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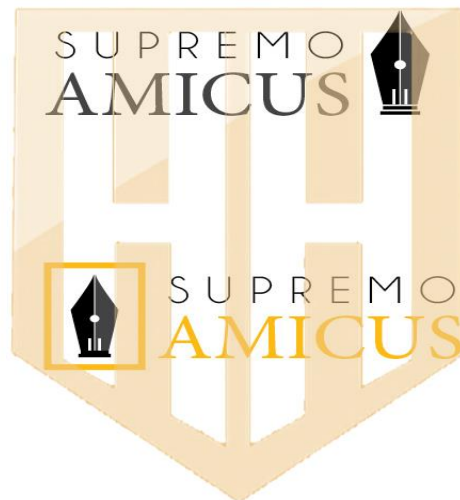


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EDITORIAL

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

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

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

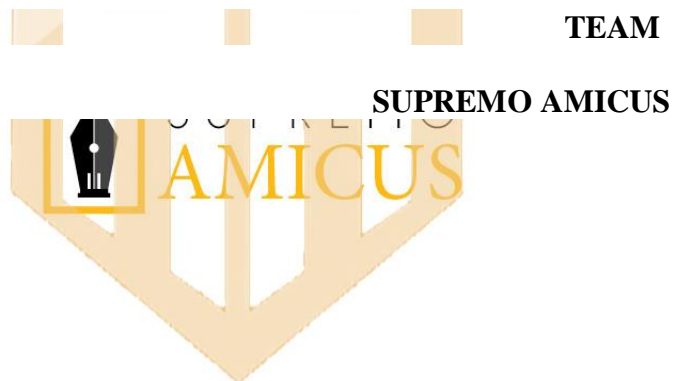




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META-CONSTITUTIONAL CONCEPTS AND THEIR IMPORTANCE

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From: *Tamil Nadu National Law School*

ABSTRACT:

The NJAC judgment delivered by the apex court was a huge sensation in which the independence of the judiciary was upheld. Judiciary set its foot down on letting the executive interfere in its functioning. Independent judiciary is a part of the 'Basic structure of the Constitution'. So, the court prima facie upheld the doctrine of basic structure. The Doctrine of Basic Structure was not a part of the bare text of our Constitution when it came into force nor was it added to the constitution by way of an amendment. Yet, it is given sovereign importance to an extent that even fundamental rights can be amended or declared ultra vires, if it transgresses any element of the basic structure of the Constitution. To this extent even the recent Puttaswamy v. Union of India judgement guarantees a new fundamental i.e., right to privacy though it is not a part of the Constitution. Such kind of rights that evolve by application of judicial mind can be called as meta-constitutional concepts. They help in the progression of the law and the society. This research paper will delve into how some of the meta-constitutional concepts evolved and why they are so essential.

CHAPTER 1: INTRODUCTION

India being a democratic country has a constitution, according to which it carries out its operations. Constitution contains rules or principles governing the conduct of a nation or a state, and establishing the concept, character, and structure of the nation. It lays down the basic structure of the government under which its people are to be governed. If these laws, legal theories, norms, customs which constitute the basic law of the land are inscribed on a document it is known as a written constitution.

Generally, two sets of principles make up the rules of constitutional law. One set of rules is contained in the written constitution of a country and other includes the constitutional interpretations made by the courts in order to fill up the constitutional gaps. These unwritten parts of this written constitution are called as meta-constitutional concepts and they are part of the architecture of the constitution just as written principles. They can come from historical context, court interpretations or conventions which evolve and become deeply rooted.

India has a written constitution and is known as the longest constitution. However, the written constitutions cannot provide for every eventuality¹. It must evolve with time and respond to unanticipated demands. The constitution lays down the inner boundaries and the unwritten parts extend those inner boundaries. These meta-constitutional

¹Supreme Court Advocates-on-Record Assn v. Union of India, (1993) 4 SCC 441.



principles have never been enacted in the form of laws. Hence, it can be said that a 'Meta Constitution' lays down the outer boundaries of a constitution.

This is a way of developing the constitution without undergoing the conventional process of making changes in the law. These concepts are developed on the basis of the principles of written constitution. However, these concepts enable a immutable structure and are vital to keep up with the varying social and political needs and requirements. It is also imperative to the functioning of the democracy. Each of these principles have a meaning as it basis itself on need of the hour and it helps to evolve the society and does not keep it stagnant.

Sir Ivor Jennings² developed criteria for deciding whether or not a particular Constitutional Convention should exist, namely: a) What are the precedents? b) Did the actors(judges) believe they were bound by a rule? c) Is there a reason for the rule? Similarly, even in case of meta-constitutional concepts it has to be seen if, the concepts interpreted by the judges were based on the constitutional principles and how relevant they are.

But, if the law diverges from its written and generally worded constitution, it can sometimes be radically incomplete for the understanding of a layman or an ordinary citizen. Though it is of paramount importance, he might not know about the existence of the concept. It is an obligation

² *Ibid*; See also, Jennings, 'The Law and the Constitution', Chapter III, <http://www.nadr.co.uk/articles/published/ConstitutionalLaw/Chapter005Conventions.pdf>, (last visited on 7th December 2017).

on the court to implement these concepts. Meta constitution as a concept is widely accepted in countries like Ireland, Canada, U.S.A. In India, certain principles like rule of law, natural justice, basic structure doctrine, judicial review, federalism, separation of powers, some of the parliamentary privileges have found their way into the system based on the meta-constitutional concept.

CHAPTER 2: RULE OF LAW "AN UNRULY HORSE".

2.1. Evolution of the concept

Rule of law is a manifestation of moral thought and has been asseverated by many democracies in the world inherent to good governance.

Rule of law has been defined as "the absence of arbitrary power on the part of the government (also termed as supremacy of law)"³ but still it has a very broad meaning attached to it and A.V.Dicey who is considered as a profounder of modern rule of law, in his writings on the British Constitution included three distinct but kindred ideas to the concept of Rule of Law⁴: (i) Absence of arbitrary power (ii) Equality before law (iii) Individual liberties.

In India, Supremacy of the Constitution is given importance and our constitutional

³ Bryan A. Garner, Blacks Law Dictionary, 1827, 10th Edition, 2014, Thomson Reuters, U.S.A.

⁴ See M.P. Jain Indian, constitutional law, Pg-7, 7th edition, 2014, Lexis Nexis ; See also, A.V.Dicey, Introduction to the study of the law of the Constitution, part II, Chapter 4, page 110-115, http://files.libertyfund.org/files/1714/0125_Bk.pdf, (last visited on 9th December 2017).



framers did not believe in giving arbitrary powers to any organ or any authority which implies that they deemed Constitution to be the supreme law of the land.⁵ But, this is

⁵ See generally, Constituent Assemle Debate, **Monday, the 23rd May 1949, Sardar Hukam Singh**: “This is so evident that I might be met with the reply that in all constitutional head always acts on the advice of his Council of Ministers and in other constitutions it is never put down expressly that he should do so. With that consciousness I have moved this amendment, because I feel that we are framing a written constitution wherein we are giving every detail, with the result that it is so cumbersome and bulky. Under such circumstances I feel that a matter of such importance and which is so apparent must be expressly put down. It may be said that conventions would grow automatically and the President shall have to take the advice of his Ministers. My submission is that here conventions have yet to grow. We are making our President the constitutional head and we are investing him with powers which appear dictatorial. Conventions would grow slowly and as this constitution is written and every detail is being considered, why should we leave this fact to caprice or whim of any individual, however high he may be? If we clearly put down that he is to act on the advice of his Ministers, it is not derogatory to his position” <http://parliamentofindia.nic.in/ls/debates/debates.htm>, (last visited on 13th December 2017, 6:30 P.M); See also Constituent Assembly Debate, Tuesday, the 15th November 1949, **Pandit Thakur Das Bhargava**: “We will come to the same situation in the case of article 257 also, because these words occur there in article 257 also, and they are very extensive, very vague, and very general, Sir, I do not visualise that our Central Government as at present constituted will ever exercise such absolute or arbitrary powers. But I should think that no Government of the day should exercise powers in an arbitrary manner. I know that, if he were to do so in every case then the carrying on of the Government of India would be impossible. But what does it mean? It means that every provincial government shall be constantly trembling before the Prime Minister. The Prime Minister of India will become not only the Grand Moghul, but he will be like a lion and the Provincial Governments will be like lambs. The provincial government will be in constant fear and will constantly tremble before him.

expressly not stated anywhere in the Constitution and is a convention which is strictly followed over years. Judiciary is considered to be the custodian of the same⁶. In 1973 supremacy of the Constitution was termed as a part of the doctrine of basic structure and has been acknowledged⁷. Where supremacy of law enforces checks and balances over the administrative and executive acts and proclaims Constitution to be supreme, the principle of equality before law makes sure that this law is enforced equally on all citizens without any apathy. This is codified concept in our Constitution under Art.14⁸. Supreme Court in *Jaisinghani* *case*⁹, held that, “the rule of law from one point of view means that decisions should be

Such a provision invests the Central Government with absolutely arbitrary power and I maintain that arbitrary powers should not be given to any person. Ministeries and Provincial Governors will have no security or stability and will change at the whim or caprice of the Prime Minister”, <http://parliamentofindia.nic.in/ls/debates/debates.htm>, (last visited on 13th December 2017, 6:30 P.M); See also, Constituent Assembly Debates, 20th August 1949, **Shri H. V. Kamath**: “The other day the Prime Minister, I believe while addressing some public meeting, referred to the frequent conflict between the liberty of the individual and the security of the State. Yes, I agree that the State should be secure so that the individual may have life, liberty and happiness. But the liberty of the individual is not a thing to be trifled with at the mere behest or arbitrary fiat of the executive”,

<http://parliamentofindia.nic.in/ls/debates/vol9p14b.htm>, (last visited on 13th December 2017, 4:30 P.M).

⁶ *Indra Sawhney v. Union of India*, AIR 1993 SC 477, Para 623.

⁷ *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461.

⁸ Art. 14 The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁹ *Jaisinghani v. Union of India*, [1967] 2 SCR 703.



made by the application of known principles and rules, and, in general, such decisions should be predictable” and in KeshvanandaBharati, Rule of law was said to be a part of basic structure and it was said that “The Rule of Law has been ensured by providing for judicial review”¹⁰.

But, in including absence of arbitrariness as an ingredient of rule of law it means that the laws imposed should not be arbitrarily. It was in *Indira Gandhi v. Rajnarain*¹¹, ‘Rule of law’ as an unwritten concept was for the first time explicitly used to declare an amendment void on the basis of arbitrariness. Clause 4 of Article 329-A which was inserted by the thirty-ninth Constitutional Amendment Act 1975 to immunize the dispute with regard to the office of the Prime Minister from any kind of judicial review, was declared to be void by the apex court by stating that “It follows that Clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the Rule of Law”¹²

In, *A.D.M Jabalpur v. Shivkanth Shukla*¹³, the case was filed in the context of suspension of Art.14, 21 and 22 during the emergency period and the question raised

was ‘whether there was any rule of law in India apart from Art.21?’ Though the majority’s answer was in negative, Justice H.R.Khanna opined that, “Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law” Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning...Rule of Law is now the accepted norm of all civilized societies”. In *Maneka Gandhi v. Union of India*¹⁴, which was a landmark case, the court held that ‘procedure established by law’, must satisfy certain requisites in the sense of being fair and reasonable. The procedure cannot be arbitrary, unfair or unreasonable¹⁵. This definitely made it comprehensible that any law coined should not be arbitrary. This way comprehensive meaning of rule of law can be said to be a conventional principle.

2.2. Significance of ‘Rule of Law’ based on judicial decisions

The essential characteristic of ‘rule of law’ is equality and absence of arbitrariness but, in India there exist certain privileges like no criminal proceedings whatsoever can be instituted or continued against the President, or the Governor of a state, the special privileges enjoyed by the parliamentarians. Though these exceptions are based on

¹⁰Supra note 9, Para 504.

¹¹AIR 1975 SC 2292.

¹²Ibid “Imperfections of language hinder a precise definition of the Rule of Law. A. V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1855 under the title, ‘Introduction to the Study of the Law of the Constitution’. But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of Equality, no one shall be exposed to the arbitrary will of the Government”, Para 682.

¹³*A.D.M Jabalpur v. Shivkanth Shukla*, AIR 1967 SC 1207.

¹⁴*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹⁵Ibid J. Bhagawati said that, “The principle of reasonableness which is legally as well as philosophically an essential element to of equality or non-arbitrariness pervades article 14 like a brooding omnipresence. Thus procedure in article 21 must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive, otherwise it would be no procedure of law at all”.



reasoning it can be said that the concept of rule of law does not exist in concrete sense. However, complete absence of disparity or inequality is not possible because of certain valid grounds and reasoning. But, it can be said that there has been a constant endeavor to uphold the concept of rule of law and great significance is being attached to it.

Commitment to the 'rule of law' is the heart of parliamentary democracy¹⁶. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in the favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice¹⁷. Democracy ensures the most favourable conditions for the rule of law. It contains essential safeguards against arbitrariness and provides effective machinery for redress of grievances¹⁸. Dr. Ambedkar also believed in rule of law and democracy. He always insisted that rules of democracy must be based on fair play¹⁹ i.e., democracy cannot exist if there is arbitrariness. Every action of the State authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Art. 14 of the Constitution and rule of law. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and

natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. Even if the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination.²⁰ Rule of law constitutes the core of our constitution and it is the essence of the rule of law that the exercise of the power by the state whether it be the legislature or the executive or any other authority should be within the constitutional limits²¹. Rule of law requires that any abuse of power by public officers should be subject to the control of courts²² and even accountability by police personnel while dealing with anti-national elements is one of the facets of rule of law and it cannot be countenanced in the name of maintaining discipline²³.

Rule of law is not merely for public it ensures social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to life in dignity and development himself. This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty,

¹⁶Reliance Energy Ltd. v. MSRDC Ltd. (2007) 8 SCC 1, Para 36; *see also*, M/s. GVPR-DARA JV v. State of Rajasthan & Ors, 2016 SCC OnLine Raj 93, Para 79.

¹⁷Kranti Associates Private Limited v. Masood Ahmed Khan, (2010) 9 SCC 496, Para 47.

¹⁸H.R Khanna, *Rule of Law and Democracy - Friends or Foes?*, (1990) 1 SCC J-7.

¹⁹T.K Tope, *Dr Ambedkar and Article 356 of the Constitution*, (1993) 4 SCC J-1.

²⁰Mahabir Auto Stores v. Indian Oil Corporation, AIR 1990 SC 1031

²¹D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579

²²State of Punjab v. Khan Chand, AIR 1974 SC 543.

²³State of Maharashtra v. Saeed Sohail Sheikh, AIR 2013 SC 168.



and his human dignity on the other²⁴ and the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant²⁵.

It is also said that fundamental rights, subject to social control, has been incorporated in the rule of law²⁶ and certain constitutional provisions including fundamental rights, make it clear that rule of law seeps into the entire fabric of the constitution and indeed forms one of its basic features²⁷. Even with regard to criminal justice system, it mandates that any investigation into the crime should be fair, in accordance with the law and should not be tainted. It should not be influenced or misdirected so as to throttle a fair investigation resulting in the reprobate escaping the punitive course of law.²⁸

The rule of law is an idea about, justice and non-arbitrariness. Democracy and rule of law are interdependent as rule of law aids in better functioning of democracy. As judiciary is considered the guardian of the rule of law²⁹, it has a duty to ensure that authority is used in a manner which is consistent with rule of law, as it is fundamental principle of good administration³⁰ and has constantly strived to reinforce the mechanisms or facets of rule of law as, rule of law is imperative for

existence of democracy. Thus, it can be said that, rule of law is not a far-fetched concept but is not a concept which is concrete as well.

CHAPTER 3: CHRONICLE OF 'BASIC STRUCTURE DOCTRINE'.

3.1.EVOLUTION:

Indian Constitution gives the Parliament the power to make laws subject to the provisions of the Constitution³¹ and Art.368³² invests the power to amend the constitution. One such amendment made, led to the evolution of the doctrine which laid down an express provision that, any amendments made cannot disturb the original integrity of the constitution. In 1951 by way of the first constitutional amendment, Art. 31A and Art.31B were added to the Constitution. Art.31A stated that acquisition of the property by the state could not be questioned even if it transgressed any of the fundamental rights including right to equality³³, property³⁴,

²⁴National Legal Services Authority v. Union of India, AIR 2014 SC 1863, Para 131.

²⁵Som Raj v. State of Haryana, AIR 1990 SC 1176

²⁶Golaknath v. State of Punjab, AIR 1967 SC 1643,

²⁷Bachan Singh v. State of Punjab, AIR 1982 SC 1325.

²⁸Subramanian Swamy v. CBI, AIR 2014 SC 2140

²⁹T.N.Godavarman v. Ashok Khot, AIR 2006 SC 2007, Para 5.

³⁰EpuruSudhakar v. Govt. of A.P, AIR 2006 SC 3385, Para 65-68.

³¹ Art.245.(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

³²See Art.368.(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent

power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

³³See Art.14-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.



speech³⁵ or occupation³⁶. Article 31B created the Ninth Schedule, which was a protected schedule, that is, laws inserted in this schedule by way of amendments, could not be invalidated. This amendment attacked Art.13(2)³⁷, which prohibited legislature from making any laws which will abridge the fundamental rights of the citizens.

By, first amendment only land reform laws were brought under this schedule and in *Sankari Prasad v. Union of India*³⁸, this was challenged by the property owners under Art.13³⁹, and the question whether fundamental rights can be amended by means of Art.368 came up for consideration. The Court held that, the word amendment does not come under the scope of law under Art.13⁴⁰ and hence, strengthened the power of the parliament to amend the constitution.

Same stance was taken by the apex court in *Sajjan Singh case*.⁴¹

In *Golak Nath case*⁴², when the question on validity of Art.31A and 31B popped up again, an eleven judge bench reversed the position and opined that amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13(2). By way of this judgment, judiciary revived back its muscle to review the parliamentary actions. This led to loggerheads between judiciary and legislature. Legislature then inserted Art.13(4)⁴³ and Art.368(3)⁴⁴ by 24th amendment Act, to quench its thirst for power. This over ambitious act of legislature was questioned in *Keshavanandha Bharathi Case*⁴⁵. Seven out of the thirteen judge bench decided that, Parliament's inherent power under Art.368 was restricted by the impregnable nature of the Basic features of the Constitution or the Basic Structure of the Constitution⁴⁶. It was firmly said that basic

³⁴ See generally Originally, the Constitution guaranteed a citizen, right to acquire hold and dispose of property under Art.19(f) and Art. 301 as a fundamental right. This right was repealed in the year 1978 by way of 44th constitutional amendment and Art.300A was introduced in Part XII making the right to property only a constitutional right.

³⁵ See Art.19 (1)(a) All citizens shall have the right to freedom of speech and expression.

³⁶ See Art.19 (g) All citizens shall have the right to freedom to practise any profession, or to carry on any occupation, trade or business.

³⁷ See Art.13(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

³⁸ *Sankari Prasad Singh v. Union of India*, AIR 1951 SC 458.

³⁹ *Supra* note 34.

⁴⁰ See Art.13(3) (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

⁴¹ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

⁴² *Supra* note 28.

⁴³ Art.13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

⁴⁴ Art.368(3) Nothing in article 13 shall apply to any amendment made under this article.

⁴⁵ *Supra* note 9.

⁴⁶ See The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment.

See *Navajyoti Samanta & Sumitava Basu*, TEST OF BASIC STRUCTURE: AN ANALYSIS, NUJS Law review(2008), http://nujlawreview.org/wp-content/uploads/2015/02/navajyoti_samanta_and_sumitava_basu.pdf, (last visited 19th December 2017, 4:30 P.M); See also S.P.Sathe, "Judicial Review in India: Limits and Policy", Ohio State Law Journal, 870-899, vol. 35, no. 4 (1974),



structure or Basic features of the constitution cannot be destroyed⁴⁷.

3.2.EFFECTIVENESS:

Though the Court in KeshavnandhaBharathi held that, the power of Parliament to amend was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what exactly constituted the basic structure⁴⁸. In *I.R. Coelho*⁴⁹ the court made an attempt to define what was basic structure and held that, “*the actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys*

basic structure. The impact test would determine the validity of the challenge.”

Various features have been brought under the umbrella of Basic structure Doctrine ever since KeshavanandhaBharathi Case and some of them are Supremacy of the constitution⁵⁰; democratic form of government and secularism⁵¹; the principle of separation of powers⁵²; Federal character of the constitution⁵³; Unity and Integrity of the nation⁵⁴; Rule of Law⁵⁵; Judicial review⁵⁶; Independence of judiciary⁵⁷. Basic

https://kb.osu.edu/dspace/bitstream/handle/1811/69416/OSLJ_V35N4_0870.pdf, (last visited 18th December 2017, 4:00 P.M).

⁴⁷*Supra* note 9, **Sikri, C.J.** explained that the concept of basic structure included: Supremacy of the Constitution, Republican and democratic form of government, Secular character of the Constitution, Separation of powers between the legislature, executive and the judiciary, Federal character of the Constitution; **Shelat, J. and Grover, J.** added two more basic features to this list: The mandate to build a welfare state contained in the Directive Principles of State Policy. Unity and integrity of the nation; **Hegde, J. and Mukherjea, J.** identified a separate and shorter list of basic features: Sovereignty of India, Democratic character of the polity, Unity of the country, Essential features of the individual freedoms secured to the citizens, Mandate to build a welfare state: **Jaganmohan Reddy, J.** stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as: Sovereign democratic republic, Parliamentary democracy, Three organs of the State.

⁴⁸*THE DOCTRINE OF BASIC STRUCTURE IN PRE AND POST KESHAVANANDA'S CASE*, <http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/39853/9/chapter%205.pdf>, (last visited on 18th December 2017, 5:10 PM).

⁴⁹*I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

⁵⁰*KesavanandaBharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SCC 1299; *Raja Ram Pal v. Speaker, Lok Sabha* AIR 1965SC 745; *KuldipNayar v. Union Of India*, AIR 2006 SC 312; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861;

⁵¹ *S.R. Bommai v. Union of India*. AIR 1994 SC 1918; *Poudyal v. Union of India*, AIR 1993 SC 1804; *State of Karnataka v. Praveen Bhai Thogadia*, AIR 2004 SC 2081; *M.Nagaraj v. Union of India*, (2006) 8 SCC 212; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁵² *KesavanandaBharati v. State of Kerala*, AIR 1973 SC 1461; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861; *Ashoka Kumar Thakur v. UOI*, (2008) 6 SCC 1; *Bhim Singh v. Union of India*, (2010) 5 SCC 538; *State of T.N v. State of Kerala*, AIR 2014 SC 2407;

⁵³ *KesavanandaBharati v. State of Kerala*, AIR 1973 SC 1461; *S.R.Bommai v. UOI*, (1994) 3 SCC 1; *State of Karnataka v. Union of India*, AIR 1977 SC 1361; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁵⁴ *KesavanandaBharati v. State of Kerala*, AIR 1973 SC 1461; *Raghunath Rao v. Union of India*, AIR 1993 SC 1267; *KuldipNayar v. Union Of India*, AIR 2006 SC 312; *Vishal N. Kalsaria v. Bank of India*, 2016 SCC Online SC 64.

⁵⁵ *Indira Nehru Gandhi, Smtv. Rajnarain*, AIR 1975 SC 2292; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861; *Sub-committee on Judicial Accountability v. UOI*, (1991) 4 SCC 699; *Madras Bar Assn. v. UOI*, (2014) 10 SCC 1.

⁵⁶ *KesavanandaBharati v. State of Kerala*, AIR 1973 SC 1461; *Minerva Mills v. Union of India*, AIR 1980



structure as a theory has evolved since its inception. Once labeled as a basic feature, these rights have *ad nauseam* been upheld in plethora of judicial decisions because of the fact that they part a of the basic structure.

The framers of the constitution entrusted the legislature with complete supremacy to amend the constitution and there was no provision in the constitution which could safeguard its core ideals and essential rights, which made the constitution sacrosanct. So, with the intention to preserve these foundational ideas of the Constitution, the Supreme Court pronounced that the parliament could not deface the basic features of the Constitution which are sacred to the ideals of the Indian society. This effectually put a brake on the authority of the Parliament to mutilate the Constitution under the pretext of amending it. Thus, 'basic structure doctrine' is a judicial innovation and is an unwritten concept or rather a meta-constitutional concept and its evolution is celebrated because it helped to preserve the originality of the constitution.

CHAPTER 4: A NARRATIVE- INDEPENDENCE OF JUDICIARY

4.1.EVOLUTION

Importance of the independence of the judiciary was long ago realized by the framers of the constitution but an explicit

provision was not incorporated in the constitution. It was inferred by the judiciary from constitutional gaps, from the letters of various provisions of the Constitution thereby, making it a meta-constitutional concept. By further judicial pronouncements it started attaching importance to the concept and was marked as a basic feature.

4.1.1. Constitutional assembly debates

To secure independence of the judiciary a motion was introduced in one of the constituent assembly debates that, under Chapter IV of part V : "102-A, Subject to this constitution the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature". It was initiated by Prof. K. T. Shah as he considered that, judiciary, which is the main bulwark of civil liberties, should be completely separate from and independent of the Executive, whether by direct or by indirect influence as there possibility of the translation, that has frequently occurred in the past, of high judicial officers being available for promotion or transfer to equally high or even higher executive offices and he opines that judges should be barred from translation, as it will unconsciously influence the judges and judgments, in the hope of proper appreciation being shown at suitable moments by vesting the powers. He also stated that, as a sound principle of administration of justice, judiciary must not be influenced by legislative acts and must confine itself to the final Act of the legislature as it has been worded and remain the supreme authority for interpreting that law. Hence, he considered this amendment will enunciate a very important proposition in making of constitution and for securing

SC 1789; A.K.Behrav.UOI, (2010) 11 SCC 322; Parkash Singh Badalv. UOI, AIR 2007 SC 1274; ⁵⁷ Union of India v.Sankal Chand, HimmatlalSheth, AIR 1977 SC 2328 ; S.P Gupta v. Union of India, AIR 1982 SC 149; Supreme Court Advocates-records- Association v. Union of India, AIR 1994 SC268; State of Bihar v. Bal Mukund Shah, AIR 2000 SC 1296;



the independence of the Judiciary.⁵⁸ Some of the members thought the independence of the judiciary can be secured, by having a proper method of the appointment of the judges, by providing that there shall be no interference by the executive in the judicial functions of the judicature, by making the judges not easily removable and if the judiciary is not separated from the influence of the Executive there will be intellectual corruption⁵⁹ but, some thought that separation and independence of the judiciary is not practicable at this stage.⁶⁰ So, the motion was negated.

Though the motion for rigid independence of judiciary was set aside certain provisions were included in the constitution which indirectly set the tone for judicial independence in our country.

4.1.2. Constitutional Provisions and judicial Pronouncements

Every Judge of the Supreme Court is appointed by the President after consultation with such of the Judges of the Supreme Court and the High Courts in the States, the Chief Justice of India⁶¹ and the power of appointment of Judges of High Courts is

exercisable only after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court.⁶² Earlier, in the first judges transfer case, it was held that consultation by the president while appointing the judges was a mere Suggestion, not concurrence and was not binding on the president⁶³. But, in *Supreme Court Advocates on record v. Union of India*⁶⁴, which is known as second judges transfer case, it was held that chief justice should have primacy and the opinion of the Chief Justice shall be binding on the President as he is more competent than other constitutional machineries to accrue the merit of a candidate. This made it clear that, the central government does not have unfettered power and have to act after effective consultation⁶⁵. In third-judges case⁶⁶, in 1998, it was held that even the advice given by Chief Justice should be with proper consultation with four other senior-most judges, otherwise it is not binding. This set the base for collegium system and

⁵⁸Prof.K.T.Shah, Constituent assemble debates, Monday, the 23rd May 1949, <http://parliamentofindia.nic.in/ls/debates/vol8p6.htm>, (last visited on 20thDecember 2017).

⁵⁹*Ibid* Mr. Naziruddin Ahmad.

⁶⁰*Ibid* Mr. Munshi.

⁶¹ Art.124(2), Constitution of India, 1950-every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal 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 for the purpose and shall hold office until he attains the age of sixty-five years.

⁶² Art.217(1), Constitution of India, 1950-every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and 1[shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty two years.

⁶³ S.P Gupta v. Union of India, AIR 1982 SC 149.

⁶⁴ (1993) 4 SCC 441.

⁶⁵*But see* Constituent assembly debate, Tuesday, 24th May, 1949, Prof. Shibban Lal Saksen, during constituent assembly debates had suggested that the appointment of Judges should be confirmed by 2/3rd majority of the houses of parliament but, this was rejected by the house, <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm>, (last visited on 20thDecember 2017).

⁶⁶ In Re-Special Reference, AIR 1999 SC 1.



was one of the prominent ways to ensure independence of judiciary. Judges are not employees of the State holding office during the pleasure of President/Governor of the State, as the case may be.⁶⁷ Their tenure is secured⁶⁸ and no discussion can take place in Parliament with respect to the conduct of the judge of Supreme Court or High Court in the discharge of his duties except upon a motion for presenting an address to the President for the removal of the judge⁶⁹. This shields the Supreme Court and the High Courts from political influence, and thus ensures their independence from political pressures and authority. Even the process of removal is intricate in the sense that, he cannot be impeached except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.⁷⁰ Further, the only grounds for his removal can be proved misbehavior or incapacity⁷¹.

The allowances of the judges is also an aspect which makes the judges independent. They are charged on the Consolidated Fund of India in case of Supreme Court judges and the Consolidated Fund of state in the case of High Court judges. Though the Parliament is authorized to prescribe the privileges, allowance and pension of the Judges of the Supreme Court, it is subject to the safeguard that these cannot be varied or

altered during the course of the tenure to their disadvantage⁷².

Even under Art.50 of the Constitution it is given that, State shall take steps to separate the judiciary from the executive in the public services of the State. But, separation is directed only in public services of the state and it is a non-justiciable provision. These provisions in a circumlocutory way indicate that judiciary should be independent but, independence of judiciary was expressly given prominence after, it was brought under the umbrella of basic structure doctrine by stating that, it is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity⁷³ and was further reaffirmed by other judgments⁷⁴. Even in the NJAC judgment, Supreme Court declared the 99th Constitutional Amendment Act as unconstitutional and void, on the ground that it violated, 'Independence of the judiciary' which is a basic feature of the constitution⁷⁵.

4.2.NECESSITY

The doctrine of Separation of Powers exists to draw limits for the working of all the three organs of the state: Legislature, Executive and the Judiciary. It accommodates an obligation to the judiciary to act as a watchdog and to check whether the executive and the legislature are working

⁶⁷All India Judges Association v. Union of India, AIR 1993 SC 2493

⁶⁸Supra note 62 and 63.

⁶⁹ Art.121, Constitution of India, 1950.

⁷⁰Art.124(4) and (5), Constitution of India, 1950

⁷¹Ibid.

⁷² Art.125(2), Constitution of India,1950.

⁷³Supra note 64.

⁷⁴Supra note 58.

⁷⁵KrishnadasRajgopal, *SC Bench strikes down NJAC Act as 'unconstitutional and void*, October 17, 2015 <http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece>, (last visited on 21stDecember 2017).



within their points of confinement under the constitution and not meddling in each other's working. This errand given to the judiciary to direct the doctrine of separation of powers. It can't be carried on effectively if the judiciary is not free in itself.

Availability of an independent judiciary and an atmosphere wherein judges may act independently and fearlessly.⁷⁶ The efficient functioning of the Rule of law under the aegis, of which our democratic society can flourish, requires an efficient, strong and enlightened judiciary⁷⁷. Judiciary is the guardian of rule of law. Hence, judiciary is not only the third pillar but also the central pillar of democratic state. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of courts have to be respected and protected at all costs. Otherwise, the very concentration of our constitution scheme will give way and with it will disappear the rule of law and the civilized life in the society.⁷⁸

An effective and autonomous judiciary is a fundamental necessity for a reasonable, reliable and unbiased administration of justice. The freedom of the judiciary holds an outstanding position. It is clear from the historical outline that judicial independence has faced numerous impediments in the past mainly in relation to the appointment of judges but, courts have attempted to maintain the freedom of judiciary constantly and in light of the fact that the independence

of judiciary is the pre-essential for the effectual implementation of the Constitution.

CHAPTER 5: CONCLUSION

India's commitment to law is created in the Constitution. Our Constitution is primarily a written one but, this text is based on vital unstated principles. Framers intended to keep our Constitution dynamic in nature so that, it could survive contingencies and these constitutional principles have either evolved or become patent in this process. Courts have used structural interpretive methods to uncover these unwritten principles which were in rudimentary form which is evident in the early jurisprudence of the Supreme Court of India. Supreme Court was amongst that part of the society which believed in the supremacy of Parliament⁷⁹. But, Court began to flex its muscles and interpreted the constitutional texts profoundly to protect the principles which the Indian framers saw as *sine qua non* of the Constitution but, which the Parliament was trying to destroy by way of amendments. Interpreting constitutional texts intensely paved way to development of unwritten constitutional jurisprudence in India.

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations which constitute substantive limitations upon government action⁸⁰. Rule of law is one such principle. When rule of law was an unsophisticated principle, the power used by

⁷⁶ Om Prakash Jaiswal v. D.K. Mittal, AIR 2000 SC 1136

⁷⁷ All India Judges Association v. Union of India, AIR 1992 SC 165.

⁷⁸ *Supra* note 31.

⁷⁹ Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

⁸⁰ See Quebec Secession Reference, [1998] 2 S.C.R. 217.



the government could be arbitrary, yet justifiable. But, now the expression rule of law is clearly manifested and is a strictly accepted norm. It is used to curb the actions of the executive which are not in accordance with the law. Rule of law is the antithesis of arbitrariness. It seeks to maintain a balance between the opposing notions of individual liberty and public order⁸¹ and ‘judicial review’ is an essential derivative of rule of law. Judicial review involves determination of the constitutionality of the law and also the validity of administrative action which will ensure that there is no arbitrariness and maintain rule of law. Judicial review is a facet of judicial functions. Separation of powers is also indirectly guaranteed by rule of law, as rule of law is essential for good governance of the country, which can be secured through unbiased judiciary. Independent judiciary is viewed as a fundamental safeguard against arbitrary exercise of powers. Basic structure doctrine also acts as a barrier against parliamentary autocracy. The doctrine of basic structure provides a touchstone on which the validity of the Constitutional Amendment Act could be judged. Basic structure doctrine is, in effect, a constitutional limitation against parliamentary autocracy or state action. It ensures that any action by the state does not ‘damage or destroy’ the ‘basic features on which Constitution rests. Any restraint on independence of judiciary, rights and liberties will be at risk. So, independence of the judiciary is the basic requisite for ensuring a free and fair society under the

rule of law and basic structure doctrine aids the same.

Indian courts always have relied on these unwritten constitutional concepts, in addition to constitutional text not just for metaphorical purpose, but in lieu of deciding historical cases. These unwritten concepts help to flesh out the written principles. Upholding these fundamental principles, even those principles which are not in written form, is an innate and legitimate characteristic of the judge’s role, which he can carry out efficiently devoid of any interference. Courts assume this role to develop and defend certain fundamental or deep principles which are essential for the growth of democracy. In the absence of independent judiciary, democracy cannot flourish.

Thus, it can be said that, the power to check if any law is violating the Constitutional provisions especially basic features of the Constitution rests with the judiciary, which is known as judicial review and it is the exercise of judicial review by the judiciary which will see to it that there is no arbitrary exercise of authority which is nothing but rule of law. Rule of law is the essence of democracy. However, judiciary can function efficiently if it is independent from external influence and efficient functioning of the judiciary will help to protect constitutional mandates both written and unwritten. Thus, Indian Constitution is not a series of fully integrated texts, but rather a combination of written text and unwritten principles, both of which have binding legal force. They are interlinked and co-exist. It would be impossible to conceive our constitutional structure without them. Thus, significance of these principles cannot per se be

⁸¹*A.D.M Jabalpur v. Shivkanth Shukla*, AIR 1967 SC 1207



underestimated as, they are a now a part of what can be called as constitutional morality and serve as a root for the constitutional text to sustain.

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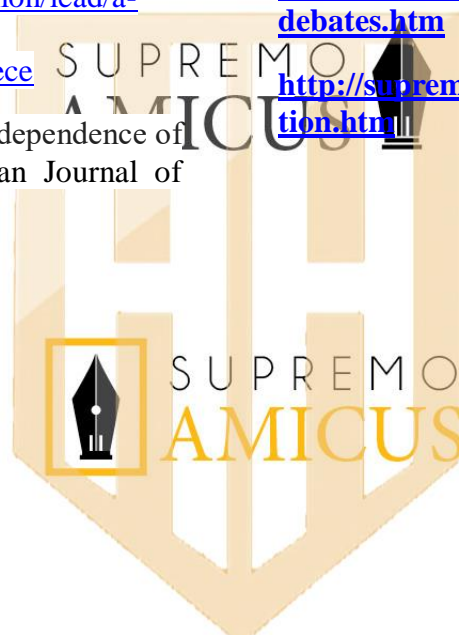
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HUMAN RIGHTS UNDER INDIAN LAW

By *Adarsh Pandey*
From *City Academy Law College, Lucknow University*

- **Neutral law theory**
- **Natural law theory**
- **Rights of man**
- **Human rights**

3. Evolution of concept

INTRODUCTION:-

- Birth right of human being.
- Universal Right of human being.
- Right flowering the spirit of human.
- Right recognize the worth of human being.
- Right determine dignity of human
- **According to B.R. Ambedkar** human right is a gift of law.
- **According to Fuller**, human right is requirement of complete development of human being.
- **According to the Protection of Human Rights Act, 1993**, Human rights means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the international covenants and enforceable by courts of India.

• **16th – 18th century**

Earliest conceptualisation of human right is credited to Ideas about Natural rights emerged from Natural law.

Some Spanish clerics who maintained Aristotle view of humanity.

Equal right to freedom from slavery for all human

• **17th century**

English philosopher John Locke in his work life, liberty & estate, social contract observes that fundamental rights can't be surrendered.

• **18th century**

At the time of U.S. Declaration of Independence and French declaration of right of man of citizen stated that-

We hold this truth to be self evident that all men are created equal that they are endowed by their creator with certain Inalienable Rights, that among of these are life, liberty & pursuant of Happiness.

Human rights are inalienable rights.

• **19th century**

In 19th century human rights become central concern over the issue of slavery.

Number of British members of parliament worked in abolition of Atlantic Slave Trade, Abolition of Slavery.

History of human right

1. Old concept as human civilization

Human right is as old as civilization of human being because from the origin of the society everyman has desire of safety which shows that desire of safety is the reason for the emergence of human rights.

2. Theories of human right.

The main concept of human right emerged step by step which are considering by the theories of human rights which are as follows



U.S. abolished slavery system between 1777 & 1804. Slavery Abolition Act 1883.

• **20th century**

World war and huge losses of life and gross abused of human right were driving forced develop of modern human right instrument.

League of Nation was established in 1919 for Negotiation over treaty of Versatile.

• **After Iind World War**

United nation and its members made the bodies of law such as International Humanitarian Law.

• **UDHR**

Established in 1950

Adopted by united nations general assembly

Historic document in promotion of human right.

First official step to legalise the concept of human rights.

HUMAN RIGHT UNDER INDIAN LAW

➤ **INTRODUCTION**

Human rights and fundamental rights of Indian constitution are not different aspects because fundamental rights of Indian constitution opted by human rights which are mentioned in UDHR

➤ **CONCEPT-**

1. Relation in adoption of Indian Constitution & U.N. Charter

Indian constitution and U.N.Charter arisen same time which are as follows-

Indian constitution

Adopt - 26th November 1949

Enforced – 26th January 1950

U.N. Charter

Adopt – 25th June 1945

Enforced – 24th October 1945

Above statement shows that how fundamental rights of Indian constitution affected by U.N. Charter.

2. Effect of adoption of UDHR

• UDHR adopted in general assembly of U.N.

• In case of **kesavananda bharti v/s State of Kerala**¹ court held that great effect of UDHR in Indian Constitution. It is basically because the India is a participant in Universal Declaration of human rights.

In case of in **Golaknath v/s state of Punjab**² court held that those rights which are traditionally called Natural Rights is now known as Fundamental Rights.

¹kesavananda Bharti v/s State of Kerala, AIR 1973 SC 1461.

²Golaknath v/s State of Punjab, AIR 1967 SC 1643.

3. Article 55 of U.N. Charter

This article charges the United Nations to promote Universal Respect for and observance of human right and fundamental right.

4. Position of term human right

This term not mentioned in Indian Constitution.

Term mentioned in Article 1(Promoting & Encouraging respect of Human Right) of U.N.Charter.

5. Effect of establishment of U.N. Commission



Establishment of United Nations Commission made great effect in the promotion and protection of human right and it also provide universal respect of human rights.

➤ **Classification of human right**

1. On the basis of Generation

▪ **Ist generation human rights**

Rights of human which are essential at the beginning of the society or civilization of human society such as right to life etc.

▪ **IInd generation human rights**

Rights of human which encourage the strength of Ist generation of human rights. The main aim of these rights is to establish the concept of public welfare. Rights are right to education, employment, health, etc.

▪ **IIIrd generation human rights**

After emergence of both generations of human rights this was emerged at the end of 20th century and these are not codified because all these rights of IIIrd generation is still under process of development.

2. On the basis of nature

▪ **Civil and political rights**

They knew as Ist generation human rights. Rights related to politics which gave right of participation to each individuals in formation of government such as right to vote.

▪ **Economical, social & cultural rights.**

All essential rights of individuals which are necessary for survival of life comes under

these rights such as right to food, shelter, cloth, health, education, trade, etc.

▪ **Collective rights**

They knew as IIIrd generation human rights.

Main aim to maintain and fulfil all necessary conditions for survive human life such as right to peace and environment.

3. On the basis of role

▪ **Positive rights**

Rights such as Economical, social & cultural rights

These rights are similar to DPSP. Main aim is to realization states affirmative action is required.

▪ **Negative rights**

Rights such as Civil and political rights. Main aim is to no realization states affirmative action is required.

These rights are similar Fundamental Rights of Indian Constitution.

▪ **Neutral right**

Rights which neither positive nor negative. These rights still in process of development.

➤ **RELATIONSHIP BETWEEN HUMAN RIGHT AND FUNDAMENTAL RIGHT-**

1. Role of Preamble

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a **SOVEREIGN SOCIALIST SECULAR DEMOCRATIC**



REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this 26th day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION

- **“We the people of India”**
This term shows respect of human right because term we shows humans means rights in respect of humans so finally we can say that the preamble which is the soul of Indian Constitution is preserves the rights of human.
- **“Democratic Republic”**
This term Democratic and Republic shows that there is no arbitraryness it means protection of humans from exploitation so we can say that our preamble protect the human right.
- **“sovereignty”**
This term sovereignty shows that the ultimate power of a country is citizens because in India **we the people of India are sovereign** means our preamble directly promoting and protecting human rights.
- **“Aim & Objective of Preamble”**
Justice - Social, Economical and Political
Liberty – Thought, Expression, Belief, Faith and Worship
Equality – Status and Opportunity

Fraternity – Dignity

Our aim and objective of Preamble shows that how human rights are promoting under Indian Laws.

2. Indian laws

- **Article 13-** prohibits the formation of any law that is inconsistent with or derogation to the fundamental rights.
- **Art.14-** State shall not deny to any persons equality before the law or the equal protection of the laws within the territory of India

Equality before law –

- Taken from Britain
- Negative in nature
- Means Equality among Equals
- **Rule of law**
A .V, Dicey said rule of law can be concluded in three main keywords which are as follows-
 - a. **Supremacy of Law**
According to Article 13 (1) (2) of Indian constitution state shall not made any law which is against the fundamental rights and if any law made by state which is contravene to fundamental rights then that law will be null and void.
According to Article 21 of Indian constitution, no one is deprived of his life and personal liberty except according to procedure established by law
These above terms shows supremacy of law,
 - b. **Equality Before Law**
We cannot achieve full equality before law in any system but we can reach near about equality before law.
 - c. **Predominance of legal spirit**



Rule of law does not exist without independence of judiciary

- **Equal protection of law**
Taken from United States
Positive in nature
Means equal law should be applied to all persons

- **Art.15- Clause** –(1) state is prohibited to discriminate between citizens on grounds only of **religion, race, caste, sex, place of Birth.**

- **Art.16**
Equality of opportunity in matter of public employment.

- **Article 19 of Constitution of India:**
Freedom of speech, though and expression is a **Fundamental Right.**
Freedom of Press is a pillar post in democracy.

- **Article 23** - prohibits bonded labour system

- **Article 24** - prohibits child labour

- **Article 25 to Article 28** - gives freedom of religion and liberty of belief, faith and worship to every citizen

- **Article 29 to 30** - confers the right to cultural and educational rights to minorities.

- **Article 31A to 31D, 300A** - deals with **Right to Property**

- **Article 32 to 35** -provides constitutional remedies available to Indian citizens.

3. **DECIDED CASES**

There are some cases which are played very important role in protection and

promotion of human rights under Indian Laws which are as follows –

- a. **Jogendar kumar v/s state of Uttar Pradesh**³, in this case court held that there is strict restrictions on police from making arbitrary arrest.

- b. **Sheela Barsey V/s State of Maharashtra**⁴, in this case court held that mistreatment with women in lockup will be considered as violation of human right.

- c. **Prem Shankar Shukla V/s .D.M**⁵, in this case court held to humanize the jail administration.

- d. **D.K.Bsu V/s State of West Bengal**⁶, in this case court held that protection of human right during arrest.

All these above cases shows how human rights are protected under Indian Laws.

4.POWER OF ENFORCEMENT OF RIGHTS.

- **Article 226** –remedies on the level of state, right to go **High Court** for enforcement of fundamental rights mentioned under part III of Indian Constitution.

- **Article 32** –
- **Constitutional remedies only in case of violation of Fundamental right.**

- **According to Dr. B.R. Ambedkar** – **Article 32 is soul of Indian Constitution.**



- In case of Fertilizers Corporation Workers Union V/s Union of India⁷ court held that **Article 32 is a basic structure of Indian Constitution.**
- In case of L. Chandra kumar v/s Union of India⁸ court held that **Judicial Review is the basic structure of Indian Constitution.**
- In case of Bandhua Mukti Morcha v/s Union of India⁹ court held that **a letter may entertain as a PIL or Plaint there is no need of legal representative and come to court, this letter may be sent by post.**
- Provided to citizens of India under Indian constitution for enforcement of fundamental rights mentioned under part III of Indian Constitution.
- Right to go Supreme Court.

- Article 32 give to file writs which are as follows-
 - a. Mandamus
 - b. Habeas Corpus
 - c. Quo Warranto
 - d. Prohibition
 - e. Certiorary

5. ESTABLISHMENT OF COMMISSIONS

- **SHRC (State Human Right Commission)-**
This commission was established with the aim of the matter dealing on the state level.
All matters related to human right entertained under this commission.
Each state has separate State Human Right Commission
- **NHRC (National Human Right Commission)-**
This commission was established with the aim of the matter dealing on the National Level.
All matters related to human right entertained under this commission.
In India one National Human Right Commission.

³Jogendar kumar v/s state of Uttar Pradesh, AIR 1989 4 SCC 62.

⁴Sheela Barsey V/s State of Maharashtra, (1997) 4 SCC 373.

⁵Prem Shankar Shukla V/s .D.M, AIR 1980 SC 1535.

⁶D.K.Basu V/s State of West Bengal, AIR 1977 SC 610.

⁷Fertilizers Corporation Workers Union V/s Union of India, AIR 1981 SC 344

⁸L. Chandra kumar v/s Union of India, AIR 1977 SC 1125.

⁹Bandhua Mukti Morcha v/s Union of India, AIR 1984 SSC 803.

6. Article 21 Played major role in promotion of human right

- Human right are not a codified and limited right because it is the requirements of human beings which were changed time to time so it's still in the process at the end of the human life so



it's the process of requirement and human rights

- On the theme of promotion and protection of human right and fundamental right of individuals, Article 21 of the Indian Constitution played a major role which can be consider by the development which was in process with the help of Article 21, which are as follows-

Right To Travel Abroad-

In case of **Maneka Gandhi V/s Union of India** court held that each and every individual has a **right to travel abroad** and this right is a fundamental right of individuals.

Right To Dignified Life-

In case of **Maneka Gandhi V/s Union of India**¹⁰ court held that each and every individual has a **Right to dignified life means** each and every individuals have all rights which will affect the individual's dignity and this right is a fundamental right of individuals.

Right To Privacy -

In case of **Justice K.S Puttaswami V/s Union of India**¹¹ court held that each and every individual has a **Right to Privacy** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

¹⁰Maneka Gandhi V/s Union of India, AIR 1978 SC 597.

¹¹Justice K.S Puttaswami V/s Union of India, WRIT PETITION (CIVIL) NO 494 OF 2012

Right to Clean Environment -

In case of **M.C. Mehta V/s Union of India**¹² court held that each and every individual has a **Right to Clean Environment** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

Right to Livelihood-

In case of **Olga Tellis's case**¹³ court held that each and every individual has a **Right to Livelihood** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution

Right to Education-

In case of **Unnikrishnan V/s State of Andhra Pradesh**¹⁴ and in case of **Mohini jain V/s State of karnataka**¹⁵ court held that each and every individual has a **Right to Education** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

Right to Marriage –

In case of **Lata Singh V/s State of Uttar Pradesh**¹⁶ court held that each and every individual has a **Right to Marriage** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

Right to Legal Aid –

In case of **Sheela Barsey V/s Union of India**¹⁷ court held that each and every individual has a **Right to Legal Aid** and this right is a fundamental right of



individuals guaranteed under Article 21 of Indian Constitution.

Right to Food –

In case of **P.U.C.L V/s Union of India**¹⁸ court held that each and every individual has a **Right to Food** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

Right to Sleep –

In case of **Ramleela Committee Maidan Case**¹⁹ court held that each and every individual has a **Right to Sleep** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

Right to Flag Hosting –

In case of **Navin Jindal V/s Union of India**²⁰ court held that each and every individual has a **Right to Flag Hosting** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

¹⁹Ramleela Committee Maidan Case, (2012) 5 SCC 1

²⁰Navin Jindal V/s Union of India, 1995 IVAD Delhi 273

Right to Passive Euthanasia–

In **Aruna Shan Bagh Case**²¹ court held that each and every individual has a **Right to Passive Euthanasia in special circumstances** and this right is a fundamental right of individuals guaranteed under Article 21 of Indian Constitution.

Right to Medical checkups of accused –

In **D.K. Basu’s Case**²² court held that each and every individual has a **Right to Medical checkups of accused in every 48 hours and make a memo after interrogation**, this right is a fundamental right of individuals guaranteed under Article 22 of Indian Constitution.

All the above rights are some examples of development of human right under Indian Societies By India Laws so it can be concluded that article 21 of Indian Constitution Played a very Important role in the protection and promotion of human right in India.

¹²M.C. Mehta V/s Union of India, (1986) 2 SCC 176.

¹³Olga Tellis v. Bombay Municipal Corporation. AIR 1986 SC 180.

¹⁴Unnikrishnan V/s State of Andhra, (1993) 1 SCC 645.

¹⁵Mohini jain V/s State of Karnataka, (1992) 3 SCC 666.

¹⁶Lata Singh V/s State of Uttar Pradesh, AIR 2006 SC 2522

¹⁷Sheela Barsey V/s Union of India, (1997) 4 SCC 373.

¹⁸P.U.C.L V/s Union of India, (2000) 5 SC ALE.

7. EVENTS IN A SEQUENCE FOR PROMOTION OF HUMAN RIGHTS

The following is a list of some of the important national statutes which have a bearing on the promotion/protection of human Rights in India.

1829 – The practice of sati was formally abolished by Governor General William Bentick after years of campaigning by Hindu reform movements such as the Brahmo Samaj of Ram Mohan



Roy against this orthodox Hindu funeral custom of self-immolation of widows after the death of their husbands.

1871 - Criminal Tribes Act 1871, was repealed by the government in 1952 and replaced by Habitual Offenders Act (HOA) (1952)

1923 – Workmen’s Compensation Act.

1926 – Trade Unions Act

1929 – Child Marriage Restraint Act, prohibiting marriage of minors under 14 years of age is passed.

1933 – Children (Pledging of Labor) Act – Prohibit the pledging of the labor of children and the employment of children whose labor has been pledged.

1936 – Payment of Wages Act

1942 – Weekly Holidays Act.

1946 – Industrial Employment Standing Orders Act.

1947 – Industrial Disputes Act.

1948 – Minimum Wages Act.

1948 - ESI Act

1948 - Factories Act.

1950 – The Constitution of India establishes a sovereign democratic republic with universal adult franchise. Part 3 of the Constitution contains a Bill of Fundamental Rights enforceable by the Supreme Court and the High Courts. It also provides for reservations for previously disadvantaged sections in education, employment and political representation.

1950 – Caste Disabilities Removal Act.

1952 – Criminal Tribes Acts repealed by government, former "criminal tribes" categorized as "denotified" and Habitual Offenders Act (1952) enacted.

²¹Aruna Shan Bagh Case, WRIT PETITION (CRIMINAL) NO. 115 OF 2009

²²D.K.Basu V/s State of West Bengal, AIR 1977 SC 610.

1952 - The Employee Provident Funds and miscellaneous Provisions Act.

1955 – Reform of family law concerning Hindus gives more rights to Hindu women.

1955 – Protection of Civil Rights Act, 1955.

1956 – Young Persons (Harmful Publications) Act – The Act seeks to prevent the dissemination of publications which are harmful to young persons.

1956 – Immoral Traffic Act.

1960 – Orphanages and other Charitable Home (Supervision and Control) Act.

1960 – Children Act.

1961 – Apprentices Act.

1961 – Maternity Benefit Act. This is an Act to provide maternity benefits, etc and to regulate employment of women in certain establishments for certain periods before and after child birth.

1961 – Dowry Prohibition Act. This is an Act to prohibit the evil practice of giving and taking of dowry.

1966 - Beedi and Cigar Workers (Conditions of Employment) Act, 1966

1971 – Medical Termination of Pregnancy Act.

1973 – Supreme Court of India rules in Kesavananda Bharati case that the basic structure of the Constitution (including many fundamental rights) is unalterable by a constitutional amendment.

1976 – Equal Remuneration Act.

1976 - Beedi Workers Welfare Fund Act

1976 – Bonded Labor (System) Abolition Act –The Act provides for the abolition of bonded labor system to prevent the



economic and physical exploitation of the weaker sections of the people.

1978 – SC rules in *Menaka Gandhi v. Union of India* that the right to life under Article 21 of the Constitution cannot be suspended even in an emergency.

1985-6 – The *Shah Bano* case, where the Supreme Court recognized the Muslim woman's right to maintenance upon divorce, to nullify the decision of the Supreme Court, the Rajiv Gandhi government enacted The Muslim Women (Protection of Rights on Divorce) Act 1986

1986 – Environmental Protection Act.

1986 – Juvenile Justice Act.

1986 – Child Labor (Prohibition and Regulation) Act.

1986 – Indecent Representation of Women (Prohibition) Act. This Act to prohibit incense representation of women through advertisements or in publications, writings, paintings, figures, or in any other manner.

1987 – Mental Health Act. – The Act regulates determination of lunacy, reception, care and treatment of mentally ill persons.

1987 – Commission of Sati (prevention) Act. This is an Act for effective prevention of the commission of Sati and its glorification.

1987 – National Commission for Scheduled Castes and Scheduled Tribes. Article 338 of the Constitution requires constitution of the National Commission for SC's and ST's for better protection of the rights of the members of the Scheduled Castes and Scheduled Tribes.

1989 – Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 is passed.

1990 – National Commission for Women Act, 1990. An Act to constitute a National

Commission for Women for better protection of the rights of women.

1992 – A constitutional amendment establishes Local Self-Government (Panchayati Raj) as a third tier of governance at the village level, with one-third of the seats reserved for women. Reservations were provided for scheduled castes and tribes as well.

1992 – National Commission for Minorities Act, 1992 An Act to constitute a National Commission for Minorities for better protection of the rights of the minorities.

1993 – National Human Rights Commission is established under the Protection of Human Rights Act.

1993 – The SAARC Convention (Suppression of Terrorism) Act.

1993 – Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 It provides for the prohibition of all manual scavengers as well as construction or continuance of dry latrines, and for the regulation of construction and maintenance of water-seal latrines.

1994 - The Transplantation of Human Organs Act.

1994 – The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act.

2001 – Supreme Court passes extensive orders to implement the right to food.

2005 – A powerful Right to Information Act is passed to give citizen's access to information held by public authorities.

2005 – National Rural Employment Guarantee Act (NREGA) guarantees universal right to employment.

2006 – Supreme Court orders police reforms.



2009 – Delhi High Court declares that Section 377 of the Indian Penal Code, which outlaws a range of unspecified "unnatural" sex acts, is unconstitutional when applied to homosexual acts between private consenting individuals, effectively decriminalizing homosexual relationships in India.

April 2010 - The Right of children to Free and Compulsory Education Act came into force. This is a historic day for the people of India as from this day the right to education will be accorded the same legal status as the right to life as provided by Article 21A of the Indian Constitution. Every child in the age group of 6-14 years will be provided 8 years of elementary education in an age appropriate classroom in the vicinity of his/her neighborhood.

2012 – Direct Cash Transfer Scheme launched.

2012 - Chhattisgarh Legislative Assembly passed the Food Security Bill aimed at providing food and nutritional security to around 50 lakh families in the state.

All above sequence shows how the development of human right has been done in Indian Society and all are legal reforms in the field of human right which was done for securing the protection and promotion of human rights.

Human Rights A source Book –NCERT
 Indian Constitution
 Wikipedia
 NHRC

Conclusion-

- Human right is a developing concept in respect of the protection and promotion of human right and ultimate aim to secure the human species, after considering the above statements it can be concluded that human rights under Indian is known as fundamental rights which is essential rights of human beings for survival.
- Right of humans for performing of their activities and their rights are protected under Indian laws from Article 12 to 35, part III of Indian Constitution, these fundamental rights are the basic structure of Indian Constitution.
- All International conventions such as U.N CHARTER, UDHR, ECHR, ICCPR, ICESCR, made great effects in the development of concept of human rights and these all are played very important role in the development of rights of man.
- Rights of human can be concluded finally that it is the essential rights of human species for survival of human life.



LEGALIZING PROSTITUTION IN INDIA

By Aditya Saraswat
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Abstract

This article deals with the need for legalizing the practice of prostitution in India. Prostitution can be described as trading of sex and sexual practices in exchange for money. The profession of prostitution is not new in India. It has a long history. If we go through it, we can see that it was mentioned not only in some of the popular and quality ancient texts such as Arthashastra, Meghadoot and Kamasutra, but it was also mentioned in Vedas and flourished during the Mughal era as well as in British dynasty. The legal status of prostitution in India is such that it does not criminalize prostitution per se but it does not effectively support prostitution in the country. We can look at the legal status of prostitution in some other countries like, Germany, Austria etc. where we can observe a lot of benefits which these countries are enjoying by legalizing this profession. Legalization of prostitution can also lead to a lot of benefits for our country. Human trafficking could be reduced. Child prostitution can be minimized. Instances of rape and other sexual crimes can be reduced. Further, by making the registration and medical checkups compulsory for the prostitutes, the risk of sexually transmitted diseases such as AIDS can be minimized. Prostitutes can be brought under the

protection of labor laws. Moreover, legalizing prostitution will help the government in earning revenue in the form of taxes and duties. It is worth mentioning here that no government in the world so far has been successful in stopping prostitution. Thus, we should also accept the fact that prohibition of prostitution is not purposeful. Instead of that, legalization of prostitution will help the government and society in many areas as elaborated by the author in the article.

Introduction

“Slavery still exists, but now it applies only to women and its name is prostitution”

-Victor Hugo

Prostitution means sexual exploitation or abuse of persons for commercial purposes.⁸² It is considered as the oldest profession in the world.⁸³ Some countries are considering the profession of prostitution as a means of employment and women’s right to do whatever she wants to do with her body, whereas according to some other countries, it is offensive to society and is treated as a crime.⁸⁴ In this article, the author will be throwing some light on how this practice of prostitution is a significant part of the history of our country. Apart from

⁸² Section 2(f), Immoral (Traffic) Prevention Act, 1956.

⁸³ Anam Yousuf, Harsh Sinha & S.M.H. Mehndi, *Prostitution: The Oldest Profession in the World*, International Journal for Legal Developments and Allied Issues, Volume 2, Issue 1.

⁸⁴ Deep Majumdar, *Do You Know the current situation of Prostitution in India*, 5 Oct, 2016, available at <https://www.weetij.com/the-current-situation-of-prostitution-in-india>.



explaining the legal status of prostitution in our country, the author will also be talking about the benefits that our country and our society can enjoy, if the practice of prostitution is legalized in India.

Practice of Prostitution forms a significant part of Indian History

The profession of prostitution has a long history in India. There was a complete chapter devoted to it in *Kautilya's Arthashastra*, written around 3rd and 4th century BC.⁸⁵ The amorous ways of life of prostitutes were also discussed in *Vatsyana's Kamasutra*.⁸⁶ These facts clearly suggest that prostitution is not a recent phenomenon in India. This profession can even be traced back to the archaeological findings of the Indus valley. The bronze figure of a dancing girl from Mohenjo-Daro represents a sacred prostitute carrying out her duties.⁸⁷ *Mrichakatika*, a story which is written in Sanskrit back in 2nd century BC also throws light on flourishing sex trade in Vaishali (which is present day Bihar).⁸⁸ Even Rigveda mentions the word

called 'sadbarani' which refers to such women who offers sex for money.⁸⁹ The 'Devadasi System' which attaches prostitutes to a place of worship is also of ancient origin.⁹⁰ Bible also mentions prostitutes, where Jesus Christ welcomes a girl in his kingdom even after knowing that she is a prostitute.⁹¹ Even in Ramayana, Valmiki gives a legendary account of the existence of Apsaras, the divine prostitutes.⁹² Further, 'Meghadoot' written by Kalidasa also describes prostitutes as dancing and waving flywhisks at a Shiva temple.⁹³

This profession was also witnessed during the Mughal era (1526-1857). The words such as "tawaif" and "mujra" gain popularity during this period.⁹⁴ In 19th and 20th century, The British even took this practice a step further. In this period, ship loads of girls from other colonies of Britain and minors from Japan were transported for prostitution. These were being used by the soldiers for their sexual requirements.⁹⁵ Thus, this profession of prostitution is present in the Indian Society from a very long period of time.

⁸⁵ Brijesh Kalappa, *An argument for legalizing prostitution*, The Times of India, 14 Jan, 2013, available at <https://blogs.timesofindia.indiatimes.com/emphasis/should-prostitution-be-legalized/>.

⁸⁶ Pallavi Thakur, *Tradition of Devadasi: The Sacred Prostitute*, 12 Nov, 2014, available at <https://www.speakingtree.in/allslides/prostitution-in-ancient-india>.

⁸⁷ Ibid.

⁸⁸ *Thirty facts that will change your outlook towards prostitution*, Daily Bhaskar, 26 Aug, 2013, available at <https://daily.bhaskar.com/news/NAT-TOP-thirty-facts-that-will-change-your-outlook-towards-prostitution-4357907-PHO.html?seq=3>.

⁸⁹ Supra, Note 5.

⁹⁰ Ibid.

⁹¹ Anuj Kumar, *Legalization of Prostitution in India: Need of the Hour*, 23 May, 2016, available at <http://www.legaldesire.com/legalization-of-prostitution-in-india-need-of-the-hour/>

⁹² Supra, Note 5.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ajay Mohan, *40 serious facts related to prostitution in India*, 30 August, 2013, available at <https://hindi.oneindia.com/news/2013/07/16/feature-40-unknown-facts-about-prostitution-in-india-253338.html>.



Why we are living in a hypocritical society?

In India, during Navratre, our pujaris while worshipping Maa Durga goes personally to beg some dust from prostitutes.⁹⁶ This is because it is believed that a man who enters a brothel leaves all his purity there and this is why the soil from outside the prostitute's home is considered holy.⁹⁷ This tradition of bringing dust from the prostitute's residence also shows the irony of the Indian society as throughout the year, we looked down at prostitutes as a blot on the society but on the occasion of Navratri only, some sort of respect was shown towards them. This itself shows the hypocrisy in our society.

How the respect and dignity attached with the practice of prostitution went away?

Earlier, prostitution was referred as courtesanship. Courtesans had imperative roles and had a huge impact on the society.⁹⁸ They were considered as a learned community.⁹⁹ Begum Samra, a courtesan,

⁹⁶*Durga Puja: Why are prostitutes considered sacred during Navratri*, Daily Bhaskar, 8 Oct, 2013, available at <https://daily.bhaskar.com/news/JM-durga-puja-why-are-prostitutes-considered-sacred-during-navratri-4396164-PHO.html?seq=7>.

⁹⁷ Avishek Sengupta, *Making of Durga idols require a handful of soil from the brothels: Do you know why?*, 28 Sep, 2017, available at <http://www.guwahatipius.com/daily-news/making-of-durga-idols-require-a-handful-of-soil-from-the-brothels-do-you-know-why>.

⁹⁸ Supra, Note 3.

⁹⁹ Ibid.

ruled over Western U.P. because of her military and political prowess and there was also Maran Sarkar (a courtesan), who even went on to become queen of Raja Ranjit Singh of Punjab in 1802 and was highly respected among the masses.¹⁰⁰ The existence and respect of this community went wrong when the British undertook the annexation of Awadh in 1856. This marked the fall of this respected community of women.¹⁰¹

Thus, we can conclude that in our history, women who entered into this profession of prostitution were having some sort of respect in a society but after the origin of British dynasty in India, it goes away and today prostitution is considered as a blot on our society. It is ironic that ancient India was much more advanced in passion and love making than in the so called modern era.¹⁰² Prostitution back then was a piece of art unlike seen today as a taboo.¹⁰³

Legal Status of Prostitution in India

As far as the legal status of prostitution in India is concerned, prostitution in India is not illegal per se.¹⁰⁴ The primary law which deals with sex workers in India is Immoral Traffic (Prevention) Act, 1956 (hereinafter referred as ITPA). Activities such as

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Sanchit Garg, *History of Prostitution & Why it should be Legalized in India*, 16 Apr, 2015, available at <http://nationalviews.com/history-prostitution-ancient-india-legalization>.

¹⁰³ Ibid.

¹⁰⁴*The Unfinished Journey: Securing from HIV/AIDS*, National AIDS Control Organization, Vol. IV, Issue 2 (2008).



pimping (A pimp is one who controls the actions and lives off the proceeds of one or more prostitutes)¹⁰⁵, soliciting these services at public places¹⁰⁶, kerb crawling (Driving slowly along the edge of the road in search of a prostitute), seduction of a person in custody¹⁰⁷, trafficking¹⁰⁸, living on the earnings of prostitution¹⁰⁹ are prohibited under the provisions of this Act. In this way, the Act does not prohibit the profession of prostitution per se but punishes the acts by third parties facilitating prostitution.¹¹⁰ Indian Penal Code also has some provisions related to prostitution. Selling, letting to hire or otherwise disposing of any person under the age of 18 years, is an offence punishable with imprisonment for 10 years and fine.¹¹¹ Similarly, buying of minors for the purpose of prostitution is also an offence punishable with imprisonment of 10 years and fine.¹¹²

Thus, we can conclude that prostitution itself in India is not an offense but the activities related to prostitution are prohibited by the law in India. But, Prostitution could not take place without such activities; hence it can be considered

that our law is not supporting prostitution in India.

How other countries are getting benefited by legalizing the prostitution

There are a lot of countries in world where prostitution is legalized such as New Zealand, Australia, Austria, Bangladesh, Belgium, Brazil, Canada, Colombia, Denmark, France, Germany and many more.¹¹³ Prostitution Reform Act was passed in New Zealand in 2003 with the objective of decriminalizing prostitution and to create such framework that safeguards the human rights of sex workers and protect them from exploitation.¹¹⁴ There are even licensed brothels operating under the public health and employment laws, which mean that the sex workers will also get social benefits just like other employees.¹¹⁵ In Austria also, Prostitution is completely legal and the prostitutes are required to register, undergo periodic medical checkups and pay taxes.¹¹⁶ In Ecuador, almost everything related to sex work is legal and you are allowed to sell your body, run a brothel and you can even be a pimp.¹¹⁷ In case of Germany,

¹⁰⁵ Section 5, Immoral (Traffic) Prevention Act, 1956.

¹⁰⁶ Section 7, Immoral (Traffic) Prevention Act, 1956.

¹⁰⁷ Section 9, Immoral (Traffic) Prevention Act, 1956.

¹⁰⁸ Section 5(a), Immoral (Traffic) Prevention Act, 1956.

¹⁰⁹ Section 4, Immoral (Traffic) Prevention Act, 1956.

¹¹⁰ Dr. Tulsing Sonwani, *Prostitution in Indian Society: Issues, Trends and Rehabilitation*, available at <https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf>

¹¹¹ Section 372, Indian Penal Code, 1860.

¹¹² Section 373, Indian Penal Code, 1860.

¹¹³ Rohit Bhattacharya, *15 Countries around the World that have legalized Prostitution*, 26 June, 2015, available at <https://www.scoopwhoop.com/inothernews/countries-with-legal-prostitution/#.tntjvr85s>.

¹¹⁴ Fraser Chrichton, *Decriminalizing sex work in New Zealand: Its History and Impact*, 21 Aug, 2015, available at <https://www.opendemocracy.net/beyondslavery/fraser-crichton/decriminalising-sex-work-in-new-zealand-its-history-and-impact>

¹¹⁵ *Supra*, Note 32.

¹¹⁶ *Supra*, Note 32.

¹¹⁷ *Ibid*.



prostitution was legalized in 1927.¹¹⁸ They have proper state run brothels. The workers of brothels have to pay taxes but they have the facility of health insurance and they receive social benefits also like pension.¹¹⁹

How our country and society can be benefited by legalizing prostitution

Our country will be immensely benefited by legalizing the practice of prostitution in India. First of all, it will help in reducing human trafficking. It is a disappointing fact that thousands of Nepalese girls are being trafficked to India and sold into the conditions of virtual slavery.¹²⁰ In order to understand that how human trafficking could be reduced by legalizing prostitution, we should take the example of Germany. In Germany, the cases of human trafficking significantly reduced by 10% during the period of 2001 to 2011, after they have legalized the prostitution.¹²¹

Legalization of prostitution will also help in bringing the sex industry under control.¹²² It will help in giving dignity to the women

engaged in this profession and will save them from living as second grade citizens. Legalization will also prevent police from robbing money from these helpless prostitutes, who are forced to give a major part of their income to the policemen to let them live in peace.¹²³

It will also help in preventing the prostitution of children. A CBI report published in May, 2009 had revealed that more than 12 lakh girls who are engaged in sex business in India were below the age of 18 years.¹²⁴ This CBI report also revealed that at least ten crore females in the country had employed themselves in prostitution. Depressingly, 40% among them were minors.¹²⁵ One of the primary reasons for the child sex slaves exists due to the criminalization of adult prostitution. If people can legally buy sex from women who are 18 years or older, this will eventually help in reducing child prostitution. Moreover, if adult prostitution is legalized, those who are in the commercial sex market will employ willing adults (because it is legal) rather than children.¹²⁶ In this way, by legalizing adult prostitution, we can control child prostitution.

Legalization of prostitution will also require prostitutes to mandatorily register themselves with the local authorities and

¹¹⁸ Sonja Dolinsek, *The German Prostitution Model: Reducing Violence Against Sex Workers*, 13 Sep, 2013, available at <https://www.faiobserver.com/region/europe/german-prostitution-model-reducing-violence-against-sex-workers/>.

¹¹⁹ Supra, Note 32.

¹²⁰ Human Rights Watch Report, *Rape for Profit: Trafficking of Nepali Girls and Women to India's brothels*, Vol.12, No. 5(A) (1995).

¹²¹ Dave Anderson, *Top 10 reasons why prostitution should be legalized*, 8 Dec, 2014, available at <https://www.listland.com/top-10-reasons-prostitution-legalized/>.

¹²² Kristie Trifolios, *Legalizing Prostitution: An Introduction*, Seaton Hall Review (2014).

¹²³ *The Dark Industry, A view of Red Light Areas in Indian Perspective*, 1 Feb, 2013, available at <http://hatpakha.com/the-dark-industry-a-view-of-red-light-areas-in-indian-perspective/>.

¹²⁴ *Thirty Facts that will change your outlook towards prostitution*, Daily Bhaskar, 26 Aug, 2013, available at <https://daily.bhaskar.com/news/NAT-TOP-thirty-facts-that-will-change-your-outlook-towards-prostitution-4357907-PHO.html?seq=3>.

¹²⁵ Ibid.

¹²⁶ Supra, Note 40.



submit themselves for the proper medical checkups.¹²⁷ Legalization of prostitution will take care of these women and medical facilities can be provided to them which will further help in reducing the spread of various sexually transmitted diseases like AIDS. A National AIDS Control Organization (NACO) report claimed that 58% of the call girls who were engaged in this profession in Surat (Gujarat) were suffering from HIV.¹²⁸ Another survey, carried out by NACO revealed that in Mumbai, there are more than 2 lakhs women who work as prostitutes, and out of them, about 50% of were found to be HIV positive.¹²⁹ It has been estimated that around 50 million of 200 million prostitutes worldwide, who are suffering from deadly sexual diseases, live in India.¹³⁰ After legalization of this practice, registration and proper medical checkups can be made compulsory for these women. Thus, legalization of prostitution can serve as a means of ensuring “public health”¹³¹ which may also reduce the expenditure of government to control deadly diseases like AIDS.

Another benefit of legalization would be that it will help in bringing the prostitutes under the protection of labor laws. This will give them equal right to protect themselves from

discrimination and various unsocial elements.¹³²

In those countries where prostitution is illegal, billions of dollars are being spent to deal with it. We can take example of U.S. where the law enforcement agencies spend at least \$2000 for a single arrest of a sex worker and because of the large number of prostitutes in the country, it costs the government around \$120 million to control prostitution.¹³³ We should appreciate this fact that spending this much amount on controlling prostitution is not of worth. This amount can be saved if we legalize prostitution. Moreover, the legalization of prostitution will also help the Indian Government in gaining additional revenue. By legalizing prostitution, brothels, workers and other related business will be obliged to pay taxes and this may help the government in earning revenues, just like they earn from other legal businesses.¹³⁴

Legalization of prostitution will also help in reducing rape and other sexual crimes because people will have an authorized and legal way of satisfying their physical requirements.¹³⁵ Most of the rapes took place because of the unsatisfied physical needs of the victims. If there was an option available with them, where they can legally avail services of a prostitute to satisfy their sexual needs, this will encourage them to do

¹²⁷ Jeein D'Cunha, *Prostitution Laws - Ideological Dimensions and Enforcement Practices* (1991)

¹²⁸ Supra, Note 43.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Dharmendra Chatur, *Legalization of Prostitution in India*, Jan 2009, available at http://www.academia.edu/613653/Legalization_of_Prostitution_in_India.

¹³² Supra, Note 3.

¹³³ Supra, Note 40.

¹³⁴ Ashwati Mohan, *Legalization of Prostitution in India: Pros and Cons*, available at <http://womennow.in/legalisation-of-prostitution-in-india-pros-and-cons/>.

¹³⁵ Devin Bowen, *The Impact of Legalizing Prostitution on violent crime*, May 2013, available at https://asp.mercatus.org/system/files/Bowen_MGPE.pdf.



so and it will help in reducing the crime rates in India. The late Indian novelist and Journalist, Khushwant Singh has also said that “*The more you try to put down prostitution, the higher will be the incidence of crime against innocent women*”.¹³⁶

Moreover, after legalization, prostitutes will have an opportunity to conduct their business on their own will without the control of an abusive pimp, which further reduces the possibility of their abuse and exploitation.¹³⁷

There are many teenage girls who are engaged in this profession not of their own choice but because of various other reasons such as financial constraints or human trafficking. Around 8% women in India who are in this profession have quoted by various sources that they are forced into this profession by their fathers.¹³⁸ Great Indian philosophers like Vatsayana, has also supported this fact that “Sleeping with strangers for gain does not come naturally for women.”¹³⁹ Another reason for women to move towards this profession can be of family background. There are some classes of people in India who are engaged in this profession as a tradition.¹⁴⁰ There are many locations such as Wadia in Gujarat, Natpurwa in Uttar Pradesh, Banchara tribe

in Madhya Pradesh and Devadasis in Karnataka and many more, where prostitution happens to be the only way for survival.¹⁴¹ Among these locations, Natpurwa is inhabited with Nat caste. Nat caste has a 400 years old tradition of this profession.¹⁴² In these families, the girls are brought up in such a way so as to suit this profession, irrespective of the fact whether they are willing to enter into this profession or not? Justice K. Ramaswamy has also stated in the case of *Gaurav Jain vs. Union of India and others*¹⁴³ that “the victims of the trap are poor, illiterate and ignorant sections of the society. Rich communities exploit them and harvest at their misery and ignominy in an organized gangsterism”.¹⁴⁴ Thus, in order to protect this exploitation of the ignorant sections of the society, legalization of prostitution is the need of the hour.

Conclusion

Thus, we can conclude that this profession of prostitution is rooted in our own history. The history of our country itself indicates that this profession is not an immoral act in the society. It is being carried forward in one or other way in different era of society, hence, prohibition of prostitution will not help in any manner. On the other hand, if it is being legalized by the government, it may help the society and nation in many ways as elaborated above.

¹³⁶ Supra, Note 40.

¹³⁷ Ibid.

¹³⁸ Supra, Note 43.

¹³⁹ *Sex, Art and History in India*, available at http://factsanddetails.com/india/People_and_Life/sub7_3h/entry-4189.html.

¹⁴⁰ Preeti Panwar, *Places in India where prostitution is the main source of income*, 23 June, 2015, available at <https://www.oneindia.com/feature/places-in-india-where-prostitution-is-the-main-source-of-income-1786111.html>.

¹⁴¹ Ibid.

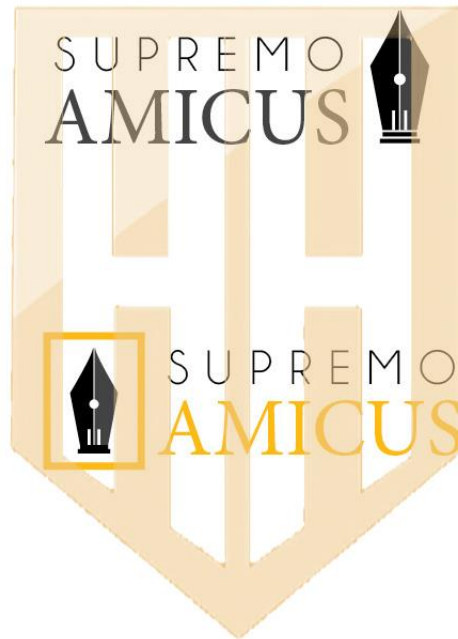
¹⁴² Ibid.

¹⁴³ *Gaurav Jain vs. Union of India and others*, AIR 1997 SC 3021.

¹⁴⁴ Ibid.



Moreover, it has also been stated in the 64th Report of the Law Commission of India that any attempt to curb prostitution by legislation or by any other means of social control, has always proved abortive. Even if the law stops it, in some other insidious and subtle form, it is bound to reappear in the society.¹⁴⁵ It is time to accept that prohibition of prostitution is not purposeful. No Government in the world so far has been successful in stopping this trade and thus the only wise decision would be to regulate prostitution with the help of laws.¹⁴⁶



¹⁴⁵ P.K.Das, *Protection of women from domestic violence*, at 291.

¹⁴⁶ *Supra*, Note 3.



THE CONSTITUTIONAL ASPECT OF AFSPA AND FOR ITS EFFECTS

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ABSTRACT

The Armed Forces Special Protection Act (AFSPA) is a legislation which aims to protect the national security in situations of international disturbances. It legitimizes deployment of the army in areas in which the civil administration may notify as disturbed areas. Though the objective of the act is to secure peace and order in disturbed areas, however it poses grave concerns to the human rights of the people living in those areas. In many instances, it is reported that the cases of human rights abuse have committed by the forces with impunity. As narrated above, the object of the AFSPA is to bring the peace and stability in the disturbed areas, contrary to this basic objective there are allegations that the army uses excessive force while implementing. Human reports and commission established by the Government of India found and argued that this legislation has not achieved its objective to curb the militancy and insurgency and restore normalcy in the affected areas. Further it is argued that the use of armed forces should be limited in a democracy and prolonged deployment of army may shows the reluctance of the government to address the issue through a democratic and constitutional process. Even in state like Nagaland designated as disturbed area, whereas it has not seen hostilities since decades and no casualty has been reported.

In light of this existing situation the current study analyses the role of AFSPA in the North Eastern states of India and its ramification in the security of the state. The study also tries study the constitutional validity of the clamping of the AFSPA in the state of Nagaland and problems of human since its implementation. Finally it argues that ways and means in which the interest and rights of the people of Nagaland to be protected under the constitutional mechanisms.

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Chapter-1

1.1 Introduction

AFSPA - Armed Forces (Special Powers) Act (AFSPA), is an Act of the Parliament of India which was passed on 11 September 1958. It is a law with just six sections granting special powers to the Indian Armed Forces in what the act terms as "disturbed



areas"¹⁴⁷. Under this designated disturbed area all security forces and security personnel are given unregulated and unaccounted power to carry out their operations. Even a non-commission officer have the power to detain and shoot to kill based on mere suspicion that it is necessary to do so in order to maintain “law and order in the disturbed area”¹⁴⁸.

AFSPA gives the security forces wide powers to shoot, detain, search and arrest to whomever they suspect without being accounted for just in the name of “aiding the law and order of the society”. It was first applied to the North Eastern states of Assam and Manipur and was amended in 1972 to extend to all the seven states in the north-eastern region of India. The “seven sister” states of Tripura, Assam, Arunachal Pradesh, Mizoram, Meghalaya, Nagaland and Manipur. The implementation of this act has always been marred with controversies and human rights abuse. Many human rights watchdogs have reported about the incidents of arbitrary detention, torture, rape, looting by security personnel in the areas where this act is being enforced.

1.2 Research Problem

If we look closely, the objective of AFSPA is to provide law and order in the places where the normal order-ness has been disturbed but quite on the contrary this Act provides the security personnel with absolute powers without being accounted

for. This leads to various atrocities and human rights violation by the security agencies.

The research looks to analyze the act and its provisions and identify human rights violation in the state of Nagaland in the due course of the Act in effect in the state by the security personnel and also analyze the present scenario and applicability of the Act to the present problems. The research aims to establish the constitutional validity of the said act and suggest reforms and recommendations to be brought up in the Act to ensure no such human rights violation and misuse of power occurs.

1.3 Legal Provisions

Act was enacted in 1958 to bring the “disturbed areas” termed by the government of India under control. The government considers those areas by reasons of differences or disputes between members of different religious, racial language or regional groups or castes or communities¹⁴⁹. The Section (3) of AFSPA Act empowers the governor of the state or union territory to issue an official notification on The Gazette of India, following which the center has the authority to send in armed forces for civilian aid. There is no clarity whether the governor requests for the troops or the center sends the troops on its own.

Once declared ‘disturbed’ the region is maintained as disturbed for a period of three months straight, according to The Disturbed Areas (Special Courts) Act, 1976. The government of the state can suggest whether the Act is required in the state of not. The different sections of the act may be applicable to the different states depending

¹⁴⁷South Asia Human Rights Documentation Centre (SAHRDC), *Armed Forces Special Powers Act - A study in National Security tyranny*, November 22, 1995 (October 5, 2017 10:00 pm), http://www.hrdc.net/sahrdc/resources/armed_forces.htm.

¹⁴⁸ Ramakrishnan M, *AFSPA explained: How does it work exactly?*, L.M, May 28, 2015.

¹⁴⁹ Ibid



upon the conditions¹⁵⁰. The Act is non uniform in nature and have different statuses for different states.

1.4 Scope and Objective of The Study

In this background, various Human Rights activist have brought forth the various atrocities and gross human rights abuse done by the security forces in the areas where AFSPA is still under force. This Act has often been argued and put forward as one of the draconian law passed by the Indian Parliament. Critics argue that due to this Act the security personnel are immune to the violations of the Article 21 and 22 of Indian Constitution. They have put forth the various instances of these violations. Based on these issues raised, the essay deals examine the relevance of these incidents to the misuse of power granted under AFSPA. This essay exclusively deals with some of the questions regarding the violation of human rights by the enforcement of AFSPA. AFSPA has been implemented in many states and its effect in each state varies accordingly. But the fundamental issue of human rights abuse and violation of Article 21 and 22 remains the same¹⁵¹. This essay does not deal Due to some constraints this essay only examines and analyze the impact of AFSPA in the lives of people in the state of Nagaland only. The situation and atrocities reported by various media in the state has come up to the attention of the world. These incidents, further challenges the enforcement of the Act in India. Here, I am categorically using this statement as it is a challenge, because it is been more than

five decade, but the violation of the Article 21 and 22 still continues to occur and people still suffer from worst form of atrocities by the state. This essay will confine to the three major issues, primarily it seeks to examine the relevance of immunity granted to armed forces. Second, it seeks to analyse the difficulties arose due to the enforcement of this Act and human rights abuse. Thirdly, essay seeks critically examine the various recommendations and regulations being suggested to amend this act.

Chapter 2

2. Historical Background

The foundation of Armed Forces Special Powers Act can be traced back to the colonial era. When India was under British rule, on August 15, 1942 Lord Linlithgow, the then viceroy of India, promulgated the Armed Forces Special Powers (Ordinance) to suppress the Quit India Movement launched by Mahatama Gandhi a week earlier¹⁵². Mahatama Gandhi, Jawaharlal Nehru and most prominent leaders of the Indian National Congress were imprisoned. Indian started protesting and they targeted and burned down police offices and railway and telegraph lines, in order to secure the release of their leaders which the British saw as hindrance to the war effort against an impending Japanese invasion on the Burmese front. Linlithgow responded with brutal force: 2,500 were killed in police mass shootings on Indian protesters, tens of thousands were arrested, rebellious villages

¹⁵⁰ Ibid

¹⁵¹ Armed Forces (Special Powers) Act 1958, Acts of Parliament, 1958 (India).

¹⁵² Basharat Peer, *The Armed Forces Special Powers Act: A Brief History*, A.J. , March 8, 2014



were torched, and protesters were flogged and tortured.

Few years into Indian independence, Jawaharlal Nehru faced the insurgency of Nagas. In 1954 the Nagas began their insurgency for their independence. Indian government responded by sending in thousands of army soldiers and personnel from the Assam military to tackle the insurgency.

To provide legal sanction to its counterinsurgency plans and provide legal assistance to the military involved in the operations, the Nehru government in 1958 passed the Armed Forces Special Powers Act in the Indian parliament without much opposition¹⁵³. Very few opposed this legislation.

Nehru acted on the similar lines as once Lord Linlithgow acted to crush the rebellion. Linlithgow acted to crush the rebellion for Quit India Movement with violence and legal protections of the Armed Forces Special Powers Ordinance. “No infirm government can function anywhere. Where there is violence, it has to be dealt with by government, whatever the reason for it may be,” Nehru told the Indian parliament. And Nehru’s soldiers in Nagaland mirrored the ruthlessness of the British forces in India. The stories of burned houses, villages and rice stacks were endless. Individuals were tied up and beaten mercilessly. The fathers, brothers and the sons were bayoneted to death and the mothers, sisters and daughters were raped¹⁵⁴.

The discontent wasn’t limited to the Nagas. The signs of trouble was started to seen in the former princely state of Manipur. A

separatist militant group seeking independence from India, the United National Liberation Front, was formed in Manipur and resorted to violence. Many other such groups came up. India responded by declaring Manipur a “disturbed area” and imposed the Armed Forces Special Powers Act in late 1980. A brutal cycle of insurgency and counterinsurgency has continued ever since, claiming several thousand lives.

3. Facilitating Violations of Rights

Initially the Act was limited to the north-eastern states of Assam and Manipur to curb insurgency by Naga militants. The 1972 amendment led to the implementation of AFSPA in all the seven north eastern states: Assam, Tripura, Meghalaya, Nagaland, Mizoram, Arunachal Pradesh and Manipur. Similar laws were also implemented in the state of Punjab from 1985 to 1994. A version of it still active in Jammu & Kashmir from 1990.

The powers that the AFSPA extends to the armed forces come into force once an area subject to the Act has been declared “disturbed” by the central or state government. This declaration is not subject to judicial review.

- Violation of Article 21 – Right to Life

Article 21 of Indian Constitution which declares right to life as a fundamental right is violated by section 4(a) of the AFSPA, which grants power to the armed forces to shoot to kill in law enforcement situations without regard to international human rights law restrictions on the use of lethal force. Lethal force is broadly permitted under the

¹⁵³ Ashwaq Masoodi, *A History of AFSPA*, L.M., May 28, 2015

¹⁵⁴ Ibid



AFSPA if the target is part of an assembly of five or more persons, holding weapons, or “carrying things capable of being used as weapons.” The terms “assembly” and “weapon” are not defined¹⁵⁵.

Article 21 reads “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The judiciary interpreted it as a “procedure established by law means a fair, just and reasonable law” and it was upheld by the judiciary and set as a precedent in the case of Maneka Gandhi¹⁵⁶. Justice that is served by use of force is no justice at all. Restraint should be shown while using force and it must be restricted to self-defense only. There are several incidents which shows the abuse of power by Border Security Forces (BSF) and army personnel in the north-east. In April 1995, a villager in West Tripura was riding near a border outpost when a soldier asked him to stop. The villager did not stop and the soldier shot him dead. Even more grotesque were the killings in Kohima on 5 March 1995. The Rastriya Rifles (National Rifles) mistook the sound of a tyre burst from their own convoy as a bomb attack and began firing indiscriminately in the town.

In the Indrajit Barua¹⁵⁷ case, the Delhi High Court held that it’s the duty of the state to protect the right to life conferred by the constitution under Article 21 to all the citizens. Under the pretext of greater good the state has continuously denying the fundamental right for the people of North East. The court said that if a law protect the larger community and their social interest

then such law is beneficial even though they violates the liberty of some individual. This is a direct contraction of Article 14 of Indian Constitution which guarantees right to equality before law. This article guarantees that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

- Protection against arrest and detention – Article 22

The Article 22 of Indian Constitution states that no person arrested can be detained in custody without being informed and also it is require that any person arrested is to be produce before nearest magistrate within a time period of twenty four hours of arrest. On the face of it AFSPA leads to arbitrary detention which is clearly the violation of the said principles in Article 22. The right to liberty and security of person is violated by section 4(c) of the AFSPA, which fails to protect against arbitrary arrest by allowing soldiers to arrest anyone merely on suspicion that a “cognizable offence” has already taken place or is likely to take place in the future. Further, the AFSPA provides no specific time limit for handing arrested persons to the nearest police station. Section 5 of the AFSPA vaguely advises that those arrested be transferred to police custody “with the least possible delay.”¹⁵⁸

Section 6 of AFSPA provides the officers with immunity against any legal proceedings against them thus violating the right to seek remedy under Indian Constitution. This section of the AFSPA prohibits even state governments from initiating legal proceedings against the armed forces on

¹⁵⁵ Armed Forces (Special Powers) Act 1958, Acts of Parliament, 1958 (India).

¹⁵⁶ 1978 AIR 597

¹⁵⁷ AIR 1983 Delhi 513

¹⁵⁸ Ibid



behalf of their population without central government approval.

In the case of *Luithukla V. Rishang Keishing*¹⁵⁹ (1988) 2 GLR 159, a habeas corpus case which highlighted the lack of restraint shown by the army personnel while detaining the accused. The court found that the man had been detained by the army and that the forces had mistaken their role of “aiding civil power”. The court said that the army may not act independently of the district administration. Repeatedly, the Guwahati High Court has told the army to comply with the Code of Criminal Procedure (CrPC), but there are is no enforcement of these rulings.

The AFSPA has also had the opposite effect to that intended by the Indian government: in each state where the AFSPA has been implemented and soldiers have been deployed, the armed forces have become a symbol of oppression and an object of hate. Human rights violations have served to fuel conflicts and act as a recruiting sergeant for militant groups in many parts of the country. Arbitrary detention, torture, and the killing of peaceful critics have had the effect of closing democratic and peaceful paths of opposition, forcing organizations underground and fueling a growth in militancy.

4. The position of AFSPA in Nagaland after 59 years.

Almost 6 decades have been passed since the AFSPA was first introduced in the state of Nagaland in April, 1958. The Act was first introduced in the Naga soil to crush the Naga insurgency to defend their declared independence. The political and the

¹⁵⁹ (1988) 2 GLR 159

historical situation in which the Act was introduced was the situation of a war. The government mobilized its troops to fight the insurgents. The troops deployed were assisted by the Indian Air Force, heavy artillery and mechanized tanks. Very soon the casualties began to come up. Hundreds of Naga villages burned to ashes and hundreds of Nagas died from the bullets, bombs, starvation and disease.

This war was projected as the situation of law and order breakdown by the Indian government. It was war in which the tiny Nagaland tried to defend its independence whereas the might India tried to impose its independence on the Nagas in the most brutal way possible.

The AFSPA was coined down to protect the perpetrators of the war from any judicial action against them. The Act which gave the Indian soldiers sweeping powers like searching without search warrants, arresting without arrest warrants, and even shooting to death on mere suspicion is a most illegal act enacted in the annals of human legal history. In fact it is an Act that negates and even nullifies the very concept and principles of law. This is because here is an act that says a person can be shot to death on mere suspicion when the Law says “A person is innocent until proven guilty.”¹⁶⁰ This Act in short violates the Articles 21 and 22 of the Indian Constitution denying the Nagas of their right to life¹⁶¹.

Ever since the implementation of AFSPA in Nagaland there have been various reports of

¹⁶⁰ Kaka D. Iralu, *The AFSPA 1958: A Review From Nagaland After 52 years*, KANGLA ONLINE (October 2, 2017, 10:00 am) <http://kanglaonline.com/2010/11/the-afspa-1958-a-review-from-nagaland-after-52years/>

¹⁶¹ INDIA CONST art 21 and 22.



human rights abuse few of them which has been highlighted in the chapter. There was an incident, recorded in a letter to the Peace Mission by the members of the Village Panchayat of Khuvi under Zunobetuo district. They wrote that the family members of the National workers were separated and punished in the army concentration at Atukuzu under Zunobetuo district for eight months in 1959. It was reported that on 4th April 1959, in Akutuzu the Indian army raided the camp of the Home Guards and shot dead four Home Guards. The Army Post Commander at Akutuzu ordered the villagers to re-excavate and bring the remains of the victims to his post. The villagers were punished by being made to dig the ground and erect army-bashas (camps) at Zunheboto for seven days. Further, on 18th April, 1960 ten villages were grouped along with Atukuzu, Vishepu, Kilo Old Khukiye, Lukhai, Tukunasami, Sheipu, Nunumi, Satakha old and new. Besides this, the villagers were reported to have been treated discriminately. They even introduced forced labour by making the villagers above the age of twelve carry the stocks on their back for transportation of military goods¹⁶². A report of the Naga Hills Rehabilitation Committee submitted to the Naga National Council mentioned that up to December 1960 many Christian Churches were damaged, burnt and destroyed in several parts of Nagaland. For instances, in Angami areas 37 Churches were burnt and 12 damaged, in Chakhesang areas 18 and 20 Churches were burnt and damaged respectively, in Lotha areas 3 and 15, Rengma areas 5 and 7, Sema areas 41

and 21, Yimchunger areas 5 and 5 and in Konyak and Sangtam areas 10 and 3 Churches respectively were burnt by the Indian army.¹⁶³

Further, in one of the Ao Naga inhabited areas, the Indian army even carried out a policy Known as 'earth-scorch Policy' in 1960. By this policy they intended to flush out all the Naga armies taking shelter in the jungles and at the same time destroy all their hideouts. The total area of jungle burnt accounted to 351,840 acres or 549 square miles.¹⁶⁴

5. The Consequences of the Act

With the enforcement of the AFSPA in Nagaland an analysis of the opinion of both the Indian army and the State police strongly indicate that there is a positive result in curbing insurgency and maintenance of law and order. They further said that this Act should continue to remain enforced in Nagaland to bring about complete peaceful situation and economic progress and development. According to the opinion expressed by the Indian Army and State police the Act has been effective in achieving its objective of maintaining law and order in the State to a certain extent. On the other hand, there is no denying the fact that there has been excessiveness on the part of some Indian armed personnel while performing their duties such as rape, torture, atrocities, etc., which have been alleged by members of the public as well as victims who themselves comprised the sample in the study. Such allegations are supported by reports appearing in newspapers and other media. The very fact that various inquiry

¹⁶² IRALU, KAKA, D, NAGALAND AND INDIA: THE BLOOD AND THE TEARS, (published by the author, 2000), pp. 155-56.

¹⁶³ Ibid pp 144.

¹⁶⁴ Ibid pp 155-162.



committees were constituted by the law enforcing agencies whenever such allegations are made show that there could be some truth against such atrocities.

The data collected from the second group comprises of the victims, family members of the deceased victims and the NGOs. As they share the same opinion regarding the army they are placed in the same group. These groups believed that the enforcement of AFSPA has indeed resulted in gross violations of human rights in Nagaland. From the questionnaires and interviews conducted it revealed that most of the victims were arrested, shot dead, some detained or taken into custody and whose whereabouts are not known till today. All these usually took place while the Indian armies were conducting operations. Further, it is found that most of the victims were illiterate and were not at all aware about the reason leading to the enforcement of the AFSPA 1958 neither about the provisions of the Act nor are they aware of their rights. Some prominent knowledgeable citizens of Nagaland also expressed their opinion saying that the presence of the Indian army in Nagaland has really affected their day today life as random checking at regular frequency in all areas of Nagaland, creating fear-psychosis in the minds of the people that they may be arrested, harassed, physically assaulted, etc., merely on ground of suspicion became the order of the day following the enforcement of AFSPA 1958¹⁶⁵.

6. Present Situation

After 59 years of imposition of AFSPA, the state has seen a decline in the cases of insurgency, extortion killings, kidnapping and other crimes. They are still there under the belt, but are well below the acceptable rate that the state police can take over and the army is no longer needed to maintain the law and order on the state as for AFSPA it is required that an area to be designated to be as a “disturbed area”. But Nagaland clearly is far away from being disturbed. No single soldier has suffered casualty in the state of Nagaland in the past decade and there has been appeal from the state government to remove the Act from the state but to no

avail. The Act has become the symbol of oppression and hate towards the army in the state. The Act is the perpetuator of the rights abuse by the army and till the time being it's in force the people of Nagaland will be denied their right to freedom which is a fundamental right according to the Indian Constitution. The Act need to remove from the state to restore the normalcy that is been deprived to the people of the Nagaland for almost six decades. That's the least we can do for the people who have already suffered a lot under oppression.

¹⁶⁵NEPRAM AND TURNER, ARMED VIOLENCE AND POVERTY IN NORTHEAST INDIA, p. 12.



**REVISITING DEFAMATION:
EXAMINING THE AMBIT OF
“PERSON AGGRIEVED” U/S 199 OF
CR.P.C**

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ABSTRACT

The paper reviews the locus standi of a friend or an acquaintance to make a complaint in lieu of damage to his reputation due to the defamation of a person he is closely associated with. The purpose of research on this topic arose when a case was handed to us by our senior while at our internship in New Delhi and we were asked to research on the locus standi of our client under the provision of section 199 of Cr.P.C. The research is for one yet to be instituted case. In this research, the point of discussion, i.e., ambit of ‘person aggrieved’ under section 199 had been challenged and discussed many a times, but the problem faced by a person (a friend) associated with the defamed person had not been addressed. Drawing upon the available case laws and interpretation by learned judges, and application of the golden rule of interpretation of statutes it has been scrutinized and reasoned that the clause is not exhaustive and a complaint can be filed by any person aggrieved of the offence. The resultant conclusion is that the person should be allowed to make a complaint, and whether harm was caused or not is a matter to be decided by the court.

I. INTRODUCTION

The elementary purpose of law is to set right the grievances of its subjects. If a person has suffered some loss or damage, he is free to approach the judicial platform for redressal. The law lays down the rights of all persons through innumerable statutes and legislations. When any of these rights are infringed, a person can present a suit and obtain a decree in his favour by showing cause. The indefinite question is here who is this person who can institute a suit? In case of trespass of property, the owner or possessor of the property can institute a suit. In case of breach of contractual agreements, the parties interested in the subject matter of the contract can institute a suit. In case of violation of rights of a corporation, the persons authorised to act on behalf of the corporation have been permitted to institute suits. The law tries to provide for all the rights of individuals who can be affected by any actions or omissions committed by another person. *Interpretation cessat in claris*, however, it is required on the part of the judges to interpret the true meaning of laws wherever necessary and this includes the specific illumination of the words used in statutes.¹⁶⁶ An example of this situation is the use of the words “person aggrieved” in

¹⁶⁶ "(J)udicial interpretation is only necessary when the plain meaning of statutory text does not reveal clear legislative intent or leads to ambiguous results.... The principle is based on the Latin maxim of statutory interpretation, *interpretatio cessat in claris*: there is no need for interpretation when the text is clear." Barrett Hall and Rebecca, *Wolf in Sheep's Clothing: Dressing-up Substantive Legislation to Trigger the Interpretive Exception to Retroactivity Violates Constitutional Principles*, 67 La. L. Rev. p. 599 (2006).



Section 199 (1) of the Code of Criminal Procedure, 1973.¹⁶⁷

The domain of Section 199 as to the definition of a “person aggrieved” has been examined many a times. The provision is laid down as follows:

“199. Prosecution for defamation.

– (1) No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that where such person is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his behalf or her behalf.”

The proviso to Section 199 (1) clearly provides for situations in case of a minor, a lunatic, persons unable to register a complain due to sickness or infirmity, and persons who according to customs ought not to appear in public.¹⁶⁸ Any person on behalf of the beforementioned persons can file a complaint for defamation with the leave of

the Court even when he himself has not been aggrieved by the defaming imputation. Therefore, the right of such persons to institute proceedings is upheld.

A point to be noted here is that the proviso clearly does not refer to persons who themselves have been aggrieved by the defamatory sentence. It merely allows a third person to file a complaint on behalf of the person defamed, therefore, allowing that person to seek justice in the name of and for the person defamed.

Further, Explanations I and II to Section 499 of the Indian Penal Code (45 of 1860) lay down exceptions in situations where a suit for defamation may be brought by persons other than the person the imputation was aimed at:

Explanation 1. – It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2. – It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

It is obvious that a deceased person cannot defend his reputation and thus, the right shifts to his/her legal heirs, family members and other near relatives. Explanation 1 is an exception to *action personalism* or *in re persona*. In a case where Netaji Subhash Chandra Bose had been defamed, his nephew was allowed to file a complaint on

¹⁶⁷ Act No. 2 of 1974.

¹⁶⁸ A Power of Attorney holder is justified in making a complaint on behalf of the person defamed; Thomas M.v. State of Kerala, 2002 SCC Online Ker 351; Arcot N. Veerasamy v. J. Jayalalitha, Madras, 2002 SCC Online Mad 361.



behalf of the deceased freedom fighter as allowed by Explanation 1 to sec 499.¹⁶⁹With reference to Explanation 2, the Supreme Court has expressed that the same is wide and thus a collection of persons must be an identifiable body so that it is possible to say with precision that a group of particular persons as distinguished from the rest of the community stood defamed.¹⁷⁰ Further, expanding the ambit of “person aggrieved” under Section 199, the Apex Court has held that if a company is described as engaging itself in nefarious activities, its impact would certainly fall on every Director of the company.¹⁷¹

Attention should be given to the use of the words “by **some** person aggrieved” instead of the phrase “by the person defamed” in Section 199(1). It indicates that the lawmakers did not propose the statute to be limited to the person whom a defamatory imputation intended to indicate. It means that **any person** who has suffered a grievance because of the offence of defamation can make a complaint.

In a present case at hand, one journalist submitted in a local newspaper of certain imputations regarding the unprofessional conduct of a public servant while in duty.

He accused him of taking heavy bribes to complete the favours of the public. The newspaper article was clearly indicating the public servant. As a result, a close friend of this public servant was then looked down upon for being associated with him and he despite knowing that the imputations are false, suffered mental agony at the hands of the society. His grievance was a result of the defamatory statement published by the newspaper. As per Section 199 (Cr.P.C.) and Section 499 (IPC) the status of this person falling within the definition of “person aggrieved” is to be examined. Whether the complainant can file a complaint and institute a proceeding thereon? Whether the complainant has *locus standi* in this situation or not? The complainant claims his reputation has been injured even though he wasn't the person defamed. Defamation concerns itself solely with reputation, and reputation is the exclusive preserve of defamation,¹⁷² by this observation any person who has suffered any harm to his reputation should be allowed to claim for damages.

Although it is a question of fact that is to be determined whether there has been harm to a person's reputation or not. However, in this case the point of discussion is whether the complainant has a right to challenge his violation of right of reputation under the said provisions. Can a magistrate take cognizance in such cases?

II. JUDICIAL INTERPRETATION OF ‘PERSON AGGRIEVED’

¹⁷² Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 Oxford Journal of Legal Studies p. 604 (2006).

¹⁶⁹ Pat Sharpe v. Dwijendra Nath Bose, 1963 SCC Online Cal 114.

¹⁷⁰ Foundation for Media Professionals v. Union of India, (2015) 9 SCC 252; Sahib Singh Mehra v. State of Uttar Pradesh, AIR 1965 SC 1451.

¹⁷¹ John Thomas v. Dr. K. Jagadeesan, AIR 2001 SC 2651; Sabal Kumar Dey v. Ranjan Sarkar, 2013 Cr LJ 470 it was held that unless a person is the director of the company or is duly authorised by the company, in accordance with law, he would not have the right to initiate a complaint on behalf of the company.



Firstly, to discuss the ambit of the phrase “person aggrieved” in general law. As per *Advanced Law Lexicon*¹⁷³ an “aggrieved party” is a person whose legal rights have been affected, injured or damaged in a legal sense. The phrase was examined as early as in the year 1870 where it was held that an “aggrieved person” is one who has a more particular or peculiar interest of his own beyond that of the general public, in seeing that the law is properly administered.¹⁷⁴ It is to be noted that in this case E was living in the neighbourhood of the roads which were to be abandoned as a result of the certificates issued by the justices. He would have suffered special inconvenience by the abandonment. Thus, E had shown a particular grievance of his own beyond some inconvenience suffered by the general public. Therefore, in this case the plea of E was taken cognizance of and E was deemed to be an “aggrieved party”.

In another case *King v. Groom ex parte*¹⁷⁵ the parties were rivals in liquor trade. The complainants (brewers) had persistently objected to the jurisdiction of the justices to grant license to one J. K. White in a particular month. It was held that the complainants had a sufficient interest in the matter to enable them to be considered “person(s) aggrieved”.

R. v. Manchester Legal Aide Committee,¹⁷⁶ is another case where it was held that the complainants therein were “persons

aggrieved” because they were grieved by the failure of Legal Aid Committee to give them prior notice and hearing to which they were entitled under Regulation 15(2). Thus, it is a clear situation where one person had suffered a legal wrong. The Apex Court’s dictum in one case is that:

*“The meaning of the words “a person aggrieved” may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make “a person aggrieved”. Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words “a person aggrieved” is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality.”*¹⁷⁷

Some more examples: The appellant, whose seniority is affected due to reinduction of respondent into service on acceptance of his request for withdrawal of voluntary retirement comes within the ambit of “person aggrieved”.¹⁷⁸ A person who feels disappointed with the result of a case is not a person aggrieved. The order must cause him a legal grievance by wrongfully depriving

¹⁷³ P. RAMANATHA AIYAR, *ADVANCED LAW LEXICON* 182 (3rd ed., 2005).

¹⁷⁴ *Queen v. Justices of Surrey*, (1870) 5 QB 466.

¹⁷⁵ *King v. Groom*, (1901) 2 KB 157.

¹⁷⁶ *R. v. Manchester Legal Aide Committee*, (1952) 2 QBD 413.

¹⁷⁷ *Bar Council of Maharashtra v. M. V. Dabholkar* (1975) 2 SCC 702.

¹⁷⁸ *P. Lal v. Union of India*, AIR 2003 SC 1499.



him of something.¹⁷⁹ A person who has pleaded guilty deliberately cannot be heard to say she is a person aggrieved by the conviction.¹⁸⁰ The word “person aggrieved” do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. He must be a man who has suffered a legal grievance.¹⁸¹ In order to earn a *locus standi* as “person aggrieved” other than the aggrieved party before the Collector of Customs as an adjudicating authority it must be shown that such a person aggrieved being third party has a direct legal interest in the goods involved in the adjudication process, it cannot be of general public interest or interest of a business rival.¹⁸²

Drawing from the above contentions, it is clear that the scope of “person aggrieved” is wide and non-exhaustive. Any person who has been affected by an act or omission whether directly or indirectly aimed at him falls within the definition. Any party who has an interest in a subject matter though not the original party to the act has a right to approach the court.

In the present case at hand, the complainant suffered mental agony on the hands of the journalist who published false statements against the public servant. He being a close friend of the officer is often associated with him. The defamation of the public servant

has resulted in damage to the reputation of the complainant even though his name was not mentioned in the article. The complainant knows the public servant since many years and thus believes him to be a true and genuine person. He clearly falls within the ambit “person aggrieved” because of the downfall in his reputation after the publication of the said article. His right was indirectly and unintentionally infringed by the journalist. It can, thus, said to be a case of *aberratio ictus*.

Right to reputation is a legal right generally protected under tort law. However, in India defamation has been criminalised under sections 499 and 500 of IPC whereby a person defaming another is subject to simple imprisonment for a term which may extend to two years, or with fine, or both.

III. THE QUANDARY OF THE COMPLAINANT

Now referring to the phrase “person aggrieved” under Section 199, the High Court of Orissa has observed that it seems impossible to limit the scope of the expression “some person aggrieved”.¹⁸³ If that were the true view, then it is only the person defamed who can make a complaint. The Honourable Court in the case of *T. G. Goswami v. The State*, clearly stated that the standard to be applied in proof that the defamatory matter refers to the complainant is whether or not a reasonable man would understand so from the piece of libel even when no name has been mentioned;¹⁸⁴ but in the former case the defamation of the wife resulted in the defamation of her husband

¹⁷⁹ *Adi Pherozshah Gandhi v. H. M. Servai*, AIR 1971 SC 385.

¹⁸⁰ *R. v. Deputy Chairman of the Country of London Quarter Sessions Appeal Committee*, (1957) 3 All ER 28.

¹⁸¹ P. RAMANATHA AIYAR, *ADVANCED LAW LEXICON* 3558 (3rd ed., 2005).

¹⁸² *Northern Plastics Ltd. v. Hindustan Photo Films Manufacturing Co. Ltd.*, 1997 (4) SCC 452.

¹⁸³ *J. Padmalochan Choudhury v. Nirakar Patel*, 36 (1970) CLT 940.

¹⁸⁴ *T. G. Goswami v. The State*, AIR 1952 Pepsu 165.



because of their association with each other in the eyes of the society.¹⁸⁵ The husband was considered a “person aggrieved”. In another case, *Navin Das v. Ranjita Singh* the Supreme Court upheld the maintainability of the suit by the wife and daughter-in-law of the persons defamed as she fell within the ambit of “person aggrieved” because she was so closely associated with the defamed persons.¹⁸⁶

Furthermore, in the case of *Devki Nandan v. K. Narinder*¹⁸⁷ the High Court of Punjab and Haryana observed that a person who suffers injury or is adversely affected by the act complained of is obviously the person aggrieved, though in some cases this expression may include a person who is not the direct target of attack.

An old judgement of Calcutta High Court observed that it cannot be laid down as an inflexible rule that the expression “some person aggrieved” will only be limited to the person actually defamed or affected. The Section does not say that complaint can only be made by the person defamed. What it requires is that the complaint must be made by “some person aggrieved”.¹⁸⁸

Following observation was made by the Bombay High Court in a case of defamation of a person’s father: The complaint can be filed by some person aggrieved by the offence and thus aggrieved person can be

other than the one against whom the offence was committed.¹⁸⁹

In all the above-mentioned cases, the common factor was that the aggrieved party was related to the defamed person by marriage or blood relations. In the case of *John Thomas v. Dr. K. Jagadeesan* the Apex Court was of the view that the collocation of the words “by some persons aggrieved” definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the court depending upon the facts of each case. In this case the Director of a hospital that was defamed was put within the ambit of “persons aggrieved”. Similarly, if a firm is described in a publication as carrying an offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it.¹⁹⁰

All the above cases are covered by the Explanations to Section 499. But the particular case at hand refers to the close friendship of the complainant and the person defamed. People are more than often judged on the basis of persons they indulge themselves with. The complainant believes the public servant to be a genuine person who performs his duty truly. The imputations made by the journalist are believed to be false and misleading, and have therefore misrepresented the complainant in front of his family, friends and the society at large because of his close

¹⁸⁵ J. P. Choudhury v. Nirakar Patel, 36 (1970) CLT 940.

¹⁸⁶ Navin Das v. Ranjita Singh, 2016 SCC Online Ori 39.

¹⁸⁷ Devki Nandan v. K. Narinder, 1962 SCC Online 225.

¹⁸⁸ Mrs. Pat Sharpe v. Dwijendra Nath Bose, 1963 SCC Online Cal 114.

¹⁸⁹ Shri Vijay Vishwanath Kuvalekar v. Shri Suresh Raghunathrao Kalkundrikar, MANU/MH/0543/2000.

¹⁹⁰ John Thomas v. Dr. K. Jagadeesan, AIR 2001 SC 2651.



association with the person defamed. Based on the reasoning of the courts above, a “person aggrieved” u/s 199 might not necessarily be the person defamed and involves a person who has faced a grievance due to the offence of defamation.

The Kerala High Court in its judgement however has given an asymmetrical opinion. It has said that where a report states that some leaders of a strike indulged in a disgraceful conduct, all the leaders would not suffer in their reputation. In that situation, a member of such an unidentified and indeterminate class cannot pose as an aggrieved person within Section 199.¹⁹¹ An “aggrieved person” is someone who has got *legal grievance*, i.e. a person wrongfully deprived of anything to which he is legally entitled and not merely a person who suffered some sort of disappointment.¹⁹² In this case, the complainant’s reputation to which he is legally entitled has been denied. No person is allowed to be defamed by words or actions as per Section 199 of IPC. Blameworthiness of conduct and protected interest are the two types of props which, when combined will make up the ‘grid’ of tort law.¹⁹³ However, it is to be noted that India does not have strict legislations on tort law as of yet. Many common torts such as negligence, defamation, assault, etc. have been criminalised by the Indian Penal Code. Though, a writ petition for decriminalisation of defamation had been filed in the Supreme Court of India, the constitutionality of

criminal defamation was upheld therein.¹⁹⁴ So, the only recourse available to the complainant is to file a complaint for criminal defamation under Section 499 of IPC (read with Section 199 of Cr.P.C.). This fact has been reiterated in the case of *Huzra Bee v. The State of Madhya Pradesh*:

“Any damage to the reputation confers civil right to claim damages from the wrong doer and also right to prosecute the offender in terms of Section 499 of IPC.”¹⁹⁵

IV. APPLYING THE GOLDEN RULE OF INTERPRETATION OF STATUTES TO SECTION 199

The conventional way of interpreting a statute is to seek the intention of its makers.¹⁹⁶ The intention of the legislature can be interpreted through the three rules of interpretation – the literal rule, the golden rule, and mischief rule. Where the words used in a statute are unambiguous but the intention of the legislature is not clear, the literal rule is applied to interpret the words in the plain, ordinary and grammatical sense that has been laid down by the legislature. Where the words used can be interpreted in more than one way, either the golden rule is applied to interpret the true intention of the legislature or the mischief rule is applied to gather the mischief that was sought to be rectified by the legislature and the words are interpreted accordingly.

¹⁹⁴ Subramanian Swamy v. Union of India, (2016) 7 SCC 221.

¹⁹⁵ Huzra Bee v. State of Madhya Pradesh, (Writ Petition No. 9060/2017, High Court of Madhya Pradesh).

¹⁹⁶ Bhatia International v. Bulk Trading SA and Another, (2002) 4 SCC 318.

¹⁹¹ R. V. KELKAR, LECTURES ON CRIMINAL PROCEDURE 236 (6th ed., 2016).

¹⁹² Parvinder Kaur v. Joginder Kaur, 2004 CrLJ 2329.

¹⁹³ Supra note 6 at 603.



In the present statute under consideration, the golden rule of interpretation is appropriate for interpretation, as there is more than one meaning obtainable from the words “by some person aggrieved”. First, does it only refer to persons actually defamed; second, does it along with the first inference also refer to persons associated to the person defamed. The use of the words “some person aggrieved” obviously does not limit the jurisdiction to only the person defamed. It is clear from the proviso to section 199 and subsequent adjudications by the judiciary that the legislature did not intend to limit the applicability of the section only to persons that were defamed themselves but some person that was “aggrieved” by such an act of defamation.

The golden rule provides for interpretation of the words in cases where one interpretation leads to an absurdity, and another gives effect to the common sense, which was originally intended by the law makers. The intention of the legislature by the use of the words is vibrant that any person aggrieved by the act of defamation should be allowed to file a complaint. If only the person actually defamed by the statement was allowed to file a complaint, then the intention of the legislature would have been misguidedly violated. This would limit the jurisdiction of the statute and result in absurdity which, by the words used by the law makers, was certainly not intended.

V. DEFAMATION – A LEGAL INJURY

It is not disputed that defamation is a legal injury or not, the very fact that criminal proceedings can be instituted when

somebody’s reputation is harmed is proof enough that defamation is a wrong. It is a settled point of law. The theme of discussion here is what constitutes as legal injury within the framework of defamation. The Supreme Court has held in the *Subramanian Swamycase* that the right to reputation is a “fundamental right”. A ‘legal injury’ cannot per se include a person feeling hurt because of the defamatory statement. The rule was clearly laid down in the case of *Hassainbhoy Ismail v. Emperor* where a member of a religious community was not allowed to bring a suit against the accused as his feelings were hurt because of the defamation of the community head.¹⁹⁷ In the present case however, the complainant alleges violation of his legal right and not just a feeling of hurt. A legal injury is an injury that is recognised by law, whether physical, monetary or loss of a legal right.¹⁹⁸ Grievance does not contemplate any fanciful sentimental grievance, it must be such a grievance that the law can appreciate, it must be a legal grievance and not a state *propratione voluntas* reason.¹⁹⁹

Right to reputation is a right in rem, i.e., it is available against the whole world. The Bombay High Court’s dictum in a case before it was that:

“Every person has a legal right to preserve his reputation inviolate. In law it has been accepted as personal property

¹⁹⁷ *Hassainbhoy Ismail v. Emperor*, 156 Indian Cases (1935), 567.

¹⁹⁸ P. RAMANATHA AIYAR, *ADVANCED LAW LEXICON* 2681 (3rd ed., 2005).

¹⁹⁹ M. L. SINGHAL, J., *CODE OF CRIMINAL PROCEDURE* 389 (21st ed., 2014).



and it is jus in rem and a right good against all the world. A man's reputation is property and degree of suffering occasioned by the loss of reputation as compared to that occasioned by loss of property is greater."²⁰⁰

In the present case, the complainant averts injury to his reputation. By all means and standards his case is that of defamation. His right to reputation to which he is entitled as against the whole world has been violated. However, whether actual injury did occur or not is a matter of facts that is to be decided by a learned judge. The code itself views it as an offence on account of the mental suffering of the person defamed.²⁰¹ In the United States, a Court permitted recovery for defamation solely on the basis of mental pain and anguish; no injury to reputation was alleged or proved.²⁰²

VI. CONCLUSION

The *locus standi* of a person aggrieved by the offence of defamation has been a topic of discussion since decades. It is settled that family, friends and strangers cannot file a complaint on behalf of the defamed person unless their own reputation has been harmed because of association with the latter. Secondly, deceased persons and companies are allowed to be represented by legally authorized persons. The complaint has to be filed by the person defamed in all other cases. On the other hand, husbands, wives,

children and other family members have been put under the umbrella of "aggrieved persons", the stance of a person who suffered injury or damage and one who is not related by blood or marriage to the person defamed has not been taken into account. The definition of a "person aggrieved" has repeatedly meant to refer to a person who has suffered a legal grievance, and therefore the complainant should be allowed to file a complaint. Right to reputation has been held to be a fundamental right which if violated attracts legal action. All the case laws that have been referred to above have in some way affected the right of reputation of a person. Whether the complainant has actually suffered harm is a matter of fact. Professor Prosser says reputation is harmed when there is diminution to the esteem, respect, goodwill or confidence in which the plaintiff is held.²⁰³ In the opinion of the complainant, his reputation has been affected. A prima facie case is thus perceptible and therefore complaint should be admitted. The aim of this research was to examine whether the complainant has *locusstandi* to challenge the actions of the journalist, the answer to which stands in the positive. The point of a trial is to determine whether actual damage was caused to the plaintiff or not. In the opinion of the author, the complaint should be taken cognizance of under Section 199 (Cr.P.C.)²⁰⁴ and a proceeding under Sections 499 and 500 of IPC²⁰⁵ should be allowed to be instituted.

²⁰⁰Umar Amid Khan v. VincyGonsalves, 2009 SCC Online Bom 1676.

²⁰¹DR. HARI SINGH GOUR, PENAL LAW OF INDIA 4723 (11th ed., 2003).

²⁰² Robert A. Steinberg, *Defamation, Privacy and First Amendment*, 5 Duke Law Journal p. 1017 (1976).

²⁰³ Albert E. Harum, *Remolding of Common Law Defamation*, 49 American Bar Association Journalp. 149 (1963).

²⁰⁴ S. 199 of Code of Criminal Procedure, 1973 (Act No. 2 of 1974).

²⁰⁵S. 499 & 500 of Indian Penal Code, 1860 (Act No. 45 of 1860).



“SUICIDE IS SIN ,SANTHARA IS RELIGION”

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INTRODUCTION

Religion is the system under which people follow their spiritual faith right from the birth until death. Although religion is merely the traditions and beliefs what had been followed by the ancestors, currently the legal system based on its rituals and its codifications determine marriage, divorce, succession, adoption and so on. Each religion slowly started adopting its own customs and institutions such as temples or mosques or churches started interpreting the manner in which one should lead their life. The human civilization is considered to attain its driving force from religion and it is supposedly incomplete without them.

Of these religions, Jainism is one such ancient Indian religion which is built upon the belief that the body and soul are two different entities. “*Ahimsa, Satya, Asteya, Bhramacharya & Aparigraha*” are the major 5 vows of Jainism which mean as “*Ahimsa* or Non violence, *Satya* or Truth, *Asteya* or NonStealing, *Bhramacharya* or Chastity and *Aparigraha* or Detachment from material property”.²⁰⁶ All these five vows are the basic morals on which Jainism works upon. The major belief in Jainism is of Reincarnation which according to this religion is mainly dependent and decided from the acts and activities performed by the concerned person in his current existence.

²⁰⁶The Five Maha-Vrata of Ascetics, JAINA, <http://www.jaina.org/?page=FiveMahaVratas>

The attainment of “*Moksha*” or “Total Liberalisation” from the Birth-Death Cycle is the sole and main motive of Jainism as with Utter Liberalisation, the Soul will completely live in the state of happiness and the body will be free from the cycle of birth and rebirth. The state of “*Moksha*” is achieved when the person has done all the good things with good faith in the present life.

JAINISM AND SANTHARA

Santhara is one such religious practice performed by Jains for the attainment of this ulterior motive i.e. “*Moksha*”. It is a custom based practice which is almost 2500 years old and yet followed by some people of Jain Community. A spiritual personage who leads a noble life and has performed all his worldly duties and responsibilities or a person who is in a vegetative state or is terminally ill and has no chances of survival or feels that his body has already reached a tattered state, and would not last long, undergoes through this practice of achieving “*Moksha*” while living for achieving a peaceful and a dignified death. “Santhārā literally means a bed of hay: the practice derives the name Santhārā because when the death approaches, the aspirant or performer sits or lies down on a bed of hay, renouncing all passions, attachment and intake”²⁰⁷. It is mainly a practice of voluntary death by reducing the intake of food day by day.

The main reason behind Santhara is to attain “*Moksha*” as in the religious books and teachings of Jainism. Sallekhana, Samadhi-

²⁰⁷DR. D. R. Mehta, Dr. K. C. Sogani, DR. Kusum Jain and S. Bothra, SANTHĀRĀ / SALLEKHANĀ, International School for JainStudies,pg1



marana or Sanyasana-marana, are all different names of Santhara. From the ancient times the practice of Santhara has been in the religious books of Jainism. Santhara word is also mentioned in “*Acharanga Sutra*” which is the principal sutra of Jains.

Jainism is divided into two major sects defining different meanings. Digambara (Sky Clad) is one of the sects and the other is Shwetambara (White clad) sect. Sallekhana is the synonym of Santhara and is defined as a proper procedure to surrender Subsistence and Water. Mainly the terms Santhara and Sallekhana are both used by Shwetambara’s but digambara’s use the term Sallekhana only. Sallekhana is been further divided into two more segments-

- Niyam Sallekhana – In this a person leaves all the things with the passage of time and in this type the death can be after many years.
- Yama Sallekhana – In this type the person is about to die in some days.

Santhara is performed by the persons own voluntary consent and no one can force the person to perform this practice. Mainly the people who perform this practice have a strong religious belief and are true followers of Jainism.

Santhara is indeed a very essential spiritual practice under Jainism. This is a belief in which when a person feels, that he is at the fag end of his life, he voluntarily and also with the consent of his family members decides to pass his last moments of life in complete peace of mind and quietude through this practice, in which he renounces

from every other thing and just starts believing and devoting time to God for attaining a good death and afterlife. Santhara cannot be just practised by one’s own consent only, the consent of Family members, Friends, Teachers & Frair is also required to follow the path of Santhara. With the consent of all the persons to whom the person was attached, the person has to surrender all his relations with all the people as well as his passions and truly indulge in religious practice and reciting mantras as all this helps the person in getting a dignified death. The person concerned prays pardon from all the people he was connected for any of his misdoings which he did in life.

Many of the religious texts of Jains (such as *Tatwartha Sutra*, *Sarvartha Siddhi*, *Bhagwati Aradhna*, *Ratankarand Shrawakachara*, *Acharang Sutra*, etc) lays down the details of the method for performing Santhāra /Sallekhanā as follows:-

- 1) A person makes up one's mind to practice Santhara and proclaims it publically.
- 2) He apologizes to everyone for any hurt caused to them by his actions in his lifetime. This practice is also known as *Michhami dukkadam*.
- 3) He takes pledge of Santhara after a discussion of his present condition with a saint.
- 4) He then starts meditation and tries to look inside his soul.
- 5) Further, He slowly and gradually restrains himself from food and water.
- 6) Eventually, His soul leaves from his body and attains “*Moksha*”.

The essential condition required for Santhara is that the person performing it



should not cling to life and also should not have a desire for early death. He should be a true follower of Jainism and perform this practice in a very peaceful manner. In such a state of intense mental peace and salvation, he reflects the fact that he is not afraid of death as it is a part of life and every person has to go through this stage of life at one point or the other, hence we cannot run away from it endlessly. The main objective of Santhara is that when the body has become too weak to be of any good for anybody, one should not cling to such death-bedded body. Santhara is nothing but an experiment of getting rid from such attachments of life. As, our greatest attachment is towards our body which according to the Jain religion is not the ultimate meaning of life. The essence of life according to Jainism is to get rid of one's karma so that they may end this cycle and the ultimate goal of Jainism is *Achieving Moksha*. Once this goal is achieved they believe that their soul has attained all knowledge and is at peace and therefore the soul rests in the heavens forever (Nirvana). It is believed by the Jain community that the practice of Santhara is a voluntary process of soul cleansing where one does not aspire death but rather decides to live his or her life, whatever is left of it, in such a way so as to decrease the influx of karmas, thereby a way to achieve the ultimate goal of their religion. It is a way to achieve proper salvation by detaching the body from the, there would be no affection either for body or for food, and thus will lead to better reincarnation according to Jainism. It is a rational or reasonable practice as the very purpose of human existence is to overcome all obstructions that come in between its progress towards attaining *Moksha*.

Everybody has an imminent fear of death and this is one such major hindrance towards attaining salvation and Santhara thereby helps in overcoming this hindrance. In the book of Dr.Colonel D.S.Baya²⁰⁸, which talks about almost all aspects of this religious practice by the Jains across the world, Santhara has been defined as a very essential part of the religion of Jains. He explained in the book that by going through this practice of Santhara one attains the ultimate form of peace and overcomes his greatest fear, i.e. death.. It is a noble form of death, which does not use any violent means to die in a fit of moment and it is perfectly non-violent as it causes no injury to the self or the other. The practice has been a tradition of Jain religion since a very long time and it has been practiced by the Jain followers since the time of *Bhagwan Rishabhadeva* to the present age. It was finally concluded in the book that it is a noblest way to die in the pursuit of immortality.

RAJASTHAN HIGH COURT DECISION AND ANALYSIS

The current legal position of Santhara in India is still not settled and has given rise to massive socio-political issues. It all started in the year 2006 when, Adv. Nikhil Soni(a Jaipur-based-lawyer) filed a public interest litigation to seek directions under Article 226 regarding the religious practice of Santhara, i.e. the fast unto death practiced by Jains, as illegal and punishable.²⁰⁹ He contended that this practice of Santhara is a form of suicide and comes within the ambit of IPC under S306 and, therefore is a crime;

²⁰⁸D S BAYA, TATTVARTHA SUTRA(1ST Ed. 2004)

²⁰⁹Nikhil soni v.Union of India, 2015 CriLJ 4951



the PIL also sought prosecution of those supporting the practice for abetment to suicide under S309 of IPC. This has given rise to debates on the validity of this practice and whether it is moral or not and has thrown open a legal issue of Santhara being similar to the act of suicide under IPC. The petitioner argued that the practice of Santhara was not a fundamental right that is guaranteed under Article 25 (freedom of conscience and free profession, practice and propagation of religion) of The Indian Constitution, because it is not an essential religious practice and also as it violates the right to life guaranteed under Article 21. It also argued that religious freedom guaranteed under Article 25 is subject to public order, morality and health. While the Jain community in their defence argued that Santhara/Sallekhana is an ancient and essential religious practice of their religion which aimed at soul-purification. It is only practiced with full consent of family members and when all purposes of life have been served. It is not the giving up of life, but dying with dignity and peace. The Rajasthan High Court after listening to both sides on August 10, 2015 allowed the writ petition and made the practice of Santhara illegal giving the following directions:

“State authorities to stop the practice of 'Santhara' or 'Sallekhana' and to treat it as suicide punishable under section 309 of the Indian Penal Code and its abetment by persons under section 306 of the Indian Penal Code. The State shall stop and abolish the practice of 'Santhara' and 'Sallekhana' in the Jain religion in any form. Any complaint made in this regard shall be registered as a criminal case and investigated by the police, in the light of

the recognition of law in the Constitution of India and in accordance with Section 309 or Section 306 IPC, in accordance with law”²¹⁰

The court asked the state to stop the practice of Santhara, and also opined that any complaint made in this regard to be registered as a crime under Section 309 (attempted suicide) or Section 306 (abetment to suicide) of the IPC.

The Jain community protested against the order in a non-violent manner. They bombarded the streets with protest and rallies in several cities all over India, saying suicide was sin, whereas Santhara is a very essential part of their religion. Hence, immediately after the order of the Rajasthan High court was passed a SLP (Special leave petition) was brought under of the Apex court of India topped off by Akhil Bharatvarshiya Digambar Jain Parishad. The Supreme Court without taking any time granted stay on the order of the Rajasthan High court. The decision is still under challenge before the Supreme Court of India.²¹¹ The following questions of law have to be adjudicated by The Apex court in the aforementioned case:-

1. Whether the practice of Santhara amounts to suicide under S309 and S306 of IPC?
2. Whether Right to life under A21 of The Indian Constitution includes “Right to die”
3. Whether Santhara is similar to euthanasia?

²¹⁰ Supra Note 4, Para 43

²¹¹ Nikhil soni v. Union of India, 2015 CriLJ 4951



4. Whether the practice of Santhara is protected under A25 of the Indian constitution

While the decision is still under challenge, a number of jurists and social-activists have criticised the decision of the Rajasthan High Court and this is what makes this issue an open field for exploration and analysis through research. The authors will be dealing with the above mentioned questions of law and analyze the same.

1. Whether the practice of Santhara amounts to suicide under S309 and S306 of IPC?

The whole society as well as some of the jurists consider the practice of Santhara similar to that of Suicide which is not true. Jain texts draws a line of difference between Santhara and Suicide. Suicide is basically a voluntary act of ending one's own life. It is mainly committed due to emotional reasons such as Depression, Anxiety, Stress, and Pressure.

In a Bombay High court case it was held that-

"It is estimated that about one third of the people who kill themselves have been found to have been suffering from mental illness requiring psychiatric treatment. Depressive illness with a feeling of worthlessness and despair and a wish to die accompany most of the mental disorders. But even in this condition the urge to commit suicide varies. Schizophrenia which is one of the other major mental disorders also takes an above-average toll of suicides. Most of the rest have unstable and vulnerable personalities. Abnormal personalities with aggressive tendencies show increased

*liability to suicide. Frustration, loss of social status, social isolation, inability to cope up with the stress and strain are still other factors of the like nature responsible for suicides."*²¹²

Justice Tukol, a retired judge of Karnataka High Court and also a Scholar of repute, in his book "Sallekhanā is not Suicide" addresses as under ²¹³

"I cannot agree with the view that this omission to take food is an act under the section (309 IPC) because one of the principles of interpretation of a criminal statute is that it should be strictly construed. Section 2 of IPC lays down the rule of interpretation of sections in Penal Code. It lays down "In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions". What is illegal is indicated in section 43 of Penal Code: (1) everything which is an offence, or (2). which is prohibited by law, or (3) which furnishes ground for civil action, or (4) omission to do whatever he is legally bound to do so". Law requires every individual to conduct himself so as not to injure others. An act becomes an injury, when it causes harm to another in body, mind, reputation or property. There is no law which casts an obligation on every individual not to fast because fasting is sanctioned by the most of the religions in India as conducive both to physical

²¹²Maruti Shripati Dubal vs State Of Maharashtra, 1987 (1) BomCR 499, (1986) 88 BOMLR 589

²¹³ Justice T. K. Tukol, Sallekhanā IsNot Suicide (1976)



and mental health, besides providing an opportunity for worship and meditation. A fast undertaken on religious grounds causes no pain or harm to anybody. Since, such fast is not directed against anybody, so as to cause him mental pressure or anxiety, it cannot be regarded as a harmful act. Every fast which is spiritually motivated exudes an atmosphere of tranquillity, peace and piety about it”²¹⁴

Justice Tukul further said that

“facing death in a war, knowing full well that death is the likely result, is applauded as heroism or *Vimarana*. Dying for religion is called *Martyrdom*. Facing death for a noble cause earns the title of a national hero or Saviour. It cannot therefore be disputed that death for a noble cause or end has always been hailed by all nations, though under different designations.”²¹⁵

Therefore, Santhara is totally different from Suicide as Santhara is a voluntary death process which is done with the consent of other people and also because Santhara is not practised under any force or due to any emotional or mental stress. The sole reason to perform Santhara by the people is to attain “*Moksha*”. Suicide is considered to be the worst form of death as according to hindu mythology it gathers bad karmas, on the other hand it is believed in Jainism that Karmas play a major role in deciding where the soul will go after death. Santhara or Sallekhana is a religious way of dying with diligence and Dignity and on the contrary

Suicide is based on anger and dejection so it is totally immoral.

2. Whether Right to life under A21 of The Indian Constitution includes “Right to die”

Right to life under A21 of The Indian Constitution states as under

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”²¹⁶

Art. 21 provides a person with a right to live a meaningful life with dignity. The sole objective of this article is to prevent the state from restricting any individual from living a dignified life except according to procedure established by law.

This article according to the Supreme Court of India does not primarily includes “right to die” for every individual, but it certainly gives this right to people who are terminally ill or has been suffering from an incurable form of disease. These are the cases which fall within the meaning of “Right to die” with dignity as according to the court these are not cases of extinguishing life but only of accelerating the process of natural death which has already commenced.

The Supreme Court of India in *Gian Kaur V. State of Punjab*²¹⁷ opined that-

“A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative State that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of vases may fall within the ambit of the ‘right to die’

²¹⁴ *Ibid* at pages 320-324.

²¹⁵ *Supra* Note 8

²¹⁶ INDIA CONST. art. 21

²¹⁷ *Gian Kaur v. The State Of Punjab*, 1996 AIR 946



with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only the accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life”

Similarly as in the case of Santhara which according to Jainism can only be practiced by individuals who are terminally ill or in old age, having no meaning of life left with them and whose death due to termination of natural life is very certain in nature, hence has a right to voluntarily end their life with dignity as under A21 of The Indian Constitution.

3. Whether Santhara is similar to euthanasia?

Euthanasia also known as assisted suicide or mercy killing is a mode of painless killing of a person who is suffering from an incurable disease or is in a vegetative state from a very long period of time. Euthanasia is of two types:-

1. Active euthanasia- ‘A mode of ending life in which the intent is to

cause the patient's death in a single act (also called mercy killing).’²¹⁸

2. Passive Euthanasia- ‘A mode of ending life in which a physician is given an option not to prescribe futile treatments for the hopelessly ill patient’.²¹⁹

3.

Passive euthanasia is legal in India. The Honb’le Court in the case of *Aruna Ramchandra Shanbaug v. The Union of India* said emphatically stated that **euthanasia is one of the most perplexing issues, which the courts and legislatures all over the world are facing today.**²²⁰ **The court in the same case held that** it is legal for doctors to withdraw life support from patients who have no hope for survival or are in a vegetative state.

The religious practise of Santhara which is followed by Jains is being referred to as similar to Euthanasia by many jurists which is not true as Santhara is totally different from Euthanasia. Religious texts also clearly defines that Santhara does not include the concept of Euthanasia. Santhara is old and spiritual practise which is going on from thousands of years. It is a practise which is performed by a person who is either Old or terminally ill and further the person who performs Santhara or Sallekhana has completed all his worldly duties and responsibility whereas Euthanasia is mainly recommended by doctors to the people who

²¹⁸ Euthanasia;Active and Passive Euthanasia, BBC, http://www.bbc.co.uk/ethics/euthanasia/overview/activepassive_1.shtml

²¹⁹Euthanasia;Active and Passive Euthanasia, BBC, http://www.bbc.co.uk/ethics/euthanasia/overview/activepassive_1.shtml

²²⁰*Aruna Ramachandra Shanbaug v. Union of India*, (2011) 4 SCC 454



are terminally ill. The process of Euthanasia is all the way fast and the death under this process can happen all of a sudden too, on the other hand Santhara is a process in which the person dies slowly and his soul rests in the lap of the divine god. Also, the motive behind performing both of these practices are very different, Santhara is practiced to attain “Moksha” while euthanasia is performed to end the suffering of a terminally ill patient.

4. Whether the practice of Santhara is protected under Art. 25 of the Indian constitution

Fasting till death is an age old practice which is prevalent in not only Jainism but also in other religions. The traditional ritual of “Prayopavesa”(fasting of a terminally ill person unto death) which is practiced by hindu and “Sokushinbudhsu” which is practiced by the budhist monks in which they undergo ascetism unto death and then mummified alive) are some of the examples of such religious practices similar to that of Santhara. These are ancient practices which are being practiced from time immemorial and which are an essential part of their cultures and religions.

A25 of The Indian Constitution guarantees to every citizen to practice and profess any religion freely as under-

“25. Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to

profess, practise and propagate religion”²²¹

In the case of Madras v/s Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, The Hon’ble Supreme Court laid down as under:-

“Religion is a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly had its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. The guarantee under the Constitution of India not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression “practice of religion”²²²

The practice of Santhara as contested by many jurists therefore does not interfere with public order, health or morality as it is

²²¹INDIA CONST. art. 25,cl.1

²²²The Commissioner, Hindu Religious Endowments, Madrasv.Sri Lakshmindra Thirtha Swamiar, 1954 AIR 282



a form of glorified death practiced by people having a lot of faith in their religion, neither does it harm anybody else nor is it against morality as it is a way of attaining peace and “Moksha” in true sense. The Hindu Code defines such custom and usage followed by different religions as –

“Any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law...in any local area, tribe, community, group or family, if it is certain and not unreasonable or opposed to public policy.”²²³

The validity of a custom can be ascertained from its reasonableness. However, every custom cannot be founded on reason. The reasonableness of a custom depends on many factors like religion, mindset of people, social values etc. Hence, a custom is reasonable or not can only be checked by analysing the values and beliefs of that particular society or religion and also from where it originated. The unreasonableness of a custom in today’s time cannot affect its validity if the court is satisfied that it has a reasonable origin.

“It is settled that a religion not only lays down a code of ethical rules but may also prescribe rituals and observances, ceremonies and modes of worship. These, when they constitute an integral/essential part of the religion is protected under Article 25 and Article 26 of the Constitution.”²²⁴

²²³ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955(India)

²²⁴ Indian Young Lawyers Association v. State of Kerala, 2006 Writ Petition (Civil) No. 373

It is a said principle that the rights of an individual which are protected under Part III of The Constitution, overrides any other law and thereby cannot have the sanctity of law. Santhara being an essential religious practice as it is a way of attaining the ultimate goal of life according to Jainism (i.e. Moksha) is protected under Art. 25 of The Constitution of India hence cannot be challenged under penal code or any other identical law.

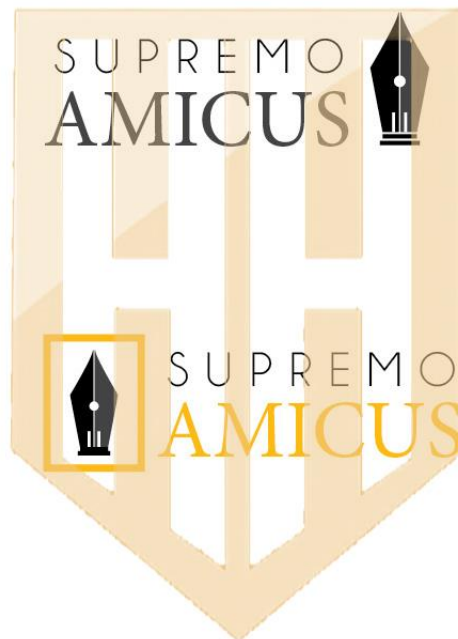
CONCLUSION

The authors through these findings on Santhara have drawn the conclusion that Santhara is truly a religious and spiritual practise and not illegal. The allegations made against Santhara are all wrong. According to the religious texts of Jains the comparison of Santhara with Crimes such as Suicide and Euthanasia is in itself a Sin because Santhara is a very ancient as well as prestigious and renowned ritual while the practise of Suicide is highly immoral , against our culture and also unconstitution. Therefore, Jainism has the most stringent standards for permitting of ending your life and only come into play when the inalienable bond between life and death has ceased to exist as in the case of Ācārya Hastimallji, who was a great Jain Acharya and was suffering from terminal illness. He undertook Santhara in early 1991 and died after 11 days. Again the kind of serenity written large on space was beyond compare. One of the senior most Physian Dr. S.R. Mehta. (Principal of S.M.S. Medical College, Jaipur) who happened to be present at the time of his death, publically commented that in his entire medical carrier he had never seen such a peaceful death.



It may also be argued that no provision of the Constitution or any ordinary law prescribes any act that a person must eat or eat adequately and further that if he does not do so, he will be liable to punishment. Therefore the authors are of the opinion that Santhara is an essential religious practice

which does not violate any right or law and which cannot be compared to suicide or euthanasia in any manner whatsoever. It is a way to attain pure bliss, referred as “Anand Anand” in Jainism.





UNBORN CHILD OF CONSTITUTION- UNIFORM CIVIL CODE

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ABSTRACT

“Religion is the opium of the masses.”
The above statement of Karl Marx emphasizes on how religion in its real existence is of such a nature that it has become significant as the people in society. Many a times, it so happens that people are so overwhelmed by religion that they overlook the basic human instincts and values that they should inculcate and begin to value religions more than individuals. For this, synthesis of the views, ideas and ideology needs to be integrated with a holistic approach. Ours is a diverse society with different sects having heterogeneous beliefs, sometimes creating a dichotomy in the society. In furtherance to the notion of coherence in society, there must be some mechanism that binds all religions together, simultaneously regularizing it. The idea is to create a Uniform Civil Code functional throughout the territory of India regulating all the religions in the same manner pertaining to legal matters of religions. The bigoted fundamentalist revolt against sanctioning this code to bring into effect, claiming that it would meddle with their personal laws and violates their fundamental right to religion. However, the code is not having any truck with religious matters and its core concern is to regulate legal matters which are strangled in the religious domain like marriage, inheritance, succession, maintenance, divorce, etc. The

researchers have preferred doctrinal mode of research in this paper. The researchers have also relied upon various judicial interpretations to indicate the significance of the subject, and have also tried to depict the status quo prevalent in the nation.

Keywords- Pseudo Identity Politics, Religious Freedom, Religious Pluralism, Secularism, Social Solidarity.

1. Introduction

“Sarv Dharma Sambhava”

The meaning of this Sanskrit excerpt drives us to an ideology which embraces the concept of equality and harmony among all religions. Our country, since ages, has been preaching the same and has nurtured all the religions in its basket. Our country has been an originating and culminating point of a number of religions- Hinduism, Buddhism, Sikhism, Jainism and yet many other religions which have thrived in its lap.

Father of the Nation has also reiterated the same, *“I do not expect India of my dreams to develop one religion, i.e., to be wholly Hindu or wholly Christian or wholly Mussalman, but I want it to be wholly tolerant, with its religions working side by side with one another.”*

Nevertheless, our country has always respected diversity among communities, religions but what hurts the most is the divergence among that diversity. The presence of different sects of personal laws for same matters in different religions leads to the violation of fundamental rights of the individuals in general and of women in particular.



(A) WHY UNIFORM CIVIL CODE?

There must be Rule of Law in the society as it denotes a way of life, commitment to certain principles and values to establish social, economic, cultural, educational and cultural conditions under which legitimate aspirations and human dignity may be realized, which is a priceless inheritance of our civilization; according to which, law must be a fair, just and reasonable law, it is not sufficient to have a law.²²⁵

While India was facing the heat of independence, our Muslim brothers constituted a separate religion centric nation. It was this time when the framers of the constitution recollected the fresh atrocities committed at the time of independence, so it was quite natural for the leaders of the divided India to aspire for the unity of the one nation, India, so that history might not repeat itself.²²⁶ Granville Austin also said that despite the inroads on personal law during the British period, the idea of uniform civil code struck at the heart of custom and orthodoxy.²²⁷

Few prominent statements in the Constitutional Assembly Debate need to be looked upon, when the matter of Uniform Civil Code was being discussed in the House to introduce the same in the Constitution of India as Article 35, which

subsequently got its place in Directive Principles of the State Policy under Article 44.

