim of survivor and the adult offender. If in any situation two minor children having sexual activity or sexual relations with each other will not be held in this act in such cases the provisions of Juvenile Justice board that is for the care and protection of the children act, 2000 will be applicable.

CHAPTER VI
SEXUAL ASSAULT AND MENTAL HEALTH.

It becomes very tough for the survivors to cope up from all the problems and trouble that they have faced it affects their mental health at a large extent and becomes very difficult for them to move on and go back to their normal life again. The survivors start to feel that their bodies are no longer their own they start to disown their body they feel so guilt in them and shame as if it’s all their fault and starts to blame themselves for whatever happened to them. Due to all this trauma and all the negative emotions their mental health starts to damage and collapse day by day according to the research the sexual assault survivors may face the following mental health conditions.

- Depression – this create them the feelings of no hopes or the despair themselves from everything and they stop to realise their self worth.
- Anxiety – many times it had being observed the survivors gets the constant panic attacks they are always afraid always have the fear that the attack may happen again and sometimes the chronic fear happens and they start getting afraid of the type of person who has done this to them.
- Posttraumatic stress (PTSD) – This is something which is very common and seen in the survivors it create very intense memories of the abuse in their mind they start getting flashbacks of what has happened to them also experience the personality disruptions as well.
- Addiction – Researchers had observed and suggests that the sexual abuse survivors there are 26 times more chances of them getting addicted to drugs or alcohol or any addiction as they helps to numb the pain of the abuses done in the past.

CONCLUSION

The researchers has Discussed all the elements and each detail regarding the POCSO ACT AND SEXUAL OFFENCES at its best. One can conclude that what can amount to sexual offences it’s essentials and the POCSO act and its essentials as well. The procedure of police officials and the trial procedure can be concluded as the effective and significant for the process of the justice in such offences as well. It is also observed that the harsh punishments are awarded to the convicts including liability to pay the fine as well and not only POCSO provisions but also Indian penal code provisions are also available to award the punishments in a greater degree for such
offences as well. The mental health of the survivors of the sexual assault is also being understood at its best.

REFERENCES

- https://www.cps.gov.uk/sexual-offences
  3rd May, 2020, 11:50am.

  8th May, 2020, 12:20pm.

  11th May, 2020 2:01pm.

- https://www.google.com/search?xssi=AL
  eKk01hdZwJs7oOLYV7K4vAW2t16ND
  W3LZC5rQ84oWICA&q=sexual+offences+act+of+Indian+Constitution
  18th May, 2020 4:30pm.

  22nd May, 2020, 10:00 am.

- https://indiacode.nic.in/handle/123456789/2079
  29th May, 2020, 1:00 pm.

- https://indiacode.nic.in/show-data
  ?actid=AC_CEN_13_14_00005_2012
  30th May, 2020, 2:30pm.

- https://www.google.com/search?xssi=AL
  eKk01pVh2Oxf5cnJLZykjycV3NSvYnaw%
  30th May, 2020, 3:00 pm.

  30th May, 2020, 3:23pm.
WAR OVER LANGUAGE: CRITICAL ANALYSIS OF THE MOST CONTROVERSIAL PART OF CONSTITUTION THROUGH CONSTITUENT ASSEMBLY DEBATES

By Kartik Gupta
From Maharashtra National Law University

1. Introduction

“How shall we promote the unity of India and yet preserve the rich diversity of our inheritance?” – Pt. Jawaharlal Nehru

This question paves the way for the essence of Part XVII Constitution i.e. Official Language. This Part though may not receive much importance in the present times as it is rarely seen as a point of contention or reference in courts, but at the time of the drafting of Constitution it involved the most heated debates. The Part ranges from Article 343 to Article 349 and is titled as the Official Language. Firstly, it specifies Hindi as the official language of the Union while permitting use of English for official purposes but for a limited period of time. In addition to this, it recognizes and protects the continuance of regional languages in their respective states. Thirdly, it specifies the language to be used by the judiciary in courts and by the legislature in passing of bills and acts. Lastly, it has certain special directives with the aim to promote Hindi and protect regional languages.\(^{1272}\) The legislative intent of this Part was to recognize the plurality of language and unite people from linguistic groups in harmony, in which it succeeded.

This issue seems to be settled in present times and therefore no heed is given to it, but it becomes extremely crucial to realize the value of this Part at the time of Drafting of Constitution. The language of the Union and provincial civil services meant money and social status to the middle and upper classes as their primary source of prestigious employment was through their services. This issue gained traction also because it involved the cultural and historical pride of the linguistic groups and in case of Muslims and Sikhs particularly, religious sentiments. For these reasons, the Constituent Assembly Debates (hereinafter referred to as “CAD”) with respect to language occupied significant time and relevance.

The objective of this present paper is to chronologically analyze the developments of the CAD which led to the coming up of Part XVII. This paper shall briefly analyze plethora of perspective which were taken into account in deciding the questions related to language by the members of the Assembly. The scope of this paper will be limited to critical study of CAD primarily. There will be neither any elaboration on the development of this Part after the Constitution was drafted, nor any scrutiny of case laws. The researcher has used a doctrinal method of research by studying the original CAD, Commentaries and Digests on the subject.

The paper will be essentially divided into three segments. The first part shall focus on the initial points of contention at the time this subject was taken up for consideration. The second part will cover all the opposing views of different groups amongst the Assembly while the last part will show how was the agreement reached amongst the

---

members which led to the draft of present Articles.

2. Issues of Contention and Division within the Assembly
The language provisions as seen in the present day context were a result of a compromise. This compromise was reached primarily between two groups. The first group was of Hindi-speaking Assembly members (hereinafter referred to as “Hindi Supporters”) from the provinces of North-central India, led by a hard-core of linguistic extremists. This group believed that Hindi should not only be the ‘national’ language by virtue of an inherent superiority over other Indian languages but it should replace English for Official Union purposes immediately or in a very short time. It also held that Hindi should soon replace English as the second language of the provinces. ¹²⁷³

In opposition were the moderates, who believed that Hindi- which they defined much more broadly- might be declared the ‘official’ language of the Union because the largest number of Indians spoke it. It that it should simply be the first among equals, the other regional languages having national status. This faction demanded that English as the de facto national language, should be replaced extremely slowly and cautiously. Nehru, joined by several other Assembly leaders, led this group.¹²⁷⁴ The other moderates came largely from South India, Bombay, and Bengal, areas where Hindi was not spoken and English had been the only link between speakers of the regional languages.

This was not the only matter of dissent, there were other questionable subjects also which even divided the Hindi supporters. One of them was related to the length of time English should continue to be used as the language of government and the status to be accorded to other regional languages. The other major issue was the definition of Hindi. Though it may not appear to be a major matter of concern, but this was severely debated upon in the Assembly. Some members said that Hindi is the Hindustani which includes the language which was commonly spoken and included words from Urdu, Awadhi, etc. while other believed Hindi to be the purest version with traces of Sanskrit present in it. The last matter of concern was regarding the language of the numerals. Some believed that International systems of Numerals should be used while others wanted Hindi Numerals to take over. All these issues are discussed in detail in the rest of the paper.

3. Development of Arguments and Conflicts in the Assembly
The primary issues discussed above will now be seen in detail, with the justification offered by each of the faction to their arguments. This section chronologically analyses the progress of debate.

3.1 Hindi as National Language
The year 1948 witnessed the majority of debates amongst the Hindi supporters and moderates to make Hindi the national language. The Hindi extremists submitted multiple amendments to the Draft Constitution between February and November.¹²⁷⁵ The Muslims all supported

¹²⁷³ Granville Austin, The Indian Constitution-Cornerstone of a Nation, Oxford University Press (1999), at pp. 350-355
Hindustani but ignored the problem of English. While the South Indians wanted English to continue for fifteen years, after which Hindi could also be recognized as the official language.

In November 1947, the Congress decided to redraft the Constitution and this gave the opportunity to the Hindi supporters to make Hindi the official language. These efforts were coupled with resentments from both southerners, as they could not speak Hindi and even the Hindi Speakers who found that Hindi versions had been so Sanskritized as to make them unintelligible. By the summer of 1948, the Hindi translation as well as Urdu and Hindustani translations had been completed. Nehru wrote to Prasad that he did not understand a word of it. But when the Assembly reconvened on 4th November, the Hindi supporters firmly propagated that the Independence would be of no use if all the people do not start talking in Hindi or conducting official business in Hindi. This increased the linguistic fanaticism in the Assembly. This fanaticism was aptly dealt by the President as he intended to delay this issue and turn to other aspects of the Draft. Nehru agreed that debate on language at that time might delay the completion of the Constitution, but he warned that proceeding in the urgent manner could ill serve their purpose. He suggested that imposition of something in urgency by majority on an unwilling minority would be in contrary to the objectives of the Assembly and the Constitution. Therefore, this matter was deferred for a later date and focus was given on other aspects.

3.2 Recognition of Regional Languages

India is a land of linguistic minorities where no one language was spoken by a majority of the population and where there not only true linguistic minorities but also relative minorities. Thus, it became important to recognize their place in the Constitution as well. The Advisory Committee drafted a set of provisions which provided that the minorities should have the right to conserve their language, culture and they will not be discriminated on linguistic grounds. It also included that these minorities could establish and maintain their own educational institutions.

Both Munshi and Ambedkar agreed that state had given only negative rights to minorities without any positive rights. Munshi stated the minority right is intended to prevent majority controlled legislatures from favoring their community to the exclusion of other communities. He further believed that this would make minority a favored section of the public as State would constantly work for the welfare of it and this would destroy the basis of fundamental rights. While Ambedkar believed that this causes no burden on State. He held that because the state was not prohibited from legislating on such matters, provided the legislation was not oppressive, and because
other mother tongue education was such a universal principle, no provincial government could justifiably abrogate the principle without damage to considerable part of the population in the matter of its educational rights.\textsuperscript{1281}

For Bilingual areas, the Congress Working Committee drafted the Resolution on Bilingual Areas on August 5, 1949. This resolution which was chaired by Prasad, laid down certain principle which were later imbibed in the Constitution. It stated that each province should choose its own language, which should be used in courts and for administrative purposes and as the medium of instruction in schools. On the subject of national language, the resolution laid down that there should be a state language in which the business of the Union will be conducted. All records of the Centre will be kept and maintained in that language. However, the state language was not specified as the Hindi-Hindustani dispute remained very sensitive, and it would be unfair to single out any tongue for the honor of being the ‘national language’.

4. The Last Rounds
This section talks about the last month of the debate where the language issue was finally reignited and decided upon. It shows how the compromise was reached which stemmed into the present day Part XVII.

4.1 Final Arguments

When the Assembly met on August 8, the order paper asked for language amendments to the Constitution. The postponement of the language issue was over and the battle was begun. Many of the amendments embodied the commonly known views of the extremists, including a provision that during a ten year transition period, Parliament could provide for the use of either or both Hindi and English for Union purposes. The moderates opposed this as they found it to be loophole that would permit the immediate exclusion of English.\textsuperscript{1282} The meeting was able to agree unanimously, however, that Hindi should be the official language of the Indian Union and that Devanagiri should be the script. But there was a divergence of opinion over the meaning of Hindi. Nehru explained that Hindi should be defined as having the style and form of Hindustani, while the extremists thought the other way. For an easy and peaceful solution to controversy in question, a committee to draft a compromise provision was made.\textsuperscript{1283} It was primarily led by N.G Ayyangar and Munshi. On 16\textsuperscript{th} August, the special committee presented its report to the party meeting. However, it pleased no one and was particularly offensive to moderates. It said that English would be sole language for ten years and for five more if agreed by the Parliament. It also paved the way for change of International numerals from the Arabic numerals. This did not appease the extremists as they demanded Nagari numerals. The special committee’s efforts having been of no avail, the party left it to the Drafting Committee to produce a compromise article. This committee then proposed that English would be continued

---

\textsuperscript{1281} Constituent Assembly Debates, Volume VII, 2\textsuperscript{nd} December, 1948.
https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02

\textsuperscript{1282} Constituent Assembly Debates, Volume IX, 8\textsuperscript{th} August, 1949.
https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-08

\textsuperscript{1283} Constituent Assembly Debates, Volume IX, 11\textsuperscript{th} August, 1949.
https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-11

www.supremoamicus.org
for fifteen years, but the question of numerals remained unresolved.\textsuperscript{1284}

Numerals and the fifteen year transition period dominated the debate in Assembly meeting during the succeeding days. During these days, the language provisions were discussed in greater detail till it became to be known as the ‘Munshi-Ayyangar formula’.

The debate over numerals had no end, meanwhile the special committee was working towards a compromise which would seek positive response from all sects. Finally, in September Munshi- Ayyangar formula\textsuperscript{1285} was presented which was the result of a great deal of discussion and compromise and resembled closely with the present Part XVII of the Constitution.

**Ayyangar Report**

On 12\textsuperscript{th} September, 1949, Gopalawami Ayyangar, the member of the special committee presented its report to the Assembly. He believed that the decision to substitute Hindi in place of English was too early. He argued that Hindi could not be used for debates and discussions within the legislature but for all the official purposes like legislations and bills, English should be used. He believed that Hindi was not sufficiently developed at that time. It required a lot of enrichment in several directions, like modernization, it requires to be imbued with the capacity to absorb ideas, not merely ideas but styles and expressions and forms of speech from other languages.\textsuperscript{1286} Therefore, Hindi should first be developed as presented in their draft and only after a certain time it should be able to substitute English. Similarly, he proposed that for first fifteen years International numeral to be used and only after then Devanagiri numerals should be used.

Lastly and very importantly he argued that the language of Courts to be English. At that time only, he believed that English language in Bills and Laws would last much longer than fifteen years. This was because law-making and its interpretation requires extreme precision, with certain expressions that have a definite meaning only and until Hindi language evolves to that stage it should not be used for this purpose. He gave reference to his time at the Draft Assembly for Kashmir and drew an analogy that how they used English there as well and not Urdu.\textsuperscript{1287} As Indian courts were accustomed to English and its style of drafting it was better that they stick to English so as to ensure a uniform interpretation of laws all across the country.

**Munshi-Ayyangar Formula**

The brief features of this formula was that it proposed: Hindi in Devanagari script as the official language of the Union and the language communication between the Centre and states and between the states inter se; international form of Indian numerals; switch-over to Hindi to be a phased programme spread over a period of fifteen years; English to continue as the official media for the interim period; regional language (one or more according to the wishes and claims of residents) or

\begin{itemize}
  \item \textsuperscript{1284} Constituent Assembly Debates, Volume IX, 22\textsuperscript{nd} August, 1949.
  \item \textsuperscript{1285} Constituent Assembly Debates, Volume IX, 12\textsuperscript{th} September, 1949.
\end{itemize}

https://www.constitutionofindia.net/constitution_assembly.debates/volume/9/1949-09-12
Hindi for the official purposes of the states; English for the functioning of higher judiciary, and for authoritative legislative texts both at the Centre and in the states; a commission representing the various regional languages and parliamentary committee thereafter, to periodically (after 5 years and then 10 years) examine and report to the President inter alia on progressive substitution of English by Hindi taking into account the industrial, cultural and scientific advancement of India and the claim of non-Hindi speaking areas in regard to public services. It also included a direction to the Union to ensure that Hindi in its development serves as a medium of expression for all the elements of the composite culture of India, and for its enrichment draws on Hindustani and other Indian languages for its style and expressions, and primarily on Sanskrit for its vocabulary.

This still did not satisfy the extremist faction of the Assembly. On 14th September, this was heavily decided as the Assembly had to reach on a conclusion that day. Finally, a mutual consensus was reached. The compromise consisted of five amendments to the Munshi-Ayyangar formula, each of which was a concession to the extremist bloc.1288 This provided that after fifteen years, Parliament cold legislate on the use of Nagari numerals as well as on the continued use of English, that Hindi might be used in the proceedings of a High Court with the sanction of the President, that Bills, Act, etc. could be issued in the official language of a state if an official English translation was published, and that Sanskrit be added to the list of languages in the Schedule. With this the debate on the language issue was over and the final compromise was on paper.

5. Contemporary Language Debate
Recently, the Union home minister Amit Shah’s emphasis on making Hindi the national link language has sparked off nationwide chaos. In his address on National Hindi Day in September, 2019, Shah emphasized the need for Hindi to be made the common language of the country. He said that it was necessary to have one language which could represent India in the world.1289 His contention that Hindi was widely spoken and could be the language to keep India ‘united’ was condemned from across the country including the opposition as well as the regional BJP leaders. BJP’s Karnataka chief minister BS Yediyurappa has declared that all official languages are equal and there will be no compromise on the importance of Kannada. Similarly, BJP ally AIADMK has asserted that Tamil Nadu will stick to Tamil and English.1290

The language issue has an old, emotive history in the country. Previously, similar move was seen in 2019 from a draft national education policy by the Narendra Modi government-II. In the draft policy, the government has proposed mandatory teaching of Hindi alongside English and the concerned regional

---

1288 Constituent Assembly Debates, Volume IX, 14th September, 1949.
https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-14
https://timesofindia.indiatimes.com/blogs/toi-editorials/war-over-hindi-there-are-better-ways-to-foster-national-unity-than-a-single-national-language/
language in non-Hindi speaking states.\textsuperscript{1291} The government later revised its draft policy to make it non-mandatory.

Such moves are extremely problematic and dangerous to the pluralism of India as it imposes one language over the entire nation of 22 languages. Though it is believed that majority of India speaks Hindi, but in reality according to the census of 2011, only 44 percent of the population includes Hindi speakers. The dangers of imposing a language are manifold. It can affect the learning ability of non-native speakers thereby affecting their self-confidence. It can also endanger other languages and dialects and reduce diversity. National integration cannot come at the cost of people’s linguistic identities. Language is integral to culture and therefore privileging Hindi over all other languages spoken in India takes away from its diversity.\textsuperscript{1292} There are better ways to foster national unity than imposing a language. Having a single, simplified tax structure creating a common market for the country, or fostering a single labour market are far better ways of practically integrating the country as well as boosting the economy.

6. Conclusion
The issue of language though it seemed a very trivial issue in comparison to other parts of Constitution came to be one of the most important one and was extremely time consuming. The main issues of contention were with regard to the status of Hindi as the national language to be substituted with English. This further had divisions amongst the groups as the definition of Hindi was not clear because it involved a combination of a number of languages and varied from place to place. Second major contention was with regard to the use of numbers, whether international form number sis to be used or the Devanagiri scriptures. The Hindi supporters were from North and Central India while those who opposed Hindi were from South India and other less integrated parts of India. The importance of this issue was highlighted throughout this debate as this was a crucial matter to preserve India’s diversity and pluralism. Ultimately, English was used for a period of fifteen years thus respecting the interests of all sects of country, as proposed by the Munshi-Ayyangar formula.

7. Bibliography

\textbf{Constituent Assembly Debates:}
- Constituent Assembly Debates, Volume V
- Constituent Assembly Debates, Volume VII
- Constituent Assembly Debates, Volume VIII
- Constituent Assembly Debates, Volume IX

\textbf{Articles/Journals:}


Aakash Sharma, “War over Hindi: Better Ways to Foster Unity than a Single Language Nation”, Times of India, 17th September, 2019
https://timesofindia.indiatimes.com/blogs/toi-editorials/war-over-hindi-there-are-better-ways-to-foster-national-unity-than-a-single-national-language/


Suraj Sharma, “National Language Debate: What does it Mean for India’s Pluralism?”, Economic and Political Weekly, 27th June, 2017

Books:
ENTRY OF WOMEN IN SABRIMALA TEMPLE, A RIGHT OR A RIGHT IN DISGUISE

By Kartikay Singh
From ICFAI University Dehradun

ABSTRACT

One of the warmed contention which we as a whole are very much aware as of late is that the preclusion of the ladies’ entrance in Sabarimala Temple. Kerala Sabarimala Temple is one of the temples which permit all the religions and positions with no discrimination it is a verifiable truth that Sabarimala Temple is the second biggest occasional journey ensuing to the Islamic Holy Site of Mecca which is arranged in Saudi Arabia. In contrast to different sanctuaries in India, this sanctuary is very noteworthy about the clothing regulation of its fans which signifies that the fans are equivalent before the Lord Ayyappa. The writers in this examination article might want to refer to out the chronicled foundation of the journey along with the reasons as to why ladies aren’t permitted inside the temple and furthermore the common sense included which would prove the quick thinking for the limitation

Keywords: Sabarimala, limitation, ladies’ entry, religion, verifiable foundation

INTRODUCTION:-

Ruler Ayyappa is known to be an interminable unhitched male (otherwise called a Naishtika Brahmachari) of the Sabarimala Temple. The Temple has been a sanctum for Lord Ayyappa which situated at the Periyar Tiger Reserve in the Western Ghat mountain scopes of Kerala in PaSree Ayyappa was conceived from the association of Lord Shiva and Lord Vishnu(mythical sorcerer Mohini). This relationship between Lord Shiva and Lord Vishnu are spoken to as Haribara putra where Lord Vishnu is perceived as Hari and Lord Shiva is perceived as Hara. The story behind the introduction of the legend Lord Ayyappa must be investigated the ancient sacred writings or Puranas. As per the Puranas, when Goddess Durga (sister of Lord Vishnu) had slaughtered King Mahishasur, his sister Mahishi needed to render retribution on her sibling. She was brought into the world with Lord Brahma’s shelter which made her indestructible as well as depended on the way that the lone kid conceived from the association of Lord Shiva and Lord Vishnu can just annihilation her. Thus, Lord Vishnu had embodied into Mohini and marries with Lord Shiva so as to bring forth a kid and spare the world from destruction. At the point when Lord Ayyappa had achieved his predetermination by crushing the evil spirit, it was discovered that an excellent lady had risen up out of her body requesting that he wed her. Lord Ayyappa rejects the ladies by guaranteeing that he would wed her solitary when Kanniswamis (first-timenedevotees) had quit going to the sanctuary during the time of Mandalamie, (November January and till then he would stay as abstinent. All together to find out the kanniswamis who visit the sanctuary, the first run through fans are made to stamp their appearance by nudging a stick at the Sharam kuthi. With the affirmation given by Lord Ayyappa, the ladies is presently venerated as Malikapurathamma (additionally known asmanjamatha) who hangs tight for him at the neighboring holy place close to the Sabarimala Temple. Master Ayyappa’s object of worship was etched and introduced upon the arrival of Makar Sankranti by Lord Parshuram. Reason behind the preclusion of ladies from entering the Pilgrimage The Journey towards the Sannidhanam of the Sabarimala.
Temple has consistently been a dining experience for the eyes of the lovers. Master Ayyappa is known to answer the supplications of his enthusiasts who visit the sanctuary with the most extreme great confidence and follow the pilgrimage ritual. The enthusiasts typically visit the fundamental sanctuary through Periyapadha normally during November January where the most perfect momer falls on January fourteenth which is to be MakarSankrantri has consistently been an exhausting excursion to arrive at the journey which covers around 48 miles by walking through thick backwoods and slope trek. It has never been a simple errand to come to the sannidhanam. One needs to mean experience a great deal of obstacles so as to arrive at the goal. It has been a training that the fans first stop at the Vavar Mosque. Vavar, an Arab administrator, is known to be one of the most faithful subjects who was crushed by Lord Ayyappa. The lovers paint their appearances and move during the Madalam time frame which portrays the satisfaction of the individuals for overcoming Mahishi. This occasion Erumeli Petta thullal has consistently been a fantastic one where the substance of the training is to relinquish one's self image and give up to Lord Ayyappa. The lovers must different sanctuaries before they arrive at the Sanvidhanam. After the fans arrive at the PampaRiver which is as heavenly as the River Ganges, they should the wash up in the waterway which decontaminates the wrongdoings of the fans. Here, the enthusiasts must visit the ShriKannimoola Ganapathi Temple where, one can discover the holy places of Ganapathy, Rama, Anjaneyar, an Naagar and complete the ceremonies which is to followed. One must lay their strides on the eighteen celestial strides before entering the Sanctum Sanctorum. These 18 stages are known as Pathinettam Padi. Every has its own centrality where one can't forego.

Mythological Tradition

The purpose for the limitation/restriction of section of ladies to Sabarimala Temple is as per the following

1. Right off the bat, Lord Ayyappa is and has consistently been abstinent till date and the primary explanation for his abstinence is the affirmation which was given to Malikapurathamma I., till the day he finds out that kanni-masters quit going to his sanctuary he would stay a celibate. In request to help this announcement, the creators might want to express that this training has been followed for quite a long time and if by any possibility the Kanni-masters have stopped to go to the devasthanam during the Mandalam time frame the nit would be viewed as that the restriction of the ladies section to the journey would reach a conclusion. It is accepted that Lord Ayyappa would get hitched to Malikapurathamma after the aforementioned period which would be a propitious day for all the enthusiasts.

2. Also, Entry of ladies would influence the sacredness of standards of Brahmacharya. There has consistently been a strict practice in the Hindu Religion which depends on 4 Ashramas where in everyone experiences these stages during their lifetime. Lord Ayyappa is experiencing the
principal period of the Ashrama Brahmacharya. The essentialness of being a Brahmacharya is to accomplish both profound and viable greatness wherein one should entire heartedly follow the standard of chastity Lord Ayyappa who is a Naishtika Brahmachari is protecting the enthusiasts who visit the Temple and furthermore achieves an adjustment in the horrible contemplations of the mankind. The rationale behind the restriction of section of ladies is that it would influence the sacredness of the devasthanam as well as influence the fundamental standard of being a Brahmachari.

3. In conclusion, The purpose for the limitation for passage of ladies maturing between 10-50 was due to the feminine cycle which every single lady would experience subsequent to accomplishing adolescence. The importance of this limitation is in facilitation of the confirmation given to Malikapurathamma by Lord Ayyappa as a condition to wed her. It is accepted that each lady old enough beneath 10 or more 50 are permitted to enter the sannidhanam. The Travancore Devaswom Board has made it compulsory for each lady to convey an age confirmation so as to stop the occurrences of ladies entering the sanctuary by challenging the limitation. Moreover, Even the limited ladies who have expelled their uterus are permitted to enter the sanctuary with no limitation gave they bring the clinical endorsement which expresses the equivalent.

It is essential to comprehend the significance of this issue now of time. The Constitutional Bench lead by the Chief Justice of India, Dipak Misra J. have begun hearing the issue concerning denial of Women's entrance inside the areas of The Sabarimala Temple Chief Justice of India, Dipak Misra: "Where a man can enter, even a lady can go. What appliesto a man, applies to a lady.

"The writer of this exploration article isn't yielding to the announcement made by the Honourable Chief Justice of India in the midst of the consultation concerning the Sabarimala issue. To progress with the fore referenced suggestion, the creators have managed the legitimate component of this issue in detail.

Tendency of the law towards the lawfulness of the Ban

The limitation forced over the lady to enter into the sanctuary is a "Fundamental Religious Practice of this Religious Institution. The order done based on physiological attributes between the Women and Men is upheld up by solid thinking and hence isn't violative of Article 14 of the Constitution of India. It is, thusly, fulfilling the states of Intelligible Differentia and Rationale Nexus standard. Sabarimala Temple has a different category for itself as it fulfills all the prerequisites and it is enabled to oversee its own strict undertakings. The request asserting for invalidation of the boycott over the section of lady is a clear worldview of inspired and vexatious case. It isn't the first disagreeing voice of the ladies who are associated with this issue. Truth be told, there is no contradicting voice against this issue itself when we consider the real voices of those ladies who comprehend their rights and impediments concerning their entrance at the premises. It is a foul game played by the open activists attributable to their unconcerned and stubborn thought for age-old strict Acharas, Customs, and Practices.

The Proposition articulated by the Supreme Court For the situation of Mahendran v. Secretary,Travancore
Devaswom Board is Unambiguous and Unequivocal.

It is critical to consider the judgment of the Honorable Supreme Court in the previously mentioned case to comprehend the legitimate ramifications of the band the astuteness behind such thinking. Open intrigue suit was recorded against Former Devaswom Commissione SmtChandrika who led rice taking care of service of her excellent little girl with different family members of her, inside the premises of the sanctuary. The photo of which showed up in a diary by name Jan Bhoomi Daily. The court considering the confirmations held that the boycott was pertinent just in regard of ladies in a specific gathering and not ladies as a class itself. In this manner is a sensible arrangement not adding up to class enactment. Class enactment is a bit of law which vests certain rights or points of interest to a gathering of people, without presenting a similar right to different individuals from the gathering who can't be III. separated from those to whom the rights are given. In the current case, the proof cited in the interest of the Devaswom board in the last piece of the article would validate the grouping.

A holding scrimmage between Article 25 and Article 26 of the Indian Constitution.

A strict Denomination is distinguished by its customs, practices, principles, and teachings. The individuals from such group reserve the option to make sure about the sustainment of its Denomination under article 25 of the constitution by the obligation of adherence to the blessed and hallowed principles this makes each category special from other such foundations making it recondite and infrangible. Article 26 of the constitution illuminates the denominational privileges of a Religious Institution. It explains that such a section would have total power to follow its bown customs and ceremonies which it considers as a fundamental piece of its love.

The Sabarimala Temple fits the bill to be a Denomination without anyone else Supreme Court on account of SP Mittal v. Association of India held that for any strict foundation to perceive itself as a Denomination under Article 26 needs to fulfill three basic conditions.

I. Right off the bat, the constitution ought to be an assortment of people who should promotion here to a system of convictions which are helpful for their otherworldly prosperity.

II. Besides, they ought to perceive themselves as a piece of a typical association unmistakably from other comparable gatherings.

They ought to be assigned by a particular name A reference to the instance of Bramchari Sidheswar Sahi V. Province of West Bengal would be of extraordinary assistance to comprehend the pertinence of the previously mentioned conditions. This was a case identifying with adherents of Ramakrishna. They had a positive allowance of faith based expectations helpful which characterized their association. They were aggregately alluded to as Rama Krishna Matt or Rama Krishna Mission. Correspondingly, to the inquiry whether Sabarimala is a division, the organization fulfills the conditions to perceive itself as group.

The Supreme Court while deciphering this privilege of a strict category on account of D. R.R Varu v. State of Andhra Pradesh has expressly noticed that lone the category ought to have the self-sufficiency to deal with its strict undertakings and
encroachment of which would prompt infringement of the privilege under Article 26(d) of the Constitution of India. Examination of the case H. R. and C. E Madras v. Sri Lakshmindra Thirth a Swamiar of Sri Shiruru Mutt, the court explained on the way that a religion may recommend the moral direct for adore as well as can endorse different customs, methods of love and observances for the individuals looking for section into the spot of love. In straightforward terms, a religion doesn't exist dependent on its doctrinal standards and convictions alone however incorporates additionally the training some portion of it. Also, both are commonly reliant on one another. In Hindu philosophy, a religion or a strict category doesn't exist based on Gnana' alone yet in addition on Bhakti and Karma Kandas related with it. Through this, it turns out to be evident that if the limitation of a lady depends on some strict sponsorship, it doesn't experience the ill effects of any illicitness.

The Supreme Court in a plenty of cases have deciphered the extent of article 26(b) and had held that the strict division would have total Autonomy over the choices taken by it subject to the limitations of Morality, Health and Public Order alone under the Constitution. While Article 25 of the Constitution which engages an individual with Freedom of Conscience and the Right to maintain, rehearse and proliferate religion is dependent upon opportunity to oversee strict issues ensured under Article 26(b) of the Constitution and different articles remembered for Part III of the Constitution. The proof cited in the interest of the Devaswom Board supporting the Restriction Whether training can be considered as a vital piece of the religion ought to be settled on the premise of the proof showed by the gatherings related with it. Only the individuals who are firmly familiar with the historical backdrop of the sanctuary and the information in regards to the customs would be at a situation to remark over this issue. The Court called upon the present tantri of Sabarimala Temple, Sri Neelakandaru, who was contrary to authority actively give data concerning the uses followed in the sanctuary. Different Thanthrimukyas were additionally called to cast their conclusion over the issue. In this manner the legitimate data gave by the Thanthrimukyas would be the main significant bit of proof accessible to choose the lawfulness of the boycott. The present Tantri (Chief Priest) had expressed that it was his fatherly uncle who reinstalled the present deity (icon) in 1950. He included that he led the First Pooja after installation according to the headings of his fatherly uncle. The fundamental purpose behind holding fast to the old traditions and standards is for the government assistance of the sanctuary. For a similar explanation, the passage was approved uniquely to the individuals who had carefully clung to the 41-day atonement. Till the joining of Travancore and Cochin occurred, the definitive job was played by the individuals from the Pandalam Palace. Theornaments to be embellished by the symbol during the favorable day of Makaravilakku were put at the Pandalam Palace. A male individual from the family needed to take the trimmings in a parade. Bunch of times, proposals were brought by the leader of the load up for modification old enough old traditions, for example, conveying the symbol gem in the van rather by a parade and furthermore for passage of ladies matured between 10-50. The proposals were alienated and denounced through a public statement securing that if the utilizatons are abused, the royal residence individuals would be harassed with the scourge of the God.
At the point when the Thanthrimukyas can't resolve the equivocalness in regards to specific issues, they used to decide on a strict strategy by name Devaprasannam. This is done to know the desires of a god at whatever point such circumstance emerged. This is a technique followed since days of yore. In 1985. When Sri Maheswararu was the main Priest, he led Devaprasannam to recognize the god's desire over the issue of Entry of Women raised by the then State Secretary of Hindu Munnani. He educated the State Secretary that permitting ladies between the age bunch 12-50 will be in opposition to the recondite traditions of the sanctuary. The outcome was one and the same when Devaprasannam was directed by different other famous Astrologers.

The Devaprasanam report of the Thanthri was shown as the record of the Court and legitimacy of the archive was rarely being referred to. The important part of the English interpretation of the report peruses as tails It is seen that the god doesn't care for youngsters entering the regions of the sanctuary. In this way there can't some other equal conclusion with respect to the passage of lady at the premises of Sabarimala.

Lord Ayyappa is a Naishtika Brahmachari as indicated by the Thanthri of the sanctuary. A Naishtika Brahmachari is one who lives holding fast totally to the standards of abstinence with no lewd want as a main priority, word deed, despite everything being an encapsulation of adoration and connection for everybody. Owing to this, ladies lovers are confined for offering their love to guarantee that the preeminent sacredness of this embellishment is ensured without even smallest deviation. This being the most holy decoration for the god, the lovers of the Lord Ayyappa are vested with the prime obligation of ensuring his holiness and austerity. The Deity at Sabarimala is as Brahmachari while the gods present at other Sastha sanctuaries (Totally seven) at Achankovil Aryankavu and Kulathupuzha aren't Brahmacharis. This reasons out why ladies aren't permitted in Sabarimala Temple alone.

The work on worried with the limitation of certain classification of individuals according to the scriptures isn't another issue. Shiva sanctuary in Taliparamba in Kannur District Is one among the other temples which prohibits the passage of ladies during the day time until Athazhappja(last pooja forth day) is finished. This depends on the conviction that Lord Shiva would be sitting with Goddess Parvathy as of now in positive disposition to shower gifts on his lovers. So convictions which are a basic piece of the training assume an extraordinary job in characterizing the religion itself. In the equivalent way, when Thanthrimukhyas and the other famous crystal gazers have recognized the desire of the deity with respect to the love by ladies lovers, it is should be loved and it is over all theories.

Notwithstanding all these, the creators might want to cite the announcement given by Honorable Chief Justice of India Dipak Misra during the consultation that "There is no guideline of private sanctuary in the nation. Sanctuary is definitely not a private property, it is a public property". Here, the creators might want to avow the announcement given by CJII and furthermore might want to express that the Sabarimala Temple has consistently been an open property and there is no uncertainty about it. But there are sure strict practices which have been trailed by the fans of the sanctuary and which can't be changed. These strict practices must be regarded. It is to be noticed that one can't make any strict practices as it is something which is
accepted to be valid and has gotten a custom. Custom can't be underestimated and it very well may be changed by the impulses and likes of the individuals.

Conclusion:-

The creator might want to presume that the preclusion of passage of ladies is lawful, in view of the Essential Legal Practices” which are being followed from days of yore. Extraordinary Religious conclusions are profoundly established in this issue and any sort of insult would prompt closing down of the whole sanctuary itself. Such strict convictions may not really have logical thinking however is weaved with the incomprehensible and undeniable confidence of millions. Article 26 of the Constitution of India gives a strict category, a privilege to set down practices and customs for sustainment of profound prosperity. Legal Intervention with this profoundly grounded right of the Denomination would prompt shared disharmony. The creators affirm that the limitations forced don’t experience the ill effects of any wrongdoing and along these lines qualified for be maintained by the Honorable Supreme Court.

*****
THE IMPACT OF AGE OF MINORITY DURING SENTENCING TO DEATH IN THE CONTEXT OF DIFFERENT COUNTRIES

By Keerthana.R.Chelluri
From Symbiosis Law School

ABSTRACT:
With changing times the rate of crimes committed in the society also increases significantly. The study is mainly based on how a crime in normal sense would be called inhuman and brutal but the punishment for the crime is lessened due to the age factor of the convict. This is a major issue because due to the increasing exposure towards technology, a minor or minors brains thinks and perceives equivalent to a grown up adult. So when an adult is convicted for a crime and receives death penalty, so can a minor with the same thinking capacity deserves. This is an analytical study conducted with the secondary information collected from various online websites, journals, books and other sources. A doctrinal method is approached with qualitative research method. The age of majority has variable factors, they are different in different countries, religions, statutes of different countries and other guidelines so it is important to square down on one common denomination of age of minority to analyse. There are mitigating and aggravating factors for one to get a death penalty. They both have been taken into account while analysing the study. It has been found through the study that most of the times, the decisions involving death penalty has other factors involved like socio-economic status of the country, cultural impact, public opinions etc due to which the justice fairly not provided. The only limitation of the study according to the author is that, there were no elaborate case files provided in-order to analyse the non-verbal intentions of the juris. The author throughout this study understood that region wise case analysis would help to understand various underlying values of the society instead of world as a whole.

KEYWORDS: Juvenile, Death penalty, Minority, Law, Culture, Religion

BACKGROUND:
In law, a minor may be a person below a precise age, typically the age of majority, that de jure demarcates childhood from adulthood. The age of majority depends upon jurisdiction and application, however it's usually eighteen. Minor might also be utilized in contexts that are unconnected to the age of majority. For instance, the elder within the us is typically twenty one, and younger individuals are typically known as minors within the context of alcohol law, albeit they're a minimum of eighteen. The term below age typically refers to those under the age of majority, however it's going to conjointly talk over with persons underneath a precise regulation, like the legal age for consuming alcohol, smoking age, age of consent, mature age, driving age, voting age, etc. Such age limits are typically totally different from the age of majority.

The thought of minor isn't sharply outlined in most jurisdictions. The age of criminal responsibility and consent, the age at that college attending is not any longer required, the age at that de jure binding contracts are often entered into, then on could also be totally different from each other. In several countries, together with Australia, India, Brazil, Croatia, and South American nation, a minor is outlined as someone below the age of eighteen. Within the us, wherever the
age of majority is ready by the individual states, minor typically refers to somebody underneath the age of eighteen however will, in some states, be utilised in bound areas (such as casino gambling, firearm possession and also the overwhelming of alcohol) to outline somebody below the age of twenty one. within the criminal justice system in some places, "minor" isn't entirely consistent, as a minor could also be tried and chastened for against the law either as a "juvenile" or, typically just for "extremely serious crimes" like murder and/or stealing, as associate degree "adult". In Japan, Taiwan, and Kingdom of Thailand, a minor may be a person below twenty years .. In New Zealand law, the age of majority is twenty years aged in addition, however most of the rights of adulthood are assumed at lower ages: for instance, getting into contracts and having a testamentary documents are allowed at fifteen. The Indian Majority Act, 1875 in section 3.1293 states that each person domiciled in Republic of India shall attain the age of majority on completion of eighteen years and not before. Unless a selected personal law specifies otherwise, every one domiciled in Asian nation is deemed to possess earned majority upon completion of eighteen years older. However, within the case of a minor for whose person or property, or both, a guardian has been appointed or declared by any court of justice before the age of eighteen years, and just in case of each minor the management of whose property has been assumed by the Court of Wards, age of majority are going to be twenty one years, not 18. The age of majority differs from various laws within the State itself, for Instance personal laws like muslim law have the age of 15years or age of adolescence to be considered a major while in Judaism 13years is age of majority in case of boys and 12 years in case of a girl. Contrary to these the christianity (includes roman catholics) considers 18 years as age of majority just like any other law. In Indian Contract Act, 1872 section 11.1294, the age criteria to be a major is not being a minor i.e 18yrs and 21yrs in cases where a guardian is appointed by the court. In family law that includes special marriage1295 or hindu marriage act1296, the age of majority for female in 18years and for male is 21yrs. Naturally under Indian penal Code and Juvenile Justice (Care and Protection of Children) Act1297 the age of minority is 18yrs. Most counties have 18-20 years as the age of majority since that is time when biologically a person attains certain kind of maturity unless he is suffering from any disqualified from contracting by any law to which he is subject.

1293 "Age of majority of persons domiciled in India.- (1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

1294 "Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject. I and who is of sound mind and is not disqualified from contracting by any law to which he is subject. —

Every person is competent to contract who is of the age of majority according to the law to which he is subject, I and who is of sound mind and is not
kind of mental or psychological disorder or other specific cases while this was the scenario in India, different countries in the world has different ages of majority depending on various factors like age to legally consume alcohol or live independently etc. Age 15 is the age of majority in Iran while in Cuba, Kyrgyzstan, Turkmenistan, Uzbekistan, Scotland the age is one up i.e. 16 yrs. 17 is the majority in North Korea, North Tajikistan while all countries of the European Union (with exceptions as listed) Albania, Afghanistan, American Samoa, United States, Andorra, Argentina, Armenia, Angola, Australia, Azerbaijan, Bahamas, Barbados, Belarus, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil (though one may vote at the age of 16) Brunei, Bulgaria, Burundi, Cambodia, Canada (provinces of Alberta, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan), Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia (16 if minor marries or has a child), Cyprus, Czech Republic, Djibouti, Dominican Republic, Dominica, Ecuador, El Salvador, Estonia, Fiji, France, Gabon, Germany, Greece, Ghana, Gibraltar, Guatemala, Guernsey, Guinea (minors are emancipated upon marriage), Guyana, Haiti, Hong Kong, Hungary, Iran, India, Indonesia, Ireland, Italy, Israel, Isle of Man, Jamaica, Jersey, Kenya, Laos, Latvian, Lebanon, Liechtenstein, Lithuania, Luxembourg, Macau, North Macedonia, Malaysia, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Montenegro, Nepal, Netherlands, Oman, Pakistan, Panama, Paraguay (minors are emancipated upon marriage), Peru, Philippines, Poland (minors are emancipated upon marriage), Portugal, Qatar, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sudan, Switzerland (16 if parents agree) Syria, Taiwan, Tanzania, Trinidad and Tobago, Tunisia, Turkey, United Kingdom, (except Scotland) United States, (with these exceptions: Alabama, Delaware, Massachusetts, and Nebraska, 19; Colorado, Mississippi, and Puerto Rico, 21) Ukraine, Uruguay, Venezuela, Vietnam, Yemen, Zimbabwe. I.e. majority of the countries 18 years is the age of majority. 19 is the legal age of majority in Alabama, United States, Canada (provinces of British Columbia, New Brunswick, Newfoundland, and Labrador, Northwest Territories, Nova Scotia, Nunavut, and Yukon), Delaware, United States, Massachusetts, United States, Nebraska, United States, south Korea while Age 20 is majority in Denmark (incl. Faroe Islands, and Greenland, minors are emancipated at 18) Finland (minors are emancipated at 18) Iceland (minors are emancipated at 18) Japan, New Zealand, Norway (minors are emancipated at 18) Taiwan, Sweden (minors are emancipated at 18) Thailand (minors are emancipated upon marriage). In Bahrain, Cameroon, Chad, Colorado, United States, Egypt, Honduras, Lesotho, Madagascar (minors are emancipated upon marriage), Mississippi, United States, Namibia, Puerto Rico, United States, Singapore, Swaziland, the highest she of majority exists as 21 years old. Historically the age bar shifted from 18 in 1700s to 21 in 1900s worldwide while if the case deepens, the age of adolescence was a sign of maturity and was considered as majority age. There is a difference in the age of majority in different countries based on the customs and culture of the country while westernised countries changed the age bar according to the changing world.

INTRODUCTION:
The study began with the Concrete Encased High school girl murder case where a young girl of 17 years was tortured and brutally
murdered by 4 other High school going minor boys in Japan. The Brutality used to torture the young girl in 44 days is spine chilling and would fall under the definition of Rarest of rare case. The doctrine of rarest of rare case formulates mitigating and aggravating factors in order to help one decide if the crime was brutal enough to sentence the convict with capital punishment, specifically death penalty. The learned Judge in this was shocked with the amount of sadism filled in the minor boys yet sentenced them to a very meagre periods in prison give the fact that they were minors. This enraged the global community raising questions should the punishments be given to the person’s evil mental state and act or for his age. This gave rise to one of the major objective of study that, what are the factors that should be considered while sentencing a minor who committed a crime eligible for death penalty. The 104 countries in world totally banned death penalty while 55 of them retained it in books or have a half baked stand regarding giving a death penalty. Japan tops the inequality HDI which shows the potential justice achieved if the amount of inequality is removed which shows the weak justice system. The aim of justice system should definitely be rehabilitative but at least in cases that show threat to the humanity should be sentenced with capital punishment. Various countries have different reasons to abolish Death penalty. The main reason is the UN based organisations that promote peace and non violence in countries. Amnesty international listed various reasons for abolishing or retaining death penalty (i) cultural reasons (ii) It is misused as a political tool (iii) It is discriminatory mostly based on certain community, race-religion etc. For instance, George stinney Jr, a young 14 yr old African American guy was sentenced death penalty making him the youngest to receive it mostly because of his ethnicity. After 70 years of his death he was proved innocent. This is a grave misuse of law. (iv) It mostly takes place within skewed justice systems (v) statistically it did not deter crime rate (vi) it is irreversible I nature. While mostly on humanity basis it is condemned, it is not a hidden fact that grave cases where the global community was shook because of the crime and its intensity, Death penalty should be awarded in order to provide justice to the victims and their families. This research would mainly focus on the cases where the convict had an age of minority that was a factor for him to escape the death penalty (the case satisfying doctrine of rarest of rare) in various countries. They may be political reasons, religious or must be come from the customs of the very country. Also includes the different ages of majority and minority given by other was existing in the country and the reasons behind the same. The thought of minor isn’t sharply outlined in most jurisdictions. The age of criminal responsibility and consent, the age at that college attending is not any longer required, the age at that de jure binding contracts are often entered into, then on could also be totally different from each other. In several countries, together with Australia, India, Brazil, Croatia, and South American nation, a minor is outlined as someone below the age of eighteen. It is significance of this study is to balance the views on death penalty in case of juveniles and consider the mental factor (mental state, gravity of offence, weapon used etc) and crime committed instead of age being the extremely mitigating factor.
Reasons and arguments abolitionists and retentionists countries behind their decisions\textsuperscript{1298}

This is the meat part of the study where in depth analysis is shown for various countries taking stand for or against death penalty specifically of minors who act as adults but are legally loosened up due to their age. These reasons are used further in recommendations to consider the varying opinions. The retentionists have their reasons for the same ,they say we need to be tough on crime, The convicts have to pay for their mistakes, It is Fair in the criminal justice system to take such step. It is cheaper as well as humane to execute people, can they change or compensate to such heinous crimes committed etc while abolitionists have standard arguments for the same that There is no way to remedy the occasional mistake, There is racial and economic discrimination in application of the death penalty\textsuperscript{1299}. Application of the death penalty tends to be arbitrary and capricious; for similar crimes, some are sentenced to death while others are not\textsuperscript{1300}. The death penalty gives some of the worst offenders publicity that they do not deserve, The death penalty involves medical doctors, who are sworn to preserve life, in the act of killing. Executions have a corrupting effect on the public, the death penalty cannot be limited to the worst cases, The death penalty is an expression of the absolute power of the state; abolition of that penalty is a much-needed limit on government power, there are strong religious reasons for many to oppose the death penalty. Even the guilty have a right to life. Everybody knows that violence is terrible and that we ought to curb it. It in some sense sounds rational and reasonable, before we raise the question: do we require the death penalty to be 'tough' on crime? The reaction to that is no, we are not. The false dichotomy that grimmer punishments deter crime does not take into account that complex social and economic factors plow crime rates and, second, that criminals often do not plan to get arrested or think through all the ramifications of their actions. Various versions of this statement came when Amnesty began campaigning for the clemency of Australians Andrew Chan and Myuran Sukumaran, who are reportedly on the death row in Bali for drug offences. Ironically, we are not thinking about periods or the death penalty, we are concerned about the reverse.

These people understand their actions, and accept that they ought to suffer justice. But a death sentence takes away the opportunity for reform from people. Myuran Sukumaran and Andrew Chan are perfect examples of progress, one of them leading art lessons and the other of a pastor learning. Their rehabilitation has so far penetrated that a previous Kerobokan prison governor has suggested that they will not be hanged. Several people globally who languish on death row have accepted and forgiven their abuse. There is no State gain in murdering these men, a senseless loss of life.

\textsuperscript{1299} 10 reasons to oppose the death penalty. America Magazine. (2020). Retrieved 23 March 2020, from https://www.americamagazine.org/politics-
The subsequent alternative point is that the death threat is pushing citizens to change themselves. The proof for this is clearly not definitive once again. Public justice initiatives across the globe have seen significant change progress without the possibility of execution, most also because of services that rely on recovery of prisoners. Most court mechanisms are directed against the individual convicted of the offense. Siti Zainab is a Saudi Arabia-based Indian citizen on death row. Siti was a domestic worker who reportedly murdered a household member following inhuman abuse at the hands of her boss. In the Gulf, domestic staff are sometimes unable to seek help from their bosses and Siti is allegedly suffering from a mental disorder.

A balanced criminal justice system does not imply an infallible one irrespective of nation—mistakes may and do occur. In Georgia, USA, Troy Davis was executed after seven of nine primary witnesses modified their evidence, even going so far as to petition for the innocence of Troy. Many criminals have done terrible, unspeakable acts so civilized society will not enter their ranks by carrying out a murder as well. By their acts, individuals are measured, and murdering another human being is just as dark as actions come.

**Case studies from various countries**

This chapter is divided into two subthemes in order to show the difference of opinion shown by jurists and factors considered by them arising from various countries while sentencing the crime of a minor. The landmark cases used in this study were the murder of Junko Furuta\textsuperscript{1301} and Miryang\textsuperscript{1302}. Both the cases involved High schoolers brutally raping and torturing girls aged below 16 years. The convicts were found guilty but were only punished with a prison sentence for 20-30 years. Given the brutality of the convicts who were juveniles, even the juries said that if the convicts weren’t if that age, they would definitely be given a death penalty. The murder of Anakriege\textsuperscript{1303}, a young Russian residing in Ireland yet proves the point that convicts should be treated as adults when tried in the court of law. The convicts in this case were as young as 12 and 13 ears old yet have brutally assaulted and murdered the victim. The were murders committed just out of pure revenge or fun\textsuperscript{1304}, racist discrimination\textsuperscript{1305} or for no reason at all\textsuperscript{1306}.

**Conclusion**

The major finding in this study was that, most of the world countries have banned or abolished the death penalty. The main reason is the UN based organisations that promote peace and non violene in countries. Amnesty International listed various reasons for abolishing or retaining death penalty: (i) cultural reasons (ii) It is misused as a political tool (iii) It is discriminatory mostly based on certain community, race-religion etc. for instance, George stinney Jr., a young 14 yr old African American guy was sentenced death penalty making him the youngest to receive it mostly because of his ethnicity. After 70 years of his death he was proved innocent. This is a grave misuse of law. (iv) It mostly takes place within skewed justice systems (v) statistically it did not deter crime rate (vi) it is irreversible I nature. While mostly on humanity basis it is condemned,

\textsuperscript{1301} Murder of Junko Furuta: infamously known as the Concrete-encased high school girl murder case or the 44 days in Hell
\textsuperscript{1302} Miryang murder case: The infamous Korean gang-rape and murder case
\textsuperscript{1303} Catherine and Curtis Jones-the youngest convicted duo from Florida
\textsuperscript{1304} the infamous menendez brothers murder case
\textsuperscript{1305} the murder of xinran jl
\textsuperscript{1306} The murder of Angela wrightson
it is not a hidden fact that grave cases where the global community was shook because of the crime and its intensity, Death penalty should be awarded in order to provide justice to the victims and their families. It can be analysed from the above information that most decisions taken by the justice systems and law making bodies are highly influenced by international organisations as well as public opinion. It should be understood that the circumstances and situations of a sentence is based on multiple situations and circumstances and that one general rule should not and cannot be applied for all of them. On the other hand, it is found through the study that more than thousands of cases are as such that they fall under the category of brutal crimes committed by juveniles while still they are not sentenced with a death penalty. This is a grave and unfair form of justice. The author through the finding realised that there should be a different laws in relation to death penalty for minors that should be incorporated in different countries taking in count of their factors and variables instead on giving general guidelines. This would give a room for ignorance and lose confidence in minors that mature before age due to different factors like technology, surrounding etc to take law and order in a live manner and commit crimes knowing that they would not be punished

This study was majorly conducted in order to find out why, that minors who are closing the age of majority or minors who show maturity of an adult are not sentenced to death penalty due to the mere reason of age. The fundamental motive was to to Study the various reasons behind abolishing or retaining penalty. Suggest a concrete and distinctive method that can used to decide during Sentencing death penalty to minor and related questions. through the study it was found that the world is divided into two parts as retentionists and abolitionists who have different ideologies when it comes to death penalty. The international community of law, based of these two types of people provided guiltiness that area common for every country ignoring the fact that: age of minority is different for each country, religion and statues. Moreover, the socio-economic status, law making body, cultural norms, social practices, public opinion etc also plays. Major role in defining and deciding such rules. It is fairly ignorant to provide such common rules. The major finding was that biologically the structures of human mind evolve faster than considerable previous generations which creates a room for children of minority age understand, think and perceive as fully grown adults. This brings us to suggest that these offenders should be tried as a fully grown adult and should be subject to death penalty given the brutality of the crime committed. This is suggested by the author in order to consider all the different factors in different countries. One rule should not be imposed. And justice should be provided regardless of age unless remorse and regret is genuine portrayed by the minor offenders.

*****
LEGAL STATUS AND RIGHTS OF WOMEN IN INDIAN CONSTITUTION

By Khushal Khatri
From ICFAI University, Dehradun

Abstract

Women, a young lady, a spouse, a mother, a grandma, by and large lady is a key of a family. World can never be finished without a lady. Law is the arrangement of rules upheld to oversee the conduct of individuals. From the earliest starting point of this world ladies is treated as a more fragile segment of the general public and they are the survivors of the violations like assault, eve prodding, female child murder, endowment, aggressive behaviour at home, youngster marriage and corrosive tossing. They were just permitted to live underneath the shoes of their spouses and fathers. Laws are being made to make sure about the lives of the ladies from the savagery of their families and social orders, and to give them their privileges of which they are the proprietors. This paper covers the part of ladies from previous history to the current world. It shows how the law of our nation has contributed its best to change the lives of ladies, to make them live with poise and regard not as a slave.

Introduction

Lawfully a female is known as a lady after she has gone through her youth and pre-adulthood, for example fundamentally in the wake of intersection the high school a young lady is a lady. Legislature of India has made a few laws to give equivalent status to ladies in our nation and secure their lives from different brutality and wrongdoings. Constitution of India gives basic rights and crucial obligations to the residents of India; every single resident of this nation is similarly entitled of these rights and obligations. The Constitution of India assures to every single Indian lady equity (Article 14), no separation by the State (Article 15(1)), balance of chance (Article 16), and equivalent compensation for equivalent work (Article 39(d)). What's more, it permits unique arrangements to be made by the State for ladies and kids (Article 15(3)), repudiates rehearses censorious to the respect of ladies (Article 51(A) (e)), and furthermore takes into account arrangements to be made by the State for making sure about just and others conscious states of work and for maternity alleviations (Article 42). Moving back to the historical backdrop of our nation we can locate the despicable state of the ladies from the absolute first time. As indicated by considers, ladies delighted in equivalent status and rights during the antiquated and the early Vedic period. Anyway, in roughly 500 B.C., the status of ladies started to decrease, and with the Islamic intrusion of Babur and the Mughal Empire and Christianity later declined ladies' opportunity and rights. Indian ladies' situation in the public arena further weakened during the medieval period, when youngster relationships and a prohibition on remarriage by widows turned out to be a piece of public activity in certain networks in India. The Muslim success in the Indian subcontinent carried purdah to Indian culture. Among the Rajput’s of Rajasthan, the Jauhar was polished. In certain pieces of India, some of Devadasis were explicitly misused. Polygamy was rehearsed among Hindu Kshatriya rulers for some political reasons. In numerous Muslim families, ladies were limited to Zenana zones of the house. During the British standard numerous reformers battled for the advancement of
the ladies. Ladies additionally contributed in the battle of the freedom of India. State of ladies began improving from the British principle Women in India presently take an interest completely in zones, for example, training, sports, governmental issues, media, workmanship and culture, administration segments, science and innovation, and so on. Indira Gandhi, who filled in as Prime Minister of India for a total time of fifteen years, is the world's longest serving lady Prime Minister. There are numerous demonstrations and arrangements made by the Government of India for the advantages of ladies.

Legal Status of a Woman in India: -


Women and Education: -

The instruction of ladies in India assumes a noteworthy job in improving livings gauges in the nation. A higher ladies proficiency rate improves the personal satisfaction both at home and outside the home, by empowering and advancing instruction of youngsters, particularly female kids, and in lessening the new born child death rate. A few investigations have demonstrated that a lower level of lady’s education rates brings about more significant levels of fruitfulness and new born child mortality, less fortunate sustenance, lower acquiring potential and the absence of a capacity to settle on choices inside a family unit. ladies' lower instructive level is likewise appeared to unfavourably influence the wellbeing and day to day environments of youngsters. A review that was directed in India
demonstrated outcomes which bolster the way that new born child death rate was conversely identified with female proficiency rate and instructive level. The overview likewise proposes a relationship amongst instruction and monetary development. In India, it was discovered that there is an enormous divergence between female proficiency rates in various states. For instance, while Kerala really has a female proficiency pace of around 86 percent, Bihar and Uttar Pradesh have female education rates around 55-60 percent. These qualities are additionally related with wellbeing levels of the Indians, where it was discovered that Kerala was the state with the most minimal baby death rate while Bihar and Uttar Pradesh are the states with the least futures in India. Moreover, the dissimilarity of female education rates across rustic and urban territories is additionally huge in India. Out of the 24 states in India, 6 of them have female proficiency paces of underneath 60 percent. The country state Rajasthan has a female proficiency pace of under 12 percent. In India, advanced education is characterized as the training of an age bunch somewhere in the range of 18 and 24, and is to a great extent financed by the administration. Regardless of ladies making up 24-25 percent of advanced education enlistment, there is as yet a sexual orientation awkwardness inside advanced education. Just a single third of science understudies and 7% of building understudies are ladies. In correlation be that as it may, over a large portion of the understudies contemplating training are ladies. The quantity of educated ladies among the female populace of India was between 2-6% from the British Raj onwards to the arrangement of the Republic of India in 1947. Purposeful endeavours prompted improvement from 15.3% in 1961 to 28.5% in 1981. By 2001 proficiency for ladies had surpassed half of the general female populace, however these insights were still low contrasted with world gauges and even male education inside India. As of late the Indian government has propelled Saakshar Bharat Mission for Female Literacy. This crucial to cut down female lack of education by half of its current level.

Women ‘s Economic, Social and Cultural rights: -

The development to guarantee ladies' financial, social and social rights (ESCR) as an essential human's privilege is simply rising in India. The development intends to find ladies' privilege inside the bigger human rights structure, and by doing so moves from ladies' issue just inside the system of viciousness and concepitive rights. ESCR endeavours to take a gander at the more extensive issues confronting ladies in particular neediness, lodging, joblessness, training, water, food security, exchange, and so on. While the human rights development at ESCR is to a great extent contained at the universal arrangement level, there are rising social developments around the globe. In the Indian setting, ventures like the, Program on Women's Economic, Social and Cultural Rights (PWESCR) plans to manufacture the lady’s rights development in India to make correspondence in all the circle of ladies' lives. Ladies' financial open door in India is a quickly changing scene as ladies are at the very least any man in each division whether it might be sorted out or sloppy. The introduction is required for the ladies in disorderly area.

Women Reservation: -

In India ladies were viewed as kept inside the house for the administration of their parents in law, youngsters and spouse.
Their privileges were not secure and they were not given equivalent open door in any of the angle whether it might be social, practical, political or social. Booking for ladies began to offer presentation to them and to cause Indian culture to feel that ladies are at least man in any viewpoint. In 1993 the established revision called for irregular 33% town gathering pioneer or Pradhan position in gram panchayat to be saved for ladies. Ongoing inquiries about on portion framework has uncovered that it has changed recognition on ladies' capacities, improved ladies’ discretionary possibilities, and raised desires and instructive accomplishment for youthful young ladies. There is a drawn-out arrangement to stretch out this booking to parliament just as administrative gatherings. For example, some graduate schools in India have 30% booking for females. Dynamic political feeling in India is unequivocally for giving particular treatment to ladies to make a level playing field for all the residents. The Women's Reservation Bill was passed by the Rajya Sabha on 9 March 2010 by a greater part vote of 186 individuals in favour and 1 against. As of March 2013, the Lok Sabha has not decided on the bill. Pundits state sex can't be held as a reason for reservation alone different elements ought to likewise be considered for example financial, social states of lady up-and-comer particularly while applying booking for instructed ladies. There additionally is a developing interest for ladies’ reservation in prior reservations like OBC, SC/ST, Physically incapacitated and so forth. Some women's activist gatherings despite everything request that booking for ladies ought to be at any rate half as they involve half of the populace.

State initiatives for women:

National Commission for Woman - In January 1992 the Government set up this legal body to study and screen all the issues identifying with the shield of ladies and audits the current enactment to make and propose revisions any place fundamental. Reservation of ladies in nearby self-government - The 73rd established alteration act went in 1992 guarantees 33% of complete seats to ladies in totally chose bodies in neighbourhood bodies whether in rustic or urban zones. The national strategy for the young lady kid (1991-2000) – this arrangement activity was to guarantee endurance, presence and advancement of a young lady kid with a definitive target of raising the better fate of young lady youngster. National arrangement for the strengthening of ladies (2001) - this approach was planned to bring headway, improvement and strengthening of ladies. Indian ladies will never be equivalent as long as these 9 laws will stay in the books.

- The Goa law on polygamy - a Hindu man can remarry if his current spouse can't bring forth a male kid till the age of 30. Furthermore, this law is only the tip of the endorsed sexism the nation over.
- Hindu law of legacy – the property of a lady who kicks the bucket without a will is dealt with uniquely in contrast to a man. Regardless of whether the perished lady was abused in her conjugal home her significant other's mom or father will get her property rather than her own mom and father.
- Parsi's law of legacy - Parsis despite everything punish the individuals who wed outside their locale and it's permitted. A non-Parsi lady who is either a spouse or widow of a Parsi can't acquire. Their youngsters despite everything can, in spite of the fact that those destined to a Parsi lady
wedded to a non-Parsi man are not viewed as a major aspect of the network.

- Prohibition of a kid marriage act - the law just forestalls the relationships of kids; it doesn't render them unlawful once really occur. The wedded kids have option to make their marriage void. A lady can cancel her marriage till the age of 20 where as a man can cancel his marriage till the age of 23.

- Age of assent - sex with a young lady without her assent is viewed as assault. A man can lawfully have intercourse with his better half even she is minor and doesn't give her agree to it. Conjugal assault isn't condemned in India.

- Rape of an isolated spouse - The assault of an isolated wife conveys lesser discipline than the assault of some other lady. Constrained sex with the previous is culpable with two to seven years of detainment. Jail sentence for the assault of some other lady ranges from seven years to life.

- Marriageable age - The base age for marriage for a kid is 21, yet 18 for a young lady. This is a lawful expansion of the man centric outlook that accepts that a spouse ought to consistently be more youthful than the man.

- Hindu Minority and Guardianship Act: Women are as yet not equivalent gatekeepers of their youngsters. A dad is considered the "common watchman" of a kid, in spite of the fact that the authority of posterity younger than 5 will conventionally be granted to the mother.

- No privilege to conjugal property - Upon detachment or separation, an Indian lady is the qualified uniquely for upkeep from her significant other. She has no privilege on the benefits, for example, house or business property, purchased in her significant other's name during the marriage. So, on the off chance that she leaves him or gets separated, even a long time after the marriage, she is conceivably without resources. Indian government arrangements don't consider the work done at home by a lady as having a financial worth.

**Indian scenario of women security:**

The administration of India has made numerous laws and acts to shield and secure the life of a lady in the nation. Despite such laws, rules and guidelines the life of ladies is as yet not secure totally. Imbalance among people goes around each circle of the nation, whether it might be training, administration or monetary chances. Some ongoing measurements on ladies include:

- One lady was killed each hour over share requests in 2010 (National Crime Records Bureau).
- Almost 45% of Indian young ladies are hitched before they turn 18 (International Centre for Research on Women).
- One of every five Indian ladies, numerous kid moms, bites the dust during pregnancy or labour (the United Nations).
- Up to 50 million of young ladies are absent over because of female child murder and female foeticide.
- 66% of ladies who have encountered physical savagery in the course of their lives are separated, bereft or abandoned.
- 85.3% of ladies revealing brutality guarantee that their spouses are culprits.
- Particularly ladies and young ladies from the upper east area in India living in urban focus have detailed encountering social
separation and minimization and commonly physical savagery.

Extent of Misuse: 

Numerous ladies who are really pestered by their spouses and parents in law documents case under 498A. Bunches of them live in rustic territories, uninformed of law or absence of fundamental financial and good help from their natal families. Passing by the conviction rate revealed by a few adjudicators and the Centre for Social Research the extent of ladies who have real case is 2%. 98% of the ladies who document 498A cases are from urban foundation, and are either fit for getting themselves or have enough family backing to depend on. In each example that one little girl in-law records a bogus grumbling, in any event two ladies (a blameless sister-in-law and relative) are captured and experience pressure, mortification and badgering in the hands of exploitative police, legal advisors, staff and authorities in Indian courts before being absolved quite a while later. So, in each 100 cases 2 ladies really and 98 ladies pull off prevarication and blackmail and numerous ladies endure unnecessarily. Consistently there is a rising number of cases manufactured by spouses just to compromise, coerce cash from and unleash revenges from husbands and their parents in law, if there should arise an occurrence of conjugal disunity. There are likewise bogus instances of inappropriate behaviour, attack and assault by ladies’ workers so as to undermine their guys’ associates of managers and to coerce cash from them and to slander them. As per information acquired (utilizing RTI) from the Ministry of Home Affairs, in the year 2005 alone, 58,319 cases were enlisted under charges of mercilessness by spouse and family members (IPC 498A) and brought about the capture of 127,560 people including 339 youngsters and 4512 grown-ups beyond 60 years old. Under 10% of the cases brought about conviction of the charged. Around the same time 15,409 people were captured in Andhra Pradesh, including 417 senior residents and 14 youngsters. The Supreme Court of India has marked the abuse of segment 498A as "legitimate psychological oppression" and expressed that "numerous occasions have become visible where protests are not true blue and have been documented with a sideways intention. In such cases quittance of the blamed doesn't clear out the disgrace endured during and before the path. Here and there antagonistic media inclusion adds to the wretchedness."

The Delhi High Court as of late expressed that, "Arrangements under Domestic Violence Act ought not go the IPC'S area 498A way (hostile to settlement law), which, to our view is the most mishandled arrangement." The World Health Organization, in its report on India obviously referred to Section 498A as one of the significant explanations behind the "Expanding Abuse of the Elderly in India."

Conclusion: 

Women - a person with all the circles in her which are viewed as the feeble piece of the general public however really are the most grounded one. We find throughout the entire existence of our nation ladies were abused, were not given any introduction or acknowledgment, yet significantly after such a separation there were females like Rani Lakshmi Bai, Razia Sultan and Meera Bai who considerably in the wake of living in such a man, culture and culture overwhelming condition, battled for themselves and their nations. By this I basically mean to state that Government can make laws, rules and approaches for...
our security yet we do need to expel all the
dread and faltering and venture out
ourselves for our acknowledgment.
Nothing can help a lady until she
encourages herself. Rather than sitting in
pardah ladies should evacuate her pardah
and see the world around and her. As we
can from past to introduce there is an
intense change in the lives of ladies,
presently ladies with their family work
likewise contributes in the procuring of her
family and economy of the nation. She
needs no place behind the man. Everything
has its benefits and negative marks both, a
few ladies make legitimate usage of lawful
protections gave to them, some abuse it and
some are as yet unconscious of the lawful
arrangements for ladies. Things will set
aside effort to get in orderly way as I
previously referenced government can
make laws yet its use is in our grasp. Ladies
should never be viewed as the feeble piece
of the general public as their family unit
work is more troublesome than a man's
office work. Men for 8-10 hours every day
with a week after week leave however a
lady work entire day with no leave. Battle
of a ladies' life is in excess of a man's regard
lady regard world. One who mishandles a
woman is the greatest defeatist. Ladies are
not powerless, they commit themselves to
their families however it doesn't imply that
they can't work outside the house, in some
cases they end up being better than in
scholarly or official exhibitions. "Ladies are
the biggest undiscovered repository of
ability in this world", Hillary Rodham Clinton.

References

1. Parashar A. Women and family law
reform in India.
Uniform Civil Code and gender equality. New Delhi,
2. Agnes, Flavia. Law and Gender
Inequality: The Politics
of Women’s Rights in India. New Delhi,
India: Oxford
3. All India Democratic Women’s
Association. Gender-Just
of the Western Legal Tradition. Cambridge,
5. Cook, Rebecca J, Human Rights of
Women: National
and International Perspectives.
Philadelphia: University
6. Ali, Ikram. Muslim Women Form
Law Board. Times
7. Jacobsohn, Gary J. The Wheel of
Law: India’s
Secularism in Comparative Constitutional
Subversive Sites:
Feminist Engagements with Law in India.
New Delhi,
9. Verma B.R. Commentaries on
Mohammedan Law (in
India, Pakistan, and Bangladesh) 8th ed.
Allahabad,
10. The Constitutional Law of India: Dr.
JN Pandey

*****

By Kunal Singh
From Vivekananda Institute of Professional Studies

ABSTRACT
The world at large is badly hit by the COVID-19 pandemic. In the time of the pandemic, businesses, including huge conglomerations, are experiencing unprecedented challenges in the proper regulation of their business and finding it difficult to sustain themselves. Big business giants are coming forward in pharmaceutical, hospitality, banking, and software development sectors to cooperate to hand over a boost to the economy. While these efforts taken by the companies are commendable, the cooperation between the business entities should operate in consonance with the provisions of the competition law. This article discusses the refashioned implementation of the provisions of the competition law without having an Appreciable Adverse Effect on Competition (AAEC). This article further compares the perspective of India on the competition with the perspective of other countries and concludes plausible solutions to tackle the problems arising therein.

INDIAN PERSPECTIVE
The competition sector in India is governed by the Competition Act 2002. In the time of the pandemic, more and more business groups are coming forward to join hands to cooperate to increase the production, demand, supply, distribution, and consumption of goods so that a larger section of society would be benefitted. The catch here is that these business groups can only cooperate if they do not violate the provisions of the competition law, and adhere to the guideline laid down by the commission otherwise, it would attract penalty.

Section 3(1) of the Competition Act 2002 deals with the Anti Competitive Agreements. While conducting business in India, business groups are prohibited from executing anti-competitive agreements. These agreements include agreements between “enterprises or association of enterprises or persons and association of persons germane to the production, supply, distribution, storage, acquisition or control of goods and provision of services” within India and for this reason it is prohibited.

Section 3(3) of the Competition Act deals with the anti-competitive cartel agreements which are agreements; “(a) to directly or indirectly determine sale or purchase prices; (b) to limit or control production, supply markets, technical developments, investment or provision of services; (c) share markets, source of production or provision of services by way of allocation of the geographical area of the market, types of goods or service, number

---

1307 The Competition Act 2002
1308 The Competition Act 2002, s 3(1)
1311 The Competition Act 2002, s 3(3)
of customers in the market, or in any other similar way; or (d) rig bidding or collusive bidding as it is presumed to have an AAEC within India”\(^{1312}\). An exception to this is that the agreement entered into by way of Joint Venture that is or is likely to increase the efficiency in the production, distribution, supply, storage, acquisition or control of goods, and provision of services is not prohibited under the provisions of the Act.

The Competition Commission of India also issued an advisory\(^{1313}\) dated 19\(^{th}\) April 2020 citing this as an extraordinary, unprecedented, and challenging time for the businesses to carry on their operations. It notified that in these hard times it is essentials to maintain the chain of production, supply, distribution of essential commodities and has allowed the business group to cooperate and share critical information such as stock levels, information about infrastructure, and information about customers, but also added that this cooperation between business groups should look to enhancing the efficiency in the production, supply, distribution, and consumption of the commodities and if the commission finds someone contravening the guidelines laid by it would be penalized. The *onus probandi* lies upon the party being investigated for the possible contravention. For the business groups to benefit from this presumption, increased efficiency, larger benefits and social welfare has to be demonstrated by them, in the absence of which they are presumed to have been violating the provisions of the competition law and thus will elicit the prescribed penalty.

While some of the jurisdictions in the European Union recognize *crisis cartels*\(^ {1314}\), India does not. The concept of crisis cartels allows the industry players to join hands to cooperate and find a solution for the common problem arising out of the crisis. These industry players have to demonstrate that their cooperation is the *sine qua non* for the larger benefit and welfare of the society and the consumers will receive a fair share of the benefit received by them. In India, the provision of, ‘efficient increasing JV’s’ is carved out in the Competition Act which is a possible defense for the cooperation between business players and not industry-wide collaboration.

**MEASURES TAKEN BY THE COMPETITION COMMISSION OF INDIA**

In the bid to tackle this pandemic and to succour the business operations, the Competition Commission of India has taken some timely and effective measures. Some of the steps taken by the commission are:

- **Suspension of filings under Sections 3 and 4 of the Act:**
  - Sections 3 and 4 deal with the anti-competitive agreements and abuse of

---

\(^{1312}\) Competition Commission of India, ‘Competition Act’ (Competition Commission of India, 1 August 2018) <https://www.cci.gov.in/competition-act> accessed on 19 May 2020

dominance position respectively. The Competition Commission of India had suspended all the filings related to the aforementioned sections as per the notice dated 23rd March 2020. Subsequent notices by the commission extended this date to 14th April 2020.

Hearings before the Commission:
Even before a nationwide lockdown came into operation, the CCI had suspended all the business and competition-related hearings from 17th March to 31st March 2020. Further, it extended the date of this suspension to 13th April 2020.

Pre-filing consultations:
All the pre-filing consultations were suspended by the CCI by a notice dated 23rd March 2020. Later, they were allowed via video conferencing through a notice dated 13th April 2020.

Notification of combinations:
The CCI following its notice dated 23rd March 2020 had suspended all the notification of combination related to combinations (Section 6 of the Act). Further, a notice released by the CCI on 30th March 2020 allowed for the filing of notification of combinations electronically only through the Green Channel.

ANALYSIS OF THE INDIAN PERSPECTIVE
The competition authority in India, i.e. the Competition Commission of India responded readily and effectively the imminent threat, posed by COVID-19, to the business sector and competition regulation in India. The most significant step taken by the Commission was the adoption of electronic means for filings and notification of combinations. This step, if studied in the light of COVID-19, was appreciable because it saved time of the applicants and red-tapism involved in the whole procedure and maintained the social distancing norms.

Taking cognizance of the challenges faced by the business operators in these hard times and welfare of the society at the same time, the CCI took a comprehensive and balanced approach in addressing these issues. It allowed the industry players to collaborate and cooperate with each other for the purpose of boosting the production, supply, and distribution sectors, keeping in mind that while doing so they are not contravening the provisions of the Act. It is generally said that hard times call for innovation and the CCI has put this saying into practice. In an advisory released by the CCI dated 19th April 2020, it stated that it will only allow those businesses that are essential to operate to address the concerns arising out of COVID-19, and no business operator should contravene the provisions of the Act. Thus, the approach of the CCI is pro-competitive and not anti-competitive in nature.

THE GLOBAL PERSPECTIVE


1316 The Competition Act 2002, s 6
India is not the only country that has been suffering persistent unprecedented challenges in the business and the competition sector stemming from the gradual rise of the COVID-19 pandemic. Many countries across the world have been badly hit by the pandemic resulting in the disruptions faced by industries in maintaining the production and supply chain to make up for the imminent shortage of essential scarce products.

These times have provided an opportunity for the countries to re-assess their competitive practices and to re-frame their competitive provisions in order to facilitate the production and supply chain of essential scarce products saving them from imminent shortage and ensuring that these concerns should be addressed in compliance with the intensity of the emergency. For this, many countries, like India, have allowed the industry players in the essential goods sector to cooperate by sharing all the commercial, consumer-related, and business-related information that may otherwise be anti-competitive in nature.

The European Competition Network (European Union):
The European Competition Network responded readily to the challenges posed by the pandemic and has temporarily accepted the cooperation between industry players to continue the disrupted production and supply chain of essential scarce products and ensuring proper dispersal of those essential goods to the consumer. To this effect, the ECN released a Temporary Antitrust Framework on the 8th of April 2020 to ease the competitive practices for the purpose of cooperation between industry players dealing in essential scarce products. Since this pandemic is a public health emergency and the word emergency means that things will not be normally operated and a temporary restructured framework is necessary to facilitate the operations as they would have been if things were normal. Thus under the TAF, the ECN inspected the scope for cooperation between competitors and allowed them to carry on their operations in cooperation for a temporary period.

The ECN under the TAF has set out some criteria for the validation of the essential cooperation and stated that since this cooperation involves the sharing of sensitive information germane to the business and commerce which would attract anti-competitive provisions, and to prevent this these criteria have to be met by them. These are as follows:

a) The cooperation should be ‘essential’ and necessary to foster the output of essential scarce goods and avoid the imminent shortage.

b) The cooperation should purely be temporary in nature and not continue beyond the prescribed periods by the ECN.

c) It should not be strictly necessary to achieve the objective of avoiding the imminent shortage in the supply of essential scarce goods.

The ECN in the TAF also stated that the cooperation between the industry players is a way to avoid the imminent shortage of essential scarce goods. For this, the ECN recognized the need for specific guidance that can help the industry players with their cooperation initiatives for their self-
assessment. The ECN also recognized that providing ad hoc feedback to the undertaking would help in carrying on their cooperation initiatives. The ECN for guiding the undertakings in their essential cooperation initiatives and to facilitate a swift continuity in the production and supply chain had also introduced a completely dedicated portal and mailbox (COMP-covid-ANTITRUST@ec.europa.eu) for guiding the undertakings in their initiatives. In the first, the ECN issued first of the comfort letters to the Medicines for Europe on 25th March 2020 relating to the essential cooperation for ensuring a continued supply of medicines to some critical hospitals. The issuance of the comfort letter has opened up the scope for other undertakings to seek exemption from the anti-competitive practices during the pandemic.

Article 102 of the Treaty on the Functioning of the European Union prohibits the potential abuse of a dominant position by one or more than undertakings in the form of refusal to supply, setting up of the minimum price, and fixing of exorbitant prices of the essential scarce commodities. Within the ambit of the aforementioned article, the ECN is also planning of fixing the maximum price of the essential scarce commodities so that the undertakings do not take undue advantage of the consumers and charge them exorbitantly.

<table>
<thead>
<tr>
<th>STEPS</th>
<th>CCI</th>
<th>ECN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crisis Cartels</td>
<td>No (only through JV’s)</td>
<td>Yes</td>
</tr>
<tr>
<td>Suspension of Filing</td>
<td>Yes</td>
<td>No. It has been accepted albeit at a slower rate.</td>
</tr>
<tr>
<td>Hearings before the Commission</td>
<td>Suspende d</td>
<td>Suspende d</td>
</tr>
<tr>
<td>Notification of Combinations</td>
<td>Suspende d</td>
<td>Not suspended and ECN is already</td>
</tr>
</tbody>
</table>

1321 European Commission, ‘Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak’ (8 April 2020)
accepting them.

The above table draws a fair comparison between the two antitrust regulators after a close analysis. The Competition Commission of India does not recognize the concept of ‘crisis cartels’. It has only allowed the business players to cooperate in situations like this only by way of Joint Ventures. It does not permit an industry-wide collaboration for the purpose of general well being and overcoming the imminent shortage of essential scarce goods. Unlike India, many jurisdictions in the European Union \(^{1323}\) recognize ‘crisis cartels’ which allow an industry-wide collaboration between the undertakings without contravening the provisions of the competition law.

Another distinction is regarding the suspension of filings before the respective commissions. While the CCI had suspended all the filings under Section 3 and Section 4 of the Act till 14\(^{th}\) April, the ECN on the other continued to accept the filings. Unlike the CCI, the ECN continued to accept the notification of mergers albeit in a slower manner. Both the CCI and the ECN suspended the hearing before the respective commission.

A close look at the steps taken by both the antitrust regulators has shown that although their approaches were distinct, they were directed towards revitalizing the economic structure by re-assessing the antitrust regulations and re-framing a temporary framework to uplift the production and supply chain of the essential scarce goods for the general well being of the public.

**CONCLUDING REMARKS**

The public health emergency has called for a coordinating approach by the undertaking to fulfil the public health objectives. The most important thing that the industry players or the undertakings have to remember that before collaborating with other competitors one should take legal advice on the legality of the cooperation and should assess one’s competition compliance program. Competitors should not share (directly/indirectly) any sensitive information; use a common platform to set prices, or cooperate by equally dividing the geographical area and sharing the consumer-related information. An ill-informed decision at the time of the pandemic may attract the penal provisions of the respective anti-trust regulators that can cause the financial drain of the undertaking.

---

PHOTOGRAPHY AS AN ARTISTIC WORK UNDER COPYRIGHT LAWS

By Malvika Pal
From University School of law and legal studies, GGSIPU

ABSTRACT

Photography which is considered as a very common skill nowadays grants certain intellectual property rights to their owners. Now these rights can give certain economical, social and legal benefits to the owner therefore to determine who is the author of such work is essential. Under copyright act the author of the photograph have been granted certain rights but whether such copyrights to the photographers are justified. Isn’t photography a machine’s output where human interaction is minimal. And if copyright is to be granted how to define the artistic creativity in photograph or shall we consider all photographs worthy of a copyright in this millennial era. The paper also discuss about the stand of orphan works in photography and the Indian copyright laws on this. Later the paper discusses about the meaning of fair use in photograph and when it can be considered as fair use.

I. INTRODUCTION

“Photography is the story I fail to put into words.”

- Destin Sparks

Photography isn’t an alien concept to anyone in today’s world every second person you will look around will be holding a camera phone or any electronic device, capable of capturing a beautiful shot. Photography is a new trend amongst this millennial population but with this new trend certain new rights emerged and new laws and principles comes into picture. Photographs are protected under the copyright act under the term artistic work in Indian copyright Act, 1957\(^{1324}\). Any photograph taken by the author is protected by the copyright no other person can infringe his rights associated with such photographs however in some specific situations. Certain exemptions are provided. Photography is an art and it was recognized by the courts that even after the involvement of a machine it isn’t excluded from the ambit of copyright. The act of photography involves human intervention it can be defined as a way of expression. Photographs depict emotions, feelings and perspectives. When someone looks at a photograph, he sees the subject, object or nature from the eyes of a photographer, the side of the story which the photographer is trying to bring out. “There are always two people in a photograph- the photographer and the viewer”. (Ansel Adams)

Photography and copyright

As per section 13 of the Indian copyright act, 1957 the act applies to
1. Original literary dramatic, musical, and artistic work
2. Cinematograph films and sound recording
3. Sound recording\(^{1325}\)

The original photographs are protected under artistic works, the quality of such work doesn’t matter. As per the definition of artistic work given in section 2 (c)\(^{1326}\) it is not necessary to possess artistic quality for a work to fall within the category of artistic work under the Indian copyright act.

---

\(^{1324}\) S.13, The Indian copyright act, 1957
\(^{1325}\) Ibid
\(^{1326}\) Ibid
1957. The category of photograph includes photolithograph and any other work produced by the process which is on the line of photography. However, the cinematography films don’t fall this as section 13 has a different category for it. Photograph can be defined as an art of taking pictures by chemical action of light and other radiation such as heat and x rays on sensitive film or other material and it embraces xerography and similar processes.\(^{1327}\)

Any photograph which is the outcome of a photographer’s skill and effort will be eligible for copyright however mere replica of a normal picture won’t be eligible for that.\(^{1328}\) A common picture of a famous place taken with no skills and efforts is open to the rest of the world. However if the photographer has put in some efforts and used his skills by fixing the lights and arranging the objects, selecting the exact moment and sized of the photograph of the moving object and objects and someone else replicates the same to arrive at the same product this will amount to infringement the copyright. Thus, in photography the copyright arises in the moment when you took the picture unlike the painting and sculpture it arises in the split of the second.

### II. ISSUE WITH PHOTOGRAPHY DEVELOPMENT

#### 1. Dual nature of photography

The copyright arises not at the mere instance of the idea but when such idea is expressed in material form however in case of the photograph it isn’t produced in one go like a painting or a sculpture. It is developed on two levels

- **Firstly:** it is clicked by the person and it remains in its negative form
- **Secondly:** after the negative is taken out the are available only after the chemical and mechanical processes.

The issue which used to arise were:

1. When does the copyright arises, when the shot is taken or when it is produced in the material form?
2. Who owns the copyright when the production involves the labour of so many people?
3. Where technology is an essential part for the production of a material work can one effort be deemed as more creative over others.

### Photograph and original work:

Initially the court suffered great difficulty in recognising the authorship in photography since the photography is a collective outcome of the work done at multiple levels. The *Burrow-Giles Lithographic co. v. Sorony*\(^ {1329}\) is the first supreme court case to recognize the photography as a skill worthy of authorship and to be protected by copyright.

*In this case there were* arguments against providing the protection to photography *firstly* since it used to be considered as a work done by machines only and there is no constitution protection availability to it similar to that of the writing done by an author, *secondly* it was considered that it requires no human intellect and brain it is just the mirroring of the reality, i.e., n copying whatever is already present there.

---


\(^{1328}\) V.K Ahuja, Law relating to Intellectual property rights, 42 (3rd ed., 2019).

The court decided the case on the grounds by finding human skills and efforts present in the work produced it gave the example of the maps and charts which are the subject matter of the copyright both are original writings of the author.

On the similar track the court held that photographs are liable to copyright protection as long as the “ideas in the mind of the author expressed”.  

The court said that an author is the one who owns, originates or makes something and the nature of the copyright is to provide the exclusive right to author over his own genius or intellect. This judgment leads to the courts’ reliance on the photographer’s pre shutter activities which impact the pictures in a major way. This includes selection, arrangement, settings, and framing of the angle for the shot which eventually will lead to the photograph hence intellectual property.

In this case, the court addressed the issue regarding the conflicts between humans and machines in respect of the copyright’s protected subject matter. It can be concluded that the picture of nature which was taken from the camera isn’t solely because of the existence of nature but it was the photographer’s perspective, his imagination, his view and his judgments which influenced his photography. It isn’t solely a combination of already existing objects, nature, or subjects and machine the photographer’s perspective matters. A photograph is a result of his intellect, his skills and efforts.

By addressing the personal contribution, the court describes what copyright actually protects and it is the human intellect that has the will to produce such products which need protection it can be a painting a photograph or a drawing as well. By this judgment, the court didn’t ignore the rights of the people who take the pictures without paying much attention their rights may arise or may not it depend on the conditions which were apparent at the time of taking such photographs.

However, it can be said that if the work is done by the machines only it can’t be protected there is no originality, it is only reproduction of the existing ideas, it can be aesthetic. Copyright protection is required for human productions.

Another principle that evolved is that not only the human being controls such machines for the photograph but the photograph must not be the “ordinary” one. hence two morals developed from this

1. humans shall control the automation
2. the one who is inventive should be given the copyright.

Monkey case (Naruto v. Slater)

This case is an extension of the two morals that we discussed earlier.

Facts:

1. In this case, a British photographer David Slater travelled to a national park in Indonesia to click some pictures of the wildlife, there he followed a troop of monkeys and tried to get a close shot however it wasn’t possible for him to do so. Therefore, he left his camera on a tripod stand by adjusting the settings and let the monkey click the pictures. The first few shots weren’t clear so he again changed the settings and got the perfect shots. The shot was sent to many agents and was published in daily mail; however, it went viral later on.

1330 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)

1331 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)
2. Later on, the same picture was posted by Wikipedia on its page contending that a monkey doesn’t own copyright of this picture that can remain in the public domain.

3. In September 2015, People for the ethical treatment of animals (PETA) stating that the picture is a result of continuous action of the monkey (Naruto) therefore he owns the copyright.

4. In 2016 January the trial dismissed the PLEA by peta stating that animals don’t have any standing in the court of law, therefore, can’t sue for copyright infringement.

5. In between the PETA appealed the dismissal in a court of appeals in the 9th circuit, however it was all resolved through an out of the court settlement in which it was decided that Mr. Slater would donate 25% of his future royalty revenue to charities which will protect the Indonesian crested macaques.  

We can draw an analogy between this case and Temple island collections Ltd. v. New English Teas where a famous black and white picture of the houses of parliament with a red bus crossing the Westminster Bridge was the issue. Here in this case the picture was used by a firm used to sell London souvenirs. When the negotiation regarding the picture’s license didn’t end in successful result the new English teas went ahead and clicked another picture with different angle and setting but the same monochromatic view. When the copyright infringement case was filed the defendant argued that it wasn’t an original piece of work.

Here the judge held:

Individual judgments about the selection of visual angle, motifs illumination plays a role here the author has made decisions about the arrangement of the photograph he has a copyright.

Here, in this case, the judge identified a series of actions required to

- The angle of shot, light, and shade, exposure and effects achieved with even filters and developing techniques
- The creation of the entire scene
- And being in the right place at the right time.

1332 Naruto v. Slater, No. 16-15469 (9th Cir. 2018)
1333 Temple Island Collections Ltd v. New English Teas [2012] EWPCC
1334 ibid
Conclusion: Now if we apply all these principles held by the judge as important factors in deciding the author’s copyright, we can say that in monkey selfie case Mr. Slater has the copyright over the picture. It can be concluded that he set the camera put it at a perfect place, adjusted the settings, adjusted the aperture for close shot, checked the settings and kept on waiting there he was in the right place at the right time.

2. Digital photographers’ creative contribution:

Since with the digitalisation and accessibility of camera in our hands’ photography is a dime a dozen nowadays. The copyright for photography needs to specific and purely towards artistic photograph. The broad horizon of the copyright law right now is actually compromising the art that ‘photography’ is and on what ‘photographers’ thrives on. The renowned photographers claim that today world is lacking the creativity now everybody is holding a camera there are tons of pictures available but the quality is decreasing. Photography can’t be concluded as just a reproduction of reality it is an image through the lens of the photographer, it shows just more than the subject, the layers of perspective, layer so reality even in mundane things. The camera is a tool and the photograph is an art of the photographer on which he has worked like an artist.

Photographs helps the people to broaden their horizons. Their views towards the same subject, object takes a different lane. It is like watching a same story with different mindset. A photographer is the one who sets the stage, who decides the protagonist in a movie and tells the story from his perspective.

Many of the young photographers believe that there is a distinction between “taking photograph” and “making photograph”. When a photographer makes a photograph they intentionally set the frame from a specific angle, from a particular perspective, with particular tools, selecting everything that will affect the photograph. “A picture is a worth a thousand words”, hence many photographers believe that it is the duty of the photographers to check what they are putting out there in public since the picture represents their perspective there can be another side to the story. There are so many horrible pictures circulating on the internet creating multiple issues on regular basis. It is considered as their ethical duty towards the world. The case of burrow Giles1335 talked about the issue of automated images. By giving protection to ordinary images the court actually narrows down the path of the skilled and talented photographers. When there are so many ordinary pictures available it will eventually lead to the elimination of critical audience. People don’t find more art and beauty in it. It becomes a regular affair for them. The copyright law in an attempt to expand the copyright protections is actually compromising on the aesthetic value, on which the market of the photographs work.

3. Authorship in photographs

Author of the photograph under section 2 (d)(iv) in Indian copyright Act1336 is defined as a person who is taking the photograph. The photographer will be deemed as the owner of the photograph and


1336 S.2(d)(iv) Indian copyright act, 1957
not the owner of the negative of the photograph.

Section 17 the act talks about the author of a photograph in different conditions.\textsuperscript{1337}

By summarizing this section to deduce who has the ownership over a photograph we will see that:

1. that the person who took any photograph with skill and effort will be the owner of such picture

2. if such photograph is produced by the person during the course of his employment in relation to the contract of service or apprenticeship for the reason of publication in newspaper, magazine or similar periodical than the proprietor is the owner. However, in another scenario the author will be the owner.

3. when such photograph is taken at the instance of a person in exchange of valuable consideration, such person will be the owner in absence of any agreement to the contrary.

4. Owner can be government, PSU and any international organization.

Section 22 of the Indian copyright Act says that the term exists till the lifetime of the author and 60 years after the year author died. so in total it exists till his/her lifetime + 60 year from the next year of his/her death.\textsuperscript{1338}

The copyrights given were over both tangible property as well as intangible. Because the intellectual property has resulted in the production of both. However it differs from There is a landmark case on photographs authorship here \textit{Fairmount Hotels Pvt. Ltd. vs. Bhupender Singh (2018)}\textsuperscript{1339} Where the pictures of the plaintiffs hotel were took by the defendant and were posted on his Facebook page under the name of his hotel it was held that this is an unfair use of the of the photographs belonging to another person. The court held such any such an act done with mala-fide intentions to incur undue profits from it he will be held liable for unfair use.

\section*{III. ORPHAN WORK IN PHOTOGRAPHY.

What are orphan works:}

Copyright work is said to be orphaned when the author of the work is untraceable. This can happen because of the various reasons such as:

- The author couldn’t have been publicly known
- The work has been published anonymously
- Or never published at all
- When it is impossible to locate the owner, such sorts of works include pictures documents stored in public libraries or museums.
- Another type is the one where the works are inherently informal, collaborative, or amorphous. Such works are very common in digital world.\textsuperscript{1340}

The orphan work creates issues for both the potential user of such work and for the photographer and other copyright owner. Because the potential user may desperately wants to use such work and may want to get the license to use the photograph. The potential user may have to put in a lot of efforts cost and time I finding the author of the orphaned work. And even though if the

\textsuperscript{1337} S. 17, the Indian copyright act, 1957.

\textsuperscript{1338} S.22, Indian copyright Act, 157

\textsuperscript{1339} Fairmount Hotels Pvt. Ltd. vs. Bhupender Singh (2018)

\textsuperscript{1340} Yael Lifshitz- Goldberg, Orphan works, WIPO seminar, available at https://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf, last seen on 04.05.2020.
potential user may use such photograph of an unknown photographer with an unknown date of creation but later on what if the copyright owner comes in and files a case which will lead to high money damages or an injunction against such a potential user. This will put the potential owner in trouble. That’s why most of the time the potential users don’t use orphaned work. And for the photographer and other copyright owner he won’t be able to use such work for his research or reference hence such work will be lost. The issue of orphan work isn’t a minor work it is escalating with the digitalisation of the work.

It is leading to the wastage of the intellectual property since such property has been left redundant because there is no owner to claim such work.

Two possible reasons for the increment in orphan work are:

- Eliminations of all the registries and formalities to get the copyright under Berne convention.
- The extended term of the copyright. Under section 25 of the Indian copyright act the term of copyright over a photograph is 60 years from the date of publication of the photograph.

INDIAN COPYRIGHT ACT ON ORPHAN WORK

Section 31 A of the act provides that if a person want to use an orphan unpublished or published work or communicated to the public but withheld from the public or any other work whose author is either dead or unknown or cannot be traced he can do so by applying for the license to publish or to communicate such work to public. However, before applying for the license the applicant is required to publish his proposals in any an English language newspaper which is having circulation in the major part of the country. And if such work involves the translation to any specific language then in any newspaper in published in that specific language as well. So Indian copyright act thus provide a chance to use the orphan intellectual property.

Rights of the photographers

The rights of the photographers are given in section 14 (c) of the Indian copyright act. in the case of an artistic work, —

(i) to reproduce the work in any material form including depiction in three dimensions of a two-dimensional work or in two dimensions of a three-dimensional work;
(ii) to communicate the work to the public;
(iii) to issue copies of the work to the public not being copies already in circulation;
(iv) to include the work in any cinematograph film;
(v) to make any adaptation of the work;
(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv); From all of the above-mentioned rights it can be safely assumed that it the ‘owner’ of the copyright who can reproduce his work. Anyone else who reproduced the same work in any material form without the consent of the authors infringes his right to reproduce even if does only some part of the work provided that part must be the substantial part.

---

1341 ibid
1342 S. 31 A Indian copyright act, 1957
1343 S. 14 (c), The Indian copyright act, 1957
As per section 14 the reproduction of work in any material form includes:
1. Storing of it in any medium by electronic or other means
2. Depiction in three dimensional of a two-dimensional work
3. Depiction of a two dimensional in a three-dimensional work.\textsuperscript{1344}

One of the most certain test to assure whether something is a copy of other is the 
lay observer's test: as per this test if a person who is not an expert who is a layman in relation to the description, the objects which were reproduced appear to him as the reproduction of the work, if that doesn’t happen it wont account for an infringement.

IV. REPRODUCTION OF COPYRIGHT WORK
Exemption under Indian copyright act, 1957;
Section 52 of the acts describe certain acts where the use of copyright material is permitted. In context of photography certain relevant acts are:

1. Fair use
The doctrine of fair use allows the unauthorize use of the excerpt of the copyright work for research, private study, criticism, news, reporting, teaching, review etc. on the basis of this doctrine the copyright work can be used by any person without infringing the copyright. The term hasn’t been defined anywhere in the Indian copyright at. However, there is one test to determine the fair use it is to check whether the use is likely to affect the armlet value of the copyright work. The broad principles of fair dealing have been given by the Delhi high court in the case of super cassettes industries limited v. Hamar television network private limited.\textsuperscript{1345}

What is Fair use in photographs
The purpose of the doctrine of fair use is to grant access to the copyright material to a limited extend if it benefits the public. While granting the immunity of fair use the court looks into the following aspects:

- **The purpose of the use:** this must be education, judicial, research, reporting, news reviewing and non profit
- **The nature of the use:** it should be fact based or public content
- **The amount and substantiability used:** using only a small part of the image or only a thumbnail or low-resolution version of the image
- **The market effect of such use:** the user wasn’t in a condition to buy or license such work

Can we consider altering photographs as a fair use?
In a landmark case of Patrick CARIOU v. Richard PRINCE\textsuperscript{1346} U.S. the US court of appeal discussed about the alteration in photographs when can it be considered as fair use.

**Facts:** Cariou a professional photographer took some pictures in mid of 1990s and then those pictures were published in 2000 in a book titled ‘yes rasta’. Which was described by him as extremely classical work.

Prince on the other hand is an appropriation artist, which means he directly take from another work of art a real work or an existing art and uses such art and

\textsuperscript{1344} S. 14, The Indian copyright act, 1957.
\textsuperscript{1345} 2011(45) PTC 70 (Del.) at pp 88-89.
\textsuperscript{1346} Patrick CARIOU v. Richard PRINCE United States Court of Appeals, Second Circuit. 714 F.3d 694 (2013).
incorporates them into his own work by changing the whole context. He tries to change the work of the artist into something unrecognizable. He took 28 pictures out of ‘yes rasta’ and altered the images and in 2008 in a canal zone exhibit at the Gagosian art gallery he featured 28 of the prince which were published in ‘yes rasta’. A copyright suit was filed against him.

Judgment: The district court held that it wasn’t a case of fair dealing and held him liable however the Appeal court heard him and held that Mr. Prince’s work has created an entirely different aesthetic. The court held that prince’s work has given a new expression to such photographs. Mr. Cariou photographs brings out the sense of serenity and are depicting natural beauty whereas princes work brings a hectic and provocative expression. However, the court still sent back 5 princes work to the lower to determine whether they infringed the copyright as the change was very minimal. The court in this judgment tried to expand the meaning of fair dealing. It was held that the whole expression has been changed therefore it bring out the new expression. Hence no tampering and affecting the reputation of the old work.

2. Reproduction of work for judicial proceeding, legislative work, and with the certified copy made under the law.

The acts section 52(1)(d) says that the reproduction of the work for judicial proceedings doesn’t constitutes copyright infringement. However, the term judicial proceedings haven’t been defined by the court therefore it can be considered as the any proceedings before any court, tribunal, commission or any person having the authority to do so.

The act’s section 52(1) (e) also granted use of such copyrighted work by the secretariat of the legislature exclusively for the members of the legislature isn’t infringement of the copyright.

Such reproduction made under certified copy is also permitted by the section 52(1) (f)

3. Storing of the work in electronic medium by non-commercial public library

Section 52 (1) (n) provides that any non-commercial library public library can store the work in electronic form provided before doing so they have a non-digital copy of the work.

4. Use of the artistic work by the author himself.

It says any use of the artistic work by the author himself where he isn’t the owner of the copyright isn’t infringement of the copyright. And where such and work is used in another work. He isn’t allowed to imitate the same thing. Under section 52(1)(v)

Conclusion

Photography is an artistic work, however, the copyright law fails to justify the artistic version of the photographs, by giving the copyright protection even to a photographer who has put in minimal efforts, it is actually
jeopardizing the real art which photography is. In this digitalised era where 5 photos are getting added to someone’s Instagram account every hour. The copyright law for photography must dwell into the aesthetics of photography and try to protect the intellectual property which is actually worthy of protection. The whole business of art certainly revolves around aesthetics, emotions and skills. Photograph is an author’s expression to the world how he sees it. Every picture is telling a story from a photographer’s perspective. It is something unique to a person, what can be considered as a fair use of photograph is still a question of debate, to what extent a picture can be altered to claim it as a fair use.
A COMPARATIVE STUDY OF SABARIMALA ISSUE VIS-A-VIS THE ROLE OF JUDICIARY FOR THE PROTECTION OF RIGHTS OF WOMEN

By Manas Ranjan Padhi and Riya Shrivastava
From Amity Law School, Amity University, Raipur

ABSTRACT:

Gender inequality has been a phenomenon in India. Women have primarily suffered and are still suffering various socio-legal inequalities. The women of the age group between 10 to 50 years were not allowed to enter the temple of Lord Ayyapan because of their biological process of menstruation. It signifies that they have failed to seek equality in every extent for so long before the Sabarimala verdict. The Supreme Court's judgment has made the storm and has been a sensitive matter. However, the Judiciary has to regulate and resolve the problems relating to every aspect of religious affairs. Nevertheless, sometimes it is not easy for the Judiciary to manage the conflict between religious matters and laws. Moreover, the judgments of the Honorable Supreme Court are binding on every person. The conflict escalated between religion and law. The people of Kerala and other states have been protesting as the judgment is against their long-term religious practice that was being followed by the people of Kerala, as any drastic change in society is not acceptable and is susceptible to the opposition. By the very judgment of Sabarimala, the Supreme Court of India have brought about a shift in religious matters and a change which was need of the hour.

This paper overviews the conflict between religious affairs and laws with regards to the Sabarimala verdict. The paper contains the history and beginning of the ethics and ethos that is being followed in Sabarimala temple. Further, it discusses the brief facts and Judgement pronounced by the Honorable Supreme Court. Also, it deals with the rights of the women and their position in the country with regards to religion and laws. The paper also provides suggestions for the enhancement of women's status in Indian society.

INTRODUCTION:

Polymath has widely recognised that in secular states, the intervention of Judiciary in religious matters is commonplace. Judiciary is regarded as the third organ of the government, and it is considered to be very important in a democracy because the Constitution alone cannot secure fundamental rights. For the enforcement of fundamental rights, judicial review is indispensable. Freedom of religion is secured by Article 25 and 26 of the Constitution of India, but it is subjected to judicial review on the grounds of morality, health and public order. Judicial review is regarded as the most lethal weapon in the hands of Judiciary that is used to challenge the arbitrary action by any entity. Supreme court is regarded as the highest Court of appeal in India. Article 13 of the Constitution of India authorise the apex court to use the power of judicial review for administrative, legislative and judicial actions itself. Apex court is regarded as the protector of the fundamental right of the citizens of India. It is seen that that are certain rights which are conferred by the Constitution, but that cannot be Infringed, waived or abrogated. The preamble of the Constitution ensures the liberty of thought, expression, belief, faith and worship. It is a
fundamental right of a person to profess and practise any religion they like. The state shall not interfere in the matter of religion except when it is convenient to do so. It is a fact that the Supreme Court of India has intervened in the religious matter at the right time.

One of the recent examples of judicial intervention in a religious matter in India is the Sabarimala case. Here in the case of the young lawyer's association, the ban on entry of women in the Sabarimala temple was challenged.

BACKGROUND OF LORD AYYAPPA AND SABARIMALA TEMPLE:

Lord Ayyappa is considered to be a Hindu deity who is worshipped in south India. Lord Ayyappa was born through the association of Lord Shiva and the Vishnu avatar Mohini. Later, King of Pandalam in, i.e. king Rajashekhara found the baby and accepted him as a celestial blessing.

Sabarimala temple is the place where Lord Ayyappa meditated and became one with the divine. It is located in the district of Pattanamthitta, Kerala.

RIGHT OF WOMEN & POSITION IN THE COUNTRY VIS-A-VIS RELIGION & LAW:

There are several statutes in India enacted for the protection of right and labilities of women. However, the implementation of statutes remains in question. It can be seen in the case of Sabarimala that Hon'ble Supreme Court has favoured the Judgement on behalf of women, but the implementation of the Judgement is still in question, one of the primary reasons is the stagnant culture and custom of the people and their susceptibility to accept any change. If we compare the Sabarimala issue to the contemporary world, the issue can be regarded as unintelligible. Because of the reason that modern women are empowered due to realisation of self-independence.

Pre-historic shreds of evidence suggest that women were subjected to various limitations. Though in recent time, the status of women has drastically improved. The status of women is enhanced in various field such as education, professions, etc. Women are provided with various rights which are protected by the statutes. Despite the enhancement in the status of women, still, now some part of society lacks to acknowledge women's position concerning religion. Religion is a set of a belief system that someone has faith upon. All religion is based on some ancient menu script. These menu scripts were written in the era where the status of women was incredibly inferior to the men; the women were merely considered as a property. India is a place of religious diversity; the majority of Indians follow the concept Hinduism. The menu script which regulates the Hinduism provides very inferior status to women because of which the people who follow Hinduism tend to ignore the status to women.

The dynamic nature of society has helped in the rise of the status of women. Along with that, the realisation of law & the Judiciary, through various verdict has dramatically helped in shaping the status of women. Women structure a large portion of the populace in this contemporary world. Law much helped in reducing female infanticide. Law is directly related to the need of society, and it takes shape according to the need of society.
Even though after such realisation, the only domain where the law is unable to access is religion. But if such a matter affects the rights of a person the Judiciary by exercising its power, intervene in such matter. However, when it is not able to do the same, it creates a disequilibrium in society as it encourages others to do the same.

To deal with this matter, awareness about the matter is essential. Despite being in the modern era if the mindset of people is mediaeval, then the progress of our country would be hampered. We, the people of India indirectly, are responsible for the problem of religious affairs. The concept of God varies with every community, but one unique point is that God is one. We require to have an extensive understanding and should welcome any change, which is for good.

CASE ANALYSIS ON INDIAN YOUNG LAWYERS ASSOCIATION & ORS. VS THE STATE OF KERALA & ORS.:

FACTS OF THE CASE:

Hindu Temple devoted to Ayyappan named Sabarimala Shrine is located in the State of Kerala. The most famous temple Sabarimala Shrine in Kerala had restricted women (of menstruating age) to entry. The women tried to enter the Sabarima Temple but could not because of the intimidations of physical assault against them. A women's advocate group of five members had moved the PIL to the Supreme Court challenging the judgment of the Kerala High Court which upheld the centuries-old restriction and ruled that only the "Tantric (Priest)" was authorised to decide on customary practices.

ISSUES BEFORE THE COURT:

The Issues raised before the Honorable Supreme Court are:

- The custom that was practised in the Shrine was challenged as it violated Article 14 and 15(3) of the Constitution on the ground of Gender.
- Does the custom was an essential religious custom under article 25?
- Does the Religious institution could uphold its claim and manage its own religious affairs?
- Does the exclusion of women entry lead to gender discrimination?
- Does the character of Shrine is denominational?

VERDICT:

The Hon'ble Supreme Court of India on 28 Sep. 2018, delivered the verdict in this case by 4:1 majority. The Supreme Court held that the customary practice of excluding women in the Sabarimala temple is unconstitutional, the practices violated the fundamental right of equality, liberty & freedom of religion under Article 14,15,19(1),21&25(1). The Court declared rule 3(b) of the Kerala Hindu Places of public worship act as unconstitutional. The rule 3(b) allowed the Hindu denomination to exclude only women from the commonplaces of worship if the ban was based on custom the Former Chief Justice Deepak Mishra, Justice A.M. Khanwilkar, Justice Nariman and Justice Chanrachud formed the majority stated that "Women is not lesser but inferior to men. Patriarchy of religion cannot be permitted to trump our faith. Biological or physiological reasons cannot be accepted in freedom for faith. Religion is a way of life."
However, the certain practice creates incongruities'. The only dissenting opinion was of Justice Indu Malhotra. Former CJI Deepak Mishra said that faith is a manner of existence intrinsically connected with the dignity of a person and the patriarchal practices primarily based at the exclusion of one Gender in want of the other, this cannot be allowed as this violate the essential freedom of religion. It turned into similarly ruled that the exclusion of females of age in between the age institution of 10 to 50 years, which become practised in Sabarimala temple denuded the women in their freedom of worship, which is guaranteed below article 25(1).

It was further held that the devotees of Ayyappa had not passed the Constitutional test to be declared as a separate religious identity. He further stated that if Ayyappans are Hindus, then the exercise of excluding females cannot be held to be an essential religious practice.

CASE COMMENT:

From time immemorial women have struggled for their right and position in society. It is not about the representation, but the matter is about an ideological fight with the stagnant custom and practices in a patriarchal society as per which women are subordinate. This case is about the fight against the patriarchal philosophy of the religious practices which ban the entry of women inside the Shrine. When the rights of a person are inferred, their Judiciary has to intervein. Hence the verdict of the case in favour of women is justified here.

LEGITIMACY OF SABARIMALA TEMPLE:

The democratic framework of India works within the Constitution of India. Constitution of India provide us with six fundamental rights which cannot be rendered away without any reasonable explanation, but in the case of Sabarimala temple, the stagnant customs in the disguise of religion have emerged to be discriminatory.

The only dissenting opinion of justice Malhotra raised a question regarding the filing of PIL in religious affairs. However, this statement is itself flawed, as PIL is regarded as something in which the public, i.e. the community at large, has few pecuniary interests, or some interest by using which their felony rights or liabilities are affected. It does no longer mean anything so slim as a mere curiosity, or as hobbies of a particular locality, which can be tormented by the subjects in a query. Interest shared via citizens generally in affairs of local, state or country's government. In the case of Sabarimala, the question was not merely about the religious affair, but it was more of the fundamental rights of women. Hence, the submitting of PIL is justified.

DENIAL OF FUNDAMENTAL RIGHTS OF WOMEN:

Sabarimala is a greater difficulty of gender equality than of non-secular freedom. Those who oppose the entry of females, do not have the backing of custom because the ban on females of a particular age inside the

1347 Ms Natasha Jain, case comment on Indian young lawyers association & Ors. vs the state of Kerala & Ors. , (Jan.22 2020), https://www.lawaudience.com/indian-young-lawyers-association-v-the-state-of-kerala-ors/

1348 State of Uttaranchal vs Balwant Singh Chaufal & Ors, AIR 2010 SC 2550.
temple only goes back to the High Court judgment of 1992, or even after that there is enough proof to show that young ladies have entered the temple with the full know-how of the 'Thantri', the chief priest. The practices, if at all exists, militates towards the gender equality guaranteed by the Constitution and subsequently desires to be discontinued. From antiquity, it is seen that women of childbearing age never endeavored into the Sabri forest to disturb the everlasting meditation of the lord Ayyappa and this point out the respect for the deity in them. However, devotees chaperoned along with women before they attained puberty and older women in the circle of relatives on their annual pilgrimage to the Shrine. Further, it was the condition of that time because of which women didn't enter the temple, but now that condition is converted into restriction for them.

In a legal context, we can state that the rights of the women are denied under the Constitution of India. However, the restriction can be based on intelligible differentia, but, this condition is not met in the Sabarimala case. Restriction based on biological and physiological features of human is discriminatory. Nevertheless, the apparent truth is that classification on the basis of menstruation will turn out to be being a default classification on the foundation of sex. It is, however, to be understood that the age-old notion of considering menstruation as impure should be abolished in this modern era of technology.

In addition to the above, the matter of menstruation also violates the right to privacy as the women have to disclose such personal matters in front of all.

Another point to consider is that Justice Malhotra wanted the cases which involved "oppression in the name of religious practices" and the matters of "social evils" to be entertained. Here, there was a need on her part to justify as to what part shall be a social evil and how banning the admission of women of menstruating age by inflicting harsh conditions is not a social evil. She gave an example of the long-banned exercise of Sati and defined what is troublesome, however, ended up getting the last inception for the leisure of petitioner under Article 32 inside the matters of spiritual faith. One cannot make a distinction when it comes oppressiveness and the courts ought to manage all of the crises of discrimination with due seriousness menstruation is a biological phenomenon and discrimination on this ground is in our opinion oppression of rights and freedom of women.

RIGHT TO RELIGION CANNOT OVERPOWER EQUALITY:

Secularism is considered as a fundamental feature of the Constitution. Secularism represents religion born out of rational

---


www.supremoamicus.org
schools, and it permits to look the imperative necessities for human progress in all aspect\textsuperscript{1353}.

The Court should not ordinarily infer the issues of deep religious sentiment. The Sabarimala temple and the deity are protected by Article 25 of the Constitution of India, and the religious customs cannot be solely tested based on Article 14.

From the past, Court has previously intervened in a religious affair of Shani Shringnapur and Haji Ali Dargah where women were denied entry after the voice by Bhumata Brigade. For Ayyappans the primary essential practice is being celibate which does not have any relation with a restriction on women entry in Sabarimala; instead, this provision is against the Constitutional morality because it restricts half of the population from accessing any public place.

If we take a look into the Constitution, religion can be defined as a collection of individuals classed together under the same name or a religious sect or a body having a common belief and organisation and characterised by a peculiar name\textsuperscript{1354}. Furthermore, the Ayyappans are not a separate religious; they are part and parcel of Hinduism as Lord Ayyappa was the son of Hindu deity Shiva and Vishnu.

Moreover, if the Hindu religion is to be their religion, then it must become a religion of social equality. Therefore, if non-entry of women is their religious tenant, then it cannot be presumed that its regulation will fundamentally and irreversibly challenge the very existence of sect and its core belief.

**FAILURE OF STATE IN IMPLEMENTING JUDGEMENT OF THE SUPREME COURT:**

It is a shame for a country's political framework if it cannot implement the Judgement pronounce by the apex court. If a judgement is passed and that is not followed, then it may create disharmony in the society as it may instigate other sects to ignore the Judgement. If this condition persists, then it may lead to a violation of the rule of law. If the rule of law is not followed, then it can be stated that there lies arbitrariness in behalf of the state. Then the sole purpose of the Constitution of India will be challenged.

The failure of the state to implement the Judgement can be due to the reason of political reasons, reasons to do with the scale of the reforms required, practical reasons relating to internal legislative procedures, budgetary reasons, reasons to do with public opinion, casuistically or unclear judgments of the Court and reasons relating to interference with obligations deriving from other institutions.

To overcome such failure by the state should implement the following suggestions:

The state should provide safety mechanisms that are necessary for the implementation of such Judgement, the state should spread awareness about such Judgement, the state should provide punishment for the violation of the Judgement, the state should form a


\textsuperscript{1354} S.P. Mittal Etc. v. Union of India And Others, 1983 SCR (1) 729.
committee that can keep track of such implementation of Judgement and provide a review about the same, the state can provide legal aid about fundamental rights and duties in elementary education, and Media should spread positive awareness about the Judgement.

**CONCLUSION:**

India being conspicuously patriarchal for a long time, women hardly experience fairness and equal rights endorsed by the Constitution of India. After the Supreme Court's decision, the issue of Sabarimala temple is still not resolved entirely. The verdict of permitting women to enter the temple is still not acceptable by the devotees but, the opportunity has arrived to understand the issue with diligence and think of a solution. Presently, the perfect opportunity for the individuals to transcend the negligible sentiment of fundamentalism and unite together. Sabarimala it isn't just about right to affirm religion but about the women who were separated with no sensible reason and were viewed as sullied because of their natural menstruating cycle. Although the Supreme court allowed women to enter Sabarimala temple which was in favour of Constitution one major problem is still not resolved that there is no guideline or instructions made to safeguard women's, that they can safely enter into the temple. It is still a dream of women to enter Sabarimala temple, till now they have been permitted to enter the sanctuary on a paper only which overthrows the aim of the decision of Supreme Court.

As indicated by us, it is the issue where exacting government intervention is needed. It is the built-up reality that official need to enforce the decision of the Supreme Court. Women must not be looked like a mediocre piece of the general public. At present, India is caught in the swarm of male-centric society which ought to be abrogated. Creators are not in support of female predominance likewise; rather we need a society where exists a harmony between both the sexual orientation and this parity must be made by changing the biased mindset of individuals in our nation.
LEGAL ASPECTS OF EUTHANASIA

By Mansi Gohar
From Government New Law College, Indore

INTRODUCTION

EUTHANASIA: A merciful act to end one’s life deliberately but is not a murder, it is an act of killing a person who is in a persistent vegetative state (P.V.S) and has no hope of recovery. Euthanasia is derived from Greek words ‘Eu’ & ‘Thanatos’ which means ‘good death’. There are two types of euthanasia, active & passive euthanasia.

Active euthanasia necessitates the use of lethal substances like a Sodium Pentothal & Botulinum, by injecting such substances in human body, a person goes in deep sleep in just few seconds and dies in sleep, it is the fastest and painless means of death, on the other hand passive euthanasia necessitates the withdrawing or withholding of treatment i.e. withdrawing means switching the machine off which is keeping a person alive, so that the person dies because of its disease while withholding of treatment means not providing of medicines & if there is a need of surgery that will extend the life for short time will not be done.

Active euthanasia is illegal in India under section 302 and 304, IPC and physician assisted suicide is a crime under section 306, IPC which is abetment to suicide. In other countries active euthanasia is illegal unless their legislation permitting it, only few countries in the world has permitted active euthanasia. It is considered as the crime because actively killing a person is morally unsatisfying. Sometimes the need to differentiate the physician assisted suicide and euthanasia occurs, as both the terms seem to be inter-relating and cause misunderstanding. In euthanasia the third party and physician regulate the process while in assisted suicide patient itself does it, on the advice of doctor.

Passive euthanasia is legal in India and in many countries even without legislation. On the traditional basis passive euthanasia is less bad than active euthanasia. Passive euthanasia is further detailed in two types i.e. voluntary euthanasia & non-voluntary euthanasia. Voluntary euthanasia is consent from the patient itself to die. The occurrence of non-voluntary euthanasia is when the patient is unconscious (in coma), so the close relatives or friend gives consent on behalf of the terminally ill person. Non-voluntary euthanasia also occurs when the terminal ill patient is a child & is unable to take its own decision.

LEGALISATION OF EUTHANASIA

Ending one’s life is a kosher violation of their fundamental right ‘Right to life’ and the topic of concern. Killing a person is murder but if it is in the form of euthanasia it is bona fide, the concept of mercy killing is too complicated. The Supreme Court has given its guidelines on the validation of euthanasia in India after the case Aruna Shanbaug vs. Union of India. A writ petition was filed by the patient’s friend Pinki Virani of Mumbai, claiming to be a next friend. 1355 It was a sodomitical attack on Aruna Ramchandra Shanbaug who was a nurse in a hospital in Mumbai, by a sweeper in the hospital but when he found that she was menstruating he left her strangulated with a dog chain and escaped. On the next day when she was found by the hospital staff, she was alive but due to strangulation, supply of the oxygen to the brain stopped and the brain got damaged.

After that incident Aruna Shanbaug got terminally ill & was not even aware of herself, she just lied on the same bed for 37 years. Then her friend Pinki Virani appealed to the court that she is not living a dignified life and is like a dead animal who is just breathing and eating mashed food, the end of her life would be better for her but the petition was dismissed by the apex court. The grounds to dismiss the petition were that under Article 32 of the Constitution of India the petitioner has to prove the violation of the fundamental right and it has been held by the Constitution Bench of this court in Gian Kaur vs. State of Punjab that the right to life does not include right to die.\textsuperscript{1356} It is also clarified by 196\textsuperscript{th} Law Commission of India that we are not dealing with “euthanasia” or “assisted suicide” which are unmistakably crime, the concern of the commission was different i.e. “withholding life-support measures to patients terminally ill and universally in all countries, such withdrawal is treated as lawful.”\textsuperscript{1357} The applicability of legal concepts to “withholding or withdrawing of life support” is the scope of concern and in which circumstances the medical professional could take such decisions and what will be the ‘best interest’ of a patient.

The chairman of the 196\textsuperscript{th} law commission observed and then addressed to the hon’ble ministers that, a century ago when there were no apparatus to keep a person alive, people used to die due to natural death and now by keeping them alive in such state is not bona fide for them, may be they are suffering from a pain, postponing their death is also not a ‘best interest’ for them. The Law Commission in its report did an exhaustive study, recorded the bad and good aspects of the issue and concluded it as a legal framework. Supreme Court after five years of Aruna’s case rendered a landmark judgement by approving passive euthanasia subject to unquestionable safeguards and conditions anticipated in the judgement. The Supreme Court as well as the Commission considered it to be no crime and found no objection from legal or constitutional view.\textsuperscript{1358}

**LEGAL PROCEDURE TO PERFORM EUTHANASIA IN INDIA**

In 196\textsuperscript{th} report of Law Commission of India, passive euthanasia has been advocated in the case of both competent patients and incompetent patients, who are terminally ill. In the case of incompetent patients, the attending medical practitioner should obtain the opinion of three medical experts whose names are on the approved panel and thereafter he shall inform the patient (if conscious) and other close relatives. Then he shall wait for 15 days before withholding or withdrawing medical treatment including discontinuance of life supporting systems.\textsuperscript{1359} This 15 days are for contemplation for the patient (if conscious) or relatives or guardian to file a petition to the High Court seeking final declaration that the act or omission proposed by the doctor/medical practitioner in respect of giving euthanasia is lawful or unlawful. The final decision of the High Court is binding on all concerned and will play an effective role to protect doctors and hospitals from any civil or criminal liability. The approval for non-voluntary euthanasia was given by Supreme Court in the case of Aruna Shanbaug and laid down safeguards in the

\textsuperscript{1356} Aruna Shanbaug v. Union of India, AIR 2011 CRI LJ (SUPP) 301 (2011).


\textsuperscript{1358} Id.

judgement. In Aruna’s case it was ruled by the Supreme Court that in the case of incompetent patient specific permission must be taken from High Court. Anybody either relatives, close friends or hospital staff can seek permission from the High Court. After filing a petition, a panel of three doctors (one should be a neurologist, one psychiatrist and a physician) selected by court will examine the patient and then report to the court and on the basis of that report the court will grant its decision, either to euthanize the patient or not. The procedure laid down by the Supreme Court in Aruna Shanbaug’s case to take High Court’s approval as condition precedent for life supporting measures is safer according to the present Law Commission. The High Court’s permission is necessary and desirable as the withholding of life supporting measures means violating the right to life and there is possibility that greedy relations who are interested in the wealth of the patient may with the help of doctors hasten the process of death. In such cases the High Court plays a big role and its decision is binding on everyone.

Yet there is no law in India to perform euthanasia, only the guidelines and safeguards which were given by Supreme Court in Aruna’s case are the ways to perform euthanasia. It was held by the Supreme Court that the same procedure will be done to euthanize a terminally ill person, until the legislation will make law on this. Patients below the age of 16 are required the consent of their parents to euthanize them.

LEGAL ASPECTS OF EUTHANASIA IN OTHER COUNTRIES

NETHERLANDS

In Netherlands euthanasia and physician assisted suicide are not punishable offences if performed within decided criteria of due care. Criteria concerns persistent vegetative state, request of the patient and a report of the attending physician to show to a review committee. The “Postma case” 1973 of Netherlands was debated as the concern of euthanasia, in which a physician facilitated its mother death following repeated explicit requests for euthanasia. While the physician was convicted, the court judgement sets out a criterion when a doctor would not be required to keep a patient alive contrary to his will. This set of criteria was formalized in the course of a number of court cases during the 1980s.1360

SWITZERLAND

In Switzerland euthanasia is illegal while assisted suicide is legal the only difference between them is, in former the physician or some other person regulates it and in latter the person regulates the lethal dose itself. Assisting suicide is crime according to Article 115 of Swiss Penal Code, if the motive is selfish. It condones assisting suicide for altruistic reasons.1361

There is uniqueness in Swiss law, as the recipient of euthanasia need not be a Swiss national and there is no need of involvement of physician. People from other countries, especially Germans go to Switzerland to undergo euthanasia.

BELGIUM

Belgium is the second country to legalize euthanasia in Europe after Netherlands in 2002. Belgian law has set out some conditions to perform euthanasia, which can be practiced without giving

doctors a license to kill. The patient who is desiring to be euthanized should be conscious and have a ‘constant and unbearable physical and psychological pain’ due to any accident or illness. In Belgian law, minors cannot seek permission to be euthanized. Each case of mercy killing must be filed in the special commission, to keep an eye on the doctors whether they are working under law or not.

UNITED STATES OF AMERICA

In all the states of America active euthanasia is illegal, but in the states of Oregon, Washington, Montana, assisted suicide is illegal but there are some conditions for how and when to give a person death.

OREGON

Oregon was the first state of America to legalize physician assisted suicide. In 1997, the Oregon legislature enacted the Death with Dignity Act. In this act there were criteria for an adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with ORS 127.800 to 127.897. After such a request an appointed physician (termed as ‘consulting physician’ in Death with Dignity Act, 1997) will check upon the patient and the reports of the medical history of the patient. After 15 days of request (either oral or written) and checking upon the patient assisted suicide can be performed.

WASHINGTON

The Death with Dignity Act, 2008 of Washington legalizes the physician assisted suicide in Washington.

MONTANA

In Montana, the rules for the physician assisted suicide are bit different, instead of legislature, the State judiciary has jurisdiction on such cases.

In no other state of USA euthanasia and physician assisted suicide is permitted.

CANADA

Earlier the section 241(b) of Canada Criminal Code declares physician assisted suicide illegal. The Canadian Supreme Court in a leading decision Sue Rodriguez v. British Columbia1363, in which Rodriguez, a woman was diagnosed with Amyotrophic Lateral Sclerosis, due to which she is going to be bed bound soon and will lose the capability to listen, speak, eat & see. She pleaded in the Supreme Court of Canada to allow someone to aid her in ending her life. The Supreme Court rejected her plea by a 5 to 4 majority.

In 2015, the Canadian Supreme Court in Carter v. Canada ruled that the parts of Canadian Criminal Code need changes to satisfy the Canadian Charter of Rights & Freedom and the invalidity of the physician assisted dying would be change and to validate this concept a new law in June 2016, passed by the Federal Legislation of Canada.

On February 24, 2020, the Minister of Justice and Attorney general of Canada introduced An Act to amend the Criminal Code (medical assistance in dying) in Parliament, which proposes changes to

1362. Death with Dignity act, 1997 (Oregon, USA).


www.supremoamicus.org
Canada’s law on medical assistance in dying.\textsuperscript{1364}

UNITED KINGDOMS

The Airedale case\textsuperscript{1365} in which a person named Anthony Bland, went to Hillsborough Ground to support the Liverpool Football Club, and there in crowd crushed against a steel fencing and injured. His ribs were crushed, and both the lungs punctured which interrupted the supply of oxygen to the brain, which caused catastrophic and irreversible damage to the brain. The patient was now in the persistent vegetative state. The doctor and parents were in belief that continuing medical treatment will not work and help to recover the patient. It was first pleaded in the Family Division of High Court and then transferred to the House of Lords, where they examined the condition of the patient and discussed the moral and ethical issues raised by this case and then decided to discontinue the medical treatment of Anthony Bland. Later in England in 2006, a bill which was allowing physician assisted suicide and euthanasia, was blocked by the House of Lords and never established as a law.

CONCLUSION

The issue of ending a life is incredibly controversial and is opposed by so many people. It is hard to see their beloved suffering, still people keep them alive and desires for their well-being. But the situation of a terminally ill person cannot be understood by anyone, their sufferings, their pain, is what showing them a living hell, sometimes ending up their lives is ‘best interest’ for them. Therefore, the concept of euthanasia is introduced, just to give them a peaceful death instead of suffering. As discussed above people can use this process as greediness, so the establishment of proper law is needed badly. However, the Supreme court of India has given its guidelines for regulating euthanasia (when & how). But it is not the end, the proper legislation for the execution of euthanasia is necessarily required.

\textsuperscript{1364} Government of Canada, Medical assistance in dying (26 May 2020, 22:04:56)

\textsuperscript{1365} Airedale NHS Trust v. Bland (1993) All ER 82.
LABOUR LAW REFORMS:
DECODING CODE ON WAGES AND
INDUSTRIAL RELATION CODE

By Mathivadhani.C and Madhumita
Christina Jegaraj. A
From School of Excellence in Law (SOEL),
The Tamil Nadu Dr. Ambedkar Law
University, Chennai

Introduction:

Indian labour laws, referring to the laws regulating labour and employment, is
interwoven with Indian independence movement with the history of British
colonialism. The colonial labour legislation favouring the British employers underwent
substantial changes in independent India including fair wage and fair working
conditions. The significance of the labour rights and the need to safeguard their
interests are enshrined in part III and IV of the constitution. The labour laws enacted
were sought to have high degree of protection towards the labours, but the
compliance differs as labour law is a concurrent subject. Currently there are
nearly 44 central laws and 100 state-level legislations making the industries shackled
by socialist-era laws. Numerous labour laws made the compliance quite tough,
created confusion, complexity and chaos and was a deterrent to industries and foreign
investors.

The NDA government vociferously engaged in labour law reforms as promised
by streamlining the existing central laws regarding labour into four codes: code on
wages, industrial relations, social security and occupational safety, health and
working conditions. The government claims that this simplification and consolidation of compliances which will
promote the ease of doing business and will instigate investor confidence. Among the
code four codes the two codes regarding the wages and industrial relations are dealt in
detail which together subsumes seven existing labour laws. Most of the laws are
pre-independent laws, so the codes aim to transform aged and obsolete laws, moving
towards more accountable and transparent labour laws.

II) Code on wages, 2019

The code on wages, 2019 one of the four labour laws subsumes and repeals the
following four acts relating to wages and bonus: The Payment of Wages Act, 1936,
The Minimum Wages Act of 1948, The Payment of Bonus Act of 1965 and The
Equal Remuneration Act of 1976. The object of the code as mentioned in the
preamble is to “amend and consolidate the laws relating to wages and bonus and
matters connected therewith or incidental thereto”.

A. Enhanced coverage of the code:

Merits: The code on wages claims to set
one’s sight on achieving a way round to all
the surmountable obstacles faced by the
workers and has been aimed to benefit
around 500 million workers over the country. In
India there is a fall in labour share profits,
accordingly the wages paid have not
increased in proportion to the labour
productivity, furthermore one in three
workers are not safeguarded by the

1366 Yogima Sharma, Parliament Passes Wage
Code Bill to Ensure Minimum Wage for Workers,
Economic Times,

www.supremoamicus.org
minimum wage protection\textsuperscript{1368} because of futile enforcement mechanisms. So the need for a progressive code was obligatory for a long time to enhance this situation.

The new code attempts to simplify and untangle the multiplicity of definitions and authorities involved, thereby the extensive definitions (such as for ‘employee’\textsuperscript{1369}, which now includes individuals appointed in managerial, supervisory and administrative roles and ‘employer’\textsuperscript{1370}, also refers to contractors making them responsible for paying minimum wages as prescribed) would improve compliance and widen the coverage of previous laws to make them inclusive of the unorganised sector. Forging ahead the code defines ‘establishment’\textsuperscript{1371} for the first time. It also obliterated the small catch kept in the previous legislation to get protection, such as the Minimum wages act, 1948 only applied to scheduled employments\textsuperscript{1372} and the Payment of wages act, 1936 did not cover workers from informal sectors. So, the code endeavours to cover workers from all sectors including unorganised which includes around 92% roughly\textsuperscript{1373} unlike the previous law.

The economic implication of this would increase the consumption expenditure of the country which in turn aggregate GDP growth.

Demerits: As endorsed by the Directive Principles, the new code seeks to cover all employees (around 90% of the workforce) and it will eventually lead to menace of harassment from the labour officials. Removing the concept of scheduled employments, which lists the specific industries protected by minimum wages will lead to repress wages in industries thereby bringing down the wages in all sectors. The minimum wages fixed by the state must be based on indigent workers and the industrial workers having higher wages through the protection of the schedule are affected as it gives no clarity whether the minimum wages will be set at the same level for all industries.

B. National minimum wage:

Provision: Introducing the concept of national minimum wage (National-level floor wages) was broached by various governments in order to efface the imbalance and disparities in income distribution and is ultimately included in the Code of wages, 2019 that the central government would fix a national minimum wage. According to S.9 of the code the central government will fix the floor wage or it may fix different floor wages for different geographical regions taking into account minimum living standards of a worker, after obtaining the advice of the

\textsuperscript{1368} Economic Survey 2018-19, Department of Economic Affairs 2019.
\textsuperscript{1369} S.2(k) of the Code on wages, 2019.
\textsuperscript{1370} S.2(l) of the Code on wages, 2019
\textsuperscript{1371} S.2(m) of the Code on wages, 2019.
\textsuperscript{1372} S.2(1A) of the Minimum wages act, 1948.
\textsuperscript{1373} REPORT OF NATIONAL COMMISSION ON LABOUR,2018, Ministry of Labour and Employment.
Central Advisory Board and consult State Governments in such manner as may be prescribed\textsuperscript{1374}. The minimum rates of wages fixed by the appropriate Government shall not be less than the floor wage and while fixing the minimum wage it shall take into account skill of the workers and arduousness of work\textsuperscript{1375}. If the minimum wage set by the appropriate government is higher than the floor wage, they cannot reduce the minimum wages. The appropriate Government shall review or revise minimum rates of wages ordinarily at an interval not exceeding five years\textsuperscript{1376}.

Merits: It is prominent that our country suffers a serious wage problem and 45\% of regular workers are paid below the minimum wages\textsuperscript{1377}. But with this simple and easily applicable national wage floor which applies to the whole country and all job types, all are safeguarded by minimum wage security. The code, besides anticipated the government to stipulate to set as few minimum wages as possible unlike the current situation where there are several hundred rates of minimum wages for diverse industries, zones etc; making it strenuous for the actual beneficiaries to know the wage they deserve. For example, Tamil Nadu has 76 categories of minimum wages, ranging from ₹132 to ₹419. The national floor wage will limit the possibility of different wage rates across states for the same occupation and this uniformity in wages will prevent the complications of economic migration and the corresponding repercussions.

Demerits: However, the code did not specify the methodology or the factors to be taken into account while devising the floor wage and minimum wages, leaving it to the discretion of the government authorities. The expert committee, 2019\textsuperscript{1378} recommended that the existing norms i.e. the principles of Indian labour conference (ILC), 1957 and from the Raptakos Brett case, 1992\textsuperscript{1379} must be upgraded with respect to the changing labour conditions such as the previous three consumption units of a family must be now updated to 3.6 consumption units. The committee after scrutinising the above principles recommended the floor wage to Rs. 375 per day (equal to Rs. 9,750 per month as per July 2018) irrespective of the sector of employment, skill, rural or urban etc. But the new code did not even consider the above guidelines given by the ILO and Supreme Court, the code sets the floor wage to be Rs. 178 per day and it is only Rs. 2 higher than the previous floor wage (not binding on any states). Such a low floor wage will defeat its very purpose and will help in promoting forced labour, minimum wage can only be a potent tool when it is set at an appropriate level.

\textsuperscript{1374} S. 9(3) of the Code on wages, 2019.
\textsuperscript{1375} S. 6(6) of the Code on wages, 2019.
\textsuperscript{1376} S. 8(4) of the Code on wages, 2019.
\textsuperscript{1377} Periodic Labour Force Survey 2017-18, Ministry of Statistics and Programme Implementation.
\textsuperscript{1379} The Tripartite Committee of the Indian Labour Conference’- 1957 has formulated five norms for the fixation of ‘minimum wage’ (i) three consumption units for one earner disregarding earnings of women, children and adolescents; (ii) minimum food requirement based on net intake calories; (iii) clothing requirement at 72 yards per annum for an average working family of four; (iv) house rent corresponding to minimum area provided for under the Government’s Industrial Housing Scheme; (v) 20\% of total minimum wage for fuel, lighting and other miscellaneous items. These principles were approved by the Supreme Court.
It was believed to be a ‘game changer’ to the status quo as far as informal sector workers accounting for 93% of working population contributing to around 60% of GDP rather it will suffer the same fallacies as the previous laws because the existing wage rates were already above the stipulated floor wage and the labour’s life will not improve and there won’t be any raise in consumption expenditure as estimated. By creating a façade of false promises, the floor wage meant the starvation wages (Rs. 18 per day) denying the right to living wage. The landmark jurisprudence in the ‘raptakos’ case\textsuperscript{1381} explained the right to living wages where the new code still continues to push starvation wages.

The Fair Wages Committee\textsuperscript{1383} insisted that “the minimum wage must provide not merely for the bare sustenance of life but for the preservation of the efficiency of the worker. Accordingly the minimum wage must cover the expenses for education, medical requirements, etc. Also the directive principles proclaims the right to living wage and conditions of work ensuring a decent standard of life\textsuperscript{1384}. On that account the code should have treated living wage as a fundamental right.

In U. Unichoyi and Others v. The state of Kerala\textsuperscript{1385} it was pronounced that the problems of unemployment and poverty crisis in underdeveloped countries should not be used to push the workers to starvation wages. The Supreme Court said that the minimum wage must guarantee not only the sustenance of the employee and his family but also preserve his efficiency as a worker. It is a blunder to calculate minimum wages based on the worker’s physical needs and to keep himself above starvation. Woefully the new framework exacerbates this archaic practice and promotes forced labour. It is sad that the code which is expected to enhance the life of workers by providing economic and social justice now exploits them by seeing them as mere factors of production. In India according to ILO report nearly 41% are poorly paid\textsuperscript{1386} and India ranks fourth from the bottom in salary satisfaction among the 22 countries of the Asia-Pacific region.

Without setting any methodology and norms gave it to the hands of administrators (central and state government) on its discretion disregarding the workers’ rights to adequate wages. This might lead to adverse effects such as lobbying to lower wages by the bureaucracy. Also the recommendations of the advisory boards are not binding and the representation of women among the nominated employees in the board has been reduced from 50% to one-third. This move has taken us back dissipating the work spent strengthening the robustness of these bodies.

In spite of the floor wage, the state governments have the power to fix minimum wages as per their specific conditions and requirements in their own states which might lead to a race between them competing to bring in investments by

\textsuperscript{1381} Workmen Represented By Secretary vs Management Of Reptakos Brett, 1992 AIR 504, 1991 SCR Supl. (2) 129.
\textsuperscript{1382}\textsuperscript{In spite of the promise by the Constitution of a living wage and a 'socialist' framework to enable the working people a decent standard of life, industrial wage, looking as a whole, has not yet risen higher than the level of minimum wage.
\textsuperscript{1383} Fair Wages Committee report, Government of India, Ministry of Labour, in 1949.
\textsuperscript{1384} Art.43 of the Indian Constitution.
\textsuperscript{1386} Ibid, 2.
labour cheapening.\textsuperscript{1387} For this the expert committee recommended splitting the country into five regions and having a different regional minimum wage, on the basis of the cost of living. This was not accepted.

Economic implications of minimum wages: The impediments faced in fixing higher minimum wages are hesitation in hiring, leading to unemployment and in lower minimum wages, the workers are exploited. These two results leave the economists and policy makers with a paradox. The equilibrium wage is the one where there is neither excess or shortage of labour. However, due to governmental intervention in imposing minimum wage as flooring, the equilibrium is disturbed. The supply becomes excess, over the demand and unemployment is created when a minimum wage higher than the equilibrium wage is fixed. This mostly affects the vulnerable group who are unskilled.

In India it is difficult to arrive at an equilibrium wage thus making it difficult to measure the efficiency of minimum wages. Nonetheless with the current floor wage (Rs.178) it is clear that there won’t be any impact in the labour market. For better understanding taking the average wage estimated by ILO, Rs. 247 as equilibrium wage and it is clear that the stipulated minimum wage is below the average wage. The miserable part is despite very low minimum wages the supply won’t decrease given the lack of alternate sources of earning resulting in forced labour.

Recommendation: The government must emphasize on “Need Based Minimum Wage” covering nutrition, healthcare, education, housing and provisions of old-age. Therefore, guaranteed minimum wage should be treated as a fundamental constitutional right for every citizen of India. Minimum wages should be adjusted to inflation so as to align the wages to market volatility and 5 year is quite a long period considering the volatility in the market. Adopting a national floor minimum wage across five regions\textsuperscript{1388}, after that the States can fix minimum wages accordingly would bring uniformity and will equally attract the labour cost for investment reducing distress migration.

To handle the problem of inequality mandating minimum wage alone is not important other measures such as Phelps idea of wage subsidies must be considered. That is mandating job quota for locals while keeping wage bills low for firms operating in competitive environments.

C. Definition of wages:

Demerits: Regarding the concern to achieve uniformity among various labour laws, the new code came up with a single wage definition creating some odd outcomes. It eliminated house rent allowance (HRA) and any award or settlement between the parties from the definition\textsuperscript{1389} without any explanation, hitherto HRA is guaranteed in nature. This exclusion is unfair, creates ambiguity and legal uncertainty, resulting in more lawsuits and litigation.

The proviso clause mentions that few allowances excluded from the wage will be included for the purpose of payment of wages and its ambiguous why the same is (UP) to take advantage of lower minimum wage rates in the latter.

\textsuperscript{1387} For instance, this was seen in the case of the Okhla Industrial Area in Delhi, wherein businesses shifted out from Okhla to Haryana and Uttar Pradesh

\textsuperscript{1388} Ibid, 13.

\textsuperscript{1389} S.2(y) of the Code on Wages, 2019.
excluded from the ambit of minimum wages or wages for the purpose of determining bonus eligibility. Also, the approach to count the sum-total of the excluded components exceeding 50% of the total remuneration calculated under the definition of wages is ineffective and it tends to create some more uncertainty.

Deduction of wages based on performance, damage, loss, advances is arbitrary as the code did not mention any due process and affects the bargaining power and right to association of workers making them scared to demand even basic wages, also paving ways to dominate the workers.

D. Inspection scheme:

Merits: The ‘inspector’ is now replaced with ‘Inspector-cum-Facilitator’ in the new code with auxiliary duties such as advice to employers and workers relating to compliance with the provisions and effective implementation of the act. With the advent of Digital India, now inspections can be done through a web-based inspection scheme and summoning of information electronically, which may ease compliance burdens. Detaching the inspector from their respective geographical regions and facilitating the inspector-cum-facilitators beyond their jurisdiction through a random computerised scheme will steer transparency, accountability, better implementation of labour laws.

Demerits: ILO’s Labour Inspection Convention recommended that a well-resourced and independent inspectorate with provisions to allow thorough inspections and free access to workplaces. Being a signatory to this convention it did not imply these principles in the code. The term facilitator means one who supplies information and advice, this benevolent approach towards the employers for labour law violation is deplorable. It also removed the surprise checks and examined persons from the previous acts because web-based inspections through an automated centralised system will pull out surprise checks.

E. Penalties:

Merits: The new code enhanced the penalties prescribing larger fines for non-compliances and the burden of proof in case of non-payment or deficient payment of wages or bonus lies on the employer. The code went a step ahead and stipulated imprisonment only for more serious offences, if they are repeated, and done away with any sort of imprisonment for mere procedural non-compliance. It also allows compounding of offences for the first time by settlement to avoid lengthy court proceedings.

Demerits: The Supreme Court stated that non-compliance of minimum wages amounts to forced labour in Sanjit Roy v State of Rajasthan, but these violations are now given opportunity to comply with the provisions of the Wage Code or give reasons for such violation for the first time. This type of compassion towards employers are detrimental towards the workers.

---

1390 S. 51(5) of code on wages, 2019.
1391 S. 51(2) of code on wages, 2019.
1392 International Labour Organisation’s Labour Inspection Convention of 1947 (Convention C081).
F. Jurisdiction of courts:

The wage code made another major change, taking away the jurisdiction of courts placing it in the hands of quasi-judicial bodies completely. The reason the government claims for this change is speedy, cheap and effective resolution of wage disputes and providing quick justice for the workers. But violating S. 9 of CPC by providing sole power to the appellate authority, which are not subject to review of court is not ok. A claim can only be filed by an appropriate authority, employee or trade union ignoring the undocumented, casual and informal workers, as well as workers who do not belong to a trade union who will find it extremely difficult to file a case. Thereby further disempowering them to assert their right to be paid the legally mandated wages.

III) Industrial Relation code:

Industrial relation code is the third among the four law reform codes that has been proposed by the Ministry of Labour and Employment in 2019. This code is an attempt to facilitate ease of doing business and to simplify, regulate and integrate three pre-independence acts namely: industrial dispute act of 1947, trade union act of 1926 and Industrial Employment (standing order) act of 1956. Some of the key issues have been analysed and censured in detail.

A. Fixed-term employment:

In 2018, the Central Government appended fixed-term employees to the categories of workers under schedule I of Industrial Employment (standing order) Act,1946 by amending standing order rules,1946. Its origin can be traced back to 2003, where the government had to withdraw its proposal to set up fixed-term employment due to pressure and protest from the trade union. The Industrial Relation bill, 2019 in the course of subsuming standing order act,1946 included this provision under clause 2(l) of the bill.

Object:

Fixed-term employment can be understood as a type of contractual employment where employer and employees directly enter into a written contract for fixed duration. This facility was rudimentarily drafted with the ideology to uplift contractual employees on par with regular employees. This provision suffices three predominant requirements of employer and employee. Firstly, to provide working rights to contractual labourers, secondly to provide adequate workforce to employers to do seasonal work at plausible rates and conditions in accordance to fluctuating market demands and lastly to sidestep mismanagement and inordinate expenses that was caused by the intervention of a third-party contractor.

Analogy of contract labours and FTE:

<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>CONTRACT LABOURS</th>
<th>FTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kind of employment</td>
<td>Benefits</td>
<td>Not entitled to statutory benefits of a permanent worker</td>
</tr>
<tr>
<td>--------------------</td>
<td>----------</td>
<td>------------------------------------------------------</td>
</tr>
<tr>
<td>Hired through a middleman/contractor</td>
<td>Hired directly by the employer.</td>
<td></td>
</tr>
<tr>
<td>Salary</td>
<td>On the establishment’s payroll</td>
<td>Not on the establishment’s Payroll</td>
</tr>
<tr>
<td>Tenure</td>
<td>As per the negotiable terms entered with contractor</td>
<td>On the expiry of term specified in the written contract entered between employer and employee</td>
</tr>
<tr>
<td>Exempted nature of work</td>
<td>Stated under clause 57(2) (*indispensable/incidental to the establishment, *perpetual nature *work done by regular workers.</td>
<td>Not specified.</td>
</tr>
</tbody>
</table>

**Merits:**

a) The code confers fixed-term employees with benefits and rights equivalent to that of permanent employees such as wages, allowances and social security benefits except retrenchment compensation.

b) Entering into a written contract with the employer leads to formalisation of workforce.

c) The minimum gratuity period requirement of 5 years has been relaxed for the fixed-term employees, who by OSHW code will be paid gratuity on a pro rata basis.

d) This provision aids employers who are uncertain about the demand-supply pattern to recruit employees.

e) It is a win-win for employers and employees as it cuts down intermediary cost and mitigates other financial expenses for the employer as well as provides substantial benefits to employees.

---

1396 53. (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,— (a) on his superannuation; or (b) on his retirement or resignation; or (c) on his death or disablement due to accident or disease; or (d) on termination of his contract period under fixed term employment; or (e) on happening any such event as may be notified by the Central Government: Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement or expiration of fixed term employment or happening of any such event as may be notified by the Central Government.
Demerits:

a) The code doesn’t specify the prohibited nature of work under fixed-term employment, this can lead to substitution of permanent employment and greater risk of replacement of permanent jobs with FTE by the employers.

b) Fixed-term employees are susceptible to employer’s exploitative manipulation on the term of employment as there is no ceiling imposed on the number of contract renewals and there is no minimum tenure prescribed by the code.

c) The code fails to warrant job security for fixed-term employees as they can be terminated from work on the expiration of the contract without prior notice.

d) As the key to contract renewal lies with the employer, the fixed-term employees will be dissuaded to raise disputes on violation of their rights which eventually leads to dilution of bargaining power.

e) By amending the standing orders Act instead of contractual labour Act, the code has failed to tend to its objective of elevating rights of contractual labourers.

Instead of extending the protection and benefits to contractual labourers, it has created a new category of works which is highly stifling.

B. Power to executives to nullify tribunal’s award:

Clause 53(3) of the code confers the appropriate government with discretionary power to annul an award passed by industrial tribunal, if it discerns that the award is inexpedient on public grounds and affects national economy/social justice. This provision has serious implications has it infringes on two fundamental principles:

1. Doctrine of separation of power
2. Nemo judex in causa sua

a) Separation of power:

Clause 53(3) by bestowing executives with judiciary power has violated the doctrine of separation of power. Section 17-A of Industrial Dispute act, 1946 (which was analogous to clause 53) was struck down by Andhra and Madras High courts in Telugunadu Workcharged Employees state

1397 (3) An award made under this Code shall become enforceable on the expiry of thirty days from the date of its communication under sub-section (2): Provided that— (a) if the appropriate Government is of the opinion in any case, where the award has been given by a Tribunal in appeal in relation to an industrial dispute to which it is a party; or (b) if the Central Government is of opinion in any case, where the award has been given by a National Industrial Tribunal, that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification, declare that the award shall not become enforceable on the expiry of the said period of thirty days.

1398 (1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under section 17: Provided that (a) if the appropriate Government is of opinion, in any case where the award has been given by a Labour Court or Tribunal in relation to an industrial dispute to which it is a party; or (b) if the Central Government is of opinion, in any case where the award has been given by a National Tribunal, that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days.
federation v. Government of India\textsuperscript{1399} and Union of India v. Textile Technical Tradesman\textsuperscript{1400} respectively. The courts in both the cases opined that section 17-A transcends and encroaches upon independence of Judiciary, thereby impinges upon the constitutionally ingrained principles of separation of power and rule of law. Hence there is high probability that clause 53 if enacted will be struck down based on the high courts ruling.

b) Nemo Judex in causa sua:

Nemo judex in causa sua is a rule against bias which lays down that “no one can be a judge of his own cause”. Clause 53(3) empowers the Government with discretion to nullify a tribunal’s award in all disputes in case of certain contingencies (inclusive of cases where it might itself be a party to the dispute). This implies that the government can play a dual role by being a party as well as judge of the dispute. This will result in biased decisions and also erode the fundamental right to access justice guaranteed under article 21 of the constitution. Hence this provision violates the natural principle of rule against bias.

C. Forbidding right to strike:

The right to strike is integral to collective bargaining, subject to the legality and humanity of the situation. This right of the weaker group viz., labour, to pressure the stronger party viz., capital, to negotiate and render justice are processes recognised by industrial jurisprudence and supported by Social Justice\textsuperscript{1401}. The definition and scope of right to strike has been broadened by the code which through its twisted provisions robs workers of their right to strike.

a) Adding ‘mass casual leave by 50%’ in clause 2(zf) makes the definition digress from the subject matter of strike as it fails to consider the intent of the employees. As a result, coincidental leaves taken by innocent employees with no intention to revolt may also be deemed to be illegal strike under clause 62\textsuperscript{1402}. This will make them susceptible to sanction ranging to 50k/1month imprisonment and they could also be deprived of compensation under clause 69, as the code prescribes no protection.

b) The right to strike has been proscribed by the code implicitly by imposing certain restrictions (initially it was imposed only on PSU’s):

i) Time frame: Workers can strike only between 14 th and 60 th day from the date of sending notice to the employer.

ii) Clause 62(6) mandates the employer to forward notice to the conciliation officer within 2 days from the date of receipt of notice. This will lead to commencement of conciliation proceedings, which will terminate strike even before it is initiated.

iii) If the conciliation proceeding goes unsettled, then the employer using clause 52(6) can approach the tribunal to cease employers from striking\textsuperscript{1403}.

\textsuperscript{1399} Telugunadu Workcharged Employees state federation v. Government of India, 1997 (3) ALT492.
\textsuperscript{1400} Union of India v. Textile Technical Tradesman, 2014 (6) CTC 427.
\textsuperscript{1401} Gujarat Steel Tubes Ltd vs Gujarat Steel Tubes Mazdoor Sabha 1980 AIR 1896, 1980 SCR (2) 146
\textsuperscript{1402} Clause 2(zf).
\textsuperscript{1403} Clause 53(6) Any concerned party may make application in the prescribed form to the Tribunal in the matters not settled by the conciliation officer under this section within ninety days from the date on which the report under sub-section (4) is received to the concerned party and the Tribunal shall decide such application in the prescribed manner.
iv) Workers can resume strike only after 7/60 days of dispute resolution (under conciliation/industrial tribunal respectively), within which, the timeframe to commence strike will expire. If the tribunal award doesn’t fulfil workers’ demands and if they want to recourse to strike to express their agitation, they again have to go back to step 1 which will result in process looping.

v) Altogether, this provision instead of simplifying the procedure makes it more complicated which inconsistent with the code’s objective.

D. Exit policy:

The 2017 draft bill initially proposed that industries having less than 300 employees can retrench/lay off employees/close the establishment without seeking government’s permission. The 2019 code has lowered the threshold value from 300 to 100\(^{1404}\) which is commendable, but on the other end of the spectrum it gives unrestricted power to the appropriate government to change the threshold value without setting out the maximum and minimum limit. This will have the following adverse effects:

There are chances that appropriate government might set:

i) Undesirable high ceiling limit, that will scrap out job security of employees as it will accentuate hire and fire policy in the state.

ii) Undesirable lower limits, that will be a sticking point in growth of GDP as foreign investors will shy away investing in India. This will also hamper the development of smaller domestic industries as they will be reluctant to take up risks to expand the industry.

Hence this contentious issue should be drafted with clarity so that balance is not affected.

E. Definition:

a) worker and employer:

The code has classified persons entitled to seek protection under code under two categories as worker and employee defined under clause 2(zm) and clause 2(i). Both the terms are similar with few differences as follows:

<table>
<thead>
<tr>
<th>WORKER</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Includes working journalists, Newspaper Employees and sales promotion employees</td>
<td>Includes person employed in managerial and administrational capacities</td>
</tr>
<tr>
<td>Excludes person employed in supervisory capacity earning more than 15 k wages</td>
<td>Includes person employed under supervisory capacity irrespective of their wages</td>
</tr>
</tbody>
</table>

a. The employees also belong to the working class under the employers and it is unjustifiable to classify them by treating them differently.

b. There is difficulty in interpreting their rights resulting in perplexity differential rights classification is unjustified causing difficulties in interpretation of their rights and procedures.

b) Industry:

\(^{1404}\) Clause 77 of industrial relation code, 2019.
Right from 1946 till date, the legislature and judiciary has been attempting to lay down an unambiguous definition for the term ‘industry’, but the journey has only been tempestuous as it only led to futile results due to heterogeneous contradictory judgments. The Legislature through section 2(m) of the code has attempted to bring about a solution to this ambiguity, but unfortunately it suffers from following discrepancy:

a) The code has deprived employees employed in charitable, social or philanthropic services (profit motive) of their pre-existing rights\textsuperscript{1405} to avail protection under the industrial dispute act.

b) There is no distinction made for institutions run by charitable trust with profit motive and non-profit motive. Hospitals, educational institutions that are run by charitable trusts who have established huge business empires with profit motive employing 1000s of employees will also be excluded.

c) There is no clarity as to what institutions fall under the clause ‘substantially engaged charitable, social or philanthropic service’ which again makes it equivocal.

\textbf{F. Recognition and Registration of trade union:}

Recognition of trade union in an industry/establishment is crucial for an effective tripartite consultation as the worker’s grievances and demands will be fairly attended to only if they are given due recognition. Till date, recognition is done in accordance with the code of discipline, 1958 which is voluntary in nature. There is no statutory obligation on the employer to recognise trade unions as there was no provision for it in trade union act 1926. The IR code has filled this void by providing for setting up a negotiating union/council in clause 14.

\textbf{Merits:}

One of the major impediments encountered in collective bargaining is plurality of trade unions. Employers had to meet contradictory demands from different trade unions which resulted in chaos and delay in arriving at a solution. Formation of a negotiating union will help streamline and simplify this issue thereby facilitating collective bargaining.

\textbf{Demerits:}

Clause 14 however suffers from certain irregularities:

a) Registration of trade union is the foremost condition to be granted recognition, but the provisions with regard to registration itself suffers from certain loose ends:

- There is no prescribed deadline issued to the registrar to finalise the application of registration.
- Even when all the requirements to register are duly met by the trade union, there is no strict mandate on the registrar to grant them registration.
- These laxities might result in unnecessary lagging and unfair non-registration by the registrar. This will impede the union’s right to get registered and recognised\textsuperscript{1406}.

\textsuperscript{1405} Bangalore Water-Supply v. R. Rajappa & Others 1978 AIR 548, 1978 SCR (3) 207

\textsuperscript{1406} ILO convention 87.
b) The code has set a benchmark that a Trade union possessing 75% workforce will be qualified to constitute a negotiating union. This criterion should be brought down as it is too rigid and unrealistic being self-defeating in nature.

c) Out of 12 recognised central trade unions hitherto, 11 unions have political affiliations which speaks for itself the larger political interference in the unions. Granting the power to recognise trade unions to the appropriate government will lead to further politicization in the structure. Greater political interference doesn’t bode well for serving the interests of workmen.

G. Adjudicatory bodies:

The code has brought about the following positive changes in adjudicatory mechanism to resolve disputes.

- The code has shrunk the number of adjudicatory bodies by eliminating labour court from three to two making tribunals as the sole adjudicatory bodies. Along with it, the court of enquiry has been deleted. Limiting forums will cut down plurality of claims before diverse forums and hence aid in resolving disputes promptly and effectively.

- b. The code has remarkably put an end to executive’s volition in referring disputes to tribunal (except national industrial tribunal). This has now shifted to the concerned parties of the dispute who can now approach tribunals for dispute resolution. This provides for limiting political interference and guaranteeing autonomy to the parties.

Though this provision is beneficial there are two irregularities that requires change:

- The provision to constitute Single member (administrative) tribunal to adjudicate disputes distorts separation of power doctrine.

- Setting up a two-members tribunal might sometimes prolong the dispute due to differences of opinion between the members which might lead to further entanglement.

Recommendations:

a) The number of tribunals should be set up in proportion to workforce for expeditious resolution.

b) It is advisable to constitute an odd number bench (preferably 3).

H. Reskilling fund:

The code stipulates the employers to contribute 15 days of the last drawn wage of the retrenched employee as reskilling fund. This provision is laudable as it is in tune to recommendations made by the world economic forum in its report ‘Future of jobs 2018’. The report stressed upon the need to reskill workers to meet the demands of the technological-driven future.

IV) Conclusion:

Industrial relation code can be attributed as a mix of medicine and poison, as certain provisions such as reskilling fund, limiting the number of adjudicating forums, acknowledgment of recognition of trade unions cure the deficiencies of archaic laws while some provisions providing for conferring excessive power to the government, curbing right to strike, nebulous definitions, distortion of separation of power further aggravate the existing problems. Likewise, code on wages has fallen short of its objectives to
attain harmonization and uniformity in the laws as some of the core definitions like wages, employer, employee, hours of work lack coherence. The legislature needs to address the scant enforcement mechanism provided by the code. There is also a compelling need to explicate the scope of the code as it is unambiguous and cumbersome.

In decoding the above two labour codes, it is evident that the codes suffer from imbalance between ease of doing business and upholding labour rights. This has invited huge unrest among the trade unions and workforce as they strongly reckon the codes are employer friendly. Abraham Lincoln was right in quoting, “Labour is prior to and independent of capital. Capital is only the fruit of labour and Labour deserves much the higher consideration.” Hence the parliament on virtue of its constitutional obligation under article 38 to secure social order and to eliminate inequalities among its citizens should append the code in light to secure balance between uplifting labour rights and economic upliftment.

*****
CLIMATE REFUGEES: A GLOBAL ENVIRONMENTAL AND LEGAL CRISIS

By Megha Gautam
From Amity Law School, Amity University, Noida

ABSTRACT
The erratic climatic conditions are impacting the lives of millions. Many natural resources are becoming scarce in different parts of the world. In response to it, people are trying to adapt to the conditions but nevertheless, many are forced to migrate either internally or cross-borders. The migration impedes development of vulnerable people in four ways; by inducing unmanageable stress on urban infrastructure and other services, by weakening the growth of economy, by raising the risks of disputes and by paving way to disrupted educational, health and social factors amongst the migrants.

This research paper focuses on bringing about a more substantive and rigid terminology for these people so that it can be generally accepted in international law. Studies have shown that there are no taut and sound laws for climate refugees in India and elsewhere. This paper will take help of examples to elucidate the gravity of the situation by analyzing the reports of eminent organizations, like International Organization for Migration, the United Nations, The UNHCR (The UN Refugee Agency), etc.

The research paper intends to hypothesize that the ongoing industrialization is doing pernicious and irreparable damage to the environment which in turn is putting large chunk of population at the verge of losing out on livelihood opportunities, socio-economic and socio-cultural status. Through the course of research, various findings shall be discussed with relevant case studies. The ultimate aim of the research will be to suggest changes in the system and encourage masses to unite in the mission of alleviating the effects of ever-changing environmental conditions.

1. Introduction
Climate change is no longer an alien word. The catastrophes that mankind is seeing today is deplorable and heart-wrenching. The natural resources like, drinking water, are becoming scarce in various parts of India and elsewhere. Climate change is negatively impacting the agriculture, animal husbandry thereby threatening smooth survival of large chunk of population. Despite the efforts to mitigate the effects of climate change people have to flee to take residence in a safer place. This forced migration is inviting more rigorous competition for survival as resources are limited but consumers are increasing at an alarming rate.

The first case of climate refugee came in 2014 when Loane Teitiota, a man from Kiribati knocked the doors of court in New Zealand. But his plea was rejected and he was asked to deport back to his native place. The rising sea level in Kiribati is creating havoc and it is projected that by 2050 the large part of this archipelago will be underwater. And now it is accepted by the global minds that environmental disasters are becoming one of the leading causes of displacement round the globe. There is a vital need to look for some prospective solutions to the problem.

2. What is Acceptable: Refugee or Migrant?
Labeling the environmentally effected people is one of the contentious issues of
It’s difficult to decision whether they should be termed “migrants” or “refugees”. It is imperative, for this not limited to semantics but this will pave a way for these people to secure an identity in the international law. Campaigners have long tried to term them either “climate refugee” or “environmental refugee” to add seriousness to the current issue. They believe that such people are in need of refuge because of homelessness and any other term of reference would defeat the purpose. Moreover, masses connect better which the term “refugee”, they sympathize with sense of agony it brings. But “migrant” is a more flexible terminology as it can be used to refer to the people who seek voluntary movement due to reasons other than climate change.

However, the word “refugee” is not appropriate in international law. The 1951 Geneva Convention on Refugees defines refugee as “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

But problems are associated with usage of “refugee” too as this word connotes to refer to only cross-border movement and not internal displacement. Given the reality, mostly people want to take asylum within the geographical border and thus restricting the definition to only cross border movement will downplay the serious of this situation. Secondly, the term “refugee” suggests that people have a right to return to their homes once the persecution has ceased to exist. This proposition is not appropriate in case of climate change induced mass exodus because it might become totally impossible for them to return to their original place of stay.

To find a fitting definition has become a cause of hot debates amongst the human rights lawyers. It has been seen that there is considerable resistance to advance the process of expansion of the definition of “refugee”, mainly because that would compel the developed countries to protect not only political refugees but also climate refugees, a standard no country wants to comply with.

Due to this inadequacy these migrants are almost invisible in the global scenario; no institution is readily working to keep a watch on these people’s miseries. In an effort, The International Organization for Migration (IOM) proposes the definition as: “Environmental migrants are persons or groups of persons, who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad”.

We look forward with the view that this long debate on definition will settle for good in the near future and this vulnerable class will be officially recognized in the international law like any other refugee.

1. Impeding Development
The biggest irony of today is that the poor countries and the developing nations will bear the brunt of climate change - the ones emitting the least possible greenhouse gases in the atmosphere. The lacuna in legal
system to deal this menace is causing unwarranted duress upon the economy and social fabric of nations.

1.1. The inundation effect:
The climate change is igniting water and food scarcity which in turn is accelerating rural to urban shift in most of the developing nations. Urban areas do make life easy by providing basic services at doorstep. However, the unplanned urbanization is leading to serious ramifications in terms of urban welfare and infrastructural facilities. Already, 1 billion of the population in urban structure is living in slums without access to clean water, education services and sanitation. In the next ten years, it is estimated that count of slum population is destined to increase to 1.7 billion. With this, there are chances of increase in community spread diseases, plagues, epidemics and other health issues. For example, in India unplanned urbanization gives rise to spread of dengue fear.

1.2. Stymied economies:
The economy of the developing nations is worst hit by changing weather patterns. Migration of masses in search of stable life leads to stress on the production systems, undermining the domestic market growth. In addition to it, the dropping of human capital further undermines the economic growth. The competition for a single commodity is increasing because of excessive large amount of consumers which is further widening the gap between rich and poor.

1.3. Political and cultural conflict:
The mass mobility of people from one place to another will eventually redraw the cultural map of various countries and this will bring proximity between distinct cultured people and also competition for resources. The UN Security Council has identified mass migration of people from one place to other a possible cause for discontentment between already existing people at a place, and this is a threat to international security and peace.

1.4. Upset health and welfare systems:
The healthcare systems are greatly affected by mass population displacement, making it even more difficult to cope up with deadly diseases and epidemics. The studies have shown that the displaced population is more adversely affected than already settled population. The migrants easily fall prey to the wrongs, like human trafficking, sexual exploitation.

3. How Does India Fight?
The reports show that in India nearly 1.5 million people are said to be internally displaced each year due to harsh climate conditions. The WORLD BANK REPORT named ‘Groundswell-Preparing for Internal Climate Migration’, explains that the risk of displacement is hanging upon the population of 143 million people. It is more likely that this mass Exodus will try to fit in the developing nations of the world, South Asia, Sub-Saharan Africa and Latin America.

The abovementioned data shows the urgency with which this issue should be tackled by Indian government. There is dire necessity to strategize the region plans in orderly fashion to better adapt the climate change effects. Therefore, the action plan needed to deal with the situation of drought in Rajasthan will be absolutely different from the one dealing with cross-border displacement of people from Bangladesh owing to sea-level rise. Furthermore, climate change can exasperate the already existing agrarian crisis. There are specific communities who pay a heavy price for climate change than others. For example, in the times of serious air pollution the poor can’t temporarily shift to cleaner place like...
elites. This suggests the importance of implementing relief policies considering the requisites of targeted people. In India, The National Asylum Bill 2015, The Asylum Bill 2015 and The Protection of Refugees and Asylum Seekers Bill, 2015 are the attempts that the government has undertaken to deal with refugee law. However, there is no precise mention of “climate refugee” in these laws. So this suggests that India should chalk out a comprehensive law to umbrella cover this vulnerable class of migrants.

It is propounded that in years to come, India is going to be one of the most desirable countries for migrants to inhabit. Considering this fact there is need to propose a mechanism in order to provide short-term visas to environmentally affected people.

The Disaster Management Act, 2005 envisages the procedures to deal with internal disaster. But this is not sufficient to serve the purpose because this legislation is not enough to deal with the plethora of plights which changing climate might invite in running years.

Now, it’s the responsibility of government to either revamp the existing laws or to formulate new ones in response to increasing threat of climate change. Moreover, there should be awareness programs to generate consciousness in people to promote more environmental-friendly practices.

4. Climate Change Affecting lives
The pace with which the climate is changing today is a cause of worry and it is projected that it will keep changing not only during this century but beyond. Climate change in magnitude primarily depends upon the emission of harmful gases into the atmosphere globally. The various effects that can be seen in near future are listed below:

- **Rise in global temperature**: Because of the various activities of human which ultimately leads to warming of the temperature clubbed with already varying climate, the temperature will continue to rise across the globe.

- **Landslides and Floods**: Both of these natural disasters add pains to the normal life of people. They cause large scaled destruction of life and property. There maybe increase in the rate of their occurrences due to changing climate. The large impacts can be seen in many countries; for example, Bangladesh, Netherlands, Sudan, and Khartoum.

- **Tornadoes and Hurricanes**: As the temperature of ocean is increasing, this will subsequently increase the speed of wind. When this speed surpasses 74 miles per hour, it is a hurricane in the case of Atlantic and in the case of pacific, it is a typhoon. It is seen that tornadoes are very frequent in United States causing massive damage to lives and properties of human population.

- **Droughts**: four types of droughts are identified, firstly, meteorological (meaning low precipitation), hydrological (meaning that the level of supply of groundwater is below normal), agricultural (meaning not appropriate amount of moisture available for crops) and lastly, socioeconomic (meaning adverse effects seen on economy because of water scarcity)

- **Forest fires**: These are very common in countries like Australia and Indonesia during events of El Niño. Forest fires can also be caused due to volcanic eruptions, spontaneous combustion and lightening. It has been noticed that exotic oily plants and slash and burn agriculture ignites natural fire.
Heat waves: Heat waves have killed nearly 2500 people across India by the month of June till 2015. The most affected areas are Telangana, Uttar Pradesh, Bihar, etc. It not only affected people but it also damages cattle and production of crop.

Climate change is also leading to acidification of water bodies, loss of ice sheets and glaciers, increment in air pollution, economical imbalances, etc.

5. Treaty to Combat Climate Change

In 1992, at the international level the UN Framework Convention on Climate Change (UNFCCC) was created with the view to curb dangerous effects of climate change. There were 200 nations which came together to fight the climate change and its effects by undertaking various responsibilities according to their capabilities. It was mutually decided that the developed countries should take a step ahead in providing technological and financial aid and this will eventually help the developing nations to abide by their obligations without stress.

This body became effective in the month of March, 1994. Since then every year a COP, i.e., Conference of Parties meets to discuss the goals and to create new pathways by negotiating on various lines in order to acknowledge the threat of climate change. The major step was taking at the (COP3) conference when Kyoto Protocol was adopted. This created a breakthrough because it was first time when a legal document was formulated for already developed nations to lessen the emissions. This protocol created an obligation on the developed countries to minimize the emissions to 5.2 per cent, between the time frame of 2008 and 2012.

The first conferences were started in 1995 and till now 25 meetings have been successfully held. By the year 2019, the member nations of UNFCCC have become 197. Now let’s briefly take a glance at the conferences which have been conducted so far:

- **COP 1**: It was held in Berlin, 1995. It agreed to the “activities which were implemented jointly”. This was the first step towards climate change.
- **COP3**: It was held in Kyoto, 1997. It paved the base for carbon market. In this conference the developed countries committed to minimize the level of emissions in wake of industrialization.
- **COP13**: It was held in Bali, 2007. In this conference it was decided that it’s the responsibility of not just developed countries but developing nations also to curb the emissions.
- **COP15**: It was held in Copenhagen, 2009. It was decided to keep the global temperature below 2°C and the developed nations took it on their shoulders the responsibility to give financial help to developing nations.
- **COP16**: It was held in Cancun, 2010. A climate fund was made with the objective of catering the climate actions taken in the developing nations.
- **COP18**: It was held in Doha, 2012. The Kyoto protocol was extended in this conference but that was not welcomed by some countries like, China, Canada, United State and Russia.
- **COP20**: It was held in Lima, 2014. In this summit all the countries came together to curb the menace of emissions of harmful gases.
- **COP21**: It was held in Paris, 2015. In this summit the Paris Agreement was accepted which has the primary goal to curb the temperature to 2°C globally.
- **COP22**: It was held in Marrakesh, 2016. The Paris Agreement came into power. It tried to highlight the importance of this agreement and not only this, a decision
making body was also made to look after the affairs.

**COP23:** It was held in Bonn, 2017. The Talanoa Dialogue was made, paving a way for the member countries to share their experiences and suggestions with everyone with the motive to achieve the objectives of Agreement.

**COP24:** It was held in Katowice, 2018. In this summit the Talanoa Dialogue was done away and the steps were taken to keen look for ways to achieve the climate action plan. The work done by member nations is commendable but the struggle doesn’t end here. In the times to come it will take a more colossal form and to flatten the rising graph of climate refugees, it is imperative that governments work more proactively and energetically than ever.

6. **Menace of Climate Change**
Mozambique’s southeast coast was struck by the cyclone Idai on 14 March, 2019. According to the report of UN High Commissioner there was nearly 1.85 millions of population that needed immediate assistance. There were 1,36,000 people who were displaced internally. This cyclone and flood damaged about 1,00,000 homes, infrastructure worth $ 1 billion and 1 million of crops. This cyclone was the most dreaded in the history of Mozambique. And there are quite possible changes that disasters like these might occur in near future with more intensity and frequency. Due to this cyclone there was an intensified competition for basic amenities, like, shelter, food etc.

According to one of the reports of World Bank released in 2018, three main regions (Sub-Saharan Africa, Latin America and Southeast Asia) will alone generate more than 143 million of climate refuges by 2050. It is becoming obvious now that these crisis will contribute to events such as sea-level rise, air pollution, loss of biodiversity, desertification, global warming.

India has suffered a lot when it comes to climate disasters. Nearly 2.7 million of people were displaced because of floods and tropical storms. CSE published The State of India’s Environment 2020 report which stated that India suffered nine disasters out of total 93 disasters in Asian continent and this caused 48 % deaths in the country. The National Disaster Management Authority has stated that there are 27 states and the union territories which are prone to disasters. There are various areas in the country which are prone to different types of risks depending on the geography of the place, like the rising of sea level is because of concern in Sundarbas, the mountains in the north of India are prone to frequent floods, landslides and cloud bursts. The floods that occurred in kedarnath in 2013 and the cyclone ‘Ali’ in 2009 brought devastation in Bay of Bengal are some of the examples.

Numerous reports have pointed out that the countries which will be most affected by rising temperature will be poor and other developing nations of the world. And so India will have to prepare itself against catastrophes. The IPCC has through various reports deliberated that temperature is increasing and it will invite frequent natural disaster and unbearable weather events. As India’s geography suggests it is one of the countries which will be most affected in this changing conditions. The country has witnessed to the least one climatic disaster every month. A study issued in Proceedings of National Academies of Science (PNAS) stated that GDP of a country like India can substantially fall and this can broaden the gap between poor and rich countries, thereby making it tough to narrow it down. This study indicated that had the country
not been under the pressure of climate change, the GDP would have been up by 30% than it is today. The study highlighted that there are nearly 250 million people who live along the coastline of India and they depend on oceans or sea for their survival and increasing sea level and floods will adversely affect these people, mainly, fisherman and poor laborers.

7. A Need for Legal Recourse
Today human mobility is increasing because of the erratic climate patterns and the people who are forced to move have little or no legal protection. The current state of the system of international law shows a story where it is not equipped to protect rights of climate refugees. There is no legal identification of them and so countries are not obliged to give refugees to these people.

The migrants who are forced to flee from their habitats because of rage of climate are not recognized under international law. After the World War II, a system was established by the UN in order to give protection to the people who were forcibly made to leave their countries mainly due to political violence. And today, nearly 20.4 million are named as refugees by the United Nations High Commission for Refugees (UNHCR). However, there is also a large chunk of people accounting for 21.5 million who are also made to evacuate their home countries because of natural disasters every year. The international law has no peculiar identification of climate refugees as it is restricted to political refugees.

The Kampala convention and the UN Guiding Principles( in Africa) is much wide in its approach as it covers people who leave their native places because of human-made or natural disasters, but there is no legal framework specifically for “climate refugees”.

The UNHCR has so far not agreed to provide this vulnerable class the tag of refugees instead they are termed as “environmental migrants” because there is lack of resources to mark their needs. Due to unavailability of an organized action plan, they are left with no option than to go to places where they can, instead of finding refuge where they should. Gradually the number of this section of migrating population is increasing and thereby this calls for an imperative action by the international community to take cognizance of the situation. Seeing the plight of refugees, it has become necessary to either redefine its basics on “refugees” or create a separate and new category for them. Therefore, it is need of hour to have international regimes which are legally binding to protect the interests of climate migrants. It is essential that every country should undertake environmental friendly approaches to dampen the effects of changing climate.

On the other side, The International Organization for Migration has always actively addressed the agony of climate refugees. And in 2016 when this agency tuned with the UN, the opportunity was given to IMO to actively work with UNHCR. Despite restricted definition to regard these refugees, the UNHCR tries to help these victims.

8. Efforts to Make Headway despite Obstacles
Many proposals have come forward but they mainly lack in addressing the problem of cross- border migration. In 2012, the governments of Norway and Switzerland launched The Nansen Initiative with the objective to recognize the seriousness of issue of mass exodus due to changing climate. This is the only initiative which seeks to control the cross-border migration.
However, restricting the framework to consider cases of displacement occurring due to harsh weather conditions will not serve the entire purpose because the mass movement due to other climatic events like rising sea level will be excluded.

The Draft Convention on the International Status of Environmentally-Displaced Persons of the University of Limoges attempts to put forth all-inclusive approach. According to its definition:

“individuals, families, groups and populations confronted with a sudden or gradual environment disaster that inexorably impacts their living conditions, resulting in their forced displacement, at the outset or throughout, from their habitual residence.”

This Draft suggests that environmentally-displaced refugees should be protected in compliance with the laws of human rights which are given by the international laws. They claim to include both internal as well as cross border migration. But this definition is not satisfying because it is confined to “sudden or gradual environmental disasters” which is a restrictive approach. Mostly the proposals are unwilling to situate the elephant in a room - cases of cross border migration as the number of people affected is likely to be large.

9. Case Studies

The effects of climate change are tormenting millions and billions today. The worst hit is seen on the poor people all around the globe. Environmental catastrophe is taking toll over the people in Indonesia. The areas near sea are submerging into it and people are left with no option but to evacuate to safe places. Mr. Musjayadi Rehemtullah lives in Pantai Bahagia. The village is very close to the sea and almost 80 per cent of people have seen water encroaching the land. Mr. Musjayadi is a teacher in that village and he described the devastating situation of the school. He said that most of the times during flood the children sit on benches with half their legs in water. Many students have left the school and moved with their families to some other place. According to Rachmat Witoelar (Indonesia’s Special Envoy for climate change) by 2050 almost 17,000 islands will be eaten up by the sea. There will be diseases, plaques and stagnant economic growth mainly because of “horizontal strife” as people will fight with each other for some commodities. Jakarta, the capital of Indonesia is the second largest conglomeration, nearly 30 million people live there. Most part of the population is suffering due to pollution, heavy traffic, poor hygienic conditions and majorly climate change. In February 2013, nearly half of Jakarta was underwater due to excessive rainfall and floods. Most of the people still live there because they are not affluent enough to shift to elsewhere. In an effort to curb floods, the Government did try to make sea walls but the intensity of water is such that it rushes in despite walls. Dadap is a slum district near airport, nearly 500 residents live in there but today it seems that they live in the sea. Eko Sumarno is a resident of that area since 1970s and he described the pathetic conditions during floods. He said that mostly the water remains on the land for either two days or even a week. The people in that area lack basic facilities to sustain living. In the years to come, it is presumed that the district will submerge into the sea and people will be forced to completely relocate.

Another case of climate change comes from Tangier. It is an island near Washington DC. It is inhabited by fishing community located 18 miles offshore on Virginia side.
This island is just 4 feet above sea level and rising of sea is slowly and gradually threatening the lives of people. Dave Schulte is a marine biologist who has been studying the topography of this island from over a decade now. In his views the state of Tangier is getting miserable with each passing year, the water is intruding into the island gradually. One of the reasons for sinking of this island is its sandy foundation. The foundation is getting eroded due to tidal cycles. Facts show that since 1890 this island has lost almost two third of its land masses and this ratio is increasing at a phenomenal rate. Carroll Pruett is a 7th generation Tangier and she reminisced over the lost landmass where once her grandparents and family used to live. People of Tangier feel that building a sea wall will give some more precious years to this island. The mayor of the city focuses on the need of providing funds for this cause because maybe this is the only thing which can be done to maximize the longevity of the island.

These two studies reflect the gravity of situation, the agonies that people are going through. It’s the call of hour that we all should work at all levels in unison to make our earth clean, habitable and adaptable for each of the human being irrespective of the place of their belongingness.

10. Conclusion
Climate change is a major issue, gone are the days when it found no first page mention in eminent news channels, newspapers, articles, etc. The problem is not just restricted to the regions which are currently experiencing environmental degradation but it has the potential to engulf other currently unaffected areas of the world. We as a part of humanitarian community should do efforts to curb the changing weather conditions. Both developed and developing nations of the world should work together to fight the damaging effect of changing weather conditions.

Below are the few suggestions that can be adopted to fight the climate change induced statelessness and displacement.

11. FULLPROOF DEFINITION OF REFUGEE:
A major setback comes from the definition of “refugee” which does not include climate induced migration. There is a dire need to reorient the definition to include this vulnerable group of people because this way the plight can reach to global level in a more structured way. And if not this then the other solution could be to make a new category of refugee altogether.

11.2. DEVISE NEW INITIATIVES:
More initiatives like the “Nansen initiative” should be taken to deal climate change. The Nansen Conference on Climate Change and Displacement in Oslo (June 2011) is one of the constructive steps taken by the government of Norway and Switzerland in the process of addressing the climate refugees. Moreover, new imaginative solutions can be temporary protection, humanitarian visas, and priority migration agreement. In addition to this, already operational initiative, like, the Sendai Framework for Disaster Risk Reduction, the Nansen Initiative, various COPs, should be taken to more higher levels.

11.3. DESIGN ALLIANCES:
One of the main concern for the countries is that acceptance of this category of refugees will cause extra burden on the already shrinking resources and ultimately on the economy. So by formation of alliance this problem can be collectively tackled by
members. Under this alliance a quota of climate refugees can be made by countries and in the same manner other financial resources can be pooled to mitigate burden on a single economy.

Though climate refugees are not recognized under any convention but it’s a legal conundrum today. It’s not only the responsibility of a particular country but of humankind per se. Every individual attempt to bridge the gap is praiseworthy and urgent at the same time. The present situation can be aptly summarized from the words of Antonio Guterres (the Secretary General of UN), when he said “The moment has come for a radical change in international efforts to address displacement. As humanitarians, we are supposed to be the first responders, but we are at breaking point. There is no way we can go on treating the symptoms while talking about curing the disease as if that were possible only in an ideal world. We must stop just dealing with the consequences of displacement, and seriously start tackling its root causes”. Let’s hope that countries around the globe will take cognizance of the situation with a view to protect climate refugees against natural hazards.

12. References


• Global Warming and Climate change, causes, impacts and ... (n.d.). Retrieved May 12, 2020, from https://www.researchgate.net/publication/230548391_Global_Warming_and_Climate_change_causes_impacts_and_mitigation


www.supremoamicus.org

VOLUME 18

ISSN: 2456-9704

517


• Fleeing climate change — the real environmental disaster | Dw Documentary. (2019). Retrieved May 4, 2020, from https://www.youtube.com/watch?v=e4Jv9_7KJE&list=LLiGi7w9WENr8C2N2OTyPWviA&index=3&t=13s

*****
ROLE OF JUDICIARY IN CYBER CRIME

By Mehak Aneja
From School of law, The Northcap University

ABSTRACT
Judiciary plays an important role and also wing of the government in resolving the conflicts among the parties in cybercrime. Before going into this research paper, lets know what is cyber- crime. Cybercrime is defined as a crime in which a computer is the object of the crime (hacking, phishing, spamming) or is used as a tool to commit an offense (child pornography, hate crimes). Cybercriminals may use computer technology to access personal information, business trade secrets or use the internet for exploitative or malicious purposes. Criminals can also use computers for communication and document or data storage. Criminals who perform these illegal activities are often referred to as hackers.

In this research paper we will be discussing about how judiciary played role in cyber crime cases. So many amendments were made in other Acts and also there are many landmark judgments to know how judiciary played role in solving disputes related to cyber crime of different type.

INTRODUCTION
In India the use of internet is growing rapidly. Internet has given rise to new opportunity in every field like education, business, entertainment. Cybercrime is emerging as a serious threat all over the world. Now, government police departments and intelligence units have also started reacting and taking initiatives to reduce these cyber threats. Special cyber cells are initiated by India police. India judiciary is also very successful in reducing cyber offences by implementation of the provisions of Information Technology Act 2000. These offences are also known as modern day offences which involves computer as a tool or target. The trails are conducted in the court and punishment is given to the accused. To provide punishment to accused. To provide punishment to accused. To provide punishment to accused. Information Technology Act is read with criminals laws. Cybercrime law identifies standards of acceptable behaviour for information and communication technology users. It also establishes socio-legal sanctions for cybercrime; mitigates and prevent harm to people, data, services, systems, infrastructure in particular; protects human rights; and also enables prosecution and investigation of crimes which are committed online. They also facilitate cooperation between countries on cybercrime matter. There are some cybercrime laws which provides standards of behaviour and rules of conduct for the use of the internet, computers and related digital technologies.

On the 14th august 1995, the 48th anniversary of Indian independence, India launched a full internet service for public access. In 1998, just after the few years VSNL introduced dial-up internet and around 0.5% of India’s population has regular internet access. By 2013, 15% of the countries were connected with the internet and the number is growing exponentially. As the influence of the internet grew the law and the courts began to take notice.

INFORMATION TECHNOLOGY ACT, 2000
International trade through electronic means was spreading in many countries and has turned over from paper base commerce to E-commerce. With this globalization of trade and business, the international community felt a need of such law which would set uniform standards for electronic commerce. This thought led to adoption of model law on electronic commerce by UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL).

First, legislation was passed by Indian parliament in the 51st year of the Republic of India called as Information technology Act, 2000. India enacted the Information Technology Act, 2000 for providing legal recognition to the transaction which are carried out by means of electronic data interchange or electronic communication and also to facilitate electronic filings of documents with the government agencies. Due to this some Acts were amended. Indian penal code, 1860\textsuperscript{1407} Indian evidence Act, 1872\textsuperscript{1408} Bankers books evidence Act,1890 Reserve bank of India Act, 1934 Though since 2000 the IT Act was in place in India for curbing cybercrime, but the problem was still that these statutes were only on paper than on execution because layers, police officers, prosecutors and judges feel handicapped in understanding its highly technical terminology.

**CYBER CRIME UNDER INFORMATION TECHNOLOGY ACT, 2000**
This Act deals with cybercrimes. The provisions relating to cybercrime are given under chapter XI of IT Act, 2000 under the heading of ‘offences’ which deals with various types of offences which are done through electronic form like computer, computer system, computer networks. Cybercrime and cyber offences are never defined under IT Act, 2000. Various legislative provisions with respect to various cyber crimes in India are given as follow: -

1. Tampering with computer source document
2. Computer related offences
3. Sending offensive messages through communication services etc.
4. Identify theft
5. Violation of privacy
6. Cyber terrorism
7. Publishing or transmitting obscene material in electronic form (cyber pornography)
8. Breach of confidentiality and privacy
9. Offences related to electronic signature certificate
10. Offences by companies.

**JUDICIAL RESPONSE**
Cybercrime is of intangible nature; it does not require any physical presence or physical violence at the scene of crime. Under these circumstances, the adversarial system of litigation would hardly meet the ends of justice in cases relating to cybercrime. the problem faced by the judiciary and the enforcement agencies in dealing with computer related crimes, the Supreme Court of India in *State of Punjab and Others v. M/S Amritsar Beverages Ltd. and Others* observed that:

“Internet and other information technologies have brought with them the

issues which were not foreseen by law. It also did not foresee the difficulties which may be faced by the officers who may not have any scientific expertise or not have the sufficient insight to tackle with the new situations. Various new developments leading to various kinds of crimes unforeseen by our Legislature came to immediate focus. Information Technology Act, 2000, although was amended to include various types of cybercrimes and punishment for them, does not deal with all problems which are faced by the officers enforcing the Act.”

Indian judiciary has played an important role in handling cybercrime cases in cyber age because the Supreme court of India is the ultimate interpreter of laws over the decades. The judicial and law enforcement agencies only well understand that the means available to investigate and prosecute crime and terrorists act which is done through the medium of computer are present almost wholly and national in scope. But still the Indian judiciary improved and come up with the amendment of laws and also handled so many cases related to different types of cybercrimes. Some of the important judgements given as follow:

1. Tampering with computer source document:
Tampering means to interfere with something in order to cause damage or make authorized alterations. The Indian judiciary is playing important role in dealing with offences relating to the tampering with computer source document.

2. Computer related Offences:
Indian judiciary has played a vital role in dealing with cases related to computer offences which falls under cybercrime.

In Sanjay Kumar v. State of Haryana
The petitioner has been convicted for an offence punishable under section 65 and 66 of IT Act read with 420, 467, 468 and 471 of IPC and sentenced for rigorous imprisonment but the petitioner filed an appeal against such order which was dismissed by the appellate court and upheld the trial court judgment. In this case the manager of Vijay Bank, NIT, Faridabad, filed a complaint to police by stating that the petitioner was deputed by M/S Virmati Software and Telecommunication Ltd. to maintain the software system supplied by them to the Bank. But the petitioner has manipulated the interest entries of computerized bank account and thereby cheated the complainant bank by forging electronic record in order to cause wrongful loss to the bank.

These judgements clearly demonstrate the importance and necessity of addressing cybercrimes in the Indian legal framework.
The accused gained unauthorized access to the Joint Academic Network and deleted, added files and changed the passwords to deny access to the authorized users.

It was revealed by the investigations that Kumar was logging on to the BSNL broadband Internet connection as if he was the authorized genuine user and made alteration in the computer database pertaining to broadband Internet user accounts of subscribers. The Additional Chief Metropolitan Magistrate, Egmore, Chennai sentenced him to undergo a rigorous imprisonment for one year with a fine under section 420 of Indian Penal Code for cheating and section 66 of Information Technology Act for computer related offence through communication service, etc.

In State of A.P v. Prabhakar Sampath
The complainant M/S SIS Infotech Pvt. Ltd., Hyderabad, carrying the business of research station, filed a complaint by stating that somebody successfully hacked their server and downloaded their e-reports through some free public sites. After investigation made by the police, the accused was found guilty and charged under section 66 of IT Act for hacking content server of complainant’s company.

3. Sending offensive messages through communication services etc:
Judiciary played a well role in solving cases related to sending offensive message. The Additional District Court and Sessions Court was upheld a lower court’s verdict in the first cyber case in State v. Ts. Balan and Aneesh Balan (2006) and sentenced a Pentecostal priest and his son for morphed photographs and e-mailed to victims from fake IDs with captions under section 67 of Information Technology Act, 2000.

In Shreya Singhal v UOI, (2013) 12 S.C.C. 73(interim relief)
A public interest litigation was filed before the Apex court challenging constitutionality of Section 66A of the IT Act wherein State of Maharashtra

---

1410 Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

1411 Computer related offences. -If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both. Explanation. -For the purposes of this section,-
(a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code (45 of 1860);
(b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code (45 of 1860).]
was called upon to explain the manner of the arrest of two Muslim girls for writing posts on Facebook relating to closure of Mumbai over Bal Thackeray’s death. Later, Ministry of Information Technology also issued an advisory on implementation of Section 66A dated 9 Jan 2013 that requires police not to arrest any person under Section 66A till approval is taken from Inspector General of Police or Superintendent of Police at district level. The Hon’ SC declared section 66A as unconstitutional in its entirety and against the freedom of speech and expression and struck it down in Shreya Singhal and others v. Union of India. This section had been misused by police in various states to arrest the innocent person for posting critical comments about social and political issues on networking sites. This section had led to the arrest of many people’s for posting content deemed to be allegedly objectionable on the internet.

4. Identity Theft:
   Role of judiciary in dealing with cybercrime related to identity theft.
   Vinod Kaushik and ors. V. Madhvi Joshi and ors
   In this case the issue was raised that whether the wife accessed husband’s and father-in-law email account without their permission to acquire evidence of dowry harassment. In this case court held the wife liable under section 66C of IT Act, 2000 for unauthorised access and dishonest use of password of any person.

5. Violation of privacy:
   Judiciary played in dealing with cases on violation of privacy. Section 66E of IT Act,2000 provides punishment to those persons who intentionally on knowingly capture, publishes or transmits the image of private area of the person without consent. Any electronic transfer of the image through emails, internet, message, Bluetooth is an offence. It doesn’t matter whom it is send read it or not but it leads to violation of privacy.
   Motion v. state
   Sting operation made by a private person or an agency which may result in violating bodily privacy of another person will fall under sect 66E and shall be liable under the IT Act,2000.
   On Feb. 17, 2017, a 24-year-old cybercrime accused and his two aides who are wanted in cybercrime cases, walked into the cybercrime police station, Mumbai, posing as vigilance officers and tried to conduct a sting operation on the investigation officer. They wanted to blackmail the senior police inspector of the cybercrime cell to not take any action against the accused. However, their spy pen camera did them in.
   Subsequently, the police found that the three men had fake Central Vigilance Commission (CVC) identity cards and fake letterheads with the names of CBI officers. The Spy camera has been seized. Then the

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

1414 Punishment for identity theft. -Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine with may extend to rupees one lakh.
police charged him under section 34 (common intention), 170 (personating a public servant), 174, 419 (cheating by personation), 420 and 506 of IPC.

6. Cyber terrorism:
It is a terror or threat against common people or government which is not predictable. Sec 66F defines the punishment for cyber terrorism under IT Act, 2000. Terrorist means a person who involves in disruption of services, means communication which is essential for community or indulges in wanton killing of persons or in violence. It also includes hacking, cryptography, trojan attacks and viruses etc.
In 2008 blast in Ahmedabad, Delhi, Jaipur and Bangalore are live examples of cyber terrorism in India. In 2008 attack on Mumbai Taj hotel and again in 2010 the web side of central bureau of identification was hacked by programmers identifying themselves as Pakistani cyber army.

7. Publishing or transmitting obscene material in electronic form (cyber pornography):
Cyber pornography is simple words defined as the act of using cyberspace to create, display, distribute, import, or publish pornography or obscene materials. With the advent of cyberspace, traditional pornographic content has now been largely replaced by online/digital pornographic content.
In Sukanto v. State of West Bengal case which is relating to a magazine ‘Nara Nari’ as a obscene publication, the under section 292 of IPC convicted the petitioner for giving effect to public morality above art,

8. Breach of confidentiality and privacy:
The Indian judiciary is playing the important role in dealing with the cyber crimes relating to Breach of Confidentiality and Privacy.
Sharda v. Dharmpal
The Hon’ble Supreme Court held that the right to privacy under article 21 of India Constitution is not an absolute right. If any dispute rose between fundamental rights of two parties then that right would prevail which advances public morality.

9. Offence related to electronic signature certificate:

1415 Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

www.supremoamicus.org

524
The Indian judiciary is playing the important role in dealing with the cyber crimes relating to electronic signature certificate. The Supreme Court defined the term ‘publication’ in the case of *Bennett Coleman & Co. v. Union of India*. The term ‘publication’ means dissemination and circulation. The term includes dissemination, storage and transmission of information or data in electronic form if we talk about in the context of digital medium.

10. Offences by companies:
The Indian judiciary is playing the important role in dealing with the cyber crimes relating to offences committed by companies. In the case of *Sheoratan Agarwal v. State of Madhya Pradesh*, it was held that “there is no statutory compulsion that the person-in-charge or an officer of the company may not be prosecuted unless he is ranged alongside the company. Each or any of them may be separately prosecuted or along with the company if there is a contravention…by the company.” But this position was overruled in a combined decision by the Supreme Court in the cases of *Aneeta Hada v. M/S Godfather Travels and Tours Pvt. Ltd.* and *Avinash Bajaj v. State* which laid down that prosecution of the company was a condition precedent for the prosecution of the persons who was in charge of or responsible to the company and the director or managing director.

**CONCLUSION:**
The Indian judiciary has played very successful role in reducing cyber crime offences under IT Act,2000. Cyber offences are also known as modern day offences. Many amendments were made under different Acts like Indian penal code, Evidence Act to come up with cyber law cases. so, from above judgements and from this research paper it is clear that the laws for cyber crime are read with criminal laws to punish the accused. So, therefore it is concluded that the judiciary or government is very active in identifying cyber-crime and solving it.

**REFERENCES**
1. Law on cybercrimes: P.K.Singh
2. Justice Yatinder Singh
3. Cyber Law Karnika Seth
5. [www.legalserviceindia.com](http://www.legalserviceindia.com)
6. Shodhgangainflibnet.ac.in
7. Information Technology Act,2000

*****
This paper examines the definition of BWS, the critical appraisal of the existing defences under the Indian Penal Code, 1860, and the need to establish a new fair defence fit for battered women.

Keywords: Domestic Violence, Battered woman syndrome, Homicide, Defence, Indian Penal Code


INTRODUCTION:

“Battered Spouse Syndrome” is a constellation of medical and psychological conditions of a person, as a result of repeated violence such as beatings, choking, sexual assault, verbal abuse, or a combination of different acts amounting to violence at the hands of the spouse or partner.1416 Usually this is known as “Battered woman syndrome” (BWS), because most of the victims of this syndrome are women.

Battered woman syndrome is a criminal defence involving a pattern of psychological dependency among women caught in long-term relationships with abusive male partners. Over time, abuse produces an irrational mental state of “learned helplessness,” limiting free choice and placing victims of abuse in a spiral of conflict that occasionally results in a violent and sometimes fatal response over which they have no rational control.1417

This terminology is not that much used in Indian Judiciary as a defence of Spousal Homicide. While in other countries like Australia, the United Kingdom, Canada, New Zealand and the United States have

1416 Battered Spouse Syndrome Law and Legal Definition

1417 Battered Woman Syndrome Law and Legal Definition

Keywords: Domestic Violence, Battered woman syndrome, Homicide, Defence, Indian Penal Code
accepted the research showing that battered woman can use force to defend themselves and sometimes kill their abusers because of the abusive and sometimes life-threatening situation in which they find themselves, acting in the firm belief that there is no other way than to kill for self-preservation. The courts have recognized that this evidence may support a variety of defences to a charge of murder or to mitigate the sentence if convicted of lesser offenses. ¹⁴¹⁸

Psychotherapist Lenore Walker developed the concept of battered woman syndrome in the late 1970s. She wanted to describe the unique pattern of behavior and emotions that can develop when a person experiences abuse and as they try to find ways to survive the situation. Walker noted that the patterns of behavior that result from abuse often resemble those of post-traumatic stress disorder (PTSD). She described battered woman syndrome as a subtype of PTSD. ¹⁴¹⁹

DOMESTIC VIOLENCE:

Domestic violence refers to violent or abusive acts committed by one family or household member against another, such as child abuse or spousal abuse. Domestic violence can refer to physical harm, or behavior that is controlling, coercive, or threatening. It can occur in any kind of intimate relationship -- married or unmarried, straight or gay, living together, or simply dating. ¹⁴²⁰

It occurs within all age ranges, ethnic backgrounds, and economic levels. And while women are more often victimized, men also experience abuse—especially verbal and emotional. The bottom line is that abusive behavior is never acceptable, whether from a man, woman, teenager, or an older adult. One deserves to feel valued, respected, and safe. Domestic abuse often escalates from threats and verbal assault to violence. And while physical injury may pose the most obvious danger, the emotional and psychological consequences of domestic abuse are also severe. Emotionally abusive relationships can destroy your self-worth, lead to anxiety and depression, and make you feel helpless and alone. ¹⁴²¹

There are several types of Domestic Violence and those are:

1. Physical Violence
2. Sexual Violence
3. Economic Control
4. Psychological Assault
5. Emotional Abuse

Each of them are discussed below. ¹⁴²²

- **Physical violence** involves the use of physical force against another. Examples include hitting, shoving, grabbing, biting, restraining, shaking, choking, burning, forcing drug/alcohol use, and assault with a weapon, etc. Physical violence may or may not result in an injury that requires medical attention.

¹⁴¹⁹Battered woman syndrome and intimate partner violence, Available on https://www.medicalnewstoday.com/articles/320747#symptoms, accessed on 6/7/2020
• **Sexual violence** involves the violation of an individual’s bodily integrity (sexual assault), including coercing sexual contact, rape, and prostitution, as well as any unwelcome sexual behavior (sexual harassment), and including treating someone in a sexually demeaning manner or any other conduct of a sexual nature, whether physical, verbal, or non-verbal. Sexual abuse also includes behavior which limits reproductive rights, such as preventing use of contraceptive methods and forcing abortion.

• **Economic abuse** involves making or attempting to make the victim financially dependent on the abuser. Examples of economic abuse include preventing or forbidding an intimate partner from working or gaining and education, controlling the financial resources, and withholding access to economic resources.

• **Psychological abuse** is often characterized as intimidation, threats of harm, and isolation. Examples include instilling fear in an intimate partner through threatening behavior, such as damaging property or abusing pets, constant supervision, or controlling what the victim does and who they talk to. Spiritual abuse may be included as a type of psychological abuse. It involves the misuse of spiritual or religious beliefs to manipulate or exert power and control over an intimate partner (i.e., using scripture to justify abuse or rearing the children in a faith or religious practice the partner has not agreed to).

• **Emotional abuse** involves undermining an individual’s sense of self-worth. Examples of emotional abuse include constant criticism, name-calling, embarrassing, mocking, humiliating, and treating like a servant.

**Indian Laws relating to Domestic Violence**

- Section in Indian Penal Code, 1860:

  **498A.** Husband or relative of husband of a woman subjecting her to cruelty.— Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, “cruelty” means—
  (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
  (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

- The Protection of Women from Domestic Violence Act, 2005

The Protection of Women from Domestic Violence Act 2005 is an Act of the Parliament of India enacted to protect women from domestic violence. It was brought into force by the Indian government from 26 October 2006. The Act provides for the first time in Indian law a definition of "domestic violence", with this definition being broad and including not only physical violence, but also other forms of violence such as emotional/verbal, sexual, and economic abuse. It is a civil law
meant primarily for protection orders and not for meant to be enforced criminally.\textsuperscript{1423}

Battered woman syndrome (BWS) is a psychological condition and describes a pattern of behavior that develops in victims of domestic violence as a result of serious, long-term abuse. BWS is dangerous primarily because it can lead to what some scholars say is “learned helplessness” -- or psychological paralysis -- where the victim becomes so depressed, defeated, and passive that she believes she is incapable of leaving her abuser. This gripping fear feels absolutely real to the victim. Feeling weak, and possibly holding out hope that her abuser will stop hurting her, the victim remains in the abusive situation. This continues the cycle of domestic violence and strengthens the BWS grip. BWS has been recognized by many state courts and there are support systems available to domestic violence and BWS victims. Some states also take BWS into account when addressing violent outbursts by victims of domestic violence.\textsuperscript{1424}

In 2011, a total of 8,618 women were estimated to have been killed due to dowry issues. This is likely an underestimate of the true numbers because many murders of women are falsely labeled “suicides or accidents”. A large number of DV-related cases (for example fatal burns, poisonings, suicides, etc.) are under-reported due to stigma and sociocultural factors or are misclassified in police records.\textsuperscript{1425}

**BATTERED WOMAN SYNDROME:**

After Walker published her research, some empirical data emerged that cast doubt on her explanation of why women kill their abusers. More specifically, some research indicated that victims of abuse often contact other family members and seek the assistance of the legal system for help as the violence from their batterers escalates. This research also indicated that when battered women sought outside help, they were confronted with insufficient help sources, a legal system that did not address their issues, and societal indifference. The lack of practical options, combined with victims’ lack of financial resources, made it likely that battered women would stay in abusive relationships. In contrast to this research demonstrating battered women’s active help-seeking behavior, Walker’s theory of BWS emphasized women as becoming passive and helpless in the face of repeated abuse.\textsuperscript{1426}

There are three major symptom clusters that are measured to determine whether or not a person who has been exposed to trauma has developed a PTSD. They are cognitive...
disturbances, high arousal symptoms, and high avoidance symptoms.\textsuperscript{1427}

There are four psychological stages of the Battered Woman Syndrome.\textsuperscript{1428} The foremost is the “denial” stage where the woman declines to admit even to herself that she has been beaten or that there are "crisis" involved in her marriage. She may entitle each incident an "accident". She proffers excuses for her husband's violence and each time steadfastly believes it will never ensue again.\textsuperscript{1429}

The second is the “guilt” stage in which she now concedes that there is a dilemma, but deems herself accountable for it. She is of the conviction that she "deserves" to be beaten, because she has shortcomings in her character and is not living up to her husband's expectations.\textsuperscript{1430}

The third is the “enlightenment” stage where the woman no longer assumes responsibility for her husband's abusive treatment, recognizing that no one "deserves" to be beaten. She is still dedicated to her marriage, though, and continues with her spouse, on tenterhooks that they can work out with the things.\textsuperscript{1431}

The fourth is the “responsibility” stage in which the woman accepts the fact that her husband will not, or cannot cease his brutal behavior, the battered woman resolute that she will no longer surrender to it and initiates life anew.\textsuperscript{1432}

As the abusive cycle continues, the victim starts to feel helpless. In many cases, especially where the victim’s family is not supportive enough, she begins to blame herself for the abuse. Often times, the abuse may not physically harm the victim, in many cases the abuser uses emotional manipulation by attempting to hurt himself. This sort of abuse is usually even more successful in causing self-doubt and inflicting blame on the victim. This begins a toxic process known as “gas lighting” – a targeted approach to make the victim doubt their own sanity and inflict self-blame. This state of mind of the victim, clinically known as “learned helplessness” or “psychological paralysis”, is the cause of the entrapment in the relationship. Thus, BWS is recognized as a mental disorder, a form of Post-Traumatic Stress Disorder (PTSD) that is common in women who are victims of serious, long-term abuse of the kind described above.\textsuperscript{1433}

MARITICIDE:

Mariticide (from Latin maritus "husband" + -cide, from caedere "to cut, to kill") literally means killing of one's husband or boyfriend. It can refer to the act itself or the person who carries it out. Used in current common law terminology as gender-neutral for either spouse or significant other of

\textsuperscript{1427}Battered Women Syndrome and Self-Defence by Lenore E. A. Walker Available on https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1476&context=ndjlepp, accessed on 7/7/2020
\textsuperscript{1429}Ibid.
\textsuperscript{1430}Ibid.
\textsuperscript{1431}Ibid.
\textsuperscript{1432}Ibid.
either sex. The killing of a wife is called uxoricide.\textsuperscript{1434}

Xhemali et al. (2015) deliberate that mariticide is the extreme form of family violence which means the killing of one’s husband by the wife rather than a general term for killing a spouse.\textsuperscript{1435}

According to Centers for Disease Control and Prevention, mariticide made up 30% of the total spouse murders in the United States. Data not including proxy-murders conducted on behalf of the wife,\textsuperscript{[1]} FBI data from the mid-1970s to mid-1980s found that for every 100 husbands who killed their wives in the United States, about 75 women killed their husbands indicating a 3:4 ratio of mariticide to uxoricide.\textsuperscript{1436}

According to many authors, mariticide would therefore only be the final option the woman believes would end the abuse, especially after continuous attempts to seek help. These observations originated the spread, in the United States, of battered woman self-defence, a legitimate legal defence identified in cases where a woman suffers violence at the hands of the victim, even in the absence of legal conditions necessary to constitute lawful self-defence.\textsuperscript{1437}

DEFENCES AVAILABLE FOR BATTERED WOMEN:

The legal defences available in India are incapable of dealing with cases of BWS, thus making it critical to discuss the legal defences available to battered women who are compelled to kill their partners.\textsuperscript{1438}

In India, Battered woman syndrome is not a legal defence in and out. It does not accommodate the defence under Indian Penal Code, 1860 the situations faced by a battered women.

But it constitutes partial or full defence in:

1. Self-defence
2. Grave and Sudden Provocation
3. Legal Insanity

\textbf{SELF-DEFENCE AS A DEFENCE FOR BATTERED WOMEN:}

Even though the Indian Courts have not yet accommodated the cases of battered women within the realm of self-defence, many scholars, as has been discussed above, have mooted for expansion of the self-defence structure. In such a scenario, it will be pertinent to examine the possibility of extending the right of private defence to battered women who commit homicide as against the partial defence of provocation.

\begin{itemize}
\item \textsuperscript{1434} https://en.wikipedia.org/wiki/Mariticide#English_common_law, accessed on 7/6/2020
\item \textsuperscript{1435} A Reason To Kill: Case Study On Mariticide by MARY GRACE C. LACANARIA & JUAN JOSE T. DAVID, Available on https://search.proquest.com/openview/3cb9af64bece76d2b2e485a63f29a031f/1?pq-origsite=gscholar&cbl=2030615, accessed on 8/6/2020
\item \textsuperscript{1436} Ibid, https://en.wikipedia.org/wiki/Mariticide#English_common_law, accessed on 8/6/2020
\item \textsuperscript{1437} https://www.researchgate.net/publication/33626248_Mariticide_in_Milan_between_1990_and_2017_A_criminological_and_medico-legal_analysis, accessed on 8/6/2020
\item \textsuperscript{1438} BATTERED WOMEN: THE GENDERED NOTION OF DEFENCES AVAILABLE by Keerthana Medarametla Available on http://docs.manupatra.in/newsline/articles/Upload/F1D66902-8FAE-4580-BDB1-479D1768B695.pdf, accessed on 8/6/2020
\end{itemize}
Criminal law in India authorises a person who is under a reasonable apprehension that his life is in danger to inflict death upon the aggressor, provided the harm inflicted should not be more than what is actually necessary for the purpose of self-defence. This is based upon the basic norm of self-preservation as duly recognised by the criminal legislations of majority of the countries.\textsuperscript{1439}

Domestic Violence Homicides and Suicides in India 3
“suicides or accidents” (United Nations Office on Drugs and Crime, 2011). A large number of DV-related cases (for example, fatal burns, poisonings, suicides) are under-reported due to stigma and sociocultural factors or are misclassified in police records (Kavita, Girish, & Gururaj, 2011)

Domestic Violence Homicides and Suicides in India 3
“suicides or accidents” (United Nations Office on Drugs and Crime, 2011). A large number of DV-related cases (for example, fatal burns, poisonings, suicides) are under-reported due to stigma and sociocultural factors or are misclassified in police records (Kavita, Girish, & Gururaj, 2011)

Domestic Violence Homicides and Suicides in India 3
“suicides or accidents” (United Nations Office on Drugs and Crime, 2011). A large number of DV-related cases (for example, fatal burns, poisonings, suicides) are under-reported due to stigma and sociocultural factors or are misclassified in police records (Kavita, Girish, & Gururaj, 2011)

Domestic Violence Homicides and Suicides in India 3
“suicides or accidents” (United Nations Office on Drugs and Crime, 2011). A large number of DV-related cases (for example, fatal burns, poisonings, suicides) are under-reported due to stigma and sociocultural factors or are misclassified in police records (Kavita, Girish, & Gururaj, 2011)

1439 Deb, Aishwarya, Battered Woman Syndrome: Prospect of Situating It within Criminal Law in India (May 30, 2018), accessed on 8/6/2020.

The narrow doctrine of self-defence and its application to the cases where a woman is battered, results in the acquittal of only those women, who have killed the husband in an act where the husband was actively engaged in inflicting an injury. The doctrine does interfere or try to protect those women, who kill so as to protect themselves, not from an imminent physical attack on them, but from an extremely serious psychological injury. The idea here is that these women, who actually do this, do so to protect themselves not from an attack that may eventually kill them, but from an injury that can strictly be defined in psychological terms. The women in essence, are unable to escape the vicious cycle of repeated torture inflicted on them.

1440 According to the traditional common law doctrine of self-defence, on which the right to private defence in India is based, for a plea of self-defence to be successful the following conditions need to be satisfied:

1. The defendant has defended herself in a situation in which she reasonably believed that unlawful bodily harm was imminent;
2. The amount of force used by her in order to protect herself was proportionate to the impeding danger or the intimidating force;
3. It was a necessity and not a choice, to use force in order to prevent the threatened harm;

1440 The Rig...
d. The defendant reasonably believed that the aggressor’s threatened use of force was imminent.\textsuperscript{1441}

Thus, it is evident from the above pre-requisites that self-defence predominantly relies on the components of imminence, necessity and proportionality.\textsuperscript{1442}

There are several case laws in which Indian Judiciary has given acquittal to those women who had committed Homicide and opt for Self-defence in their trial and some of them are:

In \textit{Champa Rani Mondal v. State of West Bengal},\textsuperscript{1443} the accused woman had challenged her conviction for committing the murder of her brother-in-law. According to the facts of the case, the brother in law had tried to rape her and for the purpose of the same dragged her to the bed by putting cloth in her mouth. It was at that very moment when she inflicted two blows of katari upon him as a result of which he succumbed to death. The Court acquitted her as she had exercised her right of private defence.

In \textit{Malliga v. State},\textsuperscript{1444} the deceased brother of the accused had physically assaulted and tried to rape her. The question before the Court was whether a helpless woman at an advanced stage of pregnancy under frequent and imminent threat of rape is entitled to a right of private defence. The Court held that accused having a reasonable belief or apprehension of the continuing danger to her body of being raped as well as harm to the child in her womb was entitled to exercise the right of private defence in terms of Section 100 and 102 of IPC. The Court also held that even though the initial burden of setting up a plea of self-defence lies on the accused, the burden immediately shifts to the prosecution to establish that the accused had exceeded the right of private defence.

\textbullet\textbf{GRAVE AND SUDDEN PROVOCATION AS A DEFENCE FOR BATTERED WOMEN}

The offence committed amounts to culpable homicide not amounting to murder in India if the offender loses his or her power over self-control due to a grave and sudden provocation.\textsuperscript{1445}

This is the defence usually pleaded by female offenders with a history of abuse, but it is not available if time lapses between provocation and the criminal act.

The traditional definition of provocation comes from \textit{R. v. Duffy}, in which it was held that “provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his [or her] mind.”\textsuperscript{1446}

\textsuperscript{1441} By Deb, Aishwarya, Battered Woman Syndrome: Prospect of Situating It within Criminal Law in India (May 30, 2018), accessed on 9/6/2020

\textsuperscript{1442} Ibid


\textsuperscript{1444} \textit{Malliga v. State}, 1997 SCC OnLine Mad 787.


\textsuperscript{1446} \textit{R. v. Duffy}, (1949) 1 All ER 932.
In the case of *K.M. Nanavati v. State of Maharashtra*[^1447], the Supreme Court laid down guidelines for what constitutes ‘grave and sudden’ provocation, which are as follows:

1. Whether a reasonable man from the same class of society would lose his self-control in a similarly placed situation;
2. Words and gestures may also, under certain circumstances, cause ‘grave and sudden’ provocation;
3. The mental state of the accused due to a previous act of the victim may be considered to determine whether the antecedent act provoked the accused to commit the offence;
4. The offence committed should be rooted back to an act of passion and not occur after a lapse of time.

More recent studies are consistent with Wolfgang’s finding that wives who kill their husbands have been strongly provoked. These studies confirm that wives often kill in self-defence and that they have frequently been abused. University of Florida researchers found that most of the women studied who had killed their husbands did so “only after being subjected to prolonged physical or verbal abuse.” These studies and others with similar findings demonstrate that wife abuse jeopardizes the lives of husbands as well as wives.[^1448]

The Madras High Court in *Amutha v. State*[^1449] granted anticipatory bail to a woman, victim of domestic violence in the hands of her husband, who had pushed her daughters into the well and jumped herself too but unfortunately survived. The Hon’ble Court, while explaining the consequences of battering relationship with the concept of BWS, held that the continuous provocative conduct of the husband for years and the triggering action on the night of the incident, made her lose self-control and take a decision to kill herself and her daughters in order to put an end to the violence.

In an another case of Delhi High Court, *State v. Hari Prashad*[^1450] convicted the accused-husband for the suicide of his battered wife and held that the provocation by the husband became her compulsion to end the domestic relationship by taking her own life.

The defence of provocation is not an acceptable option for the battered women who kill her husband, as this defence is not justified. This defence solely reduces the charge of murder to a lighter offence, so that the punishment of the battered women would be reduced.

**LEGAL INSANITY AS A DEFENCE FOR BATTERED WOMEN**

In some cases, battered women who kill their abusers will claim the defence of insanity. Battered women who claim an insanity defence allege that their mental capacity was impaired at the time of the criminal act, in contrast to a defence of self-defence, in which battered women claim that they acted in response to a reasonable perception of danger. This insanity defence is referred to legally as “defence of excuse” rather than a defence of

[^1448]: HUSBAND-WIFE HOMICIDE: AN ESSAY FROM A FAMILY LAW PERSPECTIVE by Margaret Howard, Available on https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3825&context=lcp, accessed on 8/6/2020
[^1449]: Amutha v. State, 2014 (2) MWN (Cr) 605.
justification. An excuse defence refers to situations in which the defendant doesn’t deny that she committed the crime, but rather states that she is not responsible for it, typically on grounds of lacking volition over her free will, as in the case of a claim of insanity. The defence of insanity requires that a defendant have a serious mental illness at the time of the criminal act.\textsuperscript{1451}

Furthermore, in most states, the legal standard for insanity is a narrow one, requiring that the defendant’s mental condition impaired her mental capacity to such an extent that she did not understand the nature and consequences of what she was doing or did not understand that what she was doing was wrong. This defence is used much less frequently in cases of spousal homicide than is the claim of self-defence, but when the condition of legal insanity is offered as a defence, testimony by experts can be offered to explain how BWS and its associated symptoms may have precluded the victim from knowing right from wrong or appreciating the consequences of her actions at the time of the criminal act.\textsuperscript{1452}

The Indian Courts follow the M’Naghten Rules, formulated in the English M’Naghten case,\textsuperscript{1453} while deliberating upon cases where defendants plead insanity as a defence. The M’Naghten Rules, which are the continuing measure of insanity, incorporate a classical thought which is more than a century old. Although, attempts at modernization have led to some modification in the rules of criminal responsibility, the statute and significance of the M’Naghten Rules has impeded efforts at creative reconstruction.\textsuperscript{1454}

The High Court of Karnataka has criticized the limitations of the defence of insanity in Sunil Sandeep v. State of Karnataka.\textsuperscript{1455} It held that the rigidity of the M’Naghten rules falls short of the modern knowledge of psychiatry and that there may be cases where the accused knows the ‘nature and quality of the act’ and yet commits the act due to an ‘irresistible impulse’ by reason of mental defect or deficiency. However, the Supreme Court of India does not recognize the test of ‘irresistible impulse’ and restricts insanity to M’Naghten rules. Further, while certain High Courts in India have acknowledged the principle of diminished responsibility as applicable in English Law in cases of mercy killing,\textsuperscript{1456} or battered women killing their abusive partners,\textsuperscript{1457} none have gone so far as to apply the principle of diminished responsibility explicitly in the Indian context.

In any case, the use of defence of insanity for battered women is highly vexed. It would indicate that battered women are not able to realize the actual nature of crime. The use of insanity as a defence is not at all viable because the battered women is very much capable of knowing the gravity of the crime she committed because she was forced to do so for her own protection.

\textsuperscript{1452}Ibid.
\textsuperscript{1453}R v. M’Naghten, [1843] UKHL J16.

\textsuperscript{1454}Deb, Aishwarya, Battered Woman Syndrome: Prospect of Situating It within Criminal Law in India (May 30, 2018).
USE BATTERED WOMAN SYNDROME AS A LEGAL DEFENCE:

Currently in India, as the law exists, the only defence that appears to be available to battered women who retaliate is self defence. Thus adapting the BWS as a legal defence for those badgered and battered would help them live their life.

Further, Indian jurisprudence on BWS has not progressed beyond the ‘Nallathangal syndrome’. Thus there is a need to contemplate upon the progress made in other jurisdictions relating to BWS and accordingly instigate a comprehensive parley on battered women who counterattack and their interaction with the law in India.

COMPARATIVE STUDY:

In the English case of *R v Charlton [(2003) EWCA Crim 415]*, the victim and her daughter consistently received violent and sexual threats at the behest of the abuser. During their regular sexual activity when the abuser was cuffed, gagged and blindfolded, the victim killed him. It must be noted that there was no sudden provocation, apprehension of harm here; there certainly was preparation for the crime. Nevertheless, taking into account the threats of the abuser, the mental state of the victim and the concern for the safety for her daughter and herself, the Court mitigated her sentence from 5 years to 3.5 years. Among other jurisdictions, while Australia accepts evidence of abuse as part of defence, Canada has accepted set precedent for the use of battered women’s syndrome as complete defence since 1990. New Zealand goes further to recognize abuse of men at the hands of women and abuse in same-sex relationships as well.  

- **UNITED STATES OF AMERICA:**

  One in four women in the United States has experienced domestic violence during her lifetime, according to The Centers for Disease Control and Prevention and The National Institute of Justice, report *Extent, Nature, and Consequences of Intimate Partner Violence* released in July 2000. Such violence can be fatal. Every day in the United States, more than three women and one man are murdered by their intimate partners on average. In 2000, 1,247 women and 440 men were killed by an intimate partner. Thirty percent of all murders of women and 5% of all murders of men were intimate partner homicides. *See Bureau of Justice Statistics Crime Data Brief, Intimate Partner Violence, 1993-2001, February 2003; Bureau of Justice Statistics, Intimate Partner Violence in the U.S. 1993-2004, 2006.*

  Battered Woman Syndrome, a theory developed in the 1970’s that is now associated with Post Traumatic Stress Disorder (PTSD), is sometimes used in court cases as mitigation in homicide cases where a battered woman kills her abuser. Early on, the evidence was not admitted, but it is increasingly admissible despite questions about Battered Woman Syndrome.


Syndrome’s validity as a psychological disorder. It is currently admissible in seventy-six percent of states (39 states as of 2000).1460

- CANADA:

As a result of a 1990 Supreme Court of Canada decision, battered woman syndrome defence is now accepted as a legitimate extension of self-defence in Canadian courts. This defence hinges on the expert testimony that a battered woman who is accused of murder or aggravated assault suffers from the psychological sequelae of abuse and that this psychological distress contributes to her apprehension of danger and ultimately her apprehension of death during a particular battering episode.1461

- INDIA:

The law in India needs to recognize and assimilate the psychological aspect of domestic violence as it has been excluded till now. If once this syndrome will be implied in our law, the battered women’s condition would be a lot better. It would also protect her human integrity and dignity, as promised under Article 21 of the Constitution. Commencing such sensitive sympathetic principles and laws is like disentangling the laws.

The use of Battered Woman Syndrome and diminished responsibility as a defence to murder by battered women has been strongly criticized by certain feminist scholars. The gravity of the consequences of using this defence is evident in that the women who plead successfully to this defence could be designated ‘mentally ill’ and be detained in an institution or be put on probation. This is cruelly ironic because battered women “may” show no signs of psychological situtation of victim there is also a need to look into social, economic, cultural and political circumstances in which violence takes place. Avoiding gender stereotypes and labeling a woman as ‘mad or bad’ is not the purpose of the shift in approach, the need is to consider the situation of the battered woman in a patriarchal society that needs to be reformed.1462

CONCLUSION:

The law in India needs to acknowledge and assimilate the psychological aspect of Domestic Violence as it has been excluded till now. If once this syndrome will be implied in our law, the battered women’s condition would be a lot better. It would also protect her human integrity and dignity, as promised under Article 21 of the Constitution. Commencing such sensitive sympathetic principles and laws is like disentangling the laws.

1460 Ibid

post-traumatic stress disorder and live their life without the fear of violence.\textsuperscript{1463}

In summary, battered women who kill are not different from those who do not kill. All of the differences have been found in the frequency and severity of violence committed by the batterer. Over fifty percent of all women who are killed in the United States are murdered by previously violent husbands, usually when they attempt to terminate the relationship. It is important for legal and mental health professionals to understand the dynamics of violent relationships to avoid inadvertently escalating their already high lethality potential.\textsuperscript{1464}

\textsuperscript{1463} BATTERED WOMEN: THE GENDERED NOTION OF DEFENCES AVAILABLE by Keerthana Medarametla Available on http://docs.manupatra.in/newsline/articles/Upload/F1D66902-8FAE-4580-BDB1-479D1768B695.pdf, accessed on 11/6/2020

\textsuperscript{1464} Battered Women Syndrome and Self-Defence by Lenore E. A. Walker Available on https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1476&context=ndjlepp, accessed on 11/6/2020
ALTERNATE DISPUTE RESOLUTION AND CONCILIATION IN INDIA

By Milind Jain
From K.L.E. Society’s Law College, Bangalore

ABSTRACT
In India we have learned and studied about many acts, laws, amendments have taken place for speedy trials but maximum of them have failed in providing justice to an individual in a better manner and on time. This case is especially in civil matters and others. Therefore for the developing nation like India where we have seen many economic reforms such as Liberalization, Privatization and Globalization, many of the foreign companies have set up their works in India and many Indian firms are also set up in abroad. So any disputes regarding them in India especially in civil matters where courts already have a lot of burden and many of the cases are still pending, for that we need to create a different and special court so that the burden on the courts will be less. Therefore on 4th December 1996 Chief Ministers and Chief Justices of each state came up with the Act which is now known as The Arbitration and Conciliation Act of 1996. The main motive of this act was to lessen the burden on the civil courts in India. In this paper I will be discussing about the history of ADR in India, how our Indian Judiciary has adopted ADR and what were the challenges faced by them, various forms of Alternate Dispute Resolution. Advantages and Disadvantages of ADR, how ADR is functioning in modern India, what is its role, what are the duties of a conciliation officer under Industrial Disputes Act 1947, then I will be taking about The Arbitration and Conciliation Act 1996 and what is conciliation how it is different form Arbitration.

INTRODUCTION
“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, and expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough” – Abraham Lincoln

We have learnt, seen and studied in Article 1465 of The Constitution of India that state ensures just, fair and reasonable procedure. Therefore, we can say that the sooner the dispute is over, it is better for the parties concerned in particular and society in general. We can say that denial of justice through delaying it is the biggest mockery of law, but as we have seen in the courts that in India, delay in bringing in the Justice kills the entire Justice Dispensation system. If we talk about Alternative Dispute Resolution mechanisms it has become more crucial for business operating in India as on the other hand the same for the parties doing Alternative Dispute Resolution with Indian Firms. This mechanism was brought as the process of getting Justice through Litigation in Courts is very time consuming. And there are many other reasons like India is a developing country therefore there are many economic reforms within the framework of the rule of law for lessening the burden of courts. ADR are the only alternatives through Arbitration, Conciliation, Mediation and negotiation.

THE CONSTITUTION OF INDIA BARE ACT
- P M BAKSHI (PAGE NO. 72)
If we see Article 21 of The Constitution of
India, we can see that Right to speedy
trial is a right to life and personal liberty of
every citizen of India which is guaranteed
under Article 21, which ensures just, fair
and reasonable procedure. Every conflict is
like a termite, as soon as it gets over it is
better for the parties, and if it does not gets
over soon then it spreads very fast and time
and the effort to resolve the conflict
increases. Disposal of cases on time is very
much required to maintain the rule of law
and providing access to justice, which is a
fundamental right of every citizen
guaranteed under Article 21 of The
Constitution of India.

As we have seen that denial of justice
through delay in getting justice has been
considered and is the biggest mockery of
law, due to this people are setting the scores
by their own which has resulted more
criminal syndicates and mob attacks,
vioce for Justice in some parts of the
Country which has reflected the loss of
people’s confidence in Justice and law. In
1996 Indian Legislature and Judiciary has
taken some points into consideration to
lessen the burden on the courts and
accepted the fact that a new effective and
efficient mode of delivering Justice should
be created. And that was created in the form
of Arbitration, Mediation and Conciliation
as an Alternative Dispute Resolution
(ADR) for civil and commercial matters.
Therefore parliament enacted Arbitration
and Conciliation Act 1996. The main
purpose for enacting this act was for speedy
trial in civil matters and commercial dispute
by private Arbitration. ADR is also being
referred as a global system as it is not
restricted by any territorial Jurisdiction.

**HISTORY OF ADR IN INDIA**

In India history of ADR is from a long time
before the time of Christ. For Example such
as panchayat, where group of elderly people
in village areas decide the disputes between
the villagers which are also common today.
The disputants are required to present their
problems or case in front of panchayat
which will attempt to resolve the dispute
between the parties. But the working of
panchayat is such that it would be difficult
to consider them as mediators, conciliator,
an arbitral tribunal or judicial body. But if
the facts of any case before the panchayat
will disclose a clear legal obligation then it
will act as a Judicial Body to decide the
rights of the parties and enforce the
decision. The parties should understand that
the decision given by the panchayat should
always be followed irrespective of the
source of the decision. If we see from 18th
century panchayat decisions has played a
very important role in solving the cases and
the decisions given by them.

When there was Muslim rule in India many
laws and principles were incorporated in
the Indian Culture. According to literatures
and texts Kazis were the designated judicial
officers who used to solve the disputes
between the parties and
indians. There
are many cases and instances where Kazis
have given the decisions and decided the
cases beyond the law by getting the
disputants to agree on the solution that
could be arrived by conciliation. Therefore
the cases decided by kazi and the decision
given by them would be binding on the
parties before him.

So we can say that the mechanism of ADR
in India was already there from many
centuries in the villages even at the time of
Muslim rule and empire. But these
principles mentioned above cannot be used
in modern society for providing justice to the individuals, therefore as the time changes the principles also changes with it as to provide complete justice to the individuals. But the panchayat system is today also followed in India in villages for the Justice as not every individual can come to courts for their small matters. And in India maximum of the citizens are not having such money to afford the court fees and Advocate’s fees, nor are the courts in some parts of India near so that every individual with its problem can come. Therefore the need for panchayat system is also necessary in India.

ADR IN MODERN INDIA

As we have also seen that conciliation has also been used effectively in solving the disputes. If we see Industrial Disputes Act 1974 the use of conciliation has been very much prominent and effective. Conciliation has been recognized as an effective method to solve any dispute between workmen and the management of the industry. Industrial Disputes Act 1947 makes conciliation more attractive for disputant parties for the settlement of the disputes between them through negotiation. The conciliation is adopted by Government and before going for litigation, conciliation officer discusses some set of provisions so that conciliation can be successful.

Some of the sections of Industrial Disputes Act 1947 which talks about conciliation are-

SECTION 2(d) - conciliation officer means a conciliation officer appointed under this act.

SECTION 12(2) - The conciliation officer should and shall make all the efforts to settle the disputes by conciliation only.

SECTION 12(3) - Any agreement settled in the process of conciliation shall be certified as a fair settlement by the conciliation officer.

This Sections talks about the duties of a Conciliation Officer under the Industrial Disputes Act.

SECTION 18(3) - All such settlements given by the officer shall be binding to all the parties to the industrial disputes, and all the parties are invited to participate in the conciliation but prefer to stay away from the conciliation process.

SECTION 33C - The settlement of the dispute itself is a document and if any breach of settlement by management is a ground for recovery of dues.

The parties in an Industrial Dispute gone for litigation knows that it is a very tedious process and it can be continued beyond the lifetime of some beneficiaries. This is one of the most important factors which have contributed greatly for the success of conciliation in industries.

As we know that any civil dispute regarding Industry or anything else can be continued forever and the Judgement also comes late in litigation process. Therefore one of the major positive thing about conciliation is that the process is very fast it takes time but not as of litigation.

NEED OF ADR IN INDIA

As we have seen that the litigation process consumes very long time for the delivering of Justice to parties and there are lot more ongoing cases already in courts therefore

---

1467 https://indiacode.nic.in/bitstream/123456789/2169/1/A1947-14.pdf
the stress and burden upon them keeps on increasing due to pendency of cases in courts. If we check the statistics we get to know that in India the number of cases have shown tremendous increase in recent years which has resulted in pendency and delays which automatically underlines the need of Alternative Dispute Resolution methods in India. This resolution was adopted by Chief Ministers and Chief Justices of states in a conference which was held on 4th December 1993 under the chairmanship of Late Prime Minister P.V. Narasimha Rao and was presided over by the Chief Justice of India.

The conference which was held said that - “The Chief Ministers and Chief Justices of the states said that they were not in conditions and position to bear entire burden of the Judicial System and the number of disputes should be resolved by any other alternative methods such as arbitration, mediation and negotiation. They said that due to this valuable time and money will be saved and the stress of conventional trial will be avoided.

As we know that India is a developing country with major economic reforms under which the procedure should be very swift for lessening the burden on the courts. There is no other better option, only to strive to develop alternative methods of disputes by establishing facilities for providing settlement through arbitration, mediation, conciliation and negotiation. So, the mechanism ADR was established for lessening the burden of the courts and for swifter process and procedure. Therefore ADR was introduced and now it is being practiced. What are the advantages of ADR in Modern India. Some of the advantages are –

ADVANTAGES

- The Judges which are selected for this resolution and to deal with disputes should know International Business, commercial transactions and they should not be lost in the language of the law. On the other hand parties will be sure that the person chosen will have all the expertise to resolve the disputes to the satisfaction of the parties.
- If we see, then we will get to know that most of the transactions are based or founded on the timings. And on the other hand if the timing is lost then the transaction makes no sense to the parties. Therefore in this situation the remedy can be given will be of a same tone. But the problem is that the remedy acceptable by one party sometimes cannot be accepted by other party. The person who is an expert, who applies ADR should be able to understand these situations and positions of the parties and should guide them towards the procedure to the solution. However it is not expected that the judge who is giving the decision or the judgement would understand such considerations of the parties.
- In the last few decades we have seen that there was increase in International Trade and commerce due to increase in commercial disputes all over the world in which India is not an exception. On the other hand we also know that the growth of ADR mechanism cannot match with the pace of Industrial growth and modernization. So we can say that the need for Alternate Dispute Resolution is more in business operations in India and for the countries doing business with India.
- Alternate Dispute Resolution is preferred over the conventional way of resolving the disputes. As we know that courts resolve their disputes using binding process by applying legal principles for findings the facts which consumes a lot of valuable time of the court and the parties.
• Alternate Dispute Resolution also encourages the participation of the citizens or the people in the process of dispute resolution, so it creates a legal awareness and on the other hand it respects the rights of others and promotes self-reliant development.

• Alternate Dispute Resolution is having a better advantage that it reduces the hospitality of the parties, gain, and acceptance of the outcome and resolves the Dispute in a very peaceful manner which achieves a greater sense of justice for each individual’s case.

• One of the main and strong advantages of Alternate Dispute Resolution mechanism is that the dispute remains under the control of the parties themselves and any settlement in which they have agreed do not represent any dictate from any outsider.

• In this mechanism the parties are directly involved in the process of dispute resolution, therefore they can easily and more effectively reach to any settlement of any dispute arisen.

These were some of the advantages of the mechanism of Alternate Dispute Resolution. Therefore we can say that the need of Alternative Dispute Resolution is not a mandatory mechanism but after seeing the delays and the pendency of the cases in the courts which have put a burden on them, so for that we need the mechanism or system that is Alternate Dispute Resolution. On the other hand every mechanism or any new law, act or system is enacted or comes into force they have both good and bad side. Above we have seen some of the advantages of this mechanism, now we will see some of the disadvantages of this mechanism.

DISADVANTAGES

• Not every act is perfect, it’s a mixture of both, therefore one of the biggest disadvantage of Alternate Dispute Mechanism is that the parties cannot be compelled to go for this mechanism unless they have signed mutual agreement or both the parties have agreed to go for the settlement of the dispute by Alternate Dispute Resolution.

• Just after the enactment of the Arbitration and Conciliation Act 1996, there were some of the rumours that the act has lost its identity and its basic structure and it is no longer an act for which it was enacted.

• The success of Alternate Dispute Resolution is based upon the good faith of the parties and their attorneys, therefore the parties who are unrepresented or uninformed are at a disadvantage of succeeding in Alternate Dispute Resolution.

• If we see any proceedings of Alternative Dispute Resolution or any Judgement we will see that precedents are not given such importance. So the outcome of any dispute is dependent upon the arbitrator or mediator or on any other factors.

• If the mediators and arbitrators are not so qualified or are not having such good knowledge about the mechanism then this can lead to unsuccessful resolution, and on the other hand it can defeat the purpose of this mechanism.

These were some of the disadvantages of this mechanism. But if we do a comparative study of advantages and disadvantages of this system then we will get to know that the balance lies in the favour of advantages.

VARIOUS FORMS OF ALTERNATE DISPUTE RESOLUTION

There are various forms of Alternate Dispute Resolution system in India for resolving disputes outside the courts. It only depends on the nature of the dispute of the parties which decides the choice of Alternate Dispute Resolution method that
are arbitration, conciliation, mediation and Lok Adalat. These methods we will be discussing one by one in brief –

- **ARBITRATION** - This is the process used by the agreement of the parties for resolving the disputes. In arbitration the disputes are resolved with binding effects of the parties by the persons acting in judicial manner in private and not acting by a national court of law. To start the process of Arbitration there should be a legal and valid Arbitration Agreement between the parties before the emergence of the dispute. Under Section 7 of The Arbitration and Conciliation Act 1996, it is clearly mentioned that the agreement must be in written form and not in oral form. The main object of Arbitration is to settle the dispute in a convenient way and in inexpensive and in private manner so that the parties may not become the subject of future litigation.

- **CONCILIATION** - The Conciliation has been given a statutory recognition under The Arbitration and Conciliation Act 1996. In conciliation the parties do not need to prepare any sought of agreement as prepared in Arbitration. On the other hand Conciliation can be held even after parties have resorted to litigation and the case is even pending before the court. We can say that conciliation is a less formal form of Arbitration. Conciliation is an Alternate Dispute Resolution mechanism with the help of a conciliator. Conciliator helps to find a mutual solution for both the parties which is acceptable by lowering tensions and improving communications between them. Under Sections 61 - 81 of part III of The Arbitration and Conciliation 1996, conciliation has been given statutory recognition.

- **MEDIATION** - It is a private, informal dispute resolution process. In this a neutral third person known as mediator helps the parties in solving disputes and to reach into an agreement. Outside India in United States of America mediation is the most followed process and most popular form of Alternate Dispute Resolution. This process is mostly focused on effective communication and negotiation skills. In this process mediator acts like a facilitator for the parties in communicating and negotiating more effectively for reaching into a settlement. In Mediation one or more third parties intervene into a dispute with the consent of the participants and assists them in negotiating in an informed agreement. Mediator brings the people together who have a dispute and makes them to talk to each other. On the other hand mediator does not make any binding decisions on the parties. The role of Mediator is only to communicate with the parties in the hope that they can find their own ways to settle the dispute.

- **LOK ADALAT** - It is constituted under National Legal Services Authority Act, 1987 and it is pursuant to the constitutional mandate under Article 39-A of The Constitution of India, which already contains various provisions for settling the disputes between the parties. This concept is not new. It’s a very old concept which has been given a statutory basis now. The main unique feature of Lok Adalat is that the settlement of the disputes are done without going through the complexities of the courts. Under National Legal Services Authority Act 1987, Lok Adalat has been given a statutory status under Chapter VI of the said Act. The chapter contains provisions for organizing the Lok Adalats,
the powers and functions and effect of the award made by Lok Adalat. Under Section 19 of National Legal Services Authority Act 1987, it is clearly mentioned that anybody can get its dispute referred to Lok Adalat for its settlement through mediation or conciliation. When any dispute is settled before Lok Adalat the award given is in the form of decree of a civil court, it binds both the parties with its decree. National Legal Services Authority Act, does not allow the parties for filing an appeal to any court on such award given except if there is no fraud. In Lok Adalats the Justice done is very fast and is free of cost. If we see, maximum of the Indian Population does not approach courts for Justice as they take a lot of time, much money is invested and Justice done is late due to other pending cases. Therefore Lok Adalats can be another form of mechanism for the Judicial Institution, as it can help in reducing backlog of the cases, which keeps on increasing day by day and time to time. On the other hand Lok Adalats can settle both the civil cases and Criminal cases.

JUDICIAL APPROACH TOWARDS ADR IN INDIA

If we talk about the role of judiciary regarding Alternate Dispute Resolution in India we can see that judiciary in its nature is very protective about its supervisory role in the Alternate Dispute Resolution System. The higher courts and higher judiciary in India has always looked upon the arbitral tribunal as subordinate court have treated them as such. In F.C.I. v. JOGINDERPAL MOHINDERPAL, case the judiciary believed that the judicial power of the state is exclusively vested with judiciary, therefore it is necessary for them to exercise its supervision over the functioning of the arbitral tribunal. In UNION OF INDIA v. G.S. ATWAL & CO., in this it was held that judiciary on some occasions has been extremely over protective about the freedom of the arbitral tribunal, but on the other hand a subordinate court is having and is empowered to decide on its jurisdiction. But this decision was changed after the commencement of The Arbitration and Conciliation Act 1996. SECTION 16 of The Arbitration and Conciliation Act 1996, talks about the “competence of arbitral tribunal to rule on its jurisdiction” which clearly mentions that it empowers the arbitral tribunal to decide on its Jurisdiction. But on the other hand judiciary is also happy to see and let the arbitrators to decide the matters at the first glance or instance, but it would not allow the arbitrators to go beyond the supervision of the courts.

Therefore while seeing the Judicial Approach towards Alternate Dispute Resolution in India we can say that Courts want this mechanism but they won’t allow to go beyond their supervision but on the other hand they are also happy to see and they are letting the arbitrators decide the matters on the first instance. Now it is to be seen if the new legislation which limits the scope of Judicial Review changes the position or not.

ARBITRATION AND CONCILIATION ACT 1996

As we have discussed earlier also that this act was enacted on 4th December 1996 under the chairmanship of late Prime Minister P.V. Narasimha Rao and was presided over by the Chief Justice of India.

1473 COMMERCIAL’S THE LEGAL SERVICES AUTHORITIES ACT 1987 BARE ACT (PAGE NO.12)
1474 (1989) 2 SCC 347
1475 (1996) 3 SCC 568
1476 THE ARBITRATION AND CONCILIATION 1996 BARE ACT - LAW LITERATURE PUBLICATION 2020 (PAGE NO. 12)
The main aim for enacting this act was to lessen the burden on the courts and for speedy trial. This act is an attempt by the Parliament to take a good and better approach to alternative dispute resolution in India. If we check the history we can see that domestic and international arbitration were dealt separately under different legislations. The domestic arbitration were dealt by the Arbitration Act 1940 and on the other hand foreign arbitral awards were classified on the basis of New York and Geneva Conventions and these were governed by the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act 1937. This act was cast in terms of the UNCITRAL Model Law on International Commercial Arbitration and it seeks to break form the regulated and supervised forms of Alternate Dispute Resolution as it has been in existence in India. Through this Act the need to provide flexibility to the parties in legal relationships to decide themselves the mode for the settlement of the disputes was finally recognized. On the other hand there has been many major changes in arbitration, therefore conciliation has received more recognition then arbitration. There are several other provisions which clearly states or seek to settle certain issues that have been of great contention in front of the Supreme Court of India.

All the Acts have their own features which make them different from each other. Here are some of the salient features of The Arbitration and Conciliation Act 1996 –

- **SECTION 5** of this Act clearly mentions and states that - no judicial authority shall intervene except where so provided in this part, so it means that there is only limited judicial intervention.
- **SECTION 8** of this Act clearly mentions and states that - it is the duty of the court that where the suit is filled upon any application on this behalf, it should refer the parties to arbitration with accordance with the arbitration agreement between the parties.
- **SECTION 17** of this act clearly mentions and states that - the courts should empower the arbitrators to give interim order measures for the protection of the subject matter to ensure that the award given is satisfactory.
- **SECTION 16** of the act clearly mentions and states that - the courts should empower the arbitrators to decide on their jurisdiction.
- **SECTION 36** of the act clearly mentions and states that - the courts should make equivalent the arbitral award as the decree of the court.

---

1477 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1966
1478 THE ARBITRATION AND CONCILIATION ACT 1996 - LAW LITERATURE PUBLICATION BARE ACT 2020 (PAGE NO. 7)
1479 THE ARBITRATION AND CONCILIATION ACT 1996 - LAW LITERATURE PUBLICATION BARE ACT 2020 (PAGE NO. 8)
1480 THE ARBITRATION AND CONCILIATION ACT 1996 - LAW LITERATURE PUBLICATION BARE ACT 2020 (PAGE NO. 12)
1481 THE ARBITRATION AND CONCILIATION ACT 1996 - LAW LITERATURE PUBLICATION BARE ACT 2020 (PAGE NO. 12)
1482 THE ARBITRATION AND CONCILIATION ACT 1996 - LAW LITERATURE PUBLICATION BARE ACT 2020 (PAGE NO. 21)

www.supremoamicus.org
**SECTION 37(3)** of the act clearly mentions and states that - court should limit the number of statutory appeals from the award given to one\(^{1484}\).

Although the basic premise of the court is to strike down certain actions of the arbitrators because they were not empowered to act in a certain manner to decide on certain matter. On the other hand the act clearly specifies that the arbitrators should be empowered in these areas. Although by granting more powers to the arbitrators, the act also imposes some of the duties upon them to give reasons for their awards, unless the parties specifically agrees that no reason should be given. This is clearly mentioned under section 31(3) of the act\(^{1485}\). On the other hand this will make the arbitrators open to criticism from the courts who have till now not refused to interfere in most of the cases.

**CONCILIATION**

The Arbitration and Conciliation Act 1996 provides for recognition of conciliation in commercial disputes. If we see Part III of the Act, it provides for conciliation of disputes which arise out of legal relationships\(^{1486}\), and if we see Section 61 of the Act it is clearly mentioned it doesn’t matter that it is contractual or not but to all the proceedings\(^{1487}\). This Act clearly applies on commercial arbitrations and conciliations. From the understanding of Section 61 the parties and individuals need to understand that if only legal obligations may be the subject of the conciliation, then can the differences of the opinions that may have an impact on the relationship between the parties can be the subject matter of the conciliation?. Therefore if the subject matter of the dispute is the legal obligation of the parties so the choice of the Alternate Dispute Resolution mechanism is clearly available, therefore the parties can choose either Arbitration or Conciliation it completely depends on them. On the other hand there is no doubt that conciliation can be used in the place of arbitration therefore the parties can be happy with the settlement in place of an award. We should see that conciliation has one of the special characteristic that is it can completely go into the root of the difference, that means Conciliation can solve the major problems faced by the parties which have made them to disagree with each other.

Conciliation is a less formal form of Arbitration. Under conciliation it doesn’t matter to have an agreement for getting justice. Like in Arbitration we have seen that parties should sign a mutual agreement before commencing with the proceedings. In conciliation any of the party can request the other party for appointment of any conciliator. In conciliation parties must submit statements to the conciliator for the description of the general nature of the dispute and the points at issue. Both the parties send a copy of statement to the other. The conciliator can or may request for the further details or can ask to meet the parties, or he can directly communicate with the parties orally or in writing. On the
other hand parties can even submit any suggestions for the settlement of the dispute to the conciliator.

If conciliator thinks that even one element of settlement is present in the dispute then he may draw up the terms of settlement and will send it to the parties for the settlement or for their acceptance. And if both the parties sign the settlement document, then it shall be final and will be binding on both.

In **TARAPORE & CO. V. COCHIN SHIPYARD**¹⁴⁸⁸, in this case The Supreme Court of India held that under Section 61 of The Arbitration and Conciliation Act 1996 a phrase “arising out of” is widely used under this section and should not be read in restrictive nature. In **RENUSAGAR POWER CO. LTD. v. GENERAL ELECTRIC COMPANY**¹⁴⁸⁹, in this case the decision given by the court was same as given in the above case. In **STATE OF ORISSA v. DAMODAR DAS**¹⁴⁹⁰, in this case court interpreted the word “dispute” and said that any dispute or differences arisen between the parties on unequivocal denial of claim as the result of which the claimant acquires the right to refer the dispute to arbitration.

Therefore after seeing both arbitration and conciliation we have got to know that for many instances conciliation is best suited for disputes more than Arbitration. So now we will be seeing the comparison between Conciliation and Arbitration.

We have seen that Conciliation is different from Arbitration and therefore it is better suited under some situations those are:

1. The decisions of the parties which are non-legal relationship or obligation, these types of situations cannot be arbitrated.

2. Some of the decisions are somehow based upon the unrestricted rights of the parties which affect the relationship between them.

3. In some disputes there are operational issues which cannot be solved by arbitration and it affect the relationship between the parties.

4. In the end, result of conciliation, the settlement is done and it is not imposed in the form of order or decree.

5. Due to conciliation the possibility of better compliance increases in a better manner.

6. As we have seen in arbitration or in litigation the outcomes of disputes are not certain and due to that more unwarranted expenses are increased. But in conciliation the outcomes are easily accepted by the parties.

7. If there is no result of the dispute in conciliation it does not closes the doors for arbitration and litigation until the settlement is signed by the parties.

These were some of the situations where we can say that conciliation is very much better then arbitration.

**CONCLUSION**

After seeing both Arbitration and Conciliation I have reached to the point that Conciliation has been more successful in India by a system which we call it as “Lok Adalat”. Although the mechanism brought by our Parliament is of very much use and we can say that yes it is achieving its main goal which is to lessen the burden on the courts. On the other hand Alternate Dispute Resolution is both good and bad but it is based on the citizens how to treat it because every law has its advantages and disadvantages, no law or act has escaped from it. But the need is as the country and the society is changing so amendments should be made on time so that there should...

---

be no difficulty in providing Justice to the citizens.

In the end I will only say that by seeing above some of the advantages and disadvantages of Alternate Dispute Resolution and by comparing Arbitration with Conciliation, I will say that yes conciliation is more effective in providing timely Justice and is a better process then Arbitration.

*****
ETHICS IN TECHNOLOGY:
INTERNET ACCESS AS A HUMAN RIGHT IN THE AGE OF INFORMATION

By Milind Malhar Sharma
From Jindal Global Law School, O.P. Jindal Global University

ABSTRACT
The internet has become an omnipotent entity in the present day and age. More companies, start-ups and businesses are relying on the services of the internet than ever before. As is evident, the lion’s share of most economies is not occupied by the primary or the secondary sector but is instead claimed by the tertiary or services sector. The internet has played a huge role in this as sophisticated use of data has enabled tech giants like google and Facebook to transform our material and digital lives. In such a landscape, a question is increasingly being posed which concerns law and ethics- given the role it plays in our lives, should access to internet become a human right?

This paper aims to analyse the idea of internet access as a human right and argues that while the ethical concerns in themselves are not settled, the existence of technocrats and internet monopolies pose huge impediments in attaining this goal. This is not only because of issues related to privacy and surveillance but potential undermining of individual decision making as a result of ‘behavioural modification’, which can potentially become a human right violation. Moreover, internet and technology have their own limits in terms of the way they deal with societal problems and aim to solve them. This is another impediment in the fight for internet access as a human right. The arguments made in this paper lead to the conclusion that there are possible solutions and that by adopting an ‘ethics’ based approach to the internet, a better world is possible where everyone has a right to access the internet without having to sacrifice individual freedom or autonomy.

Key Words – internet freedom, human rights, privacy, internet centrism, behavioural modification

INTRODUCTION
So much of what takes place in the modern world depends on transactions taking place online. Data has become more valuable than oil, and companies like Google, Amazon and Facebook rely heavily on data, its extraction and processing to deliver services to their users. Even without them, there are plenty of other services like education, connecting with people, transmission of news and communication - different necessities which are rendered obsolete without some reliance on the internet. But then, it also raises certain questions- given its importance in our lives, can access to internet be necessarily considered as a basic right which should be available to everyone?

There are several arguments to be considered on both sides of the issue. One of the major arguments put forward is that the internet cannot be considered as a human right because it is a means to an end and not an end in itself. Moreover the internet does not exist in itself, it was

created as a result of human endeavour and is essentially a technological advancement. Such an entity does not meet the requisite high standard of being deemed as a human right as it is a mere enabler of rights and not a right itself. 1492

The last line is crucial. The fact that internet is a product of technology and that it facilitates enabling of other human rights (like freedom of expression) is well founded and to an extent justified. But what if access to internet could be seen to be not as a human right but as a right which is a subset of other human rights as an inextricable part? A plain reading of article 27 of the Universal Declaration of Human Rights makes this clear. Article 27 states that—

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Part (1) says that there is a right to freely participate in cultural life and enjoy benefits of scientific advancement. In today’s world where governments and private enterprises are heavily dependent on the internet, as well as consumers who go about their daily lives, the argument for access to internet as a human right becomes increasingly strong. Some argue that technological progress will always change how people enjoy their fundamental rights, and require governments and people to reaffirm the inseparability rights, and the methods of enjoyment of those rights. 1493

Thus, it becomes imperative that governments enact laws which enable citizens to enjoy these rights and that laws should be in tune with what is produced in the form of technological advancement.

Moreover, the internet has also proved to be an important means for human rights activists themselves to further the rights of the marginalized and oppressed. Jamie Metzl writes that information technology systems can allow for information to be both collected and disseminated faster and more cheaply than before, can foster links between local human rights groups or between local and international groups and can allow local groups to be less dependent on international NGOs for accessing information relevant to their work. 1494 Metzl has also emphasized upon the important role that can be played by individual actors—

Electronic communication has allowed concerned observers to bypass traditional filters of the news media or international NGOs and receive daily reports of developments surrounding an issue of concern rather than wait for sporadic coverage by popular media. 1495 This again highlights the key reasons as to why human rights activists, legal scholars and even some governments are increasingly coming on board with the idea of internet access as a human right. But the question one is more concerned with is whether such an access would impinge upon existing rights? Maria Lourdes P. A. Sereno writes that as the internet and other communication technologies permeate more aspects of our lives, the internet access and usage will be a frequent arena of future legal battles for

1492 ibid.
1495 ibid 713.
human rights advocates, regulators and legislators.\textsuperscript{1496} He elucidates that the codes and data which allow for the connections to take place are not representative of mere electrical signals but are representative of something greater- “these numbers and codes are representations of our choices, feelings, opinions, and the knowledge we generate and are the products of our creative minds.”\textsuperscript{1497} And Lourdes is right in saying that. This also means that when our choices become simplified into pinpoints and collectable data, they become prone to exploitation, and this exploitation can take place in several ways. Technology, while being useful, is increasingly showing a dark side, and big internet companies like Facebook, Google and Microsoft are creating power structures that are changing the very frontiers on which the struggle for human rights is taking place. This shall be elaborated upon in the succeeding sections.

**THE CHALLENGES TO INTERNET FREEDOM: SOME RECENT EVENTS**

Privacy is one of the biggest emerging concerns among consumers across the world. This has been highlighted in several key events which occurred throughout different countries and this section will discuss some of the key events which are important for the debates around freedom, technology, data and the internet.

In an article appearing in the Guardian in 2015, Harry Davies reported that in the run-up to the 2016 American presidential election, the presidential candidate Ted Cruz had been employing the services of a company called Cambridge Analytica for boosting his chances against Donald Trump and other Republican candidates.\textsuperscript{1498} The company, while being funded by one of Cruz’s leading donors Robert Mercer, made use of so called “psychographic profiles”- using psychological data based on research spanning tens of millions of Facebook users, harvested largely without their permission to analyse and understand his voter base and induce and influence them to vote in a particular way in a bid to make his campaign successful.\textsuperscript{1499} What started as a minor news leak raising concerns about user data privacy became a full blown scandal in March 2018 as a result of the work of other leading journalists on the case, most notably Carole Cadwalladr, who published articles with the help of an ex-employee in Cambridge Analytica, Christopher Wylie.\textsuperscript{1500} Data had been harvested on an unprecedented scale from Facebook users- personal information included and not just preferences and choices. The scandal ended up causing a huge outcry in the public and revealed interference in the Brexit campaign as well as elections in several countries. Mark Zuckerberg, the CEO of Facebook eventually agreed to testify in front of the U.S. Congress as a result of the scandal. But this is just one of the many events which have taken place in the past few years which

\textsuperscript{1496} Maria Lourdes P A Sereno, 'Internet and Human Rights: Issues and Challenges' (2013) 2013 Asian J Legal Stud 93, 101
\textsuperscript{1497} ibid.
\textsuperscript{1499} ibid.
raised concerns among the public about data privacy and the trust they hold in internet companies.

The emergence of information-based technology companies and the unprecedented use of data in modern economies have led some to conclude as data having become more valuable than ‘oil’ in the modern day and age.1501 But collection of data in data bases raises quite a few eyebrows. Such was also the case with Aadhaar. Initially introduced as a service which was not mandatory, the government of India started introducing several campaigns encouraging Aadhaar card holders to link their unique identification numbers with essential services like bank accounts, mobile sim cards, Rural employment guarantee scheme, and Public Distribution System. This prompted several petitions in the Supreme court of India regarding the nature of the service and the court ruled that the Aadhaar system was of a voluntary nature and can’t be made mandatory.1502 Nevertheless, the importance of Aadhaar grew. In June 2017, in a landmark judgement, the supreme court upheld right to privacy as a fundamental right guaranteed under articles 14, 19 and 21 of the constitution.1503 Following this, new questions started arising regarding the validity, usefulness and potentially data breaches regarding Aadhaar. In a later judgement, filed by petitioners challenging the validity of the Aadhaar act, the supreme court upheld the validity of the Aadhaar system by a 4:1 majority, while striking down several sections and instructing the government to come up with a robust system to deal with data protection.1504 Many have pointed out the judgement as a ‘disappointment’, pointing towards the fact that it “divides the people of this country into those receiving state assistance and others” with some getting socio-economic rights if they do as they are asked to do.1505 Attention has also been drawn to the fact that the personal data of people who enrol themselves is not safe along with the failure rate of biometrics in various states.1506 What is also noteworthy is the lone dissent given by Justice DY Chandrachud which became the minority judgement. He wrote - “The entire Aadhaar programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act does not save the project. The Aadhaar Act, the Rules and Regulations framed under it, and the framework prior to the enactment of the Act are unconstitutional.”1507 This clearly shows that while the majority may be okay with it, there is scope for raising more questions regarding the validity.

---

1501 The Economist, ‘The world’s most valuable resource is no longer oil, but data’(May 6 2017)<https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 30 December 2019
1502 Justice K.S. Pattaswamy (Retd.) v. Union of India, 2018 SCC Online SC 1624
1503 Justice K.S. Pattaswamy (Retd.) and Anr. v. Union of India, (2017) 10 SCC 1
1506 ibid.
1507 Justice K.S. Pattaswamy (Retd.) v. Union of India, 2018 SCC OnLine SC 1624
Aadhaar is also one of the examples about data privacy. But that is not the only rights which are important when we are talking about big data, information and the internet. The right to freedom of expression is also an important right. But loads of information can lead to an outbreak of misinformation and data manipulation is sometimes detrimental to public morality and interest. This has become apparent in the use of data and social media in elections and political campaigning in India. We shall now take a brief look at the way the Bhartiya Janata Party has utilised the internet and social media to fundamentally change how election campaigning takes place and elections are won. The BJP is in majority in the Lok Sabha and is the ruling party. The kind of success they have enjoyed in state elections as well as the 2014 and 2019 general elections and the role of social media is unprecedented in the history of elections in this country.

In a piece published in 2014, Arvind Gupta, the technology head of BJP, revealed the role data analytics played in the campaign which allowed Narendra Modi and his government to come to power. "We had data on each of the 543 constituencies. We knew how many mobile and Internet users were present in each constituency. The same holds true for social media users. Alongside, we used analytics to understand which polling booths had voted for the BJP in the previous elections," said Gupta. Gupta further elaborated that for each polling booth data analytics was used to segregate voters into blocks to determine who were pro, undecided or against the BJP. “Deep analytics was employed to understand group communication behaviour and then used appropriate technology to communicate with them,” he said.

The results speak for themselves- In 2014, the BJP won 242 seats. In 2019, they won 303. Their wins in state elections show similar electoral domination barring a few states. The words used by Gupta may sound like the words of a pragmatic strategist looking out for the best interests of his party but seem to have a manipulative tone to them. The fact that technology can be harnessed in ways which can allow political parties to “influence” voters shows how destructive and dangerous the use of technology has become in conducting free and fair elections as voters can no longer be said to be free, as people who make an informed choice today may not be completely well versed with all the facts which are considered pre-requisites in order to make such choices. We have witnessed in the last few years a surge in the spread of misinformation on the internet in the form of fake news. Earlier this year, the messaging service company WhatsApp spent over Rs. 120 crores on an ad campaign which aimed to spread awareness about fake-news as a result of the rising cases of lynching, something which the company had done for the first time in any country.

The nature of the incidents describes a brutal reality about the internet and the


\[1509\] ibid.

\[1510\] ibid.

future it promises. Perhaps the most persisting question is this – Is internet freedom real? or a myth? The next section will try to find answers for the same.

THE INDIAN SUPREME COURT ON ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

Attention deserves to be diverted towards Indian courts and how they have discussed the concept of internet access as a fundamental right. In Faheema Shirin R.K. v. State of Kerala, the Kerala High court held access to internet to be an inextricable part of the fundamental right to education as well as the right to privacy. The court further stated that - “When the Human Rights council of the United Nations have found that right to access to internet is a fundamental freedom and a tool to ensure right to education, a rule or instruction which impairs the said right of the students cannot be permitted to stand in the eye of the law.”

The Kerala HC gave the judgement keeping in mind international conventions and resolutions. However, in another judgement of the Supreme Court, Anuradha Bhasin v. Union of India, the court recognized that the right to freedom of speech freedom to conduct trade and commerce through the internet was constitutionally protected. The Supreme Court of India passed an order asking the centre to review all orders regarding curbs in Jammu and Kashmir, which had been experiencing an ongoing internet shutdown. While the court did opine that the freedoms of speech, expression and conducting business on the Internet are fundamental rights integral to Article 19 of the constitution and subject to reasonable restrictions, it did not give any opinion as to whether access to internet was a fundamental right of itself. “None of the counsels have argued for declaring the right to access the Internet as a fundamental right and therefore we are not expressing any view on the same,”

THE MYTH OF INTERNET FREEDOM

The debates about internet access and human rights are inseparable from the larger one surrounding internet freedom.

Access to the internet in a free and equitable manner is essential cornerstone of any functioning modern-day democracy and the human right freedom of expression. This could be alluded to the idea of right to information, a right which emerged under the Indian constitution as a result of the influential movement carried out by Aruna Roy and the Mazdoor Kisaan Shakti Sangathan (MKSS). The act is meant to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto. Thus we see that the right to information is not necessarily a right in itself but is implicit in the right to freedom of expression. Same goes for the internet.

1513 ibid.
1514 ibid.
1515 ibid.
1516 ibid.
1517 The Right to Information Act, No. 22 of 2005
But there are limits to how the internet works and how it can be used for the good. One of the many ways in which the internet has been hailed as revolutionary is by its power to democratize. There are many who believe that authoritarian regimes could be easily toppled if people are empowered by access to internet technology and social media websites like twitter or Facebook. This idea is part of a larger ideology of ‘internet centrism’ which Evgeny Morazov calls ‘cyber utopianism’. Morazov argues that governments and their faith in the magic of internet i.e. cyber utopianism is dangerous because it is expensive to maintain, forgoes asking important questions about the ethics of internet and may not work in fighting authoritarianism. There is also no guarantee about its misuse as authoritarian regimes could very well use the internet as a tool to oppress people.

Free flow of too much information also creates problems and this is also prevalent in human rights reporting. Human rights NGOs are under enormous pressure when collecting data to aim for 100% accuracy and are particularly vulnerable in authoritarian regimes. Morazov argues that certain information regarding human rights abuses should not be made accessible on the internet. For instance, if information is revealed about rape victims (say geographic location), it can make lives worse and unbearable for them. Thus, the data protection mechanisms built into human rights reporting need to be protected regardless of the impetus to promote internet freedom.

SOLUTIONISM AND THE ILLUSION OF TECHNO-UTOPIAS

The hurdles in the democratization of internet and human rights are also created by an over reliance on the internet technology in terms of offering solutions to problems being faced by modern society. The government of India has launched a programme known as ‘Digital India’ which aims at “transforming India into a digitally empowered society and knowledge economy.” The programme is supposedly meant to strengthen electronic manufacturing in the country. According to the government sources, “e-governance” in this country needs a thrust in order to promote inclusive growth that covers electronic services, products, devices and job opportunities. The intent of the government seems to be well founded. Afterall, who does not want growth and job opportunities? But does this mean that there should be an over reliance on technology for providing us solutions for our foremost problems?

Evgeny Morazov thinks it does not and he provides an interesting critique about the problems of a mindset and belief called solutionism. Morazov refers to solutionism

---

1519 ibid 27.
1520 ibid 271.
1521 ibid 271.
1522 ibid 272.
1523 ibid 248.
1525 ibid.
as an ideology which sanctions a belief system based on technology that seeks to find simplistic computable, well-defined solutions to complex problems. When combined with technology, these can become potentially dangerous. “Recasting all complex social situations either as neatly defined problems, with definite, computable solutions or as transparent and self-evident processes that can be easily optimized- if only the right algorithms are in place!- this quest is likely to have unexpected consequences that could eventually cause more damage than the problems they seek to address” says Morazov.1526

Does that mean that we completely shun technology? Doing so would be harmful. And Morazov recognises this. What is argued here is that there needs to be a better approach in terms how one deals with technology and implicitly recognising that technology is not going to be an answer to all our problems. According to Morazov, the very idea of internet has become an obstacle to having a more informed and thorough debate about digital technologies.1527 He thus points out very succinctly that the problem can only be solved if we let go of our pre-conceived notions of the internet and come up with solutions which can allow technology to enable human flourishing.1528

What is the importance of solutionism and how is it particularly relevant to human rights and the ongoing discussion about access to internet? Well the fact that technoutopianism is a threat to the development of effective and ethical technologies are a cause of great worry. This is prevalent in modern society in many facets. To cite just one example, let us come back to the example of digital India mentioned above. In its bid to improve e-governance, if the government relentlessly pushes for technology-based solutions, they can run into potential problems. This is present in the ongoing debate and criticism about policies like the Aadhaar system and the Personal data protection bill. There was also a controversy with regards to Unified Payment Interface (UPI). Truecaller, a phone app service which aims at identifying unknown callers on mobile phones came under flack when some customers started receiving messages about UPI IDs being created and shared with ICICI bank. According to sources, Information regarding their existing bank accounts was revealed in the process, and their phone numbers and other information may have been shared with ICICI Bank.1529 What is clear is that information was shared but to what extent, it could not be said clearly. This being done without the consent of users is a violation of their right to privacy. Incidents like these along with the right to privacy judgement have led people to argue for a robust data protection law. While that is still being tabled by the parliament, one thing is clear from this discussion- pushing endlessly for a techno-centric world driven by a sense of ‘solutionism’, internet-centrism and cyber utopianism is problematic.

The international human rights regime is finding a tricky place in the cyber world.

---

1526 Evgeny Morazov. To Save Everything Click Here: Technology, Solutionism And The Urge To Fix Problems That Don’t Exist (Allen Lane 2013), 5.
1527 ibid 61.
1528 ibid 62.
Cees J. Hamelink has discussed in detail the application of the international human rights regime in cyberspace. Cyberspace, according to Hamelink, involves the operation of computer networks and encompasses all social activities in which digital information and communication technologies (ICT) are deployed.\textsuperscript{1530} One of the major arguments made by him is that human rights in cyberspace should not only be articulated as individual rights, but should be recognized both as individual and as collective rights.\textsuperscript{1531} This is because placing rights in either category undermines the rights of the individual as a part of the community as well as the community as a whole. In Hamelink’s own words – “Knowledge as common heritage should be protected against its private appropriation by knowledge industries.”\textsuperscript{1532} The growing economic disparities and concentration of wealth in the hands of a selected few is a reality which is well known in today’s times. With an emphasis on solutionism, governments and private companies play a greater and greater role in our lives. Hamelink argues that information rights should be free from public as well as private parties.\textsuperscript{1533} That is, freedom of expression and access to the internet should be done in a way which maximizes individual freedom of expression. However, this can only be done once the notion of freedom changes. This can happen with the promotion of the so called ‘positive’ notion of freedom. This involves, in Hamelink’s opinion, focusing upon the provision of access to the public expression of opinions rather than on restrictions to freedom of expression.\textsuperscript{1534} Construing freedom in this sense in important because in a highly unequal society, freedom does not exist for everyone.\textsuperscript{1535} Thus, in order to expand the scope of human rights, including improving access to internet and construing that as an innate part of pre-existing inalienable rights would require moving away from ‘solutionism’ and internet-centrism.

UNDERSTANDING BEHAVIORAL MODIFICATION AND THE CHALLENGES IT POSES

Manipulation and behavioural modification sound like heavy words coming from a science fiction dystopian novel. It can also be associated with magicians and performers who aim to hypnotize and control their subjects but not necessarily the heads of technology giants. But reality is often more disturbing than fiction. And when it comes to modern information society and neo-liberal economics, the tech companies are no exception.

The parallel discussed above need not be taken literally. But there is a disturbing problem which exists in our society which many had been observing but were unable to articulate. However, new beginnings have been made by some scholars in identifying this new phenomenon which has been termed as surveillance capitalism by the scholar Shoshana Zuboff, Surveillance Capitalism is a new phenomenon, argues Zuboff that is unprecedented in history, brought about in the 21st century as by the advent of information technology and technology giants like Facebook, Google, Microsoft

\textsuperscript{1530} Cees J Hamelink, ‘Human Rights in Cyberspace’ in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 31
\textsuperscript{1531} ibid 37
\textsuperscript{1532} ibid
\textsuperscript{1533} ibid 41
\textsuperscript{1534} ibid 35
\textsuperscript{1535} ibid

www.supremoamicus.org

558
and increasingly, Amazon.\textsuperscript{1536} It is a new form of capitalism which, in Zuboff’s understanding, claims human experience as raw materials for creating behavioural predictions in terms of ‘prediction products’, which are then traded in a new market called \textit{behavioural futures market}. By virtue of such measures, Surveillance capitalists render individual choice redundant by essentially creating tweaks in our behaviour which then results in behavioural modification.\textsuperscript{1537} The phenomenon is deeply worrisome and poses the latest threat to human rights in its long-drawn history in this author’s opinion. As Zuboff elucidates succinctly – “the struggle for power and control in society is no longer associated with the hidden facts of class and its relationship to production but rather by the hidden facts of automated, engineered behaviour modification.”\textsuperscript{1538}

She has relied on interviews, calls, patents, company programmes and policies of executives from companies like Facebook, Google and Microsoft in order to understand Surveillance capitalism.\textsuperscript{1539}

One of the key problems highlighted by Zuboff is Surveillance Capitalism’s relation with decision rights. Decision rights confer the power to choose whether to keep something as secret or share it. Surveillance capitalism lays claims to these rights, by redistributing privacy instead of eroding it.\textsuperscript{1540}

This phenomenon became visible in the public domain after the Cambridge Analytica data scandal. People were specifically targeted during the Brexit campaign by showing them specific content which would eventually result in influencing their behaviour, thus violating principles of free choice. Such an influence, when taken on a large scale, say a general election, could potentially have terrible consequences in terms of undermining human sovereignty. Access to Internet thus becomes a questionable objective considering such widely skewed power dynamics. Yet, it is an important right for which people must argue and fight for.

\textbf{THE SOLUTION: AN ETHICS BASED APPROACH TO TECHNOLOGY}

The debate around human rights and their intimate relationship with modern technology and the internet is becoming complicated with each passing year. Added to that are the grand dynamics of increasing income inequality, fall in standards of living in terms of environmental degradation as well as a spurt in cases of mental health because of social media. And yet, there is still a case for making internet access as a human right for it is becoming essential in the age of information. But as has been highlighted in this paper, there are several impediments in front of it which makes it extremely hard to fight for this cherished ideal in the 21\textsuperscript{st} century. There are several things which can be done in terms of policy making and change of ideas which can lay down the groundwork for paving the way for a better conversation around internet access and how it can be framed as a human right.

It is argued that having a more ethics-based approach to science, technology and its development should be the first step. Several people have worked on this idea in the past. In particular, Karim et al. say that

\textsuperscript{1536} Shoshana Zuboff, \textit{The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontiers Of Power} (Profile books 2019), 12

\textsuperscript{1537} ibid 8

\textsuperscript{1538} ibid 309

\textsuperscript{1539} ibid 24.

\textsuperscript{1540} ibid 90.
a human rights based approach grounded in ethics means “an approach that demands scientists to push their knowledge further in understanding "how their work bridges with human rights and demands" that they endeavour to confirm and secure human rights by the knowledge they generate.”

In their article they have tried to understand the nexus between human rights and science and how they two are co-related in several different aspects.

Among others, the chief problems which seem to have been identified and talked about in this paper are related to the ideology of solutionism, internet-centrism, and the existence of a new system of power articulated as surveillance capitalism. Each of them is as important as the other and are interconnected in intricate ways. A collective battle must be waged in tackling each of them systematically in order to ensure effective implementation of the international human rights regime. Detaching from the idea of solutionism could be one of the first steps, both philosophically and policy wise. Governments and World Organizations need to work together to not only spread information among the masses but need to foster a newer relationship with technology. The fact that ownership of most internet companies as well as related technologies rests with private enterprises is not likely to change soon. Thus, new laws and policies need to be formulated in order to create an effective mechanism for checks and balances.

Karim et al. believe that science and technology are inextricably linked with human rights. Both rely on each other in various capacities to foster a culture of creativity as well as welfare. The question that needs to be answered now is how to expand the scope of scientific development in a way which allows societies to maximize human development. They argue that in terms of law and rights, more emphasis must be put upon the 'right to science’ or ‘right to scientific advancement'. Legal analysis should enlighten these terms to ensure the establishment of core human right instruments. Understanding the relationship of right to development and its relationship with technology development is also important. Hamelink puts it very succinctly when he writes – “UNGA Res. 34/46 of 1979, states that "the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations." As a result, in the discussion on the locus of human rights the individual and the community cannot be separated.” In his understanding, Individuals also play an important role as Human rights cannot be realized without involving citizens in the decision-making processes about the spheres in which freedom and equality are to be achieved. In addition to that, public accountability of private players seems to be a running concern. This is unlikely to change as government’s world over tend to rely more and more on private participation in technology markets, which allows them a virtual free run with extreme concentration of powers. This has resulted in new forms of instrumentarian power, like surveillance capitalism. Thus, in order to keep private

---

1542 ibid
1543 ibid 175
1544 ibid 178
1545 ibid 34
1546 Hamelink (n 35) 37
players in the market in check i.e. to bring their work in greater sync with the existing human rights regime, a massive mobilization and politicization of consumer organizations around the world is required.\textsuperscript{1547}

It would be pertinent to state at this point that the case for a right to internet access as a basic right is one which must be made simultaneously with the other measures stated above. The right must be construed not only in the context of right to privacy but must be structured as being intimately linked with the right to freedom of expression and individual liberty. Such arguments have been made in the past as well, stating that the legal horizon extends beyond the right to privacy to freedom of expression and that technological development means that that our assessment of the same needs to be done using a new lens.\textsuperscript{1548}

**CONCLUSION**

After the verdict in the Anuradha Bhasin judgement, internet access was not restored fully before being allowed in part only at 2G speed. This is a clear violation of the fundamental rights of the people in Jammu and Kashmir, especially students who are unable to access internet at the speed as other students in India, clearly indicating discrimination as well as denial of right to education. In practice, the state has abrogated article 370 of the constitution however the reality is much harsher when it comes to treating the people of Jammu and Kashmir as equal citizens. While the verdict was praised for directing the centre to carry out reviews, it also raises certain questions. There is still a lot of scope for placing the right within the ambit of fundamental rights. While reasonable restrictions are and should be applicable as and when required, Tully writes that even international human rights law itself imposes restrictions on the kinds of information content which can be accessed.\textsuperscript{1549}

But the essential gap in Indian jurisprudence, as pointed out by Kartik Chawla is that internet access as a right as to be discussed in detail in its positive dimension which has so far not been carried out.\textsuperscript{1550} The positive dimension consists of obligating the State to take all measures necessary and practical in order to enable each and every one of its citizens to access the internet, within reasonable bounds.\textsuperscript{1551} Beyond putting private players in check, tackling internet solutionism and surveillance capitalism, the biggest challenge in making internet access a human right is this aspect. This is potentially tricky because the state is also being brought under checks and balances, something which has become imperative and necessary in countries like India, which records some of the highest internet shutdowns in the world. But this paper has tried to argue that our essential fears about giving unfettered internet access and the costs involved need to be handled bravely, looking at the positive dimensions of the right, creating the infrastructure and facilities for individuals so that individual liberty can thrive. And this is happening right now across several countries. The scale needs to broaden and there is a need

\textsuperscript{1547}ibid 43  
\textsuperscript{1548}‘Tommaso Edoardo Frosini, ’Access to Internet as a Fundamental Right’ (2013) 5 Italian J Pub L 226, 228  
\textsuperscript{1549}Stephen Tully, ’A Human Right to Access the Internet - Problems and Prospects’ (2014) 14 Hum Rts L Rev 175, 191  
\textsuperscript{1550}Kartik Chawla, ’Right to Internet Access - A Constitutional Argument’ (2017) 7 Indian J Const L 57, 60  
\textsuperscript{1551}ibid 61.
to expand the ambit of stakeholders so that civil society can play an active role. The world has undergone rapid transformation and thus, our laws and notions of human rights need to change as well. And it is possible because. The reason is best summed up in Frosini’s own words – “In the past, it was the government to control citizens by the control over information; today, it has become harder and harder to control what a citizen reads-sees-hears, seeks-receives-imparts. The technology provides thus to individuals the ability to become a power that is in the condition to control the other powers.”1552

*****

1552 Frosini, (n 58) 234.
DOES ANTI-DEFECTION LAW REQUIRE STRICT IMPLEMENTATION?

By Mohammad Shadab  
From University of Rajasthan

On the need of a new anti-defection law, Atal Bihari Vajpayee once said, “There are facilities available even for a heart transplant but this syndrome of political defection is yet to find remedy.”

After Independence, Democracy was the most beautiful gift given by the framers of the constitution of India to the Indians. They insured that the citizens will elect their representatives with free will and their vote will decide the government. They also chose parliamentary form of government over presidential form of government to make the voice of the common strong and decisive. One more feature added by them in Indian polity was multi-party system with infinite number of political parties. However, it was not described in the Constitution of India. This was done because the social and geographical diversity in such vast country cannot be easily absorbed by two or three parties and also to provide more choices. Gradually, when this multi-party system evolved, there was a raise in defection in political system where a member of one party shifts to another. The problem with the defection was actually break down of public confidence in democracy. In political galleries, it is also termed as ‘Horse- Trading’ , ‘Floor Crossing’ etc. To stop this horrifying process, Anti-Defection Law was introduced in the Constitution of India by 52nd Amendment in 1985. It was the need of the hour as defection was considered as a hidden enemy of democracy.

The strict implementation of the Anti-Defection law was first felt in 1967 by Indian politics. However, also before 1967 there were certain events of defection as:

1. Defection by 52 Congress members in 1948 who joined communist party,

2. 12 members of congress formed a new party ‘Jana Congress’

3. Fall of Sampurnanand Government in Uttar Pradesh.

But the incident of 1967 was considered as watershed movement in India’s democracy as about 142 MPs and 1900 MLAs left their parties and joined another. Due to one such defector ‘Gaya Ram’, all defectors were started to be called as ‘Aaya Ram- Gaya Ram’. After a while in 1985, provisions for disqualification on ground of defection were provided. However, even after such a solid step, defections have become an inseparable part of Indian polity with raise of coalition governments.

In Tenth Schedule of the Constitution of India, several provisions are provided for conditions of disqualification as:

• Voluntarily gives up membership of political party.

• Votes or abstain to vote contrary to direction of political party.

1553 Kashyap Subhash C., Parliamentary Procedure: the law, privileges, practice and precedents, VOL II

www.supremoamicus.org  563
Nominated or Independent members joins political party\(^{1554}\).

These provisions were enough to curb the end of defection but due to tremendous need in coalition government and due to benefit of all political and due to certain loopholes, it was not observed properly.

Now the question is that is it really necessary to strictly implicate the anti-defection law? To understand and answer the question, certain points need to be evaluated and those are:

Firstly, the defection from one party to another is an open form of corruption where members defect for certain greed. The juicy ministries, money, posts and other favours are the basic causes of such defections. In present political scenario, it is not a reason of difference of opinion or unparalleled ideologies but the heavy offers from other side are the reason. However, exceptionally in certain cases, the opinion, ideologies and inferiority feeling inside the party becomes a cause but the truth is these types of cases are exception. It is a form of corruption which is open and legal, and the party with more resources and more donations, is the winner in this corrupt context. The selling of public elected post for own interest in a corruption of high level.

Secondly, the defection is an open threat to democracy. The office which is elected by people due to the ideology, thoughts, party belonging of the person is changing the party on his own is polluting the democracy. In democracy, the government is framed by the people and not by the elected members, they are the mere representatives. It can be evaluated as treason to democracy as by defection, the citizens are left as spectators of foul play with their primary right, where the elected ones are teasing and managing that whomsoever you elect, the government will be of money holder’s. The defection makes a voter disabled after voting because the defection is a decision taken by the elected member alone by leaving no choice for those who elected him. This practice was even condemned by Motilal Nehru before independence because of its severe threat to democracy and socialist approach of Indian political system and need of welfare government.

Thirdly, the defection has given rise to a practice where political parties are more focused on framing government or strengthening government rather than welfare of people. The latest cases of Karnataka and Madhya Pradesh for forming government and of Rajasthan for strengthening the government are the examples where the parties wants to make their government on the cost of public welfare, wastage of time of house or session of house schemes and laws. The main motive of elections or formation of government is the welfare of the nation and after an election it should be assessed and secured by the government and opposition but the focus on how to maintain the power has made the political houses so blind that the definition of democracy is converted into ‘to the power, for the power, by the power’. The primary objective of the government has been lost and every party wants to be in power by ignoring the original needs and by destroying democracy.

Fourthly, the defection is also a reason of instability and insecurity in political

\(^{1554}\) The Constitution (52\(^{\text{nd}}\) Amendment) Act, 1985
system. After Rajiv Gandhi’s government, the political scenario of India was disastrous as there was instability in state as well as central government. Even after insertion of Tenth schedule in the Constitution of Indian and constitutional validation by Supreme Court of India in Kihota Hollohan v. Zachilhu\(^{1555}\) case, the defections were very normal. Also in present condition, the falling of government without completion of tenure within a year or two is visible. This practice makes a just majority government insecure and highly unstable, as it is likely to happen that some delicious offer comes to the member and the majority collapses. It is harmful for working and programming of a government as their policy and bills also comes on brink with the insecurity of majority. The defection is dangerous for political infirmity and functioning of government.

Lastly, the defection process is against political ethics. It creates the differences among the parties beyond ideologies. It violates the ethical competitiveness and companionship in the house. It affects the functioning of house and creates enmity and feeling of revenge in parties respectively. It is also unethical for the members who defected as it defeats the idea of ideology and belongingness of party. It makes that person unauthentic and unreliable for upcoming affairs. This unethical political practice was even not dreamt by our founding fathers so they didn’t insert any provision regarding the defection, in our constitution. Certainly, they wanted a political environment, which is independent, secured and dedicated for the nation and its people. The spread of defection is defeating that thought of our nation’s framers, as this unethical practice is not only affecting the democracy but the entire concept of Indian polity.

Many of eminent politicians has considered it against the freedom of members of the house and once Shashi Tharoor said that ‘Anti-defection law has negative impact on democracy’ but the truth is democracy is in more danger in absence of this law. Such concern of politicians can be cured by amendment in law.

However, With the strict implementation of anti-defection law, it is also necessary that certain reforms should be introduced in anti-defection law. The review of decision-making power of speaker or chairman of house is largely needed to be revised as the credibility and unbiased approach of the office of chairman or speaker is no more visible. Supreme court has, however, pronounced that the decision under anti-defection law is under judicial review\(^{1556}\).

The expression “Voluntarily giving up membership” is confusing and vague, and its proper explanation and interpretation is to be provided. In the cases of Ravi s. Nayak v. Union of India\(^{1557}\), And G. Vishwanathan v. Speaker, Tamil Nadu assembly\(^{1558}\)

The Supreme Court has interpreted the expression according to the situation but now it is necessary that legislature to revise it comprehensively.

\(^{1555}\) AIR 1993 SC 412
\(^{1556}\) Kihota Hollohan v. Zachilhu and others (AIR 1993 SC 412)
\(^{1557}\) AIR 1994 SC 1558
\(^{1558}\) AIR 1996 SCC 353
A guideline structure should also be provided through law for the political parties regarding issuances of whips, binding the members and its authority over the members. The excessive use of whips by political parties is also a threat to freedom of speech and expression. So, a limitation over the whips will make the law more objective and meaningful.

Many of commissions and the committees has provided about utility, significance and needed suggestions for anti-defection law. Law commission, 1999 has given a very important advisory that pre-poll electoral fronts should be treated as political parties under anti-defection law as defection from electoral fronts can also create the similar problems as defection in political parties. The example of pre-poll alliance of JD(U) and RJD in Bihar is suitable here which collapsed later on.

The Election commission and Dinesh Goswami Committee on electoral reforms (1990) had also recommended that issue of disqualification should be decided by President and Governor on the recommendation of Election Commission.

All these commissions and committees were intended to combat the corruption and defection, dangerous to democracy and implementation of a safe, sound and effective anti-defection law.

The fact that the 52nd Amendment Act 1985, got passed because there was a huge majority of Rajiv Gandhi’s government. No political party and their members wanted such law because it was a legislation, which was banning the corruption of legislatures. For its reformation, revision and enforcement, the government and politics of similar enthusiasm and ethics is needed. 91st Amendment Act, 2004 was an example of such courage, which has, strengthens the anti-defection law. This modern tradition of Indian politics, the defection, is actually a curse to a democracy. It was a vision of those who wanted that our polity and our Constitution get forbidden and banished by citizens of India. It is a threat of highest level as it is promoting authoritarian form of government as well as capitalist approach in place of socialism. In modern India, the largest democracy should be a strongest and most alive democracy of the world. It should not be shaken up its products only. The Parliament and State Legislatures are the temples of democracy where the constitution, its principles and welfare approach of state is to be propagated. These are the places where whole nations is dependent and looking for their hopes and needs to get served. The defection is converting the temple into a fighting arena where the different political groups are fighting for power and authority. After the elections, the government should work for public welfare policies and opposition should keep check over it and force the government to deliver productivity to the public. A developing country can afford politically differences and rivalries but it cannot afford the battles of power in regular interval as it hardened the achievement of progress and prosperity. The defection is such a battle of power, which creates chaos in house of legislature as well as in country or state.

Conclusively, the present Anti-Defection Law requires urgent strict implementation to bring down the jeopardy of democracy and violation of Constitution. The Anti-Defection Law is aimed to delete the political defection but due to inability, discourage, dishonesty or corruption; this law remained in textual words only which has yet not been fully enforced or implemented. This law is mere spectator rather than a player against the mockery of
democracy. Due to such conditions and situations, this law has failed to seek the needed attention, thus it has not evolved properly. Now a question has arrived in political mind, in India or elsewhere, that whether the anti-defection law is a reality or myth? It is a high time to answer this question because for a long time, politicians have found loopholes and played with the law but now is the time to protect our constitutional values and revisit the issue of defection strictly to fight the corruption through defection to regenerate the value of democracy. To frame our political system more progressive and productive, such disease in democracy should be treated so that substantial matters are given more importance in our politics. The hunger of power never be satisfied, it can only be treated through strict and logical laws. Defection is a challenge to our modern India and revision of anti-defection laws can deal with such challenge. Strict implementation of Anti-Defection law can save the eroding values of our Constitution and depletion of democracy.

*****
LAY PERCEPTION OF PSYCHOPATHS AND ITS EFFECT ON LEGAL JUDGEMENT

By Moulya Reddy
From ISBR Law College

Abstract

Although prior studies have discussed the lay perceptions of psychopaths on their social life, little is known about its effect on their tendency to commit crime hystERICally which has a negative effect on legal decision making and judgement. The purpose of this study is to assess the lay perceptions of people on psychopaths and determine how this affects the credibility of the sentencing judgement. It is firstly important for the mock jury to identify the underlying mental disorder pertaining to a particular individual who is responsible for committing the horrendous crime. There are different types of mental disorders. However, due to the lack of knowledge in psychology, these individuals are generally categorized under “mental illness”. It is the responsibility of the judges, advocates and police investigators to have the knowledge of different classification of mental disorders along with the legal provisions. Additionally, they must also be aware of the treatments associated with the disorders of those who are guilty of criminal acts. This information is of high importance when it comes to the hearing of the final judgements because not all criminals commit crime under the same circumstances. Many reported crimes are with regard to serial killers, generalised mental illness and other sexual activities. But very few cases have recognised psychopathic conditions in criminals. The United States and the United Kingdom have developed separate statutes for assessing criminals with psychopathy conditions while India is being negligent about these defensive laws towards psychopath criminals.

1. Introduction:

Crime is considered as the most evil deed of the society. Once a person commits crime, society is blinded by the idea of giving gruel punishments to criminals at any cost. Psychopaths are seen as an evil entity but little do they know what drives these psychopaths to commit the crime. Lay perceptions eventually leads to misconceptions on psychopaths as it is an ambiguous term. So, to what extent is it fair to treat a mentally impaired person and a normal person similarly while giving legal judgements. The cause of the crime is more important than the crime itself. While passing a legal judgement, it is crucial to take other disciplines (in this case the psychological condition) into consideration to explain the phenomenon and the circumstances under which the crime was committed. Ignorance of abnormality of a criminal can question the credibility and validity of the decision making system.

Lay perceptions are informal, self explanatory definitions assumed by individuals while referring to a particular social behaviour and is completely different from the clinical definitions. Psychopathic personalities are highly misunderstood. Mayo clinic defines psychopathy as a personality disorder, with no regard to right or wrong.\textsuperscript{1559} Most psychopaths lack

\textsuperscript{1559}https://www.scienceofpeople.com/psychopath/ Accessed on 8 October, 2019
empathy, emotions and fear which inclines them towards criminal acts. Many people have developed a stereotypical view on psychopaths, hence they fail to recognise it as a mental condition which needs intervention of clinicians. A study conducted by Furnhan et al.\textsuperscript{1560} provided questionnaires to two hundred and thirty two individuals out of which one hundred and forty five were women and eighty seven were men. The yielded results suggested that the general crowd had a relatively poor comprehension about psychopathy. Vignette identification was a part of the experiment, where participants easily identified the conditions such as depression and schizophrenia whereas significantly few participants identified psychopaths. It is evident that many people are not aware of psychopathy being a medical condition, rather they see it as a generic term used to describe a heartless person. This stereotypical influence is reflected on the legal judgements as they are reluctant in recognizing psychopathy as a medical condition which requires clinical intervention.

Researchers have been debating whether psychopathy is a genetically predetermined condition or if the behaviour has been developed by environmental factors. A scientist from Vanderbilt University discovered that neurons of psychopaths have been wired in a way to seek rewards at any cost.\textsuperscript{1561} The basis of their problematic behaviour including violent crimes, substance abuse and recidivism is due to a hyper-reactive dopamine reward system. They revealed that psychopath’s dopamine system gets highly active when they anticipate a reward. These rewards are mental satisfaction due to exaggerated dopamine response and they cannot alter their attention from gaining these rewards. This chain of actions eventually leads to criminal behaviour.

Psychopathy has two broad dimensions: interpersonal detachment and antisocial/impulsive behaviour.\textsuperscript{1562} Environmental factors play a major role in developing psychopathic conditions in young juveniles. Several researchers from the University of Michigan used Psychopathy Checklist-Revised and Multidimensional Personality Questionnaire to determine the effect of environmental factors on the development of psychopathy on 2604 twins of seventeen years.\textsuperscript{1563} The results concluded that factors such as abusive family relationships, poor school environment, insecurity from peers, and post traumatic influence in their lives lead to disturbance in their dopamine reward system causing psychopathy. The study also suggested that individuals’ genetic predominance were highly under the risk psychopathy.

The court should be aware of the fact that some psychopathic criminals are offenders ‘but’ with a diseased state of mind which impairs their judgemental functionality.

1.1 Research Problem:
There are no defensive laws for psychopathic offenders in India. Chapter IV of IPC, under general exception, section 84

\textsuperscript{1562}https://www.ncbi.nlm.nih.gov/pubmed/14658743 Accessed on 12 October, 2019
\textsuperscript{1563}https://www.ncbi.nlm.nih.gov/pubmed/22452762 Accessed on 12 October, 2019
gives protection for criminals who commit crime under unsound mind (example for schizophrenia) whereas psychopathic offenders are treated like normal criminals and there are no laws in India in favour of these psychologically affected criminals.

1.2 Aim:
To examine the effect of lay perception of psychopaths on legal decision making.

1.3 Research Question:
To what extent does the effect of lay perception of psychopaths have on the credibility of legal decision making in India as compared to the United States and the United Kingdom?

1.4 Hypothesis:
Psychopath offenders associated with lay perception are more likely to be sentenced to death or given rigorous life imprisonment without any medical intervention in India, in contrast with the United States and the United Kingdom.

1.5 Scope:
This critique attempts to draw attention to the credibility of legal decision making based on their perception of psychopaths. Various argumentative points have been observed to have a contravening effect on Indian justice legal system. Labelling of psychopaths causes prejudice of judges resulting in unjust judgements towards mentally impaired psychopaths. Benefit of section 84 is also not extended towards psychopaths and on the contrary they get intense punishment without medical intervention. This paper also includes a comparative study of legal judgments in Indian as compared to legal judgements in the United States and the United Kingdom.

1.6. Limitation:
This paper is limited to case studies where the Indian judicial system was reluctant towards psychopaths to justify the argument. These case studies are compared with international case studies where only the United States and the United Kingdom are considered while the law regulation towards psychopaths in other countries were not reviewed. This also critique lacks primary information collected through interviews, questionnaires and surveys. Further investigation is needed to acquire information to see if there is a correlation between labelling of psychopaths and legal judgements.

1.7 Methodology:
This paper incorporates both exploratory design and descriptive design. Exploratory design is used to study an area which has not yet been interpreted or investigated by other researchers. Since not much attention is given to psychopath’s criminal tendencies despite encountering multiple cases related to psychopaths, this discipline is considered as an unexplored discipline. On the other hand, Descriptive design is a research design in which characteristics of a person, community or a group is described, the research distinctly describes the characteristics of psychopaths and further lists out the reasons to justify implementation of defensive laws for psychopath criminals. In addition, a doctrinal research method has been adopted in this research paper. Data has been collected from primary sources and secondary sources. Data from primary sources is taken directly from the original source like legal documents and data from secondary sources are taken from relevant literature review articles, credible websites and periodicals. The critique also includes a comparative study between India and other countries to justify the argument.
2. Data Analysis:

2.1 Stigmatisation Effect of labelling Psychopaths:

Criminals labelled as ‘psychopath’ are seen as more vicious than an offender without such labels. Edens et al. (2005) conducted a mock trial on mock juror’s to test their perception on psychopathy and extention of death penalty. The results surprisingly found that sixty percent of the mock jury members endorsed the death sentence as a punishment for males labelled as psychopaths. The study further investigated that layperson was more likely to support death penalty than an individual who knew the clinical aspects associated with psychopathy. Laypersons saw labelled psychopaths as an aggravating factor to the society and disregarded the fact that they need medical treatments more than death penalty as their mind set is different from that of a normal person. In the case, Kishor Jaising Sonawane V. the State of Maharashtra, the appellant was sentenced to ‘suffer for imprisonment for life’ for committing murder. Despite providing the evidence of his mental illness, the court overlooked it and stated that he showed no sign of unsound mind. There was no mention of clinical treatment to be provided for the appellant instead the court used the word ‘suffer’ while passing the judgement of imprisonment for life just because he was labelled as a psychopath. The court failed to see psychopathy as a mental condition where the person’s judgemental ability is impaired. The accused was egocentric and his main motive is not to kill but to satisfy his mental state and the court completely neglected this mental state. Here again the labelling effect caused biased judgement reinforcing the fact that lay perception of psychopathy can lead to unfair judgement.

2.2 Ignorance of Section 84 for psychopaths:

The impulsive and irresistible behaviour of psychopaths are not assured with protection under section 84 in the Indian Penal Code. S. 84 Act states that “nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.” According to this law, the crime committed by the accused can be forgiven when they are mentally impaired. However, in the case of Sarjeroa Rambhau Machale V. The State of Maharashtra, Sanjeroa Rambhau Machale was not given the protection under section 84. He was accused of murder of his wife under section 302 which states that “whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.” Sarjeroa believed that his wife was involved in an extramarital affair. Dr. Dhananjay Chavan who was a resident doctor at Sassoon hospital revealed that the accused was suffering from a psychopathic disorder known as ‘bipolar mood disorder’. The appellant showed clear symptoms of

1564 https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2561&context=etd Accessed on 12 October, 2019
1566 https://indiacode.nic.in/handle/123456789/2263?locale=en Accessed on 8 October, 2019
1567 https://indiankanoon.org/doc/33731897/ Accessed on 7 October, 2019
1568 https://indiankanoon.org/doc/1560742/ Accessed on 7 October, 2019
bipolar mood disorder which included agitated, sleep-deprived, irritability and somatic anxiety. He also stated that the accused also had episodes of multiple depression from the past six years. Another witness admitted that the accused suffered from lunacy from past ten years and often when the appellant had the attack of lunacy, he would grind his teeth and cross his fingers and shout that people were beating him. To add on, Dr. Lavate reported that the appellant was diagnosed with Schizophrenia as well. Dr. Lavate further stated that at the time of committing the act, he was not of sound mind and his impaired orientation led to his poor judgement of right or wrong. However, because the accused has been tagged as a psychopath, the misconceptions that they intentionally commit crime failed to take into consideration Sarjeroa’s schizophrenic condition which led to impaired judgement. Also due to his psychopathic condition, he was anxious that his wife would leave him for another man and out of his impulsive nature he murdered his wife. Despite giving the evidence of his mental state, the Additional Public Prosecutor (APP) denied to extend the benefit of section 84 of the Indian Penal Code because according to APP the way in which the appellant murdered his wife seemed like he was in a normal state of mind. The way in which a person murders cannot define his intention and it is a clear example where the legal judgement was unjust and biased towards the accused or more likely towards psychopaths.

Even if the accused was in a sound state of mind, his judgemental capacity was abnormal which is closely related to an unsound mind. The India legal system does not have any statutes to define psychopathic crime laws and it also refuses to extend protection under section 84. Therefore, it is evident from this incidence that lay perception of psychopaths do have a negative effect on legal judgments and the protection under section 84 will not be extended to a person labelled as psychopath.

Control Study- In the case Amitabh Das V. The State of Assam\textsuperscript{1569}, Amitabh was accused of murdering his mother but got the benefit of section 84 was given to him as he was diagnosed with schizophrenia. The accused was set to liberty and declared not guilty of the offence. He was emancipated until he was found guilty of another crime.

From the above comparative study, it is clearly evident that the Indian legal system is negligent towards psychopaths alone.

2.3 Indian Judicial Response towards Psychopaths:

Many cases are reported each year with various mentally ill criminals, serial killers, violent crimes and sexual criminals. In the case Mithu vs. State of Punjab, the Supreme Court abolished section 303, which made death penalty mandatory for crime offenders who commit murder during their term in prison.\textsuperscript{1570} India denied to align with United Nations General Assembly for the use of death penalty.\textsuperscript{1571} Despite the abolishment of this law, Amnesty International has published a report disclosing that there is an increase of

\textsuperscript{1569} https://indiankanoon.org/doc/175532416/ 13 October, 2019
\textsuperscript{1570} https://en.wikipedia.org/wiki/Capital_punishment_in_India Accessed on 12 October, 2019
\textsuperscript{1571} https://thewire.in/external-affairs/india-votes-against-unga-draft-resolution-on-use-of-death-penalty Accessed on 13 October, 2019
eighty one percent on death penalty in India.\textsuperscript{1572} The report revealed that hundred and thirty six death sentences were recorded in 2016 and seventy five death sentence cases in 2015. According to their report, not a single death execution was recorded officially but more than four hundred death penalty of prisoners were given to those who committed murder during their imprisonment of life sentence. In the case, The Registrar General vs Doddahanuma,\textsuperscript{1573} the accused was sentenced to death by hanging his neck until he died. Dandupalya Krishna, the accused killed many victims with a crowbar. He also stated that he liked to hear the last sounds of life draining away and he used to get excited while hearing the gurgling sound after slitting their throat. He had no sense of remorse in his statement which is a clear sign of a person being a psychopath. However the court did not even recognise his mental condition and sentenced him to death.

2.4 Other Countries V/S Indian Judgements:

The scope of defence is excluded for psychopathic criminals in various legal systems. The United States and United Kingdom developed a separate statute to recognise psychopathic criminals to prevent the false judgement. In the case of Surendra Koli vs State Of U.P. Ors on 15 February, 2011\textsuperscript{1574}, popularly known as the ‘Nithari Case’ where Surendra Koli was accused of killing and eating flesh of children at that time. The accused showed clear traits of psychopathy however due the jury failed to identify his abnormal behaviour as a psychological disorder. The jury considered Koli as a psychopathic patient in the beginning, but this significant fact became a vague impression at the time of judgement. He was sentenced to death without even giving him a chance to prove his mental illness or the motive behind his act. There is no law in India to treat the psychopathic criminals who are victims of their own minds. This area requires in-depth study of such criminals and their mental state to differentiate between the crime conducted by an impaired mind and crime conducted by a normal person. A popular chief justice in New Jersey stated that “the postulate is that some wrongdoers are sick while others are bad.”\textsuperscript{1575} Surendra Koli was called ‘psycho killer’, ‘monster’ and ‘animal’ without correct knowledge regarding psychopathy. Lay perceptions of psychopaths in the crowd fail to consider his understanding of right and wrong and the same applies to legal systems who fail to understand the accused point of view. On the other hand, most legal systems require the accused who is mentally impaired to prove that they were functionally impaired as a result of mental disorder at the time of offence. Professor Robert Hare, a criminal psychologist has created a psychological assessment tool to determine if someone is psychopathic, this tool is known as PCL-R\textsuperscript{1576}. Hare observed and studied various criminal psychopaths and non-criminal psychopaths. He stated that he was surprised at the fact that some people are emotionally resistant to an extent.

\textsuperscript{1572} https://www.huffingtonpost.in/2017/04/11/india-81-increase-in-death-penalty-2016_a_22035043/ Accessed on 12 October, 2019
\textsuperscript{1573} https://indiankanoon.org/doc/11515780/ Accessed on 12 October, 2019
\textsuperscript{1574} https://indiankanoon.org/doc/659859/ Accessed on 8 October, 2019
\textsuperscript{1575} https://law.justia.com/cases/new-jersey/supreme-court/1963/40-n-j-191-0.html Accessed on 8 October, 2019
\textsuperscript{1576} https://www.telegraph.co.uk/books/non-fiction/spot-psychopath/ Accessed on October, 2019
where they objectify other people and kill them without a concern. He compares a psychopath with a colour blind person, where red colour is attributed to other human’s emotions. It provides an insight into a psychopath's inability to understand others emotions. A person who scores above thirty out of forty in the PCL-R test, are considered for the defence in their criminal acts as they are considered psychopathic. David Eagleman, a neuroscientist opined that the legal system is falsely demonstrated in terms of treating all people standing in front of the judge equally. He suggested that rather than applying death penalty to psychopath criminals, the law suit should consider the likelihood of the accused to reoffend and accordingly pass judgements. He also added that rehabilitation should be provided for those who can improve their mental state and long-term imprisonment if they pose a threat. In 2011, Missourie revised its statues in defence of sexual psychopaths under Section 632.475 where in the accused can be released any time after commitment when a written application to show promising facts that the sexual psychopath has improved during his commitment period to an extent where he no longer poses any sort of danger to the society. Commitment is an order from the court, where a mentally ill person should be taken in custody of a hospital, prison, mental health facility or similar institution. For instance, in the State V. James’s case, Leory Allison James who was an appellant was accused of being a criminal sexual psychopath. The Supreme Court of Missouri passed its judgement stating that the appellant may be committed to State Hospital No.1 at Fulton. Before passing judgement, two psychiatrists from Mid-Missouri Mental health inspected Mr. James. Dr. Dana L. Solemn testified that the appellant was diagnosed with psychopathy.

In the United Kingdom as well, Scottish commission law stated that psychopaths have difficulty in complying with the laws which are not shared with an ordinary man due to his psychological make-up. Scottish commission law believes that ‘psychopath criminals find it difficult but not impossible’ to follow the laws as they mentally suffer from partial violating behaviour. These criminals have been provided with separate laws to control their acts and further prevent them by clinical intervention. There is no confusion in terminologies associated with psychological conditions like psychopathy, schizophrenia, psychosis, sociopaths, rapists, sexual offenders and serial killers. The United States and the United Kingdom have clear demarcations made to differentiate these conditions and provide suitable treatments, as compared to India.

2.5 Draft Law:
Firstly, the reasons to have defensive laws for psychopaths are as follows:

1577 https://www.telegraph.co.uk/books/non-fiction/spot-psychopath/ Accessed on 8 October, 2019
1579 Para 2.60
1580 Para 2.60
I. They are criminally responsible but not morally responsible for their criminal behaviours due to an exaggerated dopamine reward system resulting in impulsive/irresistible behaviour leading to criminal activities.

II. They lack moral reasoning, their judgemental capacity varies from a normal person.

III. They lack the capacity to sympathise and comprehend other’s emotions.

IV. Other emotional abnormalities include lack of remorse or guilt and fear.

V. Their personality features include extremely self-centered, constant need for stimulation, impulsive, irresistible, irresponsible, delinquency at a young age, and criminal versatility.

Secondly, a diagnostic tool like PCL-R should be used to evaluate the characteristics of a person to diagnose him as a psychopath. Based on these criteria, the researcher has proposed a law draft which may be included in chapter IV of the IPC under general exception:

Law proposed-
Act of a person of impaired judgement due to impulsive and irresistible nature of. Crime committed by a person with a impaired judgement due to impulsive and irresistible nature should be exempted from rigorous punishment, and must be taken under the custody of Medical Subordinate until good faith is established that the person will not commit crime further.

Provisos
1) This shall not extent to those who intentionally commit murder without a underlying personality disorder
2) This shall not extent to those who display partial or minimal or starting symptoms of personality disorder

3. Data Interpretation/Findings:

As per the discussion, the hypothesis proposed has been proved right. Indian Judiciary decision is not reliable enough with regard to judgement associated with psychopaths. On the other hand, the United States and the United Kingdom have developed special statues for psychopaths and different categories of psychopaths. For instance, the United States has passed a law separately for sexual psychopaths. So, based on the rating of psychopathic tendency different laws are applicable to different types of psychopathy in order to prevent unbiased judgement. Whereas, Indian legal system is unaware of the clinical definition of psychopathy and is neglecting the importance of acknowledging the fact that psychopaths need rehabilitation during imprisonment rather than death penalty or rigorous life imprisonment. Therefore, Indian judicial system has not yet identified this area pertaining to psychopaths.

4. Suggestion:

The United States and United Kingdom utilise a diagnostic tool known as Psychopathy Checklist- Revised by Dr. Robert Hare to classify and rate them based on their psychopathic tendencies. Firstly, India should also develop a checklist to diagnose a person with psychopathic tendencies. The checklist should include interdisciplinary factors that build up or moderate the cognition of psychopaths and symptoms-signs-and-causes Accessed on 18 October, 2019

https://www.healthyplace.com/personality-disorders/psychopath/psychopathy-definition-
must be presented to the courtroom in defence of the accused. Additionally, it is suggested for the India legal system to take steps to educate the jury and the society about psychopathy being a medical condition and not just a term used to describe an insane person. The government should consider passing a law at community level whereby the schools and colleges appoint a psychologist to recognise the sign of psychopathy at an early age and give suitable treatment, as this condition is mostly development during the juvenile period. Once the condition is identified, defensive laws must be implemented to make it mandatory for psychopaths to get medical treatment from rehabilitation centres or hospitals to improve their cognitive behaviour because every offender deserves a chance. If a person's psychopathic tendency is very high, then they must get treatment in the jail itself but medical intervention is necessary either way. This can eventually cut down crime rates associated with psychopaths and ethically law will be right on its part.

5. Conclusion:

It is common for the legal system to ignore the condition ‘psychopathy’ without knowing the relative clinical definition of the personality disorder. It is important for the legal system to learn the underlying condition of the criminal to understand his motives and drives that lead to criminal acts. Legal system should appoint a special team with proper training in criminal psychology to study such cases. Indian government should develop statutes to recognise such special personality disorders like psychopathy to make legal decision making free of personal bias. Legal judgements in some cases are not credible enough due to lack of recognition of psychopathic disorders in various cases in India compared to other legal systems. Many infamous cases like Raman Raghab, Auto Shankar, Charles Shobraj, etc have shown psychopathic tendencies but their psychological condition was not identified, making the legal judgement unreliable. In the above mentioned Indian cases, Kishor Jaising Sonawane, Sarjerao Rambhau Machale, Dandupaly Krishna and Surendra Koli were sentenced to death or given life imprisonment while their mental state was neglected. On the contrary, the state of Missouri allowed Leory Allison James to get treatment from a psychiatric hospital. Scottish government also has realised the importance for the need of separate statutes to be created to regulate crimes committed by psychopaths. This ambiguity has to be resolved by the Judicial system and legislature by passing relevant laws for different mental illnesses in order to reach the public at large to clear issues on lay perception.

Reference

Act of a Person of Unsound Mind (1980, Chapter 4) section 84. from https://indiacode.nic.in/handle/123456789/2263?locale=en

Amitabh Das V. The State of Assam (26.09.2012 - GAUHC)


Kishor Jaising Sonwane vs The State Of Maharashtra (14.03.2018 - BOMHC)


Sarjerao Rambhau Machale vs The State Of Maharashtra (29.07.2015 - BOMHC)


State of Missourie v. Leroy Allison James, 534 S.W.2d 41 (1976).

Surendra Koli vs State Of U.P. Ors (15.02.2011 - SC)

Child Psychology, advanced online publication, doi: 10.1023/a:1026262207449

The Registrar General vs Doddahanuma @ Hanuma (22.09.2017 - KARHC)


*****
DEVELOPING CRIMINAL JURISPRUDENCE WITH REFERENCE TO SEXUAL OFFENCES AGAINST MEN

By Muskaan Singh and Rebecca Mishra
From UPES School of Law

Abstract
The Indian Penal Code, 1860 section 375 lays down the definition of ‘rape’ which begins by stating “A man is said to commit rape if he […]”. The provision works on the foundation that only a man can commit rape; further into the provision, which enunciates what all acts entail rape, it is repeatedly quoted that only the (anal, oral, etc.) penetration of a woman is considered rape. This particular provision negates the possibility of sexual offence being committed by a woman against a man and/or by a man against a man. Law is not static, but something always evolving with time and societal progressions. However, in this respect, it has become outdated and primitive.

These developments become all the more relevant when considered that the Supreme Court decriminalized section 377 and came to recognize same-sex relationships but fails to recognize same-sex rape. This paper will move to develop criminal jurisprudence in the Indian context with references to J.S. Verma Committee Report, POCSO (Amendment) Bill, 2019 and drawing contemporary examples from foreign countries.

This paper will also delve into evidentiary matter on sexual offences against men, i.e.,...
who have encountered assault in the course of their life are men. The Centers for Disease Control and Prevention and the National Institute of Justice found that 92,700 grown-up men are persuasively assaulted every year in the United States, and that roughly 3% of every American man—an aggregate of 2.78 million men—have encountered an endeavored or finished assault in the course of their life. The Bureau of Justice Statistics' National Crime Victimization Survey found that 11% of complete rape casualties are male.

An article published in India Today on August 14 entitled "Educator among four reserved for homosexuality in Muzaffarnagar" is only one more case of a particular qualification that has remained solidly tucked away in Indian speech: the possibility that men can be sodomized yet not assaulted.