However in the Constitutional Assembly Debate, an objection was raised in the House that religion would be in danger and communities won't be able to live in amity if there is to be a uniform civil code. In reply to the above objection, Shri Alladi Krishnaswami Ayyar answered that, "*the article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. What it aims at is to try to arrive at a common measure of agreement in regard to these matters. It is not as if one legal system is not influencing or being influenced by another legal system.*"

Shri K. M. Munshi, had also expressed his concern on the enactment of the uniform code. He said that if a uniform code has to be enacted, the benefits which may accrue to the whole community shall be taken into consideration and not a part of it, in the path of consolidation of a community. So, a Uniform Code would not mean the domination and an act of tyranny of the majority; rather a unification of all the personal laws in such a way that the way of life of the whole country may in course of time be unified and secular.

He further emphasized that, religion must be divorced from ties of personal laws, from what may be called social relations or from the rights of parties as regards inheritance or succession. Shri K. M. Munshi while

²²⁵ 1 Soli J. Sorabjee, *Rule Of Law Its Ambit And Dimension*, in *Rule of Law in a Free Society* 3-7 (N. R. Madhava Menon ed., 1st ed., 2008).

²²⁶ 3 Acharya Dr. Durga Das Basu, *Commentary on the Constitution of India* 4138 (Hon'ble Justice YV Chandrachud et al. Hon'ble Justice S. S. Subramani et al. Hon'ble Justice B. P. Banerjee et al. V. R. Manohar, 8th ed., 2008).

²²⁷ Austin Granville, *The Indian Constitution: Cornerstone of a Nation* 101 (18th ed., 2012).



speaking in the favour of enactment to divorce religion from personal laws added that, “*Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible a strong and consolidated nation.*”

Despite a pledge to this effect in the constitution, a common civil law for all Indians was not enacted but left on sweet will of the legislators to enact the same somewhere in the future at the apt time. The framers of the constitution decided to reach to an amicable solution through inception of only “*an idea*” for the Uniform Civil Code which would bring about a uniformity and unanimity among all the religions.

Article 44 of the Constitution in the Directive Principles of State Policy reads as: “*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*”.

The article gives us a hope and duty to the legislators to enact a uniform code for all the religion throughout the territory of our nation. A Civil Code, as defined by *Shri Alladi Krishanaswami Ayyar*, has been pointed out as the law of contracts, as the law of property, as the law of succession, as the law of marriage and similar matters. Moreover, personal law has been defined in the *Entry 5 of List III of VIIIth Schedule of the Constitution* as, “*Matters relating to marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the*

commencement of this Constitution subject to their personal law.”

India has retained its identity as the center for diverse religion and cultures; consequently, the colonial administration left its legacy in the form of operation of separate personal laws for different religious communities in India.²²⁸ This gave birth to *legal pluralism* in India as far as personal laws are concerned. This kind of legal pluralism has blurred the boundaries of the state and the society.²²⁹

Whenever, debate over Uniform Civil Code strikes, it leaves patches of conflict between the ideal which have been running through the vein of our country. To be precise, these are—existence of pluralistic society, secularism, patriarchal set-up of society and religious identity of minorities.

(B) PLURALISM

India is a country of faith residing in different religions based on beliefs or tenets propounded by different religions, similar problems were confronted by our founding fathers when it came for the purpose of unification and integration of people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different languages and dialects in different regions; resulting which they provided us a secular Constitution to integrate all sections of the society as a united Bharat.²³⁰

²²⁸ Rajeshwari Sunder Rajan, *The Scandal of the State: Woman, Law and Citizenship in Postcolonial India* 147 (1st ed., 2003).

²²⁹ Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism and Gender Equality in India* 326 (1st ed., 2011).

²³⁰ Pannalal Bansilal Patil v. State of Andhra Pradesh, AIR 1996 SC 1023 (India), ¶ 12.



However, the founding fathers decided to maintain the same living style to not to repeat the conflicts from which a new India was recovering recently and Uniform Civil Code was kept under the ambit of Directive Principles of State Policy. But, with so many disruptive forces of regionalism, communalism and linguism, now it is necessary to emphasize and reemphasize that the unity and integrity of India can be preserved only by a spirit of brotherhood.²³¹ It is the call of the hour bring the same brotherhood in a single thread via enactment of the uniform code.

(C) SECULARISM

There is not a single word, 'secularism' in our Constitution yet in its preamble it declares India to be secular nation, with secularism as its basic feature. Secularism has a wide expanse in its applicability, but with restrictions.

In pursuance of the goal of secularism, the State must stop administering religion-based personal laws.²³² Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation.²³³ Mr. Mohamad Ismail Sahib in the Constitutional Assembly Debate has said that "*the right to follow personal law is part*

of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people."

(D) PATRIARCHY

The nature of Indian society is patriarchal and it draws its emergence from the tenant of religion itself. But, the set-up often gets into conflict with the rights of the women and in cases, victimizes them. It can be turned upside down and status of women can be fortified by the enactment of the uniform code.

(E) RELIGIOUS IDENTITY OF MINORITY

The problem of minorities is basically one for the major communities to handle. The test of success must not be felt as what majority thought but how the minority communities felt.²³⁴

There is a division among various religions on the subject of Uniform Civil Code. Certain communities take defense of sacramental origin of their personal laws due to which they cannot be altered. The Hon'ble Court in the case of *Ahmedabad Women Action Group (AWAG) and Ors. Vs. Union of India*,²³⁵ noted that the personal law of the Hindus, such as relating to

²³¹ Shri Raghunathrao Ganpatrao v. Union of India, AIR 1993 SC 1267 (India), ¶ 108.

²³² Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945 (India), ¶ 36.

²³³ S.R. Bommai v. Union of India, AIR 1994 SC 1918 (India), ¶ 237. It has been stated by Sri K.M. Munshi during the Constituent Assembly Debates, which has been recognized in the Hon'ble Court in this case.

²³⁴ Sarvepalli Gopal, *The Crisis of Secularism in India, Imperialists, Nationalists, Democrats: The Collected Essays* 346 (Srinath Raghavan ed., 1st ed., 2013).

²³⁵ AIR 1997 SC 3614 (India), ¶ 13.



marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians, in spite of that the Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a “common civil code” for the whole of India.

So, the sacrifice needs to be done from both sides, minority as well as majority community, reaching to a cordial juncture.

2. CONFLICT WITH THE PERSONAL LAWS

It will be wrong to say that to make Islam even with Hinduism, Uniform Civil Code is required. Rather differences among every religion and in between every religion prompts us to go in this direction.

Apart from the religious sentiments which may get affected by the enactment of uniform civil code, another aspect was also to be put in picture. Yes, we are talking about woman, who is behind the curtains, the glorified picture shows her pockets to be filled by number of empowerments as she is surrounded by all the legislation and protected by judiciary, yet she is facing the agony of unequal treatment and peeping from the curtains, requiring a helping hand to pull her out and treat her on equal footings with each and every citizen of this country. And, this helping hand can be in the form of Uniform Civil Code by restricting the personal laws of the extent which does not violate their fundamental rights guaranteed under the Constitution of India.

Enactment of Uniform Civil Code has not only faced hue and cry from the side of

followers of Mohamedan law but also from the various provisions of different set of personal laws, which is going to be discussed further in the chapter.

(A) HINDUISM

The evolution and development of Hindu Law is acknowledged as having one of the most ancient pedigrees of any known system of jurisprudence.²³⁶ The recent urbanization of customary rules of Hindu Law have altogether strengthened the each and every subject of the law on which it is being made applicable, let it be men or women. But then again, even after codification of laws and series of historical amendments in various legislations dealing with various arenas of personal laws of Hindus which ultimately projected towards the development of Uniform Civil Code, there are certain vicinities which can be checked after the enactment of the Uniform Civil Code.

A.1 Marriage- When Hindu Marriage Act was introduced, it ratified the rule of monogamy for all the Hindus, unlike the culture earlier followed which posed no restriction on monogamy. Apart from curbing up of this vice, it removed many other inequalities and tried to give equal rights to women as that of men.

Although, a Central Act has been enacted, almost all States have made the required Rules under the Hindu Marriage Act, 1956, but provisions of the various State Rules have not been uniform, under which

²³⁶ 7Mulla *Principle of Hindu Law*, (S.A. Desai ed., 20th ed., 2007).



registration of marriages has been kept optional.²³⁷

Despite of the presence of the Hindu Marriage Act, other legislations for rules governing marriages of Sikhs and among Hindus has been enacted, the presence of multiple legislations for the same subject devaluate the resolution of any law.

The Anand Marriage Act, 1909, still in force, was passed to recognize Sikh marriages performed by the religious rites known as “Anandkaraj”, but it contained no provision for registration of any such marriage.²³⁸

The Arya Marriage Validation Act, 1937 was passed to recognize inter-caste and inter-sect marriages among the Hindus; strangely, this Act which remains in force said nothing about the well-established Arya Samaj system of certification of marriages.²³⁹

A.2 Divorce- Section 13 of The Hindu Marriage Act provides certain grounds for the dissolution of marriage on which a petition can be forwarded to obtain a judicial divorce, meanwhile at the same time, ironically Section 29(2) of the Act confers customary right on the spouses to obtain the dissolution of a Hindu marriage, wherein no authority is required.

²³⁷ Report No. 211, *Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform* 15-16(2008) Law Commission of India (Oct. 5, 2017), <http://lawcommissionofindia.nic.in/reports/report211.pdf>.

²³⁸*Id.* at 16.

²³⁹*Id.* at 17.

A.3 Succession- When the Hindu Succession Act was enacted in 1956 which was a uniform and comprehensive rule of succession for both Mitakshara as well as Dayabhaga Schools, yet the orthodoxy in the enactment did not grant rightful place to the women in the Hindu Undivided family as far as their succession rights are concerned. Only after the Hindu Succession (Amendment) Act, 2005, the daughter were being allotted the same share as that of son and she became the coparcener by birth in the same manner as that of the son.²⁴⁰

A.4 Tax Benefit- Hindu Undivided Family (HUF), unlike any other religion gets a separate leverage in form of tax benefits as HUF is treated as a person²⁴¹ and while claiming for tax exemption a HUF can claim such exemption as a separate assessable entity alongside with other members of the family,²⁴² providing an additional benefit to the members of HUF.

These differences between inter and intra-religious activities, acts as a warfare inside and outside the religion. These feuds must be curbed through some sort of legislation binding on every community, in this very case, probably the Uniform Civil Code.

(B) ISLAM

The one prominent religious group opposing the enactment of Uniform Civil Code are the followers of Islam and some of the members of the group are averting this Code only

²⁴⁰ Section 6, The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956, (India).

²⁴¹ Section 2(31), The Income-tax Act, 1961, No. 43, Acts of Parliament, (India).

²⁴² Section 80, The Income-tax Act, 1961, No. 43, Acts of Parliament, (India).



because of *Pseudo Identity Politics* played by them and naming this as of social stigma, which they cannot overrun, even at the cost of violating the fundamental rights of women in the society.

This is a violation of the principle of equality before the law, for Muslim women are at present being denied the rights given to the Indian women of other faiths. There is no room in a society which declares itself to be secular for inequalities which claim religious sanction. Religion should be divorced not only from the politics but also from the law.²⁴³

B.1 Marriage-

Polygamy-The most debated and disputed topic relating to marriages in Mohamedan Law has been polygamy which is allowed in our country, according to which a Mohamedan is allowed to have as much as four wives where as it is not lawful for a Mohamedan woman to have more than one husband, if her husband is alive.²⁴⁴ Polygamy is totally prohibited in Tunisia, Turkey while in some countries such as Indonesia, Iraq, Somalia, Syria, Pakistan, Bangladesh, it is permissible only if authorized by State or some other prescribed authority.²⁴⁵

Age of Marriage-An another prominent issue which can be considered while considering uniform code is the age of marriage which is age of puberty and not of age of 18, i.e., age of majority, as in any

other religion is considered while entering into the contract of marriage.

Mehr-Mehr is considered as a token of respect given to the wife by the husband as amount of consideration for the marriage, which is also one of the essentials to put the contract of marriage in force. Although *dowry* and *mehr* are two different things, but the authors pose a relevant yet, unnoticed question. Dowry which once possessed the same belief, “a token of respect”, has been abolished being a social evil, then why not Mehr?

Mutta marriage-Another prominent debatable part of marriage under Muslim law is *Mutta marriage* recognized under Shia law, in which marriage continues for a fixed period of cohabitation, and the marriage also does not create mutual rights of inheritance between man and woman.²⁴⁶

Registration of Marriage-There are Muslim Marriage and Divorce Registration Acts in force only in six States of the nation providing for voluntary registration of marriages and divorces among the local Muslims.²⁴⁷

B.2 Maintenance- The dispute in Mohamedan law regarding the duty of husband to maintain his wife initiates after divorce as according to Mohamedan law, wife is entitled to get maintenance only upto the Iddat period.²⁴⁸ But, this proposition got

²⁴³Gopal, *supra* note 10 at 346.

²⁴⁴ Sir Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* 334 (Prof. Iqbal Ali Khan ed., 20th ed., 2014).

²⁴⁵Basu, *supra* note 2, at 4145.

²⁴⁶Mulla, *supra* note 20, at 344.

²⁴⁷*Supra* note 13, at 19.

²⁴⁸Mulla, *supra* note 20, at 353. Holy Quran on the issue of maintenance says that: “And for divorced women, maintenance (should be provided) on reasonable (scale). This is a duty on the pious.” (11:241).



modified after the landmark judgement of *Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors.*²⁴⁹ in which the Hon'ble Supreme Court established the supremacy of Section 125 of the Criminal Procedure Code, 1973 over personal laws and awarded maintenance to the wife to be paid by husband even after the Iddat period.

But, due to uproar shown by the Muslim community, The Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted by then government. In spite of enactment of this Act, Hon'ble Supreme Court in the series of its judgments, *Danial Latifi v. Union of India*,²⁵⁰ *Shabana Bano v. Imran Khan*,²⁵¹ *Shamima Farooqui v. Shahid Khan*,²⁵² has shown the supremacy of Section 125 of Cr.P.C., 1973 over Section 3 of The Muslim Women (Protection of Rights on Divorce) Act, 1986 in which the divorced woman is entitled to get maintenance by her former husband until she remarries in case of poor financial position

B.3 Divorce-Islamic law recognizes various modes in which talak can be given, but, these modes are discriminative towards wife and favors only unilateral divorce. She has no absolute right to obtain divorce, but can be exercised only in certain specific contingencies and conditions.²⁵³ Islamic law recognizes the oral talak and this unguided power has been vested only upon the husband in which he may pronounce talak by uttering the word 'talak' and addressing

it towards his wife. Talak-ul-Biddat is such mode of talak in which husband has the power to divorce women by uttering the word 'talak' thrice.

B.4 Inheritance-While inheriting the property of the father, son always gets more share as that of the daughter, discriminating only on the basis of sex in both Shia and Sunni law of inheritance.

It is due to the stubborn and rigid approach of customary and personal law; Muslim women are unable to breathe in the atmosphere of freedom and gender justice is a fragile myth for them.

(C) CHRISTIANITY

The Indian Christian Marriage Act 1872 is also discriminatory in many ways. The Act provides separate rules for the solemnization and registration of marriages of Indian Christians and other (native) Christians, and also for the followers of various Churches, which has made the Act complicated; and thus has made it conflictive with the Special Marriage Act 1954, which also provides provisions of marriage with Christians.²⁵⁴

(D) PARSIS

The system of a Parsi matrimonial Courts in the provisions of the Parsi Marriage and Divorce Act, 1936 where members of the community are invited to be on the jury, a system abolished in all other courts, still prevails; Section 50 of the Act provides for an archaic provision which allow the

²⁴⁹AIR 1985 SC 945 (India).

²⁵⁰AIR 2001 SC 3958 (India).

²⁵¹AIR 2010 SC 3205 (India).

²⁵²AIR 2015 SC 2025 (India).

²⁵³Mulla, *supra* note 20, at 416.

²⁵⁴*Supra* note 13, at 22.



property of an adulterous wife to be settled in favour of her children.²⁵⁵

(E) MISCELLANEOUS

Moreover, Section 28 of the Indian Succession Act, 1925 read with schedule I of the Act declares adopted son as a closer relative than the mother as far as implementation of this Act is concerned. The above said law, prima facie is impugned in its very nature.

These laws relating to judicial separation, divorce and nullity of marriage are far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste.²⁵⁶ What should be a fate of such law which is violating fundamental rights of the citizens of this country or is against the principle of justice, equity and good conscience? The answer is very raw and simple, we must have to abolish the law or amend the same. If it is the case of personal law, the answer is even rawer and simpler- Uniform Civil Code.

3. UNIFORM CIVIL CODE: CONFLICT WITH THE CONSTITUTION

Gathering the arguments raised in the above chapters, it can be noted that the enactment of Uniform Civil code has been now and then interpreted as conflictive of Article 25 of the Constitution and supportive towards

Article 14 of the Constitution which has further been summarized below.

(A) OUTLOOK IN RESPECT OF ARTICLE 25.

The debate of conflict between Article 25 and Article 44 of the Constitution has been discussed at length in the case of *John Vallamattom and Anr. Vs. Union of India*,²⁵⁷ wherein Hon'ble Justice V. N. Khare pointed that Article 25 merely protects the freedom to practice rituals and ceremonies etc. which are only the integral parts of the religion. He clarified that, "*Articles 25 guarantees religious freedom whereas Article 44 divests religion from social relations and personal law. Any legislation which brings succession and the like matter of secular character within the ambit of Articles 25 and 26 is a suspect legislation. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.*"²⁵⁸

(B) OUTLOOK IN RESPECT OF ARTICLE 14.

Reforms have been introduced in the personal laws but it have only been brought up in certain communities. If one reform is available to members of one community it is not available to another. Whether this would not result into the discrimination between citizens of this country is a question asked now and then, and which must be answered by legislature. Members of one community get abstained from enjoying certain fundamental rights while the same rights are

²⁵⁵The Oxford Handbook of The Indian Constitution 916 (Sujit Choudhary et al. Madhav Khosla et al. Pratap Bhanu Mehta, 1st ed., 2016).

²⁵⁶Ms Jordan Diengdeh v. S.S. Chopra, AIR 1985 SC 935 (India), ¶ 7.

²⁵⁷AIR 2003 SC 2902 (India), ¶ 42.

²⁵⁸Id. at ¶ 44.



enjoyed by the members of another community.

The traditional Hindu Law - personal law of the Hindu - governing inheritance, succession and marriage was given go-bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.²⁵⁹

These unequal, differential treatment led by non-uniformities in the person law often violates fundamental right of the citizens of our nation enshrined under Article 14 of the Constitution and, if it violates Article 14 of the Constitution, it affects the basic structure of the constitution. Thus incompetency of legislature must be thrown out and it can be done if they take any positive steps to legislate a uniform code for all the communities, all the religions.

(C) JUDICIAL VIEW

Showing resentment towards the enactment of Uniform Civil Code, Hon'ble Justice Y.V. Chandrachud in the case of *Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors.*,²⁶⁰ regretted that "Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their persona law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State

which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."

The assessment of Uniform Civil Code in the case of *Smt. Sarla Mudgal, President, Kalyani and others vs. Union of India and others*²⁶¹ is considered one of the landmark cases of the subject-matter. The Hon'ble Supreme Court has shown relentlessness for the introduction of Uniform Civil Code and has particularized several grounds, few of which can be assessed below:

- a) Hindu Law has been codified in the 1950s itself by replacing the traditional Hindu law, covering 80% of the Citizens in this country and hence there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.²⁶²
- b) If we see the political history of India, justice was administered by the Qazis during the Muslim regime who would apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system continued until 1772 when Warren Hastings made Regulations for the

²⁵⁹ Supranote 6, at ¶ 30.

²⁶⁰ Supra note 8, at ¶ 35.

²⁶¹ AIR 1995 SC 1531 (India).

²⁶² Id. at ¶ 1.



administration of civil justice for the native population, without discrimination between Hindus and Mahomedans. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. But, in India, no community could claim to remain a separate entity on the basis of religion. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.²⁶³

Furthermore, the Hon'ble Court also directed the Government of India through Secretary, Ministry of Law and Justice to file an affidavit of a responsible officer in this Court in August, 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a "uniform civil code" for the citizens of India.²⁶⁴ But, it had remained in abeyance till October, 2016 when Law Commission of India sought public opinion on the matter of uniform civil code as per direction given by the elected Union Government.

On the point of enactment of the Uniform Civil Code, it was noted by the coram of Hon'ble Justice K. Ramaswamy and Hon'ble Justice B.L. Hansaria in *Pannalal Bansilal Patil and others etc. Vs.*

State of Andhra Pradesh and another,²⁶⁵ that "the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India."

(D) COMPLEXITIES

D.1 Concurrent List- The matter related to personal law has been put up under Entry 5 of List III of VIIth Schedule, i.e., under concurrent list which has authorized both the State as well as Union Government to enact legislations on the same subject matter. But, the authors are proposing that because of sensitivity of the issue, it must be regularized only by a Central Act.

D.2 Special status to certain states- Article 244 of the Constitution gives immunity to the States of Assam, Meghalaya, Tripura and Mizoram from the applicability of the matters listed under Fifth Schedule in which any particular Act of Parliament or of the Legislature of the State shall not apply to these states if a notification for the same is issued by the Governor. Similarly, Article 371-A of the Constitution provides that no Act of Parliament in respect of religious or social practices of the Nagas and Naga customary law and procedure for the state of Nagaland, shall apply unless the legislative

²⁶³*Id.* at ¶ 33.

²⁶⁴*Id.* at ¶ 36.

²⁶⁵*Supra* note 6, at ¶ 33.



assembly of Nagaland by a resolution so decides.

These provisions enshrined under the Constitution giving special immunity to certain states may act as a hindrance in the path of enactment of Uniform Civil Code.

It can be said that though Article 44 has been highly controversial and has gathered much critique from various authorities of personal laws and have been blamed of violating the fundamental right of religion.

However, only the enactment of Uniform Civil Code can bring the stability so desired by our society, removing all the conflicts.

Hence, it must be noted that *“Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles; without stability the law becomes not a chart of conduct, but a gore of chance: with only stability the law is as the still waters in which there is only stagnation and death.”*²⁶⁶ Evolution always finds its own way and at times, it takes place by the change by human intervention. So, the history needs to be re-written by our own legislators to evolve and modify the laws existing in our society in a desired manner.

4. STATUS QUO

The current status of Uniform Civil Code in our country is like treasure trove, wherein only one among the 28 states has enacted the law concerning Uniform Civil Code. A Uniform Civil Code in Goa has ruled out the socio-religious repercussion which is being witnessed in rest part of the country. The Goa, Daman and Diu (Administration) Act of 1962 ratified the prevalent Portuguese

Civil Code of 1867 in the area, which was earlier enacted by the Portuguese through a Decree in the year of 1869.

The importance of the Code can be very well seen in the Judgment pronounced by the Honorable Bombay High Court in the case of *Shri Damodar Ramnath Alve vs. Shri Gokuldas Ramnath Alve and Ors.*²⁶⁷, in which Justice B.U. Wahane said:

“The Code has, thus, proved to be a powerful weapon to create and forge a cohesive, well-knitted and homogeneous society with its citizens living in peace and harmony, as well as to strengthen that basic unit of the social - the family - by safeguarding the interests of the children and of the widows. To some extent, therefore, the Code has fulfilled in the Territory of Goa, Daman and Diu that resolve so eloquently expressed in the Preamble of our Constitution to constitute India into a Secular Republic and to secure social and economic justice to all the citizens, equality of status and of opportunity and fraternity assuring the dignity of the individual.”

But, this Code also encompasses certain anomalies which is yet to get resolved. One of them being the right to manage the property, in which husband and wife share equal right on the property, but husband precedes wife when it comes to managing of that property. Moreover wife comes way down the line after children, parents and

²⁶⁶ *Supranote* 33, at ¶ 35. Hon'ble Justice V. N. Khare pointed the quote of Albert Camus in the same judgment.

²⁶⁷ (1997) 4 Bom CR 653 (India), ¶ 3.



siblings in case of death of her husband in case of a Hindu family.²⁶⁸

Another concern was pointed by the Justice Jagannatha Shetty Commission Report regarding the Civil Code prevailing in Goa as the original Civil Code of Portugal was replaced there in 1966 itself. It was also noted here that, *“the Goa Government had appointed a Law Commission in 1968 to go into the question and the Law Commission recommended that all Portuguese laws were to be repealed and to extend all personal laws with slight modification. However, nothing further was done. The Uniform Civil Code in existence needs to be examined and the legislation has to be brought on par with the needs of the Society.”*²⁶⁹

STEPS TAKEN BY UNION GOVERNMENT

The current nominated government has also taken an endeavor to make a way for Uniform Civil Code for the rest of the country and in result, has delegated this task to Law Commission of India to prepare for such an option. The idea is to target social injustice rather than plurality of laws. To achieve such an objective, the Law Commission of India formulated a questionnaire for the citizens of this country to take into account their opinion towards the issue, which could be incorporated in the statute later.²⁷⁰

²⁶⁸Namita Kohli, All in the family: Goa Civil Code a model for the rest of the country?, Hindustan Times, Sep. 13, 2016, (Oct. 10, 2017), <http://www.hindustantimes.com/india-news/all-in-the-family-is-the-go-civil-code-a-model-for-the-rest-of-the-country/story-4ImvwP0OrAST2hUnsZxtiL.html>.

²⁶⁹ Chapter 2.5, First National Judicial Pay Commission.

²⁷⁰ (Oct. 10, 2017), <http://lawcommissionofindia.nic.in/questionnaire.pdf>.

Earlier in its 174th Report on *“Property Rights of Women, Proposed Reforms under The Hindu Law”*, the Law Commission emphasized on the need of enactment of Uniform Civil Code by a peculiar instance under which if any Joint Family has properties in two states, one which is governed by the one Act and the other not so governed, it may result in two Kartas, one a daughter and the other a son. It will subsequently rise difficulties of pertaining to territorial application of the law.²⁷¹

5. CONCLUSION AND SUGGESTION

Moving towards the end of this essay, the authors propose that while enacting a Uniform Civil Code, it must be taken into consideration of the legislators that no one religion should overlap over the other; consensus of society must be there; evolution must be carefully noticed, which must be done by the enactment of only one Central Act, which must have overriding effect on all other personal laws through a non obstante clause in the new legislation, or repealing the existing personal laws.

Cutting the long story short, the words of Shri Alladi Krishnaswami Ayyar need a special attention, which were stated in the Constitutional Assembly Debate that, *“When there is impact between two civilizations or between two cultures, each culture must be influenced and influence the other culture.”* This statement can only be put into effect if we move on from our old set of orthodox ideologies to a reformist one.

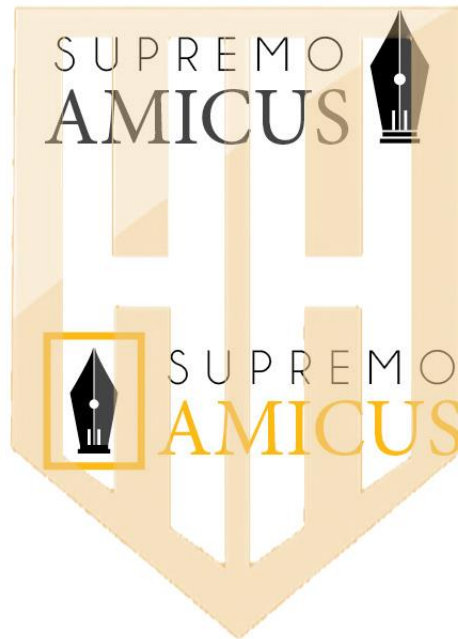
²⁷¹ 174th Report, Law Commission of India, Property Rights of Women, Proposed Reforms under The Hindu Law, Annexure – III, Working Paper on Coparcenary Rights to Daughters under The Hindu Law.



Furthermore, our country is a secular state and if the laws of the nation will discriminate its subjects on the basis of religions, then that secularity which is the bedrock of our Constitution and a fundamental base on which the pillars of our country lies, through which citizens of this country of various religions are residing together, will not stand tall; and if it hits the ground, we too will hit the ground.

The authors' viewpoint is intended towards the enforcement of a code so uniform that

instills the cardinal values of all personal laws into a single unified one rather than manifold personal laws and aims that no individual is deprived of their rights just for the namesake of religion. Now, we would like to end this essay on the note of an optimist viewpoint of *Shri K. M. Munshi* on Uniform Civil Code- *"The sooner we forget this isolationist outlook on life, it will be better for the country."*





THE ACTS, JUDGMENTS AND REFORMS- PROGRESSIVE OR REGRESSIVE

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Abstract :

India, has a series of long historical events and facts. Starting from the Harappan Civilization till the Indian Independence, the country underwent a great revolution in terms of the living, culture, rules, laws and the working of the people. Laws, or the rules governing the people of the country had developed a significant change since times. The Kings in the medieval India, made autocratic laws and imposed them on the people. Many rules like the over imposition of taxes, or the administration of justice they followed were oppressive for the people. At the same time, some kings helped the poor and had the noble idea of equality. Modern India, incurred a similar fate. Britishers, ruined the country and used its resources to flourish their nation, Britain. Regulating Act, 1773, Charter 1813, Charter 1833, imposition of English language on the people, their policy of divide and rule, and many other charters totally disturbed the internal peace of the nation and changed the mentality of the people within 300 years. Despite, the fact that the English brought with themselves technologies and their advancements, they even ruined and looted the country, once known as the golden bird. India is now a democratically and politically active country. Many acts are passed by the Parliament, Ordinances and policies issued

by the Government and Judgments given by the courts. This act of decision making has both regressive and progressive effect on the socio-political and cultural scenario of our country. Some helped the nation to prosper, while the other proved to be a detrimental decision for the nation. These decisions proved the saying that " there are two sides of the same coin ".

Essay :

" Every action has an equal and opposite reaction." The Acts passed by the Parliament,

judgments given by the courts have both their black and white faces. They are not pure, ie, they are not fully accepted or rejected, but its the grey tone which goes on. An act is a legislation or law passed by the parliament of a country (in case of India), and its non - adherence invites an action in the court of law. In the Parliament of India, every bill passes through various stages before it becomes an Act. The first stage is the first reading. This is an introduction stage where any member introduces the bill in either house of parliament. The second is the discussion stage, where the provisions of the bill are studied. The third is the voting stage, where the members either votes for or rejects the bill. After the bill is passed by the house, it is sent to other house.. After the bill, (other than money bill), reaches Rajya Sabha it undergoes the same procedure of arguments. But if, any amendments are suggested the bill again goes to Lok Sabha. After the bill is passed by both the houses of the Parliament, it is sent to President for his approval (the final stage) , where he can return the bill except money bill. If the



President gives his assent, the bill is published in the Gazette of India and becomes an act.

Since, Independence many acts have been passed. National Commission for Backward Classes Act, Consumer Protection Act, Right to Information Act, Central Goods and Services Tax Act, 2017 are a few examples of prominent acts passed. They had different implications on the people. Some, were very much useful for the people, some proved to be a blunder on the part of government. For instance, the **Armed Forces (Special Powers) Acts (AFSPA)**, proved out to be a curse for the people as even the innocents were killed by the Armed Forces on the pretext of "destroying harmful activities". These are the Acts of the Parliament of India that grant special powers to the Indian Armed Forces in what each act terms "disturbed areas". The Armed Forces used unlimited power and attacked even the innocent gathering of 4-5 people. The act gave the right to the forces to search properties without warrant, attack, raid or kill any person who is being suspected to be insurgents. Irom Sharmila, also known as the "Iron Lady" fasted for about 16 years against the act in the state of Manipur. The act though, was passed with a broad objective it turned out to be oppressive and detrimental for the people, as the act gave absolute powers to forces which they improperly handled and people suffered a lot. The implications of the acts should be predicted beforehand, so that the effects are not in negative. The concern for the people who are the foundation of the nation should be kept in mind. **The Land Acquisition Act**, is an act of Parliament which approves the Central or state government to acquire private lands for the purpose of better

infrastructure and development on the land for the betterment of the people as a whole. The government in turn will give the affected people suitable monetary compensation. The amendment in 2015 stated that the Bill creates five special categories of land use: 1. defence, 2. rural infrastructure, 3. affordable housing, 4. industrial corridors, and 5. infrastructure projects including Public Private Partnership (PPP) projects where the central government owns the land and can use it without permission from the owners.¹ It changed the earlier provision of 80% consent in case of private companies and 70% in case of PPP. The people lose their land and even get the compensation after a long time. The plea of the government is that the infrastructure projects are very much important for the nation. There is an essence of use of absolute power by the government, as the land is taken over without landowner's permission. This causes despair among the people, as they are attached to their land emotionally and financially. The act though having fallouts have good impact too. The fast development work in the country could be carried on without any stays, which could be imposed by court if a case is filed in the suit, thus delaying the nation building process. Another examples of act, where government tried to do best for the nation but their effects are still unknown are the **Central Goods and Services Tax Act, 2017** and **Specified Bank Notes (Cessation of Liabilities) Act, 2017**. The GST act aims at one nation one tax, and replaced several former taxes and levies which included: central excise duty, services tax, additional customs duty, surcharges, state-level value added tax and Octroi. The act, though aimed at simplifying the tax structure brought



problems for the people as the end amount they have to pay is much more high than earlier times. . Under GST, goods and services are taxed at the following rates, 0%, 5%, 12% ,18% and 28%. The serious implication of the act is increase in the price of goods and services and reduce in the purchasing capacity of the people.² Demonetisation, initially passed through an ordinance became an act later on. It caused the withdrawal of Rs. 500 and Rs. 1000 notes from the economy . The aim was to curb black money, terrorism and counterfeit currency. Even after one year, black money still exists in the country as the people have recovered their amount. Terrorism cannot be curbed by a mere action of demonetising the currency. Counterfeit money of Rs. 2000 were found just after 2 weeks of the decision. Demonetisation, caused only harm to the people as they were left cashless and had to stand in long queues waiting for their chance to get their currency changed. It also slowed down the flow of goods and services in the economy. Though, there is a check on anti-social activities, yet the results are more negative than being positive. Adverse situations faced by the people weighs more than the positive results of the action. Many acts passed by the parliament, have serious repercussions on the people but some are really helpful for the people and have changed their life to the best. One example of such act is **Real Estate Regulatory Authority (RERA) Act**. The act aims to protect the interest of home buyers from the builders and boost the development of the economy. The act states that developer has to put 70% of money collected from buyer via cheque in a separate account to meet the construction costs. It increased the developer's liability to repair structural

defects to 5 years from 2 years.³ The buyer now will only pay for the carpet area and not the super built up area as the case earlier. The act encouraged transparency in the estate sector and a greater benefits to the buyers. The people now are confident while purchasing properties and can do so without fear. **The Maternity Benefit (Amendment) Act, 2017** is another achievement, which has helped the women a lot during their pregnancy and has encouraged their women employment. It has increased the duration of paid leave from 12 weeks to 26 weeks. Also the option of work from home has been started for women. Creche facilities have been made compulsory for establishment employing 50 or more employees. But, as said that there are two sides of a thing, employers are unwilling to employ women as they have to be now given increased facilities and leaves which causes hindrance in the work.

Where acts are passed by parliament, judgments are given by the courts which is an independent body. They effect the socio-cultural scenario of the country too. The leading judgment of the court in the instant **Triple Talaq case**, led to the abolishing of this system of divorce in Muslim Personal law, whereby divorce could happen just by saying three times the word Talaq. The verdict gave privileges to Muslim ladies and has helped in reducing polygamy by the Muslim men. Though, the Muslim law propounders initially were against this on the pretext of their religious sentiments, they had to accept the court's verdict. **The Haji Ali case** and **Shani Shingnapur case**, dealt with the same problem of allowing the entry of women sanctum sanctorum. The verdict allowed the entry of women and lifted up the



old traditional views of not allowing women due to their biological factors. It changed the religious scenario among the people and giving equality to women as propounded by Dr. B R Ambedkar initially. On 7 March 2011 the Supreme Court of India legalised **passive euthanasia** by means of the withdrawal of life support to patients in a permanent vegetative state. The decision was made as part of the verdict in a case involving Aruna Shanbaug, who had been in a Persistent Vegetative State (PVS) until her death in 2015.⁴ Another landmark judgement by the SC, is the ban on **Lal Batti culture**. Red beacons are similar to "Raj mentality" and are the "antithesis of the concept of a Republic", the Supreme Court declared in 2013. From 1 May, 2016 the red or blue lights were banned on cars of "VIP".⁵ This decision has restricted the VIP culture signifying that all Indians are equal. The political scenario hence has been changed by this, and has reduced their dominance over the people. One of the landmark judgements by the SC is the recognition of **transgenders as the third gender** and ordered the government to treat them as minorities. They are now to be given a reservation in job opportunities, education and other amenities. The apex court also said states and the Central government will devise social welfare schemes for the third gender community and run a public awareness campaign to erase social stigma.⁵ It gave recognition to these people and has helped changed the view of other people towards them. With the landmark Supreme Court judgment which declared that privacy is a fundamental right of all Indians, court indicated that right to privacy is valid even in the context of Section 377. **Section 377** of IPC deals with homosexuality and there is a

demand to decriminalize the same. The judgements of the courts have a bearing on the country's development and the socio-cultural scenario. They are progressive in nature and help the depressed section to lead their life in a better way. Though, for some of the people these decisions may be worthless, as far as the whole country is concerned it proved out to be a bliss.

Besides, acts and judgments, many reforms and policies are undertaken by the government to bring a change in the country. The **LPG (Liberalization, Privatization, and Globalization)** policies, for instance, opened up the economy. It removed trade barriers and allowed free import and export of certain goods and services. MNCs were allowed to invest in India which made the country to be a part of the global village. LPG policies, helped set up large companies which gave a cut-throat competition to the small industries in India. Public industries were privatized. At the same time, there was technological advancements in the country, and also increased the flow of goods and services in the economy and hence gave a greater options to the consumers for their purchasing. Programs of the government like **Make in India**, will help to increase the infrastructure and GDP of the country as it will lead to import substitution. Another is the **Jan Dhan Yojna**, which aimed to open bank accounts for all people even with a minimum bank balance. Its aim was to ensure access to financial services, namely Banking Savings & Deposit Accounts, Remittance, Credit, Insurance, Pension in an affordable manner⁶. Many other policies like National Health Policy, National Education Policy, National Cyber Security Policy, National Civil Aviation Policy⁷ are



ongoing in India, which helps in progressive development of the nation.

India has a huge population with many religious beliefs, culture, background and economic status. Laws should be framed so that they satisfy all the sections of the society equally, without hurting anybody. Advancement of all the people should be with equal rate so as to ensure robust growth and development. So as the saying goes, "There is no rainbow without rain.", the same is true with respect to the legislative changes and reforms in our country. Few acts like demonetisation, AFSPA act proved to be a sort of disasterous for the country, but at the same time, Maternity benefit act, and RERA are some of the achievements of the government. So, the results are mixed: some decisions proved to be excellent for the country, but at the same time some were more troublesome, than being fruitful. Though, the idea before framing of such decisions are nobel, they sometimes fail owing to their bad implementation or lack of foresight regarding their effects. India needs unassailable decisions which will help the country to progress at a faster rate. The acts, judgements and reforms hence, proved out to be both regressive and progressive for our nation, giving varied results.

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LEGALIZATION OF PROSTITUTION IN INDIA

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ABSTRACT

This paper addresses the perplexity regarding legality of prostitution. By the word ‘Prostitution’ we mean buying and selling of sex in exchange of money. People may oppose to it intensely, but a world of narrow alleys and shady rooms still exist in many corners of the country where mostly women and children are exploited day and night, where the customer’s reputation is upright but service giver is seen as disgrace to the society, void of any rights that a human being should have. Calling prostitution illegal is a otiose formality and denouncing it as an immoral blotch on the society does not serve any purpose. Recognizing it as a profession will help curbing consequential evils that accompany, like child prostitution, drug abuse, and increased rate of criminal offense.

The paper further focuses imperatively on the legality of prostitution in India after a comparative analysis of the possible advantages and disadvantages of doing the above mentioned. This paper shall also look into the current scenario of India and answer the question that whether India is really ready to legalize Prostitution and recognize it like any other trade? And if it is ready then how to implement it effectively and in a way so that nobody can take advantage of the legalization in a negative way.

The Immoral Trafficking Prevention Act 1956 and some sections of the Indian Penal code indirectly criminalize prostitution. The paper shall examine these laws and find out the loopholes so, that a comprehensive law could come into force which shall protect the rights of people irrespective of their status in the society and many people could be saved from being exploited.

The paper also examines the scenario in different countries’ status with regard to legalization of prostitution and the existing scenario regarding the same of these countries.

INTRODUCTION

Prostitution is the business or practice of engaging in sexual practice in exchange for payment either as money, goods services, or some other benefit agreed upon by the transacting parties. Prostitution is sometimes called sex or hooking. According to the Immoral Traffic (Prevention) Act, 1956 ‘prostitution’ means the sexual exploitation or abuse of persons for commercial purpose.²⁷²

Prostitution is a term that is of a questionable nature in India. Illegal in principle and prospering in practice, prostitution has become a thriving profession. Prostitution is said to be an age old profession. Prostitution was a part of daily life in ancient Greece. In the more important cities, and particularly the many ports, it employed a significant proportion of the population and represented one of the

²⁷² Rajendra Kumar Sharma, Criminology and Penalogy, 45-46.



top levels of economic activity. In the ancient city of Heliopolis in Syria, there was a law that stated that every maiden should prostitute herself to strangers at the temple of Astarte.

Indra, the god of rains and also the king in Gods, had beautiful dancers called the Apsaras. They were the biggest assets of Indra's court; the vedas do mention some of them, of which Urvashi and Meneka are the most beautiful. Whenever his throne was in danger, he asked the Apsaras to seduce and distract his enemies with beauty and dance. At times they lived together without marriage ceremony. If we look closely, these are the prostitutes in modern day. The Apsaras are highly respected today and even people compliment by saying that ' you are looking like an Apsara'.

Even Jesus Christ welcomes a woman in his kingdom knowing that she is a prostitute.²⁷³ Chanakya's Arthashastra established a well organized sector for buying and selling sex, mentioning the minimum wages ensuring the protection and dignity of women. Navratre, a nine day festival devoted to Maa Durga, is the one of the most important festivals in India. During this festival, the people worship the deity of Maa Durga, made of eighteen soils, taken from eighteen places, one from a prostitute's door, which is the great irony because that soil is called the purest and the prostitutes themselves are considered to be sinners.

All these makes it very clear that our ancestors were more open. So the question comes that why are we today as a society not accepting the prostitutes as normal

human being and should get the same rights which others enjoy? Are we moving towards modernization or orthodization?

Around 3 million people are involved in prostitution in India.²⁷⁴ These many people enjoy no rights. If they are exploited they cannot go to police station and lodge an FIR. They are looked as disgrace to the society. A child born to a prostitute is actually a prostitute before even growing up, because no school will take the child and as a result the child will have no qualification and the only job which will be left is prostitution. Around one million children live in brothels in India. It is a given fact that most of the sex workers have been forced to get into prostitution or have been trafficked.

So if prostitution is bad and immoral then why not abolish it?

It cannot be abolished because there is demand. Though people may not accept it at front but in the back of their minds they know this. For example Devdasi system was abolished but still it is very much prevalent in India especially in South Indian States.

The present Indian law's status is

Prostitution as profession? ' yaaay!'
Prostitution, the activity? " Boo! , chi chi!"
So the only option left is to Legalize it. By legalization we don't mean to encourage others to get into sex work or give advantage to the traffickers but on the contrary to help those who are already stuck in the profession and to keep check on the traffickers and also help abolish child trafficking.

²⁷³Luke 7:36-50

²⁷⁴Ministry of children and women 2015



LEGALIZING PROSTITUTION

➤ **CONS AND ARGUMENTS AGAINST LEGALISATION**

Legalizing prostitution would benefit the pimps and the facilitators and not the victims. In India where women are coerced into the trade and kept in it almost like bonded labourers, such a move will not benefit them. Commercial sexual exploitation is a form of slavery and slavery cannot be legalized. India should not compare itself with the western countries where prostitution enjoys legal status because our social customs are different from them. Since abortion is illegal in India there is no question of legalizing prostitution. So giving legal status to it means society is giving approval to flesh trade. Some critics say that prostitution wrecks personality and affects family relationship.²⁷⁵

How legalizing would affect?

- Lucrative incentives prohibiting the tendency to work - For population that belongs to the group that earn less, is less educated and less skilled prostitution becomes a viable option to earn money in a speedy manner. This will enable people to simply avoid putting in efforts and these people will resort to prostitution. This will lead to unrecognized potential and force.
- Forced Prostitution - Although it is argued that a person's body is his/her personal property, prostitution is not always voluntary. The report published by the ILO [International Labour Organization]

makes it quite clear that most women choose prostitution for economic reasons.

- No job security or guarantee – This profession offers no job security whatsoever. Also, the number of customers per day cannot be guaranteed thus making it difficult for the workers to estimate their monthly income and determine their budgetary expenditure.

➤ **PROS AND ARGUMENTS FOR LEGALIZATION**

- The benefit of legalizing prostitution in India will be that at least we will have a track record of sex workers. For example when dance bar in Bombay was closed most of the workers migrated to Gujarat and Karnataka and started their business undercover²⁷⁶. Now one may be wondering why is it necessary to keep a track record of sex workers? It is necessary because if someone is forced into this profession if there is track record, then once free she cannot be again subjected to same force. Also if the exact number is known their health status can regularly be checked. It is to be noted that 21.17 lakhs people are suffering from HIV AIDS.²⁷⁷ It has become the second most dangerous killer after heart attack.

- Sex workers are not within the ambit of normal labour laws. Once recognized as a trade the workers will get their minimum wage that they are entitled to.

²⁷⁵www.ijetst.in

²⁷⁶Times of India story 2013

²⁷⁷National AIDS control organization



- The ILO suggests that by including prostitution as an economic sector, poor countries of South East Asia can benefit economically through the revenues generated by the industry.
- By legalizing prostitution and taking strict measures to regulate it, we can ensure removal of minors from the profession, thus protecting their rights and confirming their safety.
- Removal of intermediaries from the sector - Legalization of prostitution will lead to a systematic betterment of the industry. The service of pimps and middlemen will no longer be required, leading to a decrease in criminal behaviour, decrease the rate of trafficking and an increase in the wages of the sex workers.
- If legalization is done the sex workers will be able to come out of the trade, whenever they want because now they will not have the social stigma attached to them.
- If prostitution is against morality then what about the item numbers which are enjoyed by everyone public-ally without any shame or hesitation. If a child says something about sex, immediately he/she is made to shut their mouth, but if the same child sings or dances on an item number, the talents are appreciated.

We often see that at a tender age people are getting into relationships with many men/ women and loose their virginity for fulfillment of their sexual desire. This is not just with youth even adults do it like having

extra marital affair, sexually harassing others and many more. The only difference between the prostitutes and these people are that they are not doing it for money because they are well off and prostitutes are doing it because they need money. What is the harm then the prostitutes are causing?

If prostitution is against morality then why not make laws against the customers who are availing this kind of service? Why only the prostitutes will suffer from social stigma?

The answer is that we all know that prostitution won't come to an end because there is a great demand in the market. By legalizing it , it will protect a human being from being exploited.

LAWS DEALING WITH PROSTITUTION IN INDIA

The Law governing prostitution in India is Immoral Traffic (Prevention) Act which is a 1986 amendment to the primary law passed in 1950 known as the Immoral Traffic (Suppression) Act. The law does not criminalize prostitution per se but only organized form of prostitution is against the law. The Indian Law bans the act of trafficking, procuring, detaining, pimping, lending a premise for carrying on prostitution for running a brothel.

The Suppression of Immoral Traffic Act, 1956 was the major legal effort concerning prostitution. The purpose of the Act was primarily the abolition of prostitution among women and children. Lacunae in the act led to its amendment in 1986. However, the new



legislation has widened its scope. It includes that children and even men who are exploited for commercial purposes and should be protected. Section 3 of the Act has a broader definition of brothels, which will make easier to prosecute the brothel keepers. Section 9 of the Act provides greater punishment to persons who cause, aid, or abet the seduction of women and girls, over whom they have care and custody, for prostitution. The centre government under this act has powers to allow police officers arrest without warrant in any premises where this offense is suspected of being committed and rescue a person forced in this profession. This act also has provisions to have protective and corrective homes for safe custody of children²⁷⁸, however, living conditions of protective homes were found to be inhuman and degrading²⁷⁹.

IPC has also been lending support in this very context, in a consequential, yet in an effectively binding manner. Sections 366-A²⁸⁰ and 366-B²⁸¹ make procreation of the

minor girl for illicit sexual intercourse as illegal. Sections 372²⁸² and 373 make buying and selling of girls of any age for the purposes of prostitution as a heinous crime for which 10 years punishment and fine can be awarded.

Under the ITPA, a Magistrate, if he deems it to be necessary, can order the removal of a prostitute from any place in the interest of the general public. The 2006 Bill omits sec-8 of the original Act, thus removing the offense of soliciting or seducing for the

may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

²⁸²SECTION 372- Selling minor for the purposes of prostitution- Whoever sells, lets to hire, or otherwise disposes of any [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse] with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

2[Explanation I -When a female under the age of eighteen years sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of Prostitution.

Explanation II - For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi - marital relation]

²⁷⁸ Shobha Saxena, Crimes against women and Protective laws, 259-261.

²⁷⁹Upendra Bakshi v. State of Uttar Pradesh

²⁸⁰ SECTION 366 A- procreation of minor girl.— Whoever, by any means whatsoever, induces any minor girl under

the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is

likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with

Imprisonment which may extend to ten years, and shall also be liable to fine.

²⁸¹ SECTION 366-B - Whoever imports into [India] from any country outside

India [or from the State of Jammu and Kashmir] any girl under the age of twenty- one years with intent that she



purpose of prostitution, it also omits sec-20 of the Act regarding the removal of prostitute from any place. The newly proposed sec-5(c) provides for punishment of any person visiting a brothel for the purpose of sexual exploitation of any person.

INADEQUACY AND LOOPHOLES OF ITPA

The uneven enforcement of the ITPA against prostitute women is attributed to various causes: first there is a strong collusion between elected representatives, law enforcement agencies and the brothel keepers that impedes the strict implementation of the provisions of the Act²⁸³ and this collusion has to be busted and decimated. Corrupt officials in the law enforcement agencies are widespread. An overhaul of the prevalent police procedures involved in ITPA cases and the scrutiny of their corrupt practices might bring a more desirable effect. For this purpose sensitization of police is a must.

The second persistent problem with the enforcement of ITPA has been uncovered during field studies and one such study confirms the complexity of collection of sufficient proof to make a conviction absolute. Some police officers have said that there is an immense gap between the number of crimes committed in reality and the registration of crimes in the police records as many crimes that are reported are not registered (around 60 percent)²⁸⁴

The third problem is with the reformative (corrective and rehabilitative) homes that are

set up under the Act and their inadequacy. Such homes are overburdened and cannot accommodate the large number of sex workers who are convicted under ITPA. The rules for protective homes must compulsorily provide for literacy and a range of vocational and occupational training based on the woman's aptitude and market value of job; counselling which helps in redefining inmates as surviving human beings must be provided; and subsidized hostels and care homes must also be set up to house inmates discharged from homes.

LAWS IN OTHER COUNTRIES

Countries like the United States, Russia, Massachusetts and China have made prostitution illegal. But even after implementing anti-prostitution laws strongly it has failed. China has 5 million prostitutes, US have 1 million.²⁸⁵ In Boston since the mid 1990s more than 130 people have come forward with horrific tales of child abuse by the priests in their locality.²⁸⁶ The children were made victims because they were easy to prey upon and secondly since prostitution was illegal, they had to do it undercover so that they can fulfill their sexual desire. The high number of prostitutes is because making prostitution illegal merely shifts it underground, where it becomes more difficult to regulate.

Prostitution has been legalized in countries like Germany, Netherlands, Greece, Denmark, Sweden and few more countries. In Germany there are proper state run brothels and the workers are provided by

²⁸³P. Kotishwaran, Supra note at 171

²⁸⁴NHRC-UNIFEM-ISS Project, Supra note 47 at 363

²⁸⁵A havoscope report- Global black market information

²⁸⁶Boston global



health insurance, have to pay taxes and they even receive social benefits like pension.

There has been a significant increase in the number of brothels in Victoria, Australia, since legalization, the number of legitimate brothels grew from 40 in 1989 to 94 in 1999. Legalization is a 'pull factor' for traffickers. Project Respect estimates, "at least seven licensed brothels in Victoria have used trafficked women in the last year".

So we can see that there are some flaws with legalization of prostitution. To overcome these flaws we need a comprehensive law in India and strong implementation.

RECOMENDATION FOR LEGALIZATION OF PROSTITUTION IN INDIA

India is a country where most of the people are still orthodox and are not at all free to talk about sex on the dinner table or to say that they have suffered marital rape. Legalization of prostitution in India would be a big challenge. There will be a lot of criticism but one needs to understand also the need of this at this hour. Before legalization there has to be awareness of the benefits in large scale and the steps taken for legalization has to be taken with proper care and strong implementation. The following are some of the steps:

i. The state can bring in certain measures to curb excessive exploitation and preserve public health, it does not seek to abolish prostitution per se but is only targeted at trafficking in women and girls for prostitution, brothel-keeping, pimping, procuring and renting

premises for prostitution, here prostitutes will not be criminalized for their work and they will have more or less the same rights as other citizens in the society. Child prostitution will be eradicated as it will be considered a legal profession.

ii. It would require to have a license or to register prostitutes and brothels so that, prostitutes can be monitored and checked for venereal diseases.

iii. The ILO suggests that by including prostitution as an economic sector poor countries in South East Asia can benefit economically through the revenues generated by the industry²⁸⁷.

iv. After legalization there should be a committee made at the center and as well as all the states and the districts. This committee shall grant the license after verifying that the prostitutes are not brought by force and confirm their nationalities and as well as their residence and as to why they are joining the profession. The committee should have one social worker with the experience in this area and two retired lawyers or an old sex worker. Also this committee will look after any problem suffered by the prostitute.

v. There should be an online portal of the registration of the prostitutes and regularly checked by the center.

²⁸⁷Janice C Raymond, prostitution on demand : legalizing buyers as sexual consumers 10(10), Violence against women 1156, 1162(2004)



There should be regular campaigns initiated by the government and NGOs to make the prostitutes aware of their rights.

- vi. Should be regular inspections hold in the brothels to check whether all the workers are licensed or not.
- vii. In 2011 in West Bengal the legal service authority started a program in which legal aid was given by directly reaching the people in a van. In this van three lawyers would be present and give their service. But, this unfortunately could not go for long because of lack of funds. This idea can again be put to use. If this is renewed and this time inspection could be carried out with regard to prostitution. If all the states and district have these van and this van shall go to all the places where brothels are located and ask the prostitutes that whether they are forced or not along with the regular police inspection. In the van there could be retired lawyers sitting or social workers.

- viii. To work this legalization effectively both the center and the state has to work together. The government before legalizing prostitution in the whole of India, it can experiment first by legalizing prostitution only in Goa which is a small state and would be easier to handle it unlike big states. Goa is also famous for sex tourism. After implementing it in Goa we can see what are the results and loopholes and correct them before applying to the other states.

Transformation of prostitution into a legal, regulated form of work is needed to adequately address the situation in which women can voluntarily exchange their sexual work for money. Such an exchange for money is not for accumulating capital, but for basic survival, a means for women to provide and feed her children and to resolve an immediate economic problem²⁸⁸.

To legalize this profession of prostitution, there has to be a radical transformation of the beliefs, sentiments and enhanced education about this issue. If things progress in a slow but a steady manner, there still lies a hope of betterment of the situation.

CONCLUSION

²⁸⁸ S.C.Singh, Conceptualization of Prostitution as Labour, 2, APEX COURT EXPRESSIONS 51, 55 (2003).



**OAPI ISSUE IN AFRICA : MADRID
PROTOCOL**

*By Anuja Naidu
From Amity University Madhya Pradesh*

ABSTRACT

1. Objective of Research:-

The main objective of the paper is to study the OAPI, Bangui Agreement and understand issue related to Madrid Protocol which is in conflict in Africa.

2. Scope

Paris Convention, Madrid Union, Bangui Agreement and Lisbon Treaty

3. Statement of problem

Issue in Africa for becoming part of Madrid Protocol .

4. Research Questions:-

- a. What is the significance of OAPI before joining Madrid Protocol ?
- b. What are the advantage of being a part of Madrid System?
- c. What is the conflict in Africa for becoming part of Protocol in reference to European Union ?

5. Hypothesis:-

Amendment in the Bangui Agreement for International Registration.

6. Limitation

OAPI region in Africa .

7. Research Methodology:-

The researcher had relied on secondary data collected from articles and websites

LIST OF CASES

- Case Law : Van Gend en Loos (1963)
- Case Law : Costa V ENEL (1964)
- Case Law : *Internationale Handelsgesellschaft mbh v Einfuhr- und Vorratsstelle* (1970)
- Case Law: Amministrazione delle Finanze v *Simmenthal spa* (1978)
- Case Law: R (*Factortame Ltd*) v Secretary of State for Transport (1990)
- Case Law: *Blackburn v Attorney General* (1972)

LIST OF ABBREVIATIONS

ARIPO	<i>African Regional Intellectual Property Organization</i>
AU	African Union
EC	European Community
ECJ	European Court Of Justice
EU	European Union
IP	Intellectual Property
IPR	Intellectual Property Rights
OAPI	<i>“Organisation Africaine de la Propriété Intellectuelle”</i>
TM	Trademark
WIPO	World Intellectual Property Organization
US	United States

LITERATURE REVIEW



“The Organisation Africaine de la Propriété Intellectuelle” which has been made through an agreement known as Bangui Agreement in 1977. With a vision of common procedure to issue titles to applicants for the protection of intellectual property which will at once be valid in other states of OAPI. Through the established system of intellectual property rights, underdeveloped nations can come across economic activities of the developed nations which promotes simultaneous development of the world. Trademark can be get registered in numerous jurisdictions across the world by Madrid Protocol with a single application . OAPI has set down its instrument of accession to the Protocol on 5. Dec.2014. International registrations are currently unenforceable in this territory due to uproar of issues in Africa regarding the administrative power used for passing resolution which deemed as unlawful for the process adopted by Administrative Council .

And the second issue is that, the state in EU has incorporated the international treaties in its national statute and on the other hand OAPI member state has not incorporated such statute the way EU has done with its member states. Such concerns lead to ineffectiveness of Protocol in the region. Such criticism has given the way for understanding the state’s approaches towards international law which can either be monistic or dualistic as well as comparison with European Union . European Union law has got its legal personality through Lisbon Treaty.

Instances where the conflict arises between the EU law and municipal law, EU has been granted the status of dominance due to “doctrine of Supremacy”. In the case Costa

v ENEL, the Member States have transferred sovereign rights to a Community created by the consent of all of them. This process cannot be reversed by any sort of unilateral measures which are conflicting with the concept of the Community law. But on the other hand UK give apex status to the “act of parliament “thus having inclination towards dualism approach.

African Union has been formed for the purpose of national liberation from colonialism, fight against the racial discrimination and apartheid . At present notions related to monism or dualism approach in Africa are the notions could be converted at a later stage when the African Union solves its territorial issues which are intact with colonialism, constant rebellion outrages and other social issues to reach the stage of EU efficiency . Presently national and regional IPR offices are situated in Africa for registration. Issue related to Madrid Protocol can be sorted through an amendment in its Bangui Agreement which is drafted with the consent of member states of OAPI in 1977, through international registration clause insertion .This approach will solve the conflict in Africa and the Protocol gets validity in OAPI region which has a direct effect on residents as well as non – residents.

1.“ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE”

(OAPI)





The Organisation Africaine de la Propriété Intellectuelle (OAPI)²⁸⁹ caters the service of central registration system of intellectual property to African member states. The organization, through an agreement known as Bangui Agreement in 1977 which is designed to help member states as a tool of opportunity to work in unity, mutual sharing of resources and injecting ideas to meet economical demands, social appraisal needs and to promote literacy advancement and artistic aspects. OAPI helps member countries to organize strategy for the administration to protect intellectual property rights.

Many of the French speaking African countries till 1962 were governed by the French legislation on the industrial property as these countries were a part of French Union. On Sept.13,1962²⁹⁰, few countries 12 African states decided to make up a common body for using it for the purpose of office of industrial property for each member state. The African and Malagasy Registrar for Industrial Property i.e. OAPI came into existence through the Libreville Agreement²⁹¹. The Libreville Agreement covers patents, trademarks as well as other design and industrial models.

This Agreement founded on 3 main principles:-

1. Uniform protection through procedure to all member states which complement in common implementation of law and administrative functions.

2. This body will serve as a national industrial property registrar for its members.
3. Centralization of procedures related to Industrial Property.
4. This Agreement was further led to the framework of Bangui Agreement on 2.March. 1977 which in turned give birth to the contemporary setup i.e. “*Organisation Africaine de la Propriété Intellectuelle*” (OAPI).

The main goal of OAPI are :

1. Through a common procedure issue titles to applicants for the protection of intellectual property which will at once be valid in other states of OAPI.
2. To consolidate and publish research and information in this field.
3. Technological advancement of each member state.

1.1 Member States

The OAPI (or AIPO) states are a union of French speaking African countries. Member states are:

- ❖ Benin,
- ❖ Burkina Faso,
- ❖ Cameroon, the Central African Republic,
- ❖ Chad,
- ❖ Comoro Islands,
- ❖ Congo,
- ❖ Equatorial Guinea,
- ❖ Gabon, Guinea,
- ❖ Guinea-Bissau,
- ❖ Ivory Coast,
- ❖ Mali,
- ❖ Mauritania,
- ❖ Senegal

²⁸⁹ trademark.marcaria.com

²⁹⁰ www.africanlawlibrary.net

²⁹¹ www.ohadalegis.com



❖ and Togo

OAPI and ARIPO trade marks countries

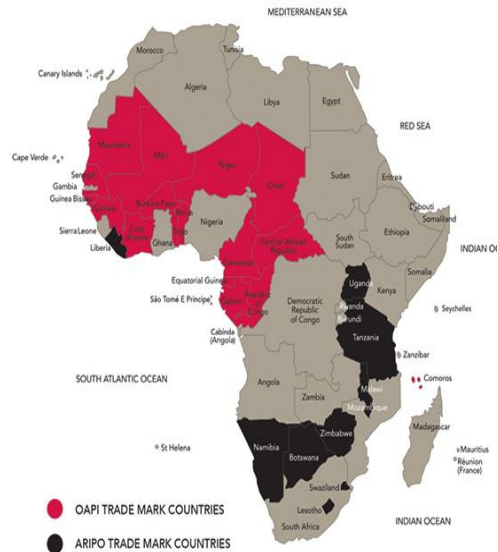


Fig (ii)²⁹²Region of OAPI and ARIPO in Africa

1.2 OAPI Institution

Under this agreement, OAPI comprises 3 main organs which are as follows :-

1. Administrative Council
2. The High Commission Of Appeal.
3. The Directorate General

FUNCTION OF ORGANS²⁹³

S. No.	Organs	Functions

1.

Administrative Council
(One representative of each member state)

Article 29 states the function of the organ:

- ❖ The Administrative Council is the highest authority of the Organization
- ❖ Determining the general policy ,regulate and control the activities
- ❖ Make the regulations for the application of the agreement and in reference to Annexes.
- ❖ The financial regulations (fees - the High Commission of Appeal- the general staff - professional representatives)
- ❖ Supervise the implementation of the regulations of above issues
- ❖ Approval of the program and annually voting for the budget
- ❖ Examine and approve annual accounts and

²⁹² www.expertguides.com

²⁹³ www.wipo.int



		<p>stocks.</p> <ul style="list-style-type: none"> ❖ Approval for the annual report ❖ Designate the auditor for the OAPI. ❖ Make rules on applications for admissibility as a member or as associated State of the OAPI ❖ Set the amount of any sort of contribution to be made by associated or member States ❖ Creation of adhoc committees on issues requires particularly. ❖ Working language regulation 	<p>2.</p>	<p><u>Special function (6 including treaties & conventions)</u></p> <p><u>The High Commission Of Appeal</u></p>	<p>Art.30 (regulate) few treaties and convention related to industrial property.</p> <p><u>As per Article 33</u></p> <p>Three members get elected through drawing of lots with regard to a list of representatives appointed by their respected member States (one per State– compulsory)</p> <p>Based on rejection of application ,reinstatement,extension of duration as well as objections.</p>
			<p>2.</p>	<p><u>Special function (6 including treaties & conventions)</u></p> <p><u>The High Commission Of Appeal</u></p>	<p>Art.30 (regulate) few treaties</p> <p><u>As per Article 33</u></p> <p>Three members get elected th representatives appointed by compulsory)</p> <p>Based on rejection of applic well as objections.</p>
			<p>3.</p>	<p><u>The</u></p>	<p><u>As per Article 34</u></p> <ul style="list-style-type: none"> • Execution of activities • Implement instruction • Task mention in agree



	<p><u>Directorate General</u></p>	<p>council.</p>	<p>can come across economic activities of the developed nations which promotes simultaneous development of the world.</p> <ul style="list-style-type: none"> In a study made by World Bank²⁹⁵, the renowned economist Dr Edwin Mansfield has made a survey in almost 100 US firms involving 6 manufacturing industries in understanding the importance of IP protection which caters in taking better financial investment decisions, the result he concluded that it has a major impact with consideration given to the type of industry and its quantum of investment.
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OAPI LAW

OAPI Law includes appendixes :

- Patents (Appendix I),
- Registered Patterns (Appendix II),
- Trademarks (Appendix III),
- Industrial Designs and Models (Appendix IV),
- Trade names (Appendix V),
- Captions (Appendix VI),
- Copyrights (Appendix VII).

In case of trademark counterfeiting where the mark and product are copied are usually of inferior character, through this consumer and producer both suffers. It states the requirement of stronger IPR system.

2. INTELLECTUAL PROPERTY AND DEVELOPING NATIONS

Intellectual property is a vital tool in economic development²⁹⁴ :-

- Microeconomic level-At this level investors as well as innovators can recover time and money which facilitate them in bringing new product in market.
- Macroeconomic level- It encourages foreign investment as well as domestic innovations.
- Through the established system of intellectual property rights underdeveloped and developing country

It promotes growth of the private sector and encounters deceptive practices and adequate enough in providing remedy when such event occurs²⁹⁶ and reboots confidence of consumers.

- With stronger IPR laws businesses gains assurance of risk reduction. At international level, WIPO regulates most of the IP agreements which facilitates uniformity in procedure, reduction of fees, economical and social development.
- Being a part of a international agreement gives not only reciprocal treatment in the

²⁹⁵ Edwin Mansfield .1991 Intellectual Property Protection, foreign direct investment and technology transfer.

²⁹⁶ www.researchgate.net

²⁹⁴ www.researchgate.net



field but also help the territorial market to boost.

- These international agreements contains a framework which works for the betterment of individual at a global level which has provisions for its mechanism of administration of policies in a fairer manner. Today the scenario has changed which can be evident through political system and competition practices, therefore a strong IPR system and unification of nations at multiple areas is required. This not only caters revenue flow in the economy but also become a backbone in sustainable development of states.
- OAPI joins with the Madrid Protocol which will provide protection to brand owners in more than 100 countries through one single international application on 5.March 2015²⁹⁷.
- For statistical analysis , Cameroon has been taken into consideration which demonstrates from the table regarding IP filing, applications and registration at domestic level before OAPI become a part of Madrid Protocol.

2.1Ip Filing Resident +Abroad Including Regional And Economy

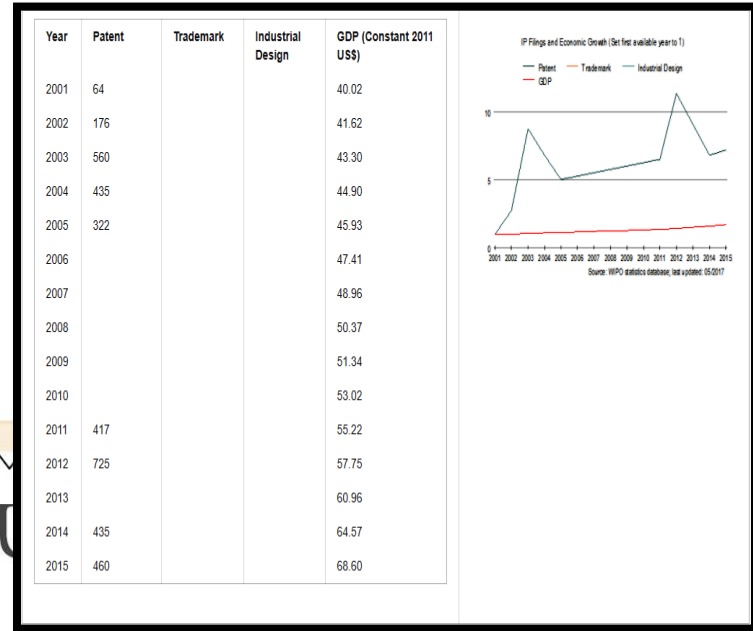


Table (i)²⁹⁸

Table clearly states that the patent filing is more dominant compare to trademarks and industrial designs which has contributed addition to the constant GDP growth of the nation.

²⁹⁸ www.wipo.int



TRADEMARK APPLICATIONS

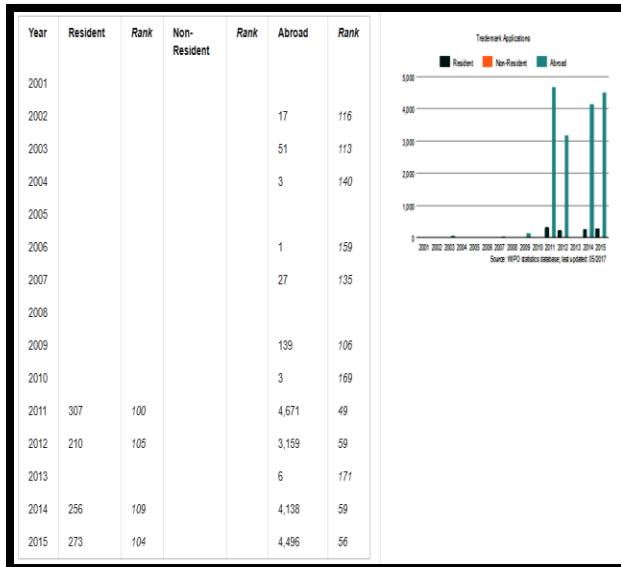


Table (ii)²⁹⁹

Table concludes that in the 2nd decade that more of the residents of abroad has filed for trademark application, on the other hand though the residents are comparatively very less to foreigners, but the residents are increasing through which it can be assumed that the development in the socio-economical scale level is considerably increasing as well as awareness of IPR system in the state.

TRADEMARK REGISTRATION

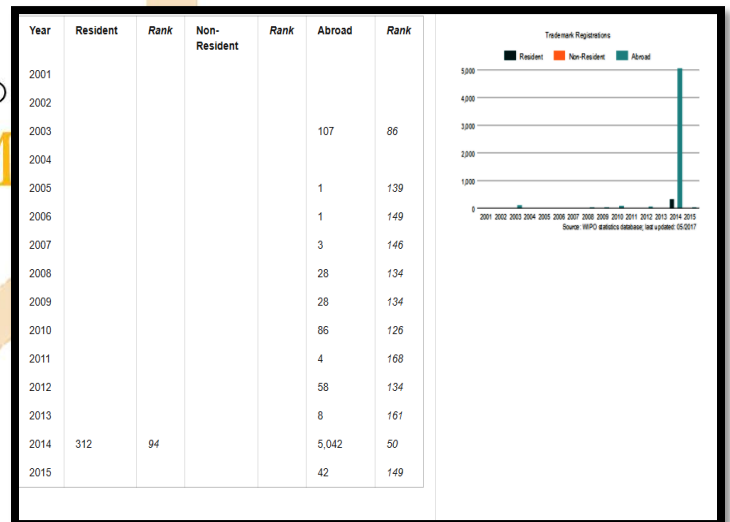


Table (iii)³⁰⁰

This table signifies that the abroad registration is very high compared with residents during 2014. In 2015, OAPI was in the process of Madrid Protocol enforcement.

²⁹⁹ www.wipo.int

³⁰⁰ www.wipo.int



This Protocol is a boon for the applicant that it can proceed with a single international application and get its trademark registered in a large number of nations in one go. It also covers the mechanism of mark in a simplest way. Even a change in its procedure will require a single step for its implementation and execution.

3.MADRID SYSTEM

Trademark can be get registered in numerous jurisdictions across the world by 2 independent treaties and they are :

- The Madrid Agreement (the Agreement)
- The Madrid Protocol (the Protocol)

Regardless to its name, the Protocol is a different treaty and not a “procedure or regulation” to the Madrid Agreement. Together, these two are known as the Madrid System for the International level Registration of trademarks. Countries member to agreement / protocol or any organization being a part of protocol are collectively known to be contracting parties. They deemed unified as a Union and a Special Union reference is also given in Art. 19³⁰¹ of Paris Convention. The Madrid Union has a status of a centrally administered system (by the International Bureau -World Intellectual Property Organization, WIPO) for obtaining a quantum of trademark registrations in diverse jurisdictions, creating a platform for an "international registration" of trademarks.

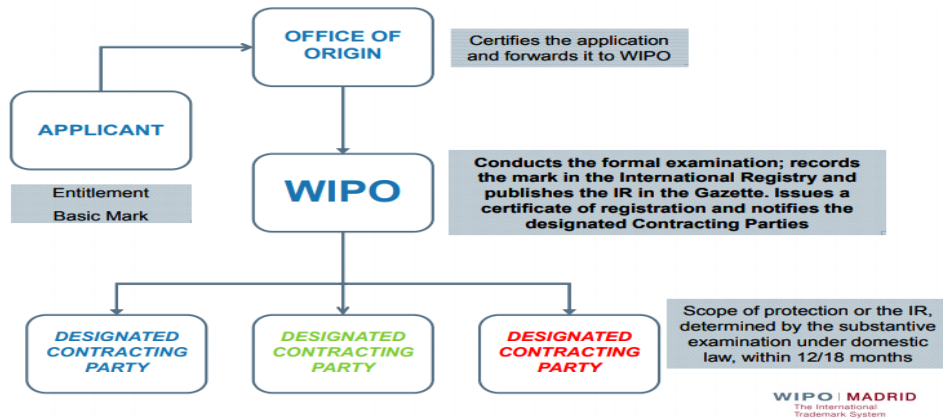
³⁰¹Paris Convention : The countries of the Union has the right to make independently between themselves special agreements for the protection of industrial property, unless the agreements do not friction with the provisions of Convention.

3.1Difference³⁰² Between Madrid Agreement And Madrid Protocol

- ❖ Parallel Treaties
- ❖ Independent treaties.
- ❖ Separate but overlapping regulations and memberships.

<u>S.No.</u>	<u>Madrid Agreement</u>	<u>Madrid Protocol</u>
<u>1.Basic</u>	Filed - After national registration is fulfilled.	Filed- Even if national registration is pending.
<u>2.Refusal (Period)</u>	Trademark of office within 12 months have to inform International Bureau in case of any objection has been raised	Period of 18 months or longer in case of any opposition
<u>3.Protection Term</u>	20 years which is subjected to renewal.	10 years which is subjected to renewal.
<u>4.Fee Structure</u>	Charges independently for each contracting state.	Less compare to agreement fee structure
<u>6. EU (membership)</u>	Not a Party.	Party to Protocol.
<u>7.Language</u>	French	French, Spanish or English.

³⁰²ssrana.in



application to the designated member states.

- ✓ Then each member country will then examine and on that basis it may accept or not the application depending on their local regulation so to make sure there would no contravention of its local rules.

3.2 Registration Procedure Internationally Of Madrid Protocol

3.3 Advantages³⁰³ Of The Madrid System

fig. (iii) Procedure Of Protocol

Requirements

To make use of this system, a applicant must fulfill certain requirements and they are as follows :

- national of member state or
- resident of member state or
- should have a real industrial or commercial industrial establishment in member country.

This helps in locating applicants - *country of origin*.

Application process

- ✓ The applicant firstly file a TM application or have a TM being registered in the state which can be done by the local trademarks office in compliance with the country's.
- ✓ Once the TM is filed or registered, in the next step the application is made to the WIPO by the local TM office to extend further the trademark

- ❖ The Madrid System is advantageous to the trademark owners. An applicant can make use of different languages for filing a single application - languages, namely English, French or Spanish by paying a single set of fees.
- ❖ The instances of any kind of mark infringement can be reduced at an extent with the facility of free online databases of marks registered in the Madrid System.
- ❖ The Protocol give the service of reasonably quick examination i.e. 12 or 18 months for the application by the trademark offices of the nationals.
- ❖ If the contracting party (office) does not address any notification for refusal within the time duration as set by the Madrid System, the mark will automatically get the right of enjoyment

³⁰³ www.altacit.com



as well as protection in the contracting party in question for registration.

- ❖ All changes in the international registration whether
 - It can be modification in name and/or address of the holder of the trademark.
 - Alteration in total or partially in ownership of the holder of the trademark or
 - Addition or deduction in the list of goods and services in reference of all or few of the designated parties of the Protocol.

It can be amended by a single procedure with the International Bureau effectively and efficiently.

- ❖ Due to single expiry date regardless of the diverse number of contracting parties of the Madrid protocol which is designated in the international registration of trademarks using the Madrid System. This uniformity in rules make the procedure or in the matter of any remedy unbiased and unambiguous.

- Mali, Mauritania,
- Niger,
- Senegal,
- Togo
- The Union of the Comoros.

International Arrangements

- Paris Union, Bangui agreement and Madrid Union (Protocol)
- It was effective on 5.Mar.2015 but till date no amendment has been given for international registration.

International registrations - OAPI are neither valid nor enforceable

OAPI deposited its instrument of accession to the Madrid Protocol on 5 December 2014.

In order to give effect to its Madrid obligations, legislation must be passed which recognizes those obligations. No such legislation has been passed. Consequently, International registrations are currently unenforceable in this territory.

4.ISSUE³⁰⁵ IN AFRICA RELATED TO MADRID PROTOCOL

3.4 Status Of OAPI In Madrid Protocol

OAPI³⁰⁴ has set down its instrument of accession to the protocol on 5. Dec.2014. In order to give affect to Madrid Protocol.

Trade Marks - OAPI

OAPI registrations enabled protection in:

- Benin, Burkina-Faso
- Cameroon,
- Central African Republic, Chad,
- Congo,
- Equatorial Guinea,
- Gabon, Guinea,
- Guinea-Bissau,
- Ivory Coast,

- ❖ In Mar.2015 two new territories of Africa joined the Madrid Protocol which are :

- Zimbabwe and
- OAPI. (OAPI is the single-registration IP union that covers much of French-speaking Africa.)

OAPI

- ❖ The main concern³⁰⁶ is that, on what basis OAPI acceded to the Protocol which is done through the resolution conducted by its Administrative Council. Many of the IP lawyers were amazed with the fact in reference to international registration

³⁰⁴www.spoor.com

³⁰⁵ www.spoor.com

³⁰⁶ www.ensafrica.com



which has been done by Council for which it is incompetent.

- ❖ One issue related to comparison between European Union and OAPI is that; the states in EU has incorporated the international treaties in its national statute and on the other hand OAPI member state has not incorporated such statute the way EU has done with its member states.
- ❖ Critics stated concern over various issue that the organization was created by the way of the Bangui Agreement and this agreement derived from treaties like the Berne Convention and the Hague Agreement; that the Bangui Agreement in its document makes no statement or subject related to international registration or the Madrid Protocol nor does the Agreement has been amended.
- ❖ Critics stated that the organization may in a better procedural manner could acceded to the Protocol through the way of amendment to the Bangui Agreement, followed with the ratification by the legislatures of the member states.
- ❖ Many lawyers who were practicing in OAPI countries became quiet vocal in their expressions. These criticism considerably has an effect. Accreditation of these lawyers has been withdrawn by the OAPI. This act may be further concluded as an issue in court as the livelihood of the lawyers is at stake now. If it happens then definitely it will become an issue in court regarding the validity of OAPI accession to Madrid Protocol.

Zimbabwe

- ❖ In common law countries, the rule they follow is that, any foreign statute to become effective, firstly it has to get incorporated into national law by the way

of statute. The problem in this country exists in a number of common law countries. Despite this fact Protocol is in force thou not incorporated in its national law. There is a big confusion related to its validity and enforceability in Zimbabwe.

- ❖ Liberia, Namibia, Sierra Leone, Swaziland and Zambia have similar concerns related to it.
 - Such criticism has raised the concern related to state's approaches towards international law which can either be monistic or dualistic as well as comparison with European Union .
 - For that it is very important to understand the European Union setup regarding incorporation of international law in its member states and condition of conflicts arises between the national law and union law .
 - With reference to EU ,what is the status of African Union .

4.1 Monism And Dualism³⁰⁷

The interconnection and interdependence of the international law and municipal law with relation to the concept of sovereignty of states has led to the way of legal theories determining the scope of monism and dualism.

Dualism: The dualism theory consider the level of the international and national legal order are equal but completely independent and different in their own approaches , which coexist with each other in parallel , In short there is no relation of any kind of subordination between the two systems.

Monism: The monism theory makes that the rule of municipal law is in the same aspect with that of international law. This theory

³⁰⁷www.ugb.ro



states that national law is derived from the concept of international law.

their sovereign rights, though within limited scope’.

5. EUROPEAN UNION (BRIEF)

The European Union³⁰⁸ (EU) is a union made for economic and political corporation of certain countries in Europe. 28 European countries are generally the members of the Union. Without the United Kingdom, there will be 27 members in future(Lisbon treaty – after full compliance with procedure). The Treaties which are the foundation of the European Community is renamed as the ‘Treaty on the Functioning of the European Union’ and the word ‘Community’ was replaced by ‘Union’ throughout the text. The Lisbon³⁰⁹ Treaty gives the EU distinct legal personality. Therefore, the Union is competent to sign international treaties in the fields of its given powers or join any international organization for the benefits of its members. Member States may only sign those agreements that are compatible with European Union law .The Lisbon Treaty formally recognizes the European Council as an institution, responsible for providing the Union with the ‘momentum necessary for its development and prosperity’ and for determining its ‘general political agenda and priorities for its well being’.

In a various event of important rulings the of the ECJ i.e. European Court of Justice has paved the way for the development of the doctrine of supremacy of EU over municipal law.

- The ECJ stated that³¹⁰ ‘the Community consist of a new legal order in international law, for whose development and appreciation the States have limited

- The ECJ stated the doctrine of supremacy³¹¹ of European Community law over national law. There are 2 main important observations taken in the relationship between Community law and municipal law. The Member States have transferred sovereign rights to a Community created by the consent of all of them. This process cannot be reversed by any sort of unilateral measures which are conflicting with the concept of the Community law.

- EU law is supreme over provisions of national constitutions. In the case the conflict³¹² between an EC regulation and provisions of the constitution of Germany. The constitution is apex in the hierarchy of legal rules to statute law and this is the cause that any ordinary law is subordinate to it and become invalid if it goes against it, the EC law had been incorporated into Germany by statute, through the Act of ratification. There was no point written in the constitution of where any of its provision could be overridden by EC law thou Art. 24 GG provided that ‘the transfer of sovereign powers to intergovernmental institution’. Therefore ECJ was in the opinion that EC law is supreme.

- In Simmmenthal case³¹³, the ECJ stressed on the fact that supremacy of EU law

³⁰⁸www.citizensinformation.ie

³⁰⁹ www.europarl.europa.eu

³¹⁰Case Law : Van Gend en Loos (1963)

³¹¹Case Law : Costa v ENEL

³¹²Case Law : *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle*

³¹³Case Law: Amministrazione delle Finanze v *Simmmenthal* SpA (1978)



affects both prior and future law of the state. The fact of the case states Italian law passed in 1970 for that Simmen was made to pay an amount as for a public health inspection when importing some beef (France to Italy). It was in contradiction to the EC Treaty and two regulations passed in 1968. The two points when the case began has been highlighted that the Italian law was made before the prevailing of the two regulations. Secondly, Italian law had to be implemented by the courts of Italy until declared as unconstitutional by the Constitutional Court. It was held finally that the national courts have to work in accordance of the Community provisions .

- ✓ In Factortame case³¹⁴ ‘the conflict between provisions of the EC for the preventing any discrimination on the basis of nationality .It was later held that parts of the Merchant Shipping Act 1988 were contradicting as well as bias with the relevant provisions of the Treaty. Here, the outcome was that any law passed or to be passed in the United Kingdom must be interpreted with applicable European law .

In opposition, dualism means the system of international law and municipal law as separate. Some domestic legislation must be incorporated by the parliament in order for the execution of international law. UK had adopted dualism approach and remains rigid with the sovereignty of parliament. ‘The UK’s dualist approach signifies that international treaties to be enforced at the national level, they must be sanctioned

priory by an Act of Parliament., Lord Denning MR confirmed this view in the case³¹⁵ and asserted that ‘ no notice of treaties are taken by us unless they are embodied in laws enacted by Parliament.

6. AFRICAN UNION

The **African Union (AU)** is a **union** consisting of 55 **countries**. It was established on 26 May 2001 at **Addis Ababa, Ethiopia**,

Some of Africa’s core security challenges³¹⁶ in the present scenario includes :

- The issue related to state sovereignty notions.
- The lacking of common values which has given rise to **regionalism** .

The duty of OAU is supporting collective struggles

- ✓ national liberation from colonialism,
- ✓ racial discrimination and apartheid,

The principles related to equality, respect for sovereignty, non-interference aspects as well as territorial integrity are the parameters of inter-governmental collaboration within the AU.

The heads of state of the African Union³¹⁷ (AU), which is the regional body working for African integration, have decided to form a Pan-African Intellectual Property Office (PAIPO),

Ordinary Session of the African Union Summit met from 21-28 January 2013 in Ethiopia, under the theme: “Pan-Africanism

³¹⁴Case Law:R (*Factortame* Ltd) v Secretary of State for Transport

³¹⁵Case Law:Blackburn v Attorney General (1972)

³¹⁶ www.omiconline.org

³¹⁷ www.ip-watch.org



and African Renaissance.” The AU website states the Union’s goals as “accelerating the process of integration in the continent while addressing multiple issues of social, economic and political problems compounded with the effect of globalization.”

It stated that the main mission of the AU is primarily to make

- ✓ Continent free of colonization and apartheid .
- ✓ Promote unity and solidarity in states.
- ✓ Coordinate and intensify cooperation.
- ✓ Safeguard the sovereignty and territorial integrity.
- ✓ Promote international cooperation within the framework of the UN.

There is currently no IP office for all of Africa except the national and two regional offices which are drafted and executed in an efficient manner for Africans and non-Africans. Therefore it would be much simplified procedure for amending amendment in the Bangui Agreement compared to stating a new provision related IPR at this point. Capability of a nation is not the question but the history of the territory and consequences from the past and the present is the concern. An African Union Law supremacy can be brought but, for that the states of the continent are not prepared and if they indulge in the process, things will become more complex which lead to delay in legislation for years and the pace of development would become very slow in this nation. On the other side Agreement has consent and execution of it has been started in 1900’s so the change can be done in the single procedure easily.

7. CONCLUSION

OAPI, The organization was formed to organize strategy for the administration to protect intellectual property rights for its development. The Administrative Council is the highest authority of the Organization that determines the general policy to regulate and control the activities to encourages foreign investment as well as domestic innovations, it was necessary for the recognition of OAPI at international level, due to which through a resolution passed by the administrative council OAPI became a part of Madrid Protocol. This Act in itself has give an approach among the IP law firms as well as other lawyers that the procedure followed by the council was not lawful as it was not in its function. They demanded for the amendment in its former Agreement by inserting clause for international registration which has not till date took place in the Agreement . In case of other common law countries matter can be sort through incorporation in its national statute in a time frame for effective results .There was also another issue concerning that the critics that EU law permits any treaty to get implemented in its member state only after its incorporation in its national statute which was not in the case of OAPI which led to question related to international approaches adopted in EU as well as supremacy in case of conflict between municipal and Union law. African Union on the other hand has not reached till the stage of EU and its roots are not stable as an integrated nation due to colonialism, apartheid and extremism. Therefore national and regional offices for IPR protection are given weightage for residents and non- residents as it is adequate for the execution of its purpose and also for any amendment to resolve any conflict in

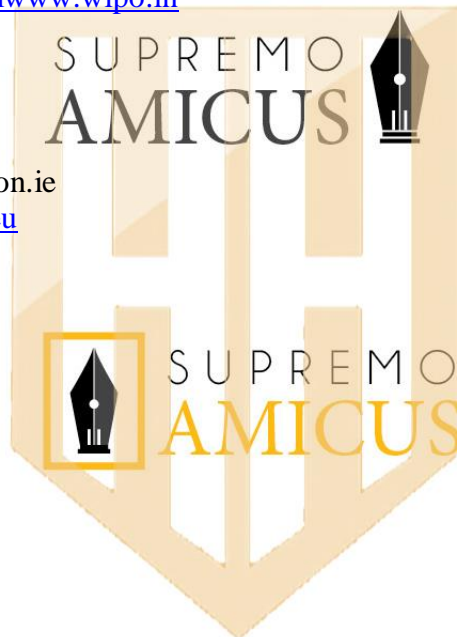


the present situation. Therefore amendment is the far better option in the Agreement for regional cooperation so that the enforceability of Madrid Protocol can be validated .

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CONTRADICTIONARY LAWS ON GENDER AND SEXUALITY IN INDIA – WITH HOMOSEXUALS NOW SINGLED OUT AS A THREAT

By *Anvesha Pipariya*
From *National Law University, Jodhpur*

Let's start with a brief description about LGBT community. LGBT community includes, Gay, lesbian, bisexual and Transgender. While gay & lesbians are people attracted towards same sex (homosexuals), bisexuals are both homosexual and heterosexual. Transgender, on the other side is a blanket term used for Eunches, people born with both sex characteristics; Transmen/Transwomen, people who have gender identity opposite to that of assigned sex; Transsexuals, people who desire to medically transition into opposite sex and Cross dressers, people who like to wear clothes of opposite sex.

It goes without saying that the stature of LGBT community is oppressed to the extreme. The existence of homosexuality goes back to the pre-colonial times where several texts were related to LGBT causes. Even though in many ancient hindu scripts homosexuality had been considered as a heinous offence; in Arthashastra, homosexuality is considered a minor one.³¹⁸ Even historic sculptures in temples of Khaguraho (Madhya Pradesh) depicts homosexuality. Throughout Hindu and Vedic texts there are many descriptions of saints, demigods, and even the Supreme Lord

transcending gender norms and manifesting multiple combinations of sex and gender.³¹⁹ There are several instances in ancient Indian which depicts the union of gods and goddess. But even if our ancient scripts had a mixed opinion about homosexuality, today in this 21st century people consider homosexuality as good as untouchability and transgender as the most down ridden section of the society.

It was only in 20th century, it was brought to consideration that LGBT community was discriminated on the grounds of sexuality. Few magazines like Sakhi and Bombay raised the LGBT community rights' violation issues and strengthen their voice to make them audible to the society.

But needless to say, while hanging at the edge of this intolerant society of 21st century, homosexuality and LGBT issues are still uncultured to be talked about. This community is seen as a threat and are being out casted by our society. Today when social status, casteism, regionalism and religious rights are one of the key oppressions in our society, sexuality is still considered as frivolous and awarded by ignorance. Today our society is developing in almost every corner, every field from technology to live in relationships, to single parenting, artificial fertilisation, etc but when it comes to transsexuals the society is unwilling to accept them as a part of the society. Sexuality rights still have a long struggle to finish to get their space in the broader human rights battle.

Legal jurisdictions have been equally disappointing by criminalizing homosexuality and not providing vivid policies to the LGBT

³¹⁸Vanita & Kidwai 2001, p. 25.

³¹⁹Ritiya-Prakriti: People of the Third Sex, p. 40.



community regarding their fundamental human rights.. Here is the evolution of LGBT movement and major events of indian judiciary on homosexuality.

1860 - Homosexual intercourse was declared "unnatural" which made it a criminal offence under Chapter 16, Section 377 of the Indian Penal Code, 1860

July 1999 - India's first LGBT pride parade in Kolkata

December 2001 - An NGO fighting for gay rights, Naz Foundation files PILS seeking legalisation of gay sex among consenting adults.

July 2009- High Court strikes down section 377, decriminalising homosexuality

December 2013- Supeme court reverses high Court's decision

REASONS FOR UNACCEPTABLE

• A “taboo “

In present times people are still not willing to discuss freely about LGBT rights, homosexuality, gender-identity, etc. and only young youths of this generation are interested in this discussion and actively take part. But a large portion of the society still is not ready to take up such issues. Indian society is tethered by it's culture, traditions, etc. thus talking about such an issue has become a Taboo in present society.

• Family unit

One's own family plays an important influence on a person. The expectation of the relatives and family for marriage and to have kids exerts immense pressure which often leads to commit suicide by the person.

• Rituals and cultures

People in the Indian society believe in rituals, customs and culture and according to which homosexuality is considered immoral. LGBT individual face social stigma and are still not completely accepted by the society.

• Illiteracy and lack of awareness

Lack of awareness and illiteracy plays a pivotal reason for treating LGBT community as strange and therefore, still people are not able to understand the problems being faced by them and deny to acknowledge them as of their standard.

Nowadays, even educated folks condemn these people and are not willing to recognize them as equals and are ill- treated.

It has to be understood by us that Transgenders, homosexuals, transsexuals, etc are no different from us, they too are humans and have feelings and should not be treated as cursed or immoral.

Every person has right to live their life in the way in which he or she wants and this right cannot be taken away by anyone including the government, parliament, judiciary as such rights are granted to every citizen by the Constitution and thus not treating LGBT people equally or not granting them same opportunities like everyone else will be an infringement of the constitution.



MAJOR CHALLENGES: The regime of discrimination and challenges this community has been facing through ages is endless. Few of them are as follows:

**1. Legal discrimination:
Prevention of unnatural offences-**

Section 377 of IPC reads:

Unnatural Offence: 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.

“Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence

described in this section.”³²⁰

This itself is a contradictory law and discriminates on the basis of sex and equality. Since equal rights are not given to this community. Therefore laws on criminalising homosexuality in itself are contradictory laws and are in violation of Article 14, 15 and 21

Right to privacy to LGBT community- the constitution does not directly provide the right to privacy as a fundamental right to LGBT community hence withholding them from freedom to choose their sexual orientation.

Discrimination of grounds of sex: our constitution does not allow any discrimination on the grounds of Sex. Hence the rights of LGBT cannot be violated on grounds of:

Right to freedom

Right to religion

Basic hygiene facilities

Educational facilities

Right to live with family

Right for equal pay

Right to equality

Right for dignity

Right to freedom of expression

Right to livelihood

2. Societal Discrimination - These people are discriminated in every field, at every stage in their life. Whether it is at home , work place , or any other place. They often become the victim and are abused and harassed. They are being cursed by the straight people.

3. Discrimination at workplace - They are not recruited for any job in any sector. People are unwilling to give them the opportunity to progress and move ahead and thus have created a hindrance in their growth and development. The society itself neither consider them as a part of the society nor is ready to accept them and give same status and opportunity to move forward. There is hardly any place in India which recruits them. There is no work place for them by which they can earn a handful sum for livelihood and

³²⁰Section 377, Indian Penal Code ,1802.



therefore they left with no other option but to choose another way of earning such as prostitution, beseeching, go in marriages and ask for money, etc.

4. Exile from Family -

5. Fear of coming out - Many individuals from LGBT community restrain themselves to disclose their identity and some even conceal their sexuality at home from friends and family due to the fear that they might be disown by their family or that people in surrounding might harm them or segregate them. Thus many refuse to come out of the closet to disclose their identity. They fear to accept as who they are in public.

6. Mental Health:

A STEP FOR DEVELOPMENT

• **Political Representation**

In 2002, Kali became the first hijra person to stand for elections in Bihar. She was elected as ward councillor to the Patna Municipal Corporation.

In Chhattisgarh, Madhu Bai Kinnar made history too, after being elected as the first trans mayor of Raigarh.

• **Pride Marches**

The first ever Pride Marches in New Delhi and Mumbai were organised simultaneously in 2008. The two metropolitan cities saw a large and encouraging turn out, and it set the pace for the years to come, as Pride only grew bigger and brighter.

In July 2016, The first Gurgaon Pride March was held bringing visibility and encouragement to Millennium City.

• **A ray of hope**

In 2001, the Delhi High Court passes a landmark judgement on July 2, 2010, by striking down the Section 377 of the IPC and declared it unconstitutional. In effect, it granted equal rights and was one of the most euphoric moments for LGBTQ Indians.

• **First Transgender Principal**

Manabi Bandhyapadhyay became the first openly transgender college principal in 2015. She held the post at Krishnanagar Women's College.

• **Inclusion at work place**

In May 2017, the Kochi Metro made the bold decision to hire 23 transgender women. They even released a moving ad campaign featuring these employees.

• **A public platform.**

In 2016, Anwesh Kumar Sahoo became Mr. Gay World India.

• **Literacy for Transgenders**

The Kerala State Literacy Mission, launched at the start of June 2017, said it will hold classes for transgender school drop-outs in Kollam, Kozhikode, Malappuram, Thrissur, Kollam, Kozhikode, Kottayam and Thiruvananthapuram thus a step to support them for education.

• **Film- Industry**

Many movies are being made which touch the issue, problems faced by these people and are a medium for creating mass awareness. Movie like Aligarh, Dostana, The Journey (2004 film), My Brother Nikhil, The Pink, etc are few movies which are helping in creating mass awareness and are an initiate to discuss about homosexuality, transgenders on an open platform and publically.

ACTS TO BE DONE FOR THEIR VISIBILITY



The criminal justice system needs an overhaul in this direction as well. Reforms are needed to change the situation, one should understand every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites, and *hijras*. They should also have the right to freely express their gender identity. This includes the demand for *hijras* (as they are called) to be considered female as well as a third sex. There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.

Protection and safety should be ensured prevent rape in police custody and in jail. The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord *hijras* and *kothis* the same courteous and humane treatment as they should towards the general public.

A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behavior of all sexualities. The need to answer a psychological question is felt here, if we have prisoner rights for both men and women then, why not for the '*hijras*', as we refer to them?

A RAY OF HOPE

With passage of time and continuous petitions the judiciary realised the need to review its

decision of setting aside the Delhi High Court's decision of legalising Section 377 of IPC.

Also, in the landmark judgment by the Supreme Court of India the transgender people were granted the status of a "*third gender*" category, recognising them as a socially and economically disadvantaged class. "*It is the right of every human being to choose their gender*", the detailed judgment stated, thus granting rights to those who self-identify as neither male nor female. By this decision the apex court has given a ray of hope to LGBT community by allowing them to choose their gender which will be recognised even for housing, ration cards, etc. By this step SC has encouraged justice and visibility to this community.

Due to efforts of the LGBT community and activists, recently SC in its historic ruling confirming the right of the country's LGBT people to express their sexuality without discrimination.

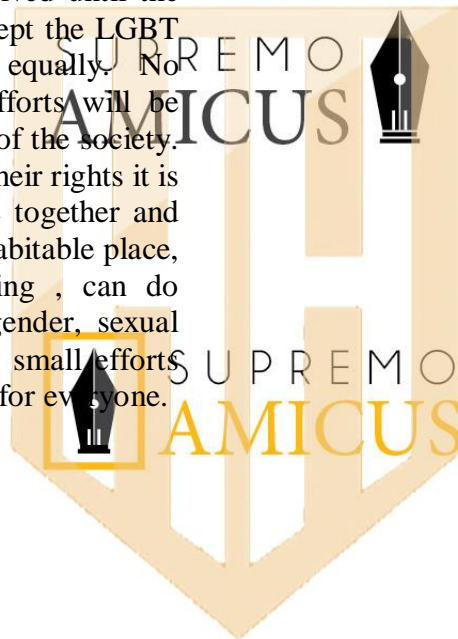
The Supreme Court's verdict declaring the right to privacy to be a fundamental right has lead a hope for the gay and LGBT community that was dealt a blow by the same court when it criminalised sex between two consenting adults of same sex and brought it under the ambit of Section 377. But in this landmark judgement Judges ruled that sexual orientation is covered under clauses in the Indian Constitution that relate to liberty. The ruling lead a way for discriminatory practices against LGBT people to be challenged in the courts. The apex court concluded that privacy includes at its core the preservation of personal intimacies and that sexual orientation is an essential attribute of privacy. The court held that privacy and protection of sexual



orientation lie at the core of the fundamental rights under Articles 14, 15 and 21 of the Constitution.

Discrimination against an individual on the basis of sexual orientation is intensely offensive to the self-esteem and character of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform.

Though from last few years the society is becoming aware about LGBT people and is understanding the challenges they face every day but this issue cannot be solved until the whole society gets ready to accept the LGBT community and treat them equally. No government schemes ,NGOs efforts will be fruitful without the cooperation of the society. Therefore, to give these people their rights it is necessary for all of us to come together and make this world a better and a habitable place, where anyone can be anything , can do anything irrespective of their gender, sexual orientation, etc. only then these small efforts would yield the effective results for everyone.





**ALTERNATIVES TO ANIMAL TESTS
CONDUCTED FOR
MANUFACTURING OF DRUGS AND
NEED FOR A CORRESPONDING
LEGISLATION**

By Anwita Dinkar

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Abstract: Every year various manufacturing industries and research laboratories conduct a number of tests on animals in the pre-clinical stage of experimentation to detect the efficacy of a drug, before it is introduced in the market. These animal tests are discouraged by ethicists, environmentalists and supporters of animals rights, as such tests are not only inhuman and unnecessary but the outcome of these trials have proven to be harmful to the environment, are against animal rights and result in wastage of time and money. The article that follows will discuss the problems related to the animal tests that are conducted for manufacturing drugs, the ineffectiveness of such tests on human beings and the negative impact such experiments have on the environment. The article also gives examples of several alternatives to animal tests which should replace the current practice of performing experiments on animals. The article will conclude by highlighting the need of securing a proper legislation to promote animal rights and prohibit the performing of such tests to manufacture drugs.

Introduction

About 100 million animals are used for research and experiment purposes each year.³²¹ Experiment on animals is usually conducted to manufacture new drugs for human beings and are conducted by Corporations, Research institutions, Universities and some Government Organisations. More often than not smaller animals are used which include rats, birds, fish, frogs, to name a few for performing such experimentations; typically bigger animals are not used. Before being euthanized these animals are kept in extremely bad conditions and tortured continuously. Such experimentation and killing of animals is unnecessary and a cause of concern as it affects the environment, animal life as well as human life. Also, there is no law present in India which discourages the killing of animals for the purpose of manufacturing of drugs. There are several institutions that are guilty of unnecessary animal torture, but such wrongdoers go unpunished.

Preservation and protection of animal rights is an issue that is as important as human welfare. Unfortunately animal rights are not taken as seriously as human rights and hence not much is being done for it. For a long time environmentalists, ethicists and animal rights supporters have discouraged the use of animals for experimentation for the purpose of manufacturing of drugs. But

³²¹ Meredith Cohn, 'Alternatives to Animal Testing Gaining Ground' *The Baltimore Sun* (Washington, 26 August 2010)
<http://articles.baltimoresun.com/2010-08-26/health/bs-hs-animal-testing-20100826_1_consumer-products-animal-testing-experiments> accessed 12 December 2017



corporations and research institutions have time and again relied on animal tests and have highlighted its efficiency on human beings; the article that follows challenges the effectiveness of such animal experimentations conducted during the pre-clinical trials and hence proposes to advance several alternatives to such tests, the article also emphasises on the need of securing a legislation for promoting animal rights and prohibiting the performance of such tests for the purpose of manufacturing drugs.

Hence, the paper that follows has the following four-fold purpose:

1. To understand pre-clinical studies, vivisection and use of animals during such tests
2. To recognise negative implications of these tests
3. To emphasize on and suggest the various alternatives to such tests available today
4. To highlight the need for an effective legislation, to discourage animal experimentation and promote alternatives to it

Preclinical study

Preclinical study or Preclinical trial is a study to test a drug, a procedure, or another medical treatment in animals. The aim of a preclinical study is to collect data in support of the safety of the new treatment. Preclinical studies are required before clinical trials in humans can be started.³²²

Before testing a drug in people, researchers must find out whether it has the potential to

³²² MeiciNet- medterms medical dictionary, 'Medical Definition of Preclinical Study' <<https://www.medicinenet.com/script/main/art.asp?articlekey=5019>> accessed 15 December 2017

cause serious harm, also called toxicity. The two types of preclinical research are:³²³

- *In Vitro*- in a test tube
- *In Vivo*- in the living organism

Usually, preclinical studies are not very large. However, these studies must provide detailed information on dosing and toxicity levels. After preclinical testing, researchers review their findings and decide whether the drug should be tested in people.³²⁴

Vivisection

While the article addresses animal tests as merely 'animal test' or 'animal experiment', the process of animal experimentation in scientific terminology is known as *Vivisection*.

Vivisection is the practice of animal experimentation. This can include administering drugs, infecting with diseases, poisoning for toxicity testing, brain damaging, maiming, blinding, and other painful and invasive procedures. It can include protocols that cause severe suffering, such as long-term social isolation, full-body restraint, electric shocks, withholding of food and water, or repeatedly breeding and separating infants from mothers. Essentially, it is using animals in ways that cause distress and/or death in

³²³ U.S. Food and Drug Administration (FDA), 'The Drug Development Process: Step 2: Preclinical Research' <<https://www.fda.gov/ForPatients/Approvals/Drugs/cm405658.htm>> accessed 17 December 2017

³²⁴ U.S. Food and Drug Administration (FDA), 'The Drug Development Process: Step 2: Preclinical Research' <<https://www.fda.gov/ForPatients/Approvals/Drugs/cm405658.htm>> accessed 26 December 2017



attempts to test the safety of drugs and biological products or of finding treatments, prevention, or cures for human diseases.³²⁵

Why is there a need of using alternatives to animal experiments?

The following reasons highlight the need for encouraging animal rights and having a law which prohibits or at least limits animal tests;

1. These tests result in violation of animal rights

Countless monkeys, dogs, rats and other animals are burned, blinded, cut open, poisoned, starved and drugged behind closed laboratory doors every year for convenience, for economic reasons and because of old habits. Not only are animal tests extremely cruel, they are also completely inaccurate because of the vast physiological variations between species. Animal studies teach us nothing about the health of humans because human reactions to illnesses and medications are completely different from the reactions of other animals. Other species absorb, metabolise and eliminate substances differently than humans do. The truth is that testing on animals is just plain bad science which harms humans and other animals alike.³²⁶

Studies published in prestigious medical journals have shown time and again that animal experimentation wastes lives—

³²⁵ England Anti-Vivisection Society (NEAVS), ‘What is Vivisection?’
<<http://www.neavs.org/about/vivisection>> accessed 26 December 2017

³²⁶ People for the Ethical Treatment of Animals (PETA), India ‘Animals used for Experimentation’
<<https://www.petaindia.com/issues/animals-experimentation/>> accessed 25 December 2017

both animal and human—and precious resources by trying to infect animals with diseases that they would never normally contract.³²⁷

More often than not, tests on animals have proved to be wasteful when tested on human beings thereby causing unnecessary loss of animal life.

Despite the use of over 115 million animals in experiments globally each year, only 22 new medicines were approved in 2016 by the leading drug regulator, the U.S. Food and Drug Administration. Many of these are for rare diseases.³²⁸

PETA US has conducted many undercover investigations in laboratories. Every time it does, physical abuse and neglect are documented. Animals are yelled at, hit, left to suffer after surgery without any painkillers, crammed into small cages, denied veterinary care and more. In India, one of the largest animal suppliers, the National Centre for Laboratory Animal Sciences (NCLAS) in Hyderabad, supplies approximately 50,000 animals to laboratories every year and to 175 institutions in India, including pharmaceutical companies and educational institutions. Both NCLAS and the NIN have been under fire from animal protection

³²⁷ People for the Ethical Treatment of Animals (PETA), ‘Animal Testing is bad Science’
<<https://www.peta.org/issues/animals-used-for-experimentation/animal-testing-bad-science/>> accessed 23 December 2017

³²⁸ Cruelty Free International, ‘Arguments against animal testing’
<<https://www.crueltyfreeinternational.org/why-we-do-it/arguments-against-animal-testing/>> accessed 25 December 2017



organisations for years for not maintaining basic animal welfare standards.³²⁹

According to *The Hindu*, NIN has kept monkeys, who are highly social, in solitary confinement for up to 12 years.³³⁰

2. Animal experimentations do not prove effective on human beings

Animals are used in scientific experimentation based on a presumption that similarities between animals and humans enable data from animal models to be extrapolated to humans. However, the *differences* between other species and humans make translating data from animals to people problematic.³³¹

The harmful use of animals in experiments is not only cruel but also often ineffective. Animals do not get many of the human diseases that people do, such as major types of heart disease, many types of cancer, HIV, Parkinson's disease, or schizophrenia. Instead, signs of these diseases are artificially induced in animals in laboratories in an attempt to mimic the human disease. Yet, such experiments belittle the complexity of human conditions which are affected by wide-ranging variables such as genetics, socio-economic factors, deeply-rooted psychological issues and different personal experiences. It is not

surprising to find that treatments showing 'promise' in animals rarely work in humans. Not only are time, money and animal's lives being wasted (with a huge amount of suffering), but effective treatments are being mistakenly discarded and harmful treatments are getting through. Despite many decades of studying conditions such as cancer, Alzheimer's disease, Parkinson's disease, diabetes, stroke and AIDS in animals, we do not yet have reliable and fully effective cures.³³²

Humans are harmed because of misleading animal testing results. Imprecise results from animal experiments may result in clinical trials of biologically faulty or even harmful substances, thereby exposing patients to unnecessary risk and wasting scarce research resources. Animal toxicity studies are poor predictors of toxic effects of drugs in humans. Humans have been significantly harmed because investigators were misled by the safety and efficacy profile of a new drug based on animal experiments. Clinical trial volunteers are provided with raised hopes and a false sense of security because of a misguided confidence in efficacy and safety testing using animals.³³³

An example of inefficacy of drugs tested on animals, is the reaction of the drug Rezulin on humans. Rezulin

³²⁹ PETA India, 'Animals used for Experimentation' <<https://www.petaindia.com/issues/animals-experimentation/>> accessed 12 December 2017

³³⁰ PETA India, 'Animals used for Experimentation' <<https://www.petaindia.com/issues/animals-experimentation/>> accessed 12 December 2017

³³¹ National Anti-Vivisection Society, 'The failure of Animal Model' (Chicago, 2012) <<http://www.navs.org/science/failure-of-the-animal-model>> accessed 25 December 2017

³³² Cruelty Free International, 'Arguments Against Animal Testing' <<https://www.crueltyfreeinternational.org/why-we-do-it/arguments-against-animal-testing>> accessed 26 December 2017

³³³ Tom. L. Beauchamp & David DeGrazia, 'The Flaws and Human Harms of Animal Experimentation' (2015) 24(4) *Camb Q Health Ethics*. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4594046/#fn3>> accessed 16 December 2017



(Troglitazone) was a drug intended to treat type 2 (adult-onset) diabetes, was approved by the FDA in the United States in 1997. Rezulin lowered the blood sugar in rats without producing adverse effects, but reports of severe and even fatal liver failure appeared immediately after approval. Due largely to an aggressive investigation by the *Los Angeles Times* and after four label changes, Rezulin was withdrawn in 2000 after 391 deaths were attributed to the drug.³³⁴

Vioxx, a drug used to treat arthritis, was found to be safe when tested in monkeys (and five other animal species) but has been estimated to have caused around 320,000 heart attacks and strokes and 140,000 deaths worldwide.³³⁵

In another example of human suffering resulting from animal experimentation, six human volunteers were injected with an immunomodulatory drug, TGN 1412, in 2006. Within minutes of receiving the experimental drug, all volunteers suffered a severe adverse reaction resulting from a life-threatening cytokine storm that led to catastrophic systemic organ failure. The compound was designed to dampen the immune system, but it had the *opposite* effect in humans. Prior to this first human

trial, TGN 1412 was tested in mice, rabbits, rats, and NHPs with no ill effects.³³⁶

3. Animal experimentations have proven to have a negative impact on the environment

Typically, facilities that engage in animal testing not only dispose of animals, but also dispose of potentially dangerous chemicals, food waste, and a variety of supplies used during the testing process. Additionally, animal testing also heavily impacts water and air quality.³³⁷

Also, all these animals that are euthanized are not properly discarded thus leading to environmental degradation due to the large amount of toxins contained in these animal bodies.

According to the National Institutes of Health (NIH), waste from their animal testing facilities totalled 1.5 million pounds from 2011 to 2013. In another case, a major pharmaceutical lab was responsible for producing almost 15 tons of animal waste in just one year.³³⁸

As already mentioned, ordinarily smaller animals are tested upon, and larger animals

³³⁴ David Willman, 'Deadly Drugs' *Los Angeles Times* (Washington, 20 December 2000) < <http://www.latimes.com/nation/la-122001fda-story.html> > accessed 18 December 2017

³³⁵ Cruelty Free International, 'Arguments Against Animal Testing' <<https://www.crueltyfreeinternational.org/why-we-do-it/arguments-against-animal-testing>> accessed 23 December 2017

³³⁶ Tom. L. Beauchamp & David DeGrazia, 'The Flaws and Human Harms of Animal Experimentation' (2015) 24(4) *Camb Q Health Ethics*. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4594046/#fn3>> accessed 17 December 2017

³³⁷ Jai Shroff, 'The Significant Impact of Animal Testing on the Environment' <<https://jaishroff.wordpress.com/2016/11/15/the-significant-impact-of-animal-testing-on-the-environment/>> accessed 27 December 2017

³³⁸ Jai Shroff, 'The Significant Impact of Animal Testing on the Environment' <<https://jaishroff.wordpress.com/2016/11/15/the-significant-impact-of-animal-testing-on-the-environment/>> accessed 27 December 2017



are not generally used for experimentation purposes, this practice leads to ecological imbalance in the environment.

The current loss of species is estimated to be 50 to 500 times higher than the natural background rates found in the fossil record.³³⁹

Considering all of the above stated negative impacts of animal experiments, it becomes highly important to address the issue and secure alternatives to such tests.

Methods to alternate animal tests

Methods that alternate animal experimentations fall into three broad categories. These are called the 3 Rs.³⁴⁰ This concept of three Rs was formulated by British researchers W.M.S. Russell and Rex Leonard Burch in their 1959 book 'The Principles of Humane Experimental Technique'³⁴¹ and they are as follows;

i. Replacement – Which involves replacement of animals and experimenting

³³⁹ Groff K. Bachli, 'Animal Research is Hazardous Waste' (2014) 3 New England Anti-Vivisection Society Journal
<<http://neavs.org/campaigns/environment>> accessed 26 December 2017

³⁴⁰ Johns Hopkins Bloomberg School of Public Health, 'What does alternatives to animal testing mean?'
<<http://altweb.jhsph.edu/resources/faqs.html#2>> accessed 20 December 2017; Understanding Animal Research, 'The three Rs'
<<http://www.understandinganimalresearch.org.uk/how/three-rs/>> accessed 20 December 2017; National Centre for the Replacement, Refinement and Reduction of Animals in Research, 'What are the 3Rs?' <www.nc3rs.org.uk/the-3rs> accessed 20 December 2017

³⁴¹ R.L. Burch and W.M.S. Russell, *The Principles of Humane Experimental Technique* (Methuen 1959)

using other methods, this replacement may either be a complete replacement where animals are not at all used or a partial replacement where only animal tissues or cells are used.

ii. Reduction- Reduction means to reduce the number of animals to a minimum, to obtain information from fewer animals.

One example of this method can be 'Data Sharing', this method involves sharing of data and information obtained from testing on animals with other organisations involved in manufacturing same products. This helps reduce costs and also reduce unnecessary killing of animals.³⁴²

Another example of reduction can be substituting animals that have just been killed in place of a living animal; this recommendation was given by Marshall Hall, a British experimental physiologist.³⁴³

iii. Refinement- This method involves refining the way animal experiments are carried out so that animals are not harmed unnecessarily and all proper precautions are taken to cause as little harm as possible. Refinement involves housing animals under proper conditions and maintaining animal welfare.

Various alternatives to animal tests

While the above section underlined the method of alternating animal tests by replacement, reduction and refinement, the following discussion will cover certain

³⁴² University of York, 'New Online System Set to Reduce Hundreds of Chemical Tests on Animals' 20 June 2017 <<https://www.york.ac.uk/news-and-events/news/2017/research/new-online-system-set-to-reduce-tests-on-animals/>> accessed 28 December 2017

³⁴³ Andrew N. Rowan, *Of Mice, Models and Men: A Critical Evaluation of Animal Research* (SUNY Press 1984) 265



examples of alternatives to animal tests which are in practice and may be adopted.

For a long time, to predict toxicity, corrosivity, and other safety variables as well as the effectiveness of a new product for humans, traditional testing of chemicals, consumer products, medical devices, and new drugs has involved the use of animals. But today, scientists have developed and validated alternative methods shown to lead to safer and more effective products and drugs for humans than animal testing.³⁴⁴

Also, several non-governmental organisations and promoters of animal rights have often spoken against use of animals and hence have also devised methods of alternating these tests with different approaches, some of these alternatives devised by scientists and suggested by ethicists and environmentalists are provided as follows;

- **Three-dimensional human skin equivalents-** Skin corrosivity and irritation can be easily measured using three-dimensional human skin equivalent systems such as EpiDerm and SkinEthic. Additional alternatives include EpiSkin (a model of reconstructed human epithelium) and a variety of sophisticated, computer-based Quantitative Structure Activity Relationship (QSAR) models that predict skin corrosivity and irritation by means of correlating a new drug or chemical with its likely activity, properties, and effects with

classification accuracy between 90 and 95 percent.³⁴⁵

- ***In vitro* methods and *In silico* models-** Today, because experiments on animals are cruel, expensive, and generally inapplicable to humans, the world's most forward-thinking scientists have moved on to develop and use methods for studying diseases and testing products that replace animals and are actually relevant to human health. These modern methods include sophisticated tests using human cells and tissues (also known as *in vitro* methods), advanced computer-modelling techniques (often referred to as *in silico* models), and studies with human volunteers. These and other non-animal methods are not hindered by species differences that make applying animal test results to humans difficult or impossible, and they usually take less time and money to complete.³⁴⁶
- **Using blood from human volunteers-** Using blood from human volunteers to test for the presence of fever-causing contaminants in intravenous medicines can save hundreds of thousands of rabbits each year from traditional "pyrogen" tests.³⁴⁷
- **Chemo-synthetic livers-** To eliminate tests conducted on the animal livers, Chemosynthetic livers which are fake livers have been developed and this was

³⁴⁵ European Commission. (n.d.). Joint Research Centre: [QSAR Review Irritation](#)

³⁴⁶ People for the Ethical Treatment of Animals (PETA), India 'Animals used for Experimentation' <<https://www.petaindia.com/issues/animals-experimentation/>> accessed 25 December 2017

³⁴⁷The Humane Society of the United States, 'Alternatives to Animal Tests' <http://www.humanesociety.org/issues/cosmetic_testing/facts/alternatives_animal_tests.html> accessed 29 December 2017

³⁴⁴ New England Anti-Vivisection Society (NEAVS), 'Animals in Science/Alternatives' <<http://www.neavs.org/alternatives/in-testing>> accessed 27 December 2017



announced in 2014 at the 247th National Meeting & Exposition of the American Chemical Society, and this discovery could dramatically alter how drugs are made and tested.³⁴⁸

- **Organs –on-a-chip-** Organs-on-a-chip are tiny cells in 3-D that mimic human organs. They are small micro fluidic devices with hollow channels lined by living human cells. They have several properties that make them more realistic models of human organs than conventional lab-grown cells. These devices are a big step closer to being accurate alternatives to animal tests for new drugs and toxins.³⁴⁹
- **Use of human cancer cells-** The National Cancer Institute (United States) now uses human cancer cells – taken by biopsy during surgeries – to perform first-stage testing for its new anti-cancer drugs. This practice spares the lives of the millions of mice whom the institute previously used every year and gives the institute a much better shot at combating against cancer.³⁵⁰
- **Microdosing-** Microdosing is a technique used for studying the behaviour of drugs in humans through administration of doses so

low that it is unlikely to produce any adverse reaction but high enough to allow the cellular response to be suited.³⁵¹ This method helps in determining the efficacy of the compound and whether it is worth continuing with compound development or not. If this technique is appropriately used, it could reduce the number of unwanted drugs going through safety and toxicology testing in animals.³⁵²

- **Fish threshold method-** When testing to determine chemical concentrations that are deadly to fish and other aquatic life, use of the Fish Threshold Method can reduce the numbers of fish used by at least 70 percent compared with standard test methods.³⁵³

Plant analysis- Plant substitution has had limited success in animal research. Some effects of exposure to certain substances have been demonstrated and the effects *did* relate to humans. A recent study on the effect of pharmaceuticals and their residues as environmental contaminants was performed on *Brassica juncea*, and it demonstrated drug-induced defense responses and activation of detoxification mechanisms as a result of oxidative stress.³⁵⁴

³⁴⁸Jen Veigas, 'Liver Stand-In Could Replace Animal Testing' *Seeker* (Global, 14 March 2014)

<<http://news.discovery.com/animals/liver-stand-in-could-replace-animal-testing-140318.htm>> accessed 21 December 2017

³⁴⁹ Wyss Institute, 'Three 'Organs-on-Chips' Ready to Serve as Disease Models' <<http://wyss.harvard.edu/viewpage/484/>> accessed 20 December 2017, pg.21

³⁵⁰ Wyss Institute, 'Three 'Organs-on-Chips' Ready to Serve as Disease Models' <<http://wyss.harvard.edu/viewpage/484/>> accessed 20 December 2017, pg.21

³⁵¹ Animal Testing, 'Microdosing'

<Sites.google.com/site/alternativestoanimals/microdosing-human-volunteers> accessed 22 December 2017

³⁵² CCAC, 'Microdosing'

<3rs.ccac.ca/en/research/refinement/microdosing.html> accessed 22 December 2017

³⁵³ The Humane Society of the United States, 'Alternatives to Animal Tests'

<http://www.humanesociety.org/issues/cosmetic_testing/facts/alternatives_animal_tests.html> accessed 24 December 2017

³⁵⁴ T. Arora, A. K. Mehta, V. Joshi, K. D. Mehta, N. Rathor, P. K. Mediratta, and K. K. Sharma 'Substitute of Animals in Drug Research: An Approach Towards Fulfillment of 4R's' (2011) 73(1) *Indian J Pharm Sci.*



- Imaging technique-**
 Magnetoencephalography (MEG), magnetic resonance imaging (MRI), functional MRI (fMRI), magnetic resonance spectroscopy (MRS), positron emission tomography (PET), single-photon emission computed tomography (SPECT), event-related optical signals (EROS) and transcranial magnetic stimulation (TMS) are the techniques offering a view of the human body –in particular, the brain – that cannot be gained by studying animals.³⁵⁵

The above listed alternatives are examples and the list is not exhaustive, there is a need to recognise and promote several other alternative methods to abandon animal experimentation altogether.

Need for a legislation to prohibit animal experimentation conducted for the purpose of manufacturing of drugs

Let us first look into certain laws operating in India for protection and welfare of animal;

- Prevention of Cruelty to Animals Act, 1960

The Act prohibits cruel treatment of animals and provides for establishment of an Animal Welfare Board for protecting animals from unnecessary and extreme

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3224398/>> accessed 19 December 2017

³⁵⁵T. Arora, A. K. Mehta, V. Joshi, K. D. Mehta, N. Rathor, P. K. Mediratta, and K. K. Sharma 'Substitute of Animals in Drug Research: An Approach Towards Fulfillment of 4R's' (2011) 73(1) Indian J Pharm Sci.

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3224398/>> accessed 19 December 2017

torture and suffering, and for promoting well-being of animals. The board is also responsible for making rules to promote welfare of animals.

Section 14 of the Act allows the use of animals for experimentations if it would help in discovery of knowledge that would be helpful for human beings, animals or plant life.

The act furthermore provides for establishment of a committee for the purpose of control and supervision of animal experiments, for which the committee is empowered to make suitable rules. If the rules are not adhered to, the person or institution may be prohibited from conducting tests on animals.

- The Ministry of Health & Family Welfare has passed an amendment to Schedule Y of the Drugs and Cosmetics Rules, 1945, which spares animals testing for new drug registrations when complete data from earlier toxicity experiments already exist for drugs approved abroad.

The Gazette notification reads: "3. In Schedule Y to the said rules, in Appendix I, in item 4, after sub-item 4.8, the following note shall be inserted, namely:

Note. Where the data on animal toxicity as per the specifications of Appendix III has been submitted and the same has been considered by the regulatory authority of the country which had earlier approved the drug, the animal toxicity studies shall not be required to be conducted in India except in cases where there are specific concerns recorded in writing."³⁵⁶

³⁵⁶The Gazette of India, No.171, 16 March 2016
 <<http://egazette.nic.in/WriteReadData/2016/168612.pdf>> accessed 22 December 2017



C. The Ministry of Health and Family Welfare issued a Gazette Notification GSR 346 (E), dated 21 May 2014 amending the Drugs and Cosmetics Rules 1945, to ban testing of cosmetics in animals³⁵⁷ : **The new rule 148-C states: Prohibition of testing of cosmetics on animals – ‘No person shall use any animal for testing of cosmetics.’**

D. The Drugs and Cosmetics Act, 1940
The act regulates the manufacture, import and distribution of drugs. Certain guidelines for the same have also been provided in the act. Section 26 A of this act gives the power to the Central Government to prohibit the manufacture, sale or distribution of drugs and cosmetics in public interest, especially if it involves risk to human beings or animals.

Unfortunately, while these legislations operate towards welfare of animals, they have not proven to be successful in curbing brutal treatment of animals while they are being experimented on and India needs a better structure of law which effectively operates towards care and protection of animals, whether used in experimentation or not.

Also, laws are stricter for using humans in experiments as compared to using animals. Animals are forced to be a puppet in the process of drug testing and no stringent legislation in India has been successful to

curb the problem of mistreatment and unnecessary killing of animals during such scientific procedures.

This article thus aims to highlight this inadequacy in law for the purpose of eliminating all forms of torture and mistreatment towards animals that are used for such experiments, and secure a legislation that will protect animal rights and promote alternative methods of animal experimentation for drug testing.

Conclusion

Experiments performed on animals to manufacture drugs involve cruel techniques and unnecessary torture and killing of animals. These drugs when tested on humans have more often than not, proven to be ineffective. Several animal protection agencies, ethicists, and environmentalists have suggested alternative methods to test drugs, but unfortunately a traditional approach towards drug testing, inconvenience caused by newer methods and increase in costs may be certain impediments in adapting to alternative methods and hence the traditional method of testing drugs on animals in the pre-clinical stage is continuing to hamper animal life, the environment and human welfare too. While there is a need to adopt these alternatives, such is not possible without there being a suitable and effective legislation for the same. This article therefore emphasises on the several available alternatives to animal testing and the need for a fitting legislation to promote animal rights, secure well-being of human beings and protect the environment.

³⁵⁷ Ministry of Health and Family Welfare, ‘Guidelines for Implementation of GSR 346 (E)’ (New Delhi, 21 May 2014)
<http://ficci.in/sector/73/add_Docs/AniTestGuideline_sFICCIFINAL16092014.pdf> accessed 21 December 2017, pg.1-3



DNA FORENSIC: CONTROVERSY, RELEVANCY AND ADMISSIBILITY

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INTRODUCTION

Discovery of DNA is considered as one of the most important discoveries during 20th century owing to its tremendous impact over science and medicine. The emerging fields in various laws have seriously seen a rise in number of cases where DNA test can be used to determine biological relationship between two persons. DNA stands for deoxyribonucleic acid. It is a strand of identity that a person receives from their ancestors. No two persons can have similar DNA pattern except identical twins.

Prior to use of DNA, identification was heavily based on certain technology named as finger prints, foot prints, blood traces or other evidences that the suspect may have left on the crime spot. The era we are living in now has a lot of scientific benefits and one of the booms out of all the innovations that science has given is DNA test. It has proved really useful in following two cases-

1. To identify criminal from the traces left at crime spot.
2. To trace blood relations in cases of family disputes relating to paternity or maternity.

The DNA test has 99.99 % chance of correct conclusions and is perceived as an objective scientific test which may be difficult for an

individual to refute³⁵⁸. However lack of adequate legislative enactments and constitutional provision such as immunity from Self-incrimination and Right to Privacy have left the use of DNA in cases to be decided solely by the judiciary on the basis of facts and circumstances of each case. Various decisions of the judiciary where use of DNA has been allowed have been subjected to controversy. Evidentiary value of Expert opinion finds its place under section 45 of The Indian Evidence Act. However there is no straight jacket formula for determination of the value given to DNA tests and upto what extent the corroboration is required in cases of DNA test reports. The conclusiveness of DNA test is medically accepted all over the world but its legal relevancy is still not clearly decided in absence of straight legislative enactment. Under The Indian Evidence Act, 1872, every evidence that may be legally relevant might not be logically acceptable and everything that is logically acceptable might not be legally relevant.

Despite the absence of legislation relating to DNA printing, the judiciary has leaned in favour of opting DNA test. In cases where rights of a person are needed to be decided by determining their biological relation with another person, DNA test is the only conclusive way available.

In India, DNA tests have been relied upon by the courts for deciding various family disputes. Recently the use of DNA has taken a pace and a straight legislation is need of the hour to regulate the conduct of judiciary

³⁵⁸ Veeran v. Veeravarmalle & Anr., AIR 2009 Mad. and Harjinder Kaur v. State of Punjab & Ors., 2013 (2) RCR (Criminal) 146.



in relying upon DNA tests. Recently law commission of India submitted its 271st law report with the title “*Human DNA Profiling – A draft Bill for the Use and Regulation of DNA-Based Technology.*” The report was submitted in July 2017 and has not been implemented yet. Since 2015 the Indian legislature is trying to introduce the DNA bill in the Parliament but the efforts has failed miserably. In 2017 again the bill reared its head and centre told Supreme Court that it will introduce the newer version of the bill titled ‘The DNA Based Technology (Use and Regulation) Bill, 2017’. However the results are still awaited. The forensic DNA is becoming ever more common day by day but is it reliable as well or it’s just the false promises of DNA testing? The question is unanswered in terms of evidentiary value, though courts have trusted DNA test results. There are darker sides of the DNA tests as well.

Let’s see the various facets of DNA testing.

LEGISLATIVE ASPECT OF DNA SAMPLING IN THE INDIAN LAW

DNA profiling is the most effective tool for justice in criminal and civil cases. Although, the Courts are using DNA test for determining various issues, but still in the present India, there is no specific legislation or specific guidelines for DNA sampling. The legislatures of India dates back to the age when Britishers ruled over the country. Now, with time, as science is advancing, so are the techniques and so should law. There is a need of a statute dedicated for DNA sampling so that it can provide guidance to the Courts and investigative agencies or

officers for such DNA tests and their admissibility.

DNA test can be used for both civil and criminal suits. DNA tests are widely used in civil suits to identify the biological relation amongst persons for suits of maintenance, inheritance, succession, determining the paternity, etc. In criminal cases, this technique can be used for identifying the offence-doer, especially in cases of rape.

In spite of lack of a uniform legislation, various statutes contain different provisions for such test. Section 112 of the Indian Evidence Act, 1872, states that “The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.” In such cases, introduction of DNA technique and determination of paternity of a child can be very fruitful. DNA test can give finality to such dilemmas related to paternity of the child. In the case of *Nandlal Wasudev Badwaik v. Lata Nandlal Badwaik*³⁵⁹, the Hon’ble Supreme Court held that DNA test prevails over presumption of conclusive proof under Section 112 of Indian Evidence Act.

Section 73 of the Indian Evidence Act, 1872 talks about “comparison of signature, writing or seal”. Handwriting sampling is also viewed as DNA test, and hence, this

³⁵⁹ AIR 2014 SC 932.



provision gives an insight that how indirectly and remotely, DNA testing is envisaged into the Act, even in the times when such technological advancement was absent.

Some provisions of Criminal Procedure Code, 1973, also indicate toward DNA tests. Section 53 of the Criminal Procedure Code talks about “Examination of accused by medical practitioner at the request of police officer”. This section also envisages DNA test of the accused.

Section 53-A was added vide the Code of Criminal Procedure (Amendment) Act, 2005, provides that an accused of rape can be examined by a medical practitioner, which will include taking of bodily substances from the accused for DNA profiling. The explanation to section 53 clarifies the scope of examination, especially with regard to the use of modern and scientific techniques including DNA profiling. The explanation also applies to section 53A and Section 54. Section 53 authorises the police officials to get medical examination of an arrested person done during the course of an investigation by registered medical practitioner. The Explanation provides that “Examination shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case”³⁶⁰. This section specifically talks about DNA profiling of the accused. In the case of Shreemad Jagadguru

Shankaracharya v. State of Karnataka³⁶¹, the Court held that this is section is constitutionally valid.

In Krishna Kumar Malik v State of Haryana³⁶², the Supreme Court in a rape case observed:

“Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Criminal Procedure Code, prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case.”

In Dharam Deo Yadav v. State of Uttar Pradesh³⁶³, the Supreme Court observed that “Crime scene has to be scientifically dealt with without any error. In criminal cases specifically based on circumstantial evidence, forensic science plays a pivotal role, which may assist in establishing the evidence of crime, identifying the suspect, ascertaining the guilt or innocence of the accused. One of the major activities of the investigating officer at the crime scene is to make thorough search for potential evidence that have probative value in the crime..”

³⁶¹ [2014 SCC OnLine Kar 5639.](#)

³⁶² (2011) 7 SCC 130.

³⁶³ 2014 (5) SCC 509.

³⁶⁰ Section 53, Cr.P.C. 1973.



Section 164A of Criminal Procedure Code talks about “Medical examination of the victim of rape”. In this section also, it says that DNA profiling is done of the victim of rape. This practice of DNA Sampling for rape victims is useful for determining the offender of rape under section 375 or 376 (A to E) of Indian Penal Code, 1860. A landmark judgement was delivered by the High Court of Delhi in the case of Delhi Commission for Women v. Delhi Police³⁶⁴, mandating that a SAFE Kit (Sexual Assault Forensic Evidence collection kit) be used by all medical personnel for gathering and preserving physical evidence following sexual assault. Special rooms are to be set up for rape victims to be examined in privacy at every hospital where such cases are received.

Under Section 293 of the Criminal Procedure Code, the reports of certain government scientific experts can be used as evidence in any enquiry, trial or other proceedings under the Criminal Procedure Code and he need not be examined as a witness. But the entry for DNA fingerprinting and diagnostics is not specific in Section 293(4) Criminal Procedure Code. Therefore, the expert has to give evidence in each case where a report has been given.

Section 311-A of Criminal Procedure Code was also added to empower the Magistrate to order a person to give specimen signatures or handwriting.

Similarly, section 45 of the Indian Evidence Act, 1872 talks about expert opinion. Testimony by DNA experts at courtroom helps in determination of various issues at hand by the Courts.

Section 125 of Criminal Procedure Code, 1973, that is, “Order for maintenance of wives, children and parents”. In such cases as well, DNA test is very useful for getting to know the biological relations amongst persons. Delhi High Court set a precedent in the year 2008 for determining paternity in the case of child maintenance suit³⁶⁵. In this case a man filed a suit claiming that he was not the father of the child for whom his wife was claiming maintenance. In this case, DNA test was disallowed by the Trial Court but the Delhi High Court held that “The parentage of the child can only be determined by a DNA test. The liability to pay maintenance under section 125 Criminal Procedure Code can be avoided by the petitioner with respect to this child only if it is established that he is not the biological son of the petitioner”.

Section 7 of the Family Courts Act talks about jurisdiction of the Family Courts. The section empowers the Family Courts to have jurisdiction of Family Court to decide the legitimacy of any person and suit or proceeding of maintenance, which now uses the technique of DNA tests.

DNA test finds its way into the Hindu Marriage Act, 1955 as well. Section 13 of the Act talks about grounds for divorce, which also includes adulterous relationship.

³⁶⁴ W.P(CRL)696/2008.

³⁶⁵ Ravindra v. Sonam (Names are changed for privacy).



To determine, whether there exists an adulterous relationship or not is possible by the way of DNA test. In the case of Dipanwita Roy v. Ronobroto Roy³⁶⁶, the husband alleged his wife of having adulterous relation. The Supreme Court ordered DNA test to determine whether there existed such relationship or not. Hence, it can be said that DNA test may be ordered for proving or disproving adulterous relationship.

Also, in the case of Sharda v. Dharampal³⁶⁷, it was held that DNA test may be ordered in divorce proceedings. The Supreme Court in this case held that “A matrimonial Court has the power to order a person to undergo a medical test, either at the instance of a party or suo motu. Party is not entitled to Constitutional protection under Article 20 of Constitution in civil litigation.”

Cases pertaining to Hindu Succession Act also seeks DNA test as a method for conclusively knowing that who is the natural born child to a person to determine the heir of a person. In the case of Nirmaljit Kaur v. State of Punjab³⁶⁸, the Court held that “DNA test can be used to prove that the child produced before the Court was not the child of the petitioner.”

CONSTITUTIONAL VALIDITY OF DNA TEST

The technique of DNA sampling faces a major challenge from Article 20(3) and Article 21 of the Constitution. Article 20(3) talks about right against self-incrimination,

that is, no person can be compelled to give evidence against him. Article 21 poses a challenge to this technique by DNA test meaning violation of Right to Privacy. There is a conservative approach taken by the Courts in respect of DNA tests.

Let’s see the judicial approach in relation to these tests of fundamental rights possessing a challenge for DNA tests.

- **Self-incrimination of Persons vide Article 20(3) of the Constitution vis-à-vis Admissibility of DNA forensics**

Article 20(3) of the constitution states that “No person accused of any offence shall be compelled to be a witness against himself”. It must be noted that article 20 is a fundamental right guaranteed to the persons by the constitution and not only to the citizens. Use of DNA forensics in various civil and criminal cases has always been debatable in light of this provision of the constitution. Various judicial pronouncements given by the court of law has dealt in length with this controversy. The supreme question is whether giving consent to DNA analysis by own wish or by court’s order could be counted as giving evidence against oneself? Let’s examine this question through various judicial pronouncements.

A judgment rendered by an eleven-Judges Bench of the Supreme Court in State of Bombay v. Kathi Kalu Oghad & Ors.³⁶⁹ dealt with the issue of self- incrimination. The question which arose in front of Supreme Court was that whether fingerprints and handwriting sampling is

³⁶⁶ SLP(C) No.5694 of 2013.

³⁶⁷ AIR 2003 SC 3450.

³⁶⁸ (2005) 8 SLT 755

³⁶⁹ AIR 1961 SC 1808.



against Article 20(3) of the Constitution. The court in this case held that

“The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.”

The Court also observed that:

“When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'. Thus, the Court concluded that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness' as the latter would mean imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.”

In *Smt. Selvi & Ors. v. State of Karnataka*³⁷⁰ a three-Judge Bench of the Supreme Court considered the question of whether involuntary administration of certain scientific techniques like narco-analysis, polygraph examination and Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. The Court held:

“it was observed that the scope of 'testimonial compulsion' is made clear by two premises. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to 'personal testimony' thereby coming within the prohibition contemplated by Article 20(3). In most cases, such 'personal testimony' can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators.”

Later in *Ritesh Sinha v. State of U.P.*³⁷¹ the apex court upheld the decision given in case of *Selvi*³⁷². The same case entertained another question that and in case the said provision is not violated, whether a magistrate, in absence of any statutory provision or inherent power under the provisions of the Criminal Procedure Code has competence to direct a person to be subjected to such a test without his consent.

³⁷⁰ AIR 2010 SC 1974.

³⁷¹ (2013) 2 SCC 357.

³⁷² AIR 2010 SC 1974.



And in case the said provision is not violated, whether a magistrate, in absence of any statutory provision or inherent power under the provisions of the Criminal Procedure Code has competence to direct a person to be subjected to such a test without his consent?

In this context the two judges deciding the case has different opinions. The Hon'ble Justice Ranjana Desai observed:

“Taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.”

Whereas another judge Hon'ble Justice Aftab Alam observed:

“There are, indeed, precedents where the court by the interpretative process has evolved old laws to meet contemporary challenges and has planted into them contents to deal with the demands and the needs of the present that could not be envisaged at the time of the making of the law. But, on the question of compelling the accused to give voice sample, the law must come from the legislature and not through the court process.”

However it is to be noted that due to the difference of opinion in the bench, the matter is pending for consideration before the larger bench.

In *Krishan Kumar Malik v. State of Haryana*³⁷³, the Supreme Court explained

³⁷³ (2011) 7 SCC 130.

that even in the absence of section 53A Cr. P.C., DNA profiling could be permissible under law. The Court observed:

“Now after the incorporation of section 53A in Criminal Procedure Code with effect from 23.06.2006 it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provisions in Cr. P.C., the prosecution could have still resorted to this procedure of getting the DNA test to make it a fool proof case.”

The Courts have persistently held that in case the accused does not want to undergo such tests the Court is at liberty to draw adverse inference under Illustration (h) of section 14 of the Indian Evidence Act.

However, in *Rohit Shekhar v. Narayan Dutt Tiwari & Ors.*³⁷⁴, the Delhi High Court held that “a person can be forced to undertake the test for the reason that the valuable right of the party cannot be taken away by asking the said party to be satisfied with comparatively week adverse inference”.

In *Kanti Devi v. Poshi Ram*³⁷⁵ the Court dealt with the issue of determining the paternity of a child and held:

“The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in

³⁷⁴ 2012 (2) RCR (Cr.) 889.

³⁷⁵ AIR 2001 SC 2226.



law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.”

However, in *Nandlal Basudev Badwaik v. Lata Nandlal Badwaik*³⁷⁶ the Court held that: “Depending on the facts and circumstances of the case, it would be permissible for the Court to direct the DNA examination to determine the veracity of the allegation(s) made in a case. If the direction to hold such a test can be avoided, it should so be avoided. The reason is that the legitimacy of the child should not be put to peril.”

Considering various judicial pronouncement it is clear that judiciary has always leaned in favour of DNA forensics. Invention of DNA has certainly proved to be a milestone in administration of justice. DNA sampling is one of the very few methods of procuring evidence whose outcome is approximately 100% certain. Giving science a space in system of administration of justice will turn out to be speedy and reliable methods for delivering justice and establishing rights of victims or the petitioner. In the wake of immunity from self-incrimination, placing hurdle for DNA profiling would not prove useful for anyone in the long run.

- **Right to privacy vis a vis DNA profiling**

Right to privacy which is envisaged in the Constitution of India under Article 21 as Right to Life and Liberty is a challenge to the upcoming and growing technique of DNA mapping and sampling.

There are several judgments claiming that Right to Privacy is a fundamental right and it should not be infringed, and therefore, due to this Courts have a conservative approach towards DNA test. Courts order DNA test in its ‘eminent need’ and otherwise not.

In *Mn Bhabani Prasad Jena v. Convener Secretary, Orissa State Commission for Women*³⁷⁷, the Supreme Court sketched the approach for courts while directing DNA test. The apex court in the administration of justice observed that

“In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is

³⁷⁶ AIR 2014 SC 932.

³⁷⁷ AIR 2010 SC 2851.



apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made.”

The Supreme Court, in the case of Goutam Kundu v. State of West Bengal³⁷⁸ held that “Courts in India cannot order blood test and DNA test as a matter of ordinary course. There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.”

Also, an important observation was made by the Court in this case that “The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding the child illegitimate and the mother an unchaste woman?”

One of the most important authorities on the question of whether a party to divorce proceedings be compelled for medical examination is the case of Sharda v. Dharmpal³⁷⁹. Subsequent to the Goutam Kundu’s case, a full bench of the Supreme Court in Sharda v Dharmpal³⁸⁰ considered the power of a matrimonial court to order such test and clarified that Goutam

Kundu’s³⁸¹ case is not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. The Court after hefty discussion summed up three significant conclusions,

1. A matrimonial court has the power to order a person to undergo medical test.
2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

However, the Court should exercise such a power only if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

The three-judge bench of the Supreme Court also observed:

“If for arriving at the satisfaction of the Court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.”

In this case it was also held that “if everyone started using Article 21 as a shield to protect themselves from going through the DNA

³⁷⁸ AIR 1993 SC 2295.

³⁷⁹ AIR 2003 SC 3450.

³⁸⁰ AIR 2003 SC 3450.

³⁸¹ AIR 1993 SC 2295.



test then it will be impossible to arrive at a decision.”

In the leading case of *Nandlal Basudev Badwaik v. Lata Nandlal Badwaik*³⁸², the Court held that depending on the facts and circumstances of the case, it would be permissible for the Court to direct the DNA examination to determine the veracity of the allegation(s) made in a case. If the direction to hold such a test can be avoided, it should so be avoided. The reason is that the legitimacy of the child should not be put to peril.

In the case of *Shri Rohit Shekhar v. Shri N.D. Tiwari*³⁸³, the Delhi High Court said that DNA test is not against right to privacy as the reports would be in sealed envelope and the results undisclosed. In the guise of right to privacy, the young man should not be denied access to justice.

The Delhi High Court, in the case of *Kanchan Bedi v. Shri Gurpreet Singh*³⁸⁴ also, held that DNA testing does not amount to violation of any right.

In the case of *Naveen Krishna Bothireddy v. State of Telangana*³⁸⁵ also, the Andhra Pradesh High Court upheld the order passed by the trial court directing the accused to undergo medical tests/ potency test or erectile dysfunction (ED) test, **observing that such tests do not violate the mandate of Article 20(3) and Article 21 of the Constitution.**

In the cases of *Andhra Sugar v. State of Andhra Pradesh*³⁸⁶, *Siddheshwar Sehkar Sakhar Karkhana Ltd. v. CIT Kolhapur & Ors*³⁸⁷ and *Harjinder Kaur v. State of Punjab*³⁸⁸, the Courts observed that “There can be no dispute with regard to the settled legal proposition that statutory provisions and binding legal principles cannot constitute “compulsion” as to violate the basic or constitutional rights of any person. Enforcement of such principles is itself a constitutional obligation”.

Hence, it can be safely said that Courts are adopting the view that DNA test are not against any fundamental right given in the Constitution and that DNA test must be allowed according to facts and circumstances of the case to meet the ends of justice.

With Supreme Court’s recent judgement establishing right to privacy as fundamental right guaranteed under Article 21 of the constitution vide case of *Justice K.S. Puttaswamy (retd.), v. Union of India*, use of DNA forensics will be a subject to debates again. However the judicial intent has always been to favour DNA profiling and the decisions tend to lean in favour of relying upon the expert reports in cases of DNA tests.

The controversy will continue till the time a straight law is not formulated by the legislature. Though attempts have been made by the legislature but final result of those efforts is still hidden in the womb of time and a codified law is still awaited.

³⁸² AIR 2014 SC 932.

³⁸³ (2012) 12 SCC 554.

³⁸⁴ AIR 2003 Delhi 446.

³⁸⁵ 2017 (1) ALT (CrL.) 422 (A.P.).

³⁸⁶ AIR 1968 SC 599.

³⁸⁷ AIR 2004 SC 4716.

³⁸⁸ CrL. Misc. No. M-31938 of 2011.



NEED FOR SPECIAL LAW

Use of DNA reports as evidence in civil or criminal cases is passed through 3 fold litmus test firstly, what is the constitutional validity of such tests?, What is the evidentiary value of forensic information obtained from experts? And in absence of any concrete legislation what judicial stand must be taken by the courts regarding admissibility of DNA forensics?

The law commission in its 271st report has opined that merely amending the Code of Criminal Procedure may not serve the purpose but what is required is a conclusive law which would regulate the whole process of DNA forensics admissibility with well delineated standards, quality controls and quality assurance systems to ensure the credibility of the DNA testing, restricting it to the purposes laid down in the Act.

271st Law Commission Report: Human DNA Profiling – A draft Bill for the Use and Regulation of DNA Based Technology: Analysis

The bill submitted by The Law commission of India contains 88 page and the bill has been formulated considering the need of guidelines for the use of DNA forensic as evidence in court of law. Apart from that the bill advocates for setting up of DNA Data Bank. The bill deals in length various related issues such as ethical framework, International human right laws, right to privacy etc.

Provisions:

Number of recommendations has been made by the law commission in the bill. Out of all

those the important ones have been discussed below.

1. **Constitution of DNA Profiling Board:** The board has been empowered with various functions. The board shall have the responsibility of laying down procedures and standards for establishment of DNA laboratories and granting accreditation to such laboratories and advising the concerned Ministries / Departments of the Central and State Governments on issues relating to DNA laboratories. The Board shall be authorized to supervise, monitor, inspect and assess the laboratories. The Board will also frame guidelines for training of the Police officers and other investigating agencies dealing with DNA related matters. Advising on all ethical and human rights issues relating to DNA testing in consonance with international guidelines will be another function of the Board.
2. **Use of DNA profiling:** The use of DNA profiling shall be strictly limited for identification of a person and the same shall not be used to extract any other information.
3. **Establishment of National And Regional DNA Databanks:** There shall be national and regional data banks for the states and the same shall be established by the Central Government.
4. **Assisting kith and kins:** Provisions have been made in the bill for assisting the kith and kins of missing person on the basis of one's bodily sample and substances.
5. **Rights available to under trials:** In case an under trail satisfies the court that the previous DNA sample(s)/bodily substance(s) stood contaminated and hence could not be relied upon in the instant case, the court may order for



another DNA test at the request of under trial.

6. **Confidentiality:** The bill has provisions for maintenance of strict confidentiality with regard to storing of DNA profiles and their use.
7. **Punishment:** The violators of the provisions of the bill shall be liable for punishment in form of imprisonment, which may extend up to three years and shall also be liable for fine which may extend up to ₹2 Lakhs.

CONCLUSION

DNA Profiling is an accurate technique for identification of victim and accused, investigation of crimes, identification of missing persons and human remains, and for medical research purpose. Many countries have adopted this technique to reach to meet the ends of justice.

DNA Profiling and its use thereof involve various legal and ethical issues. Various concerns are raised by the common man and apprehensions exist in the minds of the common man about its misuse which unless protected may result in disclosure of personal information, such as health related data capable of being misused by persons having prejudicial interests, adversely affecting the privacy of the person

DNA testing has both positive and negative effects of it. On one hand, it can prove to be a very efficacious technique for administration and service of justice. While on the other hand, it can result into disastrous consequences, especially in matrimonial and family disputes. On one hand, it can help victims attain justice; while on the other hand, it can make lives of the

people miserable. As it was rightly observed in the case of *Goutam Kundu v. State of West Bengal*³⁸⁹ that “The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding the child illegitimate and the mother an unchaste woman?” Such type of results will surely destroy the reputation and the peace of any family.

Therefore, both the sides of this technique should be kept in view. Everything which is a boon can turn into bane if not used properly. In a nut shell a legislative enactment is immediate requirement in this context and later on its interpretation is in the hands of the judiciary as to technique should be opted for administration of justice.

³⁸⁹ AIR 1993 SC 2295.



MARITAL RAPE

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INTRODUCTION

Marital rape is a widely debated term which means sexual intercourse with one's own spouse without their consent. Majority of the people are reluctant to accept the view of marital rape as, it is considered that the institution of marriage gives unlimited right to the husband to have sexual intercourse with his wife and such act cannot be considered "rape". Marital rape has come to light since the late twentieth century. Most of the countries have criminalized marital rape but some still refuse the existence of the concept of marital rape. The countries which accept the view of marital rape fail in execution of such laws mainly because of non acceptance of the society for example marital rape was criminalized in India in 1990 but till date only two males have been prosecuted for the same.

The idea of marital rape cannot be backed by historical support as it is believed that a husband cannot be guilty of the offence of rape, as at the time of marriage women gives her husband right to have sexual intercourse with her and sexual intercourse within matrimonial relations cannot be considered rape. Also it is believed that by marriage a women gives her husband complete control over her including her body. In the past rape was considered to be an offence against honor and reputation and not against a particular person. It was only after 1990's that laws and statutes recognized sexual violence crime against and individual.

From 19th century the feminist movements across the world started challenging the idea of control of a husband in the domestic relationship and his unlimited right to have sexual intercourse with his wife even if it is without her consent. These movement aimed to provide women right over their own bodies and fertility. It was the contribution of these movements that, people started viewing the exception of marital rape as violating the human rights. These feminist movements also lead to criminalization of marital rape in various parts of the world.

Despite these efforts not all countries have criminalized marital rape. While some have completely criminalized marital rape, some explicitly exempt spouse from the offence of rape and consider matrimonial relationship as an exception to rape and laws of some countries remain silent over the issue. Even though marital rape is criminalized in many a countries the society fails to accept marital rape and very limited cases are reported worldwide because traditionally rape as an offence could be committed only outside marriage. These conflicting views about marital rape make it a very controversial topic and worsening the condition of the victims who suffer from a marital rape and other coercive acts in a domestic relationship.

MARITAL RAPE IN INDIAN CONTEXT:

In the present scenario Marital Rape is not criminalized in India. Although most of the countries have criminalized, but surprisingly there are no laws which protect women from forced sexual intercourse in marriage expect for during judicial separation and exemption 2 in Section 375 of IPC which particularly rejects the act of sexual violence in the case



of rape in marriage. But exemption 2 in section 375 of IPC also states that if the wife is a minor or below 15 years of age Then any sexual intercourse done by the men with his minor wife with or without her consent to commit to rape. Exemption 2 to section 375 of IPC was very important in order restrict men from taking advantage of their martial rights before the age of maturity. Well this exemption also states that no man can be held obligated for assaulting his own significant other, when she is over 18 years old. Exemption 2 to Section 375 of IPC is plainly violative of Article 14 of the Indian Constitution which is equality before law as it has a tendency to victimize married women.

In *Bishnudayal v. State of Bihar*³⁹⁰, where the casualty, a young lady of 13 or 14 years old, who was sent by her father with the in-laws of his elder daughter's husband to take care for her elder sister for quite a while, was coercively 'married' to the litigant and who had sex with her, the accused was held subject for rape under sec 376 of IPC.

However under section 376B of IPC whoever, has sexual intercourse with one's own spouse who is living separately with or without decree of separation, without her consent is deserving of 2 to 7 years imprisonment.

In *RTI Foundation v. Union of India*.³⁹¹The Central Government submitted to Hon'ble High Court of Delhi that Criminalizing Marital Rape may destabilize foundation of marriage. Central Government additionally presented that simply erasing Exception 2 will not the slightest bit fill any helpful need

as a man is said to confer 'rape' as defined under Section 375 of IPC can't be the same on account of conjugal rape. On the off chance that every single sexual act by a man with his possess spouse will fit the bill to be conjugal rape, at that point the judgment in the matter of whether it is a conjugal rape or not will independently rest with the wife. The inquiry is the thing that confirmations the Courts will depend upon in such conditions as there can be no enduring proof if there should be an occurrence of sexual acts between a man and his own particular spouse.

In *Independent Thought V. Union of India*³⁹² The Hon'ble Supreme Court of India with two judge bench consisting of Justices Madan Lokur and Deepak Gupta on eleventh October 2017, In perspective of the above discussion said that sexual intercourse with a minor wife i.e below 18 years will come under the definition of rape. Supreme court accepted the petitioner's argument and considered that Exception 2 to Section 375 IPC in so far as it identifies with a young lady below 18 years is liable to be struck down on the following grounds:-

- (I) It is subjective and violates of the privileges of the young girl and not reasonable, just and sensible and, hence, violates of Article 14, 15 and 21 of the Constitution of India;
- (ii) It is unfair and violates of Article 14 of the Constitution of India and;
- (iii) It is conflicting with the arrangements of POCSO, which must win.

Subsequently, Exception 2 to Section 375

³⁹⁰ AIR 1981 S.C 39 (INDIA)

³⁹¹ W.P.(C) NO.248/2015 (INDIA)

³⁹² W.P. (C) NO.382 of 2017



IPC is perused down as follows:

"Sex or sexual acts by a man with his own spouse, the wife not being 18 years, isn't rape". It is, in any case, clarified that this judgment will have forthcoming impact. It is additionally clarified that Section 198(6) of the Code will apply to instances of assault of "spouses" below 18 years, and discernment can be taken just as per the arrangements of Section 198(6) of the Code. At the cost of repetition, it is repeated that nothing said in this judgment might be taken to be a perception one way or the other with respect to the issue of "conjugal rape".

WOMEN AND MARITAL RAPE

Research with women, who have been raped by their partners uncovers the seriousness of this type of brutality against women. Not exclusively do many women encounter rape in their marital connections, yet women who are raped by their partners are probably going to be raped various times through the span of their relationships. Women who have been assaulted by their spouses normally encounter an extensive variety of violence that includes verbal abuse, battering, strikes with weapons, and forced intercourse with other individuals. Research demonstrates that between 20 percent and 70 percent of battered ladies encounter sexual violence with their partners (Bergen 1996; Campbell 1989; Pense and Paymar 1993). By far most of ladies in Bergen's (1996) and Finkelhor and Yllo's (1985) thinks about experienced both battering and rape. In "battering rapes" women encounter physical abuse and in addition to sexual abuse various number of ways. A few women are battered and raped all the while, while others

encounter physical violence and afterward are raped when there partner needs to "make up" (Bergen 1996). A few women' encounters are described as "twisted" or "over the top" rape when the savagery includes torment, unreasonable sexual acts, and, every now and again, the utilization of smut (Bergen 1996; Finkelhor and Yllo 1985). Around 25 percent of Bergen's (1996) example detailed no less than one experience of perverted sexual savagery with their accomplices.

It ought to be noticed that not all ladies who are raped by their partners encounter physical abuse with sexual abuse (Bergen 1996; Finkelhor and Yllo 1985). In what Finkelhor and Yllo (1985) have called "force only rapes," women are compelled to have intercourse without wanting to however their encounters are not described by extreme physical brutality. Twenty-five percent of the women in Bergen's (1996) example experienced power just assault, as completed 40 percent of women in Finkelhor and Yllo's (1985) think about. In Russell's (1990) think about, 4 percent of the women who had been hitched had been assaulted however not battered by their accomplices. It is important to perceive conjugal rape as an unmistakable type of savagery and think about the different impacts of this kind of violence against women.

Women who are raped by their partners ordinarily encounter an extensive variety of physical and emotional impacts from the violence. As demonstrated above, ladies who are raped by their spouses are frequently physically assaulted, and basic wounds incorporate gashes, broken bones, torn muscles, and bruised eyes. Research



shows that when contrasted and women attacked by different culprits, ladies who are raped by their accomplices report more physical wounds. Women who are assaulted by their spouses likewise usually encounter gynaecological outcomes because of the sexual violence, including vaginal and anal tearing, unsuccessful labours, stillbirths, urinary tract diseases, and bladder contaminations.

Research demonstrates that the emotional results of being raped by one's significant other can likewise be very extreme. Women who are raped by their partners, much like ladies raped by different sorts of aggressors, every now and again experience the ill effects of depression, posttraumatic stress issue, serious dread, resting issues, and stun (Bergen 1996; Riggs, Kilpatrick, and Resnick 1992; Stermac, Del Bove, and Addison 2001). Long haul impacts can incorporate sexual brokenness, dietary problems, poor self-perception, and gloom (Bergen 1996; Frieze 1983; Ullman and Siegel 1993). At the point when contrasted and different survivors of assault, examine demonstrates that being raped by one's life partner isn't less awful than being raped by another culprit (Bennice and Resick 2003). To be sure, it might be significantly more horrendous given that conjugal rape survivors regularly encounter numerous strikes and that the attacks are executed by somebody whom they know and trust (Bergen 1996; Kilpatrick et al. 1988). A few examinations have likewise endeavoured to inspect the effect of sexual violence contrasted and physical savagery on survivors of conjugal rape. At the point when contrasted women who have been battered by their partners, women who encounter sexual and physical abuse

encounter larger amounts of wretchedness, tension, fear, and sexual brokenness, and poorer confidence (Bennice and Resick 2003; Campbell 1989). In this manner, unmistakably being raped by one's partner has genuine passionate and physical outcomes for the numerous ladies who encounter this type of violence.

SUGGESTIONS:

1. The exemption for martial rape be expelled. Matrimonial relationship should not be considered as a license to commit rape, because the offence of rape is an offence regardless of the fact by whom it is committed. From the above discussions it can be clearly said that marital rape is as grave as rape done by other person if not more. The emotional and physical harm done in marital rape is much more grave and it has long lasting effect due to its continuous nature. Considering these facts, marriage should not be considered as an exception in the offence of rape.

2. The law should indicate that:

i. In our legal system, conjugal or other relation between victim and offender should not be considered as a defence against the offences like rape or sexual violation. There should be proper laws and statues which deal with such offences.

ii. The relationship between the offender and the victim should not be a ground to make a conclusion that the victim has consented for sexual relationship, i.e by entering into a matrimonial relationship the women does not give complete control over her body to her husband, and the law should come out of these traditional thought process that by entering into a matrimonial alliance the



husband has complete control over his wife and has a right to do whatever he want.

iii. Under exception 2 of IPC ³⁹³the marital rape with a minor wife is considered an offence of rape but forced sexual intercourse with a major wife is not given the same status, this distinction on the basis of age is unjustified and unreasonable because the age should not be a criteria to make an exception if a major wife is victim of forced intercourse, against her will that has the same effect on a women's conscious weather she is a minor or not.

3. The outlook of the society towards such offences needs serious changes. The society needs to come out of their stereotyped and traditional thinking and accept the nature and existence of marital rape. It is due to the structure and thinking of our society that the victim is forced to live a exploitive and disgraceful life. Most of the cases of marital rape are never reported due to the indifferent nature of our society.

CONCLUSION

“ Indian law ignores the fact that a major wife is women first than a wife and when a women says NO it means NO, regardless of the fact the she is a wife and is above 18 years of age”

It is a very disgraceful for a country like India who in all the other fields competes with all the developed nations of the world, fails to come out of its cocoon of traditional thinking which give a male supreme power

and control over female, it does not recognizes that a women weather married or not suffers the same if not more mental trauma, physical torture and emotional drainage due to forced sexual intercourse even if it is done by her own husband in her own house. In fact the consequence of a marital rape are more severe as it is done by her husband continuously. Moreover the society we live in does not even considers marital rape because according to our society it a husbands right to do whatever he wants with his wife regardless of her opinion. Our so called modernise society which talks about women empowerment on one hand fails to recognise the rights of a married woman on the other hand just because of the fact that she is married. While entering into a matrimonial alliance a women does not give consent of this unreasonable distinction which is created by our law and society.

It is high time that our society and law makers take some serious steps to prevent marital rape and make provisions for such offenders who commit such offences. The silence of law and society encourages these offenders and forces the victims to live a disgraceful life throughout their relationship.

³⁹³Bhattacharyya, T. (2010). *The Indian penal code* (6th ed., pp. 360-361). ALLAHBAD, INDIAL: CENTRAL LAW AGENCY.



COURT SUPPORT FOR ARBITRATION IN ITS THREE STAGES: BEFORE, DURING AND POST RENDERING OF THE ARBITRAL AWARD

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Introduction

Arbitration is a method of settlement of disputes through third person called arbitrator without having recourse to a court of law. “An independent and efficient judicial system is one of the basic structures of our constitution.. It is our constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases”³⁹⁴ Fair, economic, rational and speedy deliverance of justice is the endeavour of every legal system. However, at present, there is a growing crisis of judicial delay and arrears before the Courts. Arbitration is one of the alternatives to remedy the situation.

The main objective of the Arbitration and Conciliation Act 1996 is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of courts in the arbitral process and to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings in settlement of disputes. Section 5 of the Act brings out clearly the object of the New Act

³⁹⁴*Brij Mohan Lal V. Union of India & Others* 2002 4 Scale 433

namely that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the Court’s intervention should be minimal.³⁹⁵

Notwithstanding the fact that the act aims at finding speedy disposal of cases in economic and commercial transactions, such speedy disposal shall not be at the cost of Justice. The Act also prudentially contemplated to enable the court to intervene whenever justice appears to be trampled for the purpose of targeting speedy disposal of cases. Supreme Court and High Courts being courts of justice are vested with the power to render justice even in economic and commercial transactions in matters that come under its purview of arbitration. The intervention of the court implies justice is done. Intervention of the Judiciary may appear to be delaying the case, but judicial consideration of commercial disputes implies justice is done in the proper sense. Speedy disposal of the case is one aspect but justice is an important aspect of jurisprudence. Speedy justice is the blend of both and it is the need of the hour in the matters related to economic and commercial transactions including arbitration matters.

Judicial Intervention Before Arbitration

The general principle pertaining to the extent of judicial intervention is emphasised in Section 5 of the Arbitration and

³⁹⁵*P. Anand Gajapathi Raju V. P.V.G. Raju* AIR 2000 SC 1886



Conciliation Act 1996³⁹⁶. It is analogous to Article 5 of UNCITRAL Model Law as well as the general principle as stated in Part 1 of the English Arbitration Act 1996. Section 5 is a new section as there was no analogous provision in the old Act of 1940.

It is a clear recognition of the need to limit and define the Court's role in arbitration. Party Autonomy and the independence and authority of arbitrators are the hallmarks of this Act.

The Supreme Court in *Surya DevRai V. Ram ChanderRai*³⁹⁷ had observed as follows: "The parameters for exercise of jurisdiction under Article 226 or 227 of the Constitution cannot be tied down in a strait jacket formula. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where 'a stitch in time would save nine'. Thus, the power is there but the exercise is discretionary which will be governed solely

³⁹⁶ Section 5: Extent of Judicial Intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

³⁹⁷ *Surya DevRai V. Ram ChanderRai*, AIR 2003 SC 3044

by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

Function of Judicial Authority begins with the application to stay court proceedings, which have been brought in contravention of the arbitration agreement. The court has no power to compel arbitration save indirectly by refusing the claimant a remedy through the courts, so that if he wants to pursue his claim he can only do so by arbitration.

A party to a judicial proceeding can seek a reference of the dispute to arbitration by virtue of invoking Sections 8 of the Arbitration and Conciliation Act, 1996³⁹⁸, Sections 45³⁹⁹ and 54⁴⁰⁰ of the Arbitration

³⁹⁸ **Section 8: Power to refer parties to arbitration where there is an arbitration agreement:-**

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

³⁹⁹ **Section 45. Power of Judicial Authority to refer parties to arbitration .—**

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a Judicial Authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."



and Conciliation Act, 1996 depending upon the context therein.⁴⁰¹ Section 8 relates to domestic arbitration coming under Part-I of the Act while Sections 45 and 54 of this Act relate to International Commercial Arbitration under the New York Convention Awards and the Geneva Convention Awards respectively dealt with under Part-II of the Act.

POWER TO REFER PARTIES TO ARBITRATION

Under Section 8, power is conferred upon the Judicial Authority to refer the parties to the dispute to arbitration, in the circumstances, namely, where:

1. an action is brought, before such judicial authority;
2. the matter brought is subject matter of an Arbitration Agreement;
3. a party applies while submitting his first statement on the substance for reference;
4. the application so filed by a party is accompanied by original arbitration agreement or its certified copy.

⁴⁰⁰Section 54. Power of Judicial Authority to refer parties to arbitration .—

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a Judicial Authority, on being seized of a dispute regarding a contract made between persons to whom Section 53 applies and including an Arbitration Agreement, whether referring to present or future differences, which is valid under that Section and capable of being carried into effect, shall refer the parties on the Application of either of them or any person claiming through or under him to the decision of the Arbitrators and such reference shall not prejudice the competence of the Judicial Authority in case the agreement or the arbitration cannot proceed or becomes inoperative.”

⁴⁰¹ This extract is taken from *Kotak Mahindra Bank Ltd. V. Sundaram Brake Lining Ltd.*, (2008) 4 CTC 1

By the consent of the parties, the matter may be referred to arbitration even after the submission of the first statement of the party before the judicial authority and conversely by implication, if a party objects to the application, such a reference cannot be made⁴⁰²

The requirement that the judicial authority shall refer the parties to arbitration is mandatory ⁴⁰³ . This section has been described as one of the pillars of this Act⁴⁰⁴.

ANALOGOUS PROVISIONS

In this section, the legislature has not adopted the phrase ‘unless satisfied that the agreement is null and void, inoperative or incapable of being performed’, from Article 8 (1) of the Model Law. Consequently the judicial authority has no jurisdiction to determine the question of existence and validity’ of the arbitration agreement⁴⁰⁵. It has been left to the jurisdiction of the tribunal to be decided under section 16 which provides ‘the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement’.

COMPARATIVE ANALYSIS

The three provisions of section 8, 45 and 54 of the 1996 Act it is seen that Section 8, 45 and 54 of the Act has been inserted by the

⁴⁰²*Sudarshan Chopra V. Company Law Board* 2004 (2) Arb LR 241, 259 (P & H) (DB)

⁴⁰³*Hindustan Petroleum Corporation Ltd., V. Pink City Midway Petroleums*, (2003) 6 SCC 503

⁴⁰⁴ Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, second edn, 2005 pg 88 para 2079

⁴⁰⁵*Renusagar Power Co Ltd., V. General Electric Co* (1984) 4 SCC 679



Law Makers in such a fashion having its own distinct and different features in the area of its operation, scope and ambit. From the overall comparative analysis of these three provisions the following distinctions would emerge⁴⁰⁶.

Part II of the 1996 Act contains a provision for approaching the Court. It is reiterated that *Non obstante* clause are the opening words in Sections 45 and 54. It is the foremost objective and the purpose upon the Judicial Authority while entertaining the Application at the instance of a party which alleges that there exists an Arbitration Agreement to refer the parties to arbitration. But however discretionary power is conferred to the Judicial Authority not to refer the parties to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed. Obviously such a leverage conferred upon the Judicial Authority in the later part of Section 45 is absent in Section 8.

Court at the instance of a party to arbitral proceedings.

This section details out the nature of interim measures of protection that can be obtained as an order from the court. These orders are aimed at preserving assets, protecting the position of the parties, maintaining status quo, and procuring evidence. This power of the court is mandatory. The parties cannot avoid the provisions of this Act by agreeing otherwise. These powers are to be exercised strictly in accordance with the provisions of the statute in respect of the matters listed in it. Indian law on arbitration signifies the importance of minimal judicial interference. Furthermore, these powers are not available where the seat of arbitration is outside India or the place has not been designated or determined.

This Section is invoked only as an interim measures pending commencement in course of the arbitral proceedings. It is not a

Judicial Intervention During Arbitration

Intervention by the Court at the instance of a party to arbitral proceedings is provided in Section 9 of the Arbitration and Conciliation Act 1996⁴⁰⁷ provides for intervention by the

- a. the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement.
- b. Securing the amount in dispute in the arbitration.
- c. The detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land, or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
- d. Interim injunction or the appointment of a receiver.
- e. Such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power of making orders as it has for the purpose of, and in relation to, any proceedings before it.

⁴⁰⁶ *Kotak Mahindra Bank Ltd V. Sundaram Brake Lining Ltd., (2008) 4 CTC 1*

⁴⁰⁷ **Section 9: Interim measures etc. by Court** – A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it becomes decree of a Court, apply to a Court (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters namely,



substantive relief⁴⁰⁸. An application under section 9 under the scheme of the Act is not a suit. The relief sought for in an application under section 9 of the Act is neither in a suit nor a right arising from a contract. The court under section 9 of this Act only formulates interim measures so as to protect rights under adjudication before the arbitral tribunal from being frustrated⁴⁰⁹. Obviously it is not within the scope of this section to inquire into the claim and the counter claim made by both the parties in regard to the custody of the articles beyond what has been admitted by the respondent.

“A PARTY MAY APPLY”

“The right conferred by section 9 of the Act cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court must possess is of being a ‘party’ to an arbitration agreement. This has relevance only to his locus standi as an applicant. The court under section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated”⁴¹⁰

TERRITORIAL JURISDICTION

As far as the court having territorial jurisdiction is concerned the “Court” mentioned in Section 9 refers to the Court as defined in Section 2(1)(e) of the Arbitration and Conciliation Act 1996 which reads: “Court” means the Principal Civil Court of Original Jurisdiction in a District, and

includes the High Court in exercise of its Ordinary Original Civil Jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes”.

STAGE

A court can make appropriate interim measures specified in this Section before or during arbitral proceeding or at any time after the making of the award but before the same is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996⁴¹¹. This contemplates three situations for making the application (i) after entering into the contract up to the commencement of arbitral proceedings. (ii) during the arbitration proceedings up to the termination of the mandate of the arbitrator; and (iii) at any time between the making and enforcement of the arbitral award in accordance with Section 36 of the Act⁴¹².

GENERAL PRINCIPLES FOR APPOINTMENT OF RECEIVER

General principles for grant of interim injunction are laid down in Order 39 Rules 1 and 2 read with Section 151 and for appointment of receiver in Order 40 Rule 1 of Civil Procedure Code 1908. Appointment of guardian for a minor or a person of unsound mind is regulated by Order 32 of the Civil Procedure Code. The principles

⁴⁰⁸ *Liverpool and London Steamship Protection and indemnity Association Ltd., V Arabian Tankers Company* 2004 (1) RAJ 311 (Bom)

⁴⁰⁹ *Firm Ashoka Traders V. Gurumukh Das Saluja* 2004 (3) SCC 155

⁴¹⁰ *Ibid.*

⁴¹¹ *Sundaram Finance Ltd., Rep. By The Assistant Manager (Legal) V. M.K. Kurian* 2006 (1) RAJ 493(Mad)

⁴¹² *Globe Cogeneration Power Ltd., V. Sri Hiranyakeshi Sahakari Sakkere Karthane Nymat Sanke shwar*, 2004 (4) RAJ 263 (Kar)



incorporated in the CPC will mutatis mutadis apply to the proceedings under this Section also⁴¹³.

APPOINTMENT OF A GUARDIAN

The appointment of a guardian is for the limited purposes (minor or person of unsound mind) of the arbitral proceedings. The object for appointment is to ensure that the interest does not suffer and that he is properly represented.

INTERIM MEASURE OF PROTECTION

The Court cannot adjudicate or decide any issue related thereto on the merits of the disputes. The powers of Court for passing orders with respect to interim measures specified in the Section only is to protect the rights of the party pending adjudication of its claim in the arbitral proceedings.

This section provides the following interim measures of protection.

1. Preservation, custody and sale of goods.
2. Securing the amount in dispute.
3. Detention and preservation of property.
4. Interim injunction or appointment of a receiver and
5. Just and convenient: Pre award attachment.

RULES COMMITTEE

Rules Committee for framing of rules is to be emphasized. In the case of *Hinduja Leyland Finance Limited Rep by its legal manager R. Kumaran V. Jaffer Khan and others*⁴¹⁴ while dealing with the question to

be determined in those cases Hon'ble Court had an occasion to consider another aspect which calls for our attention. Hon'ble Court observed that "...Section 82 of the 1996 Act gives the High Court power to make rules consistent with the Act.

It would be helpful if such rules deal with the procedure to be followed by the Courts while exercising jurisdiction under Section 9 of the Act. The rules may provide for the manner in which the application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the Courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory disposal of arbitration cases.

Judicial Intervention After Arbitration

A party who is discontent with an arbitral award shall proceed to challenge the award by preferring an application for its setting aside arbitral award.⁴¹⁵ Section 34 of the Act

5.42013 Coram Hon'ble Mr. Justice Vinod Kumar Sharma

⁴¹⁵Section 34 of the Arbitration and Conciliation Act 1996: Application for Setting Aside

Arbitral Award (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if –

(a) the party making the application furnishes proof that –

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it

⁴¹³ *Right Approach Group Ltd., V. M/s. Rosoboroneport* 2004 (2) RAJ 484 (Del) *M/s. Global Company V. M/s. National Fertilizers Ltd.*, AIR 1998 Del 397

⁴¹⁴ *Hinduja Leyland Finance Limited V. Jaffer Khan and others* , 2013(2) LW 401, Judgement dated



or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration :Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation : Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal :

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so request by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral

1996 carves out the permissible grounds only upon which the award can be subject to challenge. The Court does not sit in appeal over any award⁴¹⁶. The Tribunal under the pretext of exercising its power cannot travel beyond terms of reference.

DOMESTIC AWARD AND FOREIGN AWARD

Any arbitration conducted in India or enforcement of award there under (whether domestic or international) is governed by Part I while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the Act. The provisions of Part II of the Act give effect to the New York Convention under Chapter I and the Geneva Convention under Chapter II.

There are very limited grounds for setting aside the domestic arbitral award, which are as follows: -

1. A party to the arbitration agreement was under some incapacity.
2. The arbitration agreement is not valid under the law.
3. The applicant that is the party making the application was not given proper notice of appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
4. The arbitral award deals with matters outside the scope of submission or reference to arbitration.

proceedings or to take such take action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

⁴¹⁶ *P.R. Shah, Shres and Stock Broker (P) Ltd., V.B.H.H. Securities (P) Ltd.*, AIR 2012 SC 1866



5. The constitution of the arbitral tribunal or the procedure of arbitration was not as per agreement of the parties.
6. The subject matter of dispute is not capable of settlement by arbitration.
7. The arbitral award is in conflict with the public policy of India.
8. The award is founded on matters relating to conciliation proceedings between the parties, which are confidential in law or is based on admissions, suggestions or proposals made in conciliation for an attempted settlement of dispute.

Limited grounds for refusing enforcement of foreign award are

1. Incapacity that a party to the arbitration agreement was under the law applicable to him under some incapacity⁴¹⁷,
2. invalid arbitration agreement that the arbitration agreement was invalid under the law to which the parties subjected it, or failing any indication thereon, under the law of the country where the award was made⁴¹⁸
3. Due process that a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case⁴¹⁹
4. Jurisdictional defect that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration. Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award

which contains decisions on matters submitted to arbitration may be enforced.⁴²⁰

5. Composition of the tribunal and procedure that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, with the law of the country where the arbitration took place⁴²¹.

6. Ineffective award that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which, it was made

8. Ex officio court jurisdiction may refuse to enforce a foreign award if it finds that that award is in respect of a matter which is not capable of settlement by arbitration under the laws of India⁴²³ and that the enforcement of foreign award would be contrary to public policy of India⁴²⁴. The court may decide these two issues suo motto.

Section 35 of this Act provides that a domestic award shall be final and binding on the parties and persons claiming under them respectively. While section 36 provides that after the expiry of the prescribed time, the award shall be enforceable under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the court. Section 36 cautions that enforcement is available only

⁴¹⁷ Section 48 (1) (a)

⁴¹⁸ Ibid.

⁴¹⁹ Section 48 (1) (b)

⁴²⁰ Section 48 (1) (c)

⁴²¹ Section 48 (1) (d)

⁴²² Section 48 (1) (e)

⁴²³ Section 48 (1) (a)

⁴²⁴ Section 48 (1) (b)



after the expiry of the time for making an application to set aside the arbitration award under section 34 has expired or when such application having been made stands refused. In case amendment of award is called for in a given case three months is provided from the date on which the application prescribed under section 33 has been made and further discretion has been given to the court to extend the time under section 33 for correction.

GROUND FOR SETTING ASIDE DOMESTIC AWARDS

Challenge to an arbitrator can be made on the grounds of lack of independence or impartiality or lack of qualification as provided under Section 13 of the Act which is corresponding to Article 13 of the Model Law. Initially the challenge to an arbitrator ought to be raised before the arbitral tribunal itself. If the challenge is rejected by the tribunal then it is open for the tribunal to continue with the arbitral proceedings and make an award. Then the only recourse for the party challenging the arbitrator is to make an application for setting aside the arbitral award under Section 34 of the Act raising the same ground. This is corresponding to Article 34 of the Model Law. Therefore the occasion for the party to resort to court is only at the post award stage.

Section 16 of the Act provides that the arbitral tribunal can decide as to the preliminary objection to rule on its jurisdiction and conferred with jurisdiction to decide the dispute as to the existence or validity of the arbitration agreement. If the arbitral tribunal negatives any objection in the case where it rejects any objection as to

its jurisdiction, the arbitral tribunal as usually can proceed to conduct the arbitral proceedings and pass the award. Then even here the only recourse for the party is to make an application for setting aside the arbitral award under Section 34 of the Act raising the same ground. Therefore the occasion for the party to resort to court is only at the post award stage.

To put in other words in addition to the grounds contained in Section 34 of the Act, there are yet another two grounds for challenge of the award as contained in Section 13 (5) and 16(6) of the Act.

The Delhi High Court in *Hindustan Fertilizer V. J.M.Boxi and Co*⁴²⁵ and the Madras High Court in *Central Warehousing Corporation V. A.S.A.Transport*⁴²⁶ have taken the view that the Court has no power to remit the matter back to the Arbitrator. Therefore, in such circumstances even if the application for setting aside arbitration award is allowed, the Court cannot remit the matter back to Arbitrator and the only option to the court is to leave it open to the parties to work out their remedies in a manner known to law.

TIME LIMIT

An aggrieved party can make an application to the court for setting aside an arbitral award within three months from the date of receipt of the award only on the grounds mentioned in Section 34 of the Act. However, the aforesaid time limit can be extended maximum by another 30 days by

⁴²⁵*Hindustan Fertilizer V. J.M.Boxi and Co*⁴²⁵, 2008 (3) RAJ 464 (Delhi)

⁴²⁶*Central Warehousing Corporation V. A.S.A.Transport*, 2008 (3) MLJ 382 Mad-DB



the court where the applicant was prevented by sufficient cause from filing it timely "but not thereafter."

Supreme Court of India in *the State of Maharashtra & Ors. V. M/s. Ark Builders Pvt. Ltd.*⁴²⁷ has held that the application for setting aside the award to be made within the period of limitation which would start commencing only from the date when the signed copy of the award is delivered to/received by the party making the application.

Also, Hon'ble Supreme Court of India in the case law *State of Maharashtra V. M/s. Hindustan Construction Company Ltd.*⁴²⁸ has observed that the very objective of the 1996 Act is to hold the conclusion that the court cannot by applying section 5 of the Limitation Act and extend the time-limit prescribed under Section 34 to challenge an award.

SCOPE OF ENQUIRY AND NATURE OF PROCEEDINGS

Scope of enquiry in proceedings under Section 34 is restricted to consideration whether any one of the grounds mentioned exists for setting aside award. Application under Section 34 of Act is single issue proceeding.

Proceedings under Section 34 of the Act are summary proceedings with provision for objections by respondent, followed by opportunity to applicant to prove existence of any ground under Section 34(2) of the

Act. Proceedings under Section 34 differ from regular civil suits.

Suggestions And Conclusion

Arbitration as an alternative to dispute. It is a much recognized practice of affording an opportunity to the aggrieved party to exhaust the appeal remedy against the decision of lower forum.

Judicial Intervention in arbitration proceedings plays a very imperative role as the rear of the arbitration legislation.

In my research work, it is not out of point to highlight a few of the suggestions to be incorporated in the arbitrary legislation subject to trial to guarantee speedy justice both in the nature of quality and quantity.

1. Award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of a civil court as contemplated under Section 36. This section cautions that enforcement is available only after the expiry of the time for making an application to set aside the arbitration award under section 34 has expired, i.e. 3 months from date of receipt plus 30 days as the case maybe; or when such application having been made stands refused.

Such arbitral award which has become final can be enforced in accordance with Section 141 read with Order 21 of the Civil Procedure Code. The court which executes the decree has to satisfy itself before issuing the process of execution that no proceedings are pending to set aside the award, be it contested or ex parte.

⁴²⁷ *State of Maharashtra & Ors. V. M/s. Ark Builders Pvt. Ltd.*, (2011) 4 SCC 616

⁴²⁸ *State of Maharashtra V. M/s. Hindustan Construction Company Ltd.*, AIR 2010 SC 1299



At this stage the proposal – would be that the enforcement of the decree shall be only before the court which could maintain application for setting aside.

2. One other problem that may arise is the issue relating to Limitation to enforce the award. Section 36 of the Arbitration and Conciliation Act 1996 merely says that award shall be enforced in the same manner as if it were a decree of a court. Limitation to execute the decree of a civil court is prescribed for in Article 136 of the Limitation Act, which is Twelve years from the date of decree. What is the date of decree is respect of award?

Assuming that even in respect of awards pendency of application to set aside or appeal even in the absence of any orders of stay could be excluded, even so, in the absence of any indication in the enactment that the date of the decree shall be the date of the award or the date on which it came to be communicated to the successful party, or the date on which it is filed before a civil court for execution, the difficulties are bound to crop up. Therefore under Section 36 of this Act, a proviso has to be incorporated indicating that date of the award shall be the date on which the arbitral tribunal affixed its signature and seal and the time taken to communicate the award and the time during which the application under section 34 of this Act, or the appeal thereof was pending shall be excluded and part II of the Limitation Act shall apply mutatis mutadisviz sections 12 to 24 of the Act to such executions.

3. Though the 1996 Act confers greater autonomy on arbitrators and insulates them from judicial interferences, it does not fix any time period for completion of proceedings. Fixing of time period for completion of proceedings would really be much more productive.

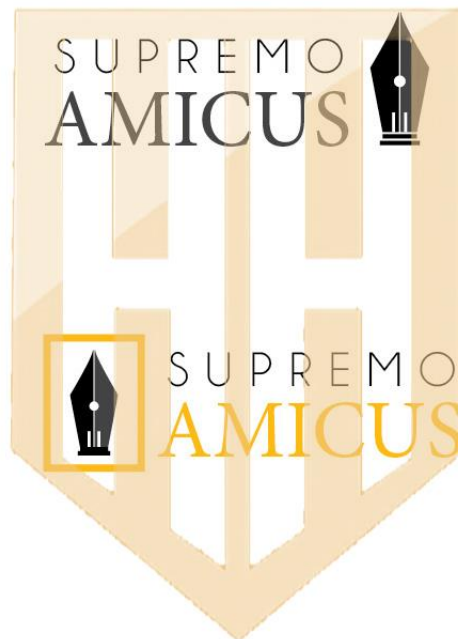
4. Under Section 16(1) of the Arbitration Act, 1940, the Court had the power to remit the Award for reconsideration, under three contingencies listed therein. But there is no corresponding provision in the Arbitration and Conciliation Act 1996.

The Delhi High Court in *Hindustan Fertilizer V. J.M.Boxi and Co* and the Madras High Court in *Central Warehousing Corporation V. A.S.A.Transpor* have taken the view that the Court has no power to remit the matter back to the Arbitrator. Therefore, in such circumstances even if the application for setting aside arbitration award is allowed, the Court cannot remit the matter back to Arbitrator and the only option to the court is to leave it open to the parties to workout their remedies in a manner known to law. Therefore an eye opener is required to scrutinize such a scenario to adopt the provision thereby enabling the power of the court to remit the award for reconsideration since the same would be vital in appropriate and genuine cases.

Judicial Intervention in arbitration proceedings plays a very vital and predominate role in the arbitration proceedings as the back bone of the arbitration legislation. Its unique and distinct functionary role to come and play where ever it has been vested with jurisdiction with limitations, applying with concrete interpretation of the provisions of the



statute. It is needless to mention that the judicial intervention will certainly cater the needs of exploding population to have their redressal before the arbitration proceedings in the day to day affairs efficaciously, economically and expeditiously resulting in speedy justice – both in the nature of quality and quantity.





**THE CONVENTION AGAINST
TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT
: A DETAILED ANALYSIS OF
THE HUMAN RIGHTS PROVISIONS
ENSHRINED AND A CRITICAL
APPRAISAL OF THE JUDICIAL
TRENDS INVOLVED**

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ABSTRACT

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the United Nations Convention against Torture (UNCAT)) is an authoritative international human rights treaty, with the underlying objective to prevent the infliction of and impose an absolute prohibition on the acts of torture and other cruel, inhuman or degrading treatment or punishment, with respect to the diverse classes of individuals as prisoners et al, thereby, seeking to entrench an efficient mechanism for the protection of their rights within the realm concerned.

The 'Torture Convention' came into force on the basis of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975, and subsequently, in 2006, was supported by the Optional Protocol to the Convention, which further established a system, the preventive and

rehabilitative aspects of which are form a part of the attempt of full realization by international and national bodies as to the places of detention, with the purpose of preventing the acts of torture and other cruel, inhuman or degrading treatment and punishment.

The entire Convention has been broadly categorized into three parts, that is – the substantive section, the implementation section and the final clauses - each of which, along with a detailed analysis of all the significant provisions constituted therein, have been elucidated in a critical manner through the analysis of their legal, socio – cultural and economic implications, along with also decoding the expansive and far - reaching consequences of the violation of such intrinsic natural rights as have been guaranteed to all, for their status as 'humans'.

The paper also examines the judgments decided by the international judicial bodies and the expansive interpretation afforded by the pillar of judiciary to significant terminologies employed under the Convention, which have been rendered with an expansive interpretation, along with appraising the import of the other aspects of the International law on acts of torture and inhuman treatment. The subsequent sections of the paper further deal with a brief analysis of the inferences derived from the Optional Protocol to the Convention, and the mechanisms and procedures constituted therein.

The paper lays forth the aforementioned in an organized manner, seeking to systematically explain the various



provisions, their import and the judicial trends involved.

by the 20th state party², it came into force on 26 June 1987.

Since the entry into force of the convention, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law.³

I. INTRODUCTION TO AND THE COURSE OF DEVELOPMENT OF THE 'TORTURE CONVENTION'

The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (commonly known as the **United Nations Convention against Torture (UNCAT)**)¹ is an international human rights treaty, which was formulated under the review of the United Nations. The objective of the Convention stands to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world.⁴²⁹

The Convention also imposes obligations upon the State Parties to take effective measures to prevent and prohibit torture in any territory, within their jurisdiction, and further forbids States from transporting people to any country where there is reason to believe that they shall be subjected to torture.

The text of the Convention was adopted by the United Nations General Assembly on 10 December 1984 and, following ratification

Development of the Convention : It's Evolution

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987, after that had been ratified by 20 States.

The Torture Convention was a product of prolonged efforts, initiated after the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Declaration") by the General Assembly on 9 December 1975 (resolution 3452 (XXX)).

In a second resolution, adopted on 9 December 1975, the General Assembly requested the Commission on Human Rights to pay regard the question of torture and any necessary steps for ensuring the effective observance of the Torture Declaration (resolution 3453 (XXX)). On 8 December 1977, the General Assembly requested the Commission on Human Rights to produce a draft convention against torture and other cruel, inhuman or degrading treatment or

⁴²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

²*Ibid.*, Article 27

³ "CAT General Comment No. 2: Implementation of Article 2 by States Parties" (PDF), Committee against Torture. 23 November 2007



punishment, with respect to the principles embodied in the Torture Declaration (resolution 32/62).

The Commission on Human Rights began its work on this subject at its session in February-March 1978. A working group was set up to deal with this item, and the main basis for the discussions in the working group was a draft convention presented by Sweden. During each of the subsequent years until 1984 a similar working group was set up to continue the work on the draft convention.

II. THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT : AIMS AND OBJECTIVES

There tends to be a wrong notion as to the principal aim of the Convention.

As per the popular opinion, such has been inferred that the aim of the Convention is with regard to that of outlawing torture and other forms of cruel, inhuman and degrading treatment or punishment. The erroneousness as to this inference is that, such an inference will cause the assumption that the prohibition of all such practices as stipulated by the Convention is established under International law, by the virtue of the Convention only. However, such is a rather wrong notion, as such would imply that the prohibition would stand as binding as a rule of international law only with respect to the States which are parties to the Convention and not otherwise.

However, on the other hand, the very foundation the Convention is derived from the assumption that the Convention is based upon the recognition that the aforementioned acts of torture, cruel, inhuman and degrading treatment and punishment are outlawed under International law.

Thereby, the aim of the Convention stands in strengthening the existing prohibition of such practices by virtue of these execution of a number of supportive measures.

Secondly, however, the Convention does not deal with those cases which occur exclusively in a non- government setting. It only aims to regulate and control those practices which are with respect to some sort of responsibility of the public officials or the other person's who are acting in an official capacity.

The Convention, is on the basis of the Declaration in the same matter of the General Assembly of the United Nations, in 1975.⁴

Hence, the objective of the Convention is to ensure an efficient implementation of the elimination of all form so torture, cruel, inhuman and degrading treatment or punishment by the State Parties, and ensuring an effective punishment of the person who are regarded as having undertaken such unlawful practices.

⁴ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment



III. DEFINITION OF ‘TORTURE’ ELUCIDATED UNDER THE ‘TORTURE CONVENTION’

As per the **Article 1** of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘*torture*’ means⁵–

- Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
- for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,
- when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Further, as per the **clause 2⁶**, the Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.\

Thereby, the requirements as per the definition of ‘torture’ are :

- The infliction of severe mental or physical pain or suffering
- By or with consent or acquiescence of State Authorities

- For a specific purpose such as receiving information, or for intimidation or punishment

Hence, the two guidelines for assessing whether a set of facts amount to torture, are specified as :

- i. The requirements comprised in the definition of torture should be supported by the virtue of facts.
- ii. Torture can be differentiated from the other kinds of ill – treatment through the degree of suffering involved and the purposive element.

IV. STRUCTURE OF THE UNCAT: AN ANALYSIS OF THE SEGMENTED DIVISIONS UNDER THE CONVENTION

The Articles of the Convention stand divided in three different parts, elaborated as

i. Part I (Articles 1 – 16) :

The Part I comprises of the *substantive provisions*.

Thereby, most of the provisions enlisted in the specified part are about torture and not about the other forms of cruel, inhuman or degrading treatment or punishment.

However, a very limited number of provisions stipulated apply to all the categories.

⁵supra note. 2, Article 1

⁶*Ibid.*, Article 1(2)



ii. **Part II (Articles 17 - 24) :**

The Part II further comprises of the *implementation provisions*.

These articles deal with the several forms of international supervision, with respect to the due regard and observance paid by State Parties, as to their obligations under the substantive provisions stipulated.

iii. **Part III (Articles 25 - 32) :**

The Part III comprises of the *final clauses*.

These Articles pertain to the provisions as the signature and ratification of the Convention, its entry into force, amendments, denunciation, settlement of disputes concerning the Convention's interpretation and application, and optional exclusion of one of the implementation provisions.

i. **Article 2⁷**: As per the Article 2, each State party shall undertake the effective legislative, administrative, judicial or other measures to prevent the acts of torture from being committed. The prohibition against torture shall stand as being absolute, and shall be upheld without regard to a state of war, as well as, in other exceptional circumstances.

ii. **Article 3⁸**: As per Article 3, no State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

ii. **Article 4⁹**: The Article 4 stipulates that, each State party shall ensure that acts of torture are regarded and punished as serious criminal offences, within its legal system.

Article 6¹⁰: As per Article 6, every State to the Convention shall take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts. However, such can only be undertaken on the ground of certain conditions.

v. **Article 7¹¹**: According to Article 7, each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for

V. **THE STATE PARTY UNDERTAKINGS UNDER THE UNCAT : AN EXAMINATION OF THE RELEVANT PROVISIONS**

The provisions under the Convention that deal with the obligations of the State Parties under the Convention and their requisite undertaking, are specified as :

⁷*Ibid.*, Article 2

⁸*Ibid.*, Article 3

⁹*Ibid.*, Article 4

¹⁰*Ibid.*, Article 6

¹¹*Ibid.*, Article 7

¹²*Ibid.*, Article 12



prosecution.

- vi. **Article 12¹²** : The Article 12 stipulates that every State party shall ensure that its authorities make investigations, whenever there tend to be a reasonable ground to believe that an act of torture has been committed.
- vii. **Article 13¹³** : The Article 13 provides that every State party shall ensure that an individual who alleges that he has been subjected to torture, shall have his case examined by competent authorities.
- viii. **Article 14¹⁴** : According to Article 14 of the Convention, every State party shall ensure to the victims of torture that an enforceable right to fair and adequate compensation shall be afforded to them.

The substantive part of the Convention deals with a limited number of provisions enshrined, which further apply to both torture and the other forms of cruel, inhuman and degrading treatment and punishment, when such acts are committed by or at the instigation or with the consent or acquiescence of a public official or any other person acting in official capacity.

As per the **paragraph 1 of Article 2* and Article 16¹⁵** of the Convention, respectively, each State Party to the Convention shall undertake a due prevention and prohibition of any acts of torture, cruel or inhuman treatment or punishment, within the territory which is under its jurisdiction.

As per **paragraph 1 of Article 10¹⁶** of the Convention, every State Party shall further ensure that the information regarding this prohibition is fully comprised in the training of such persons.

Further, as per **paragraph 2 of Article 10¹⁷** of the Convention, each State Party to the Convention shall undertake the prohibition of all such acts in the rules or the instructions, issued with regard to the duties and functions of both the civil and military law personnel as well as the medical personnel, public official, as well as the other persons who maybe involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Also, as per **Article 11¹⁸**, each State Party is required to maintain interrogation rules, methods, and arrangements under its systematically review, for the purpose of the treatment and custody of the persons under arrest, detention or imprisonment, so as to

VI. CRITICAL ANALYSIS OF THE PROVISIONS OF THE TORTURE CONVENTION : A DETAILED APPRAISAL

A. Substantive Part Of The Convention On Cruel, Inhuman And Degrading Treatment Or Punishment :

¹³*Ibid.*, Article 13

¹⁴*Ibid.*, Article 14

**Ibid.*, Article 2 (p.1)

¹⁵*Ibid.*, Article 16 (p.1)

¹⁶*Ibid.*, Article 10 (p.1)



ensure the prevention and prohibition of any acts of cruel, inhuman and degrading treatment or punishment.

In accordance with **Article 12**¹⁹ of the Convention, each State Party has been vested with the obligation to comply with the provisions which stipulate that such a State Party shall ensure that its competent authorities undertake an impartial and prompt investigation, whenever there tends to be a reasonably viable ground to believe that any such act has been committed in its territory.

Any individual who alleged that he had been subjected to any cruel, inhuman or degrading treatment or punishment shall be entitled to ensure the examination of his case by the competent ⁴³⁴ authority, in a prompt and impartial manner. Such a provision has been specified under **Article 13** of the Convention.

Further, the provisions as stipulated under the **Article 10, 11, 12 and 13** only pertain to acts of torture. However, as per the **paragraph 1 of Article 16**²⁰ of the Convention, the obligations as have been constituted in the aforementioned articles also apply to the other forms of cruel, inhuman and degrading **treatment and punishment**.

B. Substantive Provisions Of The Convention As To The Act Of Torture :

¹⁷*Ibid.*, Article 10 (p.2)

¹⁸*Ibid.*, Article 11

¹⁹*Ibid.*, Article 12

²⁰*Ibid.*, Article 16 (p.1)

The substantive part of the Convention provides an elaborate definition as to the term ‘torture’ for the purposes of the Convention. The definition is provided under that **paragraph 1 of Article 1** is as specified –

Further, as per **paragraph 1 of Article 2**,²¹ each State Party is under the obligation to implement the effective and efficient measures to ensure the prohibition of the acts of torture in its territory.

Also, as per the stipulation specified under **paragraph 2 of Article 2**,²² of the Convention, no exceptions on the ground of a state of war, a threat of war, internal political instability or any other instance of public emergency or any other circumstances whatsoever, shall be inflicted as the justification for infliction of torture.

As per **paragraph 3 of Article 2**,²³ there shall not stand to be an implementation of any order which maybe made by a superior officer or public authority as the justification for torture.

According to **Article 15**²⁴ of the Convention, any statement which has been made as a result of torture shall not be regarded or held as evidence in any proceedings whatsoever. The victims of torture shall be rendered with and enforceable rights to adequate and fair compensation, including the means for as full rehabilitation as maybe possible. Such has been provided under **Article 14**²⁵.

As per the provision under **Article 3**²⁶ of the Convention, no State Party shall return, extradite or expel a person to another State if there exist substantial grounds for believing



that he would be in the danger of being subjected to incidences of torture.

Also, the stipulations as specified under **Article 4-9**, include provisions with respect to the application of penal laws as to persons who are guilty of torture.

According to **Article 4**²⁷ of the Convention, each State Party shall have the obligation to endure that all acts of torture, attempt to commit torture, as well as the acts constituting participation or complicity in torture, are specified as offences under its criminal law, which shall be punishable by appropriate penalties imposed as per the graveness of the offence.

With respect to such offences as specified, the Convention comprises of the stipulations which provide for a system of **universal jurisdiction**, as enshrined under the **Articles 5,6 and 7**. However, as per the provisions of the Articles, if the offence had been committed in a territory abroad, then the State Party shall be obliged to submit the case to its competent authorities for the purpose of prosecution, unless it extradites the alleged offender to another State.

Under the **Article 8**²⁸ of the Convention, with respect to the offences punishable under Article 4, the Convention comprises of the provisions concerning extradition to other State Parties.

Also, **Article 9**²⁹ provides for the assistance to be extended by the State Party with regard to the criminal proceedings instituted in that State.

C. Implementation Provisions :

The part of the Convention that deals with the implementation - based provisions provides for the creation of the international supervisory body, under the provisions of **Article 17 and 18** of the Convention. Such is regarded as the '**Committee Against Torture**' which comprises of 10 experts who are elected by the State Parties. Such experts perform the functions vested in them not in the capacity of the representatives of the government, but rather in their personal capacity.

Under **Article 24**³⁰ of the Convention, the Committee is required to submit a report once in a year to the State Parties and to the General Assembly of the United Nations, with respect to its activities. The State Parties are further required to submit their own reports with respect to the measures, as have been instituted by them, to execute their own undertaking under the Convention, and whereas, such reports shall also be transmitted to the other States parties to the Convention, as per the **paragraph 1 and 2 respectively of Article 19**³¹ of the Convention.

Subsequently, the report as has been submitted by the State Parties are thereupon considered by the Committee, on which general comments ⁴³⁶ maybe forwarded by

²¹*Ibid.*, Article 2 (p.1)

²²*Ibid.*, Article 2 (p.2)

²³*Ibid.*, Article 2 (p.3)

²⁴*Ibid.*, Article 15

²⁵*Ibid.*, Article 15

²⁶*Ibid.*, Article 3

²⁷*Ibid.*, Article 4

²⁸*Ibid.*, Article 8

²⁹*Ibid.*, Article 9

³⁰*Ibid.*, Article 30



the Committee in a particular report. However, the

Committee may also decide to incorporate the report in it's own annual report, along with the observations, as per the **paragraph 2 and 3 of Article 19**³²of the Convention.

Further, the provisions of Article 19 apply to all the State Parties, although the stipulations under Articles 20 to 22 do not so apply uniformly to all State Parties. The procedures have been described in detail in the subsequent sections.

Also, the Articles 21 and 22 comprise of *two optional procedures*, which enable the Committee to consider the opinions against State Parties. The procedures tend to be optional for the reason that each of those procedures apply to only those State Parties which have made an explicit declaration of the fact, that, they recognize the competence of the Committee under the procedure.

Under the procedure under **Article 21**³³, the Committee may consider the communications made by the State Parties which claim that another State Party has not complied with it's obligations under the Convention.

Under the second procedure under **Article 22**³⁴, the Committee may consider the communications made from or on behalf of the individuals who claim to be the victims of violation of the Convention by the State Party.

³¹*Ibid.*, Article 2

³²*Ibid.*, Article 19 (p.2&3)

³³*Ibid.*, Article 21

³⁴*Ibid.*, Article 22

VII. THE IMPLEMENTATION PROCEDURE UNDER THE TORTURE

CONVENTION : THE FRAMEWORK COMPRISED

The Implementation Procedure, as stipulated under the Convention, constitutes the specified segments :

A. Committee Against Torture :

A Committee against Torture which comprised of ten experts, having high moral standards and competence in the field and with respect to the discipline of human rights, was further constituted in the year 1986 when the Convention finally came into force.

The Committee, thereby, comprises of ten experts, who are, in practice, elected by the State parties.

Significant regard has also been rendered to the concept of equitable geographical distribution, and required usefulness of the participation of such member belonging to the field of law for further having the requisite legal experience.

Furthermore, the members of the Committee stand elected for the period of 10 years. Such members are further eligible for a subsequent re - election, on the ground that they are re – nominated.



The Committee has further been rendered with several functions under its authority and competence, briefly elaborated as specified :

- i. The Committee has the principal function of affording regard to such reports as have been submitted by the State Parties, pertaining to the efforts instituted by such parties in effecting a due implementation of the provisions of the Convention. Hence, with respect to the aforementioned, the guidelines have also been laid forth to the State Parties to adhere to, and discussions have also been undertaken with the State representatives with the object of establishing constructive dialogue with them.
- ii. The Committee has been afforded the power to also make any general comments, as maybe considered fit and requisite, with regard to the reports which have been submitted by the State Parties. The comments so specified and extended and the content of the comments shall further be communicated and forwarded to the State Parties, the reports of which have been so submitted.
- iii. The Committee may, thereby, also come to a decision to extend the invitation to the State Party in whose territory the incidences of torture have occurred or have been otherwise systematically practiced, to cooperate in the due examination of the information in hand. They may also be further required to extend submissions as to the concerned data made available.
- iv. The Committee is also under the requirement to undertake such functions,

as maybe required for the purpose of fostering inter - state communication system, as have been made requisite under the provisions of Section 21 of the Convention.

B. Inter- State Communication System.

The provisions under the Convention have been provided for, for the purpose of fostering inter – State communication, which also stand on a similar ground as those stipulated under the Article 42 of the International Covenant on Civil and Political

Rights³⁵
The Article further stipulates that the State Parties may, at any stage, recognize the competence of the Committee in the task of receiving and paying due consideration, to the effect that a State party extends the claim that another State Party has not fulfilled the obligations put forth in the Convention.

However, if a State Party decides that another State party has not undertaken a due execution of the provisions of the Convention, then the criticizing State Party shall undertake efforts to bring such in the notice⁴³⁹ of that other State Party.

However, the Inter - State communication shall stand liable to be recognized only when such has been submitted by that State Party which has extended the recognition, through Declaration, to the competence with respect to the Committee. However, no communication made whatsoever, with respect to the Committee, shall be liable to be dealt with by such a Committee, if the

³⁵ International Covenant on Civil and Political Rights, Article 42



said information is as regards to a party which has not made the declaration.

Furthermore, if a party consider that another State party has not undertaken the requisite implementation of the various provisions enshrined in the Convention, then such may bring the same within the notice of the State Party which failed to undertake the implementation, as per its opinion. In lieu of the same, the receiving State shall, within a period of three months from the receipt of the communication as aforementioned at its helm, shall afford to that State Party which extended the communication, an explanation or any other statement in writing, extending a clarification as to the matter in question, along a reference to the domestic proceedings. Had the remedies employed to curb the issues, which maybe pending or available.

Further, if the matter does not settle and is not adjusted to the satisfaction of both the parties concerned, then, within a period of six months of the receipt by the receiving State of the initial communication, either of the States shall have the right to refer the matter to the Committee, upon giving a notice to the Committee and the other State party concerned.

However, the Committee shall have the competence to deal with the question of non-implementation, only when such is satisfied that all remedies have been invoked and exhausted, unless such remedies available have been unreasonably prolonged or is regarded as unlikely to bring relief to the person who is the victim of the contravention of the provisions of the Convention. The Committee may also make available its good offices to aid the State

Parties, so as to arrive at an amicable solution.

Also, the Committee, when it regards as appropriate, may further set up an *ad hoc* Conciliation Commission.

Such is important to be understood that the inter - State communication system is *optional*. Such is because of the fact that the inter - State communication system shall come into force only when five States have supplied declarations in that direction. The declarations are subsequently required to be deposited with the Secretary General of the United Nations. The copies of the declarations shall then be transmitted by the Secretary General to the other State Parties.

C. Individuals' Communication System.

The provisions for the Individuals Communication System have been stipulated under the Section 22 of the Convention. As per the Section, a State Party may, at any point, declare that such recognizes the competence of the Committee to receive and consider the communication made by or on behalf of individuals. Such individuals shall be under its jurisdiction and who claim to be the victims of violation of the Convention by the State party.

Thus, the inter - State communication system stands applicable to only that State which has made the communication, and thereby, the process becomes optional.

However, the communication made shall be regarded inadmissible if such is :



- anonymous, or,
- that which is considered by the committee as amounting to an abuse of the right of submission of such communications, or,
- that which is incompatible with the provisions of the Convention.

Further, the Committee shall not consider any communication from an individual unless it has ascertained that :

- *firstly*, the same matter is not being or has not been examined under any other procedure of international investigation or settlement, and,
- *secondly*, that the individual has exhausted all available domestic remedies.

The Committee should also undertake closed meetings for the purpose of examining the communications, and thereby, shall send its own opinions on such communications to the State parties and the individual.

The number of individual communications which have been extended to the Committee has increased manifold. Although, in the year 1994, the number of communications were between 7 and 18, in 1995, the figure expanded to 39 in 1997.

The Office of the Special Rapporteur : Further, the Commission on Human Rights, in the year 1985, appointed a *Special Rapporteur* on Torture to examine the questions with respect to torture, and to thereby, receive the credible and reliable information on such questions, and to be able to respond to the questions put forth without delay. The function of the Rapporteur further also includes the sending

of urgent appeals. The Rapporteur is also further required to undertake country visits and is required to cooperate with the Committee on Torture.

VIII. THE OPTIONAL PROTOCOL TO THE CONVENTION ON

PREVENTION OF TORTURE AND OTHER CRUEL, INHUMAN OR

DEGRADING TREATMENT OR PUNISHMENT

An Optional Protocol to the Torture Convention was adopted by the United Nations General Assembly on 18 December 2002 (resolution 57/199)³⁶. The Optional Protocol³⁷, entered into force on 22 June 2006, and further established a system of regularly undertaken by international and national bodies to places of detention with the purpose of preventing the acts of torture and other cruel, inhuman or degrading treatment or punishment.

Under the Optional Protocol to the Convention, a sub - committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been established to undertake such visits and to extend the support States parties and national institutions in duly implementing the

³⁶United Nations General Assembly (Resolution 57/199)

³⁷ **Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2006**



functions of a similar type at the national level.

The significant provisions of the Optional Protocol to the Convention on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment include :

- The Optional Protocol reaffirmed that the cruel, inhuman and degrading treatment and punishment amount to the grave violation of human rights and are absolutely prohibited.
- The Optional Protocol stipulates that the further measures become imperative to ensure the implementation of the purposes enshrined in the Convention. The OPCAT further provides for the significant requirement to strengthen the protection of the persons who tend to be deprived of their liberty against torture, cruel, inhuman and degrading treatment or punishment.
- The OPCAT provides that the States have the responsibility to ensure the efficient and the requisite protection of those people who tend to be deprived of their liberty. The OPCAT also provides for the fostering of common responsibility, and that the international institutions shall also undertake to strengthen and aim in the implementation of the national measures, as have been formulated.
- The OPCAT emphasized upon the fact that the World Conference on Human Rights declared that the efforts towards the removal of torture shall be directed towards the prevention of the acts of

torture, and that the OPCAT shall cause the establishment of a preventive system.

- The Optional Protocol also provides for the non – judicial means of preventive measures, which include the visits to places of detention.

A. The Evolution Of The Optional Protocol To The Torture

Convention

The mechanism concerning the prevention in-of torture emerged from development of Swiss Committee for the Prevention of Torture (today Association for the Prevention of Torture, APT), which was founded by Jean-Jacques Gautier, in Geneva in 1977. Such provided for the establishment of a well - organized system for the inspection of the places of detention. Such was subsequently constituted as the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

However, the Committee in Torture (CAT), had only weak instruments as that could only analyze the self reports if the respective governments and establish the institution of a Special Rapporteur on Torture. However, the problem was as to the fact that neither the CAT and not the Special Rapporteur were rendered with the requisite power to visit countries and thereby inspect prisons and such could not be a possibility for such Institutions without having at their helm the permission if the respective government.



Hence, in the year, 1987, the Council of Europe brought about a formulation and subsequently, an implementation of the original ideology, however at a regional scale, with the European Convention for the Prevention of Torture. On the basis of the same, the European Committee for the Prevention of Torture demonstrated the possibility of a success and the viability of the model constituted through the reports, regular visits, and the recommendations to the government as well as undertaking the publication of such reports.

Such brought about a major development in the United Nations, and thereby, the Optional Protocol to the Torture Convention was created, and was opened for signatures on 18 December 2002 by the UN General Assembly.

Subsequent to the ratification by 20 states, the Optional Protocol came into force on 22 June 2006.

B. Status of Ratification of the OPCAT

As on September 2017, 84 states have ratified the Option Protocol including - Albania, Argentina, Armenia, Austria, Azerbaijan, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cape Verde, the Central African Republic, Chile, Costa Rica - among others.

Also, about 15 states have signed, but not ratified the Optional Protocol, which include - Australia, Belgium, Cameroon, Chad, Republic of the Congo, East Timor, Guinea, Guinea-Bissau, Iceland, Ireland, Sierra

Leone, South Africa, Venezuela, and Zambia.

IX. JUDGEMENTS UNDER THE CONVENTION : INTERNATIONAL

JUDICIAL DECISIONS RENDERED

i. Defining Cruel Treatment and Torture
:

a) Wainwright v. United Kingdom³⁸

In this case, the European Court had emphasized upon the fact that an applicant must meet a certain standard to establish a claim under Article 3, under the Convention.

The Court held that –

*“Ill-treatment must attain a **minimum level of severity** if it is to fall within the scope of Art.3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is ‘**degrading**’ within the meaning of Art. 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner*

³⁸Application no. 12350/04 (2007) 44 E.H.R.R.



incompatible with Art.3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation. Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.”

b) Ireland v. The United Kingdom³⁹,

In this case, the European Court of Human Rights elaborated upon the **factors to be taken into account in determining the severity** of treatment, including the age, sex, and state of health of the victim. The Court also examined some of the methods of interrogation, none of which were found to cause acute *physical* injury, finding that forcing detainees to remain in stress positions for periods of time, subjecting them to noise and depriving them of food, drink and sleep amounted to ill-treatment, but refusing to find that the treatment amounted to torture. The case stresses the applicability of the prohibition, even *in cases involving terrorism and public danger*.

the psychological harm he would suffer if he were sentenced to death and held on death row.

iii. Corporal Punishment :

a) Osbourne v. Jamaica⁴¹

In the case of **Osbourne v. Jamaica**, the Human Rights Committee regarded that corporal ⁴⁴³ punishment violates the prohibition of torture, cruel, inhumane and degrading treatment or punishment, and that such is prohibited by Article 7 of the Covenant..

b) Curtis Francis Doebbler v. Sudan⁴²

In the case, the African Commission ruled that the corporal punishment violates the human right to dignity.

iv. Treatment of Prisoners and Detainees :

a) Antti Vuolanne v. Finland⁴³

In this case, the Human Rights Committee examined a case involving the solitary confinement of a Finnish infantryman who was sanctioned for abandoning his military service. The Committee regarded that for punishment

ii. Psychological Suffering :

a) Soering v. The United Kingdom⁴⁰

In this case, the European Court of Human Rights regarded that a suspected criminal could not be extradited to the United States because of

³⁹ Application No. 5320/71 (1978)

⁴⁰ Application No. 25803/94, Judgment of 28 July 1999

⁴¹ Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000)

⁴² African Commission on Human and Peoples’ Rights, Comm. No. 236/2000 (2003).



to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty. In determining the severity of the alleged maltreatment, the court should consider all the circumstances of the case at hand, including the duration and manner of treatment, its physical and mental effects and the sex, age and state of health of the victim.

v. **Death Penalty :**

a) **Cox v. Canada**⁴⁴

In the case, the Human Rights Committee considered that imposing death by lethal injection is not cruel and inhuman, despite evidence showing that the injections can cause terrible suffering.

X. **JUDICIAL DECISIONS IN INDIA :**
DETERMINING THE

IMPLICATIONS OF ACTS OF TORTURE AND THE MEASURES

UNDER PROTECTIVE MECHANISMS TO BE DEPLOYED

The right to life as has been provided under article 21 of the Constitution has been

⁴³ Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989).

⁴⁴ Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930. (1994).

regarded as 'supreme', and including includes both so-called negative and positive obligations for the State.

Thereby, as per the positive obligation, the State has an overriding obligation to undertake the protection of the right to life of every person, within its territorial jurisdiction. Hence, the obligation provides that the State shall implement the administrative and such other measures as are requisite for the protection of the life and the investigation of any cases of suspicious deaths.

Some of the judgements include -

In the case of **D.K. Basu v. State of West Bengal**⁴⁵, the Supreme Court that the term, 'Torture' has not been defined in the Constitution or in other penal laws.

The Court held –

“Torture of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of the human civilisation”.

In the case of **Francis Coralie Mullin v. Administrator, U.T. of Delhi**⁴⁶, the Supreme Court held that torture or cruel, inhuman or degrading treatment of any kind would be offensive to the human dignity and shall be prohibited under the Right to Life under the Article 21 of the Constitution of India, unless that is in accordance to the procedure established by law.

⁴⁵AIR 1997 SC 610

⁴⁶AIR 1981 SC 746

⁴⁷AIR 1990 SC 1480



Further, the Court held that no law which authorizes the infliction of any torture or cruel, inhuman or degrading treatment can be viable in accordance to the test of reasonableness and non – arbitrariness. Such a law would also be violative of Article 14 and Article 21 of the Constitution of India.

In the case of **Charan Lal Sahu v. Union of India**⁴⁷, the Supreme Court held that under the Articles 21, 48A and 51A(g) of the Constitution of India, the right to life, liberty, pollution free air and water is guaranteed and that the duty of the State shall be to undertake the steps requisite for the protection of the constitutional rights as have been specified.⁹³

In the case of **Prithipal Singh etc. v. State of Punjab and Anr.etc.**⁴⁸, the Court considered the police atrocities towards prisoners and held that as under Article 21 of the Constitution of India, any form of torture or cruel, inhuman or degrading treatment is prohibited. As per the Court, torture is not permissible whether it occurs during investigation, interrogation or otherwise.

The Court held that the Latin maxim *salus populi est suprema lex* - the safety of the people and that, *salus reipublicae suprema lex* - safety of the State are the supreme laws which co-exist.

In **Munshi Singh Gautam v. State of M.P.**⁴⁹, the Supreme Court held that the peculiar type of cases shall be considered in a way that is different that that utilized for

the ordinary criminal cases. Such is because of the fact that when a person dies while in police custody, the evidence does not tend to be available.

The Court provided –

“The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. that used for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence... Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity... The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.”

The Supreme Court, in the case of **Mehmood Nayyar Azam v. State of Chhattisgarh**⁵⁰, dealt with a case of a social activist, who agitated the exploitation of people who were belonging to poor and marginalized sections of the society. Those persons were falsely roped in criminal cases and were after that arrested. The Court held that the torture or cruel, inhuman or degrading treatment of any kind shall be

⁴⁸(2012)1SCC10.

⁴⁹AIR 2005 SC 402

⁵⁰AIR 2012 SC 2573



violative of the Articles 20 & 21 of the Constitution.

The Court held that the term ‘harassment’ has a wider meaning and also includes any kind of torment and vexation.

The Court held:

“If the functionaries of the Government become lawbreakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy.... The right to life of a citizen cannot be put in abeyance on his arrest.”

In the case of **Rama Murthy v. State of Karnataka**⁵¹ the Supreme Court considered that there tend to be problems in the prison which is to be rectified and that includes torture and ill-treatment.

The Apex Court in the case of **Sube Singh v. State of Haryana**⁵², considered the incidences of custodial violence and third degree methods used by police during interrogation and also considered the reasons due to which such acts are carried out and also provided for the measures which can be utilized to prevent those instances.

The Court observed:

“The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow ‘catch’ the ‘offender’. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest

“someone” in a hurry on the basis of incomplete investigation, just to ease the pressure.The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution.”

In the case of **D.K Basu v. State of W.B**⁵³, the Supreme Court after perusing the several reports that were provided on custodian violence, held that –

“Custodial violence including torture and death in lock ups strikes a blow at the rule of law which demands that the powers of executive should not only be derived from law but also that the same should be limited by law.”

The Court also provided for the guidelines on the cases of arrest and detention, which include –

- a) The police personnel who carry out the investigation and arrest shall carry identity card providing his designation, etc., and his designation should also be recorded in the register.
- b) The arresting officer shall prepare the memo of arrest at the time of arrest. The memo of arrest should be attested by a witness, who may be the family member of the arrestee, and which shall also be counter-signed by the arrestee, providing the time and date for arrest.
- c) The arrestee shall, during the period of interrogation, be entitled to have one friend or his relative with him unless the attesting witness of his arrest is his relative/friend.

⁵¹AIR 1997 SC 1739

⁵²AIR 2006 SC 1117

⁵³supra note 45



- d) The time, place of arrest and venue of custody of an arrestee must be notified by the police and legal aid organisations should be informed.
- e) The arrestee must be informed of his right to inform someone about his arrest, immediately after the arrest.
- f) The entry should be made in the diary providing for the place of detention and the particulars of the police officials having his custody.
- g) The arrestee, where he so requests, shall be examined medically at the time of his arrest, if he has any major or minor injuries, and the arrestee should be subjected to medical examination within 48 hours of his detention.
- h) The copies of the Memo of arrest and all the other documents shall be sent to the illaqa magistrates.
- i) The arrestee may be permitted to meet his lawyer during interrogation, and the information regarding arrest and custody shall be communicated to the police control room, and shall also be displayed on a conspicuous notice board.

In the case of **Raghubir Singh v. State of Haryana**⁵⁴, the violence which was carried out by the police to extract a confession resulted in the death of a person suspected of theft, the Court held that –

“We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.”

In **Haricharan v. State of M.P**⁵⁵, Supreme Court held that –

“life or personal liberty in Article 21 includes right to live with humandignity. Therefore, it also includes within itself guarantee against the torture and assault by the States or its functionaries.”

In the case of **Bhagwan Singh & Anr. v. State Of Punjab**⁵⁶, there was a death of a person in the police custody, and the Supreme Court held that the interrogation doesnot amount to inflicting injuries.

The Court held –

Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid.”

• **Victim Compensation :**

The judgements of the Courts in India with respect to the need for compensation to the victims of torture and the mitigating circumstances include :⁴⁴⁹

In the case of **Kasturi Lal v. State of U.P.**⁵⁷, the Supreme Court upheld the plea of sovereign immunity. In that case, a partner of the Kasturilal Raliaram Jain, which was a firm of jewellers of Amritsar was taken into custody by police in Meerut on the suspicion that he was of possessing stolen property.

⁵⁴AIR 1980 SC 1087

⁵⁵(2011) 4 SCC 159

⁵⁶AIR 1992 SC 1689

⁵⁷AIR 1965 SC 1039

⁵⁸AIR 1983 SC 1086

⁵⁹AIR 2000 SC 2083



He stood released, but however, the gold jewellery taken from him was not returned. The head constable in charge of the *malkhana* had not only misappropriated the same, but he fled away to Pakistan, and so, the firm claimed the recovery of ornaments or compensation, as the alternative.

The Apex Court rejected the claim, and did not provide any compensation, on the ground that, the act was carried out by the employees during the course of their employment, which was in the characteristic of a sovereign power.

In the case of **Rudal Shah v. State of Bihar**⁵⁸, the Supreme Court took a completely opposite stand, and rejected the plea of sovereign immunity and provided the compensation, as the petitioner had been illegally detained in jail for over fourteen years, after his acquittal in full-dress trial.

In the case of **State of Andhra Pradesh v. Challa Ramakrishna Reddy**⁵⁹, the Supreme Court provided that where the fundamental right of the citizen is violated, the plea of sovereign immunity would not be available. The Court held :

“The maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof.”

In the case of **Nilabati Behera v. State of Orissa & Ors.**⁶⁰, the Supreme Court held :

“.....in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.”

In the case of **Ram Lakhan Singh v. State of U.P.**⁶¹, the Supreme Court considered a case under the Article 32 of the Constitution for the compensation for loss of professional career, reputation, great mental agony, heavy financial loss and defamation.

The Court held that there was the illegal detention by the respondent authorities of the petitioner, who was an Indian Forest Service officer, by implicating false vigilance cases at the instance of the then Chief Minister of respondent State.⁴⁵⁰

The Supreme Court in the case of **Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble**⁶², directed the State Government to pay the compensation of Rs.1,00,000/- to the mother and children of the deceased.

The Court held :

“This amount of compensation shall be as a palliative measure and does not preclude the affected person(s) from bringing a suit to recover appropriate damages from the State Government and its erring officials if such a remedy is available in law.”

⁶⁰AIR 1993 SC 1960

⁶¹(2015) 16 SCC 715

⁶²AIR 2003 SC 4567.



XI. PROVISIONS BY COMMISSIONS IN INDIA IN PUSUANCE

PREVENTION OF TORTURE : LEGAL MEASURES AND

RECOMMENDATIONS EXTENDED

The various Commissions in India have contributed towards the incorporation of provisions under the Indian laws for the prohibition of acts of torture and the relief to the victims of violence.

Some of the Commissions in India which have provided recommendations include :

A. National Commission to Review the Working of the Constitution – under which report was the recommendation made?

The National Commission to Review the Working of the Constitution (2002) is established by the Law Ministry. The Commission recommended that the ‘prohibition of torture and cruel, inhuman or degrading treatment or punishment’ shall be provided under the fundamental rights chapter under the Article 21(2) of the Constitution⁶³, taking into account the provisions which have been upheld under the various Supreme Court judgments.

Under the clause 3.9 of the Report of the Commission, it is provided :

“3.9 Rights against torture and inhuman, degrading and cruel treatment and punishment.

3.9 Rights against torture and inhuman, degrading and cruel treatment and punishment grossly violate human dignity. The Supreme Court has implied a right against torture, etc. by way of interpretation of Article 21 which deals with Right to life and Liberty. The Universal Declaration of Human Right 1948 and the ICCPR prohibit such acts in Art. 5 and 7 respectively.

It is therefore, recommended that the existing Art.21 may be numbered as Clause (1) thereof and a new clause should be inserted hereafter on the following lines-⁴⁵¹
 “(2) No one shall be subjected to torture or inhuman or degrading treatment or punishment.”

B. Reports of the Law Commission of India :

a) 113th Report (1985): Injuries In Police Custody⁶⁴ – was the section 114B added?

In the 113th Report the Law Commission recommended provision for the amendment of the Indian Evidence Act, 1872, by including the section 114B which provides that in the case of custodial injuries, if there is evidence, the Court may presume that the injury was caused by the police who had the custody of that person during the period.

⁶³Article 21(2), Constitution of India

⁶⁴113th Report (1985), Law Commission of India

⁶⁵152nd Report (1994), Law Commission of India

⁶⁶177th Report (2001), Law Commission (2001)



b) 152nd Report (1994): Custodial Crimes⁶⁵

The Commission considered the issues of arrest and abuse of authority by the officials, taking into account the Constitutional and statutory provisions including Articles 20, 21 and 22.

The Commission recommended that there should be the amendment of the IPC, and also, provision shall be included to provide for the punishment for the violation of Section 160 of Cr.PC.

The Commission also provided for the inclusion of Section 41(1A) under the Cr.PC, for recording the reasons for arrest and the section 50A to inform the relatives etc.

In the Indian Evidence Act, the Commission recommended adding a new provision, i.e. section 114B as recommended in the 113th Report.

c) 177th Report of the Law Commission (2001) titled "Law Relating to Arrest"⁶⁶ and 185th Report of the Law Commission (2003) : Review of the Indian Evidence Act, 1872⁶⁷

The Law Commission of India, in the 177th Report provided the section section 55A for inclusion in the Cr.PC, which provided - **"Health and Safety of the Arrested Persons:** It shall be the duty of the person having the custody of an accused to take

reasonable care of the health and safety of the accused."

In the 185th Report, the Commission specified the judgement of the Supreme Court, in the case of *State of MP v. Shyam Sunder Trivedi*⁶⁸, where the Court considered the 113th Report of the Law Commission.

d) Fourth Report of National Police Commission (1980)⁶⁹

The National Police Commission, in the Fourth Report (1980) considered that custodial torture had been prevalent and that any instance of that torture on a person in police custody was dehumanising.

XII. RECOMMENDATIONS FOR EFFICIENT IMPLEMENTATION OF

THE CONVENTION IN INDIA

A. Ratification of the Convention by India

The ratification of the Convention against Torture become very significant considering the issues that maybe with respect to ensuring the requirements of extradition of criminals from the nation in the absence of a law governing torture provisions and providing for the prohibition of the infliction of instances of torture at any cost or on any grounds.

⁶⁷185th Report (2003), Law Commission of India

⁶⁸1995(4) SCC 262

⁶⁹Fourth Report (1980), National Police Commission



ther, the requirement for the ratification of the Torture Convention becomes highly integral taking into account the need for the protection of the human rights, and the prevention of the violation of the same, with respect to safeguarding the Right to Life under the Article 21 of the Constitution of India.

as per their condition, as per the facts and circumstances of the case.

The Courts should also take into account the economic conditions of the victim, the injuries caused, the cost of reparation etc. for determining the compensation.

B. Stringency of the Punishment for the Acts of Torture

There is a requirement that any acts of torture as are inflicted with respect to prisoners or accused persons shall be prohibited, and the mechanisms shall be utilized which ensure the efficient prevention of the same, so as to safeguard the members of the society from the violation of their fundamental rights.

Thereby, the instances of torture and the persons by whom such acts are carried out must be protected against by ensuring stringent punishment for the perpetrators. The measures may be incorporated to deter the acts of torture so that they may not be carried out.

C. Compensation of Victims of Torture

The Courts shall determine a just compensation for the victims of torture which may enable their rehabilitation. In order for the restoration of the rights of such persons, the measure must be taken by the Courts to provide the compensation that can help in medical aid and other requirements

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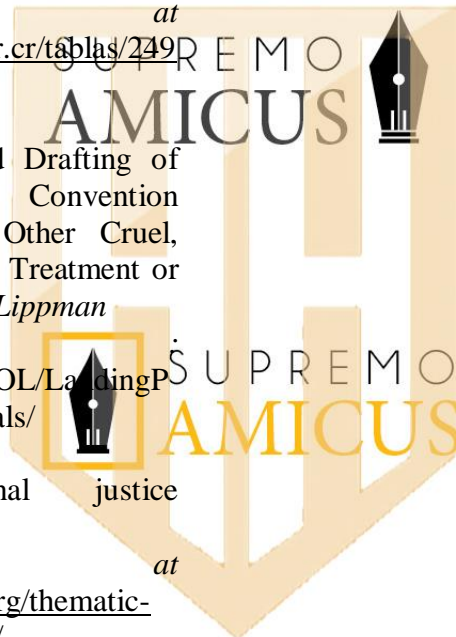
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RIGHTS OF ACCUSED: THE CONSTITUTIONAL ASPECT

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INTRODUCTION

“The creation of constitutional government is a most significant mark of the distrust of human beings in human nature. It signalizes a profound conviction, born of experience, that human beings vested with authority must be restrained by something more potent than their own discretion.”

Raymond Moley

The Constitution of India under Article 21 that is Right to Life & Personal liberty lays down that, life and personal liberty of an individual can be deprived by a reasonable, fair and just procedure established by law. Since the beginning of civilised society, human race has always been conscious of justice and has frowned at efforts to interfere with individual Liberty and dignity. Therefore to safeguard the rights of the person who are deprived of their life and personal liberty and suffer an irreparable loss due to accusation or conviction are constitutionally recognized under Article 20 of the Constitution. A person in custody of the police, an under-trial or a convicted individual does not lose his human and fundamental rights by virtue of incarceration. And these rights are so elemental in the imparting of justice that almost all developed countries’ in world whether it is Constitution of USA, UK or Australia have given recognition to certain rights constitutionally.

As recognized internationally Article 15 Para 1 of International Covenant on Civil and Political Rights says “No person shall be held guilty of any criminal offence which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall there be any imposition of greater penalty or punishment than that was there when the offence was committed.”⁴⁵⁴

ARTICLE 20 AND THE PROTECTION IT GRANTS TO ARRESTED PERSON.

Article 20 gives protection to convicted persons under its different clauses. Article 20(1) provides protection against ex post facto laws, 20(2) provides protection against double jeopardy and 20(3) provide protection against self-incrimination.

I. **ARTICLE 20(1) PROTECTION AGAINST EX-POST-FACTO LAWS.**

The literal meaning of ex post facto law is retrospective law. According to me ex post facto law is a law which criminalizes an act which when committed wasn't a criminal act or law which imposes greater penalties than the penalty which was there when the act was committed. As early as in 1798 in case of **Calder v. Bull**⁴⁵⁵ justice Samuel Chase defined ex-post-facto law as:

- “1. Every law that makes a non-criminal action done before the passing of the law criminal; and punishes such action.
2. Every law that aggravates a crime, or makes it greater than it was, when committed.

⁴⁵⁴The International Covenant on Civil and Political Rights.

⁴⁵⁵2 Dall.(3 U.S) 386.



3. Every law that inflicts a greater punishment, than the law enforced at the time of commission of crime.

4. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”

But in India Supreme Court through several of its judgement has deviated from the definition given by Justice Chase.

Article 20(1) provides protection to convicts in two ways

1. It prohibits conviction under any law which has retrospective affect.
2. It prohibits greater penalties under any retrospective law.

Under part one of 20(1) a person can't be convicted for an offence which was not a crime when it was committed the conviction can only be done for violation of any law which was in force at the time of such act. Any law enacted later which criminalizes any act done in past cant punish a person for the same. Immunity is thus provided to a person from being tried for an act, under a law enacted subsequently, which makes the act unlawful.⁴⁵⁶

Exceptions to Article 20(1):

- Preventive detention.⁴⁵⁷
- Civil Liabilities.⁴⁵⁸
- Tax.⁴⁵⁹

⁴⁵⁶State of Maharashtra v. K.K

SubramaniamRamaswamy, AIR 1977 SC 2091.

⁴⁵⁷Prahlad v. State of Bomaby, AIR 1952 Bom 1.

⁴⁵⁸Hastising Mfg. Co. v. Union of India, AIR 1960 SC 923.

⁴⁵⁹Jawala Ram v. Pepsu, AIR 1962 SC 1246.

Article 20(1) only prohibits conviction not the trial under such laws. The change in procedure or change in courts of proceeding is not unconstitutional and can't be quashed by Article 20(1). In *Union of India v. Sukumar*⁴⁶⁰ Supreme court held that law which changes the venue of trial is not hit by Article 20(1). In *Sajjan Singh v. State of Punjab*⁴⁶¹ the court held a change in procedural law is not hit by Article 20(1). Thus a law prescribing new rules of evidence can be made applicable on offence committed earlier.

Furthermore the law passed now but through legislative declaration deemed to have been enacted on an earlier date cannot be said to be law in force if any act committed earlier becomes an offence by such declaration and is hit by Article 20(1).

The second protection under Article 20(1) is protection of the convicts from the enhanced punishment. If any law is made by legislature and enforced by executive who increases the punishment then such law is hit by Article 20(1) of the constitution. But when there is no minimum penalty prescribed by law then any law preceding the act in question laying down minimum penalty will not be hit by Article 20(1). The same was said by Supreme Court in *K. Satwant Singh v. State of Punjab*⁴⁶² held that an ordinance which lays down the minimum punishment or penalty where no such bar is there is not hit by Article

⁴⁶⁰AIR 1966 SC 1206.

⁴⁶¹AIR 1964 SC 464.

⁴⁶² AIR 1960 SC 266 : (1960) 2 SCR 89.



20(1) because “the minimum penalty prescribed by it could not be greater than what could be inflicted by the law in force at the time of commission of offence”.

An ex post facto law which mollifies the punishment of a criminal offence is not within the prohibition of Article 20. And an accused should have the benefits of such law which reduces the punishment.⁴⁶³

II. ARTICLE 20 (2) : PROTECTION FROM DOUBLE JEOPARDY

Any person should not be subject for the same offence to be put twice in jeopardy of life or limb. It is one of the doctrines laid down inter alia by the fifth amendment of the U.S. Constitution. This means that when a person has been tried and acquitted or convicted of an offence by a competent court, the conviction serves as a bar to any further criminal proceedings against him for the same offence. i.e. no person be indicted to punishment and prosecution for same offence more than once and this has been developed into the ‘rule against double jeopardy’.

Ever since the commencement of the constitution of the country the principle of double jeopardy is a constitutional right, but the question arises did it exist prior to the commencement of the constitution of India, the answer is yes, but merely as a statutory right. The scope of the following provision in India is lower than that of the English or American rule, as in India, the rule of *autrefois acquit* is not incorporated in

Art. 20(2) but only of acquit convict. For it to be invoked both prosecution and punishment should co-exist in the first instance.

Article 20(2) can only be invoked when the prosecution and punishment is for the identical offence. The same offence means an offence whose ingredients are the same. The test to ascertain whether the two offences are the same is the identity of the ingredients of the offences.

The Supreme Court explained the following proposition in the case of **State of Bombay v. S.L. Apte**⁴⁶⁴: The crucial requirement for the Article 20(2) to get triggered is that both the offences should be identical. The two are analysed to be identical on the basis that ingredients of the two offences should be identical.”

PROSECUTION

The limitation read into Art. 20(2) are that the prosecution and punishment must be before a court of law, or a judicial tribunal. The court has explained legal proposition under 20(2) as follows: to invoke the Article, the words ‘prosecuted and punished’ are to be taken not distributively. Both the factors must co-exist at the same time.

III. ARTICLE 20(3) : PROTECTIONS AGAINST SELF INCRIMINATION

The fundamental canon of criminal jurisprudence is the privilege against self-incrimination. Article 20(3) provides that no person shall be compelled to be a witness against himself. And the basic postulates of this principle are –

⁴⁶³ Rattan Lal v. State of Punjab, AIR 1965 SC 444 : (1964) 7 SCR 676.

⁴⁶⁴ AIR 1961 SC 578 : (1961) 3 SCR 107



- That the accused is presumed to be innocent
- That it is for the prosecution to establish his guilt
- That the accused need not make any statement against his will.

Thus the privileges ensured against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. Article 20(3) which embodies this principle reads: no person accused of any offence shall be shall be compelled to be a witness against himself.” For the protection given under article 20(3) to be claimed the following three ingredients must co-exist which were propounded by the Supreme Court in the case of **M.P. Sharma v. Satish Chandra**⁴⁶⁵:

1. It is a right available to a person accused of an offence
2. It is a protection against ‘compulsion’ ‘to be a witness’
3. It is a protection against such compulsion resulting in his giving evidence against himself’.

TYPES OF INCRIMINATING EVIDENCE COVERED BY ARTICLE 20(3)

The most basic question arises on which the judicial opinion fluctuated was whether Article 20(3) covers something more besides oral evidence. As held by Supreme Court in the case of **Selvi v. State of Karnataka**⁴⁶⁶ the Article is a privilege against ‘testimonial compulsion’.

Therefore to stabilize the opinion the Supreme Court taking a broader view in **M.P. Sharma v. Satish Chandra**⁴⁶⁷ stated that to limit the scope of Article 20(3) to oral evidence is “to confine the content of the constitutional guarantee to its barely literal import, and it covers not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes.”, so to restrict is to rob the article off its substantial purpose.

The main question which arose in the case of **State of Bombay v. KathiKaluOghad**⁴⁶⁸ was whether 20(3) is violated when accused is directed to give his specimen hand writing, or signature, or the impression of his palms and fingers. Which was ruled out that “self-incrimination must mean conveying information based upon the personal knowledge of the person giving information” and only “personal testimony which must depend upon his volition”.

So in order to draw a balance between the exigencies of investigation of crimes and the need to safeguard the individual from being subject to third degrees and the variegated forms of torture, several types of evidences have been excluded from the purview of article 20(3).

Also explaining the scope on documentary scope supreme court in **Oghad**⁴⁶⁹ explained that: the accused may be in possession of a document, “is not the statement of the accused, which can be said to be of nature of a personal testimony.”

⁴⁶⁵AIR 1954 SC 300.

⁴⁶⁶AIR 2010 SC 1974.

⁴⁶⁷ Supra, note 23.

⁴⁶⁸AIR 1961 SC 1808.

⁴⁶⁹ Id.



Therefore self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely include the mechanical process of producing documents in court which may throw light on the controversy but may not include any statement of the accused based on his personal knowledge.

With the advancement of technology, methods of investigation are now available to the investigating authorities and therefore the constitutionality of various methods is being challenged under Article 20(3). Recently according to the Bombay High Court in the case of **Ramchandra Ram Reddy v. State of Maharashtra**⁴⁷⁰: “the tests of Brain Mapping and Lie Detector in which the map of the brain is the result, or polygraph, cannot be said to be the statement made by the witness. At the most it can be called the information received or taken out of the witness.”

But later in the case of **Selvi v. State of Maharashtra**⁴⁷¹

“Supreme Court held that the compulsory administration of certain scientific techniques, namely Narcoanalysis, polygraph Examination and the Brain Electrical Activation Profile (BEAP) bear a testimonial character and thereby triggers the protection under Article 20(3) of the constitution.”

WHAT IS COMPULSION?

In order to avail the protection under Article 20(3), not only the person making the statement out of his personal

knowledge be an accused but also that he was compelled to make the statement.

As a proposition of law, the mere fact of being in police custody at the time of making the statement does not by itself lead to the inference that the accused has been compelled to to make the statement. However as held in **Ghazi v. State of U.P.**⁴⁷², if the police obtains the statement by employing third degree methods, the statement would be barred under 20(3).

Expansive interpretation was given to testimonial compulsion in the case of **Nandini Satpathy v. P.L. Dani**⁴⁷³ “not only by physical threats or violence but also by psychic torture, atmospheric pressure, or any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied on an accused to obtain information highly incriminatory will be hit by Article 20(3)”.

Privilege against self-incrimination has not been applied in India to searches and seizures, or seizure of document under a search warrant. A passive submission to search and seizure cannot be styled as a compulsion on the accused and if anything is recovered during such search which may provide incriminating evidence against the accused it cannot be styled as a compelled testimony.

Under Sec 15 of TADA Act, the confession made by the accused was considered admissible in evidence, but must be strictly according to the procedure laid down in the Act for recovering confession.

⁴⁷⁰ 2004 All MR (cri) 1704

⁴⁷¹ Supra, note 24.

⁴⁷² AIR 1966 All 142

⁴⁷³ AIR 1978 SC 1025: (1978) 2 SCC 424



The prosecution under Article 20(3) is available only in criminal proceedings or proceedings of criminal nature before a court of law or other tribunal before which a person may be accused of an offence as defined in S. 3(38) of the General Clauses Act, that is, an act punishable under the Penal Code or a special or local law. as held by Supreme court in **Shyam Sunder Chowkhani v. KajalKantiBiswas**⁴⁷⁴ stated that “the protection of Article. 20(3) do not therefore extend to parties and witnesses in civil proceedings or proceedings other than Criminal”.

ARTICLE 21 AND ITS DEVELOPMENT TO PROTECT THE RIGHTS OF ARRESTED PERSON

Article 21 of the Indian Constitution has been incorporated with the object to prevent encroachment upon personal liberty and deprivation of life except according to the procedure established by law.

Article 21 ensures to the person his life and liberty, where once liberty and life were narrowed to the bodily liberty free from constraints or restraints in **Gopalan**⁴⁷⁵ case, the emergence of **Maneka Gandhi**⁴⁷⁶ case enumerated the widest concept to the life and especially the liberty of the individual. As interpreted in **Gopalan**⁴⁷⁷, Article 21 provided no protection or immunity against competent legislative action. Article 21 gave a carte blanche to a legislature to enact a law to provide for arrest of a person without

much procedural safeguard. It gave final say to the legislature to determine what was going to be the procedure to curtail the personal liberty of a person in a given situation and what procedural safeguards he would enjoy.

Article 21 constituted a restriction only on the executive which could not act without law and Article 21 was impotent against legislative power which could make any law, however drastic, to impose restraints on personal liberty without being obligated to lay down any reasonable procedure for the purpose. It was not the court to judge whether the law provided for fair or reasonable procedure or not.

Thus, Supreme Court ruled in **Gopalan**⁴⁷⁸ that in Article 21 the expression procedure established by law means the procedure as laid down in the law and enacted by the legislature and nothing more. A person could be thus deprived of his life or personal liberty in accordance with the procedure established by law.

The court was thus concerned was thus concerned with the procedure as laid down in the statute. Whether the procedure was just, fair or reasonable was not the concern of the court. Three easy steps could deprive an individual of his life and liberty:

- 1) There must be a law
- 2) It should lay down a procedure
- 3) The executive must follow the procedure while depriving an individual of his life or personal liberty

⁴⁷⁴ AIR 1999 Gau 101.

⁴⁷⁵ AK Gopalan v. State of Madras, AIR 1950 SC 27.

⁴⁷⁶ Maneka Gandhi v. Union of India, AIR 1978 SC 597.

⁴⁷⁷ Supra, note 26.

⁴⁷⁸ Id.



Maneka Gandhi⁴⁷⁹ case advent gave a major blow to the interpretations laid down in **Gopalan**⁴⁸⁰, in the post emergency period major transformations took place in the judicial attitude towards the protection of personal liberty which went through a traumatic set back during the period of emergency in the country in the time frame of 1975-77 when personal liberty had reached its nadir.

In case **Munn v Illinois**⁴⁸¹ : “by the term life as here used is something more is meant than mere animal existence.”

Personal liberty was given a comprehensive understanding it does not mean mere the liberty of the body, i.e. freedom from physical restraint or freedom from confinements within the bounds of prison. Personal liberty was brought to the wider ambit under the law.

And especially the term ‘Procedure’ was settled after **Maneka Gandhi**⁴⁸² that Procedure for purposes of Article 21 has to be reasonable, fair and just and should not be arbitrary, fanciful or oppressive.

Presumption of innocence is a human right. Article 21 in view of its expansive meaning not only protects life but also conducive to fair procedure. Augment of **Maneka Gandhi**⁴⁸³ case had a very profound impact on the administration of criminal justice. Since the conditions prevailing in prisons have long been extremely deplorable and sub human; prisoners are mal treated;

criminal trials are inordinately delayed; police brutality is legendary.

The protection of Article 21 extends to all persons- persons accused of offences, under trial prisoners, prisoners undergoing jail, etc all the aspects of administration of criminal justice falls under the umbrella of Article 21. As justice is shun into shackles the moment power delegation becomes arbitrary. A procedure which is unreasonable, harsh and prejudicial to the accused cannot be in consonance with Article 21.

I. ARREST

Denying a person of his liberty is never a sign of free and civilised society. It causes to a person incalculable harm to the person’s reputation and self-esteem. Reasonable restrictions are permitted by law but in accordance with the just and reasonable procedure established by law. Post **Maneka Gandhi**⁴⁸⁴ the court has constantly emphasised that the right to life of a citizen cannot be put in abeyance on his arrest. Arrest should not be made on mere suspicion but only after a reasonable satisfaction reached after some investigation

In the **Joginder Kumar v. State of Uttar Pradesh**⁴⁸⁵, the Apex Court laid down the directions regarding the arrest, since the apex court wanted the arrest to be regulated and executed with the procedure established by law. The Apex Court in **D.K. Basu vs. State of West Bengal**⁴⁸⁶ has held that transparency

⁴⁷⁹ Supra, note 27.

⁴⁸⁰ Supra, note 26.

⁴⁸¹ Munn v. Illinois, 94 U.S. 113 (1977).

⁴⁸² Supra, note 27.

⁴⁸³ id.

⁴⁸⁴ Supra, note 27.

⁴⁸⁵ AIR 1994 SC 1394.

⁴⁸⁶ AIR 1977 SC 3017.



of action and accountability are perhaps the two possible safeguards which courts must insist upon. In this judgment, the Supreme Court has laid down more concrete and specific guidelines concerning arrest.

II. SPEDY TRIAL

There is no such provision in the constitution of the country, prescribing any maximum period for which a magistrate can keep an undertrial in jail or even without trial. But quick justice is now regarded as sine qua non of Article.21. Inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of the accused will also be relevant fact. The prosecution should not be allowed to become persecution.

The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vies, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State.

The Apex Court in **Maneka Gandhi's**⁴⁸⁷ case has evolved it, through a process of interpretation that speedy trial though not a specifically enumerated fundamental right in the Constitution, is an integral and

essential part of Article 21 of the Constitution. The Supreme Court has repeatedly in **HusainaraKhatoon v. State of Bihar**⁴⁸⁸, **A.R. Antuley vs. R.S. Nayak**,⁴⁸⁹ and in consequent landmark cases has held that the speedy trial of an accused is his fundamental right for being implicit in the broad sweep and content of Article 21 of the Constitution though neither the Constitution nor legislation provides any time limit for High Courts to pronounce their judgements but it has to be without delay.

In **Anil Rai vs. State of Bihar**⁴⁹⁰ the problem of delay in delivery of judgements has been elaborately treated and termed delay in imparting justice as a 'horrible situation' and 'Shocking state of affairs prevalent in some High Courts'.

In the words of learned Justice Sethi, "Such a delay is not only against the provisions of law but in fact infringes the right of personal liberty guaranteed by Article 21 of the Constitution of India. Any procedure or Course of action, which does not ensure a reasonable quick adjudication, has been termed to be unjust. Whereas justice delayed is justice denied, justice withheld is even worse than that".

The learned judge further said. In a country like ours where people consider

⁴⁸⁸AIR 1995 SC 366.

⁴⁸⁹AIR 1992 SC 1630.

⁴⁹⁰AIR 2001 SC 3173 (1).

⁴⁸⁷ Supra, note 27.



judges second to God, efforts make the judges only to strengthen that belief of the common man. Delay in disposal of cases facilitates the people to raise eyebrows, sometimes genuinely, which if not checked, may shake the confidence of the people in Judicial System. A time has come when the judiciary itself has to assert for preserving its stature respect and regards for the attainment of the rule of law. For the fault of a few, the glorious and glittering name of the judiciary cannot be permitted to be made ugly. It is the policy and purpose of law, to have speedy for which efforts are required to be made to come up to the expectation of the society by ensuring speedy, untainted and unpoluted justice.

In **HussainaraKhatoon (IV) V. State of Bihar** ⁴⁹¹, the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and that it is the constitutional obligation of the state of devise such a procedure as would ensure speedy trial to accused. And emphasised that financial constraints and priorities in expenditure would not enable the Government to avoid its duty to ensure speedy trial to the accused. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability.

⁴⁹¹AIR 1995 SC 366.

The guarantee of speedy trial is intended to avoid oppression and prevent delay by imposing on the Court and the prosecution an obligation to proceed with the trial with a reasonable dispatch of justice, and the right to speedy trial flowing from Art.21 encompasses all the stages, namely, "the stage of investigation, inquiry, trial, appeal, revision, and retrial. And the ensuring of life and liberty under article 21 extends till that horizon till where the ensured justice and the method to get it implemented has reached it's zenith.

III. INVESTIGATION

Investigation is the first step on the basis of which prosecution files a case against accused in the court which tries the accused for alleged offence. It is a well settled proposition that right to speedy trial in all criminal prosecutions is an inalienable right under article 21 and this right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well.

Article 21 of the Constitution of India confers upon every individual a fundamental right not to be deprived of his life or liberty except in accordance with due procedure prescribed under law. The procedure prescribed under law has to be necessarily reasonable, fair and just. Under Article 21 of the Constitution, the right to speedy investigation is a fundamental requirement. Hence, it is the state that has on its shoulders the burden of



investigation as well as the prosecution in a criminal trial. Speedy and expeditious investigation and trial, which have been envisaged under section 309(1) of the Code of Criminal Procedure, 1973 reflect the spirit of Article 21 of the Constitution of India.

in **R.P. Kapur vs. State of Punjab**⁴⁹² where there was extraordinary delay in the investigation and in submitting the charge-sheet, the Supreme Court remarked:

"It is an utmost importance that investigation into criminal offences must always be free from any objectionable features or infirmities which may legitimately lead to the grievance of the accused that the work of investigation is carried on unfairly or with an ulterior motive".

Inordinate delay by the police in the investigation of criminal cases is violative of fundamental right under Article 21 of the Constitution and gives rise to a right in favour of the accused to move the High Court under Article 226 or to the Supreme Court under Article 32 of the Constitution for the enforcement of his right.

Inordinate delays in investigations raise presumption that either there is no evidence against the accused to put him on trial or the investigation is malafide with a view to keep the accused in custody or harass the same. In both the cases, the appropriate remedy is quashing of the investigational proceedings.

In cases of inordinate delay there are two approaches followed by the courts. The

first approach is to release the accused on personal bond or without any bond, where an accused had been in Jail for the maximum term which could have been awarded to him if found guilty for the offence he was charged with, he was ordered to be released from custody forthwith. In cases where no charge sheet had been filed for three years, accused remaining in Jail custody, they were ordered to be released on furnishing personal bonds in meagre amount.⁴⁹³ The second approach is somewhat radical and revolutionary.

In **Abdul Rehman Antulay vs. R.S. Nayal**⁴⁹⁴ now the Supreme Court has finally settled the position that right to speedy trial flowing from Article 21 of the Constitution of India encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial, by this decision the Apex Court has broadened the scope of this right.

Fair investigation and fair trial are concomitant to preservation of fundamental rights of accused and cannot be compromised unless by the fair procedure established by law under Article 21 of the Constitution.

PROTECTION GIVEN TO ARRESTED PERSON UNDER ARTICLE 22 OF THE CONSTITUTION

Article 22 of Indian constitution lays down the quintessential rights of an arrested person to protect him from the oppression

⁴⁹²1960 Cr. LJ 1239(SC).

⁴⁹³Mohd.Saleem Khan V. State of UP AIR 1982 SC 1996.

⁴⁹⁴ Supra, note 36.



and abuse at the hands of arresting officials. When an individual is detained his basic liberties of life and freedom of movement are denied. Art 22 provides protection against arrest and detention.

I. PROTECTION AGAINST ARREST

When a person is arrested, he loses his liberties, freedom of movement and his reputation in society the Supreme Court granting protection stated in *Joginder Kumar v. State of Uttar Pradesh*⁴⁹⁵ “no arrest should be made without a reasonable satisfaction reached after some investigation as to genuineness of the complaint”. The Article 22(A) made mandatory for the detaining authority to notify the grounds of arrest. Also the Supreme Court in *Shobharam case*⁴⁹⁶ said that “a person’s liberty cannot be curtailed by arrest without informing him, as soon as possible, why he is arrested”. The rationale behind this is that the person arrested has to prepare his defence for bail and failure to inform the person of grounds for arrest would entitle him to be released and if there is any delay in communication of the grounds then the same should be justified. The insufficiency of information regarding grounds of arrest will make arrest unlawful. Article 22(1) also gives the person arrested to be defended by a lawyer and as Justice Iyer in

*Nandini Satpathy*⁴⁹⁷ said “the spirit and sense of Article 22(1) is that it is fundamental to the rule of law” and every person can avail his right to consult a legal practitioner of his choice even if he is not under arrest or detention and if an arrested person wishes to have a lawyer by his side while he is examined then such demand cannot be denied to him⁴⁹⁸ and state has no duty to provide the accused person with a lawyer.⁴⁹⁹

Under Article 22(2) the arrested person also has a right to be produced before a magistrate within 24 hours of his arrest excluding the travelling time. If the arrest is made without a warrant in presence of a magistrate then the person can’t be produced before the same magistrate. The Supreme Court in *Khatri v. State of Bihar*⁵⁰⁰ said that the arrested person should be produced before magistrate within 24 hours and this constitutional provision should be **strictly and scrupulously** observed. The court in *Gunpati v. Nafisul Hasan*⁵⁰¹ held that if the provision is breached the arrested person is entitled to be released.

Clause 3 of Article 22 mentions the exceptions for above clauses:

- Enemy aliens, and

⁴⁹⁵AIR 1994 SC 1349.

⁴⁹⁶State of Madhya Pradesh v. Shobharam, AIR 1996 SC 1910.

⁴⁹⁷Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025 : (1978) 2 SCC 424.

⁴⁹⁸Id.

⁴⁹⁹Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 217 : 1951 SCR 344

⁵⁰⁰AIR 1981 SC 928, 932.

⁵⁰¹AIR 1954 SC 636.



- Person arrested under preventive detention law.

These provisions only apply to the criminal or quasi criminal cases or for some activity prejudicial to public interest.

II. PREVENTIVE DETENTION

Preventive detention means detaining a person without trial or conviction by a court only on the suspicion of authorities on the person doing or will be threat to law and order. The difference between an imprisonment after conviction and preventive detention is where former goes through the process of trial the later doesn't involves the trial procedure and person detained is only on the suspicion of executive officials. In conviction the punishment is for the past act and the offence has to be proved beyond reasonable doubt whereas in preventive detention the past act is the merely the material for inference about the future course of probable conduct. Both Parliament and State legislature can make laws on preventive detention concurrently for maintenance of law and order. Clauses 4 to 7 of Article 22 lay down the minimum procedure which is to be observed by the authorities even in preventive detention.

COMMUNICATION OF GROUNDS TO THE DETENU

Article 22(5) gives two rights to the arrested person first, detaining authority must convey the grounds of arrest to the person being detained as soon as possible and second is the right of detenu to make representation against such detention at the earliest possible opportunity. This is

natural justice woven into the fabric of preventive detention by the constitution. And there is relation between the two rights given in 22(5) because to defend oneself against the detention in a court of law the detenu must know the grounds of his detention. Further in *Khudiram Das v. State of West Bengal*⁵⁰² the Supreme Court held that all basic facts and particulars which influenced the detaining authority in arriving at its satisfaction must be communicated to detenu. No additional grounds can be added, after the communication of grounds of detention to detenu, to strengthen the detention order.⁵⁰³ But any additional fact can be conveyed later within a reasonable time period.⁵⁰⁴

All the grounds of detention must be communicated in one instalment. Once the grounds have been conveyed, fresh or new grounds cannot be added to strengthen the original detention order. But the detaining authority can withhold facts if they are not desirable to be disclosed in interest of public and this power to withhold only the facts of detention is given in Article 22(6). Here distinction should be made between ground and facts; the former has to be compulsorily communicated whereas the latter can be withheld by authorities under 22(6). The detaining authority is under no obligation to disclose the decision on which the facts of detention are withheld from him.⁵⁰⁵

⁵⁰² AIR 1975 SC 550: (1975) 2 SCC 81.

⁵⁰³ State of Bombay v. Vaidya, AIR 1951 SC 157: 1951 SCR 167.

⁵⁰⁴ Ujagar Singh v. State of Punjab, AIR 1952 SC 350.

⁵⁰⁵ PuranlalLakhanpal v. Union of India, AIR 1958 SC 163: 1958 SCR 460.



a) RIGHT TO MAKE REPRESENTATION

To make a representation before the court against the detention the detenu should be communicated the grounds of detention so as to make him able to defend himself. All the grounds of detention must be disclosed to the detenu and non-disclosure of the same would make the rights of detenu to make effective representation will be curtailed. For a proper representation the communication must be clear, non-ambiguous and in a language which is understandable to the detenu and which can be interpreted by common man. If the language in which grounds are communicated needs interpretation of lawyer then the grounds are held to be vague. In *Ichu Devi v. Union of India*⁵⁰⁶ court held that the detention of the petitioner became illegal because of non-compliance with statutory and constitutional requirement. Further in *Kamarunnissa v. Union of India*⁵⁰⁷ court held that the detenu has to show that because of non-supply of copies of the document in time denied him opportunity to make an effective defence against the detention and hence denying him of his rights.

b) CONSIDERATION OF THE REPRESENTATION

The interpretation of Article 22(5) by the court is such that it creates a duty on the authorities to consider the representation of the detenu before sending it to the advisory board. Creation of advisory board doesn't

means that the authorities have been absolved from their duty. So there are two scenarios regarding representation, first being the representation made to the authority is considered, second being the representation is made to authority but due to lack of time it is referred to advisory board after the decision of advisory board the authority detaining must consider the representation⁵⁰⁸ independent of the report of advisory board⁵⁰⁹ but if authorities transfer the case to advisory board then it would violated Article 22(5) and vitiate the detention. The government is still bound to consider the representation because it is not bound by the report of advisory board.⁵¹⁰ The consideration of representation must be promptly and diligently and it should be at earliest opportunity.⁵¹¹ The Supreme Court has often sharply criticized the phlegmatic attitude of bureaucrats in taking up the consideration of representation. The court accentuated the importance of prompt action authority as said "personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the

⁵⁰⁶AIR 1980 SC 1983: (1980) 4 SCC 531.

⁵⁰⁷*Kamarunnissa v. Union of India*, AIR 1991 SC 1640, 1648 : (1991) 1 SCC 128.

⁵⁰⁸*Mossa Husein Sanghar v. State of Gujarat*, AIR 1994 SC 1479 : (1993) 1 SCC 511.

⁵⁰⁹*Union of India v. Manish Bahal*, AIR 2001 SC 2685.

⁵¹⁰*Pankaj Kumar v. State of West Bengal*, AIR 1970 SC 97 : (1969) 3 SCC 400.

⁵¹¹*B.C. Dutta v. State of West Bengal*, AIR 1972 SC 2605.



appropriate authority but also unconstitutional”⁵¹².

c) ADVISORY BOARD

Another safeguard under 22(4) is 22(4) (a) which says that for detention beyond the period of three months can be made if advisory board has opinion that there is sufficient cause for detention. The report of advisory board should be made within three months otherwise detention becomes illegal.⁵¹³ The board must consist of persons who are qualified to be a judge of High Court. Article 22(7)(c) Prescribes the procedure followed by an advisory board. Some changes have been introduced by 44th Constitutional Amendment Act:

- Maximum detention period has been reduced to 2 months.
 - Board must consist of atleast three persons, a chairman (serving judge of High Court) and atleast two other members (serving or retired judge of High Court).
 - The board must be constituted in accordance with the recommendation of Chief Justice of Respective High Court.
 - Detention beyond the maximum period must be in accordance with laws made by Parliament.
- These changes have not been implemented yet.

d) CONFIRMATION OF THE DETENTION ORDER

Article 22(4) interpretation also says that apart from advisory board the government should confirm and extend the period of

detention within the three months limit beyond that the detention becomes invalid as soon as the time is elapsed. The government should not only consider the report of advisory board but also apply their mind.⁵¹⁴ The order of detention should be in writing and communicated to detenu non communication will be treated as irregularity and does not invalidate the detention.⁵¹⁵

In *Gopalan*⁵¹⁶ the Supreme Court said that the ‘and’ used in Article 22(7) means ‘or’ so parliament can either lay the circumstances or classes of cases for extension of detention beyond the period of three months. But this view of court changed and in *Sambhu Nath Sarkar v. State of West Bengal*⁵¹⁷ the court said that both the circumstance and classes of cases must be prescribed for extension of period of detention.

⁵¹²Jayanaryan Sukul v. State of West Bengal, AIR 1970 SC 675.

⁵¹³ Abdul Latif v. B.K. Jha, AIR 1987 SC 725 : (1987) 2 SCC 22.

⁵¹⁴Nandlal v. State of Punjab, AIR 1981 SC 2041 : (1981) 4 SCC 327.

⁵¹⁵ Deb Sadhan Roy v. State of West Bengal, AIR 1972 SC 1924 : (1972) 1 SCC 308.

⁵¹⁶Supra, note 26.

⁵¹⁷ AIR 1973 SC 1425 : (1973) 1 SCC 856.



**SPECIAL MARRIAGE ACT; A
BURDEN TO LIVE : A
SOCIOLOGICAL INTERPRETATION**

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Abstract

Freedom of religion is a recognized fundamental right in India. Is this fundamental right being questioned after a woman's marriage? This Article draws attention to a relevant question of wife's presumption of religion in inter-caste marriage. The presumption of wife's religion to be that of her husband can be a forceful conversion of religion. This concept under certain personal laws is a violation of the constitutional guarantee that directly affects the basic structure of the Constitution. This study is highlighting the concept of fundamental rights and the conflict of this fundamental right under personal laws. It also analyses the fact that any such presumption will be vitiating the object of the beneficial legislation for inter-caste marriages and those personal laws restraining to continue the wife's religion would be affecting the basic structure of the Constitution. This issue raises a question of social importance. The incorporation of fundamental rights in all legislations gives utmost importance to human rights. Freedom of religion is one among the basic human right. But in real life the predominance of religious rulings makes the concept of fundamental rights into a question mark. The Special Marriage Act of 1954 is seen as a statutory alternative for couples who choose to retain their identity

in an inter-religious marriage. This weightage given to customary practices under personal laws is diluting the object of the Act. This is because the guiding factors of customary beliefs in India and this guiding factor is becoming the burden of Special Marriage Act. The veiled reason is that there is an indirect interference of religious institutions into the personal life of an individual. Such interferences must be curtailed for promoting the universally recognized principles of human life and also for promoting international peace and security in the nation.

Introduction

Freedom of religion is a recognized fundamental right in India. Is this fundamental right being questioned after a woman's marriage? A relevant question of wife's presumption of religion in inter-caste marriage arises. Sometimes the presumption of wife's religion to be that of her husband can be a forceful conversion of religion. This concept under certain personal laws is a violation of the constitutional guarantees that directly affects the basic structure of the Constitution. Any such presumption will be vitiating the object of the beneficial legislation for inter-caste marriages and those personal laws restraining to continue the wife's religion would be affecting the basic structure of the Constitution.

Currently the issue of a Parsi lady, married to a Hindu, was restrained from performing her last rituals to her father. The matter of discussion arises at this point. Though there is a beneficial legislation in India, Special Marriage Act, 1954 allowing the inter-caste marriage and Art.25 of Constitution of India, guaranteeing the Freedom of Religion, the



personal laws here are having an overriding effect. This personal law deems the wife's religion to be that of her husband but the lady still like to be a Parsi. The contradictory fact is that unless and until a person voluntarily renounces his religion he continues to be in his original religion. But here the irony is that the wife has no choice rather than accepting her husband's religion. This issue raises a question of social importance.

The statement "A woman does not mortgage herself to a man after marriage" made by Chief Justice Dipak Misra in the Parsi lady and Hindu man marriage issue raises the question of social importance.

Concept of Fundamental Rights

The concept of human rights can be traced to the natural law philosophers, such as Locke and Rousseau¹. According to Locke, man is born "with a title to perfect freedom and an uncontrolled freedom of all the rights and privileges of the law of nature."²

1. M.P.Jain, Indian Constitutional Law, 2014, p-846
2. *ibid*

The right that cannot be taken away by an ordinary procedure or legislation is known as fundamental right. The Constitutional documents of all legislations and International recognition of fundamental rights arose from the *doctrine of natural law and natural rights*.³ Thus the concept of fundamental right give a prominent place both nationally and internationally. The recognition of fundamental rights as a constitutional guarantee was first drafted in U.S. Constitution in 1787⁴. As a result, the Bill of Rights, 1791 was incorporated in the

U.S Constitution.⁵ This concept has been emphasized by Justice Jackson in *West Virginia State Board of Education v. Barnette*⁶ he had described fundamental rights like right to life, liberty, and property, free speech, free press, freedom of worship and assembly may not be subjected to vote as these rights are not a result of any election. This view shows that the fundamental rights are inalienable.

In 1948 The United Nations Organization had adopted the Universal Declaration of Human Rights. In 1950 The Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms. Based on this European Convention the British Parliament in 1998 had enacted the Human Rights Act.

The purpose of the Act was to give effect to the rights and freedoms guaranteed under the European Convention on Human Rights.⁷

This incorporation of fundamental rights in all legislations gives utmost importance to human rights. Freedom of religion is one among the basic human right. But in real life the predominance of religious rulings makes the concept of fundamental rights into a question mark. The choice of a life partner from other religion by a woman does not mean her relinquishment of customary practices. Any such restraint will be a violation of the basic human right. The presumption of religion after marriage is only applicable to a woman. This leads to discrimination and inequality. Such practices are against the basic human rights.

3. *ibid* FN1



4. ibid
5. ibid
- 6.319 U.S.624
7. ibid FN1

Indian Socio and legal Scenario

India is a secular country. The concept of fundamental rights plays a significant role. The freedom of religion is guaranteed under Articles 25 to 28 of the Constitution of India. Art 25 (1) guarantees the right to freely practice a religion. As the concept of fundamental rights is an internationally recognized principle, whenever there arises a conflict in these rights the Supreme Court of India looks into the United Nations Declaration of Human Rights. There are several landmark cases⁸ where the Supreme Court has frequently drawn attention to define the scope and content of fundamental rights in India⁹. This reference of Indian courts shows the due importance given to the fundamental rights

The relevance of these references shows that the presumption of wife's religion in inter-caste marriage to that of her husband is against the existing recognized legal regimes. There is no such regime that prescribes this presumption in Indian Constitution, thus it leads to a controversial issue of social importance. The object of Special marriage Act, 1954 was to simplify the marriages and give a permanent record of marriage. The Act does not put a bar on religion but recognizes the customary practices under personal laws. This weightage given to customary practices under personal laws is diluting the object of the Act.

Currently the relevance of Parsi lady marriage issue comes into highlight because of this shortfall in the Act. The issue of the

Parsi lady, married to a Hindu, was restrained from performing her last rituals to her father on the ground that she was inter-married. This violates her fundamental right to: choice, life, religion, equality, and not to be discriminated. These violations are directly questioning the Preamble of the Constitution. The matter of discussion arises at this point. To overcome this issue there is a beneficial legislation, Special Marriage Act, 1954 allowing the inter-caste marriage and Constitutional guarantee under Art. 25 guaranteeing the Freedom of Religion, but these legislations are thorned with the personal laws. The personal

8. Manella Gandhi v. Union of India, AIR 1978 SC 597. Also in Vishaka v. State of Rajasthan, (1997) AIR SCW 3043, Peoples Union for Civil Liberties v. Union of India, (1997) 1 SCC 301

9. Supra FN 1

having an overriding effect on these legislations. When the lady likes to retain her religion the personal law deems the wife's religion to be that of her husband. The contradictory fact is that, as per the Constitutional right, unless and until a person voluntarily renounces his/her religion he/she continues to be in his/her original religion. But here the irony is that the woman has no choice rather than accepting her husband's religion and this rule is not applicable to men. This is a matter to be debated and addressed in large format and come to the consent on right and equality as the modern society is in fight for social justice.



The pointing statement by Chief Justice Dipak Misra “A woman does not mortgage herself to a man after marriage”¹⁰ highly draws the attention of the State to resolve this social issue. The social issue is that the burden of recognition of customary practices under Special Marriage Act.

The Special Marriage Act of 1954 is seen as a statutory alternative for couples who choose to retain their identity in an inter-religious marriage.

“Special Marriage Act confers in her the right of choice. Her choice is sacred. I ask myself a question: Who can take away the religious identity of a woman? The answer is only a woman can choose to curtail her own identity,” Chief Justice Misra said on the first day of hearing of a petition filed by a Parsi, who was barred by her community from offering prayers to her dead in the Tower of Silence for the sole reason that she married a Hindu under the Special Marriage Act¹¹

Nobody could presume that a woman has changed her faith or religion just because she chose to change her name after marrying outside her community, the Chief Justice observed.¹²

The Indian society has a culture of giving prime importance to their religious and cultural practices. The Constitution guarantees the Equality, Justice and Liberty as its basic structure but these basic features are at times seen impossible. This is because the guiding factors of

12. *ibid*

customary beliefs in India and this guiding factor is becoming the burden of Special Marriage Act. The veiled reason is that there is an indirect interference of religious institutions into the personal life of an individual. Such interferences must be curtailed for promoting the universally recognized principles of human life and also for promoting international peace and security in the nation.

The resultant issue of religious practices is the discrimination of practices applied between women and men. Unfortunately even in the present social scenario of India only women are subjected to all religious taboos and restrictions. This leads to discrimination of women on the basis of religion, custom, equity and violation of equality principle. The amazing fact is that these same restrictions are seen to be changing with people and controversies. If such a change can be brought in one case then it can be observed as a general practice. The only requirement for this social change is the mind to accept the need for social justice and the place for women in the society. The abolition of the customary practices like sati, dowry system and such other practices that were discarding the rights of women are evident recognition of her status in the society. The addressing of our nation as ‘Mother Nation’ pin points the place given to a women in the society. In such a country, where the nation itself is addressed as Mother, such discrimination to this magnitude is against the ideology of the nation. The age old such customary practices, which are restrictive and discriminative in nature must be strictly curbed from the

10 Reported in The Hindu on Dec 7, 2017

11. *ibid*



interference into the objects of legislations. All men are born equal to exercise their own rights .This must be an underlying principle of every religious practices.

Conclusion

The customary beliefs and practices are essential for an organized living. These practices were followed for personal liberty and well-being of an individual .The concept of fundamental rights alsoemphasize this organized living. . The Constitution guarantees the Equality, Justice and Liberty as its basic structure but these basic features are at times seen impossible. This is because the guiding factors of customary beliefs in India and this guiding factor is becoming the burden of Special Marriage Act.Such interferences must be curtailedfor promoting the universally recognized principles of human life and also for promoting international peace and security in the nation. All men are born equal to exercise their own rights .This must be an underlying principle of every religious practices. Therefore therestrictive and discriminative nature of customary practices must be strictly curbed from the interference into the objects of legislations for enforcing the view of social justice in all angles of the society.

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PROSPECTIVE Vs. RETROSPECTIVE



By Dixita
From Jamnalal Bajaj Institute of Legal Studies

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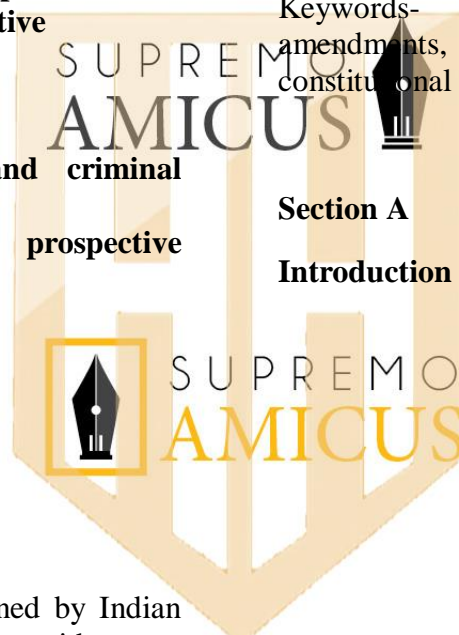
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necessary to dealt with meaning first than to observe analysis of its nature and effect. Than only it should be conclude about prospective amendments in criminal law. This paper mission is to clear the confusion between both the terms and observe the prospective effect. This paper aims to observe both terms in respect of constitutional validity. Why it is needed to see this expression in respect of constitutional validity? This paper mission is to observe its positive and negative views of both the terms.

Keywords- prospective, retrospective, amendments, ex-post facto laws, constitutional validity,



Section A

Introduction and meaning

Abstract

Criminal law has been governed by Indian penal code (45 of 1860) with state amendments and classification of offences, state amendments index, subject index. There is a need of amendments in every Act according to change and needs of society. Now there is need to determine that what kind of amendments should be there, whether prospective or retrospective one in respect of criminal law. This paper deals with the meaning of expression prospective amendments in criminal law first of all. It is



Competent authority's name	Meaning
1 according to black's law dictionary ¹	Looking forward; contemplating the future. A law is said to be prospective (as opposed to retrospective) when it is applicable only to cases which shall arise after its enactment.
2 according to Merriam Webster ²	Relative to or effective in future Likely to come about Likely to be or become
3 according to oxford dictionary ³	Expected or expecting to be specified thing in the future Likely to happen at future date
4 according to medical definition ⁴	Relating to or being a study (as of incidence of disease) that starts with the present condition of a population of individuals and follows them into the future.
5 according to legal definition ⁵	One which provides for, and regulates the future acts of men and does not interfere in any to be expected way which what has past.

However after such a wider connotation of word prospective, it is of the opinion that prospective is a future contingency which is solved or overlooked at this very present time. It is

1 Garner A Bryan; Thomson west aspatore books; black's law dictionary; ed. 10

2 Merriam Webster, US; ed.11, Collegiate dictionary

3 Simpson John and Weiner Edmund; Oxford university press; ed.

4,5,6 www.legalserviceindia.com

thus ought to be expected in future i.e., what would be the changes that should occur, in future or required to consider a present stipulated situation which needs to be overlooked now for the future acts of men.

As law is just like a wheel that has a static point in it and a dynamic wheel that circulates. As same rule applies in law, in law there has been a static point that is, its base and entire law regulates accordingly.

For better understanding of expression, it requires to observe the word amendment thoroughly as well. And to observe what is amendment? And is amendment needed or it's just a wastage of time?

Coke maxim- A new law ought to be prospective and not retrospective in its operation.

Prospective- that which is applicable to the future, it is used in opposition to retrospective. To be just, a law ought to be prospective.⁶

What is amendment?



1 Garner A Bryan; Thomson west aspature books; black's law dictionary; ed. 10

2 Merriam Webster, US; ed.11, Collegiate dictionary

3 www.legalserviceindia.com

According to above definitions, amendment is such modifications or alteration in existing laws that shall be done by competent authority or any such addition or subtraction that needs to be overlooked to time. Many amendments have been done since independence because law runs according to needs and circumstances of society.

Yes, amendment is a need of society because a static law does not provide justice to a society of dynamic nature and therefore amendment is needed in society of dynamic nature.

Thus a prospective amendment means applying the laws in future with some alterations or deals with future contingencies and does not affect existing rights and not being ultra virus. It is of such nature that shall have effect from a future date.

“A law enacted later making any act done earlier as an offence, will not make person liable for convicted under it. This means that if an act is not an offence at the date of its commission it cannot be an offence at the subsequent to its commission.¹

In prahlad Krishna v state of Bombay², it has been held that immunity is thus provided

to a person from being tried for an act under a law enacted subsequently, which makes the law unlawful.

Thus it means any prospective amendment enforced in future doesn't meant to be liable a person for its offence which is not an offence earlier. The constitution also provides for the same, article 20 is divided into two parts, discuss it earlier.

For better understanding, it requires to consider meaning of retrospective as well. For prospective amendments in criminal law, it needed to understand the concept of retrospective. Is there any difference between both? Why law should be prospective and not retrospective?

What is retrospective?

¹ Pandey JN Constitution of India; ed 2017; central law agency

²AIR 1952 Bom 1, (1951) 53 BOMLR 717, ILR 1952 Bom 134; www.indiankanoon.com

Competent authority	Meaning
1 according to black's law dictionary ¹	Looking back; contemplating what is past.



<p>2 according to legal definition²</p>	<p>A retrospective law is one that is to take effect, in point of time, before it was passed.</p> <p>Whenever a law of this kind impairs the obligation of contracts it is void. But laws which only vary the remedies divest no right, but merely cure a defect in proceeding, otherwise fair are valid.</p> <p>The words is usually applied to those acts of the legislature which are made to operate upon some subject, contract or crimes which existed before the passage of the acts, and they are therefore called retrospective laws. These laws are generally unjust and are, to a certain extent, forbidden by article of the US, which prohibits the passage of ex-post facto laws or laws impairing contracts.</p> <p>Laws should never be considered as applying to cases which arose previously to their passage, unless the legislature has clearly declared such to be their intention.</p>	<p>constitution of India guarantees rights against ex post facto laws.</p> <p>Not only that, such principle has its own basis on the Latin maxim SALUS POPULI EST SUPREMA LEX³ which means the welfare of the people is the supreme for the law and inspired by principle of justice, equity and good conscience.</p> <p>----- ----- -----</p> <p>1 Garner A Bryan; Thomson west aspatore books; black's law dictionary; ed, 10</p> <p>2 www.legalserviceindia.com</p> <p>3 Pandey J.N., Constitution of India; ed 2017; central law agency</p> <p>Reason, why to law should be prospective and not retrospective</p> <p>Law looks forward not back- <i>lex prospicit non respicit</i></p> <p>Law works to provide justice, welfare to people. There are number of reasons to adopt prospective amendments instead of retrospective one. As the Latin maxim suggest law looks forward and not backward. Not only that, many times, Supreme Court provides clarity between both i.e., prospective and retrospective.</p>
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However according to above definitions, art20 of constitution of India provides certain safeguards to the person accused of crime and so ar20(1) of Indian constitution impose a limitation on the law making power of the constitution as it prohibits the legislature to make retrospective criminal laws and not civil liability. Art20 of

- Concerned with or applying the laws in future or at least from the date of commencement of the statute.
- Does not affect existing contract.
- Does not reopened past, closed and complete transactions.
- If it would not apply than number of cases shall get reopened because of later enacted laws or amendments. Thus, law or



amendments taken shall be prospective one and not retrospective.

- It deals with future contingencies, and does not annul or affect existing rights and liabilities.
- If any amendment or law or both come into effect from a past date, it is of retrospective nature. Altogether it curtails some of the vested rights which had been acquired from some existing laws.
- Retrospective amendments are demands in immediate situations.
- Retrospective amendments are not allowed in criminal law. They are having ultra virus effect. Art 20 of constitution of India specifically bars it. Thus it favours prospective one.
- Art 20 of Indian constitution states as follows¹:
- 20(1) no person shall be convicted of any offence except for violation of the laws in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- 20(2)- no person shall be prosecuted and punished for the same offence more than once.
- 20(3)- no person accused of any offence shall be compelled to be a witness against himself.

Art 20 (1) provides that legislature cannot make laws which provide punishments for those acts which were committed in past. This is called ex post facto laws. Thus according to

¹ Basu Das Durga; Constitution of India; ed. 21st; Lexis Nexis

Constitution of India art 20 ex post facto laws are banned. New law can not punish old act or omission of person. Even American constitution prohibits ex post facto laws. The same doctrine held in many cases and observed by Supreme Court. Some of those cases are:

- Kedar nath v state of west Bengal ¹
- Prahlad Krishna v state of Bombay ²
- T. baral v henry³
- Calder v bull⁴
- Garikapat veeraya v N. subbiah⁵

In kedar nath case the accused committed an offence under the prevention of corruption act then in force was punishable by imprisonment or fine or both. The act was amended in 1949 which enhanced the punishment for the same offence for an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment prescribed in 1949 could not be applicable to the act committed by the accused in 1947 and hence set aside the additional fine imposed by the amended act.

In prahlad case, it has been held that immunity is thus provided to a person from being tried for an act under a law enacted subsequently which makes the law unlawful.

In henry case the Supreme Court held:

Nothing really turns on the language of section 16(1)(a) because the central government act has not created a new offence thereby dealt with the same offence. It is the only retrospective criminal legislation that is prohibited under art20 (1).



It is quite clear that in so far as the central amendment act creates new offences of enhanced punishment for a particular type of offence no person shall be convicted by such ex-post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But in so far as the central government act reduces the punishment for an offence should not have the benefit of such reduced punishment.

1 AIR 1954 SC 660; www.indiankanoon.com

2 AIR 1952 Bom 1, (1951) 53 BOMLR 717, ILR 1952 Bom134; www.indiankanoon.com

3 AIR 150, 1983 SCR (1) 905; www.indiankanoon.com

4 3 Dall. (3 U.S.) 386 (1798) www.oxfordreference.com

5 1957 AIR 540, 1957 SCR 488; www.indiankanoon.com

In the American case *calder v bull case*, chase, j., said “every ex-post facto law must necessarily be retrospective, but every retrospective law is not an ex-post facto law.

In the case *garikapati*, Supreme Court held that, the golden rule of construction is that, in the absence of anything in the enactment to show that is to have retrospective operation; it cannot be so constructed as to have the effect of altering the law applicable to a claim in litigation at the time when the act passed”.

From the above mention case laws and art 20 of constitution of India, it clearly stated that retrospective amendments exempted immunity from accused person. And every amendment prima facie shall have a

prospective one unless it is expressly or by other necessary implications made to have retrospective operation. Under art 20 legislatures has power to make prospective laws and prohibits making retrospective criminal laws.

But with regards to rape case, retrospective effect gained much more importance while that of levy taxes that come under civil, allows retrospectively not that of penal provision in it. And the reason of that of rape cases is the immediate situation arose for amendment. If prior that situation arose, the amendment would do, than there shall no need for such retrospective criminal amendment. This is another the reason for prospective criminal amendment curtails existing rights and came due to immediate demand. And sometimes due to change such immediate demand amendment or laws affect exiting rights, procedure. Thus there should be prospective amendment so that no such situation arises.

Section B

Positive views of prospective and negative views of retrospective

- History and meaning
- Nature and effect
- Present effect
- Ultra virus and intra virus
- Constitutional validity
- Criminal jurisprudence
- The sections in IPC needed prospective amendments
- Comparision



➤ **History and meaning**

Retrospective	Prospective
<p>1. Looking back; contemplating past</p> <p>Eg. Government introduce to levy taxes</p>	<p>1. Looking forward; contemplating future</p> <p>Eg. Government meet to discuss prospective changes in law</p> <p>Such as to introduce Income tax Act 1961, sec 234D introduce finance act 2003 with effect from June 1, 2003. The objective of this levy is to prevent assesses from enjoying free money in their hands without interest. And thus this principle operates prospectively laid down in Govind Das Vs ITO and Sharma Vs ITO.¹</p>

2. Historically in many cases it laid down that retrospective legislation can be held invalid on the basis that is unreasonable and beyond the legislation competence

Historically in many cases prospective legislation held reasonable. And even supreme court provides clarity on prospective versus retrospective operation.

Not only that in many cases historically it has been proved that retrospective legislation is unjust and oppressive. In the case of mithilesh kumara and anr Vs prem behari khare² the apex court in para 21 of its judgment as:

“ A retrospective operation is not to be given to a statue so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect can not be avoided without doing violence to the language of the enactment. Before applying a statue retrospectively the court has to be satisfied



	<p>that the statute is in fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, will prejudicially affect vested rights or the illegality of past transaction, or impair contracts, or impose new duty or attach new disability in respect of past transaction or considerations already passed. However, a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. The general scope and purview of the statute and the remedy sought to be applied must be looked into and what was the state of law and what the legislation contemplated has to be considered. Every law that impairs or takes away rights vested agreeably to existing law is retrospective, and is generally unjust and may be oppressive.</p>		<p>But laws made justly and for the benefits of individual and the community as a whole may relate to a time antecedent to their commencement. The presumption against retrospectivity may in such cases be rebutted by necessary implications from the language employed in the statute. It can not be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which has to be constructed. The question is whether on a proper construction the legislation may be said to have so expressed its intention. By history, I conclude that in criminal laws there shall be prospective amendments instead of retrospective one.</p>
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➤ **Nature and effect**

Retrospective	Prospective
Nature of retrospective law	Nature of prospective law or



<p>or amendment in criminal law has been unjust and beyond the constitutional validity. It infringes the vested rights or procedure.</p>	<p>amendment in criminal law shall take effect as it is not being unreasonable and infringe rights. It secures rights of citizens. And law just made for welfare or benefits of the people.</p>
<p>It should be made expressly. It is explicit. Eg. Y, competent authority provides that certain law or amendments shall have retrospective effect. As the law takes effect from 23 January 2018 and will continue its effect thereafter. But the act or omission happened in the past, also dealt with same law or amendment. Thus it is retrospective affect till 23.</p>	<p>1. In Indian law, any law ought to be prospective in its operation unless expressly made, retrospective. By default it's prospective. It is implicit. Eg. X, competent authority provides that certain law or amendment shall take affect after stipulated date and will continue its affect thereafter. It is prospective, as there is no ex-post facto affect of same la wor amendment.</p>

Eg. In Francis Bennion’s statutory interpretations¹:

“The essential idea of legal system is that current law should govern current activities. Elsewhere in this work a particular act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy through these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the laws applying to it should be the law in force today, not tomorrow’s backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex-post facto law is enshrined in US Constitution and in the Constitution of many American states, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward not backward). As Willes, j. said retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing laws.”

➤ **Present effect and situation**

To understand the present situation it requires seeing the context by analysis or observing the judgment of recent cases;

Videcon international ltd. Vs securities and exchange board of...on 13th January 2015²:

The securities and exchange board of India (Amendment) Ordinance, 2002(ord. 6 of 2002), is hereby repealed.



Notwithstanding the repeal of the securities and exchange board of India (Amendment) Ordinance, 2002, anything done or any action taken under the principle Act as amended by the said ordinance, shall be deemed to have been done or taken under the principal Act, as amended by this Act.

(Emphasis is ours) drawing the Court’s attention to section 32, the contention of the learned

1 In Francis Bennion Statutory Interpretation, ed. 2nd

2 On 13th January 2015 www.indiankanoon.com

Counsel for the appellant was, that in the absence of any saving clause, which may have had the effect of preserving, protecting, securing or sustaining the jurisdiction vested in respect of appeals would have to be adjudicated by the substituted forum after the amendment of provision vesting a substantive right was generally prospective.

Subhash Chatterjee Vs State of west Bengal and Anr on 7th august, 2007¹

Mr. chatterjee drawing my attention also to the notification issued by the ministry of law and justice (legislative deptt.) submitted that provision to section 151 of the electricity Act, 2003 as amended vide the Electricity (Amendment) Act, 2007 No. 26 of 2007 became effective on and from 15.6.2007 by virtue of notification No. s. 0950(E), new Delhi, dated 12.6.2007 by issued by ministry of power, and, therefore, by such amendment which has no retrospective effect, e cannot take away the right of the

accused (petitioner) which was endowed to them under section 151 of the Electricity Act, 2003 in respect of an offence which was committed prior to such amendment. Mr. Chatterjee drawing my attention to the decision reported in 2006 (1 C Cr. LR Cal 334 (Ranjit Kr. Bag, Additional District and session judge- cum- special judge under the Electricity Act, 2003, Tamluk, Purba Midnapore v. State of west Bengal) submits that the said decision was delivered on the basis of reference made to it by the concerned court and it has been observed by the division bench of this court that Electricity Act, 2003 prohibits the court from taking cognizance of an offence under the said Act except upon a complaint made by a specified authorities but is does not impose any restrictions in the matter of investigation by police authority. The division bench further observed that commencement of investigation and power of taking cognizance are separate and distinct act. Mr. Chatterjee further submits that in view of the said decision a special court cannot take cognizance of an offence under section 151 of the act. Section 173 of the Crpc cannot have any retrospective effect in its operation. Amendment of Andhra Pradesh Electricity Act virtually took away the constitutional right guaranteed under article 20(1) because the said act introduce harsh procedure and enhanced the punishment taking away the right of appeal and therefore the apex court held the said act is violative of constitutional guarantee. And the apex court accepted and introduces amendment by the electricity (Amendment) act, 2007; No. 26 of 2007 which came into force on and from 15th June, 2007 should be held to have no retrospective effect.



From the above mentioned cases, history and present situation and analysis of mine, I conclude that there shall be prospective amendments in criminal law which is better in all perspectives at this very present time. It might be possible that in future situation there shall be a need for retrospective amendments according to the needs of society and for the welfare of the people

1 www.indiankanoon.com

as well. This present situation favors prospective amendments. From the above mentioned cases IPC, Crpc and Constitution does not allowed retrospective or retroactive effect or amendment. In both the cases Supreme Court clearly stated the retrospective effect and its reason not being established. Both the cases clearly stated that procedure had generally retrospective effect but amendment to substantial right has been prospective one.

- **Constitutional validity includes ultra and intra virus**
- **Criminal jurisprudence**

The Constitution is the soul of law, the mother of law, the key to a lock, the ultimate source. Why it is so important? Why each and every subject of law seeing with the view of constitution that whether it is ultra or intra virus? Is it that much necessary? All these questions need to be answered.

- Constitution is important as its provides **territory-part I; citizenship (population)- part II, benefits given to citizens and non citizen- part III,**

IV,IVA; sovereign (government) – part V TO XVII; Emergency situation – part XVIII. No other document or Act provides these much to a country. It is that document which is flexible as well as rigid in its nature. It is that document which maintains the balance such as it shows the boundary (territory), population (citizen who shall eligible for benefits as well as its detriments, balance between the union and its units. Thus it provides overall framework. These are the reason why it has been given so much importance.

- Now after seeing the importance of constitution, it is important to check constitutional validity of prospective amendments in criminal law.

1. Firstly prospective amendments are intra virus and not ultra virus. The major difference between ultra and intra virus are: - **ultra virus means beyond the powers.** The doctrine in the law of corporations that holds that if a corporations enters into a contract that is beyond the scope of its corporate powers, the contract is illegal¹. **Intra virus means within the powers².** This means that the stipulated subject matter does not beyond the constitutional validity and is valid. Intra virus can also be termed as legitimate, reasonable, within the ambit, warranted, sanctioned.
2. Prospective amendments are intra virus as constitution prohibits retrospective amendments in respect of criminal laws. Art 20 of constitution of India makes the retrospective effect unconstitutional or ultra virus. Thus art 20 reads:



1 Basu Das Durga; Constitution of India; ed. 21st; Lexis Nexis

2 Basu Das Durga; Constitution of India; ed. 21st; Lexis Nexis

20- Protection in respect of conviction for offences.¹

(1) No offence shall be convicted of any offence except for violation of Law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2)- No person shall be prosecuted and punished for the same offence more than once

(3)- No person accused of any offence shall be compelled to be a witness against himself

From this article 20 of constitution of India it clearly stated that it prohibits retrospective effect or ex-post facto laws. The term ex-post facto laws have different connotations and used in different sense. This term refers to the law signifies that something done in past but due to retrospective effect of law or amendment that past situation now dealt with the same retrospective legislation which is barred by constitution of India. The expression in art 20 of constitution of India specially bars it (for violation of law in force at the time of the commission of the act charged as an offence). This expression briefly described the prohibition of retrospective effect, and the interpretation of the said

article also prohibits it. Immunity is thus given to the convicted person that the act done by him earlier will not make him liable under a subsequent enacted act or amendment.

3. As instance S 304B, IPC was enacted on 19-11-1986 making a dowry death punishable as an offence under the penal code. Because of art 20 of constitution of India the acts which prior committed to 1986, would not governed by the said act.

4. Not only in constitution but in general clause act s.3 (38) defines “offence” as any act or omission made punishable by law for the time being in force¹. The same section also gives immunity from ex post facto laws.

In the case of **jk Apinning and Wvg. Mills Ltd. Vs UOI**², the court held that tax could retrospectively charged due to retrospective amendment of central excise rules 9 and 49, but there could not be any retrospective imposition of penalty or confiscation of goods. It will against all principles of jurisprudence to impose penalty on a person or

1 Basu Das Durga; Constitution of India; ed. 21st; Lexis Nexis

2AIR 191, 1988 SCR (1) 700 www.indiankanoon.com

to confiscate his goods for an act or omission which was lawful at a time when such an act was performed or omission made but subsequently made unlawful by virtue of provision of law.

Thus in many cases the same interpretation or judgment ruled.



• **IPC Sections that need prospective amendments or required legislation to overlooked**

1. **Adultery s 497** needs to be overlooked. As in this section, wife shall not be punished even as an abettor. This section gives unwanted immunity to wives. Now the situation change and there are chances that even wives do misshape and abuse the section. So for that there is need to be overlooked this section and makes this section a little bit rigid.