As Section 375 of the Indian Penal Code stands, assault is something that lone a man can do to a lady. There is no space for grown-up male casualties, significantly less female culprits. In spite of the fact that kid overcomers of both genders are secured by the Protection of Children from Sexual Offenses Act 2012, current assault laws forget about an enormous swathe of male casualties, who can't approach because of a paranoid fear of disgrace and an absence of lawful response.

As a previous executive of a Lesbian Gay Bisexual Transgender advising and sexual wellbeing community in New Delhi, we verify first-hand to the many such male and transgender survivors in the country's capital. They have likewise been very much recorded in legitimate cases, for example, Naz Foundation versus the Government of National Capital Territory of Delhi and in announcing by household human rights associations. Why, at that point, this latency around a word as out of date as "homosexuality"?

The Law Commission, in its 172nd Report submitted in 2000, recommended gender-neutral definition of rape by replacing the term “rape” in the IPC with the words “sexual assault”. The Centre accepted the proposal to make definition of rape gender-neutral after the December 16, 2012, gang rape of Nirbhaya. The Justice Verma Committee, set up after the horrific incident, recommended use of the word “person” in place of “woman” to cover all victims of sexual violence.

The then UPA government thus notified the Criminal Law (Amendment) Ordinance in February 2013 which adopted a gender-neutral definition of rape. However, following criticism of the change by a number of women’s rights activists, the Criminal Law (Amendment) Act, 2013, passed by the Lok Sabha on March 19, 2013, and the Rajya Sabha on March 21, 2013, reverted to the gender-specific definition of rape. Those who opposed gender-neutral rape laws questioned their relevance in the context of an intrinsically patriarchal and gendered society where sexual violence evidently acts as a medium to exercise power over the female/non-male body.

The Verma Committee recommended in 2013 that though the perpetrator of sexual violence should continue to be identified as a man, the victim be categorised as gender-neutral to cover sexual violence against men, women and transgender persons. The Criminal Law (Amendment) Act, 2013 unfortunately restored the gender-specific definition of sexual violence for both the perpetrator and the victim. Justice Leila Seth, one of the members of the Verma Committee, noted that “this was a serious
mistake, and Parliament failed to understand the injustice done thereby to so many men and transgender people”. It is this lacuna in law which the centre should seek to fill while responding to pleas for gender-neutral laws against sexual violence.

The Law Commission, in its 172nd Report, said: “Not only women but young boys, are being increasingly subjected to forced sexual assaults. Forced sexual assault causes no less trauma and psychological damage to a boy than to a girl subjected to such offence.” While the Commission’s concerns were justified, its recommendations to opt for “sexual assault” for “rape” and to substitute “person” for either male or female, were not very convincing to the legislators and civil society alike.

**Bills and Amendments: No room for male victims?**

The most common belief that surrounds the concept of rape is that men cannot be raped for they are physically more resilient and more probable to ward off any potential attacker. There have been correlations made between the perspectives of a bystander towards the victim and the victim’s ability to resist the attack- meaning a victim who would resist more profusely would be considered to have been raped and those who did not resist as aggressively, attract less sympathy. There is a certain victim blaming culture that views victims are less sympathetic or more, some being deemed as not being victims at all based on circumstances of the act.\(^{1583}\)

It needs to be understood that in order for men to be recognized as being potential victims of rape the legislators need to condone two possibilities- men on men rape and women on men rape. The current legal position in India stands that “a man is said to commit rape who…” and the criterions for what constitutes as rape all follow with the phrase “of a woman” so as to induce that rape can only be done to a woman and only by a man.

Once the possibility of men on men sexual assault begins to be considered, it would go a long way to prove that men can be potentially overpowered by other men too and wouldn’t be able to ward off aggressive attackers in all situations. There’s a certain pressure being laid on male victims of sexual assault to be able to prove that the act was not consensual and forced, the person needs to display high levels of resistance to back up their contention. This position becomes more difficult to prove when the perpetrator is a woman- with the wider population insinuating that if the man was unable to resist a woman then they themselves are at fault. The whole structure of rape myths function on the assumption that men are physically stronger and would, under normal circumstances, be impervious to rape. This assumption has to have its roots in traditional orthodox masculine values of power, dominance and strength. While documenting the circumstances of most male victims of sexual assault it was observed that four out of five times the victims were beaten up, punched, burnt, strangled and cut, to get their way with them. These instances demonstrate that victims, both male and female, can succumb to sexual assault by not being able to fight back; it is not a woman only narrative.

It was only after the brutal gang rape case in the heart of National Capital Territory in December 2012 that Anti-rape laws were taken up for reconsideration and a J.S. Verma Committee was set up to suggest reforms and to further strengthen the rights of survivors of sexual assault.

“It is unfortunate that such a horrific gang rape (and the subsequent death of the victim) was required to trigger the response needed for the preservation of the rule of law—the bedrock of a republic democracy.”

Just how the country realized, after this brutality, that there needs to be changes in the current criminal justice system, it needs to be understood that as each day passes, we’re depriving a potential male victim of sexual assault the opportunity to protect themselves in the eyes of the law for the primordial and erroneous reason that only a "man is said to commit rape" and only with a woman. There need not necessarily be a new barbaric case along the lines of Nirbhaya gang-rape case for the Judiciary and Legislators to realize that men can also be raped—by woman or other men, both. In the J.S. Verma committee report it was noted that:

“Correction of the societal mindset of its gender bias depends more on social norms, and not merely on legal sanction. The deficiency in this behalf has to be overcome by the leaders in the society aided by the necessary systemic changes in education and societal behavior. Attitudinal changes to correct the aberration of gender bias have to be brought about in the institutions of governance to improve the work culture, and in civil society to improve the social norms for realizing the constitutional promise of ‘equality’ in all spheres for the womenfolk. The ‘workmen’ must improve the work culture instead of quarreling with the ‘tools’. In the Committee’s view, without the improvement in this aspect, mere additions in the statute book are of no avail. Focus on the machinery for implementing the laws is, therefore, a significant part of this exercise. The Committee hopes that the concern and urgency shown by the Government in constituting it will not wane with the passage of time and the publication of our report; and that the constitutional promise of gender justice in a social order with the egalitarian ethos will soon be realized without much ado. A positive reaction to the tragedy which triggered this response of the government would be the real tribute to the memory of the victim of gang rape and to the honor of the womenfolk.”

Even after the efforts of the Committee made for this purpose the suggestions for a gender-neutral rape provision wasn’t considered and in 2013 a bill introduced in Lok Sabha and passed by both the houses read as follows:

“375. A man is said to commit "rape" if he—
(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) manipulates any part of the body of a

1584 Report Of The Committee On Amendments To Criminal Law, 2013 (India).
woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,”

In 2018 a Criminal Law (Amendment) Ordinance noted that- In the case of rape of minors, according to the POCSO Act, the victim may either be male or female (and the offender could also be of either gender). However, in cases of adults under the IPC, rape is as an offence only if the offender is male and the victim is female. The Law Commission of India (2000) and the Justice Verma Committee (2013) had recommended that this definition of rape should be made gender neutral and should apply equally to both male and female victims. The Ordinance does not address this issue. However, The POCSO Act 2019, referred to above, was the very first instance of a Bill being passed, in over a decade, which was gender neutral with regards to the victim and the perpetrator only deviation from IPC being that it was applicable on minors, to protect the interest of Children.

“The said Act is gender neutral and regards the best interests and welfare of the child as a matter of paramount importance at every stage so as to ensure the healthy physical, emotional, intellectual and social development of the child.”

In a similar tone, towards the end of 2019 a Transgender Persons (Protection of Rights) Bill was introduced in Lok Sabha and by November 2019 had been passed by both the houses. This Bill recognized people’s right to self-identify them as what gender they belong to and laid out an elaborate all-encompassing definition of transgender. It further penalized, amongst other things, “sexual abuse” of a transgender person.

“18. Whoever, —
(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.”

Sexual abuse defined as - Includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman, [Section 3 Explanation (ii), Protection of Women from Domestic Violence Act, 2005 (India)].

“Whoever” again insinuates that the ambit was kept wide as to include men, women, and a third gender. This Act was as far as the Indian Parliament has gone to widen its ambit, for if under this law, it can be entertained that transgender woman and man both are under a potential threat of sexual abuse from someone, then why is the Indian Penal Code so far behind to bring adult male members under the same umbrella. Logistically, a transgender woman, with her biological sex being male, who hasn’t gone through Sex Reassignment

---

Surgery or hormone therapy, would have the body structure and bone structure of a male. Hence suggesting that in the process of looking out for best interests of the Transgender community, the legislators acknowledged that a transgender person having the physical strength of a man may also be subjected to sexual abuse. It seems atrocious then that the same recognition does not lie with cisgender men.

**How prevalent is sexual assault against men?**

“We assume that race and gender are strongly linked to sexual harassment because they are key dimensions of social stratification. Because sexual harassment is about power, we would expect less powerful people (e.g., women, minorities, and younger individuals) to be particularly vulnerable to harassers. Indeed, women are usually found to be at higher risk than men to all types of harassment.”

The above extract is one example amongst many that lay emphasis on the probability of female sexual harassment cases to be more than that of male cases. This undermining nature of the society towards male survivors of sexual assault make it even more difficult than it already needs to be to safeguard both men and women. In a survey of the Centers for Disease Control and Prevention it was recorded that 40.2% gay men, 47.4% bisexual men and 20.8% heterosexual men, in The United States, reported sexual violence other than rape during their lifetimes. Which bids the question- Is sexual violence perpetrated on men really that prevalent? Approximately one in 45 men has been made to penetrate an intimate partner during his lifetime. UN reports on sexual violence in armed conflict are now attuned to the problem and sometimes carry a sentence along the lines that ‘men and boys are also subject to sexual violence’. However, such a sentence, if indeed present, usually the sole reference to men and boys in any report. Accordingly, this brief recognition has not translated into concrete efforts on behalf of male victims, be they mechanisms for raising awareness of the problem, focused research agendas on the issue, or strategies for prevention.

**Wales & England:** It is estimated that there were between 366,000 and 442,000 female victims and between 54,000 and 90,000 male victims. With regard to the most serious sexual offences, the survey estimated the number of females who were victims ranged between 68,000 and 103,000 and male victims between 5,000 and 19,000 per year.
Contrary to popular belief, India is also a hub of mass unreported rape or sexual assault cases. In a very peculiar fashion India recognizes that men can be sodomised, but they allegedly can’t be raped. Although the modern usage of the word ‘rape’ extends also to the forcible sexual intercourse by a woman with a man, the dictionary meaning of the said word as well as the offence of rape as defined in the Indian Penal Code speak only of forcible sexual intercourse by a man with a woman. It can, therefore, be said that a woman can also be guilty of sodomy. So will be the position in the case of the offence of bestiality. The discrimination, therefore, can be alleged by the husband only on the basis that these two grounds, viz., sodomy and bestiality, are not available to him for claiming dissolution of his marriage whereas the same are available to the wife for the purpose.

In a Mumbai (India) case that was reported by Reuters, a 14-year-old boy was playing cricket when a man took him into a room and shut the doors and windows and then proceeded to rape him or better yet “sodomise” him. There is an unparalleled effect of sexual assaults on the minds of impressionable kids as so was observed in this case for the kid, soon after, killed himself by drinking rat poison.

The government has not only made any attempts to bridge the gap between discrimination as regards sexual assault victims and perpetrators, but in the aftermath of Nirbhaya gang rape case also increased the minimum punishment for girl victims but made no changes to minimum sentencing for boy victims. Although there has been talk of government wanting to make the IPC provision on rape-gender neutral, which was corroborated by a public official that did not want to be named, who said that whatever shall be applicable to girls will also be to boys - there has been no substantial moves made yet. The boy’s medical reports said the child had been “sodomized”.

How a Man’s rape cannot be taken as evidence
There is considerable proof to suggest that narratives about rape, rapists and victims of rape contribute greatly in molding societal cognitions. Amongst these factors are myths revolving around rape and sex-role stereotypes, wherein the latter goes a long way to affect assailant victimization; the mere contention that a woman victim “must be wanting it” or that women want to be raped subconsciously and that men are “more interested in sex and likely to enjoy it” is where we fail them. One of the reasons by which female assailants are absolved of responsibility works on the function that men would have to be actively participating for them to be engaged in sexual intercourse. Adding to the stereotypical load is the belief that men are incapable of being raped for the simple erroneous reason that they can’t function sexually unless aroused.

This assumption is called into question by evidence that men are capable of

 1595 Anil Kumar Mahsi v Union of India, (1994) 5 SCC 704.
functioning sexually in a variety of intense emotional states; including fear and anger just as female victims sometimes report vaginal lubrication and orgasmic responses while being traumatically raped.

However, almost exclusively, most of the empirical research on social responses to rape and rape victims have been women centric, something that needs to change- for as the society evolves, so does the law. We live in times where men have gone to the moon, cars drive themselves, we have rovers on mars, and yet being objective about rape laws seems like a monumental task.

**Protection under The Indian Evidence Act, 1872**

“As early as 1952, the Supreme Court of India ruled that conviction for rape could be based solely on the victim's testimony. However, as in any other case, testing the reliability of the testimony of the witness was critical to determining guilt. In rape cases, defence counsels employed section 155(4) of the Indian Evidence Act, 1872 which permitted them to cross-examine the victim to show that she was of a generally immoral character. The defence could use evidence of the past sexual history of the woman to attack or create doubt about that the veracity of her claim of rape, based on an assessment of her sexual behaviors as promiscuous or otherwise improper. Alongside witness testimony about the immoral behavior of the woman, medical evidence was often used as an objective tool to assess a woman’s sexual habituation continues even today. Despite the change in law excluding a woman’s past sexual history through medical tests that claim to demonstrate women’s habituation to sexual intercourse.”

In 2003 section 155(4) of the Indian Evidence Act, 1872 was omitted and the section before omission read as “when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.” Another set of Amendments emerged in 2013 inserting section 53A and substituting certain words of section 146.

Before substitution s.146 read as “Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the victim as to her general immoral character.” which was changed to “Provided that in a prosecution for an offence under Section 376, 177[Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB] or Section 376-E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.”

On observation it is revealed that both the provisos are essentially talking about the same thing only difference being the substitution broadened the ambit of s.146 which also has its reasons attached to the amendments that came into place after the Nirbhaya gang rape case. The phrase “general immoral character” was broadened to include previous sexual

---

1598 DURBA MITRA & MRINAL SATISH, Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India, 49

ECONOMIC AND POLITICAL WEEKLY 51, 52 (2014).
history and that this couldn’t be taken up in cross examination to try and prove consent. It must be made clear that this section falls under the heading of permissible questions in cross-examination whilst a separate s.53-A was inserted specifically to address questions as to character.

Section 53-A reads “In a prosecution for an offence under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 376, 68[Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB] or Section 376-E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

This provision goes straight to the relevance of character and past sexual history in order to validate consent of the victim. Emphasis also is laid on the terms “shall not” in all of these sections for it is important for our criminal justice system to take into account the ramifications of a trial for sexual assault. There is already proof as to the inhibitions of the victim as regards the stereotypical society and stigma associated with male victims in addition to the prevalent problem of victim blaming while victimizing the assailant; there needs to be a downright demarcation of societal nuances to what is relevant to constitute a crime. The offence of sexual assault shouldn’t be excluded for the same reason that section 114-A presumes that if the woman says there wasn’t consent, the court will proceed with that presumption. “[…] and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.”

These sections while only talk with respect to woman victims; the protection of these sections should also be imparted to male victims whereupon an amendment is instituted in the Indian Penal Code to make the definition of rape gender neutral.

There needs to be an air of gravity and seriousness attached to crimes of such depravity that attack the very conscience of a person to live their life with dignity which is guaranteed by article 21 of the Constitution of India. The law is already imperfect and pro-accused and lest this protection of presumption is not given to the victims of sexual assault, the law would further deviate from furnishing justice to the wronged.

Given the society’s assumption as regard to male rape, it is imperative that a man’s sexual experience be made irrelevant for it would degrade the victim to paint them to be a result of their past doings; to bring up a man’s character would be to proceed with the notion that sexual assault isn’t something that is gender-race-color-age neutral. A person is not only the product of their misdoings and shouldn’t be resolved by the court to be so.

Medical examination of Rape victims
In the event that Bodhisattwa Gautam v. Subhra Chakraborty, Supreme Court said that assault is a wrongdoing against essential human rights and an infringement of the casualty's most significant principal right, to be specific, the privilege to life in Article 21. In Francis Coralie v. Association of Territory of Delhi, Supreme Court said that the option to live isn't just about creature presence.
It doesn't constrain itself to insurance of appendage and life; it is substantially more
than this. It likewise implies option to live with human pride. Option to live with human respect is the most fundamental component of right to life under article 21. A demonstration of assault not simply abuse the one's privilege of physical body, the individual's self-rule over body yet in addition her pride, mental solidness. It is a wrongdoing against essential human rights. It turns out to be progressively significant and critical that how an assault survivor is dealt with. The hardware like police and clinical should be progressively delicate and cautious while associating with them.

State of Karnataka v. Manjanna
Before Supreme Court’s judgment in 2000, the system for clinical assessment of assault casualties was extremely remiss. Specialists would continue with the assessment simply after the solicitation of the police. Because of this, it got essential for assault casualties to record a FIR for getting a clinical treatment. This mentality towards the assault casualties was exceptionally uncalled for and unreasonable, in light of the fact that the specialists overlook the power and grievousness of the offence and the human viewpoint, and just concentrations upon the procedural angle.

In the State of Karnataka v. Manjanna, said that clinical assessment of assault casualties is a "medico legal crisis.” It is the privilege of each casualty and an obligation of each emergency clinic to therapeutically look at the casualty before documenting of a lawful grievance, and the emergency clinic in line with the person in question, can thereafter record a protest. A medical clinic may get a casualty of assault when casualty willfully reports to the emergency clinic, on demand by the police or by the court.

The above cases have been cited so at to build a foundation where only the cases and the possible outcomes are only for female rape victims. There are such tests to examine if a man has been raped or not. The common two-finger test which is most commonly used to examine a female rape victim cannot be used in males. Similarly there have been no such tools devised to check whether a man has been raped or sexually abused or not.

If the act of sodomy has been performed then Trauma to the anus can cause tears in the anus or the rectum and may worsen hemorrhoids (piles) or cause temporary problems when using the bowel accompanied by persistent pain around the anus. These injuries can be used as an evidence for a male rape victim.

In Canada the admissibility of Sexual Assault Evidence Kits is being questioned, whether they actually go on to help the victim or do they work against them. “The kit requires the administration of physical “tests” as well as documentation in which the woman involved answers questions about the assault and her current and past medical history. SANEs record all visible injuries on diagrams indicating their type and size and are required to document any signs or reports of physical resistance as kit components. In some regions, health professionals who administer the kit provide written assessment of the woman’s emotional status, scrape under fingernails, and ask if she scratched or otherwise “fought back.” Kit requirements and evidence of this sort can reinforce the myths that “real” rape involves a certain emotional
response and attendant physical injury and that “good” women resist.”

It goes to show how contemporary countries are so far ahead in bringing in innovative ideas to curb this menace while India is still lagging behind in recognizing that there is a huge chunk of the population that succumb to sexual assault, especially the poor who as it is don’t have resources to fall back on when their rights are being violated.

**Conclusion**

In this paper, we argue that India should introduce gender neutral rape laws to its Indian Penal Code by way of amendments, lest another set of atrocities like the Nirbhaya gang-rape case would happen and laws will have to be made after its occurrence rather before. If the Indian Judicial System waits around for a case as such to happen so that the issue is arisen, the assailant would potentially be booked only for sodomy since the law gives no protection to male victims either from males or females. The first step towards redefining rape would be to cast down all the myths and stereotypes that revolve around men and rape- essentially starting from a generalizing statement that men are physically stronger and therefore cannot be raped. There are multiple cases quoted in India itself that have reported men being forced upon for penetrative anal intercourse. The second myth that the society harbors is that one cannot have sexual intercourse unless one is actively participating in it too. Contending that sexual arousal can’t take place unless the victim is “liking it” which is proven wrong by evidence of traumatic arousal and lubrication being a thing. India was blessed with the Justice J.S.Verma committee report, wherein, it was first reiterated what “any person” is said to commit rape. However, in order to bring men under the protection of the penalizing laws one has to consider that it is in fact a two parted job. One, to establish that any person can commit rape, also include transgender male, female in that definition of “person” for there seems to be no reason why anyone gender should be left out of that definition (especially after being given recognition and protection for their interests in a separate Act). Two, to amend the various acts that constitute as rape to remove “of women” and to insert “and of man” or make it “any person” for all the provisions are just as relevant in the case of men. The broadened ambit of sub-section (3) would be the saving grace perhaps to prevent any other form of manipulation of the body that degrades the person, violates their dignity and is done forcefully for sexual gratification, and of course adhering to the five forms of violation of consent. To act as evidence of rape, there is all but the victim’s testimony that, as per s114A of the Indian Evidence Act presumes the word of a rape victim (woman) to be true and proceeds with that presumption. Such revisions may bring a measure of fairness and respect to the process of reporting a rape as girls and women will no longer have to undergo the duress of the finger test or other tests that scrutinize their past sexual history and violate their privacy and dignity. Courts have also failed in their responsibility to implement the law by blindly accepting medical jurisprudence books as the primary authority on evidence of rape. Further, by permitting doctors to

---

1599 JANE DOE, SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN’S ACTIVISM 367 (Elizabeth A Sheehy, 2012).
opine about women’s sexual history through their medical reports, courts adjudicating rape often fail to follow law, which prohibits the consideration of sexual history of the victim in determination of rape. Courts must be more critical and cautious in their usage of medical manuals and evidence based on these manuals in order to effectively safeguard constitutional rights. For over a hundred years, medical jurisprudence textbooks for India have been extraordinarily influential in the legal process.\textsuperscript{1600} Aside from setting aside sexual history, there are also recourses of medical evidence that can prove lacerations in the anal region or evidence to place the assailant at the scene of the crime in order to prove guilt. The fundamental role that societal notions play in dictating what is the “norm” and what is impossibility is what needs to undergo a logical-empirical check for the advancement of the fundamental and human rights of male rape victims to protect their privacy and dignity.

\textsuperscript{1600} DURBA MITRA & MRINAL SATISH, Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India, 49 ECONOMIC AND POLITICAL WEEKLY 51, 57 (2014).
RIGHT TO WHOLESOME ENVIRONMENT UNDER INTERNATIONAL ENVIRONMENTAL LAW

By Nabanita Sarma
From Amity University Kolkata

ABSTRACT
Individuals are the creators and moulders of their environment, which gives them bodily sustenance and presents before them the possibility of intellectual, ethical, social and religious growth. In the long and tortuous evolution of the human race on earth, a degree has been reached when, through the fast acceleration of technological know-how and generation, an individual has acquired the energy to convert his/her environment in limitless methods and on a scale that is unheard. The protection and improvement of the human surroundings is a primary difficulty which influences the prosperity of people and their monetary development at a certain stage in the arena of life and so far it has now become a matter of sheer preference for the humans all over the globe and the duty of all international as well as regional governments. Moreover, a certain level has been reached in records whilst we have to form our strategies throughout the global arena with greater and prudent care for the environment. Conversely, through fuller expertise and wiser action, we are able to acquire for ourselves and our posterity, a better lifestyle and our surroundings coping with human needs and hopes. Consequently, it has turned out to be an imperative intention for mankind to shield and improve the human surroundings for present and upcoming generations.

INTRODUCTION
Indeed after a few endeavors were being made to create worldwide environmental law within the 19th century, it was not until the Stockholm Conference, 1972, that the right to a wholesome or healthy environment was unequivocally recognized in a worldwide environmental law archive. The conference adopted what is known as the Stockholm Declaration, comprising of three non-binding instruments: a resolution on institutional and financial arrangements; a declaration containing 26 principles; and an action plan containing 109 recommendations which is considered as the starting point in developing environmental law at the global as well as national level. Principle 1 of the Declaration linked environmental protection to human rights norms stating that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”. A notable influence of the Declaration was the creation of the United Nations Environment Programme (UNEP) which laid down a total of 26 principles. Twenty years after Stockholm, in June 1992, the UN Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil which adopted three non-binding instruments, one of which was the Rio Declaration, which identifies 27 principles. The purpose of the conference was to create methodologies and measures to end and invert the impacts of environmental degradation.

METHODOLOGY
This paper highlights upon the international legislations, treaties or conventions and related precedents that has been adopted with the aim to achieve a wholesome environment and also comprises of my personal suggestions which has been
incorporated as the conclusion of the essay. The data mentioned in the said paper has been collected and theoretically in great detail. Therefore, the research done hereby is purely based on empirical data which makes it an empirical research study.

**The right to a wholesome environment as a human right**

As it has been specified already, the right to a healthy environment was to begin with unequivocally recognized in the Stockholm and Rio declarations as non-binding principles in spite of the fact that those declarations did not aim at forming lawful rights and commitments. Many national constitutions and laws recognize the right to a healthy environment inferred from the commitment of States to embrace the standards reflected in the Stockholm and Rio declarations wherein some domestic courts have also referred to principles enshrined in these Declarations. In spite of the fact that, the legal status of a sound environment as a human right shifts among diverse frameworks, numerous nations have created sacred arrangements that ensure the right to a healthy environment. Additionally, environmental degradation caused by economic activities is often accompanied by and related to infringement of civil and political rights, including lack of public access to information, citizen participation, freedom of speech and association. In many cases where industrial development and resource extraction (e.g., mining or oil development) affect communities, those who address the negative impacts of the developmental action are subject to badgering or concealment by government or venture specialists. As our generation faces genuine environmental and social crisis, the potential of the right to a healthy/wholesome environment for progressive development and accountability cannot be understated. However, its global recognition is long overdue.

**LEGAL ANALYSIS**

In relation to environmental obligations, certain treaties potentially having global application, include:

- **The Rio Declaration**, although not a treaty, stipulates certain state obligations. Principle 1 of the Rio Declaration states that human beings are “at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Although it failed in recognizing a healthy environment as a basic human right, but Principle 1 points in that direction.

- **The 1985 Vienna Convention**, whose purpose is to set up a framework within which countries can cooperate to tackle the problem of ozone depletion in order to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.°

- **The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer**(UNEP), aims to reduce and eventually eliminate the emissions of man-made ozone depleting substances.

- **The 1992 Framework Convention on Climate Change**(UNEP), which requires parties to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with

---

the climate system,” aims to protect the climate system.

There have been successful domestic court cases guaranteeing the right to a healthy environment in various countries. For instance, in India, the enforcement of the constitutional right to a healthy environment can be seen in the case of M.C. Mehta v. Union of India.1602 This case is about pollution by a number of tanneries and the failure of the authorities to take appropriate steps. The petition asked the court to restrain certain industries from discharging trade effluents into the Ganges River. The Supreme Court ordered the tanneries to close down unless the trade effluents were subjected to a pre-treatment process by setting up primary treatment plants that are approved by the State Pollution Board. The court noted that “closure of tanneries may bring unemployment and loss of revenue, but life, health and ecology have greater importance to the people.”

Another such important case in India, which is notably a landmark case is the case of Subhash Kumar vs. State. of Bihar. In Subhash Kumar vs. State. of Bihar,1603 the Court observed that ‘Right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.’ Through this case, the court recognized the right to a wholesome environment as an integral part of the fundamental right to life. Furthermore, this case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. Henceforth, they could be also compelled to take positive measures to improve the quality of environment to ensure better living conditions. The Supreme Court in this case held that Right to life is a fundamental right under Art. 21 of the Constitution which included the right to enjoyment of pollution free water and air for full enjoyment of life and therefore if anything endangers or impairs that quality of life in derogation of laws, a citizen has recourse to Art.32 of the Constitution for removing the pollution of water or air which may be detrimental to life.1604

IMPLEMENTATIONAL FAILURE
There are several reasons due to which there is no legitimate execution of the legitimate measures adopted for a wholesome environment. A few of which are promptly clear and a few others which require a broader understanding of universal, comparative and domestic laws. Some of them have been discussed below:

1. The first reason being moderately direct. The Rio Declaration is not authoritative as such, and this feature has anticipated a few standards from conveying their full effects.
2. The second reason is the non-appearance of a broader common center of lawfully binding principles on which critical crevices within the direction seem to depend upon, which leaves certain critical questions unsettled.
3. Third, there are even broader questions that influence the operation of the entire international environmental law framework which have been to a great extent ignored. For instance, consumption-driven environmental degradation, that is,

1602 (1987) 4 SCC 463
1603 (1991) 1 SCC 598

1604 Available at https://thelawblog.in/2017/10/27/right-to-environment-calls-for-justice/
environmental degradation in one country led by utilization in others and tragically, neither the Rio Declaration nor the various Multilateral Environmental Agreements (MEAs) have much to offer in this regard.

4. Fourth, a form of gap concerns the conceivable clashes between instruments with constrained sectoral or spatial scope. Lawfully, there are no overarching standards, aside from the restricted set of standard universal environmental law standards, that seem to give arrangements to such far-reaching clashes. In this regard, when one considers the questions of ‘gaps’ genuinely, beyond the shallow references to commonly recognized lacunae, there is a much more profound requirement for an authoritative overarching framework.

5. A fifth issue is that a few of the Rio principles have been caught on and treated in an unexpected way over settlements and their related dispute settlement instruments, with imperative viable suggestions whereby, three illustrations concern the diverse positions taken. Those are- with regard to the nature and scope of the precautionary principle/approach, those with respect to the spatial scope of the prerequisite to conduct an environmental impact appraisal and those relating to public interest. This disparity is conceivable because of a need of an overarching explanation of binding principles.

6. A sixth and imperative reason is that the direction given by the Rio Declaration to national lawmakers and courts is neither clear nor solid enough.

CONCLUSION

The several years that have passed since the Rio Conference have been characterized by globalization whereby, numerous nations have seen economic conditions decline and public administrations fall apart resulting in an increment in wage imbalance among and within the nations. In order to curb the threat, it is fundamental to form a shared worldwide vision of long-term objectives and to construct Universal frameworks that will offer assistance to each nation to play its portion in meeting the common objective of accomplishing a wholesome environment. To conclude with, I would like to suggest the following ways so as to achieve a decent and healthy environment to live in:

1. There should be proper implementation of Carbon Tax by the government in the countries which is a form of pollution tax levied on the production, distribution or use of fossil fuels based on the emission of Carbon combustion.

2. Electric Vehicles should be used in place of gasoline or diesel engines that are expensive, especially when the ever-fluctuating price of gasoline is high. This will also reduce the vehicular emissions and help the environment become energy independent.

3. Avoid the use of plastic as it has toxic pollutants that damage the environment and cause land, water, and air pollution creating a long-lasting damage to the ecosystem.

4. Use of recycled materials as it reduces the amount of waste sent to landfills and incinerators which will also conserve natural resources such as timber, water and minerals, resulting in an increase in economic security, preventing pollution by reducing the need to collect new raw materials, which will save energy.

5. Lessen the consumption of meat. Cutting back our meat consumption and replacing them with vegetables or seafood can make a huge difference in the environment. More than 30 percent of the Earth’s surface is being used to raise and support livestock. According to a United Nations study, “the livestock sector accounts for 9 percent of CO2 deriving from human-related
activities, but produces a much larger share of even more harmful greenhouse gases. It generates 65 percent of human-related nitrous oxide, which has 296 times the Global Warming Potential (GWP) of CO2.” Hence, this can be an important step in reducing the overall emission of GWP gases.

6. Old tungsten bulbs that consumes more energy should be replaced with a Compact Fluorescent Light (CFL) or LED bulbs as they last five times longer than normal bulbs, consumes less electricity and are comparatively brighter.

*****
RESTORATIVE JUSTICE

By Nandini Menon
From Gujarat National Law University

_featured_ ABSTRACT

→ Braithwaite (2004) said “Restorative Justice is about the idea that because crime hurts, Justice should heal.” The aims of Restorative Justice are to better meet the needs of the people directly involved when a crime happens than is normally possible in traditional criminal justice systems. In the traditional system, legal professionals are the active decision makers and the people who have been harmed and those that have harmed are passive in their roles. Howard Zehr (2002) lists the three pillars of Restorative Justice as:

- Harms and Needs: Who was harmed, what was the harm? How can it be repaired?
- Obligations: Who is responsible and accountable and how can he/she repair the harm?
- Engagement: Victims and Offenders have active roles in the Justice process

→ In this paper, the researcher aims to examine various aspects related to the concept of Restorative Justice and its effectiveness and utility, especially in the Indian context. The paper aims to analyze and explain the important developments in the area of restorative justice, the aim of restorative justice in the 21st century, the key principles of restorative justice, its cost effectiveness, values of restorative justice, the stakeholders of restorative justice, participants in the restorative justice program, restorative justice from international perspective and a comparison of restorative justice system with the traditional justice system along with the advantages and disadvantages of the same.

→ The paper will specifically aim to examine the concept of restorative justice from the Indian perspective and the critical issues or challenges faced in the implementation of the same, which shall also include the main criticisms of the restorative justice system from the perspective of victims, offenders, community, culture, class, gender and some more perspectives. The researcher will substantiate certain points with the help of various case laws. The last part of the paper would also include summations and certain suggestions on how to overcome the various challenges.

_featured_ INTRODUCTION

→ It is very much documented that criminal justice framework worldwide had a total tilt for the accused; consequently pre and post preliminary rights have been perceived for them. India isn't a special case to this above expressed worldwide position. Nonetheless, particular to India have been the status-quo in its situation when contrasted with different countries of the world. This has additionally been bolstered by the antagonistic arrangement of criminal justice to which India has selected. Our nation has perceived the pre and post preliminary privileges of the wrongdoer both constitutionally and procedurally. The significant unit of the criminal justice for the most part the victim has no spot in Indian framework with the exception of that it has been consigned to the witness that too
when necessary. However, certain decisions by the Apex Court in India have made it conceivable to make a domain of "take off" identifying with victim equity so much that most recent changes in Criminal Procedure Code are pointers in that direction. That is clear by the current definition of "victim" in Section 2.

Restorative Justice is an alternate method to take a look at equity. It expects to:

- Put key choices in the hands of those generally influenced by wrongdoing
- Make equity all the more mending and transformative
- Decrease probability of future wrongdoing

Restorative Justice depends on three hidden premises:
- Wrongdoing is an infringement of individuals and connections
- Infringement makes commitments on the individuals who submitted the damage
- The focal commitment is however much as could reasonably be expected to make things right.

KEY ELEMENTS IN RESTORATIVE JUSTICE SYSTEM

The following are the key elements in the Restorative Justice System-

(a) Supporting and Helping Victims:
The Restorative Justice model can bolster a procedure where the victims perspectives and interests are considered, where they can take an interest and be dealt with reasonably and deferentially and get restoration and redress. By taking an interest in the process of decision making, victims have a voice and role in figuring out what might be an acceptable and adequate outcome for the procedure.

(b) Repairing of Relationship:
A key component of Restorative Justice is that the reaction to criminal conduct centers around something beyond the offender and the offense. Peacemaking, dispute resolution and remaking connections are seen as the essential strategies for accomplishing equity and supporting the victim, the guilty party and for advantages of the community.

(c) Denouncing Criminal Conduct:
Reprobation is accomplished in an increasingly adaptable way, taking into account the guidelines, yet in addition the individual conditions of the offense, the person in question and the wrongdoer. It is intended to be a positive reprobation inside a bigger procedure, as opposed to being the sole focal point of the intervention.

(d) Encouraging Duty:
The restorative procedure is intended to make it simpler for guilty parties to accept dynamic accountability for their conduct and its results. A restorative procedure moves from simply evaluating legitimate blame to endeavoring to decide responsibility regarding a contention and its outcomes. This has the impact of expanding out the procedure past the particular episode, victim and, guilty party. The way wherein this duty will prompt action, in specific conciliatory sentiments and rebuilding, is left to be resolved through the process itself and not through the programmed utilization of some broad lawful principles.

---


(e) **Focused Reclamation:**
Instead of underlining the principles that have been broken and the punishment that ought to be forced, restorative approaches will in general focus basically on the people who have been hurt. A Restorative Justice process doesn't really preclude all types of sanctions (for example fine, imprisonment, probation), yet its attention remains solidly on remedial, forward looking results. The helpful result that is being sought after is the fixation, to the extent it is possible, of the damage brought about by the wrongdoing by giving the guilty party a chance to make significant reparation. Restorative Justice is relationship based and makes efforts towards results that satisfy a wide range of stakeholders.

(f) **Reducing Recidivism:**
The past conduct of people and its results are clearly a focal point of the restorative procedure, yet so is the wrongdoer's future behavior. A guilty party's endeavor as it identifies with their future conduct is typically a fundamental element of agreements arrived at through intercession or other restorative processes. Changing or transforming the guilty party through the restorative process is a real goal of the procedure as is the avoidance of recidivism. The request that guilty parties comprehend and acknowledge duty regarding the results of their activities is unmistakably intended to influence the guilty parties' future conduct. It is comprehended that the community

---

1609 Id.
1613 Id.
attempts to reintegrate wrongdoers into the community.\footnote{Messmer H and Otto H-U, \textit{Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation} \textit{International Research Perspectives} (Springer 1120).}  

- **RESPECT** which means regarding and treating all parties to a wrongdoing as people with poise and worth. The reason here is to make the procedures related to Restorative Justice - non-criticizing, monetarily feasible and socially practicable process.\footnote{Shapland J, Robinson G and Sorsby A, \textit{Restorative Justice in Practice: Evaluating What Works for Victims and Offenders} (Routledge 2011).}

- **SOLIDARITY** which implies the experience of help and connectedness, even in the midst of critical difference or dissimilarities.

→ Likewise, Howard Zehr and Van Ness\footnote{Zehr H, \textit{The Little Book of Restorative Justice} (Langara College 2016).} proposed 10 \textit{operational values} to control how restorative procedures are overseen:

1. **Amends**: Those liable for the mischief coming about because of the offense are likewise liable for fixing it to the degree conceivable.
2. **Assistance**: Affected parties are helped in turning out to be contributing individuals from their communities in the outcome of the offense.
3. **Collaboration**: Affected parties are welcome to discover solutions through common, consensual decision-making in the repercussions of the offense.
4. **Empowerment**: Affected parties have a genuine chance to take an interest in and successfully impact the response to the offense.
5. **Encounter**: Affected parties are allowed the chance to meet the other parties in a protected situation to examine the offense, hurts, and the proper reactions.
6. **Inclusion**: Affected parties are welcome to legitimately shape and participate in restorative procedures.
7. **Moral Education**: Community guidelines are strengthened as values and standards are considered in deciding how to react to specific offenses.
8. **Protection**: The parties' physical and emotional wellbeing is essential.
9. **Reintegration**: The parties are given the methods and chance to rejoin their networks as entire, contributing individuals.
10. **Resolution**: The issues encompassing the offense and its outcome are tended to, and the individuals influenced are upheld, as totally as conceivable.

→ Of these 10, four appear to be of specific significance: encounter, amends, reintegration and inclusion. On the off chance that Restorative Justice were a structure, we would hope to discover them as key highlights or basic components in its architecture.

\textbf{COST EFFECTIVENESS OF RESTORATIVE JUSTICE SYSTEM}

→ As far as cost effectiveness is concerned, proof from research recommends the capability of Restorative Justice to fundamentally decrease the expenses identifying with criminal equity.\footnote{Sherman LW and Strang H, \textit{Restorative Justice: the Evidence} (Smith Institute 2007).} In view of an investigation directed by Shapland et al. (2008), it was inferred that there is an 8 to 1 cost benefit ratio, i.e., for each £1 spent
on Restorative Justice conferencing, the criminal equity framework will spare £8 from decreased expenses of reconviction.\textsuperscript{1619} Research by Sherman and Strang (2007) found that if just one out of each 50 helpful restorative meetings forestalled somebody serving one year in custody, then that by itself would take care of the expenses of every one of the 50 conferences. In light of surveys of excellent worldwide and New Zealand research, the New Zealand Ministry of Justice (2016a) reasoned that Restorative Justice can be financially effective, especially when substituting traditional court forms.

Another method for estimating cost viability could be to take a look at expenses to the wellbeing and social government assistance frameworks. On the one hand, that victim recuperation is helped or sped up by Restorative Justice, there will be lesser requests on general practitioners, social workers, advocates, psychological wellness administrations and government assistance frameworks. It might be practically difficult to quantify this measurably, however the draw out monetary reserve funds that would accumulate from a systematic, widespread and tailored utilization of restorative practices would certainly be significant (Angel et al., 2014; Sherman and Strang, 2007). As the House of Commons Justice Committee (United Kingdom) expressed in a report in 2016, "there is clear proof that Restorative Justice can offer some value for money by both lessening reoffending rates and giving substantial advantages to victims".\textsuperscript{1620}

\textbf{STAKEHOLDERS IN THE RESTORATIVE JUSTICE SYSTEM}

McCold and Wachtel\textsuperscript{1621} have given the structure of stakeholders which is material during the procedure of Restorative Justice. This structure recognizes the interests of the immediate stakeholders, those most influenced by a particular offence, from those in an indirect way affected.

Victims are harmed by the loss of control they experience because of the offense. Victims need to recover a sense of individual power.\textsuperscript{1622} This strengthening is the thing that changes victims into survivors. Offenders harm their relationships with their own community of care by breaking their trust. To recover that trust, they should be engaged to take obligation regarding their wrongdoing.\textsuperscript{1623} The community of care, the individuals who have an passionate association with a victim or offender,\textsuperscript{1624} for example, guardians, companions, other relatives, educators, employers and others, meet their individual needs by guaranteeing that

\textsuperscript{1622} Zehr H, Changing Lenses a New Focus for Crime and Justice (Herald Pr), p-54.
something be done about the wrongdoing, that the illegitimacy be recognized, that valuable advances are being taken to forestall further offending, and that victims and wrongdoers be reintegrated into their communities.1625

→ The circuitous stakeholders, the individuals who are not emotionally associated with the principals yet who live close by or are individuals or authorities of government, religious, social or business associations whose zone of duty incorporates the spot or individuals influenced by the occurrence, must not take the contention by usurping the duties of those straightforwardly affected.1626 These indirect stakeholders have a duty to help and encourage procedures in which the direct stakeholders decide for themselves the result of the case. Such procedures will reintegrate both victims and offenders, construct critical thinking communities and fortify the civil society.1627

PARTICIPANTS IN THE RESTORATIVE JUSTICE PROGRAM

→ The following are the participants involved in the Restorative Justice Program:

1. VICTIM(S) - Adequate amount of consideration must be given to help victims, both during and after the procedure. Victims must be permitted to recount to their story. This may require that victims talk first in any discussion so as to maintain a strategic distance from an imbalanced focus on the guilty party's issues. Where it is possible, victims ought to be accompanied by, and have progressing support from, relatives and companions, and, where accessible, victim support organizations.

2. OFFENDER(S) - In numerous frameworks, a guilty party can be handled through the entire equity framework, from arrest, detainment, trial, condemning, and maybe incarceration, without talking in excess of a couple sentences.1628 The Basic Standards of Restorative Justice listed by the United Nations1629 suggests that remedial procedures should just be utilized where there is adequate proof to accuse the guilty party and with the free and deliberate assent of the guilty party, who ought to have the option to pull back such assent at any time during the procedure. Guilty parties likewise expect access to legal advice/information.

3. POLICE - Suitable alternatives for police association in restorative programs include:1630 Filling in as a referral source to restorative projects; Explaining the restorative equity procedure to victims, guilty parties and different members; Participating among numerous others in a community based procedure; Facilitating restorative equity forms; Conducting Restorative Justice meetings and sessions; Using remedial methodologies for settling debates and strife at street level; Playing a job in observing the execution of restorative agreements and reporting breaches, if any.

1625 Id.
1626 Id.
1630 Supra Note 24.
4. **PROSECUTORS** - In both civil law and common law nations, prosecutors can allude cases to restorative procedures, the latter role having all the more as of late developed with the order of enactment in various jurisdictions. In setting up restorative procedures in a jurisdiction, it is basic that prosecutors be associated with conversations from the start and that training and data be given to prosecutors so the two of them can comprehend the standards of Restorative Justice and welcome the potential benefit of the utilization of this alternative for juveniles and adults.

5. **DEFENCE LAWYERS** - Defense legal counselors can play a significant job in disclosing to guilty parties the potential advantages of taking an interest in a Restorative Justice process. They can help guarantee that the rights of the guilty party are secured and that opportunities of appeal stay accessible. They can additionally assume a critical job in cases including juvenile offenders by guaranteeing that their consent to take part in a Restorative Justice process is well-informed and uninhibitedly given.

6. **JUDICIARY** - In both civil law and common law countries, individuals from the judiciary can play a key role in alluding to a restorative process, taking an interest themselves in the restorative procedure, as well as checking the understandings that are reached. Even in circumstances where a wrongdoer has entered a guilty plea or has been seen as liable of an offense, the appointed authority may suspend the imposition of a sentence pending the result of a restorative process.

7. **CORRECTIONAL DEPARTMENT** - As of late there has been expanding utilization of restorative procedures in redresses and all through the different phases of the execution of the guilty parties’ sentence. Restorative procedures can likewise be utilized inside correctional establishments to alleviate the more negative traits of life inside correctional organizations, including giving forums to offenders to determine their disparities calmly and to create an elective method for dispute resolution.

8. **COMMUNITY MEMBERS** - Numerous remedial equity approaches accommodate an extended job for network individuals in the goals of contention and in developing understandings to be clung to by guilty parties and once in a while additionally by different gatherings. It has been noticed that ‘network association‘ can assign individualistic methods of cooperation or an incredible or national lobby.

9. **SOCIAL WORKERS** – Restorative Justice and social work share various standards and objectives, as the two of them look to stem brutality and to address the

---

1632 Id.
1634 Id.
1635 Zehr H, Changing Lenses a New Focus for Crime and Justice (Herald Pr).
1636 Id.
agony related with harm.\(^{1639}\) During restorative practices, social workers analyze the routes through which they can contribute and explore more advantages of Restorative Justice in the areas of school settings, communities, domestic violence, homicide, prisons, child welfare and gerontology.\(^{1640}\)

10. **NGOs - Non-Governmental Organizations (NGOs)** have assumed a significant job in the improvement and execution of Restorative Justice programs around the world. Their viability in making restorative discussions stems, in enormous measure, from their being nearer to the communities than criminal justice work force generally are.\(^{1641}\) Similarly, NGOs may have more credibility now and again than the police, public prosecutors and judges and be held in higher regard.\(^{1642}\) NGOs may likewise collaborate with government, yet in doing as such, ought to guarantee themselves that doing so won't compromise the trustworthiness of the program or bring political or different agendas into the process.\(^{1643}\)

**COMPARISON OF RESTORATIVE JUSTICE SYSTEM WITH THE TRADITIONAL JUSTICE SYSTEM**

- **Retributive justice vs. Restorative Justice**

An extraordinary philosopher of law Conrad Brunk has contended that on the hypothetical or rational level, retribution and restoration are not the total opposites that we regularly assume.\(^{1644}\) Indeed, they share a lot of commonalities. An essential objective of both retributive hypothesis and remedial hypothesis is to vindicate through reciprocity, by "evening the score." Where they vary is in what successfully will right the balance. Both retributive and restorative approaches of equity recognize a fundamental moral instinct that a balance has been lost by the offense. Thus, the victim merits something and the guilty party owes something. They vary, nonetheless, on the currency that will satisfy the commitments and right the parity. Retributive hypothesis accepts that torment will vindicate, yet actually that is frequently counterproductive for both victim and wrongdoer. Restorative Justice Approach, on the other side, contends that what really vindicates is affirmation of victims' damages and needs joined with an active exertion to urge wrongdoers to assume liability, make right the wrongs and address the reasons for their conduct.

- **Criminal Justice vs. Restorative Justice**

Restorative Justice advocates may dream of a day when equity is completely restorative yet whether this is practical is disputable, at least in the short term. Increasingly feasible, maybe, is when restorative justice is the standard while some type of the lawful or criminal justice framework gives the reinforcement or option. Attainable, maybe, is the point where all our ways to deal with equity are restoratively-oriented. Society must have a framework to sift through "reality" as well as can be expected when individuals are rejecting obligation.


\(^{1640}\) *Id. at 63.*


\(^{1642}\) *Id.*


We should have a procedure that focuses on societal requirements and commitments that go past those of the immediate stakeholders. We additionally should not lose those characteristics that the legitimate framework at its best speaks to: the standard of law, fair treatment, a profound respect for human rights and a precise advancement of law.

**RESTORATIVE PRACTICES IN CRIMINAL JUSTICE SYSTEM IN INDIA**

- The concept of restorative Justice is not alien to the criminal justice system in India. The following are some of the legislative provisions which reflect certain principles and practices of Restorative Justice:
  1. Article 141 of the Indian Constitution
  2. Section 357, 358 & 359 of the Criminal Procedure Code, 1973

- This can also be substantiated with the help of certain recent case laws adjudicated by various High Courts of India:
  1. In the case of State of Gujarat Vs. Raghavbhai Vashrambhai and Ors. the Honorable Justice J.N. Bhatt of Gujarat High Court had opined :-
    "In a domain of victimology the choice is one of the view point towards satisfying the structure and objective and restorative justice to the survivors of wrongdoing."
  2. In the case of Bhagwan Kaur vs. State of Punjab, the honorable Justice Viney Mittal of Punjab and Haryana High Court has observed :-
    “Compromise in present day social orders is the sine qua non of congruity and efficient conduct. It is the spirit of equity and if the intensity of the court is utilized to improve such a trade off, which thus, upgrade the social harmony and decreases erosion, at that point in really is "best hour of justice."
  3. In the case of Anupam Sharma Vs. NCT of Delhi and Another, the honorable Justice Pradeep Nandrajog of Delhi High Court had observed :-
    “Restorative Justice might be utilized as an equivalent word for mediation. The objective and nature of restorative justice targets reestablishing the interest of the person in question. Contribution of the victim in the settlement procedure is welcome during the process of restorative justice. It is a procedure of deliberate arrangement and fixation, straightforwardly or in a roundabout way between the wrongdoer and the victim.”

Thus, various Judges of High Courts in India have realized the importance of Restorative Justice in the criminal justice system of India.

**CRITICISMS OF THE RESTORATIVE JUSTICE SYSTEM**

- From a purely conceptual perspective, Restorative Justice System has the following criticisms:
  1. There is ambiguity in the conceptual definition(s) of Restorative Justice emphasizing indirectly on privatizing crime.
  2. Restorative Justice deals with the penalty, not fact finding phase of the criminal process.
  3. The results in the Restorative Justice Process Outcomes are modest but patchy.

**CONCEPTUAL DILEMMA**

The assorted variety of definitions and understandings adds to extravagance in the Restorative Justice field, yet it is likewise a source of disarray and even clash. Numerous scholars like Braithwaite emphatically alert against building up firm meanings of Restorative Justice or setting standards for its practice, because of a paranoid fear of cutting off development or responsiveness to local needs. Simultaneously, many concur that we do need to characterize Restorative Justice clearly enough to recognize it from retribution and rehabilitation, from different sorts of alternative equity forms, and from strikingly awful practice.

- **RESTORATIVE JUSTICE OR PRIVATIZING CRIMES?**
  The restorationist vision is established in a center hypothetical postulate, to be specific, the privatization of the criminal scene. Here Restorative Justice is appropriately radical. It moves from a state-center meaning of crime and mulls over a transfer of power from the state. It re-conceptualizes the criminal scene as a private clash between people that has upset the relations of community within the influenced portion of the populace. The basic task of Restorative Justice is to patch those relations, without the interruption of the ultimately violent resources of the state which is by all accounts a troublesome one in a populated nation like India.

- **RESTORATIVE JUSTICE- A PUNITIVE ORIENTED CONCEPT**

At the point when we consider the typical types of Restorative Justice practices, for example, family group conferences (in New Zealand), family or community meetings (in Australia), police restorative cautioning schemes (in selected jurisdictions in England and North America), circles and condemning circles (North America), or enhanced types of victim offender intervention (North America and a few European nations), we see that all are worried about what an equity practice ought to be after an individual has admitted committing an offense. Restorative Justice doesn't address if a 'crime' happened or not, or whether a suspect is 'guilty' of a wrongdoing or not. Rather, it centers around 'what shall we do' after an individual concedes that s/he has committed an offense.

- **MODEST BUT PATCHY RESULTS IN THE RESTORATIVE JUSTICE PROCESS OUTCOMES**
  Furthermore, it may not be conceivable to have value or proportionality across Restorative Justice results, when results should be designed from the specific sensibilities of those in Restorative Justice encounter. Therefore, we ought to anticipate modest and patchy outcomes' to be the standard, not the exception.

Restorative Justice has not yet changed the essential course of the criminal justice framework. It has demonstrated to be an increasingly powerful option in contrast to

---

jail or different types of punishment; however it can create alleviated outcomes regarding victim cooperation and reparation for injury. Victims' issues are most certainly not settled for the last time by the arrangements made accessible to them. The objectives of reparation and mending set forward in these methodologies must not limit us to a shortsighted perspective on their necessities and the perplexing procedures related with their recuperation. Restorative Justice has incredible potential for the parties in question and for the community. In any case, it isn't the magic answer for all shades of malice. It stays a choice for certain violations in certain conditions and under certain conditions. It must not be viewed as a modest type of equity or imagine equity. Nor must it trivialize the legitimate requests of victims.

1. **THE MISCONCEPTION OF RESTORATIVE JUSTICE BEING SOFT ON CRIME**

There is a mainstream observation that Restorative Justice is "soft on crime" and that a harder reaction is expected to prevent criminal behavior. Some prefer to see the job of Restorative Justice being constrained to minor offenses and cases involving children and others figure Restorative Justice ought not be applied at all when reacting to wrongdoing. Some argue that victims could feel strain to partake in a Restorative Justice discourse and in this way be denied access to justice. As for the observation that Restorative Justice may be a "simple way" for guilty parties, proof proposes that wrongdoers think that it is all the more testing to meet the victim eye to eye and understand the effect of their bad behavior than going to Court.1652

2. **LEGISLATION**

It is vital to understand that an enactment that accommodates Restorative Justice approaches isn't, on its own, adequate to guarantee full execution. Elements identified with the particular legislative provision, funding, public perspectives and mindfulness, cooperation between providers, and trust in the process would all be able to affect the quality and availability of Restorative Justice administrations. However, more fundamental are the philosophical contrasts that exist between a restorative approach to deal with accomplishing equity, and the overarching ethos of retribution. In any case, there are a few different ways to advance more extensive utilization of Restorative Justice out in the open and social life.1653

3. **AWARENESS RAISING**

The advancement of Restorative Justice requires methodologies for bringing issues to light among justice officials, for example, police, prosecutors and judges, just as for cultivating expanded comprehension about Restorative Justice in the public arena for the most part. Criminal justice authorities should know about Restorative Justice projects and

---


1653 Id.
fundamental Restorative Justice standards to facilitate appropriate referral to administrations. Citizens should be increasingly educated about the choices accessible to them in settling their disputes or clashes. This doesn't block the regular alternatives of Court and sanctioning but the community should be made mindful of procedures and avenues of access to administrations, which might be more likely to address their need for affirmation, emotional and psychological repair, and the chance to offer some kind of changes.1654

4. RELATIONSHIP WITH INDIGENOUS COMMUNITIES & INTERCULTURAL ASPECTS
In ongoing decades, the expansion in the utilization of Restorative Justice within the customary criminal justice frameworks has brought up issues about the degree to which indigenous people enjoy access to Restorative Justice forms in manners that addresses their issues. This is additionally aggravated by the broad and profoundly ingrained issues of structural racism or systemic bias present in Western Criminal Justice Frameworks that have been generally reported. A few researchers have identified that indigenous individuals have less access to diversionary and Restorative Justice measures because of systemic inclinations within criminal justice processes. Additionally, people with an immigrant foundation or displaced people are reported as having more troubles in getting access to Restorative Justice services. Proof of this sort focuses to the basic need to dispose of any type of discrimination that compromises equal access to justice, including access to processes of Restorative Justice.1655

1654 Id.
1655 Id.
1656 “A Restorative Framework for Community Justice Practice” (Restorative Justice)

→ Other challenges include problems of definition, problems of institutionalization, problems of displacement, problems of relevance, etc.

❖ SUMMATIONS AND SUGGESTIONS
→ In this research, an endeavor has been made to discover the possibilities of Restorative Justice – satisfying victim without defaming the guilty party. The study concluded the following features of Restorative Justice:-
  - Focuses On Victims' Needs
  - Focuses On The Affected Community's Needs
  - Offenders To Assume Active Responsibility
  - Reintegrate Victims And Offenders Into The Community
  - No Social Stigma
  - Community Based
  - Inexpensive

→ According to Harry Mika and Howard Zehr,1656 we are working towards restorative justice when we:
  - Focus on the damages of bad behavior more than the standards that have been broken;
  - Show equivalent concern and promise to victims and wrongdoers, including both during the process of justice;
  - Work towards the reclamation of victims, enabling them and reacting to their necessities as they see them;
  - Support guilty parties while urging them to comprehend, acknowledge and carry out their commitments;
  - Recognize that while commitments might be hard for guilty parties, they ought not be expected as damages and they should be attainable;

Provide open doors for exchange, immediate or backhanded, among victims and guilty parties as fitting;

Involve and enable the influenced community through the equity procedure, and increment its ability to perceive and react to community bases of wrongdoing;

Encourage joint effort and reintegration, as opposed to compulsion and segregation;

Give thoughtfulness regarding the unintended outcomes of our activities and programs; and

Show regard to all parties (including victims, wrongdoers and equity associates).

**CONCLUSION**

There are different originations of Restorative Justice. For certain, its substance lies in encounters, the remedial procedures wherein parties may find healing. For other people, it is a perspective on equity that demands that the mischief brought about by wrongdoing be fixed to the degree conceivable. For still others, it is a method for living that changes associations with others and with the social and physical condition. We hold to the reparative origination with the understanding that repair is best achieved when the parties themselves cooperate in deciding how that ought to be done.

Restorative Justice reacts to specific crimes by accentuating recuperation of the victim through review, vindication, and mending, as well as recompense by the wrongdoer through reparation, fair treatment, and habilitation. It looks for forms through which parties can find reality with regards to what occurred and the damages that came about, to identify the injustices included, and to concede to future activities to fix those damages. It thinks about whether explicit wrongdoings propose the requirement for new or reconsidered systems to forestall wrongdoing.

Restorative procedures and practices hold their remedial character as they mirror the qualities and standards of Restorative Justice. In the event that these qualities and standards are lost or damaged, at that point the result may not exclusively be less remedial, it might be ruinous. Four of these qualities are especially significant: *encounter, amends, reintegration, and inclusion.*

Restorative Justice looks to forestall wrongdoing by expanding on the qualities of community and the legislature. The community can construct harmony through solid, comprehensive, useful, and just connections. The government can bring order through reasonable, compelling, and miserly use of power. Restorative Justice stresses the need to fix past damages in order to get ready for what's to come. It tries to accommodate guilty parties with those they have hurt, and it approaches communities to reintegrate victims and offenders. Restorative Justice has huge contributions to make as a structure for understanding the work of peace building and as an establishment for the advancement of practices, procedures and organizations aimed at accomplishing it.

****
THE GROWING NEED FOR LEGALLY ADOPTING THE PATIENTS’ RIGHTS CHARTER IN INDIA

By Nandini Menon
From Gujarat National Law University

ABSTRACT
The need to address the issue of protecting and promoting the Rights of Patients has become more evident now than ever with the onset of the COVID-19 pandemic caused by the novel Coronavirus. In a war-like situation where humans are afraid not of any weapons but of other human beings, there is a dire need to have a calibrated set of legal remedies so that the patients and people associated with them can avail them for addressing their grievances. The patients suffering from severe and fatal diseases caused by many factors (one of them being the COVID-19 pandemic) already face a lot of issues in their recovery process, be it the extremely expensive hospital fees or the medications or the lack of access to the healthcare system and the lack of legal remedies should not be one of them. Therefore, there is an increasing need of promoting patient advocacy, especially in the Indian context where there are a considerable number of cases of patient abuse (both reported and unreported) in one way or the other. On these lines, this article tries to assess and further explain the rights of the patients covered in the ‘Charter of Patients’ Rights’ [prepared by the National Human Rights Commission (NHRC)] along with the responsibilities of the patients and caretakers, the grievance redressal mechanisms and its components and certain implementation mechanisms for the same. All these rights invariably have a tinge of Human Rights because NHRC considers Patients’ Rights as Human Rights, and rightly so. The Nobel Peace Laureate, Elie Wiesel has observed that one cannot, one must not, approach public health today without looking into the human rights component. According to

INTRODUCTION
The first draft of the ‘Charter of Patients’ Rights’ was released by the Government of India through the Ministry of Health and Family Welfare (MoHFW) on August 30, 2018 and it was placed in the public domain for inviting comments and suggestions from the citizens till September 30, 2018. This Patients’ Rights Charter has been prepared by the National Human Rights Commission (NHRC) so that it can be used as a reference document by the Government of India. This Charter encompasses all the basic rights which should be enjoyed by the patients and it draws its reference from various national and international documents and legislations and provisions; with the main objective of consolidating all of them into a single document. The second main objective of this Charter is to make the citizens aware about their rights as patients and also about the responsibilities of the Government and healthcare service providers in this regard. All in all, this Charter covers 17 basic rights that could be claimed by all the patients along with the responsibilities of the patients and caretakers, the grievance redressal mechanisms and its components and certain implementation mechanisms for the same. All these rights invariably have a tinge of Human Rights because NHRC considers Patients’ Rights as Human Rights, and rightly so. The Nobel Peace Laureate, Elie Wiesel has observed that one cannot, one must not, approach public health today without looking into the human rights component.


1658 ibid.

Justice J S Verma, right to health is a basic human right with universal recognition and therefore it is the responsibility of the State to achieve the highest attainable standards of health for its citizens. The health and human rights experts have a collective responsibility to conceptualize and carry forward these agenda. Although principles and provisions related to Human Rights do apply to patients, there is a need to codify the Rights of Patients as a specific category and so this Charter was seen as an important first step in that direction. The brief overview of the rights and responsibilities tabled in the Charter is given below.

RIGHTS OF PATIENTS AS TABLED IN THE CHARTER OF PATIENTS’ RIGHTS
The Patients’ Rights Charter mentions 17 basic rights of patients to be protected by the Government. These rights have been collected and consolidated from various domestic law provisions as well as from various international documents. These rights can be broadly describes as under-

1. Right to Information-
All the patients and their representatives have a right to get relevant information about the illness- its cause and nature, the course of treatment, the estimated costs for the same and most importantly the complications included in the procedure of treatment, if any. The patients have the right to know the costs or expenses of their treatment i.e. the fees of the physician, before such treatment is rendered or before such operation is performed and not after the completion of the same and neither when the same is under way. Along with this, the patients also have the right to information with regard to the medication involved in the treatment process - its name, dosage, side effects, etc. The patient, his relatives or his responsible friends have a right to know about the exact gravity of the condition of the patient- neither exaggerated nor minimized, such as will serve the best interest of the patient and his family. All the information should be in a language which is preferred by the patient and in a way that is easily comprehensible to the patient.

2. Right to Records and Reports-
Every patient and his/her representative/caretaker have the right to access a copy of their case papers, patient records, investigation reports and detailed bill. The patient also has a right to have access to these documents of records within 72 hours of the request made for such records. This right is not only protected under the Right To Information Act 2005 but also under the regulation of Indian Medical Council (which is based on world medical ethics) and also as a ‘consumer’ under the Consumer Protection Act 1986 (now 2019).

3. Right to Emergency and Medical Care-
The State is under an obligation to preserve the life of each person and so it was
rightly held by the Supreme Court that it is the duty of every physician/doctor to provide services with due expertise for protecting a patient’s life. Correspondingly, it becomes the right of a patient to get emergency medical care. It is also important to note that the fees for such emergency medical care should not be demanded or asked in advance and the patient has the right to such emergency medical care irrespective of his/her paying capacity, because the status of a critically ill patient would be similar to that of a poor person. The physician has a right to make a choice as to whom will he serve but in case of an emergency, he should not deny service and he should also not deny treatment to a patient arbitrarily.

4. Right to Informed Consent-
Prior to tests or treatment procedures, informed consent of the patient must be necessarily taken. The doctor should obtain the consent before performing the operation on the patient, in writing, either from the patient himself/herself or from the husband or wife or from the parent or guardian of the patient if s/he is a minor. The consent for clinical trials must be obtained in a specific format.

5. Right to Confidentiality, Human Dignity and Privacy-
Every patient has the right to personal dignity, right to privacy during examination and treatment as well as the right to confidentiality about their medical condition. It is the right of a female patient that a female practitioner be present at the time of examination of that female patient by a male practitioner. Duty to maintain confidentiality has its origin in the Hippocratic Oath. It is on the basis of the above that the International Code of Medical Ethics has laid down as under: “A physician shall preserve absolute confidentiality on all he knows about his patient even after his patient has died.” The right to confidentiality can be breached and the information related to the medical condition of the patient can be revealed by the doctor/physician only under certain circumstances which are as follows- (a) In a Court of Law under order of the Presiding Judge; (b) in circumstances where there is a serious and identified risk to a specific person and / or community; and (c) notifiable diseases.

6. Right to Second Opinion-
Every patient has the right to seek second opinion from a doctor/physician of the patient’s choice and correspondingly the treating hospital has a duty to provide records and information. The American Medical Association also reiterates the same. The hospital authorities must ensure that the quality of care is not adversely affected just because the patient chooses to seek a second opinion and any kind of

---

1671 Pravat Kumar Mukherjee v Ruby General Hospital & Ors [2005] (National Consumer Disputes Redressal Commission).
1672 Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, s 2.1 & 2.4.
1673 Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
1674 Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, s 7.16.
Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
1676 Mr. ‘X’ v Hospital ‘Z’ [1998] (Supreme Court).
1678 Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
1679 Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
discriminatory practice by them would result in the violation of Human Rights by them.\textsuperscript{1680}

7. Right to Transparency in Rates, and Care According To Prescribed Rates Wherever Relevant-
All the patients have a right to know the rates and fees of the services provided by the clinical establishment and the same shall be displayed by the clinical establishment at a conspicuous place in the local as well as in English language.\textsuperscript{1681} Such rates must be within the range determined and issued by the Central Government in consultation with the State Governments.\textsuperscript{1682} In all such cases, the physician must see to it that the interests of the patients are given utmost priority and that his/her own financial interests are not in conflict with the medical interests of the patients.\textsuperscript{1683} In addition to this, it must also be seen that all the medicines, devices, implants and services listed under National List of Essential Medicines (NLEM) by the Government of India and the World Health Organization must be provided to patients at rates not higher than the prescribed rates or the Maximum Retail Price (MRP).\textsuperscript{1684}

8. Right to Non-Discrimination-
The right to non-discrimination is a very essential right which should be made available to the patients especially to patients suffering from HIV/AIDS. The patients suffering from HIV/AIDS have a right against discrimination on any ground—occupational, educational, healthcare services, etc. and there are penal provisions for the same.\textsuperscript{1685} Moreover, it is a right of each and every patient to receive care and treatment without any form of discrimination based on the nature of their disease, religion, gender, age, etc. and correspondingly it becomes the duty of the hospital authorities to orient and train their staff accordingly.\textsuperscript{1686}

9. Right to Safety and Quality Care According to Standards-
All patients have the right to safety and security in the hospital premises as well as the right to quality care which match the standards set out by the Standard Treatment Guidelines (as may be determined by the Central Government from time to time in consultation with the State Governments).\textsuperscript{1687} The patients are entitled to get quality uniform care be it in any setting—outpatient units, wards, Intensive Care Units (ICUSs), procedure rooms and operation theatres.\textsuperscript{1688} There should be no medical negligence or deficiency in service delivery system on the part of the hospital management. For this, the organization should take measures and actions to prevent or reduce the risk of Healthcare Associated

\textsuperscript{1681} Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8; Clinical Establishments (Central Government) Rules 2012, s 9(ii).
\textsuperscript{1682} Clinical Establishments (Central Government) Rules 2012, s 9(ii).
\textsuperscript{1683} Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, s 1.8.
\textsuperscript{1684} Drugs (Prices and Control) Order 2013.
\textsuperscript{1685} Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017, s 3.
\textsuperscript{1686} Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
\textsuperscript{1687} Clinical Establishments (Central Government) Rules 2012, s 9(iii).
Infection (HAI) among patients as well as employees.\textsuperscript{1689}

10. Right to Choose Alternative Treatment Options if Available-

The right to choose among available options is a basic right of every consumer\textsuperscript{1690}, which invariably includes patients. Thus, each and every patient has the right to choose an alternative treatment if that option is available to him/her.\textsuperscript{1691} Correspondingly, it is the duty of the hospital management and authorities to provide the patient with the available alternative treatment/management options, so that the patient can make an informed choice and decide what works best for him/her, and also to receive due acknowledgement from them for the same.

11. Right to Choose Source for Obtaining Medicines and Tests-

By convention, doctors may advise the patient to buy medicines from a particular pharmacy or to go for conducting tests at particular laboratories. The patient, in such and all other cases, has the right to choose\textsuperscript{1692} the source for obtaining medicines and tests according to his own preference and so it becomes the duty of the doctor to inform the patient about the same. In no way should it adversely influence the quality of care provided to the patient.

12. Right to Proper Referral and Transfer, which is free from Perverse Commercial Influences-

There should be proper policy and procedure to guide the transfer-in of patients to the organization and to guide the transfer-out/referral of unstable patients to another facility in an appropriate manner.\textsuperscript{1693} Also, when any patient is referred to a specialist, a case summary of the patient should be given to the specialist.\textsuperscript{1694} It is also desirable that health centres have ambulance facilities for the transport of patients for timely and assured referral.\textsuperscript{1695} Such referral process should in no way be influenced by commercial considerations of any sort.

13. Right to Protection for Patients Involved in Clinical Trials-

Clinical trials and medical research involving human beings as subjects of the trial/research are necessary for the development and progress in the field of medical sciences. Every human being involved in such trials or research should have right to be protected. This kind of trial or research involving humans should be continued only if the benefit-risk profile remains favorable.\textsuperscript{1696} It is necessary that in all clinical trials, an informed consent be obtained in writing from each study subject, and such consent/refusal should not affect the quality of care provided to the patient.\textsuperscript{1697} It is the duty of the physician to protect the life, health, dignity, integrity, right to self-determination, privacy and confidentiality rights of the patient on whom the medical research is being conducted.

\textsuperscript{1689} Ibid.
\textsuperscript{1690} The Consumer Protection Act 2019.
\textsuperscript{1691} Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
\textsuperscript{1692} The Consumer Protection Act 2019.
\textsuperscript{1693}(nabh.co,2015)
\textsuperscript{1694} Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, s 3.6.
\textsuperscript{1695} Indian Public Health Standards (IPHS) Guidelines for Primary Health Centres.
\textsuperscript{1696} 'Handbook For Good Clinical Research Practice (GCP)'
\textsuperscript{1697} Amended Drugs and Cosmetics Act 1940 and Rules 1945, Schedule Y.
conducted because medical research is subject to ethical standards that promote and ensure respect for all human subjects and protect their health and rights. The patient should also be informed about the name of the drug/intervention that is undergoing trial along with the dates, dosage and duration of administration. In addition to this, the patients also have a right to free medical management of adverse events, financial or other assistance, compensation to dependents (in cases of death) and ancillary care in case of illness whether related to the trial or not and for this, institutional mechanisms may also be established.

14. Right to Protection of Participants Involved in Biomedical and Health Research

Any biomedical or health research which involves humans should be carried out with the prior approval of the Ethics Committee. The research should be conducted with the informed consent of the subject and the rights to life, dignity, privacy and confidentiality of the individuals and community should be protected and additional safeguards should be taken involving vulnerable population. The medical research involving human subjects should only be conducted if the benefit of the outcome outweighs the risks to the subjects and those benefits should be made accessible to individuals, communities and populations wherever relevant. Research participants are entitled to compensation in case of any direct harm - be it physical, psychological, social or legal or economic.

15. Right to Take Discharge of Patient, or Receive Body of Deceased from Hospital

Each patient has the right to take discharge and no patient can be detained on the grounds of non-payment or dispute in payment of hospital charges. Similarly, the caretakers of the patient have the right to take the deceased’s body and they cannot be refused on the grounds of procedural grounds. In cases of unlawful detainment, the criminal law provisions can be invoked. A Division Bench of Justice Satyaranjan Dharmadhikari and Justice Bharti Dangre said, “There have been instances wherein hospitals have detained patients over non-payment of bills. This act of the hospitals of detaining a person who is declared fit otherwise, is illegal.” Therefore, it becomes utmost important that the patients are aware of their rights so as to prevent them from such and other similar harassment. On these lines, the Bombay High Court had also directed the

---

1699 Protocols and Good Clinical Practice Guidelines issued by Central Drugs Standard Control Organisation, Directorate General of Health Services, Govt. of India.
1700 National Ethical Guidelines for Biomedical and Health Research Involving Human Participants 2017.
1702 National Ethical Guidelines for Biomedical and Health Research Involving Human Participants 2017.
1703 Indian Penal Code 1860, s 340-342.
Maharashtra Government to see to it that the patients become aware of their rights so that such harassment is not meted out to the poor patients.  

16. Right to Patient Education-
Every consumer has the right to consumer education, and consequently every patient has the right to patient education. This right includes the right to receive education about the rights and responsibilities of the patients, cost estimates, third party services (e.g. Insurance), redressal mechanisms, information related to disease and its condition, proposed line of treatment, complications involved, alternative treatments, benefits, progress in the condition, etc. Education related to all these and other aspects must be given (by the hospital management and treating physician) according to standard procedure in a language that the patients understand and in an easily comprehensible manner.

17. Right to be Heard and Seek Redressal-
As every consumer has the right to be heard and to seek redressal for their grievances, patients (being consumers themselves) also have the right to do the same. The patients have a right to give feedbacks and file complaints in a user-friendly manner. The patient has the right to file a complaint through the concerned authority and thereafter has a right to fair and prompt hearing of his/her grievance. In addition to this, the patient also has the right to appeal and can also insist that the outcome be provided in writing. There should be a robust tracking and tracing system to ascertain the status of complaint resolution of the patients.

RESPONSIBILITIES OF THE PATIENTS
Like the patients have certain rights which need to be protected and promoted, they also have certain responsibilities which need to be fulfilled. Some of those responsibilities are as under-

1. The patient should not conceal relevant material information regarding his/her family/medical history and should disclose the same with honesty and transparency.

2. The patient is expected to cooperate with the doctor/s during the process of examination and diagnostic tests by following all instructions and to comply with the doctor’s treatment plan, which includes being punctual for appointments.

---

1705 ibid.
1707 Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), s 10.2 & 10.22.
1712 ibid.
1715 Clinical Establishment Act Standards for Hospital (LEVEL 1A &1B), Annexure 8.
and having realistic expectations from the treatment plan.\footnote{1716}

3. The patient is also expected to take responsibility for his/her own health and do everything in his/her capacity for the same.\footnote{1717}

4. The patient should respect the dignity of the doctor as well as the hospital medical staff and should follow the rules and regulations laid down by that particular hospital.\footnote{1718}

5. Whatever maybe the grievance, the patient should see to it that s/he never resorts to violence.\footnote{1719}

6. It is also the responsibility of the patient to pay the hospital bills on time and to never ask for surreptitious bills and false certificates.\footnote{1720}

7. To report fraud and wrong-doing,\footnote{1721} it is also one of the responsibilities of the patient and an important one indeed.

**CERTAIN MECHANISMS FOR THE IMPLEMENTATION OF THE PATIENTS’ RIGHTS CHARTER IN INDIA AND GRIEVANCE REDRESSAL MECHANISMS**

The Patients’ Rights Charter prepared by the National Human Rights Commission (NHRC) not only mentions the rights and responsibilities of the patients but also recommends mechanisms on how to implement the same. These recommendations with respect to the implementation mechanisms are as under-

1. First and foremost, the NHRC recommends the Government of India, all State Governments and the Administration of all Union Territories to adopt this Charter and to incorporate it in the existing range of regulatory frameworks in the healthcare sector. Further, the NHRC recommends that in all Human Rights violations cases concerning patients, this Charter should be used as a reference document by all the State Human Rights Commission (SHRC).\footnote{1722}

2. Once the Patients Rights’ Charter is officially adopted in India, the doctor/physician/hospital should display this Charter in English, Hindi and other local languages, prominently and at multiple locations in the healthcare provider setting.\footnote{1723}

For the grievance redressal mechanisms, NHRC recommends that every clinical establishment shall set up an Internal Grievance Redressal Mechanism, where the complaints can be filed by patients with the Internal Grievance Redressal Officer who shall assess the complaint and try to find a solution for the same keeping in view this Charter.\footnote{1724}

4. If the patient’s grievance is not resolved through the above mentioned redressal mechanism, then s/he can approach the district level regulatory authorities established for this purpose under the relevant legislations in various States, and

\footnote{1717} ibid.
\footnote{1718} ibid.
\footnote{1719} Clinical Establishment Act Standards for Hospital (LEVEL 1A & 1B), Annexure 8.
\footnote{1721} ibid.
the concerned authority can pass an executive order accordingly. An attempt to resolve the dispute through mediation should be made within 30 days from the date of receipt of appeal.\textsuperscript{1725}

5. In case if the grievance is still not addressed/resolved, the patient may go to the State Council of Clinical Establishments which has the power to hear appeals against the order of the District authorities.\textsuperscript{1726} The State Council of Clinical Establishments can then set up a sub-committee with 3/5 members or a cell with multi-stakeholder participation (to be known as ‘Healthcare Grievance Redressal Authority’) which can pass appropriate binding orders within 30 days of the date of receipt of appeal.\textsuperscript{1727}

6. NHRC recommends that apart from the aforementioned remedies, the patient can also approach the State Medical Council or the Consumer Forums to seek disciplinary action or financial compensation respectively.

7. The patient can also approach the Civil/Criminal Courts and thus the NHRC recommends that the creation of a separate grievance redressal mechanism for the violation of the Patients’ Rights Charter should in no way affect the legal remedies (both civil and criminal) available under the existing legal framework.

CONCLUSION

With the increasing frequency of news related to the violation of Human Rights of patients, all over the country, flashing on our news channels and printed in our newspapers almost each day, it can be necessarily concluded that India needs to adopt the Patients’ Rights Charter legally, to incorporate it into the existing legal framework and to use it as an enabling reference document for the grievance redressal of the patients. Moreover, the Charter should also be given a binding effect. The Charter should also include penal provisions in cases of non-compliance with the Charter. A States’ obligation to support the right to health – including through the allocation of “maximum available resources” to progressively realize this goal - is reviewed through various International Human Rights mechanisms, such as the Universal Periodic Review, or the Committee on Economic, Social and Cultural Rights. In many cases, the right to health has been adopted into Domestic law or Constitutional law,\textsuperscript{1728} which all the more makes it the responsibility of the State to ensure protection and promotion the rights of the patients. With India being one of the nations where the Supreme Court has declared the Right to Health as a Constitutional Fundamental Right under Article 21 and has also acknowledged it to be the State’s obligation/responsibility in many landmark cases \textit{[Paschim Banga Khet Mazdoor Samity v. State of West Bengal (1996), State of Punjab v. Mohinder Singh Chawla (1997), State of Punjab v. Ram Lubhaya Bagga (1998)]}, it becomes increasingly important to legally protect and promote the rights of the patients and the adoption of this Charter legally is an appropriate step in this direction.

\textit{****}

\textsuperscript{1725} ibid.
\textsuperscript{1726} The Clinical Establishments (Registration And Regulation) Act 2010, s 8(5)(d).
ANALYSING FREE SPEECH IN A DEMOCRACY: A COMPARATIVE ANALYSIS OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 19(1)(A) OF THE INDIAN CONSTITUTION

By Nandini S Patil  
From Alliance School of Law, Alliance University, Bengaluru

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”

- John Milton

ABSTRACT

Freedom of speech, Supreme Court Justice Benjamin Cardozo declared years ago, “is the matrix, the indispensable condition of nearly every other form of freedom.” James Madison while introducing the First Amendment was certain that this was the source “for all the triumphs which have been gained by reason and humanity over error and oppression.” On the other hand, the right to freedom of speech and expression in India is guaranteed under Article 19(1)(a) of India’s Constitution. However, the Constitution also allows the government to limit freedom of expression in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. Freedom of speech is an essential element in a democracy, it therefore becomes important that citizens of a democracy be allowed to express themselves. In a democracy diversity in thought and opinion play an important role. It is imperative for a democratic government to tolerate dissent and opposition.

This paper aims at analysing the free speech in a democracy and then goes on to analyse the right under the First Amendment of the US Constitution and under Article 19(1) (a) of the Indian Constitution. It also touches upon the federalist papers, and the Constituent assembly debates to understand the debates that gave us the right of freedom of speech in the two biggest democracies. It further aims to bring about a comparative analysis of the same by taking into consideration the ambit of free speech when it comes to freedom of press and restrictions to the right.

I. INTRODUCTION

Freedom of speech is the bulwark of democratic government. This freedom is crucial for the proper functioning of a democracy. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succour and protection to all other liberties. It has been variously defined as “the basic human right” and a “natural right”. It has been truly said that it is the mother of all other liberties.

I729 Freedom of speech is important in assessing contemporary governments. Governments are called “democracies” when freedom of speech and press in guaranteed to the citizens.1730 States that do not allow dissent and criticism are often considered as


1730 Frederick Schauer, ‘Free Speech and the Argument from democracy’ (1983) 25 American Society for Political and Legal Philosophy 241
undemocratic. When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme as it was held by the Apex Court of India. On a communal level, free speech facilitates majority rule, on the other hand on an individual level, speech is a means of participation. Freedom of speech is the right to defiantly, robustly and irreverently speak one’s mind just because it is one’s mind. Free Speech is often called as the indispensable tool of self-governance in a democratic society. Because it is free speech what makes a democracy a true democracy. Democracy is based essentially on free debate and open discussion. How a Government treats dissent tells us a lot about how truly free the citizens are. Dissent being an important facet of free speech. As the Apex Court of India has held there is no freedom of speech if there is no freedom after speech. This gives us an understanding that freedom of speech is not merely about protecting the freedom to speak, but also the freedom after one has spoken.

Freedom of Speech and expression means the right to express one’s own beliefs and opinions freely by words of mouth, writing, printing, pictures or any other mode. In modern time it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all time. The first principle of a free society is an unrestrained flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays significant role in the development of that particular society and ultimately for that state. It is one of the most valuable fundamental liberties guaranteed against state suppression or regulation.

This paper in the next chapters will attempt at discussing the ambit and scope of freedom of speech in America as guaranteed by the First Amendment in contrast to Freedom of Speech guaranteed by Article 19 of the Indian Constitution. The freedom of speech in India is not absolute as there are restrictions laid down in the Constitution itself. The First Amendment may seem absolute as it has no explicit restrictions but however these restrictions evolved by judicial decisions, the same will be discussed in the chapters that follow.

II- THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Among other cherished values, the First Amendment protects freedom of speech. The First Amendment to the United States Constitution says that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the

---

1731 Frederick Schauer, ‘Free Speech and the Argument from democracy’ (1983) 25 American Society for Political and Legal Philosophy 241
1732 Shreya Singhal v. Union of India, (2015) 5 SCC 1
1733 www.lincoln.edu. Available at <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> accessed 13 March 2020
1734 www.lincoln.edu. Available at <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> accessed 13 March 2020
1735 www.lincoln.edu. Available at <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> accessed 13 March 2020
1736 Maneka Gandhi v. Union of India, (1978) 1 SCC 248
free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."1738

The Freedom of speech is solidly entrenched in the Constitution of the United States. The First Amendment’s protection of speech and expression is central to the concept of American political system. This provides for a direct link between free speech and a spirited democracy. Madison1739 believed that the freedoms guaranteed by the First Amendment were the source “for all the triumphs which have been gained by reason and humanity, over error and oppression.”1740 Justice Louis Brandeis wrote in 1927 that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”1741 As held by the Courts, the First Amendment preserves “an uninhibited market place of ideas which will ultimately prevail…it is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences.”1742

1738 U.S. Constitution, Amendment I
1739 James Madison was a Virginia representative who went on to become the fourth president of the United States. He created the Bill of Rights which was introduced to Congress in 1789 and adopted on December 15, 1791, includes the first ten amendments to the U.S. Constitution.
1741 Whitney v. California, 274 U.S. 357 (1927)
1742 Kleindiest v. Mandel, 408 US 753, 763 (1972)
1743 Available at https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press> accessed 16 March 2020; Madison had also proposed language limiting the power of the states in a number of respects, including the freedom of press. Although passed by the house, the amendment was defeated by the Senate.

2.1. Adoption of the First Amendment
The debate in the House is unenlightening with regard to the meaning the members ascribed to the speech and press clause, and there is no record of debate in the Senate.1743

Madison’s version of this clause provided: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”1744 The special committee made a few changes to Madison’s draft, to make it read “The freedom of speech and of the press, or the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.”1745

The Senate further rewrote it to read: “That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”1746 Subsequently, the religion amendment to add a right of the people to instruct their representatives

1743 Available at <https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press> accessed 16 March 2020; Madison had also proposed language limiting the power of the states in a number of respects, including the freedom of press. Although passed by the house, the amendment was defeated by the Senate.
clauses and these clauses were combined by the Senate. In the course of the debate, Madison warned against the dangers that would arise from discussing and proposing abstract propositions, of which the judgement may not be convinced.\textsuperscript{1747}

It appears as though Madison advanced the libertarian views from the following, “If we advert to the nature of republican government,” Madison told the House, “we shall find that the censorial power is in the people over the government, and not in the government over the people.”\textsuperscript{1748} But however it is important to mention that, Madison during the revolutionary period had promoted prosecution of loyalist speakers and the burning of their pamphlets.\textsuperscript{1749}

It is evident that Jefferson held to the Blackstonian view, writing to Madison, Jefferson said: “A declaration that the Federal Government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed.”\textsuperscript{1750}

Jefferson further suggested that the free speech clause should read as follows: “The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations.”\textsuperscript{1751}

The Blackstonian view with respect to the freedom of press can be understood to mean that liberty of press is essential to a free state and to lay down restrictions on this would mean to destroy the freedom of press. But if one publishes what is improper, mischievous, or illegal, he would face consequences.\textsuperscript{1752} This lays down the foundation of restrictions to free speech when it is of the nature that may cause harm to another individual or the State.

The Blackstonian view was a general consensus that prevailed at that time and perhaps what influenced the minds of the ones that drafted, voted for and ratified the First Amendment. It is thus evident that the First Amendment was influenced by the Blackstonian view, especially in the suggestions of Jefferson which included restrictions. Although Jefferson’s suggestions included restrictions the Amendment as we see today does not have any restrictions in the text but however, the Courts have read in various restrictions on this right to free speech which makes the right a non-absolute right.

The United States was founded on the cantankerous revolutionary principles of John Locke, who taught that the sovereignty always rests with people, who

\textsuperscript{1747} Available at <https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press> accessed 16 March 2020

\textsuperscript{1748} 4 Annals of Congress 934 (1794); Available at <https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press> accessed 16 March 2020


never surrender their natural right to protest, or even revolt, when the state exceeds the limits of legitimate authority. Speech is thus a means of “people-power”, through which the people may ferret out corruption and discourage tyrannical excesses.\footnote{www.lincoln.edu. Available at< http://www.lincoln.edu/criminaljustice/hr/Speech.htm> accessed 16 March 2020} The free speech as we see today is one of the most celebrated rights of the American Citizens. This free speech has been extended to freedom of expressing symbolic speech which includes burning the flag in a protest.\footnote{Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990)}

Freedom of speech is also an essential contributor to the American belief in a government confined by a system of checks and balances, operating as a restraint on tyranny, corruption and injustice.\footnote{www.lincoln.edu. Available at <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> accessed 16 March 2020} Freedom of speech in the American context is not merely linked to grandiose ends as the service of the democracy or the search for the truth. Freedom of speech has more value on a more personal and individual level. Freedom of speech is a part of the human personality itself, a value intimately intertwined with human autonomy and dignity. In the words of Justice Thurgood Marshall in the case of, \textit{Procunier v. Martinez}, \footnote{Procunier v. Martinez, 416 US 396 (1974)} “…The First Amendment serves not only the needs of the polity but also those of the human spirit, a spirit that demands self-expression.”\footnote{www.lincoln.edu. Available at <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> accessed 16 March 2020}

While the Language of the First Amendment appears absolute, freedom of speech is not an absolute right. According to the Current State of Law, freedom of speech does not protect the following: Speech that contains “fighting words” (insulting or abusive language that is likely to cause “an immediate violent response.”); Obscenities; Language or communication directed to inciting, producing or urging the commission of a crime; Defamation, words or communication that are false and untrue and intended to injure the character and reputation of another person; Abusive, obscene or harassing telephone calls; Loud speech and loud noise meant by volume to disturb others or to create a clear and present danger of violence. The restrictions shall further be discussed in chapter four of this paper.

### III- ARTICLE 19 (1) (a) OF THE INDIAN CONSTITUTION

Article 19(1) (a)\footnote{Constitution of India, 1950, art. 19 – “Protection of certain rights regarding freedom of speech etc(1) All citizens shall have the right (a) to freedom of speech and expression; available at <https://indiankanoon.org/doc/237570/> accessed 17 March 2020} guarantees to all citizens of India the right to “ freedom of speech and expression. Article 19(1) (a) corresponds to the First Amendment of the US Constitution. The Courts in USA have to spell out the restrictions on this right from case to case as the language of the First Amendment does not have any restrictions.\footnote{M P Jain, \textit{Indian Constitutional Law} (7th edn, Lexis Nexis 2016) 1020; Also see \textit{Secretary, Ministry of Information and Broadcasting v. Cricket Association, Bengal}, AIR 1995 SC 1236: (1995) 2 SCC 161 for a discussion on the First Amendment} Unlike the Constitution of the US the Indian Constitution clearly lays down the restrictions to free speech in the Constitution. It is pertinent to mention that out of the several rights enumerated in clause (1) of Article 19, the right in sub-
clause (a) is not merely a right of speech and expression but a right to freedom of speech and expression. The concept of such freedom is to be able to speak and express freely, the thoughts and opinion of one person. The significance of this freedom can be understood from the Preamble to the Constitution where it ensures to every citizen liberty of thought, expression, belief, faith and worship.

3.1. The Constitutional Assembly Debate
The Constituent Assembly Debate on Article 13 was held on 1 December 1948. During the debate Shri Damodar Swarup Seth argued that one significant omission is that of the word “press” he further mentioned that although it may be argued that the freedom of press is implied but he was of the opinion that the freedom of press should be mentioned separately. Prof. K. T. Shah was of the opinion that said that the words “of thought and worship; of press and publication be added.”

Shri K. M. Munshi argued to amend clause (2) of Article 13. In Shri K. M. Munshi’s opinion this would make the meaning clear. He was also in favour to omit the word sedition form clause (2) of Article 13.

Sardar Bhopinder Singh argued that the rights should not be restricted and all peaceful opposition should get full opportunity.

\[\text{1760} \text{ Dharam Dutt v. Union of India, (2004) 1 SCC 712} \]

\[\text{1761} \text{ Article 13 of the Constituent Assembly debate Corresponds to the present-day Article 19. Art. 13, (1) Subject to the other provisions of this article, all citizens shall have the right- (a) To freedom of speech and expression; (2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law relating to libel, slander, defamation, sedition or any other matter which offends against decency, or morality or undermines the authority or foundation of the State. Available at https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/article%2019 accessed 17 March 2020} \]

\[\text{1762} \text{ Shri Damodar Swarup Seth argued that: “Article 13, as at present worded, appears to have been clumsily drafted. It makes one significant omission and that is about the freedom of the press. I think, Sir, it will be argued that the freedom is implicit in clause (a) that is, in the freedom of speech and expression. But, Sir, I submit that the present is the age of the Press and the Press is getting more and more powerful today. It seems desirable and proper, therefore, that the freedom of the Press should be mentioned separately and explicitly.” Available at Constituent Assembly of India Debates Volume VII, 2 December 1948, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020} \]

\[\text{1763} \text{ Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020} \]

\[\text{1764} \text{ Shri K. M. Munshi argued to amend clause (2) of Article 13. In Shri K. M. Munshi’s opinion this would make the meaning clear. He was also in favour to omit the word sedition form clause (2) of Article 13.} \]

\[\text{1765} \text{ Sardar Bhopinder Singh argued that the rights should not be restricted and all peaceful opposition should get full opportunity.} \]

\[\text{1766} \text{ Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020} \]
Shri Seth Govind Das was of a view that although he prefers that these rights should be granted to people without restrictions, the Conditions in our country. He was also of the opinion that it is a matter of great pleasure that an amendment was introduced to remove the word sedition. Shri Sardar Hukum Singh perceptively noted that the phrase “in the interest of”, placed just ahead of the substantive restrictions, would serve to reduce the Supreme Court’s area of review to very narrow sliver. Pandit Thakur Dass Bhargava suggested a way out: add “reasonable” before “restrictions.”

Although the Constituent Assembly was unanimous on the incorporation of the rights to freedom in the Constitution, the Assembly saw skirmishes that primarily revolved around the clauses that allowed existing and future laws to restrict the rights that is peaceful and not seditious should get full opportunity, because the opposition is a vital part of every democratic Government. To my mind, suppression of lawful and peaceful opposition means heading towards fascism” available at Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020

Sardar Singh Argued that: “The question of whether a legislation was “in the interest” of the security of the State, for instance, would restrict the Court to merely being able to interrogate its bona fides. “The proviso in article 13(3),” he argued, “has been so worded as to remove from the Supreme Court its competence to consider and determine whether in fact there were circumstances justifying such legislation.”

From the debates it is clear that the arguments raised were in respect to include freedom of press expressly in the Article and with respect to the reasonable restrictions i.e., whether these restrictions would take make the freedom insignificant. Members were concerned that the restrictions in 13(2) would limit the freedom guaranteed in 13(1)(a). However, the Article along with the Restrictions was adopted with certain amendments.

November 4, 1948 was a critical date in India’s Constitution-making process. It was on this day that the President of the Constituent Assembly, Dr. B.R. was called upon to formally introduce the draft...
Constitution of India in the Constituent Assembly. Dr. Ambedkar made a long and comprehensive speech that would become famous and widely cited in the post-independent India while introducing the Draft. During the speech at one point, and only at this point Dr. Ambedkar felt it necessary of invoking a judgment in his support. The topic was the restriction of Fundamental Rights. The Judgment was the opinion of the United State Supreme Court in *Gitlow v. New York*. This was one Judgment that Ambedkar felt would justify the Drafting Committees’ restrictions on Fundamental Rights. With regard to Freedom of Press, Dr. B.R Ambedkar said:

> “the press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager is merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of press.”

After renumbering and rearranging the sections of the bill, freedom of speech and expression was included in article 19. Thereafter, certain amendments were made to the article. The first amendment in 1951 removed the words slander and libel that was included previously. The sixteenth amendment act in 1963 added sovereignty and integrity of India’ to clause (2) of article 19. At present, freedom of speech and expression is not absolute as per the constitution itself. Article 19(2), imposes certain reasonable restrictions in exercising this right in the interests of security and integrity of the nation.

It becomes clear that Article 19(1)(a) preserves the essence of free speech i.e., the ability to think and speak freely. The freedom of speech under Article 19(1)(a) includes the right to express one’s view and opinions at any issue through any medium, for example, by words, writing, printing, picture, film, movie, etc. This is however subject to reasonable restrictions under Article 19(2). Article 19(2) provides that the Government can frame laws to impose violent change, the Supreme Court said: “It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”

---

1772 286 US 652 (1925) : Ambedkar Stated the following : ‘It is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance… in support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court. It would be sufficient to quote one such judgment of the Supreme Court in justification of the limitation on the right of free speech contained in Article 13 of the Draft Constitution. In *Gitlow Vs. New York* in which the issue was the constitutionality of a New York "criminal anarchy" law which purported to punish utterances calculated to bring about

---

Dr. Ambedkar’s Speech in the Constituent Assembly Debate accessed <https://www.constitutionofindia.net/blogs/b_r_ambedkar_introduces_the_draft_constitution_in_the_constituent_assembly> accessed 17 March 2020
reasonable restrictions in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency or morality and contempt of Court, defamation and incitement to an offence.

IV- INDIA v. AMERICA: AN ANALYSIS

The two greatest democracies of the world America and India rightly recognise the right of freedom of speech and expression. While Article 19(1)(a) corresponds to the American First amendment both the countries have almost similar provisions in their constitutions. However, the provisions of the US Constitution have two notable features i.e., Freedom of Press that is expressly mentioned and there are no restrictions in the First Amendment. Although there are no restrictions in the language of the text, as discussed above, the Courts of the United States have read in restrictions to this freedom from case to case.

As far as India is concerned, although there is no mention of “freedom of press” in Article 19(1)(a) but this has been done by the Judiciary which has widely interpreted Article 19(1)(a) to include freedom of press in considered an essential in a democracy. The Supreme Court of India speaking about the freedom of press in the case of Indian Express Newspapers v. Union of India1775 has observed that:

“The expression freedom of the press” has not been used in Article 19 but it is comprehended within Article 19(1)(a). Article 19(1)(a) encompasses within itself the freedom of press. The expression means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Freedom of the press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.”

The Judiciary has held that the Freedom of Press is regarded as a “species of which freedom of expression is a genus”.1776 Therefore, the press cannot be subjected to any special restrictions which cannot be on any private citizen and at the same time the press cannot claim any privilege (unless conferred specifically by law), as such, as distinct from other citizens. The freedom of press is a cherished right in every democracy. It brings out ideas, opinions and ideologies to the people, rightly described as the fourth estate of a democracy.

On the other hand, in America, a very liberal approach has been adopted with regard to freedom of press. The Constitution framers provided the press with extensive, expansive and wide-ranging freedom. This freedom was considered necessary to the establishment of a strong, independent press sometimes called “the fourth branch” or “the fourth pillar of the democracy”. The American Jurisprudence on freedom of press has reaffirmed that “freedom of expression upon public questions is secured by the First

1775 (1985) 2 S.C.R. 287

1776 Sakal Papers v. Union of India, AIR 1962 SC 305: (1962) 3 SCR 842
Amendment, so that “debate on public issues should be uninhibited, robust and wide-open.”

The Supreme Court of America has played an effective role in shaping the First Amendment in such a manner by spelling out restrictions from time to time, since the text of the First Amendment does not spell out restrictions. The Freedom of speech in the US is extended to freedom not to speak specifically, the right not to salute the Flag; it includes the right of students to wear black armbands to school to protest a war; to contribute money (under certain circumstances) to political campaigns; to advertise commercial products and professional services (with some restrictions); to engage in symbolic speech (e.g., burning the flag in protest); While the Court has held that these would fall under the ambit of Freedom of speech, the Courts have held that Freedom of speech does not include the right to incite actions that would harm others (e.g., shouting of ‘fire’ in a crowded theatre); to make or distribute obscene materials; to burn draft cards as an anti-war protest; of students to make an obscene speech at a school-sponsored event; of students to advocate illegal drug use at a school-sponsored event. Further the American Court also recognises defamatory speech or publication i.e. slander and libel as a restriction to free speech. Thus it can be seen that, despite the guarantee of free speech in the United States, the judiciary has not treated the speech as absolute and has put restrictions on this freedom.

On the other hand, in the Indian Context the reasonable restrictions are laid down in the text of Article 19(1) (a) as on one hand it is necessary to maintain and preserve freedom of speech and on the other hand no freedom can be absolute. Article 19(2) provides that the Government can frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency or morality and contempt of Court, defamation and incitement to an offence. The Courts have also the right to Freedom of speech encompasses in its ambit the right to silence; the right to receive information; the right to express one’s convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner (telephone tapping has been held violative of Article 19(1)(a)). When it comes to advertisements, the supreme Court considered the question as

---

1777 West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
1778 Tinker v. Des Moines, 393 U.S. 503 (1969)
1782 Schenck v. United States, 249 U.S. 47 (1919)
1783 Roth v. United States, 354 U.S. 476 (1957)
1785 Bethel School District #43 v. Fraser, 478 U.S. 675 (1986)
1786 Morse v. Frederick, 551 U.S. 393 (2007)

1788 Noise Pollution (V) in re, (2005) 5 SCC 733
1789 PUCL v. Union of India, (2003) 4 SCC 399, The Supreme Court held that the right of the Citizens to obtain information on matters relating to public acts flows from the Fundamental right enshrined in Article 19 (1)(a) (1997) 1 SCC 301. The Supreme Court has held telephone tapping to be violative of Article 19 (1)(a) unless it falls within the grounds of restrictions falling under Article 19(2)
to how far advertisements are protected under Article 19(1)(a) in *Hamdard Dawakhana v. Union of India*\(^{1791}\). The Court held that an advertisement promoting drugs and commodities, the sale of which is not in public interest could not be regarded as propagating any idea and, as such, could not claim the protection under Article 19(1)(a). But, however the Supreme Court has modified its view in the case of *Bennet Coleman and Co. v. Union of India*.\(^{1792}\) The Court held that “for a democratic press the advertising “subsidy” is crucial. With the curtailment in advertisements, the price of the newspaper will be forced up and this will adversely affect its circulation which is a direct interference with the right of freedom of speech and expression under Article 19(1)(a).” It can be seen how the Judiciary has played an active role from time to time in interpreting the right to Freedom of speech and ensuring that the Citizens are not deprived of this very fundamental right.

In India the freedom enshrined under Article 19(1)(a) does not merely promote the basic rights of the Citizen but also certain democratic values. The Supreme Court has time and again held that it is possible that a right does not find express mention in Article 19 and yet it may be covered by the clauses therein as mentioned in the abovementioned paragraph.

**CONCLUSION**

What is undeniable is that freedom of speech is essential ingredient of a democracy. Free speech plays a critical role in promoting and maintaining democracy. There can be no doubt that the First Amendment is the most cherished right of every American. Chapters II and III of this paper have laid down the intent of the framers of the Constitution and what is the pertinent is the unanimous opinion of the framers about this right being an absolute necessary in a democracy although certain changes were proposed to the draft text. The First Amendment has however been drafted in a broad manner the text does not contain any reasonable restrictions nonetheless the U.S. Courts while interpreting the First Amendment have read in restrictions on a case to case basis as discussed. It may be said that the freedom of speech in America is broader than freedom of speech in India. For example the Law in the U.S. not only recognises the right to a National Flag but has gone to the extent where it recognises the flag burning as an expression of free speech but the Indian Constitution does not approve the latter part as envisaged in the U.S. Constitution.\(^{1793}\) Unlike the U.S. the Indian Constitution lays down reasonable restrictions and laws such as sedition etc which inhibits the citizens from speaking as they wish. The rich Jurisprudence shows that the restrictions imposed by the American Courts are similar to the reasonable restrictions in the Indian context. The only real difference when compared can be said that the degree of free Speech in US is broader than the free speech in India.

**REFERENCES**

**PRIMARY SOURCES**

**Indian Cases**

1. *Bennet Coleman and Co. v. Union of India*, AIR 1973 SC 106

**Footnotes:**

\(^{1791}\) AIR 1960 SC 554

\(^{1792}\) AIR 1973 SC 106; See also *Sakal Papers v. Union of India*, AIR 1962SC 305

3. Hamdard Dawakhana v. Union of India, AIR 1960 SC 554
7. Noise Pollution (V) in re, (2005) 5 SCC
8. Peoples Union for Civil Liberties v. Union of India, (1997) 1 SCC 301
10. Sakal Papers v. Union of India, AIR 1962 SC 305: (1962) 3 SCR 842

U.S. Cases
17. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)

SECONDARY SOURCES
Articles
10. Syed Aqa Raza, ‘Freedom of Speech and expression’ as a Fundamental right in India and the Test of Constitutional Regulations” [2016]
Miscellaneous


Websites

1. globalfreedomofexpression.columbia.edu
2. Indiankanoon.org
3. www.constitutionofindia.net
4. www.freedomforuminstitute.org
5. www.jstor.org
6. www.law.cornell.edu
7. www.lincoln.edu
8. www.scconline.com

****
GIAN KAUR V. STATE OF PUNJAB:  
CASE COMMENT

By Neha Samji  
From Symbiosis Law School, Pune

BACKGROUND:
The right to die is always a disputed one where the question of suicide is debated both in the ethical as well as the legal sphere. This question was first disputed in the P. Rathinam v. Union of India1 where the court held suicide to be acceptable and permissible but this judgement was later overruled in Gian Kaur v. State of Punjab2. All the judgements were based on various interpretations derived from Art.21 of the Indian Constitution which deals with ‘Right to life and personal Liberty’. Thus, it aims to determine the legality of S.306 & S.309 of IPC which punishes abettors to suicide as well as the person who attempted suicide respectively.

INTRODUCTION:
The appellant Gian Kaur and her husband Harbans Singh were convicted by the Trial court for abetting their daughter-in-law, Kulwanti Kaur, to commit suicide. This was challenged in the court and were convicted for this heinous crime under S.306 & S.309 of IPC. After several appeals were dismissed in the lower courts, the appellants filed special leave petition stating S.306 & S.309 to be unconstitutional. However, the court withheld the decision that S.306 and S.309 of IPC are constitutionally valid. Thereby, the court struck down P. Rathinam’s case.

This case deals with the widely debated Articles of the Constitution. It has provided a basis for other interpretations with regards to ‘right to die’. This case has contributed to the enhancement of human well-being by declaring it to be the responsibility of the state to protect the people as well as their lives. This case aims to derive the scope of right to die, validity of the provisions of IPC and its constitutionality with respect to the Constitution. Therefore, this case has contributed to comprehend the articles of the constitution and expand the subject of constitutional law.

ANALYSIS:
This case has widened the concept of right to life. There were two important issues addressed in this case. Firstly, whether the S.306 of IPC was in accordance to the Art.14 and Art.21 of the Constitution. Secondly, whether S.309 of IPC was constitutionally valid. While, the court gave the judgment for the same, the following principles were laid down:

- Extinction of life is not included in protection of life and said that ‘right to life’ does not include ‘right to die’. Right to Life is a natural right, embodied in Art. 21 but suicide is an unnatural termination and therefore, inconsistent and incompatible with the concept of ‘right to life’.

- The Court makes it clear that the “Right to Life” denotes the right to lead a life with dignity. The word “Life” in Art.21 does not refer to the mere survival, but it mainly emphasizes the right to live with human dignity and personal liberty until his/her natural end of life.

- There is sentencing discretion and hence all suicides are not treated alike, therefore S.306 & S. 309 of IPC is not violative of Art.14. While, it is not violating Art.21 of the Constitution as well, because it prevents

---

1 Rathinam v. Union of India, 1994 SCC (3) 394
2 Gian Kaur v. State of Punjab, AIR 1996 SC 1257

www.supremoamicus.org
to take away one’s own life as everyone has ‘right to life’.

Therefore, on the above grounds, Gian Kaur and her husband were awarded 3 years imprisonment and fine of Rs. 2000 each for abetting their daughter-in-law to commit suicide. All the judges had common opinion and thus none dissented with the judgment which makes it a strong case law. After this judgment was passed, it has been restated in the famous case of Aruna Ramachandra Shanbaug v Union of India and Ors1796. Thus, this case has stood as a landmark judgement.

COMMENT:
The Supreme Court has examined various case laws, articles as well as books in-depth and adopted a line of reasoning in delivering this judgment. The line of reasoning is that S.309 of IPC is constitutional as ‘right to life’ does not include ‘right to die’. The arguments were fundamentally based on the presumption that killing or attempting to kill oneself is a criminal wrong. Abetment of suicide is made punishable in accordance to the procedure established by law and is provided with any exceptions. I support the judgment with respect to S.309 of IPC in its totality but I have a dissenting opinion with regard to the criminalization of attempt to commit suicide under S.306 of IPC. The decision of one wanting to live or not is fundamentally inherent and thereby making it an ‘inalienable’ right. Moreover, a person who tries to kill himself do not infringe upon others rights so it is not said to violate any public policy.

The above said judgment states that ‘Art.21 confers a natural right which cannot be unnaturally curtailed’1797. Thereby, the people should be given a choice to live or die and should not be forced to live due to the fear of being punished for death. Furthermore, the person who had attempted to kill himself must be suffering already and punishing him, would be making him suffer more. Such a person has to be counselled rather than being put behind bars.

Therefore, as Arthur Schopenhauer said, “There is nothing in the world to which every man has a more unassailable title than to his own life and person”1798. So attempt to commit suicide has to be de-criminalized.

CONCLUSION:
Suicide can be act done to kill oneself and such suicidal tendencies can occur in all age groups. One’s life is precious but its premature termination is not acceptable by the society. The person attempting to commit suicide needs care and rehabilitation rather than imprisonment. The government has to enact legislations which regulates the ‘right to die’ by providing reasonable reformatory measures, where he can be reformed and be given a new life. Hence, ‘right to die’ is at one’s own will and shall not be forced to continue with life. Thus, it shall be included as a fundamental right and it shall not be curbed unreasonably but should be regulated in a reasonable manner.

Moreover, this instant case signified the importance of an individual’s life and emphaised more on leading a dignified life. It most importantly validated the S.309 of the IPC. It also decided upon the consistency of S.306 and S.309 with Art.14.

---

1796 Aruna Ramachandra Shanbaug v Union of India and Ors, (2011) 4 SCC 454
1797 Ibid 2
1798 http://www.antipsychiatry.org/suicide.htm
as well as Art.21 of the Constitution. It had also contributed to add a different interpretation to Art.21 of the Constitution. Hence, this judgement is a landmark judgement of ‘right to life’.

*****
DOMESTIC VIOLENCE: THE SHADOW PANDEMIC

By Prabhav Pandey
From Army Institute of Law

A house comprises many members belonging to a family and the eldest member of the family is considered as the ‘karta’ or ‘head’ of the family who is usually a male member. The women and the girls of the family never get to that point in their lives when they can be made the ‘head’ or ‘caretaker’ of the family. Their lives are mostly restricted to doing what the ‘head’ of the family wishes or desires her to do. And when they do not comply with it, there arises the “need” for violence known as domestic violence. In a more elaborate manner, domestic violence is the violence inflicted upon the wife by her husband. This violence can be both physical as well as mental.

This injustice has been existing in society for a long time and although there have been various provisions against it, it is still being committed in various households. The major provision which was enacted by our Parliament was the Protection of Women from Domestic Violence Act, 2005. This was enacted to curb the rising rate of domestic violence being committed in almost every household in India. Though, it has not been able to completely eradicate the problem but, yes, it has made such offence punishable for those who would try committing it.

THE NEED FOR A LAW AGAINST DOMESTIC VIOLENCE

The scope of this piece of legislation has been expounded in plethora of judgments by the High Courts and the Supreme Court in India. For instance, in a recent judgment, the High Court of Gujarat in the case of Bhartiben Bipinbihai Tamboli v. State of Gujarat and Ors. while extensively discussing the provisions under the Domestic Violence Act remarked that:

“Domestic violence in this country is rampant and several women encounter violence in some form or the other or almost everyday. However, it is the least reported form of cruel behaviour. A woman resigns her fate to the neve ending cycle of enduring violence and discrimination as a daughter, a sister, a wife, a mother, a partner, a single woman in her lifetime. This non-retaliation by women coupled with the absence of laws addressing women’s issues, ignorance of the existing laws enacted for women and societal attitude makes the women vulnerable. The reason why most cases of domestic violence are never reported is due to the social stigma of the society and the attitude of the women themselves, where women are expected to be subservient, not just to their male counterparts but also to the male relatives. Till the year 2005, the remedies available to a victim of domestic violence were limited. The women either had to go to the civil court for a decree of divorce or initiate prosecution in the criminal court for the offence punishable under Section 498-A. In both the proceedings, no emergency relief is available to the victim. Also, the relationships outside the marriage were not recognized. This set of circumstances ensured that a majority of women preferred to suffer in silence, not out of choice but of compulsion. Having
regard to all these facts, the Parliament thought fit to enact Domestic Violence Act. The main Object of the Act is protection of women from violence inflicted by a man or/and a woman. It is a progressive Act, whose sole intention is to protect the women irrespective of the relationship she shares with the accused. The definition of an aggrieved person under the Act is so wide that it is taken within its purview even women who are living with their partners in a live-in relationship.”

**FILING COMPLAINT UNDER THE DOMESTIC VIOLENCE ACT**

Section 2(a) defines “aggrieved person” as ‘any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent’.

The Domestic Violence Act not only covers those women who are or have been in a relationship with the abuser/accused but it also covers those women who have lived together in a shared household and are related by ‘consanguinity, marriage or through a relationship in the nature of marriage or adoption’.

Even those women who are sisters, widows, mothers, single women, or living in any other relationship with the abuser are entitled to legal protection under the Domestic Violence Act.

**SHARED HOUSEHOLD**

Shared household has been defined under the Domestic Violence Act itself as:-

“A household where the person aggrieved lives or at any stage, has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household”.

In the case of S.R. Batra & Anr. v. Smt. Taruna Batra The Supreme Court with reference to definition of shared household under Section 2(s) of the Domestic Violence Act stated that the definition of ‘shared household’ in this section of the Act is not very happily worded, and appears to be the result of clumsy drafting required to be interpreted in a sensible manner.

The Court held that under Section 17(1) of the Act wife is only entitled to claim a right to residence in a shared household, and a ‘shared household’ would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. In this case, the property in question neither belonged to the husband nor was it taken on rent by him nor was it a joint family property of which the husband was a member. It was the...
exclusive property of mother of husband and not a shared household.

**WOMEN WHO ARE IN LIVE-IN RELATIONSHIP**

Women who are in a live-in relationship cannot be denied their right to be protected from domestic violence. So, to offer a wider meaning to the term “aggrieved person” under the Domestic Violence Act, the Supreme Court in the case of D. Veluswamy v. D. Patchaiammal\(^\text{1806}\), wherein the Court enumerated five ingredients of a live-in relationship as follows:

1. “Both the parties must behave as husband and wife and are recognized as husband and wife in front of society.
2. They must be of a valid legal age of marriage.
3. They should be qualified to enter into marriage. eg. None of the partners should have a spouse living at the time of entering into a relationship.
4. They must have voluntarily cohabited for a significant period of time.
5. They must have lived together in a shared household.”

The Supreme Court also observed that “not all live−in−relationships will amount to a relationship in the nature of marriage to get the benefit of Domestic Violence Act”\(^\text{1807}\). To get such benefit the conditions mentioned above shall be fulfilled and this has to be proved by evidence.

*Status of a Keep*: The Court in the case further stated that “if a man has a ‘keep’ whom he maintains financially and uses mainly for sexual purpose and/or a servant it would not be a relationship in the nature of marriage”.

In this case, the Court also referred to the term “palimony” which means ‘grant of maintenance to a woman who has lived for a substantial period of time with a man without marrying and is then deserted by him’\(^\text{1807}\). This term was first used in 1976 by a US Court in the case of Marvin v. Marvin.

**AGAINST WHOM COMPLAINT CAN BE FILED UNDER THE ACT**

‘Respondent’ can be defined as “any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner”\(^\text{1808}\).

Referring to this definition relating to the ‘respondent’ being an adult male, the judiciary has been confronted with the argument that an aggrieved person under the Act can only be an adult male and cannot be filed against the female relatives such as mother-in-law, sister-in-law, etc. However, the Supreme Court in the case of Sandhya Wankhede v. Manoj Bhimrao Wankhede\(^\text{1809}\) put to rest the issue by holding that ‘the proviso to Section 2(q) does not exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act’. Therefore, complaints are not just maintainable against the adult male person

---


\(^{1807}\) *Marvin v. Marvin*, (1976) 18 C3d660

\(^{1808}\) Protection of Women from Domestic Violence Act 2005, s.2(q)

\(^{1809}\) *Sandhya Wankhede v. Manoj Bhimrao Wankhede*, (2011) 3 SCC 650

---

www.supremoamicus.org

636
but also the female relative of such adult male.\textsuperscript{1810}

**RISE IN CASES AMID NATIONWIDE LOCKDOWN**

With the global pandemic of COVID-19 affecting the whole world at a disastrous rate, there is another virus which has risen without much notice. The rates at which domestic violence has increased is astonishing and hard to digest at the same time. India’s National Commission for Women (NCW) on Friday said “it registered 587 domestic violence complaints between March 23 and April 16 - a significant surge from 396 complaints received in the previous 25 days between February 27 and March 22”. The NCW relies on women to report domestic violence on its fixed helpline numbers and through the post, two modes of communication that have been closed since the lockdown.

Feminist economist Ashwini Deshpande analysed NCW data for the months of March and April in 2019 and 2020. She calculated the average complaints per day and found that “there is already a jump in complaints related to domestic violence and the right to live with dignity, and a smaller increase in rape or attempt to rape and sexual assault”, all within the home.

One-third of women in India’s 2015-2016 National Family Health Survey (NFHS) said “they had experienced domestic violence, but less than 1 percent of them sought help from the police”.

According to the NFHS study, “52 percent of women and 42 percent of men believed that a husband is justified in beating his wife”. Showing disrespect towards the in-laws topped the list of reasons why the respondents deemed it acceptable to subject a wife to a beating.

Most countries globally are seeing a surge in domestic violence, leading to UN Secretary-General Antonio Guterres appealing to the governments worldwide, to pay attention to and prevent a “horrifying global surge in domestic violence” during such times.

Many women facing abuse want to go to their mothers’ houses, but during the lockdown, they can only be sent to state-run shelter homes, where the risk of overcrowding and poor hygiene runs high.

“Why should a woman escaping abuse in the middle of a lockdown be sent to a shelter home where she risks catching coronavirus?” Vrinda Grover, a leading feminist lawyer who is associated with several landmark women's rights advances in India, said.\textsuperscript{1811}

For Grover, “the government's failure to shore up women's protection organisations and to plan for what was an expected surge in domestic violence is of a piece with its failure to protect the poor and daily wage earners, particularly migrants, from the devastating shock of this lockdown”.

**WHAT CAN BE DONE TO CURB THIS PROBLEM?**

For eliminating such a problem given the current scenario, the initiative has to be taken by the women themselves. They have to stand up against this injustice and fight for the cause which affects them the most. Still, if there are any hurdles on the way, there are various women organisations and NGOs working towards helping women in these circumstances. Even the police are

\textsuperscript{1810} Archana Hemant Naik v. Urmilaben I. Naik & Anr., 2009 (3) Bom Cr 851

\textsuperscript{1811} <www.aljazeera.com> accessed 08 May 2020
working very proactively nowadays which is a good sign and there is no need to worry for the women. Another alternative can be contacting the National Commission for Women for instant action upon the matter or also the State Commissions which have been set up in almost every state for the redressal of their grievances. Thus, women should feel safe and there is no need to panic as has also been said by one of the characters of the movie series ‘Harry Potter’, Dumbledore that “Help will always be given at Hogwarts, to those who ask for it”.

*****
DATA ENCRYPTION AND SURVEILLANCE

By Prabhjot Singh
From Fairfield Institute of Management and Technology

Abstract
Living around modern technologies comes with number of threats and cautious acts to be played by the individuals. In cryptography encryption means encoding a message in such a way that only authorized persons can use it and unauthorized persons are denied the access to use it whereas on the other hand Surveillance means by having an eye on someone’s act by different means such as cyber cells, intelligence beaureu’s etc. Surveillance is mainly done to prevent crime activities taking place in the country by having an eye on the suspects.

Many a times whenever a person regardless of his religion, caste or community is suspected of something illegal by the authorities is kept under the process of surveillance so that the intelligence beaureu’s can record their actions through their various branches which conducts investigation according to their own criteria.

For those who fear restrained government surveillance, encryption is an obvious technical response governments around the world are taking several measures to protect its public and to make their nation strong by introducing and regulating various structural reforms at regular intervals. A variety of technical and administrative measures have been also proposed to address law-enforcement and privacy concerns. Data privacy is the main concern for today’s youth as number of activities are now regulated and conducted through technical devices and the structures that various portable or importable devices consist of. Gathering in large groups and connecting through social networking sites is also a serious concern and being strict towards such acts and cautious is as necessary for the youth as JOBS for today’s young generation are. This research paper will further tell about the different parts of the encryption functioning and all the related information with surveillance database.

With enumerating possibilities and regardless of the cultural difference our economy is yet to set out to be an absolutely charged field in each and every way possible.

THE PRIMARY FUNCTION OF DATA ENCRYPTION
The main and the most important function of data encryption is to protect data confidentiality as number of documents are transmitted through various computer devices on a daily basis and in day to day routine. The outdated data encryption standard(DES) has now been replaced by modern encryption algorithms that significantly play a critical role in the protection and security of IT SYSTEMS and COMMUNICATIONS.

CHALLENGES TO CONTEMPORARY ENCRYPTION

Data Protection 101,www.digitalguardian.com by Nate Lord accessed 08 May 2020 5:30 pm
The basic method used in today’s world is “brute force” i.e. applying various innovative techniques until the right technique simply works. Partly the method of applying a technique depends upon the person who’s taking the charge. Alternative methods of breaking a cipher include side-channel attacks and crypto-analysis.

CRYPTO WARS IN INDIA
Despite being a rapidly maturing digital economy, INDIA has not yet experienced and able to gain lightening opportunities of the version of “CRYPTO WARS”. However policy developments such as the draft personal data protection bill, the proposed amendments to India’s intermediary liability laws indicate and remind us that regulation on encryption based on its perceived hindrance of lawful data collection is imminent. Regardless of other campaigns and strategies India has undergone a tectonic shift in the past few years while delivering specifically targeted schemes launched for the purposes of strengthening the commerce industry and delivering welfare system.

CURRENT ENCRYPTION SCENARIO’S
If we talk about the current take on India or about the present scenario’s then it wouldn’t be wrong to suggest that it do have restrictions on the sectorial parts such as telecom industries as well as any other plans which may issue general implications. Some examples of such sectorial regulators are the RBI AND SEBI as they mandate minimum encryption standards for entities and transactions acknowledging the key role played by encryption in enabling trust and security.

LAWS OF ENCRYPTION
Sec 84 of the INFORMATION TECHNOLOGY ACT 2000 empowers the government to prescribe modes or methods for encryption by issuing required rules. This was attempted in 2015 when the Ministry of Electronics and IT issued disastrous ‘draft encryption policy’ which was further withdrawn almost immediately. Sec 69 of the INFORMATION TECHNOLOGY ACT 2000 states the government to issue directions for decryption of any information generated, transmitted, received or stored in any computer resource.

EFFECT OF THE REGULATIONS
The main and the most signified effect of such rules and regulations have been on the private sector, sub optimal information security and roadblocks to innovation. For instance, telecoms are not allowed to deploy ‘bulk encryption’, the same licence requires them to assure that ‘no unauthorized interception takes place’. Both of these objectives cannot be achieved without a systematic and strong form of encryption policies which could deeply put an emphasis on how to put restrictions on the encryption problems. Highlighting the objectives of government behind mandating weak encryption in telecom sector was presumably to make interception and surveillance easier. While this might have once worked, over the last decade practically all sensitive or personal communications have moved to heavily

1813 The Encryption Debate in India-William Thomas accessed and retrieved 08 May 2020 5:35 pm
1814 Information and Technology Act 2000,Sec 84
1815 Information and Technology Act 2000,Sec 69

www.supremoamicus.org
encrypted internet applications which are technically resilient and should not subject to the restrictions. Its somehow also unclear that whether India’s Intelligence Agencies have really the ability to break currently ubiquitous strong encryption algorithms.

**OBLIGATIONS ON INDIVIDUALS TO ASSIST AUTHORITIES**

This refers to national legislation or policy which provides for state authorities to be able to require individuals to decrypt of encrypted communications.

**COUNTRIES WITH OBLIGATIONS ON INDIVIDUALS**

**AUSTRALIA**

Australia comes under the list of top countries in relation to the rules and legislations they generally impose on their individuals. Their authorities and the substantial steps not only protect the rights of their citizens but also record their actions. As per the rules of encryption The provisions of section 3LA of the crimes act 1914 impose the same obligations on individuals as on providers.

**CANADA**

No known legislation or policies

**UNited KINGDOM**

The provisions of part 3 of the Regulation of Investigatory powers Act 2000 impose the same obligations on individuals as on providers.

**Unites States**

United States is empowered and socialized with thousands of weapons and resources but it has till now failed to regulate some basic legislations or rules for the encryption terms.

**DATA SURVEILLANCE AND MONITORING**

People across the world have always been confused between the trade-off security needs and personal privacy including data privacy. Government as a part of such monitoring activities conduct various functions regarding data services and uses the data protection concerns such as surveillance, monitoring etc.

It is very well seen that whenever any terrorist attack happens in our country, people always starts to favour the government about their surveillance programme’s that they usually organise through strict functioning of their authorities. But when the same government tries to implement measures for monitoring the activities of these individuals they protest the same government by making harsh comments and by inappropriate use of words through social media platform as well as in daily life activities.

**OBJECTIVE OF SURVEILLANCE**

The main objective of conducting surveillance is to check on the persons who are suspected through their daily activities of data programming and through social media platform. The main good thing about this surveillance programme is that it doesn’t discriminate people on the level of caste, colour or religion as for government every other individual who will he against the nation would be termed as criminal regardless of any of his instincts.
DIFFERENCE BETWEEN MONITORING AND SURVEILLANCE

There is no doubt that Monitoring and Surveillance are done to protect the privacy of the people but there’s still a lot we’re missing here. MONITORING and SURVEILLANCE comes with no. of differences and we really need to throw some light on that.

A simple explanation is that “monitoring” refers to the simple observation of people for commercial purposes but on the other hand “surveillance” comes out with a much wider meaning as it can be defined as a silent act of monitoring and collecting important and crucial data from the device of a suspected person. Surveillance is mainly done by the Government for security reasons and ensuring that the statehood policies and its dignity is not in danger and the country is safe throughout.

**STEPS FOR SURVEILLANCE**

Some recent steps have been taken by the authorities with a view to improvise the policies of its department in relation to SURVEILLANCE PROGRAMME. On 07.Nov.2019,”Facial Recognition System” has been introduced by the authorities for easy catching of the one’s who are suspected by the police department.

FRS is basically a camera based technology which is implemented at different public places so as to record their actions and catch the suspect lively through his actions and intentions both. It is a technology capable of identifying or verifying a person from a digital image or a video frame.

---

1817 Data Surveillance, Monitoring and Spying by Cathy Nolan accessed and retrieved 09th may 2020 10:30 pm
1818 *Facebook keep getting sued over Face Recognition Software*-International Business Times

### FACEBOOK DEEPFACE

Living in a modern era with social websites generating their wheels to success leading paths .it is always recommendable to watch the actions of these social networking sites by the crime investigation cells and see that if they are not doing any inappropriate activity with the data of public. Now recently Facebook’s Deep Face has become the subject of deep concern. Several active class lawsuits has charged up and taken up their responsibilities under the Biometric Information Privacy Act, with claims alleging that Facebook is collecting and storing face recognition data of its users without obtaining informed consent from them, it is a direct violation of the Biometric Information Privacy Act, the most recent case was dismissed in January 2016 because the court lacked jurisdiction in it. Therefore it is still unclear if the Biometric Information Privacy Act will be effective in protecting biometric data privacy rights. In December 2017,Facebook rolled out a new feature which indicates that when any of your friend uploads and tags you in a photo FACEBOOK will automatically tag you according to your face instincts or we can say features without taking your prior consent for it. This new feature not only violates right to privacy but it will also give birth to number of hindrances coming in future. Facebook has attempted to frame new functionality in a positive light, amidst prior backlashes. It is still contested as to whether or not facial recognition technology works less accurately on people

---

1819 *Hera Dana Judge tosses illinois privacy law vs Facebook over phototagging,Cookcountryrecord.com accessed and retrieved 09th May 2020 10:45 PM*
based on their competitiveness.\textsuperscript{1820} Experts fear this very new technology might have a bad impact in the lives of people but police is protecting the claims by saying that FRS is implemented for the security reasons and not for any other undesirable reasons or basis.

The lack of regulations holding facial recognition technology companies to requirements of racially biased testing can be a significant flaw in the adoption of use in law enforcement.

**COVID-19 and SURVEILLANCE**

We all are well aware of the Corona outbreak in the country and the level of problem and frustration that we all are dealing with. The situations are even worst in the much developed countries such as Italy, Spain And US. But the problems and frustration level of the people who are stucked in their homes are not ought to be finished yet and as a result they are coming out of their homes to resemble again and carry on their day to day works. Summarising all this the main problems for the people who are engaged in restricting them in their homes are increasing as the people are not yet becoming responsible for their acts. For this the main and the most crucial role played by the intelligence beaureu is by the FRS system as they are already having an eye on the people who are not ready to sacrifice their cultural as well as moral beliefs for their own lives. As a result intelligence beaureu and other authoritative responsible committee’s have taken a step to charge the offenders with procured punishment and to put necessary restrictions. Corona has not only increased the tensions of the individuals but has also affected and increased the burden on the investigating authorities as for them the workload is now more emphasised by the government.

**CONCLUSION**

By this research paper the conclusion that came out to be is every other thing on this planet has somehow affected the social, technical and linguistic backgrounds of the devastating economy of India. Data encryption and surveillance tools are necessary for the well working systems of social networking as well as for data protection purposes but at the same time “Private Privacy” should also be taken into consideration and maximum efforts should be made that if intelligence terminals have made their mind to put surveillance on any individual’s data then in that case they must take measures to protect that person’s data from any non authoritative person.

\textsuperscript{1820} Facebook can now find your face even when it’s not tagged’-TIMES NOW published and accessed 09\textsuperscript{th} May 2020 11:05 PM
COVID-19: THE CATALYST TO AN E-JUDICIARY

By Pragya Jha and J Nayak
From Symbiosis Law School, Hyderabad

INTRODUCTION
“A meaningful life can be extremely satisfying even in the midst of hardship, whereas a meaningless life is a terrible ordeal no matter how comfortable it is.”

The primary objective and meaning of humankind is to constantly evolve and adapt to new situations and surroundings. This very phenomenon has been witnessed since the stone age up to the modern age where humanity has constantly evolved and adapted itself to newer technology and ideas whenever the circumstance and situation has demanded so. Similarly, it can be said that the current COVID-19 pandemic can be deemed to be the catalyst, for humanity to evolve further in all arenas including the judiciary.

The pandemic after being first witnessed in China, has spread throughout the world in no time, continuing to wreak havoc. The COVID-19 pandemic has prevented people and governments of all countries from adhering to their normal day to day working and forced them to stay back, confined in their homes. This pandemic has been testing the basic tenets of our social and economic fabric. The Governments of all countries have been forced into finding new ways to carry out their day-to-day activities to keep their economies alive. Every field of governance has been affected be it telecommunication, tourism, education, jobs in public and private sectors, or the justice delivery system, to mention a few.

Most people have already lost their livelihood and there is an atmosphere of fear & panic worldwide. In such a scenario, it has become imperative to find alternatives for the physical presence of people in workplaces, to help them contribute in keeping the key processes running, while being in the safety of their homes or safe workplaces. Most of the sectors have adapted to methods like work from home using technological solutions like group chats, group workflow applications including Slack, Microsoft Teams along with video-conferencing apps like Zoom & Cisco WebEx. It’s imperative for the justice delivery systems around the globe to adapt as well. Hence, it can be adequately affirmed that this pandemic has been acting as a stimulant to push the judiciaries around the world into the electronic medium thus rendering the inception of the system of E-Judiciary in and around the world including India.

THE ADVENT OF E-JUDICIARY IN INDIA
The Judicial system in India has been following the age-old procedural customs for carrying out the different court procedures like filing, granting adjournments, hearing of cases, to mention a few. The recent pandemic has forced the Judicial system to adopt a new approach towards the working of its courts and evolve its mechanisms. Though the basic phenomenon of E-courts has existed previously in certain sectors of the judiciary in India yet it was just meant to be a secondary approach that was rarely used hence its true potential was not realised. This Pandemic has given a chance for the Indian judiciary to realise the flaws existing...
in the old system and change itself for the better, in its methods of working. This is the new era of technology where information is available freely online and the Judicial system should rightly adapt itself to incorporate its benefits. The system of physically filing of cases requires the aggrieved party to especially come to the court to file their case as well as for the defendant to submit its written statement. This proves to be highly inconvenient for people, in terms of accessibility, especially the ones who are coming from the rural areas or from residence that lies in a considerable distance outside the court premises/jurisdiction. Moreover, the need to carry important documents physically, renders it vulnerable of getting misplaced, stolen or destroyed in transit. Also, the documents, orders and judgements stored in the premises of the court can easily get stolen, misplaced or destroyed which will result in the loss of that crucial assets of the litigants and the court of law. Furthermore, it’s very difficult to retrieve valuable information from the stacks of papers and documents kept in huge bundles, and consume a lot of time of the court officials, who can retrieve such information within seconds if stored in a digitally accessible format. The aforementioned drawbacks also contribute in the high number of backlogged cases in India.

11.01%\(^{1822}\) cases have been pending for more than five years in the Supreme Court of India out of the total of 60,469 pending cases\(^{1823}\) (as on 01.03.2020\(^{1824}\)). Out of these cases 12,071 cases\(^{1825}\) are “Incomplete / Not Ready Cases”\(^{1826}\) which are lacking in basic procedural court requirements. These Procedural confusions, loopholes or mistakes can be more efficiently tackled in an online medium like an intuitive website that can aid the litigants with the adequate knowhow, resources and notifications about any procedural court pending, things like filing fees, notice yet not served, pleadings not completed, notice of lodgement of appeal to served, statement of case not filed etc. hence leading to faster adjudication. Thus, through e-courts, justice can be made more accessible to each and every section of the society and will also expedite the speed of litigation. The e-judiciary system will also ensure a more transparent justice delivery system with a very limited scope for procedural confusion, mistakes, bureaucratic logjams and corruption. The storage and retrieval of useful information will become very efficient and easy with the introduction of online file retrieval systems in the e-courts. The files and documents can be easily shared between different courts, judges and lawyers which will save manpower and time. The Supreme court through its power under Article 142\(^{1827}\) instructed every High court to frame a system to make use of technology to carry out the day-to-day working of the courts during this pandemic. The term ‘virtual courts’ is a term used when the physical presence of litigants or lawyers is not necessary in the court to conduct hearings and the case can be adjudicated upon online by the judges. It can be also referred to as e-courts or


\(^{1823}\) Supra at 2.

\(^{1824}\) Supra at 2.

\(^{1825}\) Supra at 2.

\(^{1826}\) Incomplete / Not Ready Cases: procedural court pending like filing fees, notice yet not served, pleadings not completed, notice of lodgement of appeal to served, statement of case not filed etc.

\(^{1827}\) Constitution of India, Article - 142.
electronic courts. E-filing and payment of fees and fine online is also included in its ambit. The e-courts project was conceptualized on the basis of the “National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary on 1st August, 2005” which was submitted by the e-Committee of the Supreme Court of India which strived to transform the Indian Judiciary by ICT enablement of the Courts.\(^\text{1828}\) However, the virtual courts system is not devoid of vulnerabilities and complications. It is highly cost-sensitive in the initial stages of setting up of the e-courts as most of the courts in India lack infrastructure and mechanism for setting up the virtual courts. It is an advanced technological ecosystem which primarily requires the use of computers along with secure yet simple networking media and interface. These inherent prerequisites for the system leave out the rural parts of the nation especially vulnerable, because of the absence of basic amenities that are crucial for the development of this system like electricity, skilled & technical labour and technological awareness among the potential litigants to make use of the said system. Also, most of the court staff, litigants as well as judges are not very familiar with the use of modern technological interfaces & media and need to be trained in this sphere so that they will be able to easily handle the documents or record evidences electronically. This vulnerability was evident in a case hearing where the High Court of Andhra Pradesh after witnessing intrusions while hearing a case through Video Conferencing had directed physical hearing of rest of the case by maintaining social distancing norms later. The bench comprising Chief Justice JK Maheshwari and Justice M Satyanarayana Murthy was hearing the Andhra Pradesh SEC case where sacked SEC Ramesh Kumar had challenged his removal in the High Court. During the course of hearing through video conferencing, the bench noticed that about sixty-seven people had joined the video conference, due to which there was congestion and severe disturbance caused during the hearing. Though, the bench dropped the unrelated persons from the video hearing, yet they still tried to join the video conference and the same situation persisted for a while. All these narratives elucidate that fact even if the necessary technological infrastructure is set up, there will still be a necessity for the stakeholders to be trained to make effective use of the same.\(^\text{1829}\)

Another huge threat to e-courts is in the ambit of cybersecurity. The system of virtual courts is highly susceptible to cyber threats and hence better industry practices along-with stronger laws are needed to be enforced in this regard. However, these challenges and hurdles can be considered as minute bumps on the path towards setting up a modernized and digitalized Judiciary which will act as a crucial catalyst in the advent of a growing economy, a more just, lawful country and further in the larger perspective, a technologically advanced future for the legal industry and the world economy overall.

ORDERS AND NOTIFICATIONS OF VARIOUS INDIAN COURTS &


COMMISSIONS IN THE FURTHERANCE OF AN E-JUDICIAL SYSTEM:

The Hon’ble Supreme Court of India:
The Supreme Court ordered on 23rd March, 2020, for the closure of courts and for hearing of only extremely urgent matters.1830 Vide an order of 17th April, 2020, the Supreme Court gave helpline telephone numbers 011-23381463 and 011-23111428 for mentioning and hearing of matters, technical support for video conference or e-filing, between 10.30 am to 5.00 pm on week days and 10.30 am to 1.00 pm on Saturdays, except on holidays.1831 Also, vide an order dated 26th March, 2020 the Supreme court notified that important matters be held through video conference app ‘Vidyo’ via video conferencing. The same was also mentioned in the circular dated 23rd March, 2020.1832

The Hon’ble Delhi High Court:
The Delhi High Court through an order dated 2nd May, 2020 notified that the important and urgent matters can be mentioned before the court and the court shall continue the hearing of urgent matters through video conferencing via a link mentioned in the order which shall be available from 9.00 am to 10.30 am on all working days.1833

The Hon’ble Bombay High Court:
The court issued similar orders for hearing of urgent matters through video conferencing following the guidelines of the Supreme Court.

The Hon’ble Madras High Court:
The Madras High Court ordered that the Judicial officers should make maximum use of video-conference facility. Vide circular dated 19th April, 2020 it was decided that all judicial proceedings in the High Court will be conducted only through video conferencing.1834 Also, as per the notification given on 20th April, 2020, a detailed process would commence from 22nd April, 2020 on portal https://ecourtv.ecourts.gov.in. Before e-filing, the Advocate or party-in-person needs to create a user account on the portal. They can avail the helpline 14627 between 10:30 a.m. to 3 p.m. on all working days. A detailed guideline and tutorial video will be available at http://www.hcmadras.tn.nic.in.

The Hon’ble Karnataka High Court:
The Karnataka High Court vide notification dated 21st March, 2020, issued directions that virtual courts be created in the High Court of Karnataka, Principal Bench, at Bengaluru. Advocates and parties can digitally appear by using Video’s/Skype. Advocates/Party-in-person are to share their case details, video/Skype ID to regcomp@hck.gov.in of Registrar (Computers). The concerned Advocates/Party will be informed about the slot given for their appearance through digital means.1835


1832 Supreme Court of India, App Availability at http://ecourtv.nic.in, Order dated 26th March, 2020

1833 Delhi High Court, Order dated 2nd May, 2020, delhihighcourt.nic.in (last accessed at 10:30 am on 26th May, 2020).

1834 Madras High Court, Order dated 19th April, 2020, www.hcmadras.tn.nic.in (last accessed at 12:30 am on 26th May, 2020).

1835 Karnataka High Court, Order dated 21st March, 2020, https://karnatakajudiciary.kar.nic.in (last accessed at 12:30 pm on 1st June, 2020).
The Hon'ble Kerala High Court:
Instructions for advocates for e-mail filing and video conferencing for extremely urgent cases vide a notification on 25th March, 20201836 were:

- The Counsel needs to send urgent requests not exceeding one page to the registry by email to casefiling.hc-ker@kerala.gov.in. not more than one request can be sent.
- In matters involving state Government, the copy of urgent memo can be addressed to aagkerala@gmail.com & advnpekm@gmail.com.
- In the matters involving Union Government the copy of urgent memos can be addressed to rajkumarkrkhc@gmail.com & Jaishankar.cgc@gmail.com.

The Competition Commission of India (“CCI”):
CCI has given directions vide order dated 20th April, 2020, inter alia, allowing pre-filing consultation to those seeking informal guidance on determining filing-related requirements and information to be given for a proposed combination and the green channel.

Further, the CCI has allowed such consultations through video conferencing. Combination notices under the green channel route can be filed electronically. Besides, all filings or compliances due on or before 3rd May, 2020 in respect of pending cases under Sections 3 and 4 (anti-competitive agreements and abuse of dominant position respectively) will also remain suspended and fresh dates will be notified. All other filings, submissions and proceedings, including those before the director general, have also been deferred.1837

National Commission Disputes Redressal Commission (NCDRC):
The NCDRC will hear cases through video conferencing from June 15 onwards due to the pandemic.1838 All the aforementioned examples show that how the Indian Judiciary is attempting to use this adversity to incline the whole system towards a more technologically accessible phenomenon.

THE EVOLUTION AND IMPLEMENTATION OF E-JUDICIARY WORLDWIDE:

In the modern world, all the citizens of the free social structures, while exploring their roles in the society with their own freedom and perspectives, are bound to develop differences and disputes. The Advanced judicial systems have been using the model of resolution where lawyers represent their clients before the court of law. However, with the advent of the Internet Era, globalisation is the new norm, where information is more and more free to move, and where model laws like the Common Law system influence so many jurisdictions across the globe. We live in a world where international commercial contracts are agreed to be of the jurisdiction of a model judicial system like the UK where the international litigators are confident of having easy and

---

1836 Kerala High Court, Order dated 25th March, 2020, www.highcourtofkerala.nic.in (last accessed at 1:30 pm on 1st June, 2020).
technology-oriented access of free and fair justice. This assurance also translates to generous contributions of the legal services to the economy of the state like the 25.7 Billion Euros contributed by the UK Legal Services into the UK economy.\textsuperscript{1839}

Professor R. Susskind\textsuperscript{1840}, the IT consultant to the UK Lord Chief Justice, iterates four most compelling grounds for the court of law to assess the developing technological and digital opportunities to fine tune justice delivery. He says that the justice delivery system is firstly quite Cost Intensive for the accessors (with all logistical costs inclusive for the litigators having to travel for their physical presence), secondly it being very Time Consuming, with the judiciaries being vulnerable to becoming bureaucratised; and the judiciary with its complicated terminologies and procedures becoming more Unintelligible, with the concurrent Internet Society where information is becoming more and more free, simplified, democratised, and easy to access. “Citizens have a growing expectation that services will be delivered digitally” described Professor Susskind.

Hence the initiatives of transcending towards a more digitally able judiciary has been received in a positive manner both by the judiciaries and the citizens. It renders new opportunities for justice administration. Numerous researches on the same\textsuperscript{1841}, reiterate the fact that the inclusion of technology into judiciary has resulted in the strengthening of the virtues of democracy and justice in the developed as well as the developing nations.

In the developing nations, as per studies conducted\textsuperscript{1842}, digitisation can be deemed as an effective instrument in providing the opportunity to boost the efficiency, transparency, accessibility, equitability, and quality of justice. The digitisation methods range from simple transcendance into videoconferencing, to the advent of cyber courts of law and very simplistic online mediums and forums for the creation, certification, verification, and access of legal documents and completely digital proceedings and procedures of the courts.

Complete access to the legal remedies forms the core of the fundamentals of justice delivery in the modern society, and the consequent migration of the society to the digital avenues hence again call for the judiciary to step up and extend its historical accessibility in the digital realm too.

One of the most persistent problems like, the difficulty to refer & accession of paperwork piles has been, for example, addressed by the Higher Criminal Courts in England and Wales, which in the April of 2016 itself had transitioned themselves into the system of completely digitised evidence files. Or the case of Turkey, that was accoladed with the United Nations Public Service Awards\textsuperscript{1843} in the year 2012, has now, across all of its judicial institutions, a uniform national electronic service.

\textsuperscript{1839} Transforming Our Justice System, Ministry of Justice, UK, Page 3, September, 2016.
\textsuperscript{1840} IT consultant, UK Lord Chief Justice Office.
\textsuperscript{1841} Gomes et al., 2018; Freitas & Medeiros, 2015; Friedman, 2007; Dominic Chawing, Towards e-judicial services in Malawi: Implications for justice delivery, John Wiley & Sons Ltd, Pg. 2, September 2019.
\textsuperscript{1842} (Gomes et al., 2018; Louro, Santos, & Filho, 2017; Freitas & Medeiros, 2015; Rosa, Teixeira, & Pinto, 2013; Andrade & Joia, 2012, Hindman, 2009; Foot & Schneider, 2006; Reiling, 2006).
\textsuperscript{1843} Supra at 21.
Some more examples of the nations and the judicial systems around the world that have adopted and benefited from digitisation:

**Australia** – which has historically been one of the nations that has incorporated Digitisation and technology from several decades, since the 1980s. The internet-based systems present different services to its citizens and other judicial & legal stakeholders, some of which are electronic search, e-courts, e-courtrooms, evidence presentation, knowledge management, integrated justice systems and e-courts.\(^{1844}\)

**British Colombia in Canada** - in 2019, the nation’s first Online Civil Tribunal was launched that is designed for providing the citizens the access to effortless resolution of small-value property and disputes pertaining to land. This avenue though is voluntary initially, yet is set to be soon mandatorily applicable. i.e. for the disputes that involve sums of money less than $25,000\(^{1845}\), the applicants can access justice in the online civil tribunal consequently saving up a much larger amount of their finance that would have been spent in affording a pricey trip to the Supreme Court apart from the obvious legal costs. The new revolutionary system further also is inclusive of Party to Party Negotiations through online chatrooms, wherein if the parties fail to arrive at an agreement, then there is facilitation for online mediation in common chat rooms, and finally online adjudication where an adjudicator can render out a decision with the equal authority as a court ruling.\(^{1846}\)

**United States of America** – The legal system and the judiciary in the oldest democracy of the world is adequately advanced with the incorporation of all the modern digitisation modes like Videoconferencing. Public access to court records electronically through Case Management / Electronic Case Files Systems, the Pacer Case Locator, and the PACER fee waiver, Electronic Filing of Cases to mention a few. Furthermore, there are availability of Public forums like the Electronic Public Access User Groups (EPA) that renders a forum to the users of the PACER users to communicate and reiterate their feedbacks and ideals for the improvisation and the expansion of the Electronic Public Access services to all.\(^{1847}\)

Furthermore, to specifically tackle the new challenges of dispensing justice in the difficult times of this Pandemic, the courts in US have resorted to several innovative means like:

- The Online System for Clerkship Application and Review or OSCAR System is being incorporated by the federal judges to hire law clerks replacing the offline in person interviews and paper applications with online doc reviews and skype interviews.
- Judges in the state of New Hampshire and Missouri are imparting civics education to the house bound student.
- Various Courts like the Federal Circuit, District and Bankruptcy Courts have made use of the technological modes of audio-video conferencing to carry out judicial adjudications. Many service providers like Skype for Business, Zoom, AT & T

---

\(^{1844}\) Federal Court of Australia Report.


\(^{1846}\) Supra at 25.

Conferencing, Court Calls are being incorporated for the same.\(^{1848}\)

- Judicial Conference, the national federal courts policy body had in late March iterated the allowance to Media and the Public in the ambit of the Federal Civil Court Proceedings and later to the electronic Criminal Proceedings.\(^{1849}\)

**Netherlands** – Other than adopting to the mainstream digitisation and technological advances in the judiciary, Netherlands has displayed that there is still scope to streamline online justice delivery by the creation of a service that provides automated legal guidance through the disputes of matrimonial nature alongside matters of maintenance and custody.\(^{1850}\)

**Pakistan** – In the developing nations like this, iterating his views about the online case management system introduced in the High Courts of Lahore and Islamabad, Taimur Ali Khan, a lawyer mentions that the digitisation of the case files is the very 1st step in the technological journey of the judiciary. He further points to his optimism that the nation should witness a more completely optimised, automatic and digitised court system where the adjudications may happen over video conferencing forums like skype. This would, he believes not only cleanse corruption but also improve the justice rendering system, making it more accessible to the poor.\(^{1851}\)

**Brazil** – the nation’s judicial system has displayed a remarkable departure from the traditional corruption laden bureaucratic system and has now migrated to a digitised system with online platforms.\(^{1852}\)

**Kenya** - The lost confidence of the public and the immense reduction in the operational costs was accomplished by the Kenyan Judiciary by emulating the digitalisation best practices incorporated by the model judiciaries like that of the USA, thus the development of the Electronic Court Management System ECMS in the Court of Eldoret in the year 2011, which has since its implementation made the public realise and enjoy its numerous benefits, meanwhile increasing the job satisfaction of the court employees and the weeding out of corruption and bureaucratic logjams.\(^{1853}\)

**Challenges and Implications to the advent of E-Judiciary:**
While there are numerous advantages as elucidated above with the advent of E-Judiciary, yet there are also present inherent dangers and risks on reliance of completely electronically-delivered judicial service. While owing to the fact that justice delivery has been prevalent since time immemorial hence the fact of the trust in the system and the status quo also comes into the perspective. We as humans have been acquainted with associating the fairness of justice rendered

---


\(^{1849}\) Supra at 26.

\(^{1850}\) Louise Tickle, Online justice: why courts should explore emerging digital possibilities, The Guardian, (May, 15\(^{th}\) 2020, 4 pm), https://www.theguardian.com/public-leaders-


\(^{1852}\) Supra at 21.

\(^{1853}\) Dominic Chawing, Towards e-judicial services in Malawi: Implications for justice Delivery, John Wiley & Sons Ltd, Pg. 4, (2019).
with the critical quality of Human Judgement which can be said to have been asserted by physical presence in the courtrooms. Hence it will be up-to the stakeholders of the judiciary and the government to educate and make the citizens believe in the merit of the E-Judiciary with robust checks and balances in place, else the citizens will finally end up being legally administered by unidentified online pathways which can be quite alienating for some.

Furthermore the nations that lagged behind in the pursuit of reaching a greater streamlined, efficient and accessible judicial system online have been struggling with not only the upfront costs of investments in physical infrastructure, logistics, clerical resources etc., but also have lawyers and the court clerks who are not deep seeded in affirming the regime of bureaucracy and corruption, on the premise of existing traditions and protocols.

Another issue for the nations and the judicial system that are attempting to evolve into a more digitally accessible system include the issue of Training and Educating the already overworked judges and lawyers, which can further be aggravated by capacity and learning curve issues. This aggravation can be especially acute in the developing nations like India, Pakistan, Indonesia, Africa etc where there is very less adoption and knowhow of technological means in the daily lives of those involved in the administration of justice, be it the judges, the lawyers or the court clerks. Specific examples can include that of our own nation where there is only a handful number of training centre that is working for the aid of the judicial professional that want to know and learn

the practicalities and the principalities of the delivery of justice in E-Courts.

Other Technological Challenges include:
- Loss of network and access to Slow Internet
- Recurrent blackouts or power outages.
- Lack of adequate operational skills.
- Pressure from legal firms and other clients for in-court proceedings.
- System being too complex to utilize.

CONCLUSION

As elucidated from the aforementioned examples, all of these reforms (that come with their respective challenges) are an attempt of all the judiciaries around the world to build upon what we already possess — judicial systems that are in place to uphold the basic tenets of freedom, independence, justice, peace, lawfulness, liberty and remedy to the ones bereft of their fundamental rights, in the most accessible manner possible.

However, these reforms also recognise something crucial. That, we humans have always evolved, be it the abolition of the Jury system in 1960s in India, post the Nanavati Case (where the vulnerabilities of a trial by jury system was aggravated by a nationwide media trial bereft of facts), the US Supreme Court striking down the conviction of Miranda in Miranda v. Arizona, 1966, post his confession to the Police (owing to the failure of him being informed of his right against self-Incrimination), the creation of the Crown Courts in the UK in the 1970, or be it the first Online Civil Tribunals launched in the British Columbia in Canada, these are only a few elucidations of the fact that there has seldom been moments of complacency.

---

1854 Supra at 32.

or stagnation in the judicial systems around the world.

Now with the advent of accessible technology and the internet aiding free flow of information, there is yet again the chance for radical change, wherein as the traditional methods of conducting work are transformed across all the industries & systems, it should be an obligation upon the judiciaries of the world to transform themselves to yet again adhere to the basic tenets of law and justice in this hyper-connected informational era.

At its core, all these reforms are simply about administering to the modern necessities of all the stakeholders of the system be it the judges, the lawyers, the court officials, the witnesses, the victims, the defendants, citizens and business or any other entity of any size. The rule of law, in its most basic essence is the very fundamental element for every civilised societal fabric. Hence, these aforementioned reforms suggesting the migration towards a more technological justice delivery system, will aid in protecting it.1856

*****

CRIMES AGAINST WOMEN: LAWS ABOUT THE MENANCE IN THE SOCIETY

By Prenita Ranjan
From Amity law school, Amity University Noida

ABSTRACT

“Women” a very important and necessary part of this world, a human who has the greatest power to birth a new life, yet so underrated in our world, so underrated and suppressed that she is taken as an object and has her own gender-based crimes which has become a global issue.

This article talks about crimes against women, these crimes against women started with the start of patriarchy and a mindset of women being weak and inferior to men. Even in today’s modern world where women are working and are as efficient as men are, the old mindset is killing our society. In this article, I have tried to start as far as we go about the history of downfall of status of women in the society to the crimes against women that take place the most and have become a problem in the modern world. Looking at some surveys conducted all over the world about how the world countries are fighting to protect its women and how there are certain organizations who have decided to put their best foot forward to create a safer environment and improve their quality of life of victim/survivors of these gender-based violence, from huge amendments in the constitution to implementation of new laws in order to punish the offenders of these barbaric crimes. I have concluded my article by talking about how, we as a part of the system can help in proper implementation of these laws and what we can do to have a safer environment and if not completely stop, then to at least control these crimes against women.

KEYWORDS

Women, Patriarchy, Violence, Rape, Global issue, Sexual Assault, Society.

ABBREVIATIONS


1.0 HISTORY- Where it all started?

There was a time when women were valued as Goddesses, which tells us that women were held in high esteem as over 30,000 statues have been found of Goddesses from the ancient time and 97% of them were women, also known as Venus figurines, but then something changed, the earth warmed and dried, people could now farm instead of following idols and started gathering crops, people started to live in one place and these societies became patriarchal in nature as women slowly started to take place the most and have become a problem in the modern world. Looking at some surveys conducted all over the world about how the world countries are fighting to protect its women and how there are certain organizations who have decided to put their best foot forward to create a safer environment and improve their quality of life of victim/survivors of these gender-based violence, from huge amendments in the constitution to implementation of new laws in order to punish the offenders of these barbaric crimes. I have concluded my


www.supremoamicus.org
654
1.1 **ARCHAIC ERA - RISE OF PATRIARCHY**

Around 8000BC to 1000,000 BC, societies took place to discovery of bronze and how to make weapons and equipments out of it which were in the possession of the man, life in this time frame was extremely unstable, wars broke in between neighboring tribes and villages all the time, women wanted protection for their children and as they were not skilled enough in using weapons as men were, they would have to allow themselves to a man who promised them protection. This is the initial underpinning of patriarchy, a system adapted by the society which had rights for the men in the society and women and children didn’t. It was seen when the wars broke out the first slaves were women and children.

Men also knew that through Exogamy, that is marrying a woman outside your tribe, bring them into different tribes, and making them pregnant would make them part of their tribe.

1.2 **MIDDLE AGES**

During the medieval times, most people in Europe used to live in small world communities and made their living from the land. The status of women in this time was often described by biblical texts, according to the bible since Eve was responsible for the sin of mankind being evicted from the Garden of Eden, women were seen as morally weaker and inferior to men. The women were forbidden from receiving any kind of education or teaching and were instructed to stay silent.

In order to uphold these biblical texts, men made chastity belt, which were made out of bronze and had certain openings in the back and in the front. There was presence of Scold’s Bridle or a silencing mask, a type of mask which was placed over a woman to let everyone in the community know that her husband or the community decided that she was way too chatty, opinion ad and she was going to be publically shamed. When this was inserted in a woman’s mouth, it had a tough piece on it which had nails on the bottom of it, to make sure she does not talk or move her tough. If a woman did not change her ways, she was put into a dunking stool usually with the silencing mask over her head and was dunked into the water and was held down however long they decided to hold her down, creating huge panic as everyone watched, specially to the other women who were forced to watch.