2. **Cruelty s 498A** this section needs to be clearer. The term cruelty should be defined and should define its ambits and purview. The difference between cruelty that is ground for divorce in Hindu marriage act 1956 and the expression cruelty meant in IPC should be cleared. As these has been given in many judicial interpretations but the prospective amendment is needed now.

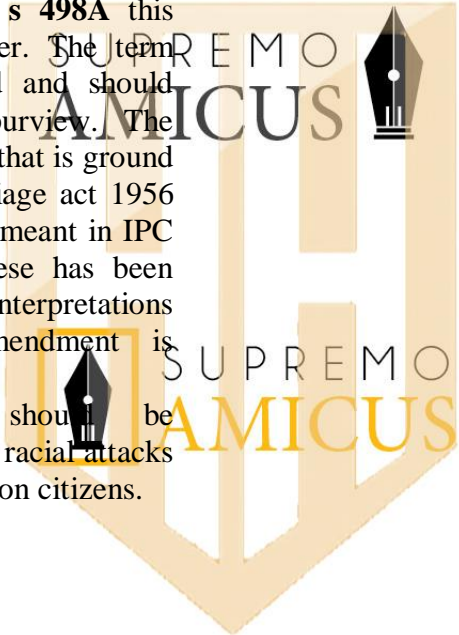
3. There should be amendments to the IPC for racial attacks against citizens as well as non citizens.

4. There should be provision for LGBT community. As they for this time need a special protection.

5. There shall give a protection against ex post facto laws in IPC too.

• **Overall comparisons between both the terms prospective and retrospective**

There is a need to compare both the terms so as to precisely take a view of its difference:-





Retrospective	Prospective
1. Looking backward	1. Looking forward
2. Against the Latin maxim <i>lex prospicit non respicit</i>	2. Favors the Latin maxim <i>lex prospicit non respicit</i>
3. Unambiguous term	3. Clear and precise term
4. Ultra virus	4. Intra virus
5. Favors ex-post facto laws	5. Against ex-post facto laws
6. Against constitutional validity	6. Favors constitutional validity
7. Favors civil laws	7. Favors criminal laws
8. Favors civil laws but not of penal provision such as tax laws	8. Favors penal provision
9. Illegal or void in its inception	9. Valid in its inception
10. Need not to be overlooked	10. Need to be overlooked, may section of criminal law

retrospective one. As there are many reasons as to why prospective amendments should be in force which is above discussed. From all the aspects it is suggested to have prospective amendments in criminal law.

It is suggested that there are some sections in IPC which need amendments and that should be prospective one as stated above. From all these no penal provision shall take retrospective effect. It might be possible that retrospective amendment is effective in civil laws but even in that no penal provision shall take retrospective effect. Constitution bars retrospective effect in criminal laws.

Thus there should some prospective amendments in criminal law in its some sections. Some suggestions for prospective amendments are:-

- Meaning of the term and its importance criminal law should be defined
- Its nature and effect should be defined
- The term needs to be clearly stated in IPC itself
- Sections in IPC need to be amended are 498A, 497, etc.
- Some words that needs to be defined in IPC are racial discrimination, its punishment, etc

Section C

Conclusion and suggestions

From all the above observation and analysis it is concluded that, firstly there shall be prospective amendments instead of



DEATH 2.0: WHO INHERITS A SELFIE VIS A VIS THE FUTURE OF DIGITAL WILLS

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ABSTRACT

As more and more number of individuals are using internet for various purposes, speculations regarding retrieval of someone's digital assets by some masked mugs after they become intestate brings forth a matter of concern pertinent to all. Is it that all the rights of a person perish with his death and nobody owns him after the announcement of his funeral? Legislations which were earlier perceived to be a form of shielding have now turned their recognition into a new kind of asset.

In the present scenario, right after the death of the person who died intestate, the family members and acquaintances of the deceased begin to deal or adjust his personal right of privacy or unique digital documentation to their own bleak benefits. In the opinion of the author(s), a person's identity should survive for decades to come and after he leave this world, his gist should augment even if someone else owns it after the intestate's death.

Furthermore, this paper also deals with the state of intricate set of circumstances involved with failure of the Internet service providers to agree with accepted procedure for account management after death and to make these explicit in terms and conditions. This research paper focuses upon the above

mentioned aspect of what happens to the privacy rights of people after their death?

Keyword(s): Digital Death, Privacy, Inheritance, Digital Assets, Selfie.

1.1 INTRODUCTION

"Privacy is not something that I'm merely entitled to, it's an absolute prerequisite"

Marlon Brando

The Internet has transformed the way we live our lives. What we have not yet fully realized is how it will impact what happens after we die.⁵¹⁸ As more and more people use social media to share personal information, privacy issues become critical to the discussion about control over user accounts after their death. Although internet service providers (ISP's) like Facebook have policies governing the terms and conditions of a user's account, these policies usually do not fully protect a deceased person's right to privacy.⁵¹⁹

Rohan Aurora, an engineering student living in the United States, relies on Facebook to maintain relationships with friends back home in India.⁵²⁰ One day, a friend from high school, Lalit Mendhe, posted a photo of

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⁵¹⁸ <http://www.hastingslawjournal.org/wp-content/uploads/Wilkens-62.4.pdf> accessed on 28th October 2016.

⁵¹⁹ <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1240&context=njtip> accessed on 29th October 2016.

⁵²⁰ Jaweed Kaleem, Death on Facebook Now Common As 'Dead Profiles' Create Vast Virtual Cemetery, HUFFINGTON POST (Nov 7, 2012, 3:40 PM), http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html.



himself in a hospital bed.⁵²¹ Hoping to cheer him up with a joke, Aurora posted on the photo: “Did you get a haircut?”⁵²² Shortly after making this comment, another friend informed Aurora that Mendhe had been in a car crash and had died in that hospital bed of cardiac arrest and liver failure.⁵²³ Aurora immediately deleted his comment.⁵²⁴

Four months after Mendhe had passed away, however, his Facebook profile remained active.⁵²⁵ After all, “[a] Facebook profile is an indication that someone is alive.”⁵²⁶ How social media, including Facebook, handles death of its users is becoming increasingly important. As more and more Indians use social media to share personal information, questions about a user’s right to privacy become critical to the discussion about control over users’ accounts after their death. Concerns about control over digital assets⁵²⁷ such as Facebook profiles, Email

Accounts and Dropbox storage become particularly significant among young adults who die unexpectedly and without a will. Young adults who die suddenly are more likely to leave behind an enormous trove of digital assets.⁵²⁸

ISP’s have policies governing the terms and conditions of a user’s account. These policies, however, do not fully protect a deceased person’s right to privacy. In some instances, these service providers have policies that default to ignoring the deceased person’s privacy interests, instead choosing to act on the pleas of friends or families of the deceased.⁵²⁹ These policies often give rise to a heightened need for protection of posthumous privacy rights.

Honouring the dead is not a new concept. Societies all across the world have traditions and practices to honour the deceased.⁵³⁰ Deceased individuals should

⁵²¹ *Ibid.*

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ The author could not verify whether Mendhe’s Facebook profile remains active at the time of publication of this Comment.

⁵²⁶ *Ibid.* As a side note, Facebook does process “special requests” and removes profiles of deceased users at the request of “verified immediate family members” or executors. How Do I Submit a Special Request for a Deceased User’s Account on the Site?, FACEBOOK,

<https://www.facebook.com/help/265593773453448> (last visited Nov 24, 2014). Family members making a request to remove a deceased user’s account must provide proof of death (e.g., death certificate), the deceased user’s birth certificate, and verification of their relationship to the deceased.

⁵²⁷ “A general definition of a digital asset is ‘any file on your computer or in a storage drive or website and any online account or membership.’” Susan Porter, Digital Estates: Handling Digital Assets in the Real

World, http://files.article.org/thumbs/datastorage/lacidoirep/forms/TPL1308_Porter_thumb.pdf (last visited Oct. 31, 2016).

⁵²⁸ This is because American young adults are the age group most likely to use the Internet and access social networking websites.

⁵²⁹ See How Do I Report a Deceased Person or an Account That Needs to Be Memorialized?, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last visited Oct. 31, 2016).

⁵³⁰ See, e.g., FUNERALS IN AFRICA: EXPLORATIONS OF A SOCIAL PHENOMENON ix–xi, 142, 210 (Michael Jindra & Joel Noret eds., 2011) (discussing how funerals are a way for the living to honor the deceased); James Sanders, The New Ground Zero: Honoring the Dead in the City That Never Weeps, NYTIMES (Aug. 31, 2003), <http://www.nytimes.com/2003/08/31/arts/the-new-ground-zero-honoring-the-dead-in-the-city-that-never-weeps.html> (discussing how New York City would commemorate and honor those who died on



have the right to privacy even after death,⁵³¹ and so their dignitary rights should extend posthumously. This is a particular concern for young adult Internet users who are more likely to die intestate.⁵³²

Electronic records are more cumbersome than their paper counterparts: They are harder to find, harder to access, and harder to wade through. A person’s online presence can quickly become unwieldy. He/she may maintain websites and blogs, have accounts on Facebook, Twitter, or other social media sites, or use online storage sites such as Flickr or Google Docs.⁵³³

September 11th). Consider also that holographic wills of a deceased individual, if they meet certain conditions, are legally valid. Wills, FORD+BERGNER LLP, <http://www.fordbergner.com/legal-practiceareas/texas-wills/handwritten-will-texas> (last visited Nov. 20, 2016).

⁵³¹ Ronald Z. Domszy, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOY. U. CHI. L.J. 493, 495 (1994) (arguing in favor of enforcing in-terrorem clauses include giving “full effect to the intent of the testator,” implying the rights of the deceased extend beyond death).

⁵³² Sheryl Nance-Nash, *Why More Than Half of Americans Don’t Have Wills*, DAILYFINANCE (Nov. 26, 2016, 3:05 PM), <http://www.dailyfinance.com/2011/08/26/what-america-thinks-about-estate-planning/>. Only 44% of surveyed American adults reported having a will. *Id.* People under thirty-five years old “said that it is less important for people to have wills because people are living longer, healthier lives.”

⁵³³ For more information about these websites, see About, Twitter, <http://twitter.com/about> (last visited Nov 31, 2016) (“Twitter is a real-time information network that connects you to the latest information about what you find interesting. . . . At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters in length, but don’t let the small size fool you—you can share a lot with a little space.”); About Flickr, Flickr, <http://www.flickr.com/about/> (last visited Nov. 31,

accounts on any number of retailers’ websites contain a consumer’s credit card information to make future visits and purchases easier. Thus, each of these accounts must be known, accessed, and eventually closed after a person dies.

1.2 SOCIAL MEDIA USAGE EMPHASIZES THE NEED FOR PRIVACY PROTECTION OF THE DECEASED’S INFORMATION

“Privacy matters. Privacy is what allows us to determine who we are and who we want to be.”

Edward Snowden

An increasing number of people today access and use the Internet.⁵³⁴ Although research has found that individual Internet use varies according to age, ethnicity, income, and education, research consistently

2016) (“Flickr . . . has two main goals: 1. We want to help people make their photos available to the people who matter to them. . . . [and] 2. We want to enable new ways of organizing photos and video.” (emphasis omitted)); Facebook, <http://www.facebook.com/facebook> (last visited Nov. 31, 2016) (“Facebook helps you connect and share with the people in your life.”); Google Docs, <http://docs.google.com> (last visited Nov. 31, 2016) (“Upload . . . files[,] . . . edit and view . . . docs from any computer or smart phone . . . and [engage in] [r]eal-time collaboration . . .” (emphasis omitted)).

⁵³⁴ The first time the Census Bureau asked Americans about Internet access in 1997, 18.0% of households reported they accessed the Internet. Thom File, *Computer and Internet Use in the United States: Population Characteristics*, U.S. CENSUS BUREAU 1 (May 2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>. By 2011, 71.7% of households reported they accessed the Internet.



reports that young adults⁵³⁵ are the age group that most frequently accesses the Internet. As of May 2013, seventy-two percent of American adults with access to the Internet reported using social networking websites.⁵³⁶ This exponential growth is astounding considering that only eight percent of adults reported using social networking sites in February 2005.⁵³⁷

⁵³⁵ I define “young adults” as eighteen to twenty-nine year-olds. My use of “adult” also reflects the Pew Center study’s use of the word—all individuals eighteen years old and older. See Joanna Brenner & Aaron Smith, 72% of Online Adults are Social Networking Site Users, PEW RESEARCH CENTER (Dec. 5, 2016), <http://pewinternet.org/Reports/2013/social-networkingsites/Findings.aspx>

⁵³⁶ Amanda Lehnhart & Mary Madden, 55% of Online Teens Use Social Networks and 55% Have Created Online Profiles; Older Girls Predominate, PEW RESEARCH CENTER (Dec 7, 2016), http://www.pewinternet.org/~media/Files/Reports/2007/PIP_SNS_Data_Memo_Dec_2016.pdf.pdf (““Social networking sites” are defined as sites where users can create a profile and connect that profile to other profiles for the purposes of making an explicit personal network.”)

⁵³⁷ Facebook’s statistics are particularly notable. As of December 2012, sixty-seven percent of U.S. adults online were reportedly using Facebook, and eighty-three percent of U.S. adults ages eighteen to nineteen reported using the social networking site. Cooper Smith, 7 Statistics About Facebook Users That Reveal Why It’s Such a Powerful Marketing Platform, BUSINESS INSIDER (Dec. 27, 2016, 1:34 PM), <http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10>. 27 Worktable 23R. Death Rates by 10-Year Age Groups: United States and Each State, 2007, CENTERS FOR DISEASE CONTROL AND PREVENTION – NATIONAL CENTER FOR HEALTH STATISTICS (Sept. 20, 2010), available at http://www.cdc.gov/nchs/data/dvs/MortFinal2007_Worktable23r.pdf. As a point of reference, the United States’ population in July 2007 was approximate 301.23 million. U.S. Population by Year, MULTPL,

Young adults are also more likely to die intestate, raising issues about what happens to their digital assets after death. The 2007 U.S. death statistics showed that the death rate for individuals ages fifteen to thirty-four was 184.8 deaths per 100,000 people in that age group.⁵³⁸ In 2011, Entrustet⁵³⁹ predicted that 580,000 U.S.-based online users would die in 2012.⁵⁴⁰ Yet, in a 2009 survey, only about sixty-five percent of Americans reported having any type of will. Most notably, only twenty-five percent of Americans between ages twenty-five and thirty-four have a will⁵⁴¹, while fewer than ten percent of people eighteen to twenty-four have one.⁵⁴²

<http://www.multpl.com/united-states-population/table> (last visited Dec. 29, 2016).

⁵³⁸ Worktable 23R. Death Rates by 10-Year Age Groups: United States and Each State, 2007, CENTERS FOR DISEASE CONTROL AND PREVENTION – NATIONAL CENTER FOR HEALTH STATISTICS (Sept. 20, 2010), available at http://www.cdc.gov/nchs/data/dvs/MortFinal2007_Worktable23r.pdf. As a point of reference, the United States’ population in July 2007 was approximate 301.23 million. U.S. Population by Year, MULTPL, <http://www.multpl.com/united-states-population/table> (Dec. 31, 2016).

⁵³⁹ Entrustet is a company that allows users to securely list all their digital assets and decide what to do with each one after death (e.g., delete, bequest to another individual).

⁵⁴⁰ Nathan Lustig, 2.89m Facebook Users Will Die in 2012, NATHAN LUSTIG (June 6, 2012), <http://www.nathanlustig.com/2012/06/06/2-89m-facebook-users-will-die-in-2012-580000-in-the-usa/>

⁵⁴¹ Wendy S. Goffe & Rochelle L. Haller, From Zoom to Doom? Risks of Do-It-Yourself Estate Planning, 38 ESTATE PLANNING 27, 27 (Apr. 2011).

⁵⁴² Tanya Roth, New FindLaw Survey: Most Americans Don’t Have Will, FINDLAW (Dec. 20, 2010), <http://www.lawyermarketing.com/blog/new-findlaw-survey-most-americans-dont-have-will/>.



PROTECTING PRIVACY RIGHTS THROUGH CONTRACT LAW IS INSUFFICIENT

The statistics about Internet use, online behaviour, and likelihood of a young adult dying intestate highlight the necessity for the law to evolve in order to sufficiently protect the deceased's right to privacy. One method of protecting the privacy rights of a deceased user is through contract law. Relying on contract law, however, does not provide users with sufficient privacy protections after death because they agree to terms drafted by the Internet service provider. Instead, these terms focus on the interests of the drafter, the Internet service provider and therefore are unlikely to protect the deceased's right of privacy.

When an individual opens an account with a service provider like Facebook or Dropbox, he or she must agree to the provider's "Terms of Service" by affirmatively clicking "yes."⁵⁴³ Many of these agreements are the modern equivalent of "shrink-wrap" agreements.⁵⁴⁴ "Click wrap" or "browse wrap" agreements⁵⁴⁵ are typically utilized

when users sign up to use an online service, and such agreements are generally upheld in court.⁵⁴⁶ Yet, most people do not read the terms in their entirety before agreeing to them; only about seven percent of people actually read the full terms.⁵⁴⁷ Most users are overwhelmed by the various policies and terms governing their use of various websites. For example, if someone were to take the time to read all of the privacy policies she encountered in a year, it would take about 200–250 hours.⁵⁴⁸ By not fully reading all these terms and policies, users may not completely understand what service providers can or will do with their information. However, even if users understood all of the terms, there may not be

required to actually click any agreement button Alternatively, 'clickwrap' agreements require the user to click an 'I Agree' button or some variation thereof to demonstrate acceptance. Both types of contracts are used regularly on the Internet."⁵⁴⁶

⁵⁴⁶ See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 398, 403 (2d Cir. 2004) (enforcing terms of service agreement because the user had notice and was aware of the terms); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *2 (N.D. Cal. Apr. 1, 2005) (discussing how a contract formed when Cairo continued to use the website, thereby agreeing to the browsewrap agreement). But see *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 791–92 (N.D. Ill. 2011) (finding terms of a browsewrap agreement to be unenforceable because the hyperlink to the Conditions of Use was too buried).

⁵⁴⁷ Rebecca Smithers, *Terms and Conditions: Not Reading the Small Print Can Mean Big Problems*, *THE GUARDIAN* (May 11, 2016, 2:00 PM), <http://www.theguardian.com/money/2011/may/11/terms-conditionssmall-print-big-problems>.

⁵⁴⁸ Shankar Vedantam, *To Read All Those Web Privacy Policies, Just Take a Month Off Work*, *NPR* (Apr. 19, 2012, 3:30 AM), <http://www.npr.org/blogs/alltechconsidered/2012/04/19/150905465/to-read-all-thoseweb-privacy-policies-just-take-a-month-off-work>

⁵⁴³ See, e.g., *Log In, Sign Up or Learn More, FACEBOOK*, <https://www.facebook.com> (last visited Feb. 11, 2015) ("By clicking Sign Up, you agree to our Terms and that you have read our Data Policy, including our Cookie Use.").

⁵⁴⁴ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).").

⁵⁴⁵ Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 *BERKELEY TECH. L.J.* 1641, 1645–46 n.11 (2011) ("'Browsewrap' contracts involve terms of use agreements that are available from the site's home page, but the user is never



a good alternative to the service and they therefore effectively have no choice but to accept the terms.

LIMITATIONS OF THE CONTRACTUAL APPROACH

The contractual approach suffers from a primary limitation: users' rights are limited by what service provider's state in their terms of use agreements. If users do not affirmatively click "agree" to a service provider's terms, they cannot access the website.⁵⁴⁹ Most users, however, do not even realize what they are agreeing to. This is problematic for many reasons, but especially because users often do not realize that many of the terms are very favourable to the service provider's interests.⁵⁵⁰ Expecting that users review every terms of service agreements they accept is not reasonable. The sheer number of agreements people encounter and the lack of alternatives to these services makes it impossible for users to fully read and understand these agreements. These terms of service agreements ultimately put the privacy of a

deceased person at the mercy of a service provider who may disregard the deceased's wishes regarding how his privacy is treated after death. Because young people are more likely to die intestate, the contractual approach to protecting a deceased person's online privacy is particularly challenging. Without the user young or old alive to contest his or her understanding of the contract, the immediate default is to interpret the contract on its face.⁵⁵¹ Additionally, because these agreements are written so strongly in favour of the service provider, the privacy rights of the deceased user are left even more vulnerable. The deceased's digital information governed by these service agreements is often very personal and sensitive,⁵⁵² which makes protecting the privacy rights of the deceased so important.

WHAT THIS MEANS FOR THE DECEASED USER

Most Internet service providers also prohibit the sharing or transferring of account login details to another person, regardless of her relationship to the deceased user.⁵⁵³ Despite

⁵⁴⁹ See, e.g., Myspace Services Terms of Use Agreement, MYSFACE, <https://myspace.com/pages/terms> (last visited Feb. 11, 2015) ("If you do not agree to this international transfer of data, then you must refrain from using the Myspace Services.").

⁵⁵⁰ See, e.g., Statement of Rights and Responsibilities, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Feb. 11, 2016) ("For content that is covered by intellectual property rights . . . you specifically give [Facebook] the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.").

⁵⁵¹ 2 See, e.g., *Puerto Rico v. Russell & Co.*, 315 U.S. 610, 618 (1942) (The Court interprets the word "deliver" by looking at the agreements themselves, or the "four corners" of the agreements.).

⁵⁵² See *infra* Part IV.A. (contrasting real and digital property); see also *infra* Part III.A. (discussing the counterargument to the longstanding theory of dead hand control).

⁵⁵³ *Contacting Twitter About a Deceased User*, TWITTER, <https://support.twitter.com/articles/87894-contacting-twitter-about-a-deceased-user> (last visited Feb. 11, 2016) ("We are unable to provide account access to anyone regardless of his or her relationship to the deceased."). But see *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, DROPBOX, <https://www.dropbox.com/help/488/en>



an increase in services like Death-switch⁵⁵⁴ and Legacy Lock, which grant specified individuals access to the deceased’s digital assets, online services agreements may act as a barrier to fulfilling the deceased user’s final wishes. For example, if Amanda signs up for Death-switch and sets it to send a pre-scripted message with her Facebook account password to her boyfriend after her death, the boyfriend may violate Facebook’s rules by accessing her account after her death.⁵⁵⁵

If he accesses Amanda’s account and violates Facebook’s terms of use, it is unlikely that a court would uphold Amanda’s desire for her boyfriend to retain access to her account if the matter is litigated. Following the death of an individual intestate, the question of ultimate ownership of the information stored on the deceased’s account is troublesome and often dependent on the service provider’s terms. For example, Facebook memorializes the profile pages of deceased users.⁵⁵⁶ In other words, Facebook will turn a deceased user’s

Facebook page into an online memorial. Users agree to this policy when they sign up for an account.⁵⁵⁷ Although Facebook will not provide the user’s account login details, most of the content a deceased user had previously shared (e.g., photos, posts) will remain visible.⁵⁵⁸ And, while most Internet websites permit only family members to cancel the account of a deceased user,⁵⁵⁹ anyone regardless of their relationship to the deceased individual can request to memorialize a deceased person’s profile, ensuring that the profile will be preserved and remain visible for as long as Facebook exists (or longer).

In contrast, services such as Dropbox and Gmail consider requests for access to a deceased’s account on a case-by-case basis in order to determine whether or not to grant access.⁵⁶⁰ Dropbox will only consider granting access to the deceased if the

(last visited Feb. 11, 2016) (a person demonstrating a legal right to access the deceased’s files may request access).

⁵⁵⁴ DEATHSWITCH, <http://deathswitch.com/> (last visited Feb. 11, 2016) (“A deathswitch is an automated system that prompts you for your password on a regular schedule to make sure you are still alive. When you do not enter your password for some period of time, the system prompts you again several times. With no reply, the computer deduces you are dead . . . and your pre-scripted messages are automatically emailed to the individuals you designated.”).

⁵⁵⁵ See *Statement of Rights and Responsibilities*, supra note 37.

⁵⁵⁶ *How Do I Report a Deceased Person or an Account that Needs To Be Memorialized?*, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last accessed Feb. 11, 2016).

⁵⁵⁷ See *Log In, Sign Up or Learn More*, supra note 30.
⁵⁵⁸ *What Happens When a Deceased Person’s Account Is Memorialized?*, FACEBOOK, <https://www.facebook.com/help/www/103897939701143> (last accessed Feb. 11, 2016).

⁵⁵⁹ See, e.g., *Contacting Twitter About a Deceased User*, TWITTER, <https://support.twitter.com/articles/87894-contacting-twitter-about-a-deceased-user> (last visited Feb. 11, 2016); *How Do I Submit a Special Request for a Deceased Person’s Account on the Site?*, FACEBOOK, <https://www.facebook.com/help/www/265593773453448> (last visited Feb. 11, 2016).

⁵⁶⁰ See *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, supra note 44 (requires proof of death and proof of requestor’s legal right to access the deceased’s files); *Accessing a Deceased Person’s Mail*, GMAIL, <https://support.google.com/mail/answer/14300?hl=en> (last visited Feb. 11, 2016) (involving a two-step process that requires proof of death and “additional legal documents”).



requester can prove the account holder is in fact deceased and that the requester has a “legal right to access the person’s files under all applicable laws.”⁵⁶¹ On the other hand, a requester seeking access of a deceased individual’s Google account may simply submit a form with proof of death indicating a request to “[o]btain data from a deceased user’s account” and then wait for Google’s preliminary review.⁵⁶² Despite providing for case-by-case consideration, it seems extremely unlikely that Google will grant the request without a court order.⁵⁶³

Being at the mercy of the service provider’s terms is especially concerning when there is no clear rule of law that addresses what happens to an online account following the death of its owner. While perhaps contract law is the most obvious legal theory to apply to interpret the deceased’s privacy rights, it does not fully protect these rights if the individual dies intestate. In fact, the opposite is true: the contractual approach strongly favours the service provider who drafted the terms. As such, a deceased user’s right to privacy is at the mercy of the service provider’s terms under the contractual approach.

⁵⁶¹ *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, supra note 42.

⁵⁶² *See Log In, Sign Up or Learn More*, supra note 30.

⁵⁶³ See *id.*; see also Stefanie Olsen, *Yahoo Releases E-Mail of Deceased Marine*, CNET (Apr. 21, 2005, 12:39 PM), http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html (discussing how Yahoo finally shared information contained in a deceased Marine’s email account with his father after a court order); Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, 150 TR. & EST. 61, 62 (2011) (discussing how to avoid potential conflict by obtaining a court order).

1.3 DIGITAL WILLS: PRESERVING DIGITAL LEGACY BEYOND THE GRAVE

“Paper wills are dead. Instead, a growing number of people are thinking about recording their last will and testament on video”

Anonymous

The subject of digital wills seems to bring out the black humour in headline writers: *“How to log out permanently”* ran a recent piece in Forbes India. “Death 2.0” screams Wired. But given the entrenched role that cyberspace now plays in our everyday lives, the question of what happens to our online property when we die is increasingly pressing, particularly given the increasing monetary (and sentimental) value of virtual assets.

The concept of a digital will, secure and tamper proof, is yet to catch on in the country.

India has just about a few hundred of digital wills. For wider adoption, the Information Technology Act, 2000, needs to be amended to help people register digital wills. We work, socialise, like and dislike things, post-holiday pictures and more, all online. What happens to that data when we die?

DATA LIFESPAN: ONLINE DATA AFTER DEATH

1. **Aadhaar:** Identity remains on the server.
2. **Google:** Lets users plan what to do with Gmail account, Picasa photos, YouTube videos. Users can bequeath digital assets.
3. **Twitter:** Tweets are removed, account deleted on submission of death certificate.



4. Yahoo: Account deleted on submission of death certificate.

"Hundreds of gigabytes of data are locked up daily as people have passed and their accounts (Gmail, Facebook etc) will never be opened. In this aspect, the law is 10 steps behind technology," said cyber law expert Pavan Duggal.⁵⁶⁴ The IT Act 2000 doesn't cover such virtual records. Social media didn't exist when the Act was passed, while You-Tube was born in 2005, Facebook a year before that and Twitter in 2006.

All of these are now mainstream. Duggal said digital wills are the answer. "Like people bequeath moveable and immovable assets, they can will digital assets. Facebook account, iPads etc are moveable assets."⁵⁶⁵

A digital will attested by a digital signature will save loved ones the bother of proving who the legal heir is or getting a succession certificate, which could take 12-18 months, by which time some of the data could be deleted. *A traditional will only addresses real-world property as well as IPR rights,* said Suhail Nathani, partner at Economic Laws Practice but when it comes to cyber property, accounts and passwords should be mentioned in the will or they could be lost to heirs and administrators of the estate.⁵⁶⁶ That's because standard terms of

service at internet sites contain strict privacy conditions, which prohibit access to anyone other than the individual who signs up for the account.

The IT Act, which otherwise applies to digital data, doesn't cover testamentary disposition, Nathani said. *"The remedy, if any, will lie in equity, and to that extent depends on the discretion of the court,"* he said.⁵⁶⁷

Remember that while physical wills are legally binding (even if written on bizarre materials), digitally-written wills are not in most territories – and may require a major change in statutory law to become binding. As Indian Supreme Court lawyer, Gopal Sankaranarayana observes. *"If a digital will is to have sanctity, there has to be an amendment in succession laws."*

LEGAL GREY AREA

The problem for users is that digital bequeathing remains a legal grey area in jurisdictions globally – testamentary law just hasn't kept up. "Virtual assets have little legal protection in China," observes the Chinese news service ECNS.cn. The same is true everywhere from New York and London to Mumbai. As one Indian pundit observes: "No-one denies the need for digital wills, but no-one seems to be doing much about it either."⁵⁶⁸

⁵⁶⁴ [http://economictimes.indiatimes.com/tech/internet/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the-](http://economictimes.indiatimes.com/tech/internet/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the-country/articleshow/32879308.cms)

[country/articleshow/32879308.cms](http://economictimes.indiatimes.com/tech/internet/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the-country/articleshow/32879308.cms) last visited on 20th November 2016.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ <http://economictimes.indiatimes.com/tech/internet/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the->

[country/articleshow/32879308.cms](http://economictimes.indiatimes.com/tech/internet/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the-country/articleshow/32879308.cms) visited on 20th December 2016.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ <http://www.lexology.com/library/detail.aspx?g=da85a184-df3a-4c4b-af2a-e78ae1861acd> visited on 22nd December 2016.



The situation is complicated by the failure of internet service providers to agree an accepted procedure for account management after death and to make these explicit in terms and conditions. Because accounts are governed by contracts with individuals, however, most are decidedly unwilling to unlock email and social networking accounts after death.

YOUR ELECTRONIC AFTERLIFE

But what of individual privacy? While most people wouldn't bat an eyelid at allowing their heirs to peruse their music or film collections, many would balk at giving them unfettered access to email or social networking accounts. Hence the importance of making it explicitly clear who should have access to what is also something on which a testator needs to ponder upon.

The market has already responded. In recent years, a glut of companies have sprung up to facilitate the transfer (or withholding) of your digital treasures. Companies like Legacy Locker, Entrustet, Passmywill.com and Deathswitch, will allow you to upload personal log-in details and passwords to all your accounts, which can then be released to your executors – along with your instructions on who should see what. These provide a useful service, but they're not perfect. Although they claim to be safe repositories, you may have concerns about security and (given the volatile market place they inhabit) longevity. There's not much point in entrusting your digital afterlife to a company that goes bust.

India, though, is still a long way off from such legislation. "The legislations in India presently do not recognize the concept of a 'digital will' or any other form of

testamentary disposition by electronic means. The Indian Information Technology Act, 2000, in this regard has specifically excluded wills or other testamentary dispositions from the applicability of its provisions," said **Ramesh Vaidyanathan**, managing partner at Indian commercial law firm Advaya Legal.

In the absence of a specific law for a digital will in India, the execution and enforcement of the testator's will is governed by the Indian Succession Act, 1925, according to Vaidyanathan. In some cases, like with respect to emails or social media pages, the beneficiary may have to request the company concerned such as **Google Inc.** or **Facebook Inc.** for permission to access and, if requested by the testator, keep the website or social media page alive after the death of the person. However, any online operation of the deceased's bank account is illegal and a criminal offence, he added.

Making a digital will could also help since it can be monetized. According to legal experts, online books or research papers, or valuable advertising content, professional photographs all of which may be subject to copyright or patents can be monetized after a person's death on his or her instructions. The person authorized can then continue to run the digital business, or even sell it.

"In such cases, taxes may also be applicable and the digital will may also be contested in a court of law, just like an ordinary will. However, there needs to be more legal clarity on this since digital wills still make up just a fraction of all the wills made in India," said **Daksha Baxi**, executive director at Indian law firm Khaitan and Co.



The need of the hour, thus, is a more structured legislation to govern the use of technology and e-space in India, say legal experts. Moreover, since electronic documents can be manipulated, a major challenge is ensuring the authenticity of the contents of the will and genuineness of its execution, after a testator's death. The scope for digital wills in India still holds large potential, thanks to the burgeoning Internet user base and use of multiple digital devices. "With the new Indian government promoting the use of e-governance, social media and technology to encourage the pace of growth in various sectors, and countries positively recognizing testaments made in electronic form, there is an expectation for recognition of such concepts in India," said Vaidyanathan.

Duggal added that despite India having "a largely touch-and-feel culture, making digital wills in the country rare and legal firms dealing with digital firms rare still", digital wills could become popular as more people become comfortable with the online mode.

"Given the growing popularity of mobile phones, in the next five years, I expect even digital wills on mobile to become popular in India. Digital assets could even be bought and sold online with permission from the testator to the beneficiary in the future, like in the case of bitcoins today," he added.

1.4 HOW TO LOG OUT PERMANENTLY

"While you log in to live your life, you can also choose the way you log out."

Anonymous

EXTENDING TORT LAW TO PROTECT THE PRIVACY OF THOSE WHO DIE INTESTATE

Extending existing tort law would be the most effective method of protecting the privacy of a deceased user. Under current common law, a deceased individual does not have a right to privacy, but the judiciary is already well-positioned to fill this gap in tort law to meet this pressing need in order to protect the deceased's privacy rights. Courts can achieve this by broadening current tort law to apply posthumously and give the deceased an inherent right of privacy. Currently, only a living individual can bring a tort claim for invasion of privacy.⁵⁶⁹ Not even an heir can recover under this tort on behalf of a deceased individual; only the individual whose privacy has been violated can bring a claim.⁵⁷⁰ This stems from the idea that the concept of privacy is personal and can only be asserted by the individual whose privacy was invaded.⁵⁷¹

⁵⁶⁹ Cal.App.3d 59, 62 (Cal. Ct. App. 1975) (internal citations omitted) ("It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that his privacy has been invaded. Further, the right does not survive but dies with the person.").

⁵⁷⁰ J. THOMAS MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 9.1 (2d ed. 2014); see, e.g., *Bradt v. New Nonpareil Co.*, 79 N.W. 122, 122 (Iowa 1899) ("The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action.").

⁵⁷¹ *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1341 (N.D. Ohio 1969).



A. Extending the right to the tort posthumously is justified

Extending the tort of invasion of privacy to apply to posthumous privacy interests is justified because both statutory law and common law already recognize that people can retain their rights posthumously.

1. RECOGNITION IN STATUTORY LAW

Statutes have recognized dignitary interests of deceased individuals. For example, while not prohibited by federal law, twenty-three states in the U.S have laws prohibiting necrophilia or, sex with corpses.⁵⁷² Furthermore, some states mandate the dignified disposal of dead bodies in certain places to reduce the risk to public health.⁵⁷³ State laws criminalizing certain acts to a corpse exist because the state legislatures believe these acts are undignified. While these laws focus primarily on public health and safety concerns,⁵⁷⁴ they demonstrate a desire for the dead to be disposed of in a

dignified manner.⁵⁷⁵ In fact, recommendations for disposing bodies after major disasters do not solely focus on disposing them in the most efficient manner possible.⁵⁷⁶

2. RECOGNITION IN COMMON LAW

Common law also acknowledges deceased persons' rights after death. Under common law, an individual has the right to decide how to dispose of his or her own body after death.⁵⁷⁷ In *Long v. Alford*, for example, the court upheld the testator's desire to be buried in a specific cemetery, thereby authorizing exhumation of his body for reburial.⁵⁷⁸ Similar to the UAGA 2006 amendments that permit relatives to decide about donating a deceased's organ donation only absent a decision by the deceased, various courts have stated that only in the absence of "testamentary disposition . . . [does] the right of preservation and burial . . . belong[] to . . . the next of kin."⁵⁷⁹ Since common law already recognizes the right of an individual to make decisions about the disposal of his or her own dead body, it

⁵⁷² Daily Mail Reporter, *Necrophilia Set to be Outlawed in Illinois After Officials Realize It Is Technically Legal*, DAILY MAIL (Feb. 18, 2016, 8:09 PM), <http://www.dailymail.co.uk/news/article-2103238/Necrophilia-set-outlawed-Illinois-officials-realise-technically-legal.html>; 720 ILL. COMP. STAT. ANN. 5 / 12-20.6 (West 2012).

⁵⁷³ Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISOR 197, 233 (2013).

⁵⁷⁴ See, e.g., *Management of Dead Bodies After Disasters: A Field Manual for First Responders*, INT'L COMMITTEE OF THE RED CROSS (Apr. 10, 2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0880.pdf>; *Disposal of Dead Bodies in Emergency Conditions*, WORLD HEALTH ORG., http://www.who.int/water_sanitation_health/hygiene/envsan/tn08/en/ (last visited Nov. 1, 2016).

⁵⁷⁵ Young, *supra* note 58.

⁵⁷⁶ *Disposal of Dead Bodies in Emergency Conditions*, *supra* note 107 ("Burials in common graves and mass cremations are rarely warranted and should be avoided.").

⁵⁷⁷ DAVID A. ELDER, *PRIVACY TORTS* § 1:3 (2013); see, e.g., *Long v. Alford*, 374 S.W.3d 219, 223 (Ark. Ct. App. 2010) (stating that a "decendent's wishes concerning ultimate disposition of his or her remains are entitled to consideration and should be carried out as far as possible."); *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. Sup. Ct. 2000) ("[A] decedent's wishes will be taken into account when a dispute erupts over the ultimate disposition of remains and, in some cases, given effect over the objections of family members.");

⁵⁷⁸ 374 S.W.3d at 223.

⁵⁷⁹ *Lumley*, 7 S.E.2d at 315.



should also recognize a deceased person's interest in the privacy of her digital assets.

3. NEXUS BETWEEN PRIVACY AND DIGNITY

Privacy and dignity are two separate, but closely interrelated concepts. Privacy is “about the protection of human autonomy and dignity, the right to control the dissemination of information about one’s private life.”⁵⁸⁰ The law already recognizes a deceased individual’s dignity interests posthumously through organ donation laws and dead body disposal rights. Thus, courts should also recognize a deceased person’s interest in the privacy of her personal information. Users have some degree of control over the privacy of their digital assets during their life: Facebook permits accountholders to change what they share with different people;⁵⁸¹ Twitter allows users to decide whether their tweets are public or private;⁵⁸² and OkCupid gives its users the ability to visit other users’ profiles in secret.⁵⁸³ Users’ control over their privacy interest in their digital assets should extend past death.

⁵⁸⁰ N. A. Moreham, Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort, in *LAW, LIBERTY, LEGISLATION* 231–248 (Jeremy Finn & Stephen Todd, eds., 2008), available at <http://www.victoria.ac.nz/law/about/staff/publication-s-nicole-moreham/nm-law-libertylegislation.pdf>.

⁵⁸¹ Choose Who You Share With, FACEBOOK, <https://www.facebook.com/help/459934584025324/> (last visited Nov. 2, 2016).

⁵⁸² About Public and Protected Tweets, TWITTER, <https://support.twitter.com/articles/14016-about-publicand-protected-tweets> (last visited Nov. 2, 2016).

⁵⁸³ Privacy Controls, OKCUPID, <http://www.okcupid.com/help/privacy> (last visited Nov. 2, 2016).

1.5 DIGITAL ASSETS PROVIDE MORE INFORMATION FOR A LONGER PERIOD OF TIME

“Privacy is one of the biggest problems in this new electronic age”

Andy Grove

Digital assets raise more privacy concerns than the burial of a dead body. A dead body can only provide a limited amount of information about a person.⁵⁸⁴ In contrast, digital information about an individual can persist and be transferred much more easily than information derived from a dead body. Firstly, digital assets tend to include very personal information captured over an extended period of time.⁵⁸⁵ Secondly, it is much easier to derive private information from a person’s digital assets. Few skills are needed to download or look through content such as photos, tweets, or bank statements. In comparison, gleaning information from a dead body requires skill and, often, special equipment. For example, medical doctors and pathologists are specially trained to perform autopsies on dead bodies to uncover information about the deceased person.

Additionally, digital assets are easily transferrable. Users can send data to anyone in the world over the Internet almost instantaneously, subject to obstacles they may encounter such as Internet connection speed and download speed. The transferability of digital assets allows for 1) unauthorized or unwanted disclosure that damages reputations and 2) exposure, which

⁵⁸⁴ <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1240&context=njtj>.

⁵⁸⁵ *Ibid.*



causes grief and humiliation.⁵⁸⁶ A dead body, on the other hand, is more challenging to transport because of various state public health laws.⁵⁸⁷

Lastly, digital assets are less likely to be corrupted. Barring a virus or some affirmative act of destruction, information captured online can persist indefinitely. Even if one tried to destroy digital information, it is very difficult to fully erase the trail left by the information from the Internet.⁵⁸⁸ Because digital assets can persist for a very long time and usually contain a plethora of personal information,⁵⁸⁹ they contain more sensitive information than the information revealed by a dead body. Dead bodies are comparatively more destructible because organic matter decomposes.⁵⁹⁰ Human bodies inevitably decompose unless someone preserves the organic

matter.⁵⁹¹ And, once organic matter begins to decompose, the information that can be gleaned from it decreases.⁵⁹²

CONCLUDING REMARKS

As online activity becomes a greater part of everyday life, much more of the information collected online can be extremely personal. Despite this, very few young adults have a will dictating what should be done with all the personal information collected online during their life. In the absence of testamentary intent, a deceased individual’s posthumous right to privacy is tenuous under current law. Since contract law and property law ineffectively protect a deceased individual’s online privacy rights, extending the invasion of privacy tort posthumously is the best way to protect an individual’s privacy rights after death. Utilizing common law would be most effective because a legislative approach would take too long. Also, common law and state legislatures already recognize posthumous dignitary interests. Since dignity and privacy are closely intertwined and digital assets tend to elicit much more personal information than a dead body, extending the tort posthumously is necessary to protect these rights.

⁵⁸⁶For further discussion on a framework to approach analyzing privacy, see generally Daniel Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006).

⁵⁸⁷ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 13.2 (1991); CODE ME. R. tit. 10-146 Ch. 1, § 4.

⁵⁸⁸ Polina Polishchuk, *Can You Ever Really Delete Yourself from the Internet?*, VENTUREBEAT SECURITY (Dec. 29, 2016, 2:38 PM), <http://venturebeat.com/2013/01/29/delete-password/>. The European Union is currently amidst efforts to implement a “Right to be Forgotten” policy, which would give individuals to right to request complete removal of information about them. See Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88, 89–90 (2012).

⁵⁸⁹ See Solove, *supra* note 97, 505–09 (discussing information aggregation and how it can “form a portrait of a person”).

⁵⁹⁰ See, e.g., Richard T. Conant et al., *Sensitivity of Organic Matter Decomposition to Warming Varies with Its Quality*, 14 GLOBAL CHANGE BIOLOGY 868, 868–69 (2008).

⁵⁹¹ *How Long Does It Take a Dead Body to Decompose?*, CURIOSITY.COM, <http://curiosity.discovery.com/question/take-dead-body-to-decompose> (last visited Nov. 1, 2016). Even embalmed bodies will eventually decompose.

⁵⁹² See generally Michelle J. Thali et al., *Into the Decomposed Body—Forensic Digital Autopsy Using Multislice-Computed Tomography*, 134 FORENSIC SCI. INT’L 109 (2003) (implying a need for technology to evaluate a decomposed body by arguing the usefulness of a type of technology to help with forensic documentation of decomposed bodies).



LEGALIZATION OF MARIJUANA FOR MEDICAL PURPOSES

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Introduction

Drug Abuse is the consumption of drug in a quantity which may be self-damaging and addictive. In addition to possible physical, psychological and social harm, it may also lead to criminal penalties. Basically, these drugs include alcohol, cannabis, cocaine, opioids, methaqualone etc. Human Security basically means protecting the people and promoting peace and socio-economic development of the society and it is more of humanitarian in nature and aims to eliminate human sufferings and ensure human security⁵⁹³. The security understood in

⁵⁹³ <http://www.humansecurityinitiative.org/definition-human-security>.

traditional sense means how the state manage threats from external source but nowadays a new concept of human security has come in ambit which means the use of non-military methods for the purpose of achieving security and fulfill the basic needs of the people.⁵⁹⁴ In modern times the concept of human security also covers food security, health security, environmental security and personal security. We have one such increasing threat on human security i.e; Drug abuse.

The drugs like the synthetic drugs should be completely banned but non-synthetic drugs can be applied with checks and balances. Marijuana is one of them it is referred as cannabis or weed but it has a number of names like pot, 420, grass, hemp, hashish, charas etc. Cannabis is also sometimes referred to as a synthetic drug but it is not so because it is developed from the cannabis plant⁵⁹⁵. Cannabis also referred to as marijuana is legalized for medical purposes in some countries and yet to be done in some countries. A Bill was proposed regarding this in our Indian Parliament last year but was not passed⁵⁹⁶. Lately, Maneka Gandhi has suggested the legalization of

⁵⁹⁴ D.P.K Pillay, Applying Human Security in Indian Context, (Jan.7,2016), <http://www.tandfonline.com/doi/full/10.1080/09700161.2015.1116246?src=recsys%20https://www.youtube.com/watch?v=IgicVQTX86s>.

⁵⁹⁵ D.P.K Pillay, Applying Human Security in Indian Context, (Jan.7,2016), <http://www.tandfonline.com/doi/full/10.1080/09700161.2015.1116246?src=recsys%20https://www.youtube.com/watch?v=IgicVQTX86s>.

⁵⁹⁶ <http://www.hindustantimes.com/punjab/aap-mp-gandhi-s-bill-seeking-opium-legalisation-cleared-for-tableting-in-parliament/story-itanKX3vRrhuXJPdgnJD6N.html>.



marijuana for medical purposes⁵⁹⁷. We are in favor of legalizing marijuana for medical purpose because it has more health benefits than harms. As the excessive consumption of anything is harmful so we cannot completely ban anything for its harms ignoring the benefits arising from it.

The term medical marijuana means to use the whole unprocessed marijuana plant or its basic extracts to treat the symptoms of illness⁵⁹⁸. Scientific study of the chemicals in marijuana, called cannabinoids, has led to two FDA-approved medications that contain cannabinoid chemicals in pill form as marijuana plant contains chemicals that may help treat a range of illnesses⁵⁹⁹. In ancient times, it was considered as herbal plant and were used as painkillers.

History of Marijuana

Marijuana has a very long history. The first record on cannabis is of a Chinese Emperor Shen Nung in 2727 BC⁶⁰⁰. The Chinese soldiers used it during war for gaining strength and durability and reducing pain. Marijuana was introduced for the first time in America in about 1575 by the Spanish. It wasn't mainly for recreational purposes until 1900's when the Mexican immigrants introduced the recreational habit of smoking

marijuana. It evolved from the Central Asia where a large group of Iranian nomads known as the Scythians started inhaling the smoke from the cannabis seeds and flowers to get high and with the spread of Islam in the region there was a rise in its popularity, although the Quran prohibits the use of alcohol or any kind of intoxicating substances but there is no specific prohibition on cannabis. Later on it evolved in Africa, Europe and America. Although the people in earlier times were aware of the intoxication properties but their focus was on its power of medication rather than for recreational purpose or euphoria. It was used to treat rheumatism, labor pains and tooth aches etc.

In India, cannabis has a long history. In the Atharva Vedas (sacred Hindu texts) chapter 11, Hymn 6, Verse 15, the cannabis plant is regarded as one of the five sacred plants and the guardian angels lived in its leaves⁶⁰¹. Lord Shiva is mainly associated with cannabis commonly known as bhang (one of the segregated plant under cannabis) in India, it is used in religious ceremonies and festivals like Holi. In our country, cannabis was used for ayurvedic medication as well as for spiritual purpose.

Adverse effects of excessive consumption of marijuana

After consuming marijuana, for a short span of time the person will feel relaxed, experience mood swings, heightened sensory perception, increase in appetite and euphoria but there is more negative effect if a person consumes it in excess as cannabis is highly potent and in recent decades the

⁵⁹⁷ <http://www.firstpost.com/india/watch-maneka-gandhi-suggests-legalising-marijuana-for-medical-purposes-in-india-3872711.html>.

⁵⁹⁸ <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>.

⁵⁹⁹ <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>.

⁶⁰⁰ <https://www.deamuseum.org/ccp/cannabis/history.html>.

⁶⁰¹ <http://titus.uni-frankfurt.de/texte/etcs/ind/aind/ved/av/avs/avs.htm>



chemical potency has comparatively increased which has increased the instances of short term memory loss, hallucinations, psychosis, panic, etc⁶⁰². There is risk of sexual problems in male, etc⁶⁰³. While some of the long term effects are lower life satisfaction, depression, relationship problems, antisocial behavior etc⁶⁰⁴.

Benefits arising from Legalization of Marijuana

There are two main active chemicals in marijuana that researchers found to have medicinal application. These are cannabidiol (CBD) - which seems to impact the brain without a high and tetrahydrocannabinol (THC) - which has pain relieving properties. The term *medical marijuana* refers to using the whole, unprocessed marijuana plant or its basic extracts.

However, scientific study of the chemicals in marijuana, called *cannabinoids*. Cannabinoids are chemicals related to delta-9 tetrahydrocannabinol (THC), marijuana's main mind-altering ingredient that makes people "high." The marijuana plant contains more than 100 cannabinoids.

There are different types of cannabinoids, they are:

- **Phytocannabinoids** – plant leaves, flowers, stems, and seeds collected from

the *Cannabis sativa* plant and ingested in some form (cigarettes, vapor).

- **Endogenous** – cannabinoids made by the body: examples include *N*-arachidonylethanolamine or anandamide (AE) or 2-arachidonoylglycerol (2-AG). AE and 2-AG activity can be manipulated by inhibiting their corresponding hydrolases FAAH or MAGL, preventing their degradation.
- **Purified** naturally occurring cannabinoids purified from plant sources: examples include cannabidiol (CBD) and delta-9-tetrahydrocannabinol (THC)
- **Synthetic** cannabinoids synthesized in a laboratory: examples include CB1 agonists (CPP-55, ACPA), CB2 agonists (JWH-133, NMP7, AM1241), CB1/CB2 nonselective agonist (CP55940), ajulemic acid (AJA), nabilone, and dronabinol.

Cannabinoids are useful as medicine because of the two main essentials from the marijuana plant that are of medical interest are THC and CBD. THC can increase appetite and reduce nausea and also decrease pain, inflammation (swelling and redness), and muscle control problems. CBD doesn't make people high. It may be useful in reducing inflammation, controlling epileptic seizures and possibly treat mental illness and addictions.

There are some Scientific research going on marijuana and its extracts to treat symptoms of illness and other conditions like diseases that affect the immune system, including HIV/AIDS and multiple sclerosis (MS), which causes gradual loss of muscle control. There is also growing interest in the marijuana chemical *cannabidiol* (CBD) to treat certain conditions such as childhood

⁶⁰²

<http://www.drugfreeworld.org/drugfacts/marijuana/short-and-long-term-effects.html>

⁶⁰³

<http://www.drugfreeworld.org/drugfacts/marijuana/short-and-long-term-effects.html>

⁶⁰⁴

<http://www.drugfreeworld.org/drugfacts/marijuana/short-and-long-term-effects.html>



epilepsy, a disorder that causes a child to have violent seizures. Therefore, scientists have been specially breeding marijuana plants and making CBD in oil form for treatment purposes. These drugs aren't popular for recreational use because they aren't intoxicating.

Medical Benefits

Marijuana helps in the treatment of a number of diseases from its chemical properties, some of them are as follows:

1. Marijuana slows and stops cancer cells from spreading- One of the main reasons for legalization of marijuana for medical purpose is because of its ability to treat cancer. According to a research, published in the journal *Molecular Cancer Therapeutics*, that Cannabidiol has the ability to stop cancer by turning off a gene called Id-1. Researchers at California Pacific Medical Center in San Francisco, reported that CBD may prevent cancer from spreading. The researchers experimented on breast cancer cells in the lab that had high level of Id-1 and treated them with cannabidiol. The outcome was positive, the cells had decreased Id-1 expression, and were less aggressive spreaders. In fact, the American Association for Cancer Research has found that marijuana actually works to slow down tumor growth in brain, breast, and lungs considerably.⁶⁰⁵

2. Prevents Alzheimer's- THC, the active ingredient present in marijuana slows the progression of Alzheimer's disease, a 2006 study led by Kim Janda of the Scripps Research Institute found out. THC slows the formation of amyloid plaques by blocking

the enzyme in the brain that makes them. These plaques kill the brain cells, and potentially lead to Alzheimer's disease.⁶⁰⁶

3. Relieves Arthritis- Cannabis reduces pain and inflammation, and promotes sleep, which may help relieve pain and discomfort for people with rheumatoid arthritis. Researchers at several hospitals gave their patients Sativex, a cannabinoid-based pain-relieving medicine. After two weeks, patients on Sativex had a significant reduction in pain, and improved better sleep quality compared to placebo users.

5. Eases the pain of multiple sclerosis- Weed works to stop the negative neurological effects and muscle spasms caused by multiple sclerosis. Jody Cory Bloom studied 30 multiple sclerosis patients with painful contractions in their muscles. These patients didn't respond to other medications, but after smoking marijuana for few days, they reported that they were in less pain. The THC in the pot bonds the receptors in the nerves and muscles to relieve pain.⁶⁰⁷

6. Soothes tremors for people with Parkinson's disease- Smoking marijuana remarkably reduces pains and tremors and improves sleep for Parkinson's disease patients. What was impressive about the research was the improvement of the fine motor skills among patients. Israel has made medical marijuana legal, and a lot of research into the medical uses of weed is done there, supported by the Israeli Government.

⁶⁰⁵ California Pacific Medical Center, Research Institute, 475 Brannan Street, San Francisco, CA 94107, USA.

⁶⁰⁶<http://www.scripps.edu/news/press/2006/080906.html>.

⁶⁰⁷ <https://neurosciences.ucsd.edu/faculty/Pages/jody-corey-bloom.aspx>.



7. Decreases the symptoms of Dravet’s Syndrome- Dravet Syndrome causes seizures and severe developmental delays. Dr. Sanjay Gupta, renowned chief medical correspondent for CNN, is treating a five years old girl, Charlotte Figi, who has Dravet’s Syndrome, with medical marijuana strain high in cannabidiol and low in THC. During the research for his documentary “WEED”, Gupta interviewed the Figi family, and according to the film, the drug decreased her seizures from 300 a week to just one every seven days. Forty other children are using the same medication, and it has helped them too. The doctors who are recommending this medication say that the cannabidiol in the plant interacts with the brain cells to quiet the excessive activities in the brain that causes the seizures.⁶⁰⁸

8. Lessens side effects from treating Hepatitis C, and increases treatment effectiveness- Treating Hepatitis C infection has severe side effects, so severe that many people are unable to continue their treatment. Side effects range from fatigue, nausea, muscle pains, loss of appetite, and depression- and they last for months. But, pot to the rescue: A 2006 study in the European Journal of Gastroenterology and Hepatology discovered that 86% of patients using marijuana successfully finished their therapies, while only 29% of the non-smokers completed their treatments, maybe because marijuana helps to lessen the treatments’ side effects. Cannabis also helps

to improve the treatment’s effectiveness. 54% of the Hep C patients smoking marijuana got their viral levels low, and kept them low, compared to the only 8% of the non-smokers.⁶⁰⁹

9. Helps reverse the carcinogen effects of tobacco, and improve lung health- In January 2012, a study published in Journal of the American Medical Association showed that marijuana improved lung functions, and even increased lung capacity. Researchers looking for risks factors of heart disease, tested on 5,115 young adults, over the period of 20 years, and found out that only pot users showed an increase in lung capacity, compared to the tobacco smokers who lost lung function over time.⁶¹⁰

10. Protects brain after a stroke- Research (done on rats, mice, and monkeys) from University of Nottingham shows that cannabis may help protect the brain from damage caused by a stroke by reducing the size of the area affected by the stroke. This isn’t the only research that has shown neuroprotective effects from cannabis. Some research shows that the

⁶⁰⁸Dr. Sanjay Gupta, Why I changed my mind on weed,(Aug.9, 2013), <http://edition.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/index.html>.

⁶⁰⁹Diana L Sylvestre Cannabis use improves retention and virological outcomes in patients treated for hepatitis C (Jan. 26, 2016) , <http://journals.lww.com/eurojgh/pages/articleviewer.aspx?year=2006&issue=10000&article=00005&type=abstract>.

⁶¹⁰ Maia Szalavitz, study-smoking marijuana not linked with lung damage, (Jan. 10,2012), <http://healthland.time.com/2012/01/10/study-smoking-marijuana-not-linked-with-lung-damage/>.



plant may help protect the brain after other traumatic events like concussions.

11. Helps veterans suffering from Post Traumatic Stress Disorder- Marijuana is approved to treat PTSD in some states in America. In New Mexico, PTSD is the number one reason for people to get a license for medical marijuana, but this is the first time U.S. Government's The Department of Health and Human Services has approved a proposal that incorporates smoked or vaporised marijuana. Naturally occurring cannabinoids, similar to THC, help control the system that causes fear and anxiety in the body and brain.

Revenue Generation

There is a huge market of illegal production, processing and supply of marijuana in India which is growing rapidly. This black market can be acquired by the government by legalizing marijuana, this would dose up our country's economy and would help many sectors of occupation specially farming(cultivation).

- 1. Creating Job opportunities-** Legalization of marijuana for medical purposes will definitely open new doors in different industries like cultivation, processing, transporting, processing, package, distribution, licensing and selling. There are plethora of jobs that can be created by the marijuana industry and help reduce India's unemployment rate⁶¹¹.

- 2. Licensing System-** The marijuana if would be legalized for medical purpose then a controlled mechanism could be developed by licensing it at every step to prevent the misuse. Licensing could be set up at (1) Cultivation, (2) Processing Industry, (3) Medicinal Products etc. The tax slabs could be set up according to its need among the society by the government. As the tax revenue is very important in today's economy this would prove to be ideal step towards controlling and earning while providing health benefits to the public at large.

Uttarakhand is the first state in India to allow the cultivation of cannabis in the state not only for industrial purpose as there is a dying need for cash crops⁶¹². However, the government has cleared that only those people who possess a license will be able to cultivate and the produce can be sold only to the government and not to any private buyers⁶¹³.

- 3. Medical Tourism-** Nowadays, people are aware of the health benefits arising from marijuana, so if our government legalize marijuana it would definitely attract a lot of foreigners (as marijuana has got a lot of medical benefits as explained before in this research paper) for their treatment, this would definitely increase income of

⁶¹² Bobins Abraham, Uttarakhand to be the first Indian State to legalise cannabis cultivation ,(Nov. 27, 2015), <http://www.indiatimes.com/news/india/uttarakhand-to-become-first-indian-state-to-legalise-cannabis-cultivation-247769.html>.

⁶¹³ Bobins Abraham, Uttarakhand to be the first Indian State to legalise cannabis cultivation ,(Nov. 27, 2015), <http://www.indiatimes.com/news/india/uttarakhand-to-become-first-indian-state-to-legalise-cannabis-cultivation-247769.html>.

⁶¹¹ Surya Solanki, 10 reasons why marijuana should be legalized in India, (Nov. 19, 2014),



country as medical tourism is a very strong economical resource in India which will further increase if marijuana is legalised for medical purposes.

Changes required in Law

In India, any quantity of cannabis derivative was pretty much legal until 1985, when the Narcotics Drugs and Psychotropic Substances Act came into existence in India under pressure of UN convention which reclassified the cannabis product as much more dangerous chemical drug⁶¹⁴. After the legalization of marijuana for medical purposes in Canada we got to know about a loophole in the 1971 Convention on Psychotropic Substances which considers the Constitution of any country as supreme law of the land, therefore if any country is willing to legalize any substance which is prohibited by the UN conventions, it wouldn't violate the UN convention. So this strategy could be adopted to legalize marijuana and at the same time not being a defaulter of UN convention⁶¹⁵.

Legalization of marijuana can be linked with Article 47 of The Constitution of India which states that, "The state shall regard the raising of the level of nutrition and the standard of living of its people and to improvement of public health as among the primary duties, in particular, the state shall

endeavor to bring about the prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health⁶¹⁶. Which can make marijuana which is stated as an injurious drug to be used for medicinal purpose and hence to be decriminalized for the improvement of health of the people of India.

Presently in India selling of cannabis comes under the category of prohibited drugs under the Narcotics Drugs and Psychotropic Substances Act, 1985 and so cultivation, possession or sale is an offense punishable with rigorous imprisonment upto 10 years fine upto Rs 2 lakh⁶¹⁷.

Last year, Dr Dharamvira Gandhi, MP of Patiala introduced a Bill seeking legalization of opium and marijuana which was rejected in the legislative branch of Parliament claiming to be against UN convention⁶¹⁸. This year, The Women and Child Development Minister Maneka Gandhi said Marijuana should be legalized for medical purposes especially because it serves a purpose in cancer and would reduce the rapid growing consumption of Heroin (chemical drug) among the youth⁶¹⁹. So to legalize marijuana for medical purposes the NDPS Act, 1985 should be amended by changing the category of

⁶¹⁴ Lisa Kush, New Bill could legalise cannabis and opium in India, (Dec.12, 10:35 AM), <https://www.liwts.org/cannabis/new-bill-legalize-cannabis-opium-across-india/>.

⁶¹⁵ Patrick Cain, Canada seems likely to legalize pot while ignoring UN treaties, (July 19, 2017, 3:58 PM), <http://globalnews.ca/news/3606927/after-blowing-july-1-deadline-canada-seems-likely-to-legalize-pot-while-ignoring-un-treaties/>

⁶¹⁶ Article 21 of The Constitution of India.

⁶¹⁷ Section 16, 18(C), 20 of Narcotic Drugs and Psychotropic Act, 1985.

⁶¹⁸ <http://www.hindustantimes.com/punjab/aap-mp-gandhi-s-bill-seeking-opium-legalisation-cleared-for-tableting-in-parliament/story-itanKX3vRrhuXJPdgnJD6N.html>.

⁶¹⁹ <http://indianexpress.com/article/india/maneka-gandhi-suggests-legalising-marijuana-for-medical-purposes-4773915/>.



marijuana from prohibited drug to controlled substance leading to its legalization under the control of government.

Comparative Study on Legalization of Marijuana

Marijuana is the most commonly used illegal drug in the world with an estimated 125 million people consuming it in some form or the other. In around 40 countries marijuana is legal. Recently in USA, marijuana has been legalized for medical purposes in most parts of the country and in some states even for recreational purpose including the capital i.e. Washington D.C. itself⁶²⁰. Uruguay was the first country to decriminalize it for both medical and recreational purposes and later joined by major countries like USA, Netherlands and Canada and many others⁶²¹. Mexico's Supreme Court ruled that growing, possessing and smoking marijuana for recreation is legal under the right to freedom⁶²². According to Switzerland laws, growing marijuana on private property for personal consumption by adults is legal, however, buying or selling marijuana is a strict criminal offence and punishable by a fine. Bolivia put a right to chew coca leaves, an ancient practice in that society, in their constitution after a referendum in 2009 for this

reason⁶²³. Possession of Cannabis is illegal in Argentina, but decriminalized. It is legal for personal consumption in small quantities inside a private property, while consumption for medical reasons is acceptable within a private property, sale, transportation and cultivation is illegal by law⁶²⁴. The point here is that in almost every major country marijuana is either legally available for recreational purpose or only for medical purpose. But in India, although marijuana cultivation and possession has been declared as illegal and punishable still it is easily available in almost any part of the country because of the great hold of black market.

Measures that can be taken by the government while Legalizing Marijuana

The Government of India has taken steps to curb this issue but it backfired. We do have a Narcotics Drugs and Psychotropic substances Act, 1985 but it is only deterrent in nature and not reformative.

Government should take measures to make the people aware of the harmful effects of excessive consumption by:

1. Should make the children aware of its harmful effects by educating them in this regard. Putting down these things in course books⁶²⁵.

⁶²⁰ Elisabeth Ponsot, Where in the world can you get (legally) high on 4/20, (Apr. 19, 2017), <https://qz.com/961240/where-is-marijuana-legal/>.

⁶²¹ Elisabeth Ponsot, Where in the world can you get (legally) high on 4/20, (Apr. 19, 2017), <https://qz.com/961240/where-is-marijuana-legal/>.

⁶²² Express Web Desk, Six countries where Marijuana consumption is legal, (Nov.5, 2015, 3:39PM), <http://indianexpress.com/article/world/world-news/six-countries-where-marijuana-consumption-is-legal/>.

⁶²³ Patrick Cain, Canada seems likely to legalize pot while ignoring UN treaties, (July 19, 2017, 3:58 PM), <http://globalnews.ca/news/3606927/after-blowing-july-1-deadline-canada-seems-likely-to-legalize-pot-while-ignoring-un-treaties/>

⁶²⁴ Express Web Desk, Six countries where Marijuana consumption is legal, (Nov.5, 2015, 3:39PM), <http://indianexpress.com/article/world/world-news/six-countries-where-marijuana-consumption-is-legal/>.

⁶²⁵ Article 47 of The Constitution of India.



2. Government should help in funding the non-governmental organizations dealing with this.
3. Make treatment services widely available by opening sufficient de-addiction centers⁶²⁶.
4. Providing the Youth accurate information.
5. The government should make it mandatory to provide a card to every purchaser and the quantity upto which he can purchase within a time period.

Conclusion

India is a country which majorly works upon the belief of majority of people. And the marijuana is historically connected with the faith of people which is easily depicted in even NDPS Act, 1985 which was incapable to criminalize Bhang which is said to be a family plant of marijuana just because of great significance as “bhole ka parshad”. But unfortunately NDPS Act under the influence of UN Convention on narcotic drug and psychotropic substances kept the marijuana under prohibited drugs ignoring its multiple health benefits and very less adverse effect in comparison with alcohol and tobacco which are under controlled drugs. With the upcoming new research upon the marijuana and it is found to eliminate and cure many harmful diseases which are threat to the human society and whose cure is either not found or is very expensive, in such cases marijuana can be helpful in a very less cost. Legalizing marijuana will also boost the Indian Economy through various methods of income by the government like tax and

increase the medical tourism for India, whereas simultaneously it will benefit the poor farmers as this cash crop can be easily grown and don't require much efforts or any particular weather. However the result of legalization of marijuana would also curb the rapid increase in consumption of synthetic drugs, specially by the young generation of the county. The marijuana can be legalised through article 47 of the Constitution of India and this would also not hamper the UN treaties. The legalization can be controlled by licensing system at different stages preventing the negative use of the substance.

Human security – broadly defined by the United Nations as “the right of people to live in freedom and dignity, free from poverty and despair” so we believe a person can be free from poverty and despair if he is working hard and putting all his effort in his work which will help a person become independent, free and lead a dignified life. Lastly, we believe its supply should be controlled to an extent that only the people who require it for medical purpose are able to purchase or keep it as its medical benefits would certainly help towards the human security while providing assistance in treatment of certain diseases with low cost medication and the rest depends on how the government wants to see the use marijuana in one's life and the economy of the state.

⁶²⁶ National coalition for effective drug policies Washington, D.C, Eight steps to effectively controlling drug abuse and drug market, (Sept.1, 2017) <http://www.csdp.org/news/news/8steps.html>.



SARFESI ACT, 2002: A CRITICAL ANALYSIS

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Introduction

Debt or asset securitization is one of the latest techniques which financial markets have been witnessing. Under asset securitization, a financial institution pools and packages individual loans and receivables, creates securities against them, get them rated and sells them to investors in a market. Thus, asset securitization is nothing but a process of stimulating assets into securities and securities into liquidity on an ongoing basis, increasing thereby turnover of business and profits, while also providing for flexibility in yield, pricing, pattern, size, risks and marketability of instruments.

Development of the SARFAESI Act

The first structured asset securitization occurred in 1970 in the United States in which securities were backed by a pool of mortgage loans. These pools for security were then sold in the form of certificates to the investors by putting similar securities together. From 1970 to 2000, the securities backed by assets other than mortgage has increased to almost \$60 billion. The Financial crisis of 2008 has taken a toll on business all over the world. Post-crisis analysis showed inadequate understanding and pricing of risks inherent in the process of risk transformation. This further lead to the present situation in which India had to

develop its own securitisation policy. The previous legislation enacted for recovery of the default loans was Recovery of Debts due to Banks and Financial institutions Act, 1993. SARFAESI Act, 2002 was passed after the recommendations of the Narsimham Committee – I were submitted to the government. This act had created the forums such as Debt Recovery Tribunals and Debt Recovery Appellate Tribunals for expeditious adjudication of disputes with regard to ever increasing non-recovered dues. However, there were several loopholes in the act and these loopholes were mis-used by the borrowers as well as the lawyers. This led to the government introspect the act and this another committee under Mr. Andhyarujina was appointed to examine banking sector reforms and consideration to changes in the legal system. With a view to formalize the operations of the securitization market in India and to ensure financial discipline and control in respect of the rights and obligation of the players, the legislature passed SARFAESI Act, 2002 which overrides previous Recovery of Debts due to Banks and Financial Institution Act, 1993[1] which is used as an effective tool by banks for bad loans and NPA (Non-performing assets). It is only possible when such NPAs are backed by hypothecation, mortgage or assignment. It aims to regulate securitization and reconstruction of financial assets and enforcement of security interest. It is only effective in case of secured loans where banks can enforce underlying security and the only exception is agricultural land. Another feature of this act which removes intervention of Courts in this procedure makes it speedy and swift unless the security is invalid or fraudulent.



Operation of securitization under SARFAESI Act-

Securitization of assets involves a lending institution termed as Originator, whose loans and receivables will be converted into securities and a trust or Special Purpose Vehicle (SPV), through which the former will liquefy its assets. The Originator picks up a pool of assets which are similar in nature from the balance sheet and passes them on to the SPV through a pass through transaction. It is then converted into marketable securities for investment. The resultant cash flow will enable Originator to create further assets and periodical cash flows from the underlying collaterals by the way of repayment of loans and interest payments will enable the SPV pay off its obligations of principal and interest to its debtors.

The provisions of this Act to override other laws is dealt in Section 35 which states that, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument have effect by virtue of any instrument have effect by virtue of any such law.

Objectives and Application of SARFAESI Act, 2002

The Financial Sector has been one of the key drivers in India’s effort to achieve its success in rapidly developing its economy. While the banking industry in India is progressively complying with the international norms and accounting practices, there are certain areas in which the banking and financial sector require legal framework. In India, banks and financial

institutes lack the power to take possession of securities and sell them which has resulted into slow pace of recovery of defaulting loans and mounting level of NPAs of banks and financial institutions. Acting on the suggestions given by two committees, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came into the picture. This will enable the banks and other financial institutes to realize long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

Features of SARFAESI Act, 2002-

SARFAESI Act is Procedural in nature – This act is procedural in nature and lays a procedure for providing remedy of enforcement of security interest in secured assets, not through Court but by the secured creditor directly with the intervention of the Tribunal and Appellate Tribunal are not relevant for holding the Act is not of procedural nature [2].Retrospective provisions of SARFAESI Act- The provisions of this Act have been held to be retroactive in nature. The language used by the legislature in this Act is more than sufficient to show the intention of the legislature to include the transactions of loan already entered into on the date when the Act came into force and therefore, merely because in sub-section (2) of the Section 13 there is a use of words “makes any default”, it cannot be read that the Act would not apply to the loan transaction and security created prior to the Act came into force. If



such interpretation is given, it will frustrate the very intention of the legislature and also nullify the effect and operation of number of provisions of this Act. As such the Act intends to cover up all the transactions of loan already entered into the subject to the provisions within the period of limitation and the defaults in making repayment and the debts already classified as non-performing assets and such future contingencies too. Constitutional validity of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- The constitutional validity of this Act has been upheld by the Supreme Court. There was failure on the part of borrower to discharge his liability in full within the period specified. Notice of 60 days as required was given. After measures under Section 13(4) are taken, mechanism provided under Section 17 of the Act is for the borrower to approach Debt Recovery Tribunal (DRT). On measures taken under Section 13(4), before the date of sale/auction of property, it would be open to the borrower to file appeal (petition) under Section 17 of Act before DRT. Borrowers would get reasonably fair deal and opportunity to get matter adjudicated upon before DRT. Impugned provisions of the Act were not unconstitutional as the object of the Act is to achieve speedier recovery of dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general to save public interest. The Constitutional validity of the Act and its provision was upheld except Section 17(2) of Act, which was declared Ultra virus Article 14 of Constitution. Action under SARFAESI Act during pendency of civil

suit- During pendency of the bank's civil suit, the bank can resort to simultaneous action under Section 13(4) of the Act [3].

Writ Jurisdiction- The remedy of appeal is available under the Act against actions relating to recoveries of dues of banks and financial institutions. Hence, it is not necessary to resort to writ jurisdiction under Article 226 of the Constitution. Section 13(4)(d) gives power to creditor to require the borrower to pay to the secured creditor a sum of money sufficient to discharge the secured debt such notice is given under Section 13(2). The action to be taken is not contemplated under Section 13(4)(d) of Act. The order passed by the DRT directing bank to proceed under the section during pendency of the petition was upheld. Can Co-operative Banks take action under SARFAESI Act- The provisions of this Act enabling co-operative banks to take resort to the Act cannot be challenged on the ground that members of co-operative banks are governed by the provisions of the bye-laws which inter-alia, provide for filing of suits before the Nominee, which cannot be nullified by the provisions of the present Act. Validity of Securitization Act so far as inclusion of co-operative banks is concerned cannot be challenged on the ground that since provisions for recovery by co-operative bank is already made under Gujarat Co-operative Societies Act and therefore remedy under any other law is excluded.

In Allahabad Bank Vs Bipin Behari Lal Srivastava & Ors. (2010 (1) DRTC 340, Allahabad Court held that Civil Courts cannot grant injunction restraining the bank from taking measures under the SARFAESI



Act as the same is barred under Section 34 of the Act.

In *Mardia Chemicals Vs. Union Of India* AIR 2004 SC 2371, the Apex Court while rejecting all the contentions acknowledged that NPAs⁶²⁷ due from industrial units is a serious issue. While the Court accepted the recovery of debts due to Banks and Financial Institutions Act deals essentially with the same subject matter the court stated that it is widely accepted fact that the legislation has not been very successful in dealing with the problems of NPAs.

“It is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view it cannot be said that a step towards securitization of the debts and to evolve means for faster recovery of the NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts due to Bank and Financial Institutions Act”

The Court further held “NPAs problem is an important issue regarding the growth of the economy in general and the financial sector in particular, the fact that NPAs. Have reached to an alarming proportion was noted be several committees and institutions and dealing with financial sector.

But certainly what must be kept in mind ins that law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure

should also be fair and reasonable though it may vary looking to the different situations needed to be tackled and object sought to be achieved. At the very outset the court observed that there is a need for modern enforcement laws and speedy enforcement laws and there has been shift in paradigm on the issue of enforcement laws which have increasingly becoming lender friendly. The court held “in such a situation there is a need for change in approach towards enforcement of the security interest law and the act cannot be held to be ultra virus merely because it allows the secured creditors to enforce their rights without the intervention of a Judicial authority.

“the act of the secured creditor is alleged to be fraudulent or their calm may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgage.

In view it is imposed while approaching the adjudicating authority of first instance, not in appeal, there is no determination of the amount due as yet the secured assets or its management with transferable interest is already taken over and under control of the secured creditor, no special reason for double security in respect of an amount yet to be determined and settled 75% of the amount claimed by no means would be a merger amount will leave the borrower in a position where it would not be possible for him to raise any fund to make deposit of 75% of the underdetermined demand. For the above reasons the court held Section 17(2) of the Act is unreasonable, arbitrary

⁶²⁷ Non Performing Assets.



and violative of Article 14 of the Constitution. So 2004 amendment came.

Exemptions from Enforcement:

1. Lien
2. Pledge
3. Security in Air Craft's/ Shipping Vessels
4. Conditional Sale/ Hire Purchase/ Lease
5. Unpaid Sellers Right
6. Security Interest in Agricultural land
7. Properties not liable for attachment
8. Any Financial Asset: not exceeding Rs. 1 Lakh or where the amount due is less than 20 % of the Principal Amount and Interest.

Methods of Recovery under SARFAESI Act

According to this act, the registration and regulation of securitization companies or reconstruction companies is done by RBI. These companies are authorized to raise funds by issuing security receipts to qualified institutional buyers (QIBs), empowering banks and Fls to take possession of securities given for financial assistance and sell or lease the same to take over management in the event of default.

This act makes provisions for two main methods of recovery of the NPAs as follows:

Securitization: Securitization is the process of issuing marketable securities backed by a pool of existing assets such as auto or home loans. After an asset is converted into a marketable security, it is sold. A securitization company or reconstruction company may raise funds from only the QIB (Qualified Institutional Buyers) by forming schemes for acquiring

financial assets. Asset Reconstruction: Enacting SARFAESI Act has given birth to the Asset Reconstruction Companies in India. It can be done by either proper management of the business of the borrower, or by taking over it or by selling a part or whole of the business or by rescheduling of payment of debts payable by the borrower enforcement of security interest in accordance with the provisions of this Act.

[1] Garlon Polyfab Industries v. State Bank of India (2003) 3 BC 626

[2] Apex Electrical Ltd. v. ICICI Bank Ltd., 2003 CLC 1323, (Guj.)

[3] Sushil Kumar Agarwal v. Allahabad Bank, (2004) 2 BC 94



SOCIO-LEGAL CHALLENGES UNDER MUSLIM DIVORCE

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Abstract :

This paper was focused on Triple Talaq. It deals with Islamic rules. This paper was focused on the meaning of Muslim marriage and also focused on divorce on Muslim law. It deals with types of Muslim divorce and whether Triple Talaq is valid or not. It also deals with that whether there is equality among people and Muslim personal law also this paper also deals with the position of women after marriage. It also deals the cases related to Triple Talaq and Muslim community. This paper cover all the topics related to Triple Talaq.

Meaning of Muslim Marriage:

Muslim marriage is an Arabic word called as Nikah. It is not a sacrament is a contract between two people. There is an agreement between two person at the time of marriage. There were some considerations known as Mehr. It is done between man and woman under the consideration. It is paid by the family of man to the family of woman at the time of marriage. In Muslim marriage there must be an agreement between both man and woman that after marriage they take the rights and responsibility towards each others. There must be two witnesses of the marriage contract.

Meaning of Divorce:

Prophet was the head of Muslim community. He treats as a evil and suggest everyone to avoid it as far as possible. The

literal meaning of talaq is simple divorce. Both man and woman have a right to take divorce to each other at any time as they think may fit. After taking divorce both live separately but in Islam only a man has a right to take divorce from his wife. There are two form of divorce in Muslim law.

1. Talaq-i-Sunnat.
2. Talaq-i-Biddat.

Talaq-i-sunnat:

Talaq-i-sunnat is also known as revocable talq. According to this talaq the decision is taken by prophet and it should be the final decision. People should follow the decision of prophet. This talaq is a form of evil. Talaq-i-sunnat is also known as Talaq-ul-Raje. Only this type of talaq should be practiced during the life of prophet. It is recognised by both Sunni and Shia's law. .talaq-i-sunnat is pronounced by either by Ahsan(most proper) or Hasan(proper).

In Talaq Ashan(most proper):- In this form of talaq the husband should pronounce talaq as a single form in the period of tuhur. Tuhur is a period in which cohabitation is possible. and after the single pronouncement the wife is observed as three an Iddat of three montly course. During this period there is no revocation of talaq by husband.

In Talaq Hasan(proper):- this is also regarded to be proper and approved form of talaq. In this form of talaq there is a provision of revocation of talaq. In this the husband has to make single declaration of talaq in the period of tuhur. After this there is a possibility of second time for talaq.the important feature in this form of talaq is that there is a possibility of revocation of talaq



before pronouncing third talaq and irrevocability after third talaq.

Talaq-i-Biddat:

Talaq-i-Biddat is also known as irrevocable talaq. It is also known as triple talaq. In this form of talaq husband and wife should separate each other after divorce. In this husband say divorce by pronouncing three times in one sentence. In this form of talaq there should be no possibility of compromise and reconciliation between husband and wife. When husband take divorce from his wife by saying i divorce thrice it should be final decision from both the side and both live separately. Their rights and responsibility towards each other will stop at that time. It is disapproved mode of divorce. it is also known as Talaq-ul-Bain. This mode of talaq practise in Sunni Law. It doesn't recognize Shia Law. Husband can't give Talaq to his wife during the period of Iddat i.e. 4 months and 10 days.

Concept of Triple Talaq:

Triple Talaq is neither recognised by the Holy Book of Quran and Holy Prophet. It was not practise in the first caliph while it was not practise in second caliph also. It was practise during the time of emergency situation and it was not a permanent law. Triple Talaq is also known as Talaq-i-Biddat in which man has a right to take divorce from his wife at any time and it should become void. It is also known as irrevocable talaq.

According to Hanafi's when wife take divorce from her husband then they will separate with each other and wife cannot marry remarry with him. She become totally

prohibited by her husband. She cannot go back through her husband neither she can remarry with her husband again. After taking divorce from her husband she is free to remarry with another man only on that situation when other have divorcy only she can remarry with another man and she have and rights and responsibility towards them. And that man should give divorce to his wife when she is widow.

Concerning regarding Triple Talaq:

In Muslim Law man treated his wife like a chattels. They think that they can take divorce from his wife at any time by saying talaq three time but while we are thinking those woman who are being deserted but their husband just by the way of instant divorce without any justification and reasonable cause. If one's talaq is pronounced by husband to his wife then they get separate from each other. They don't have any rights and responsibility towards each other. Talaq can be given in any form like through Telegram, Telephone, Letters or it can be through SMS.

In case of Rashid Ahmed V. Anisha Kathoon:-

There was a man who pronounced Triple Talaq in the presence of witnesses but in the absence of his wife. But Four days later it is noted that Talaq Nama was executed in which it is stated that Triple Talaq is allowed for both man and woman both can get divorce from each other. In spite of this Recently we have seen that there has be big issue Bharatiya Muslim Mahila Andolan launched to ban triple talaq where they said that after divorce they want to go back first husband and then they consummate the second marriage.



Reasons of Triple Talaq:

According to Muslim law there are various reason which whom husband took divorce from his wife:-

1. After marriage there must be pressure on parents or the parents should instigate him to take divorce from his wife.
1. Relative instigates him to take divorce from his wife.
2. Wife failure to fulfil the dowry demands.
3. Husband have affair with other women.
4. If both don't have any child and they want to take divorce then they take divorce from each other.

Above all are the reasons if the husband wants to take divorce from his wife they can take divorce from each other.

Banned on Triple Talaq in various countries:

The All India Muslim Personal Law Board has been opposed to abolish Triple Talaq in various Countries in which a man to take divorce from his wife by prouncing Talaq three times in one sitting. Triple Talaq should be abolish in various countries including Pakistan, Shrilanka, Bangladesh ,Egypt, Iran and Arab Countries.

- Egypt was the first country in which triple talaq should be declared as invalid and it provide 90 days procedure to take Muslim divorce.
- Pakistan was also a country in which Triple Talaq was banned on 1951 and they also have a validity of Triple Talaq after the period of 90 days.
- In 1959, Iraq and Iran Was a country in which Triple Talaq should be banned.
- In 2006 SriLanka amended Muslim and divorce act in 1951, in which there is no

grant validity of the concept of Triple Talaq. When a man wants to take divorce from his wife then they send the notice to his to the Qasi. and Qasi gave time to both husband and wife to resolve their matter within 30 days otherwise they both want divorce from each other.

Above is the list of the countries where triple talaq should be banned.

Constitutionality of Triple Talaq:

According to Art.15 (1) of Indian Constitution of India state that there shall be no discrimination against any citizen, religion, race, caste, place of birth or any of them,

But in Triple Talaq men and women has a right to take divorce from each other and Muslim women has suffer of Triple Talaq on account of gender and equality. Muslim men have a right to take divorce from his wife on his own will.

According to Article21 of Indian constitution states that protection of right and personal liberty to every citizen of India. No one has a right to infringed others basic right and right to life and personal liberty in fundamental right which is conferred by law.

The practice of Triple Talaq in this article violates the Muslim women his right, life and personal liberty. It violates women right that known why she has been giving divorce and not to be deprived to be her right on children and her matrimonial house. She become helpless after divorce. The most important content which make a Triple Talaq violation of Article21 is this concept



of arbitrary of women and is totally unfair and unconstitutional.

Article 25 state that every citizen and women have free form their religion and no one can forced to adopt any particular religion. Women have freedom to choose their own religion. It also provided that state shall have not to interfere any religion practise of the citizen.

Constitution of law and other law has rightly said and it is mentioned in Holy Quran that Triple Talaq should be practiced to dissolve Muslim marriage the Quran says that husband can divorce from his wife on that situation when both have valid reason for taking divorce. If there are no valid reason they cannot take divorce. There will be no doubt that Triple Talaq should be violated on women's rights and equality and it should be violated on women's freedom also. Like freedom of marriage is violated by Supreme Court.

TRIPLE Talaq is known as disapproved form of divorce as it is violated on fundamental rights and it is considered as unconstitution and invalid. It is repugnant to our natural justice also. Triple Talaq which promotes gender in equality is also liable as unconstitutional and invalid. Triple Talaq is also considered as unessential part of Islamic law.

So, it can be said from above instant that Triple Talaq is violation of constitution. Therefore, it violates the basic structure of constitution which provides justice Equal to both man and women because it violates our fundamental rights in constitution and it is unconstitutionality.

Case law:

Shayara Bano V. Union of India:

Facts of the Case:

There was a man whose name was Rizwan Ahmed he pronounced talaq three times to his wife shayara bano in presence of two witnesses and gave talaq Nama on 10-10-15. then shayara bano filed for a writ to be issue in supreme court declaring that triple talaq is violated on her fundamental rights.

It was held by Supreme Court that Triple Talaq in Muslim community was declared as unconstitutional and it is void. It infringed art.14,21,25 of Indian constitution. It infringed the Muslim women his basic rights and personal liberty of Muslim women. According to article 14 of Indian constitution all citizens have equal rights and live together equally.

Mohd. Ahmed Khan V. Shah Bano:

In this case there was a women who claimed the Maintenance under section 125 of Crpc. After taking divorce from his husband. According to Muslim personal law The Muslim women petition a file on Maintenance after getting divorce she claim maintenance during the period of iddat.

It was held that Supreme Court was in the favour of shah Bano and gave judgement that claiming under Muslim personal law should gave maintenance to shah Bano and Shah Bano also received various interest. According to legislation there must be fair and just on Muslim the husband gave liability to women during Iddah period.

**Conclusion:**

Divorce in Islamic Law is a big issue in our society and on that regards Muslim man can easily take divorce from his wife and for this there is a big issues in our society regarding Triple Talaq. After divorce Muslim women faces many struggles in her life and it also impact on her gender equality also. For this there are many disputes arises between our community as well as between husband and wife also. At present time Triple Talaq has widely spread practises in non Islamic countries also. Muslim divorce can be taken only by men by pronouncing Talaq three times because it violates article 14 of Indian constitution that everyone treat equally.

Suggestion:

Triple Talaq cannot give to the women if there must be divorce between husband and wife then the husband could not remarry with them they both separate from each other husband can give maintenance to the wife after getting divorce. Once talaq should be pronounced then women facing many problem. There must be valid reason for giving divorce to his wife. Talaq should be given in presence of Qasi. And it violates our fundamental rights also and there is a big issue towards muslim community and towards society also. For this many disputes arises and women wants to face on that.



INDIAN PATENT LAW AND THE FUTURE OF PHARMACEUTICAL INDUSTRY

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Abstract

In April 2013, the Supreme Court of India delivered a much awaited judgment in the case of *Novartis v. Union of India*. The judgment marked the climax of an 8-year long litigation between Novartis on one side and the Patent Office, the Government of India and several Indian generic pharmaceutical companies on the other side. At the heart of the litigation was the interpretation of Section 3(d) of the Indian Patent Act, 1970.

The final judgment, which went against Novartis, is also going to have a wide ranging impact on the grant of future Indian patents for pharmaceutical inventions, especially for those inventions derived from new chemical entities (NCEs). While the Supreme Court's observation in the case has a positive impact on the healthcare system in India by making affordable and safe drugs available to poorer section of the society in developing country like that of ours; on the other hand it discourages foreign pharmaceutical industries from inventing in preventing India's growth as the pharmaceutical hub of the world. This narrow interpretation of article 3(d) of the Indian Patent Act 1907, has raised eyebrows on the question of its compliance with TRIPS Agreement at the World Trade organization with Doha declaration

completely supporting India's freedom to frame the patent laws in accordance with its socio-economic condition.

This paper traces the growth of IPR laws in India and analysis the Novartis case, concluding with the positive and negative effects that this decision will have on India's Healthcare Industry.

KEYWORDS: Section 3(d) of Indian patent Act 1970, *Novartis AG v. Union of India*, TRIPS agreement, healthcare, pharmaceutical industry.

INTRODUCTION

Patent system is a contract between the inventor and authority whereby the inventor gets exclusive rights for a period of 20 years in return for disclosing full details of the invention. The main purpose of patent system is to encourage innovation and eventually results in technological development.

The IPR laws of India are a boon in disguise. Intellectual property rights in India have gone through a whirlwind with the coming of the TRIPS regime and an unpleasant encounter with Novartis. The pharmaceutical industry's biggest challenge in India are its IPR laws, it is a monster that is eating into the profits of the multinational pharmaceutical companies. However this very monster has turned out to be an angel for the Indian population as it prevents the prices of important medicines from skyrocketing.



The first patent legislation of independent India was enacted in the 1970 amending and incorporating the existing laws relating to Patents and Designs act 1911 in India. Section 5 of this legislation prohibited the grant of product patents to “any substances intended for use, or capable of being used, as food or as medicine or drug.”⁶²⁸ Patents for manufacturing processes were, however, allowed. Without a product patent regime and a strong domestic expertise in chemistry, India successfully built up one of the largest pharmaceutical industries in the world. By the turn of the century, the generic Indian pharmaceutical industry was referred to as the pharmacy of the world.⁶²⁹

Once India became a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) it was required to stop discriminating against any field of technology and instead grant patents for any invention that met the basic requirements of patentability, that is, novelty, non-obviousness and utility and amend its own laws accordingly.⁶³⁰

As India approached the TRIPS implementation deadline of January 1 2005, there was significant opposition to changing Indian law, from both the Indian generic pharmaceutical lobby and the global public health movement, because a product patent regime would restrict the number of new

pharmaceutical drugs that could be manufactured by Indian generics. This would affect the profits of the Indian generics and also make it more difficult for public health movements to source more affordable versions of new drugs from India. However, as it soon became clear to the lobbies that the government was determined about amending the Indian IPR law and bring it in compliance with the international obligations under TRIPS they tried to reduce the effect of any possible amendment limiting the kind of pharmaceutical inventions that would qualify for the grant of patent. In other words they prescribed high standards for the patentability of any pharmaceutical invention.⁶³¹ This included demands to restrict pharmaceutical patents only to NCEs. The Government of India refused to accept the proposal, by public health activists, to restrict patent-ability to only NCEs until it was examined by an expert committee on the issue of TRIPS compatibility. An expert committee would however take time and the Government did not have time. When the proposal to limit patenting to NCEs was stalled by the Government, another proposal was made to limit the kind of pharmaceutical inventions that would qualify for the grant of patents. This proposal was Section 3(d). The provision was introduced into the law as a possible safeguard against the rent-seeking practice of ‘evergreening’, where a pharmaceutical company tried to patent not just incremental innovation but also trivial

⁶²⁸The Patents (Amendment) Act, 2005, No. 15 of 2005.

⁶²⁹ Prashant Reddy Thikkavarapu, *The Indian Supreme Court’s judgment in the case of Glivec– the uncertain future of pharmaceutical patents in India*, 3(2) PHARM. PAT. ANAL. 117–119 (2014).

⁶³⁰ Shamnad Basheer, *India’s Tryst with TRIPS: The Patents (Amendment) Act, 2005*, 1 INDIAN J.L. & TECH. 15, 16–17 (2005).

⁶³¹ Shamnad Basheer, *India’s Tryst with TRIPS: The Patents (Amendment) Act, 2005*, 1 INDIAN J.L. & TECH. 15, 16–17 (2005).



improvements in a bid to extend its monopoly over the drug.⁶³²

Therefore the law afforded protection to pharmaceuticals only if they constituted brand new chemical substances or enhanced the therapeutic “efficacy” of known substances.⁶³³ This law, which is codified under section 3(d) of the Patents (Amendment) Act of 2005,⁶³⁴ has not sat well with some MNCs, including the Swiss company Novartis.

II. THE CASE OF NOVARTIS

A. Facts of the case:

The tussle between the Indian Patent Regime and Novartis began long back in 1993, when it filed patents around the world for its synthesis of the molecule imatinib.⁶³⁵ The patent application for Glivec, by Novartis was made in accordance with the “mailbox” requirement, following the formation of WTO and passage of TRIPS in 1995. In January 2006, the Madras Patent Office, rejected the Glivec patent application on the grounds that it was “an unpatentable modification of an existing

substance, imatinib”⁶³⁶, and failed to show “novelty and inventiveness.”⁶³⁷ Novartis appealed to the high Court of Madras in May 2006 on the ground that section 3(d) was vague, ambiguous, in violation of article 14 of the constitution of India and also not in compliance with TRIPS.⁶³⁸ The patent application was also reviewed by the Intellectual Property Appellate Board (IPAB).⁶³⁹ Both the High Court and the IPAB returned decision against Novartis.⁶⁴⁰ Madras High Court also concluded that the TRIPS compliance issue was beyond the Court’s jurisdiction and WTO would be the proper forum for deciding on that issue.⁶⁴¹ Novartis subsequently appealed to the Supreme Court of India.⁶⁴² Supreme Court confirmed the previous Courts decisions that Novartis failed to demonstrate Glivec’s enhanced or superior efficacy in accordance with section 3(d).⁶⁴³ However the apex Court

⁶³² Prashant Reddy Thikkavarapu, *The Indian Supreme Court’s judgment in the case of Glivec– the uncertain future of pharmaceutical patents in India*, 3(2) PHARM. PAT. ANAL. 117–119 (2014).

⁶³³ Shamnad Basheer, *The “glivec” patent saga: a 3-d perspective on indian patent policy and trips compliance*, 17 Dec 2017) www.atrip.org/Content/Essays/Shamnad%20Basheer%20Glivec%20Patent%20Saga.doc.

⁶³⁴ The Patents (Amendment) Act, 2005, No. 15 of 2005, §3(d), Gazette of India, section I(2) (Apr. 4, 2005).

⁶³⁵ *Glivec Patent Case in India: Fact vs. Fiction*, NOVARTIS, (Dec. 19, 2017) http://www.novartis.com/downloads/newsroom/glivec-information-center/Fact_vs_fiction_of_Glivec_India_Case.pdf.

⁶³⁶ Basheer S, Reddy PT. *Novartis, efficacy & Indian patent law: crude yet constitutional*, 5(2) SCRIPTED 232 (2008)

⁶³⁷ Shamnad Basheer, *India’s Tryst with TRIPS: The Patents (Amendment) Act, 2005*, 1 INDIAN J.L. & TECH. 15, 16–17 (2005).

⁶³⁸ Linda Lee, *Trials and TRIPS-ulations: Indian Patent Law and Novartis AG v. Union of India*, 23 BERKELEY TECH. L.J. 281, 299 (2008).

⁶³⁹ *ibid*

⁶⁴⁰ Shamnad Basheer, *Novartis Loses at the High Court: Focus Now Shifts to IPAB*, SPICY IP (Aug. 6, 2007), <http://spicyip.com/2007/08/novartis-loses-at-high-Court-focus-now.html>

⁶⁴¹ Shamnad Basheer, *The “glivec” patent saga: a 3-d perspective on indian patent policy and trips compliance*, (Dec. 17, 2017) www.atrip.org/Content/Essays/Shamnad%20Basheer%20Glivec%20Patent%20Saga.doc.

⁶⁴² *ibid*.

⁶⁴³ *India’s Novartis Decision*, N.Y. TIMES (Apr. 4, 2013), http://www.nytimes.com/2013/04/05/opinion/the-Supreme-Court-in-india-clarifies-law-in-novartis-decision.html?_r=0.



did not provide a definitive definition of “enhanced efficacy.”⁶⁴⁴

B. Supreme Court’s judgment:

In its judgment, the Supreme Court interpreted ‘efficacy’ as meaning only ‘therapeutic efficacy’. In the pertinent part, the Court stated *“What is evident, therefore, is that not all advantageous or beneficial properties are relevant, but only such properties that directly relate to efficacy, which in case of medicine, as seen above, is its therapeutic efficacy”*⁶⁴⁵. Such an interpretation is a rather narrow interpretation when compared with the ‘unexpected properties’ standard followed in countries such as the USA, where any property of the new invention, as long as it is ‘unexpected’, can rebut a presumption of obviousness in favor of a salt form or a structurally similar compound. Therefore, a drug that demonstrates unexpected thermodynamic stability, making it easier to store, can be patented in the USA but not in India because the same would not increase the therapeutic efficacy of the drug.

C. Interpretation of section 3(d):

Section 3(d) of the said act reads as follows,

“What are not inventions – the following are not inventions within the meaning of this Act, –^[SEP]... (d) the mere discovery of a new form of a known substance which does not result in increased efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless

such process results in a new product or employs at least one new reactant.”

From the first reading of the section, it is apparent that in order that Section 3(d) is attracted the following conditions must be satisfied:

- What is claimed must be a mere discovery;
- What is claimed must be a new form of a known substance; and
- Such substance claimed does not result in increased efficacy over known substance.

If any of the above-mentioned three conditions are not met, Section 3(d) cannot and should not be applicable. Therefore the applicability of the section lies on the difference between ‘discovery’ and ‘invention’. According to the Webster’s Third International Dictionary of the English Language, the expression “discovery” refers to *“the act, process or an instance of gaining knowledge of or ascertaining the existence of something previously unknown or unrecognised.”* Therefore, unlike “invention” which refers to a new product or process involving inventive step and capable of industrial application (Section 2(1)(j) of the Patents Act, 1970), “discovery” essentially refers to finding out something which already existed in nature but was unknown or unrecognized.

Furthermore going by its literal reading, Section 3(d) seeks to target two kinds of pharmaceutical inventions structurally similar chemical compounds and new salt forms of existing chemical compounds. In both cases, the person applying for a patent was required to demonstrate that the structurally similar chemical compound or

⁶⁴⁴Novartis v. Union of India, (2013) 6 SCC 1

⁶⁴⁵Novartis v. Union of India, (2013) 6 SCC 1



the new salt form demonstrated significantly increased ‘efficacy’ when compared with the ‘known substance’.

At issue in the Glivec case was the patentability of the beta crystalline form of Imatinib Mesylate. The NCE in this case, Imatinib, was a path-breaking discovery but could not be patented in India because it was discovered before 1995, the cut-off date for TRIPs. The beta-crystalline form of Imatinib Mesylate was derived from Imatinib Mesylate, which in itself was a salt form of Imatinib. According to Novartis, the beta crystalline form of Imatinib Mesylate should have been patentable since it had better bioavailability than the Imatinib free base, that is, it could dissolve better in blood than the known form from which it was derived. The main hurdle faced by Novartis was the word “efficacy”⁶⁴⁶ in section 3(d) of the Indian Patent Act, 1970. The word was not defined in the law and the issue of its interpretation was contested all the way up to the Supreme Court in the Glivec case.

The Supreme Court, in order to provide greater clarity on the matter observed that, *"Efficacy means the ability to produce a desired or intended result. Hence, the test of efficacy in the context of section 3(d) would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of the product under consideration. Therefore, in the case of medicine that claims to cure a disease, the test of efficacy can only be 'therapeutic*

⁶⁴⁶ Basheer S, Reddy PT. *Novartis, efficacy & Indian patent law: crude yet constitutional*, 5(2), SCRIPTED 232 (2008).

efficacy”⁶⁴⁷.

Therefore it is found that the Novartis’ patent application for the beta-crystalline form of Imatinib Mesylate (polymorph B) did not pass the test of section 3(d) as it did not have any enhanced therapeutic efficacy. The Supreme Court thereby upheld the observation of the High Court and Indian Patent office and rejected the patent application filed by the petitioner.

D. Is 3(d) in confirmation with TRIPs:

Whether section 3(d) of the patents act 1970, actually meets the requirements of TRIPs depends on the construction of the word “efficacy”⁶⁴⁸. If efficacy is given a fairly narrow construction, so as to essentially reserve patent protection for new chemical entities only, then section 3(d) may in fact violate TRIPs.⁶⁴⁹ However, the significant provisions in TRIPs clearly indicate that member nations have been given significant flexibility to frame patent laws, which reflect their social and economic needs.⁶⁵⁰ Article 27 of the TRIPs Agreement states, *"Patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial*

⁶⁴⁷ *Novartis v. Union of India*, (2013) 6 SCC 1.

⁶⁴⁸ Shamnad Basheer, *The “glivec” patent saga: a 3-d perspective on indian patent policy and trips compliance*, (Dec. 17, 2017) www.atrip.org/Content/Essays/Shamnad%20Basheer%20Glivec%20Patent%20Saga.doc.

⁶⁴⁹ *ibid*.

⁶⁵⁰ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, (Dec. 18, 2017) <http://www.iprcommission.org>.



application."⁶⁵¹ Fortunately for WTO member states such as India, many of the terms included in TRIPS have been left undefined, including "inventive step", "industrial application" and "invention" providing flexibility to establish the criteria of patentability.⁶⁵² In the absence of a precise definition of patentability, there is nothing to prevent the Section 3(d) from using an "efficacy" requirement,⁶⁵³ i.e. a higher level of inventiveness for determining patentability of new forms of known substances. Accordingly, in order to acquire patent protection in India, the substance has to go beyond establishing the novelty, inventive steps, non-obviousness and industrial application test set forth in TRIPS agreement and also fulfill the additional improved efficacy incorporated under section 3(d). Moreover, in India, international treaties are not directly enforceable and municipal law prevails over international law.

Additionally the **Doha declaration** has also helped in softening the tone of international debates concerning access to medicines in the context of TRIPS. The declaration clearly states that TRIPS Agreement shall not prevent members from taking measure to protect public health.

*"... We affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."*⁶⁵⁴

Article 5 of the Doha declaration protects the rights of countries like India by cogently stating that,

"... 5(b) Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted...."

5(c) Each Member has the right to determine what constitutes a public emergency...

*5(d) [TRIPS leaves] each member free its own regime for exhaustion [of intellectual property rights] without challenge ... (International exhaustion permitting parallel importation permitted)..."*⁶⁵⁵

⁶⁵¹ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, [1] Marrakesh Agreement, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

⁶⁵² Linda Lee, *Trials and TRIPS-ulations: Indian Patent Law and Novartis AG v. Union of India*, 23 BERKELEY TECH. L.J. 281, 299 (2008).

⁶⁵³ Former WIPO director, Nuno [1] Pires de Carvalho, when asked about section 3(d)'s compliance with TRIPS, stated, WTO members can individually define the term invention for purposes of patentability, subject to meeting the TRIPS criteria of "novelty," "inventive step" and "industrial application potential," of the substance concerned. Therefore, what India did through Section 3(d) was to make it clear that a number of technical creations are not inventions, unless they present a significant increase in efficacy.

⁶⁵⁴ Doha Declaration on the TRIPS Agreement and Public Health, WT/L/54o (Dec. 30, 2017), available at <http://www.wto.org/english/tratop-e/implem-para6-e.htm>.

⁶⁵⁵ Doha declaration on the TRIPS Agreement and Public Health, WT/L/54o (Dec. 30, 2017), available at <http://www.wto.org/english/tratop-e/implem-para6-e.htm>.



III. CONSEQUENCES AND FUTURE OF INDIAN PHARMACEUTICAL INDUSTRY:

The ruling in the Novartis's case represents a major victory for community's access to inexpensive medicines in developing countries and influences the access of medicines to the poor. Apart from protecting public interest this interpretation of the section 3(d) of the patent's act 1970, is an effective means of preventing the practice of 'evergreening' by large MNCs. But there is a negative side too, to the interpretation given by the SupremeCourt in the said case.

Under the prevailing interpretation of section 3(d), it is very difficult to acquire a patent for a drug with incremental improvements because it will likely fail to meet the "enhanced therapeutic efficacy" threshold.⁶⁵⁶ This will eventually harm the domestic drug companies because India's major domestic pharmaceutical companies have yet to accrue the infrastructure and capital to make major leaps in drug innovation, a number of them have focused on "incremental innovation."⁶⁵⁷ *"Indian scientists do not have the know-how or capital to come up with new chemical*

*entities, but do have the know-how to make improvements."*⁶⁵⁸ This is unfortunate for a country, which is emerging as powerful player in the realms of science and technology. This will at least in the near future, discourage foreign investment in India. While the SupremeCourt requested that its decision not be read as a prohibition on patents for all incremental innovation,⁶⁵⁹ the reality is that many MNCs will question their ability to secure patents for their products in India. Foreign firms will simply abstain from investing in India, perhaps by withholding the introduction of new products to the Indian market, or by refusing to create new high-paying jobs there. This possibility is troubling in the face of India's increasing need to attract foreign investment in order to bolster its weak currency, and to meet the demands of its growing middle class.

Moreover, The Indian SupremeCourt's decision leaves enough ambiguity regarding the meaning of "enhanced efficacy" that both multinational and Indian pharmaceutical companies must continue to pursue industry patents without the benefit of a bright-line rule.

Having said this, India is fighting simultaneously on two fronts. One where it seeks to protect the interest of its poor and middle class citizen by ensuring availability of affordable and safe medicines to promote healthy and better lives. While on the other hand it needs to protect the interest of the

⁶⁵⁶ Rumman Ahmed & Amol Sharma, *Novartis Fights India for Cancer Pill Patent*, WALL ST. J. (Dec. 19, 2017), <http://online.wsj.com/article/SB10000872396390444233104577594973786074692.html>.

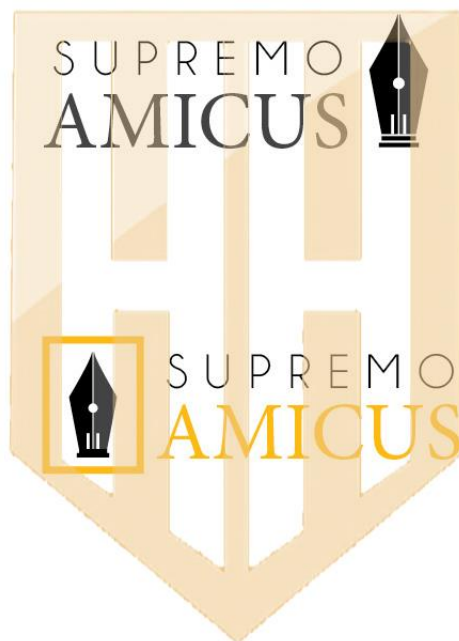
⁶⁵⁷ Padmashree Gehl Sampath, *Economic Aspects of Access to Medicines After 2005: Product Patent Protection and Emerging Firm Strategies in the Indian Pharmaceutical Industry*, UNITED NATIONS UNIVERSITY INSTITUTE FOR NEW TECHNOLOGIES, <http://www.who.int/intellectualproperty/studies/PadmashreeSampath.Final.pdf>

⁶⁵⁸ Lok Sabha Debate, Mar. 22, 2005, <http://164.100.24.230/Webdata/datalshom001/dailydeb/22032005.htm>

⁶⁵⁹ *Novartis v. Union of India*, (2013) 6 SCC 1, at 95.



foreign and domestic Pharmaceutical interest by providing patent protection to ensure enthusiastic research and development in the field of medicines. This seems to be a never-ending tussle. Having weighed the pros and the cons on each side only time can tell us the future of pharmaceutical industries in India and its position in the world.





CONSPIRACY

*By Harshika Kapoor & Charchit Khandelwal
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Conspiracy⁶⁶⁰ is when two or more persons agree to an act, which is forbidden by law, or an act which is not illegal but when it is done by illegal means. Earlier, Conspiracy was not an offence under Indian Penal Code (IPC) until the Criminal Law Amendment Act of 1913. It was added under the Section 120-A and 120-B of Indian Penal Code. Section 120-A defines 'conspiracy' and Section 120-B prescribed punishment for 'criminal conspiracy'. Conspiracy was being framed upon these elements. They were-

- Agreement to do an act
- Between two or more persons
- A criminal object, which may be either the ultimate aim of the agreement, or may constitute the means by which that aim is to be accomplished.

There are many unproven conspiracy theories from disappearance of Malaysia Airlines Flight MH370 in South-East India to Germany's pretense for invading Poland in World War II. Conspiracy existed in the times of Julius Caesar as well. Famous Julius Caesar was ceased to death by Conspiracy of his kingdom's officials. But there has been difference between English Law and Indian Law relating to Conspiracy. The Supreme Court in **State v. Nalini (Rajiv Gandhi Assassination Case)**, Rajiv Gandhi was assassinated by a human bomb. And this case led to forming of certain broad

principles governing the Law of Conspiracy. It firmly explained that offence of criminal conspiracy is an exception to the general rule where intent alone doesn't constitute a crime. It is the intention to commit crime and joining hands with persons having the same intention. In the eyes of Indian law, Conspiracy is punishable in two forms viz., conspiracy by way of abetment and conspiracy involved in certain offences. In the Former Case, an act or illegal omission must take place in pursuance of conspiracy in order to be punishable. The latter is conspiracy by implication and proof of membership is enough to establish the charge of conspiracy. The punishment for conspiracy is the same as if the conspirator had abetted the offence. Conspiracy is a form of substantive offence. The offence of conspiracy is complete when two or more conspirators have agreed or cause to be done an act which is itself an offence, in which case, no overt act need not be established. Conspiracy can be considered as volatile entity. A Conspiracy to commit an offence under Section 121 or to discourage the government by means of criminal force is punishable under Indian Penal Code. Conspiracy Theory frequently emerges following the deaths of prominent people from which the best known is theories concerning to assassination of John F. Kennedy in 1963. Conspiracies have led from hijacks of Airplanes to killing of prominent persons in the world.

In the Famous Case of **State of Maharashtra v. Somnath Thapa**⁶⁶¹,

⁶⁶⁰ Ronald wood Mathams v. State of West Bengal

⁶⁶¹ The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two



Supreme Court explained the ingredients of Conspiracy. It was observed in this case that ultimate offence consists of a chain of actions, it would be not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had to know of what the collaborator would do, so long as it is known that the collaborator would put the goods or services to an unlawful use.

Types of Conspiracy Theories (Optional if needed)

- Surveillance Theory
- Hiding Theory
- Control Theory
- Deaths Theory
- Warfare Theory
- Technology Theory
- Paranormal Theory

Reasonable ground exists for believing that 'A' has joined in a conspiracy to wage war against the Government of India.

Principal and scope:

persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy, some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not (sic) sufficient. A conspiracy is a continuing offence, which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B of the Indian Penal Code 1860.

The State of Maharashtra and Ors. vs. Rajesh and Ors. (05.05.2016 - BOMHC) : MANU/MH/0660/2016

The general principle is that no person can be made liable for the acts of another except in cases of abetment in criminal proceedings and contract of agency in civil proceedings. However, in conspiracy persons who take part in conspiracy are deemed the mutual agents or confederates for the purpose of the executive of the joint purpose.

Bhagwan Swarup v. State of Maharashtra, the Supreme Court of India states that Section 10 of the Evidence Act will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy, before his act can be used against his co- conspirators.

Section 10 is based on the theory of agency. In Emperor v. Shafi Ahmed, it has been held that if two or more persons conspire together to commit an offence, each is regarded as being the agent of the other, and just the principal is liable for the acts of the agent of the other, and just the principal is liable for what is done by his fellow- conspirator, in furtherance of the common intention entertained by both of them.

Section 10 contains the following ingredients as stated in Bhagwant Swarup v. State of Maharashtra,

- There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy,
- If the said condition is fulfilled anything said, done or written by any one of them in



reference to their common intention will be evidence against the others,

- Anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them,
- It would also be relevant for the said purpose against another who entered the conspiracy, whether it was said, done or written before he entered the conspiracy or after he left,
- In addition, it can be used only against a conspirator and not in his favor.

REASONABLE GROUND OF CONSPIRACY:

In Barudra Kumar Ghose v. Emperor, it has been held that the operation of Section 10 is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit offence.

In *Gulab Singh v. Emperor*, it has been observed that it is necessary in a prosecution for conspiracy to prove that there were two or more persons agreeing for purpose of conspiracy and that there could not be a conspiracy of one. This decision is based on the decision given in *King v. Plummer*.

In re: *Rangarajulu*, it has been held that the existence of a secret code by itself is evidence to support the inference that the persons named therein have conspired to commit an offence.

In *Samundar Singh V. State*, it has been held that the evidence is taken after a prime a facie proof of the Conspiracy but at a later stage of the trial that reasonable ground of belief or prime facie proof is

displaced by further evidence, the Court must reject the evidence previously taken.

Confession:

In *State of Gujrat v. Mohammed Atik*, it has been held that a post-arrest statement made to police officer whether it is a confession or otherwise touching his involvement in the conspiracy would not fall within the ambit of Section 10 of the Act.

In *Kehar Singh v. State*, it was held that in the absence of reliable evidence beyond reasonable doubt confession of a co-accused could not be used against other.

In the absence of reliable and trustworthy evidence, such confession cannot be used in a conspiracy case.

Difference between English Law and Indian Law relating to conspiracy:

- In Indian Law, under Section 10 of the Evidence Act, what the Conspirator said, did or wrote must be in reference to his common intention, whereas under the English Law, such acts must be in furtherance of the common design. The Indian Law is much wider than the English Law.
- In Indian Law, even after one conspirator ceases to have connection with the conspiracy, his acts are admissible, whereas under the English Law, they are not admissible
- In Indian Law, acts done after the termination of the conspiracy are also relevant, but in English Law if the acts and declarations were done or made after the person against whom the evidence is to be given and served his connection with the conspiracy, they will not be held relevant.



- In *Nathu Ram Godse v. Rex*, it has been held that “Under the English law statements or acts made or done by one conspirator in order to be admissible against the others, must have been made or done in furtherance of the common purpose and in pursuance of the conspiracy. This rule of the English Law has not been adhered to in Section 10 of the Indian Evidence Act.”

Case Laws:

The opening words in Section 10 of the Evidence Act, 1872, are "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence". If prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common object is admissible against all. Therefore, there should first be a prima facie evidence that the person was a party to the conspiracy before his acts or statements can be used against his co-conspirators. No worthwhile prima facie evidence apart from the alleged confessions have been brought to notice to show that the petitioner along with A-2 and A-4 was party to a conspiracy. The involvement of the petitioner and A-2 and A-4 in the alleged conspiracy is sought to be established by the confessions themselves.

Here, the confessions of A-2 and A-4 were recorded long after the murder when the conspiracy had culminated and, therefore, Section 10 of the Evidence Act cannot be pressed into service.

Subject Category:

CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO BAIL/INTERIM BAIL/ANTICIPATORY BAIL AND AGAINST SUSPENSION OF SENTENCE

JUDGMENT

1. Leave granted.
2. This appeal, by special leave, has been preferred against the order dated 8.12.2004 of Madras High Court, by which the petition for bail filed by the petitioner under Section 439 Cr.P.C. was rejected.

3. An FIR was lodged at 7.00 p.m. on 3.9.2004 at Police Station B-2, Vishnu Kanchi by Shri N.S. Ganesan. It was stated therein that at about 5.45 p.m. on 3.9.2004 while he was in the office of Devarajaswamy Devasthanam, two persons armed with aruval came there and caused multiple injuries to Sanakararaman, In-charge Administrative Manager, who was sitting on a chair. Three persons were waiting outside and the assailants escaped on their motor cycles. After the case was registered, necessary investigation followed and several persons have been arrested. According to the case of the prosecution, the actual assault upon the deceased was made by A-6 and A-7, while four persons, namely, A-5, A-8, A-9 and A-10 were standing outside.

4. The petitioner, Shri Jayendra Saraswathi Swamigal, who is the Shankaracharya of Kanchi Mutt, Kanchipuram, was arrested on 11.11.2004 from Mehboob Nagar in Andhra Pradesh. He moved a bail petition before the High Court of Madras, which was rejected on 20.11.2004 and the second



bail petition was also rejected by the impugned order dated 8.12.2004.

5. In order to establish the aforesaid motive for commission of crime, the prosecution relies upon copies of 39 letters which were allegedly recovered from the house of the deceased himself. What the prosecution claims is that the deceased used to keep copies of all the letters and complaints which he made against the petitioner and it is these copies which have been recovered from the house of the deceased. The prosecution claims that of these 39 letters or complaints 5 complaints were found in the office of HR&CE, Chennai which relate to the period 14.8.2001 to 23.1.2002, one in the residence of A-4 and 2 in the residence of the petitioner. In our opinion, the recovery of these letters from the house of the deceased himself is not a proof of the fact that they were actually received by the petitioner or were brought to his notice. The deceased was not an employee of the Mutt but was working as In-Charge Administrative Manager of another Dharamsthanam which has nothing to do with Kanchi Mutt and at least since 1998 he had no connection with the said Mutt. Though according to the case of the prosecution, the deceased had started making complaints against the petitioner since August 2001, there is absolutely no evidence collected in investigation that the petitioner made any kind of protest or took any kind of action against the deceased. Even otherwise, many letters or complaints etc. are addressed to people holding high office or position and it is not necessary that they read every such letter

or complaint or take them seriously. There is absolutely no evidence or material collected so far in investigation which may indicate that the petitioner had ever shown any resentment against the deceased for having made allegations against either his personal character or the discharge of his duties as Shankaracharya of the Mutt. The petitioner having kept absolutely quiet for over three years, it does not appeal to reason that he suddenly decided to have Sankararaman murdered and entered into a conspiracy for the said purpose.

6. N. Sundaresan (A-23) who is Manager of the Mutt was arrested on 24.12.2004 and was produced before the Judicial Magistrate, Kanchipuram at 1.45 p.m. on 25.12.2004. He stated before the Magistrate that he had received Rs.50 lakhs in cash on 30.4.2004 and the said amount was deposited in Indian Bank, Sankara Mutt Branch on 7.5.2004. Learned counsel for the petitioner has placed before the Court copies of two accounts bearing nos.124 and 125 which the Kanchi Kamakothi Peetham Shri Sankaracharya Swam has in the Indian Bank at No.1, Salai Street, Kanchipuram. This statement of account shows that on 7.5.2004 an amount of Rs.28,24,225/- was deposited in cash in account no.124 and an amount of Rs.21,85,478/- was deposited in cash in account no.125. Thus the total amount which was deposited in cash comes to Rs.50,09,703/-. Learned counsel has explained that in addition to Rs.50 lakhs which received in cash an extra amount of Rs.9,703/- was deposited in order to liquidate the overdraft over which penal interest was being charged by the bank. The statement of account clearly



shows that after deposit of the aforesaid amount the entire overdraft was cleared. This clearly shows that the entire amount of Rs.50 lakhs which was received in cash on 30.4.2004 was deposited in Bank on 7.5.2004. This belies the prosecution case, which was developed subsequently after the order had been passed by this Court on 17.12.2004 directing the State to produce copy of the ICICI Bank account, that the cash money was retained by the Petitioner from which substantial amount was paid to the hirelings.

7. The prosecution also relies upon confessional statement of Kathiravan (A-4) recorded under Section 164 Cr.P.C. on 19.11.2004, wherein he stated that he went to the Kanchi Mutt on 1.9.2004 and in the presence of Ravi Subramaniam and Sundaresan, the petitioner said that Sankararaman had written letters and had filed cases and it was not possible for him to bear the torture any longer and, therefore, he should be killed on the same day. It is important to mention here that A-4 retracted his confession on 24.11.2004 when his statement was again recorded under Section 164 Cr.P.C. The prosecution also relies upon confession of Ravi Subramaniam (A-2) which was recorded on 30.12.2004 wherein he made a similar statement that the petitioner offered him Rs.50 lakhs on 1.9.2004 for getting rid of Sankararaman.

8. Shri Nariman has submitted that in view of Section 30 of the Evidence Act confession of a co-accused is a very weak type of evidence which can at best be taken into consideration to lend assurance to the prosecution case. He has referred to

the decision of the Privy Council in *Bhuboni Sahu v. The King* MANU/PR/0014/1949, wherein it was observed that confession of a co-accused is obviously evidence of a very weak type and it does not come within the definition of evidence contained in Section 3 as it is not required to be given on oath, nor in the presence of the accused and it cannot be tested by cross-examination. Learned counsel has also referred to *Kashmira Singh v. State of M.P.* MANU/SC/0031/1952 : 1952CriLJ839 where it was held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3 and it cannot be made the foundation of a conviction and can only be used in support of other evidence. It was further observed that the proper way is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing such evidence which without the aid of the confession he would not be prepared to rely on for basing a finding of guilty. Reliance has also been placed upon the Constitution Bench decision in *Haricharan Kurmi v. State of Bihar* MANU/SC/0059/1964 : 1964CriLJ344



where it was held that the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. It was further observed that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. It has thus been urged that the confession of A-4 which was retracted by him subsequently and also that of A-2 have very little evidentiary value in order to sustain the charge against the petitioner.

9. Shri K.T.S. Tulsi, learned senior counsel, has, on the other hand, placed strong reliance on Section 10 of the Evidence Act and has submitted that this being a specific provision dealing with a case of conspiracy to commit an offence, the principle laid down in the authorities cited by Shri Nariman would not apply and anything said, done or written by any one of the accused is a relevant fact as against each of the person conspiring to commit a crime. In this connection he has referred to State of U.P. v. Buta Singh MANU/SC/0182/1978 : [1979]1SCR298 State of Maharashtra v. Damu MANU/SC/0299/2000 : 2000CriLJ2301 Firozuddin Basheeruddin and Ors. V. State of Kerala MANU/SC/0471/2001 :

2001CriLJ4215 Prakash Dhawal Khairnar v. State of Maharashtra MANU/SC/0788/2001 : 2002CriLJ928 and State of H.P. v. Satya Dev Sharma and Ors. : (2002)10SCC601.

10. The opening words in Section 10 are "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence". If prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by anyone of the conspirators in furtherance of the common object is admissible against all. Therefore, there should first be a prima facie evidence that the person was a party to the conspiracy before his acts or statements can be used against his co-conspirators.



**A BIOTECHNOLOGICAL WAY
PARENTHOOD AND DIFFICULTIES
IT FACES AFTER SURROGACY BILL
2016**

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ABSTRACT

It is no bizzare that in our society there is no place for a barren women . taking account of ancient time or of today ,we will witness that according to our society *modus vivendi* of women is to produce a child to her family and if she fails to do that then she becomes subject of derogatory remark and she is being stated as a "witch".

In our society motherhood is not just loving and caring nature of the mother but motherhood comes when or women succeed in giving birth to a child ,after birth of a child a woman is given a status of a mother, if she fails to bear a child but still holds motherly nature that is not what is accepted and appreciated by our hypocrite society .

with the passage of time when technology developed,a miracle was introduced by the veterans in the field of science and technology. this ,miracle was none other than a biotechnological way which helps childless couples to enjoy the ride of parenthood.this miracle is known as surrogacy in the field of science & law and as a blessing to the childless couples. surrogacy came into existence cause of science & technology and continue to be in existence by the law and regulations. The purpose of science to invent this step was to bring a ray of hope in the sombre and dark

life of those people who are childless and whose homes are mournful without giggle of a child but with the time few people in the society exploited this invention by overtly using it and misusing it and government took certain steps and put some clauses in surrogacy bill 2016 which has a poor effect on large mass , so in this article I have tried to put forth some analysis on the biotechnological way to parenthood and the difficulties it faces after surrogacy bill 2016.

INTRODUCTION

It is no bizzare that in our society there is no place for a barren women . taking account of ancient time or of today ,we will witness that according to our society *modus vivendi* of a woman is to produce a child to her family and if she fails to do that then she becomes subject of derogatory remark and she is being stated as a "witch".

In our society motherhood is not just loving and caring nature of the mother but motherhood comes when or women succeed in giving birth to a child ,after birth of a child a woman is given a status of a mother, if she fails to bear a child but still holds motherly nature that is not what is accepted and appreciated by our hypocrite society .

In past there were many instances where women were deserted by their family people cause she fails to give child to her family to continue the lineage and to cease all these violence against women a miracle was introduced .couples who fails to reproduce an offspring ,they often have to go through a lot of sympathetic but at the same time taunting advices . but it is worst for a woman individually .cause if a woman do not succeed in providing a child to her



family than she is of no use and they see her as a "worthless woman" cause in the eye of society women's modus operandi is to produce a child for her family to continue the lineage and carry forward the legacy. so, if a woman do not able to get an embryo in the womb and unable to produce infant for her family she is being left in lurches by her family .

with the passage of time when technology developed,a miracle was introduced by the veterans in the field of science and technology. this ,miracle was none other than a biotechnological way which helps childless couples to enjoy the side of parenthood.this miracle is known as surrogacy in the field of science & law and as a blessing to the childless couples. surrogacy came into existence cause of science & technology and continue to be in existence by the law and regulations.

Definition And Meaning

this word "Surrogacy" was first introduced in the year 1603.⁶⁶² It is originated from the latin word *surrogatus*.

literal meaning : One that serves as a substitute

Medical meaning : A woman to undergo pregnancy usually by artificial insemination or surgical implantation of fertilized egg for purpose of carrying the fetus for another woman

Legal meaning : One acting in the place of another ; Esp : one standing *in loco parentis*

to a child .

A standard definition of surrogacy is offered by the American Law Reports in the following manner:

“...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights.

The Assisted Reproductive Technologies (Regulation) Bill, 2010 defines

“surrogacy” as an agreement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

hence,

Surrogacy is a *modus operandi* or agreement whereby a woman shows her consent to carry a fetus for another woman /man /couples,who will be the newborn's parent(s) after birth .

Historical Roots

http://shodhganga.inflibnet.ac.in/bitstream/10603/57389/8/08_chapter%202.pdf

Surrogacy was known and rehearsed in antiquated circumstances. In the Mahabharata, Gandhari, spouse of Dhritarashtra, conceived yet the pregnancy continued for about two years; after which she delivered a mass (mole). Bhagwan Vyasa found that there were 101 cells that were typical in the mass. These cells were placed in a supplement medium and were developed in vitro till full term. Of these,

⁶⁶² .www. Merriamwbsite.com



100 formed into male kids (Duryodhana, Duhshasana and different Kauravas) and one as a female kid called Duhsheela.

There are other all around cited illustrations that allude to IVF as well as to the thought that a male can create a tyke without the assistance of female. Sage Gautama created two kids from his own semen—a child Kripa and a girl Kripa, who were both unnaturally conceived children. Similarly, Sage Bharadwaj delivered Drona, later to be the instructor of Pandavas and Kauravas. The story identifying with the introduction of Drishtadyumna and Draupadi is considerably more fascinating and reflect the extraordinary forces of the immense Rishis. Lord Draupada had animosity with Dronacharya and wanted to have a child sufficiently solid to slaughter Drona. He was given solution by Rishi and in the wake of gathering his semen, handled it and proposed that artificial insemination homologous (AIH) ought to be improved the situation his significant other who however refused . The Rishi at that point put the semen in a yajnakunda from which Dhrishtadyumna and Draupadi were produced . While the above are cited as cases of in vitro fertilization (IVF) and parthenogenesis, there is another story, which alludes to embryo transfer. As indicated by Bhagwad Gita, even Lord Krishna is comprehended to have been conceived without a sexual union. This was with respect to the seventh pregnancy of Devaki, by the will of the lord; the fetus was exchanged to the womb of Rohini, the first spouse of Vasudev, to prevent the baby being killed by Kansa⁶⁶³

⁶⁶³http://shodhganga.inflibnet.ac.in/bitstream/10603/57389/8/08_chapter%202.pdf

MODERN HISTORY

The issue of surrogate parenthood came to national consideration amid the 1980s, with the Baby M case. In 1984 a New Jersey couple, William Stern and Elizabeth Stern, contracted to pay Mary Beth Whitehead \$10,000 to be artificially inseminated with William Stern's sperm and convey the subsequent kid to term. Whitehead chose to keep the kid after it was conceived, declined to get the \$10,000 installment, and fled to Florida. In July 1985, the police captured Whitehead and return the kid to the Sterns. In 1987 the New Jersey Superior Court maintained the Stern-Whitehead contract. The court removed all parental and appearance rights from Whitehead and allowed the Sterns to legitimately embrace the infant, whom they named Melissa Stern. After a year, the New Jersey Supreme Court switched a lot of this choice. That court pronounced the agreement unenforceable however enabled the Sterns to hold physical custody of the kid. The court also reestablished some of Whitehead's parental rights, including visitation rights, and voided the adoption by the Sterns. Most essential, the choice voided all surrogacy contracts on the ground that they strife with state open approach. but, the court still allowed voluntary surrogacy arragement⁶⁶⁴

Available at:
<http://imaginativeworlds.com/forum/showthread.php?p10900-Surrogate-MotherhoodPoland-quot->

Reasons to why people opt surrogacy

Couples opt for surrogacy when traditional means of conceiving a child have failed, this

⁶⁶⁴<http://imaginativeworlds.com/forum/showthread.php?p10900-Surrogate-MotherhoodPoland-quot->



also includes in-vitro fertilisation, or it is dangerous for the couple to get pregnant and give birth. The following medical conditions usually necessitate surrogacy⁶⁶⁵:

- > Malformation of or infection in the womb
- > Absence or removal of womb by hysterectomy
- > Recurring miscarriages
- > Repeated failure of IVF
- > Other conditions that make it impossible or risky for a woman, such as severe heart disease

Factors affecting surrogacy

it is important to make sure the surrogate mother is healthy and ideally between 21 and 40 years old.

- > Other than general fitness levels, such as blood pressure, sugar levels, thyroid, etc., one should check for the mental health of the surrogate.
- > It is also advisable that the surrogate should have already given birth to one healthy baby before.

Science of Surrogacy

surrogacy is a big inventive step of a science which helps create life on earth and come out as a boon to those who are unfit to produce child. it is neither ignorable nor deniable that surrogacy lit up the dark path of those who want to have child but cannot bear it.

Surrogacy dawn in the field of science during the period of 1970's when the first IVF got successful and brought a hope in the life of all that sombre life which were dark and morn without a child. It spread as a ray of hope in india when the procedure become a successful practice in india with the birth of world's second and india's first IVF baby "kanupriya" alias "durga", she was born in

the city of kolkata on 3rd october in the year 1978.

science of surrogacy says that surrogacy is a scientific and unnatural way of producing or creating an offspring and hence, it is known as REPRODUCTIVE TECHNOLOGY because it does not comprise of natural way but artificial way of reproduction by creating an embryo in laboratory using the sperm and the egg of the intended parents and the fertilized egg get inseminated inside the uterus of surrogate mother and this procedure is known as surrogacy.

There are primary two methods of surrogacy:

TRADITIONAL SURROGACY: this kind of surrogacy is less practiced though it is less costly. reason that makes it fall under rare practice is cause it relate surrogate to offspring biologically.

In this method of surrogacy, surrogate act as both the egg donor and the surrogate, so the youngling produced out of this method is biologically related to the intended father and the surrogate mother cause in this procedure of surrogacy, sperm is collected from the intended father and subsequently injected in the uterus of surrogate so as the injected sperm get fused to the egg of surrogate and fertilized naturally

GESTATIONAL SURROGACY

this type of surrogacy has no biological link between embryo and the surrogate, it does not involve surrogate mother's egg and therefore the produced infant has no relation with surrogate.

using gestational surrogacy procedure the sperm of the intended father and egg of the

⁶⁶⁵ www.indianexpress.com



potential mother is fused together in the laboratory using the process of IVF .prior to transferring the sperm in the uterus of surrogate , the procedure of IVF takes some 3-5 days to get egg and sperm fertilized .once the egg of potential mother and sperm of intended father get fertilized in laboratory , it is introduced to the uterus of surrogate to carry the embryo until it comes out in the world .

there are another two types of surrogacy :

ALTRUISTIC SURROGACY : It is the form of surrogacy where the surrogate mother receives no financial reward for her pregnancy or the relinquishment of the child (however, usually all expenses related to the pregnancy and birth are paid to her by the intended parents such as medical expenses, baby delivery expenses, her additional nutrition and other related expenses)⁶⁶⁶

COMMERCIAL SURROGACY

It is a form of surrogacy in which a gestational carrier (surrogate mother) is paid to carry a child of the intended parents in her womb. This procedure is legal in several countries including in India where due to excellent medical facilities, experienced IVF specialists and availability of surrogate mothers willing to carry your child, gestational surrogacy is gaining popularity.⁶⁶⁷

Surrogacy vs Adoption

For a couple a child is the most precious gift. Those who are unable to have this wonderful gift always feel inferior and

frustrated. Thousands of couples across world are facing humiliation because of not having any child. Surrogacy is a wonderful gift that would bring the big smile on their face. The development in medical science and increased social awareness and acceptance has made it popular and more and more couples are getting benefited by it every year. The number is ever increasing and countries like India are becoming a major centre for surrogacy because of easy availability of surrogate mothers and legal flexibility. While surrogacy is becoming popular nowadays, another method has been in existence from a long time and that is adoption. Although it is also one of the most popular and well accepted methods, but surrogacy certainly has few clear-cut advantages over adoption. Genetic factor is one of the major reasons to go for surrogacy. The parents are more emotionally attached because they have seen the complete process of pregnancy and childbirth. It gives them a higher level of mental peace and satisfaction.

In the past it was assumed when a couple did not conceive a child on their own, they should turn to adoption to achieve their parenthood dreams. This notion is now quite outdated as there are far more options for infertile couple as well as singles and homosexuals who want children. Now people have the option to pursue advanced infertility treatment and egg, sperm and embryo donation are no longer rare, national and international adoption is commonplace and surrogacy is becoming increasingly popular.

Both of these methods are actually having the same end objective, that is, to give the

⁶⁶⁶ http://www.ivfsurrogacy.in/Surrogacy/Type_of_Surrogacy.php

⁶⁶⁷ http://www.ivfsurrogacy.in/Surrogacy/Type_of_Surrogacy.php



chance of enjoying one of the sweetest moments of life for a couple who has been waiting eagerly for this for a long time. Surrogacy provides an opportunity where the couple can feel the responsibility and seriousness of childbearing process and that creates more emotional bonding between the parents and child. The fact that newborn is genetically connected to at least one of the parents gives a feeling of comfort and happiness to the parents. They feel more closeness with the child because it is biologically related to them. Gestational surrogacy involves eggs and sperms of the couple and therefore it is actually their genetic offspring, developed in a different womb. This is a real feel good factor for them as compared to adoption where they are not much assured by the genetic issues. The close relationship of intended parents and surrogate mother creates a healthy relationship and the progress of pregnancy and health of the mother can be monitored easily to avoid any complications. The emotional bonding is more strong and cohesive.

Another most important factor in case of surrogacy is that the intended couple can choose the surrogate mother that is going to carry the baby. This is not possible in case of adoption where there is no chance of deciding anything about the genetic parents of the child. Although adoption is surely one of most amazing ways to create the family and giving complete unconditional love and affection to a child that does not belong to you genetically is surely not an easy task. It requires great amount of courage and openness of heart.

But there are some babies who need to be

adopted. Society might make a judgement that such infertile couples would make that choice, thereby benefiting both children in need and society. Accordingly, a state might decide that it is best that infertile couples not be permitted to create another baby by contract, when at least a few of them might otherwise decide to take on a child in need. Surrogacy advocates injure their case when they brag that as surrogacy develops, it will come to replace adoption. That would be a clear social harm. The interests of existing children in having families, and society's concern that children grow up in as secure and loving an environment as possible, should not be ignored in the decision whether to encourage surrogacy, *in vitro* fertilisation and ovum/sperm donation.

Infertile couple would argue that the chance to have a "normal" child and a child as biologically connected to them as possible, is not afforded by adoption and that although it benefits society more for them to adopt an existing child than to conceive a new one, the same is true for fertile couples, who nonetheless are permitted to reproduce without any restriction by the state. Moreover it is hypocritical to raise the needs of deprived children against surrogacy when we as a society in other respects follow policies so obviously contrary to their needs. Indeed if we provided minimally adequate welfare for poor families with children with special needs, a national daycare policy, a program to meet the housing needs of poor people, and support for battered women who would take care of their children if they could, just to name a few obvious examples, poor families would be able to stay together, and there would be many fewer children in need of families. If we provided free



prenatal care to those who cannot afford it, there would be many fewer special-needs children. Society does have a responsibility towards existing children in need, and it should exercise that responsibility, but it is unfair for it to meet its obligation simply by transferring the responsibility to couples who need surrogacy to reproduce. A ban on surrogacy would not really impose an obligation upon infertile couples to care for existing children, although it would increase the likelihood that some of them will do so and that would be part of its purpose. The serious issue is whether it is fair so to preclude infertile couples and women who want to be surrogates, and the turns on a value judgment; whether the needs of existing children should be given preference or whether the needs of parties who would use surrogacy are more important.

Surrogacy vs Baby trafficking

Those who oppose surrogacy argue that surrogacy is nothing but ‘baby selling’ and is, therefore, against law. In no country baby-selling is allowed. Hence infertile couples are to be happy by adopting children from within their country or abroad.

Adoption is a state created judicial procedure through which a child’s natural parents relinquish their parental rights and a new couple becomes the legal parents of the child. In the west, there is already a baby dearth and healthy babies are hardly available for adoption. Moreover, adoption procedure is too lengthy. In the developing countries, babies are available for adoption. Unfortunately, there exist a Baby-Black-Market and unscrupulous baby-brokers transfer unwanted babies to childless

couples. Parents of those babies are paid for and this is baby-selling. In order to prevent this, inducements to parents who part with their babies have been held to be unlawful. Here come the legal complications in regard to compensation paid to the surrogate mother for the inconvenience borne by her and expenses incurred for delivery. This may be treated as incentive. But there is a marked difference between surrogacy and baby-selling. In case of surrogacy, the surrogate mother carries the child on being asked by the intending parents and agrees to hand over the child beforehand. But in case of baby-selling, poor people hand over their children to brokers for financial benefits only even without knowing the fate of their children. Thus, the evils of baby-selling are not present in surrogacy and compensations paid to surrogate mother should not be viewed as inducement⁶⁶⁸

LEGISLATIVE JOURNEY FROM COMMERCIAL SURROGACY TO ALTRUISTIC SURROGACY

commercial surrogacy got legal recognition in Indian territory in the year 2002 . It is a practice that has helped many stars in the Hindi film industry to enjoy the ride of parenthood.

the Indian Council of Medical Research (ICMR) provided surrogacy with pro guidelines so as to protect the right of the individuals involved as a party in the surrogacy process.

1. ICMR put forth some guidelines⁶⁶⁹ :-

⁶⁶⁸ Nandia Adhikari, “ Surrogate Motherhood” law and medicine 167(2012)

⁶⁶⁹ Ww.wikipedia.com



- Surrogacy arrangement will continue to be governed by a contract amongst parties, which will contain all the terms requiring consent of the surrogate mother to bear the child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s) etc.
- A surrogacy arrangement should provide for financial support for the surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- One of the intended parents should be a donor as well, because the bond of love and affection with the child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced.
- In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child, which is resorted to if biological (natural) parents and adoptive parents are different.
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without any need for adoption or even declaration of guardianship.
- The birth certificate of the surrogate child should contain the name(s) of the

commissioning parent(s) only.

- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

However, the necessity of legal protection was enforced through the case of Baby Manji vs Union of India. A Japanese couple commissioned a surrogate mother in India but they ended in a divorce. The single male parent wasn't granted custody of the child and the mother refused to accept it. Japan gave the child humanitarian visa and allowed the grandmother to take the child on behalf of her son, given his genetic relation with the baby. During the case, however, the Supreme Court recognised that the parent of a surrogate child may be a male and recognised surrogacy as a positive practice.⁶⁷⁰

2. ART BILL 2010 was tabled in the parliament with guidelines having the legislative backing to protect the party to the contract of surrogacy from any kind of infringement and exploitation but this bill was never passed as a law, it was kept as a

Some of the features of this proposed bill are as under⁶⁷¹:

- Constitution of an authority at National as well as State level to register and regulate

⁶⁷⁰ www.indianexpress.com

⁶⁷¹ Proposed Draft Assisted Reproductive Technologies (Regulation) Bill & Rules-2010, Ministry of Health and Family welfare and ICMR, India



the [IVF clinics](#) and ART centers.

- Creation of a forum to file complaints for grievances against clinics and ART centers.
- Imposing duties and responsibilities on the clinics and ART centers.
- Regulations for sourcing, storage, handling, record keeping of Gametes, Embryos and other human reproductive materials.
- Placing rights and duties on Surrogate and commissioning parents.
- Imposing stringent penalties for breach of the duties and regulations under this Act.
- The above features are still dynamic in nature, but will take a long way in making the entire surrogacy procedure transparent and fair. The chances of any exploitation of the Intended Parents and Surrogate cannot be eliminated with mere introduction of the proposed bill; better implementation across the country must be needed.

Proposed Draft Assisted Reproductive Technologies (Regulation) Bill & Rules 2010, Ministry of Health and Family welfare and ICMR, India

3. Guidelines by **Union Home Ministry** for visas being issued to foreigners seeking child / children from surrogacy (2012)

These guidelines for foreigners planning surrogacy in India came up in July 2012 following allegations that commissioning parents from abroad were cheating the surrogate mothers. There are also few reported cases that the children were ill-treated in foreign land and that they are not treated as citizens there.⁶⁷²

- The Union ministry of home affairs observed that many non natives visit to india on tourist visa and their purpose was to get a surrogate to produce a child .On observing such incidents union ministry made it compulsory for those foreigners who want to get a surrogacy procedure to be conducted in india to get a medical visa before visiting india for surrogacy purpose .
- Under this order, a letter from the embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed along with the visa application stating clearly that the country recognizes surrogacy and the child or children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child or children of the couple commissioning surrogacy. This is particularly significant, as many babies born out of cross-border surrogacy in recent years have been trapped in legal tangles between the home country and India. A Norwegian woman, who had twins by an Indian surrogate in 2009, was stranded for over two years as Norway refused to accept her as the biological mother of her children. Many countries,

[Ministry of Home Affairs HYPERLINK "http://mha.nic.in/uniquepage.asp?Id_Pk=553", HYPERLINK "http://mha.nic.in/uniquepage.asp?Id_Pk=553"](http://mha.nic.in/uniquepage.asp?Id_Pk=553)Government of India website, [Diaspora Services: Overseas Citizenship of India Scheme; The Ministry of Overseas Indian Affairs \(MOIA\) HYPERLINK "http://www.moia.gov.in/services.aspx?id1=35&id=m3&idp=35&mainid=23", HYPERLINK "http://www.moia.gov.in/services.aspx?id1=35&id=m3&idp=35&mainid=23"](#)Government of India website 2012.

⁶⁷² [Overseas Citizenship of India \(OCI\);](#)



like France, Germany, Italy and Norway do not recognize commercial surrogacy.

- The couple will have to furnish an undertaking that they would take care of the child or children born through surrogacy, the treatment should be done only at one of the registered Assisted Reproductive Treatment (ART) clinics recognized by Indian Council of Medical Research. Besides, the couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother. "If any of the above conditions are not fulfilled, the visa application shall be rejected," the Home Ministry said.
- The Ministry also told Indian missions abroad that before the grant of visa, the foreign couple needs to be told that before leaving India for their return journey, "exit" permission from the Foreigner Regional Registration Offices or Foreigner Registration Offices (FRRO /FRO) would be required. Before granting "exit", the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child or children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement and guidelines.
- A copy of the birth certificate(s) of the surrogate child or children will be retained by the FRRO or FRO along with photocopies of the passport and visa of the foreign parents. It may be noted that for drawing up and executing the agreement, the foreign couple can be permitted to visit India on a reconnaissance trip on tourist visa, but no samples may be given to any clinic during such preliminary visit," the

order said.

- According to this new rule, gay couples and single parents living abroad will not be given an Indian medical visa if they are visiting to commission a surrogacy. Also, commissioning parents have to be heterosexual couples married for at least two years before commissioning a surrogacy, and will have to apply for a medical visa only. Apart from this, commissioning parents will now have to get documents from clinics certifying that they are heterosexual couples who cannot have children under normal conditions and need medical treatment.

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4. INTRODUCTION OF SURROGACY BILL 2016

Surrogacy will not be allowed for⁶⁷³ –

- a. Single parents
 - b. Homosexual couples
 - c. Couples in live-in relationships
 - d. Couples with children
 - e. Foreigners
 - f. Attempts at commercial surrogacy
2. Couple must be married for at least 5 years.
 3. Either one of couple must have proven infertility.
 4. Only Indian citizens; NRIs are also not included
 5. Age of couple: 23-50 for females and 26-55 for males.
 6. Women can be surrogates only once and a married couple can only have one surrogate child.
 7. The couple should employ an “altruistic relative”, i.e. the surrogate mother should be

⁶⁷³ <https://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/>



a relative who is sympathetic to the situation.

8. Egg donation is banned.

Pitfall Of Surrogacy Bill 2016

2. the bill 2016 infringes the article 21 of indian constitution which states that right to livelihood and right to reproduce is a fundamental right of every individual . eliminating commercial surrogacy and replacing it with altruistic surrogacy has deprived many poor women working as surrogate from their "right to livelihood". surrogacy was the legal mean of earning bread for their family and helping their family to give a financial backbone and by introducing surrogacy bill government has snatched the mean of employment from the hands of mob of poor women working legally as surrogate and living a normal life of human being . Further , it has not only harm the rights of surrogate to win bread but also to those women who are infertile or unsuitable to reproduce . it infringes the right of those women who want to reproduce bt fails to and hence go for surrogacy to gain the joy of motherhood , this bill violates the right to reproduce of those single male and female, heterosexual couples but not married, homosexual couples and in fact it reduces the chances of hetrosexual couples to become parent by introducing the clauses of 25-35 should be the age of surrogate , surrogate should be a close relative ..etc . this bill has harmed both the sides .
3. it violates the "freedom of trade and profession " proposed under article 19(1)(g). It violates the right of many poor women working as surrogate to earn bread for their families and numerous clinics

who gets monetary gain through this procedure and putting a blanket ban on commercial surrogacy indulge many stakeholders interest in jeopardy

4. the bill violates the Article 16 of universal declaration of human rights which states that " right to found family " is a right that every human vest in him/her since birth and by infringing" right to reproduce " this bill has violated the "right to found family " too
5. banning commercial surrogacy and introducing altruistic surrogacy will motivate the baby selling black market to sell babies to the people in need of babies without any legal contract and exploiting the life of babies without any assurance of the future
6. altruistic surrogacy can be more exploitative than commercial surrogacy cause it is so unfair and arbitrary towards those women who are close relatives and on the name of close relatives she goes through the nine months struggle of carrying pregnancy and pain in giving birth to the baby without being paid for her reproductive labour .Pregnancy is to be considered a period of nine-month labour with far reaching implications for the health, time and family of the surrogate. Altruistic arrangements do not provide any support to the surrogate.
7. the indian judiciary under the juvenile justice (care and protection)act 2015, allows foreigner, single male and women and others to adopt a child whereas when it comes to have a surrogate child with whom individual can relate to himself/herself genetically but then government put ban on it though if we ll observe then we ll notice that having a child through surrogacy will not put child



into any kind of unfavourable situation with parents and adoption has lead to many child into unfavourable condition like molestation with girls in the family and involving child into child labour ,etc.

8. It violates Article 14 of indian constitution by not allowing single male and female , homosexual , heterosexual couple not married , and couples already having a child cannot go for another child through surrogacy . these restriction and ban on surrogacy has come out as a gross discrimination .
9. spreading a blanket on commercial surrogacy will lead to the parallel ilegal industry of surrogacy where middle man who cannot afford expenditure of countries like uk and usa which has legal commercial surrogacy , will choose the illegal mean of surrogacy in india .

those countries too does not restrict surrogacy on the ground of age and number of times a surrogate can go for pregnancy. Government has ignored many factors to take into consideration and implementation surrogacy bill 2016 which has harmed both the women working as surrogate and the women willing to get a child but is infertile and due to of restrictions and clauses in this introduced bill will make it almost impossible for that women to become mother and introducing altruistic surrogacy has made many surrogate working women unemployed . It is now a high time and need of an hour for government to rethink and reform the surrogacy bill 2016 and make the biotechnological way to help people to achieve parenthood.

CONCLUSION

Government's intention were right to implement surrogacy bill 2016 but they ignored many factors into consideration and now those factors are the obstacle for many people in india to achieve parenthood goal by becoming parent to child/ children. Putting clause of age 25-35 for a woman to become surrogate , surrogate could only be a close relative and a woman can go for surrogacy pregnancy only once , these clauses come out as a obstacle and reduced the chances of even homosexual married couples to get a surrogate and achieve parenthood to enjoy ride of parenthood. introducing altruistic surrogacy and restricting a woman on clause like only one time surrogacy pregnancy and age will make it almost impossible for even couples to get a child , there are many countries in the world which practise altruistic surrogacy but



THE FACETS OF SURROGACY IN INDIA

By Isha Srivastava
From Symbiosis Law School, Pune

• INTRODUCTION

“Of all the rights of women, the greatest is to be a mother.”

Over the recent years surrogacy has become the best and most viable option for couples and persons who wish to be single parents. It seems like a win-win situation where the desperate and infertile parents get a child of their own bloodline and the surrogate mother who is in most cases poverty stricken, gets money in order to run her family.⁶⁷⁴ India has been a favourite for couples all over the world opting for surrogacy due to its cheap medical tourism industry.

The surrogacy industry in India is based on exploitation of surrogate mothers in order to earn profits. Surrogate mothers are looked at as baby-making machines and proper sanitary and medical precautions are not taken to ensure their safety and welfare.⁶⁷⁵ Various unethical practices are exercised by the medical industry, in order to produce as many offspring as possible. Thus, the fertility industry looks at surrogacy not as a remedial treatment but a profit-making sector of business. The poor conditions of

the surrogate industry in India are in need of huge reform. With the House passing the recent Surrogacy (Regulation) Bill, 2016, there has been a lot of debate about the impact of this Bill on the surrogacy industry.⁶⁷⁶ The question of the hour is whether the practice of surrogacy must be abolished in India?

• SURROGACY AND ITS TYPES

In the case of *K Kalaiselvi v. Chennai Port Trust*⁶⁷⁷, surrogacy was defined as “the well known method of reproduction whereby the woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother or she may be a gestational carrier.”

A the medical expenses of the surrogate mother are taken care of by the intending parents and the surrogate mother also receives a remuneration by the intending parents.

There are three basic types of this procedure, namely:⁶⁷⁸

1. Straight/Traditional Surrogacy:

The egg of the surrogate mother is fertilized by the sperm of the intended father. In some cases, the egg of the surrogate mother is fertilized by the sperm of an anonymous donor.

2. Gestational Surrogacy :

⁶⁷⁴ Legal Desire Quarterly Journal Vol-1, Issue 1, October, 2013, Surrogacy a bane or boon, ISSN: 2347-35250.

⁶⁷⁵ Ministry of Health and Family Welfare, Delhi Mumbai Surrogacy study Final Report: <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>

⁶⁷⁶The Hindu, A setback for surrogacy in India:,25th Aug,2016.<http://www.thehindu.com/opinion/op-ed/a-setback-for-surrogacy-in-india/article7927730.ece>

⁶⁷⁷ *K Kalaiselvi v. Chennai Port Trust*,

⁶⁷⁸ Indian Journal of Public Health, Surrogacy and women's right to health in India: Issues and perspective, Vol.57,2013.



The ovum of the intended mother is fertilized by the sperm of the intended father or an anonymous donor and then planted into the womb of a surrogate mother. This process is called In Vitro Fertilized-Embryo Transfer.

Surrogacy can be further divided into, altruistic and commercial surrogacy.⁶⁷⁹

In altruistic surrogacy, the surrogate mother is not paid any remuneration for her services apart from the payment of her medical bills, while in commercial surrogacy the surrogate mother receives remuneration for her services in addition to the payment of medical bills.

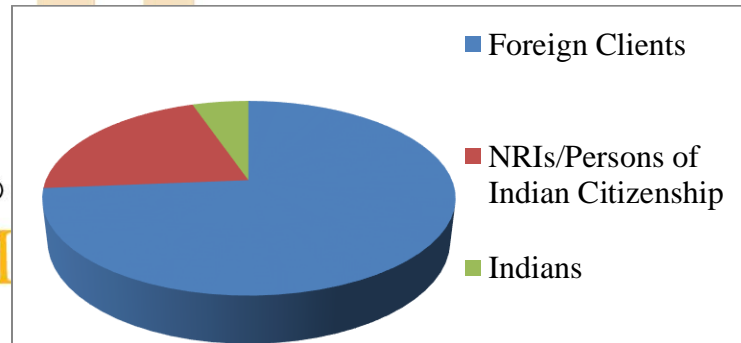
Indian medical industry provides the option of surrogacy at low medical costs with less legal hassles and plenty of surrogate mothers available, majority of the patients are foreigners majorly from countries like UK,USA, Australia and Canada.⁶⁸² India is also known as the surrogacy capital of the world with a net revenue of the reproductive tourism industry being approximately \$2.3 Billion dollars.⁶⁸³ The chart below represents the type of clients typically visiting the Indian surrogacy industry.

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• **HISTORICAL EVOLUTION**

Robert Edwards is known as the father of modern day surrogacy⁶⁸⁰. It is due to his efforts, the first IVF baby ,Louis Brown was born on 25th June,1978.The world’s second IVF baby and India’s first surrogate baby, Kanupriya also known as Durga, was born in Kolkata on 3rd October,1978.⁶⁸¹ Elizabeth Carr was the first surrogate baby born in America in the year, 1981.Since then , surrogacy became the most viable option for childless couples to have children of their own.



• **CURRENT SITUATION**

⁶⁷⁹ Surrogacy Laws India: www.surrogacylawsindia.com

⁶⁸⁰ Andrea O’ Reilly, Encyclopedia of Motherhood, Vol.1, Sage Publications, Inc, U.S.A. (2010).

⁶⁸¹ Andrea O’ Reilly, Encyclopedia of Motherhood, Vol.1, Sage Publications, Inc, U.S.A. (2010).

⁶⁸² International Journal of Recent Research in Commerce Economics and Management (IJRRCM) Vol. 2, Issue 4, Womb on Rent: Surrogacy Tourism in India-Ethical or Commercial.

⁶⁸³ R.S Sharma, Social, ethical, medical & legal aspects of surrogacy: an Indian scenario



• LEGAL

In 2002, guidelines were issued by the Indian Council of Medical Research⁶⁸⁴ to make sure that surrogacy was backed by some extra-legal rules even though they were not enforceable in Court. The 228th Law Commission of India's⁶⁸⁵ report also issued guidelines for regulating surrogacy practices.

The biggest legal development that took place with respect to the matter of surrogacy was in the matter of Baby Manji⁶⁸⁶'s case. In this case, a Japanese couple opted to have a baby through surrogacy in India. However, the baby was born, the couple refused to accept the baby on the grounds of divorce. Custody of the baby was given to his grandmother.

In this case, Supreme Court stated the need of legally regulating the surrogacy industry in India and on the basis of the SC's strong recommendation the Assisted Reproductive Technology Bill⁶⁸⁷ was formulated in 2008 and 2010, however it was never passed as a law.

Finally, in 2016, due to the various unethical malpractices instituted by the

surrogacy industry, the Surrogacy (Regulation) Bill, 2016⁶⁸⁸ was introduced. The Bill has been passed by the Cabinet in 2016. Key objective of this bill is to ensure welfare of surrogate woman.

A. THE CONSTITUTIONAL PERSPECTIVE

The Constitution of India is the supreme law governing the country.⁶⁸⁹ In order, to formulate a legislation for surrogacy laws, we must ensure that it is in tune with the Constitution. The first question that comes to our mind with respect to this is, whether the Constitution recognizes the act of surrogacy in any way. Although, there is no specific mention of surrogacy in the Indian Constitution, in the American case of *Johnson v. Calvert*⁶⁹¹, right to reproduce was considered as a basic civil right. This can be enforced in India since it is a common law country.

Part III of the Constitution offers fundamental rights to the citizens. In *Consumer Education and Research Centre v. Union of India*⁶⁹², the Apex Court stated that Article 21 does not connote mere animal existence but comprises of a human life with dignity and all the necessities required to live a stable life. The Article 21 guarantees right to life and

⁶⁸⁴ Indian Council of Medical Research, Ethical Guidelines for Biomedical Research on Human Participants, New Delhi (2006). <http://icmr.nic.in/ethical_guidelines.pdf>

⁶⁸⁵ Law Commission of India, —Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, Report No. 228

⁶⁸⁶ *Baby Manji v. Union of India*, (2008) 13 SCC 518

⁶⁸⁷ Assisted Reproductive Technologies Bill: [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf)

⁶⁸⁸ Surrogacy Regulation Bill, 2016: [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf)

⁶⁸⁹ *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr* (1973) 4 SCC 225

⁶⁹⁰ *Re Baby M*, 537 A.2d 1227

⁶⁹¹ *Johnson v. Calvert*, 851 P.2d 776 (1993).

⁶⁹² *Consumer Education & Research ... vs Union Of India & Others*, 1995 AIR 922.



liberty to the citizens of India. Right to privacy is also included in Art. 21. Right to procreation is a basic human right and must come under the ambit of right to privacy of a citizen. This has been substantiated in *B. K. Parthasarthi v. Government of Andhra Pradesh*⁶⁹³, where the Andhra Pradesh High Court stated that the right of reproductive independence of an individual as a part of his right to privacy. The Supreme Court of India in *Suchita Srivastava v. Chandigarh Administration*⁶⁹⁴, has upheld that a woman's right to make reproductive choices is also a dimension of personal liberty under Article 21 of the Constitution of India.

B. THE CONTRACT OF SURROGACY.

A contract can be defined as an agreement enforceable by law that defines the rights and duties of parties involved in it, thereby reflecting the intentions and obligations of the parties. When two parties, i.e., the commissioning parents and surrogate mother, agree to perform the process of surrogacy, they require a clear understanding between them regarding their rights and duties towards each other. A surrogacy agreement takes place when an offer made by the intending parents, generally through infertility clinics that act as agents, is accepted by the surrogate mother. The main objective of such agreements is that it will be enforced in case any dispute arises with respect to the

rights and duties of the parties as well as the object of the agreement.⁶⁹⁵

The surrogacy contracts are essential to ensure that the rights of the surrogate mothers are protected. It must be noted that in India surrogacy contracts are governed by the Indian Contract Act.⁶⁹⁶ Indian Courts have always adopted a pro-contract and pro-commercial approach and have therefore stated in various decisions, that surrogacy contracts are in the realm of Indian Contracts Act, however they do not keep a check on the enforceability of the contracts but merely regulate them.⁶⁹⁷ In *P Geetha Nagar v, Kerala Livestock Development Board*⁶⁹⁸, the court clarified that surrogacy is not illegal in India and noted India's significance as a 'surrogacy destination'.

In *Jan Balaz v. Anand Municipality*⁶⁹⁹, the High Court stressed upon the need of special legislation to govern several issues of public welfare and policy importance that arise in such disputes, like rights of a surrogate mother, guardianship, responsibilities of the fertility clinic, etc. There have been many arguments stating that enforcement of surrogacy contracts will lead to exploitation of women and baby-selling. Many critics have stated that commercial surrogacy contracts must be

⁶⁹³ *B. K. Parthasarthi v. Government of Andhra Pradesh*, 1999 (5) ALT 715.

⁶⁹⁴ *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235

⁶⁹⁵ Debora L. Spar, *The Baby Business*, Harvard Law School Press, Harvard (2006).

⁶⁹⁶ Dr. Lily Srivastava, *Law and Medicine*. (2015)

⁶⁹⁷ Legal Service India, *The Surrogacy Contracts*. <http://www.legalserviceindia.com/article/1434-Surrogacy-Contracts.html>

⁶⁹⁸ *P Geetha Nagar v, Kerala Livestock Development Board*, SCC, 2015 SCC OnLine Ker 71.

⁶⁹⁹ *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21.



held as illegal and contracts pertaining to altruistic surrogacy, must be held valid.

According to the researcher, surrogacy contracts must be enforceable and valid. This should be done in order to protect the rights of the surrogate mother. While making such contracts it should be made mandatory for surrogate mothers to get legal advice in order to avoid exploitation and fraud. Since many unethical practices are used by the medical industry, bringing surrogacy contracts under the ambit of law will help in regulating this industry. This will also ensure that the gestational mother is protected and her legal position is secure. Similarly, enforceability of such contracts will be in the best interests of the child as well and such agreements will help courts to better understand the intentions of both parties in case of disputes and custody issues. According to the guidelines issued by the ICMR and the report of Law Commission of India, surrogacy contracts must be made legally enforceable.

C. COMPARITIVE STUDY OF ART BILL,2010 AND SURROGACY REGULATING BILL,2016.

After, the direction issued by the government in Baby Manji's case⁷⁰⁰, the Parliament formulated the Assisted Reproductive Technology Bill which is still pending. In 2016, the Surrogacy(Regulation) Bill,2016 was introduced in the Parliament and it was approved by the Parliament. However, when compared, the ART Bill has a much wider scope than the Surrogacy

(Regulation) Bill. While the former deals with various assistive reproductive techniques and thus regulation of ART and surrogacy clinics, the latter only restricts itself to surrogacy.⁷⁰¹

- A major flaw in both legislations is that neither of them protect the rights of the surrogate mothers, even though the key objective of the Acts was to protect them.
- There is no provision in the legislation proposed in 2016 for written informed consent of the surrogate mother.
- The bill does not specify the maximum number of IVF Cycles a surrogate mother can go through in a year.

Even though the ART Bill puts a limit on the number of IVF cycles a woman can be subjected to, it fails to formulate provisions in order to ensure the welfare and safety of the surrogate mothers.

The Surrogacy(Regulation)Bill,2016 prohibits commercial surrogacy⁷⁰². The makers of this bill were of the mindset that surrogacy should arise out of love and family bonding rather than a monetary or business-like transaction, i.e it should be altruistic and not commercial.⁷⁰³ The key reason for this is to stop the exploitation of women by the surrogate industry.

- It is essential to understand that in today's day and age banning commercial surrogacy is not the solution to stop exploitation of women.

⁷⁰¹ NUJS, Analysing the status of the surrogate mother under The ART Bill, 2010.

⁷⁰² The Surrogacy Regulation Bill,2016. http://www.dhr.gov.in/sites/default/files/surrogacyreg_bill_0.pdf.

⁷⁰³ The Indian Express, What is surrogacy? Everything you need to know. March 6, 2017 :<http://indianexpress.com/article/lifestyle/health/draft-surrogacy-bill-2016-what-is-surrogacy-all-you-need-to-know-2994140/>

⁷⁰⁰ Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 51



- This will only lead to the creation of a surrogacy black market, where the conditions will be comparatively worse. Thus, what we need is not banning of commercial surrogacy but strict regulation laws in order to ensure best interests of both parties. Such a provision may surrogate mothers deprive them of their livelihood and they may be forced into acts such as sex work or prostitution.⁷⁰⁴ The ART Bill legally recognizes commercial surrogacy.⁷⁰⁵ But There is no mention of compensatory provisions in case the health of surrogate mothers is harmed during pregnancy or in case the pregnancy results in her death. A major point of discussion is the Debarring single persons, homosexuals and foreign nationals from being parents. The Surrogacy(Regulation)Bill,2016 states that surrogacy will not be allowed for homosexual couples, single parents, couples in live-in relationships, foreigners, couples with children and persons who have attempted commercial surrogacy.⁷⁰⁶
- Banning foreign nationals from opting for surrogacy in India may cause a huge blow to the medical tourism industry in India.
- A pre- requisite of this bill is that a couple must be married for a minimum of 5 years in order to opt for surrogacy.
- The surrogate mother must be a close relative of the couple who must be

sympathetic to the situation. The bill fails to give a clear definition of “close relative”.

- In a society like India , where surrogacy is still a taboo, it will be very difficult for couples to find a close relative who will be ready to be a surrogate mother.

The Surrogacy Regulation ,Bill is silent on various other issues such as :⁷⁰⁷

- breastfeeding of the child after birth
- the registration of the birth certificate with the names of the intending parents.
- the terms of confidentiality agreements between parties
- mandatory health screening of surrogate mother
- background check of both parties
- compensation terms in case of any health hazards caused to surrogate mother due to the pregnancy etc.

It is also ignorant with respect to the rights of the surrogate child as there is no provision for the child on reaching majority to know about his surrogate mother or his genetic details. There are some provisions that are beneficial as well such as the provision ensuring that the surrogate child has the same rights as the natural child or the provision relating to maintenance records of surrogacy for 25 years. Both the Acts were made to ensure that there is no exploitation of women and to ensure their welfare and provision , however the Acts fail to safeguard the interests of the surrogate mother and surrogate child. Relevant provisions have not been made to protect the rights of both the parties. Although formulated to curb

⁷⁰⁴ Centre for Reproductive rights: Avani Mehta Sood,Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India.<http://www.reproductiverights.org>

⁷⁰⁵ Amy Antoinette Mcgregor & Anr . vs . Directorate of Family Welfare Govt . of NCT of Delh 205(2013)DLT96

⁷⁰⁶ The Modern Surrogacy: www.themodernsurrogacy.com



the exploitation of women and baby selling, they exhibit the general policy of state banning or censoring an activity almost completely, instead of looking at ways to use laws to regulate and improve the situation.⁷⁰⁸

• **INTERNATIONAL COMPARISONS**

In order to better understand the position of India, it is important to understand the global stance on the issue of surrogacy.

A. UNITED STATES OF AMERICA

In America, surrogacy falls under the state jurisdiction. Thus, there are some pro-surrogacy states and some states that do not legally recognize surrogacy. The surrogacy friendly states are California, Illinois, Arkansas, Maryland and New Hampshire. These states legally recognize surrogacy and enforce surrogacy contracts. The primary factors in a surrogacy contract are the duration of the contract, the residing place of surrogate mother, the residence of intended parents and the birth place. A beneficial policy is that even if intending parents are in a state that is anti-surrogacy they can have a child through surrogacy if the birth mother is in a surrogate friendly state.⁷⁰⁹ States forbidding or against Surrogacy are Arizona, Delaware, District of Columbia, Indiana, Louisiana and Michigan.⁷¹⁰

B. UNITED KINGDOM

Kim Cotton, a British mother of two agreed to have a baby for an infertile

Swedish couple however, after the birth of the baby she refused to give the baby to the couple⁷¹¹. As a result of this landmark case, the Surrogacy Arrangements Act, 1985 was introduced. Thereafter the Human Fertilization & Embryology Act, 1990, was passed. The S.30 of this Act recognized the act of surrogacy, however it is still considered illegal. However in the case of *Re X and Y*⁷¹² the UK Courts ratified international surrogacy. In this case, British parents had conceived through a married Ukrainian Surrogate. Although the UK law treated the Ukrainian surrogate and her husband as the legal parents, the Ukrainian Law, held the genetic parents, i.e., the UK couple to be the real parents. Thus the Court adopted the principle of the “best interest of the children” and ratified the surrogacy. Regardless of the biological connection, the surrogate mother is treated as the actual mother of the child, unless adoption orders are passed.

C. SOUTH AFRICA

The South Africa Children's Act, 2005 empowered the intending parents and the surrogate to have their surrogacy contract approved by the High Court even before treatment. This permits the intending parents to be perceived as legitimate guardians from the beginning of the process. If the surrogate mother is the hereditary mother she has upto 60 days after birth to alter her opinion. The law permits single individuals and gay couples to opt for surrogacy.⁷¹³

⁷⁰⁸ U R Smerdon, *Crossing bodies, crossing borders: International surrogacy between the United States and India*. 2016

⁷⁰⁹ *Johnson v. Calvert*, 851 P.2d 776 (1993).

⁷¹⁰ *Beasley v. Beasley*, 359 Pa. Superior Ct. 20 (1986).

⁷¹¹ *Baby Cotton Case*, (1985)FLR 845

⁷¹² *Re X and Y* [2014] EWHC 3135

⁷¹³ *E x parte: WH and Others* (29936/11) [2011] ZAGPPHC 185S



In the event that there is just a single parent, he/she should be biologically connected with the kid. If there is a couple, they both must be genetically identified with the child unless that is physically inconceivable because of fruitlessness or if they are gay people. The Commissioning parents must be physically unfit to birth a child autonomously. The surrogate mother must have one living kid.⁷¹⁴ The surrogate mother has the privilege to singularly end the pregnancy, however she should inform the intending parents, and in the event that she is ending for a non-medical reason, might be obliged to reimburse any monetary benefits received.

• **ETHICAL AND SOCIAL ASPECT**

The moral, ethical and religious objections to surrogacy are based on the contention that life is a creation of God and human beings go against the will of God by interfering with the natural processes.⁷¹⁵ Another serious objection is that the wastage of male or female embryo during surrogacy trials is similar to murder, since human life begins with the process of fertilization.⁷¹⁶ However, there are many supporters of surrogacy as well. The people pro-surrogacy believe it to be a good practice as it facilitates the good of

the infertile couples. Even supporters of the practice believe that there is a strong need of regulation of surrogacy in the country and a proper mechanism must be developed to resolve surrogacy related disputes.⁷¹⁷ The root cause of surrogacy related problems is that the surrogate woman is put in danger. She faces irreparable psychological and physical harm. The intermediaries involved in the task of surrogacy, i.e., the hospitals and doctors make use of various unethical practices.⁷¹⁸ They do not take care of the health of the women and look at them as baby making machines. Immense psychological damage is caused to the surrogate child when he comes to know about his parentage. This may cause harm to the child as well. Their main objective is to sell as many babies as they can, i.e., commodification of children even if it harms health of surrogates.⁷¹⁹

• **WHETHER NECESSARY OR UNNECESSARY ?**

Although, the researcher agrees that surrogacy is important in order for infertile parents to have children, it must also be noted that surrogacy is not the only option for infertile persons. There are nearly 12 million orphans in India. Infertile couples,

⁷¹⁴ Surrogacy advisory group v. Minister of social development, (6) SA 514 (GNP)

⁷¹⁵ Andrew Bainham & Martin Richards, What is a Parent?: A Socio-Legal Analysis, Hart Publishing, Oxford, U.K. (1999).

⁷¹⁶ Sama - Resource Group for Women and Health, Unravelling the Fertility Industry: Challenges and Strategies for Movement Building International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies, SAMA, New Delhi (2010)

⁷¹⁷ Anjali Widge, —Socio-Cultural Attitudes Towards Infertility and Assisted Reproduction in India(2014)

⁷¹⁸ Dr. Nandita Adhikari, Law and Medicine, Central Law Publications, Allahabad (2007).

⁷¹⁹ Times of India, Telangana: 6 more doctors suspended for unethical medical practices Nov 5, 2016:

<http://timesofindia.indiatimes.com/city/hyderabad/6-more-doctors-suspended-for-unethical-medical-practices/articleshow/55258561.cms>



same sex couples and single parents should give adoption a chance as well. We must ask ourselves why is it so important to have a child of our own bloodline rather than adopting an underprivileged child and changing his life for the better. The adoption process in India needs to be reformed as it is very slow and tedious, in order to ensure a better life for the orphans. If commercial surrogacy is banned and the adoption laws are reformed, there will be a significant growth in the number of people opting for adoption. For many, adoption is not an option.

It is important to note that the practice of surrogacy is not necessary. There are various other scientific advancements which will help them to have children. The door of surrogacy may be closed, however various other assisted reproductive technologies will still be available to the intending parents. But putting an end to the practice of surrogacy will have a huge impact on India's medical tourism industry. It was cause a huge blow to a lot of fertility clinics and medical experts in the field of ART. Surrogate mothers will be significantly affected as well as they will be deprived of their financial and economic independence .

• **SUGGESTIONS AND RECOMMENDATIONS**

Instead of banning surrogacy, we must enforce strict policies to regulate it. This will be very beneficial for the surrogate mothers as they will have a stable income and their physical and mental health will be taken care of. The recent Bill does not take into consideration the various ICMR

guidelines or the Law Commission Report. A new bill must be formulated keeping the best interests of the child and the birth mother in mind.

Appropriate provisions must be added in order to ensure adequate measures are taken by hospitals for the welfare and safety of the child and the birth mother. The surrogacy contracts must be made legally enforceable and it must be made mandatory for every surrogate mother to get legal advice and professional counseling before signing on the agreements.

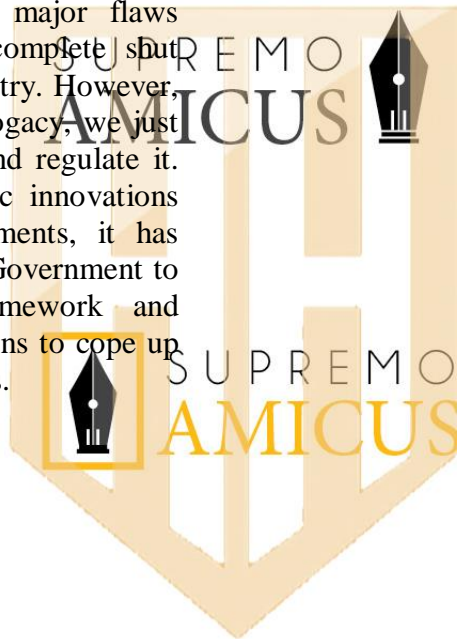
There must be a legislation in force in order to govern the issue of surrogacy in India and to ensure that the intending parents get the legal status of parents of the child in the eyes of law. Provisions must also made that in case the birth mother decides to not terminate her parental rights, she must return monetary remuneration awarded to her for her services. The Courts must always keep the best interests of the child in mind while deciding surrogacy cases. Adequate laws relating to the citizenship of the child must also be devised. It must be ensures that same-sex couples, single parents, married and unmarried couples, single persons as well as foreign nationals can opt for surrogacy in India. Strict provisions must be formulated for the exploitation of women, abandonment of children and medical malpractices.

• **CONCLUSION**

The question whether surrogacy is necessary or unnecessary has different views. We can look at surrogacy as an



absolute unnecessary practice, based solely on the orthodox premise of having a child that is biologically connected to the parents. We can give adoption preference over surrogacy as it will help in the development of the country and help in the upliftment of the needy children, or we can look at the practice of surrogacy as absolutely necessary in order to facilitate the happiness of the infertile couples and poverty-stricken surrogate mothers. However, what is important to understand is that the surrogacy industry is in immense need of a regulatory framework. The draft bills consist of major flaws which may result in the complete shut down of the surrogacy industry. However, we do not need to ban surrogacy, we just need to legally recognize and regulate it. In the light of the scientific innovations and technological advancements, it has become imperative for the Government to re-examine the legal framework and introduce new legal provisions to cope up with the emerging challenges.





**CASE COMMENT ON
AVTAR SINGH V. STATE OF PUNJAB**

*By Jasraaj Parmar
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When a decision regarding an unforeseen aspect of any statute is to be taken, the path opted by the judge dictates its future and the result of any similar case arising thereafter. When all is said and done, no matter which path is chosen, the goal of the judiciary can be understood from Lord Blackstone's words "the law holds it better that ten guilty persons escape, than that one innocent party suffer."⁷²⁰ The rules of interpretation bring forth guidelines and their proper use converts a simple judicial procedure into a groundbreaking judgment. Those rules are:

- (i) The literal rule
- (ii) The golden rule
- (iii) The mischief rule

The rule to be used depends upon the fact that which one interprets the will of the lawmakers in the best way according to a scenario but that might not necessarily be the one the judge implements. Avtar Singh vs State Of Punjab is one of such cases which show that what law says and what it intends vary with time and circumstance as the rationale of the society evolves.

⁷²⁰ <https://books.google.com/books?id=xic0AAAAIAAJ&pg=PA713&dq=%22all+presumptive+evidence+of+felony+should+be+admitted+cautiously%22&hl=en&sa=X&ei=cfwwUa-5F6OKiAL144GYDQ&ved=OCDwQ6AEwAg#v=onepage&q=%22all%20presumptive%20evidence%20of%20felony%20should%20be%20admitted%20cautiously%22&f=false>

FACTS :

In this case, Avtar Singh was convicted by the Punjab High Court for the theft of electricity under Section 39⁷²¹ and Section 50⁷²² of the Indian Electricity Act(9 of 1910) for the dishonest abstraction, consumption and usage of energy. Avtar Singh appeals to the Supreme Court regarding the same but changes his contention by challenging that his prosecution was instituted by a person not mentioned in Section 50 of the act which deals with the same. Matters relating to the Indian Electricity Act (9 of 1910) had come up before but there was no unanimity regarding the involvement of the I.P.C.. The judges in this case decided that as Section 378 of I.P.C. did not make it theft, Section 39 did so but independently and that Section 39 itself provides for a punishment without connection with I.P.C. If the two were to be connected, the Code would not have been silent about it. In addition to this, the offence mentioned in Section 39 is the one connected to Section 50 which limits the people capable of filing it. The last important point put forward by the bench was that the appellant had been contending about the party filing the complaint since the beginning whereas the prosecution did not. So the appellant was acquitted.

ANALYSIS:

1) Was the judgment appropriate?

The court's judgment held importance for the times to come when the availability and usage of electricity would drastically and exponentially increase. With the rule of literal interpretation put to use, theft was created via fiction but it's punishment was

⁷²¹ <https://indiankanoon.org/doc/1173949/>

⁷²² <https://indiankanoon.org/doc/356092/>



not added. This is a legitimate area which needed correction and a rule regarding the same could have been formulated by the court in order to bring it to the attention of the Legislature. Not doing so did create a precedent for the future cases to use but without clearing the blur.

Moreover they reinforced the fact that a complaint by any person except those in Section 50 would not be taken into consideration. When an act is considered to be a crime it attaches with it the ability of being tried by any person who may not be connected. In this case the appellant's main contention was the same, which led to his acquittal. A person committing a crime that the judges identified was let go because of this.

Therefore it can be said that a loophole in law should be filled even when it means defying existing law so that it does not become a method for wrongdoers to escape criminal liability.

2) Was the reasoning sound?

The judges used various precedents in order to unravel the complexities of this case and inspect various opinions. Cases like State v. MaganlalChunilal Bogwat⁷²³, Tulsi Prasad v. The State⁷²⁴ and Public Prosecutor v. Abdul Wahab⁷²⁵ conveyed the message that the theft was not an offence against the act when an act similar to this case was committed. These cases were deemed correct as the one with the opposite result,

namely Emperor v. Vishwanath⁷²⁶ was deemed to be wrongly decided as it made dishonest abstraction an offence punishable under I.P.C. As this case can be taken to be a great example of literal interpretation, every statement made outside the word of law was thought to be incorrect and every decision, erroneous. This reasoning can be claimed to be sound on the pretext of following the law as it was meant to be read. The results would have been different if another view was opted but it would not have made the latter inaccurate.

CONCLUSION:

The word of the Judiciary is to recognise a wrong and make it justiciable as per the guidelines of the Legislature. If one fails to do a task, it is the duty of the other to fill in the void so that no lacunae are left for the guilty to escape while the innocent pay for acts they did not do. From this case we can understand that no matter how law is read, the intention of equity should not be compromised for convicting the accused.

⁷²³ A.I.R. 1956 Bom. 354.

⁷²⁴ (1964) 1 Cr. L.J. 47 (3) (1964) L.W. Madras 271. (F.B.) (4) I.L.R. (1937) Al. 102.

⁷²⁵ (1964) L.W. 271 (F.B.)

⁷²⁶ I.L.R. [1937] All. 102



IMPACT OF BIO-COLONIZATION: A DISOWNMENT OF TRADITIONAL HERITAGE

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- An affirmative action threatening to throw the innate beings into disarray and failed to showcase the truth of the warring duos (Nature v. Technology)

ABSTRACT:

Property is classified into two – *jura-in re aliena* and *jura in re propria*. Under *jura in re propria* comes tangible and intangible property. Intangible property includes intellectual property namely patents, copyright, trademarks etc. This paper is based on the concept of impact of patent on genetically modified plants and seed and its impact on Indian traditional knowledge. To that point, Genetic Engineering (GE) which is not a traditional breeding is a curse in disguise. Here, the subject matter revolves around the concept of Bio-colonization, one of the notorious impacts of genetic engineering. It refers to the engineering, patenting and dispersal of new plants and seeds transnationally through the use of biotechnology. Biological pollution from Genetically Modified Organisms (GMO) poses more imperilment for living beings that reproduce uncontrollably. The important causatum to be noted is: firstly, the impact of genetic modification of foods and the quantum of patent protection being acknowledged to GMO companies. Secondly, whether the patent rights have

been utilized rightly against farmers without affecting traditional knowledge and the effect of patent on reproduction of crops which in turn divest the society. Thirdly, how genetic techniques affect the environment, conspicuously the land and the changes in farm practice that accompanied the adoption of Genetically Engineered crops. Fourthly, the evidence as to its impact at the individual farm level, landscape level and biological diversity and whether it is a mutagen to human lives. Finally, the myth related to foods produced using biotechnology and how India fits in the picture of Genetically Modified crops.

KEY WORDS:

Bio-colonization, Biotechnology, Copyright, Genetically modified organisms, Genetic Engineering, Mutagen, Patent, and Trademark.

INTRODUCTION

As no other technology in history, biotechnology aggrandizes humanity's reach over the forces of nature. Over the past fifty years, Indian agriculture has transformed from a sustenance system to a surplus system. Bioengineers maneuver life forms in the same way as the engineers of the industrial revolution were able to separate, collect, utilize and exploit inanimate materials. As previous generations manipulated plastics and metals into the machines and products of the industrial age, we are now manipulating and indeed converting living materials into the new commodities of the global age of biotechnology. Genetic engineering of food is the science which involves deliberate alteration of the genetic material of plants or



animals. The impact of patent on Genetically Modified plants and seeds is increasing day by day and causing more health issues to those who consume them. This study discusses in detail about bio-colonization of crops and seeds i.e.) genetically modified crops and seeds.

ISSUES

The main issues to be noted are as follows:

- To deal with the prospects and effects of Genetically Modified Food Crops
- What advances are made in plant biotechnology
- How much patent protection must be given to GMO companies
- Whether the patent rights have been rightly utilized against the farmers
- India becoming a game of GM crops
- Suggestions to tackle the problem arising out of Patent of GM crops

EVOLUTION OF GENETICALLY MODIFIED CROPS AND SEEDS

Genetically modified foods (GM food) are originated from plants or animals who's DNA has been altered through the process of genetic engineering.⁷²⁷ Genetic

⁷²⁷ Genetic engineering is the process by which scientists modify the genome of an organism. Creation of genetically modified organisms requires recombinant DNA. Recombinant DNA is a combination of DNA from different organisms or different locations in a given genome that would not normally be found in nature. In most cases, use of recombinant DNA means that you have added an extra gene to an organism to alter a trait or add a new trait. Some uses of genetic engineering include improving the nutritional quality of food, creating pest resistant crops and creating infection resistant

engineering is the process of manipulating an organism's genes directly by transplanting DNA⁷²⁸ from any other organisms. It is different from the customary method of selectively breeding plants and animals to get desired traits. Genetically modified foods have been used on the US market since 1994. This started with the introduction of "Flavr Savr" tomatoes⁷²⁹ that had been modified to ripen more slowly.

Genetic engineering is a tool that can be used for a various purposes. Almost all the

livestock. Refer <http://agbiosafety.unl.edu/basicgenetics.shtml>.

⁷²⁸ DNA is the recipe for life. DNA is a molecule found in the nucleus of every cell and is made up of 4 subunits represented by the letters A,T,G,and C. The order of these subunits in the DNA strand holds a code of information for the cell. Just like the English alphabet makes up words using 26 letters, the genetic language uses 4 letters to spell out the instructions for how to make the proteins that an organism will need to grow and live. Refer <http://agbiosafety.unl.edu/basic-genetics.shtml>. Dec 17, 2017, 21:49:00.

⁷²⁹ Flavr Savr (also known as CGN-89564-2), a genetically modified tomato, was the first commercially grown genetically engineered food to be granted a license for human consumption. It was produced by the Californian company Calgene, and submitted to the U.S. Food and Drug Administration (FDA) in 1992. On May 18, 1994, the FDA completed its evaluation of the Flavr Savr tomato and the use of APH(3')II, concluding that the tomato "is as safe as tomatoes bred by conventional means" and "that the use of aminoglycoside 3'-phosphotransferase II is safe for use as a processing aid in the development of new varieties of tomato, rapeseed oil, and cotton intended for food use." Calgene made history, but mounting costs prevented the company from becoming profitable, and it was eventually acquired by Monsanto Company.

Refer <http://en.biosafetyscanner.org/schedaevento.php>. Mar 16, 2017, 15:41:47.



corn and soy grown in the United States are genetically modified to be resistant to herbicides. They use weed killer to produce herbicide resistant crops. Other crops are produced to be pest resistant. But genetic engineering could perhaps help create crops that can survive drought, or help produce food that is more nutritious. Even though there is a broad scientific consensus that the genetically modified foods have no health risk than regular foods, still GM foods are debateable. Antagonist argues that genetically modified crops yield foods with increased use of chemical herbicides that are more harmful. They also cite the problems of patenting GMO crops by large companies. This lead to the debate whether GMOs should be used or not.

The genetically modified foods are different from regular traditional way of cultivating foods. Before hundreds of years, the farmers have been selectively breeding plants and animals in order to get the desired traits. In the earlier times, farmers have bred corn to make them larger to hold more kernels and to adapt any climate, which altered corn's genes. This is not considered as "genetic engineering".

There are two forms of genetic engineering. They are cisgenesis⁷³⁰ and transgenesis.⁷³¹

⁷³⁰It involves directly swapping genes between two organisms that could otherwise breed — say, from wheat to wheat. Cisgenic plants are made using genes found within the same species or a closely related one, where conventional plant breeding can occur. Some breeders and scientists argue that cisgenic modification is useful for plants that are difficult to crossbreed by conventional means (such as potatoes), and that plants in the cisgenic category should not require the same regulatory scrutiny as

CULTIVATION OF GENETICALLY MODIFIED FOOD CROPS – PROSPECTS AND EFFECTS

India has made rapid striddle in agriculture and allied sectors after independence. From a net importer of food grains, the country has achieved food security through domestic production and also export of several commodities is being regularly taken.⁷³² In spite of many spectacular achievements in agriculture field, the road to ensuring and maintaining food security in the years to come is full of challenges. The more worrying and daunting problem is the deceleration in the availability of food grains. As India's population is going on increasing, the food production has to be increased considerably to meet the needs of growing population. Dwindling water and land resources are the main factors of low production of crops and as a result additional food will have to be produced on existing agricultural land or marginal soils.

transgenics. Refer <http://www.vox.com> Dec 11, 2017, 01:50:42.

⁷³¹It involves taking well-characterized genes from a *different* species (say, bacteria) and transplanting them into a crop (such as corn) to produce certain desired traits. Genetically modified plants can also be developed using gene knockdown or gene knockout to alter the genetic makeup of a plant without incorporating genes from other plants. In 2014, Chinese researcher Gao Caixia filed patents on the creation of a strain of wheat that is resistant to powdery mildew. The strain lacks genes that encode proteins that repress defenses against the mildew. The researchers deleted all three copies of the genes from wheat's hexaploid genome. Gao used the TALENs and CRISPR gene editing tools without adding or changing any other genes.

⁷³² Ministry of Agriculture, 15th Lok Sabha Committee on Agriculture(2011- 2012), "Cultivation of Genetically Modified Food crops- prospects and effects", 37th Report, p.16.



The crop gets spoiled mainly due to insects,⁷³³ pests,⁷³⁴ disease and declining soil fertility that favours insect pests and disease vectors. These challenges lead to the growth of molecular biology and biotechnology in agriculture.

The use of biotechnology in the field of agriculture leads to:

- Increase in crop productivity,
- Lowering production costs,
- Conserving biodiversity,
- More efficient use of external inputs,
- Increasing stability of production,
- Improvement of social and economic benefits and poverty alleviation.

Biotechnology is defined in the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD)⁷³⁵ Report as ‘any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for a

⁷³³ Some of the insects that affect the crops are Mealybugs, Aphids, Spider Mites, Scale insects, Thrips, Springtails, Fungus Gnats, White flies, Cyclamen Mites and leaf miners.

⁷³⁴ Pests include Insects, mites, rodents, animals, birds etc. The method to control the pests includes mechanical method, physical method, chemical method, cultural method, biological method and plant quarantine measures. Refer <http://oer.nios.ac.in> Mar 19, 2017, 17:29:47.

⁷³⁵ According to IAASTD Report modern biotechnology is a term adopted by international convention to refer to biotechnological techniques for the manipulation of genetic material and the fusion of cells beyond normal breeding barriers. The most obvious example is genetic engineering to create genetically modified/genetically engineered organism (GMOs/GEOs) through ‘transgenic technology’ involving the insertion or deletion of genes.

specific use.’ Therefore, biotechnology includes any process from fermentation technologies⁷³⁶ to gene splicing.⁷³⁷ It also includes traditional and local knowledge in cropping practices, selection and breeding of plants and animals by individuals and the application of tissue culture and genomic techniques etc. The revolution in plant biotechnology has opened new opportunities for plant breeders.

ADVANCES MADE IN PLANT BIOTECHNOLOGY

The plant biotechnology has made important changes in the past twenty years. Varieties of trait have been included in plant species which include:

- Herbicide resistance⁷³⁸
- Pest resistance⁷³⁹
- Viral resistance
- Slow-ripening
- Fungal and bacterial resistance

⁷³⁶ Fermentation is the process involving the biochemical activity of organisms, during their growth, development, reproduction, even senescence and death. Fermentation technology is the use of organisms to produce food, pharmaceuticals and alcoholic beverages on a large scale industrial basis. Refer also <http://www.biologydiscussion.com> Mar 19, 2017, 09:58:09.

⁷³⁷ <http://www.dictionary.com> A term used to refer to the process by which the DNA of an organism is cut and a gene, perhaps from another organism, is inserted. (See genetic engineering and recombinant DNA.) Gene splicing is often used in industry to allow single-celled organisms to produce useful products, such as human insulin. It is also used in the production of genetically modified organisms. Refer also <http://www.dictionary.com>

⁷³⁸ Herbicide resistance can be defined as the acquired ability of a weed population to survive a herbicide application that previously was known to control the population.

⁷³⁹ Pesticide Resistance is the ability of a life form to develop a tolerance to a pesticide.



- Quality improvement (Protein and oil)
- Value addition (Vitamins, micro and macro-elements).

The first commercial GM crop was ‘Flavr Savr’ tomato, which was produced in 1994 engineered for slow ripening character.

List of GM food crops that have been commercialized in past fifteen years are:

- Herbicide resistance - Corn, Soybean, rice, corn, and Sugar beet
- Insect Pest resistance - Corn, rice, tomato and potato
- Viral resistance - Papaya, Squash and potato
- Slow-ripening and softening - Tomato and melon
- Improved oil quality - Canola and soybean
- Male sterility - Canola and corn

Some of the genetically modified organisms are:

The Tomato Fish:

In 1991, the company named DNA Plant Technologies genetically engineered a tomato by injecting a gene from fish named arctic flounder⁷⁴⁰. They wanted to create a tomato that is more resistant to frost and cold storage. Experiments revealed that the injection of the genes of the flounder to the tomato did not bring huge profits to the company and it never came into the markets. Even though this attempt was a failure, these ‘Tomato Fish’ or ‘Fish Tomatoes’ created fear among the public and the activists.

Tobacco:

Tobacco plants have been genetically altered in order to emit light. They are engineered in such a way by transplanting the genes from the fireflies into the genes of tobacco plants. In total darkness the glow from the leaves of the plant, stem and roots can be seen by eye.⁷⁴¹

Bt Cotton:

The Monsanto scientists interpolated a toxic gene from the bacterium called Bt (*Bacillus thuringiensis*) into cotton plants ten years ago. They are produced in order to be resistant to caterpillar. The gene of *Bacillus thuringiensis* is the DNA that carries the instructions for producing a toxic protein that makes the cotton resistant to caterpillars.

Bt Maize:

The Bt Maize was produced to be herbicide resistant. GM sweet corn which is insect resistant was produced by Monsanto. The genes from *Bacillus thuringiensis* (Bt) which produces Bt toxin which is resistant to insects is injected into corn in order to get high yield.

THE PATENT LANDSCAPE OF GENETICALLY MODIFIED CROPS

⁷⁴¹To make the genetically engineered plants glow, they were irrigated with water that contained another substance from fireflies, luciferin, which serves as the fuel for the insects' light production. Supplied with this raw material, the genetically engineered tobacco plants glowed. The glow was dim, but could be seen with the unaided eye when the scientists stood in the dark for about 10 minutes so that their eyes became acclimatized. The emitted glow was easily detected immediately by light detection equipment and by photographic film in exposures as little as 15 minutes.

⁷⁴⁰ The Arctic flounder (*Liopsetta glacialis*) is a flatfish of the family Pleuronectidae. It is a demersal fish that lives on coastal mud bottoms in salt, brackish and fresh waters at depths of up to 90 metres (300 ft).



The genetically modified crops and seeds are patentable nowadays. Any farmers who purchase GM seeds have to abide by the restrictions mentioned by the companies. For example, farmers who buy soybeans that have been modified to be resistant to Roundup herbicide must sign an agreement that they will use the seeds for only one planting and they won't save the seeds for second planting. The companies argue that patents are necessary to spur innovation. But the critics are arguing that granting patent has given seed companies disproportionate market power over GM crops.

MONSANTO CANADA INC. v. SCHMEISER

The most landmark case in the patent of agricultural biotechnology is **Monsanto Canada Inc v. Schmeiser**.⁷⁴² This case is regarding patent rights for biotechnology, between a Canadian canola farmer, Percy Schmeiser and the agricultural biotechnology company Monsanto.

The facts of the case are as follows. In Feb, 23rd 1993, Monsanto Canada Inc. was granted a seventeen year patent on genetically modified canola cells that are resistant to herbicide known as Roundup (Glyphosate)⁷⁴³. The company Monsanto

sold the seed as Roundup Ready canola. It was detected by Monsanto in 1998, that a farmer named Percy Schmeiser's fields were planted with the same type of seed that are resistant to the herbicide Roundup, which it perceived to be a direct infringement of the patent. Schmeiser challenged that he did not intentionally plant the Roundup ready variety of canola, but it would have been caused by the natural pollination through the air or an accidental spillage on to his field by an area farmer's truck. Monsanto claimed that, even though the presence of seed with the patented gene of Monsanto was discovered accidentally, the seed is still the property of the company and the company deserves both the licensing fee as well as the profit from the sale of Schmeiser's crop. Schmeiser again demanded that he had the right to plant the seeds again that grew on his own land and this would override Monsanto's legal rights. Monsanto's patent covered only the genetically modified plant cells and not the genetically modified plants themselves. Therefore, the Court had the discretion to decide whether growing of genetically modified plants leads to "use" of the invention of a genetically modified plant cell.⁷⁴⁴

On May 21, 2004, the Supreme Court ruled in favour of Monsanto.⁷⁴⁵ Schmeiser won a partial victory, and the court held that Schmeiser need not pay Monsanto his profits from his 1998 crop, since the presence of the gene in the crops of Schmeiser had not afforded him any advantage and he had made no profits on the crop that were determinable to the invention.

⁷⁴² [2004] 1 S.C.R. 902, 2004 SCC 34.

⁷⁴³ Glyphosate (*N*-(phosphonomethyl)glycine) is a broad-spectrum systemic herbicide and crop desiccant. It is an organophosphorus compound, specifically a phosphonate. It is used to kill weeds, especially annual broad leaf weeds and grasses that compete with crops. It was discovered to be an herbicide by Monsanto chemist John E. Franz in 1970. Monsanto brought it to market in 1974 under the trade name Roundup, and Monsanto's last commercially relevant United States patent expired in 2000.

⁷⁴⁴ See Canadian Patent 1,313,830.

⁷⁴⁵ Also refer, *Monsanto Co. vs. Geertson Seed Farms*, 561 U.S. 139 (2010).



The amount of profits was relatively small i.e.) C\$19,832. Though Schmeiser need not pay the damages to Monsanto, he also was saved from paying the legal bills of Monsanto which is of several hundred thousand dollars.⁷⁴⁶The documentary *David v. Monsanto* moved many people.⁷⁴⁷

PATENT PROTECTION TO GMO CROPS AND SEEDS IN DIFFERENT COUNTRIES

U.S.A:

Patent rights are constitutionally guaranteed under Article 1, Section 8 of U.S. Constitution. Until 1930, plants and seeds were not included under patentable subject matter because they were considered as product of nature. Almost 64 GM crop varieties are approved in U.S. The patent protection is provided to genetically modified crops and seeds in the United States of America especially in case of Monsanto.

INDIA:

Strong IP protections for genetically modified seeds are partly responsible for the rapid growth and ingenuity of new seed varieties. Article 27.3(b)⁷⁴⁸ of TRIPS

agreement provides patent to biotechnological processes and products.

CRITICS VIEW ON GENETICALLY MODIFIED CROPS

Most of the critics say that the development of genetically modified crops is a bad science.⁷⁴⁹ They say that, the more genes involved in GM plant, the more unpredictable are the results. Secondly they are of the view that they are danger to the ecosystem.⁷⁵⁰ They fear that the Bt gene⁷⁵¹ may be an imprecise weapon which affects beneficial insects as well as pests. There is some evidence that the introduced genes by process of genetic engineering “jumps” into other organisms, with unpredictable and probably uncontrollable results. Thirdly, they fear that planting of more GM

⁷⁴⁹ Some critics believe that genetic engineers will not be able to deliver on their promises because the genetic structure of plants is so complicated that scientists cannot yet fully understand and modify it.

⁷⁵⁰ Besides having doubts about genetic engineers capacity to achieve reliable results, many critics hold that the GM technologists are too focused on the specific crops they are developing, and do not pay sufficient attention to the wider environmental context in which the crops will be grown.

⁷⁵¹ *Bacillus thuringiensis* (Bt) is a unique bacterium in that it shares a common place with a number of chemical compounds which are used commercially to control insects important to agriculture and public health. Although other bacteria, including *B. popilliae* and *B. sphaericus*, are used as microbial insecticides, their spectrum of insecticidal activity is quite limited compared to Bt. Importantly, Bt is safe for humans and is the most widely used environmentally compatible biopesticide worldwide. Furthermore, insecticidal Bt genes have been incorporated into several major crops, rendering them insect resistant, and thus providing a model for genetic engineering in agriculture. Refer also <https://www.ncbi.nlm.nih.gov> > NCBI > Literature > PubMed Central (PMC)

⁷⁴⁶ Refer <https://scc-csc.lexum.com/scc-csc-csc/en/item/2147/index.do>. Mar 17,2017, 09:11:30.

⁷⁴⁷The documentary was released in 2009.

⁷⁴⁸Part (b) of paragraph 3 (i.e. Article 27.3(b)) allows governments to exclude some kinds of inventions from patenting, i.e. plants, animals and “essentially” biological processes (but micro-organisms, and non-biological and microbiological processes have to be eligible for patents). However, plant varieties have to be eligible for protection either through patent protection or a system created specifically for the purpose (“sui generis”), or a combination of the two. Refer also <https://www.wto.org>



herbicide – resistant crop may lead to over dependence on a single herbicide. They also fear that due to genetically modified crops, the biodiversity will be damaged, they may pose risk to human health, and they are only planted for profit motive.

PATENT RIGHTS WHETHER RIGHTLY UTILIZED AGAINST FARMERS

Obtaining patent is the central issue in the development of genetically modified crops. In order to develop a genetically modified variety, the researcher must invest in research and testing. To recoup the investment and profit from the product, the researcher wants the right to commercially use the new discovery himself. So he claims for patent for a certain period before the technology enters into the public domain. Though high profits are expected from biotechnology, corporations are now claiming patents on the new processes, genetic knowledge in the development of the product and the products itself. Patents traditionally were given to new products or processes and not to discovery of things that already exist in nature.⁷⁵² Initially patent was provided for gene modification which prevents saved seeds from germinating. This technology is popularly known as ‘terminator technology’.⁷⁵³ Initially it is used

in cotton and tobacco, but the patent includes all cultivated seeds.

Modern hybrids already do not reproduce regularly. So that farmers who use hybrid seeds have to buy new seeds regularly. The Genetic engineering would acquaint sterility to non-hybrid crops such as wheat. It would prevent farmers from saving some of their seeds for next cultivation as they followed them traditionally. At present 80% of the crops are sown using the saved seeds from previous yield. By increasing cost of inputs, debts and dependence on the seed marketing companies, the critics fear that the farmers will be forced to purchase the hybrid seeds.

There are different objections to patent which includes:

- ❖ Dispute arises as the biotechnology industries claim that the patent protection encourages research.
- ❖ Some critics including farmers fear that patents on agricultural plant and animal materials will harm the interests of the farmers, by establishing monopolies to companies and by forcing farmers to pay more inputs to companies.
- ❖ Patents strengthen the ability of Northern industries to gain profit from Southern raw materials. Usually “Biopiracy”⁷⁵⁴ takes place.

terminator includes a set of three novel genes inserted into one plant. However, there is another version, which divides two or three genes on to two plants that are later to be cross-pollinated. The ultimate outcome is a dead seed in the following generation. Many consider terminator technology a problem due to the fact that the top 10 largest seed companies globally control half the world’s commercial seed market.

⁷⁵⁴ “Biopiracy” means the appropriation of the genetic resources of a developing country by a foreign company as theft. It is claimed that companies are improperly claiming ownership, thus

⁷⁵² Section 2(1)(j) of the Indian Patent Act, 2005 defines “Invention”.

⁷⁵³ Terminator technology is the genetic modification of plants to make them produce sterile seeds. They are also known as suicide seeds. The terminator technology is a genetically engineered suicide mechanism that can be triggered off by specific external stimuli. The preferred trigger is antibiotic tetracycline, which is applied to seeds. As a result of which the seeds of the next generation will self-destruct by auto-poisoning. The main version of the



The most notable cases on biopiracy are

- Patenting of basmati rice⁷⁵⁵,
- Patenting of neem (**Azadirachta indica**)⁷⁵⁶,
- Patenting of turmeric,
- Patenting of rice biopiracy⁷⁵⁷ etc.

There are also objections on patenting on grounds of sustainability.

depriving local people of the possibility of benefiting themselves from the commercial exploitation of the substance or knowledge, and perhaps forcing the original users themselves to pay. Biopiracy operates through unfair application of patents to genetic resources and traditional knowledge. Biopiracy is the theft or usurpation of genetic materials, especially plants and other biological materials by the patent process.

⁷⁵⁵Basmati is a long-grained, aromatic variety of rice indigenous to the Indian subcontinent. In 1997 the US Patent and Trademark Office (USPTO) granted a patent (No. 5663484) to a Texas based American company Rice Tec Inc for “Basmati rice line and grains”. The patent application was based on 20 very broad claims on having “invented” the said rice. Due to people’s movement against rice Tec in March 2001 the UPSTO has rejected all but three of the claims.

⁷⁵⁶The people of India in a variety of ways have used neem, since time immemorial. Indians have shared the knowledge of the properties of the neem with the entire world. Pirating this knowledge, the USDA and an American MNC W.R. Grace in the early 90s sought a patent (No. 0426257 B) from the European Patent Office (EPO) on the “method for controlling on plants by the aid of hydrophobic extracted neem oil.” The patenting of the fungicidal properties of Neem was an example of biopiracy.

⁷⁵⁷Syngenta is a biotech company that tried to grab the precious collections of 22,972 varieties of paddy, India’s rice diversity, from India’s rice bowl, Chattisgarh in India. Syngenta has signed a MoU with the Indira Gandhi Agricultural University (IGAU) for access to Dr. Richharia’s priceless collection of rice diversity. Dr. Richharia is the ex-director of Central Rice Research Institute (CRRI), Cuttack and is known as the rice sage of India who has done pioneering work in this field.

TRIPs AND CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

Though there are many legislations relating to patent, the most important legislations that deals with patent on biotechnology are TRIPs⁷⁵⁸ and The Convention on Biological Diversity (CBD)⁷⁵⁹. The CBD came into force in 1993 states some basic principles. It points out that Genetic material found within a country is owned by that country. The intellectual property regimes must be devised in such a way that it does not conflict with the CBD’s goals.

The TRIPs agreement is a part of WTO. It was established in 1994. TRIPs Article 27.3(b) requires all member countries to introduce legislation allowing patenting of microorganisms, biotechnological processes and products, and patents or some type of

⁷⁵⁸ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO). It sets down minimum standards for the regulation by national governments of many forms of intellectual property (IP) as applied to nationals of other WTO member nations. TRIPS was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 and is administered by the WTO.

⁷⁵⁹ The Convention on Biological Diversity (CBD), known informally as the Biodiversity Convention, is a multilateral treaty. The Convention has three main goals including: the conservation of biological diversity (or biodiversity); the sustainable use of its components; and the fair and equitable sharing of benefits arising from genetic resources. Its objective is to develop national strategies for the conservation and sustainable use of biological diversity. It is often seen as the key document regarding sustainable development. The Convention was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993. At the 2010 10th Conference of Parties (COP) to the Convention on Biological Diversity in October in Nagoya, Japan, the Nagoya Protocol was adopted.



protection (*sui generis* or unique) for plant varieties. But some critics suggest amending Article 27.3(b), because they say that the private ownership of biological resources is unethical, inequitable and contrary to the goals of CBD. Others suggest that TRIPs allows countries to exclude biological materials from patentability.

FUTURE CHALLENGES

In future, the application of intellectual property protection i.e.) granting of patent for plant and genetic material can lead to significant negative consequences. The patenting of genetic material is fundamentally problematic because it involves issues of social ethics and cultural norms that include respect for nature and the value of life. Biotechnology companies seek to entitle patent over seeds and the new varieties produced from such seeds and they want to make them as company's property. Monsanto has aggressively pursued farmers who follow the traditional farming practice of saving and replanting seeds, accusing them of "infringing" its patented varieties.⁷⁶⁰ This lead to the production of more genetically modified crops in the society. Patents can have a negative effect on society. Overprotection of high-yield seeds could critically restrict farmers from planting the most desirable crops and the capacity of farmers and seed companies to develop future generations of seeds. The Patent⁷⁶¹ and Trademark Amendment Act⁷⁶² requires universities to share royalties with

the inventor and to use their share for research, development, and education even though they are patented.

Due to granting of patent to genetically modified organisms and plants, the patented products are removed from the public domain and it was not even available to the developing countries from where they originated. This will lead to increase in biopiracy in the future and the products of our own will be difficult to be used by us in future due to patent on the crops. The genetically modified crops are ill-suited to small and peasant farmers. The genetically modified crops will be "an antithesis of sustainable and self-reliant food production". The promoting of intellectual property rights by biotechnology companies and their governments, challenges traditional seed saving and sharing.

Due to the patent system being forced upon the farmers, they will become more dependent on seed companies and need to change their farming practices, cultivating "cash crops" to sell for export in order to buy more seed. The experts conclude that the laws should advance scientific research that helps developing countries with new technologies. These complex issues underlie the continuing controversy over granting intellectual property rights for living organisms, particularly ones that have been genetically engineered by biotechnology companies. Thus in future, the situation will be more worse than at present because granting of patent to genetically modified seeds and plants will cause a great impact on farmers which will increase the risk of farmers suicide because they will not be able to cultivate crops and earn their living

⁷⁶⁰ Refer Monsanto Canada Inc. V. Schmeiser, [2004] 1 S.C.R. 902, 2004 SCC 34.

⁷⁶¹ THE PATENTS (AMENDMENT) ACT, 2005 No. 15 OF 2005

⁷⁶² THE TRADE MARKS (AMENDMENT) ACT, 2010 NO. 40 OF 2010



instead they must depend upon the biotechnology companies which will be more difficult.

CONCLUSION

From this study I conclude by saying that, Consuming genetically modified or altered food is slowly poisoning our body. It leads to accelerated aging, organ damage, reproductive disruption, immune dysfunction and insulin disorders. Many studies have proved the connection between GM foods and several major health problems. Research has authenticated that thousands of animals who consumed genetically modified food died while animals that ate a non-GM version of the same crop had a much longer life. More human beings are affected by consuming genetically modified foods. The agriculture has been seriously affected because of the introduction of GM crops and seeds. The patent protection given to the genetically modified crops and seeds lead to suicide of farmers in large numbers. The farmers are forced to purchase the hybrid seeds from the companies and hence this affects their living. They are dependent on the GM companies every year to purchase seeds which are of high rate. Hence patent of genetically modified foods have serious consequences in the human lives and also seriously affect the people who consume them.

SUGGESSTIONS:

The following are the suggestions drawn from the study:

- Biotech companies have certainly profited from GM crops, not least because seeds and genetic innovations can be patented.

- The impact of bio-colonization especially in the field of crops and seeds vehemently affected the life of human beings.
- The Patent legislations namely, the TRIPs must be amended as soon as possible because, the impact of TRIPs agreement on agriculture industry are creating negative impacts.
- In order to stop this, the patent on plants and seeds must be revoked, so that the farmers are able to reproduce the plants and seeds from previous cultivation which are Non- GM crops.
- The patent regime can at least be controlled to some extent that the farmers are not affected by granting of patent to plants and seeds which impose high cost to purchase seeds for next cultivation.
- If patent is not granted to these seeds and plants, the large companies will not be able to seize the products of country farmers and will not file infringement on the innocent farmers.
- By following all these methods, the suicide of farmers can be reduced and the health risk of persons who consume them can be reduced.

Thus amending of the patent legislations is more important in the present situation to tackle the problems arising out of patent on the plants and seeds. The increase in the production of genetically modified plants and seeds can be controlled by having a successful legislation in India.

FINDINGS OF THE STUDY

- By studying in detail about the impact of bio-colonization, i.e.) the impact of genetically modified crops and seeds, the following have been observed:



- The patent on the genetically modified crops and seeds has created a great impact in the life of farmers.
- The genetically modified foods are like slow poison to the persons who consume them.
- The farmers are being accused by the genetically modified companies, especially Monsanto for “infringement” of the patented crops which naturally took place by cross pollination. Thus the genetic contamination of the crops affected the farmers in large.
- Due to granting of patent to genetically modified organisms and plants, the patented products are removed from the public domain and it was not even available to the developing countries from where they originated. This is called as “Agricultural Bio piracy”.
- Granting of patent to genetically modified seeds and plants will cause a great impact on farmers which will increase the risk of farmers suicide because they will not be able to cultivate crops and earn their living instead they must depend upon the biotechnology companies which will be more difficult.

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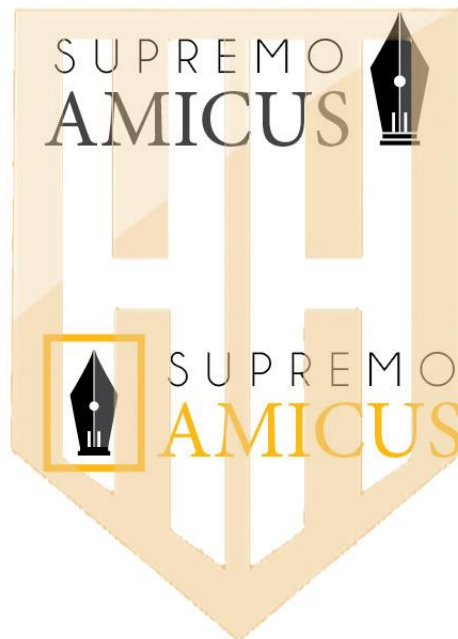
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WITCH HUNTING IN INDIA

By Jyoti Sharma

*From Bhagat Phool Singh
Mahila Vishwavidyalaya, Haryana*

India is a developing nation where science and technology play an integral part in development. Along with this, Constitution of India guarantees protection to life and personal liberty to each and every one and provides adequate standards of safeguarding fundamental rights of people. In the present era, in spite of the enriched scientific, technological and developmental roadmaps and also the constitutional provisions, superstitious practices like witch hunting⁷⁶³ prevail in the rural and tribal areas across the country, wherein there is absolute necessity of economic development, social and economic infrastructure visualizing killing of a person into a sacred act. Witch hunting is an age-old concept in India⁷⁶⁴ still in practice in some states like Bihar⁷⁶⁵, Jharkhand⁷⁶⁶, Chhattisgarh⁷⁶⁷, Odisha⁷⁶⁸,

Maharashtra⁷⁶⁹, Rajasthan⁷⁷⁰, Assam⁷⁷¹, Madhya Pradesh, Andhra Pradesh, Gujarat, West Bengal and Haryana out of which only seven states have passed a legislation to tackle the problem of witch hunting. There is also a bill⁷⁷² drafted by the legal team of HRDI⁷⁷³ which is still pending unveils the miserable reality of today's society.

The concept of witch hunting initially aroused in Europe and till date, it is being continued with tragic consequences. In early Europe, the woman who was against the church were considered as witches, were regarded as one who brings misfortune and thus to protect the society those women were burnt. Later on, women were held responsible for all the calamities like famine, flood, and epidemic diseases which caused the death of livestock. And the only solution of coming out from this dismay was by killing them who was responsible for it.⁷⁷⁴

⁷⁶³ Witch hunting is a combination of religious practices, superstitious beliefs, and patriarchal norms results in women being accused of witchcraft. Witch hunting is widely seen to be used as a tool for suppressing women, their rights and to gain personal interest over theirs.

⁷⁶⁴ It emerged in the Morigaon district of Assam, widely famous in the name of 'Indian Capital of Black Magic'. People come from distant or remote areas to learn the art of witchcraft. It is among one of the burning issues where predominantly women are the victims of this heinous crime.

⁷⁶⁵ Bihar's Prevention of Witch (Daain) Practices Act (1999)

⁷⁶⁶ Anti-Witchcraft Prevention Act, 2001

⁷⁶⁷ Chhattisgarh's TonahiPratadnaNivaran Act of 2005

⁷⁶⁸ Odisha Prevention of Witch-Hunting Bill, 2013

⁷⁶⁹ The Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013

⁷⁷⁰ The Rajasthan Prevention of Witch-Hunting Act, 2015

⁷⁷¹ Assam Witch Hunting (Prohibition, Prevention, and Protection) Bill, 2015

⁷⁷² The Prevention and Protection of Witch Hunting Bill, 2013. Bill to provide more effective measures to prevent and protect the women from witch hunt practices and to eliminate their torture, oppression, humiliation, and killing by the society by trial of offenses related to witch hunt practices and providing for punishment and, for the relief and rehabilitation of women victim of such offenses

⁷⁷³ Human Rights Defence International, lead by Dr. Alok Sharma, Advocate JyotikaKalra, and Dr. Padmini Singh

⁷⁷⁴ Everything you want to know about laws which prevent witch hunting in India, ipleaders, (Dec 27,



I have grown up in a state⁷⁷⁵ where schemes like 'BetiBachaoBetiPadhao (Save Girl Child, Educate Girl Child)⁷⁷⁶' are being introduced in the 21st century. With my own experience of being a woman in one of the patriarchal states of India, I very much empathize with the women across the states, what it feels like when one is aware of one's rights however claiming the same can land one in big troubles like acid attack or rape or also many a times branded as witches. Although education is a key to success and development, yet all this leads to further problems for women in even having access to education in the context of Haryana. Today, the female literacy levels in Haryana⁷⁷⁷ are 65.94% whereas the male literacy rate is 84.06%.⁷⁷⁸ In fact, people believe that more the education, higher the chances of disruptive marriage and family for women. It is quite hard to make people understand the importance of education where they still have faith in superstitious practices⁷⁷⁹ like witchcraft.

2017), <https://blog.ipleaders.in/laws-which-prevent-witch-hunting-in-india/>

⁷⁷⁵ Haryana, India

⁷⁷⁶ A scheme viewed to bring gender equity in the society to uplift the position of the girl child and to put an end to disruptive practices like female foeticide. It will be effective only if implemented with dedication and diligence.

⁷⁷⁷ According to the Literacy Rate 2011 Census

⁷⁷⁸ Haryana Population Census data 2011, Census 2011, (Jan 7, 2017) <http://www.census2011.co.in/census/state/haryana.html>

⁷⁷⁹ People still have belief in 'Baba Ki Maafi' (Spiritual Leader Ram Rahim Case, Haryana, 2017) wherein the name of religious practices women were being sexually harassed and forced to meet the sexual

People believe that women with evil powers are responsible for all the natural calamities and epidemic diseases. Women are branded as 'witches' or 'daayan' and are seen as well versed in performing black magic and consequentially may also be socially boycotted and outcasted by seizing their rights such as the right to property. The women who are categorized as 'Witches' are exposed to innumerable torture, beatings, coercively marched naked throughout the village, even forced to eat human excrement and depressingly sometimes even raped and killed. There are numerous cases which reflect upon this form of violence which goes unrecognized. Violence may include cutting off hair or body parts, pulling of teeth, hurling abuses. Witch hunting is widely seen to be used as a pretext for suppressing women and gaining personal interest.

In the tribal villages, due to unavailability of good doctors and health facilities, people rely on ojhas⁷⁸⁰. The village 'ojhas' swank their powers to detect a witch for a minimal price. If a woman rejects the sexual advances of powerful men or refuses to relinquish claim over her husband's property, she can be branded as a witch to rip her off her property.⁷⁸¹ This is the easiest way to appropriate someone's property by murdering them which is not even recognized as an offense due to the dearth of

pleasure of the leader and denying it would let one remain impure.

⁷⁸⁰ 'Bhej' or 'witch doctor' (known as 'sorcerers' or 'wizard')

⁷⁸¹ Prem Choudhry, *The Veiled Women: Shifting Gender Equations in Rural Haryana, 1880-1990*, Oxford University Press, 1994



any proof or witness⁷⁸². Women are branded as witches for economic gain or sexual vengeance. Patriarchal attitudes, opposition to women’s rights over the property⁷⁸³ as well as the inadequacy of education contributes to the continuance of such derogatory practices.

Provisions in Indian Constitution:The Constitution of India guarantees the protection of women and provides various safeguards and indirect relief to the survivors of witch hunting incidents.

S.No	Article	Case Laws
1.	Article 14: The State shall not deny to any person equality before the law or the	In case of Air India v. NargeshMeerza ⁷⁸⁴ NargeshMeerza filed a writ petition. In this case, the air-hostesses of the Air-India International Corporation had

⁷⁸² In the case of **Tula Devi&Ors. v. State of Jharkhand, 2006 (3) JCR 222**, the Jharkhand High Court dismissed the case on the basis that the victim has failed to prove that she was accused of being a witch and harmed, due to lack of eyewitness available at the time. In **Madhu Munda v. State of Bihar, 2003 (3) JCR 156**, there are very few incidents which are reported and that too after a long gap, due to societal pressure and lack of legal awareness among people, making the witness testimony unreliable, which was one of the ground ground for not convicting the accused in this case.

⁷⁸³In **Madhukishwar v. State of Bihar, ((1996) 5 SCC 125)** the supreme court held that denial of right of succession to women of Scheduled Tribes amounts to deprivation of their right to livelihood under article 21;

An amendment to The Hindu Succession Act, 1956 in 2005 was indeed a progressive step towards equality between male and female, and making daughters coparceners equally with sons, providing equal birthright to a share in the parents’ property.

⁷⁸⁴(1981) 4 SCC 335

equal protection of the laws within the territory of India.

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

approached the Supreme Court against, again, discriminatory service conditions in the Regulations' of Air-India. The Regulations provide that an air-hostess could not get married before completing four-years of service. If she married earlier, she had to resign and if after 23 years she got married, she could continue as a married woman but had to resign on becoming pregnant. If an air hostess survived both these filters, she 'continued to serve until she reached the age of 35 years. It was alleged on behalf of the air-hostesses that those provisions were discriminatory on the ground of sex, as similar provisions did not apply to male employees doing similar work. The Supreme Court struck down the Air-India Regulations relating to retirement and the pregnancy bar on the services of Air-hostesses as unconstitutional on the ground that the conditions laid down



		therein were entirely unreasonable and arbitrary.		by law.	in the field of sexual harassment of working women at their place of work, formulated guidelines for their protection. The Court said: "Gender equality includes protection from sexual harassment and right to work with dignity which is a universally recognised basic human right.
2.	Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children	The Supreme Court in Govt. of A.P. v. P.B. Vijayakumar ⁷⁸⁵ , held that reservation to the extent of 30% made in the State Services by the Andhra Pradesh Government for women candidates was valid. The Division Bench of the Supreme Court emphatically declared that the power conferred upon the State by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State.	4.	Article 23: Prohibition of trafficking in human beings and forced labour.	In Gaurav Jain v. Union of India ⁷⁸⁸ , the condition of prostitutes in general and the plight of their children, in particular, was highlighted. The Court issued directions for a multi-pronged approach and mixing the children of prostitutes with other children instead of making separate provisions for them. The Supreme Court issued directions for the prevention of induction of women in various forms of prostitution. It said that women should be viewed more as victims of adverse socio-economic circumstances than offenders in our
3	Article 21: No person shall be deprived of his life or personal liberty except according to procedure established	In Madhukishwar v. State of Bihar ⁷⁸⁶ , the supreme court held that denial of right of succession to women of Scheduled Tribes amounts to deprivation of their right to livelihood under article 21; In Vishaka v. State of Rajasthan ⁷⁸⁷ , the Supreme Court, in the absence of legislation			

⁷⁸⁵1995 (4) SCC 520

⁷⁸⁶(1196) 5 SCC 125

⁷⁸⁷AIR 1997 SC 3011

⁷⁸⁸1997 (8) SCC 114



		society.
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Provisions in Indian Penal Code: Indian Penal Code provides a certain provision against the perpetrators of witch hunting in different states across the country, where the states do not have any provisions or laws against this rising problem in order to provide relief to the victim and punishment to the accused. It responds to the threat, violence, intimidation, physical abuses and murder. The sections which deal with the registration of cases of witch hunting are, an act of murder in the name of witchcraft under Sec 302⁷⁸⁹, Sec 320⁷⁹⁰, forcible disrobing and parading acts are dealt under Sec 323⁷⁹¹, Sec 351⁷⁹², Sec 354⁷⁹³, Sec 364a⁷⁹⁴, Sec 376⁷⁹⁵, Sec 503⁷⁹⁶.

⁷⁸⁹**Punishment for murder**— Whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.

⁷⁹⁰**Grievous Hurt**—The following kinds of hurt only are designated as “grievous”:—
First—Emasculation.
Secondly—Permanent privation of the sight of either eye.

Thirdly—Permanent privation of the hearing of either ear.

Fourthly—Privation of any member or joint.

Fifthly—Destruction or permanent impairing of the powers of any member or joint.

Sixthly—Permanent disfiguration of the head or face.

Seventhly—Fracture or dislocation of a bone or tooth.

Eighthly—Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

⁷⁹¹**Punishment for voluntarily causing hurt**— Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with

imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

⁷⁹²**Assault**—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

⁷⁹³**Assault or criminal force to woman with intent to outrage her modesty**—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, [shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine].

⁷⁹⁴**Kidnapping for ransom, etc.**—Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.]

⁷⁹⁵**Punishment for rape**—Whoever, except in the cases provided for in sub-section (2) of Sec 376, commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

⁷⁹⁶**Criminal intimidation**—Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person



Notwithstanding the constitutional provisions⁷⁹⁷, penal provisions, Covenants and declarations⁷⁹⁸, Statutes⁷⁹⁹ for the safety of women, disparaging practices are still prevailing and violating women's right to live a dignified life⁸⁰⁰. These practices are harming the dignity of women by violating their right to live a dignified life. Where the fault lies?

Apart from the legislation for the protection of women, there are some international as well as national agencies working for the safety and promotion of women's dignity.

Numerous International Human Rights organization are currently active to eliminate the scourge of witch-hunting across the world such as United Nations Special Rapporteur on Violence Against Women,

to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

⁷⁹⁷ Art 14, 15(1), 15(3), 21, 23, 39(a), 39(d), 42, 51(A) (e) of Indian Constitution

⁷⁹⁸The Universal Declaration of Human Rights (UDHR), 1948; The International Covenant on Civil and Political Rights (ICCPR), 1966; The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

⁷⁹⁹The Family Courts Act, 1954; Immoral Traffic (Prevention) Act, 1956; The Maternity Benefit Act, 1961 (Amended in 1995); Dowry Prohibition Act, 1961; The Medical Termination of Pregnancy Act, 1971.

⁸⁰⁰ Art 21: Right to life also includes right to live with dignity.

the United Nations Special Rapporteur on Extra-Judicial Killings, UNHCR⁸⁰¹, UNICEF⁸⁰², the European Parliament, etc. CVICT⁸⁰³, FWLD⁸⁰⁴, and INSEC⁸⁰⁵ are some of the organizations active in Nepal. CRARN⁸⁰⁶ is another Nigeria-based NGO which educates people about the witchcraft epidemic. Another such organization working in this field is Human Rights Watch⁸⁰⁷ a nonprofit, nongovernmental human rights organization.⁸⁰⁸

At the National level, there are several agencies working for the upliftment of women in claiming their rights and entitlements.

All-India Democratic Women's Association (AIDWA)

It addresses the problems of women from a gender perspective and facilitates access to justice to the women. AIDWA works for the equal rights for women of all communities.

⁸⁰¹ United Nations High Commissioner for Refugees, (Jan 4, 2018) <http://www.unhcr.org/>

⁸⁰² United Nations Children's Fund, (Jan 4, 2018) <http://unicef.in/>

⁸⁰³ Centre For Victims of Torture, Nepal, (Jan 4, 2018) <http://cvict.org.np/>

⁸⁰⁴ Forum for women, Law and Development- Working for Non-Discrimination and Equality, (Jan 4, 2018) <http://fwld.org/>

⁸⁰⁵ INSEC Online Human Rights A WINDOW TO NEPAL, (Jan 4, 2018) <http://inseconline.org/en/>

⁸⁰⁶ Child's Right and Rehabilitation Network, (Jan 4, 2018) <http://www.crarn.net/>

⁸⁰⁷ Human Rights Watch; <https://www.hrw.org/>

⁸⁰⁸ Efforts of governmental and non-governmental agencies, Shodhganga, (Jan 4, 2018) <http://shodhganga.inflibnet.ac.in/bitstream/10603/152219/3/12%20chapter%205.pdf>



AIDWA believes that the emancipation of women in India requires fundamental systemic change. Women's concern is thus an integral part of a larger socio-political and economic system and cannot be addressed in isolation or only within the framework of the male-female relationship.⁸⁰⁹

Centre for Alternative Dalit Media (CADAM)⁸¹⁰

CADAM vision is to build an enlightened society. It highlights the violence against the women especially Dalit women who are widely exploited. In its report on "Violence against Dalit Women in Different States of India by studying the Sources of Materials that are Available and Conducting Interview of the Perpetrators, Victims and Witnesses⁸¹¹" it was suggested that "The practice of witch hunting in India is more prominent among the socially educationally excluded Dalits and Adivasis who usually inhabit the secluded areas within the country characterized by limited access to livelihood opportunities."

⁸⁰⁹What is AIDWA'S Perspective of Women's Oppression?, All India Democratic Women's Association, (Jan 5, 2018)

<http://aidwaonline.org/post/what-is-aidwas-perspective-of-womens-oppression>

⁸¹⁰Centre for Alternative Dalit Media, (Jan 6, 2018)

<http://www.cadam.org.in/>

⁸¹¹Research Study on Violence against Dalit Women in Different States of India by studying the Sources of Materials that are Available and Conducting Interview of the Perpetrators, Victims and Witnesses, Centre for Alternative Dalit Media (CADAM) New Delhi, NCW, (Jan 6, 2018)

<http://ncw.nic.in/pdfReports/ViolenceagainstDalitWomen.pdf>

Partners for Law in Development (PLD)⁸¹²

It is a legal resource group, which is committed to the realization of social justice and equality for women. PLD has been involved in capacity development on human rights and women's equality through training programmes, perspective development, information dissemination, and platforms for sharing and exchange. Partners for Law in Development (PLD) conducted a field study in three states, Jharkhand, Bihar and Chhattisgarh, with support from the Ministry of Women and Child Development (MWCD) to document and analyze trends in the contemporary practices of witch hunting as well as their interface with the law.⁸¹³

People's Vigilance Committee on Human Rights (PVCHR)⁸¹⁴

It is an Uttar Pradesh based organization which endeavors to provide psychological support to the witch-hunting victims through testimonial therapy⁸¹⁵. It aims at

⁸¹² Partners for Law in Development, (Jan 5, 2018),

<http://pldindia.org/>

⁸¹³Contemporary Practices of Witch Hunting :A Report on Social Trends and the Interface with Law, (Jan 5,

2018), [https://www.academia.edu/15475888/Contemporary Practices of Witch Hunting A report on Social Trends and the Interface with Law](https://www.academia.edu/15475888/Contemporary_Practices_of_Witch_Hunting_A_report_on_Social_Trends_and_the_Interface_with_Law)

⁸¹⁴People's Vigilance Committee on Human Rights, (Jan 6, 2018), <http://pvchr.asia/>

⁸¹⁵Testimonial therapy is an individual psychotherapy method for survivors of human rights violations. It is a brief psycho-legal approach to trauma, which



rehabilitating the survivors of witch hunting by organizing honor ceremonies from time to time. On the behalf of the PVCHR, a letter was written to Prime Minister to frame the national legislation on Witch Hunting and awareness program must be conducted in rural and tribal areas.⁸¹⁶

Rural Litigation and Entitlement Kendra (RLEK)⁸¹⁷

It works to enhance the status of women in social, economic, and political spheres through a process, which aims at changing the nature and direction of the systemic forces that marginalize women and other disadvantaged groups.

Reports of witch hunting—Stark Reality

For those who think witch-hunts are a thing of the past in India, here is the stark reality. The National Crime Records Bureau says 2,097 murders were committed between 2000 and 2012 where witch hunting was the motive. Out of these, 363 were reported from Jharkhand and this figure does not include the murders in 2000 when Jharkhand was a part of Bihar.⁸¹⁸

Jharkhand ranks highest in these crimes against women (and in certain cases, also men and child victims) in which “witchcraft” is the only charge against the victims. Other states such as Chhattisgarh, Rajasthan, Assam and Bihar also report witch-hunting deaths, though under-reported. An analysis of NCRB data between 2010 and 2012 reveals that while there were 77 instances of death, only nine cases were registered in Jharkhand. The figures also don’t take into account other kinds of “vengeance” exacted by a village, like forcing the victim to parade naked in the village square, to eat faeces, banishment and ostracism; none of these acts of violence warrant police action.⁸¹⁹

National Crime Records Bureau (NCRB) data state that 26, 54 and 47 cases were reported in Jharkhand in 2012, 2013 and 2014 respectively in the name of “murder for witchcraft”. NCRB data for 2014 reveals that tribal-dominated Jharkhand accounted for over 30% of ‘murders for witchcraft’ in India. Jharkhand reported 156 murders followed by Odisha with 32, Madhya Pradesh with 24, and Chhattisgarh with 16.⁸²⁰

involves the narration of survivors’ traumatic experiences. Source:

<http://journals.sagepub.com/doi/pdf/10.1177/1363461512447138>

⁸¹⁶Witch Hunting Presentation-PVCHR, PVCHR, (Jan 6, 2018), <http://pvchr.asia/?page=42>

⁸¹⁷Rural Litigation Entitlement Kendra <http://www.rlek.org/>

⁸¹⁸Witch hunting | Victims of superstition, Livemint, (Dec 29, 2018),

<http://www.livemint.com/Politics/Nnluhl4wjhiAAUkQwDtOL/Witch-hunting--Victims-of-superstition.html>

⁸¹⁹ Patriarchy And Superstitions In Rural India Continue To Cause Death Of Women Branded As ‘Witches’, The Logical Indian, (Dec 29, 2018), <https://thelogicalindian.com/story-feed/awareness/witches/>

⁸²⁰Witch hunts killed 156 in India in 2014, The Times of India, (Dec 25, 2018), <https://timesofindia.indiatimes.com/india/Witch-hunts-killed-156-in-India-in-2014/articleshow/51434574.cms>

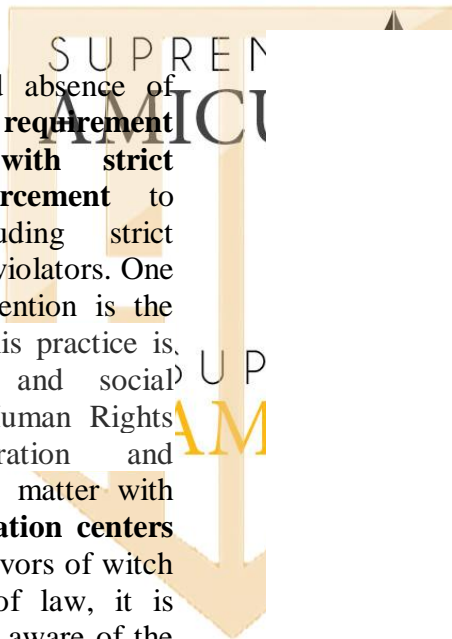


In Chattisgarh, there were 1500 witch trials and 210 associated murders between 2001 and 2013. Often, the attacks are just an excuse for some form of discrimination or denial of rights.⁸²¹ National Crime Records Bureau Report 2010 says Haryana contributed 32.0% of murders due to 'Witchcraft', and the bureau's 2012 report Crimes in India says Odisha accounted for 26.9% of murders due to 'witchcraft'. Under culpable homicide not amounting to murder Odisha accounted for 75.0% cases due to 'Witchcraft'.⁸²²

enactment, it must be the duty of the state to ensure that people are well versed with the availability of Law, under which victims can seek protection without any fear. Sensitization is required among the masses, and vulnerable groups must be provided with the legal education, aid and protection to which they are entitled. With new scientific developments, people need to realize the fallacy of superstitious beliefs and disruptive customary practices curtailing women's rights, and this will surely provide a way to enjoyment of rights and entitlements by women's independently.

CONCLUSION

Seeing this stark reality and absence of legislation, there is an **urgent requirement of national legislation with strict implementation and enforcement** to address this issue, including strict punishment provisions for the violators. One more aspect which needs attention is the working of police officials. This practice is woven with major legal and social issues, and transgression of Human Rights needs adequate consideration and attentiveness. To approach the matter with sensitivity and care, **rehabilitation centers** should be the call for the survivors of witch hunting. For the efficiency of law, it is required that people should be aware of the laws which are binding on them. With the



⁸²¹Why India struggles to tackle 'witch-hunting', DW Made for Minds, (Dec 29, 2018), <http://www.dw.com/en/why-india-struggles-to-tackle-witch-hunting/a-18603450>

⁸²² Witch Hunting On The Rise Across Several Indian States; India times; (Dec 29, 2018), <https://www.indiatimes.com/news/india/witch-hunting-on-the-rise-across-several-indian-states-231133.html>

**CASE COMMENT****Tukaram And Anr V/S State Of Maharashtra**

AIR 1979 SC 185

(Decided on 15th SEPTEMBER, 1978)

*By Kaustubh Hardikar
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Jindal Global University*

Introduction

Tukaram and another v state of Maharashtra⁸²³ also known commonly as the Mathura Rape Case was a case involving custodial rape. Its judgment was pronounced in all the three courts of increasing judicial hierarchy viz. a Sessions court in Maharashtra, the High Court of Maharashtra and finally the Supreme Court of India. The Supreme Court delivered the judgment of this case on September 1978 by a bench consisting of three judges. The fact that the accused were acquitted in the decision drew severe criticism from the Indian public. Further, an open letter sent to the Supreme Court pointing out the legal flaws in the judgment led to the amendment of India's rape law via **The Criminal Law (Second Amendment) Act 1983(No. 46)**.

Analysing the judgement

The Supreme Court's judgment, in this case was filled with numerous amount of grammatical errors, logical flaws, unwarranted assumptions and fallacies.

Sexist approach

The court was highly sexist in its judgment and showcased a double standard approach towards the case. The use of words such as 'shocking liar' in order to describe an adolescent girl who had been the victim of rape made the judgment highly prejudicial. The fact that the girl's previous sexual activities were used in order to justify the actions of the appellants goes on show the biased and sexist nature of the judgment. The bench, in the end held that both Mathura and Ganpat were habituated to sexual intercourse but went in favour of Ganpat and deemed Mathura as a promiscuous woman just on the fact that she had had pre-marital sex with Ashok and also slammed her allegation as false.

Language used

Most of the terms used by the Hon'ble Court were highly criticised, due to lot of unnecessary phrases that were used throughout the judgement. These phrases tend to distort the true nature of the incident. When Tukaram was present at the place of the incident and left the place as soon as the crime was over, the Court stated that it is "not inculpatory and is capable of more explanations than one", Further, the use of terms such as 'passive submission' to describe lack of consent in rape goes to show that the judgment was insensitive to the social and physical trauma that victims of the crime had to undergo.

Ambiguity and repetition

The judgment by the supreme court was a mere repetition of that of the Sessions Court. There was no new perspective to the judgment. The ambiguity in this case arises

⁸²³AIR 1979 SC 185



while dealing with the age of Mathura, because as her date of birth was not recorded anywhere due to her parent's early demise, and hence she being a minor was totally disregarded.

Logic

The judgment of the Supreme Court did not have a strong logical foundation. It derived its rationale from a series of unfounded evidences, the primary one being that Mathura had intercourse with Ganpat and got 'fondled' by Tukaram out of her own volition. Further, the character of Mathura was portrayed in a negative light in the judgment. The questioning of a woman's character on the basis of her sexual habits and going to the extent of using such an assumption as an evidence was logically flawed to a deep extent, in addition to being sexist. The fact that Mathura was a tribal Dalit girl may also have been of influence in the judgment. Dalits in India have long been known to be the most oppressed in the caste hierarchy. Though an evidence of such a caste-bias is not present in the judgment, the judge may have been influenced by it owing to the deep-seated and all-pervasive nature of the Indian caste system. The fact that no semen stain was found on the girl's vagina when a medical examination was conducted on her, had also played a major role in ascertaining whether rape was committed or not. This fact was so erroneous in itself as the medical examination was conducted over twenty hours after the incident and the probability of finding semen on Mathura's body was minuscule. Another logical inconsistency that is present in the judgement is that just because no injury was found on Mathura's body, the assumption of use of force on her, was not taken into

consideration by the judge. Numerous questions may arise with regard to whether a minor girl may have had the strength to put up such a stiff resistance as to sustain bodily injuries. In conclusion, the judgment given by the Supreme Court was logically fallacious on multiple levels.

Conclusion

The Mathura Judgment drew severe criticism from all over India due to its outrageous findings that were laden with flawed logic, sexist language and a general arbitrariness in the decision. Though it went largely unnoticed after it was delivered, it caught nationwide attention after its shoddiness was exposed in an open letter by Professor Upendra Baxi and others from the Delhi Law University. This led to the Indian Government amending its rape laws and making it mandatory for courts to accept the words of a rape victim as a rebuttable presumption. In conclusion, the judgment serves to prove the deep-seated flaw in legal writing that is present in the justice-dispensing framework of India.



**ACCESS TO BIOLOGICAL RESOURCES
AND BENEFIT SHARING: BEYOND
NAGOYA PROTOCOL**

**BY MAHWESH BULAND
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INTRODUCTION

History of human race is a history of application of imagination, otherwise innovation “as well as creativity, to an existing base of knowledge in order to solve problems or express “thoughts. From early writing in Mesopotamia, the Chinese abacus, the Syrian astrolabe, the “ancient observatories of India, the Gutenberg printing press, the internal combustion engine, “penicillin, plant medicines and cures in Southern Africa, the transistor, semiconductor nanotechnology, recombinant DNA drugs, and countless other discoveries and” innovations, it has been the imagination of the world's creators that has enabled humanity to advance to today's levels of technological progress.⁸²⁴ Objective of the Nagoya Protocol is towards “set an international, legally binding framework to promote a transparent and effective implementation of the ABS concept at the regional, national and” “local level in the future. IUCN considers ABS. the third objective of the Convention, to be a concrete example for valuing biodiversity and its ecosystem services, and for taking proper account of this value as a prerequisite for conservation and sustainable use. consequently, IUCN welcomes adoption of Protocol following six

years of negotiations which marks an important step towards the implementation of the Convention on Biological Diversity.⁸²⁵ “Nagoya Protocol which came into force on 12th October 2014, with an aim to implement the provision of benefit sharing under the Convention on Biological Diversity (CBD) which aims at establishing the fair and equitable sharing of biodiversity benefits as one of its main objectives. With the foundation assumptions that after implementation of the protocol, the benefit sharing of it has reasserted the need for companies to monitor, understand and comply with access and benefit sharing requirements. Further at same time especially in underdeveloped nations, its implementation is still in question. Because the target groups for whom the protocol have been made are benefited or not, the aboriginals and their traditional knowledge protection with respect to benefit sharing is still under the black shadows

**BACKGROUND OF
NAGOYA PROTOCOL**

Nagoya Protocol on access as well as benefit sharing is a landmark in international governance of biodiversity. If we go by the article 1 of protocol, it states “The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of

⁸²⁴ WIPO, INTRODUCTION TO INTELLECTUAL PROPERTY, 2010 EDITION.

⁸²⁵ IUCN, “An explanatory guide to the Nagoya Protocol on access and benefit-sharing” IUCN Environmental Law And Policy and Law Paper NO.83.



biological diversity and the sustainable use of its components.”⁸²⁶ ‘Utilization’, ‘biotechnology’ as well as ‘derivative’ are three input concepts to understand Nagoya Protocol in relation towards that of CBD regime as well as how it will going to scrutinise BioTrade. The Nagoya Protocol makes it recommendatory for all countries to establish “appropriate, effective and proportionate”⁸²⁷ measures to provide that genetic resources as well as traditional knowledge utilized within their jurisdiction have been accessed on basis of prior informed consent in addition to mutually agreed terms, as required by country of origin. So, benefit of such provision is that, it would also need to ensure that research development as well as commercialization conducted within their countries utilizes genetic resources according to requirements established by countries of origin of these resources. So, it tries on an international level to make an uniform base with look upon to utilisation along with benefit sharing of genetic resources. Further, it also mandates for the establishment of *Access as well as Benefit-sharing Clearing-House* (ABS Clearing-House),⁸²⁸ which would a platform for exchanging information on access in addition to benefit-sharing with it has been established under Art.14 of Protocol .

There is a dire need for clear, fair as well as equitable rules on Access with Benefit

sharing in order to ensure furthermore stop misappropriation of genetic resources along with associated traditional knowledge (TK). The issue of ‘biopiracy’ which is one of the biggest challenge for the genetic trade, which has been defined as “access to and use of genetic resources without prior informed consent and/or mutually agreed terms pursuant to the national access legislation of the country providing the genetic resources and applicable international rules on access and benefit sharing.”⁸²⁹ The genetic resources could be misused using IP system is when,⁸³⁰ for example, a company sources biological resources from another nation with no that country consent, utilizes that resource in Research & Development to develop an invention, with then attempts to patent that invention utilizing resource with no any benefits to provider, or without mentioning where resource was obtained⁸³¹.

Further, it has been identified that largely the economic benefits arising from the exploitation of genetic resources is based on that of biochemical compounds⁸³² obtained

⁸²⁹ Definition proposed by Switzerland for WG-ABS 9 on 18 February 2010 regarding the need for definitions in the lead up to COP 10 at Nagoya, Japan (Available at: http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf, last accessed on 21.12.2017 at 11:28pm)

⁸³⁰ *Ibid.*

⁸³¹ The Convention on Biodiversity and the Nagoya Protocol: Intellectual Property Implications. A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property, 2014 (Available at: http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf, last accessed on 21.12.2017 at 11:42pm)

⁸³² Implications for BioTrade of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their

⁸²⁷ Nagoya Protocol on Access and Benefit Sharing - Technical Brief, Union For Biological Ethical Trade. (Available at: <http://ethicalbiotrader.org/dl/benefit-sharing/UEBT-ABS-Nagoya-Protocol.pdf>, last accessed on 21.12.2017 at 10:52pm)

⁸²⁸ Article 14, Nagoya Protocol.



from those resources like plants, microbes, marine organisms, mammalian sources etc, such as chemicals with therapeutic properties for the manufacture of medicines (e.g. enzymes), cosmetics (e.g., flavonoids or food e.g., alkaloids).⁸³³

If we summarise the aims and objectives of Nagoyaprotocol, those are as follows:⁸³⁴

1. It gives a definition of objective, use of terms, scope as well as relationship by other international instruments of Nagoya Protocol;⁸³⁵
2. It elaborates on the principles and main requirements on the fair and equitable sharing of benefits and access to genetic resources and traditional knowledge;⁸³⁶
3. It also provides for possible mechanisms for implementation, including a multilateral benefit sharing mechanism and an access and benefit-sharing clearinghouse;⁸³⁷
4. It also includes measures to promote compliance with legal and regulatory requirements, as well as with mutually agreed terms;⁸³⁸
5. Further provides to promote tools and awareness raising, capacity building and

transfer of technology activities on access and benefit sharing.⁸³⁹

Table 1. BioTrade under the Nagoya Protocol

Biodiversity-based products and services	Applicability of the Nagoya Protocol
Natural ingredients and products for cosmetics: essential oils, natural dyes, soaps, cream and butters, moisturizers, etc.	Yes, if access is sought to undertake R&D to eventually extract and commercialize natural ingredients or products containing them.
Natural ingredients and products for pharmaceuticals: extracts and infusions from medicinal plants, natural medicine, capsules, etc.	See above
Natural ingredients and products for food: fruits, cereals, grains, tuberous, nuts, cocoa, jams, sweets and snacks, jellies, pulps and juices, spices and sauces, teas and infusions, food supplements, crocodile meat, etc.	See above
Leather and garments: skin from Caiman yacare and Nile crocodile, etc.	No, since no research and development or other utilization of naturally occurring biochemical compounds takes place; a price is paid for the value of the traded materials
Wildlife for pets: butterflies, chameleons, snakes, tortoise, etc.	See above
Flowers and foliage: heliconias and other tropical flowers.	See above
Fish products: paiche (Arapaima gigas).	No, unless fish is used for further breeding
Handicrafts: furniture, decoration objects, jewelry and garments.	Not applicable

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STEPS OF IMPLEMENTATION NAGOYA PROTOCOL IN INDIA AND ACCESS TO BIODIVERSITY SHARING AND ITS BENEFIT

If we take a look in India's commitments towards biological diversity protection, can be summarised as follows:⁸⁴¹

Utilization, (Available at:http://www.biotrade.org/ResourcesPublications/U NCTAD_DITC_TED_2011_9.pdf, last accessed on 21.3.2016 at 11:50pm)

⁸³³ Union for Ethical BioTrade (UEBT), Nagoya Protocol on Access and Benefit Sharing Technical Brief, Available at http://ethicalbiotrade.org/news/wpcontent/uploads/UEBT_ABS_Nagoya_Protocol_TB.pdf, last accessed on 22.12.2017 at 12:10am)

⁸³⁴ *Supra* note. 2.

⁸³⁵ *Ibid.*

⁸³⁶ *Supra* note 11.

⁸³⁷ *Ibid.*

⁸³⁸ *Ibid.*

⁸³⁹ *Ibid.*

⁸⁴⁰ Implications for BioTrade of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, (Available at:http://www.biotrade.org/ResourcesPublications/U NCTAD_DITC_TED_2011_9.pdf, last accessed on 21.12.2017 at 11:50pm)

⁸⁴¹ HemaPande "Implementation of ABS Mechanism in India", Available at:<https://www.cbd.int/doc/meetings/fin/ds-fb-02/other/ds-fb-02-presentation-22-en.pdf>, last accessed on 21.12.2017 at 12:31 pm)



1. India has signed the Convention on Biological Diversity on 5 June 1992 and ratified it on 18 February 1994
2. India has also Signed Cartagena Protocol on 23 Jan 2001 and ratified the same on 11 September 2003
3. Further has also Signed the Nagoya Protocol on 11 May 2011 and ratified the same on 9 October 2012
4. In national level, it has enacted the Biological Diversity Act (BDA) in 2003 and the enforced the law from 2004

If we consider the Nagoyaprotocol, it lays down for provisions to deal with “benefits” arising from any kind of use of biological material and associated traditional knowledge that are need to be shared.⁸⁴²For, a country like India , are have been under more pressure to design legally binding mechanisms in line with the international regime to facilitate access to biological resources and knowledge.⁸⁴³Now, lets have a look over various legal framework that india have in national level to ensure access and benefit sharing of biological resources

The Geographical Indications of Goods (Registration and Protection) Act 1999:

The Act was promulgated with the objective of excluding unauthorized persons

⁸⁴²*Ibid.*

⁸⁴³ KanchiKohli, ShaliniBhutani, Access to India’s Biodiversity and Sharing Its Benefits (Available at:http://kalpavriksh.org/images/CCCBD/ABS_BDA ct_EPW_August2015.pdf, last accessed on 22.12.2017 at 5:30pm)

from misusing GIs, of protecting consumers from deception, of adding to the economic prosperity of the producer of such goods and of promoting goods bearing Indian GI’s⁸⁴⁴ in the export market. Needless to say, geographical indication products are the natural brands because of their unique quality. It is the best way to protect TK – Basmati Rice, HyderabadBiryani and Pochampalli sari being classic examples .⁸⁴⁵

ii. Biological Diversity Act of 2002:

It aims to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge. The Act foresees the protection of “knowledge of local people relating to biological diversity” (Art.36(5)).“Biological diversity” is defined as “the variability among living organisms from all sources and the ecological complexes of which they are a part, and includes diversity within species or between species and of eco-systems,” (Art2(b)).⁸⁴⁶

The Act is a classic example of defensive protection to TK. For instance, Section 6 of this Act provides that “no person shall apply for the IPR, by whatever name called, in or outside India, for any invention based on any research or information on biological

⁸⁴⁴Supra note 18.

⁸⁴⁵ Available at <http://www.iipa.org.in/New%20Folder/Dr.%20Raju%20Narayana%20Swamy.pdf>, last accessed on 22.12.2017 at 12:21am)

⁸⁴⁶ ‘The Biological Diversity Act, 2002, Biological Diversity Rules, 2004, Andhra Pradesh Biological Diversity Rules’ (2009), Andhra Pradesh Bio Diversity Board, Hyderabad



resources obtained from India without obtaining the previous approval of the National Biodiversity Authority (NBA) before making such application”.⁸⁴⁷ NBA may determine benefit sharing fee or royalty for benefits accruing from commercial utilization of such rights ⁸⁴⁸.

Further Ministry of Tribal Affairs has also prepared a draft of the National Tribal Policy. The policy provides for regulatory protection, socio-economic and political empowerment, development of infrastructure, increased livelihood opportunities, improved governance and administration, preservation of cultural and traditional rights and traditional knowledge,⁸⁴⁹ protection of traditional knowledge in the intellectual property rights regime and access to privileges and includes measures to support and preserve the rich tribal culture, tradition heritage, arts and crafts, dance and music through documentation and dissemination, market linkages, cultural festivals and mela and encouragement and support of tribal artists,⁸⁵⁰ and folk art performers. Efforts will be made to preserve, document and promote traditional wisdom .⁸⁵¹

iii. Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulation, 2014;

Recently ,The Ministry of Environment, Forests And Climate Change, through National Biodiversity Authority has notified in exercise of powers conferred by section 64 of Biological Diversity Act 2002,⁸⁵² and introduced regulations known as "Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014. The guidelines basically contains 17 Sections covering monetary benefits through regulation 3, 4, 7, 9 and 12. Now, lets have look on the major guidelines with relation to ABS.”⁸⁵³

1. If we refer to, Regulation 3 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations (GABRAKBSR, 2014)⁸⁵⁴ it expresses mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization. Further, Article 3 seems to have been written off in haste and seems misleading as it lowers percentage of monetary benefit sharing obligations on the trader without approval, in the range of 1.0 to 3.0% and on the manufacturer in the range of 3.0 to 5.0% of the purchase price of the biological resources.⁸⁵⁵ On Prior benefit

⁸⁴⁷ *Ibid.*

⁸⁴⁸ Venkataraman, K. & Swarna, Latha, S., ‘Intellectual Property Rights, Traditional Knowledge and Biodiversity of India’, Journal of Intellectual Property Rights, 13 (July), 2008.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Ibid.*

⁸⁵¹

Available at: <http://www.nipo.in/governmentpro10.htm>, last accessed on 23.12.2017 at 1:12pm

⁸⁵² Section 64, Biological Diversity Act.

⁸⁵³ Poonam Jayant Singh and Atul Kumar Tiwari, “Analysis of Status of Access and Benefit Sharing of Biological Resources and Associated Knowledge in India: The Path from Common Heritage of Mankind to Sovereign Right of a Nation”. Uttar Pradesh State Biodiversity Board Publication.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ *Ibid.*



sharing negotiation, the benefit sharing obligations increase and shall be not less than 3.0% in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer. This article may promote traders and manufacturers not to indulge in prior benefit sharing negotiations for monetary gain and low benefit sharing. For high economic value biological resource, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB.⁸⁵⁶

2. Regulation 4 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits-Sharing Regulations (GABRAKBSR, 2014) provides option of benefit sharing and categorises graded percentages of monetary benefit sharing at the rate of annual gross exfactory sale of the product that was accessed for commercial utilisation. Till Rs One crore, the benefit sharing component is 0.4%, i.e. Rs 10,000. Annual gross ex-factory sale above Rs One crore up to three crore, fetches 0.2% or Rs 60,000, Above 3 crores, 0.5% i.e. Rs 1,50,000 would be paid as benefit sharing component.⁸⁵⁷ The guidelines have introduced a Nagoya plus provision by determining financial structure. How far the financial mechanism will reward the benefactors and stake holders is yet to be seen.⁸⁵⁸

3. Regulation 7 provides for monetary and non monetary mode of benefit sharing for transfer of results of research. In monetary

benefit case the applicant has to pay to the NBA 3.0 to 5.0% of the monetary benefit received by the applicant.⁸⁵⁹

4. Regulation 9 provides for the mode of benefit sharing in IPR. If the applicant himself commercialises the process/ product/ innovation, the monetary sharing shall be in the range of 0.2 to 1.0%. If the applicant assigns / licenses the process / product / innovation to a third party for commercialisation, the applicant shall pay to NBA 3.0 to 5.0% of the fee received (in any form including the license / assignee fee) and 2.0 to 5.0% of the royalty amount received annually from the assignee/ licensee.⁸⁶⁰

5. Regulation 12 provides for mode of benefit sharing for transfer of accessed biological resource and/ or associated knowledge to third party for research/ commercial utilization. The applicant transfer or shall pay to the NBA NBA 2.0% to 5.0 % of any amount and/ or royalty received from the transferee, as benefit sharing, throughout the term of the agreement. In case the biological resource has high economic value, the applicant shall also pay to the NBA an upfront payment, as mutually agreed between the applicant and the NBA. Regulation 15 provides for sharing of benefits for approval granted for biological resource or associated knowledge by NBA for research or for commercial utilization or for transfer of results of research or for Intellectual Property Rights

⁸⁵⁹ *Ibid.*

⁸⁶⁰ Poonam Jayant Singh and Atul Kumar Tiwari, "Analysis of Status of Access and Benefit Sharing of Biological Resources and Associated Knowledge in India: The Path from Common Heritage of Mankind to Sovereign Right of a Nation". Uttar Pradesh State Biodiversity Board Publication.

⁸⁵⁶ *Supra* note 17.

⁸⁵⁷ *Supra* note 33.

⁸⁵⁸ *Ibid.*



or for third party transfer. 5.0% of the accrued benefits shall go to the NBA, out of which half of the amount shall be retained by the NBA and the other half may be passed on to the concerned SBB for administrative charges. 95% of the accrued benefits shall go to concerned BMC(s) and/or benefit claimers.⁸⁶¹

3.Role Of Nagoya Protocol In Ensuring ABS

Under article 10 of the protocol, Multilateral Benefit-Sharing Mechanism and Transboundary Cooperation (Global Multilateral Benefit-Sharing Mechanism), has been provided under which “Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and [TK] associated with genetic resources that occur in transboundary situations or of which it is not possible to grant or obtain [PIC]. The benefits... through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.”⁸⁶² The establishment of a multilateral benefit-sharing fund has already been proposed by the Africa Group.⁸⁶³ The wording “not

possible to grant or obtain [PIC]” is broad and could thus cover genetic resources or associated TK which origin is not clear or that were obtained prior to the entering into force of the NP and the CBD, for instance for ex situ collections. The fund thus provides a potential means of addressing developing country concerns over the temporal scope.⁸⁶⁴

Further, Article 5 of the Nagoya Protocol (Fair and Equitable Benefit-Sharing) also clearly distinguishes between benefits arising from the utilization of genetic resources, benefits that are arising from genetic resources that are held by ILC and benefits arising from the utilization of TK associated with genetic resources.⁸⁶⁵ Also, in order to facilitate monitoring the Protocol introduces internationally recognized certificates of compliance which “shall serve as evidence that the genetic resource which it covers has been accessed in accordance with [PIC] and that [MAT] have been established”.⁸⁶⁶

Thereby the already mentioned permit issued in accordance with Article 6.3(e) NP shall constitute such a certificate.⁸⁶⁷ But to conclude we can say the biggest flaw of Nagoya protocol as a whole is “there is no specified obligation of user states to ensure

⁸⁶¹ *Ibid.*

⁸⁶² Article 10, Nagoya Protocol (Available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>, last accessed on 20.12.2017 at 2:47pm)

⁸⁶³ Dr Konstantia Koutouki, THE NAGOYA PROTOCOL: STATUS OF INDIGENOUS AND LOCAL COMMUNITIES, LEGAL ASPECTS OF SUSTAINABLE NATURAL RESOURCES LEGAL WORKING PAPER SERIES (Available at: <http://cisdl.org/public/docs/legal/The%20Nagoya%20Protocol%20->

[%20Status%20of%20Indigenous%20and%20Local%20Communities.pdf](#), last accessed on 21.12.2017 at 12:10pm)

⁸⁶⁴ Kamau, Fedder & Winter, "The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and what are the Implications for Provider and User Countries and the Scientific Community?"; Krystyna Swiderska, supra note 6; Union for Ethical BioTrade.

⁸⁶⁵ Supra note 23.

⁸⁶⁶ Article 17(3), Nagoya Protocol

⁸⁶⁷ *Ibid.*



benefit sharing. As before, the enforcement of benefit-sharing duties is left to contractual means, with all the difficulties of forum, litigation costs, and prosecution of titles. The fact that the Protocol does not go further in that direction constitutes a major disappointment for the provider side.⁸⁶⁸⁸⁶⁹

4.Traditional Knowledge(TK) Protection Under Nagoya Protocol

The Nagoya Protocol also address the treatment of TK associated with genetic resources and genetic resources held by ILCs. Article 7 of the Nagoya Protocol requires countries to ensure that access to associated TK is based on PIC and that benefit sharing will take place. Such benefits are required to cover benefits from R&D, but not commercialization. But, the Protocol governs only TK associated with genetic resources, and not all TK. "The protocol on 'Access to Genetic Resources and Benefit Sharing' is significant to Indigenous Peoples because it is the first treaty relevant to Indigenous Peoples to have been negotiated since the adoption of the UN Declaration on the Rights of Indigenous Peoples, and relates to access to the natural environment, including where Indigenous Peoples' territories exist,"⁸⁷⁰ The link between genetic resources and traditional knowledge

in the context of ABS is based on the second and third obligations under Article 8(j) of the CBD. Accordingly, the CBD acknowledges the value of traditional knowledge to modern society and recognizes that holders of such knowledge, innovations, and practices are to be involved and provide their approval, subject to national laws, when it gets to the wider application of those knowledge, innovations, and practices. Furthermore, States are encouraged to equitably share the benefits arising out of the utilization of ILCs' knowledge, innovations, and practices.⁸⁷¹

Today the indiginious people face threats to their traditional knowledge (TK) and resource rights. Although States commiserate about the debilitating poverty suffered by such peoples, some States appear unwilling to safeguard Indigenous rights to resources.⁸⁷² A key problem that exacerbates the impoverishment of Indigenous peoples and local communities is "biopiracy".⁸⁷³ This issue is not specifically referred to in the Nagoya Protocol. Biopiracy has been described as "the unauthorised commercial use of genetic resources and TK without sharing the benefits with the country or community of

⁸⁶⁸ Kamau, Fedder & Winter, "The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and what are the Implications for Provider and User Countries and the Scientific Community?"

⁸⁶⁹ *Supra* note 23.

⁸⁷⁰ Nagoya Protocol on Access to Genetic Resources Recognizes Indigenous Rights, Cultural Survival, (Available at: <https://www.culturalsurvival.org/news/japan/nagoya-a-protocol-access-genetic-resources-recognizes-indigenous-rights>, last accessed on 23.12.2017 at 3:40 pm)

⁸⁷¹ *Ibid.*

⁸⁷² Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights. Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva 11-15 July 2011 (Available at: http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf, last accessed on 23.12.2017 at 3:09pm)

⁸⁷³ Valeria A. Gheorghiu, "Sailing The Seas of Treaties: Biopiracy in the Wake of the International Treaty on Plant Genetic Resources for Food and Agriculture", (2006) 7 Fourth World Journal 1



origin, and the patenting of spurious ‘inventions’ based on such knowledge and resources”.⁸⁷⁴ Now lets have a look on some of the draw backs of Nagoya protocol in relation to the Traditional Knowledge protection :⁸⁷⁵

1. Indigenous peoples’ human rights concerns were largely disregarded, contrary to the Parties’ obligations in the Charter of the United Nations, Convention and other international law;⁸⁷⁶
2. progressive international standards, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) were not fully respected – despite the obligation in the Protocol that it be implemented “in a mutually supportive manner with other international instruments”;⁸⁷⁷
3. repeated use of ambiguous and questionable phrases, such as “subject to national legislation” and “in accordance with national legislation” is not consistent with the requirement that national legislation be supportive of the “fair and equitable” objective of benefit sharing;⁸⁷⁸

4. excessive reliance on national legislation is likely to lead to serious abuses, in light of the history of violations and the Protocol’s lack of a balanced framework;
5. the phrase “indigenous and local communities” is used throughout the Protocol, even though “indigenous peoples” is the term now used for such peoples in the international human rights system. ii Such denial of status often leads to a denial of self-determination and other rights, which would be discriminatory;
6. in regard to access and benefit sharing of genetic resources, only “established” rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination;⁸⁷⁹
7. “established” rights might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling. This would be a gross distortion of the original intent. Massive dispossessions could result globally from such an arbitrary approach inconsistent with the Convention;⁸⁸⁰

⁸⁷⁴Krystyna Swiderska, *Banishing The Biopirates: A New Approach To Protecting Traditional Knowledge*, Gatekeeper Series 129, International Institute for Environment and Development (London: IIED, 2006)

⁸⁷⁵*Ibid.*

⁸⁷⁶Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples’ Human Rights. Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva 11-15 July 2011 (Available at: http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf, last accessed on 23.12.2017 at 3:09pm)

⁸⁷⁷*Supra* Note 37.

⁸⁷⁸*Ibid.*

⁸⁷⁹ Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples’ Human Rights. Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva 11-15 July 2011 (Available at http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf, last accessed on 23.12.2017 at 3:09pm)

⁸⁸⁰*Ibid*



8. “prior and informed consent” of Indigenous peoples was included in the Protocol, along with questionable and ambiguous terms that some States are likely to use to circumvent the obligation of consent,⁸⁸¹
9. lack of Parties’ commitment to ethical conduct is exemplified by the Tkarihwaié:ri Ethical Code of Conduct, adopted by the Conference of the Parties – which Code stipulates that it “should not be construed as altering or interpreting the obligations of Parties to the Convention ... or any other international instrument” or altering domestic laws and agreement.⁸⁸²

Above are some of the major drawbacks, that need to be considered in order to make the Nayoga protocol much more efficient and protecting for the Indeginious people also. Around the world, in spite of worldwide distinguishment of the right of indigenous people groups to safeguard and secure their customary practices, learning and lifestyles, the social legacy of numerous indigenous people groups is under risk, and numerous indigenous people groups are kept from getting a charge out of their human rights and essential opportunities .⁸⁸³

challenging the proposed mining project on grounds that it violated India's Constitutional provisions under Schedule V, the Supreme Court's order on the Samata case⁸⁸⁴ and the country's environmental and forest conservation laws. In 2004, three different environmental activists filed petitions at the Cuttack High Court in Orissa and India's Supreme Court challenging the proposed mining project on grounds that it violated India's Constitutional provisions under Schedule V, the Supreme Court's order on the Samata case and the country's environmental and forest conservation laws.⁸⁸⁵ Niyamgiri hills is the natural habitat for many endangered, threatened and conservation dependent flora and fauna species because of its diversified topography with high mountain peaks, plain plateaus at hill tops, innumerable deep valleys and gorges, abundant springs, diverse vegetation resources and its distance from so called mainstream development process.⁸⁸⁶ Being abundant in such rich flora , which also includes many medicinal plant species and are protected under the traditional knowledge. Allowing , a MNC like Vedanta to mine would not only have violated the land rights but also the intellectual property rights of those tribals.

5. CASE STUDIES WITH RELATION TO ABS

I.Vedanta –Niyamgiri Controversy

In 2004, three different environmental activists filed petitions at the Cuttack High Court in Orissa and India's Supreme Court

The honorable apex court finally held in the case of Orissa Mining Corporation Ltd. Vs. Ministry of Environment & Forest & Others⁸⁸⁷, the blatant disregard displayed by the project proponents with regard to rights

⁸⁸¹*Ibid*

⁸⁸²*Supra* note 37.

⁸⁸³ Bruntland, G., *Our Common Future: The World Commission on Environment and Development*, Oxford, Oxford University Press, 1987.

⁸⁸⁴*Samatha v. Andhra Pradesh* (1997) 8 SCC 191

⁸⁸⁵ Seeland K., Schmithusen F., 2002, *Man and Forest Series 2, Forest Tribes of Orissa, Vol-1: The DongariaKondha*

⁸⁸⁶*Ibid.*

⁸⁸⁷*Orissa Mining Corporation Ltd. Vs. Ministry of Environment & Forest & Others*(2013) 6 SCC 476



of the tribal and primitive tribal groups dependent on the area for their livelihood, as they have not proceeded to seek clearance is shocking. So, it should be led to the village panchayats to decide whether to allow the MNC or not. Its, really an appreciable decision given by the honorable court, which not only protected the land rights but also the intellectual rights of the tribal of that region.

II. Nestle Rooibos Products Issue

Nestlé, the world's largest food company was charged with the allegations of biopiracy after it applied for patents involving two plants found in South Africa without having negotiated permission to use them with the South African government. The problem was that, they have dubbed the "rooibos robbery," the Berne Declaration, a Swiss advocacy organisation, and Natural Justice, a South African environmental group, accused Nestlé of having violated South African law and the Convention of Biological Diversity (CBD).⁸⁸⁸ Issue that arose was, there were two plants found in South Africa, rooibos and honeybush, both of which are commonly used to make herbal teas. Nestec, a Nestlé subsidiary, filed four international patent applications for using the plants or extracts from them to treat hair and skin conditions such as acne, wrinkles, and hair loss. A fifth application sought patent protection for using rooibos as an anti-inflammatory. It is seeking patent protection in a large number of countries around the world, including South Africa.⁸⁸⁹

⁸⁸⁸Supra note 21.

⁸⁸⁹ The Convention on Biodiversity and the Nagoya Protocol: Intellectual Property Implications. A

Under South African law, the commercial phase of bioprospecting begins once a patent application has been filed., phase a permit which would include a benefit sharing agreement and a material transfer agreement has to have been submitted regardless of where the research takes place, but the companies that supplied the rooibos and honeybush to Nestlé had also not secured permits.⁸⁹⁰ So, Nestlé case highlights the urgent need of a new protocol that prevents the misappropriation of genetic resources and associated traditional knowledge.

6. BEYOND NAYOGA PROTOCOL: OTHER TREATIES RELATED TO ABS

1. The TRIPS Agreement

As one of the agreements to which all Members of the World Trade Organization has a major impact on the scope of intellectual property protection around the world. The TRIPS Agreement establishes minimum standards of IP protection, which must be incorporated through national legislation by WTO Members unless specifically exempted by the WTO as in the case of the Least Developed Countries.⁸⁹¹ Such standards are established for a variety of IP instruments including patents, copyrights, trademarks, geographical indications (hereafter GIs), industrial designs, plant variety protection, integrated circuit designs and undisclosed information.

Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property, 2014 (Available at: http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf, last accessed on 22.12.2017 at 11:42pm)

⁸⁹⁰Bridges Trade Biores, Vol. 10, No. 10, 31 May 2010.

⁸⁹¹Supra note 51.



The treaty body for the TRIPS Agreement is the TRIPS Council, which is an intergovernmental body serviced by the WTO Secretariat in Geneva, Switzerland. The TRIPS Agreement establishes minimum standards of protection for WTO Members over a variety of IP instruments including patents, copyrights, trademarks, geographical indications, industrial designs, plant variety protection, integrated circuit designs and undisclosed information.⁸⁹²

II .Bonn Guildlines

ABS, the Conference of the Party to the CBD (COP) 5 (2000) established the Ad Hoc Open-ended Working Group on ABS with the mandate to develop guidelines.⁸⁹³ The result is the Bonn Guidelines, adopted unanimously by some 180 countries.⁸⁹³ The Bonn Guidelines are of voluntary nature and according to I.A.1 .

“may serve as inputs when developing and drafting legislative, administrative or policy measures under Articles 8(j), 10(c), 15, 16 and 19 CBD; and contracts and other arrangements under MAT for ABS”.⁸⁹⁴

The Guidelines identify the steps in the ABS process, with an emphasis on the obligation for users to seek PIC of providers. They also identify the basic requirements for MAT and define the main roles and responsibilities of users and

providers.⁸⁹⁵ With regard to PIC, the Bonn Guidelines distinguish between ILC associated with the genetic resources being accessed and TK associated with the genetic resources being accessed. In both cases PIC of ILC and in the latter also the approval and involvement of the holders of TK should be obtained in respect of established legal rights⁸⁹⁶ . Furthermore the Guidelines introduce a proposed list of elements that could be considered as guiding parameters in contractual agreements as well as basic requirements for MAT particularly with regard to ILC and TK⁸⁹⁷

(a) Regulating the use of resources in order to take into account ethical concerns of the particular Parties and stakeholders, in particular ILC concerned;⁸⁹⁸

(b) Making provision to ensure the continued customary use of genetic resources and related knowledge;⁸⁹⁹

(c) Provision for the use of intellectual property rights include joint research, obligation to implement rights on inventions obtained and to provide licences by common consent;⁹⁰⁰

(d) The possibility of joint ownership of intellectual property rights according to the degree of contribution.⁹⁰¹

CONCLUSION

The Nagoya Protocol is nevertheless a reaffirmation of the importance of access and benefit sharing and a renewed call for all stakeholders to take relevant principles

⁸⁹²*Ibid.*

⁸⁹³Bram de Jonge and Niels Louwaars in: Kamau, Fedder & Winter, supra note 6 at XXV, 37; Dross & Wolff, at 12; Nijar, The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries at 7; Garforth et al; Country reports, in: Kamau, Fedder & Winter,

⁸⁹⁴Bonn Guildlines.

⁸⁹⁵*Ibid*

⁸⁹⁶Para 31, Bonn Guildlines.

⁸⁹⁷Para 43, Bonn Guildlines.

⁸⁹⁸*Ibid*

⁸⁹⁹*Supra* note 75.

⁹⁰⁰*Ibid.*

⁹⁰¹*Ibid.*



into consideration in all their activities.⁹⁰² Even as the Nagoya Protocol is further defined and put into effect, early adopters of access and benefit sharing practices in the food and personal care sectors will gain a competitive advantage. In addition, early adoption of access and benefit sharing practices will reduce the growing reputation and regulatory risks of non-compliance. For companies working with biodiversity-based ingredients for food and personal care products, therefore, addressing access and benefit sharing including through membership in organizations such as the Union for Ethical BioTrade, which incorporate access and benefit sharing in its standard, tools and technical support should be seen an opportunity to advance their engagement and commitment to ethical sourcing of biodiversity.⁹⁰³ As the tribal groups have a nearby reliance on organic assets identified with plants and creatures/winged animals. Their employment and way of life regularly relies on and is formed by these assets. In this manner, their survival and sustenance is complicatedly connected to preservation and use of these assets. Corporate protectionism as far as licenses and intellectual property rights (IPR)⁹⁰⁴ emerging out of different worldwide bargains/instruments on exchange and basic property assets, for example, TRIPS under WTO speaks to a genuine danger to monetary work of these groups and in addition a wellspring of potential misuse of their asset base as bio-

differing qualities communicated in life structures and knowledge is tried to be changed over into private property and treated as an open access framework free of charge abuse by the individuals who need to privatize and patent it.⁹⁰⁵ Henceforth there is a dire need to give more suitable and solid legislations and institutional plans for perceiving and recognizing the rights of tribal groups to such assets and knowledge. Hence, the protocol should be allowed to increase its ambit with sufficient changes in order to accommodate almost the needs of every one and to ensure equitable access to “ABS”.

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⁹⁰²*Ibid.*

⁹⁰³*Ibid*

⁹⁰⁴Amnesty International ,Report 2010, “Don’t Mine Us Out Of Existence Bauxite Mine And Refinery Devastate Lives In India

⁹⁰⁵*Supra* note 43.



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CASE COMMENT ON VISHAKA VS STATE OF RAJASTHAN

(Writ Petitions (Crl.) Nos. 666-70 of 1992),
decided on August 13, 1997

Sexual Harassment of Women in Workplace

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Abstract

The dynamic essence of judiciary is an essential concomitant of any nation. In the case of Vishaka and Ors v. State of Rajasthan and Ors. the iniquitous practise of sexual harassment of women in workplace was given a deep insight by the Hon'ble Supreme Court of India. It was observed that when the existing laws are not sufficient for dealing with a specific problem, the judiciary relies upon international treaties, particularly the international bill of rights. Thus, it can be seen that Judicial Activism reached its pinnacle in the Vishaka case. If we take a deep insight on the issue, it can be observed that with the rapidly changing society and work environment we also need to review the laws in a retrospective way and make necessary amendments so as to deal with the changes. The Case's outcome has quite a narrow scope when compared to today's needs, as it only deals with the Sexual Harassment of "Women" at workplace, whereas the scope of "Men" and "Transgender" is not explicitly mentioned. A nation which is racing towards gender sensitization in each aspect should view the

Sexual Harassment at Workplace aspect in an egalitarian sense. Moreover, with the increase of online workspace, there is a need to review the ambit of workspace and expand it to the virtual working environment in order to protect Cyber Harassment on Online Working Platforms. Therefore, a holistic overview of the Vishaka Case and its subsequent acts need to be done, so as to deal with the changing needs according to the dynamic environment.

Introduction

The judiciary in its true sense did an applaudable job in the Vishaka case by setting guidelines for sexual harassment of women at workplace (public or private sector), which further acted as basis for the The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013. With the growth of online workspaces and information technologies, the ambit of the present guidelines has to be reviewed.

A comprehensive legislation is required to make the workplace truly gender-sensitized for catering to the broad needs of the citizens, and meeting the aspirations of a harassment-free work environment.

The Case

Vishaka & Ors. v. State of Rajasthan & Ors.
[AIR 1997 SC 3011]

The case began after Bhanwari Devi was gang raped in 1992 while trying to stop a child marriage. A writ petition was filed before the Supreme Court seeking justice for the heinous crime. The case proceeded in adherence to the various rights including



equality before law, right to practise any profession, occupation, trade or business, right to life and liberty, etc. Further the judgment was viewed in the light of Article 14, 19, 21 and 15(1)&(3) of the Indian Constitution.

With no existing law dealing with sexual harassment of women in workplace at that very time, the court resorted to Article 51(c) of the constitution and sought international references. The judgment relied upon some international laws and conventions viz. Art. 10 of the Beijing Statement of Principle of the Independence of Judiciary in the LAWASIA region, Art. 11 & 24 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). Since the enactment of a new legislation was a time taking process, the court formulated the Vishaka Guidelines for dealing with the issue, that further acted as a basis for The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013.

Comments and Analysis:

Legislative Inaction : Vishaka guidelines was intended to be an interim measure to be applied until the Parliament enacted laws . Since the judgment, the National Commission for Women has prepared a code of conduct for the workplace as well as drafted bills on the subject in 2000, 2003, 2004, 2006 and 2010. In December 2010, the Protection of Women against Sexual Harassment at Workplace Bill, 2010 was tabled in the Parliament, which was formulated as “The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013”. It not only protected the employees but also

clients, customers, daily wagers, students and hospital patients. The Act does not necessitate an employer-employee relationship. Initially it excluded the domestic workforce but later this was amended to fill the lacuna. It is only a pan-Indian law on this specific issue and with the growth of virtual workspace in the country, we need to develop our existing laws in order to cater to the needs of the time.

Section 66A of the IT Act that prohibits sending inflammatory or indecent messages on the internet can have a general as well as a narrow scope in the context of sexual harassment of women in virtual workspace like the official social media groups. Considering today’s working environment and the increasing number of cyber stalking and trolling case, it is not restricted to just physical existence but also virtual existence. The Supreme Court held that physical contact was not a prerequisite of sexual harassment and that the effects of mental harassment were equally damaging. The Court gave main importance to the dignity of women which could not be condoned. As per the Equal Employment Opportunity Commission, Sexual Harassment is defined as ‘unwelcome sexual advances, request for sexual favours, and other verbal or physical conduct of sexual nature that explicitly affect an individual’s employment’. The said Act is still silent in case of men and transgender at workplace. However, the United States Supreme Court in its 1998 ruling held that men were protected from workplace sexual harassment under Title VII of the Civil Rights Act of 1964, but no such law is available in India. Gender neutral laws have been found in approximately 77 countries around the world including, the U.K., Denmark,



Australia, the U.S. but not in India. Thus, men and transgenders should be included in the Sexual Harassment Act, 2013 and also in Indian Penal Code (IPC).

It has been around four years since the enforcement of the Sexual Harassment Act, 2013, but still sexual harassment of women continues to be one of the critical issues faced by private sector (Krasta, 2017; Jha 2017; TNN, 2017; Voices of Women, 2017). We do come across Sexual Harassment and its punishment, under § 354D of IPC but there is no segment relating to sexual harassment in virtual workspace. Virtual harassment at workplace includes inappropriate sexual messages/emails, virtual display of rapes that disrupts the victim's work and daily life. California's penal code defines stalking in § 646.9⁹⁰⁶ and 646(h)⁹⁰⁷ that protects all forms of harassment whether sexual, at the office home or elsewhere.

However, § 354-D(1)(ii) of the IPC relates

⁹⁰⁶Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

⁹⁰⁷ (h) For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

stalking with the virtual world but fail to bring such a provision in the virtual work environment. It is required that the companies have a clear social media policy that clearly defines actions which create a hostile work environment and the penalties for failure to maintain a healthy workplace. It is important for employees to understand that this policy applies outside the workplace. It is important to take all reports of cyber stalking and other electronic harassment seriously. In this regard, companies should ensure fair and equitable application of censures on the social media policy and also ensure that the policy is reviewed periodically.

Conclusion

The scope of the current Sexual Harassment Act 2013, has to be increased in order to accommodate the contemporary issues like harassment in virtual workspaces, harassment faced by men and transgenders so that the dignity of an individual at workplace becomes of utmost importance. In this regard the legislature and the judiciary can take the help of international laws and rulings as a comparative analysis to develop our existing laws.



UNIFORM CIVIL CODE: IS IT A BETTER CHOICE THAN PERSONAL RELIGIOUS LAWS?

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ABSTRACT

Article 44 of the Constitution of India, 1950 states that the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. Till date there is no prevalence of the Uniform Civil Code in the country because of the personal religious laws which were effective way before the constitution was drafted. Personal religious laws are one of the biggest obstacles in enacting the Uniform Civil Code in the country. There has been a constant debate over enactment of the Uniform Civil Code.

Goa as one of the only states is an exception to the rule of religion specific civil code in India. By enacting a Uniform Civil Code in India one of the most crucial problems of gender inequality can draw to a close, as it deals with uniform laws on civil matters like marriage, adoption, inheritance, succession, divorce. Muslim personal law largely discriminates women and their rights. Not only Muslim laws but other personal laws have provisions that do not adequately provide justice to women.

On the other side are the religious personal laws which have been prevalent in the country since the very beginning. India is such a vast country with such diverse

religions that having uniform laws for everyone is beyond the bounds of possibility. The framers of the constitution didn't intend uniformity of personal laws and only provided for Article 44 in the constitution so that it could be enacted by the state to make an endeavor to govern all its citizens by one uniform code.

This research paper elaborates upon whether Uniform Civil Code is a better choice than religious personal laws for a vast and diverse country like India.

Keywords: Uniform Civil Code, Secularism, Personal Religious Laws

INTRODUCTION

The purpose of Article 44 of the Constitution of India is to have common laws for all the communities which are currently governed by their religious personal laws. Preamble to the Constitution of India is framed with great care and deliberation so that it reflects the high purpose and noble objective of the Constitution makers.⁹⁰⁸ It includes the principles of Sovereign, Democratic, Republic, ideas based on the ideology of justice, liberty, equality and fraternity. Later the principles of secularism and socialism were added to the preamble through 42nd amendment in 1976. In general, the term secularism refers to, where in the state having no official religion and gives full opportunity to all persons to profess, practice and propagate religion of their own choice.

⁹⁰⁸Pradeep Jain v. Union of India, AIR 1984 SC 1420 (India).



Dr. Radhakrishnan, former President of India, in his book *Recovery of Faith* said that, “When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives. Though faith in Supreme is the basic principle of Indian tradition, the Indian state will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given special status or accorded special privileges in national or international relations for that would be violation of the basic principles of democracy and contrary to the best interest of religion and government. The religious impartiality of the Indian state is not to be confused with secularism or atheism. Secularism as here defined is in accordance with the ancient religious tradition of India.”⁹⁰⁹ The Supreme Court has declared that secularism is a part of fundamental right and an unalienable segment of the basic structure of the country’s political system.⁹¹⁰ Clearly, the Preamble facilitates the country and people to be secular that is to profess, practice and propagate religion of their own choice with reasonable restrictions.

Fundamental rights regarding freedom of religion were subsisted in the Constitution before its commencement in 1950. Right to practice religion is conferred under Article 25, 26, 27 and 28 of the Constitution of India, 1950. It shields individual’s or group’s

religion by making religious rights as fundamental rights. For people religion is not just a casual part of their personal life. Religion plays a primary role in lives of most of the people. Religion is not just a part of your lifestyle but it’s your identity, your personality, your soul. How different religions emerged and how people believed the personal religious laws to be the supreme and on the other side the evolution of the concept of the common civil code is further elaborated in the paper.

BACKGROUND OF PERSONAL RELIGIOUS LAWS

During the reign of Hindu dynasty, there was minimal interference of the state with Hindu law. The daily affairs were regulated by personal laws. The state kept itself away from the personal laws and it was considered as welfare organization dealing with any matter involving social interest. Also the Hindu sages were considered to be the leaders of the society and almost all the laws were laid down by these influential leaders. The rules not only considered religious ceremonies and rights but acted as court of ethics, morality and governed social intercourse of the life. Laws were considered as an integral part of religion in that era. The laws given by these Hindu sages were considered to be supreme because they were divinely inspired and had sufficient spiritual efficiency to evolve practices to regulate the human conduct from time to time.⁹¹¹ It’s a well-known fact that the entire spectrum of social, political

⁹⁰⁹ RADHAKRISHNAN, *RECOVERY OF FAITH* 202 (George Allen & Unwin Ltd.)

⁹¹⁰ *State of Karnataka v. Praveen Bhai Thogadia*, AIR 2004 SC 2081 (India).

⁹¹¹ Dr. Parminder Kaur, *Personal laws of India vis a vis Uniform Civil code a retrospective and prospective discussion*, LAW MANTRA, <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf>.



and economic life of the people revolved around the rules and regulations laid down by the divinely inspired agents like the sages and philosophers of manus, calibre who dominated the entire Hindu period.⁹¹² Since in that era there were no other religious communities, the question of conflict between different personal laws did not arise. With slight difference of opinions about personal laws in small Hindu communities the uniformity of law was a general rule than an exception.⁹¹³

After the Hindu era, came the Muslim era, wherein the Prophet who was considered to be the religious head of the Muslims, gradually elevated to be the head of the state. Every Muslim was required to owe allegiance to single head who was called imam or caliph. The caliph was required to rule in accordance with tenets of Koran, which were believed to be of divine origin. Consequently no individual could alter the law or question the authority of imam.⁹¹⁴ When the Muslims invaded India, it became very difficult for them to follow the rules and orders of caliph since all of them were scattered in faraway places. The Mughals were strangers to the country; they could not understand the Hindu personal laws. So they started practicing their own religion and also accepted the Hindu personal laws side by side. Therefore,

Muslim personal law was established in the country.

The Personal laws are rooted in British rule in India. With the advancement of East India Company, the only changes which were brought in the laws of the country were changes in the civil and criminal codes, matters pertaining to 'law and order' as these enabled them to regulate trade and commerce with which they were primarily concerned. They made no changes in the personal religious laws of any of the communities residing in India.

The Personal laws govern marriage, divorce, inheritance, succession, maintenance and adoption. Each Personal religious law has their own set of provisions which govern their community. Needless, the personal laws are the character of the society. In 1955 & 1956, the Hindu law was codified in the Parliament. As a result the following codes came into force in the year 1955 & 1956: the Hindu Marriage Act, 1955, the Hindu succession act, 1955, the Hindu minority and Guardianship act, 1956 and the Hindu Adoption and Maintenance act, 1956. Hindu law applies to not only those who are born in Hindu caste but also includes Sikhs, Jains and Buddhists. The codification of the Hindu laws was a progressive step of the parliament. Initially women did not have equal rights as compared to men in the family matters. Only a part of the property was kept as maintenance for the women. For instance, usually fathers are considered to be the natural guardians of the child and not the mother. It was only after the amendment of 2005 where the section 4⁹¹⁵, section 6⁹¹⁶,

⁹¹² U.C. Sarkar, *It's character and evolution*, 6 Journal of Indian Law institute 214, (1964).

⁹¹³ Dr. Parminder Kaur, *Personal laws of India vis a vis Uniform Civil code a retrospective and prospective discussion*, LAW MANTRA, <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf>.

⁹¹⁴ M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 4 (M Tripathi Pvt Ltd, 1990).

⁹¹⁵ The Hindu Succession (Amendment) Act, 2005.

⁹¹⁶ Ibid.



section 23⁹¹⁷, section 24⁹¹⁸ and section 30⁹¹⁹ of the Hindu succession act, 1956 were amended. As a result of this amendment the Hindu women were given coparcenary rights in the joint family property. Same number of shares were allotted to the daughters and as they were allotted to the son. The amount of maintenance given to the wife is decided depending from case to case like in one of the landmark cases where in different courts assigned different amount of maintenance to the wife.⁹²⁰ In case of Muslim laws, there is no codification of laws. Muslims follow what has been written in Quran. There is a clear demarcation of a sect within Muslims as well, that is, Shia and Sunni, both have a little difference of approach towards the personal laws applicable to them. The customs, traditions followed during nikah are similar yet different. The division between Shia and Sunni originated in the dispute concerning the question of imam, which arose for decision and settlement immediately on the death of the Prophet.⁹²¹ The Shia argued that the office should go by right of appointment and succession, and that the Imam was to be confined to the Prophet's family or his nominees. The Sunni, on the other hand, ultimately chose out their Caliph (or Imam) by means of votes.⁹²² Thus, the difference between the two lies in political

events, rather in law or jurisprudence. It is mentioned in the Quran that the woman is entitled to maintenance till the period of iddat, Iddat refers to a period of 3 menstrual cycle or 3 lunar months. In case the wife is pregnant the period will extend up to the time of delivery, or abortion even if it is beyond 3 months.⁹²³ Once the period of iddat is over, the husband is no more liable to give her maintenance. Quran is not a complete code in itself; it has been formed in fragments over a period of 23 years from 609 to 632 A.D.

It doesn't matter if a person is Hindu or a Muslim or a Christian or a Parsi, religion is the supreme body in everyone's life. Though our age has largely ceased to understand the meaning of religion, it is still in desperate need of that which religion alone can give.⁹²⁴ We live in an age of tension, danger and opportunities. Believing in one's own faith helps in knowing our insufficiencies and overcoming them. Till today customs and traditions prevail over the law in our country. If they are negated, soon enough religions will lose their perspective in social sphere. A study of different religions indicates that they have philosophical depth, spiritual intensity, vigour of thought and human sympathy. Holiness, Purity and charity are not the exclusive possessions of any religion in the world.⁹²⁵

UNIFORM CIVIL CODE: AN OVERVIEW

⁹¹⁷ Ibid.

⁹¹⁸ Ibid.

⁹¹⁹ Ibid.

⁹²⁰ Mohd. Ahmed Khan v. Shah Bano Begum (1985 SCR (3) 844)

⁹²¹ Jake Burman, *What is difference between Sunni and Shia? Ancient Muslim rivalry*, EXPRESS, January 6, 2016.

⁹²² John Harney, *How do Shia and Sunni Islam differ?*, N.Y. TIMES, January 3, 2016.

⁹²³ PROF. KUSUM, FAMILY LAW-I, 279 (4 ed. 2015).

⁹²⁴ RADHAKRISHNAN, RECOVERY OF FAITH 203 (George Allen & Unwin Ltd.)

⁹²⁵ RADHAKRISHNAN, RECOVERY OF FAITH 204 (George Allen & Unwin Ltd.)



Article 44 of the Constitution of India, 1950 aims at securing a uniform civil code for its citizens. Earlier it was viewed by the framers of the constitution that a certain amount of modernization is required before a uniform civil code is imposed on citizens belonging to different communities. Not much steps have been taken towards achieving the ideal of a uniform civil code. For the enactment of uniform civil code it is necessary that law be separated from religion. Till date Goa is the only state which has successfully adopted uniform civil code.

The underlying principle of uniform civil code is the replacement of personal laws which are based on the scriptures and customs of religion with a common set of law governing every citizen. Uniform civil code is an umbrella under which all the laws governing rights relating to property, marriage, divorce, adoption inheritance and maintenance are covered. It will ultimately unify all the personal laws and give one set of secular laws and these laws will be applied to all the citizens irrespective of the religion they follow.

For the enactment of uniform civil code attempts have been made from time to time, also through the Shah Bano⁹²⁶ case and Danial Latifi⁹²⁷ case the Supreme Court through its decisions has been giving directions to the government for implementing the same. Also the court strives to reform the personal laws and to remove gender inequality.

It was in 1947, when the idea of uniform civil code was first raised in the constituent

assembly. It was then incorporated as one of the directive principles of state policy by the sub-committee on fundamental rights. The argument put forward was that different personal laws of communities based on religion, “kept India back from advancing to nationhood” and it as suggested that a uniform civil code “should be guaranteed to Indian people within a period of five to ten years”.⁹²⁸ Dr. B.R. Ambedkar was of the opinion that, “We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only provincial civil law has not been able to invade so far as the marriage and succession ... and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change.”⁹²⁹ This opinion of his was contrasted by many. Pt. Jawahar Lal Nehru said in 1954 in the Parliament, “I do not think at the present time the time is ripe for me to try to push it (Uniform Civil Code) through.”⁹³⁰ Hence uniform civil code was considered to be a politically sensitive topic and was placed as Article 44 of the Constitution of India, 1950 under the directive principle of state policy.

The intention of uniform civil code can be understood through various case laws. The landmark case in this respect is Mohd. **Ahmed Khan v. Shah Bano Begum**⁹³¹ also

⁹²⁸Mohit Sharma, *Declassifying the Uniform Civil Code*, LIVE LAW, (October 16, 2016), <http://www.livelaw.in/declassifying-uniform-civil-code/>.

⁹²⁹ Ibid.

⁹³⁰ Ibid.

⁹³¹ AIR 1985 S.C. 945, 954 (India).

⁹²⁶ 1985 SCR (3) 844

⁹²⁷ A.I.R. 2001 S.C. 3958.



known as the **Shah Bano case**. In the above mentioned case the issue in question was, whether a Muslim husband was liable to maintain his wife even after the period of iddat has come to an end. In this case the woman along with her five children was thrown out the house when the husband got into second marriage with another woman. The husband divorced his former wife by way of irrevocable talaq and took the defense that she had ceased to be his wife and hence was under no obligation to provide her with maintenance. He had also claimed to have submitted a sum of Rs.3000 by way of Mahr during the period of iddat. A petition was filed by the respondent under section 125 of the Criminal Procedure Code, 1973. The petition was upheld by the magistrate and the appellant was ordered to pay Rs.25 per month as maintenance. In a revisional application this amount was increased to Rs.179.20 per month. This decision was appealed by the appellant in the higher court and the same was dismissed. The Supreme Court has ruled that even if the period of iddat came to an end, a Muslim husband is liable to pay for the maintenance of the divorced wife. The court regretted that Article 44 of the Constitution of India has remained a “dead letter” as there is no evidence of any official activity for framing a common civil code for the country. The Court had emphasized “A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.” The court accepted the difficulties that were involved in bringing people of different faiths on a common platform but nevertheless in the absence of such a code, and the inaction of the legislatures to reform personal laws, the role

of the law reformer has to be assumed by the courts themselves.⁹³²

In the case of **Sarla Mudgal v. Union of India**⁹³³, a Hindu man who was already married under the Hindu Laws converted himself into Islam and solemnized second marriage. The issue in question was whether the second marriage without the first marriage having been dissolved, would be valid qua the first wife who continued to be a Hindu. The court ruled that under section 494 of Indian Penal Code, 1860, the second marriage of the husband would be void. Cases with similar facts are still prevalent in the country as there are no general rules for matrimony. It was after this case that the court felt the need of uniform civil code so as to protect the rights of the oppressed and to promote national unity and solidarity.