We see that violence against women is today not a new phenomena, it is a primitive practice that has always been treated as a

---

1859 Womack 2005, pno. 81.
1863 One or more of the preceding sentences incorporates text from a publication now in the public domain: Chisholm, Hugh, ed. (1911). "Ducking and Cucking Stools". *Encyclopaedia Britannica. 8 (11th ed.). Cambridge University Press,"
part and participant of social cultural value. Despite centuries old history, exploitation of women has not been acknowledged as a crime in its totality, many forms of oppression, intrusion are still socially accepted. These forms of exploitation have been socially and culturally justified with alternate purpose of maintaining a patriarchal order. Women are historically one of the most enslaved classes. History has told us that women are always being recognized as a second class citizen and their victimization was accepted and socialized as a natural phenomena, it was even considered that men had the right to beat their wives and women who were first, property to their fathers and then to their husbands, who could do as they pleased with their property.

According to Aristotle, “Women may be said to be an inferior man/”, one of the German philosopher said, “When you go to meet a woman, take your weep along” under common law women were treated as cattle. Napoleon Era also shows the ways of violence against women, as according to the code ‘women are like walnut trees, must be beaten everyday’.

In Europe, it was a common view that a man had the right to beat his woman with a stick, not thicker than his thumb. Similarly, Indian culture follow the quotation of Tulsi Das that Dhol, Ganwar(Illiterate person), Shudra(lower caste), Pashu(Animals), Naari(Women) all these are subjected to be beaten or harshly treated and only then they will remain under control.

Therefore, the history has made women subjugated to men making them tolerate all kinds of violence and atrocities. Women Rights Convention very well defined all these atrocities and what all crimes are faced by women in this modern era, with talks about women empowerment but the hearts still stuck to patriarchy.

2.0 MODERN DAY: TYPES OF VIOLATION/CRIMES AGAINST WOMEN

Violence against women can be divided into various broad categories, these violence against women can be based on various types such as violence by an individual(by a stranger or a family member), violence by police officials, violence brought by government authority, violence through traditional practices. I will be talking about some of the most often conducted crimes against women.

2.1 RAPE:

All around the globe, a person committing the act of rape will be punishable. Rape is said to be “malum in se” which directly translated to “evil itself” in Latin. Rape is one of the most brutal crime committed, it not only destroys the victim physically but also breaks the victim psychologically and emotionally. Rape is defined as forced act of sexual intercourse or any other kind of sexual penetration against another person. Victim of a rape is often seen as a boon to the society and has to face society’s harassment as well. The crime has become a global problem. India faced one of the most brutal rape case in December 2012 which not only shook the entire country but the countries worldwide, commonly known

1865 Edition of the Code Napoléon of 1804
as the 1867 Delhi bus rape case or Nirbhaya Rape case brought a revolution in the Indian law system, introducing various rape related laws through the 1868 amendment act of 2013. Rape can be of different types such as War-rape: Rape committed by combatant during war time/ armed/military conflicts, Date Rape: Date rape can be defined as a rape done by a partner with whom one has a romantic or sexual relationship, Gang Rape: it refers to act of rape towards a victim by multiple violators. We still face a lot of problems towards rape laws, existence of multiple loopholes in the laws has made violators feel free and the long justice system in punishing such violators has made everyone question if women are safe at all?

2.2 SEXUAL HARRASSMENT

Sexual harassment refers to unwelcome sexual requests for sexual favors or other verbal or physical conduct of sexual nature due to a person’s condition of employment or any other reason. Sexual harassment can be verbal, non-verbal, physical. One of the most common type of sexual harassment is ‘Quid Pro Quo’ in which a person who is normally a supervisor to the other person in a course of employment asking the other person for sexual favors in exchange of some kind of employment benefit, also commonly known to be sexual harassment at workplace. Such act may lead to hostile work environment which may pollute the work environment as one person or a group of people harasses a colleague or a group of colleagues. People often get confused between sexual harassment and sexual assault, sexual harassment refers to asking for sexual favors or making sexual remarks whereas sexual assault includes attempt to rape, 1869 child molestation, forced sexual intercourse, forced 1870 sodomy etc.

2.3 DOMESTIC VIOLENCE

One can describe the act of domestic violence as an incident of threatening behavior, violence or abuse between adults who are or have been intimate partners or family members, regardless of gender or sexuality. Domestic violence can be sexual, financial, psychological, physical or emotional. When we talk about the main causes of domestic violence, we see that the causes of the act is basically the mindset of the violator can be jealousy, blame, denial or possessiveness or the feeling of domestic services, this is the thought that the partner(female) should be doing domestic work and if this is violated it results in violence. The reason why most of the victims of domestic violence hesitate or are unable to come out of the domestic violence can be fear of the violator, in some cases it maybe that the victim is not financially stable and has to depend on the violator for basic needs. Many a times a domestic violence between a couple is due to the feeling of still being in love or the feeling that it is okay for the partner to do such act.

2.4 ACID ATTACK:

Acid attack is a grievous crime, the victims of this crime are mostly women. The aim of the crime is to cause pain, disfigure or cause death of the victim by throwing acid or equally destructive substance. The attack not only disables a person physically but

also mentally. Acid attacks are seen mostly in developing countries with Bangladesh at the top of the list. It has been seen that many times the violator is a family member with cases of husband throwing acid on their own wife and sometimes their children as well. The most number of cases that are registered in India are of young women.

2.5 DOWRY DEATH:
Dowry refers to a form of gift, money, property transfer to the groom from the family of bride at their marriage. There are still many countries where amount or price of the dowry decides whether the marriage proposal will be accepted by the side of the groom or not. The custom is popular in parts of Asia, Balkans and parts of Africa. However, many a times this custom takes a very deadly turn leading to deaths of married women who are either murdered or driven to suicide. Dowry Death is when a married woman is harassed or tortured by her husband and relatives for the demand or any dispute of dowry to an extent that it leads to murder or drives her to commit suicide.

2.6 HONOR KILLING:
Most women are bound by a rigid set of rules and restrictions that place the responsibility of family’s honor solely upon them. Honor crimes usually take place when a male relative claims that a woman has brought dishonor or shame to the family, which could have dramatic consequences to the victim, most often murder of a woman or a girl by male family member. Honor killing mostly seen in Islamic regions of Middle East, North Africa, South Asia (including parts of India)

2.7 FEMALE GENITAL MUTATION:
The cruel practice of female genital cutting of female genital mutation is happening more than one thinks of, young girls of age 6-7 years are being cut. The reason for such inhuman act towards little girls and women that too through their own family and loved once is for the reason of social acceptance, religion, enhancement of male sexual pleasure, preservation of virginity and many more, but is this worth all this?

2.8 WOMEN TRAFFICKING/PROSTITUTION:
Women Trafficking is a form of sexual exploitation in which a woman is forced to perform sexual acts for their trafficker’s customers; these sexual acts may include prostitution, pornography, exotic dancing, military prostitution etc. The victims of the trafficking can include girls of any age group. The trafficking is done by making the victim believe in any kind of false promises such as offering good job, education or even marriage proposals or sometimes by kidnapping the victims. The trafficking not only destroys the lives of the victims but also the children that are born through prostitution. It has been seen that trafficking of women or humans is general is one of the fastest growing crimes today. The victims of trafficking not only suffer mental trauma but are also likely to acquire certain health complications such as

---

HIV/AIDS, UTI, vaginal tearing, syphilis etc.

3.0 HOW THE WORLD IS FIGHTING AGAINST, CRIMES AGAINST WOMEN?

We live in 2020 now and our world is changing and developing, Globalization is happening and we are happy about it but is the situation of women changed in our society? This still remains a burning question. We still have not been able to change the fact that we live in a patriarchal society, the situation of a developed / developing country can be taken positive and maybe this helped it in becoming what it is today, but what about the undeveloped countries? What about the rural areas where a woman is still not treated equal to a man, in some cases a human being even? But now we have laws against domestic violence and there is this big question that if home is the safest place for a woman or not? We see various kinds of violence, killing of girl child in the womb of the mother itself or killing them slowly by not giving them proper education, food and making them feel they are second-class citizens.

In United States Of America, the Violence Against Women Act, 1994 was passed during the 90s, the bill was signed by the then President Bill Clinton, with the simple aim of creating a safer environment for women and protect them from various violence. The act was reauthorized in the years 2000, 2005 and 2013. An office has been set up for enforcing the act in the United States Department of Justice which receives federal grants which are used to help the victims of rape, domestic violence, sexual assault etc and these grants are used to create partnership between federal, state, tribal and local authorities. The official federal government that has been established by President Barack Obama (the 44th President of United States Of America) has included in the act the

1. **White House Council on Violence Against Women.
2. The White House task force to protect students from sexual assault.

**INDIA:** The revolution in the crimes against women in India took place after the December 2012 Nirbhaya case that took place in Delhi and shook the whole nation, it led to the passing of the Criminal Law (Amendment) act which widened the horizon of the definition of rape, making it a non-bailable offence. It has also revised in the section 376A that the rapist, who in the act of rape causes death or any neurological disorder to the victim of the

---

**REFERENCES:**


https://fas.org/sgp/crs/misc/R42499.pdf

https://www.justice.gov/

https://obamawhitehouse.archives.gov/administration/eop/cwg


"Delhi gangrape: Chronology of events". The Hindu. New Delhi. 31 August 2013.


---


[1875](#) https://fas.org/sgp/crs/misc/R42499.pdf

[1876](#) https://www.justice.gov/
act, should at least have a rigorous imprisonment of twenty years. The 2013 law also increased the age of consent from 16 to 18 years. In the judgment by Supreme Court, it was stated that the two-finger test on a rape victim violates her privacy.

In the Kingdom of Jordan, a country in the Middle East, had a law earlier to 2016 according to which a rapist could avoid his prosecution by marrying the victim, this law was removed in a historic move taken by the Parliament of Jordan and abolished Article 308 of the Penal Code which was later followed by Lebanon, abolishing Article 522 from its Penal Code.

In the same year Tunisia announced its first law to fight against crimes against women and recognized other forms of violence (except physical) such as economic and psychological violence.

4.0 THROUGH SURVEYS AROUND THE WORLD

Countries such as Denmark, Sweden, Norway, Canada, have always been seen at top of the list of being the safest and the best countries to live in for women, so what is it that makes these countries best and safest countries for women? And what is it that makes countries like India, Afghanistan, Pakistan, Syria and Saudi Arabia and India the worst for women?

Denmark was ranked first in a survey conducted by Insider, in 2020 for best countries to live if you are a woman, the country is known to be one of the best countries for women due to its child care and parental leave policies that helps, despite the fact that the sun sets in the country by 4, women are very much protected. Sweden, was ranked second, the country helps in eliminating pressure on a new mother by granting long parental leave and removing the stigma of working mothers being less competent to work, the country has also worked for reducing the pay gap between men and women. Sweden was followed by Netherlands, Norway and Canada, which is recognized for its constant good record of the gender gap and violence against women.

According to a survey by the World Bank, there are 35% women all over the world who have experienced sexual or physical violence by a partner or a stranger, there are approximately 200 women who have suffered genital mutation and on worldwide scale 7% of women are sexually assaulted by someone who is not their partner.

In a survey done by Thomas Reuters Foundation in 2018 (Annexure 1) showing the world’s most dangerous countries for women, India topped the list, followed by Afghanistan, Syria, Somali and Saudi Arabia. It was said that India faces a lot of sexual and physical violence towards women through cultural and traditional practices, the country is a hub of trafficking and slavery. The violence against women in the country after the New Delhi bus rape case has outraged people and the rape

1885 https://www.insider.com/best-countries-for-women-to-live-ranked-2020-1
1887 https://p2018.trust.org/
culture in the country is increasing every year. Afghanistan was ranked second mainly due to its lack of healthcare, discrimination in workplace and non-sexual violence such as domestic violence. Syria came third, due to the long civil war in the country, the country lacks proper health care facilities, economy and a lot of sexual and non-sexual violence.

5.0 CONCLUSION

5.1 WHERE TO GO FOR HELP?
There are various organizations who have come forward to help women in need, to help them come out from being a victim of domestic violence or fight for their justice, to see their rapist or offender behind the bars and help them come out of the trauma that they face due to these crimes against them and help them live a normal life.

There are organizations such as United Nations Women which helps to create a safer environment for women by the help of international agreements such as UN declaration for elimination of violence against women, the organization works for women on a global level for formation and enactment of various ways to protect women. We have Organizations such as Association for Women’s Rights in Development which was established in 1982 and works for women’s human rights. A woman who has suffered from any kind of violence against herself should without any delay inform the crime to her parents or an elder she trusts and knows will help her, the crime should be reported to the nearest police station else to a women safety NGO which would help her in giving justice and punishing the violator. There are organizations such as Women for Women International which helps women to get jobs and earn money and make them strong enough to make their own decisions.

5.2 ACTIONS THAT MUST BE TAKEN
Violence against women has become a national agenda of many countries, we are living in 21st century and still we have bits of old barbaric mindsets within us which includes patriarchy, women are still suppressed and treated as one who is dependent on men. A lot of new laws have been introduced globally to protect women. Law plays a very important role, as its implication plays a very important role in our society but is it everything? The big question is where does our responsibility come? There have been cases of rape of a 8 month old child to rape/sexual assault cases of women as old as 80 years, which shows how cruel the world can be and how much we need to protect our women. As it is said, prevention is better than cure, being impulsive and saying harsh things to the violator, is not the solution, as it is not going to bring any change. Even after the horrific Nirbhaya case followed by Priyanka Reddy case and many more, the frequency is of 10-15 rapes per day in India, the important thing is after all these incidents how do we react and fight for our women.

1888 https://www.unwomen.org/en
1890 https://www.awid.org/about-us

1891 https://www.womenforwomen.org/
1892 "Delhi gangrape: Chronology of events". The Hindu. New Delhi. 31 August 2013.
1893 Khan, Omar. "Four men confess to gang rape of woman they later burned alive, Indian police say". CNN. Retrieved 1 December 2019.
Some of the reasons that I have concluded through my research are as follows:

1. **Alcohol:** Many of the violators are in drunken state while committing the crime, I feel a drunkard person should not be allowed to roam in that state in public as once a person is in that state, the complete cruel side of the person continuously instigates him and the fact that as a society we are taking it as normal is not acceptable. Banning alcohol is not possible but banning people to roam drunk in public place can be done and having a much more affective police force for them can help a lot.

2. **Behavior Pattern:** The question is where do these cruel intentions come from? Acts of abusing and objectifying women is something just unacceptable. It has been said by one of the directors of RGV courts that this mindset of objectifying women, seeing women as a sexual desire should be treated scientifically. One should always be cautious about its surrounding and a person who has the ability to commit such hideous crimes is easily detected and as a member of society it is our responsibility to inform about any such negative changes we feel or see around us.

3. **Media:** One should not always trust the media as many a times it has been seen that the facts of the case is far way different than what was showed by the media, media often tries to make people react, bringing another big news for themselves. It’s our responsibility to know the correct facts and not believe everything we see on television or on our social media and react accordingly.

Looking at the changes that has taken place in the past decade, we have a hope that the mindset and the situation will get better in future as they already have from the past, all we have to do is keep our faith on the law makers and the justice system and perform our duties as members of the society, if not for us then for our women.

6.0 ANNEXURE 1:

**The ten countries where it’s worst to be female**

Most dangerous countries for women ranked on 6 key criteria in 2018

- India
- Afghanistan
- Somalia
- Syria
- Iraq
- Yemen
- Saudi Arabia
- Pakistan
- Democratic Republic of Congo
- Tanzania
- Nigeria
- United States

*Criteria include healthcare, discrimination, cultural traditions, sexual non-sexual violence and human trafficking = survey of 250 experts on women's issues

**BIBLIOGRAPHY**

**Primary Sources**

- Violence Against Women and the Law
  By David L Richards, Jillienne Haglund
- Women and Law by Parikshith K Naik

**Secondary Sources**

- Criminal Procedural Code, 1973
- Indian Penal Code
- Indian Evidence Act
- The Criminal Law (Amendment) Act, 2013 (Nirbhaya Act)
- Criminal Law Amendment Act, 2018
- Violence Against Women Act 1994 (United States Of America)

**Tertiary Sources**
United Nations Women
https://www.unwomen.org/en

Thomas Reuters Foundation
https://www.trust.org/

Associations for Women’s Rights in Development
https://www.awid.org/

Women For Women International
https://www.womenforwomen.org/


https://sewabharat.org/contact/

http://azadfoundation.com/
ABSTRACT

Deoxyribonucleic Acid or DNA, as it is commonly known, is one of the most universally used techniques to identify an individual. Since ages, forensic scientists have devised new technology to differentiate between individuals belonging to the same species, by analysing different bodily substances. Forensic science interplays with law, in order to ensure speedier delivery of justice. This is to ensure that no innocent man is convicted and that the perpetrator of the crime is apprehended at the earliest to save the society from more criminal elements. In order to meet this objective, several DNA based technology have been developed to assist forensic investigation. This has been instrumental in solving several cases where heinous offences have been committed, some of the most notable ones being the OJ Simpson Murder Case and the 6-Year-Old rape case at the Snohomish County Sheriff’s Office. In India as well, this technology has been significant in improving conviction rates. Despite medical advancement in this regard existing since several decades, the legal development in this regard, particularly for the regulation and use of DNA Profiling Technology has not taken place. There have been several Bills drafted in this regard since 2003. However, the main concern regarding this Bill has remained the violation of privacy of an individual, particularly, the accused, the convict or the suspect. As a result, the Bill has never been passed. The latest version of the Bill, named DNA Technology (Use and Application) Regulation Bill, 2019 provides for the institution of National and Regional DNA Data Banks, DNA Regulatory Board and elaborates on the requirement of consent before conducting such examinations. Through this paper, the author attempts to examine whether the current Bill, with all its provisions, is adequate to protect the privacy of an individual, and compare the same to international regulations and standards in this regard. The author also attempts to analyse the requirement of ensuring privacy vis a vis the surmounting cases at the Indian Judiciary, and the need for speedier delivery of justice to restore the trust of people on the Indian Judicial System.

Keywords: DNA Profiling Bill, DNA Technology (Use and Application) Regulation Bill, 2019, Forensic Science, privacy, Indian Judicial System.

RESEARCH OBJECTIVE

DNA Technology and profiling is an integral part of the Judicial system, particularly in cases of sexual offences and in determining maternity or paternity. However, the right to conduct DNA tests should not be unfettered and requires strict guidelines and regulations. The objective of conducting this research is to analyse the importance of enacting a statute to strike the right balance between the need to ensure that the information collected for DNA samples is strictly confidential. Moreover, it is also necessary to analyse the provisions under the act from the perspective of the right against self-incrimination and the scope of “consent” of the person whose samples are to be collected. At the same time, it is also essential to ensure that an
innocent man is not convicted and that the criminal is apprehended at the earliest. Thus, through this research paper, the researcher aims to analyse the scope of the DNA Profiling Bill, make certain recommendations for enacting a more balanced legislation to meet the conflicting needs of society.

**RESEARCH METHODOLOGY**

The researcher has chosen secondary sources of data collection as the primary method of research. The researcher/author has primarily obtained information through various books, research papers and articles written on the subject. The researcher has comprehensively reviewed various Statutes which elaborate on the matter and provided an interpretation of the same. The researcher has concluded through an analysis of all the Statutes, interpretations by various jurists and International Courts and Tribunals of the topic and its allies under study.

The researcher has analysed the bare provisions of the Bill though the existing jurisprudence on the subject matter governing the same. The researcher has studied and analysed the constitutionality, the need and objective of the DNA Profiling Bill, 2019 and understand the reason for its failure to be made into a law despite several attempts. The researcher primarily aims to focus on the study of the possible infringement on privacy of the individual if the Bill is passed, and analyse the same in the light of the need to improve the conviction rates of the Indian Judicial System. The researcher analyses the legal provisions of the Bill in the light of provisions under International Laws and those under provisions of other countries. The researcher concludes with certain suggestions and recommendations for a better law to be implemented at the earliest.

**INTRODUCTION**

Deoxyribonucleic Acid or DNA is a hereditary complex molecule, present in every cell in a multicellular organism, including humans. This structure was first identified in 1953 by James Watson and Francis Crick, who also won a Nobel Prize later in 1962. However, it was only in 1984 when British scientist, Sir Alec John Jeffrey conducted further research on DNA technology, leading to the modern-day DNA profiling technology. These DNA molecules consist of two biopolymer strands, coiled around each other, to form a double helix, known as polynucleotides, which are further composed of simpler monomeric units, known as nucleotides. Thus, DNA contains all necessary information, including the biological information, necessary to build, maintain and identify an organism. DNA molecules are so unique that no two organisms, except identical twins, can have the same DNA. DNA profiling is the process through which these individual characteristics are determined to identify a person. It is based on proven scientific principles, and aims to advance social welfare, and hasten the Criminal

---

Justice Delivery System by identifying the offender(s).

1898 DNA samples for the same may be extracted from saliva, hair, blood samples, nail scrapping or any other extract of a muscle or tissue of the body.

1899 Introduced in the Lok Sabha by the Mr. Harsh Vardhan, Hon’ble Minister for Science and Technology for the second time on July 8, 2019, the DNA Technology (Use and Application) Regulation Bill, 2019 or the DNA Profiling Bill, aims to regulate the use of DNA Technology to identify certain persons. This Bill had earlier been introduced in the August 2018 session of the Lok Sabha but could not be passed owing to the lapse of the session. A large number of offences belong to that category of offence which affect the human body and property. This includes murder, rape, human trafficking, assault, battery, robbery, and grievous hurt. National Crime Records Bureau have recorded more than three lakhs crimes belonging to such categories, being committed in a year, out of which a large number of perpetrators of such offences are not convicted due to lack of DNA testing and facilities to identify the criminal. Thus, the primary purpose of the Bill appears to be to overcome this hurdle in the investigation of crime and in apprehending the criminal at the earliest.


1899 Pandit, M.W. and Dr. Lalji Singh, DNA testing Evidence Act and Expert witness, Indian Police Journal, (December 2000).


medicine with law and to ensure ethical practice of medicine and clinical research.\footnote{1905} However, it was only in 2003 that an initiative to draft a bill to regulate the use of DNA samples in criminal jurisprudence and practice was undertaken. The Orissa High Court, in 2004 however, affirmed the validity of conducting DNA tests in criminal cases, to ascertain the involvement of the accused. However, the Court, in so determining, also made a perverse observation with respect to the refusal of the accused to cooperate resulting in an adverse interference being drawn against the accused.\footnote{1906}

In 2005, the Indian Penal Code was amended to permit collection of medical details from the accused, at the time of arrest, if there exist “reasonable grounds for believing” that such medical examination will afford evidence for the commission of the offence.\footnote{1907} Thus, this provision was modified to include within its ambit, the examination of blood, semen, swabs in case of sexual offences, sputum, sweat, hair and fingerprints, through the use of modern and scientific technology, including DNA profiling and other such tests which the medical practitioner may deem necessary on a case-to-case basis.

It was only later that the Department of Biotechnology established a committee, known as the DNA Profiling Advisory Committee, which along with the Union Government, made recommendations for the drafting of the DNA Profiling Bill of 2006, which later came to be known as the Human DNA Profiling Bill, 2007. This Bill was primarily concerned with DNA fingerprinting and diagnostics. Although the draft of the Bill was made public in 2007, it was never introduced in either house of the Parliament owing to widespread criticism it drew amongst members of the civil society and several non-governmental organisations with respect to privacy concerns.\footnote{1908}

The A.P. Shah Committee Report in 2012 suggested safeguards to prevent illegal collection and misuse of DNA data.\footnote{1909} It also recommended the mechanism of appeal under which citizens may request fresh samples to be collected after consent of the stakeholders are taken. It is also required that the purpose for which the data for DNA profiling is being collected is publicly stated where possible and the data be effectively destroyed once the purpose has been met.

The Justice Malimath Committee, through its report, recommended amending Section 4 of the Identification of Prisoner’s Act, 1920 provide that any police officer investigating a case may request the Court of a Judicial Magistrate or a Judicial Metropolitan Magistrate to obtain samples (including blood urine, fingerprints, handwriting etc) from any accused person. This will enable the authorities to conduct DNA testing for speedier delivery of justice. Another significant contribution of the Committee to DNA profiling is their recommendation to amend Section 293(4)


\footnote{1906} Thogorani Alias K. Damayanti v. State of Orissa and Ors, 2004 Cri. LJ 4003 (Ori).


of the Criminal Procedure Code to include DNA experts amongst other experts enlisted thereunder.\textsuperscript{1910}

Subsequently, in 2013, the Department of Biotechnology formulated another expert committee to resolve privacy concerns and finalise the text of the Bill. Yet, in 2015, the government was unable to table the Bill as planned during its monsoon session, owing to concerns over privacy and data security safeguards creating widespread panic amongst members of the society with respect to the Bill. Shortcomings in the earlier Bill with respect to identifying certain persons, including victims and suspects resulted in the “The Use and Regulation of DNA-Based Technology in Civil and Criminal Proceedings, Identification of Missing Persons and Human Remains Bill, 2016”, which was forwarded to the Law Commission for examination and recommendations.

In the 2016 Bill, a DNA Profiling Board was proposed to be constituted, consisting of experts in the field of molecular biology, human genetics, population biology, bioethics, social sciences, law and criminal justice experts to define standards and controls for DNA profiling. However, due to criticism surrounding the Bill not effectively addressing the concerns of privacy of a large number of organisations, and any specifications for the funding of the Board, the stage in which samples can be collected and many more ambiguities, the Bill was sent back for re-drafting.\textsuperscript{1911}

\textbf{Provisions of the DNA Profiling Bill, 2019}

This Bill aims to permit DNA Testing only in certain matters as provided in the schedule attached to the Bill, which enlists offences under the Indian Penal Code as well as certain civil matters, including maternity-paternity, organ transplantation, surrogacy, immigration related suits and establishment of individual identity. The following are certain salient features of the bill.

\textbf{A. Consent}

The Act makes specific provisions for collection of DNA samples through bodily substances of the concerned person by the investigating authority after obtaining the consent of such a person. In case such a person has been arrested for an offence for which the stipulated punishment is less than seven years of imprisonment, the authorities are required to obtain written consent of such a person before obtaining the sample. For offences for which the stipulated punishment is greater than seven years, including life imprisonment and death penalty, the consent of the arrested person is not required to be obtained by the investigating authorities for obtaining samples for DNA testing. If the person whose sample is required to be collected is a victim or a relative of a missing person, a minor or a disabled person, the investigating authorities are required to obtain the written consent of such a victim where it is available or that of the relative, parent or guardian of the minor child. If consent is not provided in such cases, the Magistrate has the power to order


collection of bodily substances from such persons as samples for DNA testing.

NATIONAL AND REGIONAL DNA DATA BANKS
Another interesting provision in the Bill is the provision for the establishment of a National DNA Data Bank along with Regional Data Banks in every State or two or more States. This is to ensure the maintenance of indices for (a) crime scene index; (b) “suspects” or “undertrials” index; (c) “offenders” index; (d) a missing persons index and; (e) an unknown deceased persons index. The repository of each of these indexes are to be prepared by the Regional DNA Laboratories and must be shared with the National DNA Banks as well. The Bill also includes provisions for the entry, retention and removal of the DNA profile through certain regulations. For example, the DNA profile of a suspect may be removed if a police report is filed or a court order is given to that effect, and for the DNA profile of an undertrial to be removed, it is necessary to obtain a court order to that effect. However, the DNA samples of those persons who are not suspects, offenders, undertrials, missing persons or those from a crime scene may be removed on receiving a written request.

DNA REGULATORY BOARD
The Bill also includes provisions for the establishment of a DNA Regulatory Board to supervise the DNA Data Banks and Laboratories. This Board is proposed to be chaired, ex-officio, by the Secretary of the Department of Biotechnology. Additionally, the Board is to comprise of other members who are experts in the field of biotechnology, and the Director General of National Investigation Agency and the Director of the Central Bureau of Investigation [CBI]. The Board is to advise governments on issues related to the establishment of DNA Laboratories or Data Banks and are also to be responsible for the accreditation to DNA laboratories. The Board must also ensure that all such information collected at Data Banks, laboratories and other such institutions with respect to DNA profiling is kept strictly confidential to prevent its misuse. Thus, it is clear that no DNA laboratory can function without an accreditation from the Board, which may also revoke the same for reasons including, but not confined to, failure to undertake DNA testing or failure to comply with the conditions of accreditation. The DNA laboratories are also required to follow standards to ensure quality in the collection, storage and analysis of DNA samples. The laboratories are required to return such biological samples collected to the investigating officer in case of a DNA profile conducted in criminal cases and destroy the sample in all other cases. Any such order of revocation of accreditation may be challenged through an appeal before the central government or any other authority notified by the central government.

OFFENCES UNDER THE ACT
The Bill also criminalises certain acts including, disclosure or use of DNA samples without authorisation, with a punishment of imprisonment for a period up to three years and a fine of up to one lakh rupees.\textsuperscript{1912} Even merely obtaining unauthorised information has been made an offence under the Bill.\textsuperscript{1913} The penalty for destruction, alteration, contamination or

\textsuperscript{1912} Chapter VIII, The DNA Technology (Use and Application) Regulation Bill, 2019, Bill No. 128 of 2019.

\textsuperscript{1913} The DNA Technology (Use and Application) Regulation Bill, 2019, Bill No. 128 of 2019, Section 47.
tampering with biological evidence is imprisonment for a term of up to five years which may also include a fine of up to two lakh rupees.\textsuperscript{1914} The Bill also leaves scope of punishment against any individual acting in violation of or in contravention of any provision of the Bill where no specific punishment has been provided of imprisonment of up to two years with a fine of up to fifty thousand rupees.\textsuperscript{1915} Another unique aspect of the Bill is its provision to penalise even a company or institution which commits an offence under the proposed Act.\textsuperscript{1916}

\begin{center}
\textbf{INTERNATIONAL PERSPECTIVE}
\end{center}

\begin{center}
\textbf{A. INTERNATIONAL TREATIES AND CONVENTIONS}
\end{center}

The International Society for Forensic Genetics [“ISFG”] constituted a DNA Commission to issue strict guidelines and regulations with respect to DNA sampling and profiling to ensure that the privacy and human rights of an individual are not compromised with during the use and maintenance of DNA, particularly for disaster victim identification.\textsuperscript{1917} The DNA Commission ensures strict regulations for accreditation of laboratories, and mandate that they must have a centralised electronic database for collection of samples. One of the basic guidelines issued in this regard is to ensure that the investigation and collection of the DNA samples are kept private and strictly confidential. Before collecting the sample, Forensic DNA Laboratories are mandated to inform the concerned officer and obtain the permission of the victim or their family members. The name of the officer on duty is to be specified. Further, it is mandatory that the process of DNA collection be streamlined to ensure the accuracy of the system and maintain clarity of the data collected, including the sample size and the results. However, it has also been maintained that DNA is not to be considered as the sole determinant of identifying an individual.\textsuperscript{1918}

The Universal Declaration of Human Rights, adopted by the United Nations through a resolution passed by the General Assembly also ensures security of the rights of human beings against involuntary maltreatment.\textsuperscript{1919} The International Covenant on Civil and Political Rights, 1966 also ensures that no person be subject to scientific or medical treatment against their wish or consent.\textsuperscript{1920} It also enshrines the right against self-incrimination upon every person as one of the minimum guarantees.\textsuperscript{1921} Further, the General Comment, released by the Human Rights

\begin{itemize}
\item \textsuperscript{1914} The DNA Technology (Use and Application) Regulation Bill, 2019, Bill No. 128 of 2019, Section 49.
\item \textsuperscript{1915} The DNA Technology (Use and Application) Regulation Bill, 2019, Bill No. 128 of 2019, Section 50.
\item \textsuperscript{1916} The DNA Technology (Use and Application) Regulation Bill, 2019, Bill No. 128 of 2019, Section 51.
\item \textsuperscript{1917} DNA Commission of the International Society for Forensic Genetics (ISFG) 6: Recommendations Regarding The Role Of Forensic Genetics For Disaster Victim Identification (DVI), FSI Genetics, Forensic Science International Genetics 1 (2000) 3-12.
\item \textsuperscript{1918} R. Lessig, C. Grundmann, F. Dahlmann, Tsunami 2004-A Review Of 1 Year Of Continuous Forensic Medical Work For Victim Identification, EXCLI J. 5 (2006) 128– 139.
\item \textsuperscript{1919} UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
\item \textsuperscript{1920} UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
\item \textsuperscript{1921} UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 14(3)(g).
\end{itemize}
Committee, while interpreting the right to privacy noted that such a right is not absolute.\textsuperscript{1922}

The \textit{Declaration of Helsinki, 1964} is a unique international declaration, which set forth guidelines adopted by the 18\textsuperscript{th} World Medical Association through a General Assembly, containing 32 principles, stressing on informed consent, confidentiality of data, vulnerable population, establishment of a protocol, mentioning scientific reasons for conducting the study and review by the Ethics Committee.\textsuperscript{1923}

\textbf{International State Practice}

Several countries have modelled their domestic legislations to comply with the stipulated guidelines and regulations aforementioned.\textsuperscript{1924} Over 60 countries, including \textit{United States},\textsuperscript{1925} \textit{Argentina},\textsuperscript{1926} \textit{China} and \textit{United Kingdom}, have now incorporated DNA technology to investigate criminal cases. In the \textit{United Kingdom}, the Criminal Justice and Public Order Act, 1994 forms the basis for the creation of the National DNA Database. This act classifies certain offences to be ‘recordable’ and permits the police to obtain DNA samples, even without consent, from any person charged with such an offence. This legislation has also been upheld by the Court of Appeal, including the provisions for the preservation of fingerprints, bodily samples, and DNA profiling. Other statutes in the United Kingdom which regulate the collection and use of DNA profiling technology include the Police and Criminal Evidence Act, 1984, which also ensures that this sample is used only for the purpose of “\textit{prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.”}\textsuperscript{1927} The Court also differentiated between self-incrimination and identification through DNA profiling by observing that the right against self-incrimination is not available to an accused in a criminal proceeding for information obtained through the use of compulsory powers, such as documents obtained under warrant, breath, blood and urine sample and other materials used for DNA testing.\textsuperscript{1928}

In certain other countries, such as \textit{Netherlands}, \textit{France}, \textit{Germany} and \textit{Austria}, DNA profiling has only been made admissible in case of grave criminal offences.\textsuperscript{1929} In order to collect biological samples in such cases too, it is essential to obtain the permission of the court to conduct DNA profiling. They are generally accepted as corroborative evidence.\textsuperscript{1930} In China, the Ministry of Justice and Interior

\textsuperscript{1922} UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

\textsuperscript{1923} United Nations General Assembly, Sixty-Fourth Session. Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 10 August 2009.


\textsuperscript{1925} Maryland v. King, 133 S. Ct. 1958 (2013).


\textsuperscript{1927} R (on the application of S) v. Chief Constable of South Yorkshire, (2003) 1 All ER 148.

\textsuperscript{1928} Saunders v. United Kingdom, (1997) 23 EHRR 313.

\textsuperscript{1929} Schneider PM. DNA databases for offender identification in Europe - the need for technical, legal and political harmonization, Proceedings of the 2nd European Symposium on Human Identification. Madison, WI, USA: Promega Corporation,(1998).

\textsuperscript{1930} Simpson v. Collinson, (1964) 1 All ER 262.
have been empowered to establish DNA Banks. Offenders and convicts of any sexual offence have to, mandatorily provide such samples, either voluntarily or on being compelled by the prosecutor. These samples are to be retained for a period of 10 years.

In Canada, DNA data banks have been established vide the DNA Identification Act, 2000. This Act also empowered judges to order convicts to provide blood and hair samples to the bank, respect the privacy of an individual and ensure safe collection of samples by authorised persons, only for legal purposes. The National Forensic Science Commission established thereunder is also responsible to maintain accuracy, security and confidentiality of the information and to ensure appropriate use and dissemination of DNA information. The constitutional validity of this legislation has also been upheld by the Canadian Supreme Court. However, it has also been held that although unauthorised use of a person’s body or bodily substances would amount to “compelled testimony”, if the balance of probabilities demonstrate the evidence being discovered through alternative non-constructive means, the admission of such bodily substances would not render the trial unfair.

**Review of Available Literature**

It is noteworthy that there are extremely few works of literature based on the DNA Profile Bill of 2019. However, the majority of available jurisprudence and writings are based on the previous versions of the Bill, which form the base of the draft in its present form.

The Council for Responsible Genetics, in its article entitled “Overview and Concerns Regarding the Indian Draft DNA Profiling Act” has examined the 2007 Draft of the DNA Profiling Bill. It has indicated the omission of the then draft to limit the power of the Board in terms of protecting the privacy of an individual. It as also indicated the vague language used in the then draft to provide approval for laboratories and the lack of stringent measures to ensure maintenance of quality and standards of the laboratories. However, the present research paper is concerned with the 2019 draft of the Bill which seems to have taken at least some of the recommendations and criticism into account. As analysed, the Bill makes penal provisions for violations of the provisions of the Act. It also mentions certain criteria for the accreditation of the laboratories and makes provisions for the removal of the same as a recognised laboratory. The Bill also makes specific provisions for the Budget allocation for the laboratories and DNA Data Bases.

Another significant contribution is the Thesis by Mr. Surendra Kumar, entitled “Legal Status of Human Genetic Material– A Study Relating to Human DNA its Ethical Problems and Law.” The thesis is a

---

1935 Surendra Kumar, Legal Status of Human Genetic Material– A Study Relating to Human DNA its Ethical Problems and Law, A Thesis Submitted for the Award of Ph.D. degree of UNIVERSITY OF KOTA in the Faculty of Law, 2018, (last accessed on 18 March 2020, 19:02), available at:
thematic analysis of the provisions of the 2018 Draft of the Bill. It provides an analysis of DNA from the purview of Indian criminal law, by taking into consideration the historical evolution of the provisions of the law along with the judicial pronouncements over the years. It also provides the scientific analysis of the concept of DNA and its importance to law and the criminal trial system. This thesis is extremely comprehensive and detailed and has also incorporated scientific mechanisms of conducting DNA tests. However, the present researcher is more concerned with the legal validity of the Bill and has thus, analysed the same through the legal lens in this research paper.

In the review article published in the Egyptian Journal of Forensic Science, entitled “Current scenario of forensic DNA databases in or outside India and their relative risk”, the criteria for inclusion and retention of doubts of efficiency and infringement of privacy as concerns with respect to personal data collection has been examined. This article particularly concentrates on comparing the provisions in various other countries with respect to DNA profiling to the draft legislations of the Union Government in India. However, in the present research paper, the author attempts to analyse the draft Bill with special attention to Indian legislative provisions and judicial interpretations, while also comparing the same to provisions of other countries abroad.

**CONSTITUTIONAL AND LEGAL ANALYSIS OF THE DNA PROFILING BILL, 2019**

Article 51A (h) and (j) of the Constitution of India enshrine a duty upon every Indian citizen to “develop the scientific temper, humanism and the spirit of inquiry and reform” in order to strive to achieve excellence in all spheres of individual and collective activity. In order to analyse the DNA Profiling Bill, the interpretation of certain constitutional provisions is of paramount importance. This includes the power of the Parliament to enact such legislations, under Entry 65 and 66 of the Union List, the right against self-incrimination, enshrines under Article 20(3) of the Constitution, and right to privacy, as under Article 21 of the Constitution.

The opinion of an expert based on DNA profiling is relevant on the basis of “facts bearing upon opinions of experts.”\(^{1936}\) Further, a person accused of any sexual offence is to be examined by a medical practitioner, who may also take bodily substances from such an accused for DNA profiling.\(^{1937}\) The explanation to Section 53 of the Code of Criminal Procedure provides that the ‘examination’ specified under the Act includes the examination of blood, semen, sputum, swear, hair and finger nail clippings through the use of modern and scientific techniques, including DNA profiling and any other test deemed necessary by a registered medical practitioner in a particular case. Further, the Magistrate also has the power to order a person to give signature or handwriting specimens.\(^{1938}\)

Perhaps one of the most elaborate judgment on self-incrimination is the decision rendered by an 11-judge bench of the

\(^{1936}\) Indian Evidence Act, 1872, Section 46.

\(^{1937}\) Code of Criminal Procedure (Amendment) Act, 2005, Section 53A.

\(^{1938}\) Code of Criminal Procedure (Amendment) Act, 2005, Section 311A.
Supreme Court in the case of State of Bombay v. Kathi Kalu Oghad & Ors, in which it has been established that mechanical processes of producing documents in court which do not contain any statement of the accused based on his personal knowledge would not be covered within the ambit of self-incrimination.\textsuperscript{1939} Thus, it was held that although furnishing specimens of signatures or handwriting samples by an accused person would amount to furnishing evidence, it is not to be included within the expression of “being a witness” under Article 20(3) of the Constitution. Subsequently, the much-celebrated decision in the case of Selvi v. State of Karnataka held that involuntary administration of certain scientific tests, such as narco, polygraph examination and Brain Electrical Activation Profile (BEAP) tests are of ‘testimonial character’ and therefore, barred under Article 20(3) of the Constitution. It has also been held that a Voice Spectrographic Test conducted without the consent of the person would not violate the rights of a person under Article 20(3).\textsuperscript{1940} As such, collection and retention of DNA samples have been held not to violate provisions of the Indian Constitution, although further use of DNA profiling technique for testimonial purpose could be challenged in the future.\textsuperscript{1941} Thus, it has been established by the Indian judiciary that samples obtained for DNA profiling and sampling are not violative of Article 20(3) if they are conducted in accordance with Section 53, 156 or 174 of the Criminal Procedure Code.\textsuperscript{1942}

The significance and importance of DNA testing for the administration of justice has been recognised by the Supreme Court and it has been determined that a balance needs to be struck between the right to privacy of a person to not submit himself for forcible medical examination vis a vis the duty of the court to deliver justice at the earliest, and thus, the decision of whether a DNA test is needed must be determined on a case to case basis after careful consideration of the best interests of both the parties.\textsuperscript{1943} However, the Courts have generally taken a more or less consistent stand that DNA profiling is permissible under law, even in the absence of Section 53A.\textsuperscript{1944} Certain Courts have also permitted conducting medical tests, including potency and erectile dysfunction test,\textsuperscript{1945} even without the consent of the accused, and have held that the refusal of the accused to undergo such tests grants liberty to the Court to draw adverse inference.\textsuperscript{1946}

The most comprehensive guidelines with respect to collection of bodily substances for paternity and maternity tests were probably laid down in the Goutam Kundu

\textsuperscript{1942} D.J. Vaghela v. Kantibai Jethabai, 1985 Cr.LJ 974.
\textsuperscript{1943} Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women, AIR 2010 SC 2851.
\textsuperscript{1944} Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130
\textsuperscript{1946} Indian Evidence Act, 1872, Illustration (h), Section 114; Thogorani @ K Damyanti v. State of Orissa & Ors., 2004 CrLJ 4003; Sulabai v. Jagannath & Anr., 1972 Cr.LJ 1392; Venkateshwarulu v. Subbaya, AIR 1951 Mad 190; Subayya Gounder v. Bhoppala, AIR 1959 Mad 396
case,\textsuperscript{1947} in which the Supreme Court held that Courts cannot order blood tests as a matter of course in India. It is only after establishing a case of strong prima facie case,\textsuperscript{1948} after careful scrutiny by the Court,\textsuperscript{1949} of non-access of husband to dispel presumption under Section 112 of the Evidence Act may the court permit conducting of the blood test.\textsuperscript{1950} Thus, all attempts must be made by the Court to avoid conducting the test, particularly to ensure that the legitimacy of the child is not put at peril.\textsuperscript{1951}

The right to privacy, has been recognised to be one of the fundamental rights guaranteed within the ambit of right to life and liberty of Article 21 of the Constitution.\textsuperscript{1952} This includes the right of human beings to be free from public scrutiny unless they act in an unlawful manner.\textsuperscript{1953} However, this right is not absolute and can be derogated from under exceptional circumstances, in case surveillance is in consonance with reasonable restrictions under statutory provisions.\textsuperscript{1954} The right to privacy has been opined to be a right of man to assert directly and not derivatively, in an attempt to protect other interests.\textsuperscript{1955} In the light of the aforementioned, the Courts have also developed a ‘strict scrutiny’ test to show ‘compelling State interest’ and demonstrate ‘narrow tailoring’, that even while taking an action due to compelling interest, the infringement of individual rights takes place in the narrowest manner possible.\textsuperscript{1956} Another interesting intervention of the judiciary in the issue is when a non-governmental organisation filed a public interest litigation against the government due to the non-maintenance of a national DNA data-base, particularly in the light of a large number of unclaimed dead bodies reported annually. The Centre was told to take steps “as expeditiously as possible” to enact a legislation with respect to the same.\textsuperscript{1957}

\begin{table}[h]
\centering
\begin{tabular}{|l|}
\hline
The Department of Biotechnology along with the Law Commission have critically analysed and scrutinised several of the  
\textsuperscript{1953} Ram Jethmalani v. Union of India, (2011) 8 SCC 1.
\textsuperscript{1956} Anuj Garg v. Hotel Association of India, AIR 1958 SC 538.
\textsuperscript{1957} Lokniti Foundation v. Union of India & Ors, Writ Petition (C) No. 607 of 2016 decided on February 06, 2017.
\hline
\end{tabular}
\end{table}
previous drafts of the Bill and in almost all of their observations, emphasised on the need to remove any scope of ambiguity and misuse of the law for a more robust legislature. Undoubtedly, the DNA Profiling Bill has catered to the needs of several stakeholders of the Indian jurisprudential system, particularly to those whom to whom DNA profiling would apply to, including missing persons, victims, offenders, under trials and unidentified deceased persons. The Bill also enlists certain standards to be maintained before and after accreditation of the laboratories. It also provides unique provisions for the removal of a laboratory from accreditation, punishment for non-compliance to with the provisions of the proposed Act and provides for the establishment of National and Regional DNA Data Banks along with a Board responsible for regulating the use and collection of DNA.

As aforementioned, even the Courts have indicated the need for a robust statute in this regard at the earliest.\(^\text{1958}\) Moreover, even when the DNA report is produced, it is essential that the expert is called upon and examined in the Court to explain the report. The Court may also delve into the credentials of the expert in order to determine the reliability of the report. However, a major risk for the establishment of a Board to regulate laboratories is that in the absence of a systematic protocol, there may be a gross misuse of standards used in testing evidentiary samples. Moreover, there needs to be a more approachable and reliable body other than the Central Government, which may be authorised to hear matters regarding granting of accreditation to a laboratory or revocation thereof. There also needs to be a reliable system of performance appraisal and accreditation to dispense justice. DNA Identification has always been a powerful evidence against criminal defendants and given the technological advancements in the field, will continue to be so. Hence, it is necessary to make more stringent provisions regarding the prevention of misuse of the information and ensure there is a more stage-wise process laid down before DNA reports are submitted before the Courts. There should also be separate investigative wings and law and order wings to ensure fair trial and adjudication, without a coloured investigation. Thus, the National Police Commission may be established and incorporated within the structure for the desired result. The rank of the police official whose permission is required for “consent” to conduct the test as under the act must be so specified.

It is also of paramount Importance that the conditions stipulated under the Declaration of Helsinki be strictly followed, particularly that of informed consent required of the person who is being made to undergo the test. The Indian Medical Association is also a member of the World Medical Association, which is bound by the declaration.\(^\text{1959}\) Therefore, such conditions under the Declaration would binding upon Indian practitioners as well. Additionally, the author also strongly believes that the system followed in France, Germany and Austria, where DNA samples are collected only in case of grave offences is practiced. Moreover, the importance attributed to the element of privacy as under the Canadian

---


\(^{1959}\) World Medical Association member list, (last accessed on: 01 April 2020, 14:25), available at: http://www.wma.net/e/members/list.htm.
Statute must be incorporated in the Indian laws as well. False implantation of such DNA samples is extremely common in crimes committed in India. Hence, it is necessary that the consideration of privacy be given paramount importance, and the requirement of the use of DNA Technology be only made in case of grave offences, whose punishment is more than 7 years of rigorous imprisonment. Nonetheless, there is an urgent need for India to develop a strong statute in this regard which is long impending.

**Suggestions and Conclusion**

DNA profiling is undoubtedly, one of the more reliable and established scientific technique for individual identification. The purpose for conducting such identification tests may range from disaster victim identification, to investigation of crimes, identification of missing persons, human remains and medical research purposes. Invariably, most countries have enacted comprehensive legislations for the collection, use and storage of DNA information and developed strict guidelines and regulations in this regard. Thus, it is apparent that DNA profiling is not just concerned with legal frameworks but also needs to be analysed from an ethical lens. Any disclosure, either by misuse of information or unauthorised dissemination of information is a serious violation of privacy of an individual and may be prejudicial to their interests as well as the interest of the society at large. The Puttaswamy judgment has established that the right to privacy is much within the ambit of right to life under Article 21 of the Constitution, thus, putting to rest, the age-old academic debate. Over the years, several legislations have also been suitably amended, including the Code of Criminal Procedure, the Identification of Prisoners Act and the Indian Evidence Act to name a few. In most of these legislations, the provision regarding conducting medical examination, particularly collection of samples, has been made mandatory in case of sexual offences, at the discretion of a medical practitioner.

While the draft Bill has been prepared after careful consideration, and adopting recommendations of several law commission reports, in order to ensure DNA profiling is conducted at stipulated laboratories for ensuring quality control and assurance, particularly of the report which may be admitted as corroborative evidence before the Courts. However, there is still some ambiguity left with respect to the scope of reliability of the reports prepared by experts under the Indian Evidence Act. This Bill is also a step forward towards scientific advancement and upgradation of the evidence presented before the Indian Judiciary. However, it is essential for the Bill to be passed at the earliest as has been done in more than 60 nations across the world for positive impact to be undertaken.

**References and Bibliography**

**A. Domestic Statutes**

5. Guidelines for exchange of Biological Material (MOH Order, 1997).
10. The DNA Technology (Use and Application) Regulation Bill, 2019, Bill No. 128 of 2019
11. The Identification of Prisoners Act, (1920)

INTERNATIONAL CONVENTIONS, DECLARATIONS AND RESOLUTIONS

3. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
4. UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.
5. United Nations General Assembly, Sixty-Fourth Session, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 10 August 2009.

DOMESTIC CASE LAWS

1. Anuj Garg v. Hotel Association of India, AIR 2008 SC 663;
2. Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women, AIR 2010 SC 2851.
17. Mukesh and Anr. v. State for NCT of Delhi and Ors., AIR 2017 SC 2161
23. Rohit Shekhar v. Narayan Dutt Tiwari & Ors, 2012 (2) RCR (Crl.) 889.
29. Subayya Gounder v. Bhoppala, AIR 1959 Mad 396
30. Sulabai v. Jagannath & Anr., 1972 Cr. LJ 1392
31. Thogorani @ K Damyanti v. State of Orissa & Ors., 2004 Crl. LJ 4003
33. Veeran v. Veeravarmalle & Anr., AIR 2009 Mad. 64.

**INTERNATIONAL CASE LAWS**

**LAW COMMISSION REPORTS**

**BOOKS**
REPORTS AND JOURNALS

5. Pandit, M.W. and Dr. Lalji Singh, DNA testing Evidence Act and Expert witness, Indian Police Journal, (December 2000).

ONLINE SOURCES

2. Heinonline- www.heinonline.org
3. JStor- http://www.jstor.org/
4. Manupatra- www.manupatrafast.in
5. SCC online- www.scconline.com
7. Westlaw- www.westlawindia.com

****
WHETHER THE PRIVATE SECTOR ENJOYS A DISCOUNT ON THE INDIAN WHISTLE BLOWER LEGISLATION?

By R. Arun Kumar
From Chennai Govt. Law College

ABSTRACT:

The paper focuses on the concept of Whistle-blowing, with special reference to the private sector. It also deals with the existing legislative framework for the public sector whistle-blowing and also relevance of the same to that of the private regime. A comparative study of the mechanism in other countries like UK, USA, etc. is also dealt under this paper. The methodology used is the doctrinal one analyzing all the books, journals, articles mentioned under the reference section. The author had also thrown some light over the contemporary instances related to the paper which created a demand for the author to pen a paper on such an issue regarding Whistle-blowing. The paper starts with the basics and historical evolution of the concept, followed by the need of the hour to be considered and also the historical pressure, how far the government or the legislature had lend its support for the mechanism and finally concluding with the area of lacuna coupled with the author’s suggestions. After completely analyzing the paper, one would be clear on the concept of whistle-blowing and need for the same in making an effective private sector.

INTRODUCTION:

To see a wrong and not to expose it is to become a silent partner.”

— Dr. John Raymond Baker

This single quote would cover up the whole purpose of Whistle-blowing. It is the duty of the law and order enforcement authorities like police to detect the crime occurring in a society, to take action against the complaint and to approach the judiciary for justice. Not all the time it is practical for the police to recognize the crime from every corner of the society, so it is better to transfer responsibility to the public thereby aiding these authorities, this has been enshrined under the Code of Criminal Procedure, 1973. But the people prefer to choose the opposite, they refrain themselves from reporting the crime occurring around them, to avoid the complex legal procedures that takes place afterwards. If this is the level of responsibility that the people possess towards the immoral in the society, then what would be their contribution to offences involving public or the private sector? The employee in both sectors must be bold enough to bring the wrongs to the lime light and expose the violator thereby purifying his or her own environment. This process of disclosing the wrongdoings are referred by many names like snitching, informing or whistle-blowing. Among these the term Whistle-blowing was widely

Keywords: Whistle-Blowing, Private Sector, Enforcement Authorities, Legislature, Corporate Governance

1960 A doctor licensed in Texas since 1989. He is a level two treating doctor, on the approved doctor list for Texas Work Comp. His undergraduate degree was received from Stephen F. Austin State University in 1975. His doctorate is from Texas Chiropractic College in Pasadena Texas. Dr. Baker has been a frequently published writer for many national publications, including but not limited to, DYNAMIC CHIROPRACTIC, the most widely distributed Chiropractic publication in the United States.

1961 Chapter VI-A titled as “Aid to the Magistrate and the Police”, containing sections 37 to 40.
accepted and used for act of bringing out the wrongs in a sector. India, though, got relevance with that term in 2004 itself, it is still a beginner in whistle-blowing arena or it can also be said to have done nothing for it, but a controversial law, that is struggling for its execution, and its amendment, which has lapsed, after waiting for 4 years.

With that said, a view can be formed that India doesn’t show much priority towards the mechanism of whistle-blowing. Political parties and NGOs are raising their voice for the implementation of the Act but the government prefers to remain deaf. In this paper, the author would like to focus only on the whistle blowers protection in Indian private sector and its allied areas like the footsteps leading to the need for such mechanism, hurdles encountered in achieving them, etc. It would be relevant to take hints from India’s so called passive Whistle-blowers Act 2014 and other countries’ (like US, UK) ability to succeed and to lead forward in safeguarding the interest of the whistle blowers. The paper would also covers the relevance of whistle-blowing with the Corporate Governance and Corporate social responsibilities (CSR) and role of the former in the latter’s development.

WHISTLE-BLOWING OUTLINE:

Whistle-blowing is the act of exposing a wrongdoing, typically a fraud or an illegality, in a government agency or a private enterprise. Simply, whistle-blowing can be defined as an act of disclosure of information by people within or outside an organization and that which are not otherwise accessible to public, generally of activities of organization that are against public interest.

The history has relevance to the term in the 19th century where the police men use a whistle to alert the people about the bad situation like riots, natural calamities, accidents, violent protest thereby protecting the people. It was, at that time, attached to the law enforcement authority itself. Later the term Whistle-blowing was first coined by an U. S. civil activist Ralph Nader in 1975, he gave a positive cover, instead of coating a negative connotation, over the term which seeks to reform the society, public sector or the private enterprises. In 1883, the term was used in the Janesville Gazette where the police used to alert during the riot. In 1963 it became a hyphenated word and later it was recognized by the journalist in the 1960s. The term whistleblower was first discussed by Doggett, J., in the case of Winters v. Houston Chronicle Pub. Co. Wikipedia defines Whistle-blowing as “The act when a person tells the public or some public authority about an alleged dishonest or illegal activity occurring in government departments, a public or a private organization or a company”.

Information Act, the Consumer Product Safety Act, the Foreign Corrupt Practices Act, the Whistleblower Protection Act, and the National Traffic and Motor Vehicle Safety Act.

https://www.whistleblowersinternational.com/what-is-whistleblowing/history/

795 S.W.2d 723 (Tex. 1990).

https://en.wikipedia.org/wiki/Whistleblower
Whistle-blowing involves the act of reporting wrongdoing within an organization to internal and external parties. Internal whistle-blowing provides the reporting the information to a source within the organization and external whistle-blowing occurs when the whistleblower takes the information outside the organization such as to the media or regulators. Internal whistle blowing is often helpful to company because it helps them to correct their differences internally and save themselves from mortification before the public. Good governance signifies that it is in the interest of organization, institution or an economy to report anything wrong happening in it. This reporting of wrongdoing is not meant to cause harm to the organization, rather, it is to facilitate the exposure of wrongful acts or omissions of a person or persons that is against the interests or values of organization. In this age of globalization, where economic motives precede over all virtues and traditions; protection of larger public interest from great corporate scandals has become matter of great importance.

A whistle-blower is defined as someone who divulges wrongdoing, fraud, corruption or mismanagement. Mostly the person could be an employee because he is the person who becomes adept in about the corruption or frauds which takes place inside a company or organization because they carries the privacy of the organization. And so they would be the first persons who will come to notice all the illegal activities inside the walls. Thus the objective of a whistleblower is to put out all those malpractices, corruption or any other frauds inside a company and thereby safeguarding the public interest.

NEED FOR A WHISTLE-BLOWER:

In the case of public sector, the need for a mechanism of Whistle-blowing is inevitable to maintain the checks and balances among the functionaries, to make it accountable and responsible for its own fault towards its employees, to eliminate the evil elements out of the sector by exposing the same, to ensure its shareholders’ interest and ultimately, work towards the developmental path of the country.

On the other side for private sector, the important purpose of whistle-blowing is to bring efficiency to the corporate governance. According to James D. Wolfenshon1968, “Corporate governance is about promoting fairness, transparency and accountability”. According to Sir Adrian Cadbury1969, “Corporate governance is a system by which businesses are directed and controlled”. It means that the manner or way in which the corporate or a company is governed. The relevance of whistle blowers for the efficient governance will be discussed in the later part of the paper.

If any illegal act or wrongful conduct takes place within a company or a in a government department, then it is necessary to rectify that wrong. Primarily the responsibility is borne on the management or head of the department or CEO or board of directors. But they do not

1967 https://doi.org/10.1787/9789264252639-en
1969 Sir George Adrian Hayhurst Cadbury was the chairman of Cadbury and Cadbury Schweppes for 24 years, and a British Olympic rower. He was a pioneer in raising the awareness and stimulating the debate on corporate governance and produced the Cadbury Report, a code of best practice which served as a basis for reform of corporate governance around the world.
come across all such disparities. The public authorities like police, investigation agencies or any other law authorities cannot directly involve in the internal issues of a corporate or a government department. So the employees are made morally responsible to report to their higher authority or to any other external designated agencies about the evil factor. This is important for the good governance, both in public or private sector. But the employees, unlike the public authorities are not bold enough to disclose their department flaws to any bodies not even to their own heads, fearing that they would mishandled, harassed, undergo disadvantages in profession or even terminated or transferred from their job. This is more among the private sector employees comparing with their counterparts in public sector.

This is a usual mindset that every employees have i.e., to safeguard their own interest leaving away the interest of the corporate. This perspective is wrong. One can’t draw a line of difference between the interests of the above two. None exist without the other. Instead the employees should recognize it as a collective interest of the all employees as a whole which makes concern corporate or department to run efficiently. The employees can’t simply waive off their rights and once they do so they can’t seek remedy for any future disparities arising from that waived right. It is also fair on their part to fear of their personal interest because there are no guidelines on how to report such problems, a clear mechanism or procedure to be followed and not even any legal safeguards from the victimization of employee by the management. So the ultimate lacuna is with the government or the legislature in making a law to protect the interest of the employees who report the malfunctioning, since they are the ultimate sufferers. So the government should focus on the framework for the Whistle-blowers protection.

It is not good to say that India didn’t take appropriate steps to consider law for whistle-blowers. It has an exclusive enactment for the mechanism of whistle-blowers and many other policies, guidelines have been formulated. But we have to accept that the executive has failed to carry out the enforcement of the respective laws by remaining passive and even the political displacement didn’t favor the development in the field of whistle-blowing. Only theoretical or the practical benefits alone has not made the demand for the exclusive law, but also there are a lot of instances to support the enactment of the same from murder-less Infosys scam to cruel Vyapam scandal, this will be discussed below.

**HISTORICAL FOOTSTEPS:**

**Sathyam scam (2009):** It is about corporate governance and fraudulent auditing practices allegedly in connivance with auditors and chartered accountants. It was an Rs 7,000-crore corporate scandal in which chairman Ramalinga Raju (Whistle-blower-cum-accused) confessed that the company’s accounts had been falsified. Ironically he did so the next day after receiving Golden Peacock for Corporate governance award. On January 7, 2009...

---

1970 Sathyam Computers Service limited was one of the largest among 4 IT industries. (Infosys, Wipro, TCS and Sathyam)

1971 Golden Peacock Awards Secretariat has great pleasure in inviting applications for Golden Peacock Award for Excellence in Corporate Governance.
Ramalinga Raju sent off an email to Securities and Exchanges Board of India (hereinafter referred as SEBI) and stock exchanges, wherein he admitted and confessed to inflating the cash and bank balances of the company. Weeks before the scam began to unravel with his famous statement that he was riding a tiger and did not know how to get off without being eaten. Raju had said in an interview that Satyam, the then fourth-largest IT company, had a cash balance of Rs 4,000 crore and could leverage it further to raise another Rs 15,000-20,000 crore. Finding PwC guilty in the Satyam scam, India’s capital markets regulator SEBI on 10 January 2018 barred its network entities from issuing audit certificates to any listed company in India for two years. SEBI has also ordered the disgorgement of over Rs 13 crore of wrongful gains from the auditing firm and its two erstwhile partners who worked on the IT Company’s accounts.

Vyapam scam: It is a case where there was manipulation in the selection process of candidates for government colleges and jobs by the Madhya Pradesh professional examination board (Hindi acronym VYAPAM). The practice was that the highly influential families with political background make their members pass the competitive exams without getting the required attendance in the college. The whistle-blower was a 2003 medical student, Anand Rai, Ophthalmologist, Indore, who sensed the malpractice however he didn’t disclose that issue at that time due to the fear factor. Later he blew the matter which involved many politicians, bureaucrats, doctors, businessmen in the offence of corruption. Aftermath the matter coming into lime light saw a series of unnatural deaths. In 2013 a Special Investigation team was setup by the M.P. government which reported 32 deaths including M.P. Governor’s son, a TV journalist, dean of the government medical college, a police constable and several students who were involved in the admission scam. CBI filed charge sheet against 990 persons.

Enron scam: It was publicized in October 2001, eventually led to the bankruptcy of the Enron Corporation, an American energy company based in Houston, Texas, and the de facto dissolution of Arthur Andersen, which was one of the five largest audit and accountancy partnerships in the world. In addition to being the largest bankruptcy reorganization in American history at that time, Enron was cited as the biggest audit failure. The former vice president, Sheron Watkin blew up the whistle revealing the company’s fraudulent practices.

NHAI scam: Satyendra Dubey, an Indian Engineer service officer and the project director for National Highways Authority of India. He was responsible for the Grand Trunk Road NH II (Golden Quadrilateral

---

1972 The Securities and Exchange Board of India was established on April 12, 1992 in accordance with the provisions of the Securities and Exchange Board of India Act, 1992. The Preamble of the Securities and Exchange Board of India describes the basic functions of the Securities and Exchange Board of India as “...to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto”

1973 https://www.livemint.com/Companies/h785U22XrP2l9m4UyrAKP/Satyam-verdict-B-RamalingaRaju-9-others-held-guilty.html


1975 https://www.britannica.com/event/Enron-scandal

www.supremoamicus.org
Project) during the period of PM A. B. Vajpayee\(^{1976}\). In 2003, exposed corruption and financial irregularities by one of the contractor. He complained to the PMO office about the malpractice, but the office ignored him and circulated the matter to all other department without concealing his identity. As a result, he was shot dead in November 2003 in Gaya. Three persons were given life term in 2010 for the murder. Calls for a law to protect whistleblowers arose in the wake of his murder.\(^{1977}\)

Indian Oil Corporation Scam: Manjunath Shanmughan, known to his friends as Machan, was an employee of the Indian Oil Corporation. It was Machan’s responsibility to ensure that the oil sold in Indian petrol stations was unadulterated. In October 2005, Machan closed two petrol pumps in Lakhimpur Kheri for three months because they were selling tainted oil. However, just one month later, the pump reopened. After learning this, Machan conducted a surprise raid and was killed. Pawan Kumar Mittal, the owner of the pump, and seven others were tried for Machan’s death and Pawan was sentenced to death. The case is currently in appeal. To honor him a trust was established and also a biopic was released based on this issue.

**AFTERMATH:**

After the implementation of the New Economic Policy\(^{1978}\) in 1991, there was increase in the Foreign Direct Investment (FDI) and MNCs setup in India, which lead to the need of Accountability and a mechanism to protect the investors. The first step was the establishment of Confederation of Indian Industries\(^{1979}\) (CII) in 1996 to frame or recommend new laws for the country towards better corporate governance. Following that the Kumar Mangalam Birla\(^{1980}\) Committee, 1999 and Naresh Chandra\(^{1981}\) Committee, 2002 was formed under the SEBI to formulate the best practice of Corporate Governance.

Law Commission 179\(^{th}\) report supported the Public Interest Disclosure (Protection of Informers) Bill, 2002 which encouraged the disclosure of Corruption and maladministration among the public servants and protecting the complainants from unfair treatments. Following this, the Second Administrative Reform

\[^{1976}\] Atal Bihari Vajpayee was an Indian statesman who served three terms as the Prime Minister of India, first for a term of 13 days in 1996, then for a period of 13 months from 1998 to 1999, followed by a full term from 1999 to 2004. A member of the Bharatiya Janata Party (BJP), he was the first Indian prime minister not of the Indian National Congress to serve a full term in office.


\[^{1978}\] New Economic Policy of India was launched in the year 1991 under the leadership of P. V. Narasimha Rao. This policy opened the door of the India Economy for the global exposure for the first time. In this New Economic Policy P. V. Narasimha Rao government reduced the import duties, opened reserved sector for the private players, devalued the Indian currency to increase the export. This is also known as the LPG Model of growth.

\[^{1979}\] It works to create and sustain an environment conducive to the development of India, partnering industry, Government, and civil society, through advisory and consultative processes

\[^{1980}\] Kumar Mangalam Birla is an Indian billionaire industrialist, and the chairman of the Aditya Birla Group, one of the largest conglomerates in India. He is also the chancellor of the Birla Institute of Technology & Science, and the chairman of the Indian Institute of Technology Delhi and Indian Institute of Management Ahmedabad.

\[^{1981}\] Naresh Chandra was a 1956 batch IAS officer of Rajasthan cadre, who served as the Cabinet Secretary of India, Defence Secretary of India, Home Secretary of India, Water Resources Secretary of India and Indian Ambassador to the United States.
Commission made its 4th report titled the “Ethics in governance” suggested a law for whistle blowing.

Next, Narayana Murthy Committee submitted its report on Corporate Governance in 2003, its core recommendation was that Whistle-blowing is an important element of corporate governance, it was the first one to recommend so. It was set up by SEBI under the chairmanship of N. R. Narayana Murthy (Infosys chief mentor). It was in response to the Enron Scandal in USA. It advised to review the Clause 49 listing agreement thereby improving corporate governance. It reiterated the report of Naresh Chandra committee and also encourages the companies to follow substance, not just the form, of good governance. The major recommendation were the companies’ policy should have provisions for the protection of the Whistle-blowers from unfair terminations and other unfair procedures and there must be annual affirmation from the Board of Directors report on Corporate Governance regarding the status of Whistle-blowing mechanism along with the Annual report.

After the murder of Dubey, the Supreme Court directed for an exclusive law to protect those whistle-blowers. So Public Interest Disclosure and Protection of Informer resolution (resolution no. 89 dt. 21.04.2004) was passed in 2004 by the government of India. According to that resolution, the Central Vigilance Commission (CVC) was the designated authority to which written complaints can be made on the corruption or misuse of power in office by any employee of federal government or companies, corporation under the control of government. This was only concerned about the public sector and not about the private sector.

In 2005, Government of India setup a Jamshed J. Irani Committee on the Company law on 02-12-2004. Report has 7 parts and 13 chapters. Chapter XII dealt with the offence and penalties. It recommended the law should recognize whistle-blowing concept.

ROLE OF LEGISLATURE:

In august 2010, the Public Interest Disclosure and protection of person making disclosure Bill was introduced in Lok Sabha, where the cabinet approved it in June 2011. Later it was renamed as the Whistle-blowers Bill 2011 by the Standing Committee on personal, public grievances, law and justice. Lok Sabha passed it and was introduced in the Rajya Sabha. The main objectives of the bill is that the employees of the central government or state government or the companies or corporate owned by central or state government can make a complaints disclosing the practice of corruption, misuse of power and about the criminal offence committed or suspected to be committed to the designated authority. The bill expressly excluded the defense, police and intelligence personals from its purview; this means that the employees under these sectors cannot make complaints. It didn’t

---

1982 The Second Administrative Reforms Commission (ARC) was constituted on 31.08.2005, as a Commission of Inquiry, under the Chairmanship of Shri Veerappa Moily for preparing a detailed blueprint for revamping the public administrative system.

1983 Jamshed Jiji Irani is an Indian industrialist. Educated in Metallurgy, he joined British Iron and Steel Research Association. Later he joined Tata Steel from which he retired in 2007 as the Director. Later he served on the boards of various Tata group companies and others. He received the Padma Bhushan in 2007.
include the corporate whistle blowers within its arena because it was taken up under the Company’s Act 2009. The CVC and the SVC were made the designated authorities to receive the complaints from the employees. The authority refuse to receive the anonymous complaints and it must be accompanied by the name, designation and address of the complainant. The special features incorporated in the Bill is that the designated authority must protect the identity of the complainant, it has been given the discretion on what circumstance the identity can be revealed, court is also given the powers to direct the authority to do so, protect the complainant from harassment and other unfair treatments and also to restore employee to the original position.

Next is the clause 49 of the Listing Agreement by SEBI had mandatory and non-mandatory provisions, the whistle blowing belong to the latter. Under the whistle-blowing policy, the company shall set up a mechanism for employees to report on the misbehavior, fraud, breach of code of conduct or any other violation of companies’ or government policies. It should provide safeguard against the victimization of the complainants. The policy must provide for the direct access to the Chairman of the Audit committee or any other similar authority. The communication of the mechanism must be clearly stated to the employees.

Following this the SEBI amended corporate governance norms for listed companies in 17.04.2014 to bring Corporate Governance in line with the companies Act, 2013. The Whistle-blowers policy under revised Clause 49 is; they are made mandatory for the companies to set up a vigilant mechanism to report the wrongful acts. Additionally, it made compulsory for the company to disclose the mechanism on its official website thereby the employees will be aware of that and to make a board report regarding the Whistle-blowing mechanism.

In 2007, corporate governance guideline was issue in 2009 which was a mere recommendation, suggesting it may be voluntarily adopted by the public sector as well as the private sector. Chapter VI deals with the voluntary code of corporate governance which suggested the same guidelines as before.

Under Company’s Act, 2013 and the Companies (Meeting of Board and its powers) Rules 2014, the Chapter XIV of the former deals with Inspection, Inquiry and Investigation covering the concept of Whistle-blowers. According to section 211 under the 2013 Act, Serious Fraud investigation office is established where the blowers can report about the misconduct or frauds. Section 177(9) r/w the rules make the establishment of vigil mechanism mandatory for the followings: 1. Listed companies. 2. Companies that accept deposit from the Public. 3. Companies that borrow money from the banks and other financial institutions exceeding Rs. 50crores. If a company has an Audit committee then vigil mechanism should headed by that committee and in case of other companies, the board of directors must nominate a director from them to play the role of audit committee for that vigil mechanism.

CORPORATE GOVERNANCE:
For a country to develop in a progressive path there should be effective governance. Governance is vast area which simply includes legislature, executive and the judiciary. Likewise, the similar term used in corporate sector is the Corporate
Governance. Governance is derived from a Latin term ‘gubernare’ which means ‘to rule’ or ‘to steer’. Corporate governance is a system by which companies are managed and controlled. Definition of Corporate Governance by the World Bank has been earlier stated. In the proceedings of the Silver Jubilee National Convention of the Institute of Company Secretaries of India (ICSI), it was observed that:

“Corporate governance is not just corporate management; it is something much broader to include a fair, efficient and transparent administration to meet certain well defined objectives. It is a system of structuring, operating and controlling of a company with a view to achieve long term strategic goals to satisfy shareholders, creditors, employees, customers and suppliers and complying with the legal and regulatory requirements, apart from meeting environmental and local community needs. When it is practiced under a well laid out system, it leads to the building of a legal, commercial and institutional framework and demarcates the boundaries within which these functions are performed”.

According to CII, corporate governance deals with laws, procedures, practices and implicit rules that determine a company's ability to take informed managerial decisions vis-a-vis its claimants - in particular, its shareholders, creditors, customers, the State and employees. There is a global consensus about the objective of 'good' corporate governance: maximizing long term shareholder value. The main principles of corporate governance are transparency, fairness, accountability and responsibility.

On coming to the nexus between the whistle-blowing and the corporate governance, the former is one of the essential and effective techniques for the latter. Whistle-blowing does not cause harm to corporate but to tries to expose the wrongdoing and subsequently reform the company. Committee on Standard in public life 2005\textsuperscript{1984} precisely says the role of whistle-blowing as “both the instrument of good governance as well as manifestation of a more open culture.” For effective corporate governance five mechanisms are required: Independent board of directors, Role of audit committee, Whistle blowing, Shareholders activism and the Fast track redressal or complaint mechanism.

Whistle-blowing brings the violator or the misconduct to lime light, thereby makes the workplace safer as well as safeguarding the interest of shareholders and ultimately purifying the reputation of the company.

RELEVANCE OF FOREIGN:
Countries like USA and UK are leading us with a huge difference in the field of laws for corporate governance and whistle-blowing.

United Kingdom: It enacted the Public Interest Disclosure Act 1998 which applies both to public and private sector, classifying the disclosure into 3 tiers. 1) Internal disclosure to the employers, 2) Regulatory disclosure to prescribed bodies, 3) Wider disclosure to media, police and consumer groups. U.K. made Serious Fraud Office as the designated agency to receive the public interest disclosure. To make this Act operational there are few conditions established in 1994 to advise the Prime Minister on ethical standards of public life. It promotes a code of conduct called the Seven Principles of Public Life.

\textsuperscript{1984} The Committee on Standards in Public Life (CSPL) is an advisory non-departmental public body of the United Kingdom Government,
required, disclosure must be in good faith, reasonable belief that the information tends to show that the misconduct occurred or likely to occur. It must be true and relevant to the regulator. It protects the employees from detrimental treatment and victimization and also covers criminal offence, breach of obligations, miscarriage of justice and danger to health. In addition to this U.K. Enterprises and Regulatory Reforms Act, 2013 was passed.

United States of America: The whistle-blowers law was first at federal government instead at corporate level, US False Claims Act, 1863. It provided provisions for the incentives in the case of true disclosure and penalties in the case of void or irrelevant disclosure. Upto 30% proceeds of the law suit will be borne by the complainant. U.S. department of labour, Sarbance-Oxley Act\(^{1985}\), U.S. federal sentencing guidelines for organization were concerned for the whistle-blowers in the private sector. U.S. department of Labor’s Whistle-blowers protection program set up an equal Employment Opportunity Commission. In 2010, Dodd Frank Wall street reforms and Consumer protection Act\(^{1986}\) provided incentives to the whistle-blowers if incase the recovery exceeds 1 million USD, the award will be 30%. This is applicable only when the disclosure is made to the US Securities and Exchange Commission (SEC) and not to the internal whistle-blowing. Moreover the internal whistle-blowing is not protected. Texas whistle-blowers Act protect the public sector employees on reporting the violation of laws to the appropriate agencies within 90 days from the date of knowledge of the violation. The US Supreme Court commented on this, “the public sector whistle-blowers are protected under the first amendment rights from any job retaliation when the same flags over corruption.”

Japan enacted Whistle-blowers (Protection) Act, 2006; protect the person who reports any wrongdoing to the enforcement agencies or external parties from dismissal or unfair treatment. The whistle-blowers must seek remedy from this Act or labor contract or civil code. Korea has protection of public interest whistle-blowing Act and similarly New Zealand has Protected Disclosure Act, 2000; which is applicable to both public and private sector.

In Addition to these, there are a number of international instrument relating to the practice of whistle-blowing; International guidance for private transparency, International business principles for countering bribery, ICC rules on combating corruption, WEF principles of countering bribery, World Bank integrity compliance guidelines and others.

AREA OF CONCERNS:

In India the execution of laws relating to whistle-blowing has not even

\(^{1985}\) The Sarbanes–Oxley Act of 2002, also known as the “Public Company Accounting Reform and Investor Protection Act” and “Corporate and Auditing Accountability, Responsibility, and Transparency Act” is a United States federal law that set new or expanded requirements for all U.S. public company boards, management and public accounting firms. A number of provisions of the Act also apply to privately held companies, such as the willful destruction of evidence to impede a federal investigation.

\(^{1986}\) It is legislation signed into law by President Barack Obama in 2010 in response to the financial crisis that became known as the Great Recession. Dodd-Frank put regulations on the financial industry and created programs to stop mortgage companies and lenders from taking advantage of consumers.
cross it half way mark, still struggling due to lack of priority, political displacements, government leniency towards the corporate sector from where a huge revenue is yielded. The India whistle-blowers laws have deliberately ignored the private sector like the defense, police and intellectual agencies, as earlier mentioned, from its purview.

The term “Victimization” is unclear and the term Whistle-blower or whistle-blowing is not defined anywhere in the Act. Though it provides provision for the safeguards against victimisation, it failed to define or categorize what all includes under victimization. Whether it only considers the legal definition regarding an offence or broad enough even to include pity mistreatment or unfair treatment?

The Act has completely neglected the interest of the witnesses except by giving an ambiguous provision for their protection; the section plainly provides for the protection from evil elements but not the actual protection during investigation or trial. The Law Commission of India recommended for the witness identity protection similar to that of the countries like US, Canada, Australia, Germany and Italy.

Another significant flaw in the Act is that the appeal remedy is not available for the complainant if in case he was accused for false allegation of whistle-blowing but ironically the public official to whom the report was given has the appeal provision if in case he was accused of revealing the complainant’s identity.

Next concern is that the discretion to reveal the identity of the whistle-blower is with the CVC or the SVC and not with the whistle-blower himself. The legislation lack strict punishment or penalties for the acts of leaking the identity of the blower which in turn result fatal to the life of the complainant. The Apex Court that struck a blow for whistleblower anonymity when it ruled in a 2013 case investigated by the Anti-Corruption Bureau (ACB) of the State of Maharashtra that it’s not essential for a fair trial to reveal the identity of the whistleblower. The verbatim quote from the Honorable Judge who wrote the judgment reads:

“Situations are many where certain persons do not want to disclose the identity as well as the information/complaint passed on by them to the ACB. If the names of the persons, as well as the copy of the complaint sent by them are disclosed, that may cause embarrassment to them and sometimes threat to their lives.”

With regards to the proposed amendment to the 2014 Act, which was passed by the lower house in 2015, after a struggle of 5 years to get the approval of the Rajya Sabha, finally got lapsed in 2019 due to the general elections. The proposed amendment Bill sought to dilute the previous Act and thereby reducing the protection given to whistle-blowers. The previous Act superseded the Official Secrets Act, 1923, while the new proposed bill seeks to give importance to the 1923 Act, that is to narrow down the area of disclosure by the whistle-blowers by excluding the matters which are under the purview of the Official Secrets Act, 1923.

1987 Section 11, the Whistle Blowers (Protection) Act, 2014.
1988 Section 12, the Whistle Blowers (Protection) Act, 2014.
1989 Refer Sections 14, 15, 16 and 20, the Whistle Blowers (Protection) Act, 2014.
It proposes to keep the disclosures of issues of national importance outside the ambit of the whistle-blowers (protection) Act. The prohibited disclosures are; Security, sovereignty, integrity of the state, Scientific and economic interest of the country, Friendly relation with the other states, cabinet proceedings, Disclosures expressly prohibited by law and those endangering human life. Out of these, the odd one out is the friendly relation with other states, in what way this is considered to a reasonable ground to be excluded from disclosure? If there is clash of interest between the security of the state and friendly relation in disclosing a particular issue relevant to the latter, does the latter will be given importance than the former?

Very recently in 2017, the SEBI committee on corporate governance contributed a diverging opinion in its report which was unique from the previous reports. The committee was headed by Uday Kotak submitted the report on the corporate governance on the listed companies. It recommended a leniency mechanism towards the whistle-blowing. It suggested to provide structural incentives for the violators to come forward and disclose themselves and subsequently cooperate the authorities in carrying out the case. Protection against the victimization was also a advice of that report. The benefit of such a lenient procedure is that it leads to effective detection of violations and enhances the investigation, inquiry and trial stages. It also recommended that the SEBI must have the power to grant leniency and to offer protection the complainant. The 5 points to strengthen the whistle blower mechanism are; clarity with the definitions, non-retaliation provisions, confidentiality, Procedural transparency and fairness and communication.

CONCLUSION:

One can come to a conclusion after analyzing the paper that the mechanism of whistle-blowing is beneficial for the society with the support of the employees. Obviously, the government heads or the companies’ management will be against this concept as its notion is to bring their flaws to the lime light. But deep down, it is ultimately the collective interest that supersedes the individual interest. By this the author means to say that such disclosure would affect the individual’s interest but ultimately it purifies the working of management from evil elements and make the corporate governance effective.

“There is a Court, higher than the Court of Justice, it is the Court of Conscience, and it supersedes all.”
— Mahatma Gandhi

Whistleblower protection today is a matter of much Corporate Global Concern because overtime whistleblowers have been seen as the ‘Keepers of Corporate Conscience’. The whistle-blowing is an essence of conscience keeping and the whistleblowers are the conscience keepers. A conscience keeper has a duty to blow the whistle whenever he finds anything which is not as per standards of conscience. In the context of a corporation, whistleblowers are those who expose malpractices, unethical and corrupt practices of their co-workers and seniors, for the benefit of the company, stakeholders and society at large.

Corporate conscience is a term widely used for ‘Corporate Social Responsibility’, but in actuality corporate conscience is more than corporate governance and corporate social responsibility. Corporate conscience is displayed in exercising fair treatment and growth for all stakeholders and society without leaning towards profit for a
particular interest group. To put it simply, corporate conscience is a two-fold realization: firstly that, corporate governance deals with promoting corporate fairness, transparency and accountability; and secondly that, corporate social responsibility focuses on the idea that a business has social obligation above and beyond making profit. It requires management to be accountable to full range of stakeholders.

To conclude there are pros and cons for every concept, but the ultimate decision lies on the drawing a balance sheet between them. Supports say it is a form of civil disobedience, ethically right and to protect the public from the evil doing the whistle-blowing is necessary, on the other hand critics place their view that it is totally unethical to leak the secrets of the corporate with ultimately affects the right to privacy1991 as enshrined under the Art.21 of the Constitution of India. Whateoever the demerits be, the balance sheet always favors the concept of whistle-blowing in the corporate side.

Everyone has the whistle to blow, as a matter of right, and everyone is obliged to blow the whistle, as a matter of social responsibility and duty, but what matters is that the time, opportunity and the guts to blow it loud. It is easy to say in theory that blowing is beneficial to the society, what the blowers additionally need is the legal or government support to move forward towards the fruits of accusation without any hindrances and without any sense of fear. On the other hand, the state should make itself equipped in the mechanism of whistle-blowing and allied area and should enforce stringent laws for safeguarding the employees from victimization.

**REFERENCE:**


---


WITNESS PROTECTION

By Rahul Jaggi
From School of Law, UPES Dehradun

ABSTRACT

A witness is basically a person who sees an event happening, an accident or a crime. A witness is the only person who can act as an eye witness in front of a court in consonance to a crime witnessed by him. In primary sense, a witness is basically a person who has the most direct knowledge of a particular event because he has seen it with his eyes. A witness is an indispensable part of the criminal justice system and judgements are based on witness’s testimony. Therefore, truthfulness of a witness’s testimony is the cornerstone of justice. Moreover, a witness should be able to deliver his statements without any threat or coercion and it is because of this reason that they are considered as ‘eyes and ears’ of justice’, which is why Witness Protection system is becoming vital all over the globe and specially in the Indian Scenario. This research paper will cover the meaning of witness band witness protection.

Moreover, through this paper, the author will also be explaining the importance and need of Witness Protection in India, will explain about witness protection laws and programs in other parts of the world, will explain the reason behind witnesses turning hostile leading to hindrance in the justice system. Moreover, this paper will be covering the developments regarding witness protection in the Indian Justice system and how it tries to enhance the protection and state of witnesses and how it helps in imparting justice.

This project aims to explain the aspects of witness protection in detail and aims to cover the practical scenarios and application related to witness protection as Witnesses basically act as fuel for every step in the procedure of imparting justice and without witnesses, the justice system cannot move ahead.

Keywords: Witness, Witness Protection, testimony, cornerstone, practical scenarios, fuel, criminal justice system.

INTRODUCTION

A witness is regarded paramount and vital to the Criminal justice system. He acts as a fuel for the justice system to move forward and also helps in enhancing the justice imparting procedure, also leading to affair trials. A witness is considered as the backbone of Criminal Justice System because he is the person having the most direct knowledge of happening of the event or crime and so can act as a direct evidence to a crime. The testimony of a witness helps the court to deliver justice through fair trials. Therefore, truthfulness of a witness’s testimony is the cornerstone of justice. Moreover, a witness should be able to deliver his statements without any threat or coercion and it is because of this reason that they are considered as ‘eyes and ears’ of justice’. Extraneous factors in the form of corruption or threats form a reason for scaring witnesses and turning them hostile and which is why Witness Protection system is becoming vital all over the globe and specially in the Indian Scenario. Witness protection is basically security provided to a threatened person providing testimonial evidence against the opposite party to the case and it can be in the court during trial or before the trial or after the trial. Witness protection programs and laws now days are the need of the hour because absence of these laws in India has helped...
strengthening the delinquents as it becomes easy for such people to coerce and hold the witness hostile.

The success of criminal justice system which India is trying hard to seek largely pivots upon the individuals, the witnesses to deliver information and take an honest stand in front of the court without being threatened to death or family and without coercion being against them because no innocent person would assist or help the court by putting his own personal or private life in danger and unrest.

**WITNESS PROTECTION LAWS AND PROGRAMMES-WORLD**

**International Law**

The international law does not define clearly who is a witness but the need for setting up witness protection units during the criminal trial has been acknowledged in many in tribunals worldwide.

The International Criminal Tribunal of Rwanda has formulated rules for protection of witnesses and victims and similar rules exist in the International Criminal Court 1992. They have reckoned in time that protection is necessary so as to reach to the ends of justice and fair trial. Yugoslavia and Rwanda have recognised duties to be performed which were also added in the Statute for International Criminal Court and they are:

- Delaying the disclosure of witness details to the defence.
- Allowing testimony to be given by one way closed circuit television.
- Conducting closed sessions hearings.
- Using voice and image altering devices.
- Total non-disclosure of information relating to the identity of the witness 1993.

The international court has become very vigilant and responsible and has made a separate unit that provides support to the witnesses and responds effectively against anything endangering the protection of witnesses or when witnesses receive threats. These protective services extend to pre and post trial procedures. Not only just International Criminal Court, but even the European Court through the judgement of the landmark case of Doorson V. Netherlands 1994 recognised that the witnesses should be given rights and protection.

**United States of America**

USA has Witness Security Program(WITSEC) which is one of the most developed and most efficient security program all over the world. Before this program, United States had a witness protection program instituted under Ku Klux Klan Act of 1871 and later after evolution became WITSEC. In the USA, agencies such as, the Federal Bureau of Prisons, The United States Marshals Service, the Office of Enforcement Operations(OEO and the U.S Attorney General’s Office are associated with the programme. The main purpose of this program is to protect the witnesses so that they can testify and give statements against members of organised crimes and against dangerous criminals. Not only this, but this program assists in providing housing, medical care, training for jobs, employment.


1993 ibid

1994 (1996) ECHR 14
and subsistence funding for the needy witnesses. But USA takes action for protection and services to witnesses after assessing properly the extent and level of threat and also whether the threat is serious enough.

The Witness Protection program in USA is so advanced and effective that it provides the witness and his family a Memorandum of Understanding in total secrecy through which they enter into the Witness Security program (WITSEC) which relocates the witness and his family temporarily to a new location and provides them with temporary employment and pays them subsistent. Also the witness and the family get new ID’s which they presume after the trial is over. Since the program’s inception, the USA has been able to successfully protect a large percentage of witnesses.

**United Kingdom**

The UK govt. enacted the Criminal Justice System and Public Order Act which provides for punishment for intimidating the witness. S.51 of the act not only protects the witness but also anyone who helps in the investigation or finding of evidences. Also, Sec.16 to 33 of the Youth Justice and Criminal Evidence Act, 1999 requires the court to consider special measures for intimidated witnesses.

The procedure for application of Witness Anonymity is given in the Coroners and Justice Act, 2009. It basically orders that the identity of the witness should not be disclosed so as to ensure their safety. It states that the personal information of the witness should be removed or when disclosing the documents to the opposite party or pseudonyms be used and moreover no question leading to the personal identity of the witness should be used. The witness protection program in the UK is so advanced and diverse that it also to an extent provides for voice modulation of the witness so as to ensure his safety and also talks about child witnesses to be accompanied by witness supporter. Such a system in UK has been ensuring safety and security of the witnesses.

**Australia**

The courts of Australia have constituted a program namely Witness Protection Act, 1991 is extremely comprehensive and effective as it defines widely the definition of witness which no other country does and has defined it as “a person, who for any reason, may require protection or other assistance under this act. This definition is wide and covers everyone who requires protection or assistance from the govt. it has an expression inclusion of change of identities and guidelines regarding making changes in the birth certificates and marriage certificates of the witnesses for their protection.

**Ireland**

In the Republic of Ireland, runs a Witness Security Program which is administered by the Attorney General of Ireland and is operated by the Special Detective Unit (SDU). This particular program provides witnesses with a new identity, address, and armed police protection either in Ireland or abroad. Witness protection is basically needed in very serious and organised crimes and terrorism. the Irish Government only grants protection to those who cooperate with the investigations conducted by the Irish court and appearances by witnesses in protection are carried out by the security of the Emergency Response Unit which is the highest tier special weapons and tactical group in Irish law enforcement.

**Italy**
The witness protection program in Italy has been in force since 1970’s and 1980’s but then the witness protection program was very ineffective as it granted protection to the witnesses in some exceptional cases only which was very insufficient. Moreover, the system was corrupt and focussed more on protecting the former members of criminal or terrorist organizations. It was in 1991 when the new Witness Protection Program came into being in Italy under which most of the witnesses were given new identities and a chance to live under govt. protection for several years. But even this program has not been fully able to protect the witnesses and holds some drawbacks in implementation.

**WITNESS PROTECTION IN INDIA**

Need of Witness Protection In India

It is basically a general rule of law that a witness should not be intimated, threatened or coerced to not to give a statement against the opposition which he had been direct witness. Basically “Witnesses are eyes and ears of the court”. Witnesses act as an indispensable part of Criminal Justice system as they are the ones who have seen a crime being committed by their own eyes are the most direct and most reliable evidence to testify regarding that event in the court but as far as our country goes, it hurts the reliability and hinders the criminal justice system.

In our country, the high ups, hot shots, famous personalities and corrupted ministers are the ones who are the reason that witnesses have never faced protected when talking against them or testifying against them in the criminal court.

Witness Protection is becoming the need of the hour in our country because Indian system works in a certain prejudicial manner and gives importance to recognition. In this system, the people with more money and big businesses, the actors, the politicians tend to have a lot of authoritative and unnecessary power which the law doesn’t give them but this system of recognition because of which, they tend to think they are powerful and tends to give them a right to belittle the other citizens not in the aforementioned category and not immune by law. What really happens in practical India is that whenever there is a criminal case between two normal citizens, it goes the desire way leading to justice but whenever it is against the extraordinarily recognised class, the class tries to protect itself not legally but by threatening, intimidating, coerce the witnesses in the name of death and family and if this does not stop them, the consequences for the witness becomes even more ill and intense.

Now this type of system not only affects the witnesses but also hinders the process of fair trial and justice and degrades the Criminal Justice System because when such a circumstance occurs in front of any witness, he tends to take a step back or become hostile in front of the court which at the end hinders the court to provide the ends of justice. No witness wants to threaten his life and livelihood and so witnesses find it better as an option back out. In the very important case of Krishan Mochi v. State of Bihar, the Supreme Court observed that society suffers by wrong convictions and wrong acquittals due to the threatening of witnesses and the system of unnecessary recognition. In this case, the Supreme Court pointed that “one of the reasons may be that they do not have courage to depose against an accused.
because of threats to their life, more so when the offenders are habitual criminals or high ups in the Government or close to power which may be political, economic or other powers including muscle power”. There is one more case to explain why witnesses turn hostile and also explaining the need witness protection. According to People’s Union for Civil Liberties (PUCL), there were two reasons in the Best Bakery Case 1996 and second one was that the witnesses retracted from their previous statements because of intimidation and other methods of manipulation by the accused or defendant and his counsel. This paper will now focus on discussing about some popular cases where witnesses turned hostile due to fear and threat and other manipulation which indeed leads to the explaining the need of Witness Protection in the Indian Scenario.

1. The Sohrabuddin Case:
This case acts as a classic example of witnesses turning hostile. Here, one of the passengers of the bus wherein Sohrabuddin and his wife Kauser Bi along with associate Tulsiram Prajapati were travelling in November 2005 from Hyderabad to Sangli was Sharad Krushanji Apte who International Journal of Pure and Applied Mathematics Special Issue 1839 had deposed that he had seen them in the bus, but denied it later. The bus driver of the bus Misbah Hyder, and the cleaner Gazuddin Chabuksawar, earlier had stated that the bus had been stopped by a police vehicle and that the police had taken them away. However, they later retracted their statement. The bus operator M J Tours provided CBI with a photocopy of their tickets, but later denied issuing them. The person who had hosted Sohrabuddin in Hyderabad later denied that he had stayed with them.

2. Salman Khan Hit & Run Case:
In the 2002 hit-and-run case involving the superstar, there were 2 eye witnesses, one policeman sitting in Salman Khan’s car and other one being a person from the footpath where the others died. Later in 2014, the man near the footpath turned hostile because of threat or manipulation by Salman Khan but the other witness that is the policeman did not change his statement and then again the consequence of that was that the policeman wasn’t given protection and he then got ill and died and no one tried to save him.

3. Best Bakery Case 1997:
In this case, Zaheera Sheikh initially complained of an armed mob chanting anti-Muslim slogans, and spoke of “dance of death which continued all night”, but turned hostile later. Not just her, but 4 others also turned hostile. Due to this, Supreme Court punished her with imprisonment for committing perjury., and ordered for retrial of 21 accused at trial as well as higher court. This not only led to wrong acquittal but also led to wastage of time and energy of the courts.

4. Asaram Bapu Case:
In this case also, subsequent to the proceedings, the eye witnesses started to disappear which makes it clear why Witness Protection Program is the need of the hour.

These cases very well explain why the witnesses turn hostile and why is there need of Witness Protection Program in India. These are just some of the high profile and important cases we know about. Other than


1997 ibid
them, if we look at the whole of India, eye witness manipulation is very common specially in states like Uttar Pradesh and Bihar where corruption and recognition is coupled with more organized and high end criminals who aren’t afraid of the law and can go to any extent to act against anyone who goes against them in the court or outside. In such a state of affairs, an act to protect the witnesses is a must otherwise the Criminal Justice system will have come to a standstill or will have to work with manipulated and hostile witnesses.

DEVELOPMENT REGARDING WITNESS PROTECTION IN INDIA

Witness protection in India has been there since a long time but earlier wasn’t specially dedicated and with time, it is becoming better and dedicated in India. Now coming to the statute from where this importance of witness and witness protection came into India.

The basic problem about any statute talking about witnesses is that they don’t define the word witness. The word witness has not been defined anywhere in the Code of Criminal Procedure but during trials or any other proceedings under the Code of Criminal Procedure, the courts recognised witnesses as any person whose statement was essential to the case or any other person present, but not summoned as witness, any person for examination or re-examination or any person summoned by the court for the reason of that person being important to the case.

Code of Criminal Procedure also prescribed that subject to any rules made by the State Govt., any criminal court may, if it thinks fit, order payment of the reasonable expense of any complainant or any person or witness attending the court for purposes of the court and case, i.e for the purposes of any inquiry, trial, examination or cross examination, for proving conclusive evidence or for testifying. The Code also prescribes that this payment shall be made by the State Govt.

Now, coming to the Evidence Act, 1872. This act covers the evidence of witnesses and documentary evidences under Section 3. Chapter IX of the Evidence Act, i.e “OF WITNESSES” consists of sections spreading from sections 119 to 134 which recognise who are witnesses and considers family of the witnesses as witnesses and also talks about the choice provided to the witnesses to decide whether he wants to testify or not.

Section 151 and 152 of the Evidence Act protects witnesses from the being asked scandalous or indecent questions no matter they may have some importance in relation to case and are only considered if related to facts in issue. Moreover, they protect the witnesses from any questions to annoy or insult the witness and appears only offensive and absolutely needless to the court. They also protect the witness from being approach by the organised criminal or by any person out on bail in case a crime. There were then the provisions under the National Investigation Agency Act, 2008 which states that a witness on being threatened of life, can make an application through a proceeding or to the public prosecutor and in that case, if the Special Court is satisfied of the danger to the life of the witness, it may take whatever measures it may deem fit for the protection of the identity of the witness in order to protect the witness and any person who goes against the order of the court or infringes the protection of the witness or endangers the life of the witness will be punished with imprisonment for a term of
up to 3 years and with fine up to thousand rupees.

So there have been statutes working on the protection of witnesses since long but have not been very effective considering the Indian Scenario and the increase in corruption and the recognition system that prevails in India.

**Important Law Commission Reports**

The Law Commission of India has been working on this ever subsisting problem of witnesses turning hostile and has chocked out reports to enhance the status of protection of the witnesses and their condition in the country.

The Law Commission in its **14th Report**, i.e. the 1st report in this matter suggested a witness protection program which basically protected witnesses in a limited sense by providing for adequate arrangements for the protection of the witnesses only in respect of making them appear in the court and thus avoiding delay in justice and protecting him in court premises. This report was very limited as it only protected the witness in the court and did not provide for any provisions for the protection of the witnesses after trial or outside of the court. Moreover, this report was only one sided as it protected witnesses only for the convenience and ease of the court and not otherwise specifically.

Then came the **154th Report** of Law Commission which was a bit wider in implementation and covered the defects of the 14th Report by recommending that witnesses should be protected from the wrath of the accused or the opposite party in any eventuality. This report suggested to prevent witnesses from turning hostile by writing their statements and getting them signed by the witness under the declaration of witness being literate and of sound mind made the particular statement. This report covered the problem in a wider amplitude but didn’t suggest anything regarding physical protection of the witnesses.

Then the next report in the context was the **172nd Report** of the Law Commission along with emphasising on protection witnesses from the wrath of the accused. This report more importantly and particularly took on a subject requested by the Supreme Court through the judgement of Sakshi v. Union of India 1998, which advocated that trials be conducted in camera proceedings to keep the witness away from the accused and to protect his identity from the accused. So this report was very progressive and directly suggested the protection of witnesses in a more effective manner.

Then came the very comprehensive **198th Report** of the Law Commission which formulated a “Witness Identity Protection and Witness Protection Programs” that covered a very wide amplitude while protecting the witnesses. It emphasized that the witness protection scheme should not only be limited to the cases of terrorism or sexual offences but should extend to protect the witnesses in cases of all the serious offences, thereby widening the ambit and applicability of the protection schemes to protect the witnesses.

These reports proved beneficial for India to a partial extent as they led to the identification of certain rights to the witnesses which are:

---

1998 2004 (2) ALD Cri 504
• Right to obtain a place for waiting in the court during the proceedings.
• Right to information of the status of the investigation and prosecution of the crime.
• Right to maintain their privacy and right to be treated with respect, dignity and compassion.
• Right to protection from harm, threat or intimidation.
• Right to conceal their identity while providing evidence.
• Right to obtain a relocation and stay safely.

They also suggested to make it mandatory for the court to inform each and every witness about the existence of a Witness Protection Scheme and how it protects them. This is a very comprehensive and a very vital step and suggestion for a country like India because a large number of infringement of rights happen because people and specially people of states like Madhya Pradesh, Chattisgarh, U.P, Bihar etc. don’t even know about their rights because these states have more of illiterate population and even those who are educated aren’t aware of their rights and fall into threats and intimidation.

Next comes the Committee on Reforms of Criminal Justice System. This committee has submitted a report containing recommendations over 150 and recommendations also include the recommendations regarding the protection of witnesses for which it recommends that there should be a law for protecting the witnesses and their family members and the identity should the witness and the family must be kept a secret and the names of the witnesses be not mentioned even in the judgement or other court documents. A chapter in the report named “Hybrid System of Criminal Justice” has sought to incorporate certain features of “inquisitorial” system of trial into adversarial system, which means empowering the judges with the duty of leading evidence with the object of providing justice to the victims which is only possible if the eye witnesses would be protected and also when witnesses, the victim as witness’s rights are protected, leading to enhancement in imparting justice and convicting and acquitting the right people.

The Criminal Law Amendment Act of 2005 has also been working on the protection of witnesses and have made many amendments among which include section 199A of the Indian Penal Code, 1860 operation of which will be focussing on punishing anyone who threatens or induces any person to give false evidence.

So all the committee reports and statutes have been working to protect the witnesses against organized criminals and offenders and with time, these policies and schemes are becoming better and more accurate.

Witness Protection Bill, 2015

Following this, a bill for the witness protection was introduced in the year 2015 and was named the Witness Protection Bill, 2015.

This bill was prepared and introduced in parliament in 2015. Its objective was to put in place a strong law for witness protection in a manner which ensures a fair trial to both the parties. The bill sought to ensure protection of witness by the following:

1. Formulation of witness protection programme to be provided to a witness at
all stages i.e. during the course of an investigation; during the process of trial; and after the judgment is pronounced.

2. Constitution of a “witness protection cell” to prepare a report for the judge of the trial court to examine and grant protection to the witness referred a “protectee” after being admitted in the programme.


4. Providing safeguards to ensure protection of Identity of witness.

5. Providing transfer of cases out of original Jurisdiction to ensure that the witness can depose freely.

6. Providing stringent punishment to the persons contravening the provisions.

7. Prescribing stringent actions against false testimonies and misleading statements.

This bill was introduced but this couldn’t pass in Rajya Sabha due to the members not having common consensus on this particular issue.

WITNESS PROTECTION SCHEME, 2018

With evolution, with referring to the earlier reports and laws regarding the protection of the witnesses from threats, coercion, manipulation and intimidation and also referring to the Witness Protection Schemes and Programs of more developed counties like United States and UK, India has finally come up with its own properly drafted Witness Protection Scheme, 2018 in the year 2018 by the Ministry of Home Affairs. The drafted scheme is as follows.

Witness Protection Scheme, 2018 provides for protection of witnesses based on the threat assessment and protection measures inter alia include protection/change of identity of witnesses, their relocation, installation of security devices at the residence of witnesses, usage of specially designed Court rooms, etc.

The Scheme provides for three categories of witness as per threat perception:

Category 'A': Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.

Category 'B': Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.

Category 'C': Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

The Scheme provides for a State Witness Protection Fund for meeting the expenses of the scheme. This fund shall be operated by the Department/Ministry of Home under State/UT Government and shall comprise of the following:

i. Budgetary allocation made in the Annual Budget by the State Government;

ii. Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the Witness Protection Fund;

iii. Donations/ contributions from Philanthropist/ Charitable Institutions/ Organizations and individuals permitted by the Government.

iv. Funds contributed under Corporate Social Responsibility.
The Hon'ble Supreme Court of India in its Judgment dated 05.12.2018 in Writ Petition (Criminal) No. 156 of 2016 has endorsed the Scheme. As per Article 141/142 of the Constitution, the Witness Protection Scheme, 2018 endorsed in the said Judgment of the Supreme Court is binding on all Courts within the territory of India and enforceable in all States and Union Territories.

This was stated by the Minister of State for Home Affairs, Shri Nityanand Rai in a written reply to question in the Rajya Sabha today.

ANALYSIS OF THE WITNESS PROTECTION SCHEME, 2018

About the Scheme
The Witness Protection Scheme of 2018 was formulated by the central govt. with the aim of protecting the witnesses from the wrath of the organized criminals, from intimidation, threat and manipulation from the high end criminals so that the Criminal Justice system can practically deliver justice to the accused, however powerful he may be. The scheme covers 3 segments which include the segment of categorisation of witnesses on the basis of Threat Perception system to make a clear demarcation among the witnesses being very seriously and grossly intimated and threatened, witnesses moderately threatened and witnesses are little threatened which would help the courts to deal with the category of intimidators in a better and a clearer manner. The scheme has a proper segment with requisite provisions for funds, the procedure for filing a complaint of intimidation and a list of the kind of protection the witness would be entitled on the basis of Threat Perception. Moving further, the parts of the scheme also mention the change of identity in case of need to the witness. This scheme is based on a wide frame and has tried to cover the aspects to the promotion of witness protection. The scheme also covers the type of protection measures to be provide to the witnesses on the basis of thereat perception system and some of them are as follows:

- The scheme ensures that the accused is away from the witness.
- Asking the telephone company to allot the witness an unlisted number.
- Giving adequate physical security to the witness by assisting the witness in daily life by regular patrolling or having policemen appointed for his safety.
- Changing the identity of the witnesses.
- The scheme provides for relocation of the witness, which may be permanent or temporary depending upon the degree of intimidation.
- The scheme prescribes holding in-camera trials.
- The scheme also provides for times financial aids for the witness from the Witness Protection Fund.
- The scheme also covers pre and post-trial protection for the witnesses by providing them conveyance in govt. vehicles for enhanced security.

All these provisions are covered by this scheme to make a strong protection system for the witnesses. This scheme also provides for any other request of the witnesses apart from the above mentioned provisions.

Appraisal of the Scheme
This scheme has taken ideas and has been influenced from the Witness Protection Schemes of some other large economies, has been influenced from the previous reports of the law commission and statutes
already providing some protection to the witnesses. The main positive point about this scheme is that it covers a wide ambit for the protection of the witnesses by including not only the persons as witnesses under the protection scheme but also including all the persons related to the witness under this scheme. Moreover, this scheme does not provide protection only theoretically but also covers the practical application for its implementation through providing for funds for change of identity, for relocation, for safety and it also prescribes the application to be made against intimidation and threat under this scheme. Not just this, this scheme provides for the type of protection measures that can be used depending upon the threat perception. So this scheme has a very practical approach and has covered almost all the needs and possibilities for an effective scheme to protect the witnesses. This scheme has the potential of becoming one of the most comprehensive schemes in the world.

**Drawbacks of the Scheme**

1. **Corruption**—The major drawback of the Witness Protection Scheme is that though it provides for excellent provisions, it does not solve the problem from the root of it which is basically the administration in our country and the level of corruption prevailing in the country. The witnesses according to the witness protection scheme will be protected under the police or by the police and by the state. This system in itself is the drawback of the scheme because our country is full of corruption and corruption forwards up with the help of the officers in the administration of the country. For making this scheme work, firstly the problem of corruption has to be solved because the aim with which this scheme was made can never be fulfilled and the scheme would start falling out if this problem of corruption doesn’t go away and the scheme provides nothing to curb this problem.

2. **Over burden the Police Force**—Next major problem of this scheme is that it is very much dependent upon the police force and involves intermediation of senior police officials at various stages. The scheme has covered how police and administration will work to provide assistance to the witnesses but has not considered the fact that such amount work in such a highly burdened criminal justice system would overburden the police force, neither allowing them to perform their daily nor the protective functions properly.

3. **Lack of Awareness**—Another major problem with efficient implementation of the scheme is that this scheme provides protection, provides right to the witnesses, provides the protective measures and provides the procedure for application for protection under the scheme but misses out on the most important issue in our country, i.e. illiteracy and lack of awareness. When the witnesses in small parts of the country would not know about their rights and privileges, they would not be able to get protection and ultimately the scheme would do no good to the society because it nowhere prescribes the procedure to make witnesses aware of the scheme for their protection.

4. **Paucity of funds**—Another very practical and very major drawback of this scheme is paucity of funds in our country which can lead the scheme to fall through because our Central Government already doesn’t have funds to provide for protection and this scheme is a heavy job on the government as it relates to funds to be spent for assistance of witnesses, to be spent on relocation of witnesses, to be spent on providing witnesses with care and protection against the accused, to provide for change of identities of the witness which indeed
requires a lot of money which our government doesn’t have, hence leading to poor implementation of the scheme. These are some major drawbacks of this scheme which pose high challenge to the implementation of this Witness Protection Scheme.

**Suggestions Provided by the Author for Better Implementation**

What can be done to make this scheme a little more affective and practically efficient is that the govt. should firstly employ more police force by filling the 4-5 lakh vacancies which have been vacant since long. This will help better allocation of work among the police force and would lead to better administration in the country. Moreover, there is need to build up a special cell for dealing matters only related to protection of witnesses as it is one of the biggest challenges the Criminal Justice system is facing right now. As the scheme progresses, it is suggested that there be training given to the officials to appointed in the Witness Protection Department so that works between the officers become classified and differentiated and it wouldn’t even lead to any overburdening of work on the police which will in turn lead to efficiency in the work of police among different sectors of administration.

**CONCLUSION**

Witness acts as a fuel to every step of Criminal Justice System because of being the person closest to the event, a person who has the most direct knowledge of the event or the crime and is very pertinent to the Criminal Justice System in the sense of delivery of justice because of being an eye witness to the crime or the event and so is considered to be the most reliable source but this reliability is endangered by threats, intimidation, manipulation of the witnesses by the hot shots and politicians and organized criminals which leads to wrong convictions and acquittals by the justice system and this is the reason in today’s scenario, Witness Protection has become the need of the hour. For this purpose, India has been working to provide such protection to the witnesses through its statutes, commission reports and schemes. India in this context has travelled from having one or two provisions to finally making its own scheme in 2018. This scheme is simply one of the best schemes amongst all over the world but has certain practical drawbacks related to the condition of our country. But the point here is that India has finally realised the importance of witness protection and we have to admit that this policy is the 1st version of a substantial step towards protection of witnesses and so some drawbacks will be there. But with time, India will have to make the scheme more practical for India by making amendments wherein needed to formulate a program that will actually cover the ambit of protection of a huge number of witnesses and the day this becomes the situation, the Criminal Justice system will see immense growth.

*****
WIELDING STRIKE: SHOULD BE CONFERRED A FUNDAMENTAL STATUS IN INDIA? AN ANALYSIS OF A PARADOXICAL APPROACH

By Ramandeep Sohal
From Lovely Professional University, School of Law

ABSTRACT
It is well observed in construing the preamble of Indian constitution by our forefathers that liberty is fundamental for the development of an individual and it is very essential for the successful functioning of a democratic system. But so far, if the liberty is considered in the contemporary era alongside right to strike, the essence of the opinion of our forefathers is missed out as it is yet not given the fundamental status in Indian constitution. However, this right to strike has its prolonged genesis in the 12th Century B.C.

Over time, it is witnessed that the legal status of right to strike had always been controversial, be it from the Indian perspective or international perspective. In the former, both the legislature and judiciary had simultaneously played an imperative role in regulating this right by way of enactment especially by Industrial Dispute Act, 1947 and precedent respectively. However, in the latter the right to strike has been considered at par with other rights on an equal pedestal in terms of its legality and necessity. Thus, it becomes imperative to analyze this right through its multifaceted dimensions be at domestic or international level.

Keywords: Strike, validity, industrial dispute, work, constitution, right, labour, law

1. INTRODUCTION
In this contemporary global world every right comes along with a duty and the most powerful right comes along with the bundle of responsibilities and one such right is right to strike. In today’s time each country around the globe gives a right to strike to its workers or employees. At times this right is even termed as a powerful weapons in the hands of the workers that signifies the suspension or stoppage of work by the worker. But this right must be the weapon of last resort because if this right is misused, it will create a problem in the production and financial profit of the industry.

The relevance of this right to strike can be recognized as an ordinary right of social importance to the working class to ventilate their grievances and thereby resolve industrial conflict. Skillful use of this weapon, whether threatened or actual, may help workers to force their employer to accept their demand or at least to concede something to them. But reckless use of the same can create worse tensions, frictions and violations of law and order.

Further, taking into consideration the opinion of the general public, strikes tends to retard the nation’s economic development and in a country like India frequent stoppage of work for frivolous reasons that often accompanies this right cannot be tolerated. For these reasons, the Industrial Disputes Act seeks to regulate and restrict strikes so that the nation’s welfare do not get compromised for any reason.

- Meaning and General Concept of Strike
The word ‘strike’ comes from ‘strican to go’ which means to quit, hit or impress in
case of a trade dispute. It can ordinary be referred to as concerted refusal to work on the part of person who are accustomed to work in a particular vocational area and in a labour sense it is a stoppage of work by common agreement on the part of a body of work people for the purpose of obtaining or resisting a change in the conditions of employment but this meaning of strike has undergone various changes across the world and most of the nations have given the right to strike to the workers as natural, inalienable, inherent and almost absolute in nature.

In India the term "strike" means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of any number of persons who are or have been so employed to continue to work or accept employment. This right is thus, guaranteed under Industrial Dispute Act 1957, which state that the workers can go on a strike giving prior notice of six weeks to the employer in case of any breach of contract in public utility service. This act further provides for the conditions that needs to be satisfied before going on a strike so that this effective tool of bringing down the employer to the negotiable table is not misused.

2. EVOLUTION OF STRIKE
Strike came into existence two hundred years ago in the wake of the Industrial Revolution. The first known strike was in the 19th century B.C., in Egypt. Workers under Pharaoh Ramses III stopped working on the Necropolis until they were treated better and the first recorded phrase about it was 'to strike work' is used in the year 1778 when sailors in support of demonstrations in London, “struck or removed the topgallant sails of merchant ships at part thus, crippling the ships. As the 19th century progressed, strikes became a fixture of industrial relations across the industrialized world, as workers organized themselves to bargaining for better wages and standards with their employees. The word strike then sounded like a blacksmith's hammer, the woman's acts and the Patriots for ants till today has maintained its violent character.

---

2006 Industrial Dispute Act 1947, § 2(q).
2008 Supra n. 4, at .23.
2013 Dr. Singh Avtar, Introduction to Labour and Industrial Law (Lexis Nexis, 2nd ed. 2008).
2014 Shrikant Malegaonkar, Supra n. 13.
Soon after a rampant increase in the strikes by the workers, strike actions were quickly made illegal in most of the countries, as factory owners had far more political power than workers. However, most western countries partially legalized striking in the late 19th or early 20th centuries. It was then in 1974 that India witnessed its first railway strike by the workers of Indian Railways. The 20 days strike by 17 lakh workers is the largest known strike in India. The strike was held to demand a raise in pay scale, which had remained stagnant over many years, in spite of the fact that pay scales of other government owned entities had risen over the years.

Ever since then this weapon of strike is being used by the unions and the employees to save their rights under labour legislations. The right to strike is recognized as a legitimate right of the trade unions. The weapon of strike is mostly used by unions as the last major to ventilate their grievances, though some reckless unions resort to the weapon of strike much earlier, especially when it is not warranted to do so. In modern times strikes are not something which is to be resorted day in and day out. The modern unions and managements are of the view that the production of an establishment must not be hampered and various means and measures are worked out to see that there is no strike happening in any industry, unless it is very necessary to hold it. There is an element of caution present in every strike when an attempt is made to pressurise the management to negotiate and settle the issues at hand and thereby all this is regulated in India in accordance with the provisions of Industrial Dispute Act 1947.

3. ROLE OF INDUSTRIAL DISPUTE ACT, 1947

Industrial Dispute Act is a milestone in providing workers or employees a right and at the same time limiting it to the legality and justifiability of the strike. Justice Krishna Iyer and P.N. Bhagwati in a case held that “strike can be illegal or legal one and even the illegal strike can sometimes be justified. It is the principle of social justice and well recognized by industrial jurisprudence. It is available to the employees as their legal right also and they can go for the peaceful strike to negotiate for their demands with the employer”. Industrial Disputes Act has differentiated between legal and illegal strikes. So, it can be said that upon compliance of all requirements as mentioned in section 22 and 23, a strike can be legal and justified one.

The concerned act was enacted with an intent to make provisions for investigation, settlement of Industrial Disputes and providing for certain safeguards to the workers so that the correct legal position of the rights of workmen to go on strike could be determined and in order to attain this the provisions of the concerned act must be analyzed.

---

2016 R. J. Kochhar, Right to Strike: Has Supreme Court Moved Backward? (Economic and political weekly, 25 n. 29 (1990)).
2017 Shrikant Malegaonkar, Supra n. 13
2018 Id.
2019 Crompton Greaves Ltd. v. Workmen, AIR 1978 SC 1489
2021 Syndicate Bank v. K. Umesh Nayak, 1995 AIR 319
Valid strike & Prohibition

The industrial dispute act provides procedure that is required to be followed by the workers or employee to make their strike legal. The act has defined the strike as a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of any number of persons who are or have been so employed to continue to work or accept employment. However it is stated by the court Mere cessation of work does not come within the preview of strike unless it can be shown that such cessation of work was a concerted action for the enforcement of an industrial demand. The concerned act even impose certain prohibitions to make a strike valid. It provides that no person employed in public utility service shall go on strike in breach of contract:

a) Without giving to employer notice of strike within six weeks before striking; or
b) Within fourteen days of giving such notice; or
c) Before the expiry of the date of strike specified in any such notice as aforesaid; or
d) During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

The above mentioned provisions are mandatory and the date on which the workmen proposed to go on strike should be specified in the notice though no notice is required when already there is a lock out in existence. Moreover the provision of the concerned act are not meant to bar the workers or employees to go on the strike but require them to satisfy the requisites before. The prohibition prescribed under section 22 are applied to public utility service only but there are general prohibitions which are applied to both public utility as well as non-public utility establishments.

General prohibition on strike

There are general prohibitions given under the section 23 of the industrial dispute act to maintain a peaceful atmosphere amongst both the parties to the dispute i.e. workers and employer in order to conduct the problem solving mechanism efficiently like conciliation or adjudication or arbitration proceedings. The provision basically impose restrictions on declaring strike in breach of contract in the both public as well as non-public utility services in the following circumstances mainly:

a) During the pendency of conciliation proceedings before a board and till the expiry of 7 days after the conclusion of such proceedings;
b) During the pendency and 2 months after the conclusion of proceedings before a Labour court, Tribunal or National Tribunal;
c) During the pendency and 2 months after the conclusion of arbitrator, when a notification has been issued under sub- section 3 (a) of section 10 A;
d) During any period in which a settlement or award is in operation

---

2023 Industrial Dispute Act 1947, § 2(q).
2024 Indian Iron & Steel ltd. v. Its Workmen, AIR 1953 SC 47
2025 Industrial Dispute Act 1947, § 22(1).
2026 Mineral miner union v. kudremukh iron ore co. ltd., ILR 1988 KAR 2878
2027 Industrial Dispute Act 1947, § 22(3).
2028 Industrial Dispute Act 1947, § 22(1) & (2).
in respect of any of the matter covered by the settlement or award.\textsuperscript{2030}

It is even noteworthy to borne in mind while interpreting the provision of section 2 that a conciliation proceedings before a conciliation officer is no bar to strike under section 23.\textsuperscript{2031}

- Grounds for strike

Now since a description has been made with respect to the definition of strike, its requisites and prohibition, it is imperative to know its grounds as well. Strike apparently arouse from the quarrels growing out of the dominant and servient relations of employers and employees. There exist situation when workers are forced to work for a particular amount and under a condition stated in the law that at times become a source of contact difficulties\textsuperscript{2032} and therefore a relation law recognizes to this day, were, and still are the causes of some of the most bitter strikes that have ever occurred. Mainly the strikes are caused by differences as to:\textsuperscript{2033}

1. Rates of wages and demands for advances or reductions i.e. Bonus, profit sharing, provident fund and gratuity.
2. Payment of wages, changes in the method, time or frequency of payment;
3. Hours of labour and rest intervals;
4. Administration and methods of work, for or against changes in the methods of work or rules and methods of administration, including the difficulties regarding labour-saving machinery, piece-work, apprentices and discharged employees;
5. Trade unionism.
6. Retrenchment of workmen and closure of establishment.
7. Wrongful discharge or dismissal of workmen.

- Illegal strike

It is pertinent to take an account of the facet that Industrial dispute act not only incorporates different provisions with regard to a legal strike but also embodied provisions related to illegal strike. It is stated in the act per se that:\textsuperscript{2034}

1. A strike or a lockout shall be illegal if, i
   It is commenced or declared in contravention of section 22 or section 23;
   or
   ii
   It is continued on contravention of an order made under sub section (3) of section 10 or sub section (4-A) of section 10-A.

2. Where a strike or lockout in pursuance of an industrial dispute has already commenced and is in existence all the time of the reference of the dispute to a board, an arbitrator, a Labour court, Tribunal or National Tribunal, the continuance of such strike or lockout shall not be deemed to be illegal, provided that such strike or lockout was not at its commencement in contravention of the provision of this Act or the continuance thereof was not prohibited under sub section (3) of section 10 or sub section (4-A) of 10-A.

3. A strike declared in the consequence of an illegal lockout shall not be deemed to be illegal.

It is stated in the case of \textit{Maharashtra General Kamgar Union v/s Balkrishna Pen P. Ltd}.\textsuperscript{2035}

\textsuperscript{2030} Industrial Dispute Act 1947, § 23.
\textsuperscript{2031} Ballarpur Collieries Co. v. H. Merchant, 1967) 2 LLJ 201 Pat.
\textsuperscript{2032} Anne Trebilcock, \textit{Labour relation and human resource management: An overview}, 4\textsuperscript{th} ed. international Labour office (May 31, 2020) http://www.ilocs.org/documents/chpt21e.htm
\textsuperscript{2034} Industrial Dispute Act 1947, § 24.
\textsuperscript{2035} Maharashatra General Kamgar Union v. Balkrishna Pen P. Ltd, (1989) 1 Lab LJ 319 (Bom).
Held: when a strike is commenced before the expiry of 14 days’ notice, it will be illegal but only for the unexpired notice period and thereafter, the strike would be legal.

- **Punishment & impact of illegal strike**
The act roll out the provision explaining what does an illegal strike means and if it is conducted it is likely invokes certain punishment like any other illegal act. It is embodied in the act that any worker who commences, continues or otherwise acts in furtherance of, a strike which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees, or with both. It is even stated by the court that in case of illegal strike the only question of practical importance would be the quantum or kind of punishment. To decide the quantum of punishment a clear distinction has to be made between violent strikers and peaceful strikers.

Apart from the punishment the direct impact of illegal strike could be seen on the wages of the worker. It is well established that in order to entitle the workmen to wages for the period of strike, the strike should be legal and justified. A strike is legal if it does not violate any provision of the statute. It cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. Whether particular strike is justified or not is a question of fact, which has to be judged in the light of the fact and circumstances of each case. The use of force, coercion, violence or acts of sabotage resorted to by the workmen during the strike period which was legal and justified would disentitle them to wages for strike period. Though it will not deprive the labour union of its immunities granted by the Trade Union Act, and mere participation in the strike would not justify suspension or dismissal of workmen.

Although the right to strike has been conferred to workers and employees in Industrial Dispute Act but the fundamental status hasn’t been provided to this right.

### 4. CONSTITUTIONAL VALIDITY OF RIGHT TO STRIKE

Initially a limited right to strike was granted under the Trade Union Act, 1926 which was later given the statutory status under the industrial dispute act, 1947 but so far this right has not been recognised as a fundament right. The Constitution of India provides freedom to form associations and unions, this even incudes trade unions, but right to strike is an ancillary right to Article 19(1)(c) otherwise the right to form association would be rendered


2036 Industrial Dispute Act 1947, § 26(1).
2037 M/S Burn & Co. Ltd. v. Their Workmen, 1960 AIR 896
2038 Crompton Greaves Ltd. v. Workmen, AIR 1978 SC 1489
2039 Rohtas Industries Ltd. v. Rohtas Industries Staff Union, AIR 1976 SC 425
2040 M/S Burn & Co. Ltd. v. Their Workmen, 1960 AIR 896

2042 All India Bank Employees’ Association v. National Industrial Tribunal and others, 1962 AIR 171.
2044 T.K Rangarajan v. State of Tamil Nadu, 2003 (5) SCALE 537
2045 Aarif Shah, Supra n. 6.
The necessity to form unions is obviously for voicing the demands and grievances of labour and resorting to strike in a given situation is a form of demonstration. However it is stated by the court that strike is a legal weapon available to workers and it is mostly misused which results in chaos and maladministration, but the worker himself is the immediate victim of the strike with his only means of livelihood at stake. In addition to this there had been situations where they lose salaries, get imprisoned and sometimes shot dead. Therefore right to strike is not raised to the high pedestal of a fundamental right, it is recognized as a mode of redress for resolving the grievances of workers.

It is further embarked in the constitution of India that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry. If the workers require supporting their stand in parlance with the management an effective action like the right to strike needs to be at their reach.

5. JUDICIAL PERSPECTIVE ON RIGHT TO STRIKE

In pursuance of determining the validity and legality of right to strike judiciary had always been skeptical as reflected from the catena of decision and the foremost in the queue is All India Bank Employees Association v National Industrial Tribunal wherein the right to strike ensuring negotiation between the Union and the Company was rejected. Later an extremist approach was propagated when Supreme Court declared that the government servants do not even have the equitable right to strikes. In the case of Rangarajan v Tamil Nadu Supreme Court held “Both under the Trade Union Act as well as under the Industrial Disputes Act the expressions union signifies not merely a union of workers but includes also unions of employers. If the fulfillment of every object for which a union of workmen was formed were held to be a guaranteed right it would logically follow that a similar content ought to be given to the same freedom when applied to a union of employers which would result in an absurdity. We are pointing this out not as any conclusive answer, but to indicate that the theory of learned counsel that a right to form unions guaranteed by Sub-clause (c) of Art. 19(1) carries with it a fundamental right in the union so formed to achieve every object for which it was formed with the legal consequences, that any legislation not falling within clause (4) of Art. 19 which might in any way hamper the fulfillment of those objects, should be declared unconstitutional and void under Art. 13 of the constitution. Is not a preposition which could be accepted as correct.”

2046 Vijay M. Gawas, Supra n. 24.
2047 B.R. Singh v. Union of India, 1 1989 SCR Supl. (1) 257
2048 Id.
2049 Crompton Greaves Ltd. v. Workmen, AIR 1978 SC 1489
2050 T.K Rangarajan v. State of Tamil Nadu, 2003 (5) SCALE 537
2051 B.R. Singh v. Union of India, 1 1989 SCR Supl. (1) 257
2052 Constitution of India 1949, Article 43A.
2053 Radhe Shyam Sharma v. Post Master General, 1965 AIR 311
2054 All India Bank Employees Association v. National Industrial Tribunal, (1961) IILLJ 385 SC
2055 Rungarajan v. State of Tamil Nadu, 2003 (5) SCALE 537
2056 Rangarajan v. Tamil Nadu, 2003 (5) SCALE 537
However, Justice Ahmadi in *B.R. Singh v Union of India*\(^{2057}\) held “The right to form association or unions is a fundamental right under Article 19 (1) (c) of the Constitution. Section B of the Trade Union Act provides for registration of a trade union if all the requirements of the said enactments are fulfilled. The right to form associations or unions and provide for their registration was recognized obviously for conferring certain rights on trade unions. The necessity to form unions is obviously for voicing the demands and grievances of labour. Trade Unionists act mouth piece of labour” and if the same view is followed then right to strike is a statutory and common right.

Further the reasonability and extent of right to strike was made out in *Syndicate Bank v K. Unwsh Nuyak*\(^{2058}\) stating that “The strike or lockout is not to be resorted to because the party concerned has superior bargaining power or the requisite economic muscle to compel the other party to accept its demand. Such indiscriminate use of power is nothing but assertion of rule of might is right”. Its consequent are lawlessness, anarchy and chaos in the economic activities which are most vital and fundamental to the survival of the society. Such action, when the legal machinery is available to resolve the dispute, may be hard to justify............ The Strike or lockout as a weapon has to be used sparingly for redressed of urgent and pressing grievances when no means are available or when available means have failed, to resolve it. It has to be resorted to compel the other party to the dispute to see the justness of the demand. It is not to be utilized to work hardship to the society at large so as to strengthen the bargaining power. It is for this reason that industries legislation such as the Act places additional restriction on strikes and lockouts in public utility services.”

However, another clinical view of the same was again taken in *B.L. Wadhera v State*\(^{2059}\), wherein Delhi High Court held that lawyers have no strike to go on strike or give a call for boycott and they cannot even go on a token strike and observed specifically that the strike cannot be justified in the present day situations whether it just or unjust cause.

Therefore there is no moral or equitable justification to go on strikes and apart from statutory rights, government employees cannot claim that they can take the whole society at ransom by going on strike even if there is injustice to some extent, no matter the same right has been given the status of basic right at international forum.

6. INTERNATIONAL PERSPECTIVE ON RIGHT TO STRIKE

The international labour organization came into existence in 1919\(^{2060}\), the recommendation and conventions of the ILO form a part of the international labour law.\(^{2061}\) The convention of international labour organization stands mandatory to its members. However this convention passed

---

\(^{2057}\) B.R. Singh v Union of India, 1990 AIR 1 1989  
\(^{2058}\) Syndicate Bank v. K. Unwsh Nuyak, 1995 AIR 319  
\(^{2059}\) B.L. Wadhera v. State, AIR 2000 Delhi 266  
the freedom of Association and protection of the Right to workers, though there is no express provision on Right to Strike. There are other conventions that mandates or promote the right to organize and collective bargaining.

The provision of Universal Declaration of Human Rights (UDHR) states that everyone has a right to work, to free choice of employment, to just and favourable condition of work to protection against unemployment. Similarly, everyone has the right to form and to join trade union for protection of his interest. Therefore this means the right to form trade unions by the workers and the right to go on strike for the purpose of getting their demands fulfilled by the employer is recognized.

The International Covenant of Economic, Social and Cultural Rights (ICESCR) that the state parties to present the covenant that recognizes the right of everyone to enjoyment of just and favourable condition of work and it also ensure the right to strike provided that it is exercised in conformity with the laws of the particular country.

The country like Indian had ratified an obligation to respect the law of international provisions related to protection interest of workers. Even after being a member to the above mentioned ILO and other International conventions and treaties India has still refused to accept the right to strike as a fundamental right even though the preamble of the ILO places great importance on the right to strike as being fundamental to collective bargaining power of the workers.

7. CONCLUSION

The concept of right to strike derive its genesis from Industrial Revolution when people started realizing the essence of healthy working environment and whopping wages for their respective work. Even then the nature of the strike was quite violent which has remained intact till the present time. This weapon of strike is used by the worker class to collectively demonstrate for voicing their demands and grievances and thereby it has a close relevance to the concept of collective bargaining.

It can be seen that several efforts have been made to give a mandate to this right. At international forum different conventions and treaties have been made and signed by various countries to give Right to Strike a legal mandate. It is therefore pertinent to know that though the international forum attach an utmost importance to the Right to Strike, there are some states that do not recognize it as a fundamental right which is necessary for the living.

In India per se the right to strike is not fundamental or absolute. This a conditional right that can be invoked after satisfying the

---

2062 International Labour Organisation, Convention No.87
2064 International Labour Organisation, Convention No.98
2065 Universal Declaration on Human Right, Article 23.
2066 Sagar, *Supra* n. 14.
2067 Universal Declaration of Human Rights, Article 7.
2068 Universal Declaration of Human Rights, Article 8(1).
2070 International Labour Organisation, Preamble
pre requisites mentioned under the Industrial Dispute Act which provide mechanism of solving dispute to the workers and employees by conferring right to strike but it has to be applied judiciously an unreasonable approach would not be acceptable.

Moreover, it has been stated that the custodian of constitution also referred to the observation in Corpus Juris Secundum that the right to strike is a relative right which can be exercised with due regard to the rights of others. It is the weapon of last resort and should be used only when there is no other means left or when the available means failed to resolve to issue, so that the interest of the public at large do not get hampered.
SPORTS LAW- PROBLEMS AND PERSPECTIVE

By Rashi Jha
From Law College Dehradun

Literature Review
Sports law is one of those fields of law that is applied law in the field of sports, physical education and its related field. It is a pure law as opposed to theoretical law and is concerned with how law in general interacts with the activity known as sports.

The growing interaction between sports and law has created a new need for a greater understanding of how the law relates to the sporting world. The centre based at LNIPE Gwalior is the first of its kind started in 1996 to offer expertise law consultations to the need of sports in the legal regulation of sport in a modern reality and as an amalgam of such diverse legal disciplines as sports law and policy, contract, tort, taxation, labor, competition, TV rights, match fixing and related criminal laws.

There are no central or state legislation to regulate sports in India; the Ministry, which was set up by the government was responsible for achieving excellence in different sports events which were conducted in India and also to build a good infrastructure for sports. By and large, the administration of sports activities is in the hands of autonomous bodies, such as Sports Authority of India (SAI), Indian Olympic Association (IOA), Hockey India (HI) and Board of Control for Cricket in India (BCCI).

Research Gap
Given the close relation of sports with national pride and the kind of influence it has on the mind of the nation, the state has the most important role to play. It is very clear that the existing model has not succeeded in achieving its objective and it is time for a new model to be made. Also, it is quite clear that our culture and our attitude towards sports is the biggest hindrance in improving sporting standards. The magnitude of the problem and its nuances make it clear that sports law will no longer be an applied law or an amalgamation of laws under some jurisdiction, but a law in its own rights. A comprehensive law on Sports must aim at a broader ideal and vision. The law makers should provide and disseminate the idea and information on various issues related to sports and encourage the exchange of a variety of perspectives through conferences before embarking on the mission.

ABSTRACT

The concept of sports law is relatively new in our country. Nevertheless, it is an area of study that is worth a definition and in dept academic inquiry and practice. India hosted the Commonwealth Games, a sporting fiesta with 5000 competitors from 85 countries, more than 1.2 million spectators and an estimated 26000 crore rupees invested to make Delhi the cynosure of the sporting world. Such an event of mind boggling proportions entails problems unique and complex related to infrastructure, licensing, sponsorship, media rights and ethical sporting practices. It is an appropriate moment to analyse the need for lucid legal provisions pertaining to sports in India. Henceforth, the researchers have analysed the problems and perspectives of Sports Law in India.

Keywords: Sports Law, Games, Law
INTRODUCTION
India being a unity in diversity is also a home to a diverse population which is fond of several sports. The work of administration and funding of sports is in the hands of the Ministry of Youth Affairs and Sports, which is headed by a cabinet minister and managed by the National Sports Federations. Sports law is one of those fields of law is law that is applied in the field of sports, physical education and its related areas. It is a pure law as opposed to theoretical law and is concerned with how law in general interacts with the activity known as Sports.\(^{2071}\)

Sports have always been a form of recreation, but sports have evolved, and India is considered as one of the best places to hold international sports events. In this scenario, a need was felt to regulate the laws in the field of sports and to eradicate the grey areas. Even the United Nations, in its resolution 58/5 adopted by its General Assembly in 2003, has recognized sport as a means to promote education, health, development and peace \(^ {2072}\), and therefore, a state should have an interest in sport-related matters.

MEANING AND NATURE
Sports law is one of those fields of law that is applied law in the field of sports, physical education and its related field. It is a pure law as opposed to theoretical law and is concerned with how law in general interacts with the activity known as sports. The growing interaction between sports and law has created a new need for a greater understanding of how the law relates to the sporting world. The center based at LNIPE Gwalior is the first of its kind started in 1996 to offer expertise law consultations to the need of sports in the legal regulation of sport in a modern reality and as an amalgam of such diverse legal disciplines as sports law and policy, contract, tort, taxation, labor, competition, TV rights, match fixing and related criminal laws.\(^ {2073}\)

NEED FOR SPORTS LAWS
The sporting world has been plagued by scandals and controversies in the past few decades. The Olympic Games Bidding Scandal, the recent IPL Scam and allegations of sexual harassment by the Indian Women’s Hockey Team have rocked the nation. From six gold medals in a row from 1928 to 1956, the Indian Hockey team hit an all time low failing to qualify for the 2008 Olympics. This incident exposed the maladministration and insularity of a defective system that drained our resources. Even the gentleman’s game cricket has been marred by match fixing and payment by bookies. All these incidents expose the dark side of a highly competitive world.

Simon Rottenburg, in his seminal work on professional sports, analysed sports in terms of the same paradigms that are applicable to any other economic activity and came to some brilliant conclusions. He defined the sporting competition as a joint

\(^ {2071}\) Asser Institute

\(^ {2072}\) Sport for Development and Peace, UN General Assembly Resolution, 3 November 2003

\(^ {2073}\) http://www.supremoamicus.org/sportslaw.htm
product and a collective effort of a number of factors. He said that no single sporting team or player could offer an interesting and independent product of value in sports. Thus a sporting spectacle required a competitive balance and the ordinary rules applicable to a pure market had to be modified here. Even though competition was the crore value that promoted sports, one needed competitive balance or equality of competitors to some degree for the success of the event. Revenue was generated by the excitement offered by teams more or less evenly matched. Thus the principle that public interest is best served by the unrestrained free markets did not apply here. The second pillar on which the sporting world thrived was the unpredictability of outcome. These two factors defined the mechanism of which sporting industry worked.\(^{2074}\)

**VISION OF A COMPREHENSIVE SPORTS LAW IN INDIA**

The Law should establish and promote rules of ethics and spirit of sportsmanship among competitors and the bodies involved in decision making. Ethical solution to legal issues in sports is the core idea behind the vision. This will enhance the morale of the players by improving contractual dynamics among them and the administrative bodies. Contracts must clarify expectations and commitments from the players and agents. Consultancy services must be provided to the sorts bodies and players. Co-ordination of the legal fraternity and the sporting community is a prerequisite for such a healthy interaction. National identity and the spirit of representing India must supersede political decisions. It would be highly advisable to include a former player of a game at the helm of affairs rather than a mere administrator or politician with vested interests.

To check corruption, tenure caps and age restriction on office bearers of federation must be brought in. Denial of essential facilities and exclusionary policies that are intentional for a player or a rival organization should result in the termination of the services of the administrator concerned. Misuse of authority must be severely dealt with. Salary caps on players and teams should be brought in. Practices that create a barrier for new entrants, draw out the existing players and lead to the foreclosure of a competition must not be tolerated. A greater sensitivity and legal support must be provided for women players. Perpetrators of harassment and discrimination should be severely punished. Research of excellent quality must be encouraged in the area of sports through continuing education.

The area of sports law is relatively new in our country. Nevertheless, it is an area of study that is worthy of definition and in depth academic inquiry and practice. A well planned exhaustive competition compliance programme can be of great benefit to all enterprises. A fresh perspective, an independent authority and a comprehensive law is the need of the hour.\(^{2075}\)

**SPORTS LEGISLATIONS IN INDIA**

Per se, there are no central or state legislation to regulate sports in India; the Ministry, which was set up by the government was responsible for achieving


\(^{2075}\) https://iasscore.in/national-issues/need-for-sports-law-in-india last visited 10 May 2020
excellence in different sports events which were conducted in India and also to build a good infrastructure for sports. By and large, the administration of sports activities is in the hands of autonomous bodies, such as Sports Authority of India (SAI), Indian Olympic Association (IOA), Hockey India (HI) and Board of Control for Cricket in India (BCCI). These governing bodies are recipients of government’s aid and are also registered under the Societies Registration’s Act of 1860.\footnote{Delhi Government, http://www.delhi.gov.in/wps/wcm/connect/98f825046a2ddbd902e915d9d3d91ee/Registration+of+Society.pdf?MOD=AJPERES&IMOD=-299975412, last visited 10 May, 2020}

The following govern the whole of the Sports Law:

- **National Sports Policy, 1984/2001**
  
The main objective behind enacting this was to raise the standard of sports for the reason that it was degrading due to corruption, betting, etc. It was later realized that the Bill of the year 1984 was incomplete, and its implementation was not complete, and in a bid to revise the bill the same was reformulated in the year 2001. The guidelines are three-fold:
  
  - Firstly, to earmark the areas of responsibilities which different agencies have to undertake to develop and promote sports.
  - To lay down the procedure to be followed by the autonomous bodies and federations to make the assistance and aid by the government available.
  - And also identifying the sports federation that is eligible for coverage under these set guidelines.

It was only after this policy that the lawmakers realized the importance of sports and therefore ‘Sports’ was included in the Constitution in the State list of the Seventh Schedule (Entry 33). The central government by the provisions of this policy aims to achieve excellence in sports on the national and global plane and collaborates with the state government and other agencies to achieve it.

- **Sports Law and Welfare Association of India**
  
  It is a non-profit national organization that aims to understand, and work for the advancement of ethical sports law in India for promoting sports. The primary task of the organization is to provide consultancy services on different matters like Indian sports policy, sports injuries, health and safety in sports, IP issues in sports, etc. It also provides a forum for legal practitioners who represent different people, to set up rules for ethics for sports persons.

- **Sports Authority of India**
  
  The Sports Authority of India (SAI) is an apex National Sports body set up in the year 1984 by the Ministry of Youth Affairs and Sports for broad-basing and bringing excellence in sports across India as a whole. It is located across 9 regions at Bangalore, Gandhinagar, Chandigarh, Kolkata, Imphal, Guwahati, Bhopal, Lucknow and Sonepat; and two Academic institutions like Netaji Subhash National Institute of Sports (NSNIS), Patiala and Laxmibai National College of Physical Education. It also accounts for academic programs like coaching and physical education awareness programs.

- **The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act**
This Act was passed in the year 2007; its main objective was to provide access to listeners and viewers so as to encourage a larger audience. It shall cover the sporting events which are of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati and for matters related to it. The Act provides that no content right owner or holder or television or radio broadcasting service provider can carry out a live TV broadcast of important national sporting events. For doing this, it has to share its live broadcasting signal simultaneously (except advertisements) with the Prasar Bharati.

ROLE OF DIFFERENT STAKEHOLDERS

- **Ministry of Youth Affairs and Sports**
  - To lay down the conditions for eligibility of National Sports Federation to get recognition
  - The conditions that have to be fulfilled by NSFs and other agencies if they wish to acquire government aid and support
  - To provide assistance to the NSFs if they carry out long-term development program.

- **National Sports Federation**
  The responsibility for the complete management, direction, supervision and regulation of the discipline and promotion, development and sponsorship of the discipline is on National Sports Federation. They are expected to discharge these responsibilities in consonance with the principles laid down in the Olympic Charter or the Charter of the Indian Olympic Association in compliance with Government guidelines applicable to NSFs.

- **SAI**
  For providing the necessary support to NSF for the identification, training, and coaching of sportspersons, also to improvise infrastructure, equipment, and such other facilities, the SAI plays a significant role. Further SAI will also be responsible for releasing funds to NSFs against proposals approved by the Government. The release of funds to IOA shall, however, continue to be made by the concerned Ministry.

- **National Anti-Doping Agency**
  The centre has set up a National Anti-Doping Agency (NADA) as an autonomous body. It consists of persons from government and non-government agencies, scientists as experts and also members from IOA. In the recent past, the controversy surrounding the intake of dope by sports persons is prevalent and in this light, NADA has set up. It shall carry out ‘in competition’ and ‘out of competition’ testing on the sportsman. NADA helps in the regulation of sports activities so that it can be corruption-free and non-controversial.

COMPARATIVE ANALYSIS

**Sports law of United States of America**

The U.S.A. has a very systematic law for sports. They have not provided with single legislation, but have divided it into 3 categories-

- **Amateur sports**
  It includes athletic activities from high school athletics to organize inter-collegiate or international competitions which are often organized and managed by groups that make rules for eligibility and competition, and courts do not interfere with the actions of these groups as long as they abide by the rules. The Amateur Sports Act of 1978 created the Athletic Congress, a national body for governance of amateur athletes, which administers a fund that allows amateur athletes an option to get
funds and sponsorship payments and also not lose their amateur status.

- **Professional sports**
- In the case of some professional sports activity, most sports leagues do have a standard player’s contract, and that shall be the guiding force behind a contract between players and owners.

- **International sports**
The two main international sports events include the Olympics, sponsored by the International Olympic Committee, and the World Cup, which is sponsored by FIFA. The United States has done the charter of the United States Olympic Committee (USOC) in the year 1950.

**GREY AREAS IN SPORTS LAW IN INDIA**
The realm of sports law is new in India and time and again, there has been an in-depth inquiry and research into this. Despite having several federations and independent bodies in India, our country lacks a good sports system, and it fails in every major event due to a precise and uniform law for sports. Firstly, there is no single body or legislation under the umbrella of which the ministry, and different sports federation, primarily the National Sports Federation would come.

In recent past, the dark sides of the competitive world has come to be known which depicts the maladministration of the sports law, such as the Olympic Games Scandal related to bidding, the recent IPL scam, FIFA scandal and allegations of sexual assault, etc. are few of those scandals.

The major loopholes which our sports law face include labour and employment issues, drug use, broadcasting rights, sports injury and the concurrent liability, harassment in sports, etc. The constant failure of India in different sports events is an indication of widespread corruption and poor infrastructure and therefore, the need of the hour should be to enact a proper legislation and forum to ease the activities of sports in India.

**CONCLUSION**
Given the close relation of sports with nationalism and the kind of influence it has on the mind of the nation, the state has the most important role to play. It is very clear that the existing model has not succeeded in achieving its objective and it is time for a new model to be made. Also, it is quite clear that our culture and our attitude towards sports is the biggest hindrance in improving sporting standards. The magnitude of the problem and its nuances make it clear that sports law will no longer be an applied law or an amalgamation of laws under some jurisdiction, but a law in its own right. Entry 33 in the Seventh Schedule of our Constitution has provided a provision for the State as well as the Centre to make and enact laws on regulation, registration and recognition of associations involved in sports. Rajasthan and Himachal Pradesh are two states where there is a functional sports law at present. In India, the provincial sports bodies work under non profit making

---


---
organisations under the Company Law Jurisdiction. Rules and regulations like statutory orders act only as secondary legislations supplementing laws. The Competition Law (2002) promotes Competition advocacy, forbids abuse of dominance and anti-competitive agreements. But a comprehensive law on Sports must aim at a broader ideal and vision. The law makers should provide and disseminate the idea and information on various issues related to sports and encourage the exchange of a variety of perspectives through conferences before embarking on the mission.
ABSTRACT
The year 2020 has been a turning point all over the world. COVID-19 outbreak has led all the miseries from loss of business to death of lakhs of people in various countries. Whole world is united to fight against this COVID-19 pandemic, lockdown, selfless work of the doctors, police, nurses, people supplying food to the needy ones are the situation which very well illustrates the unity among people to fight against this pandemic. Where all are fighting against this at the same time business is being affected globally. Nobody is unaware of the fact from where this pandemic originated and how it unstable the economy of many countries. Yet the question whether it was an Act of God or Force Majeure which lead a party non-performing its contractual obligation leading to Doctrine of Frustration. Many economic disparities have arisen due to the outbreak of this pandemic and various sectors are facing problems or we may say having an adverse impact of COVID-19. Starting from the Finance Department, Reserve Bank of India providing relief to financial service system, forbearance of loan etc., industrial sector, small scale business all have an adverse impact. All the obligations are now not fulfilled. The Ministry of Finance has come out with a notification dated February 19, 2020. It has been clarified that Force Majeure under Manual of Procurement of Goods 2017 would be applicable in this pandemic due to disruption of supply chains like wise many others are focusing on Doctrine of Frustration as stated in Sec 56 of Indian Contract Act. Thus, in this paper researchers would try to analysis the impact of COVID-19 globally.

Keywords: COVID-19, Force Majeure, Frustration, Business, Globally

SYNOPSIS
This research paper deals with the role of doctrine of Frustration during pandemic. In this research paper, we will mainly focus on COVID-19 and how this pandemic effects the economy and various contractual agreements and how this simple doctrine plays a vital role in it.

Research Objective
The research paper is based on Doctrine of Frustration and COVID-19. And the keen objectives of the paper are as follows: -
1. Analysis of Doctrine of Frustration and COVID-19
2. Impact of COVID-19 on Doctrine

Research Methodology
The methodology used for this paper is purely doctrinal. Analytical and descriptive method is adopted for analyzing status of Doctrine of Frustration during COVID-19. The research is based on the primary sources like Statutes and International Conventions and secondary sources like books, journals and news in magazines/web portals/newspapers and websites.

Introduction
In the wake of the current corona virus outbreak, most businesses are looking out to re-align themselves with the economic disparity that is likely to arise. The World Health Organization has declared COVID-19 a global pandemic on March 11, 2020 which will have an adverse impact on the
economy globally leading to the non-performance of the contractual obligations. The government of India confirmed India’s first case of Covid-19 on 30 January 2020 in the state of Kerala, when a university student from Wuhan, China traveled back to the state. On 24 March, the Government of India ordered a nationwide lockdown for 21 days, as a preventive measure against the spread of the pandemic in India.

With this outbreak everyone is uncertain about their obligations and in question whether the situation will be normal again or not. The circumstances occurring all around the world has created a deterrent in the mind of the people that everybody fear to move on the road. Focusing on the virus symptoms the only safest zone is home. Talking, Sneezing or even shaking hands can cause virus. Doctors being so cautious while treating people still get affected by this virus. Seeing these circumstances people fear but stomach demand never ends. Resources are scares but demand is high. Similarly, with the supply, demand is there but supply is limited. If the situation remains same whole country will one day fight to fulfill their needs may even lead to robbery or worst situation death of people. All are affected from this the poor, middle class and if continues for long richest of the richest people also need to think before spending. There are many issue concerned with.

With the outbreak of COVID-19 reaching pandemic scale, India is on high alert with most State governments calling for a short lived lock-down of nearly essential services. The growth rate (GDP) of the Indian economy has hit the record low of 6 years on 4.5%. Sensex and Nifty have also taken a historic plunge and has since been showing increased volatility. Naturally, contracting parties are either unable to meet their contractual obligations or finding that these obligations would be delayed till the current lockdown situation normalizes. In such a happening, contracting parties will need to depend upon the Force Majeure clause in their contract to reach the implications of such delay or non-performance of contract. And here the Doctrine of Frustration plays very important role which may bring the contract to an end.

Doctrine of Frustration is defined under Sec.56 of Indian Contract Act, 1872. It means the essential idea upon which the unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.
The doctrine of frustration of contract is predicated on the impossibility of performance of the contract; after all, 'impossibility' and 'frustration' are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible, and therefore the parties are absolved from the further performance of it as they didn't promise to perform impossibility.

As per the S.56 of Indian Contract Act, 1872 it is defined as ‘Agreement to do impossible act - An agreement to do an act impossible in itself is void.’ The doctrine of frustration was developed in Taylor Vs. Caldwell within the year 1863 for the primary time, wherein Justice Blackburn reasoned that the rule of absolute liability only applied to positive, definite contracts, to not those within which there was an express or implied condition underlying the contract. As far as Indian law is worried, Section 56 of the Indian Contract Act, 1872 is totally clear that an act, after the contract is formed, becomes impossible to perform or by reason of some event which a promisor party couldn't prevent becomes void and isn't capable of performance.

The COVID-19 pandemic may be an avoidable casualty event which will be coated below contracts however, not all contracts have a similar clause. For the coverage of this pandemic within the unavoidable casualty clause, it ought to cover inside its extent, ‘prevention of fulfilment of obligations because of governmental restrictions’, ‘any unforeseen circumstance that stops the fulfilment of obligations’ or specifically mentioning a ‘pandemic/epidemic’ as an occasion that may return inside the extent of unavoidable casualty, however, some clauses don't have a similar verbiage and are restricted to many circumstances solely, within which case invoking the clause wouldn't do a lot of sensible unless each the parties to the contract reciprocally conceive to suspend the operation of the contract for a particular amount of your time. The Court must consider whether or not the party seeking to invoke frustration has established that the outbreak of the pandemic, and the associated government restrictions renders it physically or commercially impossible to fulfil the contract or alternatively

---

2081 idbi
2082 Taylor Vs. Caldwell, 3 B&S 826 (1863).
2083 Supra note 3
transforms the obligation to perform into a radically different obligation from that undertaken at the time that the contract was made.

This memorandum, in essence, states that the COVID-19 could effectively be covered under force majeure clause because it is a 'natural calamity' and all the departments who should invoke it by following the 'due process.' But this implication of COVID-19 cannot be upheld for every contract, and the clause needs to be interpreted based on different circumstances.

Force Majeure and the doctrine of frustration: "Frustration is an English contract law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract."[2084]

THE OUTBREAK: -
Mankind has observed various pandemics throughout the history where some of them were more disastrous. Once again we are observing a very tough time once again fighting an invisible enemy; the novel COVID-19 corona virus. Initially it was observed in the Wuhan province of China (which was famous for its scientific laboratory), now very fastly spreading around the world.

Corona virus or COVID-19 has been the biggest fear among the people whether related to risk of life or economic or financial market across the globe. Recently at the end of 2019 Wuhan an emerging business hub of China experienced an outbreak of a novel corona virus that killed more than eighteen hundred and infected over seventy thousand individuals within the first fifty days of the epidemic. After that this novel virus named as Corona virus by a Chinese researcher. And then later WHO named it as COVID-19, this disease caused by the new corona virus that is called SARS-CoV-2, or sometimes just “novel corona virus”.

The virus infected more than 110,000 people in at least 110 countries and territories globally, according to the World Health Organization. Of those infected, more than 4,000 people have died, according to WHO data.[2085] In the public mind, the origin story of coronavirus seems well fixed: in late 2019 someone at the now world-famous Huanan seafood market in Wuhan was infected with a virus from an animal.

Prof Stephen Turner, head of the department of microbiology at Melbourne’s Monash University, says what’s most likely is that virus originated in bats. But the origin of virus is not yet confirmed. The World Health Organization (WHO) has described the novel corona virus as a pandemic for the first time. In a press

---


briefing on Wednesday, WHO director-general Tedros Adhanom Ghebreyesus expressed concern about trajectory of the disease, which has rapidly expanded across the globe in the months since it was first announced in China. Meanwhile during their period of time the cases of Corona virus name COVID-19, started rising sharply around all over the world specially in Italy, Iran, and South Korea. After that it reached in USA as well with more than 600 cases and 29 deaths. And now it becomes a pandemic on world and also affects all the sectors of economy. Like sue to this the government of the country decided to lockdown the states to minimize the contact of people and due to this decision various agreements and contracts are become impossible to perform and so it becomes frustrated not breach. As many of the contractual agreement are done by various alternative methods like online conferencing, meeting with clients virtually, etc., but it is not same in other cases like delivering of goods, transferring something, etc. So that agreements are frustrated due to this pandemic.

**Force Majeure:**

The term has originated from the French language and finds its roots in ‘Code Napoleon’. Over the years and within the usage of a similar in the written agreement sphere, it's been outlined as ‘an irresistible force or compulsion like can excuse a celebration from acting a part of the contract’. An unavoidable casualty clause is typically place altogether contracts in order to forestall termination of a similar because of unpredictable circumstances that render performance of written agreement obligations as not possible and/or troublesome to perform. The Hon’ble Supreme Court within the case of Dhanrajmal Gobindram vs. Shamji Kalidas2086, has control that the term unavoidable casualty is of wider import. Judges within the past have united that wherever the reference is formed to unavoidable casualty, the intention is to avoid wasting the acting party from the results from the something over that he has no management.

**DOCTRINE OF FRUSTRATION:**

Doctrine of Frustration in general means parties are not supposed to fulfill their obligations because of occurring of an event which makes it impossible to do. In simple terms it discharges the party from their contractual obligations. Sec 562087 of the Indian Contract Act mentions about Doctrine of Frustration. It says an agreement is void if it is impossible to do act known to be impossible or unlawful. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

---

2086 Dhanrajmal Gobindram vs. Shamji Kalidas (1961) 3 SCR 1020 (India).
2087 Agreement to do impossible act. — An agreement to do an act impossible in itself is void. — An agreement to do an act impossible in itself is void. "Contract to do an act afterwards becoming impossible or unlawful. — A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.1 — A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.2" Compensation for loss through non-performance of
the mentioned act. Frustration occurs when firstly, the performance is physically impossible to do. Secondly, a contractual object fails. The ultimate outcome of this is that parties become free from performing their contractual obligations.