In another case of **Danial Latif v. Union of India**⁹³⁴, the problems faced by a Muslim divorcee woman have been elaborated. By interpreting section 3 of the Muslim Women Act, 1986, the court drew inference that a Muslim husband was liable to maintain his divorced wife even after the period of iddat was over. This ruling of the court was seen by orthodox Muslims as anti shariat while the liberal accepted it as progressive.

The court has time and again emphasized on the point that it is not necessary that a relation should be there between religion and personal laws. It has also pointed out to the fact that no government in India has till date been successful in implementing uniform civil code and has accordingly

⁹³²M P JAIN, INDIAN CONSTITUTIONAL LAW, 1431 (7 ed. 2014).

⁹³³A.I.R. 1995 S.C. 1531, 1538.

⁹³⁴A.I.R. 2001 S.C. 3958.



urged the government to have a look at article 44 of the Constitution of India. The case of **Lily Thomasv. Union of India**⁹³⁵ has clarified the remarks made by Supreme Court in **Sarla Mudgal v. Union of India**⁹³⁶. The court asserted that it had not issued any direction in that case for the enactment of a common civil code.⁹³⁷

The problems faced by our country can be eradicated only if laws and present day social and political realities go hand in hand. The debate between uniform civil code and religious personal laws is further elaborated in the next chapter.

CONTROVERSIAL DEBATE OVER UNIFORM CIVIL CODE AND PERSONAL RELIGIOUS LAWS

There has been a constant debate over the prevalence of Uniform Civil Code and Personal religious laws in India. Every aspect has its pros and cons, same goes with Uniform Civil Code and Personal religious laws.

Uniform Civil Code is mentioned under Article 44 of the Constitution. With enactment of the common civil code it is said that it would curb gender injustice. It is said that one of the shortcomings of the personal religious laws is gender injustice, especially in case of Muslim women.

There have been a lot of cases in the Indian history; one of the landmark cases is the **Shah Bano case**⁹³⁸ where in how is the wife supposed to put up with her and her

children's living expenses without any kind of maintenance given to her. Ultimately, in the final judgment given by the court Shah Bano was given maintenance under section 125 of the Code of Criminal Procedure, 1973. Another important case was of **Danial Latifi v. Union of India**⁹³⁹ where it was decided that a Muslim husband was liable to maintain his divorced wife even after the period of iddat was over. Not only in case of Muslim women, but there has been gender injustice against women of other communities as well. Like in the case of Hindu women, there were no coparcenary rights for women before the amendment of 2005 in the Hindu Succession Act, 1956.

The Uniform Civil Code has been kept in the cold storage since a very long time. It's been 41 years and still no government has been able to implement Article 44 of the Constitution of India. With the enactment of Uniform Civil Code, there are going to be uniform laws for all the matters, there are going to be just and equitable laws for women. Uniformity of laws would overcome the problem of gender injustice. It would not only overcome gender injustice against women on religious basis but it would also strengthen the secular fabric of the country.

Next problem which can be diminished by enabling Uniform civil code is the problem of equality amongst the different sects of the societies. Minorities usually feel neglected because of the religious laws of the Hindus, Muslims and other major communities being prevailed over other's laws. It would simply promote unity through uniformity of laws. Some of the personal laws of the minority are not even recognized by the state.

⁹³⁵A.I.R. 2000 S.C. 1650.

⁹³⁶A.I.R. 1995 S.C. 1531, 1538.

⁹³⁷M P JAIN, INDIAN CONSTITUTIONAL LAW, 1432 (7 ed. 2014).

⁹³⁸ 1985 SCR (3) 844

⁹³⁹ 2001 AIR 3958



Unifying the laws would enable the minority being recognized in the society. There would be no distinction in the matters of marriage, divorce, inheritance, succession and maintenance. When there can be a uniform criminal code for the whole of the country then why not a uniform civil code? To nurture secularism, Uniform Civil code is certainly needed. However, it can be implemented only when there is wide acceptance from all religious communities after discussing all the pros and cons as no decision, however reformatory, could be thrust on the people without their acceptance⁹⁴⁰

On the other side are personal religious laws which have been prevailing in the country since the very beginning. For a country like India it is practically impossible to enforce Uniform Civil code. With such diverse cultures and religions spread all over the country it can get a little tough to enforce the common civil code which is going to bind all the religions and communities together and give them a common platform to deal with the civil matters. The makers of the constitution had this mindset that, India is yet to reach that stage of modernization where it can accept the common civil code and thus did not enforce it at that time. In some cases, as some minorities fear, it may lead to a situation where reconciliation is impossible, pushing the state to choose between two religious beliefs or practices.⁹⁴¹

How will the makers of the Uniform Civil Code decide which laws to compile in the code? Which religion is to be given preference? The customs and traditions of religions are very different from each other. For instance, Section 10 of the Christian Marriage Act, 1872 says that a marriage can only be solemnized between 6 am and 7 pm, isn't it common in other faiths to solemnize marriages early in the morning or late in the night? How can this be made uniform in the code? Also, it is prohibited in the Hindu law that two individuals who are related to each other, say children of siblings cannot get married to each other. Whereas Muslim law does not prohibit this. Children of siblings can get married to each other. How will this be governed under uniform civil code? There is no middle path in here. It will lead to communal riots, if Uniform Civil code gives preference to any one particular religion. Every individual thinks that their religion is the best amongst all so they would want their law to be made uniform to all. It is definitely necessary for the government to treat its citizens equally irrespective of their religion, caste or gender. It essentially means there should be uniformity of rights and not uniformity of laws. It is very difficult for the government to bridge the gap between all the religions in our country.

Flavia Agnes, a women's rights lawyer said that "It is far better to reform personal laws and ensure that laws of all communities are gender-just rather than enacting a law which is uniformly applicable to everyone across religions."⁹⁴² There might be a lot of

⁹⁴⁰ M. Venkaiah Naidu, *Why not a common Civil Code for all?*, THE HINDU, September 18, 2016

⁹⁴¹ Jayakumar Selvaraj, *A Non-Discriminatory Uniform Civil Code May Be a Step Too Far for Hindus Too*, THE WIRE, (January 19, 2017), <https://thewire.in/100520/need-for-a-non-discriminatory-uniform-civil-code/> .

⁹⁴² S. Naskar, *Aim Should Be Uniformity of Rights, Not a Uniform Law: Flavia Agnes on a UCC*, THE WIRE (October 19, 2016),



countries which are being governed by the uniform Civil Code, but for a country like India, practically it is very onerous task to impose a common civil code on the people of the country. With the present state of mind of the people it is not going to be amiable for the people to accept Uniform Civil code. As of now there is no need of the common civil code, since people do not have the kind of modernization which was required by the makers of the constitution to implement the Uniform Civil Code in India.

CONCLUSION

To summarize, Hindu and Muslim laws are not just a religion but has become our identities. There is no second opinion to the fact that uniform civil code will help us bring gender equality and also help in protecting the rights of the communities. But in a country like India which is so diverse in its nature, implementing uniform civil code will be a big challenge for which the people are not yet ready. The concept of uniform civil code looks good on paper but its enactment poses a task as easy as looking for a needle in the haystack. It has been observed, personal laws have never been a new phenomenon for the country and from beginning only people have been deriving their personal laws from their respective scriptures and holy books. With uniform code also comes the fear of communal riots and unrest in the country.

Furthermore, minority communities, in fear of extinction, such as the Zoroastrian

community have adopted the culture of marrying within themselves in order to preserve their community. Uniform civil code has failed to instill the feeling of protection amongst the minorities and in such a case, if uniform civil code becomes the law of the land their fears might become a reality. The courts through its ruling have always amendment the shortcomings of the personal law and also in the hour of need legislature has always backed these personal laws. No direct connection can be established between reforming certain personal laws and a uniform law for the entire nation. Uniformity in law has been always readily accepted where it was needed like in cases of criminal laws. By bringing uniform civil code we will be fencing the fundamental rights that have been guaranteed to its citizens under Article 25 to 30 of the Constitution of India. Therefore we can conclude that state legislative authority forms the basis of personal laws and hence just like any other state laws it can be made subjected to the Constitution.

<https://thewire.in/74183/interview-flavia-agnes-says-the-aim-should-be-the-uniformity-of-rights-rather-than-the-ucc/>.



GUILTY BEFORE PROVEN GUILTY

*By Nitin Balu
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Abstract

In the modern era of nationalism of 21st century the role of media has been considered important from the viewpoint that media is regarded as one of the pillars of the democracy. Media plays the most crucial and vital role in moulding the opinion of the society and has the ability to mould the viewpoint of whole society through which people perceive through certain happening and events. Media has always been justified in calling for the perpetrators to be punished by law without actually knowing the cause behind the development of such events. However, media cannot deviate from its objectivity and cannot seize the power as well as the function of Judiciary in imparting “justice”. The concept of media is important for free and democratic society and if media has been shackled by the government regulations is unhealthy for democracy. The strength and importance of media is well recognised in each and every sphere of life and for country like India it is essential that there exist free, independent and powerful media which at times has always been considered as the cornerstone of democracy. Media is not only the medium which expresses thoughts, emotions, opinions and views but also act as a medium in building the thoughts and opinion of all, on various topics of regional, national and international agenda. The increased role of media was aptly put in the words by Justice Billings

Learned Hand judge of the Supreme Court of America that “*The hand that rules The Press, The Radio, The Screen and the far spread Magazine, rules the country*”. *Freedom of media is indeed the integral part but it must always be obligated to respect the rights of individuals so that the right of privacy of an individual is not infringed unnecessarily at any cost.*

Introduction

John Hofsess once said that “The demi-world of journalism is like the fun house of mirrors that one finds on carnival midways. In one reflection you are too fat, in another you are absurdly thin, in another reflection you appear to have an elongated neck, in another a flat head, in still another you have next to nobody. Yet there you are, standing in front of bizarre reflection, fully formed and hearing little resemblance to any of the images before you. The difference is however, that unlike the fun house of mirrors, the distortions of media are rarely a joke⁹⁴³.” The term “media” are composite of print, sound and electronic. Print media remain as powerful as ever long with newspapers, magazine, books, periodicals events etc. But electronic media offer a rich mix of that is available around the world. News of crime is always available and media starts giving its opinion even before the police interrogate the suspect at the scene of incident. Thus such crime news generates many legal problems for the media and accused, especially when overzealous media goes beyond its limit. In the past few years there are many instances in which

⁹⁴³ 1 HERBERT ARLT & DONALD G. DAVIAU, LITERATURE AND THE FINE ARTS 289 (ELOSS PUBLICATION, 2nd MAY 2009).



media has conducted the trial of an accused and passed their verdict much before the court passes its judgement. This phenomenon is particularly known as Media trials. Some examples of media trials can be the Jessica Lal Murder case, Priyadarshini Matto, the Nitish Katara murder case and the Ayushi murder case. Such trial by media always creates an impression in the mind of people about the character of the parties to the case irrespective of the decision of the court. Thus between the advantage and disadvantage of the media trial, the debate about the constitutionality goes on.

Impact of Media Trial

1. Media trial v. Freedom of speech and expression.

In words of Blackstone “The liberty of press indeed essential to the nature of a free state. Every free man has an undoubted right to lay what sentiment he pleased before the public, to forbid this is to destroy the freedom of the press. But if be published, what is improper, mischievous or illegal he must take the consequence of his own temerity.”⁹⁴⁴

Freedom of speech and expression is always important and at many times played a crucial role in the formation of opinion, thoughts over religious, political, social and economical matters. The preamble of our Indian constitution provides liberty of thought, expression, belief, faith and worship. Justice Venkaramiah Judge of Supreme Court of India observed that

⁹⁴⁴TRIAL BY MEDIA – LEGAL DILEMNA (Jan 1, 2018, 3:29 P.M) <http://www.knowyourlaw.com/trial-by-media-legal-dilemn/>

“freedom of press is the heart of social and political intercourse. The press has assumed the role of the public educator making formal and non formal education possible in a large scale in developing the world. The purpose of the press is to advance the public interest by publishing facts and opinion without which a democratic electorate cannot make possible judgement⁹⁴⁵. The Supreme Court of India has also reiterated that freedom of press is not expressly guaranteed as a fundamental right but freedom of press has always been a cherished right in all democratic countries and has been considered as the fourth pillar of the democracy⁹⁴⁶. Therefore in the view of observation made by Supreme Court in different judgement it is a crystal clear that the freedom of the press flows from the freedom of speech and expression which is guaranteed under Article 19(1) (a).

2. Media Trial v. Fair Trial

Trial by media has always created conflict because it is a war between two essential principles - Free media and Fair trial. The “Right to fair trial” is that trial which is uninfluenced and at the same time safeguards the rights of an individual mentioned under the Part III of the Indian Constitution. The trail by media is antithesis to the most celebrated phrase of the criminal law i.e. ‘*presumption of innocence until proven guilty*’ and ‘*guilt beyond reasonable doubt*’. Media presumes accused guilty even before the trail begins and tries to impose its view on the general public.

⁹⁴⁵ INDIAN EXPRESS NEWSPAPER (BOMBAY) (P) LTD. V. UNION OF INDIA. (1985) 1 S.C.C 641 P.664, PARA32 (INDIA).

⁹⁴⁶ PRINTERS (MYSORE) LTD. V. CTO (1994) 2 S.C.C 434(INDIA).



Judges are also the part of public and they can't remain immune from the aura created by the media against the accused. The Supreme Court of India explained that a "Fair trial would mean a trial before an impartial judge, a fair prosecutor and in the atmosphere of Judicial calm"⁹⁴⁷. Right to fair trial is an absolute right which is granted to the citizens of India under article 14, 20, 21, 22 of our Indian Constitution. Article 21 in its wide interpretation considered free and fair trial to be *sine qua non of Article 21*. The Supreme Court observed that "if the criminal is not free and fair and not free from bias, the judicial fairness is at stake, shaking the confidence of the public in the system and we would be the rule of law"⁹⁴⁸. The interpretation of article 21 has considered the Trial by media to be the very antithesis of the rule of law. The Honourable Supreme Court considered the trial by media as "when sensational criminal case comes to be tried before the court, public curiosity experiences an upsurge"⁹⁴⁹. Thus under Article 19(2) the right to have freedom of speech and expression is restricted by law only in the interest of sovereignty, security, integrity of India, security of state, friendly relations with foreign states, public order, decency, morality or in relation of contempt of court, defamation or incitement to an offence. Open Justice which is facet of freedom of expression, permits fair and accurate reports of Court proceedings to be published. However, fair and accurate reporting of the trial might sometimes give

rise to substantial risk so court can prohibit temporarily the publication of court proceedings under Article 19(2)⁹⁵⁰.

3. International Convention on Fair Trials.

The concept of fair trial is also recognised by the United Nations through different conventions that were passed. According Section 6 of United Nations basic principles states that the judiciary is entitled and required "to ensure that the judicial proceedings are conducted fairly and the rights of parties are secured"⁹⁵¹. Article 19 of International Covenant on Civil and Political Rights confirms that freedom of expression is a fundamental part of democratic societies. It further elaborates that "everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information of all kinds in any form or any other media of his own choice"⁹⁵².

Position in India;

There has been plethora of cases on the point of Fair trial. The Supreme Court of India through various interpretations has considered different view point on the concept of fair Trial. The Supreme Court observed that trial conducted by the press or

⁹⁴⁷ ZAHRA HABIBULLAH SHEIKH V. STATE OF GUJARAT (2005) 2 S.C.C 75(INDIA).

⁹⁴⁸ K. ANBAZHAGON V. SUPERINTENDENT OF POLICE A.I.R. 2004 S.C. 524(INDIA).

⁹⁴⁹ STATE OF MAHARASHTRA V. R.J GANDHI, A.I.R. 1997 S.C. 3986(INDIA).

⁹⁵⁰ SAHARA INDIA REAL ESTATE CORPORATION LTD. V. SECURITIES EXCHANGE BOARD OF INDIA A.I.R. 2012 S.C. 3829(INDIA).

⁹⁵¹ UNITED NATIONS BASIC PRINCIPLES ON INDEPENDENCE OF JUDICIARY, G.A. RES. 146 AT 40TH SESSION(1985) ARTICLE 6

⁹⁵² ADOPTED AND OPENED FOR SIGNATURE, RATIFICATION AND ACCESSION BY GENERAL ASSEMBLY RESOLUTION (XXI) OF 16TH DECEMBER 1966. ENTERED INTO FORCE ON 23 MARCH 1976 IN ACCORDANCE WITH ARTICLE 49.



electronic media is very antithesis to the rule of law. It can lead to miscarriage of justice. A judge has to guard himself against the pressure and is to be guided strictly by laws⁹⁵³. The Honourable Supreme Court of India in the case of *Rajendra Sail vs. Madhya Pradesh High Court Bar Association and Others*⁹⁵⁴ observed that *the rule of law and for orderly society, a free and responsible press and an independent Judiciary are both indispensable and both therefore have to be protected.*

4. *Media Trial v. Contempt of Court.*

Sometimes the trial by media gives rise to destroy the dignity of the court which may be referred as a contempt of court. This contempt can be civil and criminal. Thus in certain cases media interferes with judicial process. Thus the principle of natural justice "every accused has a right to fair trial" when clubbed with the principle that "Justice may not only done but seems to be done" give a right to the Media to have trial. But at many times this trial has been held unconstitutional by the Supreme Court of India. Chief Justice of Andhra Pradesh High Court Gopal Rao Ekkbote observed that "when litigation is pending before the court, no one shall comment on it in such a way that there is real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses in general against the party to cause action"⁹⁵⁵.

⁹⁵³ *STATE OF MAHARASHTRA V. RAJENDRA JAWANMAL GANDHI* (1997) 8 S.C.C 386(INDIA).

⁹⁵⁴ (2005) 6 S.C.C. 109(INDIA).

⁹⁵⁵ *Y.V. HANUMANTHA RAO V. K.R. PATTABHIRAM AND ANR*, A.I.R.1975 A.P. 30(INDIA).

5. *Constitutionality of Media Trials.*

***Freedom of Press;** The press as well as media has gained freedom from international conventions and charters as well. Article 19 of Covenant of Civil and Political Rights, 1966 embodies the right "that everyone shall have the right to hold opinions without interference" and the freedom to seek, receive, and impart information of all kinds in any form or through any media. But this freedom comes under certain restrictions with special responsibilities and duties and is subjected to "right or reputation of others". In *Re: Hariji Singh and Anr. And In Re: Vijay Kumar*⁹⁵⁶. The Supreme court held that the freedom of press can be recognized as, "an essential prerequisite of a democratic form of government" and regarded it as "the mother of all other liberties in a democratic society". The Supreme Court of India in *Anukul Chandra Pradhan v. Union of India*⁹⁵⁷, observed that "No occasion should be taken for an impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial"

***Immunity under Contempt of court Act 1971;** Under the Contempt Of court act 1971, all the pre trials and publications conducted by press and media was held unconstitutional as they destroy the dignity of the court and more or less harm the reputation of the parties to the particular

⁹⁵⁶ (1996) 6 S.C.C. 466(INDIA).

⁹⁵⁷ 1996 (6) S.C..C 354(INDIA).



case. Thus any publication or pre trials that tend to obstruct the course of justice in connection with civil and criminal proceeding which is pending in the court constitutes the contempt of court under section 3(2)(b) of this act. For example in the murder case of Ayushi Talwar⁹⁵⁸ the media came up with different reports like the character of the parties, strength of parties and with different evidences, which proved pre judicial to the case of the parties. In spite of this, these publications were granted immunity. This publication may harm the judicial system if they are not restricted to certain level.

The Public Right to Know: The Supreme Court of India has expounded the fundamental principle behind the freedom of press that is the people right to know the certain facts which still are unrevealed⁹⁵⁹. The Supreme Court observed that “The primary function therefore of the press is to provide comprehensive and objective information of all the aspect of country’s political, social, economic and cultural life. It has an educative and mobilising role to play in moulding public opinion⁹⁶⁰.”

200th Law Commission Report: The law commission in its 200th Report has referred a

special reference towards “Trial by Media; Free Speech versus fair Trial under criminal Procedure (amendment to the contempt Of courts act 1971), has recommended a law to debar the media from reporting anything prejudicial to the rights of accused in a criminal case, from the time of arrest to investigation and trial. The commission in its report ales said that “ that there is a view of the extensive use of television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have a prejudicial impact on the suspects, accused, witnesses and even judges in general administration of justice”⁹⁶¹. The Supreme Court in the best bakery case⁹⁶² contended that the concept of fair trial is a constitutional imperative recognise under Article 14, 19, 21, 22 and 39(A) of the constitution of India. The Supreme Court in the Rajendra sail case⁹⁶³ observed that “for rule of law and orderly society, a free press and independent judiciary are both indispensable”.

Media Trial; A necessary evil. Trial by media has been regarded as necessary evil. But many big scams were uncovered by media and judiciary merely followed them up. One of the advantages of having strong and independent press is that people are now aware of their rights owing to the fact that these people are exposed to lot of information as being provided by media. But the fact remains that media in the 21st century are regulated by some other means and completely involved them in profit oriented business. The Supreme Court stated

⁹⁵⁸ DR. RAJESH TALWAR AND ANOTHER V. CENTRAL BUREAU OF INVESTIGATION, 2013(82) A.C.C.303(INDIA).

⁹⁵⁹ A.G. V. TIMES NEWSPAPER, (1973) 3 ALL E.R. 54; EXPRESS PUBLICATIONS (MADURAI) LTD. V. UNION OF INDIA, A.I.R. 2004 S.C. 1950, PARA 29; SECRETARY, MINISTRY OF INFORMATION AND BROADCASTING, GOVT. OF INDIA V. CRICKET ASSOCIATION OF BENGAL, A.I.R. 1995 S.C. 1236, PARA 4.

⁹⁶⁰ IN RE: HARIJAI SINGH AND ANR. IN RE: VIJAY KUMAR, (1996) 6 S.C.C. 466, PARA 10(INDIA).

⁹⁶¹ 200TH LAW COMMISSION REPORT ON 3RD NOVEMBER 2006.

⁹⁶²(2005) 2 S.C.C. 75(INDIA).

⁹⁶³ (2005) 6 S.C.C. 109(INDIA).



that it is acceptable that the media should be independent and free but they can't come in the way of judiciary in exercising its function in the judicial process. Therefore it is in the media interest to ensure that the administration of justice is not undermined.

temptation to sell stories, 'what is presented is what public is interested in' rather than 'what is in public interest'.

Conclusion

From the above account it is clear that modern media has more negative role to perform in the modern society in transforming the opinion of the people. Media has been entrusted with the right of freedom of speech and expression but they cannot be given free hand in exercising the function of judiciary. It is the moral duty of the media to acknowledge everything before publishing and moreover reveal the truth in each and every case rather than manipulating words for the business purpose. The most suitable way of restricting media from exercising trial is to exercise contempt of court those who violate the basic conduct of the court. The observation of Mr. Andrew Belsey in his article "Journalism and ethics" quoted by Delhi High Court⁹⁶⁴ aptly describe the state of affairs of today's media. He says that journalism and ethics stand apart. While journalistic are distinctive facilitators for the democratic process to function without hindrance the media has to follow the virtues of accuracy, honesty, truth, objectivity etc. But the practical considerations that is to be taken up are namely as pursuit of successful career, promotion to be obtained are recognised as the factors "for temptation to print trivial stories salaciously presented". In the

⁹⁶⁴MOTHER DAIRY FOODS & PROCESSING LTD V. ZEE TELEFILMS 2005 (80) D.R.J. 74(INDIA).



**ENVISAGING A SYSTEM OF UNIVERSAL
HEALTH COVERAGE IN INDIA:
ON THE LINES OF THE UNITED KINGDOM'S
NHS AND SOUTH KOREA'S NHIS**

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ABSTRACT

With the large-scale rise in globalisation and urbanisation, and intensive growth of population, a need for quality health care accessible to all sections of a society has become the essential. However, equity in such access is largely absent and still impossible in many countries around the world. Individuals and families are being pushed into extreme stages of poverty due to such cost burdens. The situation in India is no less. Several thousands of Indian families are either over-burdened with exponentially rising health care costs or voluntarily move towards a fatal end out of fear of such burden. In this regard, the need for a nation-wide accessible Health Coverage scheme is of the highest importance.

INTRODUCTION

“In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligation.....”⁹⁶⁵

⁹⁶⁵Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37 (India).

‘Health care for all’ has for long formed a fundamental basis of goals for any democratic welfare state. While this aspect of health care for all is and has not been achievable in its fullest sense, the underlying objective for most nation-states today is towards an all-accessible health care system in function. This is all the more evident from the third Sustainable Development Goal⁹⁶⁶ agreed upon by the members of the United Nations in 2015 to work for all-round health care development.

In India, much has been done to ensure an accessible and adequate standard of health care, however it is observed that we are far from achieving a complete blanket cover for all Indians and people of India in the delivery of health care. It can never be denied, that in spite of this slow evolving system, the necessity for it has always been felt and reiterated both Constitutionally and later judiciously.

Article 47 of the Constitution of India⁹⁶⁷ states that, “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties....” Although this provision as a part of the Directive Principles of State Policy is not enforceable, it has always put on a certain form of expectation in this regard from the Government and has paved the way for several necessitating opinions on this issue. The apex court in a case⁹⁶⁸ read

⁹⁶⁶Goal 3: Ensure healthy lives and promote well-being for all at all ages,
<http://www.un.org/sustainabledevelopment/health/>
Accessed on 03/01/2018.

⁹⁶⁷INDIA CONST. art. 47.

⁹⁶⁸Kirloskar Brothers v. Employees State Insurance Corp., (1996) 2 SCC 682 (India).



together Articles 47 and 21 and has culled out therefore from the obligation on the State to provide better health services to the poor⁹⁶⁹. The Supreme Court further observed in a case⁹⁷⁰,

”.... Maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore is of high priority – perhaps the one at the top.”

It is with these landmark observations that it is right to envisage an India with a guarantee of universal health delivery, and in so obtaining it, keeping with the spirit of our Constitution-makers, due understanding and guidance of successful models in other nations can be further helping in understanding a perfectly suitable system for India.

UNIVERSAL HEALTH COVERAGE (UHC)

UHC as per the explanation provided by the World Health Organisation (WHO) is that all individuals and communities receive the health services they need without suffering financial hardship. It includes the full spectrum of essential, quality health services, from health promotion to prevention, treatment, rehabilitation, and palliative care.⁹⁷¹ The UHC is a fundamental

development from the 1948 WHO Constitution which declared health a fundamental human right and committed to ensuring the highest attainable level of health for all.

As is a scenario often seen in India, the large financial burden generally associated with diseases pushes people into extreme poverty as a consequence of shelling out most of their life savings into medical costs. The WHO, as an aspect of the UHC aims to prevent this risk by protecting all people with a health coverage. It has been estimated that nearly 100 million people⁹⁷² are pushed into such ‘extreme poverty’ every year all over the world owing to the influence of large medical costs. To battle this, as seen earlier, the UN member states assumed the UHC as an SDG to be achieved by the year 2030.⁹⁷³

One primary aspect of emphasis is that a UHC system in any country does not attempt to cover all health interventions regardless of costs, as it would be impossible to do so on a long term sustainable basis.

Further the WHO provides several aspects as to cover UHC funding and its implementation. However, a better understanding of a working UHC system can be seen in the models of the National Health Services (NHS) in England and the National Health Insurance Service (NHIS) in South Korea).

⁹⁶⁹M P JAIN, INDIAN CONSTITUTIONAL LAW 1435(Lexis Nexis 7th Ed.2014).

⁹⁷⁰Vincent PanikurLangara v. Union of India, (1987) 2 SCC 165 (India).

⁹⁷¹Fact Sheet on Universal Health Coverage (UHC) by WHO as updated in December 2017,

<http://www.who.int/mediacentre/factsheets/fs395/en/>
Accessed on 04/01/2018.

⁹⁷²Supra note 7.

⁹⁷³Supra note 2.



NATIONAL HEALTH SERVICES (NHS) – ENGLAND

While the NHS system exists all over the United Kingdom as four organs NHS Wales, NHS Scotland, Health and Social Care in Northern Ireland and NHS England, studying the model of application is England provides a comprehensive view. The NHS traces its roots back to the period immediately following the Second World War. It has been believed that the people during the war-time were so used to complete governmental control in every aspect of their lives that it felt natural for a complete control over health care too.

The seedling for the NHS can be seen in the Beveridge Report of 1943 which deliberated on several matters for post-war recovery, in an intent to establish the UK to a 'welfare state'. The Report envisaged a social insurance system from 'cradle to grave'⁹⁷⁴. It proposed that all working people would pay a weekly contribution to the government, and this fund would in turn be utilised for all persons of the society. This system was formulated on the basic tenet that no person would fall below a minimum acceptable standard of living. Although the evolution of this system shows strains of communist values, the government and social mood during that period was largely towards the development of a welfare state, which provided welfare for all.

The NHS system with the exception of a few services such as prescriptions, optical and dental service remains free 'at

the point of use' for all residents of the UK, which estimates to almost 64.6 million people.⁹⁷⁵

The funding for the NHS is mainly from general taxation and National Insurance contributions. As said earlier, the few services that are charged to the patient contribute very small amounts to the fund. In 2015, the patient charges constituted on 1.1% of the total fund⁹⁷⁶

NATIONAL HEALTH INSURANCE SERVICE (NHIS) – SOUTH KOREA

The system of UHC in South Korea can be exemplary in many aspects, the first being that in a short span of 12 years after introducing 'social health insurance', a state of complete health coverage could be achieved. The beginning of an intent to roll out a UHC system can be observed in the 1963 Social Security Act enacted by the then military government. However, no implementation was seen until the 1970's. One aspect of great interest is that implementation of a social insurance was initiated at the industrial level. In 1976, all corporations with 500 or more employees had to undertake the task of ensuring that all of them had an insurance. This process slowly was inculcated in other corporations finally coming down to even the self-employed and the unemployed, as a part of Medicaid. In this aspect, all sections of the society were brought under the ambit of the UHC.

⁹⁷⁴ The Welfare State, http://www.nationalarchives.gov.uk/pathways/citizenship/brave_new_world/welfare.htm, Accessed on 04/01/2018.

⁹⁷⁵ About the NHS, <https://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx>, Accessed on 04/01/2018.

⁹⁷⁶ Annual Accounts and Reports, Dept. of Health, 2016, as presented to the House of Commons (UK)



Contrary to popular belief, it has been observed that in South Korea, the existence of an authoritarian political regime aided in the development of the NHIS rather than the Western idea of labour parties or class struggles and revolution for change, which in fact was non-existent in South Korea⁹⁷⁷

Until 2000, where are insurance schemes were merged into one common NHIS, the insurance categories could be viewed as three, first being for government employees and organisations with large number of employees, and teachers; second being for self-employed individuals and employees of small businesses, generally less than 5 members, this division for small members came as a result of preventing excessive burden on the small business owners. Finally, came the government-aided Medicaid form of insurance for the poor and unemployed. Contribution to the insurance schemes were generally wage-based.

In 2000, a reform to amalgamate all insurance schemes was brought about unifying it into one system under the banner of National Health Insurance Corporation (NHIC) which catered to all sections through a proportionate contribution. It was fully implemented by the year 2004.⁹⁷⁸

PRACTICABILITY AND APPLICABILITY OF A UHC SYSTEM IN INDIA

⁹⁷⁷ Soonman Kwon, Thirty years of national health insurance in South Korea: lessons for achieving universal health care coverage, *Health Policy and Planning*, Volume 24, Issue 1, 1 January 2009, at 63

⁹⁷⁸ National Health Insurance System of Korea, 2014, http://www.coopami.org/en/countries/countries/south-korea/social_protection/pdf/social_protection05.pdf. Accessed on 05/01/2018.

Since the adoption of the Constitution in 1950, and even before, the need to establish India as a welfare state has been stressed upon. As a primary aspect of a welfare state, public health has always been one of high importance. Much has been achieved in scientific and technological advancements paving way to a higher standard of health care, however, India is far from achieving accessible health care for all.

While much has been deliberated on this issue, beginning from the landmark recommendations of the Bhore Committee in 1946 which modelled a complete change to the Indian healthcare system including integrating all services⁹⁷⁹, it can be observed that there has been no concrete development as to this regard.

In 2014, the Modi government announced the establishment of a National Health Assurance Mission with an aim to provide a UHC. A year later, however, the scheme could not be launched due to budgetary issues⁹⁸⁰. There has been recent upheaval in this regard with certain states within India attempting to form a particular coverage scheme⁹⁸¹, however, there has been not unified implementation on a national scene.

⁹⁷⁹ The Bhore Committee Report of 1946, https://www.nhp.gov.in/bhore-committee-1946_pg, Accessed on 05/01/2018.

⁹⁸⁰ Modi govt puts brakes on India's universal health plan, 27/03/2015, <https://in.reuters.com/article/india-health/exclusive-modi-govt-puts-brakes-on-indias-universal-health-plan-idINKBN0MM2UT20150327>, Accessed on 05/01/2018.

⁹⁸¹ Realising Universal Health Coverage in Karnataka, <https://thewire.in/190444/realising-universal-health-coverage-karnataka/>, Accessed in 06/01/2018.



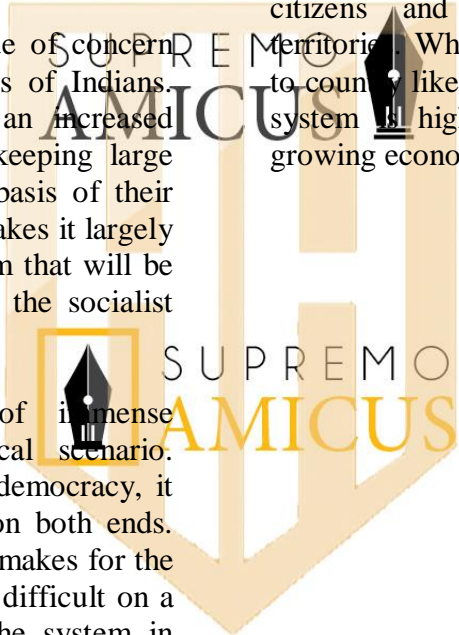
Before the implementation of any such coverage programmes, it is essential to understand the exact socio-economic and political condition of India. It is a well-known fact that India is home to a large private sector, and the health care service, more aptly 'industry' is no less. Therefore, the application of a nation-wide health coverage may face several obstacles on the end of such private hospital corporations. A principle followed in South Korea may be applicable, wherein private hospitals retain their licensing on the basis of following the NHIS guidelines.

Another important issue of concern is that of the economic status of Indians. Over the last few decades, an increased disparity has been observed keeping large gaps between people on the basis of their wealth levels. This disparity makes it largely difficult to introduce a program that will be suitable to all, while keeping the socialist intent of the country intact.

Finally, as aspect of immense importance is of the political scenario. While India follows a strong democracy, it brings about a disadvantage on both ends. The constant change of power makes for the implementation of any system difficult on a long term. As seen earlier, the system in South Korea was largely kicked off successfully due to the 'authoritarian political regime'. While such a regime is deterrent, it is necessary that an iron-hand be weld for the establishment of such system. However, on the other hand, the presence of industrialist-supported politicians further hinders the process of unifying all funding and healthcare providers under one system.

CONCLUSION

A lot has been deliberated over the international intent of the Universal Health Coverage, and its implementation in countries like the United Kingdom and South Korea. Such successful health care models exist in several other countries including Canada, Denmark, Switzerland, etc that have been able to achieve a sustainable health care system catering to all people. As was begun with, no country can truly call itself a welfare state, without looking out to cover the health care of its citizens and all people within their territories. While no model can be tailor fit to country like India, the necessity of such a system is highly essential with the ever-growing economy and resources of India.





SECTION 498A IPC – HELP OR HINDRANCE

By Palak Joshi

From University of petroleum & Energy studies

INTRODUCTION

Family is contemplated to be the commencement stone of the society and wedding is one in all the first tools utilized in enlargement of family however having aforementioned that the muse of wedding has undergone monumental changes within the previous few decades. wedding is that the deliberate union forever of 1 man and girl to the exclusion of all others.

it's aforementioned to be a sacred and pious commitment created by the spouses towards one another. it's thought-about to be the social alliance between 2 families. however, because it is splendidly far-famed that each coin has 2 aspects, thus there's presence of each sensible and unhealthy facet of a specific act.⁹⁸² The establishment of wedding is stricken by a significant social evil i.e. dowry, it's definitely that cash or property brought by a girl to her husband's house at the time of wedding, and for gift husband typically exercises physical additionally as mental cruelty on mate. girls ar maltreated, harassed, divorced, and killed for the easy reason that they didn't brought gift.

This section was ab initio enacted to combat the menace of gift deaths. it had been initial introduced within the Code by the legal code modification Act, 1983. By the virtue of same Act section 113-A has been further to the Indian proof Act for raising the presumption concerning instigation of suicide by a partner. For securing the interest of girl against the cruelty they face in their married home, the Indian legal code, 1860 was amended in 1983 and inserted Section 498A that deals with 'Matrimonial Cruelty' to a girl.⁹⁸³

Matrimonial Cruelty could be a cognisable, non compoundable and non bailable offence. it's outlined beneath Section 498A as:

Husband or relative of husband of a girl subjecting her to cruelty: Whoever is that the husband or the relative of the husband, subjects such girl to cruelty shall be disciplined with imprisonment which can reach 3 years and shall even be prone to

fine.⁹⁸³
Explanation: For the aim of this section, "cruelty" means—

(a) Any wilful conduct that is of such a nature as is probably going to drive the lady to kill or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the lady wherever such harassment is with a read to coercing her or a person associated with her to fulfill any unlawful demand for any property either tangible or intangible or any valuable security or is on account of failure by her or

⁹⁸² Joy Sarker, *A Doctrinal Research on Section 498a IPC, 1860 - A critical Analysis*, October 7, 2014.

⁹⁸³ Law warrior, *Section 498A I.P.C. - Its Use & Misuse*, February 25, 2011.



a person associated with her to fulfill such demand.

An analysis of the section makes it comprehensive that the whole section is based upon four basic issue of law they're as follows:-

Any action, gesture or conduct that's doubtless to cause any reasonably grave injury to the limb, life or health of a girl

Any action, gesture or conduct that's doubtless to drive a girl to kill.⁹⁸⁴

Harassment is caused to the lady and her family with the intent of extracting some property

Harassment caused to the lady or her family within the event of not having the ability to yield to the demand of cash or of any property.

The section came into force to combat the peril of gift deaths. it had been introduced within the code by the legal code modification Act, 1983. By the previous act solely section 113-A has been further to the Indian proof Act to lift presumption concerning instigation of suicide by partner. the first objective of section 498-A of I.P.C is to safeguard a girl World Health Organization is being pestered by her husband or relatives of husband.

REASONS BEHIND INSERTION OF SECTION 498 A

The main purpose of section 498-A of I.P.C is to safeguard a girl World Health Organization is being pestered by her husband or the relatives of husband. For the

⁹⁸⁴ Indian Penal Code, 1860 Section 498 A.

target of this section 'dowry death' shall have the similar that means as in section 304-B of the Indian legal code. The purpose that section 498A IPC was introduced is comprehensively mirrored within the Statement of Objects and Reasons whereas enacting legal code Act. As plain declared in this the increasing range of gift deaths could be a matter of significant concern.⁹⁸⁵

"The purpose of the supply is bar of the gift menace. however as has been properly contented by the petitioner that a lot of instance have come back to lightweight wherever the cases don't seem to be genuine and are filed with another oblique motive.

With the intention of kerb this atrocious crime of gift harassment and positively gift deaths Parliament within the year 1986 inserted section 304B to avoid the murder following the gift so in 1983 Section 498A was enclosed in Indian legal code with the intention of shaping cruelty additionally as U P harassment that has been a typical event in a very married relationship. Parliament has established a brand new Chapter XXA named cruelty by husband or relatives of husband in IPC, 1860 so as to create cruelty against girls punishable.⁹⁸⁶

(VII) MENS-REA: a crucial component OF SECTION 498-A, I.P.C.

The intent to injure is that the most significant component of cruelty contemplated beneath section 498-A, I.P.C. the only constituent of the offence beneath sec. 498-A is 'cruelty' that mean 'wilful

⁹⁸⁵ Anonymous, Section 498A I.P.C.- Its Use & Misuse, 25 FEBRUARY 2011.

⁹⁸⁶ Anonymous, cruelty by husband or relatives of husband, May 05, 2015.



conduct⁹⁸⁷. The word wilful contemplates obstinate and deliberate behavior on the a part of the bad person for it to quantify to cruelty. therefore 'Mens-rea' is a necessary ingredient of the offence. although intention to cause injury isn't a necessary ingredient regard could also be had on the particular intention or information on the a part of the offending married person on act or the probable impact whether or not it might cause injury to physical or mental state. once more acts or conduct ought to be judged from the angle of someone possessing normal intellectual capabilities.

Requirement of planning the principles ar that:

(a) The standards of proof of cruelty ar a lot of higher in degree to prove on the far side affordable doubt in legal code than in civil law beneath the married causes.

(b) The intention of planning on the a part of either married person to injure the opposite, isn't a necessary component of cruelty, in civil law for married cases, whereas it's a primary component in legal code.

(c) it's enough if cruelty is evidenced by contradiction, preponderance and certification of chances in civil law whereas in criminal cases the conduct of cruelty has got to be evidenced on the far side all affordable doubt; and⁹⁸⁸

(d) For the help in married case in civil law the conduct of either married person needn't essentially lead to any reasonably danger of

life, limb or health, however a mere affordable apprehension of such a danger is ample, whereas in Section 498-A, I.P.C., it contemplates such a conduct besides being 'Wilful' to finish within the chance of lashing the lady to cause either suicide or grave injury or danger to either life, limb or health.

CONSTITUTION VALIDITY OF SECTION 498A

The issue in relation with women's rights and family law reforms has been progressively tangled at intervals the polemics of politics and minority rights. it's correct that the hardship and sufferings fully fledged by girls of all the communities, minority and majority, can't be neglected with the assistance of persuasive or effective freedom of faith. Section 498 A explains that Cruelty includes each physical additionally as mental torture. Wilful conduct in clause (a) to section 498A, I.P.C. may be inferred from direct or evidence. The word cruelty within the rationalization connected with the section has been given a wider that means.⁹⁸⁹

In Kaliyaperumal vs. State of state⁹⁹⁰, that cruelty is a normal essential in offences beneath each the sections 304B and 498A of Indian legal code. each the sections don't seem to be reciprocally inclusive however definitely each of them ar completely different offences and therefore the persons World Health Organization get clean-handed beneath the section 304B for the crime of gift death may be condemned for AN offence beneath section 498A of IPC. The

⁹⁸⁷ BHASKAR RAO,J, Basic ingredient of offence punishable u/s 498A of IPC, 13 December 2012.

⁹⁸⁸ K.A. Pandey, The Problem Behind Dowry Deaths Law, 2011.

⁹⁸⁹ Akshay Goel, Matrimonial cruelty-section 498a of ipc, February 11, 2012.

⁹⁹⁰ 1995 CriLJ 4021.



gist of cruelty is given in rationalization to section 498A.

In the landmark case of Inder Raj Malik et al vs. Sunita⁹⁹¹, it had been aforementioned that this section is ultra vires to Article fourteen and Article twenty (2) of the Indian Constitution. Law has enacted gift Prohibition Act, 1961 that deals with cases associated with gift and married cruelty; thus, each these statute along creates a scenario and a far-famed issue the prosecution. however urban center supreme court opposed this rivalry and command that this section doesn't produce any such scenario for prosecution. Section 498-A is clearly distinguishable from Section 4 of the gift Prohibition Act as a result of in this act sheer demand of gift is punishable and therefore the primary presence of the component of cruelty isn't needed, whereas in section 498-A it deals with AN altogether alternative style of the offence. It tends to penalise such demands of land, expensive tangible, intangible property or valuable security from the mate or her family as ar let alone cruelty to her. thus a private may be prosecuted in respect of each the offences that ar punishable beneath section four of the gift Prohibition Act and section 498 (A). it had been therefore command that though, this section offers a far wider discretion to the courts within the matters of analysing of the words occurring within the laws and additionally in matters of subsidization penalization.

Likewise, its constitutionality was challenged in Polavarpu Satyanarayana v. Soundaravalli⁹⁹² wherever it had been

command once more that 498A isn't ultra vires to the constitution.

In Surajmal Banthia & Anr. Vs. State of state⁹⁹³, the deceased was maltreated and agonised for many days and not given food for a protracted time The court thereby acknowledged that this type of treatment is visaged by many young brides once they move from their parent's house to her in-laws, and later on the husband and father was command liable beneath section 498- A.

Allahabad supreme court in Vijai Ratna Sharma v. State of province⁹⁹⁴ took a realistic read within the criminal continuing admitted by a gift victim, by doing away with the technicalities of jurisdiction within the matter. The court sraped aside the argument of lack of jurisdiction on the technical grounds and command that since from the start, the gift demand had been living and therefore the later behaviour was AN ultimate and expected consequence, all the offences may be tried along.

Later Supreme Court in Bhagwant Singh v. Commissioner of Police⁹⁹⁵, command that the insatiability for gift and therefore the gift system as AN society incorporate the severest condemnation and conviction by all sections.

Supreme Court command in Mohd. Hoshan vs. State of A.P.⁹⁹⁶command that "Whether one married person has been responsible or is guilty of cruelty to the opposite is basically an issue of reality. The impact of accusation, complaints or taunts on someone

⁹⁹¹ 1988 Cr.L.J 1538 (AP).

⁹⁹² II (2003) DMC 546 (DB).

⁹⁹³ 1988 Cr.L.J 1581.

⁹⁹⁴ AIR 1983 SC 826.

⁹⁹⁵ 2002 Cr.L.J 4124

⁹⁹⁶ JT 2005(6) SC 266



amounting to degree of cruelty depends on various factors just like the sensitivity of the victim, the social background, the education, setting, etc. Also, mental cruelty varies from person to person relying upon the force and intensity of the sensitivity, degree of spirit, audacity and endurance to survive such cruelty. each case has got to be determined on its own facts whether or not mental cruelty is created out”

CORRELATION OF VARIOUS SECTIONS WITH 498 A

Co-relation between section 302 and 498A Indian legal code 1860:

In *ThatiKonda v. State of A.P* there was a quarrel between the mate and therefore the husband and therefore the husband wished to perform second wedding. it had been a robust circumstance for the mate to kill and for the husband to try to to away along with his mate. As favourable read to the defendant is to be taken and it's clear that the husband wished to marry 2ndtime, it amounts to cruelty.

Co-relation between section 304b and 498A Indian legal code 1860:

The two provisions don't seem to be reciprocally inclusive . They subsume completely different and distinct offences. Persons charged beneath section 304B however clean-handed may be condemned beneath section 498A IPC, 1860 even in absence of any charge. The deceased are subjected to cruelty by her husband and relative-in-law over the demand of maruti automotive as gift and persistently ironed by them when concerning six months of the

wedding and continue until her death. defendant was condemned beneath 304B and 498A IPC, 1860.

Co-relation between section 306 and section 498A Indian legal code, 1860:

Distinction between section 306 IPC, 1860 and section 498A IPC, 1860 is that of intention. beneath the latter, cruelty committed by the husband of his relations drag the lady involved to kill, whereas beneath the previous provision suicide is abetted and supposed.

SECTION 498A and therefore the ALLEGATION OF MISUSE

The Sections 498A and 304B of the Indian legal code additionally because the Protection of ladies against force Act, 2005, ar closely connected legal and judicial provisions designed to forestall the interests of a partner in Republic of India. they're important considering the big range of ladies that suffer the agony of force physical, verbal, sexual, mental, emotional at the hands of their husbands or his relatives or family.

The Indian judiciary, right from the court upto the apex level has expressed concern over the matter of misuse of Sec. 498-A I.P.C in its recent judgments. In their judicial observations and remarks, the courts have expressed deep anguish over this law. However, there's neither reliable knowledge nor empirical study to prove the extent of the alleged misuse, nor have the judiciary through their judgments offered any knowledge to support this conclusion.

In all, the institutional response to Sec. 498-A I.P.C has been that ladies ar “misusing the



law". within the case of Savitri Devi vs. Ramesh Chand⁹⁹⁷, the Hon'ble urban center supreme court had flatly declared that the supply has been ill-used to "...such AN extent that it's touching at the muse of wedding itself and has evidenced to be not thus sensible for the health of the society at large". within the same judgment, the court had counselled to the authorities to review Sec. 498-A, that court was of opinion that "thousands of marriages are sacrificed at the altar of this provision".

In Sushil Kumar Sharma vs. Union of India ⁹⁹⁸, the Hon'ble Supreme Court declared that "...it is important for the general assembly to seek out ways in which however the manufacturers of trivial complaints or allegations may be befittingly dealt with". Similarly, within the case of Preeti Gupta State of Jharkhand, the Hon'ble Supreme Court discovered that "It could be a matter of public knowledge that exaggerated versions of the incident ar mirrored in a very sizable amount of complaints. The tendency of over implication is additionally mirrored terribly} very sizable amount of cases". As already declared, no knowledge has been collected nor evaluated to warrant that the majority complaints ar created on trivial grounds. Surveys like the National Family Health Survey foreground the seriousness and impact of force on girls. The study indicates that the majority girls don't seem to be receptive coverage cases of force to police. This solely reinforces that ladies ar compelled to file a proper grievance only if the violence committed by their married person or their family takes a flip of event,

changing into so much graving tool AND intolerable for the ladies to not keep in an abusive relationship. Secondly, one doesn't consider that the overwhelming increase of complaints over the years could also be attributed to growing awareness among girls about the law. Statements like these replicate institutional bias that exists at intervals the criminal justice system. Instead, they flip a blind eye to the insufficiency that exists at intervals the system in handling cases of violence against girls. ⁹⁹⁹

In last twenty years of legal code reform features a common argument created against laws with reference to protection of violence against girls has been that ladies tend to misuse these laws. The police, politicians, civil society and even judges of the supreme court additionally as Supreme Court have offered these arguments of the misuse of laws fervidly. The allegation of misuse is created significantly against Section 498A that is to safeguard a girl World Health Organization is being pestered by her husband or the relatives of husband and against the offences of gift death in Section 304B. One such observation was expressed by former Justice K T Thomas in one in all his article titled 'Women and therefore the Law', additionally the 2003 Malimath Committee report on reforms within the criminal system additionally noted, significantly, that there's a "general complaint" that Section 498A of the IPC is subject to foul misuse; it used this as rationalization to counsel AN modification to the individual provision, however

⁹⁹⁷ 2014) 8 SCC 273.

⁹⁹⁸ JT 2005(6) SC 266

⁹⁹⁹ Vishvesh, MISUSE OF SECTION 498A, July 13, 2016.



provided no knowledge to specify however oftentimes the section is being ill-used.

Again Supreme Court, in a very moderately recent case of, Sushil Kumar Sharma vs. Union of India¹⁰⁰⁰ et al, discovered that: “The object of the supply is to securing of the gift menace. however as has been accurately contented by the petitioner that there ar several instances that have come back to lightweight wherever the complaints don't seem to be genuine in nature and are filed with oblique motives. In such cases the final judgment of the defendant doesn't wipe out the shame or humiliation suffered throughout and before the trial. typically adverse media coverage adds up to the misery. The question, consequently, is what measures may be taken to forestall abuse of the well-meaning law. just because the supply is constitutional in nature and intra vires, doesn't provide AN authorization to unscrupulous persons to use personal feud or unleash harassment. It may, therefore, become essential for the general assembly to seek out out measures as in however the manufacturers of trivial complaints or allegations may be properly addressed.

The Supreme Court in a very recent judgment in Arnesh Kumar v. State of state and Anr¹⁰⁰¹ command that no arrest ought to be created without delay within the offences that ar allegedly committed by the defendant and therefore the offence is cognisable and non-bailable, with explicit regard to Section 498A. It provided sure tips for the police to follow in cases associated with the arrests created beneath this section, owing to increasing range of false complaints.

Of course, from the previous few years, united efforts are created to discredit the complaints filed beneath them on the grounds that Section 498A, inparticular, is being ‘misused’ by purportedly revengeful wives and daughters-in-law. In fact, even the Supreme Court issued AN order in July 2014 preventing the arrest of the husband or his relations until there have been ample and valid reasons.

One of the grounds on that the Apex Court gave its judgment was the 2013National Crime Records Bureau (NCRB) knowledge. Jayna Kothari, a Bengaluru-based litigant, elaborates, “The NCRB knowledge, that the Supreme Court spoken whereas saying the judgment concerning 498A, reveals that in 2013, around ninety three p.c cases of crimes against girls were set-aside beneath section 498A. Among them, the defendant was condemned in precisely i.p.c of the cases.”

CONCLUSION AND SUGGESTIONS

The establishment of wedding is not any longer thought-about a sacred union of 2 hearts however has rather become a lot of of a civil contract between 2 people in literal sense of the term wherever one is duty-bound to a different to perform legal right.

No matter however arduous we have a tendency to might try and sweep the uneasiness of gift, gift connected deaths and force beneath the carpet, the tough reality of them being still extremely prevailing, among all strata of society, remains. Sec.498-A and alternative legislations just like the Protection of ladies from force Act are specifically enacted with the thing of protective a vulnerable section of the society (read ‘women’, and ‘married women’ in

¹⁰⁰⁰ JT 2005 (6) SC 266

¹⁰⁰¹ (2014) 8 SCC 273.



particular) that has been the victim of cruelty and harassment. If the rigour of such provisions is diluted, the social purpose behind them are lost.

The abuse or misuse of law isn't peculiar to the present provision alone. it's necessary to illustrate that partner solely ventures to travel to the police headquarters to create a grievance against her husband AND alternative shut relations out of an abject sense of despair; and when being left with no alternative remedy against cruelty and harassment disbursed to her. In such a scenario, the present law ought to be allowed to require its own course, instead of succumbing to a reflex reaction to its misuse in some cases. there's additionally a sound apprehension expressed that when the offending relations get to understand concerning the existence of a grievance of such a nature; there's a awfully real risk of a backlash within the style of additional torture of the litigant and her life and liberty could also be at peril, if the Police weren't to act firmly against them.

Section 498A that has otherwise incurred the infamy of being a legal terrorist act was primarily incorporated to combat the evil practices of gift and gift deaths. however recent study shows that over the years it's modified its color and has become a weapon of ill fame. With the assistance of books of distinguished legal personalities and eminent lawyers, articles written or printed by social activists the investigator has developed some hypothesis in respect to the kerb of this social cancer. in spite of everything the analysis we are able to conclude that Section 498-A of IPC, 1860 was brought in forth for the protection of ladies from the cruelty of her husband and his relatives however

currently that section itself is being abused. These girls ar turning the law alternative means spherical by being cruel to their husband and his relatives and obtaining them tried beneath Section 498A of IPC, 1860 that deals with Cruelty by husband or relatives of husband. henceforward sure legal actions ought to be taken as shortly as doable to curtail growth of legal terrorist act, by misuse of provisions of law.

The following ar some suggestions for securing the quality of section 498A:

In India, the trial of criminal cases particularly of significant nature continues for eight to ten years if no more counting on the gravity of crime. however a speedy trial is judicious in order that the innocent victims entrapped beneath the section of 498A gets prompt redressal. thus it's of utmost importance that besides being effective the judiciary should try and expedite the method of trial with respect to the 498A cases.

An effort should even be created in order that the investigation concerning this 498A cases is operated solely by civil authorities and solely on the finding of affordable proof, enough to ascertain the individual's crime, ought to the peace officer take actions against him.

The provision lay down beneath section 498A IPC, 1860 wants a right away modification and it ought to be one in all the most important issues of the law-makers in recent times.

In Republic of India there's no correct or formal organization that gives family direction. Establishing of a recognized family direction association is crucial in



order that the people will speak out their grief and may additionally take the recommendation of consultants and practitioners.

The NGO's allied with the human rights activities should put together act in a very neutral manner and may build the gang awake to not filing cases supported trivial matters.

A genuine try should be created in order that section 498A cases ar continuing as bailable offence and not non-bailable thus on stop the innocent ones from languish in custody.

Penalizing the corrupt Investigation Officers: If it's evident to the court that an inexpensive investigation has not been conducted by the officers which the husband and his family are charged while not correct verification of the grievance, the investigation officer ought to be penalise for negligence of duty.

NRI Issues, unless they're evidenced to be guilty when following the due judicial method, NRIs ought to be a supplied with a good probability to justice by reassuring them of the following:

- a) Authorization to come to country of the use.
- b) No revocation of passport additionally as no international law enforcement agency Red Corner Notices.
- c) No redundant arrests and;
- d) prompt investigation and trial.



**ENVIRONMENTAL JURISPRUDENCE
IN INDIA: THE IMPACT OF
JUDICIAL PRONOUNCEMENTS IN
PROMOTING ENVIRONMENTAL
CONCERNS**

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*What we are doing to the forests
of the world is but a mirror
reflection of what we are doing
to ourselves and to one another.*

*-Mohandas Karamchand
Gandhi*

ABSTRACT:

The legislature, Executive and Judiciary, the three organs of the Indian popular government have found a way to control the issue of expanding natural contamination in India. Among all of them the legal has performed lead part in making a move to control the issue of environment contamination. The legal understanding of different statutory arrangements considering environment insurance an essential undertaking has given another bend to the advancement of Environmental law in India. Despite the fact that there have been activities taken by the Legislature and the Executive, the Judiciary has taken a lead in this race through cautious legal thinking about the Supreme Court which has been giving more apparatuses both subjective and

quantitative to manage issues identified with Environmental Protection. The courts have additionally done their share by generously deciphering the different arrangements of the Constitution and different statutes towards guaranteeing social equity.

Public Interest Litigation (PIL) have moved to court for reviewing open enquiry, implementing open obligation, ensuring social and aggregate rights and intrigue and vindicating open intrigue. In course of time there has been a wave or a more prominent effect on environment suit.

Judicial Activism depends on investigation of the legal insight in translating distinctive environmental related laws in India. A surfeit of enactments has been sanctioned to manage the issue of environment assurance in India. Consistently more up to date types of protections have been embraced to see that the threatening walk of natural contamination is kept under control.

Different proposals are given for the improvement of Environmental statute in India and to expel the constraints with respect to Indian legal for compelling contribution in the natural law making process.

KEY WORDS: Constitutional and Statutory approach, Polluter pays principle, Doctrine of Public Trust, Absolute liability, Sustainable Development PILs and Locus standi, Judicial Activism.

INTRODUCTION



“The earth, the air, the land and the water are not an inheritance from our fore fathers but on loan from our children. So we have to handover to them at least as it was handed over to us.”

“There is a sufficiency in the world for man’s need but not for man’s greed.”

-Mohandas Karamchand Gandhi

The meaning of "environment" and, along these lines, ecological law in India has dependably been somewhat wide. Indeed, even today, not just does it incorporate the idea of supportable improvement additionally air and water contamination, safeguarding of our backwoods and untamed life, clamour contamination and even the insurance of our antiquated landmarks, which are experiencing serious push because of urbanization and resulting ecological contamination. Group assets, for example, tanks, lakes, and so forth have now been enunciated by the Supreme Court for incorporation in the idea of environment, and why should it not be along these lines, considering they all influence the quality and satisfaction in our life. Mindfulness about the earth and, especially matters identifying with contamination, have been renewed, so to say, to such an extent that it is hard to envision that our cutting edge natural statute is barely three decades old. In these decades, notwithstanding, the walk of the law has been so fast and beyond any doubt that one is enticed to rehash the announcement of Lord Woolf that "while natural law is currently unmistakably a

perpetual element of the legitimate scene, regardless it needs clear limits".

Inside the most recent two decades, India has ordered particular enactment on natural insurance as well as practically made another central right to a perfect domain in the Constitution. The models and techniques embraced in the Indian connection show up, at first sight, like those in other precedent-based law frameworks. However there are numerous unpretentious contrasts which have changed the structure and substance of lawful advancement in India. Indian natural law draws out the one of a kind qualities of another lawful request which has bit by bit been built up in India.

The recognizing way of this law, has three interconnected components. Firstly, the nature of the new Indian established law administration agrees more prominent significance to open worries than ensuring private interests. Besides, this jurisprudential advancement mirrors certain parts of Indian legitimate culture, through verifiable and express dependence on autochthonous qualities and ideas of law, exemplified in the Indian juristic hypothesize of dharma. Thirdly, the developing Indian ecological statute bears declaration to the lobbyist part of the Indian legal which has likewise had a huge effect in numerous territories other than natural law. To put it plainly, the advancement of ecological statute in India shows neo-dharmic law in postmodern open law. It suits thoughts at present voiced by specialists around the globe for ensuring the earth in structures altered by the Indian lawful culture.

Society is stunned over a solitary instance of crime yet when a great many individuals are



experiencing different sorts of natural issues and face the risks of aggregate genocide, responses are exceptionally tepid. In British India, a few laws were ordered which had natural arrangements. These are the Indian Penal Code and the Code of Criminal Procedure to manage the fouling of air and water under the title "Open Nuisance", the Police Act for counteractive action of clamour, the Poison Act for pesticide control and the Indian Forest Act for woodland and untamed life administration. Laws on woods, mines and minerals, water and other normal common assets of humankind were sanctioned more for their apportionment, privatization and usage as opposed to for their assurance. These laws remained responded to satisfy the necessities and to take care of the issues of the general public.

Urbanization, industrialization and populace have upgraded the issue of environment debasement. At last it was the call of hour in post freedom period to authorize certain laws to meet the extraordinary issues imperilling the human life.

THE CONSTITUTIONAL AND STATUTORY APPROACH

In compatibility of United Nations Conference on Human Environment met at Stockholm in 1972, the countries of the world chose to find a way to secure and enhance human environment. The spin-off of this, in India 42nd Amendment to the Indian constitution embedded articles 48-A guiding the state to ensure and enhance the earth and to shield the backwoods and untamed life of the nation and Article 51-A (g) saying essential obligations of the nationals to secure and enhance the indigenous habitat including woods, lakes,

waterways and natural life and to have sympathy for living animals.

The 42nd Amendment to the Indian Constitution likewise rolled out specific improvements in the seventh Calendar to the Constitution. 42nd Amendment Act surprisingly embedded Entry 20-An in the List III which manages populace control and family arranging in light of the fact that gigantic increment in populace is fundamental driver for ecological issues.

Under Article 253 of the Indian Constitution, the parliament is engaged to make any law for executing any arrangement, assertion or tradition with whatever other nation or nations or indeed, even any choice made at worldwide gathering, affiliation or other body, this power is constrained to implantation of choice and that too for a restricted period.

The expansive dialect of Article 253 proposes that in the wake of Stockholm Conference in 1972, Parliament has the ability to administer on all matters connected to the protection of characteristic assets.

This 42nd Amendment to Indian Constitution and inclusion of Article 48 and 51-A (g) denoted the start of Environmental statute in India. Natural Jurisprudence incorporates the laws, both statutory and legal, concerning fluctuated parts of ecological security and economic advancement. In India different laws have been ordered for the security of environment. Be that as it may, the development to ensure environment got energy with the legal vigil in 1980s and 90s.



Outfitted with the force of legal survey and sacred plan of freedom of legal the Indian legal has played out a stellar part in ensuring the earth and spreading ecological mindfulness among the Indian individuals.

Acting either at the occurrence of candidates or all alone, the Supreme Court has conjured Article 32 of the Constitution to give interval cures, for example, stay requests and directives to control destructive exercises by and large. Dependence has likewise been set on the ability to do finish equity under Article 142 to issue nitty gritty rules to official organizations and private gatherings for guaranteeing the usage of the different natural statutes and legal bearings.¹⁰⁰²

At present most environment activities are brought under article 32 and 226 of the constitution. The writ system is favoured over the routine suit since it is expedient, generally modest offers guide access to the most astounding courts of the land. In any case, class activities suit likewise have their own points of interest. The force of the Supreme Court to issue bearings under article 32 and that of the High Court under article 226 have accomplished more noteworthy noteworthiness in natural case. Courts have made utilization of these forces to cure past mala-fides and to check prompt and future strikes on the earth.

The mid-nineties saw the Supreme Court perceive some globally acknowledged and

¹⁰⁰² The principal environmental statutes are: The Wildlife Protection Act, 1972; The Forest Conservation Act, 1980; The Environmental Protection Act, 1986; Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981

essential standards in matters relating to the earth. This period likewise observed the Supreme Court depend increasingly on Article 21¹⁰⁰³ of the Constitution and give a far reaching intending to explain "environment"¹⁰⁰⁴ taking inside its overlay the personal satisfaction as recognized from a minor animal creature presence.¹⁰⁰⁵ This is truly the period when ecological statute started to make its mark. Article 21 was innovatively translated to incorporate a 'privilege to clean air and water' and additionally the 'privilege to a perfect domain'. The absolute most referred to cases from this stage are those which brought about the re-area of perilous enterprises from the National Capital Territory (NCT) and the conclusion of foundries in the vicinity of the Taj Mahal in Agra.

The advancements that took after the Supreme Court's request in 1998 which required all transports in Delhi to change over to Compressed Natural Gas (CNG). At the time, there was huge feedback of this request on the ground that it would be too expensive for both the Delhi Transport Corporation (DTC) and private-administrators to purchase CNG vehicles, in this manner influencing the extensive number of individuals who rely on upon open transport. As the due date for usage gravitated toward in 2002, there was some

¹⁰⁰³ Protection of life and personal liberty— No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁰⁰⁴ Chhetriya Pardushan Mukti Sangarsh Samiti v. State of U.P., (1990) 4 SCC 449

¹⁰⁰⁵ Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni, (1983) 1 SCC 124



bother brought on to the overall population because of constrained CNG supplies – however over the long haul the measure has succeeded in decreasing the air-contamination levels. This exclusive demonstrates that occasionally judges must settle on disliked choices so as to seek after the long haul target of ensuring the privilege to a spotless situation.¹⁰⁰⁶

DOCTRINES EVOLVED BY THE COURTS

❖ Polluter Pays Rule

In *Indian Council for Enviro-Legal Action*¹⁰⁰⁷ the Supreme Court acknowledged the Polluter Pays rule.¹⁰⁰⁸ For this situation, some synthetic industrial facilities in Bichhri (Udaipur District) delivered perilous chemicals like oleum and so on. These businesses did not have the essential clearances, licenses, and so forth nor did they have fundamental hardware for the treatment of released dangerous effluents. Poisonous slime and untreated waste waters brought about the permeation of dangerous substances into the entrails of the Earth. Aquifers and subterranean supplies of water got dirtied; wells and streams turned dim and filthy; water got to be unfit for human

¹⁰⁰⁶ See generally: 'The Delhi Pollution case: The Supreme Court of India and the limits of judicial power', 28 *Columbia Journal of Environmental Law* (2003) at pp. 223-249

¹⁰⁰⁷ *Indian Council for Enviro-legal Action & Ors v. Union of India*, (1996) 3 SCC 212

¹⁰⁰⁸ In 1972, the Organization for Economic Cooperation and Development adopted this principle as a recommendable method for pollution cost allocation

utilization as well as unfit for cows to drink and for water system of land. To such an extent, even the dirt got to be unfit for development. Passing, infection and different catastrophes progressively came about and the villagers in the region revolted as a consequence of this tremendous ecological debasement. The District Magistrate of the region needed to fall back on Section 144 of the Criminal Procedure Code to evade any untoward episode.

The Supreme Court supported the Polluter Pays rule, which was prior perceived for this situation. It was said, "The Polluter Pays Principle as deciphered by this Court implies that the outright obligation for damage to the earth stretches out to remunerate the casualties of contamination as well as the cost of re-establishing the ecological debasement."

In *Vellore Citizens Welfare Forum*,¹⁰⁰⁹ around 900 tanneries in five locale of the State of Tamil Nadu were releasing huge measure of untreated profluent comprising of around 170 distinct sorts of chemicals into rural fields, roadside, conduits and open land. Around 35,000 hectares of land turned out to be somewhat or thoroughly unfit for development. The water in the region got to be unfit for utilization and water system purposes.

One of the huge headings given by the Supreme Court in this suit was contained in a request went in 1995 whereby a portion of the ventures were required to set up gushing treatment plants. In another request went in 1996, the Supreme Court issued notification

¹⁰⁰⁹ *Vellore Citizens Welfare Forum v. Union of India & Ors*, (1996) 5 SCC 647



to a portion of the tanneries to show bring about why they ought not be requested that compensation a contamination fine.

Impact-While applying the rule of Polluter Pays, the Supreme Court later communicated the view that pay to be granted must have some relationship not just with the greatness and limit of the endeavour additionally the damage brought on by it. The relevance of the standard of Polluter Pays ought to be useful, basic and simple in application.

In *Deepak Nitrite*¹⁰¹⁰, while remanding the matter to the High Court for re-examination, the Supreme Court communicated the view that the likelihood of 1% of the turnover of the undertaking might be sufficient remuneration.

❖ Precautionary Principle

The Precautionary Principle prompted the development of the extraordinary guideline of weight of proof specified in *Vellore Citizens Welfare Forum*¹⁰¹¹. According to this extraordinary guideline, the weight is on the individual needing to change the norm to demonstrate that the activities proposed won't have a harmful impact, the assumption working for natural insurance. This idea of 'turn around onus' requires that the weight of verification for wellbeing lays on the advocate of an innovation and not on the overall population – another innovation ought to be viewed as risky unless demonstrated generally.

¹⁰¹⁰Deepak Nitrite Ltd vs State Of Gujarat & Ors; (2005) 13 SCC 186

¹⁰¹¹Vellore Citizens Welfare Forum v. Union of India & Ors, (1996) 5 SCC 647

The Precautionary Principle is relatable to hazard evaluation and ecological effect evaluation. Extensively, it hypothesizes that choices that may affect the earth need to take into account and perceive states of instability, especially concerning the conceivable natural outcomes of those choices. In light of the current situation, it is vital to make preventive move or stay away from impacts, which might harm regardless of the possibility that this can't be demonstrated.

In *M.C Mehta v. Kamal Nath*¹⁰¹², the Supreme Court of India avowed the choice in *Vellore Citizens' Welfare Forum v Union of India*¹⁰¹³, maintaining the preparatory guideline as a feature of the ecological law of India.

In *Narmada Bachao Andolan v. Union of India*, the Court was called upon to choose different legitimate inquiries emerging from the Sardar Sarovar Project including the development of a dam on the Narmada River. An ecological freedom had been given for the venture. At the time it was allowed there was no commitment to acquire any statutory leeway and henceforth the natural freedom conceded was basically managerial in character. By the by, the natural leeway was tested. It was affirmed the fundamental particulars with respect to the natural effect of the Project were not accessible when the ecological leeway was given and it in this manner couldn't have been given. It was further claimed that the execution of the Project, having assorted and sweeping ecological effect, without

¹⁰¹²(1997) 1 SCC 388

¹⁰¹³ (1996) 5 SCC 647



legitimate study and comprehension of the natural effects and without appropriate arranging of mitigated measures, was an infringement of central privileges of life of the influenced individuals ensured under Article 21 of the Constitution of India. Over the span of judgment, the larger part noticed the accommodation of the applicants that "in cases relating to the earth, the onus of evidence is on the individual who needs to change the norm and, in this way, it is for the respondents to fulfil the Court that there will be no natural debasement". The lion's share managed this contention of moving of the weight of confirmation and the preparatory rule expressing:

Impact-It appears to us that the 'prudent rule' and the comparing weight of verification on the individual who needs to change the present state of affairs will normally apply for a situation of contaminating or other venture or industry where the degree of harm prone to be perpetrated is not known. At the point when there is a condition of instability because of absence of information or material about the degree of harm or contamination liable to be brought on then, so as to keep up the nature adjust, the weight of verification that the said adjust will be kept up must fundamentally be on the business or the unit which is liable to bring about contamination.

❖ Public Trust

This precept came up for thought in the *Kamal Nath case*.¹⁰¹⁴ A fairly bizarre circumstance had emerged for this situation. The stream of the waterway Beas was

purposely redirected in light of the fact that it used to surge Span Motels in the Kulu Manali valley in which an unmistakable government official's family had an immediate intrigue. The motel was additionally assigned secured forestland by the State Government and had likewise infringed on ensured forestland, which infringement was along these lines regularized.

The Supreme Court utilized people in general trust tenet as a part of this case to re-establish the earth to its unique condition. Quickly, this principle hypothesizes that the general population has a privilege to expect that specific terrains and regular territories will hold their normal attributes.

Roman law perceived the general population trust regulation whereby normal properties, for example, waterways, seashore, timberlands and the air were held by the Government in trust for nothing and unobstructed utilization of the general population. These assets were either possessed by nobody (*res nullius*) or by everybody in like manner (*res communis*)

In *M.I. Manufacturers v Radhey Shyam Sahu*¹⁰¹⁵ where the Supreme Court has connected general society trust principle.

The claim was coordinated against the judgment of a Division Bench of the High Court of Judicature at Allahabad. By a typical judgment in three writ petitions, High Court talking through Shobha Dixit, J. held that the choice of the Lucknow Nagar Mahapalika, allowing M.I. Developers Pvt.

¹⁰¹⁴M.C. Mehta V. Kamal Nath, (1996) 1 SCC 388

¹⁰¹⁵AIR 1996 SC 2468



Ltd. to build underground shopping complex in the Jhandewala Park arranged, Lucknow, was unlawful, subjective and illegal. Writ of mandamus was issued to the Mahapalika to re-establish back the recreation centre in its unique position inside a time of three months from the date of the judgment and till that was done, to take satisfactory security measures and to give essential shield and insurance to the general population, clients of the recreation centre. High Court had seen that the way that the recreation centre was of chronicled significance was not denied by the Mahapalika furthermore the way that persistence or support of the recreation centre was fundamental from the natural point and that the main reason progressed by the Mahapalika for development of the underground business complex was to facilitate the clog in territory. On considering the ground circumstances the court said that general society reason, which is claimed to be served by development of the underground business complex, appeared to be absolutely deceptive.

On Appeal the court held that the realities and conditions when inspected indicate one and only conclusion that the reason for developing the underground shopping complex was a unimportant appearance and the predominant object was to support the M.I. Manufacturers to gain tremendous benefits. In denying the residents of Lucknow of their luxury of an old verifiable stop in the congested zone on the open supplication of decongesting the territory Mahapalika and its officers overlooked their obligation towards the natives and acted in a most boldfaced way. By permitting the development Mahapalika had denied its

inhabitants as additionally others of the personal satisfaction to which they were qualified for under the Constitution and the Act. The assertion bears a resemblance to assertion, shameful and favouritism. The assertion was against open arrangement. It was not openly intrigue. Entire procedure of law was subverted to profit the manufacturer.

❖ Principle Of Absolute Liability

A sensational occasion happened in Delhi on fourth and sixth December 1985. There was a hole of oleum gas from the production line premises of Shriram Foods and Fertilizer Industries. The gas release influenced a substantial number of people and advocates practising the District Courts in Delhi kicked the bucket. Recollections of the Bhopal Gas Disaster that had happened a year before were right away resuscitated.

An extremist legal counsellor instantly started procedures in the Supreme Court¹⁰¹⁶ drawing out the issue brought on by the spillage of oleum gas. It happened over the span of procedures that prior in March that year, a Committee called the Manmohan Singh Committee had gone into the security and contamination control parts of Shriram Foods and Fertilizer Industries with a view to taking out group hazard. The Supreme Court selected a group of specialists to investigate these suggestions. The group reported that the suggestions of the Manmohan Singh Committee were being agreed to. In any case, this Expert Committee additionally called attention to different insufficiencies in the plant and

¹⁰¹⁶M.C. Mehta v. Union of India AIR 1987 SC 1086



opined that it was unrealistic to dispense with risks to general society insofar as the plant stayed in its present area in Delhi. In perspective of the clashing reports got by it, the Supreme Court delegated a Committee of Experts called the Nilay Chaudhry Committee.

A thought of the reports of every one of these boards demonstrated that they were consistent in reasoning that the component of hazard to labourers and the general population must be minimized, however not completely disposed of.

In this foundation, the Supreme Court recommended that the Government advance a National Policy for the area of poisonous and risky businesses and that it ought to set up a free focus with professionally capable and open energetic specialists to give investigative and innovative sources of info. The purpose behind this was the Supreme Court thought that it was hard to get appropriate counsel and ability to empower it to touch base at a right choice.

The Supreme Court additionally suggested the setting up of Environmental Courts to manage circumstances of this kind. The significance of this case lies in the conclusion touched base at by the Supreme Court that an endeavour occupied with an unsafe or innately perilous industry which represents a danger to the wellbeing and security of its labourers and the inhabitants of adjacent ranges owes a flat out and no delegable obligation to the group to guarantee that no mischief results to anybody because of its movement. On the off chance that any damage results, then the undertaking is completely at risk to adjust

for such mischief and it is no response to say that it had taken all sensible care or that the damage happened with no carelessness on its part. As it were, the Supreme Court advanced a standard of total risk and did not acknowledge any of the exemptions in such a case as said in *Rylands v. Fletcher*.¹⁰¹⁷

In *Narmada bachao case*¹⁰¹⁸ the Supreme Court held that the prudent rule couldn't be connected to the choice for building a dam whose increases and misfortunes were unsurprising and certain.

ROLE OF PILs AND RULE OF LOCUS

There is obviously a requirement for a far reaching investigation of how law works as an instrument of ecological assurance. As of late, there has been a supported concentrate on the pretended by the higher legal in concocting and observing the usage of measures for contamination control, preservation of timberlands and untamed life assurance. A hefty portion of these legal intercessions have been activated by the determined disjointedness in approach making and in addition the absence of limit working amongst the official organizations. Gadgets, for example, Public Interest Litigation (PIL) have been noticeably depended upon to handle ecological issues, and this approach has its supporters and additionally faultfinders.

In our nation, there are a few vocal NGO's and open lively people who have moved the courts to look for alleviation against various issues, for example, those made by

¹⁰¹⁷ (1868) LR 3 HL 330

¹⁰¹⁸ AIR 2000 SC 375



unchecked vehicular and mechanical contamination,¹⁰¹⁹ carelessness in administration of strong waste,¹⁰²⁰ development of extensive tasks and expanding deforestation.¹⁰²¹ So as to address these issues, there is a need to draw a harmony between ecological concerns and contending formative needs, for example, those of creating business and riches.

Every one of you are very much aware of how the gadget of Public Interest Litigation (PIL) was formulated by our Supreme Court. Keeping in mind the end goal to enhance access to equity for poor and distraught segments, the customary guidelines of 'locus standi' were weakened and a practice was started whereby open vivacious people could approach the court in the interest of such segments. Despite the fact that there has been impressive civil argument about the utilization and abuse of Public Interest Litigation, it should be highlighted that the procedural adaptability and inventive cures that have come to be connected with this type of case.

Rather than an antagonistic setting where the judge depends on the advice to deliver confirmation and contend their cases, the PIL cases are described by a cooperative critical thinking approach.

There is close finished scholastic assentation that the purposeful contribution of the higher legal in India with the earth started with the

¹⁰¹⁹M.C. Mehta v. Union of India (1999) 6 SCC 12; M.C. Mehta v. Union of India (1998) 8 SCC 206

¹⁰²⁰Almitra Patel v. Union of India, W.P. No. 88 of 1996

¹⁰²¹T.N. Godavarman Thirumulkpad v. Union of India, W.P. No. 202 of 1995

unwinding of the government of locus standi,¹⁰²² and the take-off from the "confirmation of harm" approach.¹⁰²³ The unwinding of the run prompted some imperative results, which were especially apropos to ecological matters. In the first place, since it was conceivable that there could be a few applicants for the same arrangement of certainties managing an ecological risk or calamity, the court could take a gander at the matter from the perspective of a natural issue to be understood, instead of a debate between two gatherings. Second, the manage dealt with the numerous interests that went unrepresented – for instance, that of the average citizens who regularly had no entrance to the higher legal.¹⁰²⁴ Additionally, the procedure brought into sharp centre the irreconcilable situation between the earth and advancement, and set the phase for various choices that would manage issues identifying with this region in a more particular way.

The unwinding of locus standi, in actuality, made another type of legitimate activity, differently named as open intrigue

¹⁰²²Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344; Mumbai Kamgar Sabha v. Abdulbhai, AIR 1976 SC 1455

¹⁰²³Bangalore Medical Trust v. B.S. Muddappa, (1991) 4 SCC 54

¹⁰²⁴Some critics have claimed that public interest litigation has been misused by parties (third parties) who were secretly interested in issues allied to the environmental matter, which were sometimes commercial in nature, thereby using the exalted platform explicitly created for the solution of environmental matters alone.



prosecution and social activity suit.¹⁰²⁵ This shape is generally more effective in managing natural cases, for the reason that these cases are worried with the privileges of the group as opposed to the person.¹⁰²⁶

Impact-It is portrayed by a non-antagonistic approach, the support of amicus curiae, the arrangement of master and observing panels by the court, and the issue of point by point break arranges as consistent mandamus¹⁰²⁷ under Articles 32 and 226 by the Supreme Court of India and the High Courts of the States individually.

JUDICIAL ACTIVISM

There is a journey for envirojustice and legal activism which analyses the authenticity of the legal activism being developed of natural statute in India. Furnished with the force of legal survey and autonomy of legal, the Indian legal has played out a stellar part in the advancement of natural law and spreading mindfulness among individuals for the need of environment insurance in India.

The part of PIL in building up a natural statute in India has been amazing. Open intrigue suit is an agreeable or community exertion by the applicant, the State of open power and the legal to secure recognition of established or essential human rights,

¹⁰²⁵ “Taking suffering seriously: Social Action Litigation and the Supreme Court”, 29 International Commission of Jurists Review 37-49 (1982)

¹⁰²⁶ Sheela Barse v. Union of India, AIR 1988 SC 2211

¹⁰²⁷ T.N. Godavarman Thirumulkpad v. Union of India, AIR 1997 SC 1228; M.C. Mehta v. Union of India (Vehicular Pollution case), (1998) 8 SCC 648

advantages and benefits upon poor, discouraged and defenceless segments of the general public. General society intrigue suit is the result of acknowledgment of the established commitment of the court. The advancement of PIL was led in the late 1970s and 1980s through a progression of choices issued by Indian Supreme Court Justices, whose objective was to advance and vindicate open intrigue which requests that infringement of established or lawful privileges of extensive quantities of individuals who are poor, uninformed or in a socially or monetarily impeded position ought not go unnoticed and unredressed.

When contamination due to different reasons was touching its pinnacle and the nature of the environment its nadir, it was being felt that a few stages that could be utilized as venturing stone to a solid situation, ought to be received and usage thereof must be effectuated to achieve the genuinely necessary result. The appallingly debasing state of environment made the legal, strikingly the Supreme Court, sit and consider the bind. The undertaking confronting the court was overwhelming, and still it is. It required advancement combined with legal boldness and specialty to build up another law that could demonstrate the directing light to the earth security development. It additionally required going past the settled and searching for more up to date doctrinal field, and potential outcomes. With the progression of time, a surfeit of regulations and standards were improved and/or embraced by the Supreme Court of India. A doctrinal support that could defend the decaying state of the earth was soon raised. Some of these precepts and standards should be depicted



upon to see the magnificence of legal specialty and bravery as respects the centre issue of ecological contamination and steps brought to manage the same.

One of the wellspring of natural law statute in India has been article 21 of the constitution and its innovative translation by the Supreme Court in various cases that gave another measurement and intending to the comprehension of the article. The ever-expanding breadth of article 21 has been an aid to the reason for ensuring the earth so that the lives of the general population and their other appreciated rights are secured. Legal has utilized the spread of article 21 rights as a defensive umbrella against the endeavours that have a tendency to debilitate the earth and its presence.

Impact-Again the present part likewise analyses the authenticity of legal activism being developed of natural law in India. It basically examinations the distinctive features of legal activism in the zone ecological law in India.

CONCLUSION AND RECOMMENDATIONS

The environment and the development are two sides of the same coin and anyone of these cannot be scarified for the other. On contrary, both are equally essential for our better future. In this situation, responsibility lies on the Supreme Court and the High Courts to deal with these cases with caution of high degree, only then we will achieve our goal i.e. to secure pollution free developed country for our next generation.

Location of industries is another problem which needs to be solved. In this regard it will advisable that, when the industry is hazardous, it should not be located in a particular place where the huge number of people is residing or should not be near a colony, considering the happiness, health of the inhabitant.¹⁰²⁸ It relates to the provision of Article 48A and 51A (g) of the Directives Principles of State Policy.

We always kept in mind about the Resource management, which is another important matter which focuses that right to development should not be in such a way affecting the potentiality of natural resources and it focuses on the idea of 'sustainable development'.

The World Commission on Environment and Development observes, "What is required is a new approach in which all nations aim at a type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to resources."¹⁰²⁹

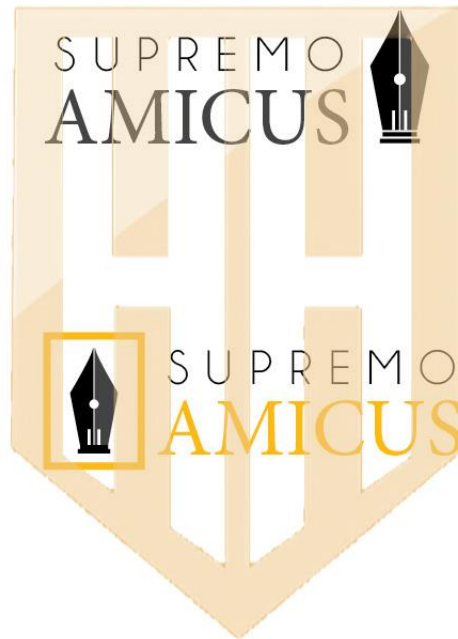
For protecting the environmental degradation Public Interest Litigation (PIL) under Article 32 and 226 of the Constitution of India also played an important role, because most of the environmental cases which are tried by the Supreme Court are the result of this Public Interest Litigation.

¹⁰²⁸ Leelekrishnan, P., 2004. LexisNexis Student Series, Environmental law case book. New Delhi: LexisNexisButterworths

¹⁰²⁹ Dr. Tonapi. V. M., 2010. Textbook on Jurisprudence. New Delhi: Universal Law Publishing Co.



Sometimes it found that, these industries or business/trades are carried on in a manner which endangers vegetation cover, animals, aquatic life and human health, but now a day we found that, any trade or business which is offensive to flora and fauna or human beings cannot be permitted to be carried on the name of the fundamental right. In this regard we can just hope that, the Judiciary play an important role to protect the environment as well as help for the Industrial development in India by adopting the policy of Sustainable Development.





**ONLINE BANKING FRAUDS AND
ROLE OF GOVERNMENT TO
CURB IT: WITH SPECIAL
REFERENCE TO INDIA**

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ABSTRACT

The essay focuses on the distress caused by online fraud, in banking sector in India. In many countries introduction of cashless economy can be seen as steps in right direction, similarly demonetization of currency by the present government has promoted cashless transaction widely in India. Cyber crimes are increasing at par with transactions done online. The cyber space is increasingly used by organized criminal group to target credit card, bank account, and other transactional instrument for fraudulent transactions. This essay envisages on the kinds of cyber frauds faced by banks and the reforms taken by the RBI and the government to deal with those fraudulent activities. the paper primarily focuses on is, whether the Indian banking sector even ready for such a reform in the economy? Are we technologically advanced enough to adopt to such a change?

INTRODUCTION

Cybercrime today is an all around organized multi-million-dollar business, executed by proficient programmers who approach better assets as far as man and machine than any organization. Most organizations are shocked as they are caught off guard for such an assault. A lot of our basic framework is associated with

the internet. With government activities of Smart Cities and Digital India, all the foundation is associated with each other through IOT (Internet of things) and web, in this manner this risk is amplified and it requires more prominent concentration in execution of preventive, analyst and arranged/practiced reaction¹⁰³⁰.

Objectives of the study is to analyze the increase in the fraud in bank in India and whether India is ready for such a reform in the country?The economic growth of any nation and its security, whether internal or external, and competitiveness depends on how well is its cyberspace secured and protected. The increase use of digital means, for online banking has increased the risks of online frauds. The maximum offenders came from the age group of 18-30.This research attempts to analyze the concerns of cyber threats to the banking sector by highlighting the underlying modus operandi. It focusses on the preparedness of the financial organizations to deal with incidents related to Cyber Crime.

In a recent study RBI has reported over 8,765cases were reported by banks in 2012-13 and figures for consequent three years are 9,500 (2013-14), 13,083 (2014-15)

¹⁰³⁰ Lalit Wadhvani, Crime and Security in The New Age: How Technology Has Disrupted National Security (Mar 18,2016)
<http://www.freepressjournal.in/business/crime-and-security-in-the-new-age-how-technology-has-disrupted-national-security/806233>.



and 11,997 (in the first nine months of 2015-16) respectively.¹⁰³¹ These cases may be very small in number in number for a country as big as India with population of 1.2 billion, even though according to the reports India is third in rank after USA and Japan, which are most affected with online malware in 2014. There shall be no room left for such uncritical satisfaction in a country where the government actively envisages for every citizen to have account in bank and has indulged into developing schemes even for the rural sector welfare. However, another report entitled *Cyber and Network Security Framework*, revealed that the total number of cybercrimes in all sectors could be around 300,000 in 2015, that is just the double from the previous year and causing havoc in the financial space, security establishment, and social fabric.¹⁰³² Interestingly, Andhra Pradesh, Karnataka and Maharashtra have been ranked top 3 state with highest online fraud, together contribute more than 70 per cent to

India's revenue from IT and IT related industries¹⁰³³.

The present study is based on secondary sources of data/information. Different books, journals, newspapers and relevant websites have been consulted in order to make the study an effective one. The study attempts to examine the Impact and Importance of Cashless Transaction in India.

LITERATURE REVIEW

E-BANKING IN INDIAN BANKING SYSTEM

Enhanced role in the banking sector in the Indian economy, the increasing levels of deregulation and globalization in the Indian banking industry have placed numerous demands on the banks. To meet the varied needs of the customers, banks have to offer wider, flexible range of facilities tailored for all type of customers.

Internet banking has changed a customer's behavior drastically due to the technological advancements. Use of financial services are today characterized by individuality, mobility, the interdependence of time and place. Internet is being used as a new distribution channel to provide complex products at lower costs to more and more potential customers. The Internet has helped banks to enlarge their market area without

¹⁰³¹India needs to spend \$4 billion to combat cybercrime: Study, (Apr. 13, 2016) <http://www.gadgetsnow.com/tech-news/India-needs-to-spend-4-billion-to-combat-cybercrime-ASSOCHAM-Mahindra-SSG-study/articleshow/51811417.cms>

¹⁰³² ASSOCHAM-Mahindra SSG, Bank Fraud Was Waiting to Happen, (Oct 2016) <http://www.assochem.org/newsdetail.php?id=5995>

¹⁰³³ ASSOCHAM- CyberCrimes in India is likely to cross 300,000 by 2015: Study, (Jan. 04, 2015,) <http://www.assochem.org/newsdetail.php?id=4821>



building new offices and to increase their market share and profits.

KINDS OF ONLINE FRAUDS

- a) *Triangulation/site cloning*: Customers enter their card points of interest on fake shopping destinations. These points of interest are then abused.
- b) *Hacking*: Hackers/fraudsters acquire unapproved access to the card administration stage of banking framework. Fake cards are then issued with the end goal of illegal tax avoidance.
- c) *Online extortion*: Card data is stolen at the season of an online exchange. Fraudsters at that point utilize the card data to make online buys or expect a person's character.
- d) *Lost/stolen card*: It alludes to the utilization of a card lost by an honest to goodness account holder for unapproved/unlawful purposes. Check card skimming: A machine camera is introduced at an ATM so to get card data and PIN numbers at the point when clients utilize their cards.
- e) *ATM extortion*: A fraudster gains a client's card as well as PIN, what's more, pulls back cash from the machine.
- f) *Social building*: A hoodlum can persuade a worker that he should be let into the workplace building, or he can persuade somebody via telephone or by means of email that he should get certain data.
- g) *Dumpster jumping*: Employees who aren't watchful while tossing away papers containing touchy data may

make a mystery information accessible to the individuals who check the organization's junk.

- h) *False affectations*: Someone with the purpose to take corporate data can land a position with a cleaning organization or another merchant particularly to increase true blue access to the workplace building.
- i) *Computer infections*: With each tap on the web, an organization's frameworks are interested in the danger of being tainted with accursed programming that is set up to reap data from the organization servers.

RISKS INVOLVED

In case of e-banking nothing is secure, use of high technology has brought the operational risk in the form of security risk not only in the world but in India also cyber fraud has increased manifolds. Customer fear that their money can be targeted by the cyber frauds. In the environment of large scale use of technology, there is a need of surveillance monitoring and auditing to detect unusual usage pattern and deficiencies. This calls for putting in place appropriate and adequate safeguards to ensure security covering physical and other aspects¹⁰³⁴

LIMITATION TO E-BANKING

It pre-supposes computer literate customers who can develop trust in

¹⁰³⁴ Jyotsna Sethi & Nishwan Bhatia, Elements of Banking and Insurance, Phi learning private limited 65,66 (2nd ed. 2012)



this technology which is not always the case especially, in a country like where literacy ratio is so less, it is not a very good idea to expect most of its population to support idea of cashless economy

RESPONSIBILITIES AND LIABILITIES OF BANKS

Now days, most banking functions have moved to core banking system and a large number of transactions are made using internet banking, mobile banking or use of debit/credit cards. This research focuses on questions such as, “What happens when the bank or other intermediaries like telecom companies fails to provide adequate security measures to protect the customer from illegal and fraudulent transfers?” or, “What are the consequences when there is a lapse of care on the part of the banks and other intermediaries during such fraudulent transaction?”.

Generally, intermediaries are not liable for the offence committed by the users or third parties using their network or system. However, they might be liable for non-compliance of due diligence requirements under the law. If due to negligence of the body corporate in handling such sensitive personal data causes wrongful loss to such person, the body corporate is liable to pay adequate damages as compensation to such person. The banks are in possession of sensitive personal information of their customers including account numbers, PIN, credit/debit card

numbers and other financial information of the customer in an electronic form. The banks are responsible for protection of such information from unauthorized usage through maintaining reasonable security procedures laid down in different rules and regulations issued by RBI and other bodies. Some of the important rules and guidelines which govern maintenance of reasonable security standards for banks include, Master Circular – Know your Customer (KYC) norms, Anti-Money Laundering standards, Combating of financial terrorism, Obligations of banks under Protection of Money Laundering Act, 2002 and by RBI and other international standards for information technology security (ISO standards).

BREACH IN DATA SECURITY: WHY DOES IT OCCUR?

Some of the common breaches in security procedures by banks and telecom operators include:

- Non-compliance of KYC norms of customers by banks. Most of the proceeds of the fraudulent transactions are transferred either in “mule accounts” (accounts of innocent persons are used to transfer money in promise of payment of a certain percentage) or in accounts where the identity of the customers cannot be verified. Such accounts are generally created by using either apparently fraudulent documents or no proper documents as such.
- Non-compliance of KYC norms by the telecom operators while issuance of duplicate SIM card. In a large



number of cases, the fraudster has obtained a duplicate SIM card of the victim's mobile, which was later used to receive one-time password or make mobile banking transaction, hence victim's original SIM will get disabled and he will not be able to receive transaction messages.

- Non installation of CCTVs or non-working of CCTVs in banks, ATMs which is a necessary security procedure for banks.
- No mechanism to identify and flag suspicious transaction patterns.

Failure to notify the customer of suspicious transactions (either through SMS or email) on a live basis

LEGISLATIVE CHECK INFORMATION TECHNOLOGY ACT 2000

- a) Section 72 of The Information Technology Act, 2000 casts an obligation of confidentiality against the disclosure of any electronic record, register, correspondence and information, except for certain purposes and violation of this provisions is a criminal offense

- b) Section 46 of the act provides that, one can file an application before the Adjudicating Officer appointed claiming breach of reasonable security procedures by the bank. An analysis of selected cases ordered by the Adjudicating Officer in the state of Maharashtra revealed that the banks and telecom operators in most cases have failed to maintain reasonable security procedures, including non-compliance of KYC norms, Anti-money laundering

guidelines, and automatic suspicious transaction monitoring facilities.

- c) Section 43 of The Information Technology Act, 2000 provides that the banks and other intermediaries who have failed to maintain reasonable security procedure must pay adequate damages as compensation to such person to cover the loss. The Adjudicating Officer has the power to adjudicate in the matters where the claim does not exceed Rs.5 crores. The bank must prove that they have maintained reasonable security procedures to prevent such fraudulent acts. In case the bank fails to prove that they have maintained reasonable security procedure, the Adjudicating Officer who has the powers of a Civil Court, may order the bank to pay damages as compensation to the victim.

STEPS TAKEN BY GOVERNMENT TO TACKLE ONLINE FRAUDS

ROLE OF RBI

Considering the scope of fraud in the electronic banking area and the possibility of the contagion- Reserve bank of India as a regulator and a supervisor has been proactive in addressing the risks associated with the electronic banking. The RBI has been promptly addressing issues relating to fraud with the use of electronic banking facilities. Even after issuing guidelines for a secured electronic banking, the RBI advises the banks, from time to time, on control mechanism, s to combat such frauds. Financial cybercrime in India has been steadily increasing over the



years. For the year 2015-16, the Reserve Bank of India (RBI) reported 16,468 cyber crimes related to ATM, debit card, credit card and net banking frauds. The number of frauds reported by the RBI were 13,083 in the year 2014-15 and 9,500 in the year 2013-14.

Some of the measures taken by the Apex institution to tackle the current problems faced by the banking sectors are:

1) **Re-BIT**

RBI has set up an entity called, 'Re-BIT' known as Reserve Bank Information Technology Private Limited. It tends to focus on IT and cyber security and also indulge in assessment of RBI regulated entities and assist in IT system audits, it would also work on implementing and managing internal or system wide IT assignments.

2) **Customer Protection Circular**

Recently in August 2017, RBI has passed a circular releasing some guidelines to curb the increasing online frauds due to the increased thrust on financial inclusion and customer protection and considering the recent surge in customer grievances relating to unauthorized transactions¹⁰³⁵, in this circular following guidelines have been given:

¹⁰³⁵Reuters, RBI to limit customer liability in the wake of increased digital fraud, (May.31.2017)

<http://gadgets.ndtv.com/internet/news/rbi-to-limit-customer-liability-in-wake-of-increased-digital-fraud-1706323>

2.1) *Zero liability of a customer:* there will be zero liability of customer in case of third party breach where neither the fault is of customer or bank but of the system. However, the customer needs to notify the bank within 3 working days of receiving the communication from the bank regarding the unauthorized transaction.

2.2) *Reported in 7 days:* In case the fraud is reported within four to seven working days, a customer's maximum liability will be from Rs. 5,000 to Rs. 25000, depending on the type of accounts and credit card limit.

2.3) *When reported beyond 7 days:* the customer's liability will be according to the bank's policy. Banks have been asked to clearly define the rights and obligations of customers in case of unauthorized transactions in specified scenarios.

2.4) *Burden of proof:* The burden of proving customer liability in case of unauthorized electronic banking transactions shall lie on the bank.

2.5) *Limited Liability of customer:* On being notified by the customer, the bank has to credit the amount involved in the unauthorized electronic transaction to the customer's account within 10 working days from the date of such notification by the customer

2.6) *Mobile Registration Mandatory:* To safeguard customers from online frauds, banks have to ask their customers to mandatorily register for SMS alerts and wherever available register for e-mail alerts, for electronic banking transactions.



2.7) Such SMS/email alerts also must have a "Reply" option for customer response so that they can easily notify banks in case of fraudulent transactions.

2.8) According to the RBI directive, banks have to provide a direct link on their website's home page for lodging the complaints.

3) **CERT(Computer Emergency Response Team):**

Ministry of Electronics and Information Technology, issued a consultation paper which envisages development of a framework for digital security that are operating in country. As part of the guidelines recommended, the government's has created CERT designated under Section 70B of Information Technology (Amendment) Act 2008 to serve as the national agency to perform the following functions in the area of cyber security:

1. Collection, analysis and dissemination of information on cyber incidents
2. Forecast and alerts of cyber security incidents
3. Emergency measures for handling cyber security incidents
4. Coordination of cyber incident response activities
5. Issue guidelines, advisories, vulnerability notes and whitepapers relating to information security practices, procedures, prevention, response and reporting of cyber incidents¹⁰³⁶

¹⁰³⁶ Ministry of Technology and Information Act (Sep.15.2017, 2:28 am) <http://meity.gov.in/content/icert>

DEFECTS IN CIRCULAR

There lies a lacuna regarding the Indian sectors of bankers who will be availing these facilities as:

- Firstly, the RBI mentions that “when a customer suffers a loss due to her negligence, she shall bear the entire loss until she reports the unauthorized transaction to the bank.” This could be problematic because in many online frauds the customer would not even receive a notification for her transaction and could be unaware about it for a long time.
- Secondly Illiterates and those with limited knowledge of banking facilities in rural areas wouldn't be able to even identify an online fraud.
- Thirdly, the RBI limited the liability of the bank in case of breach by a third party. If a customer fails to report an unauthorized online transaction on his account to the bank within seven working days, then she is entitled to no more than Rs 5000 as compensation irrespective of her loss. In case the customer takes more than seven days to report the fraud, then the bank is under no liability to compensate her.

NEED FOR AWARENESS

Requirement for carefulness in the cyber world has been highlighted by many scholars. These frauds have picked up consideration resulting to the notice of demonetization, with



rising digital managing an account exchanges and a legislative push towards a computerized economy. A few new issues originating from the doubt in computerized installment frameworks have been reported. For example, the cybercrime cell of the Mumbai Police has gotten a few reports of a trick portrayed by people accepting fraudulent calls professedly from banks, talking about another RBI strategy. These calls educated shoppers that credit and check cards were destined to be deactivated, yet in the event that they discharged their card points of interest, they would be allowed to proceed with utilization. There has likewise been a rise in Ransom ware attacks recently, with more than 11,000 assaults being accounted for in only three months. This is notwithstanding the reality that 80% of cybercrimes remain unreported according to late news reports. This post will audit a few activities taken towards the more effective examination of cybercrime by law authorization the nation over.¹⁰³⁷

CYBER POLICING IN INDIA

- 1) CRIME AND CRIMINAL TRACKING NETWORK AND SYSTEMS (CCTNS): CCTNS, a project running under the

national e-governance plan, that has been approved by the cabinet committee on economic affair in the year 2009, It aims at creating a nationwide networking infrastructure for an IT-enabled criminal tracking and crime detection system. The integration of about 15,000 police stations, district and state police headquarters and automated services was originally scheduled to be completed by 2012. However, this still remains incomplete.

- 2) 'Centre Citizen Portal' - ONLINE COMPLAINTS PORTAL: As a response to the queries asked by Supreme Court on the measures taken to curb cybercrime, an online portal has been set up by central government called 'Centre Citizen Portal'. It allows the citizens to file any sort of complaints which may include cyber stalking, online financial fraud. This portal on receiving any such portal will trigger an alert to the police station and allow the police to track and update the status of the complaint and the complainant shall be able to view updates and escalate the complain to superior authority.
- 3) CYBER POLICE STATIONS: *Cyber police headquarters include trained staff and proper equipment to break down and track advanced crimes. As per a standing order of the DG and IGP of Bengaluru City Police issued in June 2016, where damage is of over INR 5 lakh can be enlisted at cyber police headquarters in instances of bank fraud. In instances of internet deceiving, just those cases where damage is over INR 50 lakh are*

¹⁰³⁷ Law and enforcement initiatives towards tackling cybercrime in India: CCG NLU, (Mar. 31. 2017 6:23 pm) <https://www.medianama.com/2017/03/223-cybercrime-law-enforcement/>



reported to jurisdiction of cyber police headquarters. All other case is to be enrolled with the nearby police headquarters which, dissimilar to cyber police headquarters, which unlike cyber cell do not include, proper gear to investigate and track digital crime.

- 4) **PREDICTIVE POLICING:** It involves the usage of data mining, statistical modeling and machine learning on datasets relating to crimes to make predictions about likely locations for police intervention. In 2013, Jharkhand Police, in collaboration with the National Informatics Centre, began developing a data mining software for scanning online records to study crime trends.

CHALLENGES FACED

BANKING SECTOR IN INDIA

In India, legal infrastructure promoting internet banking has not yet been put in place in a comprehensive manner. Banking Sector faces many challenges while executing policies among the customers:

- 1) India does not have licensed certifying authority appointed by the controller of certifying authorities to issue digital Signature certificates. India is not yet a signatory to the International Cyber Crime Treaty, which seeks to intensify cooperation among different signatory nations for exchanging information concerning cyber criminals.

- 2) There are unresolved legislative issues related to cyber crime laws, clarification regarding regulatory authority over e-money products, consumer protection and privacy laws. To make the electronic banking operation in India more widespread, secure and effective, these issues need to be addressed by relevant authorities¹⁰³⁸.

- 3) As the banking practices and legislations concerning electronic banking are still in process of evolution in India and abroad because of technological innovations, there is a need for constant review of the current existing legislation in the banking sector.

- 4) The RBI is monitoring and reviewing legal and other requirements of electronic banking on a continuous basis to ensure that the e-banking would develop on sound lines and the e-banking would not pose a threat to financial stability.

LAW AND ENFORCEMENT

- 1) No formal technical knowledge on how to deal with the internet fraud cases. This is one of the main problem that occurs while execution of the laws made.
- 2) Struggling to establish the chain of evidence, as there is no visible evidence to start with. Online frauds are done on machines; it is very easy

¹⁰³⁸ S.M. Jawed Akhtar & Md. Shabbier Alam, Banking system in India: Reforms and Performance Evaluation, New Century Publication, 170 (2011)



to erase all history leaving no evidence behind.

- 3) Lack of Cyber forensic knowledge, India is developing country where computers are a recent introduction, thus majority deals with lack of computer knowledge.
- 4) How to setup the action plan for investigation? Police and legislature makers are not capable enough to decide modus operandi to tackle the issue due to the lack of cyber knowledge.

RECOMMENDATIONS

To reduce the risk in frauds in online transactions, banks should have a security policy duly approved by the board of directors. They should also introduce logical access control to data, system, application, software, utilities, etc. at the minimum they should use the firewall system so that there is no direct connection between internet and bank's system. **Bankwala** and **Flexcube** are the most popular e-banking solution used for securing electronic transactions in India. Biometrics which is the science of identifying an individual by means of personal characteristics like face, finger prints retina or voice, is another security paradigm which can empower banks to verify the actual identity of a person rather than merely depending upon a PIN number.

Banks should also ensure that the product that they offer should be restricted to account holders only and services shall include only local

currency products. Any breach of security system shall be reported immediately to RBI, banks should make mandatory disclosures of risks, responsibilities and liabilities of the customers in doing business through the internet. It will be naive to assume that in e-banking there are only transactions risks. This is because transactional risk will give rise to legal issues and ultimately all these will have a monetary implication of its population reputation of the bank and trust in the entire financial system.

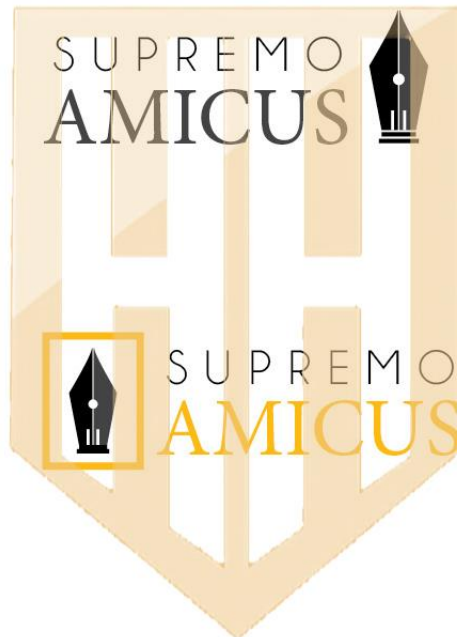
CONCLUSION

Cyber crimes are very common and criminals are using very sophisticated tools to commit the crime. Cyber criminals are taking advantage of peoples having less awareness about the Spam messages, Phishing mails from where they can steal the required information. Bank Frauds constitute a significant level of cubicle offenses being examined by the police. Unlike other frauds these frauds constitute sum of lakhs and crores of rupees. Bank fraud is an criminal offence in numerous nations, characterized as wanting to acquire property or cash from any governmentally guaranteed budgetary organization. It is in some cases considered a white collar crime. It is expanding with the progression of time. All the major operational zones in keeping money speak to a decent open door for fraudsters with developing frequency being accounted for under store, advance



and between branch bookkeeping exchanges, including settlements.

There is a need to track such activities by incorporating the SPAM filter, Phishing filter in web browser itself. Also banking organizations should take the step forward to educate the user, make them aware about the probable threats to his money through net banking.¹⁰³⁹ Current control mechanism is not appropriate and not able to serve the purpose of curbing the online frauds thus many changes are need to be made in the same.



¹⁰³⁹P.S. Lokhande&Dr. B.B. Meshram,
Collecting Digital Evidence: Internet
Banking Fraud - Case study (Sep.
14.2017, 5:14pm),
<https://www.irjet.net/archives/V2/i2/Irjet-v2i2194.pdf>



UNIFORM CIVIL CODE EYE-TO-EYE WITH PERSONAL LAWS

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I. Abstract

India is a secular state, world's largest democracy and second most populous country {1,336,286,256 (1.3 billion) people (May 2016)}. India is a multi-religious secular nation, where each religion is partitioned in various groups and categories having their own diverse (and at some point contradicting) traditions and conventions. Uniform Civil Code generally refers to that part of legislative framework, which deals with family affairs of an individual and denotes uniform law for all citizens, irrespective of his/her religion, caste or tribe. The need for a uniform civil code is inscribed in Article 44 (Article 35 in the draft constitution). This article is included in Part IV of the Constitution. The individual laws in view of such traditions and customs having 'most extreme religious substance' which oversee different matters including marriage, divorce, inheritance, legacy, maintenance, upkeep, guardianship, and so forth. The requirement for a Uniform Civil code in India has been talked about and contended a few circumstances regardless it stays a standout amongst the most questionable issues commented in our Constitution. One of the basic problems with the absence of a Uniform Civil Code

applicable throughout India is that it goes against the concept of equality, which is one of the basic tenets of our Constitution. It is also intimately connected to the issue of gender justice. The Constitution additionally calls upon the State to apply these standards in making laws, as these standards are fundamental in the administration of the nation. Article 44, which manages the Uniform Civil Code, states that: "The State might attempt to secure for the subjects, a uniform common code all through the domain of India". The target of this article is to constitute an environment in India, by bringing all groups on a common platform. This paper is an attempt to make audience aware about the much debated and controversial topic of a suitable legislation on Uniform Civil Code for all the citizens of India despite their religion or race or ethnicity in compliance with the constitutional mandate under Article 44.

Key Words: Secular state, Uniform civil code, Constitution, traditions

II. Objectives

- To analyze controversies of Uniform civil code with other articles of the Indian Constitution
- To study various aspects of the Uniform Civil Code¹⁰⁴⁰
- To study the application of Uniform civil code and how it strengthens national unity
- To evaluate application of Uniform civil code globally and domestically.

¹⁰⁴⁰Art44, Part IV, Indian Constitution



III. Review of Literature

- Towards the uniform civil code, by Vasudha Dhamagwar. ; this book explores the journey of uniform civil code from the British rule to the 21st century. It talks about the various obstacles that have hindered the application of uniform civil code.
- Uniform Civil Code: A Critical Study, by Wahiduddin Khan; this book deals with controversies and issues of implementing uniform civil code and the various conflicts with personal laws
- Uniform Civil Code in India – still a distant dream¹⁰⁴¹; this research paper cum article talks about how the status of uniform civil code and the hindrances that lie on its way for implementation.

IV. Introduction

India is a secular state, world's largest democracy and second most populous country {1,336,286,256 (1.3 billion) people (May 2016)}¹⁰⁴². India is a multi-religious secular nation, where each religion is partitioned in various groups and categories having their own diverse (and at some point contradicting) traditions and conventions. India's culture is among the world's oldest; civilization in India began about 4,500 years ago. More ethnic and religious groups than most other countries of the world characterize India. Aside from the much-noted 2000-odd castes, there are eight "major" religions, 15-odd languages spoken

in various dialects in 22 states and nine union territories, and a substantial number of tribes and sects. Many sources describe it as "Sa Prathama Sanskrati Vishvavara" — the first and the supreme culture in the world. India is identified as the birthplace of Hinduism and Buddhism, the third and fourth largest religions. About 84 percent of the population identifies as Hindu.¹⁰⁴³ About 13 percent of Indians are Muslim, making it one of the largest Islamic nations in the world. Christians and Sikhs make up a small percentage of the population, and there are even fewer Buddhists and Jains.

Uniform Civil Code

Part IV of the Constitution of India deals with the Directive Principles of State Policy, which aren't enforceable by any court, but which are supposed to play a fundamental role in the governance of the country, with the government duty-bound to apply these principles in making laws. Among other Directive Principles is Article 44, which asks the State to "endeavor to secure for citizens a Uniform Civil Code throughout the territory of India".¹⁰⁴⁴ Article 44 has always been contentious — as Article 35 of the draft Constitution, it was one of the most debated clauses in the Constituent Assembly as it set about the task of drafting a new Constitution for the recently-independent sovereign nation of India. The Constituent Assembly saw a division along communal lines among members, and the clause was adopted only after B R Ambedkar, Chairman of the Constitution Drafting Committee, assured the minorities that the

¹⁰⁴¹American International Journal of Research in Humanities, Arts and Social Sciences

¹⁰⁴²://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf (last visited Feb 27, 2017).

¹⁰⁴³ "Handbook of Research on Development and Religion" Edited by Matthew Clarke (Edward Elgar Publishing, 2013)

¹⁰⁴⁴Part IV of the Constitution of India



Article would not be thrust upon them.

VI. Personal laws in India

The people of India belong to different religions and faiths. They are governed by different sets of personal laws in respect of matters relating to family affairs, i.e., marriage, divorce, succession, etc. Personal laws are statutory and customary laws applicable to particular religious or cultural groups within a national jurisdiction. India is a land of diversities with several religions. The oldest part of Indian legal system is the personal laws governing the Hindus and the Muslims¹⁰⁴⁵. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislations in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations¹⁰⁴⁶. The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws, which are applicable to the religious communities, defined in the respective enactments themselves. The Converts' Marriage Dissolution Act, 1866

- The Indian Divorce Act, 1869
- The Indian Christian Marriage Act, 1872
- The Kazis Act, 1880
- The Anand Marriage Act, 1909

¹⁰⁴⁵Gerald James Larson, Religion and personal law in secular India (2001).

¹⁰⁴⁶Uniform Civil Code Or Codified Personal Law? | Live Law, Live Law (2017), <http://www.livelaw.in/uniform-civil-code-codified-personal-law/> (last visited Jan 8, 2017).

- The Indian Succession Act, 1925
- The Child Marriage Restraint Act, 1929
- The Parsi Marriage and Divorce Act, 1936
- The Dissolution of Muslim Marriage Act, 1939
- The Special Marriage Act, 1954
- The Muslim Women (Protection of Rights on Divorce)Act, 1986
- The Hindu Marriage Act, 1955 and
- The Foreign Marriage Act, 1969

VII. An Evaluative study of Uniform civil code; Its Journey (1850-2017)

Colonial rule (1850-1947)

The controversies regarding Uniform civil code go long back to the British period. There was a constant demand for uniform codification of Indian law, relating to evidences, crime, contracts etc. However it was always preferred that personal laws of different religious communities are kept outside the realm of uniform code of conduct. Therefore the British always chose the application of personal laws by experts for eg. Priest for the application of personal law in the disputes that arose, unless in special cases where they intervened. Thus, the British let the Indian citizens have the benefit of self-government in their own domestic religious matters with the Queen's 1859 Proclamation promising absolute non-interference in the religious matters. However the public i.e. the Indian citizens were governed by the British laws with respect to crime, land relations, contracts and evidences: all were subjected to same laws irrespective to their religious backgrounds¹⁰⁴⁷.

¹⁰⁴⁷Vasudha Dhagamwar, Towards the uniform civil code (1 ed. 1989).



Due to the difficulty in exploring each and every specific practice of each and every religion practiced on the land of India, made customary laws harder to implement.

Several legislative reforms were used to pass various laws such as Widow Remarriage Act of 1856, Women's right to property Act 1937 etc. B.N Rau committee was formed which recommended that was a dire need to pass a uniform civil code, which would give equal rights to the women and a an escape to the women community from the prevailing gender injustice.

- From Nehru to Modi

The first prime minster had fought tooth and nail against conservative Hindus to modernize Hindu Law and implement Uniform civil code. While Nehru had the strength to battle Hindu conservatives and push through measures, which have benefitted millions of Hindu women, even he failed to navigate the intractable maze that was Muslim law. India's Muslim personal laws are the most regressive in the world, lagging behind even Pakistan and Bangladesh, two other countries that inherited the same legal system that India did from the British Raj. A Uniform civil code as a silver bullet in order to remove the worst provision of our personal laws might seem tempting but unfortunately appears to be unviable. From Nehru to Vajpayee to Modi, a whole gamut of governments have tried and failed. Of course, contrary to perception, the lack of a Uniform civil code doesn't mean modernization of personal law has stopped. As events have borne out, the progressive gradualism of the Indian system is taking effect

The framers of Indian Constitution were convinced that certain amount of modernization is required before uniform civil code is imposed upon the citizens. Though the Hon'ble Supreme Court has emphasized upon the need of Uniform civil code to settle the ambiguity, which has arisen due to the different interpretations of various personal laws

- Mohammed Ahmed Khan v. Shah Bano Begum¹⁰⁴⁸

In this case a penurious Muslim lady claimed maintenance from her husband under section 125 of the Code of Criminal Procedure, 1973 ("CrPC"), and was conceded her claim. The then Chief Justice of India, Y.V. Chandrachud, came out unequivocally for a uniform civil code, watching that, "A typical common code will help the cause for national coordination and integration by expelling different loyalties to law which have clashing belief systems and conflicting ideologies." A national furor emitted in the wake of this choice, provoking the incumbent Rajiv Gandhi government to upset the choice by authorizing the Muslim Women (Protection on Divorce) Act, 1985, which adequately banned Muslim ladies from guaranteeing upkeep or maintenance under Section 125. This move repudiated the perceptions of the Supreme Court and was legitimized in light of the fact that simple perceptions of the Court did not commit alternate branches of government to really execute such a uniform code.

VIII. Judiciary's role

¹⁰⁴⁸ *Mohammed Ahmed Khan v. Shah Bano Begum* (AIR 1985 SC 945)



• **Sarla Mudgal vs. Union of India**¹⁰⁴⁹

In Sarla Mudgal case the issue was that the husband has performed the second marriage while converted into Islam but without dissolving the first marriage. So, if the literal interpretation of section 5 and section 11 of the H.M.A, 1955 is done then he cannot be held liable under the Hindu marriage act for bigamy because section 5 uses the

World, "If a marriage is solemnized between to Hindus." The Hon'ble Supreme Court has resolved the issue by saying that if there if a controversy between two personal laws then such law should prevail which is serving the purpose best. So, it was held that a conversion to Islam does not amount to automatic dissolution of the marriage performed under Hindu law. That, "Article 44 is based upon the idea that there is no vital association amongst religion and individual or personal law in a civilized society. Article 25 ensures flexibility where as Article 44 tries to dissect religion from social relations and individual law. Marriage, inheritance and like matters of a secular character can't be brought inside the assurance cherished under Articles 25, 26 and 27. The individual law of Hindus, for example, identifying with marriage, and like have each of the a holy beginning or origin, in the same way as on account of the Muslims. The Hindus alongside Sikhs, Buddhists and Jains have forsaken their estimations and sentiments in the reason for national solidarity and integration,

¹⁰⁴⁹ *Sarla Mudgal vs. Union of India and others* (1995)3 SCC 635

some different groups would not, however the constitution enjoins the foundation of a "Common Civil Code" for the entire of India. The Government of India if therefore requested through the Prime Minister of the Country to have a fresh look at Article 44 of the Constitution of India and Endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. It was also reminded by kuldeep Singh in this case that even 41 years thereafter; the rulers of the country are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The court further emphasized when more than 80% of the citizens have already been brought under the codified personal law there is no justification what so ever to keep in abeyance, any more, the introduction of "Uniform Civil Code" for all citizens in the territory of India."

• **John Vallamattom v. Union of India**¹⁰⁵⁰

Court had reason to express its conclusion regarding the matter of a uniform civil code. On this occasion, John Vallamattom, a Christian priest, questioned the sacred legitimacy of Section 118 of the Indian Succession Act, 1925, guaranteeing that it was unjustifiably prejudicial against Christians for putting outlandish limitations on their capacity to will away land as gifts for magnanimous and religious purposes. A three-judge seat of the Supreme Court, containing Chief Justice V.N. Khare, and Justices A.R. Lakshmanan and S.B. Sinha, struck down the provision as being violative of Article 14 of the Constitution. Chief Justice Khare

¹⁰⁵⁰ *John Vallamattom v. Union of India* (AIR 2003 SC 2902)



commented: “We would like to State that Article 44 provides that the State shall endeavor to secure for all citizens a uniform civil code throughout the territory of India...It is a matter of great regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.”¹⁰⁵¹

• **State of Bombay v. Narasu App Mali**¹⁰⁵²

Prevention of Hindu Bigamous Marriages Act, 146 was challenged. The Act had imposed severe penalty on Hindu for contracting a bigamous marriage. In this case the validity of the abolition of the polygamy in particular community was also challenged. The then Chief Justice of Bombay High Court J. M.C. Chagla observed that one community might be prepared to accept the social reforms, another community may not yet be prepared for it. Article 14 does not lay down that the State legislature may not be right while deciding to bring about the social reforms by stages and stages may be territorial or they may be community wise. J. Gajendradgkar opined that the classification made between Hindus and Muslims for the purpose of legislation was

reasonable and did not violate the equality provision contained in Article 14 of the Constitution. He observed that the validity of Hindu Bigamous Marriages Act has been challenged particular on two grounds. It is first contended that the personal laws applicable to the Hindus and the Mohammadans to the union of India are subject to the provisions contained in part III of the Constitution and they would be void to the extent to which these provisions are inconsistent with the Fundamental Rights. Further these personal laws allow only polygamy and not polyandry so it was also argued that these laws also discriminate against women only on the ground of sex. If that is so the provisions of the personal laws that permit polygamy, they are against the provisions contained in the Article 15(1) or in other words after the commencement of constitution the bigamous marriages amongst the Hindus as well as the Mohammedans, they were not valid or void. So in this case the Court did not only uphold the validity of the legislation it also emphasized that the said legislation was a step to secure the Uniform Civil Code.

• **Danial latifi and another v. Union of India**¹⁰⁵³

The preamble of Muslim Women (Protection of Rights on Divorce) Act, 1986 sets out that it is an Act to protect the rights of Muslim women who have been divorced by or have obtained divorce from

¹⁰⁵¹209th Law Commission Report on the Proposal for the Omission of Section 213 of the Indian Succession Act, 1925.

¹⁰⁵²State of Bombay v. Narasu App Mali AIR 1952, Bombay, 84.

¹⁰⁵³Danial latifi and another v. Union of India (1995) 3 SCC 635



their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim law and has been divorced by, or has obtained divorce from her husband in accordance with Muslim law; "iddat period" is defined under Section 2(b) of the Act to mean, in the case of a divorced woman-

(1) three menstrual courses after the date of divorce, if she is subject to menstruation.

(2) three lunar months after her divorce, if she is not subject to menstruation.

(3) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Section 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband.

(b) where she maintains the children born to her before or after her divorce, a reasonable provisions and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law.

(d) all the properties given to her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relative of the husband or his friends.

However even after the judgment, many lower courts have failed to apply its principles – but it seems to be the only method of readdressal that is actually working to protect Indian women from their regressive personal laws.

IX. **Review of Fundamental provisions of Uniform civil code**

One of the biggest obstacle in the way of implementing Uniform civil code apart from the consensus is its codification rather drafting. The biggest question is the whether Uniform civil codewill be a mixture of all personal laws or will it be fresh law confining to the constitutional mandate. There is a biggest misconception floating amongst the minds of the Indian citizens that Uniform civil codeis nothing but a repackaged version of Hindu law, however the same was ruled out by Mr. Atal Bihari Vajpayee while declaring that Uniform civil codewill aim towards gender equality and will try to cover all positive aspects of all personal laws prevailing in India. The Uniform civil codeshould carve a balance between protection of fundamental rights and



religious dogmas of individuals.¹⁰⁵⁴ It should be a code, which is just and proper according to a man of ordinary prudence, without any bias with regards to religious or political considerations

• **Maintenance**

<p>Present Situation</p>	<p>The maintenance laws for the Hindus and Muslims are very different. Apart from personal laws, a non-Muslim woman can claim maintenance under Section 125 of Code of Criminal Procedure. A Muslim woman can claim maintenance¹⁰⁵⁵. Apart from maintenance of wife, there are also provisions for maintenance of mother, father, son and unmarried daughter under the Hindu law.</p>
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Uniform civil code

Proposal

(i) A husband should maintain the wife during the marriage and also after they have divorced till the wife remarries.

(ii) The amount of alimony should be decided on basis of the income of the husband, the status and the lifestyle of the wife.

(iii) The son and daughter should be equally responsible to maintain the parents. The reason for this being that if she claims equal share of the property of her parents, she should share the duty to maintain her parents equally.

(iv) The parents should maintain their children son till he is capable of earning on his own and daughter, till she gets married.

• **Succession and Inheritance**

<p>Present situation</p>	<p>In Hindu law, there is a distinction between a joint family property and self acquired property¹⁰⁵⁶, which is not so under the Muslim law. The</p>
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¹⁰⁵⁴PERSONAL LAWS OF INDIA VIS-A-VIS UNIFORM CIVIL CODE A RETROSPECTIVE AND PROSPECTIVE DISCUSSION BY DR. PARMINDER KAUR <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf> (last visited Feb 27, 2017).

¹⁰⁵⁵Muslim Women (Right to Protection on Divorce) Act, 1986

¹⁰⁵⁶Hindu Succession Act, 1956



	<p>Hindu Undivided Family (HUF), formed under the Hindu law, run businesses and own agricultural lands.</p>			<p>which she has self acquired or acquired through her father or relatives.</p>
<p>Uniform civil code Proposal</p>	<p>(i) Equal shares to son and daughter from the property of the father, whether self acquired or joint family property. There should be no discrimination based on sex in the matters of inheritance. The provisions of the Hindu Succession (Maharashtra Amendment) Act, 1994 can be taken as guiding principles wherein the daughter of a coparcener shall by birth become the coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive the right to claim by survivorship and shall be subject to same liabilities and disabilities as the son.</p> <p>(ii) Provisions for inheritance of the property of mother,</p>			<p>(iii) The provisions relating to will should be in consonance with the principles of equity. There should be no limitations imposed on the extent to which the property can be bequeathed, the persons to whom such property can be bequeath and the donation of the property by will for religious and charitable purpose.</p> <p>(iv) The essentials of valid will, the procedure for registration and execution of the will should be provided for.</p> <p>(v) Provisions for gifts should not contain any limitations, though essential of valid gift and gift deed should be specified.</p>
<p>• Marriage</p>				
<p>Present situation</p>		<p>The personal laws of each religion contain</p>		



	different essentials of a valid marriage.			(iii) Registration of marriage should be made compulsory. A valid marriage will be said to have solemnized when the man and the woman sign their declaration of eligibility before a registrar. This will do away with all the confusion regarding the validity of the marriage.
Uniform civil code Proposal	<p>(i) The new code should impose monogamy banning multiple marriages under any religion. Polygamy discriminates against the women and violates their basic human rights. Thus, monogamy should be imposed, not because it is the Hindu law, but because it adheres to Article 21¹⁰⁵⁷ and basic human values.</p> <p>(ii) The minimum age limit for a male should be 21 years and for a female should be 18 years¹⁰⁵⁸. This would help in curbing child marriages. Punishment should be prescribed for any person violating this provision. Also, punishment for other persons involved in such an act, like the relatives, should be prescribed which would have a deterrent effect on the society.</p>			<p>(iv) The grounds and procedure for divorce should be specifically laid down. The grounds enumerated in the code should be reasonable and the procedure prescribed should be according to the principles of natural justice. Also, there should be a provision for divorce by mutual consent.</p>

X. Implications of enforcing Uniform Civil Code

- To eliminate gender injustice. The personal laws based on religious scripts and customs are discriminating women on various grounds. For example, Polygamy and triple talaq are allowed under Muslim personal laws.
- To move toward a socially progressive society. A uniform civil

¹⁰⁵⁷Part III, Indian Constitution

¹⁰⁵⁸Art.14, Part III, Indian Constitution



code is the sign of modern progressive nation. It is a sign that the nation has moved away from caste and religious politics

- To eliminate inconsistencies in application of tax laws. For example, the instrument of Hindu Undivided Families (HUF), allows getting tax exemptions, while Muslims are exempt from paying stamp duty on gift deeds.
- To eliminate the vote bank politics, which is used by most of the politicians. Once all Indians are brought under the umbrella of unified law, the misuse of religion for the sake of politics will be immensely reduced.
- To deal with problem of Honor Killings by the extra-constitutional bodies like Khap panchayats.
- To remove the Socio-legal inequalities in each religion.

XI. Controversy of Uniform civil code

- **Uniform civil code doesn't overshadow Secularism**

Articles 25[9] and 26[10]¹⁰⁵⁹ guarantee right to freedom of religion. Article 25 guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. Be that as it may, this privilege is liable to open request, profound quality and wellbeing and to alternate arrangements of Part III of the Constitution. Article 25 additionally

enables the State to control or confine any monetary, money related, political or other mainstream action, which might be related with religious practice and furthermore to accommodate social welfare and changes. The assurance of Articles 25 and 26 is not restricted to matters of precept of conviction or belief. It stretches out to acts done in compatibility of religion and, in this way, contains a guarantee for custom religion and perceptions, services and methods of love, which are the fundamental parts of religion.

Uniform civil code is not contradicted to secularism or won't damage Article 25 and 26. Article 44 depends on the idea that there is no fundamental association amongst religion and individual law in a cultivated society. Marriage, progression and like matters are of mainstream nature and, in this manner, law can direct them. No religion grants or permits purposeful distortion. Uniform civil code won't create an obstacle in the way of one's religious convictions relating, maintenance, succession and inheritance. This implies under the Uniform civil code a Hindu won't be constrained to play out a nikah or a Muslim be compelled to complete saptapadi. Be that as it may, in matters of inheritance or maintenance, there will be a common law.

XII. Practical Application Of Uniform civil code

¹⁰⁵⁹Part III of the Indian Constitution



• **Global perspective**

The question of uniform civil code does not arise in most of the other countries. The reasons are:

1. No other county can boast of as wide cultural diversity as India can.
2. In other countries which are secular (like USA), the concept of secularism is much different from India. While India has a secularism in which the government actively promotes and protects the different religions, other countries think of religion as a sphere distinct from the sphere of the state. Hence need for Uniform civil code doesn't arise.¹⁰⁶⁰

Virtually all countries have uniform civil code or for that matter uniform law, civil or criminal. The European nations and US have a secular law that applies equally and uniformly to all citizens irrespective of their religion. The islamic countries have a uniform law based on shariah which applies to all individuals irrespective of their religion, notable exceptions like Bangladesh, Indonesia exist where the law is secular though based on shariah in a few matters

• **Indian perspective**

India is governed by different specific religious laws, governing diverse population of the country. However Goa is an exception to the above fact as single code governs all Goans, irrespective of religion, linguistic or religion. Certain aspects of Goan civil code are different from Indian laws in the following ways;

- A married couple has a joint

ownership of the assets owner or acquired after or before marriage. However in the case of divorce the assets are divided equally amongst the couple and this clause cannot be revoked or changed

- Parents residing in Goa cannot disinherit their children entirely or completely. At least half of the property has to be transferred in the name of the children compulsorily.
- Muslim men residing in Goa are not allowed to practice polygamy. And the concept of verbal divorce doesn't exist.

Goan civil code isn't strictly uniform it has specific provisions for certain communities as Hindu men are allowed bigamy if the wife isn't able to deliver a child by the age of 25, or fails to deliver a male child by the age of 30. Ironically, for other communities the law prohibits bigamy.

XIII. Conclusion

The bench comprising of Chief Justice of India V.N. Khare, Justice S.B. Sinha and Justice A.R. Lakshamanan in the case of John Vallamattom v. Union of India¹⁰⁶¹ struck down the section of the Indian Succession Act it to be unconstitutional. Chief Justice Khare stated that,

"We would like to State that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India It is a matter of great regrets that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a

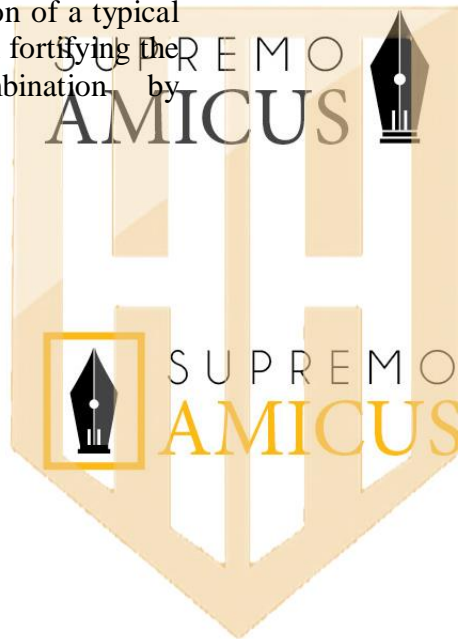
¹⁰⁶⁰Shimon Shetreet & Hiram Chodosh, Uniform civil code for India. (2015)

¹⁰⁶¹(AIR 2003 SC 2902)



common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

The implementation of uniform common code is a dynamic enactment. The legislature ought to produce the agreement of different and diverse groups belonging to different relies backgrounds, for sanctioning of uniform civil code. Be that as it may while surrounding the uniform civil code, the legislature must be additional cautious not to trample upon the established privileges of minorities. Section of a typical civil code will likewise help in fortifying the reason for national combination by evacuating clashing interests.





RIGHT TO MAINTENANCE: PROCEDURAL HURDLES AND SOCIAL REALITY

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The Code of Criminal Procedure that provides maintenance as a substantive right presents also conditions subject to which the right is extended to a claimant. Besides, the code specifies also the jurisdiction and the procedure to be followed in the enforcement of the right. The summary relief extended under Section 125 being mainly towards fulfillment of the basic objective i.e. preventing destitution and the culmination of vagrant behavior on failure of such prevention, the procedures that are prescribed under the code are much simple. The chapter of maintenance has been discussed under the following headings and sub-headings: Maintenance of Wife under Hindu, Muslims, Christian and Parsi Laws (a) Analysis of the legislative provisions (b) Evaluation of the judicial pronouncements (c) Identification of pitfalls (d) Advocacy of reforms and improvements.

BASIS OF THE CLAIM

An application under Section 125 of the Criminal Procedure Code, be it by a wife, child or parent, will be entertained only on proof of following elements. The applicant needs to prove that the respondent has sufficient means and that he/she has neglected or refused to maintain him/her. In addition, he or she has to prove her inability to maintain himself or herself.

On the side of the respondent the requisites are,
(1) he should be having sufficient means and
(2) There should have been neglect or refusal on his part to maintain the petitioner.

INABILITY TO MAINTAIN

Applicant's inability to maintain herself/himself is the sine qua non for a claim of maintenance under Section 125. The claimant may be wife, child or parent, proof of their inability to maintain themselves is a condition precedent to grant maintenance and the burden of proving the same is on them. The phrase unable to maintain does not mean that he or she should be an absolute destitute standing with tattered rags on the streets. If she for a while is taken care by some of her relatives that will suffice to prove that she is not in a position to maintain herself. A deserted wife, at the age of 50, working as laborer for her survival, is entitled to get maintenance. The capacity to earn does not mean that he or she is able to maintain him or herself. The potential ability to earn will not be considered. The 'able body' concept cannot be extended to the case of wife for this will defeat the very

Object of the legislation. The holding of an employment sometime back does not mean she has the capacity and is able to maintain herself.

Instances are not wanting where the capacity of wife is also taken into consideration. Potential capacity of a woman is least considered for extending her the benefit. The High Courts of Karnataka and Kerala have taken the potential capacity of wife



into consideration while determining her inability. The relevance of considering the income of wife, if any, has been discussed by the Supreme Court in *Bhagawan Dutt v Kamla Devi*. to settle the contrary views taken by some lower courts. “On dismissal of first application made 17 years earlier and change of circumstance in the meantime can force a woman to file a petition on the ground of her inability to maintain herself and the petition is not barred by res-judicata.

In the case of children and parents, their age and conditions of life will prove their inability to maintain themselves. Where maintenance is claimed for the child, which is only about two years old, it is obvious that it is unable to maintain itself and no specific proof is essential to prove that the child is unable to maintain itself. “Physical or mental defect on the part of major children disabling them to maintain themselves are entitled for maintenance.

Any child above the age of 18 years not being disabled by either mental or physical deformity is presumed to be having sufficient means. Old age needs no further proof to establish one's inability. But in the case of wife this at times causes much hardship.

Sufficient Means

The person against whom the claim is made must have ‘sufficient means’ based on which alone maintenance can be allowed. The courts should be satisfied on this point and then pass the order. “The words ‘having sufficient means’ do not signify only visible means of such things as real property, income, revenue, estate or employment.

Besides pecuniary resources, it has its reference to the earning capacity of the individual as well. If one is healthy and able bodied it must be construed that he has the means to support his wife, child or parent.” Even in case of insolvency of the husband, the capacity to earn being there on him it is material to construe that he has means.” One's debt” or young age and inability to get a job or worldly renunciation” does not provide ground to claim that he has not sufficient means. But physical infirmity and ailments on account of which one cannot earn is material.” Income of other relations of the husband does not construe that he has means.”

The burden of proof that the respondent has sufficient means is on the applicant. But the burden is not heavy and can be based on preponderance of probabilities. On establishment of this, the burden shifts to the respondent to show that he has no sufficient means to provide maintenance. “In the absence of any such pleading, the Court will presume that the husband or father has means.” But omission to plead that the husband has sufficient means does not take away the right of maintenance.

Neglect or Refusal to Maintain

No order for maintenance can be passed unless neglect or refusal is there by a person against whom the petition is filed. Proof of neglect or refusal is the basis of the claim for maintenance and without such proof no order of maintenance can be made even though she is living separate in exercise of her statutory right.” The term neglect is used to signify failure on the part of a person bound to maintain his wife. In wider sense, it includes disregard of duty to maintain



whether intentional. Neglect or refusal need not be express but may be inferred from the conduct of the parties.” It is a question of fact and no hard and fast rule can be laid towards determining the same. Failure to maintain properly can amount to neglect, when maintenance provided is very meager and inadequate this amounts to neglect and Magistrate can entertain jurisdiction. Mere failure or omission can amount to neglect in case of children on whom father has a duty. “Subsequent marriage by husband is a clear proof of neglect.”

JURISDICTION

Early from the inception of the Code in 1898, the jurisdiction to deal with matters connected with claim of maintenance or its execution of the orders made if any, vested with the Judicial First Class Magistrate. After 1984, with the passing of the Family Courts Act, the jurisdiction now rests with the Family Courts constituted to deal with family matters. The Family Courts Act specifically excludes the exercise of jurisdiction by the Magistrate Court.

Jurisdiction of the Magistrate Court

A Magistrate of First Class alone is given jurisdiction to entertain application for maintenance under Section 125 Cr.P.C.” A Court which normally exercises criminal jurisdiction is seized of this matrimonial and purely civil jurisdiction to cater to the needs of a vast majority of deprived population. This is justified on the ground that it aims at the prevention of crime or at least the tendency to take up a criminal career. The procedure that is followed by this criminal court is somewhat peculiar which does not

reflect either of the civil or of the criminal jurisdiction. The discretion provided under Section 125 is very vast. Again, the jurisdiction conferred on the Magistrate is not only adjudication of the claim for maintenance but includes also the power of enforcing the same through much coercive measures. Though the litigation is between the parties, the role played by the Court is dominant and indirectly reflects the state intervention in seeing effectively the enforcement of a moral duty which every husband has against his wife, every father has against his children and every son/daughter has against his/her parents. The imprint of English practice is well lit in the magisterial system, to act as a ‘casualty clearing station’. With the passing of the Family Courts Act, the jurisdiction now stands shifted to the Family Courts constituted to deal with family and matrimonial matters.

Jurisdiction of the Family Courts

The persistent demand for English model Family Court resulted in the formulation of the Family Courts Act 1984, to bring under one umbrella all family issues, such as marriage, divorce, maintenance and custody of children. The central theme of the enactment is the preservation of the institution of marriage giving emphasis to ‘conciliation’ in disputes between married partners.

Family Courts Act, 1984

All family matters at present are entrusted to the District Judge (or delegated to a Subordinate Court) who is well versed in ordinary civil and criminal trials. He tries



family matters in usual manner with the normal adverbial procedure. In other words, the judge who tries claims for breach of contract or tort, claims for motor vehicle accidents, and crimes, like rape and murder, also tries all matrimonial matters including custody of children and spousal maintenance. It is now realized that adjudication of family matters is entirely a different matter. It has a different culture; it has a different jurisprudence. The resolution of family conflict requires special procedures.

The procedures must be designed to help people in trouble, to reconcile and resolve their differences, and where necessary, to provide assistance. The Court adjudicating family disputes should function in a manner that it may tend to conserve and not disrupt the family life; it should be helpful and not harmful to individual partners and their children; and it should be preservative rather than punitive to family and marriage. It is, therefore, accepted that adversary system promotes ritualistic and unrealistic response to family problems. The present system offers no legal protection to children. They are not represented by counsel and the Court does not have enough information to determine their best interest. More often than not, children are caught in the inter spousal conflicts and become pawns, weapons and ultimately victims. The fact of the matter is that adverbial process precludes reconciliation and conciliation of inter-spousal and inter-parental conflicts. Thus, no Court which is engaged in finding out what is for the welfare of the family, whether a marriage has broken down or not, which spouse should have the custody of and access to children or which spouse needs support, should rest content with the

assertions and contentions of the parties and evidence led by them to prove or disprove their assertions and contentions. The Court engaged in this task requires a less formal and more active investigational and inquisitorial procedure. In other words, it is not a litigation in which parties and their counsel are engaged in winning or defeating a legal action, but an inquisition in which parties, social workers, parties, social workers, lawyers, welfare officers, and psychiatrists are engaged in finding out a solution to familial problems.

India has taken the necessary steps to form a new device for dealing for family matters. The Family Courts Act, 1984 has been passed to give special jurisdiction to all family matters.

Constitution of Family Courts

The Family Courts Act 1984, at the first instance, stipulates for the establishment of Family Courts for those towns and cities whose population exceeds one million. It also lays down that the State Government may also set up Family Courts for other areas. Appointment of judges of Family Courts is to be made by the State Governments with the concurrence of their High Courts. A Family Court may consist of one or more judges. Where there are more than one judge, the State Government with the concurrence of the High Court will designate one of the judges as the principal judge and any other judge as additional principal judge. Section 4(3) of the Act lays down the qualification of judges of the Family Court. A person who has at least seven years experience as a judicial officer or as a member of a tribunal or who has held



a post for that duration under the central or a state government requiring special knowledge of law, or who has been an advocate of a High Court (or two or more High Courts in succession) for at least seven years may be appointed as judge of the family court. Other qualifications may also be laid down by the Central Government in consultation with the Chief Justice of India. “Women will be given preference for the appointment as judges of the Family Court.” Section 4(4)(a) also lays down that “every endeavor shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counseling are selected”.

There is some controversy as to what matters should come within the jurisdiction of the Family Court. The Act has brought all matters directly pertaining to the family, such as matrimonial causes, maintenance and alimony of spouses, custody, education and financial support to children, settlement of spousal property, and guardianship and custody of children under the jurisdiction of family court. The Family Court has also been conferred jurisdiction for passing orders for maintenance of wives, children and parents.

Informal Procedure

The Family Courts Act opts to adopt a less formal procedure. Although Section 10 of the Act makes the procedure laid down under the Code of Civil Procedure, 1908 applicable to Family Court proceedings, it is also laid down that the Family Court is free

to evolve its own rules of procedure and once the Family Court lays down its own rules of procedure they will override the rules of procedure laid down in the Code of Civil or Criminal Procedure. The Act itself contains some provision which indicates the informality of the procedure. The Family Court may receive as evidence any report, statement, document, information or other matter that may assist it effectually in resolving a dispute, irrespective of the fact that the some would be otherwise relevant or admissible under the Indian Evidence Act 1872.

It is also not obligatory on the part of the Family Court to record the evidence of witnesses at length. It would be enough if the judge records or causes it to be recorded a memorandum of the substance of what witnesses have deposed. Such a memorandum is required to be signed by the judge and the witness, and once that is done it will form part of the record of the cases . Where the evidence of a person is of formal character it may be given by affidavit and it will constitute part of the evidence in the case. The same informality is maintained about the judgment of the Family Court. A judgment of the Family Court should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decisions“ A decree or order of the Family Court may be executed by the same court or any other Family Court or by an ordinary Civil Court in accordance with the convenience of the party concerned.“

No appeal lies against the interlocutory orders. Similarly, no appeal lies against the



decrees or orders passed with the consent of the parties. As to other matters an appeal lies to the High Court both on facts and law. All appeals are to be heard by a bench consisting of two judges. No second appeal is provided. But an appeal with the special leave can lie before the Supreme Court under Article 136.

In camera proceedings

The concept of Family Court insist for confidentiality of the court record which necessitates the proceedings to be conducted in camera. Section 11 of the Family Courts Act makes it obligatory on the part of the Court to hold the proceedings in camera if any party so desires. These may also be held in camera if the Court so deems fit.

Exclusion of lawyers

The Family Courts Act dispenses with the service of the lawyer. Section 13 makes it abundantly clear when it lays down: "Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner".

However, the Family Court may seek the assistance of legal expert as amicus curiae whenever it considers that to do so is necessary in the interest of justice.

A perusal of Section 13 of the Act indicates that a party to a proceeding before the Family Court shall not be entitled as of right to be represented by a legal practitioner. The Act does not prescribe a total bar to representation by a legal practitioner which bar would itself be unconstitutional. The

intentment of the Legislature obviously was that the problems or grounds for matrimonial break-down or dispute being essentially of a personal nature, that it may be advisable to adjudicate these issues as far as possible by hearing the parties themselves and seeking assistance from counselors.

The Procedure for Claim of Maintenance

The formal procedure for claim of maintenance by a wife or father or mother is to make a petition under Section 125 before the Family Court, if established for the area or before the Magistrate's Court, otherwise. In case of minors, the mother or any guardian can present a petition on their behalf.

The applicant is heard. When the Court is satisfied that the applicant asking for maintenance has a *prima facie* case, the Court takes the petition on file and issues summons to require the appearance of the respondent. Before the Criminal Court both the parties are normally assisted by advocates, whereas before the Family Court their representation is specifically excluded. The parties are heard. When the respondent admits relationship and is prepared to pay maintenance, an order to that effect is passed. If the husband denies the relationship, denies payment on certain grounds justifiable, or pleads inability for want of sufficient means, the matter is posted for trial. During trial, which is by summary procedure, parties and their witnesses are examined to adjudicate the dispute in their pleadings and mainly to establish the relationship, inability to maintain oneself and possession of sufficient means. The Court then passes an order either



granting or dismissing claim for maintenance.