The frustration of contract happens generally in the cases of:
- a) Death of the party – At times the parties enters into the contract but before fulfilling is obligation one of the parties dies.
- b) By Virtue of Legislature- Law is promulgated after entering into the contract.
- c) Change in Circumstances- Situation is such that it is impossible to perform the obligations.

Apart from these, there are few conditions important for the applicability of the doctrine:
- ➢ Existence of a valid contract between the parties to the contract;
- ➢ Along with this some part of the contract should be left unperformed;
- ➢ Or it becomes impossible to perform the contract after entered into which makes it void.

The Courts in various cases has explained the meaning if doctrine, taking into consideration various facts and circumstances which may lead to impossibility of performing some contractual obligations. In the case of Indian Rare Estate vs Southern Electricity Supply Co. of Orissa, the Supreme Court interpreted the doctrine of frustration as stated that, doctrine is that in which even the act has not become impossible to perform in literal sense but is such that becomes meaningless from the parties point of view.

In the case of Joseph Consultative Line Ltd vs. Imperial Smelting Corp, focusing on the change of circumstances the court held that a contract becomes frustrate when the circumstances are such that it makes its performance impossible in the stipulated time and manner.

Neville & Sons. Ltd. v. Guardian Builders Ltd. The Court held that the frustration of a contract takes place when a supervening event occurs without the fault, either party and for which the contract makes no sufficient provision. That event must so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated at the time when the contract was entered into, that a Court must be satisfied that it would be unjust to hold the parties to the contract terms in the light of the new circumstances. The Supreme Court also noted that the doctrine of frustration was flexible and capable of being applied in new ways in suitable circumstances. The effects of a finding that a contract is frustrated are:
- all future obligations are discharged (at common law) accrued rights stand
- restitution on the basis of a total failure of consideration

Bombay High Court’s Order passed in Standard Retail Pvt. Ltd vs Gs Global Corp And Ors on 8 April, 2020 COVID-

---

2088 Indian Rare Earths Ltd V. Managing Director, Southern Electricity Supply Co. of Orissa, AIR,2010Ori115 (India).


19 a curious cases of frustration doctrine.

In a departure from its 3 April 2020 Order, the Bombay High Court refused to grant interim measures to the Petitioner observing that the commodity in question was an essential item and lockdown is only for a limited period. Consequently, Petitioner cannot resile from its contractual obligation of making payments to the Respondents.

IMPACT OF DOCTRINE OF FRUSTAION DURING PANDEMIC (COVID-19)

With the arise of this pandemic we can see all the short term impact on the economy. Along with this if we go into the depth of the situation this pandemic is going to have long term impact on the economy. Short term impact has been seen in restaurants, airlines, hospitality, tourism and many more. Further people will cut down their expance so clothing, automobile and griffin goods will also have a downfall. Long germ impact will be seen in the tourism, restaurants, luxurious goods such as gold, stock market and other few industries or manufacturing units.

Taking into account the present situation of the world where almost whole economy is disturbed from public sector to private sector, Intra and Inter states transactions, international transactions and many more. This outbreak is going to have a significant impact in future also. Almost every countries economy has gone two years back with a huge number of death cases and still the situation is same. America having one of the strongest economies in the world failed to control this situation. Concerning the various issues around the globe one can analyze the importance of doctrine and its impact on various situation.

COVID -19 has widespread impact on the economy among which various major sectors concerned are: -

1. Stock Market: -It’s not the first time in the worldwide history that there has been a downfall in the stock market. Earlier also stock market has crashed many a times. Sensex plunged 53 per cent in one year in “Harshad Mehta Scam” (1992) but recovered 127 per cent in 1.5 years. During the “Asian Crisis” (1996) Sensex dipped 40 per cent in four years but recovered 115 per cent in the year. During “Tech Bubble” (2000) Sensex crashed 56 per cent in 1.5 years but recovered 138 per cent in 2.5 years.

The Corona virus has a very adverse impact on the stock market. There has been a huge downfall in the stock market leading to the crash of Stock market. The situation is too uncertain. Recovery from this situation needs a lot of money. Banks and other financial situations have certain policies to control the sinking condition of the economy. The efforts are indeed useful but recovery from COVID-19 is still a big challenge to predict the economic condition of the world.

In this case Rural Fairprice Wholesale Ltd. & Anr vs. IDBI Trusteeship Services Ltd. & Ors. the Bombay High Court recognized the market situation pursuant to the COVID-19 and observed that the share market had collapsed due to COVID-19, therefore, it had been a fit case to restrain the bank from acting upon the sale notices

---


2092 Abhishek Raja, Outlook Money, COVID-19, Impact on Stock market, (Apr 21,2020.)

2093 Rural Fairprice Wholesale Ltd. &Anr vs IDBI Trusteeship Services Ltd. &Ors., (Apr 3 2020).

and a direction to withdraw any pending sale orders for the pledged shares.

2. Aviation Industry: - Aviation industry is concerned with manufacturing of aircrafts and its related services during transportation. A social distancing with the coming of outbreak has led to the non – functioning of aviation sector. This has a huge impact on aviation industry because of less demand of travelling and its restrictions to curb the transmission of virus. The government all across the world are cancelling visa and locking down all the affected areas. Its affect is seen is all the countries across the world few of which are India, US, Europe and many more. Ministry of Civil Aviation on March 23rd, 2020 under Sec 8(B0 of Aircrafts Act,1934 gave directions to all Schedule operators and Non-schedule operators for the ceasing of all commercial operations with effect from March 24th Midnight. With this the revenue of all have gone down and will have a long term negative impact as tourism will decrease and people due to the fear of Corona will travel less. Even Government has laid some norms such as middle seat should be vacant in all the flights to maintain social distancing due to which the companies will also sell the limited tickets.

3. Manufacturing Sector: - The disruption on manufacturing caused by the COVID-19 has severe operational, social and financial consequences. It is forcing the manufacturers to rethink risk management and contingency plans. Hands on safety protocols, producing operations and new ways that of operating opportunities, all at an equivalent time. Manufacturing sector is considered as the major part of the economy because it consists of nearly 20% in the global economy. In the year 2015; Indian government took an initiative known as Make in India to promote the Indian manufacturing sectors. However due to this COVID pandemic the global FDI inflows has witnessed a sharp decline “as per the estimation by United Nation Conference on Trade and Development (UNCTAD), the COVID-19 outbreak could cause global FDI to shrink by 5%-15%, due to downfall in manufacturing sector coupled with factory shutdown. The country like china which holds a large number of manufacturing industries in it has the greater impact on their economy as many companies were going to take off their industries from China. And on the second place it will going to generate new employment opportunities.

The impact of COVID-19 on global manufacturing industries was classified into automobiles, food & beverages, machinery, electronics, aviation, pharmaceutical and medical equipment, and others. Mainly the electronic industries are going to be affected during this period of time. And during this period of time China hold nearly 85% of components utilized in Smartphone and 75% in televisions. Nearly all critical electrical components such circuit, memory, etc., was imported from China only. And during this pandemic most of the companies were shut down. As a result of these the Chinese


vendors have increased their prices on products which absolutely affect their economy. And therefore it negatively affected the electronic manufacturing sector along the globe.

The COVID-19 pandemic will also have long-lasting implications for the future of manufacturing. No company can operate in isolation, so it is essential to identify continuity risk and any single point of failure. All manufacturers need to look closely at their end-to-end operations to assess how well positioned they are to respond to future disruptions with confidence and speed. Simply saying that they have to do the work on reshaping themselves into digitally enabled, resilient, and agile organization that will help to quickly help to adjust in the face of adversity.

4. Hospitality sector: - The outbreak of Covid-19 is going to have an unprecedented effect on the Hospitality sector, such that has not been seen in Modern History. With the travel ban having been imposed and tourism shut, the Hospitality sector has experienced a complete shutdown in its economic activities whereby leading to magnanmous losses in its revenue. Oyo Homes and Hotels, one of the country's largest chains in the Hospitality sector has already suspended payments to its partners owing to unprecedented losses in its revenue. In the current scenario it is advisable that the entities forming part of the sector invoke the Force Majeure clauses in their agreements seeking suspension of payments and other obligations arising out of contracts. It has been predicted that the Hospitality sector alone in India is looking at losses to the tune of almost Rs. 500 Crores in the next 6 months owing to the outbreak of this global pandemic. Hotel operators, owners and franchisors should consider carrying out a review of key contracts to determine whether the impact of the outbreak constitutes a Force Majeure event. With an absolute bar having been implemented across the nation, hotels have had to shut their operations, owing to which it is advisable that depending on the wordings of the contract, the sector should invoke the Force Majeure clause comprising part of its agreements, seeking exemption from payments and other liabilities. Albeit, regardless of whether Force Majeure provisions apply to a specific agreement or not, the Hospitality sector should further apply the Doctrine of Frustration of contract, which although narrow in its scope, may further be helpful in the current scenario inasmuch as owing to the prevalent conditions and the magnanmous losses that the sector is going to be burdened with, the entities comprising of the sector may be in a situation to plead impossibility to perform its obligations arising out of the contract.

5. Unemployment: - The biggest affect is to the workers in the company or persons hired by small scale business man. COVID-19 has led to the reduction of income for all the biggest of the biggest companies as well as the small scale business operators. All are removing their workers with the fear of how to pay them even half of the wages when the income is nil. Recently swiggy requited it staff members. Government notified to pay half the wages and this has lead more problems to the owners. The unemployment has a huge rise. Incident of death due to unemployment is also seen. Daily wage workers are the most affected people with no income in the hand even to feed their families. Though government is taking initiative to feed the people but the sole earning and its saving is good for individuals and whole economy.
Bombay High Court’s Order passed in Standard Retail Pvt. Ltd vs Gs Global Corp And Ors on 8 April, 2020
In a departure from its 3 April 2020 Order, the Bombay High Court refused to grant interim measures to the Petitioner observing that the commodity in question was an essential item and lockdown is only for a limited period. Consequently, Petitioner cannot resile from its contractual obligation of making payments to the Respondents.

Delhi High Court’s Order passed in M/s. Halliburton Offshore Services Inc. vs Vedanta Limited &Anr. 20 April 2020
The case pertained to restrain on invocation of bank guarantees. While granting interim relief on the invocation of bank guarantees, the Delhi High Court observed that the country wide lockdown was prima facie, in the nature of force majeure. Therefore, it could be said that special equities do exist, as would justify grant of the prayer, to injunction invocation of the bank guarantees.

Delhi High Court’s Order passed in Indirajth Power Private Limited v. UOI &Ors on 28 April 2020
The Petitioner sought interdiction of the Bank Guarantee inter-alia on account of the lockdown in the country due to spread of COVID-19 pandemic, which could drive the Petitioner towards being declared an NPA.

The Court while observing the Petitioner’s conduct i.e. despite the extension of 12 months, could not fulfil its obligation under the Contract, refused to grant relief to the Petitioner. The Court observed that Petitioner’s position under the contract was unaffected by the imposition of the lockdown.

Suggestions: -

- One needs to bear in mind, that proving ‘frustration’ in an Indian Court of Law would not be easy, clearly, because of the fact that the courts would be only be willing to interpret the outbreak of COVID-19 as mere hardship and in any case, the language of the force majeure clause does not specifically include the pandemic. It really will be a challenging task.
- It is best for the parties to keep evidence with them, i.e. the supporting documents with regard to the impossibility of performance, delay or notices served, if any. Notices must be served promptly showing that the contract has become impossible to perform or that a force majeure event has occurred. It is also necessary for parties to identify the origin of such non-performance. Reviewing financing and insurance agreements to cover any unexpected losses should be of the highest priority.
- For parties ‘receiving’ notices of force majeure, it is necessary for them to determine whether such notice holds consistently with the protections contemplated by the clause, if due process has been followed and whether supporting documents are available. Parties claiming force majeure should be very careful about the evidence of such impossibility, what steps they are taking to prevent such impossibility and the magnitude of that event, since parties making claims are always at a risk of making a wrongful claim.
- Most importantly, parties need to determine whether the events associated with COVID-19 prompt the ‘material adverse event’ term in the contract. Meaning, that subsequently, post execution of the contract between the parties, the events took an ‘unexpected turn’. This could be a valid line of argument, although it will again depend on the language as well as specifics of the case.

www.supremoamicus.org
733
As the COVID-19 crisis continues to expand, manufacturers will likely face challenges on numerous fronts. Manufacturers will also need to look beyond their own economic viability. They will need to coordinate closely with the public sector to forge plans that are essential to both public safety and the solvency of their workforce, while keeping the lights on in their operations, challenging climate. Some will be austere, but austerity measures should be tempered to preserve long-term objectives.

Lastly, if the contract becomes wasteful on account of the COVID-19 crisis and loses its economic value, or if the other party wishes to repudiate or terminate the contract in order to mitigate or prevent any further losses, it is recommended that parties rely on the ‘termination clause’, ‘entitlement to terminate’ or any such clause as may be specified in such a contract.

Conclusions:
The success or failure of a plea of frustration supported the COVID-19 pandemic in defense of a breach of contract claim will mainly depend upon the factual matrix surrounding the subject matter of the contract. The length of any delays imposed by pandemic-related restrictions, specifically, are visiting be of great importance.

Here the force majeure clause plays an important role in The absence of a force majeure clause or similar provision for a party to be excused for non-performance, is beheld extremely conservatively by the Courts. Without a force majeure clause the burden of proof for the party claiming frustration shall be much higher than if the force majeure clause was present. Parties will have to show a direct correlation of the non-performance to the said event i.e. COVID-19 state of emergency, and that the non-performance was not due to any other factor like the economic slowdown or a lack of funds. Hence, each case will be reviewed in accordance with the facts and circumstances of that particular case to determine bona fide frustration.

The Court must consider whether or not the party seeking to invoke frustration has established that the outbreak of the pandemic, and the associated government restrictions renders it physically or commercially impossible to fulfil the contract or alternatively transforms the obligation to perform into a radically different obligation from that undertaken at the time that the contract was made.
APPLICATION OF DOCTRINE OF RULE OF LAW BY JOSEPH RAZ IN INDIA

By Rishabh Vyas and Moksh Ranawat
From Symbiosis Law School, Pune

ABSTRACT
Aristotle said: “It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and the servants of the Laws”. Rule of law is that concept where the state is governed, not by the ruler or the nominated representatives of the people but by the law. Joseph Raz is a follower and current propounder of legal positivism in the world. His work is recognized and admired not only in the legal sphere but also in Philosophy and moral thinking. One of his most distinguished works is his critique on ‘Rule of Law’, in his paper titled as “The Rule of Law and its Virtues”. He has discussed the doctrine of rule of law and provided some principles or virtues which are essential to establish law as an obedient and guiding force for the public as well as government. This essay will analyze the application of his virtues of rule of law, such as, Law should be clear, open and prospective; Law should be relatively stable; Independent judiciary; Adherence to Principles of Natural Justice; Court should have power of Judicial review; Courts should be easily accessible; Discretion of crime preventing agencies should not be allowed to pervert the law, in Indian scenario. It aims to provide how rule of law virtues are imbedded in the legal system and how they have been protected and guarded by the judiciary so as to establish the sovereignty of LAW in India.

KEYWORDS: Rule of law, Executive, Constitution, Supreme Court, Basic Structure.

INTRODUCTION
“Rule of Law is the antithesis of arbitrariness……..Rule of Law is now the accepted norm of all civilized societies…..Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order.”
- Justice Khanna

The term ‘Rule of law’ is a phrase that is very commonly used whenever law is being studied. It is derived from the French phrase ‘la princip de legalite’ which means the ‘principal of legality’. It refers to ‘a government based on principles of law and not of men’. In other words, the concept of ‘la princip de legalite’ is opposed to arbitrary powers. In another words ‘Rule of Law’ can be defined as a rule where law is the governing authority and everyone is equal before law. Rule of law is where the powers (limited) and functions of government & liberties of citizens are authorized and protected by the Law. The Rule of Law generally has few basic fundamental assumptions, such as, law making must be essentially in the hands of a democratically elected legislature; even in the hands of the democratically elected legislature, there should not be unfettered legislative power; and there must be independent judiciary to protect the citizens against excesses of executive and legislative power.
Joseph Raz has understood the meaning of Rule of Law in two ways, one in narrow sense and other in wider sense. According to him Rule of Law means ‘people should obey the law’ or ‘government shall be ruled in accordance with law’. The former meaning can be considered in a broader sense where ambit of law is not limited to the governance or government; rather it involves its application to whole of public in general.

Rule of Law in a very fundamental way refers that ‘law should be considered highest and it must guide the behavior of its subjects’. According to Joseph Raz, ‘law’ to be accepted and become the guiding force it must satisfy mainly two conditions. One would be satisfying that law should confirm to the standard designed to guide the actions or behavior effectively. This can be fulfilled by the following requisites:

- Law should be clear, open and prospective;
- Law should be relatively stable;
- Law should be based on the rules which are clear, open, stable and general.

Second condition includes the legal machinery to enforce and safeguard the law. Law without the enforcing authority is same as a cruise without compass in an ocean. The same can be achieved by following principles:

- Law must be guaranteed by independent judiciary;
- Principles of Natural Justice should be adhered;
- Court should have power of Judicial review;
- Courts should be easily accessible;
- Discretion of crime preventing agencies should not be allowed to pervert the law.

These virtues are discussed in detail in forthcoming sections of this essay.

APPLICATION OF VIRTUES IN INDIA

1. All laws should be prospective, open and clear

The term ‘all laws’ includes all sources of law in India, which are in hierarchy as follows: Constitution, Legislature, Judiciary, Administrative, & People (customs & usage). The above mentioned principle is referring to 3 different aspects of laws; (a) prospective, (b) open and (c) clear. This section analyses whether aforementioned sources of law are prospective, open and clear.

(a) All laws should be prospective:
Prospective laws means laws should be applicable for the future actions not past conducts. According to Article 20(1) a person cannot be subject to penalty or conviction against the laws which are not in force. Penalty includes fine and conviction, means imprisonment and death sentence. This provision of constitution clearly establishes that criminal substantive laws should be prospective in application.

But, according to the doctrine of beneficial construction substantive criminal law can be applied retrospectively if it is for the

---

2097 Minerva Mills v Union of India (1980) AIR 1789
2098 Article 245(1), Constitution of India, 1950
2099 Kesavananda Bharati v State Of Kerala (1973) 4 SCC 225; See also; Article 141, Constitution of India, 1950.
2100 Hitendra Vishnu Thakur v State of Maharashtra (1994) 4 SCC 602; See also Commissioner Of Income-Tax v Hindustan Electro Graphites Ltd. (1989) 177 ITR 465 MP.
benefit of the offender. It does not prohibit a civil liability retrospectively i.e. with effect from a past date. However procedural laws can be retrospective with the expressed provision stating the same.

In ‘Raja Nand Kumar case’, 1775, also known as Judicial Murder case, accused was punished for the offence of fraud. He was sentenced to death by then Supreme Court accepting retrospective effect of punishing the offence of forgery with capital punishment, under the influence of Governor – General Warren Hasting. If laws started applying retrospectively then it can cause a huge blunder to the society. Therefore it can be said that every law is prima facie a prospective “unless it is expressly or by necessary implication made to have retrospective operation” otherwise it can create havoc.

(b) All laws should be open
All laws should be open means, they should be published or there should be attempt to make available the knowledge of the same to general public, otherwise people could be made liable for the action without knowing their existence as a crime.

In ‘Harla v. State of Rajasthan’, a commissioner made rules and put those in his custody without making them public. Later appellant was arrested under the same rules. Court said there were no means available with the accused to know that his actions are criminal in nature, hence arrest was illegal. Court further held that rules made by administration should be made public as they are based on individual wisdom, unlike legislative enacts which are based on common wisdom and can be available to public by one or any other means. In India an ‘act’ will become ‘law’ only when it is published or notified in a reasonable manner to public, eg. Gazette of India. Judiciary is not required to publish as they are court of record, therefore easily accessible. Therefore in India laws are required to be in publication.

(c) All Laws should be Clear
All laws should be clear means that there shouldn’t be any vagueness or ambiguity in understanding or in interpretation of laws. In ‘Shreya Singhal v. UOI’, apex court observed that Section 66A of Information Technology Act is vague. Court said words used in the section, such as, ‘annoying’ or ‘erroneous’, etc. are very vague in nature and are open to arbitrary use as per the requirement. Arbitrariness is against the Fundamental rights. Therefore, court held that law should be clear, if not, then it can be struck down on the ground of arbitrariness.

Therefore, the first virtue is applicable in India but subject to some limitations.

---

2101 Ratan Lal v State of Punjab (1965) AIR 444; See also T. Barai v Henry Ah Hoe and Anr. AIR 1983 SC 150.
2102 Govind Das And Ors. v The Income Tax Officer And Anr. AIR 1977 SC 552.
2103 Mithilesh Kumari and another v Prem Behari Khare AIR 1989 SC 1247.
2104 Harla v State of Rajasthan (1951) AIR 467; See also Bangalore Woollen, Cotton And v Corporation Of The City (1962) AIR 562.
2105 B.K. Srinivasan & Another etc. v State Of Karnataka & Ors, 1987 AIR 1059; See also D.B. Raja v H.J. Kantharaj And Others (1990)SCR (3) 336; M/S. Pankaj Jain Agencies v Union Of India (1995) AIR 360.
2106 Rajendra Agricultural University v Ashok Kumar Prasad (2010) (1) SCC 730
2107 Article 129, Constitution of India, 1950
2108 Shreya Singhal v UOI AIR 2015 SC 1523.
2109 E. P. Royappa v State Of Tamil Nadu & Anr (1974) AIR 555
2. Laws should be relatively stable

Laws are made according to the needs and requirement of the society. If the society is changing then laws should be. But the change must not be very frequent; otherwise it will lead to confusion, uncertainty, risk, etc. Illustration regarding the same can be observed clearly if the laws are related to business. If laws are not relatively stable then there will always uncertain markets. Apart from this, instability can create a fear in respect of taking decisions.

In India, there are few laws which are very stable, but few are very dynamic. Constitutional provisions and legislative enactments are relatively stable as they require long and tedious process to amend. Laws in Indian can be amended by a simple majority in the Parliament, or by special majority that is majority of the total membership of each house and by majority of not less than two thirds of the members of each house present and voting, or by Ratification by the State Legislatures after special majority. However, the power to amend the constitution is not unlimited. Supreme Court through various decisions held that, some part of constitution such as, Fundamental Rights, Separation of Powers, judicial Review, etc. cannot be amended as they are part of Basic Structure of the grundnorm. Judicial decisions are also relatively stable as court doesn’t go against the precedents unless required by the change in the legal and logical jurisprudence of the society.

But administrative law is very dynamic in nature, as executive has given powers to take action according to emergent situations; if normal course is followed then it may lead to more harm. Ordinance power can be taken as example here at the central level and at lower level a District Magistrate has power to implement Section 144 of CrPC at his discretion, as per the situational need. Administrative law requires discretion to combat emergency situation at ad hoc basis, but in accordance with existing laws. Therefore, in India apart from administrative law other laws are relatively stable.

3. The making of particular laws should be guided by open, stable, clear and general rules

This principle is indicating at those fundamental general rules on the basis of which other particular laws should be formulated. These fundamental general rules should be open, clear, stable and general in nature.

The general principles can be Justice, Preamble of Constitution, Fundamental Rights or Democracy, etc. These are the pillars on which weight of other particular laws are levied. One of the general rule is ‘created can’t go against the creator’, which was discussed in ‘In Re Delhi Laws Act’ case where court said Parliament can delegate the law making power but skeleton for the same will be given by creator i.e. Parliament. It is the inherent power of the

Union of India (1980) 3 SCC 625; L. Chandra Kumar v. Union of India (1997) 3 SCC 261

Justice K. S. Puttaswamy (Retd.) and Anr. v Union Of India And Ors (2017) 10 SCC 1; See also Navej Singh Johar & Ors. v. Union of India, Secretary Ministry of Law and Justice 2018; Joseph Shine v. Union of India 2018

Kesavananda Bharti v State of Kerala AIR 1973 SC 1461; See also Indira Nehru Gandhi v. Raj Narain AIR 1975 SCC 2299; Minerva Mills Ltd. v

2110 Second Schedule, Article 100(3), 105, 11, 124, 135, 81, 137, Constitution of India, 1950
2111 Seventh Schedule, Article 73, 162, Chapter IV of Part V, Chapter V of Part VI, Constitution of India, 1950
2112 Kesavananda Bharti v State of Kerala AIR 1973 SC 1461; See also Indira Nehru Gandhi v. Raj Narain AIR 1975 SCC 2299; Minerva Mills Ltd. v

2113 Justice K. S. Puttaswamy (Retd.) and Anr. v Union Of India And Ors (2017) 10 SCC 1; See also Navej Singh Johar & Ors. v. Union of India, Secretary Ministry of Law and Justice 2018; Joseph Shine v. Union of India 2018
2114 Article 123, Constitution of India, 1950
2115 In Re The Delhi Laws Act (1951) AIR 332
Parliament to make laws under the theory of Separation of Powers. But general principles are generally not very clear; rather they are difficult to interpret. As seen in the aforementioned case where court gave general term of ‘skeleton’, but the same is not clearly defined. Another example can be taken of Preamble of Indian Constitution, which is open, stable and general but they are not clear. Terms such as democratic, secular or social have very broad ambit and they are still evolving. Fundamental Rights area also general in nature but still they are not clear, still courts are developing their scope. The fundamental general rules can be stable and open but can’t be clear at the same time. But irrespective of these inconsistencies, Indian laws follow fundamental rules such as Fundamental Rights, free and fair election under Democracy, secularism etc.

4. Independence of Judiciary

Having open, stable and clear laws are not sufficient. There should be independent authority that can guard these laws for the public. Dr. B R Ambedkar once said “The people of a nation may lose confidence in the Executive or the Legislature but it will be an evil day if they lose their confidence in its judiciary”. The judiciary is the guardian of human rights and civil liberties against the harm of atrocities. The judicial institutions are not only Courts of law; they are also the Courts of Justice. The Constitution of India guarantees this independence in the following manner:

- Security of tenure of Judges
- Parliament can't curtail the powers of Supreme Court
- Prohibition on discussion of conduct of High Court and Supreme Court judges
- Power to punish for its contempt

Appointment of judges of High Court and Supreme Court are appointed by the President after the consultation with such of the Judges of the Supreme Court and of the High Courts in the States. But the word consultation has connoted the meaning that it does not mean concurrence and implies only exchange of views. Later on apex court held that Chief Justice will render his advice after consultation with two senior most judges. But the limit of consultation was increased to four senior most judges. However, legislature appointed National Judicial Appointment Commission through the constitutional amendment act 2014 for the appointment or transfer of judges of higher judiciary. The commission had much more intervention from the Executive organ of the state. Supreme Court struck down the commission on the ground that it violates the Independence of Judiciary, which is a part of basic structure. Hence, apex court reiterated its previous stance of on

---

2116 Article 245, Constitution of India, 1950
2117 Kesavananda Bharti v State of Kerala AIR 1973 SC 1461
2118 Justice K. S. Puttaswamy (Retd.) and Anr. v Union Of India And Ors (2017) 10 SCC 1
2119 Article 13, Constitution of India, 1950
2121 Preamble; Article 14 and 25, Constitution of India, 1950; See also Special Marriage Act, 1954
2122 Article 124(2) & (4) and Article 217(1), Constitution of India, 1950
2123 Article 138, Constitution of India, 1950
2124 Article 121, Constitution of India, 1950
2125 Article 129 and 215, Constitution of India, 1950
2126 S P Gupta v Union of India AIR 1982 SC 149
2127 Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268
2128 In re Special Reference 1 of 1998
2129 Supreme Court Advocates-on-Record Association and another v. Union of India (2016) 5 SCC 1
appointment of judges through the collegium system without any interference from other state organs.\(^{2130}\)

Apart from these provisions & judicial precedents, apex courts also held in many of its decisions that independence of judiciary is sine quo non to safeguard the basic structure of judicial review. Therefore, in the light of aforementioned points it can be said that India has an independent judiciary.

5. **Natural justice principles are protected**

Principles such as Audi alteram partem, Nemo judex in causa sua, Right to counsel, Reasoned decisions are few amongst which are considered as principles of Natural Justice. Audi alteram partem means hearing to the parties must be given before deciding their rights and liabilities. Nemo judex in causa sua means no one can be judge in his own cause, as it may lead to biasness.

In ‘A. K. Kraipak & Ors’\(^{2131}\), court said Natural Justice Principles are supplementary to legislation and can't supplant it. Court also mentioned that if the law is silent, the principles of Natural Justice can come into picture otherwise legislative provisions will prevail.

However in ‘Maneka Gandhi’ case\(^{2132}\), apex court elevated the principle of Audi alteram partem as the part and parcel of Fundamental Rights, hence become higher authority over legislative provisions, as Part III is the part of Basic Structure\(^{2133}\).

Similarly in Delhi Transport Corporation v. DTC Mazdoor Union\(^{2134}\), the Supreme Court held that “the audi alteram parterm rule, in essence, enforce the equality clause in Article 14 of the Constitution, is applicable not only to quasi-judicial bodies but also to an administrative order adversely affecting the party unless the rule has been excluded by the Act in question.”

Nemo in propria causa judex, esse debet, or Nemo judex in causa sua i.e.; no one should be made a judge in his own cause. It is also recognized as the rule against bias. It is the very fundamental requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. Bias can be defined as an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Bias such as:

- Personal Bias, meaning personal or professional relationship of friendship or hostility between the authority and the parties which can hamper the judicial decision, is unacceptable.\(^{2135}\)
- pecuniary bias, meaning any financial interest howsoever small it may be is bound to vitiate the action, should be far away from justice.\(^{2136}\)
- Subject Matter Bias, meaning the situations where the deciding officer is directly or indirectly in the subject matter of the case, is against the jurisprudence of adjudication.\(^{2137}\)

\(^{2130}\) In re Special Reference 1 of 1998
\(^{2131}\) A. K. Kraipak & Ors. Etc v Union of India AIR 1970 SC 150
\(^{2132}\) Maneka Gandhi v Union Of India 1978 AIR 597.
\(^{2133}\) Kesavananda Bharati v State Of Kerala (1973) 4 SCC 225
\(^{2134}\) Delhi Transport Corporation v. DTC Mazdoor Union (1991) AIR 101; See also Cantonment Board, Dinapore v Taramani Devi AIR 1995 SC 61

\(^{2136}\) Jeejeebhoy v Asst. Collector, Than air AIR 1965 SC 1096.
\(^{2137}\) Gulla palli Nageshwara Rao v APSRTC AIR 1959 SC 308.
According to judicial decisions it can be established that Nemo judex in causa sua is a part of principles of natural justice. A procedure which does not make available legal service to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as “reasonable, fair and just” under the umbrella of Article 21. The Right to be represented by the counsel is also a part of principle of natural justice under the ambit of Article 21 of the constitution of India.

As a primary rule principles of natural justice are not above legislature as they are made under judicial capacity. But if they are part of Basic Structure or fundamental rights then legislature can't take it away as they are at higher authority compared to legislature. Therefore, in India principles of Natural Justice are protected under the constitution through the judicial interpretation.

6. Court should have Review powers for implementation of other Principles

Judicial review is the power of the judiciary to examine the constitutionality of legislative enactments & executive orders of the central and state government. In other words it is a system of check & balance, where the actions of Legislative or Executive are constrained within the ambit of constitution. Judicial Review phrase is not given in the constitution per se. But its jurisprudence can be interpreted through the various articles under Indian constitution, such as, Article 13, 32, 226 and 227. Supreme Court with the help of these articles has protected supremacy of the constitution, maintained the federal equilibrium among the state organs and upheld the fundamental rights of the general people.

In ‘Minerva Mills’ case constitutional validity of 42nd Constitutional (amendment) act, 1976 was challenged. Apex court described the importance of judicial review as:

“Our Constitution is founded on a nice balance of power among the three wings of the state namely the Legislature, the Executive & the Judiciary. It is the function of the judges nay their duty to pronounce on the validity of laws”

Supreme Court declared the amendment unconstitutional on the ground that the act will deprive the court its judicial power and will make Fundamental Rights a box of rhetoric dreams as they would never be granted and rights without remedies. Court reiterated the situation of Kesavananda Bharati case and held power of Judicial Review as a part of Basic Structure, meaning it cannot be taken away in any situation.

In ‘L. Chandra Kumar’ case where establishment of Tribunals under Article 323-A and 323-B of the Constitution was challenged on the ground that it is contrary to the spirit of the Constitution as it excludes the jurisdiction of the Supreme Court under Article 32 of the Constitution and the High Court under Article 226 of the Constitution. Apex court held that:

2138 Hussainara Khatoon & Ors v Home Secretary, State Of Bihar (1979) AIR 1369.
2139 Article 22, Constitution of India, 1950; See also Board of Trustees of Port of Bombay v Dilip Kumar Raghvendra Nath Nandkarni AIR 1983 SC 109
2140 Minerva Mills v Union of India 1980 AIR 1789
2141 Kesavananda Bharati v. State Of Kerala (1973) 4 SCC 225
2142 L. Chandra Kumar v Union of India and Others (1997) 3 SCC 261

www.supremoamicus.org
741
• Article 32, 226 and 227 of the constitution have the status of basic structure,
• Judicial review of legislative action in exercise of power by subordinate judiciary or Tribunals created under ordinary legislation cannot be to the exclusion of the High Courts and the Supreme Court.
• All decisions of tribunals would be subject to scrutiny before Division Bench of their respective High Courts under Articles 226/227.

It is settled legal proposition that the policy decision taken by the State or its authorities/instrumentalities is beyond the purview of judicial review unless the same is found to be arbitrary, unreasonable or in contravention of the statutory provisions or violates the rights of individuals guaranteed under the statute. Subject to this reason not only legislative actions but administrative actions can also be reviewed by the judiciary.

Therefore, in India Judicial Review power is safeguarded under the shadow of Basic structure and same cannot be taken away by any state authority.

7. Courts should be easily accessible
Easy accessibility means any one could approach to the court without any difficulty. This principle is guarded under the safe hands of Public Interest Litigation. Public Interest Litigation popularly known as PIL can be broadly defined as litigation in the interest of that nebulous entity: the public in genera. Public Interest Litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two parties, one making a claim or seeing relief against the other and that other opposing such claim or relief.

Through the concept of PIL the principle of locus standi has been relaxed. Any bonafide individual can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of any breach of fundamental rights of such persons or determinate class of persons, in Supreme Court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons. A private interest case can also be treated as public interest case where the petitioner might have moved to the court in her private interest and for redressal of the personal grievance, but the court in furtherance of Public Interest may treat it a necessity to enquire into the state of affairs of the subject of litigation in the interest of justice.

PIL can be filed if the affected people are incapable of doing so under the following situations:
• If people are poor, ignorant, or uneducated about their rights.

---

2143 Tamil Nadu Education Deptt., Ministerial and General Sub-ordinate Services Association v State of Tamil Nadu AIR 1980 SC 379; See also Monarch Infrastructure (P) Ltd. v Commissioner, Ulhasnagar Municipal Corporation AIR 2000 SC 2272
2144 People's Union for Democratic Rights v Union of India 1982 AIR 1473
2145 S.P. Gupta v President of India and Ors AIR 1982 SC 149
2146 Indian Banks' Association, Bombay and ors v M/s Devkala Consultancy Service and Ors (2004) 11 SCC 1
2147 Mumbai Kamgar Sabha, Bombay v M/S Abdulbhai Faizullahbhai & Ors 1976 AIR 1455; See

www.supremoamicus.org
PIL has been used as a strategy to combat the atrocities prevailing in society by the Supreme Court by the release of bonded laborers\textsuperscript{2150}, by banning smoking at public places\textsuperscript{2151}, by issuing guidelines for rehabilitation and compensation for the rape on working women\textsuperscript{2152}, by laying down exhaustive guidelines for preventing sexual harassment of working women in place of their work\textsuperscript{2153} and also protected environment.\textsuperscript{2154}

In addition to this, the court has even cornered the requirement of any proper or traditional format for filing the case. In ‘Sunil Batra’\textsuperscript{2155} case court accepted a letter as PIL. In ‘Hussainara Khatoon’\textsuperscript{2156} court treated a newspaper article as PIL. Therefore, India is the only country who has got the privilege of such easy accessibility of Supreme Court.

8. The discretion of the Crime Preventive agencies should not be allowed to pervert the law

Discretion is the power of a person under authority given by contract, trust or will to make decisions on various matters based on his/her opinion within general legal guidelines or it can be defined as public official’s power to act in certain circumstances according to personal judgment. Discretion is required to perform the duties, as it is not always reasonable or feasible to seek the permission through the lengthy process. But this discretion should be within the prescribed limit of law.

Crime Preventive agencies such as, Police, CBI, ED, etc. should be checked whether they are working within the ambit provided under law. If any violation happens then High Court of the State can be easily accessed under Article 226.\textsuperscript{2157} The scope of the Article 226 is not only limited to writs but also be used for any other purpose, which may include:

- Malafide action means any improper exercise or abuse of power.\textsuperscript{2159}
- Unreasonableness.\textsuperscript{2160}
- Colorable legislation means that under the “colour” or “guise” of power conferred for one purpose, the authority is seeking to achieve something else which it is not authorized to do under the law in question.

\begin{itemize}
\item \textit{Sunil Batra v. Delhi Administration} 1980 AIR 1579
\item \textit{S.P. Gupta v. President of India and Ors} AIR 1982 SC 149
\item \textit{Bandhua Mukti Morcha v Union of India} (1997) 10 SCC 549
\item \textit{Murli S. Dogra v Union of India} (1995) 1 SCC 14
\item \textit{Delhi Domestic Working Women's Forum v Union of India} (1995) SCC (1) 14
\item \textit{Vishaka v State of Rajasthan} AIR 1997 SC 3011
\item \textit{Vellore Citizens Welfare Forum v Union Of India & Ors} AIR 1996 SC 2715; See also M.C. Mehta v Union of India (Taj Trapezium Case) 1997) 2 SCC 353
\item \textit{Sunil Batra v Delhi Administration} 1980 AIR 1579
\item \textit{Hussainara Khatoon & Ors v Home Secretary, State Of Bihar} 1979 AIR 1369
\item Article 226, Constitution of India, 1950
\item \textit{Radhey Shyam & Anr v Chhabi Nath & Ors} (2009) 5 SCC 616
\item \textit{Jaichand v State of West Bengal} (1967) AIR 483; See also \textit{State Of Punjab v V K Khanna & Ors} AIR 2001 SC 343.
\item \textit{Sheo Nath Singh v Appellate Assistant} 1971 AIR 2451
\end{itemize}
then the action of the authority shall be invalid and illegal. 2161

- Irrelevant considerations meaning means that power must be exercised taking into account the considerations mentioned in the statute. 2162

Therefore, in India, to make sure that discretion of the crime preventive agencies are within control, recourse has been provided under law.

CONCLUSION
Distinct Flowers of this land are together because they are not governed by any one of them, they are governed by something which is above all and everyone is equal to that. It is nothing but the Rule of Law who is binding us all and giving sense of Unity in Diversity. Constitution is considered as supreme law of the land. All other organs of the state work within the guidance of the grundnorm. Every function, either it may be legislative or executive or judicial, is given, performed and governed in accordance of the supreme law. In India laws are in accordance to the standard designed to guide the actions effectively, as they are clear, open and prospective; relatively stable; and they are based on the rules which are clear, open, stable and general. In addition to this, country has an effective legal machinery to enforce and safeguard the law through the mechanism of easy accessibility to the court; judicial review; independent judiciary. Both law and law enforcing machinery has been efficiently implemented by the judiciary considering obedience to law as foremost and paramount in the largest democracy of the world under the shadow of the highest law of the land; Indian Constitution.

*****

Smt. Somavanti And Others v The State Of Punjab And Others 1963 AIR 151

The Barium Chemicals Ltd. And Anr v The Company Law Board and Others 1967 AIR 295; See also Smt. S. R. Venkataraman v Union of India & Anr 1979 AIR 49.
AN ANALYSIS OF THE EFFECT OF COVID-19 PANDEMIC ON LABOUR LAWS IN INDIA

By Sagarika S Kanakannavar, Aishwarya Prasad and Shamitha Padmanabhan
From Christ University, Bengaluru

Abstract
The current global situation with the Coronavirus pandemic defining every aspect of society is referred to as being ‘unprecedented’ in nature. This situation has brought about changes in all the sectors of society making social, economic, political and legal changes at individual, national and international levels. However, as we adapt to the situation, we are required to create a balance between economic stability and fundamental rights provided by the constitution. This is referred to as creating a balance between ‘lives and the livelihood’.

This paper gives a brief on the history and evolution of laws during historic pandemics, in comparison to the current contrasting situation of the government suspending labour laws. While the massive hit to the economy requires immediate attention, what is the extent to which the government can compromise the lives and livelihood of its citizens?

Keywords: Labour Law Suspension; Global Pandemic; Economy; Fundamentals Rights, Directive Principles of State Policy;

Historic Pandemics And Their Effects On Labour Law
Historically, pandemics have caused workers to demand more rights than settling for less. The Plague of 1896-1897, as well as the Spanish Flu of 1918 caused a pandemonium amongst the labour sector in India. Historically, pandemics have caused workers to demand more rights instead of settling for less.

Mr. Aditya Sarkar, in his paper analyzes the situation of workers during these times in the city of Bombay, India. His descriptions find a stern resemblance of events unfolding today. As he quotes, “a series of ramshackle medical and sanitary fortifications had been erected, but these proved ineffective.” Panic has spread as fast as the contagion. Workers and labourers were asked to migrate to the countryside only to be hit with a famine. Cities were emptied of workers and saw a massive labour shortage, which made employers increase incentives, offer remunerative concessions and higher wages to retain workers from fleeing the city.

Working hours in the early 20th Century, under colonial rule, ranged between 12 to 15 hours, which was justified by employers and the management through old ways of paternalism. The First World War only made the situation worse, with increased working hours, tiresome manual labour, and a sense of freedom being snatched away from family time. Over the next few decades, work hours only went up, with tighter managerial control and harsher punishments for lapses.

On the 29th of May, 1918, a ship carrying Indian troops reached the shores of Bombay and remained anchored to the docks for about two days. Given the circumstances of World War being on its last leg at this point of time, the docks were often busy with

Vol. 59 Issue 2, Department of History, University of Warwick, United Kingdom, (2014).

www.supremoamicus.org
goods being shipped back and forth from England. This ship is traced back to carry the first lethal strains of H1N1 Influenza to Indian urban industrial centres.

Following this, 7 police officials, one of whom was posted at the docks were hospitalized on 10th June, 1918 with symptoms of the flu. This was the first case of Spanish Flu in India that was spreading rapidly across the world at the time. Bombay was crippled and witnessed its effects within the next few weeks. India’s railway lines, which are one of the largest and most crowded networks in the world, facilitated in carrying the virus to every corner of the country. As the pandemic weared down by the end of 1920, it claimed almost a 100 million lives on a global scale. India witnessed an estimated 15 million casualties over the period of two years which accounted to approximately 6% of the country’s population at the time. The Spanish Flu was the last straw before the government recognized the need for labour reforms in the country. Cities of Bombay and Kanpur in India were the worst affected areas, making labourers coup a strike the following year, in 1919. The unbearable conditions following the World War and the pandemic equally played their part in workers’ perturbation.

The Asian Flu pandemic of 1957 was another global showing for influenza. With its roots in China, the disease claimed more than 1 million lives. Although it didn’t reach India in a swipe, it’s effect was seen in major Asian countries such as Hong Kong and Singapore. The influenza also spread across the U.K and the U.S causing a disturbance in their economies.

One of the biggest and most famous pandemic to which countries are prey till even today is the HIV/AIDS pandemic which came about in the year 1981 and exists till date. Despite being home to the world's third-largest population of persons with HIV/AIDS, the AIDS prevalence rate in India is lower than that of many other countries. The HIV/AIDS (Prevention and Control) Bill 2014, sought to end stigma and discrimination against HIV positive persons in workplaces, hospitals and society while ensuring patient privacy. Landmark cases which debated for this Bill include Love Life Society v Union of India & Others2165 where there was a demand for a machine for the testing of HIV symptoms and denying it amounts to a violation of right to life under fundamental rights. The second case is that of Delhi Network of Positive People & Another v Union of India & Others2166 in which Public Interest Litigations were filed demanding concessions in railway travel for HIV positive citizens.

Coronavirus Pandemic And The Suspension Of Labour Laws In India

In the present day, while the government slowly and steadily tries to revert back to normalcy, there is chaos amongst the working sector following the weeks of lockdown. The government has brought about a slew of far-reaching changes to labour laws, touting them to be a necessity

for more flexibility, ease of business and as an impediment to economic growth by attracting foreign investment. This has been followed by a number of state governments who have taken steps towards diluting labour laws and vindicating economic growth with an underlying sense of paternalism.

Over the past month, several states like Maharashtra, Madhya Pradesh, Uttar Pradesh, Haryana, Himachal Pradesh and Gujarat have announced labour law suspensions. Even the State capital of New Delhi has expressed its desire for suspension of labour laws for the 2-3 years in lieu of helping industries come out of the present crisis. This effort was made by 12 employer’s associations and industrial bodies to the Labour Minister, Mr. Santosh Kumar Gangwar. One of the suggestions made by these organisations was relaxation of the Industrial Disputes Act, 1947 wherein the whole lockdown period could be treated as a lay-off. The wages that should be paid during this period should be treated as part of the Corporate Social Responsibility (CSR) reserve. This will show an increase in the maximum workforce to 50% from the current rate of 33% after suspension of labour laws, except those governing minimum wages, bonus and statutory dues, for upto 3 years. Another suggestion made was to increase working hours to 12 hours a day from the current 8 hours a day and industries should be given appropriate packages to ensure that there are no job losses.

Karnataka has been a model state in both, tackling the COVID-19 numbers and ensuring that the economy of the state is well balanced. Along with this, the Karnataka government started a shuttle train between states called ‘Shramik Special Trains’ which took thousands of migrant labourers back home, especially to the northern states of Madhya Pradesh, Bihar and some North-Eastern areas. This rail transport was made affordable and even free for certain categories of individuals in order to ensure that people got back to their hometowns at the earliest. On the downside, it has been alleged that the states of Karnataka, Gujarat and Punjab are trying to prevent large-scale evacuation of migrant labourers back to their hometowns, in order to ensure they are not faced with labour shortage amidst the states resuming construction and other such activities that are dominated by migrant workers. This amounts to violation of their fundamental rights under Article 19(1)(d) which is the right to move freely throughout the territory of India.

Furthermore, RSS-affiliated Bharatiya Mazdoor Sangh (BMS) has raised concerns over the condition of unorganised and migrant workers during the coronavirus lockdown, through a memorandum handed over to Union Home Ministry. The memorandum spoke about a term called ‘assault on employment’ which was deepening amidst the COVID-19 threat. Those workers who were stranded midway

---


to home should reach home on priority, the memorandum said. Those still living near their workplaces should be provided jobs, for which export units, construction sites, small and medium enterprises should be allowed to open. Those workers who have made it back home should be provided employment through The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) in their villages, adding that transportation should be arranged for those wanting to return to their workplaces. For construction workers, the BMS said not only should registered workers get cash assistance, but also those unregistered workers who present identification documents.

While the Chief Minister of Madhya Pradesh, Mr. Shivraj Singh Chouhan stated his government would “seize this opportunity” to bring about the much-needed labour law reforms in India to entice foreign investment and boost the economy, Uttar Pradesh has proposed to suspend nearly the entire gamut of labour laws upto the next three years. Punjab, Haryana, Pradesh, Gujarat and Rajasthan have made amendments to their state Factories Act in April, 2020 which has increased the working hours to 12 hours/day from 8 hours/day and 72 hours a week, replacing the previous 48 hours a week provision, which is currently extended over the following 3 months, subject to further extension at the discretion of state legislatures.

It is important to note that regardless of the government making attempts at helping labourers find work, there have been multiple negative impacts over such actions of the government. These impacts affect the interest of labourers working in industrial units. For example, as already stated in the preceding paragraphs, the changes in labour laws have allowed the industries to increase working hours by 50% without paying any overtime dues. This simply means that each labourer can be forced to work up to 12 hours a day on six working days of a week now, from an earlier schedule of 8 hours per day. This goes against the International Labour Organisation (ILO) Convention of 1921 on the number of hours of work that an worker is expected to log, to which India is a signatory. This 1921 Convention has been the basis of several labour laws in India, including the Factories Act of 1948, which also has been invoked in a petition filed in the Supreme Court earlier this month.

Petitioner Pankaj Yadav, a journalist from Jharkhand, sought direction from the Supreme Court for revoking the executive orders by different states to suspend the provisions of working hours to deal with the economic situation arising out of COVID-19 lockdown. He argued that the Factories Act, 1948 provides for changes in working hours only during public emergency, which the law defines as "a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance". The COVID-19 outbreak does not fall under public

---


emergency definition under the law, thus this particular provision of the Act cannot be invoked.

Affected by these changes and many more, 10 central trade union organizations across India called for a nationwide strike on 22nd May, 2020 in an attempt to protest against the draconian measures taken by the state governments and the anti-workers labour law changes brought about by the central government which facilitate brutal exploitation of labourers. They had also decided that they will take this matter to the International Labour Organisation (ILO). And a one-day hunger strike was to be observed at Rajghat, New Delhi.

Other than the outburst by such associations and unions, even workers themselves have expressed their anger and outrage by engaging in violence with police officials. An incident in Ahmedabad\(^\text{2171}\) witnessed hundreds of migrant labourers hurling stones at police trying to enforce a lockdown to stem the spread of coronavirus. In the Hazira belt, on the outskirts of Surat in Gujarat, more than 500 workers from various industries protested that the authorities arrange for their safe return to their respective native states. The protesters, who were migrant workers from the states of Uttar Pradesh and Bihar, told the police that they are struggling to survive without work and money. Around 50 workers were arrested and charged with unlawful assembly and rioting. Several incidents of violent protests have been seen in Gujarat, by not only migrants but also the residents since the nationwide lockdown began.

Constitutional Validity Of Suspension Of Labour Laws
The Constitution of India upholds democracy by conferring innumerable rights directly and indirectly to safeguard the interests of workers under Part III and Part IV of the Constitution which deals with Fundamental Rights and Directive Principles of State Policy respectively.

The fundamental right of forming associations or unions under Article 19(1)(c) is violated by the aforesaid action taken by the government. As held in Raja Kulkarni And Ors. v State of Bombay\(^\text{2172}\), the term ‘associations’ mentioned under the said provision of the Constitution includes the right to form trade unions. Suspending the Trade Unions Act, 1926 directly affects this fundamental right. Trade unions are formed on the basis of the collective bargaining structure to address disputes of any employee(s) and bring it to the notice of authorities. The rationale to grant this as a fundamental right is to balance the power that the employer holds over their employees. If this argument is countered by stating that the suspension is valid under Article 19(4) which empowers the state to impose reasonable restrictions on the right of freedom of association in the pretext of “morality” and “public order” or the “sovereignty and integrity” of India, this exceptional provision still calls for the government to strike a balance between the restrictions imposed and the rights of the workers in order to avoid abuse of power.


\(^{2172}\)Raja Kulkarni And Ors. v State of Bombay, (1954) AIR 73 (India).
The case of Maneka Gandhi v Union of India\textsuperscript{2173} widened the scope of the fundamental Right to Life and Personal Liberty elaborated under Article 21 of the Indian Constitution to be inclusive in nature. This fundamental right has taken the form of a pandora’s box over time, with various interpretations.

As held in Francis Coralie v Union Territory of India\textsuperscript{2174}, Article 21 of the Constitution does not merely include and imply the right to stay alive but includes the right to live with dignity as well. Furthermore, the case of Olga Tellis v Bombay Municipal Corporation\textsuperscript{2175} characterized the right to life to include the right to livelihood. Hon’ble J. Bhagwati expanded the interpretation in the case of Bandua Mukti Morcha v Union of India\textsuperscript{2176} and observed:

“It is the fundamental right of everyone in this country... to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.”

Suspension of statutes such as Factories Act, 1948, Industrial Disputes Act, 1947 and Minimum Wages Act, 1948 amounts to the exploitation of workers’ fundamental right to live a dignified life along with their right to livelihood as they no longer have a guarantee of a fixed minimum wage nor any form of protection against retrenchment. While extra incentive to work during these tough times seem “far fetched” to the government, the employers will not even be statutorily liable to provide minimum standards of safety and care to the employees.

To make things worse, the fundamental Right to Access justice as recognized by the Supreme Court in the case of Anita Kushwaha v Pushap Sadan\textsuperscript{2177} is also violated due to the suspension of Industrial Disputes act, 1947 which provides for a grievance redressal mechanism. As held in Sanjit Roy v State of Rajasthan\textsuperscript{2178}, it is a violation of Article 23 to provide wages lower than the prescribed minimum wage to a person employed on famine relief work.

The Directive Principle of State Policy specifically seeks to promote the welfare of people by securing economic, political and social justice through Articles 38, 39, 41, 43, 51. The well-being of the workers is not supported by the suspension of labour laws, but instead they are stripped of the resources to guarantee social and economic fairness, leading to inequality in the payment of income. The employers can exploit the workers according to their whims and fancies with no legal repercussions. “Job security” has been made an essential ingredient of the right to work which was elaborated in the case of Daily Rated Casual Labour v Union of

\textsuperscript{2173} Maneka Gandhi v Union of India (1978) AIR 597 (India).
\textsuperscript{2174} Francis Coralie Mullin v The Administrator, Union Territory of India, (1981) AIR 746 (India).
\textsuperscript{2175} Olga Tellis & Ors v Bombay Municipal Corporation & Ors, (1986) AIR 180 (India).
\textsuperscript{2176} Bandhua Mukti Morcha v Union Of India & Others, (1984) AIR 802 (India).
\textsuperscript{2177} Anita Kushwaha & Others v Pushap Sudan & Others, (2016) 8 SCC 509 (India).
\textsuperscript{2178} Sanjit Roy v State Of Rajasthan (1983) AIR 328 (India).
India\textsuperscript{2179}, which must be read in the light of socio-economic benefits of the right. Moreover, the suspension is also against obligations taken up by India through various international labour conventions.

**Conclusion**

As the conditions decline in India, with thousands of news cases on a daily basis, it is evident that public fear regarding the pandemic has proportionally declined as well. India has the largest and the cheapest labour force in the country, this comes as a boon and a curse. Multinational companies from all over the world have their branches in India which has been feeding our economy. But when it comes to taking care of the labourers who have helped achieve this said global standing that India has achieved, we have disappointed ourselves gravely.

Although the suspension of labour laws and other related reforms made in this regard are being justified to promote investment and uphold the economy, these steps taken by the government retrogresses the situation and contradicts the reason labour laws were put in place. While the circumstances are unprecedented and therefore call for unprecedented measures, it reminds us of Machiavelli, who said “Never let a good crisis go to waste”. In contrast to various other countries’ responses to the pandemic who are aiming at minimizing the lay-off by providing additional incentive and wage subsidies conforming to directions given by the United Nations to minimize the burden on workers, India has taken a step in the opposite direction.

\textsuperscript{2179}Daily Rated Casual Labour Employed Under P & T Department & Ors v Union of India & Ors, (1987) AIR 2342 (India).

Based on the objectives of a given labour law legislation, it can be broadly classified into the following four categories: social security provided to the workers, wages, industrial relations and conditions of work. The sudden abolition of labour legislation will leave the workforce on various sides at the whim of the employers. Employers are required to be compliant by asserting minimum standards of protection which branch out to all four broad objectives. If an establishment is employing over a certain number of workers, the closure would require prior approval. Statutory protection included providing notice, retrenchment compensation, gratuity etc. These provisions can now be easily exploited by the employers to fire employees without the hassle of complying to statutory formalities, directly abusing workers’ rights. Furthermore, the suspension violates the right of trade unions to raise a dispute under the Industrial Disputes Act, 1947, leaving the labourers without a grievance mechanism.

****
AFFINITIES OF INTELLECTUAL PROPERTY RIGHTS IN SPORTS

By Sai Hasitha and Ayush Kumar Jain
From Presidency University, Bengaluru

Abstract

Intellectual Property rights are rights given to persons over the creations of their minds and the same include trademark, copyright, patents, design etc. are intangible assets. It never protects the idea but protects the expression of idea and these rights give protection and incentive to creator so that its creation can be protected and not copied by someone else. Intellectual rights also play an important role in sports. However, sports law is an emerging field and till now India has no codified legislation for sports. There is need of IP in sports because of its commercialization. This article explains how Intellectual property helps the innovator and safeguards the interests of creator in the field of sports. Further, this article central emphasis would be on IP in different field of sports such as broadcasting rights, their mark and design. This article will also discuss the significance of IPR in Sports.

Key Words: Intellectual Property rights, intangible, design, sports etc.

[I] INTRODUCTION

Intellectual property rights protect the ownership and safeguard the interest of innovator or creator who has put their efforts & hard work for creation of new work. These rights play an essential role in sports industry as well which is now a contemporary live topic. There are always two views on any issue or topic, similarly in case of IP in Sports one side protects the business and sports person but on the other side, it has been misused in the market. Commercialization of sports help individual as well as growth of the country’s economy and because of this people and nation are getting benefitted but there were many incidents of betting in Indian Premier league & other leagues also where the basic motive of sports declining day by day. Sports are for entertainment but now a days, sports like cricket, football played for business rather than entertainment.

There are many cases arose for infringement of trademark, design & especially copyright in sports and government has to formulate strict law for the enforcement of Intellectual property rights in sports. Moreover, these issues can damage the goodwill, trade secrets and commercial losses, so there is need for a proper mechanism to deal with such kind of dispute or infringement of IP rights.

Intellectual property rights encourage the growth of the sports business and it has associated in every aspect of sports such as broadcasting, promotion, merchandising and sponsorship. These rights are very helpful in growth as well as protection to the new creation in the business. For example sports shoes, then it can be protected in every element of Intellectual property rights such as in trademark; it can be protected as a mark, sign & any other logo which is unique. So, basically it protects the brand value and goodwill of the company who made any such creativity. In the case of patent, it protects the technology by which they have come up with some new product. If in the case of design, then it protects the looking and if it is the case of copyright then it safe guard the audio visual attached at the time of promotion event.
This article will also discuss about some aspects of international law and treaty adopted by India to provide more protection in sports industries.

[II] INTELLECTUAL PROPERTY RIGHTS AND SPORTS IN INDIA

The sports law in India is new and emerging field in law. There is no particular legislation regarding sports who can govern sports activities. Entry 33 of State list under schedule 7 of Indian Constitution says that enacting of sports law is the subject matter of State but no State has enacted a sports law. Today sports law in India is governed and regulated by National Sports Policy, Sports Law and Welfare Association of India, the Sports Broadcasting Law in India and Sports Authority of India.

Moreover, in the case of Indian Olympic Association vs. Union of India, the validity of National sports development code was upheld and the intention behind to enact this code is to governed the National Sports federations. If we will trace the history of sports from Vedic period to till now it is very important element of human development but now a days it is not only limited to entertainment or physical activities for development but is has become a business and its also helps in countries growth. Therefore, with the aim of protecting ownership or interest of the innovator, the Intellectual property rights play an important role in sports. In the foregoing headings, the paper deals with every aspect of Intellectual property rights which protects the sports field such as shoes design, sports moves (called as signature moves) , broadcasting, sponsorship & promotion events etc.

IP laws still lacks in protection of sports activities and one of the best example is sports moves i.e. it has not specifically mentioned under performers rights under Copyrights Act, 1957. For example Dhoni has a signature moves which is known as Helicopter Shots and that gives a competitive edge, on the basis of this technique of players sometimes match fate depends. This is the lacuna in copyright laws which has not included.

Overall the positions of these aspects in sports are very helpful and it provides a safeguard to those who have registered and take licenses under these Acts and also protect from those who can misuse the creation of others.

[III] ROLE OF INTELLECTUAL PROPERTY RIGHTS IN SPORTS

As we have observed that in the recent years, sports are not only limited to entertainment but it is seen as a high business opportunity and the idea behind IPR is to give power to creator or innovator who put their labour and hard work to protect their creation. These rights plays an important role from the formation of team and for the identification of the team, the logo, any design has been created. Moreover, it not only protects their logo but also protects their brand value and reputation which was earned from hard work and labour. These rights not only limited to the teams names but also at the commercial level when players get into endorsement & advertisements and sports association get into merchandising, promotion event, sponsorship & broadcasting. Therefore, there is no doubt that IP laws play pivot role in sports and it is necessary when commercialization of sports took place then protection becomes an essential element.

This can be understood from an example of swim wear where it can be patentable because it is creative and innovative in
nature and the logo over swim wear can be protected under trademark which can distinguish in nature. There are so many Acts in IPR which protects the work of sports person and sports association.

1. **Copyright in Sports**

Copyright is not the one right but it is a bundle of rights which is given to creator for their creation and it is a property rights in certain types of work which is described under Section 13 of the copyright Act, 1957. The subject’s matter of copyright includes original literary, Dramatic & Musical work, Artistic work, cinematograph film, Sound recording etc. The Copyright gives the exclusive rights to owner over the creation to control use of a substantial part but does not give a monopoly over the idea because the copyright is given to expression of ideas not on the idea.

Moreover, the role of copyrights in sports is very vital and various components of sports events can be protected from infringement under copyrights Act, 1957 which includes copyrighted merchandise, artwork in logo, audiovisual recordings, broadcasting and sports equipment’s.

There are laws related with broadcasting which is governed and regulated by specific legislation and these differs from country to country for example in the U.S., it is governed by Sports broadcasting Act, 1961. There are many conventions signed by India and Berne convention of 1906 is one of the conventions which protect the literary and artistic works. The said Act does not specifically mention live broadcasting of sports events but it can be fall in the category of cinematograph films under section 13(b) and it can be protected under Section 37\(^{2180}\) & 38\(^{2181}\) of the copyright Act, 1957.

2. **Patent in sports**

Patent also plays a crucial role in sports like other Intellectual rights such as trademarks and copyright. Patent can be granted only on the new invention or innovation under patent Act, 1970 and according to Article 27(1) of TRIPS\(^{2182}\) (Patent Law), Patents shall be available for any inventions, whether products or processes in all fields of technology, provided that they are new (novel), involve a non-obvious inventive step and are capable of industrial application.

In sports, patent can be granted for sports shoes, training equipment, sports drinks, golf clubs, swim wear, stop watches, muscle enhancers and sporting goods etc. but many times there was a debate on the sports moves where it has protected under Patent law. This has been answered in negative way and stated that if it will get patentable then it will restrict the athletes to play sports.

3. **Trademark in sports**

Trademark plays an important role in sports and it is governed by Trademark Act, 1999. This Act protects the mark which distinguishes the product and easily identifiable by the public. Trademark not only protects the mark but it also protects the reputation and goodwill attached with that mark. These types of marks attached with sports associations, sports personality which helps in endorsement and advertising and sports events. Trademarks gives a wide

---

\(^{2180}\) Section 37, which protects the rights of broadcasting organizations

\(^{2181}\) Section 38, which protects the rights of performers

\(^{2182}\) World Trade Organizations. (n.d.) [https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm)
set of benefits for sports industry to protect their sports merchandising. Trademark includes in sports such as their tagline, mark, symbol, logos, flags and name of league or franchise. For example- Kolkata Knight Riders, Indian primer league and their colour of shirts like Chennai super kings yellow colour.

If sports merchandising is considered then it can be classified as merchandising related with sports personalities, teams & clubs and league & tournaments. Merchandising means promotion and marketing of some event or organization by means of specially made goods and services and making them available in retail stores. In the market, we can find the T-shirt of marvels etc. Moreover, sports personalities associated with apparel making brands such as Dhoni associated with “SEVEN” and Virat Kohli associated with “WROGEN” and it helps the company to advertise their products and makes good profits in the business. These rights protect the person who have registered in their name such as if Chennai super kings has a logo of roar lion and yellow colour with tagline then it cannot be used by someone else. So, it protects from unauthorized use and they can claim damages from that person who has used without license.

These days, there is a huge demand for online games and this leads to a need for trademark I this sector. There are so much famous online games such as PUBG, Real Cricket etc. So, the need of IPs arises to protect the interest of innovator who puts their hard work and labour and this indeed encourages others to come up with innovative creations.

4. TRADE SECRETS & INDUSTRIAL DESIGN IN SPORTS

In a competitive market like sports, trade secrets plays an significance role and it means an information which is not available or known in public and any companies, Organisation can take advantages of this trade secret for reaping profits if they aren’t protected. In sports, information, such as game plays, analysis of the competitors, statistics, and method of coaching etc. provide a competitive edge over the others. Further, in respect of strategies to maintain this edge, the secrecy has to be maintained. Sometimes keeping trade secrets helps in winning the games also.

Industrial design should be registered under Industrial design Act, 2000 and the design makes product more attractive and looking of that makes more valuable such as sports shoes, swim wear etc.

[IV] CONCLUSION & SUGGESTION

In India, sports plays a significance role from the Vedic period to till now but in the ancient time it was played for human development and entertainment but after math of commercialization of sports has changed the mindset of the people and it is not limited to field but has more emphasis on earning huge profits. Therefore, there is need for protection of rights of relevant stakeholders who have invented or made commendable changes in the sports industry. Intellectual property rights play a crucial role in protecting the innovation or creation of the people. There is no specific IPs in sports that safeguards the interests but there should be a dawn of new era in the field of sports by encouraging IPs in this field. It is accepted that IPs would bring a huge change in sports field, and the same should not be made to misuse in the garb of the same. The legislature must come up with some strict laws to prevent the misuse so that the sports can be played fair and at
the same time the IPs would reap benefits to the stakeholders.

REFERENCES:
MARCHING TO GLORY: INDIA, 
THE FRACTURED SOLDIER WE 
THE NATION - THE LOST 
DECADES: A REVIEW

By Saisha Bacha
From Maharashtra National Law
University Mumbai

Abstract:
This book published in 1994 is a 
compilation of lectures given by Mr. Nani 
A. Palkhivala (Mr. Nani) on varied issues 
ranging from the condition of the Indian 
economy, law, constitutionality, human 
rights and responsibilities, philosophy and 
more. It seems today as though he had 
predicted the fractured development and 
thorny future of the Republic of India. In 
1994, he argued that socialism must equate 
to social justice just as a ritual is to religion, 
just as dogma is to truth. What may have 
seemed obvious outcomes then, is exactly 
what is in question today. In 2020, equality, 
constitutionality, liberty and life are in 
question. The Indian health care system 
battling the Novel Coronavirus 
outbreak\textsuperscript{2183}, the sword of the Citizenship Amendment Act\textsuperscript{2184} looming on the Indian populace, the Indian economic growth rate 
declining\textsuperscript{2185}, are all indications stating that 
India needs to rethink her strategy. In such 
times, poignant questions raised by Mr. Nani in his book become relevant for 
discussion. Without exaggeration, every 
page of this book has a new lesson. The 
complex issues explained in a lucid manner 
make this book an excellent resource for 
academicians, activists, economists, 
politicians, lawyers and every person 
striving for a better India.

Introduction:
The great, Indian jurist and economist, Mr. 
Nani, delivered a multitude of lectures on 
subjects ranging from legal philosophy, 
economics to international relations. This 
book is a compilation of the lectures 
delivered by him on national and 
international forums.

About the Author:
Mr. Nani was born in Mumbai, on 16\textsuperscript{th} 
January, 1920. Although from a middle-
class household, he was a dedicated scholar 
who always strived for excellence. Since 
childhood, he suffered from a bad stammer 
but that never deterred him. After initially 
struggling in his career, he pursued legal 
education. Although he never imagined, he 
became one of India’s greatest legal minds. 
He had a passion for resolving the 
complexities of jurisprudence and law. He 
joined the Bombay Bar in 1944 and he 
quickly gained repute as an eloquent and 
articulate barrister and was often the centre 
of attention in court. Mr. Nani, is 
remembered as a lawyer with excellent 
court craft and an exceptional memory.\textsuperscript{2186} 
His forte was commercial, specifically tax 
law. Together with Sir Jamshedji Kanga\textsuperscript{2187}, he authored what was then and 

\textsuperscript{2183} Coronavirus, World Health Organisation. 
https://www.who.int/health-topics/coronavirus#tab=tab_1. (Accessed on June 1, 2020).
\textsuperscript{2185} GDP Growth In 2020-21 Likely To Go Negative, Says RBI Governor, The Hindu (May 22, 2020).
\textsuperscript{2187} Sir Jamshedji Kanga, the most respected lawyer at the Bombay High Court. His Chamber was the
still is, an authoritative work: The Law and Practice of Income Tax. From 1958 to 2002, he authored a number of good reads, this being one of them.

Purpose and Contents of the Book:
The genre of the book is non-fiction with a key focus on Jurisprudence, Law, Economics and Politics. The book highlights pertinent issues such as India’s international relations, pre and post-independence; the conflict in Ayodhya; socialism and egalitarianism; and more. It also discusses his influences and inspirations. Since the subject matter is so wide-ranging, the reviewer has specially focused on the three abovementioned topics, which are relevant issues even today. The chapters highlighting these issues have been analysed in subsequent paragraphs.

A Reflection on His Thoughts:
The introduction of the book itself is striking. To see a pragmatist as himself, discuss the concept of ‘fate’, leaves the reader puzzled. He believed, that the basic pattern of an individual’s or nation’s life is predetermined. Very few individuals have the gift to foresee what is pre-determined. Guidance is pitifully granted to humans by means without scientific knowledge. He submitted that free will can be exercised but within the preordained parameters. He also narrated a personal incident of a plane crash he missed by sheer providence.


aid from the developed North using techniques of self-criticism. According to him, the South wrongly charges the North with criminal irresponsibility, arrogance and insensitivity. In a quest for achieving global power, India began to export medicines and medical equipment across the globe. While it has fulfilled its responsibility to aid the international community, it is failing to protect its own people from the deadly virus. What prevails, foreign policy or national protection?

Speaking on the Ayodhya issue, he said that most questions raised before the Court are in a sense political or policy based, hence not within the Court’s jurisdiction. He fervently opposed dragging the Supreme Court into the political arena. He said it is not for the Court to decide questions such as whether the mosque existed earlier, whether the Hindus should be allowed to visit the place, whether Ram was a mythological entity or the ideal man? Courts are meant to deal with cases of fact and law and not those of archaeology and history. He gave the analogy of diamonds and carbon. He said, “Diamonds are nothing but carbon, but on that account, those who deal in diamonds are not called carbon merchants.” The recent judgement passed in this case has received equal cheer and jeer, hinting back to his foretelling.

In conclusion, it’s a pleasure to read such a plenitude of subjects in one book itself. It is bewildering, how the problems of today, resemble those from the 1980s. The core issues have stayed unchanged. The dangers of a narrow-minded legislative branch, questionable acts of the executive and judiciary, the lack of education, poverty, communalism creating chasms still hound the Indian minds. The issues persisted despite outstanding individuals as Mr. Nani fervently debating them. It is only now, and that too hesitantly, that India is moving to take its rightful place in the world. This book is the source and Mr. Nani is the guiding light which if followed, will lead India on the path of glory.

****


HEART OF THE CONSTITUTION DURING PANDEMIC

By Sakshi Goyal
From Jaipur National University

ABSTRACT

“This work from Ramayana by Tulsidas ji is evident of the fact that the profit, loss, life, death, happiness and sorrow are all part and parcel of life but the essence of life is not to give up and one shall always pin the hopes on a great future.

Heart of the constitution i.e., Article 21 of the Indian constitution is surviving through these hard times of the pandemic and keeping its very essence intact by serving to the public and making possible for the people to live a dignified life during this hard times also. Hence, Heart of the Indian constitution is keeping its spirit alive to serve the public at large.”

PROLUSION:

Article 21 reads as;

“No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

In the words of justice P.N. Bhagwati, Article 21 embodies a constitutional value of supreme importance in a democratic society. The right has been held to be the heart of the constitution. Hence, the most organic and progressive provision in our living constitution, the foundation of our laws.

The Heart of the Constitution imbibes in itself the rights necessary to live a dignified life in a democratic society. The present scenario is creating some hard times for the whole world. It has become difficult in this pandemic to carry on the smooth functioning of the very Heart of the Constitution as it is difficult to strike a balance with the shooting expectations of the people.

CYNOSURE

Due to pandemic of 2020 i.e., the widespread of the disease called coronavirous various startas of the society have been effected ruining their means of livelihood and so their life. Due to this alarming situation, various questions has been raised before the judicial system and the very Heart of the Indian Constitution i.e., Article 21 has played an significant role in these gloomy times. The stratas of the society severely effected are;

- BPL (Below Poverty line)

People who are below poverty line or with low economic status are majorly affected as they cannot afford adequate nutritious diet to maintain their health during this crucial time or in the worst circumstances if they are affected than they cannot afford the expenses of the testing of Covid-19 of further treatment.

In the case of Shashank Deo Sudhi V. Union Of India & Ors., Hon’ble Court modified its earlier order related to free testing for all patients and issued the following directions such as free testing facility for persons covered under Ayushman Bharat Pradhan Mantra Jan Arogya Yojan. Matters as to
whether such benefit can be extended to economically weaker section of the society was left open for consideration by the governments. The Court also directed that private labs shall continue to charge the payment for testing of Covid-19 from persons who are able to make payment of testing fee as fixed by ICMR.  

In these hard times the people who are prone to this deadly disease and are not economically sound shall be tested on minimalistic fee as they also have the place in the heart of the constitution and have all rights to enjoy the Right enshrined in the Article 21 of Indian Constitution.

- Safety and Welfare of Children in protection homes

In this dark times of pandemic the most prone to the deadly disease of coronavirus are children as they have low immunity as of less development of the immunity system. So, the Hon’ble Supreme Court in the case of *In Re Contagion Of Covid-19 Virus In Children Protection Homes*, issued a slew of directions to various authorities concerned with the welfare of children such as child welfare of children such as child welfare committees, government, CCIs to ensure their safety and welfare including taking preventive measures, conducting regular 761eriod761761s761g and monitoring, creating 761eriod761761s, promote and demonstrate positive hygiene behaviours.  

Children are regarded as the most significant asset for the society as they are the future of a nation. So, protecting and preserving their health is being considered of major significance as Article 21.

- Animals (Movement of persons for procurement of food)

Due to pandemic, the animals are one who are suffering the most. As the people in lockdown are not stepping out of the house the animals are starving. In this concern, the Hon’ble High Court of Kerala in the case of *N. Prakash V. State Of Kerala And Anr.*, held that the citizens choice to rear the pets is traceable to his fundamental right to privacy recognized by the Apex Court in *Puttaswamy’s case* which in turn is a facet of right under Article 21. In the present case, the writ petition was allowed and the respondent were directed to permit the petitioner to travel to kochi to procure the said item of cat food, on his producing a self-declaration stating the purpose of his travel.  

This case clearly reflects that the life of animals is also the priority and they shall also have decent life and the heart if the constitution imbibes within itself a right to a decent for all as it states ‘no one’ shall be deprived of life and personal liberty.

- Regular bail applications to be entertained only in exceptional urgent circumstances

In the case of *Sopan Ramesh Lanjirekar V. State Of Maharashtra*, Hon’ble Court held that while examining the process involved in disposing the bail application, the Court was of prima facie opinion that once a bail

**2192** In *Re Contagion Of Covid-19 Virus In Children Protection Homes*, *Writ Petition (C) No. 1/2020*

**2193** *N. Prakash V. State Of Kerala And Anr.*, W.P. (C)– TMP 28 OF 2020.
writ is issued, several staff members of the concerned Court and other department of the state are require to complete various formalities. Due to the present lockdown, situation all offices including the offices of the Court are virtually closed. Therefore, minimum staff is deputed to deal with urgent business. In such a situation processing of a bail would amount to breach of the order of lockdown. In view of such situation, unless the Court is satisfied that their exist exceptional urgent circumstances, regular bail applications ought not be entertained. Mere fact that the accused is undergoing detention does not constitute urgency.  

➢ Safety and well-being of healthcare professionals during Covid-19

One of the most important aspect in these dark times is to maintain the safety of the health care workers and to protect them from catching this deadly disease. Keeping in view this, Hon’ble Supreme Court in the case of Jerryl Banait V. Union Of India And Anr., Court issued the following interim directions to the respondent in reference to pandemic Covid-19 such as ensuring the availability of appropriate personal protective equipment, providing necessary police security to the Doctors and medical staff in Hospitals and places where patients who have been diagnosed Covid-19 or those quarantined are housed and take necessary action.  

➢ Migrant Workers

Since, the lockdown was imposed by the Government of India many workers who migrated from their native place to work in some other city were now in a bad condition. They were not able to get a decent livelihood at the place where they were living as well as not able to move to their native place. So, to resolve this issue the following guidelines are led down:

- State/ union territories government shall ensure adequate arrangements of temporary shelters and provision of food etc. for the poor and needy people, including migrant laborers in standard due to lockdown measures in their respective areas;
- The migrant people, who have moved out to reach their homes states/ home towns, must kept in the nearest shelter by the respective state/union territory government quarantine facilities after proper screening for a minimum period of 14 days as per standard health protocol;
- All the employers, be it in the industry or in the shops and commercial establishments, shall make payment of wages of their workers, at their work places, on the due date, without any deduction, for the period their establishment are under closure during the lockdown.
- Where ever the workers, including the migrants, are living in rented accommodation, the landlords of those properties shall not demand payment of rent for a period of one month.

Heart of the Constitution very well imbibes in itself the the safety of all and it becomes even more significant when it comes to the people who risk their lives in saving others and working for the betterment of society.
• If any landlord is forcing laborers and students to vacate their premises, they will be liable for action under the act.  

  ➢ Moratorium and NPA

The Government has taken serious step to help people in these hard times as the period of moratorium during which there is lockdown will not be reckoned by banks for the purpose of computation of the 90 days NPA declaration period.

As stated in the case of Transcon Skycity Pvt. Ltd. And Ors. V. ICICI & Ors., Hon’ble Court held that the period during which there is a lockdown will not be reckoned by the ICICI bank for the purpose of computation of the 90 day declaration period. Thus, the relief is co-terminus with lockdown period. The Court also opined that this order will not serve as a precedent for any other case with regarded to any other borrower who is in default or any other bank.  

Right to life also includes within itself the right to live a dignified life as during the time of pandemic people are not able to earn their livelihood so are they not able to pay off the interest on the loans taken by them so as to provide them relief moratorium has been issued with some terms and conditions applied.

VIRTUAL COURTS SYSTEM

The Hon’ble Supreme Court while keeping the view the need of the hour has set up “virtual Courts System” as ‘administrative justice’ is of utmost importance and could not be crumbled in the face of a pandemic. The major advantage of this is especially in terms of time, money and energy saved by the litigants and counsel.

Media as representative of the public are allowed access and can watch the proceedings of all the matters being held before the virtual courts. During the lockdown, judgments have been delivered in total 325 cases, which include 268 connected matters.

This is a major step to keep the judicial system intact at its place and to carry on the smooth functioning of the system as it will strengthen the system and well.

During pandemic this is one of the most important and much required step as to ensure the smooth functioning of the judicial system is vital so as the health of the people connected with the functioning of the judicial system is concerned. For instance, judges, magistrates, counsels, litigants, etc. are the people who are prone to the disease if they openly go to Courts.

So, to strike a balance between the safety, health of the people and the administration of justice this crucial as well as vital step has been taken by the Hon’ble Supreme Court to establish the virtual Courts system.

EPILOGUE

Article 21 of the Indian constitution states the Right to Life and personal Liberty and it is stated as the Heart of the Indian constitution by justice P.N. Bhagwati as it is an mandatory provision as falls under the Fundamental Rights and it is one of the most progressive provision of the Constitution.

This inevitable provision of the Indian Constitution as proved its efficiency during...
these hard times. When the whole world is suffering from deadly disease of Covid-19, it has proved its vital role by guaranteeing dignified life and basic standard of living to all its people by making their life more simpler during this pandemic. Article 21 has very well proved to be the inevitable part of the constitution during these hard times and Heart of the Constitution is playing its role smoothly during the dark times of this pandemic.

This progressive provision is evident of the fact that our constitution makers have made the Constitution with great care and precision. Keeping in mind the future of the nation and made it efficient to deal with any contingent situation arising thereon. Article 21 of the Indian Constitution is made in consonance with need of the nation and it has proved its vital role during this crucial times.

*****
ANALYSIS OF THE CONSTITUTIONAL FREEDOM OF PRESS IN INDIA WITH RESPECT TO FREEDOM OF SPEECH AND EXPRESSION

By Saloni Suhalka
From NMIMS

ABSTRACT

Freedom of Speech and Expressions is the most important freedom guaranteed by the Constitution of India and it can be said that it is best reflected in the way freedom is given to media because it is known as the ‘fourth pillar of democracy’. Hence, it is important that the flow of truthful and useful information from the press to the public happens without any hampering. However, the State may try to impose restrictions on the freedom for the purpose of national security, etc. Therefore, we examine, through this paper, whether press is imposed just with reasonable restrictions or beyond that.

1. INTRODUCTION

“...The press [is] the only tocsin of a nation, [when it] is completely silenced...all means of a general effort [are] taken away”

Freedom of speech and expression is a weapon of liberty available to every individual. Whereas, Freedom of press is a subset of Article 19(1)(a) freedom of speech and expression. India is a democratic country and every individual is protected by the constitutional right to speak freely or rather express their views, thoughts. Printing press has evolved over the years with dynamic changes in order to provide true and fair access of information to the people of the country. This research paper focuses commonly on the press as to challenges and restrictions in the preface of constitution and the approach of freedom available to press specifically printing media.

1.2. MEANING OF FREEDOM OF SPEECH AND EXPRESSION

Right of freedom of speech and expression is incorporated in Article (19) of universal declaration of human rights, 1948. It states that everyone has a right to hold opinion without any interference of such. This Freedom is available only to the citizen of India. By literal rule the interpretation of Article 19(1)(a) include right to express one’s views and opinion at any issue through any medium e.g.: By words of mouth, writing, printing, pictures, film, movie. This natural right is not absolute , there are certain reasonable restrictions that allows the government to frame those in case of public morality, integrity, decency, contempt of court, defamation, and incitement of an offence. It provides to all the citizens irrespective of color, creed, caste, religion to raise their voices on matter of importance or otherwise creating the platform for equality as well.

1.3. SCOPE OF FREEDOM OF SPEECH AND EXPRESSION

The judiciary being creative to the approach of having a just legal system is enlarging the areas covered by the fundamental right of freedom of speech and expression. For the growth of democracy this article plays a vital role. This guarantee available to the people comes with the rational approach or assumption that every man is a rational human being and best judge to the discretion of what is good and what is bad. A constitutional provision is never stagnant it constantly evolve with changes and thus
is not narrow. For the changing need of the country, the constitutional provision in general and constitutional right in particular should be widespread. The scope of this article should not be restricted.

While discussing the scope, Supreme Court has many times said that the words freedom of speech and expression should include right to propagate one's view through the print media. The Court held that these rights are basic rights which are recognized and guaranteed as natural rights and denotes the status of an individual in a free country.

1.4. CONSTITUTIONAL PROTECTION OF FREEDOM OF SPEECH AND EXPRESSION

Protection of freedom of speech and expression is very essential. There are various purposes to protect such outshined rights. These could be:

- For discovery of truth by open discussion, if such is subjected to restrictions than the society would try to prevent from providing accurate opinion that is to say, assist the discovery of truth.
- For speech as an aspect of self-fulfillment and development - It is an integral part of individual growth, restricting on it would hamper to the personality and its growth.
- For Expressing beliefs and political attitude
- For active involvement in the democracy.

1.5. MEANING AND INTRODUCTION OF PRESS

Press has been a medium of information to the people of the country. Different modes of media help us to connect to the country’s democracy. Needless to say, the term ‘press’ refers to printing press. But the term could be issued in various sense. Indian press covers clipped form of printing press, a printing or publishing establishment, art, business or practice of printing, newspapers, magazines, news services etc. There are also various forgoing implications and functions as concerned with press.

- The press as an establishment where printing is done.
- The press as medium of publication.
- The products of printing such as newspaper, pamphlets, handbills, books.
- People who engage in production of forgoing articles such as printer, editor, publisher, journalist, author.
- The press as medium of expression.

Development of press is itself an evolutionary history not only post-independence but also pre-independence.

To focus specifically post-independence, there existed press laws from British era to which a committee was set up to examine press laws known as Press Enquiry committee, 1947. It recommended amendments in press and Registration of Books Act. Then Press(objectionable matters) Act, 1951 was passed along with amendment of Article (19)(2). It empowered government to demand and forfeit security of publication. This remained till 1956. There was establishment of all India press council, fixing the press pages, scheduled system for newspapers, code of advertisement by newspaper, Desirability of preventing concentration in ownership. Due to ever-changing society and time there has been modifications, additions to Press acts in India.

1.6. FREEDOM OF PRESS

Freedom of press is subset of freedom of speech and expression. Indian legal system is based on the constitutional principles. To put in other words, every right, liberty, power, immunity is surrounded by the constitution of India and only then it can be revoked. On similar base, freedom of press is incorporated in the constitution.
The constitution of India incorporates Freedom of Press in two aspects:

a) Preamble
b) Article (19)(1)(a) right to freedom of speech and expression

Preamble

Preamble is a vital part of the constitution. The constitution opens up with the preamble. Liberty of expression is expressed in preamble of India. It states that the citizen has liberty of thought, expression, belief, faith and worship. This liberty includes right to free press. Liberty is an oxygen for every citizen in a democratic country. Provision for freedom of press is already included in Universal Declaration of Human Rights, 1948. It clears the air, spacing out the ambiguity as to freedom of opinion and expression. This right includes freedom to hold opinion without interference and to seek, receive, and impart information and ideas through any media. Freedom of press was considered as matter of concern for liberal state that the founding fathers included in the preamble.

Constitutional Perspective

Post-independence there was a bundle of questions before the framers of the constitution, that whether to follow English way of freedom of press or a separate legislation. Chairman of drafting committee Dr. Babasaheb Ambedkar said that the press is merely another way of stating an individual or a citizen. Press has no special rights which are not to be exercised by citizen in his individual capacity. The editors of press are the citizens and therefore has chosen to write in newspaper, they are merely exercising freedom of speech and expression.”

Whether press is a citizen

Article (19)(1)(a) of a constitution guarantees freedom of speech and expression only to human beings who are citizens. Non-citizens and foreigners are exempted from such right. Rather juristic person, corporations, societies, associations are not citizens. Article (19)(1)(a) gives freedom of press that press is constituted of citizens.

In the case of Brij Bhushan v. State of Delhi in pursuance of section 7(1)(c) of the East Punjab Public Safety Act, 1949, as extended to the Province of Delhi, the chief commissioner of Delhi issued an order against the petitioner, the printer, publisher and editor of an English weekly ‘the Organiser’ published from Delhi, directing them to submit, for scrutiny in duplicate before publication till further orders, all communal matters and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies. The Supreme Court in its majority decision struck down the said order as violative of Article 19(1)(a) of the Constitution.

Again the Supreme Court in Virendra v. State of Punjab held that banning of publication in the newspapers of its own views or the views of correspondents about the burning topic of the day. In this case, a petition with regard to the validity of the Punjab

2198 G.P.TRIPATI,"CONSTITUTIONAL LAW - NEW CHALLENGES."ALLAHABAD 2013,P.368
2199 Vol. II 980
2200 AIR 1950 SC 129
2201 AIR 1957 SC 896
Special Powers (Press) Act, 1956, the Court said that:
“It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day. Our social interest ordinarily demands the free propagation and interchange of views but circumstances may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. The Constitution recognizes this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of carrying on trade or business in the interest of the general public.”

2. JUDICIAL TREATMENT OF FREEDOM OF SPEECH AND EXPRESSION

“If liberty means anything at all, it means the right to tell people what they do not want to hear”

-George Orwell

Judicial system in India has been on hands up approach to the adaptability of era changes to the changing needs of the societies. Part III of Indian constitution deals with the birth rights of an individual. Adding to such a liberal life of citizen of country, judiciary plays an essential role to interpret the law as it is for better applicability. What may be right for one person may be conflicting to other, to protect these rights constitution of India provides a helping hand. From the previous chapter, Freedom of speech and expression is better elaborated. There are certain aspects of freedom of speech and expression which could be better explained by following case laws:

- Freedom of silence (National anthem case)- Freedom of speech also includes the right to silence. In a case2202, three children belonging to Jehovah’s witnesses were expelled from the school for refusing to sing the national anthem, although they stood respectfully when the same was being sung. They challenged the validity of their expulsion before the Kerala High Court which upheld the expulsion as valid and on the ground that it was their fundamental duty to sing the national anthem. On appeal, the Supreme Court held that the students did not commit any offence under the Prevention of Insults to National Honor Act, 1971. Also, there was no law under which their fundamental right under Article 19(1) (a) could be curtailed. Accordingly, it was held that the children’s expulsion from the school was a violation of their fundamental right under Article 19(1) (a), which also includes the freedom of silence.

- Indian express Newspaper v. union of India2203

In this case the court held that freedom of press is not included in Article (19) but it is constituted in Article(19)(a). There cannot be any interference with the freedom of press in the name of public interest. The purpose of the press is to enhance public interest by publishing facts and opinions, without which a democratic electorate cannot take responsible decisions.

- Freedom of speech and sedition

Sedition is another relevant aspect when it comes to freedom of speech and expression. The offence of sedition in India is defined

---

2202 Bijoe Emmanuel v. state of Kerala 1986 3 SC 615

2203 1985 2 SCC 434
under section 124-A of Indian penal code 1860. “whoever by words either spoken or written ,or by signs, or by visible representation or otherwise brings into hatred or contempt ,excite or attempt any of these towards the government shall be punished”.

Kanhaiya Kumar v. State of Delhi 2204 - students of JNU organized an event on parliament attack convict Afzal Guru who was hanged in 2013. In this event there was protest which included forms of art, music, poetry against the judicial killing of Afzal Guru .Allegations consisted that there were slogans used which had inappropriate words. A case was filed against several students under section 124-A. The university student union president Kanhaiya Kumar was arrested after anti-national slogans used in the protest. However was later released on bail.

3. THE STATE AND FREEDOM OF PRINT MEDIA

3.1. Introduction
The relationship between print media and freedom of speech and expression has been quite elaborately explained in the previous chapters. The fact that a lot of importance is linked to freedom of speech and expression also means that it has the power of influence on the citizens. Freedom of speech and expression is, however, not an abstract form but it is allowed through several modes like print media, electronic media, social media, cinematograph films, etc. which are all the various means of mass communication. Like discussed in the previous chapters, there is no absolute freedom of speech and expression that is guaranteed under Article 19(1)(a) and the State will always impose restrictions on it as it seems reasonable to it.

The media is a crucial organ of any nation, especially in a country like India where it is known as the “Fourth Pillar of Democracy”. Media should ideally be free and independent from the State to bring to the masses the correct information regarding the affairs of the State and the State or the government should provide the space for such a flow of information while seeing to it that some restrictions are maintained for the purposes of national security, integrity of the nation, decency and morality, public order, contempt of court, defamation.

Taking away such a freedom from the media, be it any form, would mean that the large masses who rely on sources of various sources of media for updating themselves about the ongoing issues will be deprived of the access to do so. This could further result in increasing the gap between the State and the citizen when the system is not so transparent anymore and is likely to hamper the development of the nation as news is not disseminated in a conducive format.

State has been defined under article 12 of the Indian Constitution and it includes not only the organs of the government but any authority which is conferred with a legal authority. Such an authority would be responsible to make rules and enforce them against different sectors for ensuring their smooth functioning. When we discuss about the freedom of media, it does not mean that there is a separate provision to accommodate the freedom for print media

2207 Basheshar v I. T. Commissioner, AIR 1959 SC 158.
or any other source. It merely means that all the rights and restrictions pertaining to media is given under the Constitution under the clause “Freedom of speech and expression”.

The State and the print media are to work hand in hand with each other, so that the public gets maximum empowerment from such a system. The print media, although a subset of media, should be the voice of the people and expose the misdeeds, if any, carried out by the government or personnel representing the government by way of bribery, corruption, scams, scandals, etc. Press should act as the watchdog of a democratic nation. At the same time, the State should regulate the print media to ensure that such freedom of press is not misused by anyone to spread false information creating terror, fear, ambiguity to the public. Hence derives the need for us to understand whether this balance is maintained by both the State and print media.

3.2. Legislations in India

Studying the various legislations given enables us to determine the extent to which the State has drawn a boundary around the freedom of press and media. These legislations are either rooting from the Supreme Legislation or the subordinate legislations. However, we shall examine whether they remain to reasonably restrict the freedom so guaranteed.

The State is empowered under Article 13(3)(a) to make such laws that can impose reasonable restrictions on the freedom of speech and expression, which also means it can impose laws that restrict the freedom of print media, while the Executive is conferred with any such rights. Hence, such an authority may even be construed as the local law making bodies that have the right to make ‘bye-laws’. The other interesting aspect of understanding is that even though Press is regarded as the fourth democratic pillar, it is the citizens, who as editors, writers and artists, print and circulate their convictions for them to reach the larger masses. The government would want to restrict such actions when the press takes the advantage of such freedom to create content that may be either libelous or malicious.

3.2.1. Restrictions under the Indian Constitution

For any restriction provided under the law to be valid, it has to fall within the reasonable restrictions provided directly under the clauses between (2) to (6) of Article 19 of the Constitution. At the same time, such a restriction should not interfere with the exercise of any other fundamental rights. Therefore, the reasonable restrictions should be imposed only with the aim to not hamper or the following grounds:

---

i. The sovereignty and integrity of India;
ii. Security of the State;
iii. Friendly relations with foreign States;
iv. Public Order;
v. Decency or morality;
vi. In relation to contempt of Court;
vii. Defamation;
viii. Incitement to an offence;

3.2.2. The Indian Penal Code
The Indian Penal Code also provides for restriction on promoting enmity by way of words, either spoken or written, or through representations of any sort. Similarly it also constitutes an offence to hurt the religious beliefs or beliefs of others by utterance of such words or visible representations. It also provides for severe preventive as well as punitive measures for Sedition. The Code also punishes the selling or activities thereof of obscene books. The provision for defamation under Sections 499, 501, 502 and 503 also tackle certain aspects of freedom of speech for the reasons given thereunder.

3.2.3. Representation of People’s Act 1951
There is a clear prohibition by law that during the time of pollings, there can neither be any canvassing nor exhibiting of any notice or sign.

3.2.4. Customs Act, 1962
Under this, the State is allowed to impose restrictions upon importing and/or exporting of certain goods for the benefit of the clauses mentioned under the ‘Reasonable Restrictions under the Constitution’ as discussed above.

3.2.5. Criminal Procedure Code, 1973
As per the provisions of this Act, a person/entity will be liable with imprisonment for publishing map of India without the prior permission of the Survey of India.

3.2.6. Civil Defence Act, 1968
“The Act enables the Government to prohibit publication of any newspaper, etc. containing matters prejudicial to civil defence; demanding security from any press in that context.”

3.2.7. Newspapers (Incitement to Offence) Act, 1908
This Law aims at curtailing Extremist activities and the magistrates can take into confiscation all such material from the press that is objectionable and may cause incitement to offences.

3.2.8. The Prevention of Seditious Meetings Act, 1911
Those said to go about might have been sanctioned to unite and revise the theory identifying with the counteractive action. From claiming open gatherings which needed aid inclined to Push dissidence or aggravate government funded serenity. Section 4 of the said enactment makes it compulsory to look for consent in composing or provide for. Composed notice of a general population meeting of such way starting with region officer or the. Official from claiming Police. An individual falling flat should make such

---

2212 Section 157, The Indian Penal Code, 1860.
2213 Sections 295A, 298, The Indian Penal Code, 1860.
2214 Section 124A, The Indian Penal Code, 1860.
2215 Sections 292 & 293, The Indian Penal Code, 1860.
consent or provide for An composed. Notice should be rebuffed for detainment for An haul extending to six months or. With fine alternately with both. Further, Section 7 additionally gives that whatever individual delivering. Address alternately discourse that is inclined to foundation aggravation alternately general population fervour amidst. Individuals exhibiting might have a chance to be captured without warrant. Also rebuffed for detainment too. A term which might stretch out to six months alternately with fine or with both.

3.2.9. The Official Secrets Act, 1923
This Act has come into force with the view to protecting important documents and information related to the government so that the national security is not at stake. Therefore, Section 5 of the said Act states that anybody who is in possession of such classified content and indulges in passing it on in unauthorised manner will be punished with imprisonment ranging for a term between three years to fourteen years.

3.2.10. The Prevention of Insults to National Honour Act, 1971
This particular Act protects the integrity of the Indian National Flag and hence any kind of expression, act, representation that dishonours the Flag is severely punishable by the provisions of this Act. 2220

3.2.11. The Parliamentary Proceedings (Protection of Publication) Act, 1956
The opinion of the citizens over the national scheme of things is very much important in any democratic nation. And for this, the newspapers are supposed to be given the protection against the publication of true proceedings of the Parliament.

Accordingly, the law under this enactment states that nobody is to be prosecuted in a court for having published substantially a true proceeding that took place in the Parliament, unless and until a malice has been proved on part of such publisher. 2221

3.2.12. Press and Registration of Books, 1872
This particular Act is one of the oldest Acts in force with regards to the print media and remained the founding Act for regulation of publishing newspapers and registration of books. As per the provisions of this Act, there is no need to obtain a license as such for running a newspaper. However, the compliances should be met with as given under like the necessary declarations before the concerned official, etc.

The Registration process for a newspaper is clearly given under this Act where the measures of compliance have to be met by the press owner. He also needs to register before the Registrar of newspapers by following the format in which the details need to be furnished. Non-compliance may result in payment of a penalty or in losing the registration.

3.2.13. Contempt of Courts
The provision against the protection of courts from contempt can be found with the Contempt of Courts Act, 1971 where it is given that there are two types of contempt 2222:
Civil Contempt- “wilful disobedience to any judgement, decree, director., order, writ or other process of a court, or wilful breach of an undertaking given to a court.”
Criminal Contempt- “publication of any matter or doing of any other act whatsoever,


2222 Section 2, The contempt of Court Act, 1971.
which (1) scandalises or tends to scandalise or lowers or tends to lower the authority of any court or (ii) prejudices or interferes or tends to interfere with the due course of any judicial proceeding; or (iii) interferes or tends to interfere or obstructs or tends to obstruct the administration of justice in any other manner.”

3.2.14. The Press Council of India
The Press Council of India was set up in 1966, but was abolished after the declaration of emergency in 1975 and then came a new Press Council Act of 1978 under which the new Press Council was instituted in the year 1979. The Press Council of India is headed by a Chairman and 28 other members. The two main objectives of The Press Council are:
1. To ensure the freedom of press
2. To uphold and improve the standard of newspapers and news agencies.

The Council has quasi-judicial powers with it and it also investigates into matters involving newspapers and news agencies.

4. JUDICIAL TREATMENT OF FREEDOM OF PRESS

4.1. Introduction
The present Chapter will deal with the major topics like freedom of press, the fundamental right to speech and expression, and the Indian judiciary. Where the State has given the legislation, the judiciary interprets such laws and fit them to the context of the case and need of the hour through a feature special to judiciary, i.e., Judicial Activism. In a large country like India where democracy is in place, it is very important to ensure that fundamental rights are exercisable by the citizens without major hampering. Press is an important organ that brings to such citizens and masses all the information through newspapers, magazines, tabloids (the off late trend) should be given the freedom of expression so the masses aware of the happenings in the country so as to maintain transparency. The court will also address the issues in the light of reasonable restrictions so that national security is not threatened, or the law and order is not disturbed as a result of excessive and uncontrolled freedom given to the press.

4.2. Romesh Thappar v. State of Madras

In this case, when the circulation of an English daily was banned by the Madras Government, the Supreme Court had observed that “observed that “Freedom of speech & of the press lay at the foundation of all democratic organization, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.” The Court furthered recognised the value that “without liberty of circulation, publication would be of little value.”

4.3. Sakal Papers v. Union of India
This is an important case in the history of freedom of press because it happened that petitions were filed questioning the constitutionality of the Newspaper (Price and Page) Act, 1956, and the Daily Newspaper (Price and Page) order, 1960 were raised.

Mudholkar, J., delivered the opinion of the Court. A private company that published newspapers, its shareholders, and two readers (Sakal) filed petitions against the state. The publishing company challenged the constitutional validity of the Newspaper (Price and Page) Act, 1956 (Newspaper Act), which empowered the central government to regulate the price of

2223 Ibid, at 4.
2224 AIR 1962 SC 305.

www.supremoamicus.org
773
newspapers in relation to their pages and the allocation of space for advertising matter.

The publishing company also challenged the Daily Newspapers (Price and Page) Order, 1960 (Newspaper Order), which was passed by the Government under the Newspaper Act to put in place such regulations. The petitions argued that the Newspaper Act and Newspaper Order violated the freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution. The Supreme Court declared that the Newspaper (Price and Page) Act, 1956 and the Daily Newspapers (Price and Page) Order, 1960 violated the constitutional right to free speech. The Act and Order regulated the prices publishers could charge for newspapers based on page count and the amount of content, with Sakal Papers alleging that this was an unconstitutional violation of free speech. The Court found that the laws in question would either increase prices or reduce the number of pages, both of which would inhibit the dissemination of ideas, a fundamental aspect of the right to free speech.

4.4. Bennet Coleman & Co. v. Union of India

The petitioners were media conglomerates involved in the publication of newspapers. They challenged the restrictions on the import of newsprint under Import Control Order 1955 and on the manner in which this is used by newspapers under the Newsprint Order 1962. Further, the Newsprint Policy of 1972-73 placed further restrictions based on four features: first, no new newspapers may be started by establishments owning more than two newspapers if at least one of which is a daily; second, the total number of pages may not exceed ten; third, the increase in number of pages may not be more than 20% for newspapers that are under ten pages; and, finally, no-interchangeability of newsprint may permitted between different newspapers of the same establishment or between different editions of the same paper. Therefore, the petitioners were not allowed to make adjustments in circulation, etc., under these newsprint policies even within the quota limit. This was challenged for violation of Article 19(1)(a) of the Indian Constitution. The respondents argued that the petitions were not maintainable because companies do not enjoy fundamental rights, which are available only to natural persons. Further, the respondents argued that Article 358—the Constitution’s provision for “emergency powers”—barred any challenge on grounds of fundamental rights. They also proposed a subject-matter test of restriction rather than an “effects test.” Accordingly, the restrictions were valid because they regulated the commercial operations of newspapers in order to prevent monopolies, by which any effect on freedom of expression was incidental. Finally, they asserted that the question of whether newsprint import must be increased was a question of policy that could not be challenge on any grounds except “mala fide.”

In its judgement, the J.Ray delivered the opinion of the court. “As a preliminary question, the Supreme Court observed that the petitions were maintainable. The fact that the petitioners were companies was not a bar to award relief for violation of the rights of shareholders and editorial staff (who were also petitioners). Further, the bar under Article 358 did not apply to laws passed before the proclamation of
emergency, and, therefore, the newsprint policy could be challenged as a continuation of the previous year’s policy and relevant orders.

While acting under Section 398 and section 402 of the companies act of 1956, the court has ample jurisdiction and very wide powers to pass such orders and give directions as it thinks fit to achieve the object and same will not be violative of section 255.”

5. CONCLUSION & SUGGESTIONS

It can be safely concluded that the Constitution of India guarantees each and every citizen with fundamental rights out of which the freedom of speech and expression is one and the same has been upheld by the Indian Judiciary through various case laws that fundamental rights are an important part of the constitution and cannot be restricted without reasonable grounds. The whole perspective of freedom of speech and expression remains the same even for media which forms an integral part of our economy. The freedom of press has been subjected to several restrictions in the previous instances but the Supreme Court has actively interpreted that the freedom of press cannot be restricted unless such freedom is going against the restrictive clauses mentioned in the Constitution. The Indian right to freedom of speech and expression doesn’t distinguish between the rights of a citizen as against that of the press like how it is done in the US. Despite that being the scenario, the Indian Courts have always been towards upholding the rightful exercise of a citizen’s right to such freedom of speech and expression.

*****
DECODING THE SUPREME COURTS CRYPTOCURRENCY JUDGEMENT - INTERNET AND MOBILE ASSOCIATION OF INDIA V. RESERVE BANK OF INDIA

By Sana Banyal
From Symbiosis Law School, Noida

ABSTRACT
The latest judgement on crypto-currencies was delivered by the supreme court bench comprising of Justice V. Ramasubramanian, Justice Aniruddha Bose and Justice R.F. Nariman on March 3rd 2020. This judgement was against the circular passed by the R.B.I. banning and restricting the financial and banking regulators for using or dealing in Virtual currency. This Case Comment critically analyses the step taken by the R.B.I. furthermore, analyses the importance of Crypto-currencies in today's time. The Case focuses on the Arguments raised and the submissions made by the Court in order to restore equality in the professional space or trade and commerce.

The Judgement of Internet and Mobile Association of India v. Reserve Bank of India, Writ petition (civil) no.373 of 2018 has raised many questions and queries of the future of the dealer, traders, investors and users of crypto-currency in the field of Technology. With this Case Comment, we will try to critique the following judgement analytically.

INTRODUCTION

Factual Background of the Case -
A series of cautionary advisory in the form of a press release was made by the R.B.I. for its investors, shareholders, traders and other users who are dealing in virtual currencies most commonly referred as crypto-assets and crypto-currencies. The press releases dated December 24th 2013, February 1st 2017 and December 5th 2017 highlighted the risks involved to these potential dealers while dealing with virtual-currency. Because of the financial, operational and legal risks involved in the encouragement of dealing in virtual currencies, the banks were told not to invest with Crypto-Related Businesses. The latest notification released by the R.B.I. illustrated that any activity in the relation of maintaining accounts, trading, registering, clearing, giving loans against virtual tokens, accepting them as collateral and the purchase and sale of virtual-currencies were prohibited. The December 2013 press release of R.B.I. also stressed about the risks involved for the users and traders of virtual currency.

The Internet and Mobile Association of India confronted the circular issued by the R.B.I. along with a few other stakeholders in the Supreme Court. The bench of the Supreme Court comprising of Justice R.F. Nariman, Ramasubramanian and Aniruddha Bose permitted the petition on the ground of proportionality. The present judgement dated March 4th 2020 lifted the ban imposed by the Reserve Bank of India through its circular dated April 6th 2018, which prohibited the banks and financial institutes from dealing in virtual currencies.

CASE ANALYSIS

Arguments of the Petitioner -

2226 Banking Regulation Act 1949, s. 35A, 36(1)a, s.56.

The grounds for the present petition by the petitioner, i.e., Internet and Mobile Association of India, which were against the R.B.I. Circular dated April 6th 2018 were as follows–

1. Jurisdiction – the petitioner stated that the R.B.I. lacked jurisdiction to forbid dealings in cryptocurrencies, and the blanket ban was based on the erroneous understanding that it was not possible to regulate cryptocurrencies. Cryptocurrencies are digital currency in which encryption techniques are used for trading These currencies operate autonomously of a central bank like the R.B.I., rendering insusceptible from government interference.

2. Regulatory Power - The agreement adopted by the petitioner was that firstly, the virtual currency is not a legal tender and thus cannot be regulated by R.B.I. Secondly, Services rendered by virtual-currency exchanges do not qualify to be a payment system, thus are not entities regulated by the R.B.I. as per the Payment Settlement and Systems Act, 2007. (hereinafter PSSA)

3. Non-Application of mind - The ground for passing the Circular by R.B.I. was not well articulated and that it also violated the fundamental rights to practice the profession, or to carry on any occupation and trade.

4. Principle of Proportionality – It was also submitted by the petitioner in the present matter that the R.B.I. Circular did not pass the test of reasonability or proportionality, and thus should be struck.

Arguments of the Respondent –

The respondent, i.e. The Reserve Bank of India is represented by Senior Advocate Shyam Divan in the present matter countered the claims of the petitioners in the following manner –

1. They countered the argument of petitioners regarding crypto-currency not being deemed as 'Currency' in a strict sense but more as a mode of exchange or store of value. The senior advocate submitted that crypto-currency was in fact, under the control/ regulation of the R.B.I. as it was the digital mode of payment, thus putting it into the category of 'Currency'.

The R.B.I further submitted that there had been no violation of the fundamental right of profession/ trade as there cannot be an unfettered fundamental right to do business over an entity under the control of the R.B.I.

They negated the argument of non-application of mind submitted by the petitioners. They stated that the R.B.I. Circular was only issued in Public interest and to fore-warn the users, traders and holders of virtual-currency from the potential risks involved. They also submitted that the R.B.I. had been issuing the advisory to the user of virtual-currency for five years and thus there was the application of mind.

Courts holding on the Issues Raised -

The bench of the Supreme Court highlighted the following points while

---

2228 Reserve bank of India Act 1949, s. 45JA, s. 45L
2230 Payment Settlement and Systems Act 2007, s.10(2)
2231 Internet and Mobile Association of India v. Reserve Bank of India, Writ petition (civil) no.373 of 2018
lifting the ban imposed by the R.B.I. Circular –

1. The bench accepted the respondents view on the issue about the jurisdiction over Crypto-currency and that R.B.I. does have the power to regulate the virtual-currencies. It was accepted that virtual-currencies are valid modes of payment in the exchange of goods and services.  

2. The argument of R.B.I. circular was a part of the PSSA was accepted by the Apex court bench, as the R.B.I. does have the power to make policies and issue directions to the Banks regarding the subject of payment obligations.

3. The bench stated that though the R.B.I. has pervasive powers not only because of the statutory scheme but also given the particular place and role that it plays to improve the economy of the country, these powers can be exercised both in the form of pre-emptive as well as restorative measures.

4. The bench stressed that to take such preventive actions; the R.B.I. must first prove that there is some scope of damage suffered by involvement in virtual-currency. The bench submitted that till date the R.B.I. has not been able to prove that any of its regulated bodies have suffered any damage/ loss due to the virtual-currency exchanges. In the judgment of State of Maharashtra v. Indian Hotel and Restaurants Association, it was held by the Supreme Court that there must be some observed data regarding the degree of harm suffered by the regulatory bodies, which was perhaps proven in the Case.

5. The Supreme Court concluded that even though the R.B.I. did release the circular in the public interest, it was not able to establish its reasonability and was not able to satisfy the test of proportionality.

ORDER OF THE COURT

The verdict of the Court based on the submissions made by the two parties in the matter of Internet and Mobile Association of India v. Reserve Bank of India was in favour of the petitioners. The Court lifted the ban imposed by the circular issued by the R.B.I. over the regulatory entities which were prohibited from using the virtual-currency.

CRITIQUE OF THE JUDGEMENT

The judgment passed by the Supreme Court has been considered a mixed-bag of risk and rewards by many professionals in the field of law and Technology. Crypto-currencies are the new age-assets which have multiple uses other than just being used as a currency. The financial action task force (FATF) has submitted its guidelines,

---

2234 State of Maharashtra v. Indian Hotel and Restaurants Association, Civil Appeal no. 5504 of 2013, arising out of S.L.P. (c) no.14534 of 2006
which state that cryptocurrencies do not pose a threat to the global economy if appropriately regulated.

1. A positive step for fairness and justice - The order of the Supreme Court in the Case of Internet and Mobile Association of India v. Reserve Bank of India\(^\text{2236}\) showcases the importance of the principle of fairness and equal opportunity. The act of the Court of actively opposing the restriction policy set by the R.B.I. represents the fairness of our quasi-judicial system. It has been critiqued that the circular of the R.B.I. was limiting the whole innovative industry and posing challenges for the set-up of incumbent players under the regulators' active supervisory umbrella, therefore, not providing equal opportunity to exist and grow.

2. Role and Jurisdiction of R.B.I. - This verdict also helped us understand the role and jurisdiction out regulators have. An act of the Parliament led to the creation of the R.B.I. and that gives it the power to formulate regulations. Thus, these regulations cannot surpass the fundamental rights and freedoms of the citizens. It is unconstitutional for the regulators to interfere with the fundamental right to trade to close down industries when these industries, do not violate anything fundamental or are not a fraud. The difficulty in understanding this concept has been stifling the fintech innovation industries, and the SC verdict lifts that veil.

3. Traceability challenge – One of the most common challenges that have arisen is regarding the crypto-accounts can be used for illegal purposes. The concern for traceability is real due to there being no know-your-customer (KYC) requirement. This aspect makes it a troublesome process. Due to the lack of knowledge regarding information technology, the users are prone to high risk and might turn them into potential targets for cybercrime.

4. Safeguard of crypto-currencies - Cryptocurrencies have gained acceptability over specific years. However, all the investors and users of these currencies must be handled with care as they are a double-edged sword in today's unpredictable, risk-averse environment. As there is no central regulatory authority which regulates and managed these crypto-currencies, it is challenging to ensure the security to safeguard crypto-assets.

5. Need for setting up a legal framework for regulating crypto-currency – With the increase in the information technology sector, the need to encourage Indian policymakers to work on creating a crypto regulatory framework. Around the globe, many countries have recognised the need and importance of crypto-assets and the need to regulate them. For example, South Korea has recently legalised crypto-related technologies. Even South-Asian countries like Japan and Australia have adopted a positive outlook towards crypto-transactions. The introduction of crypto-regulations in India would be of great advantage to the ever-growing information technology sector of the country. It will lead to the more focused growth and development of blockchain-focused start-ups and more tax revenue for the government.

\(^\text{2236}\) Internet and Mobile Association of India v. Reserve Bank of India, Writ petition (civil) no.373 of 2018
WOMEN-THE ULTIMATE WARRIORS: ERAS CONTRIBUTIONS IN THE EMPOWERMENT OF WOMEN, EDUCATION OF WOMEN AND ENACTMENT OF POWERFUL LEGISLATIONS: EARLY VEDAS TO THE 21ST CENTURY

By Sangeeta Basu
From KIIT School of Law

Abstract
The idiosyncrasy of calling the women docile and passive are subject to underestimation by a specific thought process and mind-set that nurtures the young sapling of ego and superego backed by parochial minded contemplation. The deeply rooted senses of suppressing the women and shackling them through and through to restrain from outstanding the periphery of submissiveness have reached the audacity level of the society to the zenith, since time immemorial. The egotist attitude of some insensitive minds dragged the dignity of women at such steps which gave birth to ignominious and barbaric acts, being committed brazenly with nil sense of brutality. Be it considering women as the weakest, snatching away their rights to live with dignity or freedom, following rituals of a widow or simply burning them alive if being dissatisfied or disgusted after a passage of time. There existed an era when not even for a nanosecond did mankind had the sanguine outlook towards the women in India. Neither the society cared about their feelings nor did a single voice opined in the favour of women rights; rather it was always deemed to be sinning to ponder over breaking their shackle of suppression. Slowly and gradually as the wheel of the time moved ahead, the soil of India produced great souls with noble thoughts that gave birth to the concept of Women Empowerment which arose this issue and simultaneously elucidated the umbrage of womanhood as the dogmatic approach towards it was in itself outrageous and that came under realization when literacy and education were brought into the picture; although both the terms defer in the contexts of individual references. This paper attempts to deliver the content of how was the actual status of women long back, perhaps during the Vedic period, what caused the degradation of the level that forced the society to be habitual with such eccentric temperamental and who are the ones revered for their remarkable contributions in the upliftment of this marginalized gender to foster the human development and establish a harmonious relation among mankind which consequently led to glorious eras ahead.

Keywords: - Women Empowerment, Women Laws, Crime, Women Education, Legal Provisions, Women Safety and Measures.

Introduction
The Indian soil’s history is pregnant with every kind of cultural, social, philosophical and emotional values that in itself brings out the truth which depicts the status of women in India since the Vedic ages, because the country has strong faith and reverence towards the religious beliefs, Vedas and Puranas, the Hindu Shastras in India has attained the quintessential level that included worshipping of women as Goddesses. Women were considered the superior while being in supreme authorities in many of the prime events. There was no gender biasedness in entitling a property. The spinsters always had the privilege to be the legal heir of patrimony. The girls were given equal education as boys by sending
them to “Gurukuls”. The women showed such scintillating performance in the arena of education that was achieved through some female gurus like Indrani, Poulomi, Urvashi. This is well evident from the fact that there were more than twenty women, had great contributions who composed the Rig Vedic Hymns. Intellectuals like Gargi and Maitreyi were the trailblazers in the philosophical ideas. They were called as “Brahmavadinis”. The concept of Shakti was also a product of this age, when each and every energy created was blessed with a divine power of a particular deity. Considering the fact that Saraswati being worshipped for creativity, Lakshmi for nourishment, Kali portrays the destructive energy and Goddess Durga is the Ultimate Protector. It is strongly believed as per the Hindu Shastra’s that Mahishasur’s Vadh was possible only after the Creation of next powerful energy called Mahishasurmardini (Goddess Durga), the creators were the ultimate three musketeers (Brahma, Vishnu and Mahesh). Had the powers been self-sufficient in themselves there wouldn’t have been any necessity to create the most powerful energy on earth, again in the form of the “Woman”. As the Vedic sayings go well that where women are honoured and worshipped like a goddess, prosperity will always flourish there.

A Woman must be applauded and revered by her father, brother, husband, and brothers-in-law, who wish to live a life full of prosperity. Where women are deeply honoured, there shall be showers of blessings of the Lord; but where they are humiliated, no sacred rite yields rewards. Where the female relations live in sorrow, the family never flourishes with good health, wealth and fortune. The houses, on which female relations, not being duly honoured, pronounce a curse, perish completely as if destroyed by magic. Hence men who seek (their own) welfare, should always honour women on holidays and festivals with (gifts of) ornaments, clothes and dainty food.

Furthermore, in the Vedas, when a woman is invited into the family through marriage, she enters “as a river enters the sea” and “to rule there along with her husband, as a Queen, over the other members of the family”. This kind of equality is rarely found in any other religious scripture.

Status of Women in Mohul and Modern Period

However along with the coming ages and generations, the military and cultural interventions degraded the highly set standards of women in India. Along with the gained influence of foreign bodies that disdained the rich Indian and Vedic culture. Women were more considered as entertaining and sexual objects, although prostitution existed in Vedic period too however the prostitutes were called as Devdasis who were supposed to marry gods in a temple and serve him like a maid while serving men in the society. As Swami Vivekananda has also mentioned not to hold feelings of animosity or hatred against

---

2238 Manu-smriti
2239 Atharva-Veda 14.1.43-44

---

2240 Manu Smriti III.55-59
2241 Atharva-Veda 14.1.43-44
prostitutes therefore work was a form of worship for the sex workers too in that ongoing era. Slowly and gradually when the ages advanced and India was sailing through the Mohul period violence and brutality against women were stepping higher. 

Neither women were any more given the freedom to enjoy the privilege which they have had some centuries back, nor they were on equal footing with men. The Racist colonial historians demanded the notions of modernity and scientific principles prevalent in the society. When they found India lagging behind these specific qualities, it was highly slammed. Historians like Vincent Smith severely condemned everything facilitated with India. Some features, such as Indian art, which was undeniably worthy of praise was attributed to Greek influence, thus refuting it any possibility of aboriginal roots.  

The miserable life of women was forcibly confined within the walls and under the roof of domestic households, considering and declaring men as the sole breadwinner and head of the family. In that prevalent era daughters who were married had the privilege to enjoy their husband’s assets whereas, the sons were the real and sole owner of the patrimony; in case if the daughters were widow and had no means of livelihood then the male siblings were responsible to look after them. Only if the deceased fathers had daughters and no sons the sole owner of the patrimony was in the favour of the women. Women faced challenges in retaining the property and were often subjected to harassment. On to the Mughal times, we have greater clarity about the role of women in society. This leaves no room for ambiguity the society in itself was suppressive to women and also the the growth in influence and number of Smritis not only are maintained elucidated the number of restrictions and brutality women faced.  

Condition of women in British Raj

The status of women degraded to the nadir when British were reigning the soil of India, the women were forcibly confined, caged, and all dogmatic beliefs and customs were firmly etched in the minds of men as well as women. The orthodox practices were carried on generations after generations and since no basic education was accessible to the women, therefore, illiteracy and uneducated contemplation exacerbated the living condition of women in India. They were so much beleaguered by these that made them bling to raise voice against the unethical and monstrous acts towards their gender. There was such a devastating story behind the violation of Bengali women by the British assigned tax collectors. The women were dragged out, naked and exposed to the public view, and scourged before all the people. They put the nipples of the women in the sharp edges of split bamboos and tore them from their bodies.  

The early marriage of girls better called as Child Marriage led to turning into widows which were premature. The widows were not allowed to be passionate about cosmetics, their hair was cut too short at length, in some cases were turned bald, were not permitted to wear any colour except were always in white saree, as for them ornamenting themselves with about the role of women in society. This leaves no room for ambiguity the society in itself was suppressive to women and also the the growth in influence and number of Smritis not only are maintained elucidated the number of restrictions and brutality women faced.


2243 AS Altekar, The Position of Women in Hindu Civilization

www.supremoamicus.org 782
jewellery or any other cosmetic item did tantamount to sinning. Also, there existed this practice of “Sati Pratha” where women were considered as cursed to have lost husband and were forcibly burnt alive beside the funeral pyres of their husbands.

According to the Hindu mythology as well mentioned in the holy book of Bhagwad Gita, Chapter 4.8, Verse 8, mentions “____paritranaya sadhumam vinashaya cha____ dushkritam dharma __sansthanathaya sambhavami ____yuge ____yuge……” which means to protect the righteous, to annihilate the wicked, to teach dharma I come again, age after age says, Lord Krishna. Perhaps he sends some noble and courageous souls who hold the capacity to bring revolution and reformations when the sins over the brim. To expostulate such maverick acts which were opprobrium in the eyes of some great intellectuals and brilliant social reformers like Raja Ram Mohan Roy and Ishwar Chandra Vidya Sagar, the absolute gems brought forth by the soil of Bengal, who raised voices and penalised such despicable mind-set and acts by laying stress on Women’s education, prevention of child marriage, removal of polygamy, and remarriage of widows, that paved the way to enactment of legislation about Prohibition of Child Marriage, Commission of Sati, Widow Remarriage Act etc. which deracinated the thought process of enervating women. Lord William Bentick who was also known as a benevolent Lord initiated the Venture against Sati and ultimately Sati was abolished in the year 1829. This encouraged the enactment of several other laws to embolden women to enact laws like Child Marriage Restraint Act, 1929, Hindu Widow Remarriage Act, 1856 and The Hindu Woman’s Right to Property Act,1937.

Swami Vivekananda’s Views and Contributions on Women Empowerment

Swami Vivekananda, a diamond born in the Indian soil, who is not only internationally renowned but also highly revered all across the globe. The extraordinary merit and the rarest intellect that he possessed paved his way to the hall of fame and reverence. It was America who invited this wonderful soul to deliver a speech that had such an impact that it engraved upon the audiences at Chicago on 15th September 1893 at the age of 30. The impeccable knowledge and superior intellectual capacity eased him creating a history. He elucidated on many topics revolving around women and he believed women can do wonders if given a chance to be a well-educated and learned.

Vivekananda took the lady to represent now not merely the frailty of body and mind but an emasculating influence that visibly robbed the person of his manliness. She became from time to time capable of braveness and heroism, however importantly…….
This emerged handiest within the ___context of her fidelity or chastity___ being put to test…… Vivekananda had first-rate admiration for Padmini, the ‘brave’ Rajput princess who, instead than give up to every other guy’s lust, chose to immolate herself inside the husband’s funeral pyre.

Vivekananda had first-rate admiration for Padmini, the ‘brave’ Rajput princess who, instead than give up to every other guy’s lust, chose to immolate herself inside the husband’s funeral pyre.

towards figuring out the route or pace of lady related reform, arguing that this become best…… Left to girls themselves. He said, ....‘No guy shall dictate to a woman nor ladies to a man...women will workout their destiny higher than men can ever do for them.

___All mischief has come due to the fact guys undertook to form _____the destiny of girls......’ On one degree surely, this carries… factors of feminist self-determination and yet a very different___ meaning may also be examine into this statement.

“The woman provided a rendition of a poetry by the renowned poet Surdasa . the euphonic lyrics was so poignant that Swami ji pondered over introspection and retrospection , realizing that it can never be wise enough to frown at the sight of the prostitute as the body can be used but a soul can still remain pure therefore it really would be inhuman to hold animosity against the prostitutes’.

Women have been reigning with the status of reverence in the society in the biggest Indian Epics like Ramayana and Mahabharata and simultaneously were slammed and had to face remarks which were opprobrium in itself. A character like Draped sets an ideal example or Site who had to prove her chastity by entering into the fire.

Vivekananda also elucidated on the divine power that is connected with womanhood as mother is the first manifestation of the

a sex worker. Prostitutes have been contemplated as a sinner and viewed as most licentious predicament of the society. They have been invited to perform in the palaces before the kings and the courtyards to satisfy and quench the thirst of sexual desires of men. However as per the Vedas it has been considered as a social service provided to men by women.

Once when Swami Vivekananda came across a beautiful prostitute he initially urged to ignore her and found it immoral to meet with her but the chastity and the pure mind of the woman melted the heart of Vivekananda and he spoke to her in the usual rather saintlier manner.

Vivekananda’s warning on NOT TO HATE PROSTITUTES

Since time immemorial the women attempting to earn a living for her family by adopting unusual and clandestine ways have been compelled to encounter the social stigma, have been targeted with squalid remarks especially if she has been


[2249] https://shodhganga.inflibnet.ac.in/bitstream/10603/201032/10/10_conclusion.pdf
power and is positioned a higher idea even than a father. The Mother is the ultimate energy related with the divine power that protects us, guides us, looks after us and takes us to the right path. That is the divine mother called Kundalini (a coiled up power). That is the real and ultimate energy that is worshipped, no power is as superior as her and she is the omnipotent and omnipresent. 2250 The only wish Swami Vivekananda had was to support and strengthen the idea of Women Education and Women Empowerment as he sincerely believed that the women living since centuries ago to the modern era, are blessed with high potentials to be the metaphors in their own skies. And as he dreamt, the wheel of time moved ahead and produced the reaps of the seeds sown by such great reformers.

How did the Constitution of India embolden the Rise of Women Empowerment?

There have been several provisions in the form of Articles, have been incorporated in the Constitution of India to give prime importance in regard to the equal protection and equal rights in the eyes of law, lawmakers, people and the entire society for that matter. Some essential articles are that are Art. 14,15,15(3),16,39(a),39(b),39(c),42. As per some of the important articles herein- Art.15(3)- : “Nothing in this article shall prevent the state from making any special provision for women and children”: . Art.39(a)- The state shall, in particular direct, its policy towards securing – That the citizens, men and women equally, have the right to an adequate means of livelihood.

(d)- that there is equal pay for work for both men and women Art.42- The state shall make provision for securing just and humane condition of work and for maternity relief.

B.R. Ambedkar’s contribution towards Women laws and Women Empowerment

Dr. Baba Saheb Bhimrao Ramji Ambedkar is called as the Father of the Indian Constitution, he has been the Chairman of the drafting committee. Not only that, his scholarly, intellectual mind forged him to draft the legal document which lays the basic foundation of the rules but also he contemplated on the laws that held the capacity to educate and empower women. Dr. Ambedkar advocated on his realization that mere enacting laws for women would not pave ways to their ultimate freedom to live with dignity and be proud of the gender they are born with, therefore he enacted the legislations in such a manner that satisfied the urge of women to be equalized with men and put forth some special laws in this regard that enervated the nexus between the legal issues with the political issues in the country that in any way could tantamount to triggering a controversy. The provisions enshrined in the Constitution of India laid emphasis on Art.14,15 and 16, elucidating on equality of sexes and also including the Fundamental Rights, Directive Principles of the State Policy and Fundamental Duties.

Dr. B. R. Ambedkar once very beautifully quoted

“Unity is meaningless without the accompaniment of women. Education is fruitless without educated women, and

2250 C.W., Vol.8, p. 61
agitation is incomplete without the strength of women”

Right to Education
Jyotibai Phule, one of the pioneers in the educational front in Maharashtra believed that the lack of learning is nothing but gross bestiality. It is through the acquisition of knowledge that she loses her lower status and achieves the higher one. Jyotibai Phule setup the first ever school for women, venerating the importance of receiving education, her deeds prove that education will only be received and not achieved unless we educate other women by educating ourselves.

Legislations enacted for Women on Education in Independent India: A driving force to Women Empowerment
In respect of right to education, the contents and parameters is to be determined in right of articles 41,45, and 46. It means free education up to 14 years of age to every child and after 14 years of age rights get circumscribed by limits of economic capacity of state mentioned in Unni krishnan, J.P. vs. State of Andhra Pradesh.

The Special Laws for Women in India
1. The Family Courts Act,1954
2. The Special Marriage Act,1954
3. The Hindu Marriage Act,1955
4. The Hindu Succession Act,1956 with Amendment in 2005
5. The Immoral Traffic (Prevention) Act,1956
7. Dowry Prohibition Act,1961
8. The Medical Termination of Pregnancy Act,1971
9. The Equal Remuneration Act,1976
10. The Criminal Law (Amendment) Act,1983
12. The Protection of Women from Domestic Violence Act,2005

Women: Reservation
Reservation of 50% of posts in the favour of female candidates not arbitrary this was well decided in the case of Rajesh Kumar Gupta vs State of Uttar Pradesh,AIR 2005 SC 2540. Reservation of certain posts exclusively for women is valid under article 15(3),article 15 covers every sphere of State Action.

Clause (3) of article 15, which permits special provision for women and children has been widely resorted to and the courts have upheld the validity of special measures in legislation or executive orders favouring women. Provisions in criminal law, in favour of women, or in the procedural law discriminating in favour of women have been supported. Decided in the case of Girdhar vs State, AIR 1953 MB 147:1953 MB LJ 529.(Section 354,Indian Penal Code)

2251 Ambedkar: Writings and Speeches, Vol. 3, Department of Education, Govt. of Maharashtra.
Women Reservation in Educational Institution.


Women and Sexual Harassment

Sexual harassment of working women amounts to violation of the rights guaranteed by Art.14,15 and 23 (equality and dignity), the court issued detailed direction on the subject *Vishakha vs State of Rajasthan*.

Beauty contests: Are they an insult to Womanhood?

It has been held that beauty contests ,in their true form ,are not objectionable. But, if there is indecent representation of the figure of the women or if there is any matter derogatory of women ,then it would offend the *Indecent Representation of Women Act,1986* and also Art.21.

Still exists GENDER DISCRIMINATION

According to the survey conducted, Research says that history repeats itself multiple times to reflect the brutal kind of treatment, harassment women were subjected to the barbaric acts that ousted all kinds of peripheries relating humanity. In India where women are worshipped in the forms of goddesses during the time of Navratri, the same country includes states like Rajasthan, Haryana, Bihar, Uttar Pradesh, Andhra Pradesh exhibiting the statistics about the torture, discrimination, inhuman behaviour which are still prevalent in the norms of some orthodoxical, parochial minded blood. Although mostly of these are existing as cultural norms in the society of rural areas or semi urban areas however the disheartening aspect of the issue is that the women are still a part of the male dominated society in some way or the other.

Which are the most dangerous states for women in India to live in?

The research says ,the states of Uttar Pradesh, Maharashtra, West Bengal ,Madhya Pradesh and Rajasthan can be hold accountable for bearing almost more than half of the nation’s total crimes committed against the females revealed out by the National Crime Records Bureau .There is a visibility of increment in the heinous acts against the women in the country by up to 10 % within a period of couple of years and a majority of these are cases of abduction and domestic violence, says the NCRB's Crimes in India report. In total 3,59,849 criminal cases against the women are registered across the entire nation. Uttar Pradesh topped with 56,011 cases, carrying on with the freely moving perpetrators followed by Maharashtra and West Bengal, however the number has declined compared to the previous data produced. However, the Union Territories and the North-eastern states also showed lesser number of cases registered against the criminal activities against the women there. These included Arunanchal Pradesh, Goa, Himachal Pradesh, and the seven sisters according to the NCRB data.

---

2255 Chandra Rajkumari vs Police Commissioner, Hyderabad, AIR 1998

Big Role of Technology and Digitalization in safeguarding the Safety of Women

Living in India as a woman is challenging especially while confronting with the hike in crime rate state wise. It is impossible to turn a state, city, district or area “Woman free”, as not only it will infringe their fundamental rights guaranteed under the Constitution of India but the move will be deemed as an insanity in itself. Moreover, the rise in crime rate should not prevent women from voluntarily residing in any part of the country and earn their own living. Therefore, we must realize that the process of globalization has enhanced the connectivity that fosters advanced technology and digitalization that ensures we have safety applications for Women in India.

Some of them like My Safety Pin, Citizen cop, Himmat, Shake 2 Safety, Bsaf so and so forth. The basic idea is to enabling virtual tracking via GPS, if it is not functioning, location can be identified via SMS or Voice call, some features like Timer alarm to keep contacts informed about the user location. The apps also have the potential to function offline and indicate the Police Stations, Hospitals, Fire Services, Pharmacy or ATM and also allows to report robbery, accident or any natural calamity so that it eases the job of authorities to facilitate and render service.  

Existence of Gender Biasedness in the 21st Century: Is this a Modern Era that we dream of?

The rituals that these overly conservative and not-bohemian society believes to lie in the heart of extreme biasedness towards the concept of a son who is blessed with all the manly powers and the only gender to have the ultimate hegemony in the community, society, city or state. Initiating from the sex determination during the hours of gestation period to the time a woman goes into labour the only wish and prayer which comes out from the core is to be gifted with a “son”. This iconoclastic approach has moulded the men in the saga of male hegemony in such an influential manner that as soon as they reach puberty or turn into a complete adult, subconsciously they develop the swaggering ego of being better, smarter, stronger and highly sufficient than women. Research says that this kind of egotist psychology is common in Asian men. That may not be similar in Western countries as women are far more capable and self-sufficient, less dependent on men and are successful single mothers as well, as men find it arbitrary to act like a thwart in the personal and professional front to quench the thirst of satisfying their ego.

Global Gender Gap Report: India’s Rank

<table>
<thead>
<tr>
<th>YEAR</th>
<th>2006</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Global Gender Gap Index</td>
<td>98</td>
<td>112</td>
</tr>
<tr>
<td>Economic Participation and Opportunity</td>
<td>110</td>
<td>149</td>
</tr>
<tr>
<td>Educational Attainment</td>
<td>102</td>
<td>112</td>
</tr>
<tr>
<td>Health and Survival</td>
<td>103</td>
<td>150</td>
</tr>
<tr>
<td>Political Empowerment</td>
<td>20</td>
<td>18</td>
</tr>
</tbody>
</table>

Women who have carved niches, Reputation Skyrocketed
It is so heartening to realize that women in all the spheres in the country are excelling in their respective profession. The outstanding dedication and commitment exhibited by them itself creates an aura of celebrating the success of these extremely talented women who have set their goals in the right direction, reached and cherished it with due time. Gone are the days when a jamboree was thrown to welcome the birth of sons, now is the era of women, the time to embolden them since the nascent stage, to support them mentally, physically, psychologically and legally. Be it sports, music, politics, medicines, technology, economy, business, law, literature, army or academics women have set their benchmarks in every field, in every arena being a philosopher, a writer, a novelist or a cop they have emerged as a warrior. Some of the examples will surely accord with its true testimony of being the champions.

<table>
<thead>
<tr>
<th>Fields</th>
<th>The Exceptional Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mathematicians</td>
<td>Dr. Nilanjana Dutta, Jadhavpur University, West Bengal, University of Cambridge</td>
</tr>
<tr>
<td></td>
<td>Bhma Srinivasana (Ph.D Scholar,Fellowship from National Research Council of Canada)</td>
</tr>
<tr>
<td>Doctors</td>
<td>Dr. Anandi Joshi, First female Indian Physician to gain degree in Western Medicines</td>
</tr>
</tbody>
</table>

| Authors             | Dr. Kadambini Ganguly, first one qualifying and practicing Western Medicine |
|                     | Arundhati Roy, best seller of God of Small things |

| Businesswomen/Lawyers | Zia Mody, Harvard University, Founder and Managing Partner of AZB Law firm (tier-1) in India |
|                       | Kiran Mazumdar Shaw, Founder of Biocon |
|                       | Saina Nehwal, Badminton |
|                       | Mithali Raj, Captain of Indian Cricket Team |
|                       | Sushma Swaraj |
|                       | J.Jayalalitha |

| Politicians          | Saina Nehwal |
|                     | Kiran Mazumdar Shaw |

Conclusion.
There has been not a single Era when women failed to prove their mettle in every possible way they could. This research work neither subscribes to the views of pseudo feminists nor does it portray biasedness towards or against any particular
gender. The straightforward objective has been to reveal out the status of women from era to era. The research reveals out the truth evident from the historical background of Women, the rights and privileges enjoyed by them in a period and showed how the invasion of foreign bodies deteriorated the revered status of women in India. Sins and barbaric acts replaced the thrones of the women who were reigning some centuries back. How the brutality enhanced the audacity of the perpetrators who illegally acquired the Indian territory, tortured, harassed and killed the dignity of the women all across the country. However, the bloodshed of the fighters was the cause of rebellious attitude in women and that firmly the determination to be vindictive and fight for one’s freedom. By the time the darkest era in the history of mankind was on the verge of ending, people were emboldened enough to welcome the new sun at its first dawn. The women themselves started movements, fought for the freedom and ultimately turned themselves independent along with their contribution towards the nation. Transformation in the thought process of men and women was apparent. Enactment of legislations furthered the rights and royalties of Women. But still prevails some maverick notions that in a way shackles women to fulfil their dreams. Another objective to write this research paper has been to outshout and voice against the gender injustice done to me. The pain of being a victim of unfair biasedness towards a particular gender has strengthened me to pen down the ground realities and reveal out to all those educated nevertheless biased grandmothers who believe that only the grandsons deserve the privilege of bringing laurel and glory to the family, they are the ones who further the generations after generations; soiling the feelings of granddaughters. If a birth of a son in the family is the reason of grand celebration then the birth of a daughter should demand a jamboree too, as they certainly deserve the equal rights, love, care, attention. I feel, we, being the law students and the future of this country, should start taking initiatives to focus more and more on Women Empowerment and the Special Women Laws, by taking small steps from schools to colleges in different districts and states and reaching it to the University level. Spreading legal awareness among our friends, families, society and communities and this needs the tremendous support of all our respected law professors all across the country, legal scholars, honourable judges to encourage these thoughts and imbibe in ourselves first before imparting it to the rest of the world because women today are no more suppressive they do know to fight and win, all they need is the support of their people, the judicial system of their nation; Lastly I would like to wrap up with a quotation which I formed a couple of days back.

As the history shouts out the woman is someone who was SHE

“She was taunted and teased, harassed and displeased,
She was abused and discriminated, was brutally beaten and polluted,
She has won in all, be it sports, science, law or dance,
Women are blessed to over win themselves if given a Chance”.

References

Indian Cases

I. Chandra Rajkumari vs Police Commissioner, Hyderabad, AIR 1998

IV. Shashi Tharoor , An Era of Darkness(The British Empire in India)7-18 (ALEPH BOOKS,2016)

Bibliography

V. Manu Smriti III.55-59

Internet

IV. https://shodhganga.inflibnet.ac.in/bitstream/10603/201032/10/10_conclusion.pdf XXII.

V. https://www.deshvidesh.com/swami-vivekananda-on-women-and-womanhood/

VI. https://www.deshvidesh.com/swami-vivekananda-on-women-and-womanhood


VIII. https://www.groundxero.in/2019/10/24/position-of-women-in-medieval-india/ X.

IX. https://www.sahapedia.org/swami-vivekananda-and-woman-question

X. vanti.org.uk/avantihouse-primary/wp-content/uploads/sites/9/2020/03/03.03.2020-Sanskrit-Homework-Gita-Verses.pdf

XI. Ambedkar: Writings and Speeches, Vol. 3, Department of Education, Govt. of Maharashtra.

XII. As Altekar, The Position of Women in Hindu Civilization

XIII. Atharva-Veda 14.1.43-44

XIV. C.W., Vol.8, p. 61

XV. Manu-smriti

XVI. http://www.yourarticlelibrary.com/women/status-of-women-during-british-period/47393

XVII. http://www.yourarticlelibrary.com/women/status-of-women-during-the-vedic-period/47391, last visited on 3rd April 2020, at 5:45 pm


https://wirally.com/women-safety-apps-india/


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


https://www.deshvidesh.com/swami-vivekananda-on-women-and-womanhood/

https://www.sahapedia.org/swami-vivekananda-and-woman-question

https://shodhganga.inflibnet.ac.in/bitstream/10603/201032/10/10_conclusion.pdf

https://www.deshvidesh.com/swami-vivekananda-on-women-and-womanhood


https://wirally.com/women-safety-apps-india/


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


https://www.deshvidesh.com/swami-vivekananda-on-women-and-womanhood/

https://shodhganga.inflibnet.ac.in/bitstream/10603/201032/10/10_conclusion.pdf

https://www.deshvidesh.com/swami-vivekananda-on-women-and-womanhood


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


https://www.groundxero.in/2019/10/24/po-sition-of-women-in-medieval-india/47393

https://wirally.com/women-safety-apps-india/


JUDICIAL APPOINTMENTS: OF COLLEGIUMS AND MORE

By Sanika Gadgil
From National Law University, Delhi

Synopsis

Statement of the Problem

The process of judicial appointments has been through a multitude of changes over the years, which have affected its nature and have brought in a lot of constitutional questions into play. The judiciary has also evolved through these and has come to strongly adopt a cogent manifesto for its independence and has adopted the collegium system for appointing judges. This has created a lot of problems and has superseded not only the legal intent behind the provisions but also disregarded the involvement of the other organs. The author aims to analyze the series of developments that led to the current system and look at alternate systems for the resolution of the aforementioned conundrums.

Research Questions

1. Whether the judiciary’s current system of appointment is constitutionally tenable?

2. Whether there can be an alternate model to efficiently substitute the current system of judicial appointments for the better?

Hypothesis

That the current model of judicial appointments is not founded on cogent constitutional grounds. That it lacks accountability and transparency and needs to be amended. That its independence is not undermined due to a lack of primacy to its opinion and that the executive needs to be substantially accommodated in the process.

Introduction

The Indian Judicial System is a body politic of itself. With trials and tribulations that run the course of more than half a decade, it is an intrinsically contested functionary. There is also a perennial threat to its independent nature in the form of the ever-strengthening executive. However, there are mechanisms which it employs to protect itself from the interference of other organs of the Government. Some of these mechanisms it has been endowed with, and some of them it has developed on its own.

Today, the Indian judiciary is one of the strongest judiciaries in the world, a title that fits a judiciary that derives its power from one of the most impeccable constitutions. There are a lot of tenets of the constitution that empower the judiciary to maintain its independent nature, like on the issues of salaries, services, and removal process. There is one process, however, which allows for the role of executive. This is the process of judicial appointments. There has been a lot of debate and discussion surrounding the process and it is still quite a contested issue. This paper tries to identify and critically analyze the various themes that emerge when we look at the series of judgments, which served as the basis for the development of the same.

The paper is divided into two parts and the first part deals with three themes. The first theme to be discussed would be the debate surrounding the articulation of article 124 which included the word “consultation with judges”. It was first held to be that “consultation” would be a mandatory process, but it wouldn’t be of a binding nature on the executive. This was subsequently
overruled in the Second Judges Case since the consultation was made mandatory. The sub-argument of accountability was mentioned with respect to executive having an upper hand over the judiciary. The author believes that the statute has been misconstrued in the garb of overreach of judicial power and in the absence of any ambiguity, a plain reading of the article does not suggest anything else than a mere consultation.

Another major argument that emanated from the idea of the consultation was that primacy is accorded to the opinion of the Chief Justice of India in the consultative process. This argument does not stand when we refer to the Constitutional Assembly Debate where primacy to the opinion of CJI was openly rejected. The idea of primacy was rejected in the First Judges Case due to plain statutory interpretation, but was overruled in the Second Judges Case where it was opined that the opinion of the Chief Justice should be a cumulative opinion of all the concerned functionaries, plus the argument of primacy stands on the fact that the CJI is the highest functionary. The author believes that this argument is in continuation to the first argument, insofar as judicial overreach has soiled its true meaning. Besides, there is ambiguity regarding the process of appointment of judges of High Courts where CJI is still accorded primacy in case of disputes.

The argument of Independence of Judiciary has been employed to support the first two arguments, insofar as it has been considered as a part of the basic structure of the constitution. By providing a political background to the First Judges Case, the shift in paradigms of the appointment process has been highlighted. Under the gamut of doctrine of independence, executive’s role was intensely limited. The NJAC was scrapped under the same doctrine, due to the impervious role of the “eminent persons” in the Commission. The tenet of including primacy to the judiciary has also been unsuccessfully attempted to be included in the basic structure doctrine. Finally, the very idea of independence of judiciary is analyzed with respect to the role of the Bar.

The second part of the paper is primarily aimed at picking the best arguments from the ones discussed in part one so as to build upon a judiciary that is inclusive of all the opinions and truly represents the values enshrined in the constitution. This is also divided into three parts, which include provisions that might be; (i) retained, (ii) amended and (iii) introduced. In summation of the entire paper, a very basic model has been envisaged which, according to the author, encompasses the best possible perspectives and is the ideal model that can accommodate the aspiration of both the executive as well as the judiciary.

Part – I
Model of Appointment

Article 124 of the constitution dictates that, “Every Judge of the Supreme Court shall be appointed by the President... after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary... in the case of appointment of a Judge other than the Chief Justice, the
Chief Justice of India shall always be consulted”

The word consultation was first explained in the case of Union Of India vs Sankal Chand Himatlal Sheth where the judges opined on its meaning to say that the consultation should be full and effective rather than being unproductive and dull. However, they were of the opinion that the executive was not bound by the opinion rendered after effective consultation.

In the First Judges Case, i.e. S. P. Gupta v Union of India, the judges reiterated the meaning of the word “consultation” thus explained and opined that it is compulsory but final power rests with the executive. They reasoned that this does not and should not end up making the executive supreme, but should be considered as a due deliberation with functionaries who are ex-hypothesi acclaimed to render correct advice in terms of the candidates. The President necessarily has to give due weight to the opinions rendered by the judges, and if he departs from them, he should have cogent reasons to do so.

The doctrine of judicial primacy, which accords a binding nature to the advice so rendered was also discussed in this case and an interesting argument was raised which postulated that the doctrine fails when we consider the appointment process to the office of CJI. Under article 124, the President consults any judge that he wishes to consult and mandatorily consults the CJI while making appointments to any other post. But concerning appointment to the office of the CJI itself, the President need not mandatorily consult any judicial office and is, in effect, exclusively bound by the aid and advice of his council of ministers. Thus, if the “doctrine of judicial primacy” fails at the office of the CJI itself, then it certainly cannot be enforced upon the rest of the offices.

The First Judges Case was subsequently overruled in Supreme Court Advocates-on-Record Association v Union of India, also referred to as the Second Judges Case. This was the landmark case that drastically eliminated the role of the executive in the process by introducing the collegium system, which was to include the CJI and two senior-most judges of the Supreme Court (later increased to CJI plus 4 senior-most judges). The majority judgment agreed with the argument that due weight needed to be given to the opinion of the judicial members, but they took the argument one step further by according it a binding nature because, since the consultation is made mandatory, it would be rendered as a futile exercise if it were not effective.

Ahmadi J. dissented by pointing out that while consultation might’ve been made mandatory to put a check on the abuse of power by the executive, the article does not suggest a complete exclusion of the executive from the process of judicial appointments by making the suggestions of the judiciary binding. If the constitution-makers deliberately didn’t employ the words ‘concurrence’ or ‘consent’ in the provision then the judiciary has no mandate

2258 Article 124, Constitution of India.
2259 Union Of India vs Sankal Chand Himatlal Sheth AIR 1977 SC 2328.
2260 S. P. Gupta v Union of India AIR 1982 SC 149.
2261 ibid 3 para 328
2262 ibid 3 para 1014
2263 Supreme Court Advocates-on-Record Association v Union of India, (1993) 4 Supreme Court Cases 441.
2265 SCAORA I, para 164.
The author agrees with this perspective as only after stretching the word “consultation” to its very limits can the enforcement factor be reasonably argued and there is no ambiguity in the provision so as to enable the judiciary to do so. Besides, a quick reference to the Constituent Assembly Debates would suggest that the constitution-makers wanted this to be a joint endeavor of both the organs so as to ensure a transparent and effective system and not a one-sided endeavor.

Also, the collegium system has no mention in neither the Constituent Assembly Debates nor the Constitution, meaning that such a system was never envisaged by the constitution-makers and is an innovation of the judiciary, by the judiciary and for the judiciary.

An argument surrounding accountability was also raised in this judgment, which discussed the much-pervasive view that since the executive is elected by the people, it is directly accountable to them and the judiciary, being appointed on the basis of seniority and merit, holds no apparent accountability to the people and thus, the appointment process should rest with the executive. But the judges opined, and aptly so, that the executive is rarely ever elected on the basis of its influence in the process of judicial appointments. Their election manifesto is rarely about this and it is also not something that could be openly debated in the legislature. The Supreme Court, however, is imminently responsible for the management of the courts, which are inseparably connected to the people, and it is also accountable and responsible to the Bar. The author agrees with this view that the executive often uses the defense of being ‘directly accountable’ to the people in order to gerrymander its interests insofar as the accountability of the judiciary is considered, which is seemingly quite remote.

The majority decision is the Second Judges Case was upheld and further condoned in the NJAC case, i.e., the Supreme Court Advocates-on-Record v Union of India which challenged the constitutionality of the National Judicial Appointment Commission Act, 2015 which was to establish a National Judicial Appointments Commission, which was to replace the collegium insofar as judicial appointments were concerned. It would have consisted of “the Chief Justice of India, two other senior judges of the Supreme Court, the Union Minister for Law and Justice and two eminent persons, who were to be nominated by the Prime Minister, the CJI and the Leader of the Opposition, provided that one of the eminent persons to be nominated shall belong to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women.”

The Commission was introduced as a bipartisan model in place of the collegium in order to counter the growing complaints of lack of transparency, accountability, and sycophancy within the cloistered collegium mode.

---

2266 SCAORA I, para 300.
2267 SCAORA I, para 454.
2268 Supreme Court Advocates-on-Record Ass. v Union Of India (2015) SCC OnLine SC 388.
2270 ibid 13.
The majority ruled against the Act and declared it unconstitutional. They emphasized the importance of the process of consultation by opining that it is actually a process of aid and advice. Since the primary intent of the constituent assembly was to keep the judiciary asunder of any political influence, the involvement of executive is by default rejected and the process is made out to be a primarily judicial function.\textsuperscript{2272}

However, the author believes that the appointment process can never be a truly judicial process because it’s done under the seal and warrant of the President, an executive functionary, and by the virtue of Article 74, the President is bound to act at the aid and advice of the Council of Ministers, which is binding in nature. But if we consider the function to be judicial or even quasi-judicial in nature, it would in effect mean that the President is not bound to act by any authority, which is not possible. Thus, the function constitutionally remains an executive function.\textsuperscript{2273}

Another argument put forth by Lokur J. was that the NJAC undermined the authority of the President in the appointment process.\textsuperscript{2274} The article clearly mandated a discretionary role being provided to his/her office, however, the NJAC completely removed his/her involvement from the process, which was not in line with the legal intent behind the statute. The author agrees with this view insofar as the role of the President has been quite abruptly been limited. However, that author believes that necessarily involving the office of the President is only important insofar as the end goal of effectively involving the executive in the process is achieved.

Finally, Chelameswar J. in his dissenting opinion stated that the nature of the collegium is such that it provides no avenue for accessibility to the public. The consensus is often achieved by unfair means, and sycophancy and lobbying play a major role in most appointments. This leads to a miscarriage of judiciary and all the values that the constitution stands for, as unworthy candidates get appointed to important posts.

The executive also makes the situation worse by practicing active silence in the matter of judicial appointments even after having avenues to question the process, if not play a role in it.\textsuperscript{2275}

Thus, the current model of appointments is intrinsically contested. It is borne out of views that are not really in par with the intent behind the statutes and there is a growing need for change in the same. Within the paradigm of consultation itself, there is another major argument surrounding the fact that whether primacy needs to be accorded to the onion of the CJI.

Primacy to the opinion of the CJI

The idea of judicial appointments was often debated in the constituent assembly, with a special focus on safeguarding the judiciary against the executive.\textsuperscript{2276} The house was effectively against providing any authority to the executive, however, it was divided on the exact method to be adopted for the same. The propositions raised included one where the President was to appoint the judges of the Supreme Court in concurrence with the views of the Chief Justice of India.

\textsuperscript{2272} NJAC Case, para 97.
\textsuperscript{2273} SP Gupta, para 709.
\textsuperscript{2274} NJAC Case, para 1030.
\textsuperscript{2275} NJAC Case, para 1144.
\textsuperscript{2276} Constituent Assembly Debates, 24th May 1949 (Vol. VIII).
Dr. B. R. Ambedkar explained how vesting veto powers in the institution of the CJI (considering how he was ultimately a being with failing and misgivings of a human) when it came to judicial appointments, would be to vest authority in him that other substantially authoritative offices, like that of the President or the Council of Ministers, were left in want of.\textsuperscript{2277} Thus, it is clear that the mandatory consultation might have been envisaged to be a much-needed check on the power of the executive, however, there was a clear intention of not providing any sort of veto or primacy to the office of the CJI.

The debate surrounding primacy being accorded to the opinion of the CJI arose first in First Judges Case and pertains primarily to article 217. The question was whether primacy could be accorded to the opinion of the Chief Justice of India when other constitutional functionaries were also to be consulted. The author believes that perhaps this doubt might have arisen because of the special way the articles (124 and 217) are worded. Due to the CJI, by virtue of the office, being mandatorily consulted in both the instances and also being the paterfamilias of the judiciary, a special position might be accorded to him simply because of the constitutional gravity of his position.

However, the judges in the First Judges Case resorted to the view that since the article is completely silent about this, a hierarchy of opinions does not exist and every functionary’s view is to be given equal weight. Primacy would necessarily mean that out of two authorities, one will always be preferred over another, but such is clearly not the wording of the case, and thus, cannot be the intent. In case a difference does arise, the CJI should then compile all the opinions and send them to the President for him to deliberate and decide.\textsuperscript{2278}

The Second Judges Case did accord primacy to the opinion of the CJI, but also mentioned that his/her view was to represent the view of the judiciary \textit{per se} and was to be formed after due consideration of opinions of all the functionaries involved. It should necessarily involve the feature of plurality for it to be truly consultative and effective in nature. The justification provided for primacy being meted out to the CJI is that this process of appointment is different from that one appointed for other functionaries, and since the CJI is the highest office in the judicial system, his opinions are bound to be provided primacy, not only principally, but also constitutionally.\textsuperscript{2279}

Chelameswar J. opined against this tenet of the Second Judges Case, in the NJAC case by saying that primacy to the opinion of the CJI is not what the constitution dictates, but it is the non-investiture of arbitrary authority in neither the judiciary nor the executive.

The author agrees with this contention insofar as, it accords primacy to an office only on the basis of its virtue of being the senior-most office. In cases pertaining to the appointment of high court judges, the CJI is still accorded more weight than say, the Chief Justice of the concerned high court. The CJI may not have any primary resource to form his opinion, and the Chief Justice of the High Court may have had the

\begin{footnotes}
\item[2277] ibid 20.
\item[2278] SP Gupta, para 719.
\item[2279] SCAORA I, para 181.
\end{footnotes}
first-hand experience with the candidate. This problem especially arises in the collegium system when a candidate from a particular region is to be considered and the collegium has no cogent basis to determine the merit of the candidature. Further, since the function of appointments is primarily an executive function, so it should be left to the executive to collect a multiplicity of opinions and then decide on the appointees. The executive usually does not stray from the majority view of the consultees and even if it does, due to political consideration, it can always be checked by judiciary.

Thus there is no cogent reason, neither in the Articles nor in the CAD to prove that the opinion of the CJI needs to be accorded primacy besides it being his prerogative by virtue of his office.

Independence of Judiciary vis a vis Primacy of Judiciary

The author believes, however, that these tenets of the judiciary have turned into a tool to constitutionally justify its nature of dogma and detrimental evolution into a super-executive of sorts.

The idea of political influence came to light after Indira Gandhi appointed Justice A. N. Ray as the CJI, superseding 3 senior judges in line. This was against the age-old established practice of appointing CJI based on seniority. What was contended, however, was the fact that he was one of the minority judges, who had opined in favor of the Government in the Bharti Case.2280 This supposed malpractice was repeated when Justice Beg, who opined in favor of the Government in the ADM Jabalpur case,2281 was appointed superseding Justice Khanna, who opined against the case of the Government.2282

These were indeed difficult political times and it is in this light that we need to consider the First Judges Case. It was delivered in the early 1980s, after the Indira Gandhi Government succeeded in coming back to power with an astounding majority, after the debacle of the Emergency, and the judge ruled almost entirely in favor of the executive. Perhaps the ruling was affected by the prevailing political circumstances, the author is not sure of that. But the effect of these impugned decisions was that in the Second Judges Case, the dialogue shifted almost entirely in the favor of the judiciary. The system had basically shifted from one end of extreme to another, one with pervasive political interference to one that was completely asunder from any political inputs.2283

In the Second Judges Case, it was opined that appointment could not be left to the prerogative of the executive, not only due to fear of political interference but also because the state is the biggest litigant in the judicial system and it would not be fair to have judges of interest judging their cases. Another factor could be that judges, in the aspiration of being promoted, could deliberately adjudicate in favor of the state. This is why, the court believed, the appointment process should include consultation of a binding nature so that the independence of the judiciary can be safeguarded.

But it could alternatively be said that out of all the functions, regarding the judiciary, that the constitution envisaged, this was perhaps the only one which allowed for political involvement. All the other processes (salaries, removal, etc.) have airtight provisions to protect the independence of the judiciary from the whims and fancies of the executive, but it was only in the case of judicial appointments that the constitution deliberately allowed for only a mandatory consultation with the CJI and such consultation with other judges as the executive deems necessary. This is proof enough that the legal intent was to provisionally allow for executive involvement in the process. Besides, there is no other reason to believe that it undermines the independence of the judiciary.

The introduction of the collegium system and the belittling of executive’s role is thus, the judiciary acting in the garb of protecting its own interests and over-interpreting a provision that has been provided in a plain and simple language, to sequester itself from other organs, under the gamut of judicial independence, especially when such a system was never even mentioned in the constituent assembly or the constitution in the first place.

The NJAC Act challenged this system, on grounds of opacity and lack of efficiency and argued that the introduction of representatives from executive as well as the civil society would bring in the much-needed transparency while ensuring that the judiciary was adequately represented. This Act was challenged mainly on the basis of introduction of the two “eminent persons” in the commission who would, together, have the authority to veto the unanimous decision of the judiciary. Besides, there were no criteria established for the appointment of such persons and the commission itself was also not inclusive of the representatives of the marginalized segments of the society.

Thus, again, it was a sudden shift from the prerogative of judiciary, to that of the executive, and thence, a fatal blow to its independent nature. This is perhaps one of the main reasons why the Act was challenged and struck down before it even had a chance to be implemented.

Moreover, the tenet of primacy to the opinion of the judiciary was considered to be a part of the basic structure, based on the need for independence. However, since the concept of the ‘doctrine of basic structure’ is in itself so ambiguous and contested, there is a dearth of enough reasons so as to prove why primacy is to be a part of the

---

2284 SCAORA I, para 447.
2285 Arun T p 112-113.
2286 Dr. Anurag Deep and Shambhavi Mishra, ‘Judicial Appointments in India and the NJAC

2287 NJAC Case, para 214.

www.supremoamicus.org
basic structure. There is a lack of normative reasoning to determine what forms part of the basic structure and what doesn’t and it is something that is usually left to the discretion of the bench that adjudicates the matter. However, in this case, the problem arises when the judiciary is deciding a case that grossly affects the judiciary itself and thus has a major conflict of interest in that regard. 

Regardless, Justice Khehar and Justice Goel opined that primacy was part of the basic structure, but since only two out of five judges opined so, it does not qualify to be regarded as the binding ratio of the judgment. The only reason provided was that it is integral to securing independence of the judiciary and that this is a practice that has been an established practice which is being followed for a long time.

Both of these reasons rest on unsound grounds as the mere fact that a provision helps reaffirm a practice that is a part of the basic structure, does not automatically qualify the provision per se to be a part of the basic structure. Besides, just because a particular practice has been long established, it does not provide reasons enough to abide by it, especially in times as dire as those we find ourselves in.

Constitutional aspect apart, another perspective being shed on the independent nature of the judiciary, with respect to the executive, is in the light of the Bar. For every facet that the judges affect to stay independent from the executive, they find themselves depending on the Bar to realize it. It is considered to be the best judge of the judges and the judiciary often finds itself at the disposal of the Bar for matters that are important to its own existence. In that sense, the myth of strong and independent judiciary fails when we notice that the judiciary is intrinsically dependent on political and extra-political factors to survive.

Thus, the Indian judicial system finds itself back to square one, without having successfully resolved the problems that have been plaguing the system since the last few decades. We need to remember, however, that the collegium system was adopted as a response to a system that was inherently political in nature, something that poses a great threat to the values enshrined in the constitution. The collegium system did manage to eradicate the political interference, but problems only emerged because of the character of the approach as well as the judiciary itself, which vouched for complete independence from all extraneous factors.

Moreover, besides the nature and working of the collegium system, there exist a multitude of other problems, like documents related to the discussions of the collegium, the disclosure of which may lead to the breach of privacy of candidates. This issue has been substantially discussed and adjudicated recently in the case of Central Public Information Officer of SC v Subhash Chandra Agrawal, where the court

---

2288 Deep and Mishra (n 29).
2290 Ibid.
adjudicated that the documents that pertained to discussion related to the appointments of judges shall be covered under the RTI Act to ensure transparency. This is a landmark judgment insofar as transparency in appointments is concerned.

However, the trends have changed as even the judges themselves have started to realize that the collegium system is anything but a solution to the earlier model of an executive-based approach. A reform process needs to be initiated, which would allow for space for expression from both the organs while eradicating any extraneous influences that might hinder the process. Currently, the judiciary and the executive are in a process to figure out amendments to the Memorandum of Procedure which would allow for such changes to be effected.

After analyzing the aforementioned points, the position of the two functionaries and the various tussles that they’ve been through, the author has identified a few contentions. There are a few features that can be retained from the current system, a few that may be changed, and some additional institutional changes that might be employed to amend the system for the better.

Part – II

To Retain

The constituent assembly might have only envisaged a mere consultation with the CJI, but the gross abuse of such a provision by the executive goes a long way to show that it is not safe to leave the appointment process entirely in the hands of political actors as they might use it to supersede the authority of rule of law. Thus, more weight and greater gravity need to be provided to the CJI as well as other senior-most judges (as the distinction between the two is only based on seniority and not on merit) without making them binding in character.

The main contention against the NJAC Act surrounded the “eminent persons”. The author agrees that the ill-defined nature of their offices as well as veto power being accorded to them would have not only been inimical to the independent stature of the judiciary, but may have provided a way of undermining the constitution and subservience of the law by the hands of people who are neither accountable to the courts, nor the citizens.

The course of ensuring transparency which has been adopted through the recent judgment is going to go a long way in ensuring accountability to the people as well as incentivizing the concerned functionaries to develop norms and regulations relating to the appointment of judges.

To Amend

Both of the executive, as well as the judiciary, needs to be provided substantial space in the system of appointments, however, the final say needs to rest with the executive, instead of the judiciary.

The collegium was never mentioned in any of the constituent assembly debates and is an approach that is wholly created by the judiciary. It needs to be replaced by an

\[2293\text{https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-}\]

approach that not only draws its legitimacy from the constitution but also finds a place in it.

To Introduce

The lack of accountability and complaint mechanisms can be countered by introducing a complaint mechanism that can help address the various internal complaints since the proceedings of the collegium cannot be discussed in the legislature.

Thus, there may be a system that comprises representation from both the executive as well as the judiciary. The President as well as the CJI may be ex-officio members of the same, this will also ensure participation of the President since his role was drastically limited in the NJAC Act. There may be a majority of judicial members, perhaps 2/3rd so that the judiciary’s cardinal role is not limited. The executive might appoint eminent jurists from the legal profession, with reservation for the various ill-represented categories of the body politic, especially women, since they often do not find equitable representation in the collegium.

The proceedings might be made publicly available while ensuring that the privacy of the candidates is not breached. Concomitantly developing norms for ensuring the same as well as selecting candidates might be the first step in ensuring participation of both the functionaries. Certain criteria for selecting the eminent persons, pertaining to merit or fields of interest, might be developed prior to the Act so that it can be checked as well as implemented effectively. The role of the eminent persons so elected may be either limited to consultation, or participation in the proceedings, without making their opinions binding on any of the systems so formed. This would ensure that the independent character of the judiciary is not undermined. The decisions of such a commission would be accommodative of the opinions of the executive also and since both the functionaries would be working together, political influence might be limited since the discussions would be under the direct scrutiny of the public. The judiciary, having a majority say, would not feel undermined. The final appointment would still rest with the executive, but since the recommendation of the body would be after due deliberation and discussion, the executive would be bound by its decisions.

If it does choose to appoint someone other than the recommended person, it would be answerable to the body so formed. The introduction of the complaint mechanism could be one step forward in making the judiciary accountable to not only the judiciary but to the society at large.

Conclusion

The author has attempted to highlight the various themes that emerged when the process of judicial appointments was debated and discussed, both inside as well as outside the court, throughout the years. The model of appointment, i.e. the collegium, which primarily revolved around the word ‘consultation’ was analyzed through the four Judges Cases so as to understand how it has evolved, both constitutionally as well as politically. Existing problems, as well as future aspiration, were kept in mind while following the arguments, and it was found that the problem lies in the closeted nature of the collegium and so, solutions were developed while ensuring that the approach allows for the expression of interests of both the executive as well as the judiciary.
The issue of primacy to be accorded to the opinion of the CJI is resolved through referring to the statute and the CAD in a plain and lucid way, which postulates that there is no cogent reason for effecting the same. The issue of independence of judiciary with respect to the basic structure doctrine was affirmed and accepted, with the addendum that primacy in judicial appointments was not a cardinal factor for ensuring independence. Considering the various sub-points and contentions raised in the aforementioned discourse, the author chose the most reasonable points from all the sources discussed and formulated a very basic model, which might be given effect to, in order to realize the goals and aspirations of both the parties as well as the constitution.

The author believes that “in times when the political branches cannot be trusted, neither can the judiciary”. It is only by accommodating and trusting each other, can the two functionaries further the goals and aspirations of the constitution.

There is no perfect approach to the process of judicial appointments. It is only after a relay of continuous contesting and amending that the process can be emulated, and even then, it’s only effective insofar as it fits the current political scenario.

*****
POST BREXIT AN ENVIRONMENTAL RISK ANALYSIS

By Sarthak Sharma
From Army Institute of Law, Mohali

I. INTRODUCTION
What is Brexit?
‘We have our own dream and our own task. We are with Europe but not of it. We are linked but not combined. We are interested and associated but not absorbed. If Britain must choose between Europe and the open sea, she must always choose the open sea.’

-Winston Churchill

The Boris Johnson government has finally been able to pave a feasible path for the exit of Britain from the European Union, after some tough battles and times where everyone thought that a no Brexit deal was the most probable option. Before we delve into the crux of the matter, let’s get a good grasp about the concept of the term ‘Brexit’.

It was on 23rd of June, 2016, that, through a referendum, the United Kingdom (UK) decided that they would be leaving and abandoning their alliance with the European Union (EU), leading to the term, ‘Brexit’ or ‘British exit’. This caused turmoil and a torrent of consequences of a wide spectrum.

The British pound dropped down to its lowest in 30 years when compared to the dollar. Prime Minister David Cameron, who had called for the referendum, resigned his office and Theresa May, Home Secretary, took his place instead, further being replaced by Boris Johnson. The decision to exit was voted for, according to the statistics provided by the Election Commission, by 51.9 percent of the ballot, which is 17.4 million votes approximately. The process of leaving the EU formally began on 29th March 2017, when Theresa May triggered Article 50 of the Lisbon Treaty. UK was given a time period of 2 years to prepare (subject to further extensions as we all saw), as is prescribed under Article 50 and the negotiation talks began on 19th June 2017. The two

2294. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council in decisions concerning it.
5. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

main controversies or hurdles were that Britain’s constitution is unwritten and that no other country has ever left the EU by employing the provisions of the said Article 50.

There seemed to be a deadlock when communication started between the two parties due to opposing interests. While Britain was focusing on the terms of its withdrawal alongside the terms of its post-Brexit relationship with Europe, the EU just wanted to hurry up and get the divorce proceedings done with and winded up. On 8th December 2017, however, the two sides came to a mutual understanding and released a joint statement describing an "agreement in principle" regarding the most complicated separation issues that need to be dealt with to pave the way for talks about a future trade relationship to begin.

The talks mainly consisted of four issues, namely,

a) Formation of the ‘Brexit Bill’ to conclude a financial settlement between both the parties to decide how much the UK owes the EU.

b) The consequences of reinstating border controls on the Northern Irish Border.

c) What happens to the UK citizens residing elsewhere in EU and the EU citizens residing in the UK?

d) Scotland claimed this process to be “democratically unacceptable” as they are being forced to leave the EU even though they had opted to remain.

Two terms that come into play in the negotiations are ‘soft’ Brexit and ‘hard’ Brexit. These two terms have no particular definition and are unofficial terms mainly used by the media; however they simply refer to the closeness of the UK’s relationship with the EU post-Brexit and their prospective relationship. Hard Brexit means cutting off of all ties by the UK and refusing to co-operate on issues like free border movement of people, whereas, soft Brexit implies more cordial accords and amicable future behavior, like participating in the single market.

With all this, the scheduled day and time for the official exit of Britain from the EU was 11 pm UTC, 29th March 20192296, which we all know did not happen. Even though Brexit is talked about all around only in a political and economic sense, we rarely discuss the implications this will have on other fields, such as the environment, which will be monumentally affected by this decision. All over the internet, the only issues that are being discussed are political and economic and people are forgetting about how this decision will impact the environment and mainly its protection and conservation.

In October 2016, Theresa May promised a "Great Repeal Bill", which would repeal the European Communities Act 1972 and restate in UK law all enactments previously in force under EU law. Subsequently renamed the European Union (Withdrawal) Bill, it was introduced to the House of Commons on 13 July 2017.

So with the above in mind, where will this leave the environmental laws of the UK?

II. PRE-BREXIT EU ENVIRONMENTAL REGULATIONS

Let us understand what exactly the damage that will be done is and what will be its magnitude by placing the existing EU environmental regulations, which even

---

2296 A time of 2 years is provided from the date of initiation of Article 50.
Britain fell under, under a microscope. This is necessary to understand what environmental position Britain will be in after officially leaving the EU and this will also help us compare Britain’s environmental regulations as under the EU and what they propose will be their new stand on the matter and if their new policies and legislations will be as effective, more effective or less effective, comparatively.

The European Union (EU) is considered by some to have the most extensive environmental laws of any international organization and to be of the highest standards. Its environmental policies are significantly intertwined with other international and national environmental policies as well. The environmental legislation of the European Union also has significant effects on those of its member states and the UK is no exception. About 80 percent of the environmental laws and regulation policies of the UK come from the EU. So when UK finally leaves the EU, there will be a monumental transformation in UK’s environmental policies.

The Wild Birds Directive was one of the first pieces of purely environmental legislation at a European level and was adopted in 1979 under Article 235 EEC. As the EU evolved, and as awareness of global threats to the environment became more and more acute, the EU competence in respect of environmental policy expanded. With the coming into force of the Single European Act in 1987 Treaty powers explicitly authorizing environmental action at EU level were established for the first time, and the scope of these powers (now embodied in Title XX of the Treaty on the Functioning of the European Union or TFEU) has not changed much since that time. Even after 1987, however, most of the legislations that were ‘environmental’ in character continued to be made under the same standard Single Market legal base. Thus the first EU legislation on energy efficiency labeling of household appliances, introduced in 1992, used an Article 100 EEC legal base. More recently, the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation, which regulates chemical substances in the EU, and the Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment, have also used the standard Single Market legal base. Within Title XX, Article 191 of the Treaty on the Functioning of the EU (TFEU), as amended over the years, sets out the EU’s objectives for environment policy: “Union policy on the environment shall contribute to pursuit of the following objectives:

2297 Article 235- If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.


2301 Ibid.

preserving, protecting and improving the quality of the environment,

• protecting human health,

• prudent and rational utilization of natural resources,

• promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.** since its adoption in 1987 Title XX has provided the legal base for a range of ‘purely’ environmental legislation, including the Habitats Directive of 1992,** which provided for the conservation of rare endemic animal and plant species, and the Water Framework Directive of 2000,** which established a framework for protecting European rivers, lakes, and coastal waters, among others. A Title XX legal base also underpinned the introduction of the first EU Emissions Trading Scheme, a key component of the EU’s policy on combating climate change and reducing greenhouse gas emissions.** Professor Richard Macrory, Professor of Environmental Law at University College London, said that in Kramer’s EU Environmental Law (2011) it has been listed that 111 Regulations, 256 Directives and 136 Decisions that were in place by 2010.

EU environment policy rests on the principles of precaution, prevention and rectifying pollution at source, and on the ‘polluter pays’ principle. The precautionary principle is a risk management tool that may be invoked when there is scientific uncertainty about a suspected risk to human health or to the environment emanating from a certain action or policy. For instance, should doubts arise about the potentially harmful effects of a product, and should — following an objective scientific evaluation — uncertainty persist, instructions may be given to stop the distribution of the product or to remove it from the market. Such measures must be non-discriminatory and proportionate, and must be reviewed once more scientific information is available.

The ‘polluter pays’ principle is implemented by the Environmental Liability Directive, which aims to prevent or otherwise remedy environmental damage to protected species or to natural habitats, water and soil. Operators of certain occupational activities such as the transport of dangerous substances, or of activities that imply discharge into waters, have to take preventive measures in case of an imminent threat to the environment. If damage has already occurred, they are obliged to take the appropriate measures to remedy it and pay for the costs. The scope of the directive has been broadened three times to include the management of extractive waste, the operation of geological storage sites, and the safety of offshore oil and gas operations respectively.

As has been already mentioned, EU environmental laws have come a long way.

---


In addition, there is a range of Statutory Instruments implementing legislation concerning particular Directives. Information on these is available from the Department of Communications, Climate Action and Environment. We also have the Common Fisheries Policy (CFP), Common Agriculture Policy (CAP), The Environment Protection Agency and the European Environment Agency.

EU law and legislations are enforced by the European Commission, which acts as the ‘Guardian of the Treaties’, and is overseen by the Court of Justice of the European Union (CJEU), which has the power to levy fines on Member States that are found to be in breach of the law.

III. HOW HAS UK BENEFITED FROM EU ENVIRONMENTAL LAWS TILL NOW?

While far from perfect, EU membership has benefited the UK’s nature and environment significantly. In the 1970’s the UK was known as the ‘dirty man of Europe’. All the pollution from the UK coal-fired power stations was causing acid rain which resulted in forests all across Europe withering. EU took an action on air quality to put an end to this. As a result of, Sulphur dioxide emissions dropped by 94% by 2011. This prevented an approximately 46,000 premature deaths between the time period of 1990 and 2001. Some of the UK’s best loved nature and tourist sites are protected by the EU — places like Cannock Chase, Flamborough Head, Dartmoor and Snowdonia. Before European Nature Directives kicked in, the UK was losing about 15% of their protected sites a year, again due to EU intervention; it’s down to 1%. In the 1970’s the UK pumped out untreated sewage straight into the sea, but EU laws, and the threat of fines, forced them to clean up their act and consequently now, over 90% of the UK beaches are considered clean enough to bathe in.

EU nature and protection of wildlife laws have helped the recovery of a lot of animal species which were endangered or on the verge of being so or of ceasing to exist. For example, EU laws have helped the recovery of the bittern, a rare short-necked heron, which almost disappeared because of drastic loss of its reedbed habitat and other pressures. The UK has already lost more than a dozen types of bee, and another 35 kinds of bees are at a risk of being extinct. But several precious bee species are found in EU-protected places such as Lewes Downs in Sussex, and the saltmarshes of the east coast, which will help in their survival. Before the EU laws were adopted by the UK, there were just 3 protected marine areas around the British coastline. However, now, with the advent of EU regulations, there are over 100 Natura 2000 sites in UK seas. EU nature laws protect important fish stocks, like the Atlantic salmon, as well as the cold-water reefs.

https://friendsoftheearth.uk/brexit/EU-nature-laws-we-still-need-them.
The UK is expected to, as per EU regulations, generate 30 per cent of its electricity and 12% of its heating energy from renewable sources. In addition to that, it is also bound by a sub-target for transport, requiring 10% to come also from renewable sources. The EU has also planned on cutting the level of carbon emission by 40% till 2030. The UK, like other member states of the EU, must hit a target of recycling 50% of its household waste by 2020. The EU is also considering imposing targets requiring the UK, and most other EU nations as well, to recycle 65% of their waste by 2030.

On top of this, the EU also takes out various directives to help achieve optimal environmental protection and efficiency in doing the same. Directives are a form of European legislation that set out a target to be achieved by all of the EU member states. Each country then comes up with their own domestic laws in order to meet these directives. Directives don’t involve any implementing measures. They can also be called guidelines that the countries should follow. Following are some of the EU directives:

- The Water Framework Directive
  Protecting rivers, lakes, groundwater, estuaries and coastal waters, taking action on water quality and pollution levels, to provide a good ecological status to all wetlands.

- The Urban Wastewater Treatment Directive
  Directly address the cleanup of urban waste-water treatment like pollution from industrial chemicals.

- The Birds Directive
  To protect all wild birds across the EU, focusing mainly on endangered species, migratory species and also on special protection areas.

- The Habitats Directive
  The Birds Directive and the Habitats Directive form the basis for Europe’s conservation policy and ‘Nature Directives’ when combined together. Under special areas of conservation protection is provided to over 1000 endangered species and north of 200 habitat types.

- The Air Quality Framework Directive
  Keeping a check on air pollutants level and quality, specifically the emission of sulphur dioxide from the UK.

- The Environmental Impact Assessment Directive
  This assessment is necessary to be undertaken for any major developments or developments proposed for sensitive locations.

Now that we have a grasp on the present situation, the next section of the paper will talk about the implications that UK will face due to Brexit and how are they planning on coping with it.

IV. IS THE GREEN BREXIT PROMISED BY THE GOVERNMENT FARFETCHED?

Even though as has already been mentioned before, that not much due importance was given to the environmental aspect of Brexit, a lot of concerned citizens and foundations like ‘The Friends of the Earth’ came forward on a public platform and started rattling government cages in order to find out where will Brexit leave the environmental regulations of the UK. This in turn was answered by a lot of public statements made by government officials securing the trust of the public that the negotiators had the good of the environment in mind and that the same will not be jeopardized. However, the same has still yet to be proved because of the mountain load of consequences that will
come knocking on UK’s door. This chapter will look into the problems that UK will face, environmentally speaking and what the government is, or has planned on doing to tackle the same.

A coalition of various leading environmental groups in the UK says that there is a significant risk that British environmental protections will be reduced after Brexit, despite the government’s positive rhetoric that they will take full measures towards securing the environment. ‘Greener UK’, which consists of 13 campaign groups including WWF, National Trust, RSPB, Friends of the Earth, Green Alliance and the Wildlife Trusts, etc, says there are serious concerns that the government will not cooperate with the European Union after Brexit on environmental issues because they believe that there may be a lack of willpower on behalf of the government to ensure high standards across the UK.

Even the United Nations (UN) got involved in this fiasco after the proposals to protect the climate by the government after Brexit were dismissed as ‘toothless’ by green campaigners. The UN has warned the British government that the reputation of UK is at stake over plans that would significantly weaken environmental protections. Erik Solheim, the Executive Director of the UN’s environmental programme, called on the Environment Secretary of the UK, Michael Gove, to honour their promise of a Green Brexit. Even if they don’t however, under the new post-Brexit plans, the green watchdog would not have the power to take the government to court over breaches of environmental breaches.

The UN is also involved in this matter as a UN-backed committee has confirmed it is considering a complaint from Friends of the Earth that the government’s EU withdrawal bill breached the Aarhus convention, which requires public consultation on any new environmental law. Most of the UK’s environmental laws derive from or interact with EU law, and Friends of the Earth (FoE) has raised concerns that the bill gives ministers “unique and wide-ranging powers” to amend or delete EU-derived environmental law without public consultation, if ministers consider it appropriate. The government may have breached the convention in two ways, Friends of the Earth says: by failing to set out a consistent legal framework to allow public participation in the preparation of new environmental legislation (Article 3), and by not giving the public an opportunity to comment on the bill before it was presented to parliament to be made into law (Article 8). Friends of the Earth says the government failed to consult with the public, and by calling a snap election, any possible engagement with the bill’s white paper was prevented.

Even Theresa May’s 25 year environmental plan was, though welcomed, but was also heavily criticized. Many loopholes and non-proprietaries were pointed out along with the fact that the government is trying to arm themselves with an irrationally long period of 25 years, which aims to not only conserve, but also improve the environment, but no clauses to support the same. It has been stated to be

---


2310 Ibid.
“fundamentally flawed” and “a long way off”. Even in the new drawn out plan, not many of the pre-existing EU’s environmental regulations have been ratified by the British government. After Brexit, UK will no longer be a party to the EU legislations and treaties and if they want the same standard, they will have to incorporate the same into their domestic law, which they have failed to do. They have only ratified 26 international environment agreements which the EU wasn’t part of and have not yet clarified which all EU only regulations they intend on keeping.

“The government set high expectations with promises of a world-leading environmental watchdog and enhanced environmental standards. Yet the consultation released today proposes to give the environment and countryside less protection after Brexit than exists now,” said Shaun Spiers, chair of Greener UK. She continued to say that, “There is no commitment to give the proposed new watchdog power to initiate legal action, nor is there any commitment to enshrine vital environmental principles, such as the precautionary principle and the polluter pays principle, in law. This is hugely disappointing and suggests that some ministers do not want to be held to account on laws that protect our beaches, habitats and air quality.”

V. MAIN AREAS OF CONCERN

UK has always been a little lax when it comes to taking care of the environment.

They believed in cure is better than prevention. However under the umbrella of EU’s stringent environmental laws that all changed. Now that Brexit is taking place the pre-existing problems and even new ones will start resurfacing because the government is not focused on protecting the environment and the 25 year plan they have put forward just doesn’t cut it.

- **Pollution**
  One of the biggest problems that UK had to face was that of air pollution. UK, as has been mentioned before as well, has the biggest emission of Sulphur dioxide and nitrogen dioxide gas. Under the EU regulations however, there came to be a change due to constant checks by the EU, however UK had breached the emission levels multiple times and the EU has had to warn them. The post Brexit environmental policy is barely regarded as a preventive measure in this regard and as history repeats itself, UK might go back to becoming the dirty man of Europe.

- **Waste**
  As a consequence of Waste Frame Directive the EU had a strong hold on enforcing stricter waste collection and disposal facilities while creating a circular economy and it had a remarkable effect on the British. This area is particularly vulnerable to the consequences of Brexit, as there is a national shortage of facilities for processing refuse-derived fuel and recyclates, which has resulted in exporting waste to other member states.

---

2311 Josh Gabbatiss, Government’s post-Brexit environment laws will not enshrine EU principle that makes business pay for pollution they cause (5th April, 2018, 4:55PM), https://www.independent.co.uk/news/uk/politics/

2312 Ibid

2313 Alex Brown, Brexit’s Impact on The UK’s Environmental, Health and Safety Regulations (25th March, 2020, 5:43PM), https://www.red-on-
Euratom, it will have to replicate the alliance’s safeguarding arrangement with the International Atomic Energy Agency immediately to avoid serious consequences of nuclear waste management.

- **Energy**
  
  All business undertakings in the UK are bound to follow the EU’s Energy Savings Opportunity Scheme Regulations 2014, which are primary regulations to lower energy consumption. It requires businesses to:

  1. Calculate total energy consumption
  2. Identify areas of significant energy consumption
  3. Appoint a lead assessor
  4. Notify the applicable environmental agency
  5. Keep records

  Once UK is out of the EU, UK might find itself stuck in a funny position while being pressured from two sides. On one hand, UK businessmen might try to coerce and pressurize the government to make these regulations more lenient, whereas on the other hand, it will be difficult to deviate too far from the regulations, as any new UK regulation must comply with the European standards in order to keep their trading relationship alive.

  The EU is in the advanced stages of establishing a single market for gas and electricity, aimed at ensuring low-cost and reliable supply for consumers across the EU by enabling supply from other countries. EU legislation in the field regulates access to this single market and includes safeguards against distortion of the energy market from a competitive perspective as well as protection measures for energy consumers.\(^{231}\)

  Though EU membership is not a precondition to access the unique single energy market of the EU, the UK would not be permitted to join the market if it does not meet the high standards prevalent in the EU. As the EU lays emphasis on low and zero carbon initiatives, the UK would be required and expected to keep up with the EU or face being cut off from the European market, which would be a risk from both the perspective of energy security and as well as for the business of energy suppliers in UK.

  The EU is also very strict when it comes to the reliability on renewable energy resources. This is one point where the UK has not seen eye to eye with the EU and will most probably will change their renewable energy policy for the worse.

- **Climate Change**
  
  The UK has its own, legally binding and ambitious commitments towards reducing carbon emissions via the Climate Change Act 2008. Schemes to reduce carbon emissions, such as the EU Emissions Trading Scheme, would be greatly impacted by Brexit. UK would be free to join a newly created national emissions trading scheme with the wider EU scheme, though without that link, a smaller UK national system would face similar difficulties to Switzerland in trading and pricing emissions efficiently. Negotiating access to the EU ETS is likely to take several years, based on Switzerland’s experience. The Government may need to introduce new requirements, schemes or incentives for emissions reduction in order to stay on track to meet its reduction

\(^{231}\)Brexit: the implications for environmental law (12th April, 2020, 3:20PM),

targets. The UK is the biggest single recipient of climate-related investment via the European Investment Bank’s Climate Awareness Bonds, with eligible projects including wind, hydro, solar and geothermal energy production, sustainable transport and energy efficiency projects. The London Array Offshore Wind farm in the Thames Estuary received €244m under the initiative. Over the next five years, the EIB proposes to lend €100bn. If the UK leaves the EU, it will not automatically become ineligible to receive such loans, but the bank has said that non-EU countries and non-shareholders cannot expect the same benefits. Countries outside the EU have received only 12% of total available funds since the initiative was launched in 2007. Considering that the UK has since that time received 24% of available funds, a Brexit could have a real impact on green investment in the UK. It is not expected, however, that funds paid before a Brexit would have to be repaid.2315

The current UK government lowered the priority of climate change. This is a significant change from previous British governments and also gone back on what they had said in the 2105 Paris Agreement. The responsibilities of the “Department for Energy and Climate Change” have been shoved off to “Department for Business, Energy and Industrial Strategy”, to indicate the supposed cross-cutting rather than stand-alone nature of energy and climate policy.

- **Product Regulation**
  The EU regulates the safety and performance of products from the perspectives of taking into consideration various aspects like energy efficiency, hazardous substance content, etc, to keep a check on the environmental impact of the products. The EU has drafted a package of measures to improve resource efficiency and lessen the impact of products on the environment. The UK in this case can choose to follow or not to follow these set standards. Any sort of deregulation or deviation from the existing EU law, by the UK government, would disrupt trade to the EU market and the same could result in increased compliance costs in duplicating product testing and certification efforts.

- **Great Repeal Bill**
  The purpose of the Great Repeal Bill is two fold; firstly, its purpose is to repeal the European Communities Act, which enabled UK to become a part of the EU in the first place. Secondly, this bill will incorporate EU laws into domestic laws, wherever deemed necessary and will consequently end the supremacy of EU laws in UK. A White Paper published on the 30th March 2017, states that following Brexit, the “whole body” of EU environmental law will be carried over into UK law. So most of the EU directives will still remain in effect. While this is good news for the UK’s environment, some organisations are calling for further protection for our nature and species. It has been warned that while the Great Repeal Bill provides a step in the right direction, on its own it is not enough. Environmental charities believe that the government should also commit to bringing over the precautionary principles that underpin our high environmental and wildlife standards.2316 Since most of these laws were enforceable by EU institutions, it will prove

---

2315Ibid.

www.supremoamicus.org
813
to be more beneficial if these laws are replaced after leaving the EU, and new domestic bodies that are dedicated to ensuring the laws and rules that protect nature are upheld should be put in force.

VI. CONCLUSION: WHAT LIES AHEAD WITH THE ADVENT OF ONE BORIS JOHNSON?

With UK having officially left EU on 1st February, 2020, 4:30am IST, the biggest concern of all is that the Withdrawal Agreement Act does not contain a non-regression clause, which means that the government can set weaker environmental regulations and standards than those currently imposed by EU law. Cherry on top – the act does however contain a clause that gives the power to UK ministers to further empower the UK Courts to overturn precedents set by the EU Courts.

The main points of difference between Theresa May’s Brexit plan and Boris Johnson’s are regarding the status of the Irish border, customs, citizen’s rights and transition period, and less to do with the specifics, much less environmental concerns.

The suggested 25 year plan and the adopted directives from the EU will not cut it and there is a major risk that the environmental standard of the EU will not be kept by the UK.

UK has not yet proposed any provision to enforce the proposed environmental regulations since the government cannot be taken to court; therefore their policies are all bark but no bite. UK needs a tough environmental watchdog, which if necessary can also be an attack dog. UK should also work side by side with Wales, Scotland and Northern Ireland. If their demands regarding cross-border movement, farming policies and single market are ignored, it can prove to be disastrous. Many NGO’s like Greener UK are still fighting tooth and nail for better and more secure environmental regulations to be employed in UK and both the houses of the Parliament are still considering ways to make that happen. UK needs to look at this not as an opportunity to get away with a slap on the wrists and to levy lineament environmental regulations but as an opportunity to work with EU towards better environmental standards.

2317The European Union (Withdrawal Agreement) Act 2020 is an Act of the Parliament of the United Kingdom that makes legal provision for ratifying the Brexit Withdrawal Agreement and implementing it into the domestic law of the United Kingdom; 2020 c.1
LETHAL AUTONOMOUS WEAPONS: A CONUNDRUM OF MORALITY AND LEGALITY

By Saurabh Saket
From Rajiv Gandhi National University of Law, Punjab

Abstract
Every nation aims to bolster its security to counter any form of threat from foreign entities. This desire has led to a capricious trend of advancements in the field of weapon machinery. The development of autonomous machineries has mostly been limited to non-lethal machines such as surveillance drones and radar systems but the trend is now making its way into development of lethal weapons too. The question on the legality of autonomous lethal weapons has attracted a lot of discussion from all corners of the world. There is a void in the international legal framework regarding the specific question of autonomous lethal weapon therefore it becomes imperative to discuss the ramifications of such developments. With reference to different legal frameworks and official stances of numerous nations at major international platforms, this paper offers a glance at the legal feasibility of lethal autonomous weapons.

Introduction
“Autonomous Weapon System may be lawful but awful.”

The world is witnessing an outstanding development in artificial intelligence which has revolutionised the computer and smartphone market in the past decade. The development in these fields has reached the saturation point and any further addition to it does not serve any practical utility. However, weapon machinery is a field yet to be explored to the full potential. The application of artificial intelligence in weapon machinery, though in operation for quite some time, has not left the nascent stage of development.

An autonomous weapon does not require any human control to carry out tasks. It is able to identify and engage targets. The decisions are made on the basis of weapon’s database and machine learning. There is no human intervention in any of the steps which is the main point of concern from both legal and moral point of view. The database of a machine cannot be expected to be familiar with every type of situation the machine might face and hence could result in erroneous decisions. The errors can result in arbitrary loss of life and liberty of people that the machine interacts with. Deployment of a system cannot be afforded which is not flexible enough to adapt to the situations that is new or unknown.

The advent of artificial intelligence in lethal weapon machinery has been termed as ‘third revolution in warfare’ where opinions of experts on the topic has mostly been against the forthcoming pervasive implementation. The experts have expressed their concern on numerous occasions where they have written letters to the United Nations to consider the probable threats posed by development of lethal autonomous weapons (LAWs). Numerous nations are reported to be working on the development of autonomous weapons. The list consists of USA, UK, China, Russia, South Korea, Israel and France as one of the most prominent names.


Supremo Amicus
There are many arguments both in favour and against the development and deployment of autonomous lethal weapons. The delegation of power to decide human life to machine algorithms has rather attracted a lot of criticism on moral and ethical grounds. Speculations over its role in an outbreak of war of unprecedented dimensions have also been raised. Even if a machine is perfected to the point where it would not arbitrarily attack someone, it would still not be able to decide on the matters that might entail serious political consequences. Nevertheless, this paper shall be confined on the question of legal feasibility of such machines in accordance with the relevant laws that can address the issue to some extent.

Part I addresses the question by equating the compliance requirement of weapons to International humanitarian Law. Part II brings the issue of autonomous weapon under the roof of Martens Clause which defines and discusses the weapons not specifically covered by any law. Part III shifts the attention to Customary International Law and examines the stand of numerous nations on the given topic. The paper concludes with a view on the issue and recommendation on what should be the way in pursuing such advancements.

I. Lethal Autonomous Weapons Vis-à-vis International Humanitarian Law

International Humanitarian Law (IHL) covers “the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons.” It defines the boundaries under which a weapon has to function in order to comply with the moral and legal requirements. It lays down an ideal weapon’s technical functionality with the primary goal of achieving two objectives, the protection of non-participants in an armed conflict and limiting the impact of weapons. These requirements confer obligations on states in their interaction during armed conflict with another state. Geneva Conventions 1949 contain a major part of International Humanitarian Law which is accepted by and binds almost every country.

International Humanitarian Law is the genesis of many specific weapon regulatory regimes developed in the past century. The 1972 Biological Weapons Convention; the 1980 Conventional Weapons Convention and its five protocols; the 1993 Chemical Weapons Convention and many more are based on the principles of IHL. The basic principles of IHL has gained the status of customary international law and it is binding on every country. IHL lays down numerous requirements which shall now be discussed with reference to lethal autonomous weapons in the realm of international law.

A. Legal Review of the Newly Developed Weapon

Every country is required to ensure IHL compliance in the development phase of a new weapon. The review has to be done at research phase, development phase,
acquisition phase\textsuperscript{2324} and just prior to deploying the system.\textsuperscript{2325} The review has to be carried out again the moment circumstances change for which the weapon was developed.\textsuperscript{2326}

This stage is in itself the determinant factor of legality of a weapon. It required the states to ensure IHL compliance at every stage of development of a weapon. The compliance can be ensured by equating the functionality of the weapon with different principles enshrined in IHL. Those principles are discussed below in detail.

B. Principle of Distinction

An autonomous weapon might be programmed to eliminate every militant in its vision. Suppose a militant, within the range of the weapon, is using a civilian as cover and is on the verge of escape. The machine has two conflicting decisions at this point, to respect the life of civilian and let the militant run away or to collateral eliminate the civilian along with the militant to ensure no one gets away once in its range.

"The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."

St. Petersburg declaration gave birth to the principle of distinction wherein it was noted that the primary objective of any state during an armed conflict is to weaken the enemy military forces which requires targeting only the offensive entities from the other side.\textsuperscript{2327} Further, with no specific reference to ‘civilian and combatant distinction’, the Hague Regulations derives certain provisions from this principle and prohibits “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended."\textsuperscript{2328} Violating this principle and intentionally directing any form of attack on civilians constitutes a war crime under the statute of International Criminal Court.\textsuperscript{2329} The principle of distinction is to be followed in armed conflict of both international and non-international nature.\textsuperscript{2330} For better understanding of the principle, Civilians, Combatants and their status have to be deeply analysed.

i. Civilians Combatants

Combatant is a person who has active and direct participation in hostilities during an armed conflict.\textsuperscript{2331} Apart from them, every person who is not a part of the armed force, is a civilian under IHL and shall not be intentionally subjected to any form of attack.\textsuperscript{2332}

\textsuperscript{2327} St. Petersburg Declaration, preamble, § 83.
\textsuperscript{2328} Hague Regulations, Article 25.

\textsuperscript{2330} Common article 3 to the Geneva Conventions of 12 August 1949.
\textsuperscript{2331} UN General Assembly, Res. 2444 (XXIII) (adopted by unanimous vote of 111 in favour, none against and no abstentions). 27th International Conference of the Red Cross and Red Crescent, Plan of Action for the years 2000–2003 (adopted by consensus).
\textsuperscript{2332} UN Commission on Human Rights, Res. 1992/S-1/1.
Individuals who are members of the armed force but do not have offensive role in the conflict are also provided protection under IHL. Medical and religious personnel’s, who are part of the enemy armed force, have to be treated as non-combatant.\textsuperscript{2333}

Furthermore, the military manuals of Germany and USA do consider the possibility of other non-combatant members in an armed force apart from medical and religious personnel. According to Germany’s military manual, a combatant is a person who participates in the use of a weapon or a weapon system capable of carrying out attack. Other than them, the members of armed forces who do not have combat mission are to be treated as non-combatant.\textsuperscript{2334} Article 4(A)(4) of the third Geneva Convention goes a step further than distinguishing between combatants and non-combatants and distinguishes non-combatants from civilians who might be accompanying the armed forces but are not a member of it per se.\textsuperscript{2335} The rule 6 of the common article 3 to Geneva Conventions, 1949 also protects the person who had an active part in hostilities but has now laid down his weapon and is not capable of carrying out an attack on account of a wound, sickness, inability or some other cause.\textsuperscript{2336}

The main determinant of this principle is the capabilities of the person and therefore there also exists an exception to the rule of distinction. The exception, \textit{levee en masse}, does not protect the civilians who are not a member of any armed force but still wield weapon and participate in hostilities.\textsuperscript{2337} This exception is also customary in nature and is codified in Brussels Declaration,\textsuperscript{2338} Hague Regulations\textsuperscript{2339} and Third Geneva Convention.\textsuperscript{2340}

The lethal autonomous weapon should be able to perform the task of distinction. Regardless of the nature of armed conflict, the autonomous weapon should respect civilian life which is a corollary to its identification. Real life scenarios cannot be always predicted in a certain range and there is always something out of the box. A machine cannot be expected to solve every situation by subjecting it to its algorithms. However, if the deployment of LAWs is limited to scarcely populated areas or at the borderlines then it can handle the limited no. of situations. The IHL compliance of LAWs in a densely populated still seems to be a mind-bending task as the current level of technological development cannot afford it.

C. Principle of Proportionality

“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”

An attack should be proportional to the threat faced in an armed conflict.\textsuperscript{2341} Article 51(5)(b) and article 57 of Additional Protocol 1 lay down the foundation of this principle.\textsuperscript{2342} The intentional military attack

\begin{itemize}
  \item \textsuperscript{2333}First Geneva Convention, Article 25.
  \item \textsuperscript{2334}Germany, Military Manual, § 587.
  \item \textsuperscript{2335}Third Geneva Convention, Article 4(A)(4).
  \item \textsuperscript{2336}Rule 6, common article 3 to Geneva Conventions 1949.
  \item \textsuperscript{2337}ICRC, \textit{Customary International Humanitarian Law}, 2005.
  \item \textsuperscript{2338}Brussels Declaration, Article 10.
  \item \textsuperscript{2339}Hague Regulations, Article 2.
  \item \textsuperscript{2340}Third Geneva Convention, Article 4(A)(6)
  \item \textsuperscript{2341}Nuclear Weapons, ¶ 41.
  \item \textsuperscript{2342}Additional Protocol I, Article 51(5)(b) (adopted by 77 votes in favour, one against and 16 abstentions) (cited in Vol. II, Ch. 4, § 1) and Article 57(2)(a)(iii) (adopted by 90 votes in favour, none against and 4 abstentions)
\end{itemize}
which is disproportionate or excessive in nature and has the definite ability to indiscriminately attack civilians is treated as a war crime in International Criminal Court.\(^{2342}\) It has been observed by International Court of Justice to be of customary nature which is also evident by the fact that Article 51(5)(b) and Article 57 of Additional Protocol I met no reservation when adopted.\(^{2344} \) \(^{2345}\) Even when the LAWs are carrying out an attack in self-defence, they are required to follow the principle of proportionality.\(^{2346}\)

The Lethal Autonomous Weapons should be able to carry out an attack which is proportional and does not cause excessive damage than what would be required to control the situation. For this purpose, the LAWs need to be equipped with a wide range of weapons and systems starting from audio warnings and untargeted explosions to scare away the potential threat. Regardless of its deployment location, the LAW should respect the right to life and should be able to make reasonable apprehension or at least send signals to troops to make required arrests. Just in case any LAW is only equipped with lethal weapons, it should only be deployed or used in the circumstances which warrant the need of a lethal attack to ensure proportionality.

D. Principle of Responsibility

Any violation of IHL is followed by accountability.\(^{2347}\) It is highly probable that LAWs might create accountability gap.\(^{2348}\) The concern over the question of responsibility in case an autonomous weapon violates IHL is quite complex to solve as machines lack intent which is an essential element to assign responsibility.\(^{2349}\) However, this enigma can be avoided if the developers or the state which fields the system takes the collective responsibility of any violations.\(^{2350}\) The responsibility of any potential violation can be assigned in advance.\(^{2351}\) If responsibility is accepted by the state pre-emptively, then real world gains of the autonomous weapon system can be gained.\(^{2352}\)

It depends completely on the developers or the state to decide whether LAWs create any accountability gap or not. If the refuse to accept the responsibility of any potential violation then the deployment of LAWs will surely violate the principle of responsibility.

\(^{2342}\) ICC Statute, Article 8(2)(b)(iv).
\(^{2343}\) France, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols.
\(^{2344}\) Mexico, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols.
\(^{2345}\) Jennings, The Caroline and McLeod Cases, 32 A.J.I.L. 82, 82-84 (1938).
\(^{2346}\) AP-I, ART. 85(3), Neil Davison, A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law, in UNODA OCCASIONAL PAPERS NO. 30: PERSPECTIVES ON LETHAL AUTONOMOUS WEAPON SYSTEMS

\(^{2348}\) Rebecca Crootof, War Torts: Accountability for Autonomous Weapons, 164 U. PA. L REV.
\(^{2350}\) R. Arkin, The Robot didn’t do it, POSITION PAPER FOR THE WORKSHOP ON ANTICIPATORY ETHICS, RESPONSIBILITY AND ARTIFICIAL AGENTS 1 (2013).
\(^{2351}\) Waxman Abderson.
II. Lethal Autonomous Weapons Vis-à-vis Martens Clause

Martens clause, created by F.F. Martens, is applied on a subject matter not specifically covered by any law.2353 The 1899 Hague Peace Conference gave birth to this principle which eventually got codified in the Hague Convention, 1899. It deals with the capricious technological advancements and weighs it primarily on moral grounds. The Martens Clause triggers compliance requirement of two types namely ‘principles of humanity’ and ‘dictates of public conscience’.

The terms are quite vague in nature and do not have a definite structure which can be referred for establishing compliance. F.F. Martens, while creating this legal principle, attempted to give it a legal definition which can bolster its application and avoid confusion.

A. Principles of humanity

Earlier known as laws of humanity, the principle of humanity requires humane treatment of the enemy in an armed conflict. Treating someone humanely is broken down into principles of proportion, distinction and precaution which have been dealt in International Humanitarian Law.2354 The additional way of following this principle, which remains in grey area, is by exercising compassion and making legal and ethical judgement.2355

If we analyse LAWs from the perspective of compassion, which is an emotional element, then LAWs would most likely fail the test. The LAWs would be subjecting its target to algorithms and deciding its course of action based on its stored database, which leads to objectifying the target and hence violates humane treatment.2356 However, as Martens Clause is a legal concept, its test should be subjected to legal definition of ‘principles of humanity’ which has been defined in several military manuals.

The Law of Armed Conflict (LoAC) principle of humanity suggests that one should not use force in such a manner which is excessive in nature or is more than what is required to achieve the military objective.2357 It sounds quite familiar to the principle of proportionality discussed in IHL which can be ensured by equipping the machine with a wide range of weapons wherein they would be triggered in the specific situation. Notable jurist Meron has also defined the ‘principle of humanity’ in the context of Martens Clause. According to him, the ‘principles of humanity’ are reflected in the rules of warfare in common article 3, the distinction principle, protection of civilians, limitation on means of warfare, prohibition on collective punishment and prohibition on torture.2358

With reference to Common Article 3, there are two problematic aspects for LAWs, prohibition on violence of life and person who are ‘hors de combat’ (who are unable to fight on account of inability, injury, sickness) and prohibition on ‘outraging human dignity. Equating the anticipated level of advancements of LAWs with the aspect of hors de combat, it is most likely that it can be achieved in the near future.

---

2353 AP-1, art 1(2).
2355 Human Rights Watch, Heed the Call: A Moral and Legal Imperative to Ban Killer Robots, (2018) [Hereinafter HRW Heed].
2357 United Kingdom, LOAC Manual.
where the LAWs can figure out the gestures which imply surrender and inability to fight. With regards to the second aspect of human dignity, the Laws have to be looked through the lens of human rights. The term ‘human dignity’ lacks clarity in legal terminologies and the areas where it applies is also not certain in entirety. The instance of making it applicable to LAWs can be treated as lex ferenda (what the law should be) and not lex lata (what the law is). Therefore, principles of humanity do not offer clarity in addressing the question of legal feasibility of LAWs.

B. Dictates of public conscience
The dictates of public conscience are assumed to be synonymous with public opinion. Public opinion are dictates which reflect the concern of range of people and entities. However, Greenwood notes that public opinion lacks clarity and is vague to the point that it has not garnered enough support and is impractical to use. It lays down no threshold above which one could say there is enough public opinion against LAWs. Therefore, what is not defined in the first place, cannot be used as a litmus test for morality.

Alternatively, the public opinion can be in most of the cases assumed to be respecting the IHL principles of distinction, proportionality, precaution and respect for civilian life which can be achieved by the technology. On the other hand, it can also be said since we have not reached the pinnacle in the development of LAWs, we have no clear idea about their functionality and what they would offer as a finished product. therefore, even if we have some kind of opinion about them, it might not be accurate as they can turn out to be quite different from what we assume them to be. The Martens Clause lacks the clarity that is needed to address the issue at hand. Most of its aspect are vague and defined only to extent which is dealt with in the principles of IHL. What Martens Clause has to offer is often shrouded by personal opinion and bias which lacks any legal structure.

III. ‘Meaningful Human Control’ – Position in Customary International Law
When it comes to human involvement in the functions of machine that runs on Artificial intelligence, human can either be ‘in the loop’ or ‘out of the loop’. The fully autonomous machines perform every task on their own and have no human involvement whereas some autonomous machines do require a human command after they have everything prepared to perform a task. This difference has been the main point of debate in the international community. With the presumption of successful development of LAWs, a meaningful human control over its critical functions has been demanded by many nations.

Customary International Law hold a high rank in the hierarchy of sources of international law.

As there exists no specific law regarding LAWs, Customary International Law (CIL) seems to be the most viable option to solve the debate of meaningful human control. CIL is “a general practice accepted as law”. Customary International Law hold a high rank in the hierarchy of sources of

---

2359 Heyns.
2360 Ibid. pg. 49
2361 Meron.
2362 HRW Heed.

ICJ Statute, Article 38(1)(b)e.
international law. The formation of CIL is a complicated process which has been simplified by International Court of Justice in many cases. For a practice to become CIL, two essentials have to be met – State practice coupled with opinion juris.2366 Opinion juris is a belief that certain rule is required, prohibited or allowed, based on the nature of rule, as a matter of law.2367 CIL is also derived from bilateral and multilateral treaties when a similar law is repeatedly codified in numerous treaties.2368 CIL is binding on every country regardless of the fact whether specific consent is provided or not.

There exists no physical act on the part of any state in relation to LAWs to be taken into consideration as ‘state practice’ since no country has yet fielded a fully autonomous weapon system. Furthermore, the stance relating to its development cannot be considered as ‘state practice’ since undisclosed practices do not contribute to formation of CIL.2369

Therefore, only verbal acts of the states can be used as ‘state practice’ which has been done by ICJ in plethora of cases including the Nicaragua case,2370 Gabc’ikovo-Nagymaros’ Project case2371 and the Fisheries Jurisdiction case.2372 The official stance of a nation in terms of official statement at any international platform is also considered as a state practice.2373

Majority State parties and NAM,2374 African Group,2375 European Union,2376 ICRC,2377 UNIDIR2378 made statements in UN Convention on Certain Conventional Weapons meetings and general consensus was reached among all 80 participating states on having meaningful human control over autonomous weapons.2379 USA Department of Defence has also adopted same principle.2380 Furthermore, actions of Transnational Corporations also have indirect role in forming CIL.2381 Organisations such as Human Rights Watch,2382 Campaign to Stop Killer

2366 ICJ, Continental Shelf case (Libyan Arab Jamahiriya v. Malta), Judgement, 3 June 1985, ICJ Reports 1985, pp. 29–30, § 27
2367 ICJ, North Sea Continental Shelf cases, Judgement, 20 February 1969, ICJ Reports 1969, p. 3
2368 Ibid.
2369 ILA Report, supra note 18, Principle 5, p. 726.
2370 ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgement, 27 June 1986, ICJ Reports 1986, p. 100, § 190
2372 ICJ, Fisheries Jurisdiction case (United Kingdom v. Iceland), Separate opinion of Judge Dillard, 25 July 1974, ICJ Reports 1974, pp. 56–58

---

2380 DoD Directive.
2381 Draft CIL, at 132.
Robots and Article 36 have actively stood in favour of human control. Statements made on behalf of state are widely regarded as opinion juris. Opinion juris is reflected in conduct of state in relation to resolutions adopted by an international organisation, public statement made on behalf of state and governments legal opinion.

All the 80 participating members in UN GGE Convention on Certain Conventional Weapons voted in favour of principle of human control over autonomous weapons. Statements of 42 States in 74th session of UNGA regarding autonomous weapon and CCW Principles have also vouched against lack of human control over autonomous weapons out of which 30 recommended complete ban. Furthermore, resolutions adopted by Belgian Parliament, European Parliament and UK Ministry of Defence advisory paper on LAWs follow the same opinion.

All the state practice mentioned above make a very strong case against a fully autonomous weapon. There exists almost no opposite state practice which is against human control over autonomous weapon. However, an argument can still be made that the world has not yet seen a fully functional autonomous weapon hence its decisions are based on an incomplete knowledge but still understanding of correlation between human control and autonomous weapons cannot change no matter how the final product turn out to be.

IV. Conclusion
The past decade has witnessed more speculation regarding the legality of LAWs that actual development in this technology. A fully autonomous weapon system that is able to carry out the tasks that are under question will be possible in another half decade. Nevertheless, their legal feasibility treads on uncertain path.

The IHL compliance requirements of distinction, proportion, review can be achieved by the LAWs. The only problem in IHL lies in accountability gap that the machines with no human involvement might create. The principle of collective accountability can solve this issue if states pre-emptively take the responsibility of any IHL violation.

The Martens Clause does not make a strong case against development and deployment of LAWs as it lacks proper legal definition and structure. It brings in the emotional factors which are hard to define specially when it has to be compared to a machine, we are not completely familiar with. Therefore, the legality of LAWs is unhindered by the application of Martens Clause.

---

2385 Draft CIL at 141.
2386 Draft CIL at 140.
2388 Campaign to Stop Killer Robots, UN Head Calls for a Ban, (Nov. 12, 2018).
However, there is a strong opposition to fully autonomous weapons when it comes to Customary International Law. On numerous meetings and conferences held at international level, the statement of majority participating states has been against absence of human control on LAWs. A significant amount of countries in those participating countries have called for a blanket ban on LAWs. In several resolution adopted across the world, the same opinion is reflected and there exists almost no support for fully autonomous weapon. Even if such a machine is developed, the CIL would require it to go through a final human command before exercising force on any human being.

The problems are less connected to technical aspects of the LAWs but more so to fact that how it will be used by the states. The two most problematic aspects discussed in the paper, i.e. – accountability gap and lack of meaningful human control are associated with the human decisions rather than machine’s functionality. It remains unclear on the speculation over how and in what manner LAWs will be used. The loss and legal implications could be notable even if one country decides to have no human control and does not preemptively assign responsibility.

Contrary to the concern of ‘accountability gap’, every action of LAWs could be attributable to the state and hence state can be held liable but the real concern lies in the fact that LAWs are autonomous and can take decisions which the state would not take in any circumstances. The lack of communication between state and machine can be used as a defence to some extent. When it comes to meaningful human control then LAWs could be programmed to categorise different kinds of actions, i.e. – lethal and non-lethal actions. LAWs would be making decisions in fraction of second and might not consider the consequences which might result from political tensions between the countries. There should be a meaningful human control over the actions that result in violating the rights of humans, even justifiably. The humane factor provides the opportunity of second guessing the judgements. If the states accept the responsibility for violations of IHL by the LAWs and assign a human control, even for a single final command, then Laws could be legally fielded in the real world.

The discussion gets more complex once we analyse LAWs solely based on their technical features because that field is constantly changing and what we see today might be something else tomorrow. This analysis can be carried out once a fully autonomous weapon system has reached the final stage of development and is yet to be fielded.
LEGALIZATION OF CRYPTOCURRENCY

By Sayanti Dey
From KIIT University

Abstract

This paper highlights the growing concern on the legalization of Cryptocurrency. Initially in 2019, a panel comprising of officials from the Department of Finance, Department of Economic Affairs, Ministry of IT, and the Reserve Bank of India, came up with a bill, "Banning of Cryptocurrency and Regulation of Official Digital Currency Bill", which concerned on banning of such virtual currencies in the market which is not under the government jurisdiction and any individual contravening this act or omission shall be liable to grant fine of 25 crores and an imprisonment of that shall not extend up to 10 years, or both. Notwithstanding, the Supreme Court of India did not receive any proportionality in this recommendation as the Reserve Bank of India did not ban the use of virtual currencies in the market, legitimately. Thereby, in 2020, The Supreme Court of India, based on the minimal proportionality of the recommendation, has lifted the ban on such virtual currencies, including cryptocurrency. Yet, from the legal standpoint, the republic of India doesn’t have any Act, law or regulations regarding Cryptocurrency. However, from a financial steadfast RBI regulation prohibit any bank in India to deal or transact in Cryptocurrencies. That essentially eliminates buying or selling of any business, objects or services using Cryptocurrencies in India.

Therefore, any individual dealing in Bitcoins or other Cryptocurrencies is doing it completely at his/her own risk. Bitcoin transactions are completely unmonitored and beyond government jurisdiction, making it easy to carry out shady transactions with ease. This paper also highlights whether or not Bitcoins should be legalized and accepted as a medium of exchange, considering the wide array of opportunities, ease that bitcoin brings to individuals as a medium of currency/exchange or stop its legalization considering the cost of freedom that bitcoins give rise to.

This paper intends to throw some light on this ongoing debate from a neutral point of view and focuses on the benefits and impacts that bitcoin will have if it is legalized.

Keywords: Cryptocurrency, bitcoins, legalization, RBI, finance, economy, transactions, exchange

Introduction

The proposal for Bitcoins was initially postulated by an anonymous individual named Satoshi Nakamoto in 2007. Its domain name Bitcoin.org was formed and a notification was codified that defined the characteristics and safety measures so that it cannot be plagiarised in 2008. Nakamoto and Hal Finney, a miner first transacted in digital currency in January 12, 2009. Cryptocurrency is an encrypted tool that facilitates decentralised form of network of transactions which is monitored by the users, themselves. These type of payments and transactions are basically reigned by Bitcoins, supported by Litecoin, Dogecoin, Dash, Kittehcoin, Lottocoin, Ripples, etc. Bitcoins are generally speculative and can enhance the growth of economy in future but unfortunately, there are very less in number who can acknowledge the idea of
Bitcoins or any digital currency. 21 million Bitcoins can only be circulated by 2040 and with each passing year, the urge for digital currencies will reduce. 18 million bitcoins are mined so far (12.2.20) and it is expected to reach 21 million within the next speculative years.

**Fig. 1**

**Evolution of Cryptocurrency**

Bitcoin was first introduced in a paper Describing Digital currency in 2008 by a certain individual, named, Sakashi Nakamoto (one or a group of people). It was launched in the following year as a demonstration called the Bitcoin Network. Unlike any other previous currencies, there is no supervisory body that governs the usage of bitcoins in the global market. Anyone who can access the internet or an Application-Specific Integrated Circuit (ASIC) can transact in Bitcoins or generate such virtual currencies, by an approach, generally termed as Mining. This runs through an online mode of decentralised transaction; therefore, each participant has their own copy of the transaction and stores their money in their virtual wallet. Transactions as small a 0.00000001 Bitcoins can be made and its value changes like any other currency varying with what the buyer is willing to pay. Bitcoin is essentially decentralized in nature unlike its digital currency counterparts like Visa, Mastercard or PayPal. There is no central body to guarantee the money invested in bitcoin, instead it is secured and guaranteed by encryption (a 256-bit SHA algorithm).

Bitcoin mining is a way of generating bitcoins by solving complex mathematical problems of repetitive nature in a competitive manner by which a person is able to add a block into the world bitcoin ledger which upon successful completion results in the miner being paid 25 bitcoins which is created thus adding to the blockchain.

According to the Forbes article that was published in the year 2017, Bitcoin saw a

---


2394 Ameer Rosic, “How many Bitcoins are there? – 85% of the Bitcoins are mined” Blockgeeks, February 2, 2020.

lot of UP's and Down's between 2010 to present day.

Since it’s first valuation in 2010, it was hard to assign value to the currency as people mostly mined Bitcoins instead of trading them, 2011 saw new cryptocurrency emerge as competitors to Bitcoin. 2013 saw Bitcoin prices rise as much as 1000$ and soon plummeted to as low as 300$.

It's rises in India:
Over the last few years, one billion people in India obtained resurrection in the economic market and further, was addressed as the "fastest growing emerging economy" by the International Monetary Fund. More than 40% of the population in India have adequate access to telecom and Information Technology. Since 2012, bitcoins were generally used by the crypto enthusiasts. By 2013, Bitcoins came in the forefront, with a restaurant named "Kolonial" in Mumbai, that started it’s transacting in bitcoins. Thereafter, BtexIndia, Unocoin, Coinsecure, Zebpay, Koinex, Bitcoin-India came up.

Bangalore cryptocurrency ATM

OTC and ATMs in India.

Crypto ATM's are disseminated in every continent. The Unocoin CEO, Sathvik Vishwanath stated that he is aims to extend 40 contrivances in three different Indian cities. He further disclosed that he will first, station the crypto currency ATM in Bangalore, proceeding with Delhi and Mumbai. He also highlighted that these ATMs would engage in crypto- crypto transactions, with appropriate demarcations on deposits and withdrawals per transaction. The minimum exchange rate for deposits and withdrawals are set with a boundary of ₹1000 ($ 13.57).

In 2013, the Bangalore Crypto ATM has now 120 full-time employees and its transactions are increased to 2 billion within 1.3 million customers.

According to the Coin ATM Radar, on January 10, 2019, crypto currency ATMs arose to 4,000 and above worldwide. This led to 4.9 current growth in gauge scale.

---

2397 Kevin Helms, “30 Crypto ATMs Launching in India- Unocoin Unveils Solution to RBI Banking Ban” Bitcoin.com October 14, 2018.
Crypto currency ATMs growth in the gauge scale.

**Fig.3** This table highlights the Crypto currency ATMs worldwide.

**Fig.4**

Out of the total 4167 crypto currency ATMs worldwide, 71.8% is in North America. 56% is in the United States. 15% is in Canada, 23% is in Europe, 2.6% is in Asia. 13% is in Oceania and 1.1% to 0.2% is stationed in South America and Africa.

Notwithstanding, within Asia, Hong Kong has the highest allocation of crypto currency ATMs of about 0.8%. Within Europe, Austria made its way to the forefront by 6.4% cryptocurrency ATMs, followed by United Kingdom by 4.8% cryptocurrency ATMs.

Although 99.9% of these ATMs are supported by Bitcoins, 64.6% are supported by altcoins. Whereas Litecoin, Ethereum, Bitcoin Cash, Dash, Monero, Dogecoin and Zcash are supported by 59.5%, 49.3%, 33.9%, 17.9%, 3%, each.

This data does not extend to India’s statistics of Crypto currency ATMs because the individual who uncovered the first Bitcoin ATM in Bangalore was incarcerated under several criminal charges because that invention was not an ATM, exclusively but empowered users to evade the financial arms.

According to Coin telegraph, by March 3, 2020, 7,000 cryptocurrency ATMs escalated in around 75 countries. The first ATM, in 2013 was stationed by the company, Robocoin in the Vancouver coffee shop, observed $10,000 BTC transactions. Today, within 7,000 ATMs, two locations were organised by Robocoin. (coin ATM Radar).
It was further detected that; 11.7 new ATMs are being posted each day. Bitshop, a bitcoin ATM company, allied with Simon Mall in United States and sited five apparatus in five different malls. Another, Florida’s Miami International Airport, also installed one from Bitshop in the latter part of 2019⁴³⁹⁹.

**Impact of Cryptocurrency over the global economy.**

Bitcoins are predominantly, clutched by the bankers, companies, Government etc. They either want to become rich or pave a way for easy trade. Nevertheless, there are repercussions of the same.

Virtual currencies require no intermediaries for their financial transaction, unlike traditional transaction. It enhances decentralised mode of transaction. Therefore, as there is no service provider to regulate activities, it becomes onerous to monitor any financial obstruction which can create hindrances in the global level.

Cryptocurrency has no link with the US dollars, ordinarily functions as the global currency. The investors dealing with cryptocurrency transactions do not follow any policies stated by the US and further, violates many such economic policies.

Cryptocurrency transactions are different from any other form of transaction. Venezuela, while disclosing that they were transacting in Cryptocurrency stated that such exchanges are governed by oil supply. Cryptocurrency also, grants speculators or tycoons to elevate wealth or assets without any traditional mode of exchange. It accesses these entrepreneurs to gain resources with the help of ICO, (a public offering, wherein a start-up has to dispose of some shares of their cryptocurrency to certain financiers for fund) instead of requesting venture capitalists to transact in them. Many countries, such as the People’s Bank of China has banned and restricted such mode of transaction. The Securities and the Exchange Commission evoked to issue an admonition against ICO as they believe that it’s not authentic and further, gives rise to disruptive measures.

Cryptocurrency also, prompts certain snags in the ordinances due to anonymity which can give rise to non-payment of taxes. One example of anonymity: The Silk Road, an online marketplace which came in the fore front due to illegal buying and selling of contraband substances in the dark web. This business was entirely anonymous, and no one could have traced who is purchasing and selling.

It also gave licences to international investors for investing in their home country. Around two billion people have access to telecom and IT. For less developed countries, where credit cards are still not accepted as to run a business, crypto atmosphere makes it accessible to run such business, in their platform. It helps the countries with weak economies or when the economy becomes stagnant, as virtual currencies can still be accessed and does not require banks to invest in the internet economy. It also helps the migrants who has to pay fees not extending 9% to the financial institution before relocating the money to their respective families notwithstanding, virtual currencies or internet economy makes it free of cost. Therefore, it has both dissentious as well as affirmative impacts in the economy⁴⁴⁰⁰.

---


²⁴⁰⁰ Kayla Matthews, “5 ways Bitcoin affects the economy” Technobuffalo May 28, 2018
Demonetization-
During Demonetization, 40% of the population were using the Internet to invest in bitcoins and cryptocurrency, altogether. In 2016 demonetization policy, it urged for cryptocurrency in the market but in a way, this quashed the growth in the market. However, 2% of the total population in India was under cryptocurrency and the market rates are higher to 5-10%, equating with the global average. Therefore, Indians were able to participate as a subsidiary in the foreign market, with reference to cryptocurrency2401.

The outburst for e-currency evolved as Bitcoin was priced 52,000 in Unocoin and Zebpay during demonetization. The search for bitcoins was at its peak in google during demonetization in India. The survey formulated by the Government Sends Tax, 2018, highlighted that within this 17-month transactions, 3.5 billion had exchanged in e-currency that further, adds 200,000 users every month in India. Thereby, they were entitled to send tax to 10 in every 1000 people2402.

2,500 people invested in Bitcoins in the mid-20172403. According to a Forbes article, 600,000 people were using bitcoins through several bitcoin outlets. Amit Bharadwaj, co-founder of the GB miners, stated that in 2019, over 500 traders used cryptocurrency and there are almost five companies in India which accepts payment in cryptocurrency. Example: Dell.

The Indian Department of Economic Affairs in Ministry of Finance examined how the virtual currencies needs to be modulated. They studied certain factors that might lead to an appropriate regulation of these currencies.

1. The Reserve Bank of India, 1934, should monitor the cryptocurrency.
2. Anyone found to have invested in bitcoins should be taxed.
3. There should be bonafide guidelines regarding cryptocurrency.
4. IRB should elongate its trade with the international markets and their returns should be taxed.

The Reserve Bank of India v. Cryptocurrency.
On April 5, 2018, the Reserve Bank of India held a press meeting where they highlighted issues pertaining to cryptocurrencies and how they knock the coherence in the market, which gives rise to certain money market frauds, money laundering, etc. Supreme Court, on the other hand, lifted off the ban against cryptocurrency, that was promulgated by the Reserve Bank of India. This decision was decided by a three-judge bench led by J. Rohinton Nariman, Aniruddha Bose, V. Ramasubramanian. Initially, the circular was questioned by the IMAI (Internet and Mobile Association of India) stating that cryptocurrency is not a legal tender or a currency under any legal precision.

Therefore, the Reserve Bank of India has no right to enforce a ban. Further RBI affirmed that cryptocurrencies are a mode of

2401 Shailak Jani, “The Growth of Cryptocurrency in India- Its Challenges & Potential Impacts on Legislation” ResearchGate April 26, 2018
2402 Dr. Mohan Kumar, “Bitcoins in India- A Study of Legal and Economic Aspects” IOSR Journal of

www.supremoamicus.org
830
payment and that such virtual transactions should be ceased as it might leverage some precarious situations\(^{2404}\). Supreme court held that “anything a person can create till it is not violating the existing laws and it is, therefore, a fundamental right.” So, the companies have the right to create trading in cryptocurrency. It also held that the draft presented by the Reserve Bank of India, lacked the interpretation of violation that virtual currencies might engage in with the financial entities.

After the decision made by the Supreme Court, concerning with quashing off the ban on virtual currencies, that was circulated by the RBI on 2013, the Reserve Bank of India felt that it was necessary to file a review petition as they connote that transaction in the form of cryptocurrency can jeopardise the market economy and put the financial arms at risk.

After the circular, that was passed by the Reserve Bank of India on April 06, 2018, barring financial services from indulging in cryptocurrency, these financial investors moved to Singapore. However, once the ban was lifted off, these entities moved back to India.

- Siddharth Sogani, founder and CEO of Crebaco Global Inc., (engaged in blockchains and cryptocurrency research), stated that Supreme Court elucidated transacting in cryptocurrencies are legal and therefore, discharges any merchants who are already dealing in bitcoins. He further added that cryptocurrency transactions in India can now legally engage in fiat- to- crypto and crypto- to-crypto partnerships.

- Abhishek A. Rastogi, partner, Khaitan and co., filed a case for cryptocurrency connoting that, Supreme Court may scrutinise the review petition by the Reserve Bank of India, but apparently, investors can operate in cryptocurrencies. The IT department also studied this matter as they observed 500,000 investors are investing in virtual currencies. Thereby, they enquired whether these investors have paid taxes and if at all cryptocurrencies are goods and services, then, they are entitled to pay the GST for such virtual currency\(^{2405}\).

### Coronavirus (Covid-19) and Cryptocurrency

Coronavirus has affected the growth of cryptocurrencies. Capitalisation was reduced by half and they lost more than 150 billion in days. Bitcoins was halved to 40% within 24 hours.

- Morgan Creek Digital, (Hedge Fund cryptocurrency co.) co-founder, Anthony Pomplians said that he anticipated this downfall since 2019 and with the large rate cuts and quantitative easing will give bitcoins an attractive outlook.

- Venture Capital’s one of the firms, “Kenetic Capital” co. (backbone of cryptocurrency) Managing Partner, Jehan Chu affirmed that “this will be a formative lesson that will shape the character of this generation of founders, provided they survive the downturn.”

Binance exchanges was also impacted as prices went down due to volatility. Aaron Gong, VP of Binance Futures connoted on March 12\(^{th}\) that their bitcoin prices dropped from 50% to $3600. Insurance funds lost

---

\(^{2404}\) Murali Krishnan, “Supreme Court ends RBI’s 2018 ban on banks dealing in cryptocurrency” Hindustan Times New Delhi March 04, 2020

\(^{2405}\) Saloni Shukla & Sachin Dave, “RBI to seek review of Supreme Court order on cryptocurrency” The Economic Times Bureau March 06, 2020
50% as Tether (USDT) reserves decreased from 12.8m to 6.2m USDT. Therefore, they added 5m USDT to safeguard users from liquidation. **Difference between:** Cryptocurrency exchange and Traditional exchange is circuit breakers, a model that shelves trading for a period when it observes the market is precipitating. Example: S and P500 halted for 8% but due to circuit breaker, this lasted for 15 mins. But such operation is not available to cryptocurrencies. Therefore, bitcoins fell for hours on March 13th in Binance. However, “Huobi” was further discovered that functions as a circuit breaker.

**Legality.**
The Department of Justice opined that bitcoins provide statutory commercial aids and has the competence to enhance the global economy. On May 2010, Laszlo Hanyecz, bought two pizzas from Papa John’s with 10,000 bitcoins, which was measured at $ 60 then, however, that value will be somewhere near $5million now. Bitcoins are not static, but they vary if they are operated sagaciously as most of it are utilised for certain heinous work which needs to be scrutinised and regulated, accordingly.

**It’s stands on India-**
As India is flummox about their legalisation of cryptocurrency and with various circulars that are passed by the Reserve Bank of India and their issues regarding banning of such virtual currencies is being quashed by the Supreme Court of India, it can be acknowledged that blockchains operations are still consistent to procure impetus as they are the key to innumerable number of complications which helps them to expand their productivity within several government services. This technology is supported by other virtual currencies as all of them are licensed without a centralised chain of networks. Ramani Ramachandran, CEO of a Singapore based crypto firm coined that ZPX will start to expand their services in India. Neshal Shetty, cofounder of another crypto firm stated that, WazirX will start operating in markets in India. Virtual currencies in India had come to a halt, after the 2018 circular issued by the Reserve Bank of India, barring financial services to conduct operations in cryptocurrencies. The CEO of Block Survey, Wilson Bright, said that, “When a regulator like RBI bans, the market closes down. Six months back, we pivoted from crypto to blockchain, as we had to sustain. No investor was ready to back us amid the uncertainty of regulations.”

After the circular was dismissed, the IMAI and RBI jointly aims to monitor the variations and nefarious actions that virtual currencies can escalate so that the financial entities can appropriately work and transact in digital currencies and can promote creativity within several emerging investors. They (RBI) obviously issued an advisory earlier to make sure it doesn't become the Wild Wild West of crypto and gets too systemic. Now, RBI is better prepared to address the nuances of crypto,” said Akhil Handa, head — fintech and new

---

2406 George Georgiev, “Crypto & Coronavirus: How is the industry affected by the emerging financial crisis?” CryptoPotato April 12, 2020

www.supremoamicus.org 832
business initiative, Bank of Baroda. Even the accuracy in the delegated judicial bodies was also interrogated. Salman Waris, TechLegis Advocates and Solicitors, coined further, “The fact that the apex court outrightly shot down a strong policy step by the RBI against a whole industry has consequences on the fairness of our regulators, given their quasi-judicial status.”

Anandi Chandrashekhar, Sanghamitra Kar, Ashwin Manikandan, “Now that crypto trade is legal in India, here’s what happens next” The Economic Times Bureau March 05, 2020

---

**Regulation of Cryptocurrency-Global Perspective.**

**Vietnam**- The State Bank of Vietnam imposed a decree against cryptocurrencies as they further highlighted that cryptocurrency is not a mode of transaction, legal tender and anyone deals with virtual currencies shall be liable to pay fine not exceeding 200 million dong, on October 30, 2017. Further, the Governor of State Bank of Vietnam, Le Minh Hung, also stated that for the regulation of virtual currencies, they should accompany the Justice Ministry, to scrutinise and examine the matter.

**Thailand**- On February 12, 2018, Bank of Thailand drafted a circular stating that no such banking sectors shall invest or deal in cryptocurrencies. Bank of Bangkok even ceased exchanges with TDAX (Thai Digital asset Exchange), a Thai company on February 24, 2018. Another bank, Krungthai Bank, stopped exchanges with TDAX on February 27, 2018.

On March 13, 2018 the Cabinet passed the formulations made by two landmark decrees,

- To scrutinise and regulate cryptocurrencies and ICOs.
- To gain capital taxes from virtual currencies.

**Taiwan**- Taiwan’s Financial Supervisory Committee, on December 19, 2017, stated that virtual currencies are treacherous, and Taiwan considers such virtual currencies as “highly conjectural virtual product.” The badge under bitcoins and other virtual currencies, are examined by SEBA. This statement was also made prior to this
convocation, when the Taiwan Central Bank and Financial Supervisory Committee jointly held a conference on December 19, 2013. Following this order, on 2014, January 16, the Financial Supervisory Committee drafted on prohibition of any such virtual currencies in the banks of Taiwan.

South Korea- On January 30, 2018, the government executed a regulation that anyone who bankers to invest in cryptocurrencies, initially they are entitled to open a bank account which shall be identified by the cryptocurrency dealer, where shall dealer also is entitled to open his/her account in order to make deposits. Anonymous traders can only withdraw from their e-wallet but cannot deposit. It is entirely age restricted and minors from any country shall not be granted any license to transact in cryptocurrencies.

Reporting and Using Specified Financial Transaction Information Act, allows banks to disclose information’s if they feel fit, that the transaction is illegal, or indulge in money laundering. The Korea Financial Intelligence Unit (KFIU) formulates guidelines regarding such mysterious and anonymous actions.

However, on February 20, 2018, Chloe Heung Sik, chief of South Korea’s Financial Supervisory Service, approved trading on “standard” cryptocurrencies and uplifted virtual currencies, exchanges in the banking sector. The Ministry of Strategy and Finance accepts cryptocurrencies as capital gains or as miscellaneous income.

New Zealand- October 2017, the Financial Markets Authority, drafted complications regarding cryptocurrencies-

- Its explosive.
- New Zealand does not monitor cryptocurrencies.
- Individuals who normally deals with cryptocurrencies, indulges in frauds, Money laundering, etc.
- If ICOs are regulated offers and what kind of services do they provide and how does it affect the economy at large.

Any cryptocurrency services or business shall abide by the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Reserve Bank of New Zealand spokesperson in 2017, in an article, highlighted that cryptocurrencies will be added in the cryptocurrencies operating system of the bank.

Nepal- August 13, 2017 Nepal Rastra Bank stated that transaction dealing in bitcoins are not legal. In 2017, the Central Investigation Bureau has also incarcerated seven individuals as they had operated their service with bitcoins from several other countries.

Pakistan- There is no rule or regulations that monitors cryptocurrencies. May 2017, State Bank of Pakistan, stated that they don’t recognise virtual currencies. Further on April 06, 2018, during a press conference by the State Bank of Pakistan, they aimed at making the citizens vigilant about the complications of virtual currencies.

They opined the fact that, virtual currencies are not recognised as a legal tender and that it is strictly prohibited to sell, offer, procure in virtual currencies. They further warned the Payment Service Providers, Payment Service Operators, not to influence their investors to operate in virtual currencies, ICOs. However, on February 10, 2018, the Federal Investigation Agency has
discovered models to investigate individuals dealing in cryptocurrencies.

**China**- The People’s Bank of China has been examining the entitlement of the virtual currencies for three years. They even developed an organisation for such digital currencies, the Institute of Digital Money. Zhou Xiaochuan, Governor of the People’s Bank of China, in a conference held on March 2018, opined that, bitcoins or virtual currencies are still not entitled to be considered as a medium for any kind of consumer transaction or tax payments. On September 04, 2017, seven central government operations, the People’s Bank of China, Cyberspace Administration of China, Ministry of Industry and IT, State Administration for Industry and Commerce, China Banking Regulatory Commission, China Securities Regulatory Commission, and China Insurance Regulatory Commission, came together and drafted the Announcement on Preventing Financial Risks from the Initial Coin Offerings. According to such monetary authorities, these ICOs are not licensed or approved by the centralised authority and they are accepted as a legal tender to make retail payments and further, they are entitled with legal liabilities, unlike traditional transactions and exchanges in such digital currencies should be ceased.

Earlier on December 03, 2013, these regulatory bodies drafted a notification, the “Notice on Precautions against the Risks of Bitcoin” informing the mass about certain nefarious actions it enhances and other nuances it possesses. This circular prohibits the use of bitcoins by the financial entities. They are restricted from selling, offering, purchasing, accepting, trading, in bitcoins. They are also obliged to barred from producing anything in any bitcoin related operations, transacting in Chinese yuan or foreign markets.

**Japan**- In Japan, cryptocurrencies are monitored and examined. Cryptocurrencies are defined in the Payment Services Act which was further amended in June 2016 and came to effect on April 01, 2017. According to this Act, cryptocurrencies are-

- property value that can be used as payment for the purchase or rental of goods or provision of services by unspecified persons, that can be purchased from or sold to unspecified persons, and that is transferable via an electronic data processing system; or
- property value that can be mutually exchangeable for the above property value with unspecified persons and is transferable via an electronic data processing system.

This Act further acknowledges that cryptocurrencies are restricted to parameters which can only be accessed electronically. It grants license to investors who has entitled with a proper local Finance Bureau to transact in cryptocurrency. The investor should operate a foreign cryptocurrency business company where its members and the office should reside and situate in Japan itself. This company is a foreign company where it is monitored by the foreign government and the regulations should comply with the Japanese Payment Services Act. This company manages exchanges made by their customers and segregates them with their money. This should be monitored by certified accountants. Such financial services should have an agreement with the dispute resolution operators that can acknowledge issues under cryptocurrencies. These businesses should store every financial record with their cryptocurrency exchanges and dispatch such record to the Financial Services Agency annually. The FSA further, examines the record and advises the
investors to facilitate their skill. The FSA may cease or dissolve the company if:
- The company fails to comply with any of the conditions therein specified for the registration
- The registration was not proper and legal
- It contravenes any of the provisions stated under the Payment Services Act.

Coincheck, one of the leading Japanese cryptocurrency transaction platforms, suffered from a loss of $400 (NEM) on 26 January 2018. The FSA asked them to draft a report and was further issued a business improvement order on 29 January 2018. Also, FSA paid a visit to the site of Coincheck and issued another order of business improvement on March 08, 2018. Cryptocurrency business companies started promoting their idea on building up a newly self-monitoring body on March 2, 2018. However, this act complying with the Prevention of Transfer of Criminal Proceeds Act, the authorities of these businesses are entitled to scrutinise the accounting records of the customers and hand over the matter to the supreme hierarchy when they observe any sort of nuances or nefarious actions. According to the National Tax Agency, the surplus earned from such digital currencies are evaluated as miscellaneous income and not capital gains, under the Income Tax Act.

**Bangladesh**- The Central Bank of Bangladesh on December 24, 2017 delivered a news that notifies the citizens to be aware that cryptocurrencies are illegal in Bangladesh. This circular was made because they were of the view that transacting in virtual currencies can contravene the statutory provisions of money laundering and terrorism Act. Transactions in virtual currencies are not approved or monitored by the central authority or any crime prevention acts i.e. The Foreign Exchange Regulation Act, 1947, Anti-Terrorism Act, 2009, Money Laundering Prevention Act, 2012. Further, as they don’t have any payment method which is governed so any anonymous user or any individual who does not disclose his/her identity, may violate provisions of the abovementioned Acts. Also, people who will transact in virtual currencies may hinder certain provisions as they won’t be aware of the rules regarding such virtual currencies which might lead them to face legal liabilities. Moreover, investors are restricted from executing, abetting, publicising any crypto-related entities.

The Foreign Exchange Police Department, Bangladesh Financial Intelligence Unit, Bangladesh Telecommunication Regulatory Commission, has already promulgated four conferences regarding the prohibition of cryptocurrency.

**United States**- The United States has normally examined cryptocurrency transactions positively. Certain entities like, Dish Network, Microsoft Store, Sandwich retail Subway, Overstock.com accepts remission in bitcoins. With time, the virtual currencies were observed in the United States financial security markets which enhanced their lawful existence. From 2013, the United States Department’s Treasury of Financial Crimes Enforcement Network (FINCEN) has been drafting certain specifications, recommendations regarding virtual currencies. This Network has elucidated that Bitcoins and Virtual

---

2410 “Regulation of Cryptocurrency Around the World” Library of Congress Law, August 16, 2019
Currencies are not only paper money or a legal tender, but also Money Services Business (MSB), according to the Bank Secrecy Act. Investors under this Act is obliged to keep records, details and files of their business. Also, the Internal Revenue Service has included virtual currencies as a capital that are taxed.

**Canada** - Canada also, has a positive outlook towards Bitcoins. They also monitor such businesses so that these businesses do not enhance money laundering. Canada Revenue Agency considers bitcoins as a property or a product that is like barter system and the profit maximisation is considered as business income. This business also separately examines if it is only buying and selling the products or indulges in spending significantly. Canada also observes bitcoins as Money Service Business (MSB). Bitcoins transactions in Canada are generally complying with provisions of Anti-Money Laundering laws. Citizens of Canada, who are interested in Bitcoin businesses needs to register themselves in the Finance Transaction And Report Analysis Centre of Canada (FINTRAC) and hand over any nefarious actions to the authorities. Notwithstanding, there are some banks in Canada that has prohibited transaction in bitcoins through Debit and Credit cards.

**European Union** - The European Court of Justice, on October 22, 2015, notified that virtual currency transactions are assessed as allocation of resources but are excluded from evaluating these services through Value-Added Tax (VAT) in all European Union member states but some has already discovered their licit stances on bitcoin transaction. The Central Board of Taxes has excluded Bitcoins from Value-Added Taxes as they consider virtual currencies as a financial entity in Finland. In Finland, Bitcoins are rather treated as a product and not a legal tender. In Cyprus, Bitcoins are neither monitored nor governed. Also, the Federal Public Service Finance in Belgium excludes bitcoins from getting evaluated under the Value-Added Taxes.

However, Bitcoins are controlled under certain tax laws in the United Kingdom. The Financial Conduct Authority has a positive outlook towards bitcoin transactions and hankers for support from other enforcement agencies to come up with certain regulatory policies. Bitcoins are also legal in Germany, but they are taxed and governed differently. These transactions are differentiated between, miners, investors, exchanges etc. The National Revenue Agency in Bulgaria also added bitcoin transaction under their tax laws.

---

Prableen Bajpai, "Countries where Bitcoin is legal and Illegal (DISH, OTSK)" Investopedia May 09, 2019
Survey Analysis-
This research was carried out by doing a small survey and collecting 51 responses from people in the age group of 18-60 and having a wide response from them. The questionnaire will be uploaded as an annexure at the end. So, it was found out that Bitcoin being the most affirmative among the many other virtual currencies, next being Ethereum followed by the rest. The reasons behind using cryptocurrencies are wide. Some popular reasons stated by the audience being, 1. investing and earning money (5 out of 51 people). 2. 5.9% have no knowledge about any virtual currency. 3. For purchases on dark web (2 out of 51). 4. It is decentralised and further such currencies are immune from government intervention (3 out of 51). 5. Allows user to control their money (1 out of 51). 6. As a medium of exchange (2 out of 51). 7. Non-taxable and no interest on return (1 out of 51). 8. Trading and ease of payment and quicker mode of transfer of funds (3 out of 51). 9. eventos fraud (3 out of 51). 10.” Bitcoin is a collection of computers, or nodes, that all run Bitcoin’s code and store its blockchain. A blockchain can be thought of as a collection of blocks. In each block is a collection of transactions. Because all these computers running the blockchain have the same list of blocks and transactions and can transparently see these new blocks being filled with new Bitcoin transactions, no one can cheat the system.” (1 out of 51). However, the rest did not invest in any kind of virtual currencies. 37.25% have not invested in cryptocurrencies and 62.75% of the audience have used it through Binance, Koinex (now defunct), Stock market, contact and miners, invested in Bitcoin, Litecoin and Dash through Bitpanda trading platform, and the rest have invested through various other mobile applications. It can also be invested through medium coin base, GDAX and Bitfinex eyc. 33.3% of the target audience agreed that cryptocurrencies can be used as a mode of payment in the future, whereas 9.8% did not agree. 7.8% also agreed, given that it is secure. The rest are not sure about it. 25.5% has stated that cryptocurrency can jeopardize the economy.
with theft and hacking. 23.5% has agreed that it is perilous for the economy as it is decentralised. 17.6% has accepted that it exchanges risks because of anonymity, which was started by 7.8%, 15.7% of the people affirmed that cryptocurrencies can jeopardise the economy because it enhances easy international transactions at 9.8% of the sample opined that due to cheap transactional cost, it might hinder the economy at large. Majority of the people believe cryptocurrencies should have a regulatory body which is entitled to monitor the volatile nature of cryptocurrency by enforcing stringent laws and considering the civilian interests. It was further added that a few cryptocurrencies should be accepted and not all. 21.6% have never used cryptocurrency, 9.8% have rarely used and 5.9% have used it twice or thrice. Out of the 51 respondents, 76.5% were male and 23.5% were female, in the age group (18-24) being the maximum of 74.5%, (25-34) being 21.6%, 2 individuals from (35-44) and (55 or above) respectively. (follow the figures below)
Conclusion

This paper aims to distinguish all the variations that digital currency and cryptocurrency intensifies. We are versed with the facts of how bitcoins were conceptualized and how the usage of digital currencies elevated since then. The utility of such currencies is currently 18 million which might extend to 21 million in the coming years. This paper has also elaborated the countries which has now accepted the use of digital currencies, with countries that are against such use. It also elucidates the reasons latching with the legality of digital currencies. If we agree on the stance that, digital currencies emerge at the time of recession, when banks are closed and laymen has to suffer, it paves a way for the customers to invest, electronically, sitting back in their comfort zone, without any government interference, We are also bound to accept the fact that the Internet is accessed by 59 percent of the global population\textsuperscript{2412}, the rest are deprived of accessing the Internet, which can

\textsuperscript{2412} J. Cement, “Worldwide digital population as of April 2020” Statista April 24, 2020
thereby, be perceived that these deprivation will not be beneficial for them to acknowledge the idea of investing money, digitally. Therefore, if digital currencies are regulated it will only be pleasant for a class of people.

Meanwhile, there is an organization, Give Crypto, that aims at disposing the funds that are donated by individuals for the people in poverty, without any intermediary or any charity funds, etc. This is generally accepted in countries where the inflation rate is immense, and the prices of goods escalate very rapidly. Venezuela has further decided to implement a fresh and new aid program, which will be strictly peer-to-peer and without any central governance or political ideology. A sponsored program shall be formed, where the funds will be deposited to the accounts of the deprived individuals.  

Notwithstanding, we have weaker laws for cryptocurrencies and other digital currencies and to regulate the use of such currencies, we need more stringent laws and the anonymity should be monitored accordingly so that it can counter frauds, money laundering, hacking, theft and other cyber-crimes associated with it.

**

2413 Blockchain Association, “How Cryptocurrencies can help alleviate poverty” Medium June 06, 2019
By Sayee Tandale
From Symbiosis Law School, Pune

Abstract
It is increasingly opined that patents are slowing down rather than speeding up innovation. With an objective to encourage innovation, several companies, particularly in the technology and software sector, such as Google, Tesla and Red Hat have issued patent pledges. Patent Pledges are declarations made by companies to the effect that all or certain particular patents of the company, as mentioned in the said pledge, are open for use by the public and no legal action shall be instituted unless the conditions mentioned in the pledge are violated.

Pledges tend to be vague to provide for maximum interpretation in the patent holder company’s favour. Issuing pledges is a mechanism for a company to achieve dichotomous aims simultaneously, those being encouraging innovation and enjoying the rights given to the patentee by virtue of the invention patented. Pledges attract more prospective licensees than the traditional mode of licensing of patents would have.

This article aims to explain the theory on which the concept of patent pledges is based. The merits and demerits of patent pledges will also be discussed. Patent pledges issued by companies will then be analysed. Defences available to licensees being sued for infringement by companies which have issued such a pledge will be explained. Since this is a developing concept, relevant recommendations from existing scholarship on this subject which may enhance the effectiveness of patent pledges will be discussed. The paper will conclude with recommendations of the author on how a balance can be struck between exclusive property rights and fast innovation.

Keywords: patent portfolio, patent pledge, defensive patenting, open source.

I. Introduction
A patent is a mechanism which allows an inventor to have exclusive rights over the patented invention for a fixed period of 20 years. However, technology is developing rapidly and the invention not being in the public domain for such a long time is bound to slow down technological development. There exists a school of thought that finds patents slow down rather than speed up innovation, and are, in other words, a hindrance to the development of technology.

Companies wish to promote innovation while also retaining the exclusivity over their patented inventions. This is achieved by issuing a patent pledge, which is a promise by the company that legal action shall not be instituted against any party which uses its patents in accordance with the conditions in the pledge.

interpretation in favour of the patent holder company. Also, they may not be legally enforceable. Their enforceability depends on the language of the pledge.

This article aims to explain the concept of patent pledges and analyse some pledges issued by companies. Patent pledges are a way for companies to invite and excite prospective licensees. The author shall conclude with recommendations as to how to make patent pledges a more effective mechanism, and how companies can achieve both the aims of exclusivity over their patented inventions and encouraging innovation.

II. Objectives:
1. To understand the concept of patent pledges.
2. To analyse patent pledges issued by certain companies.
3. To recommend ways in which a company can achieve the aims of encouraging fast innovation while also enjoying the exclusive rights bestowed upon it by virtue of its invention being patented.

III. Methodology:
Secondary data shall be used for the purpose of this paper.

IV. Literature Review
1. Understanding Patent Pledges: An Overview of Legal Considerations: This article provided an insight into the legal theories on which patent pledges are based, particularly doctrine of equitable estoppel. These theories also serve as defences to the users of such licenses.
2. Contreras, J. L. (n.d.). Patent Pledges. Arizona State Law Journal: This paper provided valuable insight to the author into the concept of patent pledges. The paper provides important recommendations to make patent pledges a more effective tool. Particularly, it recommends the establishment of a Patent Pledge Registry and Database, which have been further elaborated upon by the author in the context of the Indian legal regime related to patents.

V. Analysis
A. Basis of the Concept of Patent Pledges

Equitable Estoppel: Equitable estoppel, in patent law, is a defence to a party accused of infringement. It can be adopted when the party alleging infringement adopts a manner of conduct which is misleading to the accused party. Particularly with regard to patent pledges, the issuer promises not to sue the prospective licensee. This is misleading if the said prospective licensee relies on the statement and uses the patent according to the terms laid down in the pledge, but is sued. If sued, this doctrine is a defence which may be availed by him. Since the patentee company which issues the pledge makes such a statement of non-assertion of legal proceedings against any party, albeit based on certain conditions, such as good faith, it can be said that the concept of patent pledges is derived from this doctrine. It is to be noted that not all pledges contain misleading non-assertion statements.

B. Advantages and Disadvantages of Patent Pledges
I. Advantages:
a) They encourage more licensees to obtain licenses. Patent Pledges are issued most commonly over the Internet, and thus have a wider reach over a short period of time as compared to the traditional approach of directly approaching the company, which is a comparatively inconvenient and time-consuming process. Even when Patent Pledges are issued, prospective licensees have to comply with the terms mentioned in the pledge and approach the company. However, under the traditional process of licensing, fewer applications were received by companies as compared to the number of applications that can be received by issuing a Non-Assertion Pledge.

b) Patent Pledges speed up innovation while also allowing the company issuing the pledge to retain the rights, to some extent over its invention that it has been granted by virtue of the patent.

c) Patent Pledges help to reduce patent litigation. The main clause in a patent pledge is the non-assertion clause, whereby the issuer company promises that it shall not initiate legal action against any user-provided that the conditions laid down in the pledge are not contravened. One important condition which usually exists is that the user should not institute an infringement action against the issuer company. If the user does so, the issuer company gains the right to sue the licensee. To avoid this, licensees generally do not take action against the issuer company, leading to a reduction in patent litigation.

II. Disadvantages of Patent Pledges:

a) Compromise on exclusive rights over the Patent: Even though patent pledges enable companies to achieve both their aims of encouraging innovation and exercising their rights over their invention, issuing such pledges inadvertently leads to a compromise in exercising their exclusive rights. When a pledge is issued, the company limits the exercise of its rights over the invention, in the interest of innovation and development. This is due to the fact that it is understood by companies which issue such pledges that issuing pledges with numerous conditions attached impedes innovation. There is no restriction as to the conditions which can be imposed by issuer companies in their patent pledges, but an increasing number of entities are willing to sacrifice, to some extent, their exclusive rights over their invention. Both these aims cannot be achieved simultaneously without compromise.

b) Formation of Patent Pools: Patent pledges may lead to the formation of patent pools. Patent pools are formed when two or more companies enter into a contract with each other to allow each other to use their patents with a promise of not initiating legal action against each other. In this way, patents can also be licensed to third parties on certain conditions, subject to the violation of which legal action is promised not to be initiated. They may form through patent pledges when there is a condition that any patents developed by the user also impliedly belong to the company issuing the pledge. Patent pools may indulge in anti-competitive practices such as restricting the entry of smaller entities into the market.

C. Analysis of Pledges Issued by Companies

1. Tesla:
The Non-Assertion Pledge issued by Tesla via its blog reads thus, “Tesla will not initiate patent lawsuits against anyone who, in good faith, wants to use our technology.”

There are several lacunae in this pledge, some of which are highlighted below:

2417 Supra note 1

2418 https://www.tesla.com/blog/all-our-patent-are-belong-you
The term “good faith is left undefined. It is reasonable to assume that the clause will be interpreted in favour of the company, and the user can be sued whenever the company is of the opinion that his action is not in good faith. Another probable interpretation of this clause is no act is done in good faith, unless done with the approval of Tesla. Therefore, it can be understood that if a prospective licensee wished to license a patent belonging to Tesla, he would have to approach the company and obtain a license, since no terms are mentioned in the pledge. In other words, the prospective licensee is at risk of being sued for infringement no matter what he or she does with the patent. What constitutes good faith and what does not is completely at the discretion of the company and it is not disclosed in the pledge. This pledge is an inducement inviting prospective licensees. It should not be misconstrued as an announcement of patents being licensed unconditionally.

Whether or not the pledge is legally enforceable is unclear. In this case, it is safest to presume that it is legally actionable.

2. Google
The Non-Assertion Pledge\textsuperscript{2419} issued by Google has the following characteristics:

\begin{itemize}
  \item[i)] It specifies that the patent pledge applies only to its patents related to Free Open Source Software (FOSS). The pledge does not apply to any other patents.
  \item[ii)] It also clearly states that Google will not institute legal proceedings on a Pledge recipient or user of the patents, so long as such user does not initiate legal action against Google and does not violate the terms of the pledge.
\end{itemize}

\textsuperscript{2419} \url{https://www.google.com/patents/opnpledge/pledge/}

It is expressly provided that the pledge is legally enforceable and binding. The pledge also states that it is not an assurance that any of the activities covered under the pledge, namely development, use, sale, manufacture, offer for sale, lease license, exportation, importation or distribution of any Free or Open Source Software will not infringe the patents or other intellectual property rights of a third party. This is a questionable clause. A licensee cannot be sure if the patent licensed infringes any third party’s rights. It may deter licensees from obtaining licenses from Google for the patents pledged in this manner.

Google has a procedure laid down for all licensees to follow. It requires any party to which pledged patents are sold to agree in writing to obey the terms of the pledge. If such patents are subsequently transferred to another party from the licensee, they are also required to do the same. This helps Google maintain a record of all licensees and better track instances of contravention of the terms of the pledge.

3. IBM:
IBM was one of the earliest companies to issue a non-assertion pledge. It pledged non-assertion against 500 US Patents in the development, use and distribution of Open Source Software specified in the pledge\textsuperscript{2420}, and their equivalents which were filed in different countries. Some important features of this pledge are:

\begin{itemize}
  \item[i)] The fact that it is legally binding and enforceable is expressly mentioned.
  \item[ii)] The meaning of Open Source Software is clearly defined.
\end{itemize}

It states that if a licensee takes legal action against IBM, asserting his or her patent or pledge can be accessed here: \url{https://www.ibm.com/ibm/licensing/patents/pledged patents.pdf}
any other intellectual property right against Open Source Software, thereby restricting the ability of other parties to innovate and develop Open Source Software, IBM reserves the right to terminate the pledge with such licensee. This helps to reduce the costs of litigation.

iv) The pledged patents only are Open Source. Infringement proceedings can be instituted by IBM if any of its patents other than those listed in the pledge are infringed by a licensee or an third party.

v) It does not specify the procedure to be followed by the licensee to obtain a license. There has, however, been an instance where IBM has almost violated this pledge. An Open Source Software developer, TurboHercules, was sent a notice by IBM threatening legal action on account of infringement of a list of 106 patents and 67 patent applications, two of which were pledged by IBM in this very pledge. The use of the patent by TurboHercules was for the development, use and distribution of Open Source Software, within the conditions laid down in the pledge. It had also not asserted any of its patents against IBM. IBM sent a letter with a notice threatening the institution of infringement proceedings against TurboHercules. They did not pursue legal action in this case. Had they instituted an infringement action, it would be valid only with respect to those patents which were not pledged. TurboHercules could have taken the defence of promissory estoppel with respect to infringement of the pledged patents, because it was misleading to the licensee.

D. Defence available to users of Pledged Patents, If Sued

Equitable Estoppel: As mentioned earlier, this theory forms the basis of the concept of patent pledges, and can be employed as a defence in infringement actions initiated by the company which has issued the pledge against the licensee. The licensee is required to prove that:

a) The language in the pledge was misleading; and

b) The pledge was relied upon by the licensee.

If both these conditions are proven, the licensee will have a strong defence.

VI. Recommendations:

1. Patent pledges issued by companies should be drafted clearly, outlining all the terms so as to prevent the interpretation of the pledge by the company in its favour, at the time of infringement by a licensee, and so that they are not misconstrued by licensees.

2. Contreras recommends the establishment of a government registry for patent pledges. Therefore, information related to patents issued by companies in this manner shall be easily available for the public to refer to. Registries will also keep a check on unethical transactions involving the patents pledged by companies and reassure companies of their title to the said pledged patents. This is crucial because when a company issues a patent pledge it is not surrendering any of its patents. It still has title over the said patents. Thus, establishing registries for patent pledge registrations will encourage more entities to license their patents via patent pledges, while also helping in more efficient administration of patent pledges issued by companies. This is a very important recommendation in existing scholarship pertaining to this subject. The author

2421 http://en.swpat.org/wiki/IBM_v._TurboHercules_in_2010
2422 Supra note 1.

Supreme Amicus suggests that such a registry be established under the aegis of the patent office, too facilitate easy co-ordination.

3. Another important recommendation in existing scholarship, by Contreras\textsuperscript{2424} is that a Patent Pledge Database should be created, managed by the Patent Pledge Registry as recommended. The registry should be managed by the patent office, so that patent records can be linked. Soft copies (PDFs) of patent pledges which have been registered should be stored in this database. Contreras also provides that any changes made to the pledge or new pledges issued should also be recorded on the database. The author would like to elaborate this recommendation further. At the time of registration of the pledge, each company can be given a unique identification number. In this way, they will be able to keep a record of all the pledges made. As a safeguard, they should be uploaded by the registry authorities after approval. Companies should communicate the pledge to the public only after approval of the registry is received. The pledges would also be openly accessible by using the identification number.

4. The author recommends that every patent pledge registered should have a serial number after the identification number of a company, so that it is easy to track the number of pledges registered by one entity. For example, if 1234 were the unique identification number of a company, the first pledge registered should be numbered 123401, and so on.

5. If any changes are made to registered pledges, they should be registered again to avoid confusion. Pledges should be enforceable from the date of approval, when they are communicated by the company to the public.

6. Companies should keep a record of all licensees.

7. Issuing patent pledges should be made mandatory in the Indian legal regime pertaining to patents. This will reduce licensing costs for firms, as the issuance of a pledge can have a wider reach than keeping licensing terms confidential between the licensee and the issuer company. Also, issuing patent pledges will introduce transparency in the licensing process, as all the conditions subject to which the patent is to be licensed to prospective licensees by the issuer company is known to the public. Furthermore, companies issuing patent pledges will be able to initiate legal proceedings against those who breach the conditions of the pledge easily. The fact that a pledge is registered lends an enforceable, legal character to the document.

8. As the number of licensees increases by virtue of the patent pledge issued, it will be difficult for the companies to track contraventions, if any, of the terms of the pledge by parties. Companies should be mandated by the registry established as recommended above, to maintain records of all the parties to which the patents are licensed.

9. The registry of patent pledges, if established as previously recommended can also specify certain clauses which must form a part of the patent pledge to be issued by companies, in the absence of which such pledges will not be registered. For example, one compulsory clause could be the legal enforceability clause. Contreras\textsuperscript{2425} also recommends that all patent pledges must be legally enforceable. The author believes registration of the pledges with the registry

\textsuperscript{2424} Supra note 1

\textsuperscript{2425} Supra, note 1.
as recommended will serve as proof of them being legally binding and enforceable in nature.

10. If patent pools are formed as a result of issuance of patent pledges, companies earning above a certain benchmarked amount of turnover, or holding more than a benchmarked percentage of the market share must be subject to scrutiny by the Competition Commission of India to prevent any market malpractices, such as restricting new entrants of a smaller size from becoming members of the patent pool. Patent pools must be regulated under competition law to prevent distortion of competition.

11. Observing the current trend that entities are willing to limit their proprietary rights over their patents in the interest of fast innovation, it is the opinion of the author that the duration of patent protection should be reduced from the current twenty years. Taking into account the fast pace of technological development, this is vital. Having this long a period of protection will hinder rather than speed up innovation.

VII. Conclusion
Patent Pledges or Non-Assertion Pledges are declarations issued by companies to the effect that all or some of their patents are open to the public, subject to some conditions. If these conditions are violated, the company can initiate legal action against the other party. It is a form of licensing. They enable a company to retain, to some extent, its exclusive rights related to the patent, and encourage innovation by making it freely available to the public. Pledges have a wide reach and can encourage more licensees to apply for licenses. It makes more people aware that patents are available for licensing. They reduce litigation costs. Pledges should have clear terms. A registry should be established, as recommended, for administrative convenience and proper maintenance of records. Since there is a general trend that companies are willing to sacrifice their exclusive rights to some extent, in the interest of fast innovation, the time period for patents should be reduced by international consensus. Implementing the recommendations herein discussed will help to speed up innovation and exercise one’s rights by virtue of one’s invention.

Bibliography:
1. Research Papers and Reports

2. Websites
   ii) http://en.swpat.org/wiki/IBM_v._TurboHercules_in_2010
   iii) https://www.tesla.com/blog/all-our-patent-are-belong-you
   iv) https://www.google.com/patents/opnpledge/pledge/
INCEPTION OF INDIA'S PRIVACY LEGISLATION

By Shaheen Banoo
From Symbiosis Law School, Pune

ABSTRACT

“Privacy is dead, and social media holds the smoking gun.”

– Pete Cashmore

As soon as the Cambridge Analytica scandal came to light, the talks of data and privacy breach started doing the rounds. Personal data protection is the need of the hour in today’s technology-driven world to prevent any data misuse that could be used for theft, blackmailing, extortion, sexual crimes, or to humiliate a person et cetera. Therefore, a breach of privacy is a prime cause of concern.

Furthermore, after the Supreme Court ruled that the right to privacy is a part of right to life, it became imperative for the government to come up with personal data protection legislation and in advancement of the same, Personal Data Protection Bill 2019 is the first step towards securing the said aim. "The right to privacy is a fundamental right and it is necessary to protect personal data as an essential facet of informational privacy" as envisaged under Personal Data Protection Bill 2019, 2019.

The present analytical essay delves into the prevalent surge of personal data breach activities and examines the Personal Data Protection Bill, 2019, and its salient features.

Keywords: Personal Data, Privacy, Personal Data Protection Bill, Right to Privacy, Internet

INTRODUCTION AND BACKGROUND

“Data is the pollution problem of the information age, and protecting privacy is the environmental change.”

– Bruce Schneier

The fragile hot air balloon encapsulating privacy infringement was fumed hotter as soon as the Cambridge Analytica scandal involving Facebook busted; for the air balloon to surface higher up in the sky, for the world to glimpse the gravity of the matter concerning privacy breach. This instance including many other inter alia, Edward Snowden exposing NSA's surveillance activities, privacy concerns over Indian Adhaar use and the recently exposed Jharkhand's Jamtara cybercrime fraud advocated the dire need of stricter privacy protection legislation across the globe.

It is an uncontested fact that technology is a double-edged sword wherein, on one side it gives the opportunity of safeguarding one’s privacy, however, on the flipside it also plays pivotal role with regards to
infringement of privacy. Therefore, in the light of this statement it is imperative to analyse prevalent privacy laws in India.

**Personal Data Protection Bill, 2019 - The Inception**

The Personal Data Protection Bill, 2019 (hereafter referred as Bill) traces its genesis to the SC judgement, *K. S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.* wherein "right to privacy" was recognised as the fundamental right under Article 21 of the Indian Constitution, foundation of which rests on the EU General Data Protection Regulation (hereafter referred as GDPR).

**Justice BN Srikrishna Committee- The genesis**

The draft of Personal Data Protection Bill, 2018 had been crafted under the chairmanship of "Justice BN Committee" and was submitted to the Ministry of Electronics and Information Technology. Furthermore, it is an incontrovertible fact that "the more technology we bring into our lives, the more our privacy seems to slip away", therefore, instances of inappropriate use of personal data and data breach is increasing at an alarming rate. The amount of personal data available onto public domain could lead to worrisome state of affairs and the same could be used for gamut of unlawful purposes viz., unjust political motives, theft, blackmailing, mental and physical torture, humiliation etc.

**The Personal Data Protection Bill 2019 - Legislative History**

Therefore, to have a check on crimes involving data breach and aforementioned offences concerning breach of personal information of citizens, this Bill was first drafted in the year 2018, thereafter, the **Personal Data Protection Bill 2019** was introduced in Lok Sabha on December 11, 2019 for approval by Minister of Electronics and Information Technology, Ravi Shankar Prasad. It is pertinent to note that the status of the Bill is pending in the Parliament.

---

2429 Id.
2430 Ram Jethmalani vs. Union of India, (2011) 8 SCC 1.
2438 Vinod Joseph & Protiti Basu, The Personal Data Protection Bill 2019 - A Comparison With The 2018
Significance and Relevance of the Bill - The Need?

As Marlon Brand has aptly put, “privacy is not something that I’m merely entitled to, it’s an absolute prerequisite”, given the time of aristocratic digital world we are heading towards, realising the significance of personal data protection became necessary. Privacy is not entitlement of any sort, but is a condition precedent for right to life enshrined under Article 21 of our Constitution. The Bill aims at follows-

..."to provide for protection of the privacy of individuals relating to their personal data, specify the flow and usage of personal data, create a relationship of trust between persons and entities processing the personal data, protect the rights of individuals whose personal data are processed, to create a framework for organisational and technical measures in processing of data, laying down norms for social media intermediary, cross-border transfer, accountability of entities processing personal data, remedies for unauthorised and harmful processing, and to establish a Data Protection Authority of India for the said purposes and for matters connected therewith or incidental thereto."
India with a list explaining "sensitive personal data." Therefore, lack of a full-fledged law in the country paved way for the Personal Data Protection Bill, 2019.

**GENERAL DATA PROTECTION REGULATION AND PDPB-COMPARITIVE OVERVIEW**

European Union's General Data Protection Regulation (GDPR) is regarded as the stepping stone for many countries to come up with their personal data protection laws. Following its footsteps India has drafted the structure of Personal Data Protection Bill (PDPB) relying on the skeleton provided by GDPR with minor differences. Under PDPB Bill there is a provision for categorisation of critical personal data from personal data provided this data must be processed using a server which must be operating in India. Whereas, GDPR doesn’t recognise classification among data under the prevalent guidelines and operative provisions, whatsoever.

Further, with regards to provision about data protection officer under PDPB Bill, it is the sole responsibility of data protection authority to raise awareness about data breach, to conduct audit and spread awareness about the same.

**PROVISIONS OF BILL - SALIENT FEATURES**

**THE BILL-DECODED**

i) **Objectives of the Bill - The Bottom Line**

The Bill aims at protection and regulation of personal data of the individuals and accordingly acts as a watchdog by keeping an eye on data breach. The Bill aims at establishing equilibrium among data utilization and contemporary digital economy.

ii) **Personal Data Protection Bill, 2019 - The Core Principles**

The objective of the bill rests on the substratum of "obligation to protect data". Its core principle embodies the concept of:

a) reasonable and;

b) fair, processing of the data duly collected by the "data fiduciary" or "data processor".

It is the responsibility of data fiduciary to comply with provisions laid down in the Bill in order to ensure protection and regulation of personal data.

---

2449 Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.
2451 Rohit Mahajan and Shree Parthasarathy, India Draft Personal Data Protection Bill, 2018 and EU General Data Protection Regulation A comparative view, PDPB v. GDPR, DELOITTE.
2453 Id.
2455 Siddharth Vishwanath, Decoding the Personal Data Protection Bill, 2018, for Individuals and Businesses, PWC INDIA.
2456 The Personal Data Protection Bill, 2018, Section 2(13).
2457 The Personal Data Protection Bill, 2018, Section 2(15).
order to thereby ensure full compliance on behalf of the data processor as well.²⁴⁵⁸

**iii) Personal Data- The Categories**

The draft Bill 2019 provides for **two categories** of personal data or information²⁴⁵⁹ as follows seriatim -

i. Personal data;²⁴⁶⁰  
ii. Sensitive personal data.²⁴⁶¹

**iv) Applicability of the Bill-**

The Bill mandates compliance from the government and entities named "data fiduciaries" and "data processors."²⁴⁶² One of crucial aspect of the Bill is its extraterritorial reach which so far was missing in Information Technology Rules, 2011.²⁴⁶³ Further, the Bill regulates processing of personal data by the following three categories as follows-

i. the Government;  
ii. Indian companies;  
iii. Foreign companies dealing with personal data of Indian citizens.

The 2019 Bill also gives central government the power to exercise the right of exemption to any government agency from the application and compliance of its provisions.²⁴⁶⁴

**v) Rights of Citizens- The Pillars**

The Draft Bill provides for different rights to the individual for data protection, meaning, the individual has a say into deciding who could peek into his/her data. The various rights, inter alia, includes the following rights seriatim-

i. An individual has given a right to give **consent** before the data could be used for the purposes.²⁴⁶⁵  
ii. An individual has given a right to decide as to who should be given **access** of his/her data.²⁴⁶⁶  
iii. Individual can seek **corrections** on any incorrect data collected by the data fiduciaries.

---

²⁴⁵⁸ Supra note 7.  
²⁴⁶⁰ Personal Data Protection Bill 2019, Sec. 3(28).  
²⁴⁶¹ Personal Data Protection Bill 2019, Sec. 3(36).  
²⁴⁶³ Supra note 16, at 7.  
²⁴⁶⁵ Id.  
²⁴⁶⁶ Personal Data Protection Bill 2019, Section 17.  
²⁴⁶⁷ Vinod Joseph & Protiti Basu, The Personal Data Protection Bill 2019 - A Comparison With The 2018
iv. The option of data portability is provided for the data to be shared with other agencies at the option of the citizen.2468

v. Most crucial right given in the Bill is the authority to decide the data to be forgotten2469 which was not provided earlier i.e., right of deletion.2470

vi. Data principal shall have the right to correction of inaccurate personal information.

vii. Right of erasure2471 is given to data principal to have the irrelevant personal data erased.2473

viii. Right concerning updating the old data is given to the individual along with the right to complete the defective and unfinished data.

ix. Right to justification with regards to non-compliance of the aforementioned rights by the data fiduciaries.2474

x. Right to restrict continuation of data disclosures when not necessitated.2475

vi) Permitted Instances for Processing Personal Data

Personal data2476 means data that concerns with the identity of any person.2477 This Bill provides grounds when processing of personal data can be done.2478 The grounds include, inter alia, consent2479 of the individual in order to process their personal data.2480

The right to consent is an instrumental requirement in order to protect data breach, therefore, it gives greater decisive power in the hands of the individual to have a say about their personal data processing.2481

However, there are instances when individual's consent is not required. These instances include the requirement of compliance of court's order, or any judgement.2482 Further, if the processing of personal data is done for the purpose of rendering functions of legislature or with regards to the requirement of prompt action, then processing of data is not restricted on the ground of consent not obtained.2483

2476 Supra note 23.
2479 Id.
2480 Arun Prabhu & Molshree Shrivastava, The Personal Data Protection Bill, 2019: An Analysis,
vii) **Grounds for Processing Personal Data without Consent**

Notwithstanding, consent is mandatory under section 11, but personal data of *data principal* which is not sensitive personal data can be processed for employment termination or recruitment, assessment of the performance or benefit by *data fiduciary*, provided data principal is the employee of the data fiduciary.2484

Further, *data fiduciary* can process personal data for reasonable purposes including, inter alia, identifying fraud whistle blowing purposes, concerning mergers and acquisition, for recovery of debt and securing network and information security et cetera without the consent of the data principal. The processing of such personal data can be done to secure public interest. However, due regard to be given to the reasonable expectations of the individual concerning processing of his/her data on above listed grounds.2485

viii) **Permitted Instances for Processing Sensitive Personal Data under PDPB, 2018**

Under PDPB 2018, data including passwords, status about caste, information relating gender of a person, genetic data, data about biometrics, matters concerning financial information, etc are included in "sensitive personal data".2486

However, the word password has been omitted under PDPB 2019.

One of the primary grounds for processing sensitive personal data under PDPB 2018 is the explicit consent of the individual whose data needs to be processed. Furthermore, this data can be processed if prompt action is required or is done on the grounds of rendering functions of the states or with compliance of any law of the land or the order of the court that could include even a judgement.2487

However, it is pertinent to note that grounds for processing sensitive personal data is not explicitly mentioned in Personal Data Protection Bill, 2019.2488

---

2484 Personal Data Protection Bill 2019, Section 13.
2485 Personal Data Protection Bill 2019, Section 14.
2488 Personal Data Protection Bill 2019, Section 15.
ix) Social Media Intermediaries

One of the important aspects of the Bill includes regulation of social media intermediaries. Under the provisions of the Bill, it is mandatory for the intermediaries having impact on electoral democracy and public order are required to opt for voluntary user verification mechanism for all its users in India for its functioning.  

x) Redressal Mechanism

Data Protection Authority (DPA) is required to be set up as redressal mechanism to penalise the wrongdoers for the offences committed by them. The authority shall be vested with the powers to safeguard the rights of the persons concerned in the Bill. The authority is required to keep an eye on anyone attempting to indulge in data breach or misuse of personal information of any sort. Appeals from DPA can be made to Appellate Tribunal. Further, appeals from Appellate Tribunal can be made to the Supreme Court of India.  

It is the duty of the authority to secure maximum compliance with the provisions that are mentioned in the 2019 Bill.

It consists of seven persons including a chairman. The members of the DPA should possess expertise in Information Technology and subject of data protection.

IMPACT OF THE BILL - AMENDMENT ON OTHER LAWS

The Bill casts impact on the erstwhile Information Technology Act, 2000 as it requires deletion of provisions concerning compensation payable by companies in the event of failure to protect personal data of the citizens. Further, it also impacts Right to Information Act, 2005.

PERSONAL DATA PROTECTION IN DIFFERENT JURISDICTIONS

The "California Consumer Privacy Act" (CCPA) came into force on 1 January 2020 by providing a private right of action for damages to the consumers.


CCPA has added California’s name as the latest entry on the data protection legislation chart. Further, new entrants includes Thailand’s "Personal Data Protection Act" and Brazil’s "Lei Geral de Proteção de Dados" (LGPD) that are set to become effective in the year 2020. Moreover, Brazil’s LGPD like India, too, is heavily influenced by EU’s GDPR that shall become effective from August 15, 2020. The Indian Personal Data Protection Bill, 2019 is a progressive step towards fighting the menace of personal data breach.

CONCLUSION

“If you put a key under the mat for the cops, a burglar can find it, too. Criminals are using every technology tool at their disposal to hack into people’s accounts. If they know there’s a key hidden somewhere, they won’t stop until they find it.”

– Tim Cook

We are a generation that lives in an era where the day starts by checking our phones, scrolling feed, updating our day-to-day affairs on various social media platform on priority. These activities ranges from sharing locations, likes and dislikes et cetera. Thus, it is imperative to have a law that restricts and punishes anyone attempting data breach for the concerned data could be used to realise numerous unlawful activities.

Therefore, the researcher is of the view that this Bill is a progressive step towards the dawn of data protection legislation in the country. It is an uncontested fact that today much of our lives are on social media platforms with gamut of information being available at just a click, thereby, it is indispensable for any government to work towards the protection of personal data of its citizen. Thus, Personal Data Protection Bill, 2019 comes to remedy the situation by providing provisions for safeguarding individual’s data by keeping a check on personal data breach and privacy infringement.

BIBLIOGRAPHY

BOOKS

JOURNAL
1. Animesh Sarmah, Rashmi Sarma, Amlan Jyoti Baruah, Brief study on Cyber Crime and Cyber Law’s of India, INTERNATIONAL RESEARCH JOURNAL OF ENGINEERING AND


**INTERNET DOCUMENTS**


**LEGISLATIONS**


**ONLINE DATABASES**

1. Cambridge Books Online
2. Google Scholar
3. Hein Online
4. JSTOR
5. Lexis Nexis
6. Manupatra
7. Oxford Handbooks Online
8. SCC Online
9. TAX MANN
10. Westlaw

*****
COMPARATIVE ANALYSIS OF WILL UNDER HINDU LAW AND MUSLIM LAW

By Shantanu Seth
From Symbiosis Law School, Hyderabad

STATEMENT ABOUT THE PAPER
This research paper will deal with the concept of “will” and the origin of such concept among the Hindus and Muslims and laws which are present among them to make the concept effective and implicit, while also trying to find out any similarities or differences between the two laws through comparative analysis.

RESEARCH QUESTIONS
1) How is a “will” defined as per Indian law?
2) What are the general rules which are to be followed in making of a valid will as per the governed laws?
3) How the concept of will was introduced in the Hindu law?
4) How the concept of will was introduced in the Muslim law?
5) Whether there are any differences or similarities between the two?

RESEARCH OBJECTIVE AND SCOPE OF THE STUDY
The objectives of this research paper is to put light on the concept of “will” which is prevalent in the country. This paper further analyses the general rules to be kept in making the will a valid one and also talk about the concept of it under the Hindu and Muslim law respectively. Furthermore, to compare and analyse the two and point out the differences and similarities between the two by quoting the relevant and leading case laws.

RESEARCH METHODOLOGY
The research methodology which is used while making this manuscript was the “Doctrinal Research Methodology”. The main base of a Doctrinal Research is, “What is the law in this case”. A doctrinal research an approach that has been done on a legal proposition or propositions through manner of analysing the prevailing statutory provisions, facts, instances and case laws with the aid of applying the reasoning power. This kind of approach is purely theoretical in nature that seeks to discover the "one correct answer" to certain legal issues or questions.

CHAPTERISATION
This research paper consists of four chapters. The first chapter deals with the general introduction to the topic and the scheme of the paper. The second chapter deals with the concept of will under the Hindu law, talking about the history and origins, the relevant act and the important sections and also the general guidelines of making it. The second chapter deals with the concept of will under the Muslim law, the origin, history and law behind it, the general rules which are to be followed and differences in will under the Shia law and Sunni law. The final chapter i.e. the fourth chapter puts forward the analysis of similarities and differences of the concept between the Hindu law and Muslim law and puts forward the conclusion of the research paper.

CHAPTER I- INTRODUCTION
A will (also known as a “testament”) is a document which is legally recognised by the court in which a person conveys how the property which belongs to him should be distributed to other persons upon his death. The person who expresses his wish on such a document is called the “testator”, the person to whom the estate is given until the final distribution is called the “executor”
and the person(s) who receives such a property or a share in it is called the “inheritor” or “beneficiary”. The will can be modified, revoked or substituted by the testator at any point of time during his/her life.2497

Even though a will is a legal document but it is not written in a prescribed form. It can either be typed or handwritten, be written on a stamp paper or not, etc. Any person of sound mind and a major is allowed to make a will. If an individual who is sane at the time of creating the will, such will is considered to be valid, a person should understand the result of his actions as well as the legal consequences at the time of making a will, etc.

As stated earlier there is no prescribed form of writing a will. It is also not compulsory to register it. It is on the discretion of the testator whether he wants to register or not. However, registering it would erase all the doubts and concern over its legality. The testator at the time of making the will has to state that the will is made by his/her free will and is of sound mind state. Then the executor and the testator must sign the will and two or more witnesses must also attest it and such a witness should not be a beneficiary of that will.

The will can be revoked and such a revocation can be voluntary or involuntary. Involuntary revocation is made by operation of law. If a testator is married, then his will made previously stands revoked. Thus, for any subsequent marriage after the first one the will stands as revoked. Only that will which is executed prior to the death of the testator is enforceable.2498

The essential characteristics of a will are-

- **IT IS A LEGAL DECLARATION**- All those documents that claim to be a will must be legal i.e. they must adhere to the law and must be enforced by a person who is legally eligible to do so. It must include a declaration in respect to the concerned property and is legally binding on the family.

- **DISPOSAL OF THE PROPERTY**- A Hindu person can bequeath all his property by way of his will. However, the coparcenary interest cannot be passed on by any member of the undivided family.

- **COMES INTO EFFECT AFTER THE DEATH**- A will can come into force only after the death of the testator.2499

There are different types of wills in India. These are-

- **PRIVILEGED WILL**- It is defined under Section 65 of Indian Succession Act, 1925 and states, “Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.”  

  Section 66 tells for the way in which such will is made and rules for execution of a privileged will. The will may be oral or in writing, wholly or in part written by the testator, signed and attested or not by the testator, be written as per his instructions after his death if will is still not written, may give instruction to two witnesses declaring his intention to prepare a will, etc.

- **UNPRIVILEGED WILL**- It is defined under Section 63 of the Indian Succession Act, 1925 and states, “Every testator, not

---

2498 Poonam Pradhan Saxena, Ibid.
2499 Sahil Shah, Supra 3(May. 02, 2020, 7:30 PM IST).
2500 Section 65, Indian Succession Act, 1925.
being a soldier employed in an expedition or engaged in actual warfare, 12 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will” 2501

- **CONDITIONAL/ CONTINGENT WILL** - It is a type of will which depends on happening or non-happening of an event which is not certain. The will may take effect or be defeated on such an event. If the happening of an event stated in a will is the reason for making the will, it is unconditional. But if the testator intends to dispose of his/her property in case the event happens, the will is conditional. In the case of Rajeshwar v. Sukhdeo 2502, sometimes it may be ambiguous whether the testator intends to make the will conditional or not, at that time the circumstances prevailing and the language of the document must be taken into consideration. It is provided under Section 120 of the Act.

- **JOINT WILL** - In the case of Kochu Govindan Kaimal v. Thayankoot Thekkot Lakshmi Amma and Ors. 2503, the joint will was defined by the SC as “A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing of either of their separate properties or of their joint property.”

- **MUTUAL WILL** - When two persons or more agree to make a will mutually, it is a mutual will. These are the wills which are generally made by the spouses. The benefits are conferred by the testators on each other as they are reciprocals to each other. Hence, it is also known as a reciprocal will. It can be revoked during the lifetime of either of the testators. There are two or more wills which are mutually binding. After the death of a testator, the remaining surviving testator(s) have to dispose of the property as per the agreement. 2504

- **HOLOGRAPH WILL** - A will made in writing by the testator himself is a holograph will.

- **DUPLICATE WILL** - A duplicate will made by the testator for safekeeping with the agency, executor or bank. 2505

- **SHAM WILL** - A will executed but is held invalid as it is made against the intention or wishes of the testator. Generally made by way of coercion or fraud.

The will made by Hindu, Buddhist, Sikh or Jain is regulated and governed by the Indian Succession Act, 1925. The property of Mohammedans is disposed in accordance to the Quran and other sources.

**CHAPTER II - WILL UNDER HINDU LAW**

The origin and development of the concept of will among the Hindus is still unknown. On the other hand, the concept of will was already well established among the Mohammedans and later the contact with them first during their rule over India and later on further contact with the Europeans is considered to be the most apt reason for the introduction of “will” among the Hindus. After the introduction of such concept the concept of formal testamentary instruments substituted the informal instruments. Only the will which is made by any Hindu, Buddhist, Sikh or Jain is regulated by the Indian Succession Act, 1925.

The definition of “will” is given under Section 2 (h) of Indian Succession Act, 1925 which provides that “Will means the legal declaration of the intention of a

2501 Section 63, Indian Succession Act, 1925
2502 1947 SCC ONLINE PAT 158.
2503 AIR 1959 SC 71.
2504 Sahil Shah, Supra 3 (May. 02, 2020, 10:30 PM IST).
2505 Types of Wills in India (May. 03, 2020, 5:30 PM IST) https://www.indiafilings.com/learn/types-wills-india/
The person with respect to his property, which he desires to take effect after his death”.

The Indian Succession Act, 1925, provides for only two kinds of will- Privileged wills and Unprivileged wills.

According to Section 18 of the Registration Act, it is not compulsory to register a will. In the leading case law of Narain Singh v. Kamla Dev, it was held by the Supreme Court that through a mere non-registration of the will, an inference cannot be drawn against the genuine nature of it. However, it is advised to enlist the will as the registration provides for a solid lawful proof regarding its legitimacy. At the time of enrolment of the will, it is put in the protected authority of the Registrar and subsequently cannot be altered, wrecked, ruined or taken. The will, after registration, can only be provided either to the testator, or after his death to a person who is authorized by producing the death certificate of the testator.

Section 59 of the Indian Succession Act, 1925 tells about the person who is capable of making wills. It states that, “every person who is of sound mind and not a minor may dispose the property through a will.”

Generally, a will is made by an elderly and bed driven person. Hence, as per “sound mind” the law does not expect a person to be fully fit, or is in a perfect health state, or is able to give instructions regarding the distribution of the property. The phrase “sound mind” means that the testator is able to understand that his property or object(s) is being distributed and also understands the persons among whom the property is being distributed and claim from those people who are excluded. In the landmark case of Swifen v. Swifen, it was said that “the testator must retain a degree of understanding to comprehend what he is doing, and have a volition or power of choice.”

The word “minor” means any person who has not attained the age of 18 years and holds the same influence as under Section 12 of the Indian Contract Act, 1872.

The various explanations which are provided in Section 59 of the Indian Succession Act, 1925 provides for the other persons who are capable to prepare a will. Explanation I talks about a married women and that she may only dispose by will of any property which she could alienate by her own act during her life. Explanation II talks about those people who are dumb, blind or deaf can prepare a will if they are aware as to what they are doing and are aware of the consequences of such actions. Explanation III tells about those persons who are of unsound mind but at the time of making of will the person is sane then that will is deemed to be valid. However, a will is deemed to be invalid which is made by a person who at the time of making it is either intoxicated or suffering from such a disease, because of which he is unable to understand and deduce his actions.

Section 62 of ISA, 1925 provides for the revocation or alteration of it during the lifespan of the testator and Section 70 of the same act tells about the manner in which

---

2506 Section 2 (h) of Indian Succession Act, 1925
2507 Law of joint will Indian Personal Law Context (May. 05, 2020, 5:30 PM IST) https://www.lawteacher.net/study-guides/family-law/law-of-joint-will.php#citethis.
2508 AIR 1954 SC 280.
2509 Section 59, Indian Succession Act, 1925.
2510 1 F anf F 584.
such a revocation is possible. The revocation should be real and not mere intentional. If a will is revoked, it should be in writing and there should be a clause stating that the prior will has been revoked. If the will is torn or burnt by the testator or any other person working on the directions of the testator, then it’ll be considered to be revoke. However, the will must be burnt in its entirety. If another will or codicil is made post the original will, it will mean an implied revocation. If there is a following marriage or birth after making the will, it doesn’t mean that the will is revoked.

Section 71 of ISA, 1925 provides for the alterations in the will. It states, “No obliteration, interlineation or other alteration made in any unprivileged Will after the execution thereof shall have any effect, except so far as the words or meaning of the Will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinafter is required for the execution of the Will: Provided that the Will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will.”

It is clear that for any changes which is required to be made in the will, it should be made before the execution of the will and such changes should have the signature of the testator and be accompanied by the attesting witnesses. A memorandum can also be made by the testator and be signed by him. If such things are not considered at the time of making the changes, the changes would deemed to be invalid.

The changes should be made in the will itself and be read as a part of the will, not separate or distinct from it. In the case of Balathandayutham and Another v. Ezilarasan, “When the execution of a will asserted by one party is denied by the other party, then the burden is on the party who relies on the will to prove its execution. But when the execution of the will is not denied then no burden is cast on the party who relies on a will to prove its execution.”

Section 74 of the act provides that the will can be made in any form and in any language. There need not to be any technical jargon in the making of the will. But if the technical words are present, they should be understood in a legal sense. The court should go by the manifest intention of the testator. If by reading the will, two constructions are possible, then that construction which paves way for intestacy should be avoided. Also such construction which postpone the endowment of the property should also be avoided. In the case of Gnanambal Ammal v. T. Raju Aiyar, the SC held, “the cardinal maxim to be observed by the Court in construing a Will is the intention of the testator. This intention is primarily to be gathered from the language of the document, which is to be read as a whole.”

In the case of Bhura v Kashi Ram, it was held that, “a construction which would advance the intention of the testator has been favoured and as far as possible effect is to be given to the testator’s intention unless it is contrary to law. The court should put itself in the armchair of the testator.”

2512 Section 71, Indian Succession Act, 1925.
2513 Lalitaben Jayantilal Popat v. Pragnaben Jmnadas Kataria & Ors. [2009 (1) Scale 328].
2515 Nathu v. Debi Singh [ AIR 1966 Punj 226].
2516 1951 AIR 103.
2517 1994 AIR 1202.
court should also consider about the surrounding circumstances, the position of the testator, the family relationship, etc. to make particular sense of the words in the will. It should not speculate the meaning of what is written in the will. The factors which are mentioned above should merely aid in ascertaining the intention of the testator. Court should only interpret in accordance with the expressed and implied intention of the testator and not to recreate or make will for the testator. 2518

A bequest cannot be made to a person who is dead at the time of the death of the testator. Section 113 of the act provide for transfer of property under a will to an unborn person. An earlier interest in life must be created in another person and the bequest must include the entire remaining interest of the testator. In Sopher v. Administrator-General of Bengal2519, the court upheld the transfer of property from grandfather to unborn grandson as the interest vested was transferred at the birth of the grandsons and the property can be enjoyed by them when they attain the age of twenty-one years. If the transfer is limited and not absolute, then the transfer is void. In the case of Girish Dutt v. Datadin2520, the court decided that interest to be transferred must be absolute and not limited in any way.

Section 114 of ISA, 1925 states, “Rule against perpetuity.—No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator’s death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.”2521 The maximum permissible age of remoteness in India is 18 yrs.

In Stanley v. Leigh2522, it was decided by the court that “the rule of perpetuity is not applicable when there has to be a transfer, interest in an unborn person must be created, takes effect after the life time of one or more persons and during his minority, unborn person should be in existence at the expiration of the interest.”

Section 61 of the act provides for an invalid will. “a Will, or any part of Will made, which has been caused by fraud or coercion, basically not by free will, will be void and the Will would be set aside.”2523

Section 127 of the act says “a bequest, which is based upon illegal or immoral condition, is void. The condition which is contrary, forbidden, or defeats any provision of law or is opposed to public policy, then the bequest would be invalid.”

CHAPTER III- WILL UNDER MUSLIM LAW

Under Muslim law, “Wasiyat” (meaning will or testament) is been defined as “an instrument by which a person makes disposition of his property to take effect after his death.”2525 Furthermore, Tyabji has also defined it as “conferment of right of property in a specific thing or in a profit or advantage or in a gratuity to take effect on the death of the testator.”2526 Similar to

2518 Navneet Lal v. Gokul & Ors [ AIR 1976 SC 794].
2519 AIR 1944 PC 67.
2520 AIR 1934 Oudh 35.
2521 Section 114, Indian Succession Act, 1925.
2522 (1732) 24 ER 917.
2523 Section 61, Indian Succession Act, 1925.
2524 Section 127, Indian Succession Act, 1925.
2526 Shiva, Concept of will under Muslim Law (May 05, 2020, 8:00 PM IST) http://www.legalserviceindia.com/legal/article-251-concept-of-will-under-muslim-law.html
that in Hindu law, the will becomes potent only after the death of the testator, the testator has full control over it and it can be revoked or altered by him. Beneficiary under the will cannot interfere in any manner whatsoever in the testator's power of enjoyment of the property including its disposal or transfer.  

An important narration for will under the Muslim law is the story of Sa’d Ibn Waqqas and the Prophet. S’ad has fallen ill during the Farewell Pilgrimage. He was a wealthy man and only had a daughter. He asked Prophet (Messenger of Allah), how much property he shall give as Sadaqah (Benefactor). He asked whether he could donate two-thirds or half of his property. The Prophet denied. When he asked one-third, Prophet agreed as it is good to leave the legal heirs well-off and not to leave them dependent on others and beg for the necessities in life from other people. According to the tradition of the Prophet, the object of the will is to provide maintenance to the members of the family and to those other relatives where they are not provided anything by the law of inheritance. But the power such exercised by the testator should not injure the legal heirs. Hence, it can be understood that the policy of Muslim law permits a man to give away whole of his property in equal shares as a gift done when alive among the legal heirs and part of it is to be given to the other relatives.

In the case of Abdul Manan Khan v. Mirtuza Khan2528, the general rule was reiterated by the court that no formality is required in making of the will. Writing of a will is not important to make the will legitimate and no specific structure is provided for forming of one. Even verbal assertion is vital as much as the goal of the deceased benefactor is adequately found out. The will which is made in writing is called a “wasiyatnama” and is need not to be signed or attested. Also in the case Abdul Hameed V.Mahomed Yoonus2529, it was said that if particular instructions are written on a paper on the direction of the testator about the way in which his property is to be distributed after his death is considered to be a valid will. In Mazhar Hussain v. Bodha Bibi2530, if a person has written a letter stating the way in which his property is to be disposed, the letter will considered to be a valid one.

The majority age is regulated by the Indian Majority Act of 1875, under which, at the end of 18 years, a person obtains majority (or if the child is under the guardianship of the Court of Wards, the age is taken as 21 years). The testator must be aware of the consequences at the time of making of the will i.e. must have a “perfectly disposing mind”. A will executed in fear of death is valid, but according to Shia law, the will is void if a person executes it after attempting suicide. Will which is made under undue influence, fraud or coercion is void. A will made by a minor is inept but will be ratified on attaining majority. The testator must be Muslim “at the time of making or execution of the will”. If at the time of the death the testator ceases to be Muslim, his wasiyat will still be valid in the eyes of Muslim law. The will is governed by the laws and rules of that particular Muslim law school to which the testator belonged when it was executed.

The beneficiary must be any person who is capable of holding a property. It is not

2527 Shiva, Ibid (May 05, 2020, 8:00 PM IST).
2528 AIR 1991 Pat 154.
2529 AIR 1940 Mad 153.
2530 [1898] UKPC 54.
necessary that the legatee has to be a Muslim. There is no bar on criteria like sex, age, creed or religion when the bequest is made to him. However, a bequest made to an unborn is invalid. Any bequest which is made to an institution or to a “juristic person” is valid. But such bequest can only be given to a institute which promotes Islam. Bequest for charitable purposes is valid, but it should only be towards Islam as Hindu idols are opposed to it. A person will not considered to be a legatee if his actions leads to the death of the testator. It is immaterial whether a legatee knew that he will be benefitted under the will or not, at the time of performing his actions. If no specified amount of share is mentioned in the will, the property will be equally divided among them.

The property which is dealt in the will must be capable of being transferred after the death of the testator and must be in existence at the time of his death. But such property may or may not be in existence at the time of making of the will. The property must be absolute and should not come with any conditions attached to it. A bequest cannot carry a condition when made. A “bequest in futuro is void”.

In the case of Advocate General v. Jimbabai, if at the time of the death of the testator, the son will get the property. If not, then his grandson will get the property. If failing both the property will go to charity.

A Muslim testator does not have unlimited power while making the will. The restrictions are provided so as to protect the interests of the heirs. The property bequeathed must not be more than one-third. If the testator wants to bequeath the property more than one-third, the consent of heirs is essential. This is applicable in both Shia and Sunni laws. If the whole property is bequeathed to only one of the heirs which results in exclusion of other heirs is void in nature. With respect to bequest of one-third to an heir, the consent is required in Sunni law but not in Shia law.

If there is no heir to the testator, the one-third rule is not applicable. The government will not be considered heir to heirless person. The testator may dispose of his property as he requires. Under both Sunni and Shia law, bequest to charitable and religious purposes is up to one-third of property. If marriage is happened under the Special Marriage Act, 1954, the one-third limit to a particular heir will not be applicable, as Indian Succession Act, 1925 would be applied in such cases.

In Muhammad V. Aulia Bibi, it was decided by the court that “if the property is to be bequeathed on heir and non-heir, without the consent of the heir, the non-heir will get one-third of the property and the rest two-thirds will go the heir by way of inheritance.”

A will made by the testator may be revoked at any time during his lifespan. The revocation made may be express or implied. If a subsequent will is made, the prior will (bequest) is revoked. But if in the subsequent bequest, another beneficiary is added regarding the same bequest then the bequest will be divided equally among the beneficiaries.

The two schools of Muslim law differs at various points with the concept of will. In

2531 Neha Gururani, Will under the Islamic Law of Inheritance in India (May 04, 2020, 6:00 PM IST), https://blog.ipleaders.in/islamic-law-will/
2532 Neha Gururani, Ibid (May 04, 2020, 6:00 PM).
2533 (1915) 17 BOMLR 799.
2535 Shiva, Supra 29 (May 05, 2020, 8:00 PM IST).
2536 (1920) ILR 42 All 497.
Sunni law, the consent of the heirs is required to bequest up to one-third of the property, while in Shia law for more than one-third, consent is required. In Sunni law, such consent must be given after the death of the testator but in Shia law, consent can be before and after the death of the testator. In both the laws, if the death of the testator is caused intentionally by the testate, he is not allowed to take part in the bequest. However, if the death is caused accidentally or negligently, then he can take the property. Under Sunni law, if the testator commits suicide before or after execution of the will, the will is valid, however will is valid in Shia law only if suicide is committed after executing the will. The bequest for an unborn child if he is born within 6 months of making the will (in Sunni law) and 10 months (in Shia law). In Sunni law, relatable abatement of legacy applies, whereas rule of chronological priority is applied in Shia law. Relatable abatement means if bequest of more than one-third of the property is made to two or more persons, the shares among the legatees are reduced proportionately to one-third. In Chronological priority means the legatee which is mentioned first in the will gets his share first. After the share is provided to the first legatee, the remaining goes to the second one. If still, the share further remains, it goes to the third legatee. This is done as per the one-third rule.

CHAPTER IV- ANALYSIS AND CONCLUSION
From the careful analysis of the concept of wills under both the concept of Hindu Law and Muslim Law, it can clearly be understood that both are very similar in nature in regards to the essential requirements in making of the will. The primary point of difference being that under Muslim law, the maximum of one-third of the will can be transferred to the heirs. While in Hindu law, the whole or a part of the will can be transferred to a particular heir. In will under Muslim Law, the importance of paramount nature is given to the consent of the legal heirs but is not given under the Hindu law. Also, under the Muslim laws, there are various differences between the Sunni Muslims and the Shia Muslims in the concept of will like difference if suicide is committed by the testator before or after in making of the will, death caused due to the conduct of the legatee, chronological priority and relatable abatement, etc. The concept is clear and well defined in both Hindu and Muslim laws. After the introduction of Indian Succession Act, 1925 the concept of will under the Hindus was codified properly. As stated before, the concept of will never prevailed among the Hindus but such concept prevailed in Muslims even before the Mughal Rule. Hence, over the years various issues have been ironed out and the concept is a well-polished one among the Muslims. The will among the Hindus is very heavily derived not only from the Muslim counterpart but also from the British who stated to rule the Indian sub-continent after the end of the Mughal Raj and introduced their philosophies into it. Hence, it can clearly be understood that will under Hindu law is a combination of both the Muslim philosophy and the British philosophy.

BIBLIOGRAPHY

LIST OF CASES-

2537 Supra 10 (May. 05, 2020, 5:30 PM IST)  
2538 GCV Subha Rao, Family Law in India (10th edition)

2539 A.K. Jain, Family Law II (3rd edition)
• Abdul Hameed v. Mahomed Yoonus, AIR 1940 Mad 153
• Abdul Manan Khan v. Mirtuza Khan, AIR 1991 Pat 154
• Advocate General v. Jimbabai, (1915) 17 BOMLR 799
• Balathandayutham and Another v. Ezilarasan, (2010) 5 SCC 770
• Bhura v. Kashi Ram, 1994 AIR 1202
• Ghulam Mohammad v. Ghulam Hussain, (1932) 34 BOMLR 510
• Girish Dutt v. Datadin, AIR 1934 Oudh 35
• Gnanambal Ammal v. T. Raju Aiyar, 1951 AIR 103
• Kochu Govindan Kaimal v. Thayankoot Thekkot Lakshmi Amma and Ors., AIR 1959 SC 71
• Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria & Ors., 2009 C Scale 328
• Mazhar Hussain v. Bodha Bibi, [1898] UKPC 54
• Muhammad V. Aulia Bibi, (1920) ILR 42 All 497
• Narain Singh v. Kamla Devi, AIR 1954 SC 280
• Nathu v. Debi Singh, AIR 1966 Punj 226
• Navneet Lal v. Gokul & Ors, AIR 1976 SC 794
• Rajeshwar v. Sukhdeo, 1947 SCC ONLINE PAT 158
• Sopher v. Administrator-General of Bengal, AIR 1944 PC 67
• Stanley v. Leigh, (1732) 24 ER 917
• Swifen v. Swifen, 1 F anf F 584

ARTICLES-
• Ashish Gupta, Rules governing transfer of property through Will. (May 01, 2020, 4:00 PM IST) https://economictimes.indiatimes.com/consumer-legal/rules-governing-transfer-of-property-through-will/slideshow/6180123.cms
• Neha Gururani, Will under the Islamic Law of Inheritance in India. (May 04, 2020, 6:00 PM IST) https://blog.ipleaders.in/islamic-law-will/
• Sahil Shah, An Overview of Wills under Hindu Law (May 02, 2020, 7:30 PM IST) http://www.legalserviceindia.com/articles/will_hindu.htm
• Shiva, Concept of will under Muslim Law (May 05, 2020, 8:00 PM IST) http://www.legalserviceindia.com/legal/article-251-concept-of-will-under-muslim-law.html

BOOKS-
• A.K. Jain, Family Law II (3rd edition)
• GCV Subha Rao, Family Law in India (10th edition)
• Poonam Pradhan Saxena, Family Law Lectures Family Law II (4th edition)

STATUTES-
• Indian Contract Act, 1872
• Indian Majority Act, 1875
• Indian Succession Act, 1925

ONLINE SOURCES-
• Law of joint will Indian Personal Law Context (May. 05, 2020, 5:30 PM IST) https://www.lawteacher.net/study-guides/family-law/laws-of-joint-will.php
• Types of Wills in India (May. 03, 2020, 5:30 PM IST) https://www.indiafilings.com/learn/types-wills-india/
DOMESTIC VIOLENCE: A FORGOTTEN AGENDA AMID LOCKDOWN IN INDIA

By Shaurya Gupta
From Fairfield Institute of Management and Technology

I. ABSTRACT

In the overture to the proclamation of nationwide lockdown in the wake of global pandemic COVID-19 starting 00.00 hours of 25th March'20, there were many areas where the government failed to craft game plan to address probable fallouts. One such facet which was beyond the purview of government was the way to deal with the events of Domestic Violence. Domestic violence against women is a concern rooted in social and economic norms. It is very common and intermittent towards women. Abuse against women can be of any type. It maybe physical, sexual, economical or psychological. It has been seen early on also that during the time of such emergencies or epidemics violence against woman tends to increase. According to a survey 41% of women reported experiencing domestic violence during their lifetime and about 30% of women in past year. It constitutes the reality of most girls and women’s life in India. The present paper aims at discussing about the types of violence against women, its causes, constitutional right to life and personal liberty and brief overview of domestic violence against women amid locking down India. Further suggestions were made at the end of the paper to eradicate this menace form the society.

Key Words: - Domestic Violence, Gender Discrimination, Abuse, Lockdown, Menace

II. INTRODUCTION

What a man can do, the same a woman can do in contemporary India and in ancient Hindu cultural texts women were given status of Goddess but this status has been jeopardize over a period of time as “Torturing the bride for the dowry demand”, “Harassment of wife by husband, tweets video of Domestic Violence”, are some headlines that we usually read in our daily newspapers with a cup of tea.

"Where women are respected, there the God reside, the heavens open up and angels sing paens of praise."
~says Hindu law giver Manu

According to United Nations Domestic Violence against women is defined as, "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." 2540

As defined by the Protection of Women from Domestic Violence Act 2005, Domestic violence (DV) is, physical, sexual, verbal, emotional, and economic abuse against women by a partner or family member residing in a joint family, plagues the lives of many women in India.2541


Even in 21st century issues like dowry death, female infanticide, domestic violence, sex selective abortions are still prevalent in society. Domestic violence is the act of physical, sexual violence, emotional (psychological) abuse and controlling behaviour. Where whole world is suffering from COVID-19 epidemic, there is spike in cases of domestic violence during lockdown across the globe. Events of domestic violence has been increased across the globe amid COVID-19 lockdown especially in developed countries like United States of America, China, United Kingdom. On 6th April’2020, UN Secretary-General Antonio Guterres pleaded governments to pay attention and avert “horrifying global surge in domestic violence”. As people are encouraged to stay at home, the World Health Organization has said that the risk of violence between the intimate partner is likely to increase.

III. THE VICIOUSNESS OF COVID-19

Powered by requisite rules to stay at home, social distancing norms, economic uncertainties and anxieties caused by the global COVID-19 pandemic, cases of domestic violence have increased across the globe. For example, countries like USA, China, UK, Brazil, Australia and many other countries have reported an increase in the cases of domestic violence. India is also in the list of countries showing symmetrical trends, peculiarly when it is ill-famed for being the fourth worst country for gender equality. According to the reports of Crime in India 2018, every 1.7 minutes a crime was recorded against women in India, every 16 minutes a rape was committed and every 4.4 minutes a girl is subjected to domestic violence.²⁴²

Within few days of lockdown in India, National Commission of Women provided (NCW) a data in mid-April suggesting almost 100% of increase in cases of domestic violence during lockdown. In between March 23 to April 16 (25 days), 239 complaints have been received by NCW via emails, dedicated WhatsApp numbers²⁴³ and 348 complaints via other sources (in total 587). During the period of crises, 885 complaints were received by NCW in other forms of domestic violence such as dowry deaths, outraging the modesty of women, rape or attempt to rape and sexual assault. Since the imposition of lockdown in India, various women’s right organizations have also been receiving numerous complaints of domestic violence.

²⁴³ Coronavirus Crisis: No lockdown for domestic violence, available at:

The number of reported cases might not be equally proportional to the actual number of cases of domestic violence. There are chance where many cases were left unreported because the victim locked down with the perpetrator does not get the access to mobile phones or may not have courage to call for a help. According to WHO, one in every third women (35%) all over the world witness physical or sexual violence by an intimate partner.\footnote{World Health Organization. Violence against women, available at: https://www.who.int/news-room/fact-sheets/detail/violence-against-women (Visited on June 7, 2020)}

Premature studies suggest that there is every reason to believe that during the time of these catastrophe there is a tremendous increase in gender-based violence. But it’s not about the numbers only it is also about the social and psychological impact that the lockdown would have on women.

**IV. FORMS OF DOMESTIC VIOLENCE**

1) **Physical Violence:** - It refers to the intentional act of causing injury or trauma to another person through bodily contact. Physical violence includes the act of slapping, kicking, hitting, burning, pushing and other type of acts which causes physical injury to another. According to National Family Health Survey, 30% of Indian women in the age group of 15-49 faced physical violence.

2) **Sexual Violence:** - It means forcing or manipulating someone into sexual activity without their consent. In other words, sexual violence means use of force or threat to acquire involvement in sexual activities. It includes rape or sexual assault, intimate partner sexual assault, sexual harassment etc.

3) **Emotional Violence:** - Emotional Abuse also known as psychological abuse or mental abuse leaves no physical scars but the mental health and wellbeing of the victim is adversely affected. The person experiencing emotional abuse can feel anxious, depressed and even attempts to commit suicide. It includes verbal abuse, rejection, gaslighting, bullying and intimidation etc. According to National Health Family Survey, 13% of Indian women are victim of emotional abuse.

4) **Economic Abuse:** - It refers to any act or behaviour of causing economic injury to intimate partner. The acts involve damaging property, restricting access to financial resources or limiting the amount of resources to be used by the victim, or by not performing economic responsibilities such as alimony. The objective of perpetrator behind such abuse is to reduce victim’s capacity to support herself so that she becomes totally dependent on perpetrator or on his family financially.

**V. CAUSES OF DOMESTIC VIOLENCE**

There is no specific cause of domestic violence rather it is a learned behaviour.
Sometimes abusers witness it in their own family or they learn from their friends or popular culture. Abuse is a choice and not the one that anyone has to make. External forces such as drug or alcohol addiction, societal influence, unemployment etc. also contributes in the escalation of domestic violence against women. Following are the common causes of abuse against women:

1) **Patriarchy:** - People with traditional beliefs think that women are not equal to men and they inherit the right of controlling them. According to the data of National Health Family Survey, 42% of the men believes that there is at least one reason to beat wife.

2) **Societal Influence:** - Society plays a vital role in development of a human being. Abusers learn this kind of behaviour from their family members, people in their community etc. They automatically behave according to what they have learnt from their surroundings. Youth who believes or learn that women should not be valued and respected or they should not be treated equally are more likely to abuse women when they grow up.

3) **Economic Causes:** - Unemployment, alcohol, drugs are some reasons that sometimes contribute to violent behaviour against women.

4) **Socio-Cultural:** - Dowry deaths and honour killing is also a reality that testifies domestic violence.

5) **Individual Factor:** - Low self-esteem, jealousy, difficulties in regulating anger and other strong sentiments are some of the individual factors because of which abusers feel the need to control their intimate partner or when perpetrator the perpetrator feels that he is inferior in education and socioeconomic background to the other partner.

VI. **INDIAN CONSTITUTION & WOMEN**

Protecting gender equality, right to life, liberty and right to live with dignity are the pillars of our constitution. These ideals of natural justice are enshrined in certain important provisions of Indian Constitution which are as follows:

**Preamble:**
The preamble states that the State shall endeavour to secure for its people “social justice….. Liberty of thought, expression, belief,…….Equality of status and opportunity, and to promote among them all; Fraternity assuming the dignity of the individual and the unity and integration of nation.” These ideals of natural justice can only be protected to each and every citizen of a country when all the citizens have the requisite conditions for the development of their distinct personality.

**Equality Provisions:**
Article 14 of the Indian Constitution, 1950 guarantees to every person equality before the law and equal protection of the laws. Therefore, the provision prohibits chauvinism between male and female, casts and creeds, religion etc. Thus, the provision of Article 14 strikes out the arbitrary actions of State and confirms fairness and equality of treatment.

Article 15(3) of the Constitution states that nothing in this article shall prevent the state from making any special provision on women and children. The framers of Indian Constitution knew that the women need protection and therefore provisions in this regard have to be made. The Protection of Women from Domestic Violence Act, 2005 encourages the fundamental rights of
women guaranteed under Articles 14 and 15.

Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Supreme Court in the case of Francis Coralie vs. Delhi Administration2545, held that Right to ‘live’ is not merely confined to physical existence but it includes within its ambit the right to live with human dignity, and that goes along with it. Accordingly, right to life includes the right of women to live a peaceful and dignified life.

Right to Dignity
The Apex Court emphasised the fact that the right to life included in its ambit the right to live with human dignity.2546 The right to dignity would include the right against being subjected to disgracing sexual acts. The right against being insulted would also be included in right to live with dignity.