Award of Maintenance

The legislature has favored monthly payment of maintenance an easier and convenient mode of payment under Section 125 Cr.P.C., without causing much hardship to the liable respondent and at the same time towards serving the basic objective on the part of the petitioner. The English experience might have also been a reason for this. Under Section 125 Cr.P.C. the Magistrate is required to award maintenance only at a monthly rate. The amount has to be ascertained and must be fixed, unless otherwise altered under Section 127 Cr.P.C. by change of circumstances. The order can only be for payment of money⁷¹ and not in any kind.” The rate awarded should be determinate and fixed. The rate cannot be fixed on an abstract and hypothetical thing like capacity to earn.” It is also not permissible to make an order at a progressively increasing rate. In fixing the amount payable at monthly rate the Magistrate should exercise his discretion fairly. Lump sum payment of maintenance is not permissible by the provisions of this statute.”

Amount of Maintenance

Section 125 of Cr.P.C. provides maintenance only as a summary remedy and hence the amount payable is much limited. The amount is so fixed by this provision that it fulfills modestly the needs and requirements of the wife. The objective of this remedy is not to enable the wife to live in luxury and make her feel that her living

separate is profitable and thus impede any feature possibility of reconciliation. The amount must be sufficient to keep her body and soul together. Again the relief being not permanent, since the parties are well permitted to agitate their rights before the competent civil forum, the limited monetary limit is purely a stop-gap arrangement. A tracing of the legislative history goes to show that the legislators are well aware of this.

The Code of 1898 provided for an order of maintenance for a monthly allowance not exceeding fifty rupees. The Bill of 1914 proposed an increase of the amount to Rs.100. However the proposal was rejected by the Committee of 1916. But by legislative changes in Britain, when the courts in India were empowered to issue summary orders in respect of British citizens up to an amount of £2 a week, vide the Maintenance Orders Enforcement Act of 1921, a change as regards Indian citizens was felt necessary to raise the monthly award of maintenance. A similar opinion was expressed also by the Select Committee. Hence, the Amending Act of 1923 enhanced the amount to Rs.100/-. Another change was effected by the Amending Act 1955, enhancing the amount to Rs.500/- with effect from 1.1.1956.” The newly enacted 1973 Code, though incorporated varying changes under Section 125 of Cr.P.C., retained the quantum, which still is applicable. But at no circumstance, the maximum amount should exceed Rs 500/-. The words ‘not exceeding’ should be given much emphasis. The remedy under Section 125 being summary, pending enforcement of any permanent right before the competent civil court, no severe objection has come



against this paltry sum so far. But with the steady increase in the cost of living coupled with the heavy increase in the inflation rate, the monetary assistance of Rs.500/- awarded in favor of successful litigant appears to be very meager to enable one to lead a destitute- free life. in fixing the maintenance, the status of the parties and the income of the opposite party need to be considered.” The discretion enjoined on the Magistrate should be exercised in such a manner that it does not permit the applicant to lead a luxury life and at the same time not to drive her to a starving life. it must be modestly consistent with the needs and requirements of the wife and the status per family is accustomed to. The Magistrate has to exercise his discretion fairly in arriving at the quantum. In determining the amount of maintenance, the Magistrate has to consider several factors, related to effective enforcement of the provision. The capacity of the party alone does not weigh in this. On the part of respondent, his actual income, his own expenditure and that for his other dependents and his payment of maintenance to any other claimant is relevant. On the side of petitioner, her way of life and her own source of income are material facts to be evaluated prior to passing of an order under this provision.” He should strike a balance between the financial capacity of the opposite parties and the needs of the applicant having regard to their status. The circumstances of the case before him must also be taken into consideration. The maximum amount which can be ordered as maintenance for each applicant is Rs.500/-. The words ‘in the whole‘ in Section 488 of the earlier Code has been misinterpreted by some courts to mean that the maximum amount awardable inclusive of all the

applicants regardless of their number. Thus when a wife makes a claim for herself and for her children the maintenance amount is restricted and limited to Rs 100/- the maximum then permitted by the Code.

Execution of the Order of Maintenance

The maintenance order having been passed, it becomes the duty of the court itself to see that payments are duly made. The only legal obligation placed on the wife or the minor or parents in whose favor the order is made, is to present an application within one year from the date on which the amount becomes due. Section 125 (3) of the Code imposes such an obligation on the claimant to bring to the knowledge of the Court the breach of maintenance order by an application. When this is done, it is for the Court to get its own order enforced and see that it is complied with. The proceedings from that stage cannot be treated as one between the original parties. Non appearance of a party or its non prosecution does not entail in dropping of the proceedings. The Court has every power to enquire into the reasons for non-compliance of the order and any failure on the part of the respondent to comply with the order without sufficient cause can empower the Court to issue a warrant for levy of the amount. Resumption of cohabitation after an order of maintenance is not a valid defense to counter an execution petitions.

Warrant for Levy of Maintenance

When an application is made under Section 125(3) for recovery of the amount, the Court is seized of a duty to see the due compliance of the order. If without sufficient cause the



respondent wilfully avoided payment of maintenance, it has the power to issue a warrant for levy of the amount. The power vesting with the Magistrate is similar to that of a civil court. The issue of warrant for levy of the amount due is in the manner provided for levying fines. Any further delay on the part of respondent without there being a justifying cause may lead to his imprisonment.

Sufficient Cause for Non-Payment of Maintenance

The basis of invoking the jurisdiction of Magistrate is wilful neglect and refusal to pay maintenance on the part of respondent. Conjugal relation obligates a wife to live with her husband. If she fails to fulfill this obligation and refuses to live with her husband without there being sufficient cause this amounts to desertion. In such circumstances her living separate does not give her the right for maintenance. The respondent has sufficient cause and can offer to maintain his wife provided she comes and live with him. But pretentious offer to avoid the legal responsibility is not permitted, if he himself is a cause for such separate living by his wife then such offers are not valid. Contracting another marriage with a woman or keeping a mistress are specifically provided as just grounds for the wife's refusal to live with her husband. An order of adjudication as insolvent does not by itself a sufficient cause within the meaning Section 125(3) not to comply with the order. This will not bar the Magistrate from proceeding with the petition.

Sentence in Default of Payment of Maintenance

An application informing the Court of the breach of maintenance order passed by it arms the Magistrate with more powers to see to the compliance of the order. A willful neglect on the part of the respondent even after constraint measures being taken by the Court may lead to placing him under imprisonment. A sentence of imprisonment can be passed by the Magistrate so as to compel the respondent obey the order of the Court. But arrest and imprisonment can be resorted to only after exhausting all such coercive measures of recovery, as attachment and sale of movable property of the husband. This includes issuance of a warrant to the collector authorizing him to realize the amount as arrears of land revenue as provided under Section 421 of the Code for realization of fine. An ambiguity prevailed over the period of sentence the Court can award in default of payment of maintenance. The earlier view was that the maximum sentence the Court can pass is one month for each month's default. Sentencing the respondent to periods more than this is observed illegal. Each complete one month's arrears was observed to make the respondent liable to a maximum term of imprisonment. Since the provision stipulates for presentation of an application for execution within a period of one year from the date on which it became due, Courts held that imprisonment cannot be to a period in excess of 12 months at the maximum.

Period of Limitation

An application for the recovery of arrears of maintenance shall be made to the Court within a period of one year from the date of the order or from the date on which it became due. No application filed after this



period of limitation will be entertained nor executable. Maintenance becomes due on the date of passing of the order though it might have been granted from the date of application. The limitation of one year for recovery of arrears starts in such cases from the date of the order. The provision is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to pile up until their recovery would become a hardship or an impossibility. Unlike civil courts, the Magistrate can allow arrears to aggregate only to a maximum period of one year if not ordered from the date of application. The provision is clear and in categorical terms puts an embargo on the powers of the Magistrate.

The claim for maintenance can be refused

The claim for maintenance can be refused to a wife under Sub-section (4) of Section 488 of the old Code on certain grounds, such as

- if she is living in adultery.
- if without any sufficient reason, she refuses to live with her husband.
- if they are living separately by mutual consent.

On proof of any of the above facts an order of maintenance made in favor of any wife can also be cancelled under Sub-section (5) of the old provision. The above Sub-section had been inserted without any change in the new Code of 1973 as Sub-sections (4) and (5) of Section 125. When the new code has given a new dimension to the term 'wife' by including within its orbit even a divorced woman, whether such conditions which are imposed on wife to entitle maintenance will

be applicable to divorced woman also. Or in other words, the grounds enumerated under Subsection (4) and (5) of Section 125 of the Code would be applicable only to woman whose marriage is subsisting.

Working of the System

The first formal step for a wife, child or parent who wishes to obtain maintenance is to make a petition under Section 125 before the Family Court, if one is established for the area or before the Magistrate's Court, for such other areas. The applicant is heard. When the court is satisfied that the applicant asking for maintenance has a prima facie case, the Court takes the petition on file and issues summons to require the appearance of the respondent. Before the criminal court both the parties are normally assisted by advocates, whereas before the Family Court their representation is specifically excluded. The parties are heard. Where the respondent does not deny the relationship or is prepared to pay maintenance, an order of maintenance is passed in favor of the claimant. If the relationship is denied or the respondent denies payment on certain grounds or pleads inability for want of sufficient means, the matter is posted for trial. During trial, which is summary in nature, parties and their witnesses are examined to adjudicate the dispute based on pleadings and mainly to establish the relationship, inability to maintain oneself and absence or possession of sufficient means. The Court then passes an order either granting or dismissing the claim for maintenance. The procedure as described above though looks much simple. the disturbing findings of this research is that the real working system is ill-suited to achieve the basic objective of preventive destitution, proclaimed under Section 125 of



the Criminal Procedure Code. The choice of the forum for claim of maintenance is more decided by the counsel rather than the claimant. No specific arrangement has been made before the criminal courts either before or after the passing of the Family Courts Act to receive petitions for maintenance. It is one among the other activities dealt before the criminal court. This takes months for the claimant to see the petition being taken on file. The process for appearance of the respondent is as per the provisions of the Criminal Procedure Code. The dilatory process takes months together to secure the presence of the respondent before the Court. Even after appearance, no specific time limit is followed for filing of reply. This keeps the woman waiting for justice for long. The procedure though summary, prolong for years making the poor woman run every time to the Court as an accused. Lack of judicial officers at several courts aggravate further the situation. Finally, even after the matter is decided in favor of the woman, no immediate relief comes to her as she needs to file a separate execution petition. If the respondent takes the matter for review, the condition of the woman becomes much worse. A survey of the judicial decisions by the High Courts go to show that the wife in several instances has been kept in waiting even for years to avail the so called summary remedy under Section 125 of the Code.

Under Hindu Law

Maintenance of wife under Hindu Law deals with the relevant provisions of Modern Hindu Law regarding the Maintenance of wife. It is a noteworthy fact that the maintenance of wife under the Hindu Marriage Act, 1955 and the Hindu Adoption

and Maintenance Act, 1956. The 'evaluation of the judicial pronouncements' in which the judicial pronouncements of the various High Courts and Hon'ble Supreme Court regarding the maintenance of wife under the Hindu Laws have been evaluated. In the process of the evaluation of the judicial pronouncements the issue involved in the case, the contention of the petitioner and the respondent, the order or the judgments of the respective High Courts or the Hon'ble Supreme Court and the merits or the demerits of the judgments has been humbly tried to put forth. Further, 'the identification of pitfalls' deals with the areas which has been in the serious requirement to be noticed and call for some responsible steps for the reformation by the appropriate authority. The area of the pitfalls has been found during the process of the analysis of the legislative provisions and the evaluation of the judicial pronouncements. Lastly, the advocacy for reforms and improvements which deals with the suggestions and the progressive ideas for coping up with these areas of pitfalls.

Under Muslim Law

Maintenance of wife under Muslim Law deals with the responsibility of the Muslim husband to maintain his wife in the form of *Kharch-ipandan*. After this the controversy between the Criminal Procedure Code, 1973 and Muslim Personal Law regarding the maintenance of Muslim divorcee has been discussed. The agitation of the Muslim community due to the controversial judgment of the *Shah Bano's* case which paved the way to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has also been analyzed under this heading. The 'Evaluation of the



judicial pronouncements' deals with the evaluation of the decisions of the various High Courts and Hon'ble Supreme Court regarding the maintenance of Muslim divorcee. The evaluation of the cases and judicial pronouncements describe the judicial scenario before and after the *Shah Bano's* judgment. This heading also deals with the cause of the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, and the role of judiciary towards the application of the provisions of this enactment. The reasons have also been mentioned as to why the judiciary is sometimes blamed for promoting the application of the provisions of Cr.P.C., rather the provisions of this enactment regarding the maintenance of Muslim divorcee through the sufficient case laws. Further, this part in the identification of pitfalls shows some loopholes in the hurry and rash drafting of the Muslim Women (Protection of Rights on Divorce) Act, 1986. These loopholes may be blamed to allow the judiciary to distort some intractable rules of Muslim Law regarding the maintenance of Muslim divorcee in the guise of the judicial activism which can't be said a proper way for the intrusion in the personal law of any community. Lastly, this part which is the 'advocacy of reforms and improvements', covers some humble suggestions regarding the reformation of some provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, as this Act has the heavy responsibility to represent manifestly the Islamic Community to the whole world.

Under Christian Law

Maintenance of wife under Christian Law deals with the analysis of the relevant

provisions of the Indian Divorce Act, 1869, regarding the maintenance of wife under the Christian Law. Further, it deals with the evaluation of the judicial pronouncements.

Under Parsi Law

Maintenance of the wife under Parsi Law deals with the relevant provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife. After the analysis of the legislative provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife, the rest of the headings, i.e., evaluation of the judicial pronouncements, identification of pitfalls, advocacy of reforms and improvements have been discussed.

CONCLUSIONS

By virtue of judicial pronouncements and other steps, rights of women has been restored but it will become fruitful only when under lying thinking are changed, the women should emancipate themselves educationally, economically and socially for their well being only and then they can understand their rights and worth and thereafter the social upliftment of the whole community is possible. We should always remember that mother is the first teacher and mentor of his child. It is a historical fact that no society ever lived mentor of his child. It is a historical fact that no society ever lived in peace until their women folk are at peace. Although Maintenance should be gender neutral and should be applicable both for husband and wife respectively for the great success.



RIGHT TO STRIKE IN INDIA

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INTRODUCTION

STRIKE AND ELEMENTS TO CONSTITUTE A STRIKE

In general terms, stoppage of work because of mass refusal of workers or employees to work is known as strike. A strike generally takes place in response to the grievances of the employees.

Strike is a cassation 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 no. of persons who are or have been so employed to continue to work or accept employment. Whenever employees want to go on a strike they have to follow the procedure provided by the Industrial Dispute Act, 1947, otherwise the strike will be considered as illegal.¹⁰⁶²

There are some certain restrictions on the Right to Strike.¹⁰⁶³ It is defined as that no person employed in public utility service shall go on strike in break of contract.

- a) Without giving to employer notice of strike within 6 weeks before striking; or
- b) Within 14 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 proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

These restrictions do not restrict the workers to go on strike; rather they have imposed some certain requirements that are supposed to be fulfilled before the workmen go on strike. These provisions are only applicable to the public utility service. The industrial dispute act, 1947 has not specifically mentioned as to who can go to a strike.

Whereas, the definition of strike itself defines that the strikers must be the persons, employed in the industry to do work. Moreover, notice to strike within 6 weeks before striking is not mandatory when there is already a lockout in existence.

In **Mineral Miner Union V. Kudremukh Iron Ore Co. Ltd.**¹⁰⁶⁴, it was held that the provisions of sec.22 are mandatory and the date on which the workers proposed to go on strike should be specified in the notice. If meanwhile the date of the strike specified in the notice of strike expires, workmen have to give fresh notice. Therefore, if a lockout is already in existence and employees want to restore the strike, it is not necessary to give such notice as is otherwise required.

The following can be drawn out of the definition:

1. Strikers are persons employed in any industry to do work
2. A strike is called against an employer of labour.
3. Strike is a concerted action under common understanding by the

¹⁰⁶² Sec. 2(q) of Industrial Dispute Act, 1947

¹⁰⁶³ Sec. 22(1) of Industrial Dispute Act, 1947

¹⁰⁶⁴ILR 1988 KAR 2878



- strikers to refuse to work or accept employment
4. Notice must be given to the employer before going to a strike.

NATURE OF THE RIGHT

There is a fundamental right to form association or labour unions but there is no fundamental right to go on strike.

Every right has a duty to perform. The more powerful the right, higher the duties attached with it. Right to strike must not be misused; otherwise it will create problems in the production and financial profit of the industry. This will eventually affect the economy of the country.

The Right to Strike has been recognized in all democratic societies. Reasonable restraint use of this right is also recognized. Similarly the employers also have the freedom to use the weapon of lock – out in case workers fail to follow the rules of contract of employment. The degree of freedom granted for its exercise varies according to the social, economic and political variants in the system for safe guarding the public interest, the resort to strike or lock – out and in some cases the duration of either subject to rules and regulations or voluntarily agreed to by the parties or statutorily imposed this has been criterion underline the earlier legislation for regulating industrial relations in the country. The strikes and lock – outs are useful and powerful weapons in the armory of workmen and employers and are available when a dispute are struggle arises between them. Threats of their use even more than their actually use, influence the

course of the contest. The threat is often explicit much more often tacit but not for that reason less effective.

Trade unions and employers will have to use very skillfully these weapons strike and lock – out by way of threatening or actual may help one party to force the other to accept the demands, or at least to concede something to them. But reckless use of this weapon creates the risk of unnecessary stoppages. The stoppages hurt both parties badly create worse tensions and frictions and violations of law and order and above all, from the public point of view they retard the Nation’s Economic Development. A strike could be defined 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 to accept employment.

In English law, there is no comprehensive legal definition of strike or industrial action. Perhaps the closet we come to is Lord Denning’s attempt in Court of Appeal in 1975, when he said that “a concerted stoppage of work by men done with a view of improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such an endeavor”. Strikes are, in other words, weapons in the hand of the workers and their organizations to promote and protect their economic, occupational and social interests in the broad sense of the term.



FACTORS THAT GIVE RISE TO A STRIKE

- Refusal to recognize a union or workers group as a collective bargaining party
- Refusal to accede to Unions demand/failure of negotiation
- Failure to Implement Collective Agreement

RIGHT TO STRIKE IN CONSTITUTION OF INDIA

With the constitution coming into force there was an attempt made to bring in the theory of a concomitant right, as was inferred in **RomeshThappar’s**¹⁰⁶⁵ case to infer the Right to Strike within the confines of Article 19(1) (c)¹⁰⁶⁶. As every other fundamental right is subject to reasonable restrictions,, the same is also the case to form trade unions to give a call to the workers to go on strike and the state can impose reasonable restrictions. In the case of **All India Bank Employee’s Association vs. National Industrial Tribunal and others**¹⁰⁶⁷ held as follows:

The right guaranteed by Art 19(1) (c) of the Constitution of India does not carry with it concomitant right that unions formed for the protection of the interests of labor shall achieve their object such that any interference to such achievement by any law would be unconstitutional unless it could be justified under Article 19(4) of the Indian Constitution as being in the interest of public order or morality. The right under Article 19(1)(c) extends o to the formation of an association or union concerned or as

regards the steps which the union might take to achieve its object, they are subject to such laws and such laws cannot be tested under Article 19(4) of Indian Constitution.

In another case **B.R. Singh vs. Union of India**¹⁰⁶⁸, justice Ahmadi was of the view that the Right to Strike cannot be equated to that of a fundamental one. “Strike in a given situation is only a form of demonstration. There are different modes of demonstrations, e.g. Go-slow, sit in, work to rule, absenteeism, etc. and work. Strike is one such mode of demonstration by the workers for their rights. The right to demonstrate and therefore the Right to Strike is an important weapon in the armory of the workers. The right has been recognized by almost all democratic countries. Though not raised to the high pedestal of a fundamental right, it is recognized as a mode of redress for resolving the grievances of the workers. But the Right to Strike is not absolute under our industrial jurisprudence and restrictions have been placed under it”.

In the case of **Communist Party of India (M) Vs. Bharat Kumar and others**¹⁰⁶⁹, the Supreme Court adjudicating on the legality of strikes held that the “Fundamental rights of the people as a whole cannot be subservient to claim of an individual or only a section of the people”.

Two sections of the society namely lawyers and government servants come under the scrutiny of the Supreme Court. In the case of **Ex-captain Harish Uppal vs. Union of India and another**¹⁰⁷⁰, the court held that

¹⁰⁶⁵RomeshThappar V. State of Madras, 1950 AIR 124

¹⁰⁶⁶ Constitution of India

¹⁰⁶⁷ AIR (1962) SC 171

¹⁰⁶⁸ (1989) LLJ SC 591

¹⁰⁶⁹ (1998) (1) SC 201

¹⁰⁷⁰ (2003) (2) SLL 45



lawyers have no right to go on strike or give a call for boycott and even they cannot go on a token strike. The Apex Court further opined that strike as a weapon in any field does more harm than any justice.

Strikes resorted to by different sections or groups in any society at one time or other have created hardships or inconvenience for the public. In India, at times, the sufferings of the public have roused their fury against the striking employees and also attracted the attention of the courts of law. In November 1997, the Supreme Court upheld a verdict of the Kerala High Court which held that calling and enforcing a bandh by any association, organisation or political party is "illegal and unconstitutional".

(1) The Kerala High Court had made a distinction between a bandh and general strike and held that "As understood in our country and certainly in our State, the call for a bandh is clearly different from a call for general strike or a hartal." The Court said that the word bandh conveyed an idea that everything is to be blocked or closed. It also observed that the organisers of a bandh clearly implied that all activities should come to a standstill on the day of the bandh. The decision had no direct bearing on strike but was a ban imposed on the bandh declared by the political parties. But there is a degree of similarity as it is a ban on the right to protest. However, in recent past when the government employees in Tamil Nadu resorted to strike, the Supreme Court observed that government servants have no right, fundamental or statutory or moral, to go on strike.

(2) The judgment generated sharp reaction from all the trade union federations. In

the backdrop of this judgment and reaction of the trade unions, an attempt is made here to analyze the prevalent legal provisions of strike and their bearing upon the industrial workers.

Right to strike as a fundamental right is a function of the society and its laws. In India, this consideration emanates from Art. 19(1) (e)¹⁰⁷¹, which provide for right to form associations or union. However, the right provided to Indian citizen above was limited by clause 4 of the same Article which empowers the state to restrict the right conferred in the interest of sovereignty and integrity of the country. And so this right in Art. 19 can only be exercised in as much as or to the extent that it does not adversely affect others or the public interest.

The question then is what kind of right does freedom of speech, expression and association guarantee to unionism? Does it include the Right to Strike? According to one author this question depends on the basis of theoretical and legal interpretation. Theoretical view based on the literature suggesting the way trade union came to be, and the objectives they are supposed to pursue. On the other, the legal view is hinged upon the judgments delivered by the High Court and Supreme Courts.

From the history of Trade Unionism, it is common knowledge they come into being to deflect the exploitative practices of the employers against the employee who is vulnerable due to in-balance in his bargaining power with the employer. Trade Union came therefore to substitute this individual bargain/power with collective bargaining power conceived upon the

¹⁰⁷¹ Constitution of India



balance of power between concerned parties. With each empowered with threat of withdrawal where agreement cannot be reached. This power of withdrawal acts to compel the other or both parties to make concessions.

It therefore follows that the threat to withdraw services by a union called – strike, is a useful tool/weapon which compels the employers to come to the bargaining table and which if removed, turns a trade union to collective begging rather than a collective bargainer. Therefore collective bargaining, freedom of association and Right to Strike have been recognized in the being history of struggle over the world and have come to be recognized by many of the European countries as a fundamental right in their respective constitutions.

However, the judicial view in some of the European countries and India has remained that strikes is not a fundamental right. In the Indian case of Tamil Nadu¹⁰⁷², the Indian supreme court held as such viewing the question - whether the right to form a Union would carry with it the concomitant right of collective bargaining and strike.

In All India Bank Employees’ Association v National Industrial Tribunal¹⁰⁷³ the court ruled that “on the consideration of the Art. 19(1) (c) we have reached the conclusion that even a liberal interpretation of sub – clause (c) of clause (1) of Art. 19 cannot lead to the conclusion that the trade unions have guaranteed right to an effective

collective bargaining or to strike either as a part of collective bargaining or otherwise

The author also observed that in Radheshyam Sharma v. Post Master General Nagpur¹⁰⁷⁴ the Indian Supreme Court referring to the British Law report observed that in Hapsburg’s Law of England (12th Ed, Vol. VI, P. 392) the Right to Strike or the right of the subject to withhold his labour so long as he commits no breach of contract or tort or crime, is enunciated as one of the important liberties of a British subject which may be regarded as a fundamental character. “But under our constitution the Right to Strike is not a fundamental right although it may be legal rights¹⁰⁷⁵”

Also as noted by the author, in BR Singh &Ors v Union of India¹⁰⁷⁶, the Supreme Court held that “though 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 grievance of workers¹⁰⁷⁷”

It therefore can be summed up that Right to Strike under the India constitution is not a fundamental right. And so an association’s right to associate may be extended to the right to protest through demonstrations provided it does not disturb public order.

¹⁰⁷²(2003) 6 SCC 581

¹⁰⁷³ All India Bank Employees’ Association V. national Industrial Tribunal, AIR, 1962, SC P. 171

¹⁰⁷⁴ (1964) (1) SCR 369

¹⁰⁷⁵ Radhashyam Sharma V Post master General, Nagpur, AIR 1965, S.C. p.311

¹⁰⁷⁶ (1989) LLJ SC 591

¹⁰⁷⁷ B.R Singh and others V. Union of India, (1989) LLJ SC 591, P. 591



However to avoid incessant and the misuse of the right, Industrial Dispute Act 1947 of India, set conditions. This made distinction between legal and illegal strikes.

For example a set of rules was established by the Indian Act,¹⁰⁷⁸ which must be followed by workers employed in Public utility service before declaring a strike, while it set out a general prohibition of strikes in all establishments during the pendency of reconciliation, arbitration and adjudication and also during the period of operation of settlements and awards¹⁰⁷⁹.

Earlier we have seen from the judicial pronouncement in the Indian courts that a strike though not a fundamental right but has a legal right. The courts have held that in proper cases the weapon of strike is open to all¹⁰⁸⁰. In other circumstances strike has been recognized as a legitimate weapon for the purpose of ventilating their demands¹⁰⁸¹.

The legality and justifiability of strikes here also be examined. The Indian supreme court in a case held that “it is a little difficult to understand how a strike in respect of a public utility service, which is clearly illegal could at the same time be characterized as

perfectly justified. These two conclusions cannot in law co-exist”¹⁰⁸²

In a later case it held that “this court did observe that if a strike is illegal it cannot be called perfectly justified... (but) between the perfectly justified and unjustified strike, the neighborhood is distant.... Mere illegality of the strike does not per se spell unjustifiability¹⁰⁸³.

ILLEGAL STRIKE

Any strike that is in contravention of sec. 22 as well as sec. 23 is illegal.¹⁰⁸⁴

- 1) A strike or lockout shall be illegal if
 - a) It is commenced or declared in contravention of sec 22 or sec. 23;
 - b) It is continued on contravention of an order made under sub sec. (3) of sec.10 or sub sec. (4-A) of sec. 10-A.
- 2) Where a strike or lockout in pursuance of an industrial dispute has already commenced and is in existence at 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 lock-out shall not be deemed to be illegal, provided that such strike or lockout was not at its commencement in contravention of the provisions of this Act or the continuance thereof was not prohibited under sub-section (3) of section 10¹ or sub-section (4A) of section 10A].

¹⁰⁷⁸ S.22 of the Industrial Dispute Act, 1947

¹⁰⁷⁹ S. 23 of the Industrial Dispute Act, 1947

¹⁰⁸⁰ Buckingham Carnatic Mills V. Their workmen, LLJ 1951(2), P.314; Bihav fire Works V. its workmen, LLJ 1953(1), P. 49

¹⁰⁸¹ Gwalior rayon Silk manufacturing co. V. District collector, LLJ 1982(1) P. 367, (Kerala), Ramakrishna Iron Foundry V. their workman, LLJ 1954(2), P. 371, (LAT)

¹⁰⁸² India General Navigation and Railway Co. Ltd Their workmen LLJ, 1960(1) SC P22

¹⁰⁸³ Gujarat Steel tubes V Gujarat Steel Tubes MazdoorSabha, LLJ, 1980(1), SC P. 137

¹⁰⁸⁴ Sec. 24 of Industrial Dispute Act, 1947



- 3) A lockout declared in consequence of an illegal strike or a strike declared in consequence of an illegal lock-out shall not be deemed to be illegal.

the workmen during the strike period which was legal and justified would disentitle them to wages for strike period.¹⁰⁸⁷

CONSEQUENCES OF ILLEGAL STRIKE

1. DISMISSAL OF WORKMEN:

Mere participation in the strike would not justify suspension or dismissal of workmen. Where the strike was illegal, the SC held 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.¹⁰⁸⁵

The employer might prohibit the entry of the strikers within the premises by adopting effective and legitimate method in that behalf. The employer may call upon employees to vacate, and, on their refusal to do so, take due steps to suspend them from employment, proceed to hold proper inquiries according to the standing order and pass proper orders against them subject to the relevant provisions of the Act.¹⁰⁸⁶

2. WAGES:

In order to entitle the workmen to wages for the period of strike, the strike should be legal and justified. It must not violate any provisions of the statute. It cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. The question of fact in these cases are whether the strike is justified or not and it can only be judged by the facts and circumstances of the case. Any kind of use of force, coercion, violence or acts of sabotage resorted to by

A strike may be illegal if it violates any provisions of the Act or any other law or the terms of employment depending upon the facts of the case. Correspondingly, a strike may be justified or unjustified depending upon several factors such as the service conditions of the workmen, the nature of demands of the workmen, the cause led to strike, the urgency of the cause or demands of the workmen, the reasons for not resorting to the dispute resolving machinery provided by the Act or the contract of employment or the service rules provided for a machinery to resolve dispute, resort to strike or lockout as a direct is prima facie unjustified. This is particularly so when the provisions of the law or the contract or the service rules in that behalf are breached. For then, the action is also illegal.¹⁰⁸⁸

3. RIGHT OF EMPLOYER TO COMPENSATION FOR LOSS CAUSED BY ILLEGAL STRIKE

The remedy for illegal strike has to be sought exclusively in sec. 26 of the Act. The award granting compensation to employer for loss of business though illegal strike is illegal because such compensation is not a dispute within the meaning of section 2(k) of the Act.¹⁰⁸⁹

¹⁰⁸⁵ M/S Burn & Co. Ltd. V. Their Workmen

¹⁰⁸⁶ Punjab National Bank V. Their Employees

¹⁰⁸⁷ Cropton Greaves Ltd. V. Workmen

¹⁰⁸⁸ Syndicate Bank V. K. Umesh Nayak

¹⁰⁸⁹ Rothas Industries V. Its Union



RIGHT TO STRIKE BY GOVERNMENT SERVANTS AND EMPLOYEES

Whether the government servants and employees are having the right to go on strike was debated since long period. The dispute came before the Supreme Court of India in the case of T.K. Rangarajan vs. State of Tamil Nadu¹⁰⁹⁰ this case deals with the action of Tamil Nadu Government, whereby it had terminated the services of all employees who had resorted to strike for the fulfillment of their demands. The said decision was challenged before the High Court of Madras by filing writ. Learned single judge by interim order, inter alia, directed the State Government that suspension and dismissal of employees without conducting enquiry be kept in abeyance until further orders and such employees be directed to resume duty. That interim order was challenged by the State Government of Tamil Nadu by filing writ appeals. On behalf of the Government Employees, writ petitions were filed challenging the validity of the Tamil Nadu Essential Services Maintenance Act, 2002 and also the Tamil Nadu Ordinance No.3 of 2003.

The Division Bench of the High Court set aside the interim order and arrived at the conclusion without exhausting alternative remedy of approaching Administrative Tribunal, writ petitions were not maintainable. The petitioners came up on appeal against the said order and for the same reliefs; writ petitions under Article 32 of the Indian Constitution the petitioner approached the Supreme Court.

In the above case the Court set about to answer two important questions namely:

(a) Is there a fundamental right to go on strike? (b) In the instant case, do the employees have a statutory right to go on strike?

(a) Is there a fundamental right to go on strike?

The Apex Court in the process of answering the same referred the judgments of previous cases of Kameshwar Prasad and others Vs. State of Bihar¹⁰⁹¹ and another wherein the Supreme Court held that there exist no fundamental rights to strike.

The Supreme Court quoted another judgment in the case of RadheySham Sharma Vs. The Post Master General, Central Circle Nagpur¹⁰⁹². The fact of the case that the employees of the Telegraph Department of the Government went on strike from the midnight of July 11, 1960, throughout India and the petitioner was on duty on that day. As he went on strike, in the departmental enquiry, penalty was imposed on him. The same was challenged before the Honorable Court. In that context it was contended that Sec.3,4 and 5 of Essential Service Maintenance Ordinance No.1 of 1960 were violative of Fundamental Rights guaranteed by clauses (a) and (b) of 19 (1) of the Indian Constitution.

The court considered the said ordinance and held that Sections 3, 4 and 5 of the ordinance did not violate Fundamental Rights enshrined in Art 19(1)(a) and (b) of the Constitution of India. The Supreme Court of India relied on the decisions of Ex-

¹⁰⁹⁰ (2003) 6 SCC 581

¹⁰⁹¹ AIR (1959) P. 187

¹⁰⁹²(1964) (1) SCR 3.69.



Capt. Harish Uppal v. Union of India¹⁰⁹³ and Communist Party of India (M) v. Bharat Kumar and others¹⁰⁹⁴ in coming to the conclusion that there is no fundamental Right to Strike.

(b) In the instant case, do the employees have a statutory right to go on strike?

The Supreme Court of India observes that there is no statutory provision empowering the employees to go on strike. Further it observes that there is prohibition to go on strikes under the Tamil Nadu Government Servants Conduct Rules, 1973. Rule 22 provides that “no government servant shall engage himself in strike on incitements there to or in similar activities”. The Hon’ble Supreme Court of India did not impose a blanket ban on all strikes. The court further declares that the said strike to be illegal in view of Rule 22 which prohibits government servants from going on strikes. Several decisions of the various High Courts in India as well as the Supreme Court itself have adverted to and positively affirmed the Right to Strike in so far as workmen are concerned.

The Trade Unions and the political parties of India have strongly contend that without Right to Strike, right to form association of Trade Union as guaranteed by the Constitution of India is an empty or paper right. With the impact of globalization, making the trade unions to come to a naught so far the bargaining is concerned. In some occasion the appeasement policy by the employers, suppressing the movement of Trade Unionism. The very existence of the Trade Union movement was in danger.

CONCLUSION

In India, Article 19 of the constitution of India expands the scope by giving the right to protest. Whereas, Right to Strike is a legal right, rather than a fundamental right, and with this right statutory restriction is attached in the industrial dispute Act, 1947.

The Right to strike is an absolute right in India. This is a conditional right only available after certain requirements are fulfilled. It was held in a case that the strike as a weapon has to be used sparingly for redressal of urgent and pressing grievance when no means are available or when available means have failed to resolve it. Neither the 14th amendment to the federal constitution nor the common law confers an absolute Right to strike. It was in this case where the court held that the right to strike is not a fundamental right, rather a mere legal right. Every dispute between an employer and employee has to take into consideration the third dimension, the interest of the society as whole.

¹⁰⁹³ (2003) (2) SLL 45

¹⁰⁹⁴ (1998) (1) SC 201



**SURROGACY, A SCIENTIFIC
ADVANCEMENT OR
PROSTITUTION’S LITTLE SISTER**

*By Pooja Kapur & Jatin Budhiraja
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OVERVIEW

Many theories have been formulated about commercial surrogacy, which entails a contract in which a woman concedes to carry a child for another person to whom she will relinquish the child when it is born. The typical case involves where because of the infertility of the wife, a couple is unable to raise their own biological child. Therefore, the couple undertake an agreement with a woman (the surrogate) who will carry a child for them; the man (the father) provides the sperm which will be used together with the surrogate's egg to produce a child! The partial surrogacy can be said to have happened when the surrogate will carry this child to term and subsequently relinquish it to the father and his partner (the recipient woman). However, the recipient woman may also pledge her eggs, manifesting the arrangement a Full Surrogacy. There are cases where friends or family members carry children for each other without charging a fee; however, a broker is appointed sometimes in order to bring the interested parties together for a fee and both the surrogate and broker are paid accordingly.

This paper will highlight how this analogy is sufficiently decrepit to undermine the arguments for which the authors intend it to outlook.

First, the analogy minimizes the anguish of prostitution, an act that can present many

predicaments, and at the same time, makes surrogacy-an act which has less potential for harm seem worse than it actually is by hiding the benefits and exposing only tenuous harms. Thus, the analogy does a disservice to both surrogacy and prostitution.

Second, the analogy suggests, for some, that surrogacy should be prohibited because of the negative connotations and stigma involved as a woman cannot rationally choose surrogacy.

SURROGACY

A method through the process by which a woman consents to carry a pregnancy for some other persons in a case where pregnancy is impossible to be carried on medically is what is termed as surrogacy. A woman who carries a child for some other person is known as a surrogate mother. Generally, the reason for opting a surrogate mother is when the other person is unable to conceive, when the woman is missing the uterus either from her birth itself or have been removed through some surgery, when a woman has suffered miscarriages several times which makes her womb weak to carry a baby, or who have failed repeated IVF attempts.

In a narrow sense a surrogate mother basically lends her uterus to another couple in the cases where they are unable to have a baby due to medical problems leading to various pregnancy risks, but in a broad sense it is method which has proved to be boon to the various couples because through the process of surrogacy a couple unable to have a baby then has a hope of having their child and not ending up being a childless



couple.¹⁰⁹⁵ In this process a surrogate is artificially inseminated with the male partner's sperm and thus where a woman is infertile she has no genetic relationship with the baby, known as the traditional surrogacy.

Selecting the surrogate is totally in the hands of the couple as it is completely going to be related to their child and hence keeping in mind every aspect including what would affect their child's health, the decision-making power is in their hands.¹⁰⁹⁶ Thus, essential criteria fit for being a surrogate mother includes-

1. **LIFESTYLE OF THE WOMAN** - Healthy lifestyle of the woman who would be carrying the baby of the couple is one of the main criteria of her being a surrogate. The main concern of the intended parents is to keep a check whether the surrogate is taking care of her pregnancy in the way the parents would have taken if they were carrying the child on their own.¹⁰⁹⁷ Along with healthy lifestyle she should live a stable and a regular lifestyle in order to become fit for being a surrogate mother which includes not taking of any kind of drugs without the guidance of the doctor for maintaining the regular wellbeing of the child.¹⁰⁹⁸
2. **AGE OF THE WOMAN**- For being a surrogate a woman needs to be at least 21

years old and acceptance of the surrogate mother is till 38 years of age.¹⁰⁹⁹

3. **HAS GIVEN BIRTH TO THE CHILD**- The reason for including this is that once a woman gives birth to the child it shows that she is able to become pregnant and establishes fertility.
4. **FINANCIAL STABILITY**- The surrogate mother being financially stable is one of the important aspect and not taking any kind of assistance from the government. The reason is that, it makes the intention of the surrogate mother clear that the sole purpose of carrying the baby is not earning money or receiving the funds from the

BENEFITS OF A SURROGATE MOTHER

After qualifying the various parameters through which a woman is deemed fit to be accepted as the surrogate mother she is at the stake of enjoying the several benefits of being a surrogate mother which includes-

1. **SELF SATISFACTION**- As the broader meaning of surrogacy includes helping the childless couple or the person incapable of conceiving, to have a baby through the process of surrogacy. Being at the position of helping someone in need, specifically to a woman who is infertile which can be devastating for many couples, can be source of self-motivation for a surrogate mother.
2. **EMOTIONAL RELATIONSHIP**-The process of sharing pregnancy with the intended parents builds up the emotional

¹⁰⁹⁵<http://www.studymode.com/essays/Surrogacy-Artificial-Insemination-And-Surrogate-Mother-393265.html>

¹⁰⁹⁶<https://primetimeessay.com/surrogacy/>

¹⁰⁹⁷https://www.surrogatemothers.com/find_a_surrogate.html

¹⁰⁹⁸<https://www.surrogatealternatives.com/surrogate-mothers/surrogate-mother-requirements/>

¹⁰⁹⁹<https://www.fertilityproregistry.com/question/what-maximum-surrogacy-age-2855>

¹¹⁰⁰http://www.modernfamilysurrogacy.com/page/how_to_become_a_surrogate_mother



relationship between them and the surrogate mother. This helps the surrogate to receive a sense of gratitude from the intended parents as well for the services she has rendered and from the emotional point of view the debt not in the form of monetary terms but the gratitude which they hold towards the surrogate.¹¹⁰¹

3. HEALTH CARE- Proper health care before and immediately after the pregnancy is provided not at the surrogate's expenses but on the expenses of the couple.¹¹⁰²
4. MONETARY COMPENSATION- Being a surrogate she gets the compensation which surpasses the value of compensation she receives on the account of health care. Financial compensation received varies from case to case.

TYPES OF SURROGACY

On the basis of genetic linkage surrogacy can be classified as Natural Surrogacy or Gestational surrogacy. In the former type of surrogacy, the surrogate is related to the baby genetically, where the surrogate is inseminated with sperm from the male partners of an infertile couple. Thus, the child is genetically related to the male partner but not to the female partner. In latter form of surrogacy, the surrogate mother is not related to the child genetically,

rather the pregnancy is carried on by the egg and sperm of genetic couple.¹¹⁰³

On commercial aspect

1. ALTRUISTIC SURROGACY- Form of surrogacy where the surrogate receives no reward in monetary terms for pregnancy. Usually the woman is paid all the expenses related to the pregnancy by the intended parents including all the medical facilities, expenses of the delivery of the baby and the other expenses.
2. COMMERCIAL SURROGACY- It is the form of surrogacy in which the surrogate mother is paid by the intended parents to carry their child in her womb. This form of surrogacy is legal in various countries and has gained popularity.¹¹⁰⁴

After the case of Baby Manji Yamada vs Union of India,¹¹⁰⁵ the question of foreign surrogacy became relevant. In this case a certain doctor arranged for the Japanese couple to have a surrogate baby by some lady. This lady was impregnated using a mix of male partner's sperm and an anonymous Indian woman's egg. Few months later the couple filed for divorce and whose child the baby was, it was still in question. Further the petition against the doctor was filed in the court by accusing him for running a child trafficking racket and thus abusing the surrogacy laws. Later the case was solved and the baby has handed over to her grandmother.

¹¹⁰¹<http://www.stylishandtrendy.com/parenting/pregnancy/surrogate-mother-20-things-to-know-about-surrogacy/>

¹¹⁰²<http://www.ivf-infertility.com/surrogacy/index.php>

¹¹⁰³<https://legal-dictionary.thefreedictionary.com/Surrogate+Motherhood>

¹¹⁰⁴<http://ivfgo.com/surrogacy.html>

¹¹⁰⁵<http://www.mightylaws.in/548/surrogacy-laws-india>



Easy abandonment of children, exploitation of woman by forcing them to become surrogates in order to support their family financially led to the necessity of this bill.

PROSTITUTION

It is another social evil prevailing in the society where large sector of woman are forcefully pushed into prostitution. Basically, the term 'Prostitution' denotes an occupation or an act of selling one's own body involving a sexual exchange in a manner which is indifferent. The term involves various ambiguous elements.¹¹⁰⁶ The performing of such activity involves receiving of a payment. When we talk about prostitution in India laws are completely vague and ambiguous. Non-existence of laws for the sex workers deprive them from getting justice in case of their misuse by the pimps.¹¹⁰⁷

Women facing such kind of exploitation are further exploited by their non-acceptance in the society. Prostitution in India is not illegal per se but activities related to it are considered in contravention to the law such as pimping, carrying out the activity in hotels or public places, kerb crawling etc.¹¹⁰⁸

The Immoral Traffic(Suppression) Act of 1956 is the basic law for the status of the sex workers according to which the prostitutes

can carry on their business privately but not in public. Laws in India do not regard sex in exchange of payment as prostitution. There is no clarity as to what constitutes the crime and laws are totally unclear related to prostitution which makes it really difficult to grant punishments accordingly. There is an immediate need to lay down laws, rules and regulations including the punishments, keeping in mind the status of sex workers and maintaining the decorum of the society.¹¹⁰⁹

According to the act, the prostitute shall be arrested for soliciting their services within the 200 yards of the public place and same is for the pimps who indulge in such activities within the 200 yards of the designated area. Major reason for prevailing of social evil like human trafficking in the society is prostitution. In cases of human trafficking the responsibility of the government sets in and thus it is the duty of the government to rescue such victims. Here a question arises whether prostitution should be legalized or not and the answer to it is very dicey as one hand many women earn their livelihood by entering into such an occupation which is an old practice and on the other hand, such practice completely leads to providing of a path which would increase the number of evil practices in the country like human trafficking, forcing children and women into providing unwilling sex services which leads to exploitation of their status in the society and exploiting their image in their own eyes.

¹¹⁰⁶<https://www.mapsofindia.com/my-india/india/legal-prostitution-in-india>

¹¹⁰⁷https://en.wikipedia.org/wiki/Prostitution_in_India

¹¹⁰⁸<http://www.legalservicesindia.com/article/article/legalization-of-prostitution-in-india-need-of-the-hour-2460-1.html>

¹¹⁰⁹https://ipfs.io/ipfs/QmXoyvizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/Prostitution_in_India.html



Similarities Between Surrogacy and Prostitution

This section will first monologue the views of those who believe that surrogacy is homogeneous to prostitution, and thus should be enjoined. Further it will discuss the view that surrogacy is akin to prostitution because it dissipates women, and the belief that regulation is needed due to the similarities between surrogacy and prostitution. Finally, the section will show the arguments at the other end of the surrogacy debate which also analogize surrogacy to prostitution.¹¹¹⁰

One should note that while many have written that "most feminists" see surrogacy as akin to prostitution, there are in reality few who have written about the analogy and adopted it as their own belief; yet these same few people are cited over and over for the view of "most feminists."

Since Surrogacy Is Like Prostitution, It Should Be Prohibited Because No Woman Can Rationally Choose It

1. Andrea Dworkin

Dworkin argues that surrogacy is akin to prostitution as the surrogate lacks alternative. Queries regarding the legitimacy of prostitution are argued by her, for instance whether a woman has a right to infiltrate into contracts involving her body, where the state has fabricated the economic, political and social situation

in which the sale of some sexual or reproductive capacity is incumbent to the survival of women; and somehow the selling is seen to be an act of one's own will.

She propounds that in this scenario, the hospitals are the brothels and the panders are the doctors. Hefty fee is also charged by the broker as he brings the contracting parties together, has also been collated to a pimp.

She argues that there is absence of free will but presence of force whether economic, social or political, as the woman has to do whatever's necessary to survive.

2. Catharine MacKinnon

The author highlights how the unavailability of free choice in prostitution is the same as the exclusion of free choice in surrogacy.

She states that even though a woman may desire to sell her sexual services, or to pose nude, or to rent her womb, the exploitation and abuses inherent in these practices demonstrate that the decision is hardly one of her choice.¹¹¹¹

The above argument proves how many women are desperate as they chose to be vulnerable to certain maleficent risks such as rape, degradation, AIDS and health

¹¹¹⁰<http://blog.practicaethics.ox.ac.uk/2011/01/do-we-confuse-surrogacy-with-prostitution/>

¹¹¹¹<http://www.e-ir.info/2014/03/14/is-sex-work-an-expression-of-womens-choice-and-agency/>



risks associated with pregnancy (in order to bear or deliver another couple's child).

3. Gena Corea

Another similarity was pointed out by Gena Corea between surrogacy and prostitution. She argues that the surrogates sell the use of her body parts such as eggs, ovaries and wombs which can be compared to how the prostitutes sell the use of her vagina, rectum or mouths.

She envisions a situation where some of the females are kept with one another as a class of breeders, just as prostitutes are kept together in brothels.

Factual Differences between Prostitution and Surrogacy.

The potential harms of prostitution are much more than that of the harms of the surrogacy. First, an agency is approached by the female who expresses her interest in becoming a surrogate are not generally solicited in face to face transaction. Furthermore, the need of intercourse is not present with a man in order to carry out their agreement. It is possible that there is an involvement of only two women and the transaction is not one that only involves one man and one woman. Moreover, there are no incidents reported of women being abducted or enticed to work as surrogates. A surrogacy arrangement is performed as much for a man as for a woman even if in a partial surrogacy the name of the woman recipient may be absent from the contract.¹¹¹²¹¹¹³

¹¹¹²<https://writingsonsurrogacy.wordpress.com/tag/surrogacy-prostitution-similarities-differences/>

¹¹¹³<http://philosophicaldisquisitions.blogspot.ru/2015/10/the-ethics-of-commercial-surrogacy.html>

Certain key differences for the better conceptualization of the difference between prostitution and surrogacy are mentioned below: -

1. Delinquent and Indictable Nature

The most prominent difference between surrogacy and prostitution is that the latter can be said as the sale of sexual services which is chargeable is held to be unethical, soliciting and immoral and offering it is legally prohibited in many areas around the world, for instance, in India it is a punishable offence under the Indian Penal Code as well as under the Suppression of Immoral Traffic in Women and Girls Act.¹¹¹⁴ On the other hand, surrogacy can be defined as an act of substitution of gestation and consequent child bearing without any sexual intercourse involving the surrogate, is neither held as a fraudulent act nor a felonious offence.

2. Impetus and Intent

Differentiation of surrogacy with prostitution can be based on its respective motives or purposes behind the same. The main aim behind surrogacy is the birth of an infant which leads to formation of family of an infertile couple who otherwise would not be able have a child. Thus, surrogacy may be beneficial to both the individuals and the society whereas the main objective of prostitution is temporary physical pleasure or sexual gratification. Surrogacy may be highlighted as a small component in the society where the ends justify the means

¹¹¹⁴<http://www.catholicworldreport.com/2013/08/01/the-injustices-of-the-surrogacy-industry/>



owing to its very laudable and noble objective.

3. Potential and Incidental Harms

Many embryonic harms exist which are incidental to prostitution owing to the involvement of sexual intercourse with a man is lacking in the case of surrogacy. It can be said that in prostitution, there is a vast scope of trafficking, kidnapping or selling of minor girls, forcible abduction and even subjecting these girls for other such criminal acts. These risks are more imminent in prostitution than in surrogacy.

CONCLUSION

Because of the common shared ground of bodily exploitation of women couple with the common motive of commercial gain, the analogy between prostitution and commercial surrogacy cannot be refuted.

Criticism from different legal and human right advocacy groups are present highlighting them to be stigmatized or unethical among the others.

It is a notable fact that prostitution and surrogacy are different in practice and effect. Surrogacy has become a vital component in the society as it leads to family formation and fulfilment of right to life, right to privacy which brings welfare for the family and individual thereby providing greater good for the society. One can definitely argue that surrogacy is not a criminal or punishable act like prostitution.¹¹¹⁵

However, the possibility of lurking crimes of human trafficking and the inconsistency with the established human rights standards

is somehow the common legal issue between the two.

Thus, there is a need to address the same through necessary amendment and legalization whereby the differentiation is well established as well as the positive aspects of surrogacy are further emphasized.¹¹¹⁶

Courts being the source of rendering justice to the people of the country by implementing the laws in the right manner through the laws laid down by the legislature can only be a way to provide better vision to this evil of the society. Thus, the role of executive, legislature and judiciary is of immense importance to throw light upon prostitution in the country, because growth of the country doesn't include growth economically but also protecting the citizens of the country by providing them better laws for their better survival and thus, better contribution.¹¹¹⁷

¹¹¹⁵<http://kydalov-partners.com/surrogacy-in-ukraine-positive-and-negative-aspects/>

¹¹¹⁶<https://link.springer.com/article/10.1007/s40609-014-0019-4>

¹¹¹⁷<http://www.yourarticlelibrary.com/political-science/state-legislature-organisation-powers-and-limitations-on-the-powers-of-state-legislature/40348>



**NEED AND POSSIBLE
CONSEQUENCES OF LEGALISATION
OF PROSTITUTION: AN INDIAN AND
GLOBAL PERSPECTIVE**

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ABSTRACT

The current laws governing prostitution is 'The Prevention of Immoral Trafficking Act, 1956' which was made in pursuance of the 'International Convention signed at New York', for the prevention of immoral traffic. The Act intends to combat trafficking and sexual exploitation for commercial purposes. While prostitution is not an offence, practicing it in a brothel or within 200 m of any public place is illegal. A woman soliciting for the purpose of prostitution can also be punished.

There are flaws and many loopholes in the current legislation that goes on to defeat the very purpose of the act and that is the protection of women from sanctions. The social, economic and physical condition of the sex workers is still poor and thus the paper aims to discuss and highlight the need to amend the current central legislation on the subject.

Today many countries in the world have legalised or regulated prostitution and they recognize it as any other profession. Legalisation of prostitution may refer to a system of criminal regulation and government control of prostitutes.¹¹¹⁸ The

¹¹¹⁸<http://prostitution.procon.org/view.answers.php?questionID=000114>, last updated on: 2/15/2008 8:37:00 AM PST

paper discusses the need of legalisation of prostitution in India with reference to some particular problems associated with it being criminalised. It discusses that what is the rationale behind the legalisation of the same and will the legalisation bring about a change in the social stigma attached to the profession of a sex worker.

INTRODUCTION

The Current Central Legislation: THE PREVENTION OF IMMORAL TRAFFICKING ACT, 1956

In 1950 the Government of India ratified an International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of Others.

Preamble: Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.¹¹¹⁹ Keeping in line with the ratification of the same, Immoral Traffic Prevention Act, 1956 came into force.

THE ACT AND THE INTENTION OF THE LEGISLATURE: This Act was passed in the year 1956, long after the advent of the constitution of India, with the avowed object of suppressing immoral traffic in

¹¹¹⁹Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by General Assembly resolution 317 (IV) of 2 December 1949, entry into force: 25 July 1951, in accordance with article 24



women and girls. A perusal of the various sections the Act would show that apart from suppression of immoral traffic in women and girls, they have for their object prevention of prostitution from becoming a danger to social decencies, by reducing the opportunities for such women of contacting the members of public and also helping the women who have already taken to that life to rehabilitate themselves by disassociating them from the previous environments.¹¹²⁰ The act is not aimed at abolition of prostitutes and prostitution as such and make it per se a criminal offence or punish a woman because she prostitutes herself; and the purpose of the enactment is to inhibit or abolish commercialised vice namely the traffic in women and girls for purpose of prostitution as an organised means of living. Various provisions of the act tend to strengthen such a view.¹¹²¹

THE NATURE AND SCOPE OF THE ACT:
The Immoral Traffic (Prevention) Act is a penal statute. Penal statutes affect the liberty of the subject, if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that provision which exempts the subject from penalty rather than which imposes a penalty.¹¹²² Moreover, the act is a social welfare legislation to abolish the commercial sex activity carried on by the brothel keepers by using innocent and

illiterate women and also to remove the social evil for the good of the society.¹¹²³

Prostitution as defined in the Prevention of Immoral Trafficking Act, 1956 means the sexual exploitation or abuse of persons for commercial purposes, and the expression “prostitute” shall be construed accordingly.¹¹²⁴ In order to constitute an act of prostitution the following ingredients have/had to be present:

After Amendment Act 44 of 1986 –

- (i) there must be sexual exploitation or abuse of any person;
- (ii) it must be for commercial person.¹¹²⁵

LOOPHOLES IN THE ITPA, 1956

1. *The title of the Act suggest three things:*

1.1: *That the Indian legislator is addressing trafficking as a moral issue:*

Does the Act address trafficking as a moral issue? The title suggest that there is moral trafficking and that there is immoral trafficking. However, the intent of the Act as it has been interpreted by the Indian courts is "to inhibit or abolish commercialized vice namely the trafficking in women and girls for the purpose of prostitution."

¹¹²⁰R.P. Kataria and Manzar Saeed ,Laws Relating to Prevention of Immoral Traffic In India, Second Edition(Orient Publishing Company, Allahabad, 2016)

¹¹²¹ Bai Shanta v State of Gujarat, AIR 1967 Guj. 211 at 213: 1967 Cr. L.J. 1140(Guj)

¹¹²² Tolaram Relumal v The State, AIR 1953 Bom. 347 at 357: 1953 Ct. L.J. 1445

¹¹²³ P.N Swamy, Labour Liberation Front, Mahaboobnagar v. S.H.O. Hyderabad, 1998 (1) ALD 755

¹¹²⁴ Section 2(f) of the ITPA,1956

¹¹²⁵R.P. Kataria and Manzar Saeed ,Laws Relating to Prevention of Immoral Traffic In India, Second Edition(Orient Publishing Company, Allahabad, 2016)



1.2: That the Indian legislator is enacting a law on trafficking:

'The Immoral Traffic Prevention Act' is not an anti-trafficking law depending on the definition of an anti-trafficking statute. The Act does not recognize trafficking in persons as a specific or separate crime. The Act does not define for us trafficking in persons. Instead, trafficking defined in under the act¹¹²⁶ is addressed merely as a prostitution-related activity. Trafficking under Section 5 is procuring, inducing or taking a person for the purpose of prostitution. The Act limits the crime of procurement to prostitution. The Act defines prostitution under Section 2(F) as "the sexual exploitation or abuse of persons for commercial purposes." Exporting and importing of girls for prostitution is part of the penal code, sections 366A and 366 B and not the Immoral Traffic Prevention Act. The Immoral Traffic Prevention Act is basically an anti-prostitution law. It is not an anti-trafficking law.

1.3: That the India legislator is adopting a preventive approach to trafficking:

It is submitted to it for the purpose of examining the adequacy of the Act in combating trafficking. The Act focuses on criminalization and punishment. But it does not say anything about preventing prostitution or preventing trafficking. Nowhere in the Act is there any mention of addressing the root cause of the trafficking infrastructure or the appropriate preventive measures that must be taken to warn about

the dangers of prostitution or the dangers of trafficking.¹¹²⁷

2. Forms of Trafficking But limiting trafficking for the purpose of prostitution, as the case under the Immoral Traffic Prevention Act, ignores other forms of trafficking that must be confronted:

Sex trafficking is not limited to trafficking for a commercial sex act and commercial sex is not limited to prostitution. Trafficking of children for the purpose of sex tourism should also be recognized as a crime. Non-commercial sex may constitute as a form of exploitation that gives rise to trafficking. A broad definition of trafficking should be considered by the Indian legislator to include: Trafficking of girls for the purpose of marriage to avoid the payment of a dowry, especially in cases of child marriages, despite the fact that the Child Marriage Restraint Act of 1929 prohibits marriages in which the female is under 18 and the male is under 21 years, trafficking of girls for religious purposes to serve in temples as a "female slave of God" etc. While trafficking for the purpose of forced labour may be recognized as a crime under Section 374 of the Penal Code that prohibits unlawful compulsory labour, the punishment for such offense is limited to one-year imprisonment. While the Bonded Labour System Abolishment Act of 1976 prohibits bonded labour, unfortunately, the Child Labour [Prohibition and Regulation] Act of 1986 merely sets conditions of employment of children under the age of 14. The Act must explicitly recognize

¹¹²⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons (November 15, 2000)

¹¹²⁷: <http://www.protectionproject.org/wp-content/uploads/2010/09/vz4.pdf> (last visited on March 18, 2017)



trafficking for domestic service, begging and camel jockeys as forms of trafficking.¹¹²⁸

3. Unfortunately, *the Act does not provide for the forfeiture of the assets of the trafficker* the Dominican Republic law that Assistant Attorney General Acosta helped put together. The assets can also be used to initiate programs of assistance and protection along with providing incentives to police officers who investigated cases of trafficking in persons.

unless other laws apply."¹¹³¹ Under *legalisation*, sex work is controlled by the government and is legal only under certain state-specified conditions. *Decriminalisation* involves the removal of all prostitution-specific laws, although sex workers and sex work businesses must still operate within the laws of the land, as must any businesses.¹¹³²

WHAT IS LEGALISATION?

Legalise means to make legal or to give legal validity or sanction to something¹¹²⁹ and legalisation is the action of making something that was previously illegal permissible by law.¹¹³⁰

The difference between 'Legalisation' and 'Decriminalisation' in context of Prostitution:

"Legalization would mean the regulation of prostitution with laws regarding where, when, and how prostitution could take place. Decriminalization eliminates all laws and prohibits the state and law-enforcement officials from intervening in any prostitution-related activities or transactions,

SHOULD PROSTITUTION BE LEGAL?

Proponents of legalizing prostitution believe it would reduce crime, improve public health, increase tax revenue, help people out of poverty, get prostitutes off the streets, and allow consenting adults to make their own choices. They contend that prostitution is a victimless crime, especially in the 11 Nevada counties where it remains legal. Opponents believe that legalizing prostitution would lead to increases in sexually transmitted diseases such as AIDS, global human trafficking, and violent crime including rape and homicide. They contend that prostitution is inherently immoral, commercially exploitative, empowers the criminal underworld, and promotes the repression of women by men.

GENERAL ARGUMENTS IN FAVOUR OF LEGALISATION:

¹¹²⁸ Ibid

¹¹²⁹ Merriam Webster Dictionary ,Available at : <https://www.merriam-webster.com/dictionary/legalize> (last visited on March 18, 2017)

¹¹³⁰ Oxford Dictionary, Available at : <https://en.oxforddictionaries.com/definition/legalization> (last visited on March 18, 2017)

¹¹³¹ Donna M. Hughes, "Women's Wrong", National Review, Oct 20,2004.

¹¹³² Editorial, "The difference between legalisation and decriminalisation", The Economist, July 19,2104



1. "No person's human or civil rights should be violated on the basis of their trade, occupation, work, calling or profession.
2. No law has ever succeeded in stopping prostitution.
3. Prostitution is the provision of sexual services for negotiated payment between consenting adults. So defined, prostitution is a service industry like any other in which people exchange skills for money or other reward...
4. Non-consenting adults and all children forced into sexual activity (commercial or otherwise) deserve the full protection of the law and perpetrators deserve full punishment by the law.
5. Workers in the sex industry deserve the same rights as workers in any other trade, including the right to legal protection from crimes such as sexual harassment, sexual abuse and rape.
6. There are some unscrupulous people in all walks of life -government, law, journalism, banking, law enforcement, the stock exchange, medicine, the clergy, prostitution, etc. If every profession were criminalised when some of its members broke the law, there would be few legally sanctioned professions. Unscrupulous people should be summarily dealt with by the law, regardless of which profession they corrupt."¹¹³³

Argentina: Article 19 of the Constitution states, "The private actions of people that do not offend in any way the public order and morality, nor damage a third person, are only reserved to God, and are exempt from the authority of the magistrates."¹¹³⁴

Denmark: The act of prostitution was legalized March 17, 1999.

*French:*Prostitution is legal but they must pay taxes. Laws against soliciting in public places.

*Germany:*Prostitution, brothel ownership and pimping was legalized in 1927 though exploitive behaviour of pimps is considered criminal.It was mainly to offer prostitutes protection from violence and exploitation that two years ago - against the opposition of conservative politicians - the German government legalized prostitution. Now, legal contracts between prostitutes and clients can be established. The government withholds a portion of their earnings to pay social benefits like pensions and health insurance and to guarantee a regular 40-hour-workweek. Sex workers can now even unionize. When it comes to taxation and regulation of the industry, legalization has been beneficial in some places, advocates say.¹¹³⁵

*New Zealand:*Since 2003 prostitution has been decriminalized. It is legal for citizens over 18 years old. It decriminalises prostitution and establishes a legal framework around the sex industry, with

GLOBAL SCENARIO REGARDING THE LEGALITY OF PROSTITUTION:

Some countries and their prostitution policies:

¹¹³³Prostitution Act of 1996,Available at:<http://www.bayswan.org/> (last visited at: March 18,2017)

¹¹³⁴100 Countries And Their Prostitution Policies, Available at:<http://prostitution.procon.org/view.resource.php?resourceID=000772> (last visited at: March 18, 2017)
¹¹³⁵Isabelle de Pommereau, "Rethinking a Legal Sex Trade",Christian Science Monitor, May 11, 2005



licensed brothels operating under public health and employment laws."¹¹³⁶

Portugal: Prostitution is legal here. Prostitutes sell their services for as little as €20 and many times must settle for less as the interested parties haggle and the harsh competition forces them to accept the cheaper price.

Singapore: Prostitution is legal. There are legal red-light districts, mandatory health checks, and must be 18 years or older.

Venezuela: Prostitution and brothel keeping is legal. Legislation on prostitution in Venezuela aims to regulate rather than outlaw the commercial sex industry and the operation of these brothels is legal, providing that the women working in them are over the age of 18 and undergo regular health checks.¹¹³⁷

Netherlands: "To end abuses in the sex industry, the Netherlands decided to change the law to reflect everyday reality. It is now legal to employ prostitutes who are over the age of consent, and do the work voluntarily, but stricter measures have been introduced under criminal law to prevent exploitation. The legalisation of brothels enables the government to exercise more control over the sex industry and counter abuses. The police conduct frequent controls of brothels and are thus in a position to pick up signs of human trafficking. This approach is in the interests of prostitutes themselves, and it facilitates action against sexual violence and abuse and human

trafficking.

An important spin-off of the policy is that it prevents human trafficking, which is characterised by exploitation, coercion and violence. The lifting of the ban on brothels makes prostitution a legitimate occupation and gives prostitutes the same rights and protection as other professionals. The labour laws offer the most effective protection against exploitation, violence and coercion. The policy is based on the conviction that strengthening the position of women is the best way to combat sexual violence. Moreover, abuses are easier to detect when prostitutes operate publicly and legally rather than in a clandestine subculture."¹¹³⁸

WHY PROSTITUTION SHOULD BE LEGALISED IN INDIA?

On November 8, 2014, a proposal to legalise prostitution in India was put before a Supreme Court constituted panel. The panel was set up on a public interest litigation filed by the *Bachpan Bachao Andolan* in 2010 seeking a curb on large scale child trafficking. A Supreme Court bench of Justice Dalveer Bhandari and Justice AK Patnaik asked the Solicitor General: "When you say it is the world's oldest profession and when you are not able to curb it by laws, why don't you legalise it?"¹¹³⁹ The court, presided over by a bench of two judges, said no legislation anywhere in the world had successfully

¹¹³⁶ Prostitution Decriminalised, Brothels to be Licensed, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3509357 (last visited on March 18, 2017)

¹¹³⁷ Julia O'Connell and Jacqueline Sanchez Taylor, "Child Prostitution and Sex Tourism," *childtrafficking.com*, 1995

¹¹³⁸ "Dutch Policy on Prostitution" Available at: <http://prostitution.procon.org/view.source.php?sourceID=003653> (last visited on March 18, 2017)

¹¹³⁹ Prostitution Legal Debate, Available at: <http://www.dailypioneer.com/sunday-edition/sunday-pioneer/special/prostitution-legal-debate.html> (last visited on: March 18, 2017)



managed to stop the sex trade, and legalising it would allow authorities to “monitor the trade, rehabilitate and provide medical aid to those involved”¹¹⁴⁰

1. *HIV/AIDS*: India has the third largest HIV epidemic in the world. In 2015, HIV prevalence in India was an estimated 0.26%.¹¹⁴¹ This figure is small compared to most other middle-income countries but because of India's huge population (1.2 billion) this equates to 2.1 million people living with HIV. In the same year, an estimated 68,000 people died from AIDS-related illnesses.¹¹⁴²

1.1 *SEX WORKERS AND HIV/AIDS*:

An estimated 2.2% of female sex workers in India are living with HIV, although this figure varies between states.¹¹⁴³ For example, one 2013 study cited HIV prevalence among sex workers in Maharashtra at 17.9%, Manipur at 13.1%, Andhra Pradesh at 9.7% and Karnataka at 5.3%.¹¹⁴⁴

¹¹⁴⁰Supreme Court Proposes legalising prostitution, Available at: <http://www.livemint.com/Politics/1F4DWYU1dopzL2pwV8IhoK/Supreme-Court-proposes-legalising-prostitution.html> (last visited on: March 18, 2017)

¹¹⁴¹Government of India, Report of the NACO, (Ministry of Health and Family Affairs, 2015-16

¹¹⁴²UNAIDS (2016) Prevention Gap Report, Available at: <http://www.unaids.org/en/resources/documents/2016/prevention-gap> (last visited on: March 18, 2017)

¹¹⁴³Government of India, Report of the NACO, (Ministry of Health and Family Affairs, 2015-16

¹¹⁴⁴Apoorva, J. et al (2013) ‘[Risky Behaviors among HIV-Positive Female Sex Workers in Northern](#)

Although sex work is not strictly illegal in India, associated activities such as running a brothel are. This means authorities can justify police hostility and brothel raids. Stigma and discrimination against sex workers restrict their access to healthcare. A 2011 study in Andhra Pradesh indicated a significant association between police abuse and increased risk of HIV transmission and inconsistent condom use.¹¹⁴⁵

1.2 *TRUCK DRIVERS PAYING FOR SEX AND SPREAD OF HIV/AIDS*:

A number of studies from India have reported high vulnerability of truckers to HIV transmission. NACO estimates that 2.59% of the two million truckers in India are living with HIV.¹¹⁴⁶ NACO also categorises truck drivers as a bridge population because truck drivers often have unprotected sex with high-risk groups such as female sex workers as well as their regular sexual partners, which increases the risk of transmitting HIV into the general population. A 2012 study found 47% of truckers reported paying for sex, of whom only 40% had used a condom. Of those surveyed, 47% were unaware that HIV

[Karnataka, India](#)’ AIDS Research and Treatment, Volume 2013.

¹¹⁴⁵Erausquin JT., Reed E., Blankenship KM. (2011) ‘[Police-related experiences and HIV risk among female sex workers in Andhra Pradesh, India](#)’ Journal of Infectious Diseases, Dec 1;204 Suppl 5:S1223-8

¹¹⁴⁶NACO, July 27, 2016, NACO (2015) ‘[Annual report 2015 -16](#)’, (March 20, 2017), Retrieved from: <http://naco.gov.in/documents/annual-reports>



could be transmitted through heterosexual sex.¹¹⁴⁷

1.3 There are enormous health benefits of Legalisation. Legalisation will reduce the transmission of sexually transmitted diseases. Giving sex workers more rights, and the tools they need to protect themselves, is a theory that has proven to work when put into practice.¹¹⁴⁸ In the brothels of strict Singapore, every customer is provided with condoms as well as the facility to shower before and after the 'session'. Legalisation may also ensure that the prostitutes are also required to maintain health cards. Countries like Sweden and Norway have driven prostitutes off the streets with new laws.¹¹⁴⁹

2. *Legalising prostitution will reduce violence against prostitutes:* "There is no doubt that deadly violence against sex workers is a recurring social pattern. Nor is there any doubt that serial killers know sex workers are afraid to seek protection from police; or that the public believe violence is part of a prostitute's job description. Until prostitution is legalized, these women will continue to toil down on the ocean floor, miles away from the light, in constant fear of predators."¹¹⁵⁰

It cannot be denied that there are sex workers who get physically abused or become victims of violence from their pimps and even clients. Women prostitutes in countries or states wherein it is considered illegal are less likely to report to the authorities when they get hurt. Therefore, prostitution legalization will protect women for abuse and violence.¹¹⁵¹

3. *Basic labour rights can be granted to sex workers:* Legalisation would also translate into better work conditions and better wages for workers. Pimps and middlemen will gradually be eliminated. The job of the police will be to protect rather than extract 'protection money' from sex workers. The police can also then spend its time and resources tackling more serious issues than people having paid sex.

4. *Taxing of the billion dollar industry:* In countries like the Netherlands, prostitutes have been brought under the tax net. They pay their taxes like any other working citizen. In India, prostitution is estimated to be an 8.4 billion dollar industry. Taxing it would also enable the government to channel money back into the profession, thus enabling it to protect the rights of sex workers better.¹¹⁵²

CONCLUSION:

¹¹⁴⁷ Nasir J. et al (2015) '[HIV/aids awareness; long distance truck drivers](#)' Professional Medical Journal 22(12):1580-1585.

¹¹⁴⁸ Legalising prostitution will reduce HIV infections nearly in half, Available at: http://www.huffingtonpost.in/entry/legalizing-prostitution-hiv_n_5618887 (Last visited on: 18.06.2017)

¹¹⁴⁹ Debabrata Roy, "Prostitution-A case for legalisation in India" 2 IJETST 3203-3207(2015)

¹¹⁵⁰ Melanie Reid, former Columnist and Senior Assistant Editor of the *The Herald*, wrote in the Dec.

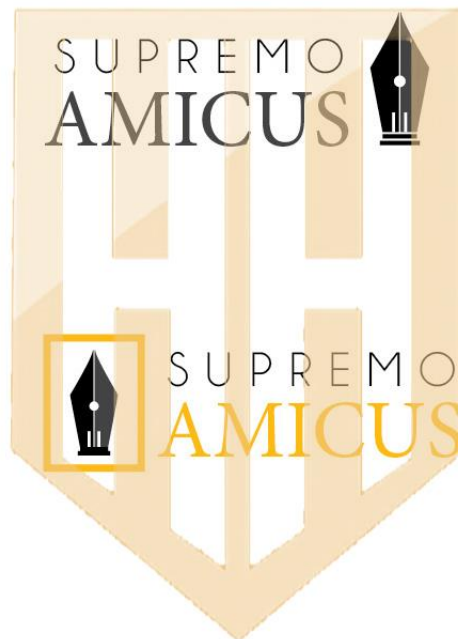
12, 2006 *The Herald* article, "Why are prostitutes allowed to be easy prey?"

¹¹⁵¹ Legalisation of prostitution in India-Pros and Cons, <http://womennow.in/legalisation-of-prostitution-in-india-pros-and-cons/> (last visited on: March 18, 2017)

¹¹⁵² International Journal of Emerging Trends in Science and Technology, September 2015, Prostitution-A case for legalisation in India, (March 18, 2017), Retrieved from: <http://ijetst.in/article/v2-i9/11%20ijetst.pdf>



Women are desired to be protected in the society but the sex workers are not treated at par with them. There is a social stigma attached to the labour of a sex worker. Legalisation can be asserted as a way to tackle the many problems that the prostitutes face in the sex industry. At last it should be questioned that what is more permissible in your basket of morals — two people consensually engaging in sex, or a large group of people suffering violence and death because of diseases?¹¹⁵³



¹¹⁵³Prostitution as a Profession,
<http://punemirror.indiatimes.com/columns/columnists/dushyant/prostitution-as-a-profession/articleshow/55881316.cms?> (last visited on : March 18, 2017)



RELIGIOUS FREEDOM A MATTER OF CONSCIENCE

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ABSTRACT

India is a pluralistic society and a country of religions. It is inhabited by the people of many religions. The framers of the Constitution of India thus desired to introduce the concept of secularism, meaning state neutrality in all matters of religion. Religious tolerance and equal treatment of all religious groups are essential parts of secularism. Secularism in India does not mean irreligion. It means respect for all faiths, belief and religions. The State does not identify itself with any particular religion.¹¹⁵⁴ India being a secular State, there is no state or preferred religion as such and all religious groups enjoy the same constitutional protection without in favour of discrimination.¹¹⁵⁵ Article 25 to 28 seeks to protect religion and religious practices from the State interferences. India has no preferred religion or State religion, as such; all religions are treated alike and enjoy equal constitutional protection without any favour or discrimination. The state has no religion of its own. It should treat all religion equally. The state should give equal respect to the church, to mosque and to the temple. Every man should be allowed to go to heaven in his own way. Worshipping God should be according to the dictates of one's

own conscience. Man is not answerable to the State for the variety of his religious views”.

Introduction

The concept of religious freedom has been considered as one of the most controversial topics upon which the highest court of appeal is silent. The Preamble of the Indian constitution declares India to be “Secular State”¹¹⁵⁶ which explains that the state does not recognise any religion as a state religion and that it treats all religions, equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.¹¹⁵⁷ But this does not mean that it is an irreligious or atheistic State, neither has it meant that India is an anti-religious state. It simply means that in matters of religion the State is neutral. The State neither promotes any practices for the upliftment of particular religious sect in state nor does it interfere with any religious practices. Thus State is not concerned with relationship of men with their God but is concerned only with the relationship of men with other men in a society. Thus the concept of Secularism which is implicit in our Indian Constitution secures to all its citizens “liberty to thought, belief, faith and worship”. The 42nd Amendment Act of 1976 which has inserted a word “secular” in the Preamble gives a new impetus to the citizens of India to have freedom of religion. The Supreme Court of India in explaining the secular character of the Indian constitution said, “There is no mysticism in the secular

¹¹⁵⁴Dr. Radhakrishnan in *Secularism in India*(Ed. V.K Sinha) 127(1968)

¹¹⁵⁵ N.A.,Subramaniam, *Freedom Of Religion*, 3 JILi 323(1961)

¹¹⁵⁶ The term “Secular “ was inserted by the constitution 42nd amendment Act 1976

¹¹⁵⁷ M. P.G. Nair v. State Of Kerala, AIR 2005 SC 3053; Bal Patil v. Union Of India AIR 2005 SC 3172



character of the State. Secularism is neither Anti- God nor Pro – God; it treats alike the devout, the antagonistic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion”.¹¹⁵⁸ The state has no official religion of its own. It should treat all religions equally without any distinction. The State must extend equal and similar treatment to the church, the mosque and the temple. Thus, every man should be allowed to go to heaven in his own way. Worshipping God should be according to the dictates of one’s own conscience.¹¹⁵⁹ “Man is not answerable to the State for the variety of his religious views”.¹¹⁶⁰ The right of worship was granted by God for man to worship as he is pleased. There can be no compulsion in law of any creed or practice of any form of worship.¹¹⁶¹

In S.R. Bommai V. Union of India,¹¹⁶² The Supreme Court has held that “Secularism is basic feature of the Indian Constitution”. The State shall treat equally all religions and religious denominations. Religion is matter of individual faith and cannot be mixed with secular activities. Secular activities can be regulated by the state by enacting law. Justice Ramaswami observed that secularism is not Anti- God. In the Indian context secularism is positive concept. Thus, the Indian context embodies the positive concept of secularism and has not accepted the American doctrine of secularism that is

the concept of erecting “a wall of separation between Religion and State”. The concept of positive secularism separates spiritualism with individual faith. The state is neither anti – religion nor pro-religion. In matters of religion, the state is neutral and treats every religion equally.

What is religion?

The word “Religion” as such has not been defined under our Indian Constitution. And indeed it is term which is hardly susceptible to any rigid definition. The Supreme Court has given a new interpretation to the word “religion” and defined it broadly. Religion is matter of faith with individuals or communities and it is not necessarily atheistic. Religion has its basis in “a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being”, “but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may have laid down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and mode of worship which are regarded as integral part of religion, and those forms and observances might extend even matters of food and dress.”¹¹⁶³ Therefore religion is matter of personal faith and belief. Every person has a right to entertain such religious faith and ideas as may be approved by his/ her judgement or conscience but also exhibit his belief and ideas by such overt acts which are sanctioned by religions. A religion is merely an opinion, doctrine and belief. Religion has been defined as a belief which binds spiritual nature of men to supernatural

¹¹⁵⁸ St Xavier’s college v. State of Gujarat , AIR 1974 SC 1389 at 1414

¹¹⁵⁹ Dowens v. Bidwell, (1901) 182 US 244

¹¹⁶⁰ United States v. Ballard, (1944) 322 US 78

¹¹⁶¹ Cantwall v. Connecticut, (1931) 310 US 295

¹¹⁶² AIR 1994 SC 1918

¹¹⁶³ Commissioner, H.R.E. v. L.T. Swamiar AIR 1954 SC 282 at p. 290.



being. It includes worship, belief, faith, devotion, etc. and extends to rituals.¹¹⁶⁴ The word “Religion” has different shades and colours. Important shade is dharma (duty), duty towards the society and soul.¹¹⁶⁵ In *lily Thomas v. Union of India*¹¹⁶⁶, the Supreme Court explained that religion was a matter of faith stemming from the depth of the heart and mind and that religion, faith or devotion were not easily interchangeable.

Thus the essence of Secularism in India is the essence of recognition and preservation of the different types of people, with diverse languages and different beliefs and placing them together so as to form a whole “united India”.¹¹⁶⁷ Thus, it is the contribution of our founding fathers that we have a constitution which is secular in character and which caters to the tremendous diversity in our country.¹¹⁶⁸ Article 30 ensures the protection of linguistic religious minorities, thereby preserving the secularism in the country. Holding that word “secularism” used in the Preamble was reflected in provision contained in Articles 25 to Article 30 and Part IV–A to the constitution, the Apex Court said that secularism was susceptible to a positive meaning, that was, developing understanding and respect towards different religions. The court thus ruled that study of religions in school education, could not be held to be an attempt against the secular philosophy of the constitution.¹¹⁶⁹

¹¹⁶⁴ P.M.A Metropolitan v. Moran Mar Marthoma, AIR 1995 SC2001

¹¹⁶⁵ Aruna Roy v. Union of India AIR 2002 SC 3176

¹¹⁶⁶ AIR2000 SC388

¹¹⁶⁷ *Virodhak Sangh v. M.M.K. Jamat*, AIR 2008 SC 1892.

¹¹⁶⁸ T.M.A. PAI Foundation v. State of Karnataka, AIR 2003 SC 355

¹¹⁶⁹ *Santosh Kumar v. Secretary, Ministry of human resources* AIR 1995 SC 293.

Concept of Freedom in International Scenario

Article 18 of Universal Declaration of Human Rights 1948 as well Article 18 of International Convention for Civil and political rights 1966 provides “Freedom of religion, belief faith and worship”. Even the international world talks about religious freedom of man in a particular society. Every man is free to choose religion of its choice and has the right to propagate the same among the masses.

Right to Freedom of religion under Indian Constitution

The right to “Freedom of religion” is embodied under articles 25 to 28 of the constitution of India. Various rights which constitute the rights to have religious freedom are-

- A. Freedom of conscience and right to freely profess, practice and propagate religion (Article 25).
- B. Right to religious denominations to manage religious affairs (Article 26).
- C. Freedom from payment of taxes for promotion of any particular religion (Article 27).
- D. Freedom from attendance at religious instructions in certain educational institutions (Article 28).

Thus, Articles 25 to 28 use the term “person”. Therefore, freedom of religion so secured is available to every person, citizens or non citizens or aliens.¹¹⁷⁰

Freedom of Conscience and the right to profess practise and propagate religion (Article 25)

Clause (1) of Article 25 provides; “Subject to public order, morality and health and to

¹¹⁷⁰ *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388.



the other provision of this Part, all the person are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion". This article secures to every person

- (a) Freedom of conscience
- (b) The right to profess religion, practice religion and propagate religion.

Freedom of conscience

The expression "freedom of conscience" means the inner freedom of the person to choose any religion of his choice. It also means the inner freedom of the person to mould his relations with his/ her god in whatever manner he likes. It connotes a person's right to entertain his beliefs and doctrines, concerning matters which are regarded by him to be conducive to his spiritual well being. It means to believe in one religion or another or none. Thus, every person in India, therefore, has the freedom to have faith and belief in religious tenets of any sect or community. Freedom of conscience as mentioned above means the freedom to hold or to entertain religious beliefs. Any belief which is genuinely and conscientiously held or any religious belief, as may be approved by his /her judgement or conscience, attracts the protection of Article 25(1). It simply means the freedom of religious opinions. Until this inner belief is expressed in any outward form, it is merely the "freedom of conscience".¹¹⁷¹

Right to profess religion

Article 25(1) guarantees the right to profess religion. To "profess" means "to avow publicly; to make an open declaration of; to declare one's belief in; as to profess Christ:

¹¹⁷¹ Webster's New world dictionary, quoted in Punjab Rao v. D.P Meshram, AIR 1965 SC1179()

to accept into religious order.¹¹⁷² Thus, to profess a religion means to declare openly and freely his/her faith towards one religion. When the inner "freedom of conscience" becomes articulate and expressed in an outward form, it amounts to profession of religion. It is to declare one's belief in such a way that it would be known to those whom it may concern.¹¹⁷³

Right to Practise Religion

To practise any religion means to perform religious obligations, duties, rites, ceremonies and rituals. The expression "practise of religion" means acts done in pursuance of religious beliefs. Religious practise which are included under Article 25(1) refer and include practices which are an integral part of the religion itself¹¹⁷⁴ that is the beliefs and doctrines which are regarded by those who profess religion, to be conducive to their spiritual well-being.¹¹⁷⁵

Right to propagation of religion

Propagation simply means to spread and publicise one's religious views. Holding public meetings by persons for propagating their religion is held to guarantee under Article (1).¹¹⁷⁶ But to "propagate religion" indicates the persuasion and exposition without any element of coercion. It does not include the right to insult the religion of

¹¹⁷² Webster's New world dictionary,

¹¹⁷³ Punjab rao v. D.P Meshram, AIR 1965 SC1179

¹¹⁷⁴ John Vallamattom v. union of India, AIR 2003 SC 2902

¹¹⁷⁵ A.S. Naryanan v. State of Andhra Pradesh, AIR 1996 SC 1765,

¹¹⁷⁶ Sri lakshamana Yalendrulu v. State of Andhra Pradesh, AIR 1996 SC1414



others.¹¹⁷⁷ The right to propagate one's religion does not give any right to others to convert other person into their religion. What article 25 (1) guarantees is right to practise, profess and propagate and does not provide any right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. Article 25 guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion. It, therefore, postulate that there is no fundamental right to convert another person to one's own religion because if person purposely undertakes to conversion of another person to his religion as distinguished from his efforts to transmit or spread the tenets of his religion that would impinge on the "Freedom of Conscience", guaranteed to all citizens of the country alike.¹¹⁷⁸

Religious Freedom Subject To the Rights of Others

A person can exercise his/her right to religious freedom as long as it does not enter into conflict with the exercise of fundamental rights of others. In the case of Acharya Maharajashri Narendra Prasadji Anand Prasadji Maharaj V. State of Gujarat¹¹⁷⁹, the Supreme Court observed that "no rights in an organised society can be absolute. Enjoyment of one's right must be consistent with the enjoyment of rights also by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the state has to step in to

set right the imbalance between the competing interests." The court has further observed that "a particular Fundamental Right cannot exist in isolation in a watertight compartment. One Fundamental rights of a person may have to co-exist in harmony with the exercise of another Fundamental right by others also with reasonable and valid exercise of power by the State in the light of Directive Principles in the interests of social welfare as whole".

Jehovah's Witnesses

In 1986 a two judge bench of Supreme Court ruled in *Bijoe Emmanuel V. State of Kerala*,¹¹⁸⁰ that Jehovah's witnesses constitute a religious denomination. Compelling a student belonging to the Jehovah's Witnesses to join in singing of National Anthem despite his "genuine", conscientious and religious objection", would contravene the rights guaranteed by Article 19(1) and Article 25(1). The court has noted Jehovah's Witnesses wherever they are do not sing the national anthem though they show respect to it by standing up whenever it is sung. They truly and conscientiously believe that their religion does not permit the singing of the National Anthem. The court has said; "the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but the subject of course to the inhibition contained therein. The Supreme Court held that "it is true Article 51A(a) of the constitution enjoins a duty on every citizen of India " to

¹¹⁷⁷ *Ramjilal v. State of Uttar Pradesh*, AIR 1957 SC 620.

¹¹⁷⁸ *Rev. Stainislaus v. State of Madhya Pradesh*, AIR 1977 SC 908.

¹¹⁷⁹ AIR 1974 SC 2098.

¹¹⁸⁰ (1986) 3 SCC 615.



abide by the constitution and respect its ideal and institutions, the National Flag and National Anthem”. Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing”.

Regulation of Secular Activities: Article 25(2) (a)

The State is empowered to regulate secular activities associated with religious practices. The state is not entitled to regulate religious practices as such. What the state can regulate under Article 25(2) (a) are the activities which are generally of an economic, commercial or political character though these may be associated with religious practices.¹¹⁸¹

Social Reform and Throwing Open Of temple; Article 25(2) (b)

Article 25(2) (b) contains the following two ideas;

- (1) Measures of social reform are permissible and would not be void on the ground of interfering with freedom of religion. Thus, the Hindu Marriage Act which introduces the principle of monogamy for the Hindus is undoubtedly a law providing for social welfare and social reform. It is the legislation intended for the benefit of the class of persons to whom the Act applies.¹¹⁸²
- (2) The state can throw open Hindu religion institutions of public character to all the sections of the Hindus. Article 25(2) (b) enables the state to take steps to remove

the scourge of untouchability from amongst the Hindus. The word “Public” here also includes any section of the public. Public institutions would thus mean not merely temples dedicated to the public as a whole, but even those which are founded for the benefit of sections thereof, and development and denominational temples would thus fall within the scope of this clause.¹¹⁸³

Freedom to manage religious Affairs Article 26

Article 26 of Indian constitution provides that “subject to the public order, morality, and health, every religious denomination or any section thereof shall have the right

- (a) To establish and maintain institutions for the religious and charitable purposes
- (b) To manage its own affairs in matter of religion
- (c) To own and acquire movable and immovable property
- (d) To administer such property in accordance with the law.

Religious Denomination

The term “religious denomination” in Article 26 means a religious sect having a common faith and organisation and designated by a distinctive name. The words “religious denomination” takes their colour from the word ‘religion’. Therefore, in case of denomination there must be common faith of the community based on the religion, and the community members must have the common intention and religious

¹¹⁸¹ Ratilal Panachand Gandhi v. Sate of Bombay, AIR 1954 SC 388.

¹¹⁸² Sate of Bombay v. Narasu, AIR 1952 Bombay 84.

¹¹⁸³ Sri venkataramana Devaru v. State of Mysore, AIR 1958 SC 255.



tenets peculiar to themselves.¹¹⁸⁴ To form a religious denomination, three conditions must be fulfilled;

- (1) It is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well-being.
- (2) They have common organisation.
- (3) Collection of these individuals has a distinctive name.

Right to establish and maintain institutions Article 26(a)

Clauses (a) of Article 26 the words “establish and maintain” go together. It means, therefore that where an institution has been established by a religious denomination, then it can claim the right to maintain the same as well. The right to maintain an institution may includes the right to administer as well. A denomination has no right to maintain an institution which has been established by it. The right to maintain an institution for religious and charitable purposes includes the right to exclude the profession or practices belonging to other religions. In *Sanjib Kumar v. Principal St. Paul College*¹¹⁸⁵ the principal of the college has established the Christian missionary society, refused to perform Saraswati Puja in the college premises. The Calcutta High Court held that the Principal was entitled to refuse the performance of such a religious practices in the exercise of his right to maintain the institution under Article 26(a).

Matter of religion Article 26(b)

The term used in Article 26(b) “matter of religion” is synonymous with the term “religion” in Article 25(1).¹¹⁸⁶ It thus includes not only religious belief but also such religious practices and rites as are regarded to be an essential an integral part of religion.

Right to own property and Administer Property Article 26(c) & (d)

Clause (c) of Article 26 secures to religious denomination or any section thereof “the right to own and acquire movable and immovable property”. Clause (d) further strengthens this right by guaranteeing to the denomination “the right to administer such property in accordance with law”. The right contained in Article 26(c) & (d) is distinguishable from the right guaranteed in clause (b) relating to management of religious affairs. While, Article 26(b) guarantees a fundamental right which cannot be taken away except on grounds mentioned under article 25(2), the right contained under Article 26(c) can be regulated by a law made by competent authority and legislature.

Freedom from payment of Taxes for promotion of any Particular religion Article 27

Article 27 provides “no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination”. The object behind Article 27 is to protect the secular characteristic of the constitution of India which prohibits the promotion or maintenance of any particular religion by the

¹¹⁸⁴Ramasswami Mudaliar v. State of Uttar Pradesh, (1197) 4 SCC 606.

¹¹⁸⁵ AIR 1957 Cal. 524.

¹¹⁸⁶ Govindlaji v. Sate of Rajasthan, AIR 1963 Sc 1638.



state or at state expenses. Therefore if such a tax is imposed, no person can be compelled to pay it. The Supreme Court in *Sri Jagannath v. State of Orissa*¹¹⁸⁷ upheld the levy and observed that the annual contribution so imposed was in the nature of a “fee” and not a “tax”. The payment was demanded for the purpose of meeting the expenses of the commissioner and his office which was the machinery set up for the due administration of the affairs of the religious institutions concerned.¹¹⁸⁸

Article 27 not only prohibits the imposition of taxes but it also prohibits the utilisation of public funds for the promotion or maintenance of a particular religion or religious denomination.

Prohibition of religious Instructions in Educational institutions (Article 28)

Clause (1) of Article 28 provides “no religious instructions shall be provided in any educational institutions wholly maintained out of state funds”

Clause (2) an exception to clause (1) provides that the prohibition contained in clause (1) would not apply to educational institutions which is administered by the state but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institutions

Article 28 distinguishes between the following three types of educational institutions in respect of holding religious instructions and worship.

- (1) Educational institutions wholly maintained out of state funds

- (2) Educational institutions which are either recognised by the state or getting aid out of state funds.

- (3) Educational institutions which are administered by the state but have been established under any endowment or trust which requires that religious instructions shall be imparted.

Article 28 was enacted to ensure that the peaceful atmosphere of educational institutions should not be disturbed by the controversies with regard to the truthful character of any particular religion and erroneous character of the other. It was provide for a path of complete safety.¹¹⁸⁹

Conclusion

Therefore in secular countries like India where there is a traditional society which is still in existence it is important to grant religious freedom to each and every individual in the society and moreover the concept of religious freedom shall not be manipulated on the ground of having political influence over it. Religio- pluralism is India’s past, present and future; indeed the heart and soul. “No religion is foreign to India; nor is India foreign land for any religion”.

¹¹⁸⁷AIR 1954 SC 400.

¹¹⁸⁸ Moti Dass v. S. P. Sahi, AIR 1959 SC 942.

¹¹⁸⁹Dr. B.R Ambedkhar, CAD VII, 883-884.



AN ANALYTICAL STUDY ON MEDIA LAWS IN INDIA WITH REFERENCE TO CONSTITUTIONAL FRAMEWORK AND RIGHT TO INFORMATION

By Purti Vyas

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Abstract: - . Media now days has become the essential part of a common man life whether it is print media or electronic or social media. Media has become a medium through which thoughts and ideas are exchange and for the same reason media is consider has the fourth Estate and fourth Pillar of a democracy. Media always plays a crucial role in strengthening the democratic base of government by establishing a close link between government agencies and general public by providing a platform for open discussions, sharing of views and opinions. Since ages there always has been a conflict between government and excessive right to freedom of press starting from British India Era to till date. The paper tries analysis the various legal provisions relating to Media law and the restriction which are imposed on it by the Constitutional provisions. This paper consists of critical analysis on issues relating to the freedom of press with help of case laws and why this right is not absolute and to what extend it should be used by media houses so that the purpose of democracy should be stained and a healthy peaceful environment can be maintain in society.

Keywords : - Constitutional provisions, Democracy , Freedom of Press, Government Agencies , Media Law

Introduction : Media is an essential attribute of a democratic government. Media tries to act as a mirror to society and is always consider has as a powerful channel of communication. The main and primary objective of Media to keep people awakened about the social, economic and political conditions of their country. And people of any democratic country are highly dependent upon the different sources of media for collecting the information regarding these aspects. There is no denying in the fact that media is performing its duties very well in awaking and educating people. Media has become one of the major instrument to bring a social change. It has become medium through which thoughts, views and opinions and ideas are expressed shared and exchanged on a national platform with the advent development of technology Media acts has a sincere friend of the citizens by providing them needful information and making them aware about their rights and duties.

Freedom of Media and Constitutional

Framework : - Constitution is said to be basic law of land. It is consider has fundamental document of a country that governs the citizens of a country. Constitution of India has given some fundamental rights to its citizen under the Article 14 to 32 and one of them is Freedom of speech and expression which includes freedom of press under Article 19. Liberty of thoughts and expression is also given in the Preamble of the Constitution which is considered as preface to the Indian



Constitution. The provisions under the constitution not only guarantee citizens, the right to speak but also to express any opinion in any form. The Indian Constitution does not merely expressly mention the freedom of press (which includes both freedom to print and publish) but it is implicated from freedom of speech and expression which is guaranteed under Article 19(1)(a) of the Constitution. Freedom of Press is an inherent provision covered under Article 19 of Indian Constitution. According to sArticle 19(1)(a) of India “All the citizens shall have the right to freedom of speech and expression.” This right is the bulwark of a democratic government. Apart from holding freedom of opinion and expression, this right also gives citizens to hold opinions without interference and to seek, receive and impart information and ideas through media houses. *In Printers (Mysore) Ltd v . Assistant Commercial Tax Officer*, the Supreme Court has reiterate that though freedom of the press is not expressly guaranteed as a Fundamental Right, it is implicated in the freedom of speech and expression. Freedom of the Press has always been a cherished rights in all democratic credentials of a state are judged by the extent of freedom the press enjoy in that state.

The Supreme Court has laid emphasis in several cases on the importance of maintaining freedom of press in a democratic society. The press seeks to advance public interest by publishing facts and opinions without a democratic electorate cannot make responsible judgments .

Reasonable Restriction on the Rights : -
The rights guaranteed under Article 19(1)(a)

are not absolute but subjected to reasonable restriction. These restriction are imposed by constitution itself. Thus, Clause (2) to (6) provides the grounds for the restrictions. The restriction can be imposed on citizens by the State. State includes any of the authorities who are include in definition of ‘State’ in Article 12 of the Constitution who are competent to make laws. The word law has defined in the Article 13(3)(a) of the Constitution. The Constitution of India does not define the term “Reasonable Restrictions”, but the Constitution of India has laid down the grounds for imposing the restriction in Article 19(2). The grounds of

- restrictions are:-
- A. Sovereignty and Integrity of India.
 - B. Security of the State.
 - C. Friendly Relations with Foreign States.
 - D. Public Order
 - E. Decency or Morality
 - F. Contempt of Court
 - G. Defamation

Different Aspects of Freedom of Press :-

1. **Press freedom and Circulations :-**
It has interpreted from various judicial cases that freedom of speech and expression , is a fundamental right under Article 19 of Indian Constitution also includes freedom of propagations of ideas or views which is ensured by the freedom of circulation in any form either mass , print or electronic media. In *Romesh Thapper v State of Madras* , it has held that Article 19(1)(a) also includes freedom to propagate ideas .Circulation is the lifeline of this freedom and to ban entry of newspaper or stop its circulation is to cut the lifeline of the expression guaranteed by Article 19(1)(a). Circulation of ideas can be any form for e.g.



in form of audios, videos , in writing , through press also.

Without right to circulate , the freedom of speech and expression is incomplete . Therefore , freedom of circulation is must and it has been held to be essential by court in many judicial interpretation.

Any attempt which denies citizen their right to circulate and propagate their ideas in any reasonable form should be frowned upon unless it comes under reasonable restrictions as defined under Article 19 (2) of Indian Constitution.

2. Right to report court proceedings

: Under this media houses has right to report the matters decided in court of law which has direct link with the interest of general public. It is so important because it tries to enhances the knowledge of them.

2a. Justification of this right – In various cases and circumstances the question was raised – Whether this right is absolute or not ? The Supreme Court has answered this question in Case of Naresh Sridhar Mirajkar v. State of Maharashtra , that court may restrict the proceedings of court in interest of justice.

Bombay High Court has said that “ the journalists has a fundamental right to attend the court proceedings in any of the court that comes under Indian Territory and to publish a faithful report of the proceedings witnessed and heard by them in court.”

Thus , it is clear that the media houses should report the matters decided in court or any judgment or any decree or any precedent given by a judge in court of law provided that the report is in the interest of

general public and report that is presented is free from error.¹¹⁹⁰

But, the right given to media to publish is not absolute , particularly in case of sensitive issues where there is necessity to maintain some restraint and secrecy for the interest of justice. In such cases the identity and any further details of the parties are not disclosed in front of public.

For sake of providing justice , court make restrict or prohibits media not to disclose the names of parties or any names relate to case.

3. Right to advertise :-

Whether right to advertise for commercial purposes comes under Article 19(1)(a) ? This has become a debatable issue these days. But at the first instance Supreme Court denied to give protection to this right. In cases such as *Hamdard Dwakhana v. Union of India* , Supreme court held ‘ commercial advertisement’ should not be covered within the scope and meaning of freedom of speech and expression.

But , later In *Tata Press Ltd v. Mahanagar Telephone Nigam Ltd*, the Supreme Court held at the ‘ commercial speech’ is part of freedom of speech and expression guaranteed by the Article 19(1)(a) as it is right of businessman to express his views about his product and expressions.

In *Bennett Coleman and Co. v. Union of India* , Supreme Court again held that right of advertisements is included within the scope of Article 19(1)(a). Supreme Court stated that advertisement is included in a way of holding an opinion and expressing views. And any restraint on publishing advertisements would be infringing the

¹¹⁹⁰Saroj Iyer v. Maharashtra Medical (Council) of Indian Medicine, AIR 2002 Bombay 97.



fundamental right of propagation , publication and circulation of ideas .

Freedom of Press and the Right to Information :-

Right to information or right to know is inherent from Right to Freedom of speech and expression .But as other fundamental rights stated in Article 19(1) , this right is not absolute and are subjects to reasonable restriction . When people aspire to have information regarding any public matters, government decision and policies, regarding the working of any government office, government is also responsible to provide them all such information .Thus , media houses help the general public to provide all the information regarding the functioning of government. In a democratic set –up government cannot deny to provide useful information to public. Press and media plays a vital role in democratic culture of open society to help general public in seeking relevant information.

Freedom of Information and International Scenario :- In Today's era almost in all the democratic countries , Media and Press enjoys a great freedom and a plays a crucial role in dissemination of news as far as concerned.

The first international organization of working newspapermen called “ The Federation Intenationale des Journalistes was founded in Paris in 1921 which was mainly concerned with working conditions of the journalists and for promoting and developing self- discipline within the profession it took a number of steps.

The Universal Declaration of Human Rights , 1948 also provides for freedom of

information . This Universal Declaration of Human Rights was proclaimed on 10th December, 1948. Article 19 of Universal Declarations of Human Rights says,

“Everyone has the right to freedom of opinion and expressions; this right includes freedom to hold opinion without interferences and to seek and , receive and impart information and ideas through any idea through any media and regardless of fronteirs”.

All the democratic nations either through their constitution or through any specific laws incorporated the legal provisions for free flow for exchanging the views and expressions.

1. **Judicial interpretation of the expression “Right to information”** - In State of Uttar Pradesh v. Raj Narain , the Supreme Court held that “ right to know” is inherent from the concept of freedom of speech. Similarly in case of S.P. Gupta v Union of India, it was held by the court that “right to know , receive and impart information has been recognized within the right to freedom of speech and expression. A citizen of India has a fundamental right to receive any information of the matter so concerned.

The Right to Information Act, 2005: - RTI provides an effective framework for implementing right to seek information or right to know stated under Article 19 of the India Constitution. But it also imparts reasonable restrictions on seeking information. The main whole and soul objective of the act is to set up a practical regime to access information in a procedural established under the Act. The act impose



restriction on seeking information regarding the following issues:-

- a. Any information which can affect the sovereignty and integrity of the state.
- b. Any information which is received from in confidence from foreign nation.
- c. Any information which can harm the security and peaceful environment of the country
- d. Any disclosure that can cause breach of privilege of Parliament or the Responsibility of Media.

restrictions and follow the norms of the democratic government.

Role of Media as sincere friend of public :

- The role of Media is not only to make people aware , but they also have responsibility and duty towards the government to see that only that information should be supplied to public is accurate and does not come under the reasonable restrictions. With the development of technology and widespread use of internet and others modes of advanced communication technology it has become easier for media to reach and communicate with people as quickly as possible.

Conclusion : - In the age of information , ignorance and illiteracy has no place and the people are required to be more vigilant , aware and informative. They should have the capacity to seek information and should have knowledge of their rights and duties which is provided to them by the Constitution or any Act . Media houses should all the information which is required by the public as Constitution provide “Right to Media” which is expressly defined under Article 19 . As the right is not absolute and comes under reasonable restrictions ,so it is duty of media to follow the prescribed



**FREEDOM OF INDIAN PRESS
(IN SPECIAL REFERENCE TO MEDIA
TECHNOLOGIES)**

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ABSTRACT

This Article is basically going to talk about the degree of freedom that should be awarded as well as professed under freedom of press guaranteed under the Indian Constitution, particularly to the Media Technologies, such as broadcast media and social networking platforms. These two platforms are the largest mode of mass communication in today's modernized world and almost cent percent of this generation's population rely mostly on these two modes for information. Basically through this Article, I want to bring the current situation or something which can be called as utmost freedom which are availed by most of the media houses just for the sake of greater TRPs and money and acting against the law of the country. This also talks about the need of a particular Act concerning the freedom and regulations on press. This article brings in the threats that can be caused because of utmost freedom granted to these media houses and networking sites, as well as lists the suggestions on restrictions that must be imposed in order to provide internal as well as external safety for the country.

INTRODUCTION

“Freedom of the press, if it means anything at all, means the freedom to criticize and oppose.”¹¹⁹¹

-GEORGE ORWELL

To understand the idea of freedom of press, let us first get the answer of the question, ‘What is a press?’ A press is something which acts as a medium to express one's opinions and views, is an effective instrument for building opinions and views on various regional, national and international issues.

Now coming to the idea of freedom of press, in a limited and well-defined meaning, freedom of press, which is basically covered under the ambit of freedom of speech and expression, implies the right to freely utter and publish whatever one pleases without previous restraint, and to be protected against any responsibility from doing as long as it does not violate the law, or injure someone's character, reputation or business. Literally ‘freedom’ means absence of control, interference or restrictions. Hence, the expression ‘freedom of press’ means the right to print and publish without any interference from the state or any other public authority. In other words, freedom of the press or freedom of the media is the freedom of communication and expression through mediums including various electronic media and published materials. While such freedom mostly implies the absence of interference from an overreaching state, its preservation may be

¹¹⁹¹ The Prevention of Literature, available at: http://orwell.ru/library/essays/prevention/english/e_plit, (Visited on December 26,2017).



sought through constitutional or other legal protections.¹¹⁹²

“Freedom of the press is a precious privilege that no country can forego.”¹¹⁹³ Why freedom of press has been given so much importance all around the globe? Why it is necessary for a democracy to have a free and fair media? The answer to the first question is that press acts as a mirror for a country; it helps to reflect back what is going in and outside the country, not just for the people sitting at helm, but also for the people at grass root level, and that too all around the world. The 1948 Universal Declaration of Human Rights states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and impart information and ideas through any media regardless of frontiers”.¹¹⁹⁴ The answer to the second question can be inferred from a statement given by Shashi Tharoor, which goes as, “Freedom of the press is the mortar that binds together the bricks of democracy.”¹¹⁹⁵ The existence of free, independent and powerful press is the cornerstone of a democracy, especially in a welfare state like India. Thus it can be said that press plays a pivotal role for the smooth functioning of a country, but a press under

the shackles is of not much importance for anyone. A free and fair press is what a democracy enshrines in itself as a birthmark and it cannot leave or get it behind fetters just for the sake of some temporary benefits, however there are some restrictions to be followed, which are enlisted under Article 19(2) of the Indian Constitution.

However the media houses, in recent times have either crossed the limits in some of the cases, and at some instances there have been no or partial censoring of the contents shown in their channels, which may have arisen many grave security issues for the country. There have been many instances where without proper investigation, just for the sake of greater number of TRPs and to get ahead of other media houses, many false (sometimes to the full extent, and sometimes partially correct and partially incorrect) reports and news were telecasted, believing which people were at a state of mental shock. Moreover there is no direct control of government over the contents in the social networking sites, which is one of the vital source of information for general public in these times, which sometimes has been the reason for inner conflicts in the nations, most popular being some of small religious riots. However till the time there have been no reported instances where our Army personnel have faced problems in counter terrorism, because of the telecast of the ongoing encounters or battles, but the kind of reporting which is done by the news reporters can someday be a grave issues for the internal and external security. Moreover the news stating or telecasting information regarding the defence ties, defence capabilities and abilities, in its strength either in population or in weapons, is not

¹¹⁹² Freedom of the press, available at: http://en.wikipedia.org/wiki/Freedom_of_the_press#India (Visited on December 25, 2017).

¹¹⁹³ Young India, available at: <http://www.mkgandhi.org/indiadreams/chap68.htm> (Visited on December 26, 2017).

¹¹⁹⁴ Universal Declaration of Human Rights, available at: <http://www.un.org/en/universal-declaration-human-rights/> (Visited on December 26, 2017).

¹¹⁹⁵ Mediapersons under siege, available at: <http://www.thehindu.com/thehindu/mag/2003/05/11/stories/2003051100070300.htm> (Visited on December 29, 2017).



something to be shown to the world, as these information might be used by some foreign agencies as well as domestic agencies in order to create conflicts as well as war, especially in a country like India which is surrounded by neighbours such as Pakistan, with whom it had been in a state of war since 1947 and China, which has grown hatredness because of the territorial issues as well as recent developments. Nevertheless the great Indian media houses have also been criticized by some well known journalists and thinkers for reporting irrelevant things and telecasting the same, which can't even be called news. The issues such as national security, decency are kept at margin by these digital Medias which require some checks time and again. There also lies some greater amount of responsibilities with those media houses, as under the Indian Constitution pre-censorship at many a time has been defeated in the court of law. So the greater sword in respect to the right and power regarding public information lies in the hand of press, and with great power comes great responsibilities, which Indian media has been overlooking time and again.

HISTORICAL BACKGROUND and LEGISLATIONS

As Evelyn Hall speaks-

*"I disapprove of what you say, but I will defend to the death your right to say it."*¹¹⁹⁶

But Indian history speaks a different way, especially when it was ruled by the British Government. It speaks I will disapprove of what you say, and for my own benefits I will defy your right to say it. There has been a

history of great impositions, sometimes legit, and sometimes not, on the Indian Press. The East India Company, in order to protect its so called throne or control over Indians, did not resist themselves from imposing and passing various Acts as stringent curbs on Indian Press of that time, which were mainly in the form of newspapers, circulars and posters. First of all those restrictions was 'the Gagging Act' passed by Lord Lytton, which was driven to curtail and control the Indian publication content invoking sepoy mutiny of 1857. The Act compelled all Indian publications to apply for a license from the government, while also ensuring that nothing was written against the British government, nor was the government challenged in any measure. And this followed many more restrictions time-to-time, for example the Vernacular Press Act, the *Newspapers (Incitement to Offences) Act of 1908*, the *Press Act of 1910*, the *Prevention of Seditious Meetings Act of 1911* and the *Criminal Law Amendment Act of 1908*. There was also "the Official Secrets Act as amended in 1903." The tension between the Press and the Government was slowly mounting. The *Press Emergency Act of 1931* further heightened the tension. During Mahatma Gandhi's Satyagraha, he used the press to advocate his feelings and rally the masses to protest against the British.

In the post-constitutional era, the Government of India, Court of law and the Constitution has been very liberal towards the rights and power given to Indian press, especially in current times to many of the media houses. After enforcement of the Indian Constitution, the old conflict between the Press and the State vanished overnight.

¹¹⁹⁶ Evelyn Beatrice Hall, available at: https://en.wikiquote.org/wiki/Evelyn_Beatrice_Hall (Visited on December 29, 2017).



However this vanishing conflict doesn't mean an ultimate and no restriction power in the hand of press. Although Nehru was a liberal and believed in freedom of the press, but he was forced to enact laws curbing freedom of the press after independence in order to check increasing writings with communal overtones, he in 1951 passed "The Press Objectionable Matters Act" (lapsed in 1956). There was a swing away from freedom of the press to control and the imposition of restrictions on the press by the government during the period when Nehru's daughter Mrs. Indira Gandhi, an authoritarian, who believed press as a tool of progression of her party, which should blindly support the government, became the Prime Minister. The emergency, imposed in 1975 which lasted for 19 months is considered to be the darkest period in the post independence history of the freedom of the press. Many arbitrary Acts were formulated and even pre-censorship was imposed all around the state. However after the emergency period was over, Indira Gandhi's government was found to be charged with mishandling and distorting the news by using her power.¹¹⁹⁷

A COMPARATIVE APPROACH

As a whole, especially in current situation, it can be said that Indian Press is enjoying the highest level of freedom. Looking into the situations, it can be inferred that the Government is not able to impose even a legit restriction on the press. There have been instances in the past where press was restricted for all the right reasons, but the same power or ability or concern lack in present time. Some of the reasonable restrictions imposed earlier can be inferred

from Reba Chaudhuri, a journalist's writings, where she pointed out that how the Government of India, during World War II armed itself with the power of pre-censorship on materials published in the press relating to certain matters. Similarly during the Quit India Movement (1942), the All-India Newspaper Editors' Conference – the protector of Indian Press' rights – gave a word of confidence to the government that the newspapers will observe caution and voluntarily refrain from releasing information regarding *Quit India Movement*. Similarly "The Press Objectionable Matters Act" which lapsed in 1956 was a correct measure taken by Nehru's Government as that was a time of greater conflict between the two countries, India and Pakistan. Even during the 1961 Declaration of Emergency which he called to deal with the Chinese incursions on India's borders, the imposition of restrictions was there applying only to news relating to India's defences, though no concentrated attempt was made to censor the press. But something is better than nothing, some restrictions, though minimal helped to prevent the leakages of information which might have backfired. So these instances clearly shows that there need to be some restrictions as well as censored news is necessary for the proper information to be imparted to the public, for their safety as well as correct knowledge. However same is not the situation in most of the countries. For example though in the landmark case of *Express Newspapers (Private) Ltd. v. Union of India*¹¹⁹⁸, Justice Bhagwati stated, "*that the fundamental right to the freedom of speech and expression enshrined in our Constitution is based on (the provisions in) Amendment I of the Constitution of the*

¹¹⁹⁷Shah Commission(Government of India, 1977).

¹¹⁹⁸(1985) 1 SCC 641



United States”, but also there are some differences between the degree of freedom in both the countries. The freedom for press under American Constitution has two distinctive and positive features as compared to that of the Indian Constitution, (i) freedom of press is specifically mentioned therein, (ii) no restrictions are mentioned on freedom of speech.

The consequence of the extent of the Freedom in the US constitution is that ideas or expression which may be offensive or hurtful or even racial can be expressed freely. The other side of the coin suggests that it leads to healthy debate on public issues and such. When talked about the UK, there lies not much difference as Acts such as, 2006 Terrorism Act, 2006 Racial and Religious Hatred Act keeps an eye and imposes reasonable restrictions on the freedom of speech. Private media outlets in the UK generally maintain their independence from political pressure and convey a range of views, with some tending to support or oppose particular parties or governments. The BBC is also editorially independent, though its governance and funding came under scrutiny in 2015. There are no restrictions on internet access in the UK. Physical attacks on the media are rare. After all these comparisons, which shows minimal differences in the freedom of press between these three countries, the rankings of the countries in RPF reports, which ranks countries on degree of freedom of speech and expression in relation with press, speaks some different story, where according to 2017 reports India ranks 136, The US 43 and the UK 40. Thus it shows the differences in the ease of the reporting news inside the country, which gets affected both

by the government policies as well as carelessness of reporters.

CONSTITUTIONAL PROVISIONS AND JUDICIARY

When the question of inserting freedom of press explicitly in the Constitution of India, Dr. B.R. Ambedkar argued, *“The press is merely another way of stating an individual or a citizen. 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 all citizens and therefore when they choose to write in newspapers, they are merely exercising their right of expression and in my judgment therefore no special mention is necessary of the freedom of the press at all.”*¹¹⁹⁹

Although the Constitution shows no special provision to safeguard the rights of the press, the Judiciary has taken up the role and confirmed that the rights of the press are implicit in the guarantee of freedom of speech and expression under Article 19(1) (a) of the Constitution. Indian Judiciary and judicial committees, from the time of Independence, has been in the favour of a free and fair press, which ultimately has led to a greater amount of freedom to the media covered under press, as it can be inferred from the decisions of taking back of Objectionable Matters Act, 1951, Shah committee charging Indira Gandhi for misuse of power and mishandling the Press etc.

¹¹⁹⁹ Constituent Assembly of India debates (Proceedings)-Vol.VII, Thursday, The 2nd December, 1948



Though in a democracy, free press is very important, as it acts as a watchdog of the three pillars of democracy, viz. the legislature, the executive and the judiciary, still no absolute right can be vested upon them, as absolute power leads to absolute exploitation and the same is visible in the Indian Constitution. The freedom of Press is imposed with certain restrictions, as enlisted under Article 19 (2) of the Indian Constitution. The restrictions are- (1) Sovereignty & Integrity of India, (2) Security of the state, (3) Friendly relation with foreign nations, (4) Public Order, (5) Decency or Morality, (6) Contempt of Court, (7) Defamation, (8) Incitement to an offence. These restrictions keep an eye on the arbitrary use of power and rights vested with the press in the country.

Keeping all these things on mind, Indian judiciary has been a faithful servant of the Constitution of India. It, following all the orders, though nowhere explicitly mentioned, not only imparts justice whenever there has been a violation of the fundamental right of freedom of press, but also when there has been arbitrary use of power by the journalists of different media houses. Indian judiciary have been quite a busy in deciding the questions of freedom of press. In *Prabhu Dutt v. Union of India*¹²⁰⁰ the Supreme Court has held that the right to know news and information regarding administration of the Government is included in the freedom of press. But this right is not absolute and restrictions can be imposed on it in the interest of the society and the individual from which the press obtains information. They can obtain information from an individual when he

¹²⁰⁰AIR 1982 SC 6

voluntarily agrees to give such information. There are many instances when the freedom of press has been suppressed by the legislature. In *Sakal Papers v. Union of India*¹²⁰¹, the Daily Newspapers (Price and Page) Order, 1960, which fixed the number of pages and size which a newspaper could publish at a price, was held to be violative of freedom of press and not a reasonable restriction under the Article 19(2). Similarly, in *Bennett Coleman and Co. v. Union of India*¹²⁰², the validity of the Newsprint Control Order, which fixed the maximum number of pages, was struck down by the Court holding it to be violative of provision of Article 19(1) (a) and not to be reasonable restriction under Article 19(2). The Court also rejected the plea of the Government that it would help small newspapers to grow.

INDIAN MEDIA HOUSES & THE LAW

*“Some people’s idea of free speech is that they are free to say what they like but if anyone says anything back, that is an outrage.”*¹²⁰³

-SIR WINSTON CHURCHILL

It seems that most of the Indian media houses have been working on this idea only, and have made this statement as their principle, and not the meaning which has been sarcastically brought out by Sir Winston Churchill. One common thing which anyone can see, inside India, whenever he opens any of the news channel (exceptions lies everywhere) is, “*we are taking a short ad break, but we will be right*”

¹²⁰¹AIR 1962 SC 305

¹²⁰²AIR 1973 SC 106; (1972) 2 SCC 788

¹²⁰³“The Churchill Spirit-In his own words”, The New York Times, August 2, 1964.



back, stay tuned with us". However these channels have taken the meaning in a quite different way, unless there is some hot gossip from bollywood or some terror attack in the country. They think a small break means a break of about 18-20 minutes in a 30 minutes show. Open a news channel and one can bet that 7 out of 10 times, you will end up watching some Patanjali ads, or fairness cream ads or something totally irrelevant. And 3 out of 10 times some good news, that too if you have good luck and has pressed a good channel number and if not some news, then at least some sensible advertisements which are related to government policies and schemes. Yes it is understandable that news channels also need money to run, and revenues through advertisements are their biggest source of income, but there are some responsibility vested upon them. It is not just the money they are working for, and for the question of revenue, there has been some particular guidelines mentioned under The Cable Television Network Rules, 1994 which ought to be followed. And thereafter they complain that they are not given proper freedom of speech and expression, and their voice is suppressed. Had they not spoiled those guaranteed time to exhibit these freedoms on money producing advertisements, they would have been able to produce a much more amount of news. And when not satisfied by their own rights, they even bark off that why that particular news channel or particular journalist has reported such things. They are embedded as supporters of a particular political party, or a follower of a particular religion.

Why this hypocrisy in a country of 125 crores population which has given

maximum number of doctors and engineers to the world? Why there is less news and more advertisement in the news channels? Why there are irrelevant news and why so much importance given to them?

The most common and suitable answers for these questions are TRP, money and a blind race ending nowhere, and the biggest problem is that most of the media houses have fallen as victim of the same. Most of the news channels are basically funded (a large amount) by political parties, political leaders and because of which these media channels just end up being the mouth piece of those particular political parties. And when their praise ends, then comes the blame game. Not only political parties and leaders are becoming the prey of these blame games, but also the cricket players who represent our country in the international level. After the recent defeats of Indian Cricket team in Champions trophy against Pakistan, this became the biggest highlight for most of the news channels. Cricket experts were called in, and then the breaking news flashed, "*Who is the culprit of India's loss?*" and that for around three to four days in a row. Similarly on 21st of June, all the news channels were busy recording 'INTERNATIONAL YOGA DAY' and yoga sessions of Modi and Ramdev baba; and this not ended here, the very next day, they were analysing how ministers have done Yoga, but the sad part was that there was only one or two news channels reporting the militants attack on 22nd June in Qazigund, Kashmir. Similarly there are intense debates on the loss of Indian Cricket team and that too only of men's cricket; but women's cricket, hockey, ice sports and athletics are just important enough to be



published as a news ticker and nothing more. Now this is hypocrisy, but then money and TRP is more important. Let us first blame the ministers for not doing yoga properly, thereafter we will report the attack, and it will fetch us one more chance to blame the government. Now talking about the ratio of news and advertisement in most of the shows, unless it is a great TRP gainer is, around 35:65. These days, there is certainly less news, and way more advertisement, because what matters most is money and advertisements are the biggest source of revenue collection. Most of us have often felt irritated because of the deluge of advertisements while watching prime time news. However, there is already a law subscribing volume of advertising per hour of programming. The Cable Television Network Rules, 1994, clearly say that not more than 12 minutes (20%) of advertisement for every one hour of programming is acceptable. Rule 7 (11) states: "No programme shall carry advertisements exceeding 12 minutes per hour, which may include up to 10 minutes per hour of commercial advertisements, and up to 2 minutes per hour of a channel's self-promotional programmes." But no one seems to follow it. Hindi channels Aaj Tak and Zee News have an average of 43% and 46% advertisement time. Only DD news, the only government funded News channel (bilingual and free to air) has an average less than the mandated 20%¹²⁰⁴. Thus it can be said that the institutes which are entrusted to impart information regarding everything

legit and possible, are themselves not following the rules and regulations which the state has levied on them. The watchdog of democracy, itself has become unfaithful to the master. Now coming to the last question, which talks about a media's huge hue and cry over some irrelevant news, has been a matter of great discussion between some of the great journalists and thinkers. Whenever there is any Bollywood gossip, let it be any irrelevant incident, viz. scandals, breakups, tiffs between stars are made the breaking news. Abhishek Bachchan's marriage was a matter of great national importance according to some of the news channels as they were live telecasting the same. Aishwarya and Sai Baba were at sometime the biggest headlines under some particular news channels. Similarly there are intense debates on the loss of Indian Cricket team and experts are called in the studio to discuss the strategies need to be followed in the forthcoming game. They blame some particular players when the team loses, and also set the match plans. So it can be inferred that they are capable enough to be appointed as Indian Coach but nobody applies. Somebody need to tell these fake media houses how a news channel is run, or they can learn from DD news channel. 'But the experts need not be taught'.

Two more questions which need to be discussed are, why there is not proper investigation before publishing any news, and if sources and investigation are not full proof then also why such news are telecasted? Second, why there is live telecast of ongoing encounters between terrorists and our Army?

¹²⁰⁴Too many ads: not just irritating, but unlawful, available at: <http://www.livemint.com/Opinion/jqj52rmzXWYh4pf3SmrR5M/Too-many-ads-not-just-irritating-but-unlawful.html>, (Visited on December 27, 2017).



As Mark Twain quoted, “If you don't read the newspaper, you're uninformed. If you read the newspaper, you're misinformed.” However if we replace the word newspaper with television or being more particular, news channels, it would more suitable in respect to Indian context, because Indian media has made itself famous for reporting news without any proof or guarantee (many-a-times). In 2008, a popular TV channel in Karnataka showed that children were dying because of the polio drops given to them the previous day. The situation became worse, and stones were pelted on one of the most trusted hospital of the city. However the next day it was reported by the same news channel that the reports were false, and published after some children died because of some disease in Hosur. No apology video was posted and no regret was shown by the news channel.¹²⁰⁵ Recently the Arundhati Roy-Paresh Rawal conflict was a great matter of discussion, where Paresh Rawal had made replied to the comments made by Arundhati Roy over tying of a man in front of Army's jeep. News headlines were flooded with the comments made by both the veterans, however later “It's crap,” Roy told *The Wire*. “Have not been to Srinagar recently.” Have not made any statements about Kashmir except what I wrote in Outlook last year.” One of the purveyors of this fake news was Arnab Goswami, nightly anchor of NDA politician and MP Rajeev Chandrasekhar's new channel, Republic TV, who attacked Roy as a ‘one-book whiner wonder’ who had “visited

Kashmir in the second week of May.”¹²⁰⁶ These reports show the credibility of Indian media; the media of the largest democracy of the world.

For the second question, these live telecasts of encounters, as far as I can think, keeps the security of army personnel as well as security of the nation at margin, just in order to telecast how well our army is fighting. But the other side of the coin is that these terrorists have always been fighting hiding in some buildings, or some enclosed space where direct surveillance by army is next to impossible; but on the other side army doing the counter attack, are at open space and live telecasting them, means the heads of the terrorist who are sitting somewhere else and guiding those terrorists, are aware of each and every position and strategies of our defence, which put not only them at a higher risk, but the same also goes with the security of nation. Kargil war was India's first televised war. I'm sure government's view in allowing reporters to embed with army was to present India's view and let the nation know how its brave soldiers are fighting. Instead of soldiers Brakha Dutt leeches all the glory. Similarly during 26/11, all these so called nation building media houses were competing with each other in order to break the headlines tab. For the kind of reporting we saw during 26/11, few journalists would have gone to jail in certain other countries. SC held that they have served no national interest or any social cause.” *“Expressing its anguish, the*

¹²⁰⁵“Rumours spark polio vaccine panic in south”, The Indian Express, Bangalore & Coimbatore; December 23, 2008.

¹²⁰⁶How Fake News Triggered Republic TV, TV18, BJP MP's Attacks on Arundhati Roy, available at: <https://thewire.in/139162/paresh-rawal-arundhati-roy-fake-news-kashmir/> (Visited on December 27, 2017).



Bench said: “The shots and visuals could have been shown after all the terrorists were neutralised and the security operations were over. But, in that case, the TV programmes would not have had the same shrill, scintillating and chilling effect and would not have shot up the TRP ratings of the channels. It must, therefore, be held that by covering live the terrorists’ attack on Mumbai in the way it was done, the Indian TV channels were not serving any national interest or social cause. On the contrary, they were acting in their own commercial interests, putting the national security in jeopardy. It is in such extreme cases that the credibility of an institution is tested. The coverage of the Mumbai terror attack by the mainstream electronic media has done much harm to the argument that any regulatory mechanism for the media must come only from within.”¹²⁰⁷ Abu Jundal the Hindi tutor of the ten terrorists who was also in the control room in Pakistan told his interrogators in India that live television reports of the operations were a boon to them and they kept advising the terrorists to act in a manner which would hamper the operations.¹²⁰⁸ When confronted with the charge, Rajdeep Sardesai of CNN-IBN said “government should have kept us out of that area.” He is one of those editors who vociferously opposes any government directive on media and talks of media’s self control, and thus if the government would have taken any step to keep them out of that area, another breakout would have

been possible by these so called liberal and free journalists. However no further developments have been seen, still in order to increase TRP, live telecasts are becoming more famous. The principle which Indian Media is exhibiting these days is ‘No matter how many of our brothers die, let us first make money on telecasting them live, and later we will bark off on their death, and that will yield more TRP and money. So a double benefit, the motto of blind utilitarianism which we also should blindly follow.

Now in recent times one more and important question that arises is what about the fake news or posts published in social networking sites such as facebook, twitter and messengers such as whatsapp. Those forwarded messages and those fake posts are one of the main reasons of these riots and tiff among various religion groups. Most recent being Basirhat incidence¹²⁰⁹ of West Bengal, where just because of some irresponsible posts on facebook, which rooted out because of some video on Youtube, gave a small incident which should have been investigated and handled by Police, was given a face of Hindu-Muslim fight. A small incident grew out to be a communal riot, burning whole of the state (West Bengal) in a war place. Even the CM and the Governor who should have acted with highest concern, are fighting with each other, and letting those morons fight. Thus there must be some checking on the reliability and applicability on these posts.

¹²⁰⁷ “Live TV coverage put national security in jeopardy, says Bench”, The Hindu, August 29, 2012.

¹²⁰⁸ 26/11 Mumbai Terror attack: More horrifying than the attack was the TV coverage, available at: <http://www.oneindia.com/feature/26-11-mumbai-terror-attack-media-role-responsibility-1572960.html> (Visited on December 17, 2017).

CONCLUSION AND SUGGESTIONS

¹²⁰⁹ “Bengal violence over FB post: Man dies of stab wounds, clashes erupt in Basirhat”, Hindustan Times, July 16, 2017.



In words of the Father of the Nation Mahatma Gandhi, "The role of journalism should be service. The Press is a great power, but just as an unchained torrent of water submerges the whole countryside and devastates crops, even so an uncontrolled pen serves but to destroy."¹²¹⁰ These Indian Media houses must be shown these lines before presenting any news, before going to their newsroom everyday. These lines states that role of journalism should be service and not just a monetary beneficiary programme. And whilst imparting this service, there must be some control and restrictions, maybe in form of censorship. Though there can't be any direct control on the things on social networking sites and messengers, but still there must be some governmental departments (though some are there, but facts shows that they are not as effective) dealing with these posts which sometimes has been the reason for communal riots. Moreover there must be some changes brought in the current situations, in order to make the country a good country in regards of Press, both in their rights and restrictions, such as a separate provision in Constitution to directly safeguard the freedom of press, freedom of press must be exercised with circumspection, and a direct and strict control over these media houses, both in their contents and advertisements. It has been seventy years since India's independence and sixty-seven years since the commencement of the Constitution, there has been a lot of ups and down in our democracy and the press also has come across age. As being a subject of the largest democracy, we should remember the PM

Rajiv Gandhi, "Freedom of Press is an Article of faith with us, sanctified by our Constitution, validated by four decades of freedom and indispensable to our future as a Nation."¹²¹¹ Thus we can conclude that the time has come for the press of largest democracy of the world to work with hand-in-hand with judiciary for the welfare of its subjects.



¹²¹⁰ Mahatma Gandhi, India of my dreams 287(Navajivan Publishing House, Ahmedabad, 2001 Edition).

¹²¹¹ Has the time come to review press freedom, available at: http://www.legalserviceindia.com/articles/press_freedom.htm (Visited on December 30, 2017).



ARTIFICIAL INTELLIGENCE: THE BEGINNING OF NEW ERA

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A year spent in artificial intelligence is enough to make one believe in God.” — Alan Perlis

Introduction

The artificial intelligence is one of the fields of computerscience, the artificial intelligence is nothing but a manmade machine who has the ability to perform those tasks by using their intelligence which is basically functioned by the human beings in a normal prudence or sometimes beyond the reach of the human beings. According to the computer science, the artificial intelligence is that kind of the “intelligent agents” which can observe the surrounding and take action according in that manner which provides the benefits to the human beings or the organization in which they are established. In general words artificial intelligence is defined as a software used to make computers and robots work better than humans, the systems are rule-based or neural networks, it is used to help make new products, robotics, human language understanding, and computer vision¹. The most popular example of artificial intelligence is ‘Siri’ in Apple iPhone, ‘Cortana’ in Microsoft and ‘Ok Google’ of Google and ‘Alexa’ of Amazon they use voice queries to attempt the answer of the questions. The most appropriate definition

of artificial intelligence is given by the Prof Nils J Nilsson which is “Artificial intelligence is that activity devoted to making machines intelligent, and the intelligence is that quality that enables an entity to function appropriately and with foresight in its environment”².

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History of Artificial intelligence

After knowing the meaning of artificial intelligence, it is very important to know its history as the famous singer Bob Marley said: “*In this great future, we can’t forget the past*”. The artificial intelligence is not the recent term, the first-time “artificial intelligence” word coined by the John McCarthy in 1956 conference at Dartmouth College, this conference is also known as the Dartmouth Summer Research project on artificial intelligence. In this conference, many famous scientists and mathematicians take part to produce the concept of “thinking machine”. The Marvin Minsky is one of the founding father of the artificial intelligence, in the year 1970 as he said that the machine would exist in 3 to 8 years’ time. He is also the co-founder of the MIT’s Artificial intelligence lab. The year of 1997 was the most memorable year for the artificial intelligence because in that year IBM’s Deep Blue defeated the world chess champion, Gary Kasparov after that people started showing their interest in the artificial intelligence.

¹²¹² <https://thelawdictionary.org/artificial-intelligence/> [Last visited December 21, 2017]

²The Quest for Artificial Intelligence a History of Ideas and Achievements available at <https://ai.stanford.edu/~nilsson/QAI/qai.pdf> [Last visited December 21, 2017]



Evolution of Artificial Intelligence in Law

The first time a paper was presented in a conference “Mechanization of thought process” in national physical laboratory Teddington, England in the year 1958 by the French jurist Lucien Mehl “Automation of legal world” in which she says that computer might be used mechanism the process of legal work³. In the year 1970 an article of Stanford law review named “some speculation about artificial intelligence and legal reasoning” was written by the Buchanan and Headrick, in this article, they discussed the possibilities of the legal reasoning and research only for the limited purpose which includes the advice giving, legal argument, and legal analysis⁴. But much before the Stanford article, another article was published in Yale law journal which is authored by the Layman E. Allen in which the emphasis on using the logic as the tool to improve the drafting and interpretation of legal document technique⁵.

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The first international conference on artificial intelligence (ICAIL) held in the year 1987, which is held at Northeastern University, where they also established a center for computer science and law, the second ICAIL meeting 1989, this committee was formed to develop a charter for an

³ Artificial Intelligence and the Law. Innovation in a Laggard Market by Vicky Harris? -available at <http://www.austlii.edu.au/au/journals/JILawInfoSci/1992/21.pdf> [Last visited December 22, 2017]

⁴ Some Speculation about artificial intelligence and logical reasoning available at <https://stacks.stanford.edu/file/druid:ms585mf7546/ms585mf7546.pdf> [Last visited December 22, 2017]

⁵ http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5788&context=fss_papers [last visited December 22, 2017]

⁶ <http://www.iaail.org/?q=page/ai-law#fn7> [Last visited December 22, 2017]

international organization and this led to the founding of the international association for artificial intelligence in 1991 also the journal artificial intelligence and law, the journal of record for the AI and community made its debut in 1992⁶. The last and 16th conference of ICAIL held in the year 2017 in King’s College, London.

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Legal Implications in Artificial Intelligence

The law is made for the humans to govern their behavior in a society, the laws are the main factor which forces the humans to think about their actions merit or demerit, but now the issue is arising that the law is made for humans, not for the artificial intelligence, what will happen when a machine done a civil or criminal wrong how will law apply to them. For example, if artificial intelligence drives a car and jumped a red light any person who will take the responsibility for the law violated by the artificial intelligence. Now we have some areas where artificial intelligence machine work, so that we get the idea of the range of legal issues, so areas following are:

- Using the artificial intelligence in medical sector for the purpose of diagnosis or for any surgery
- Using of artificial intelligence for day to day household works or any restaurants, hotels etc.
- Using artificial intelligence in car, ambulances, buses, metro, airplanes for the purpose of driverless transports.
- Using the artificial intelligence in the legal industry for legal research, due diligence, drafting contracts, agreements etc.



- Using the artificial intelligence in military forces to improve the defense system of own country.

So, these are some examples where we can see the artificial intelligence technology will be used in future. Now further this section discusses the regulatory aspects of artificial intelligence and then its legal issue in tort law, criminal law, artificial intelligence as a legal person and its freedom of speech.

Regulation of Artificial Intelligence

The very basic question arises that how will artificial intelligence will be regulate by the government, because artificial intelligence is developed in every kind of the products like in medical industry, automobiles industry etc. it is now a problem for the government that how they will ensure the public that all the products in which artificial intelligence is involved have passed the safety test in order to avoid the harm to the public. Another issue in front of the central government is that they need those people in the regulatory body who are aware of the latest technology and they can protect the interest of artificial technology as well as the public. Because of such regulation issue the artificial intelligence has given a big challenge to the policymaker.

Artificial Intelligence and Tort Law

Generally, tort is a private law, it falls outside the regulatory and statutory body, tort is originated from the common law. The tort law system provides the compensation to those plaintiffs who are physically, economically, emotionally injured by the wrongful act of the defendant by providing monetary damages to the plaintiff, the person who committed the tort is known as tortfeasors.

Negligence

The liability for negligence occurs in two situations with respect to computer programs: when the software is defective and when a party is injured as a result of using the software, both the situations raise the issues for artificial programs⁷. Under the tort law negligence has three basic elements to prove if these elements were proved, it shows that person is negligent, the following elements are.

- The defendant has duty of care
- The defendant breached the duty a
- The breach of duty caused injury to the plaintiff

If we apply these three elements of negligence in artificial intelligence software cases, it provides that the vendor has duty of care that he did not sell any defect artificial intelligence software to the buyer which cause him injury, but the main difficult issue is that what are the criteria for the standard of care in artificial intelligence cases because every AI software has different system and developed by the different people, so it is very big issue for the court of law to decide whether the duty of care is taken or not, artificial intelligence is software is very complex in nature so it is difficult for the judges to decide whether the software was defective or the plaintiff is unable to understand the software.¹²¹⁵

⁷ Liability issue with Artificial Intelligence Software by Marguerite E. Gerstner <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1652&context=lawreview> pg. [246] [Last visited December 23, 2017]

⁸<https://www.theguardian.com/technology/2016/jul/01/tesla-driver-killed-autopilot-self-driving-car-harry-potter> [Last visited December 26, 2017]



On 7th may, 2017, a 40-year-old man from Florida was killed in an accident while his car Tesla was in the autopilot mode, now the Tesla automobile company CEO Elon Musk has clearly said that car's autonomous software is designed to nudge consumers to keep their hands on the wheels to make sure they're paying attention⁸. So, the issue is that who was responsible for the death of the driver because as per the company statement it shows that they had taken the duty of care.

Artificial Intelligence and Criminal Liability

Another issue under the artificial intelligence is that what if any act of wrong done by the artificial intelligence agent, so whether they can be prosecuted for the criminal liability? Before going to the criminal aspects of artificial intelligence, it should be important that how can a person or body corporation will fall under the criminal liability, so for imposing the criminal liability on any person or body corporation the two elements of criminal law must be satisfied and these following are⁹:

- Actus Reus (consist all elements of crime except state of mind)
- Mens Rea (intention to commit crime i.e. guilty mind)

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It is very important that for imposing the criminal liability these two elements must be present, if one of the elements is missing then it will not be possible to impose the criminal liability.

⁹JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 126 (2007).

¹⁰<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100004308> [Last visited December 27, 2017]

The famous American artiste ken Goldberg once said that “we’re fascinated with robots because they are reflections of ourselves” but there is something is left in that quotation is that robots are made by human and they act according to the directions of human being, so they are like innocent agent, innocent agent means a person who is complicit in a criminal offence but lacks the capacity or knowledge necessary to form the mental element of the offence¹⁰. Now the question is arising if the artificial intelligence is an innocent agent then who is real preparator of a criminal offense. There are two candidates: the first is the programmer of the artificial intelligence software, a programmer of artificial intelligence software might design a program in order to commit offences via the artificial intelligence entity and the second person is the end-user, the user did not program the software, but he uses artificial intelligence entity, including its software, for his own benefits¹¹.

¹⁴⁷In year July 2015 a robot in killed a woman named Wanda Holbrook by crushing her

¹¹The Criminal Liability of Artificial Intelligence Entities- from Science Fiction to Legal Social Control <http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1037&context=akronintellectualproperty> [Last visited December 27, 2017]

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<http://www.independent.co.uk/news/world/americas/robot-killed-woman-wanda-holbrook-car-parts-factory-michigan-ventra-ionia-mains-federal-lawsuit-100-a7630591.html> [Last Visited December 27, 2017]

¹³

<http://time.com/3944181/robot-kills-man-volkswagen-plant/> [Last Visited December 27, 2017]

¹⁴ Section 3(42), The General Clause Act, 1897



head at the Ventra Ionia Manis plant in Michigan, her husband files the complaint against the five-robotics company for making defective robot¹². Another case happened in Volkswagen production plant in Germany where the robot killed the 22-year-old man, but production company also refuse to release the name of the deceased, according to the production company release the statement that malfunction was due to the human error¹³. While observing the cases it seems that in future the most of the criminal cases are going to lodge against the artificial intelligence system and to identify the real preparator are going to be very difficult because in these cases it is very difficult to prove the mensrea and actus reus of artificial intelligence developer because the act did not do by them.

Artificial Intelligence as Legal Person and its Rights

One of the debatable issues is that whether the artificial intelligence can be recognized as the legal person?

In the legal sense ‘person’ can be defined as the “person” shall include any company or association or body of individuals, whether incorporated or not;¹⁴ or we can say that a legal person can sue or be sued, the legal person has bundle of rights and duties also i.e. right to speech, the right to worship etc., so if we recognize the artificial intelligence as the legal person then the artificial intelligence will also grant these bundle of rights and duties. But the issue does not end here because, if we recognize the artificial intelligence as the legal person then every individual has right to sue them for their criminal and civil wrongful act, so how will the artificial intelligence be compensated to the injured party. For example, a robot

damages the property of an individual, if the court grant the monetary compensation to the injured party, then how will a robot pay the monetary compensation to the injured person.

In October 2017 first in the world a robot named Sophia was granted the citizenship of Saudi Arabia¹⁵, in year 2016 the European parliament legal committee has passed a report in which they raise the question about the robot’s autonomy in which they discuss the nature in the light of the existing legal categories- of whether there should be regarded as natural person, legal persons, animals or objects- or whether a new category should be created, with its own specific nature and implications as regarded the attribution of rights and duties, including liability for damages¹⁶.

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After Sophia’s citizenship announcement, critics were quick to point out the injustice in Sophia possibly having more rights than women in Saudi Arabia, raising important concerns about the human rights, further criticism will likely arise if robots gain more rights than animals¹⁷. After discussing the artificial intelligence as the legal person, we move towards the right to speech of the artificial intelligence, but before moving to

¹⁵<https://www.businessinsider.in/Meet-the-first-ever-robot-citizen-a-humanoid-named-Sophia-that-once-said-it-would-destroy-humans/A-complex-set-of-motors-and-gears-power-Sophia-enabling-a-range-of-facial-expressions-/slideshow/61279454.cm> [Last visited December 29,2017]

¹⁶<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-582.443%2B01%2BDOC%2BPDF%2BV0//EN> [Last visited December 29, 2017]



the issue there is a famous quotation of, Alexander Meiklejohn said in his book that “what matters for freedom of speech is not that all speak, but that everything worth saying shall be said”¹⁸, so if we interpret, speaker identity should be irrelevant to Meiklejohn’s inquiry, and strong artificial intelligence speech should be protected no less than human speech provided that its speech contributes to the democratic process- i.e. it is “worth saying”¹⁹. There is case of amazon artificial intelligence named ‘Alexa’ in regard of freedom of speech, in that case, the tech titan has filed a motion to quash the search warrant for recordings from an amazon echo in trial of James Andrew Bates, accused of murdering friend Victor Collins in Bentonville, Arkansas in November 2015, and it’s arguing that motion that the response of Alexa, the voice of the artificial intelligent speaker, has first amendments rights under the United States constitution²⁰. So, it shows that the law has started developing in regard to artificial intelligence.

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¹⁷<http://blogs.harvard.edu/billofhealth/2017/11/09/ai-citizen-sophia-and-legal-status/> [Last visited December 30, 2017]

¹⁸ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1965).

¹⁹ SIRI-OUSLY? FREE SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE Toni M. Massaro & Helen

Norton <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1253&context=nulr> [Last Visited December 31, 2017]

²⁰<https://www.forbes.com/sites/thomasbrewster/2017/02/23/amazon-echo-alexa-murder-trial-first-amendment-rights/#77afa20f5d81> [Last Visited

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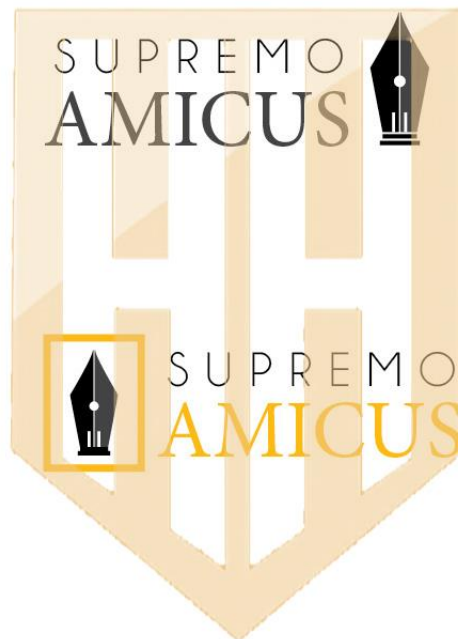
Conclusion

There is no doubt that artificial intelligence is growing rapidly in every type of the industries, but it is one of the most debatable issues for the lawyers and within the legal industry because the business environment is dynamic in nature and we have changed according to external environment for the purpose of survival, as the Charles Darwin said “Survival of Fittest” so that those people who do not adopt the artificial intelligence and embrace the change will leave behind, so in my sense it is very important that government should be aware with these technology because we cannot stop the inventions or people to stop the technology in their business because the client expectations are high and globalization has created enormous pressure on the business, so businessmen will adopt this technology in order to survive in the competitive environment, so that government should make law and policy in regard with artificial intelligence, so that it provides maximum benefit to the society, just because there are issues arising in artificial intelligence the government can’t make any excuse in that regard because whenever any technology comes its impact on us is either in good way or in bad way, what is in our hand is that how we want to these technology to impact us.

To conclude, there is famous quotation by the famous author named John C. Havens once said “how will machines know what we value if don’t know ourselves” so that it is very important to recognize our need and our values because after examining our need and values only then we can make law and policy for the artificial intelligence. It is a



high time when all the leaders of developed and developing countries should come together to discuss the issue and make an international convention for this kind of technology, and it is a duty of every nation to make law for artificial intelligence before it's too late.





HUMAN RIGHTS OF THE PRISONERS: AN INDIAN

By Rakesh Chandra

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Introduction:

Human rights are those that have been derived from natural law which have evolved out of natural rights; rights inherent to people by virtue of their being human and being of a moral and rational nature and having a common capacity to reason. This comprises a core base of basic guarantees, including the right to life, freedom from torture or inhuman or degrading treatment or punishment; freedom from slavery, servitude, and forced labour; the right to free movement (mobility); and, the right to food and shelter.¹²²⁰

These are very basic rights that are necessary for a human being to survive in the world at large. Today's notion of human rights has descended from that of natural laws which have evolved as a part of natural rights. They are positivistic in the sense that the state has contracted a deal with its citizenry, and they are more natural in origin.¹²²¹

Here, it is noteworthy that the Protection of Human Rights Act, 1993, which is most exhaustive, defines human rights as under:

"Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts of India."