Fundamental Duties towards women
Article 51 A (e) provides that “it shall be the duty of every citizen of India to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity to women”.

VII. SUGGESTIONS

- Setting up well publicised helplines in coordination with police and NGO’s.
- Offering services like counselling, shelter and medical support.
- Educating communities about the need to support women survivors.
- Creating certain specified provisions for the institutional quarantining of assassin of domestic violence with a known history of abuse.
- Easy access to police assistance for filing non-cognizable offence reports or FIR.
- If necessary, providing easy access to courts and lawyers.
- Appointment of protection officers under the Protection of Woman from Domestic Violence Act.
- Re-establish one stop catastrophe centres as a part of crucial service.
- If there is any difficulty in appointing protection officers then temporary officers shall be appointed till the lockdown in force.
- Initiating neighbourhood campaigns in order to increase awareness and to develop a support system.
- Have a widespread media outreach media that forbids domestic violence, empowering victims of such violence with survival strategies, pushes attitudinal change in assassins.

Members of the society must be sensitive of the increased danger to women’s health and life in the lockdown days, and they must develop the spirit to condemn the violence and shoulder the duty of offering all possible assistance to ensure their safety.

“Every mother should tell her son that if he violates a woman’s dignity he will not be allowed to come back home. The public will anyway ostracise you; the family will not hesitate to do the same”

~Arvind Kejriwal
CM, Delhi, India

*****

2545 AIR 1981 SC 746.

ILLEGAL WILDLIFE TRADE: IS IT NECESSARY TO CURB THROUGH NATIONAL POLICIES AND LEGISLATIVE PROVISIONS?

By Shibanee Acharya
From National Institute of Law, Siksha ‘O’ Anusandhan University

Abstract:
This study investigates and describes the concept of illegal animal trade practices carried out across various countries. The study examines the judicial scenario in restricting such illegal trade within the legislative framework & the various conventions for prevention at the International Level. The topic has been chosen for its relevance to animal trade in today’s question in emerging environmental issues. Such trade is the biggest threat to wildlife conservation. One of the most powerful motives for such exploitation of plant and animal species is income proposition through trade, especially in poor countries lacking other major resources. The preservation of wildlife is an issue of Public Interest. Every citizen must protect and improve the natural resources and wildlife etc. in order to have compassion towards them and lead a safe life. Basically, wildlife trade is the interchange of wild animals between the countries or between the continents. It can indulge the living animals and plants in order to extract diverse range of products needed by the humans. Some initiatives have been taken earlier for the protection of wildlife and certain legislations are also accomplished but people lack in visualizing the need of wildlife protection in the present scenario. This study examines some dimensions of conservation as well as preservation of wildlife which may be successful without losing much natural resources as well as decline in the population of wild animals in society.

INTRODUCTION
Wildlife trade is considered as one of the largest black markets across the globe, with an estimate of billions of dollar a year. It majorly affects the lives of the species such as elephants, rhinos, sharks, sea turtles, tigers etc. as well as the economic development and environmental health of the nation or region. The traffickers are often indulged in the international criminal networks having the suitability to carry the business due to the poor enforcement of laws, porous borders and the corrupt officials. These illegal links are very sophisticated and violent in nature which function without thinking about the loss caused to the local communities or the groups who extracted finance through the export of wildlife products.

The impact of wildlife trade are very huge in nature which ultimately affects the livelihood of people & sometimes it costs their own lives. The wild animals are often killed in order to retaliate or prevent the conflicts expected to arise in future. In this situation, it is important to control or stop the various incidents arising out of the conflicts in order to curb the illegal trade processes.

The conflict between the Human and wildlife is rising very quickly as a result of which the survival of the endangered species is becoming a critical issue to look after. These conflicts also have major impact on the ecosystem equilibrium and biodiversity conservation. Various legislations came into force, but there is still
a persistent biasness exists towards the humans and the rights of the wildlife is considered secondary to overview. But as we know, this universe has equally given the importance to the humans and animals to live peacefully.2548

ORGANIZATIONS WHICH ADDRESS ILLEGAL WILDLIFE TRADE

- International Union for Conservation of Nature (IUCN)
- South Asia Wildlife Enforcement Network (SAWEN)
- ASEAN Wildlife Enforcement Network (ASEAN-WEN)
- Clark R. Bavin National Fish and Wildlife Forensic Laboratory
- Species Survival Network
- FREELAND Foundation
- Wildlife Alliance
- TRAFFIC, the wildlife trade monitoring network
- International Fund for Animal Welfare

ILLEGAL WILDLIFE TRADE WORLD-WIDE

The extent of illegal wildlife trade is estimated to exist between $10 billion and $20 billion per year. As the trade is carried out globally across various countries & continents, therefore the problem is most pertinent in Southeast Asia. The various linkages of trade extends to countries like China, United States, and the European countries which majorly lack in the enforcement of legislations, weak control over borders, and the margin of high profit along with low risk to the commercial trafficking of wild animals.

(a) Asia- Through the various trade hubs across this continent, the smugglers offer various deals in order to carry out the illegal wildlife trade smoothly having direct jet services to other countries or continents. One of the hotspot area (Chatuchak) is the weekend market which is famous for the illegal wildlife trade involve the sale of various wild animals. Subsequently, the other trade routes are connecting from Southeast Asia to the United states, Cambodia to Japan and sale of many species to China. The illegal trade includes the various demand for the pets and consuming the meat of wild animals. Most of the sea animals are consumed as meat in the Asian continent. In 2016, The Tiger Temple was closed for being accused of exchange of tigers in Thailand.2549

(b) Africa- unlike Asian continent, many illegal trade took place in African continent both within the countries and across the globe. Most pertinent species in African continent includes the African elephants, vultures, pangolin, rhinoceros, leopards and lions. Trading of animals take place in order to sell the products for decorations, photo frames making, use in medicinal practices, and to decorate shops etc. Morocco has been clearly set up as the transit country which participate in this illegal trade practice due to its porous border with Spain to export wildlife from Africa to Europe.

2548 http://indiasendangered.com 'Leopards Victims of The Man-Animal Conflict'
(c) **South America** -
The practice of animal trading in America is also widespread as that of Southeast Asia. Due to the presence of Amazonian rainforest animals, it is becoming the popular trading place mostly. Its eminently seen that the export of the wild animals are carried out in the same way as that of smuggling of drugs across the borders. These activities tend to the destruction of human habitats in many regions, affecting mostly the lives of the wildlife in order to extract gain in selling the parts of the wild animals.\(^{2550}\)

(d) **Online** - Through the web also, illegal wildlife trade take place. However, the amount of activities are difficult to trace through online mode. People across the globe try to connect through online mode, for trading purpose and extract money. Its also seen that many fraudulent deals also take place through online mode, resulting to the loss of the trader. This loss causes the destruction in his economic standard, affects his life mostly. Its just like working as a puppet of other traders across the globe who target to earn their profit by simply making us fool through all these deals. We indulge in such a manner that if we want also, can not back out in the proper time period and save ourselves from these fraudsters.\(^{2551}\)

**ILLEGAL WILDLIFE TRADE IN INDIA**

Illegal wildlife trade has emerged as a means of Transnational offence that has caused greater loss to the habitat and lives of many species across the globe. In India, people are indulged in this illegal trade by selling various body parts of the wild animals to extract their personal gain. They do not hesitate to take the precious life of these animals, rather sell the products in International markets for its purpose. Yet India has set up various polices and legal framework to restrict this trade practice but its failing due to the mental activities of the foolish people. Under the Wildlife (Protection) Act, 1972 it is specified that over 180 species of wild animals and birds are needed to be protected.

Since 1976, India has become a member of the International agreement i.e CITES (Convention on International Trade in Endangered Species of Fauna and Flora) which aims to make it clear that the trade of wild animals and plants does not lead to any harm to their survival. Unlike other countries, India is also stringent in enforcing laws for the betterment of the wildlife, but it lacks in communicating and implementing these laws due to the less participation of people in awareness programs. Due to the governance failures and the lack of political will, these wildlife trade get a chance to take effect in a positive way. Offenders need to be penalized or punished as per the provisions of law in order to have the actual stringent effect of the legislations. There is an urgent need for the action to be taken in order to bring the sustainable levels within wildlife trade and restrict the illegal trade that has created havoc & forced many species towards extinction in the surrounding.\(^{2552}\)

---


\(^{2552}\) https://www.wwfindia.org
WILD LIFE PROTECTION AND THE LAW

During the ancient period, killing of some species of animals was prohibited as a result of which respect for animals was present. Kautilya’s Arthashastra to a great extent deals how the rulers gave importance to the preservation and protection of forests as well as animals living in those forests. Indian history and culture pertinently made it clear that the tradition for loving the wildlife and nature has not become extinct yet. It was in the late 19th century that efforts were made through legislative measures to protect the wildlife and the first statute for the protection of wild elephants was enacted in the year 1873 in Madras to prevent the indiscriminate destruction of wild elephants. Six years later at the central level the Elephant Preservation Act of 1879 was passed followed by the Wild Birds Protection Act, 1887 which the government framed various rules to stop the sale of any species of birds during the breeding season.

Later on in 1912 another legislation namely ‘The Wild Birds and Animals Protection Act’ was passed with an aim to prohibit the kill and capture of wild animals. The Act also listed clearly about the species of birds and animals which could not be harmed in any way. In the year 1935 through an amendment to the 1912 Act, for the first time provisions were made allowing the provincial Government to declare any area as a wildlife sanctuary to protect the wild animals and birds. However, in the Independent India in the year 1972 the first comprehensive legislation namely, the Wild Life (Protection) Act, 1972 aiming at the protection of wild animals and birds was enacted.

THE WILD LIFE (PROTECTION) ACT, 1972

It is the most significant legislation on wildlife protection and the Act has got threefold objective which are: to have a uniform legislation on wildlife throughout the country, to establish a network of protected areas i.e national parks and sanctuaries and to regulate illicit trade in wildlife and its products. The Act was amended in 1986, 1991 and last one in the year 2002 which came into force in the year 2003. The 1991 amendment brought certain radical changes in Act while the last amendment exhaustively dealt with certain matters and incorporated some new provisions. The Preamble of the Act states that- “An Act to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country”. The Act consists of seven chapters spread over 66 sections.

HUNTING OF WILD ANIMALS:- The Act prohibits hunting of animals except when permission is granted to hunt in certain cases and for special purposes as provided in sections 11 and 12 respectively. As per the provision of section 11 of the Act, the Chief Wild Life Warden or the authorized officer may subject to their satisfaction permit the hunting of animals specified in the Schedules appended to the Act which in their opinion has become dangerous to human life or property or is so disabled or diseased as to be beyond recovery. Further it is also provided that ‘no wild animal shall be ordered to be killed unless the Chief Wild Life Warden is satisfied that such animal cannot be captured, tranquilized or translocated and no such captured animal shall be kept in captivity. Section 12 authorizes the Chief Wild Life Warden to permit hunting of any wild animal for the purpose of education and scientific research.
TRADE AND COMMERCE IN WILDLIFE:-

A. Wild animals etc. to be Government Property:- As per the provision of section 39 of the Act, every wild animal other than vermin, which is hunted or kept or bred in captivity or hunted in contravention of any provision of this Act or any rule or order made thereunder are found dead, or killed by mistake and animal article, trophy or uncured trophy or meat derived from any wild animal referred above and ivory imported into India and an article made from such ivory in respect of which any offence against this Act or any rule or order made thereunder has been committed and every vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of the Act, shall be the property of the State government.

B. Declarations:- As per section 40 of the Act, every person who has the control, custody or possession of any captive animal specified in Schedule I or PART II of Schedule II or animal article, trophy or uncured trophy from such animal or salted or dried skins of such animals or the musk of a musk deer or the horn of a rhinoceros within the thirty days of the commencement of the Act shall declare to the Chief Wild Life Warden of the authorized officer, the number and description of such animal or such article etc. and the place where such animal or article is kept.

C. Regulation of transfer of animal etc.:- Section 43 of the Act prohibits the transfer of any captive animal, animal article, trophy or uncured trophy by any person in respect of which he has a Certificate of Ownership, by way of sale or by any other mode of consideration of commercial nature. Where a person transfers or transports to another state or acquires by transfer from outside state of any such animal or animal article of which he has a certificate of Ownership, he has to intimate about such transfer to the Chief Wild Life Warden within thirty days of such transfer or transport.

D. Prohibition in dealing with animal articles etc.:- Section 44 of the Act prohibits to a person subject to the provisions of Chapter V-A to commence or carry on the business as a manufacturer of or dealer in any animal article or a taxidermist or a dealer in trophy or uncured trophy or a dealer in captive animal or a dealer in meat or cook or serve meat in any eating house or derive, collect or prepare, or deal in snake venom, without a licence duly granted.

E. Suspension or cancellation of license and appeal:- Section 45 of the Act says that subject to any general or special order of the State Government, the Chief Wild Life Warden or the authorized officer may, for reasons to be recorded in writing, suspend or cancel any license granted or renewed under section 44. However, before suspension or cancellation of such license, the holder of license should be given a reasonable opportunity of being heard.

F. Purchase of animal etc. by licensee:- Section 48 provides that no license shall keep in his control, custody or possession, any animal, animal article, trophy, uncured trophy or meat which has not been lawfully acquired under the provisions of the Act or any rule or order made thereunder. Section 48-A prohibits acceptance of any wild animal (other than vermin), or any animal article or any specified plant or part or derivative thereof for, transportation, without a permission from the Chief Wild Life Warden or any authorized officer of the State Government.

RESOLUTION FOR BETTER ECOLOGY

In our country India, many legislations and projects have been initiated
by the Government in order to protect and conserve the wild animals. After the awareness created globally for the safety of environment and ecology, various steps are taken in the national policies to strengthen the management of the prohibited areas. The Adivasi and forest dwellers protested upon the stringent provisions made for the protection of forests. The major lacunae is the unsuccessful conservation programs having less participation of people at large. Although, Government is trying its best to take necessary steps, but people are hesitant to cooperate in all these awareness programs. Indian citizens are very negligent in participating for the conservation and ecological movements during 1970s. Though the ministry of Environment and Forest introduced various schemes and programs, but it failed due to the lesser interest of people.

The tragedy of civilization is the degradation of ecology and destruction of wildlife population by indiscriminately killing. Man has emerged as a plunderer of nature for fulfilling his thirst for money. He has successfully extracted his own benefits from all the sources that he opted by diminishing those sources to gain something. Its hightime to look after the conservation of wildlife in our surrounding for the smooth leading of life on earth. The only remedy left for making our future in a better way is to control the lives of the wild animals.

**SUGGESTIONS FOR FUTURE**

There are lots of defects in present system and many ambiguities are in execution of new policies. But we need to make some suggestions for better protection of wildlife and to control ecological crimes in our surroundings for environment for better existence rather coexistence of us in the earth. Some planned and balanced methods are very much required to balance the ecosystem of our planet. As Henry Ford said “don't find fault, find a remedy”, in the same way we have to find remedy about rapid declination of wildlife population and we have to conserve for future as those are part of our natural resources.

- Several policies are implemented and strict laws are enacted to curb wildlife crime in India and prime minister is the head of 'National Board for Wildlife', in spite of these there is a political inactivity in enforcing laws for conservation purpose. In spite of those, wildlife conservation has got support from each part of society at all. There is a lack of consensus among the political parties about the matter. No political party in India tells about environment protection or ecology.  

- Though several international conventions and treaties are made but there is no instrument or document about the rights of animals while domestic or wild. It is upon human being to think about rights of animals and like UDHR, there is necessity of a universal declaration about rights of animals. Though a draft declaration of the animal rights was adopted by the International League of Animal Rights and its preamble proclaimed 'All animals are born with an equal claim on life and the same rights to existence' on 15th October 1978 but those provisions don't have a legal status. In words of Justice Krishna Iyer, in the international level there should be a 'Universal Declaration on Rights of Nature' where all the conservation laws should be

---

2553 The Sunday Statesman Magazine; 22nd March, 2009
codified for protection of natural resources.\textsuperscript{2554}

- Powerful environmental justice movements in the third world including India mainly during the decade of 1970, have challenged the capitalist development at the cost of ecological degradation in sector of society. Again the ecological movement of the 1980s was associated with direct action on behalf of the environment and grassroots mobilization to protect communities.\textsuperscript{2555}

- India has been suffering from acute problem of marine pollution due to huge disposal of wastes from domestic, industrial and municipal sectors. There is vast destruction of ecological structure within the marine living resources. Though the Wildlife (Protection) Act, 1972 and the Biological Diversity Act, 2002 are there to curb the destruction of wildlife within aquatic and marine resources in spite of separate legal protection is needed for marine living resources from municipal and international pollutions. The Ministry Of Environment and Forests (MoEF) has already proposed for creation of more marine protected areas and he also suggested to the 'National Board of Wildlife' as well as involving institutes like 'the Central Marine Fisheries Research Institute' and the National Institute of Oceanography' for collaborative research to consider creating more marine protected areas as Wildlife Institute of India (WII) does not have the capacity to undertake all research in marine areas.\textsuperscript{2556}

- The spread of infectious diseases must be stopped and strict measures should be adopted for better protection of wildlife. After the Wildlife (Amendment) Act, 1991, Section 33A gives the legal obligation to Chief Wildlife Warden to take action for immunization of cattle in or within 5 km of sanctuary. So a wider ambit of laws is needed to save wildlife of all protected areas within the country. The mortality rate of wild animals should be checked and necessary measures must be adopted to immunize the communicable diseases of livestock in and around the national parks and sanctuaries. A strong mechanism is urgent for conducting immunization programs for cattle surroundings of Protected Areas in India to prevent wildlife from communicable diseases.

- Adoption of wild animals by individual human beings is another remedy for threatened or deserted wildlife. This is practically possible when forest and wildlife authorities can not provide proper care for each and every animal in the protected areas. The conservation movement in India has developed the concept of adoption of wild endangered or rare species. Wildlife adoption programs are common in the West but a relatively new trend in India. Now in India endangered species are bred in safety in various National parks, sanctuaries and zoos. It was very much in practice in western countries also.\textsuperscript{2557}

- The number of protected areas should be increased for the better management of ecology and wildlife. In India presently have 99 National Parks (39,155sq.km), 523 Sanctuaries (1,18,417sq.km) consisting nearly 1.19% and 3.60% respectively of the total geographical areas of the country. So this is not sufficient for vast country like where in Nepal total Protected Areas constitute about 17 per cent of the total area in the country. Several kinds of protected areas are available in India and mainly Community Reserve or Protected Areas.

\textsuperscript{2554} The Rights of our animal brethren, Justice V.R.Krishna Iyer, Lawyers Update, July 2005, Pp 16
\textsuperscript{2555} The Vulnerable Planet, John Bellamy Foster, Cornerstone Publication, Pp 136
\textsuperscript{2556} Rescue plan for more endangered species, THE TIMES OF INDIA; April 9, 2007
\textsuperscript{2557} Adopt an animal, save endangered species, THE TIMES OF INDIA; January 24, 2008
with community management should be developed for social and biological ecology. Without adopting strict preservationist approach, India has to generate many community based conservation process but any how number of protected areas must be increased.2558

**CONCLUSION**

The survival of mankind on this earth is totally based upon the balanced ecology. Wildlife is considered as the part and parcel of this earth where we sustain. So protection of wildlife is at this need hour in order to sustain in this planet peaceably. All the three organs of the Indian Government have taken all necessary steps in order to sustain the wildlife and ecology equally. Now, it's the duty of all the Indians to ensure that all the natural resources and wildlife must be conserved. It is already enshrined in the Indian Constitution that protection of wildlife must be considered by the citizens. The legislature has framed various laws and enforced different statutes for the conservation of the fauna and flora. Various International treaties and conventions are initiated to cope up with the fragile ecosystem. All the legal aspects has a strong base in socio-religious terms for protecting the animals and conserve the wildlife. Not only India, all the countries across the globe must stop this illegal wildlife trade and help each other to lead a healthy nation with beautiful birds and magnificent wild animals.

*****

2558 Global Environment Outlook 3, UNEP (http://www.unep.org/GEO/geo3/)
FAMILIES & CRIME

By Shivang Khanna
From School of law, University of Petroleum Energy and Studies

Abstract

Studies show that Family Anatomy is of great significance in demonstrating criminality among adolescents. Juvenile Delinquency is one of the consequential problems of deviation which the striplings of almost all the contemporary societies of the world are facing in the present era. This research paper will confer about Families and Crime under Criminology and Criminal Injustice. The research findings in the paper would be divided into six sections, initiating by linking Parenting to Delinquency, which is a most widely obtained finding in Criminology, explaining that the family comprises of the basic ecology in which the child’s conduct is manifested by way of positive or negative reinforcement. Additionally, the paper will discuss about the Corporal Punishment Controversy, i.e. deliberately causing physical pain to someone, often practiced on minors, predominantly at home or at an educational institution. Further, listing the Effect of Poverty and Neighborhood Conditions, which signify the disorderly effect on classification of parenting and being a reason for a child’s atypical behavior. This paper will also talk about connecting Childhood Delinquency and Adult Crime, which can be briefly summarized as the correspondence between childhood conduct complications and adult antisocial etiquette. Adding to the above mentioned information, this paper will classify points regarding Marital Rape and Violence, discussing the punishment under Protection of Women from Domestic Violence Act, 2005 (PWDVA). Moreover, this paper will confer to Child Maltreatment which is a very recurrent topic of argument for the scholars in the 21st Century. Forbye this, the paper will be terminated with a conclusion affirming that we have acquired knowledge from it. Hence, the research has been confined to a finite perspective.

Keywords: Delinquency, Criminology, Adult Crime, Violence, Adolescents.

INTRODUCTION

Present day theories pay high attention to personal attribute to justify the wrong doing and in what means a human can deliberately maltreat others. The criminal mind has always been in search for new chances to carry out crime – often unprecedented ways so as to get away with the law, making crime a spirited event. This is the every time situation that the abnormal conduct is initiated and the measures to intercept the conduct by ratification of legislation to punish, follows behindhand. Criminology, as the name suggests, as a technological discipline in India, has evolved remarkably in a twenty years time span. The number of organizations contributing in Ph. D courses are multiplying, with the standard of yearly meetings of the Indian Society of Criminology (ISC – Established 1970) is ameliorating and hence forth the degree of international commitment in these meetings is enlarging with every event. Also noting, the emergence of the South Asian Society of Criminology and Victimology (SASCV – Established 2009), a decade ago, has evolved remarkably in a twenty years time span. The number of organizations contributing in Ph. D courses are multiplying, with the standard of yearly meetings of the Indian Society of Criminology (ISC – Established 1970) is ameliorating and hence forth the degree of international commitment in these meetings is enlarging with every event. Also noting, the emergence of the South Asian Society of Criminology and Victimology (SASCV – Established 2009), a decade ago, has affected the Indian Society very significantly. The society works in encouraging Criminology and Victimological education in South Asian countries. It being the youngest society of Criminology in India, has come up with
expanding paths for publishing professional facts and also in developing the institution of peer-reviewed seminars on areas of Criminal Justice and Crime in South Asia. Domiciliary Violence or Family Crime has been acknowledged as a serious issue worldwide and one which not only has multiple damaging effects on family members, but also “expensive for women, the society, and the country as a whole”.

HISTORICAL PERSPECTIVE

Understanding the current state of the system of Juvenile Justice in India, it requires a look to be taken back at History. It is difficult for Scholars and Historians to come to same terms on the legal basis for the new Juvenile Court. According to some, it can trace its beginnings to High Chancery's English Federal courts. The Juvenile Justice System in India, which originated during the British rule, was the direct result of Western ideas and innovations on prison reforms and juvenile justice. The changes made to deal with delinquent juveniles by Britishers in India were not confined to those practiced in England alone. Under the Madras Children Act, 1920, the Juvenile Court was nothing different from the English Children Act, 1908. Nevertheless, subsequent Children Acts dispensed with the involvement of attorneys in accordance with the lines of the Parens Patriae model of the American Juvenile Courts. Throughout ancient civilizations, Corporal Punishment has been a popular form for punishing criminals. Not only on children, but also on adults, it has melted out. Its history can be traced back to the Middle Age until the nineteenth century, when it was handed out as a punishment for minor crimes and illegal acts. Flogging was a common practice in the British Army and Navy, a form of corporal punishment where a person is whipped with a rod or whip. It was scrapped as a disciplinary measure from the Army and Navy in 1874. Like other forms of sexual assault, Marital Rape, was considered a private trouble not a public issue. The assault was defined by early rape laws as a property crime against the husband or father whose wife or daughter was “defiled.” Under this framework, marital rape was an oxymoron as a wife was legally the sexual property of a husband. Taking into consideration, the historical perspective of delinquencies, the phenomenon of child abuse and maltreatment is deeply rooted in our cultural and religious history. It is as old as civilization itself. Yet the fact of child abuse has remained largely hidden and suppressed. Reform movements that have pointed out the horrors being committed upon children and attempted to provide some protection have occurred at intervals, but in time the shocking facts of mistreatment seem always to have been avoided or forgotten.

LINKING PARENTING TO DELINQUENCY

Parenting techniques differ from societies to societies. The Earth is a massive place consisting of a diversity of people having various ways of livelihood. Whereas, culture is the most important ingredient. The economic condition and degree of lifestyle as well, has an effect on parenting. By the time there are familiar set of morals in various cultures like Integrity and Honesty, the moral structure maintains division on some of the vital angles of parenting, epitomizing the comparison of the Indian technique with that of the west.

There is substantial proof to propose that a family plays a vital role in the evolution of adolescent delinquent behavior. Family works as a successful representative of
socialization. The operation of socialization starts from the initial days of a child’s birth, with a primary source being the parents. Studies have proved that if the connection between the parent and the child is weakened, then the possibility of risky functioning increases. Furthermore, if the emotional bond is strong enough, the risk of problematic functioning in a family decreases. Hence, parental connection firmly puts down adolescent action in delinquency. This, caring, loved and responsible parenting connection comes up with strengthening adolescent-parent bond and decreases the possibility of delinquency being involved. The more powerful this attachment bond gets, the more the possibility of the adolescent to take into account when the person considers a criminal act. The truncated levels of emotional closeness to parents foretells participation in delinquency in any case of race/ethnicity, class, caste or peers delinquency. Thus, a massive agreement of investigation has paid emphasis on the significance of adolescent’s connection with parental figures in bringing down the possibility of delinquency or crime as a whole.

With a couple of years that have passed by, a large number of studies have found out and revealed that parent-adolescent communication is emphatically related to adolescents’ academic attainments, self-esteem, and mental health, as well as inversely linked to adolescents being lonely and depressed, consumption of drugs and alcohol, and various others factors and abnormal behaviors. It has also been noticed and taken into consideration that family disclosure skills between parent and adolescent, specifically in socioeconomically disadvantaged families, play an important role in the upbringing of different varieties of psychosocial adjustments among children and adult youth.

PREVENTION OF JUVENILE DELINQUENCY

In order to put a stop to Juvenile Delinquency, we have to come to terms with socially maladjusted youth and kids who have been a part of conflict with law, and also with those youngsters who are generating disharmony in educational institutions and roads, while not violating the law. Safeguarding is thus a necessity for such youth. If this youth is not safeguarded, then they would become the persistent wrongdoers. The children make blunders, and get excited and fail to behave with respect legitimate expectations. Firstly, we must identify the young criminals timely and further come up with genuine and proper treatment. This youth, which is identified, might change to persistent wrongdoers if they are not recognized on time and prevented from committing the crime.

CORPORAL PUNISHMENT

Corporal Punishment or physical abuse punishment is penalizing, proposed to cause bodily pain to a human being. It is mostly practiced on minors, specifically in homes and educational organization settings. Common methods consists of spanking or paddling. It has also in the previous years been reckoned that it is used on adults, particularly on prisoners and enslaved people. Corporal Punishment of youth- most frequently known to people as ‘any punishment, which includes physical abuse or causing pain or discomfort to a human being forcefully’- is now extensively known as a difficult form of regulation. Youth put through the Corporal Punishment at home are at much
higher risk for a diversification of mental health issues and trauma as well as settling parent-adolescent relations in accordance to a current meta-analytic response. For example, the youth and adolescent that are quiet often hit by their parents, tend to evolve with a behavior of aggression towards people and reflect symptoms of anxiety, depression and various other disorders which affect one’s mental health. The pessimistic relations with parental Corporal Punishment have been duplicated in scores of studies with millions of adolescents, even though, the consequences sizes rely upon the result of the variable and study pattern. In spite of the wealth of research studies, which addresses organizations between Corporal Punishments by parents and the functioning of the child, there is scarcity of empirical proof on the clash of educational institutions’ Corporal Punishment on the students. Furthermore, kids and adolescents are most often slapped, paddled or physically caused harm by the teachers and professors and educational administrators in a large number of countries, across the globe. Thus, school Corporal Punishments carry on to be legally sanctioned in 73 Countries.

There is national and international analysis about the consequences of Corporal Punishment upon adolescents, and its innuendos for their volume to benefit from educational institutions, even though Corporal Punishment is still vastly used in educational organizations all around the globe, in spite of being banned in national legislation in most countries. Nonetheless, the subject matter is still under-researched and lacks more detail studying in developing countries. In India, Corporal Punishment is practiced in schools and even in higher educational platforms such as colleges. Most specifically these punishments are given to adolescents to teach them moral values and social manners. These practices have been happening in India culturally for a relatively long time.

Parents and adolescents in variety of cultural gatherings may interpret Corporal Punishment as either a suitable and effective discipline strategy or plan of action, or not relying on the norm of Corporal Punishment within their group. Although Corporal Punishment is more often than not related to more behavioral issues no matter any cultural group, this alliance is not strong enough in countries where Corporal Punishment is the rule. Still philosophies in which Corporal Punishment is the norm, also have increased standards of societal brutality. The United Nations Convention, on the Rights of the Child has changed global attention to removing all forms of brutality and violence against adolescents and kids, including parents’ use of Corporal Punishment, and the United Nations and the World Health Organization are functioning very hard to bring change to traditional rules about the appropriateness of Corporal Punishment and thus to execute and put into action, the parenting programs formed to decline parents’ usage of such brutal punishments.

CASE STUDY 1: Lavanya

A school going girl’s cry made the entire institution cry as an aggressive professor punished her extremely badly

Lavanya, a grade 5th girl was maltreated severely by her belligerent Professor Shalini in Global Girls’ School, Hyderabad. One day the Professor asked Lavanya, to write Math numericals in a traditional way on a banana leaf, with a wooden pencil. Lavanya failed at doing her assigned work due to some problem at her house. The Professor then began to beat her in an
inhumane way that Lavanya began to bleed. Children of the school and classmates of Lavanya, helplessly cried and shouted in the classroom. The Professor left the class, but the condition tend to become serious and worse as from each and every class, girls came out to see Lavanya. No person carried out being silent there. All of the children started crying while watching Lavanya’s blood-flowing wounds. Finally each girl of the school came out of the property and cried terribly. The condition got worse and got out of hands. The Professors and faculty in the school criticized the situation, which was a result of the violent behavior of their colleague. Some of the outside people came into the school and demanded that the belligerent Professor must have to leave the school.

The issue was taken into consideration to the notice of the higher authorities and the Professor was suspended for a time span three months.

The action taken by the authorities against the Professor was quick. The children did whatever they could to list a protest. The public played its part in a small way. This must have sent an indication in an indirect way that Professors must not beat the children and the youth. The interrogation arises whether a Professor like Mrs. Shalini in our educational institutions, ever give such Corporal Punishment? No teacher would, if a person’s acts of giving Corporal Punishment are deplored by each and everyone who has been a part of such an incident or someone who has even heard about it. A strong reaction will help the other Professors as well as the parents to understand that there is no necessity for Corporal Punishment. There needs to be an understanding on our part as Professors and parents to save the youth from physical abuse, emotional un-stability and mental trauma.

PREVENTION OF CORPORAL PUNISHMENT

Researchers and Psychologists who are against the use of Corporal Punishment refer to their studies that the teachers at educational institutions should thrust non-physical regulatory measures as an alternative to thrashing. They put forward a study that teachers need children to write down a declaration which explains the pessimistic results of their behavior to say sorry for their wrong doings in front of their classmates. Trainers can need the disobedient adolescent to sit on a chair or a mat at the back of the classroom and to retrospect about his/her wrong doings and of the various techniques to ameliorate his/her behavior.

The National Commission for the Protection of Child Rights (2008) provided a set of instructions on “Corporal Punishment” and directs the education departments of all the States to ensure the following:

1. All children are to be brought to notice through campaigns and publicity drives that they have the Right to Speak against Corporal Punishment and bring it to the notice of the higher bodies. They must be given confidence to make complaints and not accept punishment as a 'normal' activity of the school.

2. Every school, including hostels, JJ Homes, shelter homes and other public institutions meant for children must have a forum where children can put forward their views. Such institutions could take the help of an NGO for facilitating such an exercise.

3. There has to be a monthly meeting of the PTAs or any other body such as the
SEC/VEC to review the complaints and take action.

EFFECT OF POVERTY AND NEIGHBORHOOD CONDITIONS

In a primarily agricultural society, being predominantly a rain-fed economy, economic growth is carefully tied to agricultural output. Intense weather conditions, which result in drought or flood, are put together with poor harvesting and complete crop destruction. With such results, loss of a year’s harvest, aside from leading to about near-famine situations, can effortlessly compel farmers into extreme poverty conditions.

Poverty has long been a topic of interrogation and of great interest within a vast variety of subjects. Multiple scholarly regulations, which include Economics, Political Science, History and Anthropology, have deeply been studied and reported that poverty and crime go hand in hand. The literature marks differences between Absolute poverty (i.e., lack of material necessities for existence) and Relative poverty (i.e., utmost income inequality). A great deal of past studies has recorded that absolute poverty is linked with greater property crime rates, while relative poverty has been associated with the outpour of hostility and brutal crime.

In basic economic study of delinquency, originally brought forward, said that individuals are more probable to get jumbled in delinquent pursuit when they get exposed to a pessimistic income shock. This form of judgment is enclosed in expression of an opportunity cost model; as income levels decrease as a consequence of adverse situations, getting involved in crime becomes more favorable relative to engaging in increased “peaceful” economic activities. As far as the theory of foundations of poverty and crime is concerned, it has been well accepted, the factual basis for such an argument is given thought to being speculative at best. One reasonable clarification for this being left out is the endogenous bonding between poverty and crime: economic conditions decreasing at a high rate may approve criminal activity, since large number of people are probable to get involved in delinquency, as a substitute source of money earned, whilst increasing standards of delinquency may erode the economic stability, investment, and productivity.

Violent delinquency also has an extraordinary sturdy role in explaining neighborhoods. A research of neighborhoods in 22 cities signals that standards of brutal crime in a neighborhood, specifically robbery and exasperated physical attack, strongly tells about residents’ ability to see crime, whereas property crime has hardly any outcome. An arrangement of research further suggests that violent delinquency diminishes neighborhood property values more than property crime does. View points also differ among various groups of societies. People residing with adolescents and longer-term residents, for instance, perpetually recognize higher standards of crime and imbalance than do their neighbors. Commitment on where to move thus reflects concerns about safety and security. People with housing choice vouchers, for example, consistently rate a comparatively safer environment as their top priority.

International institutions also blame delinquency – which includes corruption, for laying down Africa’s risk at chances of expansion and enlargement in the present days. The same goes for Latin America. Crime has this volume to give rise to
vicious cycles being the cause of unemployment, economic deterioration and instability. Poverty and delinquency amalgamated together leave people with two choices: either to get involved in delinquent undertakings or attempt to make findings of legal but pretty limited sources of money inflow—when there are any obtainable at all.

PREVENTION OF POVERTY AND NEIGHBORHOOD CRIMES

At this point unemployment is already spread across the whole economy, except this time poverty and delinquency are marked by brutality in view of the fact that these adolescents lack sense of the most basic and simple social regulations and behaviors. One solution for Clear is to renovate societies with community policing game plans so that justice works in accordance with the public instead of going against them, and furthermore hoping that conviction in the structure can moderately be escorted back in.

Finally, increased standards of welfare backing are powerful enough to be linked delinquency reduction. Now that may seem disputable to some, but it’s not. Basically put together, countries that amalgamate social welfare in their "war on poverty" and declare that it has been pointless disregard the certainty that the war was at no time, properly fought. Outcome of it, the results are biased and strategies highly inefficient in view of the fact that lack of monitoring and development of the various policies that were tested. A failure does not every time mean that the idea was bad, but sometimes that you must just improve the system step-by-step. That's how we, humans, gain an understanding of it.

Coming to blows with poverty should be more of a long-term communal justice plan, but welfare backing has been disproportionately lower. In many scenarios, weakly designed welfare policies has caused harm to the very concept of welfare and has led many countries to turn one’s back on welfare strategies to bring down poverty and delinquency. And thus, researches have proved that the link between poverty and welfare reduction is inconvertible in many cases. Given the entire connection between poverty and delinquency, any strategy serious about handling crime has to take poverty reduction strategies into consideration.

CHILDHOOD DELINQUENCY AND ADULT CRIME

Childhood Delinquency means taking part of minors or the youth in illegal affairs. Different legal systems across the globe have adopted important techniques to deal with juveniles who are criminals such as Juvenile Justice Courts, Observation Homes, etc. A child delinquent in India is a person who is below the age of 18 and has been a part of a criminal act, which is banned under the Indian Penal Code, 1860 and otherwise would have been imposed with the delinquency if they have been adult. Depending upon the seriousness of crime and the condition of his/her mind of the juvenile while performing the act, it is quiet feasible for people under 18 years of age to be tried as an adult.

Crime on its own is socially unacceptable and inadequate adjustments on the part of a person to problematic situations. The elements that go to make up these problematic and difficulty causing situations, combined with the mental and physical condition which influences a person’s capacity to alter, account for the causes of crime. Each adolescent delinquency is the result
of a complication of causes, some of whose beginnings date back years before the act of committing crime or the offense and others whose origins are more evidently and straight away lined with the act of crime. It has been proved that a variety of causes are a part in each individual scenario. It is therefore out of the question to state the causes, which will every time have an outcome in any particular offense. The community has gone through enormous change when it comes to ideologies, view-points and its moral and ethical backgrounds. Something that was taken into consideration as immoral, about 10 years ago is no more seen the same way in the same light. The longing for a good life, superior chances and comfort has indeed opened new paths for growth and development. Even now, the same aspirations have guided us into a rapidly moving way of life with a slighter time for ourselves and individual self-analysis.

Currently, around 42% of India’s economic population is below 18 years. The modern times have observed some of the most violent and horrendous delinquencies being committed by the adolescents. Some of the infamous crimes are as follow:

1. _The Nirbhaya Case_—On 16-12-2012, the capital of India, New Delhi, observed the most atrocious crime in the history, whereby a student pursuing physiotherapy was brutally gang raped in a moving bus in which she was travelling in with a male friend. One of the offenders was below the age of 18. This was one of the well-known cases that brought out the imperfection of the then juvenile system.

2. _Hatigaon Rape case_—In September 2013, a gang of five boys (juvenile) in the age group classification of 12 years to 16 years; raped a 12-year-old minor female, by pulling her forcefully to a stranded place and started raping her all night. These men were neighbors with the victim minor girl.

3. _Mayur Vihar Murder case_—In November 2013, a group of five under age people allegedly murdered a jeweler’s wife in New Delhi’s Mayur Vihar and ran away with jewellery and money.

4. _Minor “Rape and Murder” case._—In April of 2015, Chandigarh Police apprehended a juvenile for the abduction and assassination of a minor female.

5. _Mercedes Hit and Run case_—In July 2016, it was the initial case post the ratification of the new JJ Act, 2015 whereby the offender, charged was tried as adults. The offender, 17 years and 11 months old, ran over a 32-year-old retail executive while driving his father’s Mercedes.

6. _Jhabua Murder case_—On 1-3-2017, the very initial case after the amended JJ Act came into action, two minors — aged 17 and 16 years respectively, were sentenced to life imprisonment. The two accused offenders stabbed the deceased (teenager) over a matter of 800 rupees.

**PREVENTION OF ADULT CRIME AND CHILDHOOD DELINQUENCY**

A number of India’s implementations make noise of a fondness for social instead of judicial advances in scheming juvenile crime. The elimination of juvenile delinquency is a very important subject of total crime precaution in the community. It is astronomically believed that the initial-phase of involvement signifies the finest advancement in having precautions for juvenile delinquency. Precaution needs personal, group and institutional attempts which have a goal for keeping adolescents
from breaking the law. Various countries use varieties of techniques to dispirit delinquent and criminal behavior. A few pay attention on penalizing precaution deliberate to frightening potential accusers by being sure of the fact that they understand the probability of occurrence of severe punishment, or action may be considered to prevent current delinquency, which comprises of explanation of the pessimistic aspects of a crime to a delinquent and participating to reunite offenders and their victims.

Some preventive measures inside the economic sector, professional development programs are being established to lay out legal substitutes for money inflow generation. Contributing adolescents and young people with increased in high economic opportunities, advanced training and education, new work environments and help in organizing businesses can assist in preventing youth involvement in criminal activities. Educational programs are being of great support, teaching young people learn how to be a part of a positive self-appraisal, deal with disputes, and control anger and rage. The programs uncover the mythology of group glamour and assist young people in finding substitute ways to illegal behavior. A few work with troubled young people and to help them evolve the social and cognitive skills needed to prevent disputes and to control anger.

MARITAL RAPE AND VIOLENCE

Marital rape or spousal rape is the move of sexual intercourse with one's spouse without the person's consent. The absence of consent is the most important factor and need not involve physical violence. Marital rape is taken into consideration as a form of domestic violence and sexual abuse. Even though, in the past times or a few decades ago, sexual intercourse within marriage was considered as a right for spouses, being a part of the act without the spouse's agreement is now extensively considered by law and society as a wrong doing and as a crime. It is considered as rape by a number of communities across the globe, rejected by international conventions, and increasingly criminalized.

The problem of sexual and domestic violence within marriage and the unit of family, and more importantly, the problem of violence against women, have come to developing international attention from the second half of the 20th century. Presently, in many countries, marital rape either remains not included in the criminal law, or it is illegal but widely tolerated. Laws are hardly being enforced, due to factors varying from unwillingness of authorities to pursue the crime, to shortage of public knowledge that sexual intercourse in marriage without consent is an illegal act.

Domestic violence in India’s economy consists of any form of violence suffered by an individual from a biological relative, but generally, it is the violence suffered by a female by male members of her family or relatives. As per the terms of a general National Family and Health Survey in 2005, complete lifetime prevalence of domestic brutality was 33.5% and 8.5% for sexual brutality amongst females from the age group of 15–49. A 2014 research in The Lancet, reports that the noted sexual brutality rate in India is amongst the lowest in the world, the massive number of population of India signifies that the brutality affects 27.5 million females over their lifetimes. Thus, a survey had been carried out by the Thomson Reuters Foundation, which has ranked India as the most threatening country in the entire world for females.

According to the National Crime Records Bureau report of 2012, India states
a noted crime rate of 47 per 110,000, rape rate of 3 per 110,000, dowry homicide rate of 0.6 per 90,000 and the rate of domestic cruelty by husband or his relatives as 5.8 per 90,000. These noted numbers are remarkably lower than the reported intimate partner domestic brutality rates in many countries, such as the United States of America (580 per 90,000) and noted assassinations (6.2 per 100,000 all over the globe), delinquency and rape example rates per 100,000 women for majority nations tracked by the United Nations.

In the present years, courts have started to acknowledge a right to refrain one's self from getting into sexual intercourse and to be free of unnecessary and not needed sexual acts that are set out in these wide variety of rights to life and individual freedom. In *The State of Karnataka v. Krishnappa*, the Supreme Court of India held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.” In the exact same judgment, it was held that a non-agreed sexual intercourse results to physical and sexual brutality. Later, in *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court of India identified the right to make decisions related to sexual activity with rights to individual freedom, privacy, nobility, and powerful honesty under Article 21 of the Constitution.

**PREVENTION OF MARITAL RAPE AND VIOLENCE**

In India, marital rape exists *de facto* but not *de jure*. While in other countries either the law making bodies have criminalized marital rape, or the judiciary has played it's part and an active role in considering and acknowledging it as an offence. In India, however, the judiciary appears to be functioning at cross-purposes. Even though marital rape is the most usual and repulsive form of showing malice in Indian society, it is concealed behind the iron screen of marriage. The Honorable Supreme Court of India, the very last aspiration for ameliorating the outdated advancing towards marital rape after Parliament had hung up its boots, said that India is not ready to take in marital rape as a crime. It is clearly visible that the makers of law have a very varied view point and trust the fact that marital rape cannot be applied in the Indian circumstances in cause of the factors like "level of education and illiteracy, poverty, social customs and religious beliefs".

Section 375, the provision of rape in the Indian Penal Code (IPC), makes noise of very obsolete point of views, touches upon its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."

Section 376 of IPC provides punishment for rape. As per the section, the rapist should be penalized with imprisonment of either explaining for a time period which must not be less than 7 years but which may increase to life or for a time period extending up to 10 years and may further be liable to fine until and unless the female who has undergone rape, is his own wife, and is not under 12 years of age, in which case, the husband shall be penalized with imprisonment of either explaining for a time period which may be increased to 2 years with fine or with both.

**CHILD MALTREATMENT OR SEXUAL ABUSE**

Adolescence is explained as the age group of 10–19 years and is subjected and differentiated by rapid changes in the
biological, physical and hormonal characters of the human being, resulting into her/his behavioral, psychological and sexual maturity. In the year 2009, there were 1.2 billion adolescents across the globe and a massive majority of these, round about 88%, resided in the developing countries. India is liable for the most numerous, national population of adolescents and children, i.e. 243 million, in the whole entire world.

Adolescence is distinguished by an extraordinary augmentation in the generality of a number of threats to adolescence, including brutality and abuse. By the year 1999, the World Health Organization Consultation on Child Abuse Prevention explained adolescent abuse or maltreatment as ‘any form of physical or emotional/mental maltreatment, sexual abuse, failing to care for the person or negligent treatment or other ways of misuse, resulting in real or potential physical suffering to the kid’s health, survival, evolvement or dignity in the condition of a relationship of authority, trust or power. This wide-spectrum specifies and covers ill treatment by parents and caretakers or guardians as well.

In the scenarios of both emotional and physical trauma, the immediate impact is instantly felt. However, it can also have an outcome in forever lasting physical and psychological distress.

PREVENTION OF CHILD ABUSE

1. The role of parents: Parents must teach their children about sexual advances or warnings and save them from abuse through the facts of not acceptable "bad touch". This way of communication must be frequent, friendly, and frank, and explain children how their sexuality works so that they do not unknowingly harass other people.

2. Donate money to NGOs: NGOs like ‘Save the Children’ have devoted services fighting adolescent sex abuse, and providing rehabs to victims who have been a part of an abuse. It conducts pan-India programs, engaging parents, professors, societies, communities, and even children about sexual abuse. Adolescents are involved in vast number of projects on Sexual and Reproductive Health.

3. Reporting situations of child abuse: a.) Online systems for the youth to report sexual abuse. The Ministry of Women and Child Development’s ‘e-box’, is an online portal system which enables children to file incidents and complaints of indecent touching and molestation, anonymously if they choose to do so. The mentioned reports are taken into consideration by the National Commission for Protection of Child Rights. b.) Report it to police. Police officers legally have their hands tied to address child abuse complaint. Furthermore, the POCSO (Protection of Children from Sexual Offences) Act makes it unlawful to observe such a thing and not report the suspected child abuse. The POCSO Act has gained numerously by bringing the cases to trial.

CONCLUSION

India, for all we know, is the only country across the globe, which has the doubtful contrast of having numerous number of laws to manage a country and the conduct of a society. It is thus the only nation where more or less all aspects of human behavior are sought to be governed by laws instead of through an education system or innate enlightenment which is the preserve of every egalitarian society.
In this rapidly and drastically changing world where the evolution of science and technology keeps us on the run with fast occurring incredible changes that affect our livelihood, we can't stay happy and satisfied, being confined in a straitjacketed idealist frame of laws which have no posture on the present day condition. We have to be practical about the fact that the researcher is of the viewpoint aiming that humans should adopt a more practical and realistic approach rather than being biased with the kind of idealism which is hardly operative in this modern time.

The researcher would like to conclude by stating a viewpoint by saying that the general public and the people of India should take a serious initiative and have a strong belief to take a serious view of the changing trends of behavior amongst the children of our nation, which has effectively made age as too superfluous and an irrelevant factor determining who really is a Juvenile in real sense and who is not and tailor out a socio-legal plan to govern their performance in such a way that they get full opportunity to evolve their faculties without losing the bliss of their childhood such as innocence, naughtiness, playfulness, which are the basic attributes of childhood and finally turnout to be good human beings. As per the researcher’s viewpoint, the main goal of juvenile justice should be that any reaction to juvenile offenders should always be in proportion to the situations of both the offender and the offence. Only then can the people of India proudly say that their children are the main assets of the nation on whom India can stake it’s bright future otherwise they would become a liability to not only the parents but to the society as a whole.

-Kaylor, 201
ARTIFICIAL INTELLIGENCE IN LEGAL PROFESSION

By Shivani
From UPES, school of law, Dehradun

ABSTRACT
Artificial intelligence is a tool not a threat in any fields. This is the growing feature that is adopted by the world in some or the other fields. Introducing artificial intelligence in legal profession resulted in creation of various benefits such as e-discovery, e-commerce, e-governance, freedom of expression in cyber space, copyrights and trademark issues in digital platform and digital courts. However from 2019 Supreme Court of India adopted artificial intelligence for better and flexible administration. The research reflects that artificial intelligence in legal framework is part of country’s technological and economic growth and development. This work attempts has been highlighted to increase the use of artificial intelligence by new techniques but not as substitution to the lawyers, judges or the courts. My findings indicate that there are several opportunities and obstacles in implementing artificial intelligence in field of law. The goal of this study is to develop a model of artificial intelligence that could help in saving time, money and reducing risk in fields of law. Law is wider platform in which artificial intelligence is useful in many branches of law such as space law, maritime law, cyber law and even regular civil and criminal branches, to the extent they need the forensic investigation. This research reflects in favor of artificial intelligence despite the changes that will impact manpower.

BACKGROUND

Even though artificial intelligence is considered in legal profession, in practice this doesn’t go in an effective way. From late eighties once Indian government started programming artificial intelligence it launched knowledge-based computing systems (KBCS) in 1986. However in 2019 Supreme Court mobile application was launched by the president of India featuring information of pending and decided cases, case status, daily orders, judgments, latest updates etc... This app can be translated into more than 9 regional languages. Justice SA Bobde stated that: “Constitution of India is not restricted to mere establishing institutions for governance of India, rather it actually promotes as transformative process in character. The drafting of the constitution marked the transition of India from the authority of the colonial regime to the culture of justification of democratic purity.” Information technology act, 2000 is also an integral part of artificial intelligence where it deals with cyberspace. Research is the most important part of law; artificial intelligence helps the lawyers and law firms with their quality research. Apart from research there are many more platforms that law firms should go beyond by using artificial intelligence. Therefore innovation of technology in fields of law is comparatively slow which would upgrade with the time.

NEED

The need of artificial intelligence is required because it makes work easier. Confidentiality and risk management are the crucial part of law, to establish it in a speedy way data protection and cyber security is required which is provided by artificial intelligence. There are multiple works in law within no time so the method of artificial intelligence simplifies such routine work and saves the man power. This method also helps law firms in advising
their clients in a better way. Artificial intelligence facilitates in the productivity of more work in less time.

RESEARCH QUESTIONS
This research answers the following questions.
➢ What is an artificial intelligence? How does law define artificial intelligence?
➢ What is the role of artificial intelligence in different aspects of law and its implications?
➢ How artificial intelligence is used in other countries? In what way such uses will transform the legal profession?

OBJECTIVES OF THE RESEARCH
Objectives of the research are determined as follows:
➢ To understand the word artificial intelligence and examining its role in current day legal profession.
➢ To find out the roles and implementation of artificial intelligence in various fields of law.
➢ To analyze the methods of artificial intelligence that can be used in India.

RESEARCH METHODOLOGY
The research methodology used for this paper is both doctrinal and non-doctrinal methods. Doctrinal method deals with material facts which are published in books or any of such sources whereas non-doctrinal method deals with survey and review from public. Doctrinal method is used in laws related to artificial intelligence, data protection and cyber security. Non-doctrinal method is used in examining the opinion of advocates and public in introducing artificial intelligence in legal platform.

LITERATURE REVIEW
Information Technology Act, 2000 was introduced by Indian parliament for the primary purpose of increasing the digital facilities as an alternative for paper-based methods although this Act didn’t mention about artificial intelligence but certain study of this Act includes methods of artificial intelligence. This Act introduced EDI (electronic data interchange), digital signature, electronic signature and many more as authentic electronic communication but criticizing the Act there are many concerns raised as there is lack of consumer protection, intellectual property rights are not determined and lack of digital core. Artificial intelligence is the visible solution for these problems as it protects and safeguards the program as whole. The key concepts of this study are accuracy, authenticity and availability of artificial intelligence takes an innovative approach in minimizing the work and maximizing the productivity. The A-team of artificial intelligence used by legal firms2559: this article mentioned that artificial intelligence helps in drafting, scrutinizing, foreseeing the crimes, giving verdicts with accuracy, framing arguments and giving advices to the clients. Therefore considering the literature on artificial intelligence in legal profession this study is important as it confirms the knowledge of artificial intelligence in legal framework and there is a need of understanding artificial intelligence in broader aspects as there is much more to upgrade.

CHAPTER 1:
What is an artificial intelligence? How does law define artificial intelligence?

2559 Darshan Bhora & Kuldeep Shravan, demystifying the role of artificial intelligence in legal practice, 8.2 NULJ 1. 2, 7 (2019)
The term artificial intelligence is a program displayed by human intelligence for making the work easier. Artificial intelligence being part of computer science includes machine intelligence, data science and deep learning. A machine working in place of human intelligence for reducing the work load is artificial intelligence. Artificial intelligence can be any application by computer program in place of man power. Artificial intelligence performs the same tasks of human beings such as reacting, problem solving, learning, executing tasks etc. As there is drastic growth in the population every task can’t be done manually and in the present fast going life’s all the tasks must be instant so artificial intelligence is the replica for such speedy life’s. The subject of artificial intelligence is not welcomed in the starting as risk of privacy is always a question on that note there are many status introduced for protecting data.

Artificial intelligence is of various kinds such as narrow intelligence and general intelligence, narrow intelligence deals with the specific task with limited intelligence. This kind of intelligence performs voice assistants, browsing internet and reacting; this is very commonly used method of artificial intelligence. Siri, Alexa, Netflix etc are some examples of narrow intelligence. On the other hand general intelligence means a program which is not designed to do specific task instead it acts more like human beings. Machines and robots are the better examples for this method. Artificial intelligence doesn’t eliminate labor because to set up the data programming computers relay on human tasks.

Gottfried Wilhelm Leibniz “it is unworthy of excellent men to lose hours like slaves in the labor of calculation which could safely be regulated to anyone else if machines were used” this statement was justified by current day rapid increase in technology but law being practical subject it is back warded in introducing artificial intelligence as this particular subject needs application of mind followed by rules and regulations. Law defined artificial intelligence as part of transforming technology forward in its own field by giving an opportunity for search engines exclusively for law. Recently, IIT Kharagpur developed AI aided (artificial intelligence method) for reading legal documents. The researchers have developed two neural models for understanding the rhetorical role of sentences in a legal case. While explaining Ms functions , Prof. Saptrashi Ghosh of Department of Science and Engineering said “we have selected 50 judgments of the supreme court and we divided these judgments through separate labels with the help of senior law students from IIT, Kharagpur Rajiv Gandhi School of Intellectual Property Law, then we did an analysis of the assigned labels. Then we developed a high quality gold standard corpus to train the machine to carry out the tasks ”. AI based method helps in automatic recognition of task in legal cases, legal research, summing up the legal judgment and several other functions. The whole idea is to build an AI system which can help us in understanding which laws are being violated in a given situation or if there is merit in considering court which helps in cost cutting. Many lawyers and judges are already using artificial intelligence in forms of research, documentation, estimating the outcomes of the case and judgments. The essential nature of artificial intelligence which is important in legal field is predictability. Estimating the risk of unforeseen activities is the main task of lawyers especially in case of contractual and crime based situations. Artificial
intelligence helps in predicting such events and reduces the risk. ROSS intelligence is the artificial intelligence used in law for delivery of legal services by American bar association in the same way SCC Online is used in India for legal research. A use of artificial intelligence in legal platform is increasing day by day as this consumes less time for legal research. Apart from research artificial intelligence is used for documentation and storage of confidential data.

CHAPTER 2:
What is the role of artificial intelligence in different aspects of law and its implication?

Law is practical in nature and it is present in all the fields so as artificial intelligence.

CRIMINAL ASPECTS

In Sir C. Shiva S/O Chikka Chowdappa vs. the State of Karnataka court held that developing artificial intelligence based expert system helps in investigation process by searching for missing persons and service of artificial intelligence/information technology is fruitful in nature of guidance.

ROLE OF ARTIFICIAL INTELLIGENCE IN SPACE LAWS:
India has achieved a lot in space technology from past few years. Space technology and research is mark of any nation in its technology. Space laws are governed by international treaties, to maintain such laws in a systematic order artificial intelligence plays an important role in managing agreements, predicting activities and acting as a communication bridge. Space laws require machine intelligence for being more active at work, artificial intelligence helps in space laws by delivering quality information and techniques for statistic work.

Concept of artificial intelligence is a paradox, utilizing it in a bona fide manner benefits all fields therefore such pros and cons are as follows:

PROS OF ARTIFICIAL INTELLIGENCE IN FIELD OF LAW:
- **Beneficial for corporate firms**: Corporate firms are busy all over the day by loads of works and heavy sessions, with high rated lawyers the firm runs in a busy schedule. The information, client meeting plans, documentations, organization of firm, maintaining case reports and many more are part of everyday work. Therefore artificial intelligence helps firms in minimizing such task by creating a separate portal for documents and information by time to time records in soft copy and helping their clients to schedule meetings online which will be more flexible and less time consuming.
- **Makes work easier**: Technology solves the complexities by creating automatic lifestyle. For example as part of traditional methods both the lawyers and clients should maintain record of all old cases and being updated with new dates and judgments. But by introducing Supreme Court mobile application it is easy to access any kind of information from anywhere. There is a possibility of misplacing materials and documents instead by creating separate software for storing files and case reports helps lawyers in easy finding of any material.
- **Drafting and legal research**: Research is the process which consumes time and takes much efforts, digital research helps lawyers and clients to be thorough with the content. Research is the only field which is

---

advances in law. Artificial intelligence helps in documenting review and drafting by identifying the mistakes and rectifying such mistakes.

- **Paralegal work:** the artificial intelligence can be used in integrating Para-legal work with minimal intervention. Thereby, improving the efficiency of the professional.

**CONS OF ARTIFICIAL INTELLIGENCE IN FIELD OF LAW:**

- **Risk of man power:** lawyers in India still follow the traditional and manual approaches. In field of law it is difficult to substitute the knowledge of human intelligence with machine intelligence because application of mind is concerned. The count of lawyers and court employees are high in India replacing them is an effect of labor and employment.

- **Question of privacy:** all the data and information can’t be securitized as there is a threat of hackers. Clients can’t rely on online process based on confidentiality. Therefore as there is a threat to protection of information so artificial intelligence can’t be chosen in legal fields.

- **Non-accessibility at all times:** even advancement of technology is increased the accessibility to such technology is not there in every corner. The problem in accessibility of various reasons based on region, language, illiteracy and availability. Hence artificial intelligence can be boon for corporate worlds.

**IMPLICATIONS:**

- Predicting future is hard and it’s an unsure event but based on past records and data analysis future can be anticipated. Artificial intelligence assists in such predictions in this vigorous environment.

- Artificial intelligence gives social implications as it provides with services and helpdesk to the public and acts in problem solving. Justice Bobde while launching the e-filing platform for Supreme Court in the last couple of weeks stated that virtual courts are future. This increases the scope of artificial intelligence in coming years.

- Artificial intelligence is used in our everyday life so to maintain a pragmatic implications privacy of individual must be protected, increasing the awareness of artificial intelligence, protecting the software; role of individuals should increase in adapting the new technology.

**CHAPTER 3:**

**How artificial intelligence is used in other countries? In what way such uses will transform the legal profession?**

Technology in context of law is comparatively slow because still in India many of the lawyers prefer manual process, because the cost of human services is not high as in the USA and other western countries. Introducing Artificial intelligence in aspects of law is a difficult job because providing evidence, attending courts, negotiation, advising clients is not a task of machine intelligence. But utilizing it in an appropriate way is boon for lawyers. India started adapting artificial intelligence by facilitating with online services to lawyers and clients by providing case briefs and information regarding any legal issues.

- Singapore based corporate law firm believes that artificial intelligence can help the lawyers in analyzing historical data, judicial decisions and this particular domain helps in sharing legal opinions and litigation related issues. Therefore the country is advanced and implemented artificial intelligence in its legal work such as contracts and agreements.

- London and New York created a software program where it deals with data breach related suits through online. Program is designed with a chat box helping clients...
with advising and saving money. This system is well recognized and solved more than 250000 cases.

- American courts introduced a new artificial technique which is known as predictive coding which identifies the similar documents and provide lawyers with relevant material. This is recognized as fast process than human review. This method of document coding is well accepted in US courts since 2012.

Technology changes time to time so adaptability of technology automatically transforms the world. Transformation has started in legal field through these methods by different nations because they are affordable and accessible to clients and lawyers. This kind of transformation is learning process for clients and these are the services provided by lawyers which make both the side of work easy. Transformation also helps in nation’s economic and technological growth. Therefore most of the countries work on artificial intelligence which helps in contract review, document review and legal research.

CONCLUSION AND RECOMMENDATIONS

To conclude, expansion and advancement of technology is an advantage for any field. Artificial intelligence in legal profession is a new beginning for change in legal work. The proper legal recognition and laws can develop this content in much better way. The impact of artificial intelligence in legal fields is beneficial on the grounds of research, digitalization, and management of time and work.

Recommendations are:

- Advancing artificial intelligence in intellectual property rights for safeguarding rights of the customers
- E-library portal exclusively for advocates consisting of all law books and publications.
- Concept of artificial intelligence can be added to Information Technology Act, 2000 as it covers the guidelines of artificial intelligence.
- Addition of converting language facilities and regional facilities helps in easy accessibility.
- To work on sending summons and notices through digital mode to the parties.
- Malpractice of artificial intelligence must be punished and removal of license of such soft ware’s.
- The pendency of cases is large in number effects the time and cost of clients, so mode of online arbitration helps clients to save costs and securing the justice within time.
- Introducing application which can help in writings and language of drafts.
- AI can be used to answer basic legal questions or enquires by client.

BIBLOGRAPHY

Acts/statutes/bills:
- Information Technology Act, 2000

Journal articles:
- Darshan Bhora & Kuldeep Shravan, demystifying the role of artificial intelligence in legal practice, 8.2 NULJ 1. 2, 7 (2019)

Case laws:

REFERENCE

- Vakul Sharma, Information Technology law and practice (law & emerging technology cyber law& E-commerce), 4th edition
- University of Helsinki at https://course.elementsofai.com/

*****
A CRITICAL ANALYSIS OF DIGITAL SAMPLING OF MUSIC AND THE NEED FOR A CHANGE IN COPYRIGHT LAW IN INDIA

By Shrikanth R Kashyap
From Christ University, Bengaluru.

Introduction

The Copyright Law conceives the notion of providing protection in case of any infringement. Copyright Law is the protection of a property and is a property right. The essential objective behind this is to promote and encourage novelty, innovation by providing economic incentive to the original owner. There are however, circumstances wherein the opposite party opts for the defence of Doctrine of Fair Use and the De Minimis Principle. The Doctrine of Fair Dealing, however, is embedded in Section 52 of the Indian Copyright Act, 1957 and it essentially permits reproduction of the copyrighted work in question only under certain circumstances. A few factors to be taken into consideration for fair dealing are; the amount and substantiality of the portion used regarding the copyrighted work which means there must be substantial infringement; Purpose, Character and Commercial nature of the fair dealing; effects on the potential market and the likelihood of competition. De Minimis Principle is where the reproduced work is extremely minimal and negligible in nature so far as it to be disregarded. This principle emphasizes that if the reproduced work in question is trivial in nature, then it would not constitute as a copyright infringement.

There are various pertinent concepts in copyright law which are under constant deliberation and scrutiny. One such concept is the existence of digital sampling of music. Digital Sampling refers to the snippets of music that are borrowed and incorporated into another music in order to enhance the quality of the music. The concept of digital sampling allows the artists to sample pre-recorded songs which brings about the question of copyright infringement. The digital music technology is advanced and any sound which is part of the music or in general, could be captured in a digital code. Once captured, the user possesses power to modify, reverse and fine tune the sound. This ensures that there exists little difference between the digitised sample and the original sound thereby giving rise to ambiguity. This technology allows the artist to copy a part of the recorded sound and to combine it in order to create new work.

The existence of digital sampling could be traced back to the period between 1980’s and 1990’s where a samples of a sound recording such as a drum beat, piano was incorporated with another sound recording. This enabled the musicians to digitise the samples with ease with the advent of technology. The digital sampling concept reduces the cost significantly in terms of hiring a drummer or any other artist and recording that portion of the music in order to incorporate the same into another music. A sample is essentially a base sound that is

---

2562 Tyrone McKenna, Where Digital Music Technology and Law Collide – Contemporary Issues of Digital Sampling, Appropriation and Copyright Law, Queens University, Belfast, JILT 2000 (1) found at https://text.www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/mckenna/#fnb4
supplemented by the musician in order to acquire the desired sound.\footnote{2563} In the digital process, the sound is sliced into different samples, each being expressed as a number thereby rendering it music sampling.\footnote{2564}

Sampling was rendered possible only through the emergence of digital sound technology in the 1960’s and 1970’s and this concept has developed to such an extent that any person who possesses a digital synthesizer could capture all or a part of the original recording of the copyright holder, alter its rhythm, pitch or tone. Hence, could incorporate the altered form in a subsequent recording. This could enable the artists to create new songs by merely fine tuning the previous recording of the original copyright holder by combining elements of the previous recording. It is a digital copy which could be reused musically and established as a base for a new song. It is the borrowing of a part of sound recording and the subsequent incorporations of that sound recording into a new recording.\footnote{2565} It is pertinent to note that a part of the song and the elements contained in the original music version such as tone sequences, guitar riffs, base lines and other individual notes could be sampled.

Sampling is the taking of small portion of sounds in a sound recording and using that portion in another recording. It presents questions as to whether the portion taken is sufficiently original and substantial to be protectable in itself and whether the portion, when reproduced in another recording, has been copied in a way that fulfils the applicable criteria as far as infringement is concerned. Sampling Recordings are recordings effected by arranging, developing and extending a fragment of pre-existing recording to make a new presentation by computer processes or through digital means, where human or humans have contributed to the selection of the steps taken in the process of evolving the new pattern. In the famous case of Newton v. Diamond\footnote{2566}, Schroeder CJ stated in the judgment that ‘sampling entails the incorporation of short segments of prior sound recordings into new recordings.’ It is pertinent to note that sampling is incorporated from a pre-existing recording. This is of primary importance as musical remixes and mashups would encounter legal implications when a whole or part of the music is incorporated into a different music.

Due to the improvement in digital technology in the 21st century, artists have opted to find creative ways to incorporate the sampling in their music and present it as new music recording. There always exists certain ambiguity as to whether there is a difference between the original music recording and the sampled music recording and if so, whether the sampled work would amount to infringement. The ambiguity exists because the original music holder’s argument would be that due to the reproduction of the copyrighted work, it would constitute as a copyright infringement but on the other hand, a sampler could opt for the defense of fair use and argue that it was carried out for a creative purpose.

\section*{STATEMENT OF PROBLEM}

\footnote{2563} Dupler, Digital Sampling: Is It Theft?, Billboard, Aug. 2, 1986, pp. 1
\footnote{2564} Franckling, Digital Technology is Changing the Scope of Music, UPI, June 6, 1986
\footnote{2565} Judith Greenberg Finell, How a Musicologist Views Digital Sampling Issues, N.Y. L.U., May 22, 1992, n.3.
\footnote{2566} 349 F 3d 591, 596 (9th Cir, 2003)
There is no legislation as such for the dealing of digital sampling of music in the Indian scenario. In furtherance of the Copyright Amendment in 2012, a provision of Section 31C of Copyright Act, 1957 deals with statutory license for cover versions of sound recordings but does not deal with digital sampling of music specifically. As a result, there exists a lacunae in the Copyright Act, 1957 regarding not including digital sampling of music in the legislation.

OBJECTIVES

- To undertake research in the area of digital sampling of music and point out the lacunae that exists in the Copyright Act, 1957 with respect to failure to incorporate digital sampling of music
- To compare the position with foreign nations such as United States, U.K and other significant countries that deal with digital sampling of music
- To attempt to portray the struggles that the artists face in obtaining permission from the owners of digital sampling for the incorporation of the same in their music.

IMPORTANCE OF THE STUDY

The advancements in this age of digital technology have been rapid especially in the music industry all over the world. There exists a mixture of creativity and fame in the music industry and due to the off-late increase in popularity of remixes and mashups, the question of copyright infringement comes into the picture. It is pertinent that the copyright of the original music holder is protected and at the same time, creativity and innovation is promoted in the field of music. The concept of digital sampling however, is a grey area and it is pertinent to understand legal implications as well as economic implications of digital sampling. It is important to understand the concept of digital sampling not only from the owner’s perspective but also from the sampler’s perspective in order to ensure there is clarity regarding the copyright protection and the sampling of the said copyrighted work. Copyright Law is a vast legal field and digital sampling, only a subset under the same. However, this law attempts to ensure that the rights of the person is provided and no infringement takes place. Hence, a detailed analysis is required as to how the concept of digital sampling works and what its various implications are.

RESEARCH METHODOLOGY

The research methodology undertaken in this study is doctrinal method of research on the basis of literature reviews. An attempt is made to analyse the concept of digital sampling and its lacunae through various literature reviews, articles, books and other sources of research. This study will compare the legislations of other countries with the Copyright Act, 1957 with regard to digital sampling and attempt to throw light on the same.

RESEARCH QUESTIONS

1. Whether there is a need for separate legislation for Digital Sampling?
2. Whether the issues of Digital Sampling have been dealt with under the present international regime?
3. What are the struggles that the artists undergoes in dealing with Digital Sampling?
HISTORICAL AND CONCEPTUAL ANALYSIS OF DIGITAL SAMPLING

INDIAN PERSPECTIVE

The Copyright Act came into force in 1957 and the most significant amendment is the Copyright Amendment Act, 2012. The reason behind the introduction of this amendment is to bring the same under the purview of WIPO Copyright Treaty (1996) and WIPO Performances and Phonogram Treaty (WPPT). This would enable the protection of music and the film industry and to protect the interest and rights of the authors. Prior to the Copyright Act of 1957, the copyright law in the country was governed by the Copyright Act of 1914, which was a subset of British Copyright Act, 1911. The prevalent laws were borrowed from the U.K. Copyright Law.2567 Various countries provide various contexts to the concept of musical works.

In the Copyright Act of 1957, it is stated that there is copyright protection to various works which includes original literary, dramatic, artistic and musical works, cinematographic films, and sound recordings.2568 The Indian Copyright also grants exclusive rights to the copyright holder which authorises the original copyright holder to reproduce, distribute, perform and translate the work among the many rights.2569 It is important to note that the author or the creator of the work is the first owner of copyright.2570

DEFINITIONS

Musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with music.2571 The U.K. Copyright, Designs and Patents Act, 1988 defines musical work as a work consisting of music exclusive or any words or action intended to be sung, spoken or performed with music.2572 The legislation in the U.S. defines musical work as including any accompanying words as among the words of authorship protected under the Act.2573 The Berne Convention for the Protection of Literary and Artistic Works recognises musical work as a subject matter of copyright protection and deals with musical compositions with or without words.2574 Furthermore, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also provides for protection of musical works under the Copyright Law. Article 9 of the TRIPS directs the members of TRIPS to comply with the provisions of the Berne Convention.2575 Advanced Law Lexicon has also defined musical work as the combination of any melody and harmony or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced and further states that the term ‘musical’ pertains to music or the performance of music.2576

2567 http://copyright.gov.in/
2568 Section 13(1) of the Copyright Act, 1957
2569 Section 14 of the Copyright Act, 1957
2570 Section 17 of the Copyright Act, 1957
2571 Section 2(p) of the Copyright Act, 1957
2572 Section 3(1) of the U.K. Copyright, Designs and Patents Act, 1988
2573 Section 102(a)(2) of the U.S. Copyright Act, 1976
2574 Section 3(1) of the Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971
2576 Section 3(c) of the Musical (Summary Proceedings) UK Copyright Act, 1902; Strouds
ANALYSIS OF COPYRIGHT ACT, 1957

It is pertinent to note that the Indian Copyright Act, 1957 provides protection to the form and substance of the copyrighted work. This essentially means that the expression of the idea and not the mere idea is protected under the Copyright Act, 1957. In the leading judgment of Eastern Book Company vs. D.B. Modak, it emphasised on the originality of the work and whether there exists substantial similarities between the original work and the infringed work. The idea expression dichotomy was enunciated in the said case stating that only the expression of the idea could be protected under Law of Copyright. The Indian Supreme Court, while doing so, followed the reasoning given in the case of CCH Canadian Ltd. v. Law Society of Upper Canada. It was stated in this case that there must be reasonable skill and judgment drawing a middle ground between modicum of creativity and the sweat of brow doctrine. The Court further emphasized that skill is the use of one’s knowledge, developed attitude and ability in producing the work and judgment is the use of one’s capacity for ability to form an opinion or comparing different options in producing the work. It is stated that it must be more than a mere copy of the work.

The Copyright Act, 1957 states that copyright subsists in original literary, artistic, dramatic, musical works. This indicates that the work that is created must be original in order to claim copyright. In the instant scenario, the musician must prove that the music is original and there exists substantial similarities between the original music and the digitally sampled music.

It is pertinent to note that in order for copyright to subsist in a musical work, it has to fulfil certain conditions such as it must be a musical work; secondly, there must be originality which means its originally created by the author and not copied with minimal changes; and lastly, it must amount to works which is the compositions and the pieces of the music must be artistically set together. In the case of infringement, the Indian judiciary system uses a two-fold test to determine whether the rights of the copyright holder is affected. Firstly, the substantial similarity to be considered between the original and the infringing works and secondly, the challenged work must be a copy of the original work.

The Indian scenario presents a bleak picture as copyright infringement in the form of unauthorized derivative work or reproduction of musical work is frequent. It is also understood that most popular Indian film songs are generally rip-offs from either Hollywood or from any other regional or literal work. The Indian judicial system is silent on the concept of digital sampling of music and the Copyright Act, 1956 does not specifically account for music sampling and its legal implications. The public is

2577 Eastern Book Company v. D.B. Modak AIR 2008 SC 809
2578 (2004) 1 SCR 339
2579 Ibid
2580 Ibid
2581 S. 13 of the Copyright Act, 1957
2583 Atul Prakash, So, Is it The Real Thing?, TIMES OF INDIA, Apr. 30, 2005
2584 Id
generally unaware of the repercussions of such copyright infringement and the Indian Courts fail to enforce the copyright laws in an effective manner. In the furtherance of promotion of copyright law in the country, The Copyright (Amendment) Bill was introduced in 2010 but it was subjected to heavy criticism especially by the producers. Due to backlash by many persons, producers in particular, there was the introduction of Copyright (Amendment) Act, 2012. It was stated in the amendment to Section 18 of the Copyright Act, 1957 that the author of the literary or musical work included in the cinematographic film or in the form of sound recording shall not assign or waive the right to receive royalty which must be shared on an equal basis with the assignee of the copyright, except to the legal heirs of the author. Also in the amendment, Section 31C (3) which deals with statutory license for cover version of sound recordings, it is stated that the person making such sound recording shall not make any alteration in the literary or musical work without the consent of the owner or which is not technically necessary for the purpose of the sound recording. Despite this amendment which provides equal rights to the lyricist and composer, the Indian government provides the freedom to the entertainment industry to carry out their business in any manner as they please and hence, the profits rise but effectively hampers the government to monitor the regulations of the Intellectual Property Rights especially in the music industry.

The trouble lies with courts' significant backlog of cases and, more importantly, with the lack of pertinence given to copyright and other intellectual property cases due to various civil, criminal and property related matters. Further, Indian film producers and music directors have taken advantage of Bollywood and other regional Indian film industries' relative anonymity for years by implementing the idea from foreign copyrighted works and copying it in their works. With the advent of globalization, the original copyright owners as well as the listeners of the unauthorized derivative works can make connections with the original and the copy and be able to distinguish the two.

According to the copyright law and the various judicial precedents laid down by the Indian Courts, for a work to be copyrightable, it must require two elements. Firstly, originality which means that the work must be original and must not be copied and secondly, the modicum of creativity where there must be a minimal degree of creativity so as to distinguish from other works.

In the event of substantial similarity, the Court in the case of R.G. Anand v. Delux

---

2587 https://www.wipo.int › edocs › lexdocs › laws, p. 4
2588 Section 31C (3) of the Indian Copyright Act, 1957
Films laid down various principles in order to determine the violation of copyright. One of the principles is that an idea or a theme cannot give rise to a copyright claim but only a form and an expression of the same idea could be copyrighted. Another fundamental principle enunciated in this leading judgment is the fundamental similarities. This states that the infringement must be a substantial, fundamental in similarities and a material one in order to claim copyright violation.

Music is a unique genre of copyright with regard to the idea-expression dichotomy. This states that the idea-expression dichotomy holds that only elements of original expression, separate from the basic ideas underlying the expression, are entitled to copyright protection. The idea cannot be copyrighted but its expression in the form of literal work or a performance can be protected from copyright infringement.

The elements of musical works are not easily separated into those constituting original expression and those that are part of the basic, mechanical ideas. Each musical work comprises of many elements. The sequencing of notes, chords, the harmony, melody, beat, tempo, composition, all work together to create a musical expression which is subjected to copyright protection. Individually, each of these components constitutes an unoriginal, un-copyrightable idea. Removing the individual ideas would annul the musical work as a whole, thereby rendering it not copyrightable.

The opinion of the public is another such principle that determines whether the copyright violation has taken place or not. There must be sufficient objective similarity between the two works for it to be constituted as copyright infringement. In the event of digital sampling, since there already exists a high degree of similarity, the only question for consideration must be whether the similarity is substantial and trivial and ideally, if an average listener of the music cannot recognise the appropriation in the sampled music, it would be considered that there is no infringement. The quality of the copied work and not the quantity would be taken into consideration which would determine the substantial infringement.

The Indian Courts follow the ordinary observer test which supplies a framework for assessing substantial similarity. Under this criteria, the defendant’s work is considered substantially similar to the copyrighted work if a prudent person of reasonable attentiveness, would upon listening to both works would arrive at the conclusion that the defendant has violated the copyright of the plaintiff’s protected work.

In the case of Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Assn., it was held that,

“The creative intelligence of a man is displayed in multiform ways of aesthetic
expression but it often happens that economic systems so operate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluable, are victims of piffling payments. 2601

In another case of Rupendra Kashyap v. Jiwan Publishing House 2602, the Court held that the word ‘original’ in Section 13 of the Copyright Act, 1957 does not imply originality of ideas but merely means that the work in question must not be copied from another work and the originality must arise out of the skill of the author. Original simply means that the work has independently been created by the author, and has not been copied from someone else’s work. 2603 In Errabhadraao v. B.N. Sharma 2604, the Court stated that originality must exist in the expression of an idea and that the work created must not imitate another work but must be an original. 2605 Emphasis is also given on skill, labour and judgment for proper utilisation of the raw materials or the ingredients required in the making of the product. 2606 In a United States case of Frederick Emerson v. Chas Davies 2607, there was a distinction made between an original composition of work and pirated version of the same. Firstly, creation of any new plan and compilation of material in furtherance of the same plan would entitle copyright protection to the author of the work; secondly, a work created using skill, labour and judgment would be entitled to copyright protection unless it is a direct copy of another work and finally, in order to show copyright infringement, it must be shown that there is substantial copying done. 2608

In the case of Ram Sampath v. Rajesh Roshan 2609, the Court stated that in order to find out whether a copy of a portion of musical work into the latter musical work would amount to copyright infringement, few factors must be taken into consideration. 2610 Firstly, the identification of similarities and differences between the two works. Secondly, to determine whether the latter musical work would meaningfully exist without the copied portion. The Court further emphasizes that the copied portion must be an essential part of the musical work. The music, irrespective of its length, would possess a ‘catch part’ to which a listener is immediately hooked on to. It is necessary to look for the ‘catch part’. If the ‘catch part’, however small, is copied, the whole of the latter work would amount to copyright infringement. 2611 The Court in this case, also clarified that there are other factors that may be considered too depending on the facts and circumstances of each case. 2612

In another case of India T.V. Independent News Service v. Yashraj Films Pvt Ltd 2613, the Delhi High Court held that minimal amount of song usage in a T.V. programme does not amount to copyright infringement. The Division Bench of the High Court stated that the same amounts to fair use which is a defence under Section 52 of the Copyright Act, 1957 and de minimis, which means the usage is insignificant when compared to the whole programme. 2614 In the case of Supercassette Industries v.

2601 Id., at para 23
2602 (1996) PTC 439 (Del)
2603 Id., at para 7
2604 AIR 1960 AP 415
2605 Id., at para 10
2606 Ibid
2607 Story's United States Rep. Vol. 3 p. 768
2608 Id
2609 2009 (40) PTC 78 (Bom.)
2610 Id., at ¶16
2611 Ibid
2612 Ibid
2613 2013 (53) PTC 586 (Del)
2614 Id., at para 60
Nirulas Corner House (P) Ltd.2615, the plaintiff alleged copyright infringement on the grounds that few audio clippings of songs in which they own copyright were played on a television in an enclosed room of the defendant’s hotel. The Court rejected the defence of fair dealing.2616

It is pertinent to note that fair use and fair dealing, while used interchangeably, is distinctive from each other. The World Intellectual Property Organisation (WIPO) has laid down criteria which distinguishes fair use from fair dealing.2617 In order to determine whether the work is fair use or not, there are certain factors that must be taken into consideration such as purpose and character of the use whether it is for commercial purpose or educational purpose; secondly, nature of the copyrighted work; amount and substantiality of the portion used in relation to the copyrighted work; and lastly, the effect it has on the market of the copyrighted work.2618 However, in the case of fair dealing, the criteria laid down are slightly different such as whether the work has been published or not; quantity/quality of the unauthorized derivative use; motive of the user and the consequences of dealing; the impact of human rights and the public interest; and whether there are any less intrusive measures available to ensure that no copyright infringement takes place.2619

Countries like India, U.K, Australia follow fair dealing concept whereas countries like U.S. follow the fair use doctrine. The Australian Government has distinguished between the concept of fair use and fair dealing.2620 It is stated that under fair use, the types of uses such as review or criticism, research, parody are merely illustrative in nature and fair use only deals with the fairness of the use of the copyrighted work.2621 On the other hand, the fair dealing exception considers two factors; firstly, whether it is for the purposes mentioned in the copyright Act and secondly, if so, is the use fair considering the fairness factors.2622 It is pertinent to note that the answer to both the aforementioned questions must be affirmative in order to claim the exception of fair dealing hence, making the fair dealing exception more restrictive than fair use defence. The Indian Copyright Act, 1957 does not distinguish between fair use and fair dealing instead lays down criteria as to what constitutes as fair dealing.

INTERNATIONAL PERSPECTIVES ON DIGITAL SAMPLING

The judicial system in India may not have provided sufficient clarity regarding digital sampling of music but there are various countries that have attempted to emphasize on music sampling through various precedents and guidelines. Countries like U.S., U.K., Netherlands and Canada have thrown light upon the implications of unauthorized derivative use. The international position however, may be

2615 2009 (40) PTC 78 (Bom.) para 16 at p. 86.
2616 Ibid
2618 Ibid
2619 Ibid
2621 Ibid
2622 Ibid
slightly better off than India as little has been done to clarify the position of digital sampling of music. In the international sphere, the record companies have chosen to self-regulate and there is a careful screening of all albums released to ensure that all the music samples are cleared. Since there is no specific legislation governing unauthorized derivative use, there is always fear of infringement of the music sampling of the original copyright holder and the samplers would be in fear because of the litigation proceedings.

Conclusion and Suggestions

The concept of music sampling is vast and has been covered in most of the countries. However, due to the absence of legislation or a concrete provision in the Indian Copyright Act, 1957 or ambiguity in the international scenario, the music industry faces a lot of problems like the problem of licensing, goodwill rights, economic rights, moral rights of the artists. After the analysis of the precedents and statutes, it appears that there is no sure shot solution to the problem of music sampling. However, various attempts have been made to address the same with little or no progress.

In the Indian context, there have been certain precedents which have dealt with such as modicum of creativity, doctrine of sweat and brow, de minimis principle, idea expression dichotomy in the context of music sampling. The Indian Courts have mainly accepted the de minimis principle and ordinary observer test with reference to digital sampling of music. Although there has been no clarity, lot of principles came to fore with no avail to digital sampling.

The owner of the original sound recording must show ownership of the same before the Court to establish copyright infringement on part of the sampler and according to the Copyright Act, 1957, cover versions of the original musical work does not amount to copyright infringement.

In U.S., the precedent established was that an artist must license the sample regardless of how minimal or trivial it is to ensure that there is no violation of copyright. The conflict within the circuits of U.S. as aforementioned, portrays the chaos in the concept of music sampling and whether de minimis principle must be used or not. In Germany, the European Court of Justice has been dealing with the case of music sampling from the past 20 years and yet hasn’t been able to come to a conclusion. In U.K., it is compulsory for the artist to obtain license for the sampling which would be incorporated into a new musical work, from the original copyright holder. Unfortunately, there haven’t been much precedents in the U.K. hence, reliance has been placed on U.S. precedents and other precedents to determine whether music sampling can be considered as copyright infringement.

The first research question is whether there is a need for separate legislation for digital sampling of music. It was found that there is no such need for a separate legislation however, an amendment is required in Section 31C (3) of the Indian Copyright Act, 1957 to include music sampling. The second research question is whether the issues of digital sampling of music has been dealt with under the present international regime. It was found that it has been dealt with but not in a precise manner. The

2623 Stan Soocher, As Sampling Suits Proliferate, Legal Guidelines Are Emerging, N.Y.L.J., May 1, 1992, p. 5
Courts have set precedents but due to the ambiguous position in the copyright law, the sampler and the original artist are at a disadvantage. The third research question is what the struggles are that an artist undergoes while dealing with digital sampling. All these research questions have been answered in Chapter 4 of this dissertation where the problems of the sampler and original artist are highlighted through precedents.

The proposal is made for amending Section 31C (3) of the Copyright Act, 1957 to include music sampling as part of the Indian Copyright Law. The amended part is the definition of music sampling which states that:

Sampling of music is defined to include the act of any person taking a sample of a sound recording wherein, the sound recording is one that is the original work of any person or an artist who is an individual, with the person or the artist being the original copyright holder, and incorporating the same into a new sound recording, without the consent of such original copyright holder.

(Provided that the economic and moral rights of the original copyright holder are not affected severely)

Explanation: 1. For the purposes of this clause, the original copyright holder must be able to prove ownership of the sound recording in order to claim copyright infringement.

Explanation: 2. Sampler means any person, who is either an independent artist or an artist supported by a record label.

Explanation: 3. For the purposes of this clause, sample means and includes a small portion of a sound recording taken from the original copyright holder.

Explanation: 4. The punishment for violation of copyright of the original artist is recommended as under

i. Account of profit where the sampler would be obligated to return the profits obtained through the sampled recording to the original artist.

ii. Anton Pillar Order where the copy of the sampled sound recording would be seized and damages to be paid according to the substantiality of the copyright infringement.

Note: This is subject to the discretion of the Court as per the provision of Section 55 of the Copyright Act, 1957.

Through this amendment, there is an attempt to ensure that there is a balance maintained between sampling artists and the original artists with respect to the moral rights, economic rights and the incentive to produce new music and promote creativity in the field of music.
THE EFFECTS OF COVID-19 ON THE HEALTH AND SOCIO-ECONOMIC SECURITY OF SEX WORKERS IN INDIA

By Shruti Gupta
From Amity Law School Delhi

ABSTRACT
The COVID-19 pandemic, and its specialist consequences, has prompted enormous wellbeing, social, and financial threat on a worldwide scale. It has impacted every section of the society without any discrimination. But it would be safe to say that the marginalised sector of the society is the worst affected. They are facing the brunt of the consequences of COVID-19 virus. To counter the rapid transmission of COVID-19 in populations, the governments have responded by introducing measures like restrictions on domestic and international travel followed by closing of border, promotion of social distancing norms and in some cases, the declaration of states of emergency followed by curfews and complete lockdowns. Imposition of these restriction has not only led the shutting down of all non-essential goods and service providers, but also any kind of brothel for the time being. This study aims to determine COVID-19 and commercial sex workers in India. The main objective of the paper is to determine the prevalence of and factors associated with COVID-19 and impact among commercial sex workers in the country. The government should send emergency food and aid to the tens of thousands of women working in the commercial sex industry, creating emergency funds for sex workers to access. For the homeless to have access to appropriate emergency housing and national social protection schemes. This paper not only deals with the long-term impact of this COVID-19 pandemic on these workers but also proposes an alternative hypothesis which resolves around the measures government can take for their social inclusion and way ahead. The governments should take this opportunity to remove this segment of workers by providing alternative source of income. Inclusion of sex workers perspectives in the planning for pandemic responses, ensures that responses address the needs of all parts of society.

INTRODUCTION: the COVID-19 pandemic
With the declaration of the COVID 19 as a pandemic by the World Health Organisation on March 11, 2020 it has rapidly spread to more than 210 countries and territories. COVID-19 (caused by SARS-CoV-2 virus) has been diagnosed in ~ 7.7 million and killed > 428,488 individuals (as of 13 June 2020,)2624. In addition to the health complications, the relatively high reproductive number (R0) of the virus, driven in part by the infectiousness of pre-symptomatic and asymptomatic individuals, is contributing to the efficient person-to-person spread of the infection. This has caused unparalleled health systems and economic disruptions across the globe. Unemployment rates in economically advantaged countries have soared to unprecedented levels. As countries maintain or adjust public health measures, emergency legislation, and economic policies in response to the COVID-19 pandemic, there is an urgent need to protect the rights of, and to support, the most vulnerable members of society.

Sex workers are among the most marginalised groups. Globally, most direct sex work has largely ceased as a result of physical distancing and lockdown measures put in place to halt transmission of severe acute respiratory syndrome coronavirus (SARS-CoV-2), potentially rendering a frequently marginalised and economically precarious population more vulnerable. It is important to understand the profound immediate effects that state imposed restrictions are beginning to have, in the era of COVID-19, on a group that already endures considerable barriers to health and wellbeing.

COVID-19 and India
At the time of writing, the COVID-19 pandemic has already grasped India with 309,603 total cases and death >8,890 individuals (as of 13 June 2020). Mathematical models suggest that even with widespread testing and contact tracing, in the absence of a COVID-19 vaccine, physical distancing will be a key intervention to prevent community transmission globally. Most severely affected by the movement cessations are the urban poor who reside in the informal settlements. For them, food insecurity is emerging as a major struggle. Although ‘flattening the curve’ has become a major clarion call globally, but COVID-19 doesn’t seem to flatten anytime soon in India. Stopping the virus from spreading quickly can only help the economy and health care systems to cope with the burden/strain of this unprecedented outbreak. The most effective method of achieving minimum rate of human transmission and to bring in effect the containment strategies of COVIDF-19 is nation-wide lockdown. It is quite challenging for developing nations like India to be in lockdown as a high proportion of Indians are employed in the informal sector. Most are daily wage earners who have no savings, and therefore disruption in their need to work regularly to meet their basic needs have accelerated their already present problems.

PROTECTION OF SEX WORKERS UNDER THE AMBIT OF INDIAN LAWS
Before we study about the effects of COVID-19 on the health and socio-economic security of sex workers in India and partially because of incompetency of the government in fulfilling their duty of protecting their own citizen of the country, it is important to know about the constitutionality of sex work and the safeguards that are already been catered to by the Constitution along with other enactments.

CONSTITUTIONAL PROVISIONS
The Constitution of India provides for the protection of weaker sections of the society. The Fundamental Rights along with The Directive Principles enshrined in the Constitution also take care of the special position of women and serve as a guiding star for various social welfare legislations passed in favour of women. Article 14 guarantees the fundamental right to equality and provides that the state shall not deny to any person equality before law or the equal protection of law within the territory of India. Constitution has empowered the state to make special

---


2627 "The State shall not deny to any person equality before the law or the equal protection of law within the territory of India."
provisions for women and children. This scheme of protective discrimination is provided under Article 15(3) of the Constitution.2628

Article 19(l)(g) provides the right to citizens of the country to practise any profession or to carry on any occupation, trade or business,2629 however, the right is not absolute and Article 19(6) imposes reasonable restrictions on these rights. Article 21 which is the pillar of strength of the Constitution of India says that no person shall be deprived of his life or personal liberty except according to the procedure established by law.2630

Article 23, directly touches upon the problem of trafficking in sex-work and makes trafficking in human a punishable offence. Article 23(1) of the Constitution says that, "Traffic in human beings and begar and other similar forms are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

LEGISLATIVE APPROACH TOWARDS SEX-WORK
The Indian Penal Code, 1860
The Indian penal code, 1980 illustrates a number of provisions which covers many situations where the women are forced or pushed into sex-work against their will. In order to implement certain Articles of the International Convention for Suppression of Traffic in Women and Children, Sections 366-A and 366-B were introduced in the Penal Code in the year 1923 which came into effect in 1929 with the object to punish import or export of girls for prostitution.2631 Section 366-A of the Indian Penal Code, 1860 deals with the procuration of minor girls and punishes any person who induces a minor girl under the age of 18 years to go from any place or to do an act with the intent that such girl is likely to be induced or forced to illicit intercourse with some other person.2632 The provisions of section 366-A were meant to prevent immorality and the provisions are framed more with the desire of safeguarding the public interest of morality than the chastity of one particular woman and this fact was clearly explained in Bhagwati Prasad v. Emperor.2633

Section 366-B deals with the importation of girl from any foreign country and punishes any person who imports into India any girl from any other country under the age of 21 years with the intent that such girl shall be forced or seduced to illicit intercourse with some other person.2634

Section 372 of the Penal Code punishes any person selling, letting to hire or disposing of any person under 18 years of age with the intent of employing or using for purpose of prostitution.2635

Buying, hiring or possessing of minor girl for the purpose of prostitution is punishable under Section 373 of the IPC.

Immoral Traffic (Prevention) Act, 1956
This act was enacted with the objective to inhibit or abolish commercial vice, namely

---

2628 The Constitution of India, art. 15 (3); "Nothing in this Article shall prevent the state from making any special provision for women and children."
2629 The Constitution of India, art. 19(1) (g); "All citizens shall have the right to practice any profession or to carry on any occupation, trade or business."
2631 The Indian Penal Code, 1860, s. 366-A.
2632 AIR 1929 All 709.
2633 The Indian Penal Code, 1860, s. 366-B.
2634 Id., s. 372.
the trafficking in women and children for the propose of prostitution as an organised means of living. This act nowhere mentions prostitution as a criminal offence per se. A careful scrutiny of the Act clearly reveals that the Act was aimed at the suppression of commercialised vice and not at the penalisation of the individual prostitute or prostitution itself.  

In Sangeeta v. State it was held that prostitution per se is not a criminal offence. There is no provision under the Act which makes prostitution per se a criminal offence or punishes a person for indulging in prostitution.

According to the act, sex-work in itself is not an offence but the sexual exploitation for commercial purposes or to earn living from sex-work thereby. Sex-work committed in the vicinity of a public place is an offence and is punishable. Soliciting or seducing or soliciting in a public place is made punishable under Section 8 of the Act.

'Seducing' for the purpose of prostitution was defined in Re. Manika Achari. The accused had been convicted under sections 4(1) and 8 of the Act, hence they preferred the present appeal. Justice Mudaliar observed in this case that section 9 started with the heading 'seducing' or 'soliciting' for the purpose of prostitution. The significant word under Sec 8(a) and (b) is ‘for the purpose of prostitution’ which implies the state of affair anterior in the state of time mentioned under Sec. 4 Benefit was given to the accused and the appeal was allowed. The constitutional validity of the whole Act was for the first time challenged in the Shama Bai v. State of U. P.

All the penal sections i.e. sec. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 20 of the Act were challenged as being unconstitutional as they were hit by Article 19(1)(g). The learned Judge upholding the constitutional validity of section 3, 5, 6, 7, 8, 9, 10, 12 and 18, however, did not express any final opinion on the unconstitutionality of section 4(2) and 20.

LANDMARK DECISIONS OF THE APEX COURT RELATING TO SEX-WORK

Supreme Court of India has been proactive in dealing with the problems and atrocities being faced by sex-workers and their children. Vishal Jeet v. Union of India became the first landmark decision of Apex Court.

The petitioner by way of a writ petition sought a C.B.I. enquiry against those police officers under the jurisdiction of whom these industries were thriving. He also prayed for bringing all the inmates of Red Light areas to state protective homes as also their children. Justice S. R. Pandiyan observed that in spite of the stringent and rehabilitative provisions of law under various Acts, one cannot say that the desired result has been achieved. "This malady is not a social but a socio-economic problem and therefore, the measures to be taken in that regard should be more preventive than punitive." The Court enumerated that all the state government to take appropriate and speedy action under the existing laws in eradicating child prostitution and to set up a separate advisory committee to evolve measures of eradication. Further it shall be the duty of all the State governments to take steps in proving adequate rehabilitation homes and devise proper machinery for the

2637 Immoral Traffic (Prevention) Act, 1956, s. 7.
2638 *AIR* 1970 Mad 491.

2639 *AIR* 1959 All 57.
2640 *AIR* 1990 SC 1412.
2641 *Id.*
implementation of the suggestions proposed by the committee.

Again, in the case of *Gaurav Jain v. Union of India* 2642 issues relating to the sex-work received attention of the Apex court. Observing the issue of prostitution a serious matter, Justice Ranganath Mishra, speaking for the court issued directions for the constitution of a committee to examine the problem. Accordingly, The committee called the Mahajan Committee under the chairmanship of Mr. V.D. Mahajan, submitted its report to the Apex Court by way of Public Interest Litigation titled as *Gaurav Jain v. Union of India*, 2643 in the year 1997. By way of this petition, the petitioner prayed for improvement of plight of fallen women and their progeny. Justice K. Ramaswamy observed:

“Women found in flesh trade should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. The commercial exploitation of sex may be regarded as crime but those trapped in custom oriented prostitution should be viewed as victims of gender oriented vulnerability. That could be arrested not only by law enforcement agencies but by constant counselling and interaction by NGOs impressing upon them to shed off this path and start with a new lease of life.” 2644

The court expressed concern for their rehabilitation. Justice Ramaswamy observed the importance of housing, legal aid, free counselling, assistance and other similar aids and services as a meaningful measure to ensure that unfortunate women do not fall into this trap. It was the duty of the state and NGOs and public-spirited persons to save them from prostitution and rehabilitate them so that they may lead a normal life with dignity of person.

**IMPACT OF COVID-19 ON SEX WORKERS**

In a nation like India, the exact number of sex workers are unknown. According to an estimate by the Government in 2014 suggests that India had 2.8 million sex workers. Most of the sex workers are in the states of Maharashtra, West Bengal and Andhra Pradesh. Another report from United Nations estimated the presence of about 67,800 sex workers. 2645

According to National Aids Control Organization (NACO), there are close to 6,37,500 sex workers in India, and over 5 lakh customers visited the Red-light areas daily before the pandemic closed the trade. 2646 There are currently more than 1,200 sex workers on G.B. Road alone. In the absence of appropriate legal and human rights protection to sex workers in India, especially women who are further undermined and dehumanized in the industry seen as taboo, the pandemic aftereffects are expected to be excessively brutal and derogatory to this segment of the population.

Sex workers represent an important group that exemplifies the vulnerability of workers in the informal labour sector. Apart from access to education, the overall sex industry is marked by the high levels of

2642 AIR 1990 SC 292.
2643 AIR 1997 SC 3021.
2644 Id.
poverty, illiteracy of the individuals, discriminatory treatment in terms of health care, earnings and employment, exploitation by the law enforcement agencies and harassment at the hands of the brothel owners and money lenders. In the Sonagachi district, literacy levels of sex workers are as low as 11%, a figure much below than even women in rural India. Sex workers cite poverty as the main reason for entering the profession, and almost all of them are illiterate.

Sex workers are often from groups that are already marginalized economically and socially, such as undocumented migrants, people of colour, and lesbian, gay, bisexual, and transgender (LGBT) people, some of whom have been pushed out of their families due to homophobia. The diversity of businesses that function to enable prostitution or other activities involving close physical proximity as part of the nature of service share the same risk factors as Red light areas and have been identified as potential hotspots and high-risk professions by other countries.

As with all aspects of health, the ability of sex workers to protect themselves against COVID-19 depends on their individual and interpersonal behaviours, their work environment, the availability of community support, access to health and social services, and broader aspects of the legal and economic environment. Sex workers who are homeless, use drugs, or are migrants with insecure legal or residency status face greater challenges in accessing health services or financial relief, which increases their vulnerability to poor health outcomes and longer-term negative economic impacts.

Risk of infection with SARS-CoV-2 is heightened for those who share drug paraphernalia for drug use. Though hard for everybody, the COVID-19 pandemic has severely affected key populaces, a significant number of whom are encountering monetary difficulty and anxiety about their wellbeing and security. Recommendations of ‘social distancing’ and home quarantines to combat the global COVID-19 pandemic have implications for sex and intimacy, including for commercial sex work encounters. Sex worker-led organizations from all over the country are reporting a lack of access to national social protection schemes and exclusion from emergency social protection measures that are being put in place for other workers. In response to the government guidelines of compulsory ‘social distancing’, sex workers are responsibly self-isolating whenever and wherever possible. This global pandemic presents a new problem for sex workers. Sex work is intimate by its very nature, and continuation of their occupation put themselves at a heightened risk of contracting the virus. Physical distancing being the key intervention to prevent community transmission globally, these times are more difficult for the sex workers than fighting the invisible virus from a health perspective. The pandemic affects their very livelihood, considering the nature of

2647 Human Rights Watch, Rape for profit. Trafficking of Nepali Girls and Women to India’s Brothels (New York, USA, 1995).


their job. The impact of the closure of these industries will be seen in this area for a long time, even if COVID is gone. The COVID-19 pandemic, similarly as with other health emergencies, uncovered existing inequalities excessively influences individuals already criminalised, underestimated, marginalised and living in down trodden circumstances, often outside social assurance mechanisms.2630

1. Social distancing is a far-fetched reality
Growing evidence of social distancing as an effective measure to ‘flatten the curve’, and reduce mortality, have serious implication by the nature of the activity on the sex industry. By design, these Red-light areas have high contact rates between sex workers and customers, and social distancing is not possible while having sex. Additionally, the disease does not show symptoms for a delayed period of time and a large number of individuals remain asymptomatic so sex workers would not even realize they are infected or never find out they were carriers while having spread the disease to a large number of customers. It will not be possible to make these areas COVID-compliant.

Social distancing is impossible for sex workers living in cramped brothels making them particularly susceptible to COVID-19. Cities like Delhi, Kolkata and Mumbai, are worst affected areas due to COVID 19. Brothels in these areas are jam-packed where social distancing is far from reality. Nearly 25,000 sex workers and their children live in enclosed spaces in Mumbai, with six-eight people living in 10x12 feet rooms. Where 50 people share a bathroom that too without an access to running water, following social distancing norms are a privilege. Delhi GB Road has more than 3000 sex workers housed in 80 small brothels.

Kolkata’s Sonagachi, which is referred to as Asia’s largest Red Light Area has between 8,000-10,1000 workers. Keeping in mind the ground reality, hygiene, distancing and personal space are foreign concepts. Even if they might as well try to adapt to the new world with modern etiquettes, infrastructural disability and excess of population will always act as a barrier to growth.

2. Maintenance of Hygienity
Hygiene is the next challenge among the long list of challenges faced by these workers in the wake of COVID-19 pandemic. With limited access to running water and as much as 20 people sharing one bathroom, such a situation is not at all unusual for a developing country like India, with dense population and limited resources. Such unhygienic scenario is a bigger threat than any time before. Brothels rarely have kitchen and women buy food from vendors. For these women, the lockdown has meant a loss of their entire ecosystem- rikshaw drivers, corners store and street carts. In such a constricted space, even if one person contracts COVID-19, it could spread rapidly and there is no stopping to it.

3. No business no money
As the worldwide emergency extends, sex workers are progressively confronted with the troublesome decision of detachment with no salary or backing or working at a hazard to their own wellbeing and security. As the worldwide emergency extends, sex workers are progressively confronted with

---

2630 Sex workers must not be left behind in the response to COVID-19, available at: https://www.unaids.org/en/resources/presscentre/pr

www.supremoamicus.org

918
the troublesome decision of isolation with no social or financial support. Without proper support how long can they support themselves and earning money means would mean working at a risk to their own health and safety. With the absence of business, sex workers have lost their only source of income. This income not only sustain the life of the worker but also her children dependent on them. In the absence of money, they are unable to procure even the basic necessities for their subsistence. With meagre savings, these women have other responsibilities including payment of electricity bills, making them ‘worst-affected during a crisis like this’. The community which is hard hit by impact of corona virus has pushed many of them to the brink of starvation.

Another issue at hand is the closure of majority affordable short-term lodging opportunities due to inability of the sex workers to pay rent or hotel room fees. This disappearance of short-term housing, coupled with the shuttering of workplaces, has resulted in sudden homelessness for sex workers in several places in the country, a situation that is especially aggravated for migrant sex workers, many of whom are also finding themselves stranded by inability to pay for their travel expenses to their native cities. Apart from that, these women also risk getting trapped in an endless debt cycle with private money lenders. These money lenders spare no effort to exploit the sex workers in the area. In some cases, it has been found that the interest rate that was charged to the sex workers was above 100% per month, which takes years to repay the debt. In most of these cases, the sex workers remain indebted to the money lenders throughout their lives and are exploited by them in cash and kind. Most sex workers lack account and invest savings in small gold ornaments to pawn during tough times.

4. No acceptance in society
The criminalization of various aspects of sex work serves to magnify the already precarious situation of sex workers in the informal economy, resulting to increased discrimination, harassment and missing from a lot of general conversations about exclusion from emergency social protection such as healthcare, measures being put in place for other workers. Stigma and criminalisation inhibit the sex workers from seeking, or being eligible for, government-led social protection or economic initiatives to support small businesses. Police arrests, fines, violence, disruption in aid by law enforcement, have been reported by sex workers across diverse settings. Fuelling concerns that the pandemic is intensifying stigma, discrimination, and repressive policing.

5. Unable to reach home
Majority of sex workers are migrants, and undocumented with lockdown and curfews could not legally go home to their native places. With their business shut for over two months now and all money drying up, a large portion of migrant sex workers have no money left to even afford transportation charges for themselves and their children. Another issue with these migrant sex workers is the disruption in the continuance of various therapies including HIV/AIDS. These is a presence of common tension among these women who were on medication for different diseases, including HIV-AIDS that they will not be able to get proper treatment in their home towns.

6. Most vulnerable to the virus
On average, sex workers are 13 times more likely to become infected with HIV than
adults in the general population due to an increased likelihood of being economically vulnerable, and experiencing violence, criminalisation and marginalisation. Though the industry is driven by sex workers, yet they are unable to negotiate on consistent condom use with the customers. Nation-wide HIV prevention programmes are available and are generally received and yet sex workers who by statistics are much more prone to HIV often face many barriers in accessing them. Pre-existing conditions normally present with sex workers makes COVID-19 even more dangerous. About 80% of those who contract COVID-19 will have mild symptoms and their bodies will fight the disease, but for those who have pre-existing conditions, including HIV/AIDS and tuberculosis, the disease could result in severe symptoms and even death. Nearly 1.6% of Indian female sex workers had HIV/AIDS in 2017, according to a 2018 study by the United Nations programme on HIV and AIDS. Many sex workers also have other health-related issues, including addiction to alcohol and tobacco are more vulnerable to the attack of novel Coronavirus. Though there has been no proof of the fact that the women more sexually involved are more prone to the disease. However with greater chances of these sex workers being HIV/AIDS positive, the risk could be greater among those who are immunocompromised and not on HIV treatment. Review evidence suggests, on average, use of antiretroviral therapies is already low among sex workers who are HIV positive in high-income and low-income settings. It is crucial that disruption to health services does not further reduce access to HIV treatment and prevention or to vital services addressing domestic or other forms of violence.

7. Mental health

With the surge in uncertainty and fear of the pandemic, there has been a sharp spike in depression, anxiety and perhaps suicide. Many sex workers are experiencing stress and anxiety as a significant consequence of the Pandemic. For these people who are already ‘marginalised of the marginalised sector’ with their only source of income being sex and other responsibilities on their shoulders, anxiety disorders, clinical depression are common. Existing mental health problems are likely to be exacerbated by anxiety over income, food, and housing, alongside concerns about infection from continuing to work in the absence of social protection.

8. Lack of support from government

Unlike the daily wage labourers, which are still covered under some social welfare schemes, there is no scheme for these sex workers at all. They are like the ‘informal of the informal sector’. Under the Prime Minister’s Garib Kalyan Yojana, a financial package to reduce the impact of COVID-19, Rs 500 per month would be transferred to women’s accounts under the Jan Dhan Yojana for three months, the government had said on March

---


2654 Supra note 32.

26, 2020. However, majority of the sex workers do not have a Jan Dhan account. Even if some would qualify for the assistance, it is too little to sustain a family, they told us. In addition to facing discriminatory practices in areas of health and employment, it is very difficult for sex workers to obtain credit through any means. Due to lack of proper documentation, there is negligible access to banks and other financial institutions and local money lenders are the only option that they are left with. The government’s assistance has fallen short in helping the poorest.

9. Few have health insurance, alternative income

Half of Maharashtra’s sex workers depend only on sex work for survival, and do not have insurance. Two-fifths of sex workers in Tamil Nadu and a fifth in Karnataka are in a similar situation.

Around 31% sex workers living in Maharashtra, Karnataka and Tamil Nadu remain financially insecure, making them vulnerable to poverty and unable to pay for treatment if they fall ill. As already discussed, a large population of this sector are prone to HIV/AIDS. With no customers, these workers are running out of money to buy HIV/AIDS medication which cost around 6,000/- per month.

Lack of education also plays a major role in their lack of social inclusion. Even if antiretroviral medicines are provided by the government, lack of awareness of such schemes by majority of these workers makes it inaccessible for all. Even if a small section of the society is aware of such beneficial schemes, they are refused medication because of absence of Aadhaar or any other address proof. Not only are these women denied access to services on technical ground, long queues and shortage of medicines also acts as a catalyst for non-availability of these medical services.

Another issue that is connected to the first issues is the long-term effect of the discontinuation of theses Antiretroviral Therapy therapeutic medication. The ground reality is bit challenging now. After having fought against HIV for so long with visible and applauding results, we will be pushed back to the stage of disruption and acute trouble. India, being one of the worst hit nations from COVID-19 has unfortunately failed to acknowledge the basic rights of the sex workers so far. How will it be possible for the people (sex workers) who have been diagnosed with HIV to continue with their regular treatment? As already discussed, the regular antiretroviral therapy is mandatory but will they now be able to afford any such treatment anymore? The answer is very clear, sadly they are forced to struggle even for the necessities such as medicines and food. The health sector had used the medicines for HIV to cure COVID-19 as well (as per the ICMR guidelines) which again leads to drug shortage for HIV patients which again is a huge problem for the community all over India.

ROLE OF NGOs

Non-governmental organizations play a vital role in bridging the gap between mainstream society and sex workers. Their non-judgmental and unbiased approach and the credibility they enjoy enables them to aid sex workers with better access to healthcare and education, and provide them information and other technical support. With lack of support from the government to help the marginalised down-trodden section of the society, the burden to support these women have fallen on the voluntary organisation.. Women working in the sex industry are now dependant on charities for their basic needs, including food and access to medication especially anti-retroviral therapy medication for treating HIV/ AIDS.
LONG TERM AFFECTS
Even with the upliftment of the lockdown and gradual restart of the economy, things won’t be easy for the community of sex workers; there will be lack of regular income for long as projected due to the worldwide spread of the contagious COVID-19. Even after economy starts to bloom, this industry will suffer loss for an unprecedented time. The Prime Minister, Sh. Narendra Modi while addressing the nation emphasised on the need of empathy and compassion towards people, especially for those who need help and assistance to live life during unprecedented lockdown.

No doubt, these are admirable moral values which are always necessary and not just in times of emergency. There are lot many non-governmental organisations working for the welfare of sex workers but it always remains the prime duty of the state to do so, such duties are very well enumerated in Part IV of the Indian Constitution.

Sex workers do not feature in any of the social benefit policies of the government. The government of our country doesn’t acknowledge the presence of these marginalised sector in the country.

A study from Yale School of Medicine and Harvard Medical School stated that Indians are at a much lower risk of getting COVID-19 if Red light areas shut after the lockdown. Titled ‘Modelling the Effect of Continued Closure of Red-Light Areas on COVID-19 Transmission in India’, the report was shared with government bodies along with recommendations on continued closure of Red-light areas beyond full nationwide reopening as it can reduce the number of cases by 72 per cent in a period of 45-days and delay the peak of COVID-19 cases by 17 days. The study also says that there could be a reduction in deaths by 63% in India, 61% in Nagpur, 28% in Mumbai, 66% in Kolkata, 38% in New Delhi, 43% in Pune in the first 60 days. The study also found out that there could be a 63% reduction in the number of deaths in the first 60 days after the lockdown ends, if Red-light areas are kept closed. To protect citizens against these potential hotspots, the study recommends keeping Red light areas closed indefinitely during the COVID-19 pandemic.

Without a pinch of doubt the decision of shutting down is for the safety of sex workers and their community but other alternatives must be provided to the people so that they can earn their livelihoods and sustain their lives. The role of government is very crucial here and already discussed above the government is responsible to provide a life of dignity to its citizen. Unfortunately, there is no help from the government till date therefore the sex workers depend mostly on NGOs for essentials. The impact on their livelihood has been severe.

If we look at the effect of the opining of the red light area in light of COVID-19, the impact is negative. In Japan, for example, medical facilities were “overwhelmed” by an “explosion of cases” linked to an Red Light Area. The sharp increase in cases was primarily among sex workers and their customers. However, Japan has provided relief packages for sex workers. The diversity of businesses that function to enable prostitution or other activities involving close physical proximity as part of the nature of service share the same risk factors as Red light areas and have been identified as potential hotspots and high-risk professions by other countries. Countries all over the world have decide to close down these areas, not only to protect the sex workers but also people who are customers to this industry.
WAY AHEAD
It is important to remember the sex workers who work in Red light areas and the impact that COVID-19 and the continued closure of Red-light areas has on them. There is no denying to the fact that it is the need of the hour to close down Red light areas and brothels but there is a critical need for government and healthcare providers to work with affected communities and front line workers to co-produce effective interventions. Resources and support for sex workers need to be prioritised. Involvement of communities in social protection schemes, health services, and information will enable sex workers to protect their health during this pandemic as equal citizens, in line with principles of social justice.

It is here where the involvement of the policymakers, NGOs, and experts in India will be required to come up with alternative employment and skill development programmes for the sex workers. In order to provide support to the sex workers community, the government can come up with various initiatives such as apprenticeship/training and skill enhancement and development programmes which require identifying the skills these workers need, provide them with training and provide them with support to become economically self-reliant in new jobs or as self-employed entrepreneurs. These initiatives can go a long way in compassionately mitigating the stigma which is globally seen towards sex workers. Achieving healthier communities and controlling COVID-19 requires a collective and inclusive response.

We suggest three measures to address the health, safety, and well-being of sex workers in Red light areas:
1. ensure sex workers receive payments as part of the government’s financial relief scheme for the poor during COVID
2. ensure these women are not taken advantage of by criminals, such as by preventing high-interest lending schemes that entrap them in debt bondage,
3. Proper measures should be taken for relocation, if required, to maintain social distancing as they are compelled to live in dilapidated accommodation.
4. Investment in reintegrating sex workers into other occupations, with a particular focus on reinvesting money generated through the closing and redevelopment of Red-light areas into sex worker reintegration and the healthcare system.

On the last point, COVID-19 may present the ideal natural opportunity to help sex workers exit their trade and find out alternative livelihoods. In light of the amount of health care and larger economic savings gained by keeping Red light areas closed and reducing cases and fatalities—especially if Red light areas remain closed for months—investing in retraining sex workers would be an ideal health, social, and economic measure. This opportunity to remove the vulnerable segment of workers by providing alternative source of income will require effective policy-making in consultation with civil society organizations, sex workers, and NGOs. This need becomes more acute as existing health and social challenges are exacerbated by the COVID-19 crisis.

*****

DEMERGERS AND MINORITY RIGHTS: REGULATORY FRAMEWORK

By Shubham Dimri
From Gujarat National Law University

Introduction

Mergers and demergers perform an important role in corporate restructuring. Over the past few years with the increase in economic activity instances of mergers and reconstructions have also kept pace. This need for reconstruction arises from the fact that firms need to maximise synergy and economies of scale, by removing inefficiencies to seek profitability. The causes can be wide and varied ranging from shareholder activism, failure of internal controls, capital structure (free up cash flows), currency and interest rate shocks (in cases of MNCs) to underperformance, family squabbles, tax planning, reverse synergy, corporate governance etc. In a nutshell, the age of specialisation demands better risk-reward trade off which drive firms towards creation of separate legal and operational entities.

Demerger is a species of reconstruction which results in creation of a separate entity. The rationale is allowing firms to pursue profitability by evolving specialised niches. It involves in transfer of assets and thereby value of investors. The majority rule laid down in Foss v. Harbottle is a cardinal principle of company law however many a times issues can come up with minority investors. In recent times such complexities have arisen in the demerger of Macmillan India and Century Textiles. The regulatory framework for reconstruction can run into hurdles when all shareholders are not of the same opinion. In such a scenario, minority squeeze becomes highly probable. Since demerger can involve transfer of shares between entities or mediation of rights held by right holders, the risk dilution of value of investors cannot be denied.

References

2661 [1843] ER 189
consequences.

Within this context, the present article discusses the regulatory framework in cases of demergers and the remedies available to minorities.

**Regulatory Framework for Demergers**

Demergers are executed by way of schemes of arrangement under Section 230-234 of Companies Act, 2013. The definition of demerger can be found under the Income Tax Act. According to this section, the following conditions are essential for demerger:

1. The demerger must be a transfer by the transferor company to a transferee company of one or more undertakings belonging to the transferor company;
2. The transfer should be achieved pursuant to the scheme of arrangement under Section 230-234 of Companies Act, 2013;
3. All the property and related liabilities of the undertaking transferred, immediately before the demerger, must become the property of the transferee company by virtue of the demerger, and not by virtue of sale or otherwise as a result of the acquisition of the property or assets of the transferor company or any undertaking thereof by the transferee company;
4. The property and the liabilities transferred must be transferred at values appearing in the books of account of the transferor company immediately before the demerger. Revaluation of assets must be ignored;
5. The consideration to be paid by the transferee company should be paid to the shareholders of the transferor company and not to the transferor company. Such payment must be in the form of the shares of the transferee company. Allotment to the shareholders of the transferor company must be in proportion to the shares held by them in the transferor company;
6. The shareholders holding not less than ¾ in the value of the shares in the transferor company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) must become shareholders of the transferee company or companies by virtue of the demerger;
7. The transfer of the undertaking is on a going concern basis;

As the definition goes, demerger results in arrangement within the bounds of Section 230-32 of Companies Act. For any demerger, consideration is a mandatory requirement and can involve allotment of shares as mode of payment. This is done by valuing the demerged entity and comparing it with the original company. In other words, there arises a need for proper business valuation which in turn will help in fixing the exchange ratio to arrive at further allotment of shares.

Companies Act provides that any demerger needs to be in accordance with the conditions, if any, notified under Section 72A (5) by the Central government. It can be executed through agreement between promoters; under scheme of arrangement; or under legally enforceable orders by appropriate authority. The idea is to preserve the entity through rejuvenation or rehabilitation. Here it is not sold to some outsider but it is altered in such a manner that the persons now carrying it on substantially continues to carry it on.

---

2666 [1995] 19 CLA 196 [Cal]
2667 Income Tax Act 1961. 2(41A)
2668 Kerala State Cashew Development Corporation v. Commissioner of Income Tax [1994] 205 ITR 19 (Ker)
such it has impacts on the financial and operational capacities of the firm.\textsuperscript{2670} The rationale for demergers is similar to that of reconstruction and is affected in the same way through schemes of arrangement. The jurisprudence of previous companies act had made demerger a species of arrangement under Section 391 to Section 394.\textsuperscript{2671} Hence by implication this jurisprudence is carried forward into the new regime. Arrangement has been defined to include a reorganization of the share capital of the company through either\textsuperscript{2672}:

- Consolidation of shares of different classes; or
- Division of shares into shares of different classes.

The regulatory framework section 230 provides for role of NCLT in formulating a scheme for demerger. However this provision provides for relaxation in case 90\% of creditors in value agree to the scheme. This section further lays down the procedural and certification requirements, such as the valuation report and auditor’s report etc. Section 230(4) provides the criteria for persons eligible to object to the scheme. It says that only those persons who hold 10\% or more shares or those who have an outstanding debt amounting of at least 5\% or more have the right to object. Further, the approved scheme would become binding on all when it is:\textsuperscript{2673}

- Approved by 3/4th in the value of creditors or class of creditors or members or class of members present and voting in favour; and
- It is sanctioned by the tribunal.

Hence it is visible that the scope of persons who can object to the scheme is narrow enough to exclude a substantial portion of public shareholding. The regulatory framework further provides for power to NCLT to enforce compromise or arrangement.\textsuperscript{2674} In \textit{Dr Ved Mitra v. Globe Motors Ltd},\textsuperscript{2675} it was said that Section 392 (Section 231 in new act) shows not only the ambit of the power conferred on the court but also the responsibility conferred. Hence, the court said that the power to modify the scheme implies in itself all incidental powers like convening a meeting of the members to elect directors. The combination of Section 231 and 232 allows tribunal to exercise its power keeping in mind fairness to employees and dissenting shareholders. At the same time, section 235 provides for fair exit option to dissenting shareholders. It contains provisions regarding power and procedure to acquire shares of dissenters. An escrow account has to be created from which consideration is disbursed as shares are transferred, based on the value determined by registered valuer.

In cases of arrangements, guidelines have been laid down by Supreme Court in \textit{Needle Industries case}.\textsuperscript{2676} Supreme Court had laid down that if the power is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandizement to the detriment of the company, the court will interfere and prevent the directors from doing so. There

\begin{itemize}
\item \textsuperscript{2671} Re [2004] 44SCL 461 (Bom)
\item \textsuperscript{2672} Companies Act 2013. 230.
\item \textsuperscript{2673} Companies Act 2013. 230(6).
\item \textsuperscript{2674} Companies Act 2013. 231.
\item \textsuperscript{2675} 48 Comp. Cas. 64 (Del)
\item \textsuperscript{2676} AIR 1981 SC 1298
\end{itemize}
must be good faith and reasonability on part of directors and the object must not be extra venous. To ensure that the value is not eroded or diluted, pre-emption right is provided to existing shareholders. The problem in this regulatory framework comes because unlike western nations where economic infrastructure allows for mobilisation of funds to stocks in early stages, India does not have a diffused shareholding pattern. The result of this deferred start has been that in India there is concentrated shareholding. The Delhi High Court has said that "modern Indian corporate entity is not the result of multiple small individual shareholders but predominantly overwhelmingly state-supported funding structure at all stages and there exists the only handful of the majority shareholders holding overwhelming power in the company." 

The chances of shareholders divided into two clearly identifiable groups are greater in a company having a small number of shareholders than in a company which has a large body of shareholders. This creates problems over long term where majority can be subjected to strong-arm tactics of minorities. While there is a fiduciary duty owed by majority shareholders, the possibility of squeezing out minorities cannot be overlooked. This is somewhat contained by the exceptions to the majority rule:

- The activity objected to being ultra vires or illegal.
- The activity undertaken demands that it must have been sanctioned by a special resolution.
- The activity is an infringement of personal rights of shareholders.
- The activity amounts to a fraud on the minority shareholder.
- The activity is unfairly prejudicial to a minority shareholder.

A large body of jurisprudence in India points that the majority rule cannot be applied mechanically in all the cases. It has been held in Shyam S. Rastogi v. Nona Sona Exports Pvt. Ltd., that “the court is not a mere conduit pipe or stamping authority to whatever scheme that may be laid before it. Not often, motivations in the moving of such schemes are oblique. It is in fact for the court to first look at the scheme whether it has any strength or merits of its own and is financially viable or a mere attempt to take back affairs and the assets of the company which had been earlier perforce taken over at the time of winding up.” Through this it is amply clear that adjudicating authority is well within its powers in evaluating the pros and cons of the scheme. This power when read in light of Section 231, can be interpreted to be broad enough for courts to examine the decision of majority. On the same note, in Re: M.G. Investment and Industrial Co. Ltd. vs. New Schorrock Spg. and Mfg. Co. Ltd the court had said that unless the minority is coerced into agreeing with the majority, the court would not go against the wishes of the majority. On reading of both the judgments it can be concluded that courts have reserved the power to the extent of evaluating the entire scheme. A hue of this power can be seen in NCLAT’s decision on Tata Sons case, which was later stayed by Supreme Court.

2677 Companies Act 2013. 62.
2679 Narayandas Shreram Somani v. Sangli Bank Ltd 1965 SCR (3) 777

2680 59 Com Cases 832 (Del)
2681 [1972] 42 CompCas 145 (Bom)
Through the above mentioned cases we catch a glimpse of the proactive role that adjudicating authorities play in restructuring. While judiciary has tried to maintain distance from the internal affairs and avoid lifting of corporate veil, it cannot be denied that at times circumstances have warranted its intervention. However, the emphasis has been on allowing the internal affairs to be handled by internal people. The Indian legal system has not shied away from taking action and evolving the jurisprudence when needs arise. The Needle Industries case is a prime example in this regard where Supreme Court evolved elaborate guidelines with regards to arrangements and amalgamations. The essence of judgment and prevailing position of law is that courts will interfere when scheme is unreasonable or when there is a breach of trust on part of directors.

While the law is more or less settled instances of minority dissatisfaction have not abated. In such a scenario unsatisfied minority shareholders can pursue different remedies. One of the recourse for minorities is of derivative action. A derivative action is legal action or a civil suit brought by a minority of company members in their own names seeking a remedy for the company in respect of a wrong done to it. It can be brought where the wrong complained of is a fraud by the majority of the members on the minority and the wrongdoers are in control of the company in general meeting, because they control the majority of the shares in the company, hence they will not permit an action to be brought in the name of the company. Further, if the company has no right to bring an action then no derivative action can be allowed. A minority shareholder cannot have a larger right to relief than the company itself would have had if it were the plaintiff. It has been held in Nirmal Amilal Mehta v Genelac Ltd. & Ors2683 that where directors themselves are wrong doers and in charge of the company as they have wrongfully alienated and transferred the property of the company in breach of their fiduciary duty as directors, derivative action by a shareholder would be maintainable for wrong done to the company as an exception to the rule in Foss v. Harbottle.

Second remedy available is that of representative action. A representative action is an action brought by or against one or more persons as representative of a larger group. The persons who are being represented must have the same interest in the proceedings. This type of action is appropriate when collective personal rights are to be enforced. Since in such actions, the judgment is applicable to all, it prevents the duplicity of proceedings.

Third remedy is that of personal action. Such an action is brought by a person who has been wronged and wishes to recover the damages. Generally, contractual rights which are conferred upon a shareholder under articles of association are enforced through such actions.2684

Conclusion
On being aware of the practical realities, it cannot be denied that majority rule has withstood the test of time because of its practicality and simplicity. While it is the way to go as of now, the courts have proactively come to the rescue when minority value is at risk of erosion. The

2683 (2009) 88 CLA 243 (Bom)
Companies Act and jurisprudence in India gives certain rights to minorities which can be explored in case of dissatisfaction. Even though the present system may not be perfect but in light of exigencies of business and need for a conducive business environment, scarce alternatives are available. The scope of persons who can object to a scheme can be broadened while ensuring that legal adjudication takes minimal time to preserve the value for investors. The most apt way would be majority keeping in mind the interests of minorities. Further it needs to be understood that legal friction between majority and minority more often than not leads to erosion of value for both. To maintain a flourishing business, cooperation and understanding is needed between parties.

*****
MASSACRE BY MAJORITY IN THE NAME OF THE MOTHER

By Surbhi Agrawal and Saloni Maheshwari
From DES Navalmal Firodia Law College, Pune

All night a bright and solitary star...
Hung pitifully o’er the swinging char.
Day dawned, and soon the mixed crowds came to view
The ghastly body swaying in the sun:
The women thronged to look, but never a one
Showed sorrow in her eyes of steely blue;
And little lads, lynches that were to be,
Danced round the dreadful thing in fiendish glee.”
‘The Lynching’, by Claude McKay (1922)

Introduction
India is facing unprecedented crisis of mob lynching, which is horrendous in nature. This phenomenon is not new in the Indian context, but the rise in the incidents of lynching is utterly shocking for a democracy like India which believes and upholds all democratic beliefs and the Apex Court has given consideration to acts of lynching and termed them as "horrendous acts of mobocracy”.

Mob lynching in India involves majoritarian group attacking and lynching a person or a group of persons, amounting to hate crime, on the lines of religious violence, caste-based discrimination, cow theft and child theft. An overwhelming majority of these attacks have been against Muslims, although Dalits too are targeted often. Most of these are bovine (cow and beef) related, with vigilante groups who consider the bovine, holy, accusing victims of smuggling cattle, slaughtering cows, possessing beef, or just being beef eaters. Mob lynching is popularly labeled as instant justice, by the so-called protectors of law or the vigilantes, because they believe their actions to be need of the hour and required to do justice in order to safeguard the possible alterations in the social norms and traditions.

However, these activities result in promoting majoritarianism by propagating the beliefs of the majority by suppressing the rights of the minority. The citizens of a country taking law into their hands is unacceptable and for a country like India where citizens are granted fundamental rights, such lynching is an abuse of their right to life, right to a fair trial etc. For a country that claims to be secular, it is very important to ensure that the minority groups are safeguarded in like manner and interests of these minorities are not suppressed.

The authors through this paper have highlighted specifically on the aspect of cow vigilantism which is one of the major concerns for mob lynching. The recent victimization of Dalits and Muslims in the name of the cow vigilantism has brought the holy cow back into discussion and debate.

History
The cow is protected under Article 48 of the constitution, which says the state must impose the prohibition on the slaughter of cow and cattle. However the issue of cow protection seemed to be politicized by the Hindu conservatives backing a seat at the Constituent Assembly. The cow did not find protection in the draft constitution of B.N. Rau or draft prepared by the assembly. However, ground works was prepared to include cow in the constitution.
Members like Pandit Thakur Das Bhargava, Seth Govind Das and R.V. Dhulekar voiced their opinions that provision pertaining to prohibition on cow slaughter should be incorporated in the Fundamental Rights. It cannot be ignored that all of them belonged to the Hindu background. The supporters brought forth economic and religious arguments. The religious argument rooted the ban on cow slaughter in the reverence attached to the cow in the Hindu culture. The economic argument was based on the multifarious utilities of the cow in an agrarian economy – the medicinal value of urine, usefulness of cow dung and the like. Despite the economic logic provided by members of the Constituent Assembly, cow protection was pushed for because of religious sentiments. With such motives clearly evident, emphasis on agriculture and economics were ‘predicated on a fundamental constitutive elision of the religious aspects of cow slaughter’.

Nonetheless, the most despicable blame and accusation made by the advocates of cow protection that the Muslim Community is the sole community to oppose the ban on cow slaughter. The Supreme Court in Mohammed Hanif Quareshi and others v. State of Bihar in 1958 and Mirzapur Moti Kureshi Kassab Jamat and others v. State of Gujarat of 2005 has clearly upheld majoritarian sentiments in the law by acknowledging the beliefs of the cow protectors.

The history dates back to following majoritarian opinion set in constitutional assembly debates and thereafter the Court following the so called popular sentiment in various judgments conceding to the Hindu cow protectionists group.

**Raison D’etre behind the dispute**

In India, majority population constitutes of Hindu, who revere cow and prohibit slaughter and consumption of beef. However, this prohibition attracts penal liability but is enforced lightly. On the other hand, the minority community in the country considers consuming beef as viable and cheaper option available for protein. However, lately with majoritarianism having gained ground, anti-cow slaughter laws have been enforced strictly. The underlying problem that prevails is that Gau Rakshak Dal, the self-acclaimed messiahs, have targeted the minority groups over cow and beef slaughter, consumption, trade and even possession. In these vigilante attacks, it is immaterial for these messiahs whether the victim possessed beef, whether cows were being transported for slaughter, or even that cows were not involved. It can be clearly seen that, for them, communal angle accompanied by a sectarian motive is the sole point of relevance. However, the bitter truth remains that if cow laws are broken, these so-called cow vigilantes feel it necessary to deliver ‘instant justice’ by killing the poor victim and that the law enforcement agencies, otherwise bridled with powers become

---


powerless to punish these right-winged cow vigilantes. Therefore, it can be clearly said that—

1. First, that these are hate crimes, not ordinary mob violence, as these mostly target identified minority communities and disadvantaged castes.

2. Second, that these crimes are tacitly or openly encouraged by senior leaders of the political establishment.

These self-acclaimed messiahs violate the essence of rule of law in our democracy. For them, religion has become means to an end. However, the Hon’ble Apex court in the case of National Human Rights Commission vs. State of Gujarat and others, 2688 observed as under “Communal harmony is the hallmark of a democracy. No religion teaches hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law. The Constitution of India, in its Preamble refers to secularism. Religious fanatics really do not belong to any religion; they are “no better than terrorists who kill innocent people for no rhyme or reason in a society which as noted above is governed by the rule of law”. The rule of law can prevail only if people and institutions respect and follow the laws.

In September 2015, a mob killed Mohammad Akhlaq, 50, in Uttar Pradesh, and critically injured his 22-year-old son, over allegations that the family had slaughtered a calf for beef. Following public outrage—and because the state was then governed by an opposition party—the police made some arrests including of a local BJP leader’s son and relatives. The suspects’ Hindu supporters responded by damaging a police van and other vehicles. Several senior BJP leaders backed the alleged actions of the suspects. As a result, Akhlaq’s family had to leave the village in fear. More than three years later, the trial is yet to begin. All of the accused have been released on bail, raising fears among the victims’ families.

Role of the Media

Media is the fourth pillar of democracy, however, in situation of cow vigilantism, this pillar of the democracy stumbles it. The acts of cow vigilantism are fuelled mainly by online rumors, which constitute only a small part of the ever-increasing role played by social media in Indian society and politics. The impact of social media in our lives remains undefined. States are not equipped to deal with the spread of misinformation and fake news on social media. Social media companies also fear that taking certain steps will burn a hole in their pockets and compromise with the freedom of speech.

To curb this nuisance, the Apex Court has in addition to series of measures, provided recommendations to parliament to create a special law to deal with such offences. Among the measures the court has directed to be put in place is a nodal officer in each district to take steps to prevent mob violence; to “curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms”; and to set up fast-track courts to hear cases related to lynching and mob violence.

Role of the Police

2688 (2009) 6 SCC 342
State plays a pivotal role in mob-lynching. It is the constitutional responsibility of the government to provide governance and maintain law and order and the responsibility lies on the state to protect life and property of the citizens. In this regard, the police have the predominant role to play. The role of the police in violating the right to life of victims, involved both acts of omission as well as commission. Instead of promptly investigating these attacks and prosecuting perpetrators, the police have in fact filed complaints against victim’s family under so called prohibition of cow slaughter. The level of anarchy is displayed by intimidating the victims and witnesses. The police force clearly failed to provide law and order. Following are the instances of horrendous acts of police –

The police response to the June 2018 mob attack on Samaydeen and Mohammad Qasim in Hapur district of Uttar Pradesh exposed complicity in covering up crimes. Qasim was killed and Samaydeen severely injured and hospitalized. However, the police allegedly filed a false report attributing the death to a motorbike accident. Samaydeen’s brother Yaseen told Human Rights Watch he put his signature on the FIR despite the false claim of a motorbike accident because of police threats:

The police would not tell us the hospital they had taken Qasim and Samaydeen. Then the police threatened us: “Unless you sign this FIR we will not tell you where Samaydeen is.” They also threatened us with arrest under cattle protection laws, saying they would put our whole family in jail. The police said, “Don’t you know whose government it is? What can happen? It’s better for you all to say nothing.”

There have been cases where despite prior requests for security having been made by the victims; no protection was provided from the police. The victims suffered namely Alimuddin Ansari in June, 2017 and another victim namely Ghulam Mohammad in May 2017. Police inaction, both to protect as well as act against perpetrators also emboldened the latter, resulting in repeated attacks eventually leading to deaths which happened in Mohammad Akhlaq’s case.

There is also a very important role played by the political parties in this. The mob alone can never take a shape of mob lynching until and unless it has a backing of the ruling government.

The political parties strategize the actions of the mob and then term it as a spontaneous act caused by the angered population. Because what can a state do when it is faced with an enraged mob? Who is to be punished when the crime committed only demanding their impulse? This is how mob violence is used to reach to the ends desired to be achieved by the majoritarian political parties, leading to dire violation of human rights of the innocent people.

Undoubtedly, the political outfits and organizations behind aforesaid acts of violence harness the results of such crimes by molding them into a political and social propaganda to brainwash one particular

---

2689 Human Rights Watch- “Violent Cow Protection in India -Vigilante Groups Attack Minorities”, 2019
community against another and subsequently capitalizing the gains out of it in a manner of their choice namely, elections.

**Human Rights and Mob Lynching**

The Right to Life guaranteed under Article 21 of the Constitution of India is the most intrinsic right provided to the citizens of the nation. The scope of Article 21 is very wide to include Right to Liberty, Right to Privacy, Right to Education etc. These acts of mob violence for Cow protection in India by the vigilante groups over the minorities violated all the human rights of those citizens. The most important fundamental right i.e. Right to Life is violated with the nuisance created by the mob. The burning of houses and buses, rapes, beating people to death and many more such devastating incidents just in the name of protection of their beliefs is unacceptable. Every citizen has equal rights provided under the Indian Constitution and such instances put a huge blot on the supreme document drafted for the protection of the citizens.

These attacks have also violated Article 25 of the Indian Constitution i.e. Freedom of conscience and free profession, practice and propagation of religion. The minorities’ rights have been adversely affected by such acts.

India is a signatory to the major International Human Rights law treaties that prohibit discrimination based on caste, creed, religion or race. The government is therefore obligated to protect the minority population and at the same time, prosecute the ones that cause discrimination and violence against them. Cow protection vigilantes and livelihoods-

Cow protection groups and stringent laws on cow slaughter and transportation of cattle have seriously affected India’s cattle trade and the rural agricultural economy, as well as leather and meat export industries ancillary to farming and dairy sectors.

India is the largest beef exporter in the world, exporting buffalo meat worth about US$4 billion a year. The sadistic part remains that after the current government came to power, exports have declined to a steep level. Not only this, the leather industry has also been affected, the reason being low exports due to limited availability of cattle for slaughter.

The primary responsibility of the government is to enact laws and formulate policies restricting the cattle trade however there is a need to guard against disproportionately harming minority community. The government should ensure consonance between right to livelihood of these minority groups and the right of the cow protection groups.

The minority communities mainly Muslims and Dalits have been disproportionately affected by the laws, policies, and unlawful attacks harming cattle-related industries. Slaughterhouses and meat shops are mostly run by Muslims. Dalits traditionally carry out jobs to dispose of cattle carcasses and skin them for commercial purposes such as leather and leather goods. The resulting policies are harming entire communities, particularly farmers and laborers.

---

2690 What is behind India’s epidemic of ‘mob lynching’? Apporva Nanda
**Legal Regime**

Lynching is a crime which destroys the social and moral fabric of the country. Not only this, mob lynching also violates the principle of rule of law. However, under our legal regime, there is no specific provision for mob lynching. Even the word 'Lynching' is nowhere defined.

Further, Lynching is a serious crime as it deals with a murder of a person by a group of angry mob without any legal authority. Any person acting against the legal authority is performing an illegal act and can be punished by the court. However, for this barbaric crime to be punished, various provisions of IPC can be attracted related to hate speech, hate crimes because no special law persists regarding this crime. The various provisions are:

i. Section 153A (promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc. and doing acts prejudicial to maintenance of harmony),

ii. Section 153B (imputation, assertions prejudicial to national integration),

iii. Section 505 (statements conducing to public mischief).

It is disheartening to see that in majority of the cases, these sections weren’t imposed on the perpetrators and only sections against individuals such as Section 302(punishment for murder), Section 307 (attempt to murder), Section 323 (punishment for causing hurt), Section 325 (punishment for causing grievous hurt) etc. are imposed. Due to this implication, the crime is seen as an offence against individual and not against the community. This approach remains unjustified as incidents like mob lynching are seen from communal lenses and are usually targeted against a certain minority, caste, religion, gender etc. Lynching is a matter of public order and not merely an offence against an individual. It is to be understood that the offence of lynching usually takes place as an organized hate crime against a community, so the heinousness of the offence shouldn’t be disregarded.

The laws were incompetent to redress the ongoing issue therefore the Supreme Court in the case of *Tahseen S. Poonawalla v. Union of India and others* issued punitive, remedial and deterrent guidelines for dealing with the cases of mob lynching:

- The state governments shall designate a senior police officer in each district for taking measures to prevent incidents of mob violence and lynching.
- The state governments shall immediately identify districts, sub-divisions and villages where instances of lynching and mob violence have been reported in the recent past.
- The nodal officers shall bring to the notice of the Director General of Police (DGP) any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence-related issues.
- It shall be the duty of every police officer to cause a mob to disperse, which, in his opinion, tends to cause violence in the disguise of vigilantism or otherwise.
- The Central and the state governments should broadcast on radio and television and other media platforms including the official websites that lynching and mob violence of any kind will invite serious consequence under the law.
- Curb and stop the dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which tend to incite mob violence. Register FIR under relevant provisions of law against persons who disseminate such messages.
• State governments shall prepare a lynching/mob violence victim compensation scheme.
• Ensure that there is no further harassment of the family members of the victims.
• If a police officer or an officer of the district administration fails to do his/her duty, the same will be considered as an act of deliberate negligence for which an appropriate action must be taken against him/her.\textsuperscript{2691}

**Recommendations**
These are recommendations to the Indian government to take immediate actions regarding the same. For this purpose, a few recommendations have been made which are as follows:
• Police administration must register the FIR without any delay to ensure speedy justice.
• Free legal aid must be provided to the weak and poor victims of such attacks.
• Fair compensation must be paid to the victims.
• A solid legislation must be formulated in this regard which makes mob lynching a non-bailable, cognizable and non-compoundable crime.
• A time-bound trial must be enacted to provide protection to the witnesses and quick relief to the victims.

**Conclusion**
State is parents patriae and upholder of the law and order in the country. However, certain crimes such as mob lynching disrupts the social order, and runs antithesis to democratic principles, rule of law and secularism in the country. The only remedy available is the need for anti-lynching law and implementation of the same for curbing such menaces. With the present scenario, there is prevalence of Rule of Might. If this continues and these offenders go without punishment, the citizens will lose faith in the government. Even though Cow is worshipped in a country like ours, people don’t realize that the holy one would never ask for a massacre is her name. What has also remained unchanged is the victimization of minorities in the name of the holy cow. It is high time that the state figures out a balanced approach which grants protection to the sentiments of the Hindu cow protection group and at the same time mitigates fear among the minorities and grants protection to the rights of every citizen of India.

\textsuperscript{2691}(2018) 6 SC 72
INHERITANCE RIGHTS OF ADOPTED CHILDREN IN CHRISTIAN LAW

By Tanya Antony
From West Bengal National University of Juridical Sciences

INTRODUCTION
Justice Rebello, in 1999, posed a question that emphatically captures the central point of discussion in this paper. He said:

“[Can] a civilized State committed to the Rule of law, governed by a written constitution and signatory to International Conventions on the Rights of a Child deny to a Section of its own citizens the right to adopt a child and to give that child a home, a name and nationality?”

Under present statutory provisions, Christians in India cannot legally adopt a child under personal law. In a bizarre quirk, Indian personal law has developed in a way that gives only a Hindu the full right to adopt and raise a child as their own under Statute. Christian personal law does not statutorily recognize adoption and one who wishes to adopt must proceed under the Guardians and Wards Act, 1880, (‘GWA’) and apply for ‘guardianship’ of the child.

Guardianship does not provide the child with the same status as that of a biologically born child. In Hindu law, the adopted child steps into the same shoes as a natural child, but in the case of non-Hindus proceeding under GWA, the child does not become their own, take their name or inherit their property by virtue of automatic right. This disparity rises due to the fact that personal law in India is governed by the customs and practices of the individual community to whom the law extends. Prevalence of customs in personal law has always been an attribute of it, aiming to accommodate for India’s incredibly diverse population.

CUSTOMARY LAWS GOVERNING ADOPTION IN INDIA
In the famous succession case Abraham v. Abraham, the Court had to decide whether a wealthy Tamil Christian who died intestate would be succeeded by his Anglo-Indian wife, as was the law among Christians, or by his brother, as was the prevalent custom at the time among newly-converted Christians. The case was examined on a question of fact regarding customs and it was decided that since this particular family practiced Christian customs, the succession would be by the wife. In an attempt to unify the laws regarding succession for Indian Christians and answer the questions and ambiguity

2692 Manuel Theodore v. Unknown, 2000 (2) Bom CR.
2693 According to §2, Hindu Adoptions and Maintenance Act, 1956, (‘HAMA’) this definition includes Buddhists, Sikhs and Jains, apart from the normal meaning of “Hindus”.
2694 Hindu Adoptions and Maintenance Act, 1956, (‘HAMA’).

2696 Chandra Mallampalli, Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness, LAW AND HISTORY REVIEW 28 (4) (2010).
that arose in this case,\textsuperscript{2700} inheritance among Indian Christians was first codified in the Indian Succession Act, 1865.\textsuperscript{2701}

Custom still remains an extremely important part of personal law and in the absence of law of adoption for Christians in India, personal and customary law has been recognized by Courts as a way of legally recognizing adoption.\textsuperscript{2702} Among the Syrian Christians of Kerala, there existed a custom of adopting the son-in-law when daughters were sole inheritors.\textsuperscript{2703} \textit{Deth kalam}, as this was called, would give the son-in-law of the youngest daughter the same status as a son of the house.\textsuperscript{2704} He would live with the parents of the daughter, have a share to their property, and in some cases would even take on the family name.\textsuperscript{2705}

**ADPTION IN CHRISTIAN BELIEFS**

The main reason for this ambiguity and irregularity in the matter of personal law is the simple fact that different religions have different beliefs and priorities. For instance, Islam explicitly prohibits the ascribing of parentage to those other than the real, biological fathers.\textsuperscript{2706} This means that in Islam, adoption of children as one’s own and ascribing unto them the same rights and duties, particularly those rights relating to inheritance, as that of a natural child is strictly prohibited.\textsuperscript{2707}

Christianity, however, does not hold the same view. There are multiple verses and anecdotes from the Bible that show that the Scriptures allow and even explicitly endorse adoption, or as it is described “[the act of being a] father to the fatherless”.\textsuperscript{2708} Apart from many central figures in the Bible being adopted and raised as natural children by their adoptive parents, there is even special reference to inheritance accruing out of such adoption.\textsuperscript{2709} In fact, Jesus Christ Himself is “adopted” by Joseph and Joseph is consistently described as his “foster father”.\textsuperscript{2710}

**ATTEMPTS MADE TO CODIFY ADOPTION LAWS FOR CHRISTIANS**

There have been several attempts made to codify the laws surrounding adoption for non-Hindus in India. In 1972, the Union introduced the Adoption of Children Bill, 1972,\textsuperscript{2711} in the Rajya Sabha. This was ultimately dropped owing to strong opposition from many communities, particularly the Muslims, averse to the existence of such a uniform law of adoption. Keeping these religious sentiments in mind, the Adoption of Children Bill, 1980, was introduced in the Lok Sabha with the express provision that it shall not be applicable to Muslims.\textsuperscript{2712} This too could not be enacted into law.

\textsuperscript{2700} Nandini Chatterjee, \textit{Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India}, 1149 MODERN ASIAN STUDIES 44 (6) (November, 2010).

\textsuperscript{2701} The Indian Succession Act, 1865.

\textsuperscript{2702} Sohan Lal v. A Z Makuin, AIR 1929 Lahore 230.


\textsuperscript{2704} Id.

\textsuperscript{2705} Id.

\textsuperscript{2706} Quranic verse (XXXIII:5).

\textsuperscript{2707} Ali Raza Naqvi, \textit{Adoption in Muslim Law}, ISLAMIC STUDIES 19 (4) (Winter, 1980).

\textsuperscript{2708} Exodus 1: 15-22; Exodus 2: 1-10; Deuteronomy 10:18; James 1:27; Psalms 68:5-6a.

\textsuperscript{2709} Colossians 3:24.

\textsuperscript{2710} Matthew 1:18.

\textsuperscript{2711} Adoption of Children Bill, 1972.

Finally, on an initiative taken by none other than the Christian community of India, with unqualified approval by the Catholic Bishop’s Conference of India and various other Christian denominations across the country, the Christian Adoption and Maintenance Bill, 1995, was forwarded. However, despite the clear indication of the willingness and desire of the Indian Christian community to have a uniform, codified Act governing adoption and maintenance, this Bill has not been enacted.2713

**EVOLUTION OF CHRISTIAN PERSONAL LAW REGARDING THE ADOPTION OF CHILDREN**

The preceding parts clearly highlight how irrational and counter-intuitive the current scenario is with respect to Indian Christian couples looking to adopt. Going by just the lack of statutory provisions, the standing of law would have been that since Christian law does not recognize adoption, an Indian Christian couple cannot fully adopt a child. Their only recourse would be to proceed under GWA and become guardians of the child. This only creates a temporary relationship until the child achieves majority, with the child having no rights similar to that of a natural child. There would no automatic right to inherit the property of the adoptive parents. It is into this unlegislated area of law that the Courts have stepped in. By way of cases and ancillary statutes, such as the Juvenile Justice (Care and Protection of Children) Act, 2015,2714 (‘JJ Act’) this part will illustrate the current position of the judiciary and other sources of primary law on adoption by Christian adoptive parents and the rights accruing to these adopted kids.

The High Court of Kerala held for the first time in Philip Alfred Malvin v. Gonsalvis that it is accepted fact that Christian law does not prohibit adoption, and that Canon law allows it. Simply because there is no separate statute providing for adoption, it cannot be said that Christians cannot legally and fully adopt children.2715 This decision held that the position of the adopted child with respect to inheritance and maintenance would be the same as a biological child.2716 In Ajit Datt v. Mrs. Ethel Walters and Ors, Justice S.R. Singh interpreted §3(57) of the General Clauses Act, 1904,2717 to say that an adopted child has all rights to inherit. Adoption is not prohibited in Christianity – neither in the statutes of Christian personal law nor in the religious scriptures governing the beliefs and practices of the peoples. Hence, interpreting §3(57) accordingly, it was held that an ‘adopted son’ is also a ‘son’, and would have all the rights and duties as a natural son. This means that the bond will not be severed upon the child attaining majority, and there will exist nothing barring the child from inheritance.2718 This was reaffirmed in Vasanti v. Pharez John Abraham where the Court also held that adoption has spiritual as well as secular values.2719 This puts it outside the sole jurisdiction of religion, and into the joint jurisdiction of civil rights.

---

2713 Manuel Theodore v. Unknown, 2000 (2) Bom CR.
2714 Juvenile Justice (Care and Protection of Children) Act, 2015 (‘JJ Act’).
2717 The Bombay General Clauses Act, 1904.
2718 Ajit Datt v. Mrs. Ethel Walters and Ors, 2000 (4) AWC 3270.
While providing a home, family and better life to an abandoned or orphaned child might have religious connotations, the desire for an heir, a companion in old age, and a child to raise, is all temporal in nature.²⁷²⁰ It has even been pled that these are some things that everyone, irrespective of caste, religion and creed must have the right to as part of their Right to Life under Article 21 of the Constitution of India, 1950.²⁷²¹ After being adopted and raised as one’s own, the right of that child to then inherit the property and status of his parents is also a right that must accrue to him. It would be unfair to the child to bar him from inheriting the assets of his adoptive parents, especially when such desire has been clearly displayed.

Such was the case of Maxim George v. Indian Oil Corporation, where it was held that despite the adopted child having been only seven days old at the time of adoption, despite every Holy Sacrament like Baptism and Confirmation having been done to the child as though he were a biological child of the adoptive parents, and even despite the fact that the adoptive parents had made a will bequeathing their property in the name of this child, the adoption cannot be said to be legal in the absence of concrete evidence of adoption”, which is hard to obtain owing to the ambiguous nature of adoption among Indian Christians.

In R. R. George Christopher and Another, the Court held that aspiring parents who are not prohibited by their personal and religious laws are entitled to adopt a child abiding by the terms laid down by the JJ Act, under §40 and §41 of the JJ Act which speak of rehabilitation of the child by “adoption”.²⁷²³ The Code of Canon Law, 1983, compiled by Pope John Paul II is the “fundamental body of ecclesiastical laws for the Latin church”.²⁷²⁴ Canon-110 says that children that have been adopted in accordance with civil law are considered to be, in full stature and status, the children of the people who have adopted them.²⁷²⁵ This can be considered the law with regards to the religion, Christianity. Not only do the personal laws of Christianity not prohibit adoption, but it also recognises it as a way of conferring full rights on the adopted child if it is done according to civil law.

The JJ Act, as can be seen from its preamble, was made with the aim of fulfilling international obligations as well as the obligations laid down in Part IV of the Indian Constitution, particularly Article 44, pertaining to the desirability of a uniform civil code.²⁷²⁶ §41 of the JJ Act speaks of primary responsibility that accrues to the adoptive family in cases

²⁷²² Maxim George v. Indian Oil Corporation, WP(C) No. 26644 of 2003(V).
²⁷²⁴ Pope John Paul II, Apostolic Constitution (Sacrae Disciplinae Leges) of The
where the child has been surrendered, orphaned or abandoned. This, being a statute enacted by the Parliament, is civil law. It does not speak of religion, and is secular in nature. Reading §41 of the JJ Act, along with Canon-110, it is evident that such an adoption would grant the adopted child the same rights as a biological child, including the right of succession.

The analysis in this judgement has been repeated with approval in a number of subsequent cases. In *Mrs. Mary Rani Swamy and Another* the Court upheld the validity of the adoption of a child by a Christian single woman and declared that the minor child is entitled to legal status of a biological child under §41(1) and §41(2) of the JJ Act. It was also held by the Hon’ble Supreme Court of India that there is no bar to adoption under Christian personal law for a couple who already has a biological child. This decision, dated July 3, 2019, bypasses the requirement of R. R. George Christopher that said that the adoption must not be prohibited by religious and personal laws. Decree XXI of the Acts and Decrees of the Synod of Diamper, 1599, prohibits adoption of sons when the couple has natural children. Such by-passing could only be done owing to the current stance of Indian law on adoption by non-Hindus, as laid down in *Shabnam Hashmi v. Union of India*.

**Shabnam Hashmi v. Union of India**

This is a landmark case that held adoption by any person, irrespective of religion, caste or creed is permissible and fully valid. It said that prospective parents have the option of adopting a child under §41 of the JJ Act. This is a choice, with the alternative being that they could choose to submit to the personal laws governing them. However, personal laws cannot dictate the operation of an enabling statute like the JJ Act and cannot come in the way of a couple wishing to adopt under the JJ Act. The JJ Act is a secular enactment, one more step in pursuance of the goals enshrined in Article 44 of the Constitution, and barring certain groups of people from availing its benefits due to the impact of personal laws would go against Articles 14 and 15 of the Constitution of India.

Fundamental Right to Adopt and to be Adopted

India has ratified the Convention of the Rights of the Child, 1992. The Convention levies a commitment on the State to provide for the welfare and protection of children. This contains within itself the need for adoption and rehabilitation of the destitute or orphaned children in the State. In the matter of *Manuel Theodore* Justice Rebello contemplated the right to adopt as coming within the purview of Article 21, and as such under the Right to Life. It held that on consideration of precedents on

---


2728 *Mrs. Mary Rani Swamy and Another* (in the matter of Jency Jothika), 2012 SCC OnLine Mad 4109.


2730 Decree XXI, Acts and Decrees of the Synod of Diamper, 1599.


2733 *Id.*

2734 *Id.*


2736 *Manuel Theodore* v. Unknown, 2000 (2) Bom CR.
fundamental rights, directive principles and international conventions that India has ratified, the abandoned, the orphaned, the destitute or a similarly situated child has a right to be adopted as an extension of their Right to Life because the fundamental right to life of such a child becomes meaningful only if it includes the right to be adopted along with it. It even went on to say that in the event of failure of the Legislative and Executive to make measures in this direction, it is permissible for the Judiciary to exercise its power of parens patriae.

This contemplation was rejected by the Supreme Court in Shabnam Hashmi v. Union of India where it was held that “mental preparedness of the entire citizenry” is best evaluated by the Legislature and that their decisions regarding enactments must be respected. As, at present, they have enacted the JJ Act and considered that sufficient, the laws of adoption must be governed by that. The opinion of the Court was that India has not yet reached a point where the Uniform Civil Code is a possible reality. As an extension of this, the Court decided that the Right to Adopt presently cannot be construed to be a fundamental right encompassed within Article 21 of the Constitution.

**NEED FOR CODIFICATION**

Although after Shabnam Hashmi the law officially allows for valid and full adoption of children by non-Hindus under provisions of the JJ Act, it was held in 2018 that the holding with regards to the validity of adoption and accruement of subsequent rights in a particular case would be on the basis of the facts of that case. This kind of case-to-case examination every time there rises a question as to the inheritance rights of the adopted children wastes the time of the Judiciary as well as causes unnecessary hassle for the parties involved.

Unlike Islamic law, Christian law does not prohibit adoption. In fact, it even endorses “fathering the fatherless”. There is nothing in the teachings of the Bible or the Church that suggests that the adoption of a child as one’s own is prohibited. On the contrary, there are countless anecdotes in the Bible that show that adoption is a commonly accepted practice in the Biblical context. Moreover, the moral aspects of adoption, namely the fact that life of a helpless child, is something that is said to be specially rewarded in Christianity. Therefore, in the absence of any motive or reason contrary to adoption, there exists no reason for adoption among Indian Christians to not be codified. In fact, the Christian Adoption and Maintenance Bill, 1995, which was tabled with unequivocal approval by the Catholic Bishop’s Conference of India, is an indicator of the desire of the Christian community to have codified sanction for adoption. Here, there exists a glaring void in the legislation regulating personal laws of adoption and succession among Indian Christians. The result of this void is that children adopted by Christians under GWA, as mere ‘wards’, do not get the right to inherit their parents’ properties, while the children adopted by Hindus enjoy full rights with the same legal status as natural-born child.

---

2737 Manuel Theodore v. Unknown, 2000 (2) Bom CR.
2738 Manuel Theodore v. Unknown, 2000 (2) Bom CR.
2742 Psalm 68:5.
2743 §12, supra note 3, HAMA.
While judicial interventions have corrected certain anomalies in relation to personal laws, they cannot be a substitute for statutory guarantees of substantive rights.\textsuperscript{2744} The corresponding procedural safeguards that make the right effective come only with statutory guarantees.\textsuperscript{2745} Codifying the judicial stance taken in \textit{Shabnam Hashmi} and \textit{R. R. George Christopher} would eliminate the need to examine every case on a case-by-case basis. This would reduce ambiguity in decisions, preserving the Right to Equality under Article 14 of the Constitution, and would make the delivery of justice more efficient for the Courts as well as the parties affected. For the true deliverance of justice and an equal status for the children adopted by Christian parents, it is necessary that their rights must not be contingent on them approaching the Courts, fighting the case for around five years, and then finally hoping to get a decree in their favour. The right to live with the same legal status as a biological child and ultimately inherit the property of the (adoptive) parents must be a right arising at the time of adoption into the family, much like the rights of a biological child that arise at the time of birth.

What makes a kid adopted by Hindu parents legally entitled to more rights than a kid adopted by Christian parents of the same country? The poet Kahlil Gibran once said in a couplet:

“Our children are not our children, they are the sons and daughters of life, longing for itself”.\textsuperscript{2746}

In the absence of positive steps undertaken by the State, how long must these kids await justice?\textsuperscript{2747} There is an urgent need for codified statutory provisions regulating adoption among Indian Christians. This Statute must be in lieu with fundamental rights, international conventions and the holdings of the Courts in the matter of inheritance rights of adopted children under Christian law. This is required for the true deliverance of justice – to both the adopted, as well as the adopters. There is simply no excuse or reason for this overlook by the Legislative. For the sake of 28 million Indian Christians that depend on these personal laws to govern the most important areas of their life, adoption and subsequent rights to inheritance for Christians must be codified and given the statutory sanction at the earliest.

\textbf{Bibliography}

\textbf{CASES}
- Abraham v. Abraham, (1868) 9 M.I.A. 195
- Adlin Maria(Minor) vs The Accountant General, W.P.(MD)No.6823 of 2008
- Ajit Datt v. Mrs. Ethel Walters and Ors, 2000 (4) AWC 3270
- Manuel Theodore v. Unknown, 2000 (2) Bom CR,
- Maxim George v. Indian Oil Corporation, WP(C) No. 26644 of 2003(V).
- Mrs. Mary Rani Swamy and Another (in the matter of Jency Jothika), 2012 SCC OnLine Mad 4109

\textsuperscript{2745} \textit{Id}.
\textsuperscript{2746} \textsc{Kahlil Gibran}, \textit{The Prophet} (1923).
\textsuperscript{2747} Manuel Theodore v. Unknown, 2000 (2) Bom CR.
VOLUME 18

ISSN: 2456-9704

- Philip Alfred Malvin v. Gonsalvis, AIR 1999 Ker. 187
- Shabnam Hashmi v. Union of India, 2014 SCC OnLine SC 144
- Sohan Lal v. A Z Makuin, AIR 1929 Lahore 230
- Vasanti v. Pharez John Abraham, 2007 (5) KLJ 194

STATUTES
- Acts and Decrees of the Synod of Diamper, 1599
- Adoption of Children Bill, 1972.
- Code of Canon Law, 1983
- Hindu Adoptions and Maintenance Act, 1956
- Indian Succession Act, 1865
- Juvenile Justice (Care and Protection of Children) Act, 2015
- The Bombay General Clauses Act, 1904.

SCRIPTURES
- Colossians 3:24
- Deuteronomy 10:18
- Exodus 1: 15-22
- Exodus 2: 1-10
- James 1:27
- Matthew 1:18
- Psalm 68:5
- Psalms 68:5-6a
- Quranic verse (XXXIII:5).

ONLINE RESOURCES
- Chandra Mallampalli, How Christian Personal Laws have grappled with Equality, The Times of India

JOURNAL ARTICLES
- Ali Raza Naqvi, Adoption in Muslim Law, ISLAMIC STUDIES 19 (4) (Winter, 1980).
- Chandra Mallampalli, Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hinduness, LAW AND HISTORY REVIEW 28 (4) (2010)
- Nandini Chatterjee, Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India, 1149 MODERN ASIAN STUDIES 44 (6) (November, 2010).

www.supremoamicus.org

944
OTHER SOURCES


*****
SOCIAL MEDIA AND FREEDOM OF SPEECH AND EXPRESSION: CHALLENGES BEFORE INDIAN LAW

By Tanzim Surani
From GLS Law College, Gujarat University

ABSTRACT:
It has been a few decades since internet took over the information age by storm. It has become an integral part in people’s lives. Social media is now one of the most popular means of computer mediated communication and it has shrunk the world into the global village, with people sharing information from every corner of the world. India is one of the place in the world where you can speak your heart out, without the fear of anything, though the situation is lot better for Indians than the fellow citizens of other nations, but the picture is not really smooth for Indians any more. Further, it evaluates the reliability of free flow of information and authenticity of news item in the existing proliferation of the social media. This particular observation has been made with regard to the exercise of the right of freedom and expression in context of social media and the problems placed on that by the arbitrary use of cyber laws of the nation, particularly Section 66A of the Information Technology Act, 2000.

In this paper, the researcher aims to examine the concept of Social Media in context with Freedom of Speech and Expression and its challenges before the Indian Law. This paper will specifically aim to examine the Social Media in context with the concept of Freedom of Speech and Expression from the perspective of Indian Law and the critical challenges and issues faced in the implementation of the same.

Keywords: Social Media, Freedom of Speech and Expression, Indian Law, Information Technology Act, 2000.

INTRODUCTION:
“The more time you spend in India, the more you realize that this country is one of the world’s greatest wonders - a miracle with a message. And the message is that democracy matters.” Thomas Friedman

WHAT IS SOCIAL MEDIA?
Social media comprises primarily internet and mobile phone based tools for sharing and discussing information. It blends technology, telecommunications, and social interaction and provides a platform to communicate through words, pictures, films and music. Social media includes web-based and mobile technologies used to turn communication into interactive dialogues.

Andreas Kaplan and Haenlein defines Social Media as, “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content.”


2750 “Social Media”, available on the Web, URL: http://en.wikipedia.org/wiki/social_media, accessed on 30/05/2020
refers to Internet platforms that allow for interactive participation by users “User generated content” is the name for all of the ways in which people may use social media.  

Another variant of social media is mobile social media i.e. when social media is used in combination with mobile devices it is called mobile social media. Due to the fact that mobile social media runs on mobile devices, it differentiates from traditional social media as it incorporates new factors such as the current location of the user (location-sensitivity) or the time delay between sending and receiving messages (time-sensitivity).

**TYPES OF SOCIAL MEDIA:**

According to Kaplan and Haenlein, there are six different types of social media:

1. **collaborative projects** (e.g., Wikipedia)
2. **blogs and micro blogs** (e.g., Twitter)
3. **content communities** (e.g., YouTube, Flicker)
4. **social networking sites** (e.g., Facebook, MySpace)
5. **virtual game worlds** (e.g., World of Warcraft, Whyville)
6. **virtual social worlds** (e.g., Second Life)

Social Media can be broadly divided into the following categories:

1. **Social networking:** Social networking is an online service that enables its users to create virtual networks with likeminded people. It offers facilities such as chat, instant messaging, photo sharing, video sharing, updates etc. The most popular are Facebook and LinkedIn.

2. **Blogs:** Blogs are descriptive content created and maintained by individual users and may contain text, photos and links to other websites. The interactive feature of blogs is the ability of readers to leave comments and the comment trail can be followed.

3. **Micro blogs:** Micro blogs are similar to blogs with a typical restriction of 140 characters or less, which allows users to write and share content. Twitter is a micro blogging site that enables its users to send and read ‘tweets’.

4. **Vlogs and Video Sharing sites:** Video blogs (Vlogs) are blogging sites that mainly use video as the main form of content supported by text. You Tube is the world’s largest video sharing site. You Tube is a video casting and video sharing site where users can view, upload, share videos and even leave comments.

5. **Wikis:** Wiki is a collaborative website that allows multiple users to create and update pages on particular or interlinked subjects. While a single page is referred to as ‘wiki page’, the entire related content on that topic is called a ‘Wiki’. These multiple pages are linked through hyperlinks and allow users to interact in a complex and non-linear manner.
6. **Social Bookmarking**: These services allow one to save, organize and manage links to various websites and resources around the internet. Interaction is by tagging websites and searching through websites bookmarked by other people. The most popular are Delicious and Stumble Upon.

7. **Social News**: These services allow one to post various news items or links to outside articles. Interaction takes place by voting for the items and commenting on them. Voting is the core aspect as the items that get the most votes are prominently displayed. The most popular are Digg, Reddit and Propeller.

8. **Media Sharing**: These services allow one to upload and share photos or videos. Interaction is by sharing and commenting on user submissions. The most popular are YouTube and Flickr. There can be overlap among the above mentioned types of social media. For instance, Facebook has micro blogging features with their ‘status update’. Also, Flickr and YouTube have comment systems similar to that of blogs.

**FREEDOM OF SPEECH AND EXPRESSION**: Freedom of Speech and Expression is understood as a notion that each and every person has the natural right to express themselves through any media without any interference (censorship or fear of reprisal), it is a complex right. This is because freedom of speech and expression is not an absolute right as it carries certain duties and responsibilities. Thus, it may subject to certain restrictions provided by law.

The following are some of the most commonly agreed upon definitions of freedom of expression that are considered as valid international standards:

- “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

In the same way, Article 19 (1) (a) of Indian Constitution states that, all citizens have the right to freedom of speech and expression. Freedom of Speech and expression means the right to express one’s own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode.

In the case of, **Secretary, Ministry of Information and Broadcasting vs. Cricket Association**, The term ‘freedom of speech and expression’ includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. Based on John Milton’s

---


2758 Article 19 (2), International Covenant on Civil and Political Rights, 1966 (ICCPR), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx, last accessed on, 31/05/2020

2759 Constitution Of India, Article 19 (1) (a), https://constitution.org/cons/india/p03019.html, last accessed on, 31/05/2020

www.supremoamicus.org 948
arguments, freedom of speech is understood as a multi-faceted right including not only the right to express or disseminate information and ideas but also including the right to seek, receive and impart information and ideas. The states were also asked to adopt policies to make internet available, accessible and affordable to all in all times.

The UNHRC has also taken a step forward to give application to freedom of opinions, speech and expression through internet and social media and by mobile communication. Moreover the committee has taken necessary steps in order to give access to these new media to everyone. Thus, the freedom of speech and expression is the fundamental right under the Constitution of India and also in the other International documents and right to access of these media is also a fundamental human right.

Restrictions on Freedom of Speech and Expression:
This freedom of speech and expression does not allow the citizens the right to speak or publish any information without responsibility, they are answerable to what they speak and publish, this right gives the immunity to speak and publish but also provides certain restrictions and punishment when this freedom is been abused.

Article 19 (3) of ICCPR, imposes restrictions on the following grounds:

a) For respect of the rights of reputations of others.
b) For protection of national security, or public order, or public health or morals.

Receive and Impart Information and Ideas of All Kinds through the Internet, 2011., available on web URL, https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx, last accessed on, 31/05/2020


2760 Freedom of Speech”, In its landmark judgment, the Indian Supreme Court in the case of the Secretary, Ministry of Information and Broadcasting vs. Cricket Association, (AIR 1995 SC 1236) has also recognised the ‘right to information’ as part of the fundamental right of speech and expression under Article 19 (1) (a) of the Indian Constitution.  

2761 15 Report of the Special Rapporteur on Key Trends and Challenges to the Right of All Individuals to Seek,
Moreover, according to Article 19(2) of the Constitution of India, the legislature may enact laws to impose reasonable restrictions on the right to speech and expression on the following grounds:\(^{2763}\)

- a) Sovereignty and integrity of India
- b) Security of the State
- c) Friendly relations with foreign States
- d) Public order Decency or morality
- e) Contempt of court
- f) Defamation
- g) Incitement to an offence

**CENSORING THE SOCIAL MEDIA:**

Information is a buzz word today. It is essential to march along with the progressive trends in today’s world. Technology savvy world with an increasing capacity for communicating, simplifying and storing information with amazing speed has put information at the core of development. There can be no democratic participation in decision making without transparency and sharing information. Social media has the power to reach the masses and distribute information, which in turn has resulted in everyone acting as a watchdog, scrutinizing the powerful and exposing mismanagement and corruption.\(^{2764}\)

Internet has become the basis of modern civilization due to its limitless possibilities and widespread reach. In the past years, the governments across the world had tried to stop the widespread of information, but now with the growth of internet and social media delivering information is the threat to government who is trying to regulate it. Again looking towards the benefits of internet, it is open to misuse also, which gives the State a justification to regulate online content in the interests of the public at large. Several cyber-crimes, defamation, invasion of privacy, incitement of offences, racist remarks, stalking, abuse, hacking, harassment and many more can be easily committed through social media and once such objectionable content is uploaded, it becomes viral and consequently, very difficult to contain. Hence, the importance of the State regulating social media also cannot be denied.\(^{2765}\)

China is the leader in Internet censorship. It has an elaborate mechanism in place to effect censorship known as Great Firewall of China and officially as Golden Shield Project. Blocking web-pages with objectionable content is the regular mode of internet censorship.\(^{2766}\)

Coming to India, according to the Freedom House’s latest report ‘Freedom on the Net, 2012’, India’s overall Internet Freedom Status is “Partly Free”. India has secured a score of 39 on a scale from 0 (most free) to 100 (least free), which places India 20 out of the 47 countries worldwide that were included in the report.20 On 12 March 2012, Reporters without Borders published a report titled ‘Internet Enemies Report, 2012’ on the basis of the growing control over the net by Government.21 Report contained a list of ‘Enemies of the Internet’ that restrict online access and harass their netizens; and a second list of ‘Countries

\(^{2763}\) Available on URL, https://www.mapsofindia.com/government-of-india/constitution/, last accessed on, 31/05/2020

\(^{2764}\) Bal Mukund Vyas (2008), “Sharing of Information with citizens” Also available on, HATE CRIME Pg. 20-24,


\(^{2766}\) Microblogging, digital and social media [Cyber Law]
under Surveillance’ for displaying a disturbing attitude towards the Internet. Report put India in the list of ‘Countries under Surveillance’. In its seventh transparency report, published on 27th April 2013, Internet giant Google noted that the Indian government has nearly doubled its requests to Google for removal of content in the second half of 2012 as compared to the first six months. The report, further noted that between July and December 2012, Google had received more than 2,285 government requests to delete 24,149 pieces of information. In the first half of 2012, Google received 1,811 requests to remove 18,070 pieces of information. During the same six-month period, the Indian government — both by way of court orders and by way of requests from police — requested Google to disclose user information 2,319 times over 3,467 users/accounts.

Although the Information Technology Act was in force since 2000, India did not police the cyber space with much vigour before the 2008 terrorist attack on Mumbai. After the attacks, the Information Technology Act, 2000 was amended to expand and strengthen the monitoring and censoring capacity of the Government. The cyber law of India now contains provisions relating to blocking of websites, monitoring and collecting internet traffic data, interception or decryption of such data, unhindered access to sensitive personal data viz. social media websites liable for hosting user-generated objectionable content, etc. In this backdrop, India has been considered as a country engaged in ‘selective’ Internet filtering.

In the Secretary, Ministry of Information and Broadcasting, Government of India and others vs. Cricket Association of Bengal and others, the Supreme Court held that “for ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an aware citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. It cannot be provided by a medium controlled by a monopoly— whether the monopoly is of the State or any other individual, group or organization.”

In the view of above, it can be said that rather than censoring of social media, it should be regulated in such a way which maintains the rights of users and also protects the victims.

**CYBER LAWS IN INDIA AND SOCIAL MEDIA:**
The easy availability of access to social media on the go has also triggered the phenomenon where people invariably post information on social media without understanding its ramifications. A number of times, people post content on various social media sites like Facebook, Twitter, Pinterest, etc. on the spur of the moment or on an impulse without thinking it through.

---

2769 “Indian Government v Social Networking Sites”, available on the Web, URL: http://barandbench.com/indian_government_v_social_networking_sites.html, last accessed on, 31/05/2020
2770 “CENSORING THE INTERNET”, available on, www.casemine.com/judgement/in/5609addee4b...< <, last accessed on, 31/05/2020
2771 “Social media and misuse of cyber law in India”, Pavan Duggal, October 7 2015, Available on URL,
The law in India is crystal clear regarding your publications on social media. The Information Technology Act, 2000, categorically makes you liable should you post any incriminating or illegal content or material on social media. In fact, the law has gone even further and recognises you, providing content on social media, to be a content service provider and network service provider. Hence, the law recognizes social media users as network service providers and hence, intermediaries under the law.\textsuperscript{2772}

There are several provisions in the existing cyber laws which can be used to seek redress in case of violation of any rights in the cyber space, internet and social media. The legislations and the relevant provisions are specifically enumerated as under:

**The Information Technology Act, 2000:**\textsuperscript{2773}

a) Under Chapter XI of the Act, Sections 65, 66, 66A, 6C, 66D, 66E, 66F, 67, 67A and 67B contain punishments for computer related offences which can also be committed through social media viz: tampering with computer source code, committing computer related offences given under Section 43, sending offensive messages through communication services, identity theft, cheating by personation using computer resource, violation of privacy, cyber terrorism, publishing or transmitting obscene material in electronic form, material containing sexually explicit act in electronic form, material depicting children in sexually explicit act in electronic form, respectively.

b) Section 69 of the Act grants power to the Central or a State Government to issue directions for interception or monitoring or decryption of any information through any computer resource in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States, public order, for preventing incitement to commission of any cognizable offence, for investigation of any offence.

c) Section 69A grants power to the Central Government to issue directions to block public access of any information through any computer resource on similar grounds.

d) Section 69B grants power to the Central Government to issue directions to authorize any agency to monitor and collect traffic data or information through any computer resource for cyber security.

e) Section 79 provides for liability of intermediary. An intermediary shall not be liable for any third party information, data or communication link made available or hosted by him in the following cases-

- His function is limited to providing access to a communication system over which such information is transmitted, stored or hosted.

\textsuperscript{2772} Ibid.

• He does not initiate, select the receiver and select or modify the information contained in the transmission.

• He observes due diligence and other guidelines prescribed by the Central Government while discharging his duties. 

_**Again, an intermediary shall be liable in the following cases:**_

• He has conspired, abetted, aided or induced by threats, promise or otherwise in the commission of the unlawful act.

• He fails to expeditiously remove or disable access to the material which is being used to commit the unlawful act, upon receiving actual knowledge or on being notified by the Government.

f) If any intermediary fails to assist, comply with direction and intentionally contravenes provisions under Sections 69, 69A and 69B respectively, he shall be liable to punishment.

g) Section 43A provides that where a body corporate possessing, dealing or handling any sensitive personal data or information in a computer resource owned, controlled or operated by it, is negligent in implementing and maintaining reasonable security practices and procedures thereby causing wrongful loss or wrongful gain to any person, it shall be liable to pay damages by way of compensation to the affected person.

h) Section 70B provides for an agency of the Government to be appointed by the Central Government called the Indian Computer Emergency Response Team, which shall serve as the national agency for performing functions relating to cyber security.

---

_The Central Government has also enacted rules to give effect to various provisions of this Act which are as follows:_

_The Information Technology (Procedure and Safeguards of Interception, Monitoring and Decryption of Information) Rules, 2009_\(^ {2774} \)

These rules are made by the Central Government in exercise of its powers under Section 87(2) (y) with regard to the procedure and safeguards for monitoring and collecting traffic data or information under Section 69B (3).

• Rule 3 provides that the interception or monitoring or decryption of information under Section 69 shall be carried out by an order issued by the competent authority.

• Rule 2(a) defines competent authority as the Secretary in the Minister of Home Affairs, in case of Central Government and the Secretary in charge of the Home Department, in case of a State Government or Union territory.

• Rule 4 provides for an agency of the Government authorized by the competent authority to carry out the functions.

• Rule 10 requires the name and designation of the officer of the authorized agency to whom such information should be disclosed.

• Rule 13 requires the intermediary to provide all facilities, co-operation and assistance for interception or monitoring or decryption of information.

_The Information Technology (Reasonable Security Practices and Information-rules-2009, last accessed on, 01/06/2020_
Procedures and Sensitive Personal Data or Information) Rules, 2011\(^{2775}\)

These rules are made by the Central Government in exercise of its powers under Section 87(2) (ob) read with Section 43A with regard to the reasonable security practices and procedures and sensitive personal data or information under Section 43A. Rule 6 provides that the disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information. However, the information can be shared with Government agencies, without obtaining prior consent, for the purpose of verification of identity, or for prevention, detection, investigation including cyber incidents, prosecution, prosecution, and punishment of offences.

Section 66A of the Information Technology Act, 2000\(^{2776}\)

Of all these provisions, Section 66A has been in news in recent times, albeit for all the wrong reasons. Before discussing the issue in detail, it is desirable to first have a look at Section 66A, the provision itself. Section 66A of the Information Technology Act, 2000 inserted vide Information Technology (Amendment) Act, 2008 provides punishment for sending offensive messages through communication service, etc. and states:

Any person who sends, by means of a computer resource or a communication device,—

a) any information that is grossly offensive or has menacing character;

b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently by making use of such computer resource or a communication device,

c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to three years and with fine.

d) **Explanation:** For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.

Indian cyber law requires intermediaries, including users of social media, to exercise due diligence while they discharge their obligations under the law. Of late, we are witnessing tremendous misuse of social media. The recent case of a man being lynched to death on mere rumours of his storing beef has caught national headlines. Investigations by the Police have revealed that the said incident has also lead to fuelling of social media activities. That is the reason Uttar Pradesh Chief Minister Akhilesh Yadav directed his administration to take stern action against those “creating disharmony and inciting hatred” by circulating “baseless” content on social media.

\(^{2775}\) Available on, https://cyberblogindia.in/, last accessed on, 01/06/2020

\(^{2776}\) ndiacode.nic.in/.../123456789/1999/3/A2000-21.pdf
media. As such, the police have written to twitter to disable and remove pictures and content that might create communal disharmony. Twitter as an intermediary is duty bound under Indian cyber law to comply with these directions.

In the case of, Shreya Singhal V/s Union Of India

The Supreme Court has already held that the intermediaries are duty bound when they are called upon by any order of the government to move or disable access to any information as well as provide relevant connected information pertaining to identity of the offenders. I believe this power is a very special power which has been conferred under the Information Technology Act, 2000, and needs to be more frequently used.

In the face of widespread abuse of Section 66A, a writ petition has been filed in the form of a public interest litigation in the Supreme Court challenging the section’s constitutionality wherein it has been submitted that the phraseology of impugned Section is so wide and vague and incapable of being judged on objective standards, that it is susceptible to wanton abuse and hence falls foul of Article 14, 19 (1) (a) and Article 21 of the Constitution.

Admitting the writ petition, Division Bench of Supreme Court, comprising Chief Justice Altamas Kabir and Justice J. Chelameswar, noted that the “wording of Section 66A is not satisfactory. It is made very wide and can apply to all kinds of comments.” To prevent the misuse of Section 66A, however, Ministry of Communications and Information Technology, Government of India has issued Advisory to State/UT Governments on implementation of Section 66A. They have been advised that with regard to the arrest of any person in connection with a complaint registered under Section 66A, the concerned police officer of a police station under the State’s jurisdiction may arrest any person only with prior approval of such arrest from an officer not below the rank of the Inspector General of Police in the Metropolitan cities or an officer not below the rank of Deputy Commissioner of Police or Superintendent of police at the district level, as the case may be.

CONCLUSION:

It is evident that social media is a powerful means of exercising the freedom of speech and expression, but it is also been misused and used for illegal acts, social media entails the legal censorship but there is a fear that the censorship will affect the rights of people. What is therefore desirable is regulation of social media, not its censorship. However, the present cyber laws of India are neither appropriate nor adequate in this respect. An analysis of the existing IT laws shows that there is unaccountable and immense power in the hands of the Government while dealing with security in the cyber space. Even then, it is not sufficient to check the misuse of social media. Hence, a specific legislation is desirable to regulate social media.


2778 Ibid.

2779 This writ petition has been filed by Shreya Singhal of Delhi. The writ petition can be accessed online, URL: http://www.scribd.com/doc/115031416/Shreya-Singhal-v-Union-of-India.

2780 Ibid.

2781 Ibid.
Keeping all this in mind the government should include the technical experts to look into all the possible facets and regulate laws in a manner which does not affect the rights of the citizen. The issue of social media misuse is constantly evolving. It will be interesting to see how jurisprudence on social media misuse in India evolves with passage of time.

*****
THE NEW BEHEMOTH DATA PROTECTION LAWS FOR THE 21st CENTURY: THE GENERAL DATA PROTECTION REGULATION

By V Adharsh
From Army Institute of Law

INTRODUCTION

"Facebook could tell that in Oklahoma the race between Republicans and Democrats is particularly close, identify the 32,417 voters who still haven’t made up their minds, and determine what each candidate needs to say in order to tip the balance. How could Facebook obtain this priceless political data? We provide it for free. In the heyday of European imperialism, conquistadors and merchants bought entire islands and countries in exchange for coloured beads. In the twenty-first century our personal data is probably the most valuable resource most humans still have to offer, and we are giving it to the tech giants in exchange for email services and funny cat videos.”

- Yuval Noah Harari (Israeli Historian)

In his book - Homo Deus: A Brief History of Tomorrow

The European Union has long been interested in the issue of the protection of personal data in the current world where every piece of information is digitized and is technologically driven. Initially the Data Protection Directive was issued by the European Union in 1995, regulating the processing of personal data within territory of the European Union.

Now, after duration of almost two decades, the European Union has enforced the behemoth General Data Protection Directive (GDPR), superseding the Data Protection Directive since 25 May 2018, taking data protection to whole new level and of importance. With a new legal framework requiring both organizational and technological changes along with accountability, the GDPR will necessitate an entire structural shake-up of organizations dealing with personal data of the citizens for its protection and prevention from its misuse.

The striking feature of the GDPR rests on the fact that it is applicable to all those organizations around the world, which deals with collection and processing of data on residents domiciled with the EU, including expatriates and visitors along with the permanent residents. Therefore, the compliance is on the basis of geographical location of the individuals whose personal data is collected by the organizations, and not by the registration domicile of the organization.

It has profound implications on as to how these organizations will comply with these rules in order to protect the personal data of anyone within the EU, and has the capacity to influence the data protection of even the non-EU residents as well owing to the fact that these organizations are likely to set up a uniform system for data protection for all individuals for ease of function. Hence the “General” may as well be called “Global” in GDPR as it imposes strict financial penalties with regards to non-compliance and therefore mandates attention and function in accordance with the GDPR by all those organizations who conduct businesses across Europe, including both EU and the European Economic Area.
(EEA) along with United Kingdom post Brexit as they have assented to an equivalent Act namely Data Protection Act, 2018.

India, hence naturally, is also influenced by the GDPR with its organizations being required to be GDPR ready and compliant so as to avoid heavy financial penalties imposed in the GDPR.

DATA PROTECTION PRINCIPLES

There are six general privacy principles which form the basis of this legislation, whose bedrock lies in accountability, responsibility and compliance with these principles:

1. **Lawfulness, fairness and transparency** – Personal data is processed lawfully, fairly and in a transparent manner.
2. **Purpose limitation** – Personal data is obtained for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. Further processing is allowed for archiving, scientific, statistical and historical research purposes.
3. **Data minimisation** – Personal data processed is adequate, relevant and limited to what is necessary.
4. **Accuracy** – Personal data is accurate and, where necessary, kept up to date.
5. **Storage limitation** – Personal data is not kept longer than is necessary (but data processed for archiving, scientific, statistical and historical research purposes can be kept longer subject to safeguards).
6. **Integrity and confidentiality** – Appropriate technical and organisational measures are put in place to guard against unauthorised or unlawful processing, loss, damage or destruction.\(^ {2782}\)

REGULATORY IMPERATIVE OF THE GDPR

The GDPR is essentially a new regulation superseding the earlier 1995 EU Directive, on data protection for personal data across EU. It continues to follow the original Directive’s foundational principles, while raising the level and complexity in some of the significant areas. The GDPR is important for two key reasons:

1. It is likely to apply to all organizations, even those not based in Europe, because it mandates certain protections and provisions for any organization that controls or processes personal data on EU residents where processing is related to offering goods or services (“irrespective of whether a payment of the data subject is required”) or monitoring behaviour that takes place within the EU (Article 3). Being located outside of the EU does not grant an exemption to a data controller.\(^ {2783}\)
2. Cost of non-compliance with the regulation is significant, with financial penalty as high as that of €20 million as fine or 4% of the


total annual turnover of the preceding year, whichever is higher.

WHAT IS PERSONAL DATA?

The scope of GDPR is “personal data”. Personal data is defined in Article 4 according to which it’s as “any information relating to an identified or identifiable natural person ... who can be identified, directly or indirectly ... by reference to an identifier. “The identifiers which are listed in Article 4 include name, location data, identification number, and other identifying factors, such as mental, physical, and cultural among others.

But not all data which an organization possesses or collects falls under the scope of “personal data”. For instance, previously collected data that have been fully anonymised and can’t be re-identified to an individual is excluded from the ambit of GDPR requiring compliance, and hence can be used for data analytics, for example.

DRIVERS FOR INTRODUCING THE GDPR

The GDPR also acts as one of the essential elements of the Digital Single Market priority by the European Commission, aimed at bringing the 28 national markets to a single market, specially designed for the digital age. Two of the most significant ways in which the regulation makes a contribution towards it are:

1. It both harmonizes and modernizes the legal framework for protection of data across the EU. With a uniform single law across all the member States, organizations are relieved of the hassle of implementing different approaches per market.
2. Creation of a level playing field for organizations concerning data protection wherein, principles regarding data protection apply irrespective of where the organization is based.

DATA CONTROLLERS AND DATA PROCESSORS

Article 4(7) defines data controllers and Article 4(8) defines data processors.

This distinction is important for compliance. Generally speaking, the GDPR treats the data controller as the principal party for responsibilities such as collecting consent, managing consent revoking, enabling right to access, etc. A data subject who wishes to revoke consent for his or her personal data therefore will contact the data controller to initiate the request, even if such data lives on servers belonging to the data processor. The data controller, upon receiving this request, would then proceed to request the data processor remove the revoked data from their servers.

2784 ‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.
2785 ‘Processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.
2786 Data Controllers and Processors (Jun. 8, 2020, 11:20 AM), https://www.gdpreu.org/the-
REQUIREMENTS OF THE GDPR

Ability To Demonstrate Compliance

The task wherein the organizations need to have the ability to demonstrate compliance covers both organizational and technological measures. Article 24\textsuperscript{2787} and Article 28\textsuperscript{2788} set out the general obligations for data controller and data processor respectively. Measures which are implemented according to the GDPR may reduce the severity of the fine which is levied in the case of non-compliance to the rules of the GDPR.

Legal Basis for Processing

The right of processing personal data must be lawful i.e. they should lie under the six categories of lawfulness as mentioned in Article 6, the first of which states that the data subject has “given consent to the processing ... for one or more specific purposes.”

Special Conditions When Processing Special Categories of Data

The GDPR has laid great emphasis on protection of special categories of data. Article 9(1)\textsuperscript{2789} provides the general prohibition whereas 9(2)\textsuperscript{2790} list exceptions to these general prohibitions.

Records For Keeping Track of All Processing Activities

Under GDPR, Article 30\textsuperscript{2791} necessitates that controllers “shall maintain a record of processing activities under its responsibility”. Processors are also directed to keep a record for all categories of processing activities under the requirements. Both the processors and controllers are obliged to maintain these records in both electronic and written form.

Increased Standard of Consent

The gaining of consent has achieved an elevated standard under the GDPR. According to Article 4(1) consent must be “by a statement or by a clear affirmative action.” Hence there is prohibition on the usage of opt-out consent (assumed consent). There is also the provision philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation shall be prohibited.

Consent from the data subject, the protection of vital interests of the data subject, and where the data subject has made such information public, among others.

Lists seven types of information to be maintained, including the purpose of the processing, a description of categories of data subjects and personal data, and who will see the personal data after processing, among others.

\textsuperscript{2787}The controller shall implement appropriate technical and organizational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

\textsuperscript{2788}Implement appropriate technical and organizational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data Subject.

\textsuperscript{2789}Processing of personal data revealing racial or ethnic origin, political opinions, religious or
whereby the data subject has been given the right to withdraw consent for the processing of their personal information.

Notification of Data Breaches Within 72 Hours

The GDPR requires two levels of actions in a scenario of data breach:

1. In cases of breach of data containing personal and sensitive information which risks the rights and freedoms of these individuals, the organization, once it comes to its knowledge, has to report to the relevant supervisory authority of the breach within a window of 72 hours as mandated by Article 33. Article 33(3) also requires four specifications in the issuance of such a notification:
   a. The nature of the personal data breach (including categories of data and approximate number of data subjects impacted)
   b. The name and contact details of the firm’s data protection officer
   c. An analysis of the likely consequences of the breach
   d. Measures taken or proposed to be taken to mitigate negative effects.

2. To notify individually, all those data subjects whose rights and freedoms are under a risk due to the data breach and must entail detail and specifications similar to that of to the supervisory authority.

Appointment of Data Protection Officer (DPO)

When the processing of personal sensitive data is carried out in a regular and systematic way, the organizations are required to appoint a Data Protection Officer.

The Data Protection Officer has certain requirements:

1. Should have expert knowledge of data protection law and practices.
2. Must have certain freedoms as specified in Article 38.
3. Has a list of certain prescribed tasks to execute as provided in Article 39.

Right To Data Portability

The data subject possess the right to data portability by which they have the power to request their personal data which has been supplied to a controller in “a structured, commonly used and machine-readable format” so as to give it to another data controller.

Data Protection by Design and Default

As per Article 25, data controllers are necessitated to design the GDPR’s protection principles within the very structure of their technical systems and organisational processes.

For the following purpose, an integrated and thoughtful assessment of four specific factors is required-

---

2792 Article 6.
2793 Article 37(5).
2794 These tasks include informing and advising data controllers, processors, and employees of their obligations under the GDPR, monitoring internal compliance, and cooperating with the supervisory authority, among others.
1. The state of the art (technological advances)
2. The cost of implementation and the nature, scope, context
3. Purposes of processing
4. The risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing

The conceptual understanding of the rights of data subjects as per the GDPR is required and has to be imbibed practically to the technical capabilities and organizational processes.

Further, the organizations will have to select only those IT vendors and cloud services providers who can, by demonstration, prove that the GDPR requirements are built-in by design and default into their solutions so that they are in compliance with the regulation.

OTHER REQUIREMENTS

Right of Access by the Data Subject

The right to ask the data controller by the data subject regarding whether his/her personal information is being processed, and if it’s the case, then can request access to both of the personal data as well as that of information on processing, data transfers, recipients and the subsequent rights.2795

Right to Rectification

If inaccurate personal data of the data subject is held by the data controller, then the data subject has the right to get his personal data updated by supplying the right information, which the controller is required to do without any “undue delay”. 2796

Right to Erasure (Right to be Forgotten)

The data subject has the right to request the erasure of his/her personal data by the data controller2797, subject to certain conditions 2798. On the other hand, the data controller have the power to decline an erasure request, provided it fall within one of the many exception provided under Article 17(3). 2799 Hence, nevertheless, it is implied that that the organizations should have the organisational and technological ability to erase all affected data promptly.

Right to Restriction of Processing

Similar to the right to erasure, the data subject, subject to certain conditions2800 has the right to exclude his/her data from future processing activities which can be either temporary or permanent.2801

Notification Obligation of Controllers

The GDPR requires the data controller to notify each of the recipients whose personal data has been recently impacted by the

2795 Article 15.
2796 Article 16.
2797 Article 17.
2798 Conditions include the withdrawal of consent, previous unlawful processing, and other legal compliance erasure mandates.
2799 Include compliance with a legal obligation, public interest for public health, and legal claims.
2800 Conditions include contested data accuracy, unlawful processing, and the desire of the data subject to be excluded from processing activities.
2801 Article 18.
exercise of any of the data subject’s rights in relation to restriction, erasure or rectification. Also the data controller is required to supply details on recipients when requested by the data subject.\textsuperscript{2802}

**Right to Object**

The right to object to the processing of personal data is given to the data subject, at any time, where the legal basis is "the performance of a task carried out in the public interest," "the exercise of official authority vested in the controller," or for the purposes of the "legitimate interests" of the controller or a third party.\textsuperscript{2803} Objection can also be made in cases where the data is processed for the purpose of direct market activities.\textsuperscript{2804}

**Automated individual decision-making, including profiling**

Objection can be made by the data subjects towards automated processing and profiling relating to their personal data and, at the minimum, have the right to "obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision." The basic aim of the right is to prevent data controllers making significant decisions relating to legal and like matters regarding a data subject on an purely automated basis.\textsuperscript{2805}

**Processor Requirements**

If another organization is engaged by the data controller for the purpose of data processing, the processor must have taken required technical and organizational measures, making it in compliance with the regulation and must also help the data controller in responding to the various requests filed in relation to the rights of the data subjects.\textsuperscript{2806}

**Records of Processing Activities**

Records of the processing activities done by the data controller must be kept, for which they are responsible, with a list of specific information to be maintained corresponding to each of the record.\textsuperscript{2807}

**Security of Processing**

Implementation of organizational and technological measures is to be taken up by the data controller to ensure the presence of an optimum level of security for the processing of data, such as encryption, pseudonymization, regular testing of organizational and technological measures etc.\textsuperscript{2808}

**Transfers of Personal Data to Third Countries or International Organizations (Articles 44-50)**

The EU-US Privacy Shield Framework was brought in around mid-2016, as the GDPR outlines certain special requirements for the above mentioned cases. The goal of this framework though, is to allow US companies, while maintaining the

\textsuperscript{2802} Article 19.  
\textsuperscript{2803} Article 6(e) and 6(f)  
\textsuperscript{2804} Article 21.  
\textsuperscript{2805} Article 22.  
\textsuperscript{2806} Article 28.  
\textsuperscript{2807} Article 30.  
\textsuperscript{2808} Article 32.
protections provided under the GDPR, to transfer data on EU residents.

CONSPECTUS

There are three primary implications arising out of the GDPR that is to be considered by decision makers:

1. Re-examination your data strategy
   - Every affected organization needs to immediately undertake a significant re-examination of its organizational data strategy related to personal and sensitive personal data. Specific requirements in the GDPR need to be planned for, and organizational and technological approaches implemented to resolve problems, strengthen policy and protections, and mitigate against the worst outcomes.

2. Non-EU Firms to play rapid catch-up
   - The new, level playing field introduced by the GDPR applies to all firms everywhere if they control or process personal data on EU residents. Organizations previously subjected to the data protection directive have had a 20-year head start to develop the appropriate organizational and technological approaches to operating successfully in Europe.

3. Organizational and Technological responses
   - By all means, every organization should embrace the best technology on offer, but this has to be done as one coordinated element of a wider organizational response. Achieving GDPR compliance is not something the IT department can do alone. Compliance will require a set of coordinated and appropriate responses from the organization as a whole, with strategy, policy, training, and governance processes needed based on expertise from various groups, including Executive Management, Legal, Human Resources, Training, and the IT Department.

GDPR AND INDIA

Economic Survey reveals a top down structure of economy with 66.1% contribution of services sector to GDP. Out of this, information technology – business process management (IT-BPM) sector “is expected to touch an estimated share of 9.5% of GDP and more than 45 per cent in total services exports in 2015-2016 as per NASSCOM.”

Revenue contribution of Exports in IT-BPM is expected to touch 108 billion US dollars with a comparatively less domestic contribution of 22 billion dollar. Major markets for IT software and services exports are the U.S. and the U.K. and Europe, accounting for about 90 per cent of total IT/ITES exports.

According to NASSCOM estimates for 2014, UK and Continental Europe respectively accounted for 17.4% and 11.6% of India’s IT/ITES services export.

Therefore, one can clearly see nature of criticality regarding the IT-BPM sector in India and the country must take all measures to protect and promote it. For this,

2811 Indian Services Sector: Poised for global ascendancy, KPMG-CII, Source 3, 4, 5 NASSCOM
2812 CRISIL Opinion, Why India will gain as economic recovery in US and EU gains momentum, July 2014, CRISIL Research.
India must be prepared for the global changes taking place regarding regulatory changes like that of the GDPR.

The Indian laws which are in place governing the online data protection are:

- **Information Technology Act, 2000 (IT Act)**
- **Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011**

**THE PERSONAL DATA PROTECTION BILL - 2019**

Over the past few years, India’s data privacy issues have become increasingly prominent. With the rampant growth in the usage, transmission and collection of personal data in the international sphere, the current applicable legislations in the country don’t provide the necessary depth and intricacy required for protection of data in today’s world. The introduction of GDPR also acted as a wake-up call to bring in a new legislation which corresponds to the present times.

The origin of the Personal Data Protection Bill lies in the landmark judgment of *Puttaswamy v Union of India*. The judgment was issued on August 24, 2017. In the ruling, the Supreme Court of India declared that the right to privacy is a fundamental right of the Indian Constitution. On September 26, 2018, the Supreme Court asked the government to formulate strong data protection rules.

Around the same time that the Supreme Court reviewed the evidence in *Puttaswamy v. Union of India*, the Indian government established a data protection expert committee to review issues related to data privacy chaired by a retired Supreme Court judge B.N. Srikrishna. The committee submitted a report and a draft bill a year later. The current bill in Parliament is a modified version of the draft bill.

The Minister of Electronics and Information Technology, Ravi Shankar Prasad, introduced the Personal Data Protection Bill, 2019 in Lok Sabha on December 11, 2019. The bill aims to protect personal privacy data related to individuals, and establishes the Data Protection Authority of India for the above purposes and matters related to personal data. The bill proposes to replace the Information Technology Act of 2000 (Section 43-A) and delete provisions related to compensation payable by companies for failing to protect personal data. In particular, the PDPB stipulates the methods of collecting, processing, using, disclosing, storing and transferring personal data.

The PDPB recommends the protection of “personal data” related to the identity, characteristics, “sensitive personal data” of natural persons, such as financial data, health data, official identifiers, sex life, sexual orientation, biometric data, genetic data, transgender people Identity, bisexual identity, caste or tribe, religion or political beliefs.

**Applicability**

The PDPB recommends that it be applied to the processing of personal data collected, disclosed, shared or otherwise processed in India:

- By the government, any Indian company, any Indian citizen or any individual or group incorporated in India, and
- Foreign companies processing Indian personal data.

In addition to anonymous data or other non-personal data, PDPB is not applicable for the processing of anonymous data, so that the central government can better determine the service delivery goals or formulate evidence-based policies.

**Obligations of Data Fiduciary**

The processing of personal data will be subject to certain purposes, collection and storage restrictions, such as:

- For clear and legal purposes.
- Collection of personal data should be limited to the data required for processing purposes.
- Individuals/data subjects need to be notified to collect or process personal data.
- Only retain personal data for processing purposes and delete it at the end of processing.
- At the beginning of data processing, consent must be obtained from the data subject.
- The data trustee must verify the age and obtain parental consent when processing sensitive personal data of children.

In addition, the data trustee must take certain transparency and accountability measures, such as: (i) formulating a privacy policy, (ii) taking the necessary steps to maintain transparency in processing personal data, (iii) implementing security safeguards (such as data encryption and prevention Abuse), (iv) notify the Authority of any personal data violations by notification, (v) review its policies and policy implementation annually, (vi) conduct data impact assessment of personal data when important data trustees are involved in the processing of new technologies or sensitive data, (vii) The important data trustee should appoint a data protection officer to advise and monitor the data trustee's activities, and (vii) establish a complaint redress mechanism to resolve individual complaints.

**Processing Personal Data Without Consent**

The bill recommends that the trustee can process the data only if the individual agrees. In some exceptional cases, personal data can be processed without consent, for example: (i) if the state requires the benefit of an individual, (ii) legal procedures, (iii) respond to medical emergencies, (iv) employment related, (v) Necessary to prevent fraud, mergers and acquisitions, debt recovery and other reasonable purposes

**Rights of Individuals/Data Subjects**

The bill provides certain rights for individuals (or data subjects), including: (i) Obtain confirmation from the trustee about whether his personal data has been processed, (ii) Seeking corrections, incomplete or updated personal data, (iii) Data portability-in some cases, personal data Reference to any other trustee’s data,
(iv) The right to be forgotten: if consent is no longer needed or withdrawn, restrict it from continuing to disclose its personal data by the trustee.

**Data Protection Authority**

The Bill proposes that the Data Protection Authority of India should take measures to protect personal interests, prevent misuse of personal data, and ensure compliance with the Act and raise awareness of data protection. The order of the Authority can be appealed to the Court of Appeal. Appeals for court orders can be filed with the Supreme Court.

**Restrictions on the Transfer of Data Outside of India**

If the individual expressly agrees and is bound by certain other conditions, sensitive personal data may be transferred outside of India for processing. However, such sensitive personal data should continue to be stored in India. Certain personal data notified by the government as critical personal data can only be processed in India.

**Exemptions**

If necessary, the central government has the right to exempt any government agency from applying the law:

- for India’s sovereignty and integrity, national security and friendly relations with foreign countries,
  - Prevent incitement to commit any identifiable crime related to the above matters.

For some other purposes, such as (i) preventing, investigating or prosecution of any crime, or (ii) personal, family, or (iii) journalistic purposes, (iv) for research archiving or statistical purposes, processing personal data is also not restricted by the provisions of this Act.

**Risk of non-compliance with PDPB**

Penalties and compensation are divided into two levels:

- If the data trustee fails to fulfill its data protection obligations, it may be subject to a fine of Rs 5 crores or 2% of the total global turnover of the previous fiscal year, whichever is higher.
- Anyone who processes data in violation of the PDPB regulations may be subject to a fine of Rs 150 crores or 4% of the data trustee’s annual turnover, whichever is higher.

Re-identification and processing of de-identified personal data without consent may be punishable by imprisonment of up to three years, or a fine or both.

Pursuant to the PDPB being enacted into an Act, organizations handling personal data should follow several compliances to ensure the protection of personal privacy related to personal data. Processing personal data will require personal consent. Depending on the type of personal data processed, the organization will have to review and update data protection policies and codes to ensure that these policies are consistent with the revised principles, such as updating its internal violation notification procedures and implementing appropriate technical and organizational measures to prevent data misuse. An
important data custodian is to appoint a data protection officer, and establishes a complaint handling mechanism to resolve individual complaints.\textsuperscript{2815}

As of now, the Bill is being analyzed by a Joint Parliamentary Committee (JPC) in consultation with various groups.\textsuperscript{2816}

**CONCLUSION**

“The companies that do the best job on managing a user’s privacy will be the companies that ultimately are the most successful.”

– Fred Wilson (American Venture Capitalist)

It is evident that for the provisions of data protection, the GDPR sets a really high benchmark as compared to the Indian laws. With the penalty for non-compliance involving very high fines, it’s of paramount importance that the Indian organizations become GDPR compliant, or else the country will fail to qualify as a data secure destination, prompting diversion of business opportunities to other safer locations. Following on the footsteps of the GDPR and the pressing void in data regulations for the present times, the country hopes to change its domestic regulations too, with the Personal Data Protection Bill, which would require the Indian organizations to maintain the highest standards of data and privacy protection.

India’s IT outsourcing industry, worth about $146 Billion, is one of the biggest factors cementing the country’s reputation as a technological hub. Indian organizations, from BPOs, KPOs and ITOs are undertaking key operational tasks of both MNCs and smaller enterprises managing in-house processes at a fraction of the cost of establishment, underlying the importance of GDPR compliance for sustainability and future growth.

Given how well-integrated they are with the global business landscape, Indian IT companies that align themselves with the changing dynamics of personal data management through cutting-edge data analytics, can ensure that they are in a stronger strategic position to drive continued growth – for themselves, and for the larger IT services ecosystem in India.\textsuperscript{2817}


ABSTRACT:
"Serve the heart of justice with the brain of technology"

Technology is driving a new revolution in all spheres of human life. Richard, in his book ‘Online courts and the future of the courts’ articulates that the technology will bring about an engrossing decade of legal sector and transform our traditional conservative courts. It has brought various changes in our way of working and living and such changes indubitably have an adverse effect on the administration of justice since judiciary is a vital part of the world. Technology modernizes the judicial system resulting in an enhanced efficiency and equitability. This paper investigates the role of brave new technology in upgrading the Indian courts. Our paper commences with the role, working and the present pace of technology in the Indian legal system. Then the uses and impact of various software programmes, stylometric techniques and Information Technology are explained. Further, the authors, herein discuss the existing technologies in the International courts and Indian courts. The paper is concluded with the scope of emerging technologies such as Big Data, Artificial Intelligence, Machine learning and Blockchain in transforming the Indian courts into e-courts.

Key words: Indian courts, Information Technology, Big Data, Artificial Intelligence, Machine Learning, Blockchain.

INTRODUCTION:
The Indian courts desperately need to find conclusions to the loads of unsolved cases which are pending after numerous episodes of trials. As per the National Judicial Data Grid (NJDG), nearly 3,23,21,676 civil and criminal cases are in pendency. The role of technology is that it streamlines the judicial process and paves the way for an efficient speedy disposal of cases at reasonable costs to clear up backlogs. It provides trouble-free access to information and justice resulting in an enhanced transparency, accountability and credibility of adjudication. It will bridge the glaring justice gap if optimum utilisation of the resources are ensured. Other than Allahabad High court, none of the 24 High courts have utilised more than 50% of the funds allocated for the technological infrastructure which shows that e-Court project in India is moving at a snail's pace.

THE BRAVE NEW WORLD OF TECHNOLOGY:
The progression in upgrading the courts mainly depends on the utilisation of software technologies that promotes a sound judicial system. Technology has brought revolutionary innovations in the field of law such as the remarkable stylometric techniques for identifying deceptive statements, infrared cameras for optical tracking (Pupil Center Corneal Reflection), spectrogram, voice prints and forensic voice analysis for speech detection and speaker identification, 3D scanning technology in Crime Scene Investigation (CSI) etc.,

Use of Software programmes:
The computerization of courts promotes the court management system which includes case management, file management, document management, docket management etc. As of 2020, there are
various court management software programmes such as
JISPRO, a part of Integrated Justice Information System (IJIS) for administrative hearings,
INCODE for automation and advanced communication between defendant and court personnel,
WINJURIS for tracking court records, document imaging,
MAYORS COURT for tracking payments, probation, bonds etc.,
CMS360 for collections, jury and docket management,
JUSTICE ALIGN and BENCHMARK for e-filing of cases
ECR (Electronic Court Records) and EDMS (Electronic Data Management Systems) for document management etc.

In criminal cases, GPS, cell site and geo location data are helpful in detecting the defendant’s as well as witness’ presence at the time of the offence.

TECHNOLOGIES IN COURTS OF DEVELOPED NATIONS:
The United States federal judiciary is extensively using Artificial Intelligence and Blockchain technology. The developed nations like US and Canada have already deployed AI to assist judges in granting parole and bail. Estonia is developing its legal framework by investing in the field of AI and progressively creating the E-law system through Blockchain technology. Machine learning has predicted the violation of 9 articles of the European Convention of Human Rights with 75% accuracy which shows how extensively machine learning is used in the European legal sectors.

INFORMATION TECHNOLOGY IN INDIAN COURTS:
India has also adequately deployed the Information Technology software programmes such as NICNET, COURTIS etc., in its judicial system. The Information Technology plays a pivotal role in modernizing the judicial system. The incorporation of IT helps the judiciary in clearing up the issue of pendency and in improving the efficacy of the courts while ensuring security. The National Informatics Centre (NIC), a primary constructor of E-Government applications was established under the Ministry of Electronics and Information Technology. It has streamlined and simplified the registry functions of the court and has provided easy access to information.

The following are the various software applications that have been introduced by NIC.
NICNET:
NICNET is a satellite based national informatics network which provides computerization. It is a two-way data communication infrastructure that helps in decision making.
COURTIS:
COURT Information System plays a prominent role in providing informatics service. This integrates the judicial, administrative and miscellaneous functions of the courts. It coordinates the District Court computerization and interconnects the Supreme Court and High Courts.
LOBIS (List of Business Information System):
LOBIS is the backbone application of the court that schedules day to day cases and enlists fresh, pending and disposed cases in
a chronological order eliminating irregularity.

COURTNIC:

COURTNIC is an information system that has been used since 1993. COURTNIC provides status information on the pending cases on the Apex court. It answers about 200 queries of the litigants and advocates regarding the pending cases information at nominal charges. Case status site provides the latest status of the case, daily orders which are available after they are duly signed by the court, court judgement, cause lists, court websites etc.,

JUDIS (Judgement Information System):

JUDIS is a comprehensive online case law library which helps in finding the precedents and case citations since it consists of the complete text of all judgements of the Supreme Court and several High Courts.

IVRS (Interactive Voice Response System):

IVRS provides case status through telephone at free of charge.

SCOPE FOR EMERGING DOMAINS OF SCIENCE:

The Indian judiciary is still sticking to the conservative legal systems which is the main cause for weakness of the judicial wing. The sustainability of Indian courts depends on the successful implementation of potential technological advancements which will certainly strengthen the Indian judiciary and will help in overcoming the hurdles involved in decision making. We authors, have discussed the indispensable role of the modern technologies such as Big Data, Artificial Intelligence, Machine learning and Blockchain in upgrading the Indian judiciary.

BIG DATA:

Big Data is the aggregation of a voluminous and a variety of data. Big Data technology aims in extracting, analysing and processing the information which the traditional data processing software finds difficult to deal with. This technology speeds up the court process since a tremendous amount of data are analysed instantly. Usage of algorithms help to predict the conclusion of new cases by analysing similar cases trialed at the same jurisdiction. The public data collected and analysed by this software can be conceded as evidence.

LexisNexis, the largest search database, provides electronic accessibility to legal and journalistic documents from more than 60,000 legal sources.

Westlaw includes more than 40,000 databases of case laws, law reviews, statutes, administrative codes etc.,

Juristat, a Big Data start-up, optimises the litigation strategies providing actionable analytics to law firms.

The handling of big data is very complex. Some of the challenges faced in the implementation include security breaches, inadequate data protection laws etc., There are many cloud based services for data security and many more innovations of IT that are yet to come. Thus, the role of Big Data analytics in this digital era and its potential to transform judicial administration cannot be ignored.

ARTIFICIAL INTELLIGENCE:

Artificial intelligence or machine intelligence, an emerging domain of science refers to the demonstration of intelligence by machines in contrast to human intelligence. It also refers to machines that reflects the cognitive
functions of human mind such as learning and problem solving. The unique feature of AI is the unbiased decision making. AI assists the judges in determining the appropriate sentence and in granting parole and bail. AI powered machines can identify and solve the problem with best precision and calculate the probability of success. AI systems improve their performance through learning from human - like experience.

AI enables the legal professionals to carry out the due diligence process i.e., confirming the facts and figures and evaluating the decisions to guide their clients effectively. AI tools such as Kira systems, Leverton, LawGeex, e-bravia, Contract Intelligence (COIN) etc. are used for quick contract review. Wevorce is a web based mediation technology for amicable online divorce. AI helps in generating electronic bills for the working hours of lawyers. It is capable of predicting the outcomes of legal proceedings with 86.6 % accuracy.

"AI will not replace lawyers but lawyers who use AI will replace those who don’t".

AI which ensures authenticity and accuracy will certainly make the professionals more productive and efficient and will bridge the justice gap for a sustainable justice delivery system.

MACHINE LEARNING:
Machine learning, an application of Artificial Intelligence is the study of computer algorithms that access data and can improve its efficiency through its own experience. The prime objective of machine learning is to come up with accurate, faster and cost efficient decisions and predictions. Natural Language Processing (NLP), a field of Machine Learning predicts the future judicial decisions by analysing and manipulating the texts of the legal proceedings and such predictions help in identifying the important factors of judicial decision making. Machine learning algorithms help in assessing the extra-legal bias influencing the decision making as the biased decision of a single landmark case can overturn decades of decisions. The algorithms speed up the anomaly detection process by determining the patterns of behaviour and identifying the behavioural breaches. It alerts the judges based on the historical statistical data and helps in de-biasing the law. Machine learning is also capable of rendering verdict and evaluating the effect of decisions. The risks involved in implementing machine learning can be rectified once the working of algorithms with its well defined rules are well understood by the decision makers.

Machine learning is where the fairness of law lies. Therefore, Indian Courts should pay a conscious attention to it.

BLOCKCHAIN:
Blockchain, a revolutionary technology is a decentralised public transactional ledger. It provides a completely digitalized courtroom infrastructure through an electronic approach to legal proceedings. Blockchain technology can be used in cyber security because of its decentralised nature and cryptographic algorithm. The same makes it hard to hack. It can even provide supportive evidence for cybercrimes. It integrates hyper connected networks while ensuring reliability and accountability. It protects the digital expressions of evidence by cryptographically sealing it and hence enhancing providence and authenticity. Sec 164 of CrPC demands the high bar admissibility of electronic evidences and Blockchain with the guarantee of data security helps in proper documentation of the chain of custody without breaching privacies. E-bundles, a block chain supporting digital system enables the
litigants to access the data without concern for security. Block chain is capable of creating smart legal contracts and automates the legal operations. The significant role of Blockchain in Intellectual Property Rights is that it reduces the approval time of patents and trademarks. The rise of Blockchain technology is inevitable as it has become one of the go-to tech tools of today due to the transparency and accountability it offers. Embracing it will transform the legal sector.

CONCLUSION:
In this digital era, it is imperative that the courts adapt to the innovative technologies. Though there are challenges in the implementation, the benefits that can be reaped from these technologies can't be denied. It is possible to overcome these challenges by confidently pursuing further innovations and enacting appropriate laws. Just because a technology is available, it does not mean that it will replace the traditional legal system. A proper implementation with appropriate laws will promote the advancement of courts. The online dispute resolution will certainly bridge the justice gap and enhance the principles of law i.e., Equity, Justice and Good conscience.

REFERENCES:
Artificial Intelligence - Artificial Intelligence for Sustainable and Effective Justice Delivery in India, Parth Jian, Punjab University.
Information Technology in Indian courts - http://indiancourts.nic.in/courts/itintjud.htm

*****
COMPLICATIONS WITH RELATION TO PROCEDURE OF SFIO AND THE PROSECUTION AND CRITICAL ANALYSIS OF BAIL PROVISIONS UNDER THE COMPANIES ACT, 2013

By Vanya Agarwal
From University of Petroleum and Energy Studies

Introduction
The Companies Act, 1956 had certain provisions criminalizing fraud. However, such offences were mainly compoundable. Under the garb of the corporate veil, public fraud was being committed on a large scale, for example, the Satyam scam and the Saradha scam. With the increasing cases of fraud, there was a need of criminalization under The Companies Act. Thereby, fraud was severely criminalized under The Companies Act, 2013 (hereinafter as the Act). Serious Fraud Investigation Office (hereinafter as SFIO) though introduced in The Companies Act, 1956, in 2003, was ineffective as there were no provisions which gave it any powers. Subsequently, the role of SFIO was increased and was given immense power under the Act. The effect of introducing fraud and vigorous criminalization under the Act has fed terror into the minds of businessmen. It not only affects the criminals involved in fraud but also terrorizes the innocent businessmen who are legally carrying out their business. For example, a person who is being investigated by SFIO can be arrested at any time and go without bail for the entire course of the trial by virtue of Section 212(6) of the Act. Even if he or she is acquitted, his Right to life and liberty is affected immensely during the course of the trial. Living under such fear is also a violation of the Right to life and dignity guaranteed under Article 21 of the Constitution. This, in turn, has affected the economy of the country as the businessmen are fearful of involving themselves in any kind of business. While corporate frauds need to be dealt with stringently, there is also a need to protect the interest of those who may have been wrongly accused.

This study deals with the complications in procedures pertaining to SFIO and the prosecution of the Special Courts under the Act. It further deals with the critical analysis of the constitutionality of Section 212(6) of the Act.

Research Methodology
The study is doctrinal in nature. The relevant material is collected from primary and secondary sources like various statutes and other sources like published works, law journals, national journals and websites on relevant topics.

History of Fraud and SFIO under the Act
The Companies Act was introduced in India in 1956 to consolidate and amend the law with regards to various companies and similar associations. There were many changes in the economic environment, due to the increasing globalization, competition and public frauds, which led to the introduction of the 2013 Act. The Expert Committee, headed by Justice J.J. Irani was incorporated in 2005 to send recommendations to the Parliament for the changes to be made under The Companies Act, 2013. One of the main objectives of

---

this act was to introduce and incorporate stringent punishment for serious fraud.\textsuperscript{2819} Another Committee, headed by Shri Vepa Kamesan, was incorporated in relation to SFIO in 2009. Corporate fraud was defined for the first time under the Act under Section 447. This was incorporated from The Fraud Act, 2006 in the United Kingdom, which lays down clear definitions for Fraud and proper liability for the offences contained therein.\textsuperscript{2820} Although, only parts of this act were incorporated in the Act, thereby making some provisions ambiguous and discriminatory.

Furthermore, SFIO was given immense powers under The Companies Amendment Act, 2015, under Section 212, including making the crimes investigated by SFIO to be cognizable and non-bailable. The Companies Law Committee, headed by Shri Tapan Ray, submitted its report on February 1, 2016. One of the main purpose of this committee was to promote the ease of doing business in India and to overcome the issues in the implementation of The Companies Act, 2013.\textsuperscript{2821}

Further, a Committee headed by Shri Injeti Srinivas was incorporated vide an order dated July 13, 2018 by the Ministry of Corporate Affairs. The main objective of the Committee was to give recommendations for the decriminalization of certain provisions under the Act. It did the same by “re-categorizing certain ‘acts’ punishable as compoundable offences to ‘acts’ which have civil liabilities.”\textsuperscript{2822} This led to re-categorization of 16 offences out of 81 as civil wrongs through The Companies (Amendment) Act, 2019. The MCA, vide an order dated September 18, 2019, has constituted a committee to further promote “ease of doing business to law abiding corporates”\textsuperscript{2823}, and “also to address emerging issues having impact on the working of corporates in the country”\textsuperscript{2824}.

**Need for decriminalization under the Act**

The Companies Act was formed to regulate and ease the carrying out of business in India. However, with various amendments, severe criminalization has been incorporated in the Act. While the same is necessary to tackle the cases of serious fraud, but practically, it is creating fear in the minds of businessmen, employees and people who carry out business with various companies.

Moreover, with the increase in criminalization under the Act, the burden on National Company Law Tribunal (hereinafter as NCLT) and the Special Courts incorporated under the Act has increased considerably. Another point of consideration is the global practice, where white collar crimes are

---

\textsuperscript{2819} Id. at 130.
\textsuperscript{2824} Id. at 1.
mainly compoundable, in contrast to Indian laws, where there is a high degree of criminalization.2825

As per the World Bank, India ranks 63rd among 190 countries on the indicator of ‘doing business’, previously ‘ease of doing business’.2826 Being the fifth largest economy in the world,2827 the ranking of the country’s on the ease of doing business indicator is comparatively quite low. By improving this rank of the ease of doing business, India can cope with the slowing economy.

The Parliament has also discussed this topic. As quoted by Mr. Arun Jaitley, “With some of these provisions, doing business in India would become extremely difficult.”2828 He further stated, “So, if somebody is arrested and he belongs to a company, a terrorist can get bail but he should never get bail.”2829 This means that a businessman is being kept in the same category as a terrorist by virtue of Section 212(6) of the Act. This is because there were similar provisions of bail under Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter as TADA) which have now been repealed. The entire act of Prevention of Terrorism Act, 2002 (hereinafter as POTA) and TADA were struck down because they were being exceedingly misused by the State. The Law Commission in its report stated “However, mere classification of an act as an act of terrorism should not result in the automatic denial of bail or reversal of the burden of proof. Denial of bail should not be used as a potential tool of manipulation to legitimizing actions of the State.”2830 While this legislation was repealed in TADA which deals with severely serious offences, the Act is merely a civil law. Inversion of guilt under Section 212(6) should not be allowed. Therefore, there is the need for various amendments in the Act.

Issues in procedure of investigation and prosecution under special courts of the Act

In SFIO vs Bhushan Steel Ltd.2831, a joint case for 287 accused was filed by SFIO. This not only included the main alleged culprits involved in the case, i.e. the management of the company, but various employees and Chartered Accountants. It also involved persons who were not even connected with the company through any contract as well by virtue of Section 120B of Indian Penal Code,1860 (hereinafter as IPC). This leads to various problems. The

2829 Id.
2831 SFIO v Bhushan Steel Ltd., CC No.720/2019, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Aug. 16, 2019).
first problem is that the trial shall not start unless all accused have appeared in person in the court or through their counsel. This may take years, given the high number of accused persons involved in the case. In such cases, the purpose of justice is defeated as there is a considerable delay in the completion of the trial. The second problem arises in case a person is arrested after the summoning order, due to the applicability of Section 212(6) of the Act, he shall remain in judicial custody during the course of the trial, which may extend to many years. If a person who is a mere employee of the company, unaware of the fraudulent acts of the management, is arrested, may not be granted bail under the Act. This is a gross violation of the fundamental rights guaranteed under Article 21 of the Constitution of India. This similar situation can be seen in SFIO v Adarsh Buildestate Ltd. & others, where there were 187 parties involved. Even the employees have been arrested, whose involvement in the fraud may or may not be of significant importance. The result of such cases is that the employees become fearful of working in companies. This was taken even further in SFIO v Mohd. Iqbal and others, where people who are not even part of the company, or have any contract with the company, have been accused of Fraud under Section 447 of the Act read with Section 120B of IPC. The stringent twin conditions for bail under Section 212(6) of the Act are being applied on such persons as well.

Furthermore, the twin conditions under Section 212(6) should only apply if the accused is arrested during the course of the investigation, under Section 212(8) and 212(9). This section does not apply in cases where the charge-sheet was filed without arrest. The same was upheld by the Supreme Court in Arun Sharma vs. Union of India and Ors., where similar provisions under Section 45 of PMLA are applicable. The Court held that under PMLA, if a person was not arrested during investigation, nor produced in custody under Section 170 of the Criminal Procedure Code, if such person appears to the court voluntarily after issuance of summons or warrant in a PMLA Complaint, such person should not be arrested. It further held that Section 45(1)(ii) of PMLA has no application wherein the person was not arrested under Section 19 of PMLA. However, in case of Special Courts under the Act, the conditions under Section 212(6) are being applied even in cases where the charge-sheet had been filed without arrest.

The validity of Section 212 is presently challenged in the Supreme Court in many cases as well. Companies act is a civil law and not a criminal law. Therefore, before a person is accused of a crime under this law, he or she should be issued a notice and given a chance of personal hearing before the SFIO. If a charge-sheet is filed against a person without such compliances by SFIO, the accused in most cases, is not granted bail under Section 212(6) of the Act. This is a gross violation of the fundamental rights guaranteed under Article 21 of the Constitution of India. Similar situations can be seen in SFIO v Mohd. Iqbal & Others, CC No. 720/17, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Jan. 24, 2019).

2832 SFIO v Adarsh Build Estate Ltd. & others, CC No. 3 of 18.05.2019, E-COURT SERVICES, Special Judge (Companies Act), Gurgaon (Order Dt. June 3, 2019).
2833 SFIO v Mohd. Iqbal & Others, CC No. 720/17, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Jan. 24, 2019).
2835 Id.
2836 Id.
2837 SFIO v Mohd. Iqbal & Others, CC No. 720/17, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Jan. 24, 2019).
aware as to why such charges have been filed against him. Even his business and reputation is greatly affected. The Right to Reputation is an integral part of Right to Life under Article 21 of the Constitution. This has also been re-iterated in by CJI Deepak Misra in S. Nambi Narayanan’s case.\textsuperscript{2839} Such non-compliance affects the Right to Life and dignity of a person. Presently, charge-sheets are being filed against persons, without issuing any notice or taking any statements from such persons. In case of SFIO vs Mohd. Iqbal and others\textsuperscript{2840}, charge-sheet has been filed against dead persons as well. If notice and personal hearing had been made mandatory, such an error would not have been committed.

The enquiry report submitted by SFIO under Section 212 of the Act is sanctioned by the Central Government in a mechanical manner. In N. Sampath Ganesh vs. Union of India\textsuperscript{2841}, the petitioner submitted that the report was submitted on 28\textsuperscript{th} May 2019 and on 29\textsuperscript{th} May, 2019 sanction order was issued. The next day, prosecution was lodged under Section 447 of the Act. The report which ran into 32,000 pages was approved in just one day. This shows the non-application of mind in issuing sanction of the report. In State of Bihar v. P.P.Sharma\textsuperscript{2842}, it was held that-

“The order of sanction is only an administrative act and not a quasi-judicial one nor is a lis involved. Therefore, the order of sanction need not contain detailed reasons in support thereof. But the basic facts that constitute the offence must be apparent on the impugned order and the record must give the reasons in that regard.”

It leads to discrepancies in the SFIO report being approved. Therefore, there is a need to constitute a Judicial Committee which oversees the report before sanctioning it. The Committee should pass a speaking order for each accused, which shows application of mind. In other cases\textsuperscript{2843} as well, even reports exceeding 70,000 pages is approved in a mechanical way without any application of mind. Thereby, a clarification should be made under Section 212(14) where legal advice should be taken from a Judicial Committee incorporated for the same.

In the present situation, there is no time bar as to how further in the past can SFIO conduct its investigation. There is a need to implement a reasonable time bar in Section 212 of the Act regarding the same. It was held in State of Punjab and Ors. vs. Bhatinda District Coop. Milk P. Union Ltd., that,

“It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.”\textsuperscript{2844}

\textsuperscript{2840} SFIO vs Mohd. Iqbal & Others, Reg. No. CC/720/2017, E-COURT SERVICES, Special Judge(Companies Act), Dwarka District Court, New Delhi (Order Dt. June 4, 2019).
\textsuperscript{2841} N. Sampath Ganesh v. Union of India, (2019) SCC Online Bom 1887.
\textsuperscript{2843} SFIO v Mohd. Iqbal & Others, CC No. 720/17, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Jan. 24, 2019).
Section 447 has been inserted in the Schedule of PMLA by act 13 of 2018 (w.e.f 19-04-2018). As per Section 5 of the PMLA, an order of attachment can be made in relation to scheduled offences. The same power is with SFIO as well under Section 212(14A). The Companies (Amendment) Act, 2019 has included Section 212 (14A) which gives power of disgorgement of property acquired through unfair means to the SFIO. In such case, double jeopardy is being imposed on the accused. He or she is being harassed by both SFIO and Directorate of Enforcement (hereinafter as ED). Therefore, there should be a provision that if a person’s property is being attached by SFIO or ED, the same should not be allowed to do so by the other authority.

Comparative analysis of Section 212(6) of the Act and Section 45 of PMLA

Section 212 of the Act empowers the SFIO to investigate into fraud matters involving the companies. Section 212(6) of the Act imposes twin conditions on bail, i.e. bail shall only be granted wherein the following two conditions are met- “(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.” This creates stringent conditions on grant of bail wherein an offence is being investigated by the SFIO.

There is a stark similarity between Section 212(6) of the Act and Section 45 of PMLA. Section 45 of PMLA also imposes stringent conditions for the grant of bail. These twin conditions were struck down by in Nikesh Tarachand Shah vs Union of India and Ors. 2845. The main issue in this case was whether Section 45 of PMLA is violative of Article 14 and 21 of the Constitution. The judgement reads as follows-

“We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest in tackling serious crime. Absent such compelling State interest, indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution.”

In case of Section 447 of the Act, it creates a distinction between Fraud committed on a large scale and Fraud committed at a smaller scale. However, Section 212(6) is applicable regardless of the severity of the alleged fraud committed. Thereby, a person whose involvement in the allegedly committed fraud is a lot smaller is treated as the same as those who are the main culprits involved in the case. Furthermore, an offence under PMLA is much more serious as compared to the Act. PMLA is criminal in nature whereas Company Law is civil in nature. Therefore, having such provisions may be justified to some extent under PMLA, but it is not justified under the Act.

Reasons for unconstitutionality of Section 212(6) of the Act

---

1. **Section 212(6) of the Act is violative of Article 14 of the constitution.**
   It is necessary for any legislation to pass the test of reasonable classification, in order for that legislation to be valid. There can be three ways Section 212(6) can be interpreted. In Ankush Kumar’s case, where the court had to grant a bail order under Section 37 of the NDPS Act, which is similarly worded as Section 212(6) of the Act, the court held the following three tests:
   a. “Prima facie satisfaction” - The court only needs to prima facie satisfy itself that the accused is not guilty of the crime.
   b. “More than prima facie satisfaction but satisfaction less than the satisfaction required for recording of not guilty.
   c. Full satisfaction as to the existence of reasonable grounds to believe that the accused is not guilty”, i.e. the literal interpretation of the Act.

This creates a discriminatory application of Section 212(6), since the court can satisfy itself in any one of the above mentioned ways. For e.g. if a court prima facie satisfies itself, it might lead to the bail application being granted. On the other hand if the court applies the second test, a mere prima facie satisfaction is not sufficient. This is creating a distinction between two accused persons who have allegedly committed similar crimes to be tried in a different manner. Thereby, creating a discrimination between the two without any reasonable classification.

2. **Section 212(6) of the Act is violative of Article 21 of the constitution.**
   As per the landmark judgement of Maneka Gandhi vs Union of India, if a law regulates the life and liberty of a person which is guaranteed under Article 21 of the Constitution, it has to be just and reasonable both procedurally and substantially. Further, the full bench in R.C. Cooper Vs. Union of India held that,

   "it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's right.”

   While the object of Section 212(6) may be to meet the ends of justice and not have anyone interfere with the investigations, the effect of the same is depriving persons allegedly accused as criminals their Right to Life under Article 21 of the Indian Constitution. In Shayara Bano Vs. Union of India, manifest arbitrariness was defined as “something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.”

   Every person has the right to be presumed as innocent until proven guilty under the

---

2847 Id.
2848 Id.
criminal jurisprudence.\textsuperscript{2852} The second condition under Section 212(6) inverts this presumption of innocence. In the scenario where the bail application is opposed by the Public Prosecutor, the court can only grant bail if it believes that the accused is prima facie not guilty and won’t commit any crimes when on bail. If the court is satisfied that the accused is not guilty, then the court will have to discharge the accused. The decision of guilt of accused can only be established at the completion of the trial. It is excessive for the court to be able to judge whether a person would not commit any crimes when on bail. Furthermore, to judge a person as guilty or innocent before completion of the trial is manifestly arbitrary in nature.

3. Anticipatory bail can be granted but normal bail is confined by the restrictions under Section 212(6) of the Act.

One of the peculiarity conferred by Section 212(6) of the Act is that these provisions only apply with regards to normal bail. If a person files an application for anticipatory bail, the same can be granted under section 438 of CrPC without applying the extreme conditions of bail as per the Act. This is because the Act does not restrict the grant of anticipatory bail under any of its provisions. This creates an anomalous situation. For example, there are two persons accused of Fraud under Section 447 of the Act, whose investigation has been undertaken by SFIO. One of the accused was arrested during the investigation as some incriminating documents were found at his residence. Since the twin conditions imposed under Section 212(6) of the Act would apply, the accused would be unable to secure bail. On the other hand, the co-accused filed for an anticipatory bail. The court will most likely grant him anticipatory bail as the normal bail conditions would apply in his case. Taking this example further, similar incriminating documents were found at the residence of the co-accused. In this case, this co-accused could still continue to be on bail and the former could still be in jail. This discrimination between two accused who have committed similar offences renders it manifestly arbitrary.

Way Forward

The following recommendations are suggested in response to the above stated problems:

1. Section 212(6) should be amended or removed. If applicability is considered necessary, then only to those who have directly committed fraud against the public at large or in cases of bank fraud.

2. If Section 212(6) is not removed, it should only be applicable to bail applications where the arrest was made during the investigation by SFIO. It should not be made applicable to cases where the charge-sheet was filed without arrest, but the accused was arrested during the trial.

3. The issuance of notice and personal hearing should be made mandatory before issuing a charge-sheet against any person.

4. A Judicial Committee should be constituted by the Central Government to verify the contents of the enquiry report submitted by SFIO, under Section 212(14) of the Act. Application of judicial mind should be made mandatory during the verification and prior approval of the prosecution by the Committee.

5. There should be a limit on the number of persons or companies who can be tried jointly, to ensure speedy justice and

compliance with principles of natural justice.

6. The filing of complaint by the Director of SFIO under Section 447 should be made mandatory.

7. There should be a limitation on the time as to how far in the past can the SFIO implement its investigation.

8. Where the basis of charge-sheet is conspiracy under Section 120-B of IPC read with Section 447 of the Act, the bail under such offence should be dealt under Section 437 of Criminal Procedure Code, and not under Section 212(6) of the Act. Further, conclusive proof must be made mandatory before applying Section 447 r/w Section 120B of IPC. Otherwise, Section 420 of IPC should be applied rather than Section 447 of the Act.

9. Since SFIO, under Section 212(14A) has been granted the power of disgorgement of property which has been acquired through fraud, the same should not be permitted by PMLA on the basis of the report of SFIO.

10. Only such persons should be made accused under Section 447 of the Act, against whom exists a concrete proof of fraud. The entire personnel of the company should not be charged merely because they are a part of the company.

Conclusion

Therefore, the Act, though accommodating of present circumstances, still has several lacunas relating to certain procedures which need to be filled adequately. The power given to SFIO needs to be controlled and not be arbitrary or unbridled. There is a further need to re-categorise certain low-grade offences as compoundable as they are white collar crimes. However, given the serious nature of economic offences like fraud, those who are convicted of such crimes need to be dealt with harshly. This is not to say that those who are merely accused of offences under the Act need to be treated as harshly.

The government needs to be mindful of the impact of the legislation on the businessmen while incorporating new provisions or amendments to the existing provisions. There is a need for careful consideration to be made by the administrative authorities while accusing people of offences under the Act. There are some provisions under the Act that are in violation of the principles of natural justice. Provisions like Section 212(6) should be amended or struck down as being violative of Part III of the Constitution. A huge impact on the economy of the country can be created by proper implementation of the Act and the various provisions pertaining to company law.

References


18. SFIO v Adarsh Build Estate Ltd. & others, CC No. 3 of 18.05.2019, E-COURT SERVICES, Special Judge (Companies Act), Gurgaon (Order Dt. June 3, 2019).
19. SFIO v Bhushan Steel Ltd., CC No.720/2019, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Aug. 16, 2019).
20. SFIO v Mobd. Iqbal & Others, CC No.720/17, E-COURT SERVICES, Special Judge (Companies Act), Dwarka District Court, New Delhi (Order Dt. Jan. 24, 2019).

*****
TIMES OF LOCKDOWN OR TIMES OF OPPORTUNITY?

By Y. Keerthana Reddy
From Amity Law School, Noida

ABSTRACT
Corona – The biggest calamity that the world has faced so far which is shaking the world down. Be it the economy or even education sector for that matter, our lives have changed pretty much because of this pandemic. COVID – 19 has clearly thrown education around the world in a loop. Harvard, MIT, IIT you name it. All of them are shut at the cost of our lives. There is panic all around and both students and educators are confused as the virus is growing expeditiously. There are students caught in crossfire and the entire education system is disrupted. More than 1.3 billion of students in India and all over the world are at home fighting the pandemic by social distancing. The closure of educational institutions has an impact economically and societally too. Virtual classrooms and all the required measures have been taken by the Governments as well as the to make sure the student is benefitted. Students can actively participate in various events being conducted online and utilize this time to develop skills and think innovatively with an optimistic thought that this storm of the pandemic will pass real soon. All the institutions around the world are coming up with various ideas to continue their lessons online. As distance learning is the one and only method by which education can sustain in the present scenario, this can open new doors of opportunities for the future. Lessons are being taught but the exams are all at halt for now. Few have cancelled the exams and promoted the students but the situation of the children appearing for board exams and entrance exams are the one in fear. One can also think of distance learning to be an opportunity for children and their parents to bond better in the process of learning. The pandemic is giving tech massive insights as to what learning would really look like, allowing it to potentially shift from content dissemination to augmenting relationships. But things changing overnight, with no training and often not enough bandwidth will leave many with a sour taste about the whole new change. Highly developed nations like China can continue with the e-learning but there are so many underdeveloped countries which do not have the necessary resources like electronic gadgets and the necessary bandwidth. Such countries will have to gain the momentum and ensure that there is no loss to their children. UNESCO is supporting such countries to mitigate the immediate impact of school closures and facilitate remote learning. This pandemic is widening the scope and growth of the digital world. Speaking of ‘Digital Literacy’ How should we look at it? As a pro or a con? How long can education continue through a zoom app or video conferencing? Can the practical aspect of what is being taught to the kids be achieved? Can anything be done about the board and entrance exams? Will this pandemic result in a new educational revolution in India and throughout the world? Is there a bonding scenario between children and their parents or are their conflicts because of an increased screen time?

Keywords: Covid-19, pandemic, education sector, virtual classrooms, distance learning, educational revolution, online.
“Education is a better safeguard of liberty than a standing army.”

-Edward Everett

This raging pandemic has undoubtedly created a panic scene globally. Every sector has been adversely affected but this being at the cost of our health and lives, it really leaves us with no option. The economy has crashed down but so did the education sector. All the schools and other educational institutions are all shut, students are all stranded at home. Children have been deprived of physical activity and almost a zero contact with their friends. All the educational institutions are making sure and trying every possible way to ensure that the students do not suffer any losses. Digital learning. This is adapted by every school to continue the process of learning. This measure has been taken as of now, but can this really be an alternative to the classroom learning? Distance learning costs the practical aspect of education which cannot be achieved by an online mode.

Major education problems faced:
1. Students caught in the crossfire: There are many students giving their boards year which have all been postponed until further students. There are other students who are awaiting their results to get admission into colleges. The colleges have paused the admission process. This leaves students worried and causes panic in concern for their future. The other set of students who are affected mainly are the students graduating this year. They would be entering a new phase of their lives and are clueless now as not only them but so many others do not know what and when the next step in their life would be.
2. Education-disruption: Not only these set of students are affected but students are troubled because of the change in the pattern of lectures. Children are expected to cope with the tension and panic created in the society out there as well as cop with the new system of education. This imposing on them will create tension and parents must make sure that the student is relieved.
3. Distance learning reinforces the teaching and learning approaches which might not work well and might not cater to the needs of the students learning process.
4. It is a challenging task for the teachers as well as asking them to adapt to this method of teaching is something even, they are new to.
5. This crisis that we are all currently in is definitely posing a lot of challenges such as low internet connectivity connections or the bandwidth and for that matter not possessing an electronic gadget but at the same time will help us come together and cross boundaries.

Distance learning is not only a massive shock to parents’ productivity but also a threat to the children’s social life and learning. This short-term issue has a lot of uncertainty as moving the lectures and assessments online overnight poses as a challenge to the educators.

As a part of conducting research Carlsson studied a group of men in Sweden had different number of days each to prepare for a test. From this, it was analysed that even ten days of extra schooling resulted in

---

a significant rise in their test scores. This is known as crystallised intelligence. Aspect of families: A family plays a crucial role in one’s life, especially in a student’s life. As described by Bjorklund and Salvanes (2011), a family is key and central to education and aid in providing input into the student. But, according to Oreopoulos, in some cases this might not be achieved pertaining to the various differences like the amount of time a parent can devote to the learning of the child as the parents themselves could be working. Some may not be accessible to the various resources that are available online and the amount of knowledge the parent has. This is an important fact to consider as how can a parent explain something to his child if he himself cannot understand that topic or has no knowledge about the same. This entire episode might lead to an increase in the inequality of human capital growth for the affected cohorts.

Assessment: Now not only are the lessons and teaching segments affected but also the assessment and the exam part. The key part of learning where the child is assessed is interrupted. Assessment helps the teachers and the parents analyse what the child has understood. Few institutions have cancelled the exams and are marking students based on the internal evaluation which to a certain level can be biased and can be inaccurate as said by Murphy and Wyness. Coming to the students graduating amidst the pandemic have faced a serious. The final lessons have been interrupted and students from the law background especially who would be exploring the practical aspect in the form of internships have been put on hold as well. The main concern of the online learning is how can this practical field be brought into online learning?

Cancelled events: Hundreds of competitions, events, conferences, etc. that have been planned and organised have all been put at hold too. Students who find organizing and taking part in such events are disappointed. This pandemic is anyway bringing out the innovative and creative side of a few. Students with the help of their teachers are thinking out of the box and arranging online conferences and online conferences as well. These serve as a great opportunity for students to conduct research on various topics and explore various options available on the online platform.

Impact on the students emotional and mental health: Due to the restricted movement globally, we are all restricted to our households. Children especially, who require physical activity have been are restricted to their rooms and the corridors at the most. This restricted movement physically has been proved to have a mental impact too. Many children might fall into depression, anxiety, and such other mental illness due to the restricted social life. It can be straining on them, emotionally too. To overcome this, one

---

should engage themselves in various activities which could include reading, gardening, helping the elder ones and innovative thinking.

COVID-19 redefining the conventional aspect of education: Due to the current situations, our entire outside world is digitalised and so is the education in the form of distance learning. This seems to be the only way to continue education while fighting against the invisible enemy out there. But it is expected that after these times of crisis, the entire educational revolution will undergo a massive change and chances are it can go form the conventional method of learning to the digital mode. Digital education would be integrated into the mainstream education. This will automatically lead to a manifold increase in the ed-tech companies as vernacular modules would be shot in the arm for digital education. Students are given access to audio-visual explanation of concepts, solved examples and e-books, interactive simulations which are catering to the educational needs of a student. The school fraternity can take this as an opportunity to make learning more fun and interesting by engaging them into various activities online which would be a major change from the conventional classroom mode of teaching.

Scope for public-private partnerships to bloom with importance: As a result of this on-going pandemic, there is a scope for the public-private partnerships too. The Chinese Government especially, has upgraded to a new suite of educational culture on the online platform. Emerging countries thus can tie up with the telecom network operators and fight the crisis.

Artificial intelligence: As the days are changing rapidly and with technological advancements being made rapidly, individual preferences are changing rapidly too. Unless and until such preferences are catered too, such things are disliked and not recommended further. This is the era of personalization and be it Netflix recommendations or Instagram ads, everything is demanded personal in these days of customization. Artificial Intelligence is a technology that empowers educators and the teaching staff to address and cater to the individual demands of the child. Some students are gifted with high grasping power, but the larger section falls with an average IQ who need a bit more care as compared to these students. Thus, AI would help equalising the learning ability by adapting to the individual student learning and grasping abilities. This would also aid in finding out the strengths and weaknesses of every child and provide extra assistance to the required students. The teaching staff would then be able to focus on developing the cognitive skills and understanding the needs of each student. Thus, technology which is already very much advanced is bringing about various changes in every aspect of life, especially in the education sector which builds the students personality, holistically. Block chain technology is another technology that focuses on course and skill development.

Changes in students: Due to the various lifestyle changes nowadays, children are vulnerable to various mental and emotional disorders such as depression and anxiety. To add to this, the pandemic could be a little more challenging for such individuals due to the pandemic and the panic caused all around. To overcome this and ensure the overall well-being of the child, the school fraternity is also including meditation and yoga classes as a part of the extra-curricular activities in the curriculum.
Challenges faced in distance learning:
The silver lining of the COVID-19 crisis in the educational sphere is that education does not have to be paused and can still be continued through the online platforms. There would be an extremely high usage of electronic gadgets, usage of power and internet in the process of distance learning or remote learning. It highly relies upon the ubiquitous net connections. This might be a far-fetched challenging thing for tier 2 and 3 towns. Distance learning also requires a lot of self-control as it is very easy to get distracted while using laptops and computers to not shift to a gaming app or social media. It is also difficult for a student to study using electronic gadgets as online mode is not conducive in nature and does not create the atmosphere for learning. Online learning is indeed not a substitute for field and practical knowledge. It can be said that it is highly impossible to achieve practical knowledge through an online mode. The field trips in school, the cultural programs and fests that take place on campus is something a student would be missing out on, which is considered to play a crucial role in the overall holistic development of a child. One of the ways to achieve this through the process of remote learning to make the sessions more interactive and personalized through customization which would indeed require a lot of inputs from the teaching staff and the institution management staff. The future as of now is uncertain and unclear. After various hit and trial methods that have been conducted to facilitate a smooth process of remote learning, few say that due to technical issues, online classes are not that helpful but as a long term change, the online content can replace the conventional text books as online content could be more descriptive and easy to grasp and understand. As per a survey conducted by Fairgaze, which is a reputed engagement ecosystems for the school fraternity, it has been noted that 89% agreed that the schools need to change the whole curriculum of the course and the way in which classes are being taken to improvise the way of learning further. 47% has also been agreed that the teachers and staff should adapt to the educational portals online replacing the textbooks.

Government on the new trend in education: As we say that students and the younger generation is the only hope for a brighter future, we need to ensure they are not being deprived of their education mainly. The Government indeed is passing rules and encouraging the process of learning and education through online platforms. According to surveys. Only 25% of the students have access to both electronic gadgets as well as the required bandwidth with connections. How will the rest of the students be accommodated in the concept of remote learning? The Government must do something about it and take necessary steps. The Government can contribute by donating a share of the funds towards this issue by providing basic electronic gadgets and minimal net connections. This way a larger sector of students will be able to attend online classes.

Will distance learning put an end for the road for brick and mortar schools?
This must strictly be a NO. We have discussed about how important the

---

practical aspect of education is. Mere teaching of lessons might not be as successful in achieving the aim as including the practical and field teaching in the curriculum too. Communication, collaboration, critical thinking, and analysis which are an important aspect in the upbringing of a student. The teaching staff must put in a lot of efforts as previously it was just ‘chalk and talk’ but now they must adapt to the flipped reality which is the digital mode of learning. The faculty heads are riddled with doubt as to how they can ensure that the standard of teaching does not drop. For this, the classes conducted by the teaching staff is recorded and reviewed by various schools and groups to see the quality and the method of teaching.

**Aspect of peer pressure:** Few parents choose to ‘home-school’ their kids for various reasons. The main reason being to safeguard their children from the peer pressure. Unhealthy peer pressure would result in an unhealthy thinking and unhealthy competition. Another reason is the fear of bullying. Bullying and ragging are various acts prevalent in school and the victims of it tend to develop an inferiority complex. This allows the child to blossom without any of these social troubles and the parental worries would also decrease. Due to the raging pandemic, distance learning has been adapted and every child is now home-schooled leaving no room for bullying and ragging to occur. Home-schooling indeed relies upon the online resources for counselling of students and career guidance.  

**Pandemic as an opportunity:** This pandemic that broke out in the world has begun to increase enormously causing many deaths across the globe. The only way to fight this pandemic and stay safe is by practicing ‘Social Distancing’. As we are confined to our homes, we can look at this time as an opportunity to think innovatively and do something productive. Excelling not only in the academic aspect but also doing well in extra-curricular activities is something that has always been given importance to. This time can also be devoted to quality conversations and discussions with family members that will lead to debates on various topics and there would be a growth in the child’s view and thinking. Reading is one such activity which is the base to any out of the box thinking.

**CONCLUSION**

“Resilience must be built into our educational systems.”

-Gloria Tam

This global lockdown and especially that of educational institutions that has caused an altogether disruption in education has to be recovered. Education is key to life and is something that we do not comprise no matter what. Something must be done to mitigate these negative impacts ensuring there is no academic loss to any student, globally. The educational institutions need to recover from the pandemic immediately. This is imposing in nature and a burden on them, but they are the temples of wisdom, right? Schools should particularly those set of students who could not cope with the
distance learning and take extra classes and lessons and assessed regularly so that they are at par with all the other students of their batch. The institutions must also make sure that the exams that have been cancelled and postponed shall be conducted to analyse how much the students could grasp. For the set of students graduating at these times, who are the most vulnerable ones, there should be special provisions ensuring there is no unemployment for the ones who deserve the job.

As per UNESCO, COVID-19 is going to shed light on the need for a new education model. The UNESCO general conference adopted a new global framework on Education for Sustainable Development (ESD) for the years 2020-2030. This new framework mainly focuses on the new challenges that the world would face after this crisis and also to strengthen the education system across the globe. ESD also aims at introducing unique subjects such as gender studies and environmental sustainability. Through such multi-dimensional approaches, the overall objective of academic concepts would be improvised and focus on a student’s overall critical thinking and problem-solving skills.

The rapid spread of this invisible enemy has established the importance of building resilience to face such threats ranging from extremist violence to climate insecurity to a pandemic disease or maybe even a rapid technological change. This pandemic must remind us of the skills that students and children need in this unpredictable world such as informed decision making, creative problem solving, out of the box thinking

but above all, the skill of adaptability. The ability to be able to understand and adjust to various situations and circumstances is very important for a peaceful survival and growth of a being. To ensure all of this, resilience must be inculcated into our educational systems as well.

****

JURISDICTION OF LAW OF TORTS IN INDIA

By Yash Jain, Aman Monga and Tanishka Valecha
From Amity Law School, Noida

ABSTRACT

Under this paper the future jurisdiction of law of torts in India is discussed, starting from the introduction of law of torts and basics of law of torts, difference between law of tort and law of torts, discussing theories like pigeon hole theory, and some maxims like jus ubi remedium and case laws like Ashby Vs White & Rylands Vs Fletcher. Then talking about the history of law of torts evolved from the past followed by foreign torts (international scenario) and law of torts practiced in India (national scenario), all the setbacks, limitations, loopholes were thoroughly studied and also examined the reasons of slow development of law of torts India, which were uncertainty of law, illiteracy, poverty, expensive and dilatory legal system. Also theory of economic analysis was studied further, so as to understand the proper working of the authorities in India for future aspects.

INTRODUCTION

The Torts Act provides monetary compensation for injuries to a person and property that can be recovered through the due process of law. With the concept of security, it is associated with the risk of wrongful action and demonstrates varying degrees of evaluation for some type of harm call for liability independent of one's fault, while other types are intentional or reckless wrongdoing. Typically, it seeks to transfer the loss from the 'victim' to the person who caused it, but at times, it appears to be a liability to a third party, such as social insurance for wrongdoing, and the inevitable events of modern social life, such as accidents on roads and industrial establishments.

Tort is different from crime because it can be solved by way of compensation and not by punishment or fines, the same mistake can be a torture and a crime at the same time. In the case of a contract, the tort is different from the breach of contract because the rights and duties arise, and can be enforced against the parties concerned. Violation of the Agreement will be resolved by unliquidated damages. Etymologically, right or straight, violence is not crooked, harsh, i.e. straight or right. As a separate branch of law, tort has been interpreted differently by different authors and their importance on the subject. Winfield puts forward the notion of duty, stating that "breach of duty determined primarily by law arises out of strict liability; this duty is generally on the part of individuals and its violation is resolved by action for ineligible damages."

Salmond prefers the idea of wrongdoing and defines the tort as a civil wrong, for which compensation is a common law action for unliquidated damages, and not specifically for breach of contract or breach of trust or other similar obligations. All definitions, more or less, emphasize three aspects: (1) an act or omission that violates the law, (2) a legal injury or a legal loss, and (3) a legal remedy for disqualified damages.

Tort, a common law mistake is different from the fault of a breach of trust, which is a breach of the obligation recognized in equity. Intention and wickedness play little role in the law of torts. If this law does not
cause legal injury, it does not result in strict liability, even if it is a misdemeanor or improper purpose. However, in some torts, **malice** is a necessary ingredient.

**Keywords:**
Etymologically, damages, unliquidated, malice, compensation.

**IS IT THE LAW OF TORTS OR LAW OF TORT?**

Is it Tort Law or Torts Law? In this regard, Salmond posed the question. Does the Torts Act have a basic general principle that it is wrong to harm other people when there is no specific justification or excuse, or that there are many specific rules that prohibit and quit certain harmful activities? In other words, all the remains outside the scope of legal liability are the question:

D. This is the law of tort, that is, every wrongful act, for which there is no justification or excuse for being considered a tort, or

E. It is the Law of Torts, that is, there are only a number of specific offenses that cannot arise under the provisions of this Act.

Salmond, however, preferred the second alternative, and he did not have the Tort Act, but the Torts Act, which arises only when the fault is covered by one or other of the nominated Torts. There is no general principle of liability and if the plaintiff can place his mistake in any of the pigeon-holes, he will succeed if each has a labeled tart. This theory is also known as the **pigeon-hole theory**. Defendant has did not commit any torture if there was no pigeon-hole in the plaintiff's case. According to Salmond, criminal law contains rules that establish a specific offense. The Torts Act therefore contains rules governing the establishment of specific wounds, in one case or another, there is no general principle of liability. Whether I am prosecuted for an alleged offense or sued for alleged torture, it is not for my adversary to prove that the case is under certain and settled obligations, and that I am not defending myself by proving that it is within a certain range, and the rule of justification or excuse, the subject of Winfield's book. In the name of the Law of Tort. However, Salmond's book 'law of torts' is the name that's been given some support to the theory. In 1702, Ashby vs. White is clearly established in favor of the first doctrine, recognizing the principle of **jus ibi remedium**. Holt, CJ, "If a man multiplies wounds, every man who is injured must act." Similarly, in 1762 Pratt, CJ. Said: *Torts are infinite, not limited or limited.* Pollock also supported this view, supporting the theory that courts create new torts.

**KEYWORDS:** Pigeon hole theory, jus ubi remedium

Case law: Ashby vs. White (1702); Pasley v. Freeman (1789), inducement of breach of contract in Lumley v. Gye' (1853), negligence as a separate tort in the beginning of the century, the rule of strict liability in Rylands v Fletcher (1868), inducement to a wife to leave her husband in Winsmore v. Greenbank" (1745), and the tort of intimidation in Rookes v. Barnard (1964).

**HISTORY**
The substantive law of torts in England arose out of the sorts of common law procedures. It had its origin in writs issued by Chancery. In theory, the writ couldn't be availed of in felonies but in practice it had been available in every case
exceeding that of murder if words charging a felony in a complaint were omitted. With the initial stage, the procedure in writ of trespass was having both civil and criminal aspects but in due course civil action for trespass proceeded on different lines from criminal trespass which involved indictment for felony or misdemeanour. Again, at first, the action of trespass was available for injuries which were direct, forcible and immediate, and didn't cover indirect and consequential injuries, but later on, these injuries became actionable by the writ of trespass on the case or action on the case by virtue of statute called consimili cassu in 1285, and in course of your time the procedure in action on the case became distinct from the action of trespass and hence forward the road of development was clear. In the later part of the 19thcentury, before the Judicature Acts, the fields of tort was strewn with different sorts of action having their own procedural variations which were finally unified by the Judicature Acts. Due to this historical development, we can see substantive law secreting itself in procedure and the question has been raised whether this could be called the law of tort or the law of torts, consistent with Salmond, it's law of torts, i.e., the formal branch but the student or a scholar of law on the one hand and of a lawyer on the other. The lawyer must emphasize more on the formal branch but the student or the theorist stresses the underlying general principles.

FOREIGN TORTS (INTERNATIONAL SCENARIO)

4As for international tenders, the terms of English law are that they prevail in English courts, so long as the wrong is possible in England and so the country is committed. The English courts do not have jurisdiction
to take damages for damages in the case of overseas property. In India this position exists followed by an infringement or other misdemeanor on immovable property, made outside India, does not reside in Indian courts. In the event of any privacy problems or other immovable property the act will disappear if the respondent resides in India as long as the non-compliance is in conflict with the law of the country of law and so is the law of India when the action is brought.

LAW OF TORTS IN INDIA (NATIONAL SCENARIO)

After English traders started Indian soil they were authorized to exercise judicial power to control their workers, e.g., workers of the Malay Archipelago. Complies with the laws of England. By the Charter of 1726, the common law and laws of England were entered into as they stood in 1726. In the Charter of 1774, the Calcutta High Court established and applied English law to all persons living under its law. Outside the city of the Presidency, private law of organizations was administered on such matters as recognition, inheritance, succession, marriage, and religious giving. In some cases, the courts were required to apply the doctrine of justice, equity and good conscience. In the case of ticket sales, the courts tried to abide by the principles of common law that support equality, justice and a good conscience. Any deviation from English law is made only when its use is not deemed appropriate. After the introduction of the high courts by the 1861 Act, no major changes have taken place and even after India became independent, the status quo was maintained by providing a continuation of existing law in article 300 of the Constitution. Another important difference comes from the English law of taxis, which we find in 'felonious tones'. In England, if a person is injured due to an act of equal cause, the plaintiff is not allowed to plead guilty unless he is brought to court. The act of torture will not continue but will be kept in such a state. The Madras high court does not follow the general rule while Calcutta and Bombay High Courts do, within moufussil, the general rule does not apply to the institution of criminal cases are not required to bring a case but with the same facts a serious criminal offense is also committed.

Causes for Slow Development of Law of Torts in India

Uncertainty of law:- Since the ticket law is not encoded, there is no uniformity in the rules and regulations. Of course, even though there are things mentioned about ticket law available in England on many points, that cannot be applied in Indian cases. For this reason, there is a lack of case law in India in relation to ticket law. Indian courts have refused to abide by some of the doctrines of the Torts of English Courts, introduced in the 19th century. The Supreme Court of India introduced a new doctrine in M.C.Mehta Vs. Union of India - The doctrine of absolute responsibility. The Apex court declined to follow the doctrine of 'Strong Debt' seen in Rylands Vs. Fletcher also introduced the new 'Osolute denial' doctrine.

Lack of political consciousness:- Most people in India are unaware of their rights due to illiteracy. Due to a lack of political awareness, most Indian people are unaware of their legal rights. For these reasons, they approach civil courts to find remedies available under the law of
taxation.

Illiteracy: Literacy in India is the key to social and economic development. India's literacy rate has risen to 78.31% (2011 census figures). An old 1990 study estimated that it would take until 2060 for India to reach global learning experience at that time - current progress. Literacy rates increased from 18.33 percent in 1951 to 74.04 percent in 2011. It shows that there is still illiteracy in India. Illiteracy is the main reason for their ignorance of their legal rights.

Poverty: Apart from being one of the fastest-growing economies in the world, India suffers from a severe poverty crisis. In 2010, 69% lived on less than US $2 per day, and 33% less than US $1.25 per day. Educational attainment is low, and India accounts for 1/3 of the world's most illiterate. Amendment of Constitution 73 of the Constitution of India mandates that 1/3rd of all seats in the Panchayats are reserved for women, bringing more than one million women to elected positions. According to the updated model, the world had 872.3 million people under the new poverty line, India had the third highest number of people living with extreme poverty after Nigeria and Congo in January 2019.

Expensive and dilatory judicial system: Apart from poverty issues and illiteracy, another important issue is that the judicial system in India is too expensive and costly. The fees and fees of its attorneys are very high. The average person can't put up with it. Thus, poor people are better prepared to abuse their criminal rights instead of going to court to seek remedies. If a poor person is prepared to fight for paying a huge fine in court for violating his right, after a long period of years, he gets only Rs. 500 / - Rs.1000 / - as damages, he considers it to be of no benefit at all. Cases are based on cases dismissed within one year in England but in India, it is not possible to dismiss all such cases within a year.

THEORIES OF TORT LAW: ECONOMIC ANALYSIS

For decades now, economic analysis of tort law has been on the rise, especially (but not exclusively) in American law schools. Instead of exploring a range of economic theories, this entry focuses on the depths of the great complexity of economic analysis: the very theory of restraint. Proponents of this approach, such as economic analysts in particular, see debt primarily as a way of allocating risk costs (although no economic analysis can be explored to cover a purposeful sale, such as an attack on a battery). Their main claim is that torture should be understood as aimed at reducing the sum of the costs of accidents and the costs of avoiding them.

The Economic Interpretation of Fault Liability

Assuming that the relevant social problem is a problem of costly risks, economic analysts consider the paradigmatic tort to be a negligent target. The law forces a person to be negligent when he or she risks another injury. Incurred a serious injury risk is also a matter of failing to take the precautionary measures one can take. But what safety precautions can one take?

Economists give the following answer: caution is reasonable if it makes sense; caution is reasonable when costing; and caution is allowed for expenditure where the cost of monitoring is less than
expected (resulting in the cost of the expected injury reduced by the likelihood of the injury). Imagine being involved in a job that carries a $100 benefit and an expected injury of $90. Now let's say that the only way to prevent an injury is to stop the job. Other things being equal, it would be absurd to get a $100 profit to secure a $90 expense. Predicting a profit would not be a reasonable recognition; you better get in harm's way and save $10 on the job. Now imagine that things are the other way around: the benefit is $90 and the expected damage is $100. Under these circumstances, forecasting aid can still be a cost of safety. It would be ridiculous not to put the profit forward, because you would have to get a $10 loss to participate in the work. This is a calculation that a reasonable agent can do when the costs and benefits are entirely his own.

The default credit policy has much to commend you from an economic point of view. In particular, it entails all reasonable people - the injured and the abused alike - to take everything and only the proper security measures. If all the injured do not behave badly, the loss will remain where they fall: and the victims. Reasonable victims so we will address all risks assuming they will have to bear the costs. However, they, too, will take all and only costly security measures. Debt law is therefore economically viable: it produces the right amount of risk-taking.

B. The Economic Interpretation of Strong Debt

Since a person facing a strong debt will bear the cost of their conduct or is at fault, one would assume that a potential defendant under a strong debt regime would have no incentive to invest in caution. This is wrong. Let's say I have a strong debt for some of the costs I impose on you - the cost is $100. Let's also say that by taking a $90 worth of security measures I can eliminate the opportunity to put these costs on you. What makes sense to me? The answer is obvious. It makes sense for me to invest $90, because I come out with $10 up front to prevent damage and avoid debt. So even under a tight credit regime, potential victims have a motive for this take reasonable precautions. And they will not take any costly preventative measures. If it would cost $110 to take a precaution that would eliminate the possibility of injury with an expected $100 interest, I would rather pay for your injuries than take precautionary measures. So tight credit does not encourage extra care. Under a tight credit regime, potential attackers have the incentive to take all the costly security measures just as they do under a debt obligation.

In an important respect, the plaintiff's (injured) misery under strict liability is the same as that of the defendant (victim) under the debtor's fault. Considering that the person who is hurting is reasonable, we can say that in the face of debt, he will take all possible steps to save costs. Because of this, any loss from his behavior will lie where it fell: with the victim. This means that it can be seen that the victim is suffering from some type of strong debt, that is, a strong debt for loss that can be caused by another's fault. (In a nutshell, this is a mistake, because one cannot blame them, but the symbolism is helpful.) The victim cannot turn this loss into an injury because the victim is personally responsible for the debt by taking the necessary precautions. So a reasonable victim will ask himself the following question: what is low - the cost of monitoring or the expected cost of injury?
You will take preventive measures if (and only then) taking precautionary measures is less expensive than staying at risk of injury. The conclusion is that a strong debt and debt debt both make reasonable people take it all in and use only defense costs. If efficiency requires people to take all the precautionary measures only at risk, then a strong and flawed debt can work well.

C. The Steps to Economic Analysis

There is no doubt that economic analysis provides valuable insight into the capacity of the tort law to maximize total security and reduce the cost of evil or luck. In all its understanding, however, economic analysis is in danger of challenging debate. These objections speak of both the violation of dominant culture and its symbols of order. We discuss the most important argument here.

CONCLUSION

The law of torts is not much developed in India. But the tort law has provided physical security to the people. “Tort law evolved through the common law. Historically, basic common law principles were applied to solve legal problems. In the nineteenth century, there was a movement towards systematizing tort law.” All the above principles of Common Law of Negligence have since become part of the Indian Legal System. So much so that the principles of liability in India in regard to matters of negligence correspond to what they are in English Law. This is so in regard to substantive as well as procedural laws. What needs to be pointed out is that the law in India basically is the same as it is in England, but the Courts today do not follow the English rule where there is a different principle laid down in the Statute or where the principle is not in accordance with the principles of justice, equity and good conscience or where the rule does not suit the socio economic conditions of the people. Subject to certain conditions of this kind the English Law is followed by the Indian Courts. As in the case of civil liability in the case of criminal liability also the development has been such as to allow Negligence to be a kind of crime by itself. The principles have developed not only in regard to substantive but also in regard to procedural matters. As far as criminal liability is concerned the Law in India is not in the form of Common Law as such but in the form of Statutes. The Indian Penal Code, 1860 is the first Statute dealing with the problem of crimes. It contains various offences in which Negligence is one of the elements of crime. For example Chapter XIV of the Code dealing with the ‘Offences Affecting the Public Health, Safety, Convenience, Decency and Morals’ provide for negligent conduct in regard to certain things to be punishable under the Code. For example, Section 304-A makes causing of death by negligence as a substantive offence. While the Indian Penal Code is the general law of crimes, there are a good number of Statutes constituting the Special Law of crimes which lay down punishment for negligent conduct. Thus, the Concept of Negligence is the subject matter of the Law of Torts as well as the Law of Crimes. The rules of liability are followed by the Court in the same manner as they are followed by the Courts in England but subject to certain conditions.

TEXT AND REFERENCES

AVATAR SINGH
RAPE: THE (UN)JUSTIFIED HINDRANCES SERVING (IN)JUSTICE IN INDIA

By Yashika Kuntela
From University of Petroleum and Energy Studies

What happens when a governmental machinery designed to support you during adverse times, turns down and becomes pillars of hardships in the path of justice? What happens when the series of institutions dutybound to address grievances actively takes charge to oppress you? ‘You’ here signifies none other than, what we call as ‘the easiest victim of the most heinous crime – Rape!’ The offence that suffocates breath of the sufferer. An untold misery is inflicted upon her when she paddles through various agencies – Law enforcement - ‘Police’, ‘Medical services’, and the epitome of justice- ‘Judiciary’. Lastly, the agony of un silenced crowd waiting for her when she is redirected back to habitat again in the society. This entire article will unveil the unseen side of these three institutions and cumulative role played by them to administer (in)justice. However, few questions that remains unanswered since ages as to why our system is lagging when it comes to women bodily offences? Why the system lacks women sensitivity? These questions will lead us to identify existing vacuum within the system that demands to be fulfilled.

Primarily starting with first body approached by the sufferer i.e. Police – have immense powers blended with legal and moral duties. Above all, this body have the supreme charge to set criminal justice system into motion. It is an undisputed fact that higher representation of police officers in a state contributes to flexible redressal mechanism. However, what seems frightful are the figures reflecting weakened side of police system. Across India, police department consists of 13 lakh civil police officers, making it to 96 civil police-officers per lakh population. As a result, Indian police system has managed to attain position amongst the most under-staffed police system across the world. Ironically, United Nations standards prescribes to have 222 police officials per lakh population to which India seems way behind. Integration of women police officers in the male dominated police system is highly demanded. How many of you would have an instinct of a ‘Women in uniform’ after hearing the word- ‘Police’. Surely none of you! This is because police culture is inherently known for its patriarchal blunt image and there is continuous poor representation of women in this service. Female officers are needed not just for the sake of representation but for escorting female victims, recording statements of females. Women police personnel

“…when a woman is ravished, what is inflicted is not merely physical injury, but the deepest sense of some deathless shame…”
– Justice A.M. Ahmadi


2862 Anviti Chaturvedi, Police reforms in India, PRS LEGISLATIVE RESEARCH (June 2017), https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Policereforms%20in%20India.pdf

www.supremoamicus.org
comprises of only 8.98% of the total police force in the country concluding it to 3391 women per policewomen. Research shows poor representation of women in police leads to dissatisfaction with police among women. States like Himachal Pradesh, Maharashtra and Tamil Nadu have highest representation of women police officials thereby highest satisfaction level whereas Uttar Pradesh, Assam, Bihar, and Telangana vice versa. The unproportionate ratio of men and women in police system forces rape victims to approach male officers where police starts preying on victims-the crime that every day goes unreported. Though, no data is available on secondary victimization by police. But Police apathy against women in the third highest category under which complaints have been registered at National Commission for Women. From telling victims to come after rape happens to police themselves becoming rapists. It is a common norm among police fraternity in rather providing legal and psychological assistance to the complainant, they warn the victim that they will investigate the sexual histories, that she will be exposed to the public and would become dishonour to the family - Cases are being rejected on the grounds that they do not believed rape occurred even though “reliability, genuineness and credibility of the information” are not condition precedent to register F.I.R. 19% of the people approaching police for the registration of FIR were asked to resolve the matter or to compromise and 9% people were asked to pay bribe. “The police asked me to take some money from the accused and to just let it go. When I refused to compromise, they scolded me and said, we will put you in lock-up if you don’t compromise” says rape victim Malini (name changed to protect identity). Since, 2001 to 2013, from all the rape cases reported, 90% of the times the rapist was known to the victim and therefore oppressed by society and police pushing her to enter into a compromise by referring to it as a ‘private’ matter. It is one of the rudimentary approaches where police instead of channelling the path of justice pressurises her to drop rape charges and opt as so-called easier route- ‘marital compromise’ even though it lacks legal permissibility. Out of court settlement or mediation is illegal in rape cases as it is against the honour of victim. Non-registration of FIR (First Information Report) on the part of police in-charge is a punishable offence with an imprisonment of two years. Subsequently after successful F.I.R. registration, the woman on whom rape has been committed, shall be sent ‘immediately’ for medical examination

2863 Supra Note 1.
2867 Supra Note 4.
mandatorily free of cost within 24 hours after receiving complaint.\textsuperscript{2872} to ‘any government or private hospital’.\textsuperscript{2873} Rape victim should be able to access 24 hours medical services a day and upon call basis as guided by World Health Organization.\textsuperscript{2874} It is also the right of the woman to approach directly for medical examination and no doctor/hospital could delay examination for want of police recognition.\textsuperscript{2875} The court termed it as a ‘medico-legal emergency’ where delay in examination could result into loss of therapeutic opportunities and evidences such a semen and blood samples could be washed away by the complainant herself or otherwise. However, if the survivor does not wish to go for police investigation it will not result into denial for treatment of sexual violence. But how far the laws are implemented is a serious issue. Victims are even denied medical examination on the ground of non-availability of doctor or the doctor avoid putting themselves into legal procedures in fear of getting embroiled in criminal cases even though this action is an offence ‘punishable up to 1 year of imprisonment or with fine’. Doctors have the fundamental duty as well as an ethical obligation to use their skill and knowledge in such a manner that the doing and giving must be rightful in treatment of rape survivor/victim. But what happens at ground level is disturbing. Despite prohibition by the Supreme Court in 2013\textsuperscript{2876} the ‘Two-Finger test’ or The Pre-vaginal (P.V.) is still operational in medical fraternity. Doctors perform this test to determine the laxity and sexual activity of the victim and to know whether the hymen is broken or not by inserting two-fingers into the vagina. Easy insertion of fingers suggests sexual intercourse and vice versa. Scientifically the presumption of ‘Intact hymen-No rape’ is false. This test is not scientific and lacks scientific evidence. “Scientific evidence is that which is objective, and when the test is repeated by anyone, then the same results will be achieved. The two-finger test is a subjective test. There are many variables—the test results will be different depending on the size of the doctor’s fingers”\textsuperscript{2877} -- Dr. Harish Pathak, Professor of Forensic Medicine. Therefore, it was held unconstitutional on the grounds of violation of Human Rights and Right to Privacy under Article 21 of Indian Constitution. Research states that the test is still in practice in various parts of India despite being illegal. Internationally the test is still spamming within 20 countries of all regions in the world.\textsuperscript{2878} It took 6 years for Maharashtra based Medical University to ban a full-fledged chapter on two finger

\begin{footnotesize}
\begin{itemize}
\item Karnataka v Manjanna 2000 (6) SCC 188.
\item Lilu@Rajesh and Anr v State of Haryana, (2013) 14 SCC 643.
\end{itemize}
\end{footnotesize}
In August 2019, 1500 rape survivors on whom two finger tests had been conducted, have written to Supreme Court demanding cancellation of license of doctors practicing two finger tests through N.G.O ‘Rashtriya Garima Abhiyan’ stating that the test mimics the original act of sexual violence making her re-experience the traumatization and victimization. Additionally, the medical fraternity does not have sufficient knowledge to handle routine medico-legal case. “At best, doctors will have some half-an-hour or one-hour lecture on medical evidence every year. No training. Nothing at all for medical examination in rape cases”. In a research conducted by Department of Forensic Medicine and Toxicology at S.V.S Medical College, upon 200 medical students 70% of interns and 40% of post graduates had no proper knowledge in handling medico-legal case independently. The medical evidences in rape cases are of outmost importance as 90% of times there is no eye witness to testify. The case is entirely dependent upon medical evidence which is bound to be collected in proper and systematic manner. The evidence includes ‘vaginal secretion, foreign hairs and fibres present on the victim, semen strains, fingernail scraping carrying fibres or swabs for semen’. Error is collection of evidence contributes to injustice by weakening the case of the prosecutor. Therefore, the medical fraternity which ought to be the strongest agency to serve justice becomes the providers of injustice due to improper evidence collection training during their medicine program. There is also weak implementation of guidelines and protocols by government and medical institutions. Additionally, there is no uniform systematic procedure to collect medical evidence. Every medical practitioner prior conducting medical examination must obtain ‘Informed Consent’ from the lady in whose offence has been committed or by parent/guardian on whom victim reposes. Informed consent here means that the doctor conducting medical examination is bound to give a detailed, structured and procedures ought to be carried out on her and acknowledge her about the importance and relevance of the evidence in legal proceedings. Consent can be challenged on the ground that no adequate and requisite information was not revealed in order to take knowledgeable decision. It is very rare that women on whom the test has been conducted to be informed of their right to refuse it. Informed consent of a victim is a basic ethical obligation and cannot be coerced or manipulated by authorities.

---


2881 Supra Note 18


conducted has refused to take test or asked for time to get onto a decision. The reason being the doctors takes ‘consent’ instead of ‘informed consent’. “It is very rare that women can say, “I don’t want this part of the examination,” or ask questions about what is being done. Even with social workers present, it is difficult.”

Women before undergoing medical examination were not acknowledged about the body parts on which the doctors would conduct medical examination.

It is also here to be noted that whether rape has occurred or not is a legal issue and not a medical issue. Therefore, it is not the right of doctors to conclude whether rape has occurred or not. “Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether rape has occurred or not is a legal conclusion, not a medical one.”

But the practice to mention ‘rape’ in the medical report is still prevalent in medical fraternity. The norm to mention past sexual practices is still operable even after abolishing it.

The struggle and battle of the sufferer continues when she reaches the last stage in the road to justice. Judiciary has the paramount duty to provide justice. The quality of justice rendered is not up to the mark. The whole judicial system collapses in securing the rights of rape sufferer. Witness turning hostile is not new in criminal cases especially rape and murder. The victim turns hostile owing to the threats of the accused. Though India enacted Victim Protection Scheme in 2018 but the question on its successful implementation is still needed to be answered. The prosecutors have no training to present forensic evidence before the court. Prosecutors jumps to find legal conclusion by asking “was the victim raped?” as opposed to findings of fact that would support or refute the legal conclusions.

The prosecutrix virtually have no right in criminal proceedings whereby the state is the prosecutor and victim is just a witness in eyes of law. Shift in approach is needed from the trial being ‘accused centric’ to ‘victim centric’. Indian system equates reparation with retribution and thus misses in administering quality justice. Reparation includes “restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition”. It is a weakness of our jurisprudence that victims of crime and the dependents of the victims do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our law. This is the deficiency in the system, which must be rectified by the legislature. The lack of


proper training in handling medico-legal cases administers injustice. Out of the 17313 completed trial conviction happened in 4708 cases making the conviction rate only 27.2%.\(^{2893}\) One of the reasons for the low conviction rate is lack of specialized prosecutors to deal with rape trials. The Indian Judicial system is in the need of highly trained prosecutors assigned special for rape trials. The overburdened judicial system also contributes to denial of justice. The country has 15 judges for every 1 million people.\(^{2894}\) The overburdened judiciary is one of the reasons in delay of trials. In 2018, 1,56,327 were on trial. However, the defence counsel never believes in the idea of speedy trials. The defence works on the principle “More delay-More fees”. Though it is highly unethical but is a ground reality.

Conclusion
Rape one of the most heinous crime against the victim as well as society. The entire system which is supposed to be at the side of rape survivor unfortunately, actively takes charge to oppress her. The machinery suppresses her at every point. The three pillars of the system namely Police, Medical and Judiciary lacks sensitivity while dealing with rape cases. The major loophole in the system is found out to be ‘improper training’, lack of women sensitivity and biasness. The loopholes are so deep rooted in the system that the system itself has accepted it. These issues are embedded within the system that nobody knows about it. The major drawback is that there no criticism at the end of media which has the power to bring loopholes into limelight.

****

WOMEN PRISONERS- AN OBLITERATING COMMUNITY

By Yukti Mahi Bawa and Khwaja Umair
From University of Petroleum and Energy Studies

As a method of punishment, imprisonment has evolved over the years. In most of the world today, and in India too, the definition of prison somewhat has a positive connotation attached with itself. Prisons are not merely seen as a means of punishment, but as reformation centres for criminals. The Hon’ble Supreme Court has advocated for a “therapeutic approach as an effective method of punishment”. MHA advisories on prison administration have stressed on the need for a positive prison environment stating that- “The atmosphere of prisons should be surcharged with positive values and the inmates should be exposed to a wholesome environment with appropriate opportunities to reform themselves.”

Prison and its administration is a state subject detailed in List II, Schedule VII of the Constitution of India. Different States’ and Union Territories’ prison establishments comprise several tiers of jails – central jails, district jails, sub jails as well as women jails, borstal schools, open jails and special jails. The past few decades have observed a drastic increase in the prison population further creating various challenges such as health and hygiene, overcrowding, security etc. Since the jails were designed primarily to cater to the requirements of male inmates, special efforts and steps should necessarily be taken to ensure that the basic needs of female inmates are being catered to. Since the male counterparts have access to certain resources in the prison system, female inmates, in majority situations, end up facing more obstacles. The authors aim to discuss the key areas of overcrowding, sanitation and hygiene conditions and children living in prison systems along with their mothers. The authors also aim to highlight the above, mentioned issues with the help of latest statistics recorded by National Crime Records Bureau in the year 2018.

THRONGING IN PRISON SYSTEM

Thronging or overcrowding is a situation which arises when more inmates are living than the permitted strength. Over the years, it has become one of the key problems which are faced by the prisoners. Thronging results in poor hygiene, lack of sleep and nourishment and as far as the basic rights of the prison inmates is concerned, provision of reasonable space and facilities to them becomes necessary. The rate of occupancy can be defined as the number of inmates staying in jails against the permitted capacity of 100 inmates, which means, if the occupancy rate is more than 100, it results to overcrowding. Among the States, Uttar Pradesh has reported the highest overcrowding (176.5%) followed by Sikkim (157.3%), Chhattisgarh (153.3%), Uttarakhand (150%), Maharashtra (148.9%), Madhya Pradesh (147%) and Meghalaya (143.5%). Among

2897 The Constitution of India.
Union Territories, Delhi has reported the highest overcrowding (154.3%).

There were only 24 women jails in the country as on 31st December, 2018 and 3243 female inmates out of the 19242 female inmates at the national level were lodged. 21 States/Union Territories were not having any separate women jails. Maharashtra at 159.2% reported the highest overcrowding in women jails, followed by West Bengal at 142% and Bihar at 107.9%.

Due to the lack of women jails in various States and Union Territories, the occupancy rate of female inmates in jails, except the women jails, shows that Uttarakhand reported the highest occupancy rate at 164.9% followed by Chattisgarh at 146.6% and Uttar Pradesh at (134.8%).

According to the Modern Prison Manual, 2016, four types of living accommodation are prescribed:

1. Barracks with accommodation for twenty women prisoners;
2. Dormitory Accommodation for four to six women prisoners;
3. Single room accommodation for women prisoners needing privacy owing to pursuance of studies; and
4. Cells for segregation of women prisoners for the purpose of security and punishment.

Accommodation provided to the women prisoners in particular, should meet the basic requirements of any other living human, such as adequate amount of lighting, ventilation, minimum floor spacing, and the cubic content of air- comprising the basic living standards.

However, the repercussions of overcrowding sometimes become even more conspicuous in the case of women, more so, because they are confined to smaller enclosures of the jail due to the meagerness of infrastructure for them. It is due to the overcrowding that women tend to be susceptible to poor health conditions, so much so, that even the minor infections take no time to spread. The inordinately less number of toilets and bathrooms augments the situation. Thronging also has distressing psychological effects on prisoners who are forced to live in such close vicinity with each other. Though the Modern Prison Manual, 2016 has laid special emphasis on under trial prisoners and convicted prisoners to be accommodated separately, it is not possible to adhere to this guideline because of acute shortage of space.

It is a belief that a young offender today can be a hardened criminal tomorrow, therefore it is suggested that young offenders are accommodated separately rather than being placed with older women offenders. However, it is again due to the problem of overcrowding that young offenders, aging from 18 years to 21 years of age, find themselves living with older women offenders, further having a psychological impact. It is due to the issue of thronging that the prisoners’ children end up living in sparse and dingy conditions.

By reason of the fact that women prisoners still remain to be a minority in the prison population, the infrastructural facilities and specialized services are not provided to them. Because there are hardly any separate women prisons in India, huge numbers of women offenders have to remain accommodated in male prisons and as a result face serious challenges.

2899 Ibid.
women who have been convicted for petty offences often find themselves strangled in the system of high security and restrictive measures imposed on hardened women criminals, that are very few in number, forcing the former to accommodate with the latter.

SANITARY CONDITIONS AND HEALTH OF WOMEN PRISONERS

It should be kept in mind that there are various laws and guidelines available for uplifting the condition of prisoners, categorically speaking for women prisoners, but it is due to the scarcity of space and resources that these laws and guidelines are not applied judiciously. The Prison Manual, 2016 specially states that a woman prison should have a ten bed hospital for women and that at least one and more gynecologist and psychiatrist should be provided. However, there is no specific provision for women prisoners accommodating in other kinds of prisons. In reality, there are barely such amenities available to the women prisoners. In fact, these things come much later in the list; prisoners are at least entitled to bathe themselves as and when they want to, however, due to the scarcity of water, many women prisoners end up without bathing and washing themselves for multiple days, leading to poor personal hygiene. The number of washrooms is not adequate as per the number of prisoners and falls totally out of proportion. The culture of maintaining sanitation by periodically getting the pest control done alongside the cleaning does not exist in the prisons. It is often the women prisoners in general who are made to clean to washrooms, open areas, making them more vulnerable to diseases.

It is a well-known fact that the menstrual age of a woman starts from 13 years approximately and lasts till 50 years. In the prisons, there are a great number of women ranging between the age of 18-50 years and it is perceptible that they undergo their menstrual cycle every month. Provision of sanitary napkins is not a luxury but a necessity for every woman, whether rich or poor, whether inside the jail or outside. However, women prisoners are not even subject to their basic necessities of obtaining sanitary napkins from the prison authorities, instead they end up paying to obtain the basic facility, and sometimes, in order to avoid spending the meagre amount of money that these women get by performing labor work in the prison, these women prisoners resort to using unhygienic materials such as cloth, soil, old mattress pieces, leaves, ashes etc, increasing the risks of reproductive diseases and even affecting their maternal mortality.

The needs of a woman in prison are clearly not prioritized and one of the main reasons is that they are the minority when it comes to prison statistics of number of male detainees and number of female detainees in India.

SUICIDES IN WOMEN PRISONS

The authors would now like to draw the attention towards the suicidal aspect in women prisons. There is a high risk of suicide for women in custody. Female pre-trial inmates attempt suicide much more often than their female counterparts in the

---

community and as their incarcerated male counterparts. It should also be noted that the rates of fulfilled suicides are found to be higher than those of men. More so for women, the fact that their imprisonment itself has such an exemplary effect on their relationships outside the prison, it is the societal stigma that shoots up the suicidal impulses. As per data on suicide in prison in India, the rate of suicide by women inmates are two times higher than their male counterpart.

Women’s health requires special attention in terms of physical, mental, sexual and reproductive health. They have to be re-socialized and reeducated, needing substantive changes in their perceptions, attitude and behavior. All this presupposes their good health, not only the absence of disease but also the presence of a feeling of well-being and happiness. Also, the steps should be taken to ensure that women with psychosomatic disorders or psychological disorder should be accommodated in separate jails and should be provided necessary counseling and treatment on a regular basis.

Even the Constitution of India, 1950 describes under article 21 that no person shall be deprived of his life or personal liberty except according to procedure established by law, then depriving the prisoners, be it males or females, of medical treatment and basic living conditions is not justified under any circumstances.

**CHILDREN OF WOMEN PRISONERS**

As on 31st December, 2018 there were 1732 women prisoners with 1999 children, and within this number, 1376 women prisoners were undertrial prisoners who were accompanied by 1590 children and 355 convicted persons who were accompanied by 408 children. The authors find it is ironic that people and laws have an inclination towards having austere punishments for teenagers who have committed high degree crimes but no one gives a thought to the children who are already residing in the prisons, without a fault of their own.

It is natural to know that a child requires an utmost attention of his mother, but in reality, that attention persists only till a specific time in life.

In 2006, the Supreme Court issued guidelines in the RD Upadhyay vs State of AP case to ensure that certain basic standards are observed with regard to children of women prisoners. These guidelines are aligned with international standards such as the United Nation's Rules for the Treatment of Women Prisoners (UN Bangkok Rules) and the UN Minimum Standards for Treatment of Prisoners (the Mandela Rules). However, the implementation of this ruling leaves much to be desired.

During the hearing in 2006, the Supreme Court observed that a prison is not an appropriate dwelling to raise a child; however, it also recognized that children may have to live in jail for something that wasn’t even their fault. The reason stated by the Apex Court for this observation was that it is always preferable that children are not separated from their mothers in their

---

2907 The Constitution of India, art. 21.
2909 AIR 2006 SC 1946.
impressionable years, especially when no one from the immediate family is willing or able to take care of them and the court further stated that it is only till the age of six that the children should be allowed to stay with the women prisoners but not after that.  

There are guidelines in the Prison Manual, 2016 regarding the children of the women prisoners and how they are to be cared for both during their accommodation in prison and after they leave the prison when the age of six is attained. Though there are many recommendations that the Prison Authorities are bound to follow, in reality, nothing appears to be moving in a positive direction. There is a special emphasis on the diet, clothing, education, health of children of the women prisoners, but the tender lives are far from being taken care of. Poor ventilation, no separate space for mother and child to be accommodated, the child living with adult convicted prisoners due to lack of space just highlights the actual condition that the children of women prisoners have in jails. As there is no proper diet that is maintained, these children become prone to diseases early in life due to lack of immunity.

When the child gets out of the prison, the idea of him spending the first six years of his life in a prison and the idea of not having a normal childhood like most of the other children is daunting and it also tends to affect the relationship that the child is bound to develop with his mother in later years of his life. There is already a lot of stigma attached with the child having been raised in jail, the further experiences of visiting the jail and meeting the mother too might result to be traumatizing. The authors find it best that adequate measures should be taken to not treat a child as a prisoner and that utmost sensitivity, care and guidance is provided to the child. The environment should be such that the child should not end up feeling that he/she is in a prison. There should be provision of doctors and counselors to the child both when he is inside and outside the jail in order to reduce the chances of psychological disorders that may be caused due to traumatization. As far as the education of the child is concerned, the education cost should be borne by the prison authorities till the time the child is in prison and after that suitable contacts should be made with any NGO to promote the child’s education till the time he becomes self sufficient and self reliant.

CONCLUSION
In India, and globally too, women have always been considered to be in minority, but merely because the sex ratio varies, it doesn’t give the right to anyone to treat the women lowly anywhere be it in schools, workplaces, households and last but not the least- in prisons. Women needs are a little more than that of male counterparts because of obvious reasons. A woman’s body needs adequate care because of the fact that it bears a baby, it bleeds every month, and it has higher chances of getting prone to anemia and auto immune diseases. And just because a woman is under trail or is convicted, doesn’t deprive her of her basic necessities of life. The authors think that even though there are ample guidelines as to the treatment of women and children in prison, there is barely any implementation.

of the same. There should be proper inclusion of prisons’ funding every year when the budgeting is done and funds should be directed towards prisons, state wise. Also, there should be proper maintenance of statistics since the latest data that is available is one and a half years old. The authors believe that when the conditions of prison are improved and the prison environment is positive and recreational, only then it contributes in reforming and making a prisoner believe of the good that he or she can do in the society.

*****
UNIONIZATION OF SEX WORK IN INDIA

By Yuktika Sriya Kadali
From Symbiosis Law School, Hyderabad

ABSTRACT
This paper will be addressing the importance of unionizing sex workers in India. Moreover, the study will look into the sex industries of foreign countries that have policies to ensure the rights of the sex workers, the injunction of abuse against sex workers and ultimately creating a “healthy” sex industry. Further, this study will address the critical need to Decriminalize sex work, remove prostitution as an offense from the (Indian) Criminal Code, the need to establish that sex work is, after all, work and these workers are laborers who have the rights promised to every other laborer.

INTRODUCTION
Prostitution, the word itself leads to raised eyebrows, is ostracized in the daylight, and is considered illegal by night. The Indian society disassociates with the prevalence of prostitution by stating that it goes against the “culture” of India; prostitution was not underground or stigmatized in ancient India, as it can be inferred through the Vedas and the Arthashastra. The “Ministry of Women and Child Development” put forward a report which estimated a noticeable number of 3 million sex workers in India as of 2007; 35.4% of the sex workers were recorded to be under the age of majority, i.e., 18 years of age. Contrary to popular belief, not all sex workers are trafficked or are forced by another person to perform sexual favors for potential clients. Many women are born into sex work and find no way out of the ostracized community; a sample of 3000 female sex workers found that 60% of them chose sex work out of extensive poverty and to support themselves. While it is easy to form an opinion about them choosing this way of life, it is never possible for one to understand the reasoning without really being in their shoes.

The first legal provision given to sex work was SITA or “Immoral Trafficking (Suppression) Act, 1956” which allowed for the practice of sex work in private and not solicit her services in public spaces; the Act declares organized prostitution, such as brothels to be illegal; and a woman can use her body for an exchange of consideration as long as she is doing it voluntarily. As a result of India signing the “United Nations Declaration of Suppression of Trafficking, 1950”, the “Prevention of Immoral Trafficking Act, 1986”, legislation was passed. This Act aims at limiting and eventually abolishing sex work in India. Though this might sound like an easy feat to perform in theory, practically the possibility of this would result in sour consequences. Due to the fear of prosecution, brothel owners create harsher work environments for the sex workers, which goes against the Constitutional provision of the Right to Live

2911 The Immoral Traffic (Prevention) Act, No. 104 of 1956, § 2 (aa), INDIA CODE (1956)
Sex work has been an ongoing debate for a very long period in India and around the world. It is a rocky subject dealing with multiple perspectives—human rights, feminism, exploitation, etc.—this paper will be addressing the subject of sex work between consenting adults and their rights under the perspective of labor laws and the importance of legal sex work contracts, while acknowledging and empathizing with the trafficked and abused. While sex is not the first preference of work for many, it is an unfortunate reality of many women in India. Just because it is considered as a “vice”, it cannot be forgotten that it is an ever prevailing part of the Indian society. Decriminalizing prostitution can be the first step towards lesser incidents of violence aimed at sex workers. Considering India’s stance on sex work, sex workers are more prone to exploitation and abuse by law enforcement, more vulnerable to rapes, assaults, and murders; providing these women with an organized structure of work with legal contracts which state the number of work hours, health security and insurance can ensure that their basic rights are not being tarnished.

I. SEX IS WORK PARADIGM
The concept of labor organizations for sex work arises from the “sex is work” paradigm. The idea of treating sexual services has been debated and deliberated upon for as long as the tension around the subject has been around. Certain groups of individuals, especially the sex work researchers, and the active participants of the movement of sex work internationally have noticed a critical need to be vocal in conceptualizing that sex work, after all, is a type of labor though it is not entirely understood in the mainstream and popular discourse. The position of sex work in the popular discourse, such as the public policy and policy debate has been entirely obscured by the inherent risks and exploitations occurring in this stream of work. These debates have been noticed to be especially popular in the feminist movements were feminists have shown their displeasure in prostitution and pushed towards anti-decriminalization of sex work. Here it becomes crucial to question the “feminist” movement itself as they do not comprise the entire demographic of Feminists but rather those who put forward arguments about global sexual exploitation and the normalization of subordination of women ultimately encouraging violence channeled from the opposite sex. This analysis has been based on a minority of the street trade which comprises only 5 to 20 percent of a city’s sex industry. This simplified approach in the analysis of the eradication of sex work and the industry does a poor job in advocating the multifaceted and complex institution of labor with diverse experiences. Though the recent research and publications have given sex work, the title of productive labor, most labor theorists depend on the not very recent analogy of Karl Marx on prostitution and labor. Marx considered emotional labor such as prostitution as problematic and was noted to have commented: “prostitution is only a ‘specific’ expression of the ‘general’ prostitution of the

'laborer’". His derogating comment and stigmatization lead to the creation of the “sex is work” paradigm primarily by the feminist labor theorists. Theorists such as Arlie Russell Hochschild have put forward an analysis based on emotional work to be incorporated as labor. Further, Wendy Chapkis argued that sex work is more than emotional work as Marx stated as it is just like any other work requiring satisfaction, control, and emotional labor- these observations have played a critical role in the progress of the rights for sex workers and elevating their status as labors. Though the dark side of the sex industry is very much prevalent, this study is focused on the shift in the societal perspective from sexual exploitation to sexual labor. The society must conceptualize the concept of “sex is work” to establish, maintain, and protect the rights of individuals in the sex work industry. Social acceptance plays a major role in creating legislation related to the organization and regulation for sex work.

II. VIOLENCE AND VIOLATIONS AGAINST SEX WORKERS

Sex workers are exposed forays such as health and medical care, safety and violence, and inequality under the law. These issues require more attention than any moral objection against sex work. The abuse is not only limited to indecent clients but also extends to the authorities such as the policemen. The violence against sex workers is observed in many avenues, but the majority of it arises due to discrimination owing to the decriminalized nature and the conglomeration of sex work with exploitation or trafficking. There are over one million two hundred thousand (12,00,000) sex workers in India and most of them face violence due to the negative perception that they are criminals and thus are not citizens. These sex workers are not only degraded, dehumanized, and stripped out of their identity but are also disowned by the nation due to their vulnerability and disadvantage. This has often been noticed to have led systematic violations of their human rights, majorly that is the right to live with dignity and the right to life. By not protecting the extremely vulnerable, their right to equal protection and due process under the law has also been snatched away. Further, the stigma around sex work makes them even more vulnerable to violence by their families; the violence here is used as a tool to assert sexual control and normalize punishment for providing sexual favours for other men.

The stigmatization and the myths surrounding sex work has also led to the lack of acknowledgment by the police authorities. They have been noted to ignore the pleas of desperation by the sex workers when they are being subjected to commercial violence or family violence. These workers are not recognized and are suppressed to the point of invisibility. Sex workers have been noted to consider law enforcement as the most threatening institution. Police officers have been recorded to sexually assault, illegally detain and torture these sex workers; further, they are continuously subjected to sexual demands and verbal abuse and innuendos by the people in the position of authority to have access to speedy redress and other entitlements after arresting them under the provisions of IPC for ‘public nuisance’ and ‘obscene conduct’.

2915 Karl Marx, Economic and Philosophic manuscripts of 1884, trans. M. Mulligan (Moscow 1959)

The process of raid, rescue, and rehabilitation notice the most widespread human rights violation among the sex workers. Brothels are raided by police and NGOs to “rescue” the women and are put in rehabilitation institutions. Most of these rescues are highly abusive and violent in nature as these rescuers do not have any respect for the rights of the sex workers or the others just residing on the brothel premises. A research conducted by SANGRAM, an NGO, found that non-sex workers (family or neighbors residing in the place of activity) were also bundled up undressed in a van after a raid. The authorities have been recorded to abuse and torture the sex workers without any form of human considerations and degrading them to the status of mere objects. Sex workers have been humiliated by police officers by frightening them by verbal abuse and torturing them by putting chili powder on their genitals. Due to their already established title of criminals, their complaints against the legal enforcement have been forced to revoke.

THE ROLE OF ORGANISATIONS AND UNIONS

The “Special Rapporteur on Violence Against Women” (SR-VAW) reported the poor job done by the way of rehabilitation and also gross human rights violations, accordingly, the Supreme Court stated that sex workers should not be forced to stay in corrective homes: “rehabilitation of sex workers who wish to leave sex work of their own volition and to provide conducive conditions for sex workers who wish to continue working as sex workers”\(^{2918}\) concerning article 21\(^{2919}\) of the Indian Constitution.

The role of unions and organizations becomes crucial while protecting the rights of these individuals. The SR-VAW and the UN Resolutions have come forward to notice the major concerns of abuse, violence, and medical issues such as HIV/AIDS.\(^{2920}\) The International Labour Organization (ILO) has highlighted the absolute need to make legal aid and medical aid easily accessible along with setting standards for workplace health and safety.\(^{2921}\) CEDAW Article 6, General Recommendation 19\(^{2922}\) states the vulnerability and the need for protection against any form of violence, including rape. Further, the committee has suggested methods to stop: “discrimination against sex workers and ensure that legislation on their right to safe working conditions is guaranteed”.\(^{2923}\)

INTERNATIONAL ACCOUNT

The Argentinian union “Asociación de Mujeres Meretrices de Argentina”

\(^{2918}\) Budhadev Karmaskar v. State of West Bengal (2011) 11 SCC 538
\(^{2919}\) INDIAN CONST. art. 21
\(^{2920}\) 6 Rasheeda Manjoo, Report of the Special Rapporteur on Violence Against Women its causes and consequences, Human Rights Council, (p. 6, Para 20) Twenty sixth session, A/HRC/26/38/Add. 1

UN Economic and Social Commission for Asia Pacific (ESCAP) Resolution 66-10, Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific, 2010

\(^{2921}\) ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200), Geneva: ILO.


\(^{2923}\) Ibid.
(AMMAR) was created in 1994 to defend the rights of the sex workers. The main focus of this union was fighting back against the oppression and abuse by the police authorities. AMMAR was held by the stigmatization and the imposition of the idea of sex workers having no rights but soon the union was affiliated by the “Central de Trabajadores Argentinos” (CTA) which is the “Argentine Workers’ Central Union”. With this affiliation, the union was able to fight back against violence and demand for acceptance, recognition, and legal equality. The affiliation also allowed the workers to have employment contracts, pensions, guarantees against exploitation, right to pay taxes, and also fringe benefits.

III. REGULATIONS AND LEGAL FRAMEWORKS
The “Immoral Traffic Prevention Act”, in recognition with by the Section 370-373 of the “Indian Penal Code”, is the main legislation addressing trafficking. However, the same framework and the provision of IPC criminalize sex work. Sex workers are greatly impacted by the laws relating to the soliciting of sex work in private and in public places. The ITPA not only places the solicitation of sex work in public places as an offense, but also gives the complete authority to the police officers and NGO’s to raid and “rescue” the sex workers. This framework gives the magistrates to close and expel persons from brothels, even if it is at their place of residence. The current legal frameworks in India conflate trafficking and sex work. Though there is a group of sex workers who are deceived and forced into sex work, there is a larger group who are in this industry just to make ends meet. Due to the extreme focus on the former group, the other groups’ human rights and labor rights have been denied. It is not acknowledged that some women are in this industry in search of a better life and a better quality of livelihood. By denying to acknowledge sex work as labor and legally criminalizing it, there is absolutely no scope for creating regulations for their benefit. This means that there has been an utter denial of the right safe environment and labor protection. Thus, in India, the first step is acceptance and change in legal frameworks to create a healthy sex industry with appropriate regulations.

REASONING FOR REGULATIONS IN THE NETHERLANDS
In 1999, the legal frameworks on prostitution changed in the Netherlands. Prostitution was not illegal but organized prostitution such as brothels was considered illegal. The Dutch government gave the reasoning that the change in the legislation was required to exercise better control over the sex industry with strict regulations and licensing to ensure the abolition of trafficking of minors, immigrants, and the coerced in the industry. Another reason for this change was to improve the condition of work, bring in safety, and ensure the health of the workers. “Stichting De Rode Draad”, a Dutch sex worker’s organization commented about the importance of the change in the legislation. This organization highlighted the improvements in acceptance, rights, freedom from abuse, freedom from discrimination, empowerment, and emancipation arising from this legislation and further benefiting the social relations, working conditions,
labor relations, and lowering the stigma around sex work. This also meant that the legislation recognized and addressed the issue of occupational hazards such as transmitted infections like HIV, maternity benefits in case of a pregnancy, and providing social insurance. The Legislation put upon responsibility and accountability upon the sex workers and the brothel owners by making them liable if they fail to pay taxes, file for licensing, etc. By creating a standard of financial responsibility the Dutch government has ensured in not alienating a part of their population and rather has ensured in creating a healthy environment of inclusiveness. Ultimately, legislation means making the vulnerable minority visible, allowing them to voice their problems, needs, and concerns. With the change brought about in the legislation, sex workers in the Netherlands no longer live anonymously and have a “secret life”. This excludes them from stigma and social discrimination. Another Dutch Union for Sex works, Vakwerk, used the legislations to partner with trade unions to protect the rights of the workers and ensure the active participation of the policymakers in administrating the activity of the industry. FNV is a large trade union which administers the labor issues in Varwerk and assists them in negotiations and creating contracts.

EMPLOYMENT CONTRACTS WITH SPECIAL REFERENCE TO CANADA
A study conducted in Canada about the benefits of decriminalization of sex work, most of the answers, suggestion, and recommendations were based on the need for employment contracts and gaining workers’ compensation from authorized organizations such as the “Workplace Safety and Insurance Board. Employment contracts were noted to be the most viable option to attain workplace rights. The only thing stopping sex workers to enter into employment contracts was the criminalized nature of sexual services. Canada took upon the example of New Zealand which decriminalized sex work in 2003. This revolutionary move of New Zealand established policies to protect the workers from health, safety, and occupational hazards. The main objective was to protect human rights and create employment contracts that detailed the working hours, wages, benefits, etc., while also having the complete freedom to restrain from providing any commercial sexual services when they choose to.

Taking upon this example, Canada related the situation of the sex industry before the decriminalization; it was noted that even limited employment contracts were better than no contracts at all, an employment contract meant that the sex worker had protection from the employer as well as the client. The sex workers would not be compelled to meet unreasonable demands. A contract also meant that they would be able to attain loans, housing, and employment opportunities without any stigma, all while being open to negotiations.

In conclusion, labor organizations and employment contracts help in elevating the status of the utterly stigmatized when compared to visioning a perfect utopian society free from sex work as it does more

2925 Marianne Jonker, Unionising sex workers in the context of regulation 12(4) International Trade Union Rights,5,2005


www.supremoamicus.org

1016
damage than good to a lot of sexual service providers around the world.

IV. INDIA’S STANCE ON PROTECTION OF THE SEX WORKERS RIGHTS

ANCIENT AND COLONIAL INDIA

Prostitution was a legalized profession in ancient India. The ancient accounts give evidence of the sex workers in India having agency and basic rights. To say the least, the ancient Indian society was tolerant of prostitution as even the epics, Ramayana and Mahabharata give examples of not only the existence of prostitutes but also the basic rights given. Later texts record the regulations surrounding sex work which detailed a hierarchy of prostitutes in ancient India. The lowest class of prostitutes were known as Kumbhadasi, followed by Rupajiva and the Ganikas.²⁹²⁷ The Ganikas were known for their beauty and intellect; they were educated and were respected by the King. A Ganika was treated like a government servant and she received fixed salaries from the King. The clients were held liable for the ill-treatment of the prostitutes and for not paying them for their services. With the introduction of British rule, toleration towards prostitution also began to decline. This was the beginning of the degradation of rights and the dehumanizing of sex workers in India. During the Colonial rule, prostitution was institutionalized and brothels known as chaklas were introduced. Chaklas is the origin of the stigma surrounding prostitution, to say the least, the women in chaklas were ill-treated, abused, starved, and tortured by the soldiers. This soon led to the “Contagious Diseases Act, 1868”, this Act was the first to introduce the absolute denial of human rights among the prostitutes. The Act created wrong notions about the profession and portrayed a negative impression about prostitution in the society. The final nail in the coffin was the criminalization of sex work. Gradually, after independence, these colonial ideas were incorporated into the debates of the Constituent Assembly.

MODERN INDIA

After independence, India signed the United Nations “International Convention for the suppression of traffic in Persons and of the Exploitation of Women”, in 1950. Soon, India introduced its legislation, SITA, or the “Suppression of Immoral Traffic in Women and Girls Act, 1956”. SITA was tolerant of sex work, but this was a period of international debates about the social evil, that is prostitution. To accommodate the new scenario, SITA underwent amendments and was titled: “Immoral Traffic in Persons Prevention Act, 1986” (ITPA). The major changes in the amendment were the replacement of ‘suppress’ with ‘prevent’ and the scope going beyond “women and girls” to “persons”. The Act still criminalized sexual services and specifically prohibited maintaining brothels²⁹²⁸, detaining a woman for prostitution, and living off of the earning of a prostitute.²⁹²⁹ The Act further provided geographical restrictions in soliciting the services. The ITPA is an anti-trafficking legislation it handles the issues of forced prostitution and remains silent upon prostitution by choice. It is not only a vague law but also used as a mechanism that empowers the police to implement these vague laws to exploit and abuse the sex workers.

²⁹²⁹ Immoral Traffic (Prevention) Act, No.104 of 1956, sec. 4, INDIA CODE (1956)
VIOLATIONS

BY AUTHORITIES
As per the ITPA, a major part of rescue is “rehabilitation”, but in the name of rehabilitation, these sex workers are relocated to homes that have inhuman conditions, lack of sanitation facilities, no proper food, and total confinement from their family and the outside world. An instance in Kerala was recorded where the sex workers were incarcerated in mental hospitals, another instance was the Dombarwada raid in Maharashtra evicted over 250 sex workers from their residences and were prevented from entering their own homes. By giving total power to arrest and evict the sex workers the State has failed to do its duty to protect and respect the life of the vulnerable and the stigmatized.

BY MEDICAL PROFESSIONALS
The stigma and discrimination around sex work have deep-rooted influence as even the medical professionals, who take an oath to not discriminate and provide the services whenever they can, refuse to do so accounting to the nature of work of these women. Sex workers are shamed and humiliated due to which they refuse to disclose their occupation while seeking treatment. To avoid the burden of humiliation, they deter from seeking medical treatments, making their conditions worse. They are discriminated, overcharged and in situations, are sexually exploited by the medical professionals.

BY MEDIA
The right to privacy is unfortunately a major violation being faced by the sex workers. The medical health facilities violate the confidentiality clause and the media captures the women after the raid in their detention facilities to glorify the story of the raid while essentially humiliating and violating their rights. These images and videos that the media captures, puts the sex workers at a greater risk by the family and also by those in the position of power, who can threaten the sex workers into providing favors for them.

DOCUMENTATION
An immediate issue of concern is identifying and documenting the sex workers. The stigma related to their profession stops sex workers from procuring documents to access entitlements. A survey conducted in Delhi in 2009 observed that only 20 percent of the five thousand sex workers were registered to have a voters’ card. The lack of documentation means that there is a lack of housing, ration cards and are excluded from the Public Distribution Systems. SR-VAW observed that the lack of identity leads to increased chances of violence against the sex workers. The Supreme Court had recommended the Central and State governments to record and provide identity cards to the sex workers but the critical barriers attached to the stigma make the implementation more difficult.

V. SUGGESTIONS AND CONCLUSION
The major issue of concern in India affecting the rights of sex workers is the conflation of sex work with trafficking while drafting laws. It is critical to ensure that the anti-trafficking laws do not encroach upon the human rights of the sex workers.


2930 Immoral Traffic (Prevention) Act, No.104 of 1956, sec. 6, INDIA CODE (1956)
2931 Violations faced by sex workers in India, Joint Stakeholders Submission (9.20.2016)
workers. There must be a clear differentiation in legislations while addressing consenting adults, non-consenting adults and children to ensure equity while administering justice. Rather than violent approaches, organizations and collectives must ensure to use alternative methods of fighting against trafficking while ensuring not to disrupt the daily profession of those who are consenting to it.

The next step would be decriminalizing sex work intending to create a more accepting community. It is critical to repeal laws that impose restrictions on consenting adult sex workers. Further, sex workers must be incorporated in labor organizations and employment contracts to ensure safe working conditions and to protect themselves from any kind of violence. To fully acknowledge violations against sex workers, it is of grave importance to shut down the system of compulsory detention and rehabilitation. A major way to bring about change is by referring to the experiences of sex workers while making policies affecting their rights along with providing access to the justice system. As noticed in the case of New Zealand, Argentina, Canada, and the Netherlands, unionization, and employment contracts are possibly the only best ways to tackle the major issues surrounding the problems faced by sex workers.

In conclusion, sex work is real work that requires recognition as labor. To ensure basic workplace safety, it is of the utmost necessity to associate sex workers to labor organizations. Further, it must be acknowledged that the sex industry is diverse and has multiple experiences, this makes it even more crucial to implement careful distinctive legislations. Due to the extreme diversity, it is only appropriate to begin at the grass-root level and build up with activism, unions, and employment contracts for sex work. With these implementations, it will become easier to identify the concerns and the needs of sex workers while protecting them and the rights guaranteed to them.

Large scale participation to advocate for the rights of the sex workers is essential to fight against the age-old stigma surrounding the profession. While it might be years or even decades for the Indian Penal Code to remove sex-related services as an offense, it becomes the duty of the community as a whole to acknowledge the basic rights of another individual to influence social attitudes and policymakers.

*****