It includes rights like equality before law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, equality of opportunity in matters of public employment, freedom of speech and expression, freedom to form associations or unions, to practice any profession, to carry on any occupation, trade or business, protection of life and personal liberty, prohibition of traffic in human beings and forced labour, right to freedom of religion, protection of interests of minorities etc. International documents, namely, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and other International Treaties and Declarations as also various Resolutions have widened the scope of human rights and all the rights associated with human beings, directly or indirectly, have come within the ambit of the term. All such rights must be respected, acted upon and implemented by all civilized nations.¹²²²

Human Rights in the Indian Constitutional Framework:

The Constitution of India is amongst the most comprehensive Constitutions in the world and is considered a living

¹²²⁰ Durga Das Basu, Commentary on the Constitution of India, 9th Edition Vol. 5, Lexis Nexis, Gurgaon, Haryana, 2015, p. 4725.

¹²²¹ Ibid.p.4726

¹²²² Durga Das Basu, Commentary on the Constitution of India, 9th Edition Vol. 5, Lexis Nexis, Gurgaon, Haryana, 2015, p. 4725.



instrument,¹²²³ one that can be adapted and changed according to developments in society and the needs and exigencies of the people. The Preamble, Part-III of the Constitution consisting of Fundamental Rights, Part-IV comprising Directive Principles, and Part-IV (A) containing Fundamental Duties constitute the human rights framework in our Constitution.¹²²⁴

In International Human Rights Law parlance, civil and political rights are generally referred to as 'first-generation rights' and provide for certain basic guarantees for an individual in relationship to a state; they involve the inviolability of the individual against any invasive action by the state. These are distinct from 'second-generation rights', which generally require action by the state to provide certain basic needs or amenities to an individual. In other words, civil and political rights demand freedom from coercive action by the state against an individual, while economic, social, and cultural rights necessitate certain actions and provisions by the state in order for it to fulfil its obligations.¹²²⁵

Indian Constitution, however, reflects the above classification of human rights. Civil and political rights are contained in Part III (Fundamental Rights) of the Constitution and are justifiable, i.e. they can be enforced through a court of law.

¹²²³ I.R. Coelho Vs. State of Tamil Nadu, AIR 2007 SC 861.

¹²²⁴ Oxford Human Rights and Humanitarian Law, Developments in Indian and International Law, South Asia Human Rights Documentation Centre, Oxford University Press, New Delhi, 2008, p.205.

¹²²⁵ Oxford Human Rights and Humanitarian Law, Developments in Indian and International Law, South Asia Human Rights Documentation Centre, Oxford University Press, New Delhi, 2008, p.205.

Economic, social, and cultural rights are contained in Part IV (Directive Principles of State Policy- DPSPs) and are non-enforceable in a court of law but are 'fundamental to governance.'¹²²⁶

Therefore, it can be safely deduced that the Fundamental Rights imbuing the human rights are applicable to every person residing in India whether a freeman or a detainee or a prisoner. It would be worthwhile in this context to study further the state of prison administration in India and to enquire how for the human rights are available to them within the ambit of the Indian Constitution.

Prison Administration:

In the post-Maneka era, in a catena of cases, the Supreme Court has exposed the cruelty of the system of Prison Administration in India, and has sought to humanize it. The Court has taken an active interest in seeking to improve a system which is cruel and insensitive to human pain and suffering. In the process, the scope of the Fundamental Right of personal liberty guaranteed by Article 21 has been broadened.¹²²⁷

Time and again, the Supreme Court has emphasized that Article 14, 19 and 21 "are available to prisoners as well as freemen. Prison walls do not keep out Fundamental Rights."¹²²⁸

¹²²⁶ M.P. Jain, Indian Constitutional Law, 7th Edition, Lexis Nexis, Gurgaon Haryana, 2015, p.1144.

¹²²⁷ M.P. Jain, Indian Constitutional Law, 7th Edition, Lexis Nexis, Gurgaon Haryana, 2015, p. 1144.

¹²²⁸ T.V. Vitheswaran Vs. State of Tamil Nadu, AIR 1983 SC 361 (2), cited in M.P. Jain, Indian Constitutional Law, p. 1144.



In *State of Andhra Pradesh Vs. Challa Ramkrishna Reddy*,¹²²⁹ the Supreme Court has observed in this connection "A prisoner, be he a convict or under-trial or a detainee, does not cease to be a human being. Even when lodged in a jail, he continues to enjoy all his Fundamental Rights including the right to life guaranteed to him under the constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights." The overriding principle is that detainees and prisoners, despite their allegedly deviant behaviour, are nevertheless human beings worthy of respect and ultimately must have their dignity upheld. In *Charles Sobraj Vs. Superintendent, Central Jail, Tihar*¹²³⁰, the Supreme Court pronounced, "Prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement." Therefore, prisoners are not stripped of all of their fundamental rights merely by virtue of their status as detainees.¹²³¹

The Court has thus adversely commented several times upon certain aspects of prison administration. The Court has identified the unfettered power of Jail administration to mask human rights abuses under the guise of protecting society from potential escapees as a major impediment to prisoners' rights. The Court has sought to humanise prison administration to some extent through its various pronouncements.

¹²²⁹ AIR 2000 SC 2083, at 2088, Cited in M.P. Jain, Indian Constitutional Law, p.1144.

¹²³⁰ AIR 1978 SC 1514.

¹²³¹ Ibid

Fundamental Rights of a Prisoner¹²³²:

As stated earlier, it is now established that even where a person is convicted and imprisoned under sentence of court, he does not lose all the fundamental rights belonging to all persons under the constitution, excepting those which cannot possibly be enjoyed owing to the fact of incarceration, such as the right to move freely [Art. 19 (1) (d)] or the right to practice a profession [Art. 19 (1) (g)]. Hence, a prisoner can claim to exercise the following fundamental rights:

- (a) The right to acquire hold and dispose of property. [Art. 19 (1) (f) having been repealed, this right the prisoner shall have to claim under the ordinary law].¹²³³ A convict is entitled to the right of any other workman and hence entitled to wages for his work.¹²³⁴
- (b) The freedom of expression,¹²³⁵ reading and writing,¹²³⁶ except in so far as it is circumscribed by the fact of imprisonment.¹²³⁷
- (c) The right under Art. 21, not to be deprived of his life or personal liberty except 'according to procedure established by

¹²³² Durga Das Basu, Commentary on the Constitution of India, 9th Edition, Vol. 5, 2015, p. 4876.

¹²³³ Bhuvan Mohan Patnaik Vs. State of A.P. , AIR 1974 SC 2092.

¹²³⁴ State of Gujarat Vs. Hon'ble High Court of Gujarat, AIR 1998 SC 3164.

¹²³⁵ State of Maharashtra Vs. Prabhakar, AIR 1966 SC 424.

¹²³⁶ Sunil Batra (II) Vs. Delhi Administration, AIR 1980 SC 1579.

¹²³⁷ State of Maharashtra Vs. Prabhakar, AIR 1966 SC 424.



law.¹²³⁸ A prisoner, whether a convict, under trial or detenu continues to enjoy all the fundamental rights including the right to life guaranteed to him under the Constitution.¹²³⁹

Several International Conventions, guidelines and rules exist to ensure humane treatment to the prisoners. In its General Comment on Art.10 of ICCPR, the Human Rights Committee held that it supplements Art.s7 on torture. For all persons deprived of their liberty, the prohibition of treatment contrary to Art. 7 (on prohibition of torture etc.) is supplemented by the positive requirement of art. 10 (1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person in prisons is a part of administration of justice. The subject of human rights and administration of justice, therefore, deals with the protection of persons in prisons. Standard Minimum Rules For the Treatment of Prisoners; Code of conduct for Law Enforcement officials; Standard Minimum Rules for Administration of Juvenile Justice; Convention Against Torture, etc. of the United Nations are all international instruments dealing with protection of persons in prisons as a part of the human rights in the administration of justice. Standard Minimum Rules for the treatment of Prisoners, as the title indicates, are the minimum conditions which are expected as suitable by the United Nations. These rules require that different categories of prisoners shall be kept separate; their

accommodation shall meet all requirements of health, etc. Every prisoner is to be provided separate and sufficient clean bedding and food of adequate nutritional value, special care of women prisoners would be taken, prisoners shall be allowed contact with outside world and the prison administration would comprise of suitable professionals sensitive to the needs of prisoners. These are the stated minimum conditions which must invariably be satisfied. The right of prisoners emanate from these duties of the detaining authority.¹²⁴⁰

Human Rights of Prisoners: The Judicial Approach

(i) Right Against Inhuman treatment:

*Sunil Batra (II) Vs. Delhi Administration*¹²⁴¹ : In this case the petitioner did not seek his release from the jail because he was undergoing a sentence of life imprisonment but he did seek protection from inhuman and barbarous treatment inflicted upon him in jail. The petitioner was subjected to physical torture by a Warden of the Tihar Jail as means to extract money from the petitioner. Batra, a convict, came to know this act and brought the incident to the knowledge of the Court through a letter. The Court converted this letter into a habeas corpus petition and approved and reiterated the specific guidelines laid down by Supreme Court in Sunil Batra's case (No1) before punishing a prisoner. The Court gave following directions to the Central and State Governments and the Jail authorities:-

¹²³⁸ Bhuvan Mohan Patnaik Vs. State of A.P., AIR 1974 SC 2092.

¹²³⁹ State of A.P. Vs. Challa Ramkrishna Reddy, (2000) 5SCC 712.

¹²⁴⁰ Durga Das Basu, Commentary on the Constitution of India, 9th Edition, Vol.5, 2015, p. 4877-78.

¹²⁴¹ AIR 1980 SC 1579.



- (1) That the petitioner's torture was illegal and he shall not be subjected to any such torture until fair procedure is complied with,
- (2) No corporal punishment or personal violence on the petitioner shall be inflicted,
- (3) Lawyers nominated by the D.M., Sessions Judge, High Court and the Supreme Court will be given all facilities to interview, right to confidential communications with prisoners, subject to discipline and security considerations. Lawyers shall make periodical visit and report the concerned Court the result of their visits;
- (4) Grievance deposit boxes shall be maintained in jails which shall be opened by D.M. and Sessions Judges frequently. Prisoners shall have access to such boxes.
- (5) D.M. and Sessions Judges shall inspect jails once every week, shall make enquiries into grievances remedial, and take suitable actions,
- (6) No solitary or punitive cell, no hard labour or dilatory charge, denial or privileges and amenities, no transfer to other prison as punishment shall be imposed without judicial approval of the Session Judge.

In the seminal case of **Sunil Batra (II) Vs. Delhi Administration**, the Court considered a wide array of inhuman treatment of prisoners. The Court considered a wide array of inhuman treatment of prisoners. The Court held that Article 21 clearly prohibits excessive mental, physical, and psychological pressure. This case was seminal in that it widened the scope of the writ of habeas corpus beyond redress from illegal detention to include challenges to conditions of lawful confinement.

2. Right against solitary confinement:

Sunil Batra (I) Vs. Delhi Administration:¹²⁴² In this case the important question raised before the Supreme Court was whether 'solitary confinement' imposed upon prisoners who were under sentence of death was violative of Article 14,19,20 and 21 of the Constitution. Sunil Batra was sentenced to death by the District and Sessions Judge and his sentence was subject to the confirmation by the High Court and to a possible appeal to the Supreme Court. Batra complained that since by date of his conviction by Session Judge that was on 6th July, 1976 he was kept in solitary confinement till the Supreme Court intervened on 24th February, 1978. The Supreme Court held that Section 30 of the Prison Act did not empower the prison authorities to impose solitary confinement upon a prisoner under sentence of death. Under section 73 and Section 74 IPC, solitary confinement is itself a substantive punishment which can be imposed by a Court of law. It cannot be left within the caprice of prison authorities. The Court further held that *if by imposing solitary confinement there is total deprivation of camaraderie (friendship amongst co-prisoners comingling and talking and being talked to, it would offend Article 21 of the Constitution. The liberty to move, mix, mingle, talk, share company with co-prisoners if substantially curtailed would be violative of Article 21 unless curtailment has the backing of law.*

Kishore Singh Vs. State of Rajasthan:¹²⁴³

¹²⁴² AIR 1978 SC 1578

¹²⁴³ AIR 1981 SC 625



In this case also, the Supreme Court exposed the injustice being perpetrated on the prisoners and how the guidelines laid down by the court in the Sunil Batra case was being ignored and flouted by the prison administration. The Court accordingly directed the State Government to convert the court rulings on prison administration into rules and instructions forthwith so that violation of the prisoners' freedoms could be avoided. The Court emphasized that no solitary confinement and imposition of bar fetters should take place, "save in the rarest of rare cases and with strict adherence to procedural safeguards. Articles 14, 19 and 21 operate within the prisons." Human dignity is not to be ignored even in prisons.

3. Right to socialise with family-members and friends and to have interview with the lawyer:

*Francis Coralie Vs. Union Territory of Delhi*¹²⁴⁴:

In this case, the validity of the provisions of the COFEPOSA which provided that a detenu can have interview with his lawyer only after obtaining prior permission of the District Magistrate, and that too, in the presence of the custom officer, and permitted interview of the family members only once in a month, were challenged on the ground that they were arbitrary and unreasonable and violative of Arts. 14 and 21. The Supreme Court held that the detenu's right to have interview with his lawyer and family member is part of his 'personal liberty' guaranteed by Art.21 of the Constitution. The Court further held that the provisions of the COFEPOSA which permitted only one interview in a month to detenu with members of his family were

violative of Arts.14 and 21 and unconstitutional and void.

4. Right to read and write:

*State of Maharashtra Vs. Prabhakar*¹²⁴⁵ - In this case, the Supreme Court held that a prisoner is entitled to read and write a book while in jail.

5. Right to Release:

*Rudal Shah Vs. State of Bihar*¹²⁴⁶ - If the trial against the prisoner ends in acquittal, the prisoner must be released from jail forthwith. In this case, Rudal Shah who had to remain in jail for 14 years because of the irresponsible behaviour of the State Government Officers even after his acquittal. The Supreme Court also directed Bihar Government to pay "compensation" of Rs. 30,000 to Rudal Shah.

*Veena Sethi Vs. State of Bihar*¹²⁴⁷ -When mentally sick persons were languishing in jails for nearly two or three decades, although acquitted, the court directed their release. In this case, the Free legal Aid Committee, Hazanibagh brought to the notice of the Court through a letter about the illegal detention of certain prisoners in the Hazaribagh Jail for two or three decades without any justification. At the time of their detention prisoners were declared insane but afterwards they became sane but due to the inaction of authorities to take steps to release them they remained in jails for 20 to 37 years. It was held by the apex court that the prisoners remained in jail for no fault of theirs but because of callous and lethargic attitude of the authorities and therefore entitled to be released forthwith.

¹²⁴⁵ AIR 1966 SC 424.

¹²⁴⁶ AIR 1983 SC 1086.

¹²⁴⁷ AIR 1983 SC 339.

¹²⁴⁴ AIR 1981 SC 746.



6. Right of fair treatment and basic dignity:

Citizens for Democracy Vs. State of Assam.¹²⁴⁸ - The Supreme Court held that all prisoners have a right of fair treatment and basic dignity. This would include all measures of security, remand, parole, premature release condition of prisonisation as well as prison transfer and prison visiting system.

*Suo motu Vs. State of Rajasthan*¹²⁴⁹ - While coming down heavily upon the jail authorities the court observed that the food provided to the prisoners is of the worst quality that can be given to any human being, the quality of the water is harshly compromised and 150 inmates are distended in a barrack suitable for 50. The Rajasthan High Court took suo motu cognizance of the State's incapacitating prison system lately. The Court slammed the State Government for neglecting basic human rights and infrastructural requirements of prisons and filing "false affidavits". The Court made sharp, factual observation about prison sanitation, food, healthcare and infrastructure, among other things. It was also noted that "the ratio of toilets per inmate is humongous." The Division Bench comprising J.K. Ranka and Mohammad Rafiq, JJ., outlined 45 clear cut directives and ordered the government to file a compliance/ progress report before it every month starting April this year. It asked the government to ensure minimum one toilet, filled with flush type latrine and a cubicle for bathing, for every batch of 10 prisoners. These directives also included setting up

adequate kitchens, introducing a new breakfast menu, ensuring inmates get one sweet item per week, making enough newspapers and novels available, organising fortnightly movie screenings, construction of adequate toilets and doing away with the system of segregating VIP prisoners, "most of whom are ex-ministers and senior bureaucrats."

7. Right to have a conjugal life and procreation within jail premises:

*Jaswir Singh Vs. State of Punjab*¹²⁵⁰ - It is a path breaking decision the Punjab & Haryana High Court while answering a vital question that whether jail inmates have a right to have a conjugal life and procreation within the jail premises and whether such right comes under Art. 21 of the Constitution, positively observed that Art. 21 effectively covers this right for jail inmates who are however to be regulated by the procedure established by law. In furtherance of the observation the Court issued direction to the state of Punjab to constitute a Jail Reforms Committee to be headed by a former High Court Judge in order to undertake prison reforms with respect to provision of conjugal visits for the jail inmates. In the present case, the petitioners who had been convicted under various provisions IPC for murdering a 16 year old for ransom, had moved a petition demanding enforcement of their right to have a conjugal life and procreate within the jail premises. The Court observed that conjugal visits and procreation are a component of right to live with dignity therefore under the ambit of Art. 21. The

¹²⁴⁸ AIR 1996 SC 2193

¹²⁴⁹ 2016 SCC Online Raj 173, decided on 27.1.2016, cited in The Practical Lawyer, May 2016.

¹²⁵⁰ 2014 SCC Online P & H 22479, decided on 29.5.2014 cited in The Practical Lawyer, March 2015, Issue No. 182.



Court while observing that imprisonment takes away some of the fundamental rights, thus a legal hindrance in effectuating the right of procreation issued directions to the State for the constitution of Jail Reforms Committee to formulate schemes for creation of conducive environment for conjugal visits; evaluate the option of expanding the reach of open prisons; classify the convicts who are to be or not to be allowed conjugal visits, etc. The Court however did not find the petitioners eligible for the relief sought by them.

8. Right to speedy- Trial:

Supreme Court Legal Aid Committee Vs. U.O.I.¹²⁵¹. Speedy trial is a fundamental right and in a manner, an ingredient of Art. 21. It is the obligation of the State, otherwise there will be failure of justice. Supreme Court directed for the release of under- trial prisoners under the NDPS Act except those charged under SS. 31 and 31-A of the Act who were languishing in jails in the State of Maharashtra for a period exceeding half of the punishment provided under the Act and also laid down terms and conditions thereon.

Mahendra Lal Das Vs. State of Bihar¹²⁵²:

Case, the Supreme Court held that the right of a prisoner to have a speedy trial shall encompass all the stages of trial and would be applicable even at the stage of investigation, enquiry, trial, appeal, revision and retrial.

Hussainara Khatoon (No.1) Vs. Home Secretary, State of Bihar¹²⁵³ - In this case, a petition for a writ of habeas corpus was filed by number of under trials who were in jails in the State of Bihar for years awaiting their trial. The Supreme Court held that "right to a speedy trial" a fundamental right is implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution. The Court ordered the Bihar Government to release forthwith the under trial prisoners on their personal bonds. In Husainara Khatoon (No.2)¹²⁵⁴ and Husainara Khatoon (No.3)¹²⁵⁵ cases the Court reiterated the same view.

9. Right to Free Legal Aid¹²⁵⁶:

Abardhan Singh Vs. State of U.P. - Italicising the need to protect the human rights of the prisoners, the Allahabad High Court, taking note of the condition of poverty and illiteracy in India, held that a mandate is placed on the courts to proactively inform the prisoner about his entitlement for free legal aid. The Court held that the right to free legal service is to be made available to prisoners at all stages, including the pre-trial stage, and thereafter for contesting the trial and the appeal and also for moving applications for bail. Stating that state's financial constraints cannot be accepted as ground for denying legal aid, the Court held that even where the counsel for an accused does not appear during trial or during pendency of an appeal, the prisoner can be offered legal aid to press his bail or conduct his trial or appeal. Hence, the Court,

¹²⁵¹ (1994) 6 SCC 731, cited in Durga Das Basu, Commentary On the Constitution of India, 9th Edition, Vol.5, 2015, p. 4776.

¹²⁵² (2002) 1 SCC 149. Cited in Durga Das Basu, Commentary On the Constitution of India, 9th Edition, Vol.5, p. 4776.

¹²⁵³ AIR 1979 SC 1360.

¹²⁵⁴ AIR 1979 SC 1369.

¹²⁵⁵ AIR 1979 SC 1377

¹²⁵⁶ Criminal Appeal No. 2773 fo 2005, decided on 25.9.2013, cited in the Practical Lawyer, December 2013



issuing various directions, directed the Inspector General of Police to prepare a list providing details of the prisoners and their need for legal aid which, after being cross-checked by the District Judges, shall be placed before the Court.

10. Prison Reform Guidelines:

*Dilip K. Basu Vs. State of West Bengal.*¹²⁵⁷:-

While deliberating upon the recommendations made by the noted counsel Abhishek Manu Singhvi who acted as the Amicus curiae in the present case, the Supreme Court's Division Bench of T.S. Thakur and R. Bhanumathi, J.J. laid down certain guidelines so as to prevent gross violations of human rights in prisons and usher in prison reforms. The guidelines/directions are as follows:-

- (a) Directions issued to the State of Delhi, Arunachal Pradesh, Mizoram, Meghalaya, Tripura and Nagaland to set up State Human Rights Commission (SHRC) in their territories, in consonance with S. 21 of Protection of Human Rights Act, 1993 and the Constitution.
- (b) With regard to installation of CCTV in police stations and prisons, the Court directed the State to identify police stations located in sensitive areas and install CCTV cameras in a phased manner preferably with 1 year from the date of this judgment.
- (c) Directions given for filling up the vacancies for the post of Chairpersons and members of various SHRCs. The Court further directed that the concerned States should work towards filling up the SHRC

vacancies within 3 months from the date when the vacancy arises.

- (d) Directions given to the State Governments to contemplate upon setting up of Human Right Courts, in consonance with S.30 of the 1993 Act.
- (e) States to take appropriate steps to appoint non-official visitors to prisons and police stations for making surprise inspections to check violation of human rights and to consider appointment of women constables in police stations wherever it is found that over a period of past 2 years women were detained in connection with any criminal case or investigation.

*In Re - Inhuman Conditions in 1382 Prisons*¹²⁵⁸

In this case, the Division Bench of the Supreme Court Madan B. Lokur and R.K. Agrawal, J.J., held that prisoners, like all human beings, deserve to be treated with dignity. To give effect to this, some positive directions need to be issued to by this Court and these are as follows:

- 1. The Under Trial Review Committee in every district should meet every quarter and the first such meeting should take place on or before 31st March, 2016. The Secretary of the District Legal Services Committee should attend each meeting of the Under Trial Review Committee and follow up the discussions with appropriate steps for the release of under-trial prisoners and convicts who have undergone their sentence or are entitled to release because of remission granted to them.
- 2. The Under Trial Review Committee should specifically look into aspects

¹²⁵⁷ 2015 SCC Online SC 651, decided on 24.7.2015, cited in The Practical Lawyer, September 2015.

¹²⁵⁸ Write Petition (Civil) No. 406/2013, Order dt. February 5,2016.



- pertaining to effective implementation of Section 436 of the Cr. P.C. and Section 436 A of the Cr. p.c. so that under-trial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. The Under Trial Review Committee will also look into issue of implementation of the Probation of Offenders Act, 1958 particularly with regard to first time offenders so that they have a chance of being restored and rehabilitated in society.
3. The Member Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist under-trial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid.
 4. The Secretary of the District Legal Services Committee will also look into the issue of the release of under-trial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.
 5. The Director General of Police/ Inspector General of Police in-charge of prisons should ensure that there is proper and effective utilization of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation etc.
 6. The Ministry of Home Affairs will ensure that the Management Information System

is in place at the earliest in all the Central and District Jails as well as jails for women so that there is better and effective management of the prison and prisoners.

7. The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The model Prison Manual 2016 should not be reduced to yet another document that might be reviewed only decades later, if at all. The annual review will also take into consideration the need, if any, of making changes therein.
8. The Under Trial Review Committee will also look into the issues raised in the Model Prison Manual 2016 including regular jail visits as suggested in the said Manual.

In Re- Inhuman Conditions in 1382 Prisons, 2017¹²⁵⁹:

Showing deep anguish over the increasing number of custodial or unnatural deaths in the prisons across India, the Bench of Madan B. Lokur and Deepak Gupta, JJ, issued a list of directions and said: "*The right sounding noises critical of custodial violence (in any form) cannot achieve any useful purpose unless persons in authority hear the voices of the victim or the silence of the dead and act on them by taking remedial steps.*" The Court issued detailed directions with reference to compensation for educating & training prison officials,

¹²⁵⁹ 2017 SCC Online SC 1109, decided on 15.09.2017, cited in The Practical Lawyer, November 2017



visitation rights & open jails, medical assistance, counsellors in prison and custodial death of children. The Court also directed the Chief Justice of every High Court, in the capacity of Patron-in-Chief of the State Legal Service Authority, to take up the initiative of conducting a study in respect of the overall conditions in prisons in the State and the facilities available and, if necessary, set up a committee headed preferably by the Executive Chairperson of the State Legal Services Authority to implement the direction given above.

Protection of human rights of Women Prisoners:

"In regard to human rights in prisons," the learned former Chief Justice of India, J.S. Verma has stated thus: "Special care of women as prison inmates is essential for the protection of their human rights. There is need for custodial safety and gender justice. Women are approximately 3 per cent of the prison population in India. The need is for separate jails for women which is also emphasized by the Standard Minimum Rules for Treatment of Prisoners. The Mulla Committee Report (1980-83) observed that the small number of women in prisons is, quite likely, responsible for their needs being neglected. Special care is needed of the women's health and preservation of their dignity. Article 51 A (e) of the Constitution of India prescribes for every citizen the fundamental duty to denounce practices derogatory to the dignity of women. In the case of a woman, she is not to be viewed merely as an individual person but as the pivot of a family whose protection is a matter of social concern. The provisions of convention on the Elimination of All Forms of Discrimination Against Women

(CEDAW) must also be borne in mind."¹²⁶⁰ The Report of National Expert Committee on Women Prisoners (1906-87) chaired by Justice Krishna Iyer states as such:¹²⁶¹

"Now, our Report contemplates one fundamental postulate; viz., that women have a special claim to compassion, defence of dignity and human rights and protection of her sensitive needs and personal integrity. The State must secure for her this dimension of social justice while she is in peril or under the process of being custodialised in a manner detrimental to her womanliness....."

The thrust of the case made out in the Report is that a radical experiment in the process and personnel must be organized, not from the top of the pyramid only but from the base as well, involving a wide variety of social, professional and official pillars to support the national directorate and substructures.¹²⁶²

B. Human Rights of Prisoners' : State Response

Whereas the Higher Judiciary has responded to the issue of sustaining human rights of the prisoners through their various Judgments and Orders in a commendable way, the response of the State has been lukewarm. The recent initiatives on behalf of the state may be summed up as such:

¹²⁶⁰ J.S. Verma, Ex C.J.I., The New Universe of Human Rights", Cited in Durga Das Basu, Commentary On the Constitution of India, 9th Edition, Vol.5, p.4880

¹²⁶¹ Cited in Durga Das Basu, Commentary on the Constitution of India, 9th Edition, Vol.5, p. 4880.

¹²⁶² Ibid.



1. National Policy on Prison Reforms and Correctional Administration¹²⁶³:

In pursuance to the recommendations submitted by the All India Committee on Jail Reforms in 1983, the University of Home Affairs Constituted a Committee under the Chairmanship of Director General, BPR&D for preparing a draft policy paper on the strategy relating to prison reforms and correctional administration in December, 2005. The Committee proposed a draft National Policy on Prisons, the salient points of which are given below:

- (i) The State shall endeavour to evolve a proper mechanism to ensure that no under-trial prisoner is unnecessarily detained.
- (ii) The Government shall endeavour to provide in law new alternatives to imprisonment such as community service, forfeiture of property, payment of compensation to victims, public censure etc. in addition to the ones already existing.
- (iii) Living conditions in every prison shall be compatible with human dignity in all aspects.
- (iv) The State shall help facilitate classification of prisoners on a scientific basis.
- (v) Appropriate *security arrangements* shall be made in accordance with the need for graded custody in different types of institutions.
- (vi) The State shall provide free legal aid to all needy prisoners.
- (vii) Women offenders shall be kept in separate annexes or be confined in separate institutions as far as possible.

(viii) Mentally ill prisoners shall not be confined in prisons.

2. Model Prison Manual:

In pursuance to the directions given by the Hon'ble Supreme Court in a case of *Ramamurthy Vs. State of Karnataka*, 1996, the Govt. of India has constituted All India Model Prison Manual Committee in November, 2000 under the Chairmanship of Director General of BPR&D to prepare a Model prison Manual for the Superintendence and Management of Prisons in India in order to maintain uniformity in the working of prisons throughout the country. The Division Bench of the Supreme Court comprising Madan B. Lokur & R.K. Agrawal, JJ, has held in *Re-Inhuman Conditions in 1382 Prisons Case*¹²⁶⁴ as such:

"57. A word about the Model Prison Manual is necessary. It is a detailed document consisting of as many as 32 chapters that deal with a variety of issues including custodial management, medical care, education of prisoners, vocational training and skill development programmes, legal aid, welfare of prisoners, after care and rehabilitation, Board of visitors, prison computerization and so on and so forth. It is a composite document that needs to be implemented with due seriousness and dispatch."

2. Provision of video conferencing in Jails:

Bihar government has decided to install video conferencing facility in all jails in Bihar.¹²⁶⁵ In Uttar Pradesh, about a

¹²⁶³ Prepared by Bureau of Police Research & Development, Ministry of Home Affairs, Govt. of India, New Delhi, 2007.

¹²⁶⁴ W.P. (Civil) No. 406/2013, Order February 5, 2016.

¹²⁶⁵ The Hindu, 16.11.2017.



dozen district Jails are availing this facility. This facility would do away with the need of taking undertrials to the court for hearing of their cases.

Conclusion:

Article 21 of the Constitution requires a life of dignity for all persons. Our prisons seem to be little islands where little appears to have changed on the ground as far as prisoners one concerned. Our jails are suffering from mismanagement. Overcrowding of prisons reflect on the one hand, the failure of judicial process to dispose cases in a time-bound manner. At the same time, it has direct impact on the security of prisons, and health and hygiene of inmates. Occurrence of violence and custodial deaths in jails often reminds us of Torture Chambers. Basic human rights are not generally available to prisoners. Recently, the Supreme Court has pushed for more open air jails and more humane treatment of prisoners, mostly under-trials languishing for long due to delay in justice dispensation. Our Judiciary has played a stellar role in pursuing the cause of human rights to prisoners. The response of the State is not as encouraging so far. This is high time the government should act upon the recommendations of the National Policy on Prison Reforms. Model Prison Manual, 2016 should also be enforced in right earnest. The Status report of prisons in India as regards to enforcement of basic human rights is far from encouraging. There is lot more to be done shortly. We should keep in mind what Vivien Stern has said so rightly which is as follows:

"Detained people are included because human rights extend to all human beings. It is a basic tenet of International

human rights law that nothing can put a human being beyond the reach of certain human rights protections. Some people may be less deserving than others. Some may lose many of their rights through having been imprisoned through proper and legal procedures. But the basic rights to life, health, fairness and justice, humane treatment, dignity and protection from ill treatment or torture remain. There is a minimum standard for the way a state treats people, whoever they are. No one should fall below it:"

["A Sin Against the Future : Imprisonment in the World (1998)]

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6. The Hindu, 16.11.2017



ADULTERY IN INDIA; A CRIME OR A CHOICE

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ABSTRACT

One of the most fascinating thing about law is that it changes, unfortunately the same holds true for love. When Natalia Ginzburg said "no adultery is bloodless", the blood probably meant the blood of the matrimonial home. India through its penal code punishes for adultery with imprisonment. However, the conundrum is that why are men punished for adultery against the supposed husband's right over his wife and women aren't over the wives right over their men. Moreover, why must a penal provision for something personal and intimate between two consenting individuals exist. Through this research paper, the authors wish to elaborate on the criminal ramifications for adultery as well as adultery rightly being a ground for divorce in India. An analysis of the 'adultery Laws" existing the world over has also been discussed. Taking into view the past, coupled with the in-depth study of the present and a peek into the future, it is most humbly submitted by the authors that, adultery must not be a crime and if it must, the law must follow the basic tenants of equality.

INTRODUCTION

Mark Twain once said that there are two kind people, one those who have seen the Taj Mahal and the other, who haven't. Similarly, there lies a fine line of distinction

is following customs and following them blindly. Unfortunately, in our country we find more people belonging to the latter description. Our laws are a demonstration of the same.

“Adultery” is one such condemned practice, which is known to break households worldwide and in a country like India where marriage is considered sacramental, such a practice is quintessentially taken to be of an unchaste nature. It can be defined as, “an invasion on the right of the husband over his wife. In other words, an offence against the sanctity of the matrimonial home and an act which is committed by a man.”¹²⁶⁶ This clearly corroborates to the parochial thinking that prevails in our society which takes into consideration only very little of what actually exists in reality.

Through this paper, we would like to critically analyse the Adultery laws in India and compare them with other countries so as to conclude with reasonable amendments to be brought in to keep pace with the the changes in society.

The position of women in India has gone through a significant change over the last few decades but surprisingly the law makers, to their convenience seek to see only the apparent changes brought in by certain recent developments and fail to recognise the radical reformations taken place with regard to the psyches of women in today's day and age.

Currently, as mentioned earlier, Adultery is a punishable offence under section 497 of

¹²⁶⁶ Olga Thelma v. Mark Gomes, AIR 1959 CAL 451



the India Penal Code and a ground for Divorce as per the Hindu Marriage Act. However, the interesting factor that lies is that adultery is a punishable offence only for the lover of the female indulging in the same as it is considered to be a wrong against the husband.

The court pointed out in *Mirapala Venkata Ramana v. Mirapala Peddiraju*¹²⁶⁷ that casting aspersion against a woman that she is unchaste woman, that too a married woman with children, is a very serious thing and unless there is cogent evidence beyond any pale of doubt, such a finding should not be recorded. Further in *Vishnu v. UOI*¹²⁶⁸ it was held that adultery is considered as an offence against the sanctity of the matrimonial home and hence, those men who defile the sanctity, are brought within the clutches of law for punishment.

Both of these above-mentioned cases are assertions made by our learned judiciary based on the current law which penalises adultery as an offence for the lover of the wife only and does not even punish the woman as an abettor. Now the question that arises is that a progressive society like ours still believes that it is always the man who acts as a seducer and not the female or is it just a camouflage created with the protection of Article 15 of the constitution to protect the image of woman created by society.

Quoting the makers of the Indian Penal code provided the following explanation for not punishing the wife, "Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of nuptial

contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for otherwise while still young. They share the attention of their husband with several rivals. To make laws for punishing the consistency of the wife, while the law admits the privilege of the husband to fill his Zenana with women is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law, an evil so deeply rooted in the manners of the people of this country as polygamy...but while it exists, while it continues to produce its never-failing effects on the happiness of respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law."¹²⁶⁹

In contrast to the above however lies the Indian mythology which depicted a different side that exists to a woman as well, the seducer. One of such characters was of the Apsaras, which would provide pleasure to both men and the Gods, amidst them the most famous being Urvashi(Uras-heart, Vashi- one who controls) who married and stayed with an already married king. Not to forget Shurpanakha, Ravana's sister who was sent to entice Laxman by her very own brother. If we say that our law derives its sources from the customs and traditions which have been followed meticulously

¹²⁶⁷ AIR 2000 AP 328 at 330

¹²⁶⁸ 1985 SC 1618

¹²⁶⁹ Draft penal code, Note Q, P.175. See supra n.35, P.1933-34



from time immemorial then where do practices like *Niyogya* in which women were to sleep with another man to get impregnated get placed in this century?

Unfortunately love triangles of all kinds exist in India today, but as written by Manu in the *Manusmriti* and also in the epics *Ramayana* and *Mahabharata*, a man is allowed several marriages and relationships to maintain pleasure without being condemned but the other side to the coin is to be considered as a dark secret not to be disclosed to protect the sanctity of the woman and thus the only person to be punished in this love triangle is her lover. Clearly, Indian law makers need to take about Adultery.

ADULTERY AS A CRIME IN INDIA

Sanctions are necessary to create a sense of deterrence amongst prospective perpetrators and curb the rate of crimes, however there shall be an application of the rule of reason by the lawmakers while deciding which acts bear the nature of an offence and need to be punished and which acts fall under the scope of a civil wrong.

In India, Adultery is a crime as provided under the Indian Penal code under section 497, which reads as;

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to

five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

The above section limits the scope of Adultery and makes it punishable only for the man which can be deemed as a highly erroneous decisions of the law makers. Lord Macaulay however did not include the same in the original draft of the penal code.

Reasons recorded by the same are:

- Firstly, the existing laws for the punishment of adultery were altogether inefficacious for the purpose of preventing injured husbands of the higher class from taking the law into their own hands.
- Secondly, scarcely any native of the higher classes ever had recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant.
- Thirdly, the husbands who had recourse in case of adultery to the courts of law were generally poor men whose wives had run away, and these husbands seldom had any delicate feelings about the intrigue, but thought themselves to have been injured by the elopement and considered their wives as useful members of their small households., They generally did not complain of the wounds given to their affections, neither of the stain on their honour but of the loss of a menial whom they could not replace and generally their principle object used to be to send the woman back to the household or at least be reimbursed for the expenses of the marriage.¹²⁷⁰

¹²⁷⁰ 42nd Law commission report, pg. 324.



However, the opinion of the law commissioners on the same differed. They felt that adultery shall not be omitted from the code but its cognizance shall be limited, also they felt that the wife could of the affected party could be put on stage along with her paramour for granting a decree of divorce simultaneously while her lover gets punished with either imprisonment or fine. Although the same was never accepted and we find the crime of adultery in the Indian Penal code worded as mentioned above.

Based on the definition of adultery provided in the current Indian Penal Code, the following constitute as essential ingredients:

- Sexual intercourse with the wife of another man;
- The paramour must have knowledge or reason to believe that the woman is the wife of another man;
- The same shall be committed without the consent or connivance of the husband;

Herein, connivance is the willing consent to a conjugal offence or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed.¹²⁷¹

- It shall not amount to the offence of rape

Interestingly enough, the wife cannot be punished even as an abettor in the act of infidelity as the makers of the code felt that position of women in India is highly pitiful already and more of such disgrace was uncalled for. Also, there is an apparent reasoning to this that the Indian society professes, that a woman cannot be the seducer, it is always the man who seduces the woman to act in an unchaste manner. It

was held in *Yusuf Abdul Aziz v. State of Bombay*¹²⁷², section 497, IPC is not ultra vires under articles 14,15,21 of the constitution on the ground that it is only the man, who is held liable for adultery and not the wife with whom adultery is committed. The wife is saved from the purview of the section and is not punished as an abettor. Held that sec is a reasonable and sound classification accepted by the constitution, which provides that state can make special provisions for women and children vide article 15 clause 3 of the constitution.

Further in *Smt. Sowmithri Vishnu vs Union Of India & Anr*¹²⁷³ it was held that, "*The law, as it is, does not offend Art. 14 or 15 of the Constitution. The offence of adultery by its very definition, can be committed by a man and not by a woman: The argument of the petitioner really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Where such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. Such arguments go to the policy of the law, not to its constitutionality, unless while implementing the policy, any provision of the Constitution is infringed. Therefore, it cannot be accepted that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. However, it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the*

¹²⁷² AIR 1954 SC 321

¹²⁷³ AIR 1985 SC 1618

¹²⁷¹ Stroud's Judicial dictionary, Vol I



'transformation' which the society has undergone."

However, with regard to where India stands today on the global map, it is very clear that such stereotypical peculiarities need to be ruled out even if it acts against the interest of women, in order to procure equality for all.

In order to compliment the mundane section of the Indian Penal code, Section 198 sub clause 2 of the code of criminal procedure 1973 reads as:

"For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."

Just like the French or the American or the British, all forms of love triangles exist in India but only one is considered to be an "adharma" which our code recognises and punishes. Unfortunately, the law makers forgot to recognise the rights of the wife of the lover or paramour, he who is conceded to be the perpetrator of the only victim in this act of infidelity, "The Husband" of the wife indulging in such an act. The supreme Court, in *V. Revathi v. UOI*¹²⁷⁴, observed that in case of an offence of adultery or enticing a married woman no person other than the husband of the woman shall be deemed to be aggrieved person. However, in the absence of the husband, some other

person who has care of the woman on his behalf at the time of commission of such offence may, with the permission of the court, make a complaint on his behalf.

With the current judgment of the Supreme Court recognising the right to Privacy as a fundamental right, right to relationships is definitely an ancillary vein of the same and should be identified as that. There are a million reasons for sparks to rise up in a matrimonial home which act as a catalyst for either of the partners to venture out of their sacred bond. It shall be their personal outlook as to how they wish to deal with the same. State interference in this is highly inappropriate and hence, Adultery shall not be a crime under the Indian Penal Code, but merely shall prevail as a ground for divorce.

ADULTERY AS A GROUND FOR DIVORCE

To cheat on your spouse, is probably the worst thing one can do to their matrimonial home and it utterly destroys the sanctity of marriage. Under all personal laws in India, adultery is a ground for divorce. Section 13(1) (i) of the Hindu marriage act and Section 27(1)(a) of the special marriage act talk about this say" Has, *after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse" is a ground for divorce,*

Muslim marriages act, though does not expressly talk about adultery being a ground of divorce, however, if a husband "associates with a woman of evil repute or leads an infamous life" under, section 2 (viii) (b) of the Muslim marriages act it amounts to cruelty which is a ground of

¹²⁷⁴ (1988) 2SCC 72



divorce. Further, In *Kalim Uz Zafar Shaikh Hasan v Razia Kalim Shaikh*,¹²⁷⁵ the Hon'ble court held that both mental and physical cruelty caused would amount to cruelty under the provisions of Muslim marriage act. Adultery thus being mental cruelty is indeed a ground for divorce.

The Divorce act prior to the amendment of 2001 was discriminative, as a husband could divorce his wife for adultery alone, a wife could not, she had to prove her husband is guilty of more than adultery such as incest or cruelty or bigamy etc. This position changed after the land mark case of *Ammim v Union of India*¹²⁷⁶, in which A special bench of the Kerala High Court held that the ground of adultery was way more favourable to men than to the wife as she not only has to prove adultery but also has to prove another ground. Such discrimination is purely on the basis of sex and hence, violates Article 15 of the Constitution. The court held that since the words "*coupled with*" are several and liable, it should be struck down as it is ultravires of Articles 14 and 21 of the constitution.

The Amended Section 10(1)(i) of The Divorce Act of 1869 (as amended in 2001) reads, "*Any marriage solemnized, whether before or after the commencement* of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent has committed adultery.*"

Thus, In the matter of divorce the law isn't discriminatory vis-à-vis adultery being treated as a crime. If a husband is found to have had sexual intercourse with a woman other than his wife, the wife then has the right to divorce her husband and vice versa.

SEXUAL INTERCOURSE

For adultery to be a ground for divorce, sexual intercourse is essential. What is understood by various statutes and some judgments is that a carnal union between the adulteresses is essential and thus a mere attempt for the same does not amount to adultery.

It was held in *Subramma v. Saraswati*¹²⁷⁷, that to abrogate the clause for adultery as a ground for divorce, some penetration, however brief most take place, however, and full penetration isn't necessary. "If an unrelated person is found alone with a young wife after midnight, in her bedroom, in an actual physical juxtaposition unless there is some explanation forthcoming for this which is compatible with an innocent interpretation, the only interpretation that a Court of law can draw must be that the two were committing an act of adultery together." the act of adultery once committed is enough for a ground for divorce and it is not essential that the husband or wife be living in adultery. However, before the amendment to Hindu law in 1976 the law was that if a spouse was "*living in adultery*", the other side could claim divorce

The sexual intercourse above spoken about must be consensual, and thus of course, rape of a woman, would not provide her husband

¹²⁷⁵(2001) 1 DMC 420

¹²⁷⁶AIR 1995 Ker 252

¹²⁷⁷ (1966) 2 MLJ 263



with a ground to file for divorce.¹²⁷⁸ However, it is in fact interesting to note, that sex if done under the influence of liquor or drugs or for that matter under the belief that the sexual partner was his or her spouse, it will not amount to adultery.

BURDEN OF PROOF

As held in *Bipin v Prabha*¹²⁷⁹ and various other cases subsequently, the petitioner must bear the burden of proving that the respondent committed adultery beyond reasonable doubt. Earlier the definition of “beyond reasonable doubt” in the case of adultery used to be very strict. However, now the certainty behind the allegation has changed to high degree of probability. This was elaborated in *Mallika v. D.S. Rajendaran*¹²⁸⁰, where the Hon’ble court held, in modern law, adultery may also be proved by preponderance of evidence. Moreover, adultery is of the nature where it is very difficult to adduce evidence of direct nature and if adduced it is often looked at with suspicion, moreover, the evidence should be such that a reasonable man must not reach any other conclusion.

INTERNATIONAL POSITION

Indian criminal adultery law is very similar to the Jewish biblical law as per which adultery is defined as sexual intercourse not between a woman and a married man but between a man and married

woman.¹²⁸¹ Furthermore the penalty is directed against the married woman and not against her co-respondent. The United Nation has issued a call to Governments to repeal laws criminalizing adultery¹²⁸². Closer to home the Indonesian government held adultery not to be a crime. Taking a look around,

Europe

Adultery as a crime does not exist anywhere in Europe. Criminal law for the act of adultery is only found in the history books in Europe, Romania in 2006 became the last country to denounce any sort of criminal prosecution for the same. However it would also be wrong to paint a pretty picture of the same without any context. It was only in the late 20th century that most European countries finally abolished adultery as a criminal offence. Historically speaking, in Scandinavian countries adultery has often resulted in execution of the woman involved. England, which is often called the main source of law in India hasn’t had Criminal adultery under English Law since 1857, when the offence of ‘criminal conversation’ (‘crim con’) was abolished. It has safe to thus say, that Europe is “adult about adultery”.

¹²⁷⁸ *Redpath v, Redpath* (1950) 1 ALL ER 600

¹²⁷⁹ AIR 1957 SC 176

¹²⁸⁰ AIR 1995 Mad 100 also held in *Sari v. Kalyan* (AIR 1980 CAL 374)

¹²⁸¹ “And the man that committed adultery with another man's wife, even he that committed adultery with his neighbor's wife, the adulterer and the adulteress shall surely be put to death.” (Lev. 20:10).

¹²⁸² See “Joint Statement by the United Nations Working Group on discrimination against women in law and in practice” of 18 October 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>



USA

In United States of America, because of the very nature of federalism, the states have the power to legislate. This means there is no one law in America and different states have a different take on any topic. On Adultery 21 out of the 50 states believe and have criminal laws for the offence of adultery. Amongst them in some USA states, if one of them is married to someone else, both people are guilty of adultery if one of them is married to someone else. In other USA states, the rule only applies to a married woman. Moreover, some states punish for a single act of adultery and in others, the adultery must be an ongoing act. An overview of some of the states and the punishment as prescribed by law for the offence of adultery has been given below:

As per Section 14 of the General Laws of the commonwealth of **Massachusetts**, adultery is considered a felony with a fine of up to \$500 and a maximum jail sentence of two years.¹²⁸³

The offence of adultery can result as per §21-871 of the Penal code of **Oklahoma**, can result in maximum fine up to \$500 and jail time up to 5 years.

In **Idaho**, adultery comes in the chapter of “sex offences” and could lead to the imprisonment for a period up to 3 years or a hefty fine of \$1000¹²⁸⁴

¹²⁸³

<https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section14>

¹²⁸⁴ TITLE 18, CRIMES AND PUNISHMENTS.CHAPTER 66, SEX CRIME 18-6601.

Both **North**¹²⁸⁵ as well as **South**¹²⁸⁶**Carolina** has the act of adultery as a crime in their statutes, and both states prescribe a jail period exceeding 6 months.

In **Alabama** as per, the Code of Alabama¹²⁸⁷ it is provided, ‘if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offense, be fined not less than \$100, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. On the second conviction for the offense, with the same person, the offender must be fined not less than \$300, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than 12 months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary or sentenced to hard labor for the county for two years.

However, the criminal prosecution for adultery is rare in United States of America, and adultery is often used as a ground of divorce.

ASIAN SUB-CONTIENT

Adultery is punished severely in Pakistan, and even in the recent history stoning and lashes are seen especially after the Huddod ordinance i.e. the Islamic Penal Code which was introduced in 1980. Rape in fact, is considered a sub-category of adultery and women have been punished for being raped too.

¹²⁸⁵§ 14-184. Fornication and adultery.

¹²⁸⁶ SECTION 16-15-70./ Title 16 /CHAPTER 15/ ARTICLE 1

¹²⁸⁷Section 4184



Laws in Saudi Arabia, which are based in strict Islamic Sharia laws, provide for severe and harsh punishment for the crime of adultery and often the punishment is stoning to death of the adulterer.

It is interesting to note that the section and law in the Bangladesh Penal Code for the offence of adultery is exactly the same as in India.

In 2015, the Constitutional Court of South Korea's struck down a 62-year-old statute outlawing adultery under which violators faced up to two years in prison. The nine-member bench ruled by seven to two that the 1953 law was unconstitutional. "Even if adultery should be condemned as immoral, state power should not intervene in individuals' private lives," said presiding justice Park Han-Chul. Unlike, other countries the trials for the offence of adultery were not uncommon in South Korea, in fact in the period between 2009-2015, more than 5,500 cases of adultery were seen in the courts.

DENOUEMENT AND RECOMMENDATIONS

"Adultery is an evil only inasmuch as it is a theft; but we do not steal that which is given to us." - Voltaire

Voltaire has very well defined in a contentious yet conspicuous manner the practice of Adultery, however its interpretation lies in the eyes of the beholder. For Indian lawmakers "custom and tradition convenience" has always been of top most priority and therefore, Adultery

exists as an offence punishable under the code in its current disposition.

As authors of this paper, we would however like to offer the following suggestions;

A. Adultery as a gender-neutral offence

The law commission in its 42nd report introspected over the existence of the provisions relating to adultery and after conducting a survey with various learned men came to the conclusion that it would be too radical to arbitrarily just remove the provision, however what must be done is that it shall be made gender neutral and the woman who is in all forms an abettor shall be put on the stand along with her lover to be punished, on the same lines the commission recommended that the provision shall be revised as :

*"497. Adultery – If a man has sexual intercourse with a woman who is, and whom he knows or has reasons to believe to be the wife of another man, without the consent or connivance of the man, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*¹²⁸⁸

Unfortunately, the above recommendation was not taken into consideration and the impending law still punishes just the paramour and not the wife. With the change in our society and changing roles of females,

¹²⁸⁸ Law commission of India, 42nd Report, Indian Penal Code, 1971



this is no more a ground for mere adaptation to change but has become a necessity in order to keep pace with equality. There lies no reasonable doubt that our constitution guarantees the state to make certain provisions favoring women arbitrarily without any justifications but herein, there shall be only partial justice if only one of aficionado is punished and the other is let off. There are various other fields which have been scorned off by the law makers which need the cure of law in order to nurture the bud of equality for it to blossom into democracy, Adultery however isn't one of those.

The Supreme Court on 8th December 2017 admitted that the adultery law in India was Victorian and dusty. The order said that women were treated as the husband's property. The court admitted a petition to drop adultery as a criminal offence from the Penal Code. "Time has come when the society must realise that a woman is equal to a man in every respect," the Supreme Court recorded in its five-page written order. The court has asked the government to spell out its stand on the petition from a Kerala-based activist. Earlier verdicts had upheld the existing provision and left it to Parliament to amend the law that had not touched this law for decades. This indeed points towards a new beginning with respect to this out-dated law

B. Adultery, just as a ground for Divorce

When the law commission recommended that the provision relating to Adultery shall be modified in their 42nd report, they also suggested a revision in the term for punishment.

"497. Adultery – If a man has sexual intercourse..... the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."¹²⁸⁹

Punishment was reduced from a term of 5 years to 2 years as the former was considered unreal and not called for. The report containing this recommendation is almost five decades old, enough time has surpassed and in this pendency of time, the fight with the circumstances has been superseded by the changing roles, more accountability and potent individualities.

Inherently, Adultery is society is accepted no more as a crime but as amusement, being a consequence of a banal marriage. All that is required for is a reflection of this change of mind sets in our books of law.

As per the Hindu marriage act, as explained earlier, Adultery lies as a ground for divorce and can be used at the discretion of both the husband and the wife whoever falls as a victim to the clutches of Adultery. Most countries treat Adultery as a civil wrong, a ground for divorce punishable with the inevitable consequence of separation from the respective spouse as a consequence of cheating on them. It's no doubt a radical change but one that has been long due.

To conclude, as Paulo Coelho says, we have to find a middle path, where there is neither joy nor suffering, only profound peace, our laws and regulations shall exhibit and manifest on the same.

¹²⁸⁹ Law commission of India, 42nd Report, Indian Penal Code, 1971



THE DEBATE AROUND NJAC AND COLLEGIUM SYSTEM

*By Rishika Singh & Akanksha Tiwari
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INTRODUCTION

There has always been a debate of appointing judges and conflicts between the executive and judiciary is something that has always remained a bone of contention among the two organs. The constitution of India states about the appointment of Supreme Court and High Court Judges under Article 124 & 217 respectively. After Independence, the judges were appointed by the president in consultation with the law minister and the Chief Justice of India. For few years the system worked well but gradually it started witnessing discrepancies in the appointment of judges.

After the case of *S.P. Gupta v. Union of India*¹²⁹⁰ of India the matter of judges' appointment came under limelight and a new concept of collegium was introduced by the Supreme Court for the appointment of Judges. The collegium was comprised of CJI and two senior most judges of the Supreme Court. The matter was again referred to the SC in the year 1991 in the case of *SCAOR v. Union of India*¹²⁹¹. This time the strength of Collegium was increased from three to five by increasing the number of senior most Judges of the SC. Finally, the whole chaos was settled by the honourable Supreme

Court in the case of *Re Presidential Reference*¹²⁹² in the year 1993 when the court determined the true meaning of the word "consultation" given under Article 124 and 217 of the Indian Constitution. The Supreme Court of India's collegium system, which appoints judges to the nation's constitutional courts, has its genesis in, and continued basis resting on, three of its own judgments which are collectively known as the Three Judges Cases. The Collegium System is one in which the Chief Justice and a forum of four judges Senior most Judges of Supreme Court recommend appointments and transfer of judges. The Supreme Court Bar Association had blamed the Collegium System for creating a give and take culture, creating a rift between the haves and have not. The Politicians and actors get instant relief from courts; the common man still has to struggle for years to get Justice.

National Judicial Appointment Commission was a Constitutional Body formed to replace the Collegium System of appointing Judges. The National Judicial Appointment Commission was established by amending the Constitution of India by passing the Ninety-Ninth Amendment Act, 2014 by the Lok Sabha on August 13, 2014 and by Rajya Sabha on August 14, 2014. Alongside the Parliament also passed the National Judicial Appointment Act to regulate the NJACs functions. Both the bills were ratified by 16 State Legislatures and the President gave his assent on December 31, 2014. Hence, the NJAC Act and the Constitutional Amendment Act came into force from April 13, 2015. The NJAC will consist of six people which will include the two most

¹²⁹⁰ 1982(2)SCR365

¹²⁹¹ Writ Petition (Civil) No. 13 of 2015

¹²⁹² AIR 1999 SC 1



senior judges of Supreme Court, the law minister and two eminent persons. These eminent persons are nominated for a period of three year by a committee consisting of the Chief Justice, the Prime Minister and the leader of the opposition in the Lok Sabha, and are not eligible for re-nomination.¹²⁹³

The Supreme Court has declared the National Judicial Appointment Commission Act, 2014 and the 99th Constitutional Amendment Act, 2014 void and unconstitutional. The Supreme Court has now held that the collegium System will remain operative which was established by its ruling earlier in the 1993 case for appointment of judges to higher judiciary.

NATIONAL JUDICIAL APPOINTMENT COMMISSION

COMPOSITION OF NJAC:

The National Judicial Appointments Commission Bill, 2014 was introduced in the Lok Sabha on August 11, 2014 by the Minister of Law and Justice, Mr. Ravi Shankar Prasad, a new article, Article 124 A, (which provides for the composition of the NJAC) is also be inserted into the Constitution. If we talk of a National Judicial Commission, what is fundamentally important is its composition. Its composition should not be that which should effect directly or indirectly the independence of the judiciary and the power of judicial review both of which have been held to be the basic features of our Constitution. Our Constitutional system comprises the written Constitution, the conventions like DPSP,

Fundamental rights and Duties which have been developed and are being followed and the interpretation of the Constitution by the Supreme Court.

The NJAC bill provides for a procedure that is to be followed by the NJAC for recommending persons for the appointment for the post of Chief Justice of India and other judges of the Supreme Court, the Chief Justice and other judges of High Courts. The 121st constitutional bill stipulates amendments to Article 124 (2) and 217 (1) which deal with the appointment of Judges in the Supreme Court and the High Courts. Under 121st amendment every judge in Supreme Court and High Court will now be appointed by the President in consultation with the National Judicial Appointment Commission.

The National Judicial Appointments Commission will be a six member body composed of the following members:

- Chief Justice of India – (will be the ex-officio Chairperson)
- Two other senior judges of the Supreme Court, next to the Chief Justice of India – (ex officio members)
- The Union Minister of Law and Justice – (ex-officio)
- Two eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination. – (to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India and the Leader of opposition in the Lok Sabha or the Leader of single largest Opposition Party in Lok Sabha), provided that of the two eminent persons, one person would be from the Scheduled Castes or

¹²⁹³ <http://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece>



Scheduled Tribes or OBC or minority communities or a woman.¹²⁹⁴

FUNCTIONS OF NJAC:

The Functions of the National Judicial Appointment Commission is to recommend candidates for appointment as Chief Justice of India, Judges of Supreme Court, Chief justice and Judges of High Court. The NJAC will also play a role in the Transfer of Chief Justice and other judges from one high court to another. The main task of NJAC is to ensure that the persons recommended are of ability and integrity.

To begin with, the NJAC definitely cures the earlier allegations of unconstitutionality arising due to the executive's opinion bearing no weight in comparison to the judiciary. The NJAC consists of three judicial officers and the Union Law Minister, along with the involvement of several political bodies. The recommendation would finally be made to the President. Hence the NJAC gives much more primacy to the executive, rather than the judiciary. Secondly, to some extent it can also be said that the problem of judicial accountability may also have been solved as the judiciary would now be accountable to the executive in the matter of its appointments.¹²⁹⁵

COLLEGIUM SYSTEM IN INDIA

Collegiums system in India is the system by which the judges are appointed by the judges only also referred to as “Judges-selecting- Judges”. It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution. The Supreme Court collegium is headed by the Chief Justice of India and comprises four other seniormost judges of the court. A High Court collegium is led by its Chief Justice and four other seniormost judges of that court. Names recommended for appointment by a High Court collegium reaches the government only after approval by the CJI and the Supreme Court collegium.

Judges of the higher judiciary are appointed only through the collegium system — and the government has a role only after names have been decided by the collegium. The government’s role is limited to getting an inquiry conducted by the Intelligence Bureau (IB) if a lawyer is to be elevated as a judge in a High Court or the Supreme Court. It can also raise objections and seek clarifications regarding the collegium’s choices, but if the collegium reiterates the same names, the government is bound, under Constitution Bench judgments, to appoint them as judges.¹²⁹⁶

CONSTITUTION ON THE APPOINTMENT OF JUDGES:

There is as such no mention of the collegiums system in the original constitution or in the recent amendments.

¹²⁹⁴<https://exampariksha.com/national-judicial-appointments-commission-njac-bill-political-science-study-material-notes/>

¹²⁹⁵<http://www.manupatrafast.in/NewsletterArchives/isting/ILU%20RSP/2015/Aug/The%20National%20Judicial%20Appointment%20Commission%20-.pdf>

¹²⁹⁶http://ijariie.com/AdminUploadPdf/Collegium_System_%E2%80%93_The_Unveiled_Darkness_ijariie5835.pdf



But the Constitution of India lays down certain guidelines as to the reference to the appointment of the judges in the supreme courts and the high courts. The appointment of the judges in the High Courts and the Supreme Courts is done by the President of India and the powers are given to him under Articles 124(2) and 217 of the Indian Constitution. The President is just required to hold consultation with judges of Supreme court and High Court as it may deem necessary.

According to Article 124(2): “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal 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 for the purpose and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

And Article 217 says: “Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.”

FUNCTIONS OF THE COMMISSION:

The functions of this Commission are as follows:-

- Nominating people for the position of Chief Justice of India, Judges of

Supreme Court, Chief Justices of all the High Courts and also the other judges of the High Courts.

- Recommending the transfer of the Chief Justice or Judges of the High Court, from one High Court to another High Court.
- To make sure that the people recommended are of ability, integrity and standing in this legal profession. The procedure for recommendation with respect to the appointment of High Court judges involves obtaining the views of the Governor, Chief Minister and Chief Justice of High Court of that particular state in a written manner. This should be as per the procedure specified by regulations made by this Commission.

GENESIS OF COLLEGIUM SYSTEM:

Collegium system has evolved through the series of judgement of “Judges case”. There were three cases namely:

- S. P. Gupta v. Union of India - 198 (also known as the Judges' Transfer case): it was found that CJI does not have any primacy. The Constitution Bench also held that the term “consultation” used in Articles 124 and 217 was not “concurrence” — meaning that although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them.
- Supreme Court Advocates-on Record Association vs Union of India – 1993: a nine-judge Constitution Bench overruled the decision in S P Gupta and devised a





specific procedure called ‘Collegium System’ for the appointment and transfer of judges in the higher judiciary. The majority verdict accorded primacy to the CJI in matters of appointment and transfers while also ruling that the term “consultation” would not diminish the primary role of the CJI in judicial appointments. Ushering in the collegium system, the court said that the recommendation should be made by the CJI in consultation with his two seniormost colleagues, and that such recommendation should normally be given effect to by the executive.

- In re Special Reference 1 of 1998: In 1998, President K R Narayanan issued a Presidential Reference to the Supreme Court over the meaning of the term “consultation” under Article 143 of the Constitution (advisory jurisdiction). The question was whether “consultation” required consultation with a number of judges in forming the CJI’s opinion, or whether the sole opinion of CJI could by itself constitute a “consultation”. In response, the Supreme Court laid down 9 guidelines for the functioning of the coram for appointments and transfers — this has come to be the present form of the collegium, and has been prevalent ever since. This opinion laid down that the recommendation should be made by the CJI and his four seniormost colleagues, instead of two. It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted. It was also held that even if two judges gave an adverse opinion, the

CJI should not send the recommendation to the government.¹²⁹⁷

This system is criticised because it is considered to be non transparent as there is no official mechanism involved. There are no prescribed norms regarding the eligibility criteria or even selection criteria. The NDA government has tried twice to replace the collegiums system with National Judicial Appointments Commission (NJAC) to address the concerns but failed and the collegium system still prevailing but the parliament has slowed down the process of appointment and is drafting the MoP (Memorandum of Procedure) to guide future appointments so that concerns regarding lack of eligibility criteria and transparency could be redressed.

SUGGESTIONS TO ENHANCE THE MECHANISM OF JUDGES APPOINTMENT:

On the basis of the criticisms observed and discussed, following are the suggestions to improve the functioning of the Collegium System for elevating the judges of High courts and Supreme Courts:-

To ensure the transparency of the system, the documents and audio recordings of the collegiums and candidates should be made accessible to the citizens from the Collegium Secretariat under the Right to Information Act. These records should be routinely uploaded on the website of respective

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<http://www.beingyourlawyer.com/Collegium%20System%20in%20India.php>



Supreme Court or High Court and must be accessible through a simple net search.¹²⁹⁸

- The collegium Secretariat should be headed by a team consisting members of senior bureaucrats who are sufficiently insulated from pulls and pressures caused by judges, lawyers, ministers, etc. They should support the Collegium in its Decision – making process with all the background data of candidates, along with the objective comparison and analysis of the data along several parameters.
- The secretariat should maintain the eligibility records of each and every candidate or judge of the higher judiciary and the other senior advocates who apply for the post of judge in the higher judiciary.
- Short term promotions to the post of Chief Justice of several High Courts, just for the sake of rendering the eligibility of the candidate for elevation to the Supreme Court, should be expressly forbidden.
- Appropriate criteria must be given by the Collegium of Supreme Court, made into an enactment after passing through the houses of Parliament and carefully implemented by the Collegium Secretariat and Ministry of Justice. Making the criteria a law would perform as way to protect “moving goal-posts” for favoring a few candidates.
- Appropriate Rules and formats may be developed for receiving complaints against individual judges and combining it into the eligibility criteria.
- Suitable laws may also be laid down to safeguard frivolous complaints against

judges by the parties with their personal interests, but also to facilitate the independent investigation of complaints if found have substance.

THE COLLEGIUM SYSTEM VERSUS THE JUDICIAL APPOINTMENTS COMMISSION BILL

The judiciary is perhaps the only institution in our country to which the citizens accord utmost credibility. It is indeed the most trusted and respected institution. Then why does the selection of judges to serve in the Supreme Court and the High Courts take place through an impenetrable process? Questions have been raised time and again on the genuineness and transparency of the existing collegium system for appointment of the judges to the Supreme Court and the High Courts. Justice Rumpa Pal has rightly remarked that the process of appointments of judges to the superior courts is the best kept secret in the country. The Judicial Appointments Commission, Bill 2013 has been introduced to replace the existing collegium system by an independent Judicial Appointments Commission. The collegium system undoubtedly gives supreme power to the judiciary in making the appointments and there is an immediate need for a complete overhaul of this system. But is the Judicial Appointments Commission a better successor?¹²⁹⁹

IS NJAC BETTER THAN COLLEGIUM SYSTEM?

The National Judicial Appointments Commission had been passed to replace

¹²⁹⁸ http://ijariie.com/AdminUploadPdf/Collegium_System_%E2%80%93_The_Unveiled_Darkness_ijariie5835.pdf

¹²⁹⁹ <https://academy.gktoday.in/current-affairs/njac-act-2014-99th-amendment-of-indian-constitution/>



the collegium system. It has been sought to effectively remove the issues and make better the procedure of appointment of judges to the High Court and Supreme Court of India. While the main issues with the collegium system included transparency and the power of appointing judges remained with the judges, the NJAC took a much more practical approach. The act promoted the relationship between the executive and the judiciary. It provided the President with the power to reconsider the recommendations made by the commission. The commission had ensured more transparency and accountability, this was one of the major changes to be included with respect to the collegium system which was opaque and provided no amount of transparency or accountability. This would ensure that the executive would also be kept in loop regarding the appointments. Another major benefit the NJAC sought to provide was that it would remove the elements of nepotism and favouritism and appoint candidates based on merit and experience. This was considered as a major step in the interest of justice when we consider the fact that the collegium system did not always appoint judges based on merit, but certain appointments were based on factors like nepotism, favouritism, bribery etc. The benefits of the NJAC act were many, including a check on corruption and non-arbitrary appointment of judges to the High court and Supreme Court of India. The non-arbitrary selection was ensured because of the implementation of the power to veto by the members. The act provides that if any two members of the commission do not accept a proposal

or a recommendation then that person shall not be recommended for appointment. These were among the most prominent advantages of the NJAC over the collegium system.

JUDGEMENT HOLDING NJAC UNCONSTITUTIONAL

On October 16, 2015, the Supreme Court of India had issued a landmark judgment in Supreme Court i.e Advocates-on Record Association v. Union of India (NJAC Judgment). In The judgment the Ninety-ninth Amendment was held unconstitutional to the Indian Constitution and accompanying legislation, which established a National Judicial Appointments Commission (NJAC or Commission)¹³⁰⁰

On 16 October, 2015 the Supreme Court upheld the collegium system and struck down the NJAC as unconstitutional after hearing the petitions filed by Supreme Court Advocates on Record Association (SCAORA) and others. Previously the validity of the constitutional amendment act and the NJAC Act were challenged by certain lawyers, lawyer associations and groups before the Supreme Court of India through Writ Petitions. On August 2014, Supreme Court had dismissed few Writ Petitions that had challenged the validity of NJAC on the ground that the challenge was premature as the constitutional amendment and the NJAC Act had not been notified then. After the fresh challenge in 2015 after the acts were notified, a three judge bench of the Supreme Court referred the matter to a

¹³⁰⁰ http://www.gwilr.org/wordpress/wp-content/uploads/2017/05/ILR-Vol-49.3_Rehan-Abeyratne.pdf



Constitution Bench. The five-member Constitution bench struck down the NJAC and constitutional amendment. It has also referred to the "insularity and independence of judiciary" as an intrinsic feature of the "basic structure" of the Constitution. In the court's view, judicial independence would be compromised if the executive gains an influence in the appointment of judges. The Court by a 4-1 majority, struck down the 99th Amendment. Justice Kehar's judgment concluded that the NJAC did "not provide an adequate representation, to the judicial component" and that "clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of Judges." It further held that "Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC." The clause it was held, impinged upon the principles of "independence of the judiciary", as well as, "separation of powers". The clause which provided for the inclusion of two "eminent persons" as Members of the NJAC was held ultra vires the provisions of the Constitution, for a variety of reasons. The four judgments of the majority have reasserted judicial independence with its concomitant autonomy in appointments, as an integral part of the Constitution's basic structure. No parliamentary majority can amend the Constitution to alter its basic structure and hence the 99th Amendment failed constitutional scrutiny. The court has reinstated the collegium as the clearing house of all judicial appointments to the constitutional courts.¹³⁰¹

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CONSTITUTIONAL PROVISIONS AND JUDICIAL INTERPRETATION

The constitution of India provides under Article 124(2) that the judges of the Supreme court shall be appointed by the President in consultation with such of the judges of the Supreme court and the High Courts as he may deem necessary provided that in case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted and Article 217(1) provides that the judges of the High Courts shall be appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned and in case of appointment of a judge other than the Chief Justice of the High Court to which the appointment is to be made. Thus the Constitution has vested the power of appointments with the executive in consultation with the Chief Justice and such other judges deemed necessary by the President. A question came before the Supreme Court in *S.P. Gupta V. Union Of India* that whose opinion amongst the various functionaries participating in the process of appointment should have primacy? It was held by the Supreme Court that the opinion of the Chief Justice of India and the Chief Justice of the High Court are *MERELY CONSULTATIVE* and the power resides solely and exclusively in the Central Government. Thus, a literal interpretation was given to the word consultation. In 1993, a nine judges Bench *OVERRULED* this decision in *Supreme Court Advocates On Record Association V. Union Of India* and conferred wide powers on the judiciary in making the appointments.

http://www.hitbullseye.com/currentgk/20159_cover.pdf



The Supreme held that:

- That the opinion of the Chief Justice of India should have the greatest weight as he is best suited to know the worth of the appointee,
- The selection should be made as result of a participatory consultative process in which the Executive has the power to act as a mere check on the exercise of power by the Chief Justice of India

In case of a conflict the primacy must lie in the final opinion of the Chief Justice of India and this primacy in effect means primacy of the opinion of the Chief Justice of India formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him.

CONCLUSIONS

Appointment of Judges is a cardinal process in a democratic country like India and it should be done with utmost care and caution. In a country like India where government is the biggest litigator and the judiciary is the only wing which can provide justice to the people of without any fear, therefore judges should not be under any political influence. Independence of Judiciary & separation of power should be considered while formulating a process in which judges are supposed to be appointed. Though the constitution of India explicitly states about the appointment of Judges under Article 124 & 217, but it was not enough to suffice the purpose of appointments because of the arbitrary actions taken by the executive and made some noncompetent appointment as per there won whims and fancies. As a result, judiciary has settled the situation by interpreting these articles

beyond doubt and setup the collegium. Executive interference came to an end and the collegium served the need in the proper manner. But now, even the collegium is also under several allegations and people are continuously raising questions over the working process of collegium. Collegium has been blamed of not being transparent and accountable and corruption charges have been levied.

The parliament passed the National Judicial Appointment Commission in such haste and without much debate and discussion. This clearly shows the intention of government about controlling the Judiciary and putting it under the political influence. Parliament was trying to evade the independence of Judiciary with the help of this bill. The weightage should always be given to the judiciary in appointment but this bill was contrary to it and as a result it was struck down by the honorable Supreme Court. Collegium, in spite of having few faults and flaws, is currently the best option for appointment of judges as compared to the NJAC. We did not demolish the whole building if there is any problem in the construction rather we focus on figuring out the problems and repair them with all available means. Similarly, it would be better to figure out the problems in collegium and correcting them by taking all due actions rather than introducing a whole new system for appointing judges which has designed faults in it and are identifiable at the face of it. Therefore, I have tried to figure out some problems in existing system of collegium and have given few suggestions accordingly to improve it and make it more effective and efficient.



EXTRADITION UNDER INTERNATIONAL LAW

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ABSTRACT

Extradition is the delivery of the accused or a convicted individual to the state on whose territory he is alleged to have committed or to have been convicted of a crime, by the state on whose territory the alleged criminal happens to be for the time being. The state which claims jurisdiction over the underlying crime makes a request for the alleged fugitive's extradition. A court in the state which receives the extradition request determines whether the request is in order, and if so, issues a warrant for the arrest of the person. Through subsequent hearings, the state court determines whether to extradite the person.

On the other hand there are some established principles which the States need to follow while extraditing any fugitive criminal. All these happen with the treaties among the state. If there is no treaty of extradition between the states the requested state can deny the extradition. The principles which States follow for extradition is laid down in their treaty of extradition.

This Article talk in detail about Extradition under International Law, which in detail lays down the meaning and definition of extradition by different jurists and other municipal law. It also talks about the general principles or restriction a State can impose while extraditing any fugitive. This paper

includes various foreign case laws related to topic. A detail discussion about The Indian Extradition Act 1962 with various important sections of the Act and some important case laws of India related to extradition.

KEYWORDS

- Extradition
- Treaty
- Fugitive
- States

• INTRODUCTION

Extradition is a process where one state extradite an accused or a person who is convicted of a crime from another state. Natural it is the right of the state to exercise the jurisdiction over all the crimes and criminals within its territory. But sometimes it happens that after committing crime runs away to another country. In such situation the affected country can not exercise its jurisdiction to punish the guilty person because state can only exercise its jurisdiction of punishment within its territory only.

Extradition is the delivery of the accused or a convicted individual to the state on whose territory he is alleged to have committed or to have been convicted of a crime, by the state on whose territory the alleged criminal happens to be for the time being. The state which claims jurisdiction over the underlying crime makes a request for the alleged fugitive's extradition. A court in the state which receives the extradition request determines whether the request is in order, and if so, issues a warrant for the arrest of the person. Through subsequent hearings, the state court determines whether to extradite the person.



- **EXTRADITION TREATY**

Treaty means Agreement. Generally it is a bilateral treaty between the states to surrender the criminals to the requesting state if they flee to their territory after commission of a crime. The consensus is any state in the world does not have any such obligation to surrender the alleged criminal to another state because principle of sovereignty is that every state has legal authority over people within its border.

“The inability of a State to exercise its jurisdiction within the territory of another state would seriously undermine the maintenance of law and order if there were no cooperation in the administration of justice. The awareness among national decision makers of the social necessity of jurisdictional co-operation is illustrated by the widespread practice of returning a person who is accused or who has been convicted of a crime to the state in which the crime was committed”¹³⁰²

Domenico Rancadore’s case, he is accused of being one of the biggest mafia bosses and Italian police has listed him as one of Italy’s “most wanted criminals”. Westminster Magistrates Court rejected Italy’s extradition request in march 2014.

Roman Polanski, Swiss authorities decided not to extradite Polanski to the US in 2010 after he had been under house arrest in the mountain resort of Gstaad for nine months. The fugitive director was wanted on charges of having sex with a 13 years old girl in 1977. He was arrested on a US warrant in

2009, while collecting a lifetime achievement award in Zurich. Polanski has originally been charged with six offences, which included rape and sodomy. In 1978, he pleaded guilty to unlawful sex after a plea bargain and server 42 days in a US prison.

In the case of **United States v. Rausher**¹³⁰³, the Supreme Court of the United States stated the American view on extradition in these terms: “It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives for justice, to the states where the crimes were committed, for trial and punishment. This has been done generally by treaties. Prior to these treaties and apart from them there was no well-defined obligation on one country to deliver. it was upon the principle of comity and it has never been recognized as among those obligations of one Government towards another which rest upon established principles of International Law”

Again in case **Factor v. Lanbenheimer**¹³⁰⁴, “The principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled, and it has been said that it is under a moral duty to do so the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when created by treaty.”

¹³⁰²EDWARD COLLINS, INTERNATIONAL LAW IN CHANGING WORLD(1996) 216.

¹³⁰³United States v. Rausher, 407 U.S. 119 (1866).

¹³⁰⁴Factor v. Lanbenheimer,290 US 276, 287.



- **ESSENTIALS FOR EXTRADITION**

There are certain conditions for extradition. Extradition can be denied if it doesn't fulfil the conditions which are essential for extradition. These general principles can be formed by bilateral treaties, national laws of several states and various judicial decisions of the court.

1. DUAL CRIMINALITY

The state shall fulfil the dual criminality system in order to extradite the fugitive. Dual criminality means the crime which fugitive have committed must also be a crime in other state.

Blackmer v. United States case¹³⁰⁵. The French Court refused extradition of Blackmer in 1928 to the United States on the ground that the offence with which he was charged did not constitute a prosecutable offence in concreto under French Law. The French Court found that the statute of limitation for similar offences lapse under French Law, extinguished the prosecutability of the offender, and, therefore, the act charged could not constitute an offence under French Law.

Again In re Plevani case¹³⁰⁶ of the Court of Cassation in France rejected the request of Italy for the surrender of one Plevani, a convict who was sentenced in 1946 for two terms of imprisonment in Italy but escaped from prison while serving sentence and took up residence in France. The refusal was on the basis of Article 5 of the Extradition Law, 1927, which categorically prohibits the

extradition of person whose sentence had become time barred under French Law. Again in 1959 when Spain demanded the surrender on one RullFernandes, a Spanish national on the charge of fraudulent bankruptcy and absconding with assets from the government of Venezuela, it was contented that extradition should be denied since the offences charged were not known to Venezuela Law, and therefore the extradition request violated the principle of double criminality.

2. POLITICAL OFFENCE

Under article 3(a) of Model Treaty on Extradition states that:

“Extradition shall not be granted if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature”

Under Article 3(1) of European Convention on Extradition also states that:

“Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence.”

Under Section 31(1)(a) of The Indian Extradition Act, 1962 provides

“if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the Magistrate or court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character”

¹³⁰⁵ Blackmer v. United States case, 284 US 421(1928).

¹³⁰⁶ *rePlevani*, (1955) 22 ILR 514.



In Re Castioni Case, 1891¹³⁰⁷ when the offence is political offence by its nature, the offender may not be extradited.

A number of the citizens of one of the cantons of the Swiss Republic, being dissatisfied with the administration of the government of the canton, rose against the Government, arrested several members of the Government, seized the arsenal, from which they provided themselves with arms, attacked, broke open, and took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some members of the Government, and established a provisional government. Mr Castioni on entering the municipal palace, who had taken an active part in the disturbance throughout, shot with a revolver and killed a municipal councillor during the political turmoil of Switzerland. He escaped to England, where he was arrested and committed for extradition on a charge of murder. Later, Swiss government demand extradition of Mr Castioni. However, Mr Castioni asked not to extradite him as the issue is solely in political character. The issue was whether UK was bound to extradite Mr Castioni or not.

The Queen’s Bench held that the offence is of a Political Character and output of a political conflict so UK is not bound to Extradite Mr Castioni.

In Re Munier Case¹³⁰⁸, political offences must be distinguished from the terrorist activities. If a person do not believe in political organizations his offences cannot be treated as political offences.

Mr Muenier was a French citizen, he was an anarchist and did not believed in state. So he

boomed many places to destroy his state. Likewise he boomed at two army barrack and escaped to UK, when France demanded his extradition he objected showing the reason that the offence was a political offence in character.

The Court held that the offence by Mr Muenier cannot be treated as political offence so UK is liable to extradite him.

3. DEATH PENALTY

Extradition will not be allowed if the offender if extradited may face a death penalty in his state. *Australia Extradition Act 1988* provides:

Section 15B “the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.

Also in *New Zealand Extradition Act 1999, Section 30(3)(a)* provides,

The Minister may determine that the person is not to be surrendered if—

- (a) it appears to the Minister that the person may be or has been sentenced to death by the appropriate authority in the extradition country, and the extradition country is unable to sufficiently assure the Minister that—
 - i. the person will not be sentenced to death;

One of the Landmark judgement by the Supreme Court of Canada was **Kindlervs Canada**¹³⁰⁹, After being convicted of murder in Pennsylvania, Joseph Kindler escaped and fled to Canada. He was

¹³⁰⁷ *Re Castioni*, (1891) 1QB149.

¹³⁰⁸ *Re Munier*, [1894] 2 Q.B. 415.

¹³⁰⁹ [1991] 2 S.C.R. 779 1991 SCC 70.



captured, escaped again and was captured again. Kindler then fought his extradition. In a four-to-three decision the Court found that there was no violation of section 7 of the Charter (the right to life, liberty and security of person) or section 12 of the Charter (protection against cruel and unusual punishment). the Court noted that while Canada itself had abolished the death penalty, Canada should respect that most other countries had not. This included the United States, with which Canada shared cultural connections and an easily crossed border. It was held that the government policy that allowed for extradition of convicted criminals to a country where they may face the death penalty was valid under the Canadian Charter of Rights and Freedoms

The Kindler vs Canada decision was overruled in **United States vs Burns**¹³¹⁰, was a decision by the Supreme Court of Canada in which it was found that extradition of individuals to places where they may face the death penalty is a breach of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms. The decision reached this conclusion through a discussion of evidence regarding the arbitrary nature of execution, although the Court did not go so far as to say execution was also unconstitutional under section 12 of the Charter, which forbids cruel and unusual punishments.

4. TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Many countries do not allow extradition if the fugitive may subject to torture, inhuman

or degrading treatment by the requesting state.

Soering v United Kingdom¹³¹¹ is a landmark judgment of the European Court of Human Rights (ECtHR) which established that extradition of a young German national to the United States to face charges of capital murder violated Article 3 of the European Convention on Human Rights (ECHR) guaranteeing the right against inhuman and degrading treatment.

Jens Soering is a German national, who at the time of the alleged offence was a student at the University of Virginia. He and his girlfriend were wanted in Bedford County, Virginia, USA for the murder of his girlfriend's parents. The couple disappeared from Virginia in October 1985, and were later arrested in England in April 1968 in connection with cheque fraud. Soering was interviewed by Bedford County police in the UK, which led to his indictment on charges of capital murder and non-capital murder. The USA commenced extradition proceedings with the UK under the terms of the Extradition Treaty of 1972, between the USA and UK. Mr Soering applied to the European Court on Human Rights (ECtHRs) alleging the breach of Article 3, Article 6 and Article 13 ECHR.

Othman (Abu Qatada) v. United Kingdom¹³¹² was a 2012 judgment of the European Court of Human Rights which stated that under Article 6 of the European Convention on Human Rights the United Kingdom could not lawfully deport Abu Qatada to Jordan, because of the risk of the use of evidence obtained by torture.

¹³¹⁰United States v. Burns, S.C.R. 283, 2001 SCC 7.

¹³¹¹161 Eur. Ct. H.R. (ser. A) (1989).

¹³¹² Application No. 8139/09.



5. FAIR TRIAL

Article 14 of International Covenant Of Civil And Political Rights adopted by General Assembly of United Nations led down that All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Similar provision has also been incorporated in Article 6 of the European Convention on Human Rights. In **Dudko v. The Government of the Russian Federation**¹³¹³, Russia had requested the extradition of Mr.Dudko on charge of illegal dealings involving his furniture business to UK. Lord Justice Thomas was presented with an argument that the judicial system in Russia was too corrupt, and would not guarantee the claimant a fair trial if he were to be extradited. The Judge decided the case on a separate technical point, but had sympathy with corruption argument. He stated that ‘In the light of my conclusion the appellant be discharged because the offence was not properly specified, it would not be desirable to express a view on whether on facts of this case, the Russian system violates Article 6 or does so in such a way as to amount to a flagrant denial of Justice’.

6. EXTRADITION OF OWN CITIZEN

Many states prohibits extradition of their own Nationals to foreign country.

Section 12(1) of Austrian Extradition and legal assistance Act provides “An

extradition of Austrian citizens is inadmissible”.

Article 14 (4) of Charter of Fundamental Rights and Freedom of Czech Republic “Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave her homeland”.

Similarly Republic Of China (Taiwan), Article 4 of Law of Extradition prohibits a citizen of the Republic of China from being extradited from Taiwan, unless the person acquired the citizenship after the request for extradition is made.

Also, **Constitution of the Russian Federation 1993, Article 61 A** citizen of the *Russian Federation* may not be deported from *Russia* or extradited to another State.

Valentine v. United States¹³¹⁴, In this case the respondents, native-born citizens of the United States, were charged with the commission of crimes in France. These crimes were among the extraditable offenses listed in the Franco-American Extradition Treaty of 1909. The respondents fled to the United States, were arrested in New York City on the request of the French authorities, and were held for extradition proceedings. The respondents sued to prevent their extradition from the United States to France under the Treaty of 1909. The respondents challenged the courts jurisdiction, arguing that because Article V of the Treaty of 1909 excepted citizens of the United States from extradition, the President had no constitutional authority to surrender the respondents to France.

¹³¹³ (2010)EWCH 1125(Admin).

¹³¹⁴Valentine v. United States,299 U.S. 5 (1936).



Charlton v. Kelly¹³¹⁵, is a case pertaining to extradition of a U.S. citizen to Italy. In 1910, Porter Charlton confessed in New York to having murdered his wife in Italy. The Italian vice consul requested Charlton's extradition. Hon. John A. Blair, one of the judges of the Circuit Court of the United States for the district of New Jersey, suspended Charlton's petition for a writ of habeas corpus and a warrant was issued for his arrest. This order for extradition was approved by Secretary of State Philander C. Knox.

- **THE INDIAN EXTRADITION ACT, 1962**

Jurist Oppenheim defines Extradition as:

“Extradition is a delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed or to have convicted of a crime, by the State on whose territory the alleged criminal happens to be for the time”¹³¹⁶

According to Indian Extradition Act as defined in section 2(c)(i),

“In relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State”

Section 2(c)(ii) “In relation to a foreign State other than a treaty State or in relation to a commonwealth country an offence which is specified in, or which may be specified by notification under, the Second Schedule”.

¹³¹⁵Charlton v. Kelly, 229 U.S. 447 (1913).

¹³¹⁶OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 631 (7THed.).

Under Section 3 of the Extradition Act, a notification can be issued by the Government of India extending the provisions of the Act to the countries notified.

Extradition Treaty as defined in Section 2(d) of the act states that ““Extradition treaty means a treaty or agreement made by India with a foreign State relating to the extradition of fugitive criminal and includes any treaty or agreement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India”.

Requisition for surrender under section 4 may be made to Central government by diplomatic representatives at Delhi.

Under section 8 of the Act states that, after magisterial inquiry under section 5 if the central government is of the opinion that the fugitive ought to be surrendered may issue a warrant for the custody.

Chapter I contains Sections 1 to 3. While Section 1 provides for short title, extent and commencement of the Act, Section 2 contains definitions of certain expressions and Section 3 provides for application of the Act to “Foreign States” and “Treaty States”.

Chapter II contains Sections 4 to 11 which deal with extradition of fugitive criminals to foreign states to which Chapter III does not apply.

Chapter III which contains Sections 12 to 18 deals with return of fugitive criminals to foreign States with extradition arrangements.



Chapter IV and Chapter V, they deal with “Surrender or return of accused or convicted persons from foreign States” and “Miscellaneous Matters” respectively.

The process of extradition is to be initiated by the central government. Currently, India has extradition treaties with 38 countries.¹³¹⁷

- **INDIAN EXTRADITION CASE LAWS**

Ram Babu Saxena v. State¹³¹⁸, this case leads with section 7 of Indian extradition Act, 1903. Dr. Ram Babu Saxena was an employ under U.P. Civil Services and was deputed to the Tonk State. Tonk was an Indian state and it had an extradition treaty with the British Government according to which both States were bound to extradite certain persons who were accused of certain specified crimes. Dr. Ram Babu Saxena was later on living in the district of Nainital. It was contended that while serving in Tonk State he committed crimes of extortion under section 383a and cheating under section 420. Dr. Ram Babu Saxena argued in defence that British Government had an extradition treaty with the Tonk State and that treaty did not provide for crimes for which his extradition was being claimed. Hence he could not be extradited under section 7 of Extradition act, 1903. In this

connection he made specific reference of section 18 of the Act, 1903, which provide that no extradition could be made against the provisions of the treaty. Since the treaty did not mention the specific crimes for which his extradition was sought, he contended that it will be beyond the jurisdiction of the court and whole proceedings were illegal. But the Supreme Court of India held that section 7 of the Indian Extradition Act was rightly applied and he could be extradited. The Supreme Court held:

“.....the Act doesn’t derogate from any such treaty when it authorises the Indian Government to grant extradition for some additional offences, thereby enlarging, not curtailing, the power of the other party to claim surrender of criminals. Nor does the Act derogate in true sense of the term from the position of an Indian subject under the treaty of 1869.”

His lordship concluded; “The Extradition Treaty between the Tonk State and the British Government in 1869 is not capable of being given effect to in the present day in view of the merger of the Tonk State in the United State of Rajasthan. As no treaty exist, Section 18 of Extradition Act has no application and as Section 7 of the Act has been complied with there is no ground upon which we can interfere. Thus the Supreme Court dismissed the Appeal.

Dharam teja’s case (6 July 1997)¹³¹⁹, was the managing Director of Jayanti Shipping Corporation, committed embezzlement and bungling of crores of rupees and had fled away from India. He fled from one country

¹³¹⁷ManinderDebas, *Everything You Need To Know About Extradition And India's Most Wanted Criminal*, INDIA TIMES (Nov. 13, 2017, 10:10 AM),

<https://www.indiatimes.com/news/india/everything-you-need-to-know-about-extradition-and-india-s-most-wanted-criminals-261818.html>.

¹³¹⁸Ram Babu Saxena v. State A.I.R. 1950 S.C. 155.

¹³¹⁹DR. SK KAPOOR, INTERNATIONAL LAW AND HUMAN RIGHTS 361(20thed.).



to another to escape his arrest. When he was in Ivory Coast, the Government of India requested the Government of Ivory Coast to extradite Dharam Teja so that proceedings against him could be started in India. The Government of Ivory Coast refused to extradite Dharam Teja on the ground that there was no extradition treaty with India. Later on, when Dharam Teja was in London the Government of India came to know about his whereabouts and informed the British Government and requested it to apprehend Dharam Teja and to start proceedings of extradition against him. India has an Extradition treaty with the Government of Britain under which both the countries are bound to extradite the accused of each other who run away after committing crimes in either country. Government of England accepted the request of India and proceedings were started against Dharam Teja in the court of law in England. The Court of law in England came to the conclusion that Dharam Teja could be extradited. Consequently, Dharam Teja was extradited to India. The Government of India started proceedings against him and Dharam Teja was convicted for having committed embezzlement and bungling of crores of rupees of Jayanti Shipping Corporation, while he was Managing Director of that Corporation.

Hans Muller of Nurenburg v. Supt., Presidency Jail, Calcutta and Others¹³²⁰, it was held that India under the Foreigners Act 1946 provides the power to the Central Government to expel foreigners from India. It is an absolute and unfettered discretion of the Central Government.

¹³²⁰Hans Muller of Nurenburg v. Supt., Presidency Jail, Calcutta and Others, AIR 1955 SC 367.

In another case of **Rajendra Kumar Jain and Ors. v. State**¹³²¹ through Special Police Establishment & Others it was held that political offence is one which is committed with the aim of changing the Government of a State or inducing it to change its policy.

In the case of **Bhavesh Jayanti Lakhani v. State of Maharashtra**¹³²², In this case, it was brought to the notice that if the fundamental rights of a citizen are infringed then the High Court exercising its extraordinary power under Article 226 of the Constitution would not reject citizens only because of red-corner notice. Access to justice is basic human right.

Commander Elijah Ebrahim Jhirhad Officers Extradition Case (July, 1975)¹³²³, Commander Elijah Ebrahim Jhirhad of Indian Navy was Charged by the Government of India with misappropriating Rs. 13 lakhs of the Naval Prize Fund while he was functioning as the Judge Advocate-General of the Indian Navy in the early 1960. The matter was referred to the C.B.I. in 1966. Jhirhad had the responsibility of administering Rs. 70 lakhs of the prize fund. An ex-sailor made a complaint that he had not received his shares of the prize money. On enquiry the Naval Headquarters discovered that the fund was never subjected to audit and that commander Jhirhad had destroyed all records. A charge-sheet was filed by C.B.I. against him in 1968. But Jhirhad could not be apprehended as he fled from the country along with his family.

¹³²¹Rajendra Kumar Jain and Ors. v. State, 1980 (3) SCC 435.

¹³²² Bhavesh Jayanti Lakhani v. State of Maharashtra (2009) 9 SCC 551.

¹³²³ DR. SK KAPOOR, INTERNATIONAL LAW AND HUMAN RIGHTS 361 (20thed.).



Sincethe Indian authorities were trying to find out his whereabouts. The C.B.I then got in touch with the Interpol which had arrested him April 1972 in New York. Proceedings for his extradition were then launched but Commander Jhirhad went in appeal. In July 1975, the New York Judge passed the extradition orders after accepting the Indian Government pleas in this regard. Thus Commander Jhirhad has been extradited to India and will now face trial of the charges of misappropriation of Rs. 13 lakhs of the Naval Prize Fund.

- **CONCLUSION**

As the case with all international law regimes, extradition also depends largely on mutual cooperation between the concerned nations. As goes the scenario, it is also a single basic requirement that there be an extradition treaty between the States. As is the obvious from the above mentioned case laws, it is extremely difficult to determine the status of extradition of an accused without a pre-existing treaty.

Thus it is always the need for India in light of the shifting global political and economic scene to cement its position and engage in extradition treaties with as many nations as possible for smooth and expediate custody transfer of the criminals who try to escape prosecution by exploiting this little loophole. It is the requirement for justice to be served.



RIGHT TO PEACE IN LIGHT OF THE RECENT INDO PAK TENSION

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ABSTRACT:

The present paper attempt to light “Right to Peace” in the conflict of Indo-Pakistan war. The issue behind this, to find remedy for the conflict arises due to Jammu and Kashmir. The following questions framed to answer – what are the causative agents? How and when will this dispute comes to an end? Issues in remedy available? Article 370 of the Indian Constitution drafted special provisions to Jammu and Kashmir why and how this conflict arises historical background? Have there been any legal focus and remedy to maintain peace among Indo-Pakistan? Article 15 (1) of UDHR, “Everyone has right to Nationality” Issues in the remedy frame out the solution for this war.

Key words: Indo-Pakistan, Peace, Kashmir issue, Legal Focus.

INTRODUCTION:

“War not only to show between the countries who superior or inferior? Think of the people destroys the suffering life and property its caution to ideology the remedy.”

The Indo-Pakistan war of 1947-1948, sometimes knows as the first Kashmir war was fought between India and Pakistan over the princely state of Kashmir and

Jammu.¹³²⁴ There are various causative agents for the problem arising between the countries. The Indian government is not stable after Indira Gandhi’s death. Impact of technology and military force inefficient. About 526 princely states, British have been divided but still they formed a separate state Jammu and Kashmir. Issue forbidden to kill the innocent people. The International Day of Peace is dedicated to world peace, and specifically the absence of war and violence, such as might be occasioned by a temporary ceasefire in a combat zone of humanitarian aid access. Is there any along term solution to this conflict? When and how it can be possible? Article 15(1) everyone has right to nationality, so it’s better to decide the people of Jammu and Kashmir whether to rejoin in which country. After 400 years Jammu and Kashmir possibly will become sea in future, the dispute arises between Indo-Pakistan are meaningless. Due to this there is a loss of life and property at the existence of the place.¹³²⁵ The economy of India is very stable in nature at the point of view India will better cost of war than Pakistan in such sense. India has a stable government to predict war much better than that of Pakistan, the nuclear strategic condition to the tug of cold war in the present scenario India will be in so called condition.

HISTORICAL BACKGROUND

South Asian decolonization paved the way for dispute among this region. After getting independence from British in year 1947, it’s divided into two separate nations, the secular nation ‘India’ and simultaneously

¹³²⁴Indian Army's covert operations/ 'surgical strikes' available at <http://indpaedia.com/>, 13.10.2016, 9:03pm.

¹³²⁵Ibid



Muslim Nation Pakistan.¹³²⁶ In 1940, there was a Muslim dominated area of British India in hope to create Pakistan as sovereign Muslim state. The state of Jammu and Kashmir bordered between India and Pakistan. On October 20, 1947, supported by many tribes, then Maharaja Hair Singh the king of Jammu and Kashmir approached Dominion of India for military help to protect Jammu and Kashmir from the crisis “Instrument of Accession”¹³²⁷ duly signed by him. The operation as follows;

It is further specified that: “I accept the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make law for this State”.¹³²⁸

On November 17, 1957, the instrument of accession confirmed by constituent assembly. Sec. 3 of the Indian constitution “the state of Jammu and Kashmir is considered to be the integral part of Union of India.”¹³²⁹ After the death of Jawaharlal Nehru in the year 1964, India in its weaker times, Pakistan tried to attack Indian army to capture Jammu and Kashmir from April to September in 1965. In the year 1971,¹³³⁰ a new nation Bangladesh was formed. Again, a great destruction of property and loss of

life i.e. the fourth war India won the 1999 argil against Pakistan.¹³³¹

CAUSATIVE AGENT:

There are many reasons for the conflict between India and Pakistan, the agent as follows as:

1. Two nation theory:
The principle of two nation theory, i.e. Pakistan (consist of East and west Pakistan) and partition of India in 1947. The ideology of the religion is that determining factor in defining the nationality of Indian Muslim was undertaken by Mohammed Ali Jinnah, who termed it has the awakening of Muslim for the creation of Pakistan. It clearly understood that India in means of secularism where as the Pakistan movement pluralist.
2. Instrument of accession:
Maharaja Hair Singh ruler of Jammu and Kashmir seeks help from Indian army and instrument of accession was signed by constituent assembly.¹³³² Article 370 of Indian constitution drafted special provision to Jammu and Kashmir.¹³³³
3. 1947 – partition
The British partitioned and gave independence of the new domain India and

¹³²⁶Ambedkar, B.R. (1946). Pakistan, or Partition of India (2 ed.). AMS Press Inc. p. 5. ISBN 978-0-404-54801-8.

¹³²⁷ Unspecified author (6 November 2008). "Q&A: Kashmir dispute". BBC News – South Asia. BBC. Retrieved 30 October 2011.

¹³²⁸ Justice A. S. Anand, *The Constitution of Jammu & Kashmir*, page 67(5th edition, 2006).

¹³²⁹ Ibid. pg67.

¹³³⁰*Time*. 20 December 1971. Retrieved 20 October 2009

¹³³¹ V. P. Malik, "Kargil War: Need to learn strategic lessons", *India Tribune*, 26 July 2011.

¹³³² Rajiv Malhotra, The Root of India-Pakistan Conflicts available at <http://rajivmalhotra.com/library/articles/root-india-pakistan-conflicts/> 12.10.2016, 4:45pm.

¹³³³Sumit Ganguly, “Conflict unending: India-Pakistan tensions since 1947”(2001),page 154



Pakistan.¹³³⁴ Pakistan precipitated the war a few weeks after the independence by launching a tribal lascar from Waziristan, in effort to secure Kashmir.

4. War of 1971

A new nation Bangladesh was formed in the year 1971 on 16th December in Dhaka.¹³³⁵ Indian, Bangladeshi and international sources considered the beginning of war to have been operation Cheiz Khan, when Pakistan pre-emptive air strikes.¹³³⁶

5. War of 1999

Objective of war to destroy the supply of line in India which connects Nhl, Nhl connects main India to Ladakh and Kashmir, the highway was in a very tragic situation in war.¹³³⁷ India won the war, and developed grater support in international community.¹³³⁸

PRESENT SCENARIO:

In consonance with its Kashmir policy and use of terror as an instrument of state policy, Pakistan backed terrorists owing allegiance to the Jaish-e-Mohammed attacked an army installation in Kashmir inflicting heavy casualties. The Indian state's intransigence has only emboldened Pakistan to devise new ways of bleeding India.

On 18th September (Sunday) 2016, a group of four heavily armed fedayeen attackers belonging to the Masood Azhar-led Jaish-e-Mohammed (JeM) attacked at the headquarters of the 12 Infantry Brigade at Uri. Uri is a town on the river Jhelum located in Baramulla district of Jammu and Kashmir. In this attack the JeM killed 17 army personnel belonging to the 10 Dogra and 6 Bihar Regiments. After a fierce gunfight lasting more than three hours all the four attackers were neutralized.¹³³⁹ Some of the items had Pakistani markings.¹³⁴⁰

Pakistan rejected any claims of casualties or other damage inflicted as a direct result of the surgical strikes. General Ranbir Singh, the Indian Army DGMO, only stated during his press conference on 29 September that the number of casualties inflicted had been "significant." Most accounts in the Indian media varied as to the number of militants killed. On October 9, the Indian army said that it had intercepted radio messages of the Pakistan army and claimed that "around 20" Lashkar-e-Taiba militants had been killed, including at least 10 during the surgical strikes and nine [clarification needed] killed at Balnoi (opposite of Poonch).¹³⁴¹

Afghan desk officers in mid-2010 — effectively putting an end to any hope of tit-for-tat strike.¹³⁴²

¹³³⁴ Justice A. S. Anand, *The Constitution of Jammu & Kashmir* (5th edition, 2006), page 67

¹³³⁵ "1971: Pakistan intensifies air raids on India". *BBC News*. 3 December 1971. Retrieved 20 October 2009.

¹³³⁶ "Indo-Pakistani War of 1971". *Global Security*. Retrieved 20 October 2009.

¹³³⁷ "Pak quietly names 453 men killed in Kargil war". *18 November 2010*. Retrieved 6 April 2013.

¹³³⁸ "Over 4,000 soldiers killed in Kargil: Sharif". *The Hindu*. Retrieved 17 January 2013.

¹³³⁹ Kumar, Uri Attak India Responds available at theloneranger.blogspot.in/2016_09_01_archive.html, 13.10.2016, 8:30pm.

¹³⁴⁰ *Ibid*.

¹³⁴¹ Indian Army's covert operations/ 'surgical strikes' available at <http://indpaedia.com/>, 13.10.2016, 9:03pm.

¹³⁴² Uri Attack - Pakistan's Ongoing War Against India, available at <http://kumar-theloneranger.blogspot.in>, 13.10.2016, 9:30pm.



International Dispute Settlement Mechanism:

The methods of peaceful settlement of disputes fall into three categories: diplomatic, adjudicative, and institutional methods.¹³⁴³ Pakistan agreed to simultaneous demilitarization but India chose to ignore it by raising moral and legal issues about the plan. Without India's support the initiative failed.

A legal solution based on **arbitration** was possible in 1957 when UNSC reaffirmed its earlier resolution that require the plebiscite. Gunnar Jarring was appointed by UN to mediator between India and Pakistan. He tried to secure an agreement between India and Pakistan but India again rejected it.

Rejection of Mediation: Despite the various conflict resolution prototype and formulas, there have been numerous mediation attempts in the life of the Kashmir conflict, resulting in ceasefires. India resists the third party involvement and prefers to resolve the Kashmir dispute bilaterally and not under the aegis of any international organization.

Both bilateral negotiation and mediation have been proven almost completely unsuccessful in creating lasting joint understandings between India and Pakistan over Kashmir.¹³⁴⁴

REMEDY AND ITS ISSUE:

The process for achieving peace is divided in five phases.

¹³⁴³ibid

¹³⁴⁴ Right to self-determination only solution to Kashmir dispute available at <http://kashmirvalley.info/un-resolutions/>, 15.10.2016, 11:00am.

Phase 1: Preparing the Ground

In the first phase the ground has to be prepared which will be done by declaring by the Governments of India and Pakistan their commitment to resolve all conflicts and issues – including the Kashmir problem through peaceful negotiations. Both have to accept the Line of Control (LOC) till the negotiations are concluded. Very important is that both sides should stop hostile propaganda in the government owned media. In each news in the Pakistan TV a big part is reserved for the Kashmir item. As it is “normal” with news only negative aspects of this conflict are given. The efforts made by different organizations to solve the Kashmir conflict are not brought into notice of the media audience. All leaders of various Kashmiri groups on both side of the LoC, representing different ethnical, religious and political groups should initiate a dialogue about their views on the future of Kashmir at a feasible time and location.

Phase 2: Initial Official Contact

In the second phase the official contacts have to be initiated by the two foreign secretaries or the foreign ministers to discuss modalities of official and periodical dialogue, which should happen at least once every few weeks irrespective of the state of bilateral relations.

Phase 3: Official Dialogue

It was thought that on the lines of the talks conducted in Islamabad/New Delhi in October/November 1998 should be launched with two components. First component should discuss Kashmir and peace and security issues; the second component other issues. Both sides should commit that at least thrice per year such talks should take



place – as it was done 1990. There should be a commitment for the renunciation of violence, support for terrorism and firing across the LoC.

Phase 4: Groundwork for Political Breakthrough

Once adequate progress is made on all fronts in the official dialogue, the Heads of Government should appoint special envoys to prepare for a summit meeting. These Heads should open dialogue with the main opposition parties and groups in their respective countries.

Phase 5: Summit Meeting

Once the preparations are made the Heads of Government of India and Pakistan should meet. They should specifically explore a political solution to all outstanding conflicts, in particular Jammu and Kashmir, and work out a compromise solution in the interest of the security of India and Pakistan and honor and justice for the Kashmiri people.

SUGGESSTION

High precision surgical strikes across the Line of Control (LoC) targeting the enemy's logistics and infrastructure. This may result in a certain degree of escalation, which is only to be expected. Air-strikes on Pakistani bases responsible for aiding infiltration of terrorists and Pakistani irregulars. In order to explore the possibility of countering Pak-sponsored and backed terror, Indian security agencies must start developing covert action capabilities in Pakistan and elsewhere to effectively strike at Pakistani interests. Options such as covert action cannot be discussed in great detail in blogs and news studios given the. Normal trade and bus and

train services between India and Pakistan may also be suspended. This action would be more cosmetic and symbolic. It must be reiterated that should India fail to act 'decisively' **meaning** thereby using the hard power options, India as a state would have failed in discharging its primary role, namely, of protecting and defending its territorial integrity and sovereignty and the international community will cease to take India seriously as a dominant power.

CONCLUSION

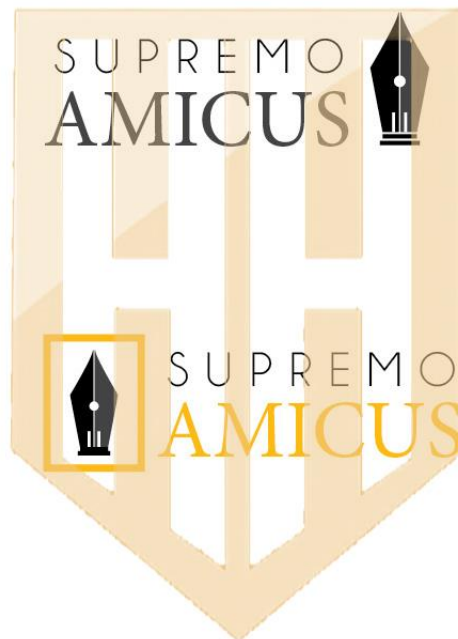
It is apparent that India and Pakistan have consistently and shamelessly violated international law in the Kashmir region. Despite these rather apparent violations, both India and Pakistan have emphasized the legal and normative dimensions of their claims to Kashmir. It appears equally evident that lofty arguments on the right of self-determination and state sovereignty are merely subterfuges for India's and Pakistan's selfish regional interests. From India's and Pakistan's actions, we may conclude that in this case international law has had a minimal impact on the regulation of state behavior. It may be that this situation is simply too inextricably linked to national security and too packed with cultural and emotional baggage for international law to have a significant impact on state behavior.

Clearly then, no international legal solution can be imposed on either India or Pakistan. Kargil demonstrated that another possible route, a military solution, would be wrought with immense dangers and would result in unacceptable levels of damage to both nations; a military solution, like any



international legal solution, is therefore also unlikely.

Unfortunately, given the historical enmity with which both nations view each other, and the central place that Kashmir holds in that rivalry, any political solution on Kashmir will materialize at only an excruciatingly slow pace, if at all.





MARITAL RAPE: UNDERSTANDING THE PLIGHT OF THE MARRIED WOMEN

By Sagnik Sarkar

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Abstract

Marital rape is one of the most common forms of violence done on women, but ironically no law exists to have them safeguard against such heinous crime. Thus type of crime goes unnoticed and unreported because so many societal customs, norms and taboos which undermine the respect of a girl who dares to go in public & takes an unconventional step to report in police. It high time both for the judiciary & legislation change their century old traditional thinking that women are chattel and rightful owner of first father then husband and marriage gives them unrestricted right to have sex without her consent to adopt a rational thinking that consent is very important aspect for sexual intercourse and if done without her consent then it's a crime.

Also law-makers should take into account that is rape by a stranger is a very serious crime, then rape by a person whom you have to live with for long time is more mentally frustrating and it's more serious offense. Though the judiciary has taken step in making marital rape for spouse whose age is less than 15 years of age is illegal, still judiciary should understand that rape is such an offense that it doesn't matter if the wife is

age of 18 or of age 30, its still mentally, physically and emotionally stressful.

Its high time for India to change its legislation so that its laws are as per to that of CEDAW which explicitly makes any kind of rape illegal & of which India is signatory. The whole world is moving towards protection of women & it will be shame if India lacks behind it.

Marital Rape: Understanding the plight of the Married women

“Rape is rape no matter if it had been done under the disguise of marriage or not.”

Introduction

We should absolutely clear the concept that there can be no difference between good rape and bad rape, which most people confuse with the case of marital rape. The recent hue & cry for the pro-marital rape law doesn't provide any special privileges to the married women, instead it safeguard them from different kinds of rape, and makes all rape fall under one category without distinguishing different categories of rape.

Marital rape is often described as an act of sexual intercourse where there is no consent of wife. Marital rape is often a chronic form of violence for the victim which takes place within abusive relations. It basically works on the traditional concept of the marriage, where its accepted that after marriage, husband has the full right of sex with or without the consent of the wife, and wife has to get on board with it even if she is not feeling well or don't have the mood for it.

Marital rape alone are not the factors or the



elements which affect the plight of the victims of the marital rape, there is societal norms, customs and taboos which plays a big role in making those victims silent and silently making them accept that fact that those conditions are regular things.

There is quite some hesitation in criminalizing and prosecuting marital rape which has been attributed to traditional views of marriage, interpretations of religious doctrines, ideas about male and female sexuality, and to cultural expectations of subordination of a wife to her husband views which continue to be common in many parts of the world. But gradually with the advent of second wave feminism and change in the way of thinking many European countries have started to change their laws criminalizing marital rape. In our society there exist three different types of marital rape, which are as follows¹³⁴⁵:-

1. **Battering Rape**: -in this case, women in their marital relationship are battered during the sexual violence act and on the other hand they have to face the physical violence after the rape. Majority of marital rape victims fall under this category
2. **Force only Rape**: -in it only that amount of force is used by the husband of the wife which is necessary to coerce them into the sexual intercourse. This type of assault takes place when the wife refuses to have sexual intercourse.
3. **Obsessive Rape**: -In this type, torture and perverse sexual acts takes place which are physically abusive.

¹³⁴⁵ R. Thornhill & N. Thornhill, 'The Evolution of Psychological Pain' in Bell, R. & Bell, N. (eds) *Sociology and Social Science* (Texas Tech University Press, 1989).

historical background

The origin of the concept that marriage gives free leeway in having sex with one's spouse without one's consent¹³⁴⁶ was propounded by Sir Mathew Hale, in his book "History Of the Pleas of the Crown" where he wrote that *the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract*. The same was followed in American English law, which used to consider that after marriage a woman's legal rights were subsumed by those of her husband meaning that one's married spouse can no longer be charged with raping one's wife, this would be no difference than raping oneself¹³⁴⁷.

The view propounded by Sir Hale was changed in case of **R vs Clarence**¹³⁴⁸ where the concept of marital rape was discussed for the first time in English court. In that case, even though the defendant was acquitted, of the rape charges, even then the case served as an important precedent for wives to save themselves from marital rape as opposed to sir hale statement¹³⁴⁹.

¹³⁴⁶ Jonathan Herring, "Family Law: A Very Short Introduction" (1st edn, oxford 2014).

¹³⁴⁷ Michelle J Anderson, 'Marital Rape Laws Globally' in Kersti Yllö and M.G. Torres (eds), *Marital Rape: Consent, Marriage and Social Change in Global Context* (Oxford University Press, 2016).

¹³⁴⁸ R vs. Clarence, 5 (1888) 22 QBD 23.

¹³⁴⁹ Arima Pankaj, 'Independent Thought vs. Union of India: An evaluation of the judgement and its repercussion in the field of marital laws.' (2017) 22 IOSR- JHSS <<http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2022%20Issue11/Version->



After that case, another landmark case was **R vs. R**¹³⁵⁰ it was held that exemption provide to husband regarding marital rape was illogical and that “the fiction of implied consent had no useful purpose to serve today in the law of rape”. As a consequence R appeal was dismissed and was convicted of rape. This case was the beginning of criminalization of marital rape in England.

In the US case of **People vs. Liberta**¹³⁵¹, same stand as that of England after the case of R vs. R was taken where it was decided by the New York Court of Appeals that, “a state arguably has no interest in protecting marital privacy or promoting marital reconciliation where a marriage involves domestic violence and where the marriage has decayed to a point where the sexual relations of the spouses are no longer consensual and sexual abuse has occurred”. It provided following observation¹³⁵²:-

1. Marital privacy is meant to provide privacy of acts that both husband and wife find agreeable; it is not meant to shield abuse.
2. Many crimes without witnesses are hard to prove, yet this is no reason for making a crime “unprosecutable”.
3. Labelling all wives as potentially vindictive is a poor stereotype backed by no evidence.

The People vs. Liberta case provided a precedent for the case of **Kirchberg v. Feenstra**¹³⁵³, in which it was held that law which gave sole control of marital property to the husband is unconstitutional, thus ending the long battle of marital rape.

The concept that marriage is the exception of the rape comes from the fact that traditionally the marriage is considered as an institution where a husband has the control over his spouse life, her sexuality, she was actually considered as an chattel so when an offence of adultery is committed its not to safeguard the interest of the women but that since women is considered a property it’s an invasion of property. In 1707, English Chief Justice **John Holt** described the act of adultery as “the highest invasion of the property”¹³⁵⁴. So rape was considered as the crime against the crime against the property of father or husband not against the women’s dignity.

Historically, the generic term for “rape” came from the word “Raptus” which imply violent theft applied to both property and person. It was synonymous with abduction and women’s sexual molestation was considered to be theft as she was considered a property of father or husband, so it was theft against the guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries¹³⁵⁵.

[4/L2211047985.pdf](#)> accessed on 20 December 2017.

¹³⁵⁰R vs. R, (1992) 94Cr App R 216.

¹³⁵¹People vs. Liberta, 90 A.D.2d 681 (1982).

¹³⁵²SamparnaTripathy, ‘Marital Rape, and Not Its Criminalisation, Debases Society’ (*The Wire*, 5 September 2017)<<https://thewire.in/173906/marital-rape-and-not-its-criminalisation-debases-society/>> accessed on 30 December 2017.

¹³⁵³Kirchberg v. Feenstra, 450 U.S. 455 (1981)

¹³⁵⁴ Sameul H Pilsbury, ‘Judging Evil: Rethinking the Law of Murder and Manslaughter’ (rev. edn, NYU) 2000.

¹³⁵⁵ Priyanka Rath, ‘Marital Rape and Indian Scenario’ (2009) 2 ILJ.



Usually it was considered that marital rape was very uncommon and that it was just a rumour, but the statistics points to other direction. Approximately every 6 hours a young married woman is burnt or beaten to death, or driven to suicide from emotional abuse by her husband. The UN Population Fund states that more than 2/3rds of married women in India, aged between 15 to 49 have been beaten, raped or forced to provide sex. In 2005, 6787 cases were recorded of women murdered by their husbands or their husbands' families. 56% of Indian women believed occasional wife-beating to be justified.

According to the National Family Health Survey 2005-06, almost one in ten married women (aged 15-49 years) in India reported to have been forced to have sex by their husbands against their will. Out of 9% of the women who reported sexual assault, 94% suffered it at the hands of their husbands.

legal aspect

The concept that marital was providing an exception to the act of rape was widely criticized as an inconsistent concept of human rights and dignity. With the constant effort from feminists since 1960 to overturn the marital rape exception and criminalizing the same¹³⁵⁶ as criminalizing the same would be reclassifying the sexual crimes “from offenses against morality, the family, good customs, honour, or chastity to offenses against liberty, self-determination, or physical integrity”¹³⁵⁷ and the same was

¹³⁵⁶ Jill Elaine Hasday, ‘Contest and Consent: A Legal History of Marital Rape’ [2000] CLR.

¹³⁵⁷ David John Frank & others, ‘Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005’ [2010] ACR.

achieved on December 1963, when the UNHRC published the “*Declaration on the Elimination of Violence Against Women*”, where the marital rape was considered as an violation of human right.

Despite the attempts made by the international organisation most of the countries still doesn't have the sound legislation to protect women form marital rape. Determining the criminal status of marital rape may be challenging, because, while some countries explicitly criminalize the act, the most apt example would be Namibia, which had a legislation to deals with marital rape called 'The Combating Rape Act' which states that "No marriage or other relationship shall constitute a defence to a charge of rape under this Act" conversely countries which explicitly exempt spouses from the charge of it, like for example South Sudan, where its rape law Article 247 states that “Sexual intercourse by a married couple is not rape, within the meaning of this section”.

In many countries the ordinary rape laws are silent on the issue that is, they do not address the issue one way or another in such cases, in order to determine whether marital rape is covered by the ordinary rape laws it must be analysed whether there are judicial decisions in this respect and former definitions of the law are also important.

In 2006, the UN Secretary – general in-depth study on all forms of violence against women stated that- “*Marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 do not exempt marital rape from general rape provisions. Marital rape is not a*



prosecutable offence in at least 53 States. Four States criminalize marital rape only when the spouses are judicially separated. Four States are considering legislation that would allow marital rape to be prosecuted".¹³⁵⁸

After the protest from different feminist and international women's organisation, many countries have change their rape laws and included a new clause which deals with, marital rape. As many as 18 American states, 3 Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia has done away with the traditional concept and made marital rape strictly illegal.

South Africa has removed the earlier exemption provided to husbands with regard to marital rape. In section 5 of The Family Violence Act 1993, it states that "Notwithstanding anything to the contrary contained in any law or in common law; a husband may be convicted of rape of his wife", thus making marital rape illegal in the country.¹³⁵⁹

Similarly **Australia**, under Section 73(4) of the Criminal Law Consolidation Act, 1953 "No person shall, by reason of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.

¹³⁵⁸ *Ending violence against women*, (united nation publication 2006)

¹³⁵⁹ Udisha Ghosh, 'Marital Rape: The Need for Criminalisation in India' [2015]

ACADEMIKE <<https://www.lawctopus.com/academic/marital-rape-need-criminalisation-india/>>

accessed on 30 December 2017.

In **Indonesia**, in cases of marital rape, a time limit of 3 months is given for filing the complaint within which the case will terminate if the survivor or his/her family withdraws the complaint. Since of the victim being socially blamed for the crime, it is the women who withdraw their cases generally. That leads to setting the criminal free.

In **Lesotho**, marital rape is only explicitly criminalized if the parties are separated and there are no provisions of violence committed by men against their wives.

legal aspect in India

The current position on marital rape in India states that there can be no rape in the institution of marriage. Despite the fact that international organisations like UNHRC and different European countries have change their stand on the same issue. So basically it states that at their event of marriage there is no law in India to protect the rights and dignity of a women from any sexual abusive from the husband. Women has either of the two choices as of present, either silent accept the abusive as part and parcel of marriage or apply for divorce.

Our criminal law is basically governed by century old Indian Penal Code (IPC) which was made by the British at the time when the idea was popular that women were chattel of father and husband. So as per section 375 of IPC¹³⁶⁰ there is an exception clause in the act of rape which states that. "*Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape*". And section 376 provides

¹³⁶⁰ Indian Penal Code 1860, s 375.



for the punishment of rape which states that, *“Rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.”*

Even in the case of sexual assault section 354¹³⁶¹, the protection to marital rape is based on very narrow view. It states that rape within marriage stands only if the wife be less than 12 years of age, if she between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife.

The traditional definition of rape as per section 375 has to be modified with the passage of time, as situation demands it. Traditionally rape is only considered when there is penal penetration, but now not just penal penetration but also threatening, forceful coercive use of force against the victim, or the penetration by any foreign object, however slight. Also different types of offenses have to be included in the definition of rape which includes oral sex, sodomy. Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

The importance of consent of women in any sexual activity cannot be over emphasized. It was and is general thinking that woman can protect ones right to life and liberty but when it comes to marriage then woman has no right over her body, it becomes the property of the husband, so if women has no right over her body, how she is able to ensure that her right to life and liberty not restricted? It is in itself an irony. The only recourse a spouse has against any assault from her husband is section 498-A, which deals to protect against the perverse sexual conduct by the husband.

Another hurdle in prosecuting cases of marital rape is that due to section 122 of Indian Evidence act¹³⁶² which prevents the communication in marriage to be disclosed in court except in cases when one spouse is being prosecuted for the offences of another. Now marital rape is not an offense, so whatever happens in marriage can't be prosecuted even if relevant evidence can be produced. So prosecution of marital rape combining the provisions of IPC and evidence act becomes nearly an impossible task.

172nd law commission report has made some recommendation for substantial change in the law of rape¹³⁶³:-

1. Rape' should be replaced by the term 'sexual assault'.
2. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

¹³⁶¹ Indian Penal Code 1860, s 354.

¹³⁶² Indian Evidence Act 1872, s 122.

¹³⁶³ Ibid 4.



3. In the light of *Sakshi v. Union of India and Others*¹³⁶⁴ ‘sexual assault on any part of the body should be construed as rape.
4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
5. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.
6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.
8. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

The National Charter for Children¹³⁶⁵ 2003 was notified on 9th February, 2004. Clause 11 reads: “The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.”

Even in Justice Verma Committee report, it stated that exception under section 375 of IPC should be repealed immediately. It even said to widen the scope of section 498A of IPC which deals with only mental & physical

abuses, and recommended that it should also include sexual abuses, as most of the time it goes unpunished.

For the protection of children against any sexual abuses, in Juvenile Justice (Care and Protection) of Children Act, 2015, states that, “a child who is at imminent risk of marriage before attaining the age of marriage and whose parent’s family members, guardian and any other person are likely to be responsible for solemnization of such marriage”.

It’s often argued that the proving and prosecution of marital rape is difficult, but that doesn’t mean that it can be used as an excuse to ignore a crime. If that’s the logic then sexual harassment in workplace is difficult to prove, even then there is law against it.

First and foremost thing to analyse whether there was any marital rape would to look for any historical domestic violence and physical assault was done by the husband to wife. Again argument is given that lack of forensic evidence could be hurdle in criminalising marital rape, for that matter, SC in the case of Zakir vs. State of Bihar¹³⁶⁵, held that absence of medical records would not be of much consequence if the other evidence on record is believable. Few basic evidences will be enough to prosecute under marital rape are¹³⁶⁶:-

¹³⁶⁴Sakshi v. Union of India and Others, AIR 2004(5) SCC 518.

¹³⁶⁵Zakir vs. State of Bihar, 1983 AIR 911.

¹³⁶⁶Ramanathan S., ‘Justice, misuse and proof: Why the legal debate on marital rape is wrongly set up’ [2016] The News minute
<https://www.thenewsminute.com/article/justice->



1. A history of physical violence
2. Result of rape-kit
3. Medical examination of the wife
4. Witness testimony

recent development

Recently in Independent Thought case¹³⁶⁷, SC gave a landmark judgement in which it stated that an act of rape under to one's spouse who is under age of 18 years of age will be considered as marital rape. Thus Supreme Court of India altered the exception 2 of Section 375 of IPC which now stands thus altered, "Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape".

Independent Thought, an NGO in a petition in 2013 challenged exception 2 which states that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. Here lies the discrepancy, first the law states that if a man has sexual intercourse with a girl under the age of 18 will be prosecuted for statutory rape under POSCO Act, on the other hand if a man has sexual intercourse with his wife whose age is under 28 but above 15 then it shall not fall under rape. So a girl above age of 15 will have protection from rape till the time she becomes someone's wife then there is no law to protect her¹³⁶⁸.

So girls between the ages of 15 to 18 fall under a legal vacuum who are unprotected

by law from intrusive sexual intercourse. So basically IPC divides the girls under the age of 18 into two categories: - those who are married and those who are not. Any logically also girl under the age of 18 years don't have the emotional, physical or mental maturity to understand and have informed decision regarding sexual intercourse.

Thus taking into the account of the following discrepancies, SC declared exemption to marital rape unconstitutional giving following ground¹³⁶⁹:

1. Supreme Court considered that since India is signatory to international instruments such as the Convention on the Rights of the Child (CRC) & CEDAW, so having exemption in marital rape making legitimized the practice of child marriage is contravention of the obligations imposed by these instruments. Article 16.2 of the CEDAW states "*that the betrothal and the marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory*".
2. Exception was found to be derogatory of Article 14 and 21, and therefore, unconstitutional.
3. It was observed that the exemption was inconsistent with other laws in force, and also created internal contradictions within

[misuse-and-proof-why-legal-debate-marital-rape-wrongly-set-40468](#)> accessed on 2 January 2018.

¹³⁶⁷Independent Thought v. Union of India, W.P. (Civil) No. 382 of 2013.

¹³⁶⁸Deya Bhattacharya, 'SC says marital rape can't be considered criminal: Tradition doesn't justify assault, child marriage' *FirstPost*(India, 11 October 2017).

¹³⁶⁹Shraddha Chaudhary, 'INDEPENDENT THOUGHT V. UNION OF INDIA AND THE UNCONSTITUTIONALITY OF MARITAL RAPE' [2017] SGR <<http://www.sociolegalreview.com/independent-thought-v-union-of-india-and-the-unconstitutionality-of-marital-rape/>> accessed on 28 December 2017.



the IPC. In 2013 Criminal law (Amendment) Act 2013 examined the present circumstances and increased the age of consent for sexual intercourse by girls from 16 to 18 years. Exception 2, however, still contains the age of consent for a married girl as 15 years.

Though this judgement will save the teenage girl from the abuses of her spouse, but SC explicitly stated in the judgement that this decision will not be applicable to marital rape of an adult women. Court stated that, *“We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally”*. It further said that *“Parliament has extensively debated the issue of marital rape and considered that it was not an offence of rape. Therefore, it cannot be considered as a criminal offence”*.

Though in **Protection of women from Domestic violence Act 2005**, offers victims of marital rape to get civil remedies. It's quite unsatisfactorily that heinous crime like rape is seen as civil wrong rather than criminal wrong¹³⁷⁰.

consequences of marital rape

It doesn't matter whether it's the adult women or a teenage girl cause both of suffer from psychologically, Emotionally, physically, mentally & emotionally & it

makes there life quite hard and there health degrades on a continuous basis. Most of the victims of marital rape victims have to live drastic consequences:-

1. Anxiety, depression and stress leading to suicide.
2. A number of bodily injuries to vaginal areas including bruising.
3. Miscarriage, bladder infections, STDs and infertility.
4. Long lasting effects like insomnia, eating disorders, sexual dysfunction, and negative self-image

Furthermore, marital rape is, more emotionally & physically damaging than rape by a stranger, cause in latter one it's a typically one-time event and woman knows she has recourse, but in the former case the rape takes place with a long time sexual partner and the relationship affects the victim's reactions. Most of the times marital rape occurs as a part of abusive relations and the trauma from rape add to the effects of abusive relationship & it has a serious long term consequences for victim¹³⁷¹.

Moreover, in other forms of rape, victim has the opportunity of never interacting with the rapist, but in marital rape they have to interact in daily basis and above it they have to live with them, which increase the stress level. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him.

recommendations

¹³⁷⁰Peter Foster, 'India outlaws wife-beating and marital rape' *The Telegraph* (India 27 October 2006) <<http://www.telegraph.co.uk/news/worldnews/1532567/India-outlaws-wife-beating-and-marital-rape>> accessed on 3 January 2018.

¹³⁷¹Hidden Hurt, 'Marital Rape' <http://www.hiddenhurt.co.uk/marital_rape.html> accessed on 2 January 2018.



Rape, whether it's a rape by a Stanger or by a known person or by spouse himself is a rape, whether we accept the reality or not, the crime of rape is increasing in an alarming rate in every part of the world. There needs to be general awareness among men and women about the consequences of rape victims and more helplines needs to be set up so that they can easily be addressed. But most importantly we have make laws which are sufficient, consistent and systematically enforced for the protection of women. Some recommendations are:-

1. Increasing awareness among men & women about the consequences of rape and also to what authorities should they report of they are the victims.
2. Increasing the helpline centres so that proper care can be given.
3. Increasing awareness among school children by promoting sex education & making them learn about good touch and bad touch.
4. There should be strict law which can restrict the perpetrator to reach any type of settlement which can include marrying the victim.
5. Amendment in the IPC section 375 to include the provision of marital rape and exception should be done away with.

that if the girl has consented for marriage then she has automatically given her body and her consented for fulfilling husband's desire for sexual intercourse even without her consent. Sexual consent is the right of every woman whether married or unmarried as that of men. If the sexual intercourse is without consent, these should be penalized regardless of the relationship the perpetrator has with the victim, which even include so called sacrosanct relationship of husband & wife. It should be keep in mind that marriage doesn't only thrive on sex but mutual respect & trust to each other is equally important. In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law. It is important that there should be more awareness among women and capacity building is the need of hour. Societal stigmatization and the chauvinistic attitude of the people should change. Rape is rape and marriage cannot be an excuse for committing such a heinous offence. The first step to stop such an offence is to empower and educate the women to stand up against such inhumane acts and abolish the existing marital rape exemption.

conclusion

Even today, in the 21st century, the idea that marital rape exists becomes very difficult for people to accept and women who speaks against it seems like she has not done her so-called 'wifely duties' towards her husband and frowned up by society. It is believed



CRITICAL ANALYSIS OF PART 2 OF THE PROCEEDS OF CRIME ACT 2002 (OF THE UNITED KINGDOM LEGAL SYSTEM)

By *Saman Idris Hussain*

Introduction

Two reasons have been identified for enforcing forfeiture in Proceeds of Crime Act 2002 (POCA)¹³⁷² - first, risk of prison was not an effective deterrent,¹³⁷³ specially for the drug trafficking dealers.¹³⁷⁴ Second, it was to serve as a mode of “identifying and removing the proceeds of crime” and to stop from being invested further in other illegal activities.¹³⁷⁵ These reasons laid down the ground work for the UK

legislation that ‘crime should not pay’¹³⁷⁶ and people should not make profits from unlawful undertakings.¹³⁷⁷ Part 2 of POCA deals with confiscation of proceeds of crime. The act sends a strong message to deter such activities.¹³⁷⁸ The objects of the regime are-punishment, deterrence, depriving of profits earned from crime to fund further criminal activities.¹³⁷⁹

Confiscation Order

‘Confiscation Order’ is a post-conviction order of the court which focuses on value based¹³⁸⁰ assessment of a ‘benefit’ earned from a criminal activity by the offender. Significantly, it means that these offenders have to pay a debt to the Government.¹³⁸¹ It does not matter if the defendant passed such benefits to co-conspirators or it has been destroyed.¹³⁸² The House of Lords *in R v May*¹³⁸³ clearly set out that the aim of the

¹³⁷² UK Legislations - Drug Trafficking Offences Act 1986; Criminal Justice Act 1988; Criminal Justice Act 1993; Drug Trafficking Act 1994; Proceeds of Crime Act 2002; Referred Roger Bowles, Michael Faure, NunoGarupa, ‘Forfeiture of Illegal Gain: An Economic Perspective’ (2005) 25 (2) Oxford Journal of Legal Studies 275, 280.

¹³⁷³ Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 251.

¹³⁷⁴ Matrix Knowledge Group, *The Illicit Drug Trade in the United Kingdom* (June 2007) Home Office Online Report 20/07 page vii

<<http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs07/rdsolr2007.pdf>> accessed 5 April 2017.

¹³⁷⁵ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 2

<https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

¹³⁷⁶ Comptroller and Auditor General, *Confiscation Orders: Progress Review* (2015-16, HC 886) page 5; Roger Bowles, Michael Faure, NunoGarupa, ‘Forfeiture of Illegal Gain: An Economic Perspective’ (2005) 25 (2) Oxford Journal of Legal Studies 275, 280.

¹³⁷⁷ Peter Alldridge, ‘The Moral Limits of the Crime of Money Laundering’ (2001) 5 (1) Buffalo Criminal Law Review 279, 284.

¹³⁷⁸ *R v Waya* [2012] UKSC 51.

¹³⁷⁹ Home Affairs Committee, *Proceeds of Crime* (2016-17, HC 25) para 66; *R v Rezvi* [2002] 2 Cr App R (S) 70 para [14]; *R v Benjafield*[2001] 1 AC 1099 HL para [8].

¹³⁸⁰ *Stanford International Bank Ltd (In Receivership) Re*, [2010] EWCA Cave 137; [2011] Ch. 33 para [162].

¹³⁸¹ Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 251.

¹³⁸² *Ibid*.

¹³⁸³ [2008] UKHL 28; [2008] 1AC 1028; *Crown Prosecution Service v Jennings* [2008] UKHL 29; [2008] 1 AC 1046.



act is to deprive the defendant¹³⁸⁴ of the 'product of his crime or its equivalent and not operate by way of fine'. This means that it is irrelevant whether the defendant owns the property¹³⁸⁵ alone or jointly with a co-defendant or he has transferred it to another person. In *R v Green*¹³⁸⁶ court summarized its opinion and the purpose of the act in the following words- '*...it does not matter that process sale may have been received by one conspirator who retains his share before passing on the remainder, what matters is the capacity in which he received them.*'

European Convention on Human Rights

UK is a signatory to many treaties by either signing or ratifying them under the United Nations and Council of Europe which have taken significant steps in controlling crimes.¹³⁸⁷ In *R v Waya*,¹³⁸⁸ the defendant had raised an issue that the operation of confiscation regime in some situations may infringe Article 1 of the First Protocol to the European Convention on Human Rights. Basically, the requirement is that a reasonable relationship of proportionality must exist between the resources employed by the state in the confiscation and deprivation of the property which is the legitimate aim of the act. The notorious fact is that the criminals take measures to hide

¹³⁸⁴ Report by the Comptroller and Auditor General, 'Confiscation Orders: Progress Review' Ordered by House of Common, 11 March 2016, HC 886, Session 2015-16 page 5.

¹³⁸⁵ Section 84 (1) (a), (b), (c) of the Proceeds of Crime Act 2002.

¹³⁸⁶ [2008] UKHL 30 paras [45] [46].

¹³⁸⁷ The UM Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1998); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, Strasbourg, 8 November 1990.

¹³⁸⁸ *R v Waya*[2012] UKSC 51.

their proceeds of crime. Therefore, it is essential to implement effective legislation which have fair powers.¹³⁸⁹ Similarly, by the virtue of section 6 of Human Rights Act 1998 the prosecutors are under a duty to act in the way which is compatible with Convention Rights, therefore, as a result of which the Crown has an essential duty to make sure that only a proportionate order is sought.¹³⁹⁰ As a result of which confiscation regime has been consistent in dealing with crime and in no circumstance, has infringed Article 1 of the First Protocol of the European Convention on Human Rights.¹³⁹¹

Making of a Confiscation Order

Under section 6, the confiscation orders can only be made by the Crown Court. Nonetheless it can also be made under a Magistrate's Court but only where the defendant is committed to the Crown Court for an order under section 70.¹³⁹²

Key Requirements Under Section 6 of POCA 2002

Section 6 of POCA lays down key features of confiscation order. These features are mandatory¹³⁹³ in nature -

¹³⁸⁹ *R v Benjafield*[2001] 1 AC 1099 HL; *R v Rezni*[2001] 1 AC 1099 HL.

¹³⁹⁰ *R v Morgan* [2009] 1 Cr App Rep (S) 60. [2002] UKHL 1, [2003] 1 AC 1099.

¹³⁹¹ *Phillips v United Kingdom* (2001) 11 BHRC 280; *R v Rezvi* [2002] 2 Cr App R (S) 70 [17].

¹³⁹² Section 70 Proceeds of Crime Act 2002; (Recommended in *The Report of Commission on Profits of Crime and their Recovery*, Chaired by Sir Derek Hodgson (1984) Cambridge Studies in Criminology; Trevor Millington, Mark Sutherland Williams, *The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture*' (OUP 2003) para 14.07.

¹³⁹³ *R v May* [2008] UKHL 28; [2008] 1AC 1028 [8]; *Crown Prosecution Service v Jennings* [2008] UKHL



1. The defendant must be convicted of an offence before the Crown Court for offences under Section 3,4 or 6 of the Sentencing Act or under Section 70.¹³⁹⁴
2. Either the prosecution or director must request the court to initiate the proceedings or the court must believe that it is appropriate to do so.¹³⁹⁵
3. The court must decide whether the defendant has a criminal lifestyle.¹³⁹⁶ If it decides that the defendant has a criminal lifestyle, then they must calculate the benefit the person has received from the general criminal conduct.¹³⁹⁷ For this purpose, the court will apply section 10 which specifies certain ‘assumptions’. I will deal with this part later in the essay. On the other hand, if the court decides that the defendant does not have a criminal lifestyle then the court must determine the benefit from the particular criminal conduct.¹³⁹⁸
4. The Court must then decide on the recoverable amount that is to be taken from the defendant which has to be in equal proportion to the profits he made from the criminal activity.
5. A proportionate order will be passed by the court¹³⁹⁹ for the recoverable amount unless it has a reason to believe that the defendant is able to prove a lesser amount or the victim initiates civil proceedings.

Criminal Lifestyle Under Section 75

To establish the benefit under general criminal conduct, the court must first decide whether the defendant has a criminal lifestyle or not.¹⁴⁰⁰ The level of implications for the order sought are wide-reaching if it is proved by Section 75 and can include even the first time offenders which is not the object of the Act.¹⁴⁰¹ The affirmative answer in a case gives the “right to a court” to include “all” income and expenditure of the offender from the past six years and his current assets in the confiscation order even though they had no link with the offence.¹⁴⁰²

More importantly, the burden of proof shifts to the defendant to prove his income is the result of legitimate business. This can be problematic if the accounts are insufficient because the courts may then assess the entire

29; [2008] 1 AC 1046; Trevor Millington, Mark Sutherland Williams, *The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture* (OUP 2003) para 15.03.

¹³⁹⁴ Section 6 (2) Proceeds of Crime Act 2002.

¹³⁹⁵ Section 6 (3) (a), (b) Proceeds of Crime Act 2002.

¹³⁹⁶ Section 75 Proceeds of Crime Act 2002.

¹³⁹⁷ Section 75, Schedule 2 of Proceeds of Crime Act 2002; Nicholas Cribb, ‘Tracing and Confiscating the Proceeds of Crime’ (2003) 11(2) Journal of Financial Crime 168.

¹³⁹⁸ Section 76(3) Proceeds of Crime Act 2002; Nicholas Cribb, ‘Tracing and Confiscating the Proceeds of Crime’ (2003) 11(2) Journal of Financial Crime 168; Trevor Millington, Mark Sutherland Williams, *The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture* (OUP 2003) para 14.13.

¹³⁹⁹ In confirmation with Article 1, Protocol 1, ECHR.

¹⁴⁰⁰ Section 6 (4)(a) Proceeds of Crime Act 2002.

¹⁴⁰¹ Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 271.

¹⁴⁰² Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page v <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.



income as criminal benefit.¹⁴⁰³ To speak the truth these broad “assumptions”¹⁴⁰⁴ are the primary reasons which have caused massive implementation problems at enforcement phase.¹⁴⁰⁵ It is not at the discretion of the court to decide whether a defendant has lived a criminal lifestyle but a box-ticking criteria under Section 75(2).¹⁴⁰⁶ A defendant will be deemed to have a criminal lifestyle if he is convicted of an offence under Schedule 2 of POCA (drug trafficking, money laundering, terrorism and other ‘serious’ crimes).¹⁴⁰⁷ Second, defendant has been convicted of multiple offences over a course or obtains the benefit of 5,000 pounds or more. Third, the offender has earned the benefit of 5,000 pounds and has been convicted of an offence over a period of six months.¹⁴⁰⁸ These assumptions were seen as oppressive but the defense of the legislature was that it was necessary to deal with criminals strictly.¹⁴⁰⁹ This reflects strong approach of the provisions but how fair is to

¹⁴⁰³ Ivan Lawrence, ‘Draconian and Manifestly Unjust: How the Confiscation Regime Has Developed’ 76 *Amicus Curiae* 22, 23.

¹⁴⁰⁴ Assumptions are made by virtue of Section 10 Proceeds of Crime Act 2002.

¹⁴⁰⁵ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 5 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

¹⁴⁰⁶ Proceeds of Crime Act 2002.

¹⁴⁰⁷ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 5 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

¹⁴⁰⁸ Section 75 (2)(c) Proceeds of Crime Act 2002.

¹⁴⁰⁹ Janet Ulph, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (OUP 2006) para 4.09.

have such wide-reaching implications is debatable.

Assumptions in Cases of Criminal Lifestyle Under Section 10

Section 10¹⁴¹⁰ creates a single scheme for mandatory rules or assumptions.¹⁴¹¹ The court will make four assumptions to settle the ‘question of benefit and amount of proceeds of general criminal conduct’. If the defendant falls under any of it, he will be declared to have a criminal lifestyle.

This will include – a property transferred to the defendant in a period of six years before his arrest.¹⁴¹² Second, property which is held by him after his conviction which was a result of a criminal conduct.¹⁴¹³ Third, expenditure incurred by him which was the benefit derived from this criminal conduct.¹⁴¹⁴ Fourth, value of the property obtained by the offender was free of interest in it.¹⁴¹⁵ But this section provides “two exceptions” to these assumptions, where the court decides, it will be - *incorrect to apply these assumption and it would cause a serious risk of injustice*.¹⁴¹⁶ Since the enactment of POCA, the defense for exemptions¹⁴¹⁷ has been sought by defendants many times but the courts have

¹⁴¹⁰ Proceeds of Crime Act 2002.

¹⁴¹¹ Trevor Millington, Mark Sutherland Williams, *The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture* (OUP 2003) para 15.34.

¹⁴¹² Section 10 (2) Proceeds of Crime Act 2002.

¹⁴¹³ Section 10 (3) Proceeds of Crime Act 2002.

¹⁴¹⁴ Section 10 (4) Proceeds of Crime Act 2002.

¹⁴¹⁵ Section 10 (5) Proceeds of Crime Act 2002.

¹⁴¹⁶ Section 10 (6)(a), (b) Proceeds of Crime Act 2002; Janet Ulph, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (OUP 2006) para 4.10.

¹⁴¹⁷ Section 10 (6)(a), (b) Proceeds of Crime Act 2002.



been reluctant to grant it. The following cases will help shine a light on the referred point.

In *R v Lunnon*,¹⁴¹⁸ the court held that if a concession was withdrawn, the defendant shall be notified of such a change so 'he can have the option of proving on the balance of probabilities that he was, after all, a first-time offender, or of inviting the court to be satisfied that there would be a serious risk of injustice, for some other reason, if the statutory assumptions were to be applied.' The injustice must relate to the operation of these assumptions and not the consequences of the order.¹⁴¹⁹ These assumptions are rebuttable if a defendant can establish that his income is not the result of criminal conduct¹⁴²⁰ although in practice it may prove to be difficult if one cannot remember the facts or it had happened years ago.¹⁴²¹ The assumptions are rebuttable only if made within the time limit frame. Facts of *R v Lazarus*,¹⁴²² were that the defendant was found guilty of possessing and supplying cocaine. The court ruled that defendant was aware, the Crown was going to rely on the statutory assumption and he had enough time to rebut on the balance of probabilities¹⁴²³ if the money was not earned out of dealing with drugs.

R v Benjafield and R v Rezni,¹⁴²⁴ the court decided the assumptions are rebuttable and as a consequence may not be applied at all, therefore, the right to the fair trial and right to be presumed innocent until proven guilty under Human Rights Act 1998 (Section 6) did not contravene these rights. In *McIntosh v Lord Advocate*¹⁴²⁵ Lord Bingham observed- '... I do not for my part think it unreasonable or oppressive to call on the accused to proffer an explanation. He must show the source of his assets and what he has been living on'.

Assessing Criminal Benefit

After the assessment of the criminal lifestyle the court will then pass a judgement as to decide the criminal benefit calculation.¹⁴²⁶ The decision is based on the assessment of the prosecutor and financial investigator. The meaning of a criminal benefit is the property that is obtained by the offender in connection with the criminal conduct.¹⁴²⁷ The court laid down a three-question test in *R v May*¹⁴²⁸ to calculate the benefit. These questions are- first, has the defendant benefitted from the relevant criminal conduct? Second, the benefit obtained is general or particular? Third, the amount of sum recoverable from the defendant? The court also explained how the

¹⁴¹⁸ [2004] Crim LR 678 CA para [17].

¹⁴¹⁹ Janet Ulph, 'Confiscation Orders, Human Rights and Penal Measures' (2010) 126 LQR 251, 271.

¹⁴²⁰ Section 4 (6) of Proceeds of Crime Act 2002.

¹⁴²¹ *R v Agombar* [2009] EWCA Crim 903; Janet Ulph, 'Confiscation Orders, Human Rights and Penal Measures' (2010) 126 LQR 251, 271.

¹⁴²² [2004] Cr App R (S) 98 CA; [2004] EWCA Crim 2297 para [21].

¹⁴²³ Section 10 Proceeds of Crime Act 2002.

¹⁴²⁴ [2001] 1 AC 1099, HL; See: *Grayson and Barham v UK* (2009) 48 EHRR 30; [2009] Crim LR 200 para [45] [46].

¹⁴²⁵ [2001] 3 WLR 107, 121 [35].

¹⁴²⁶ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 6 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

¹⁴²⁷ Ibid.

¹⁴²⁸ [2008] UKHL 28 [8].



concept of 'benefit' is not to be confused with 'criminal profit'. The court held- '*The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or amounts of payable to co-conspirators.*'

It is indeed important to punish the guilty but result of such confiscation order will put the defendant in a worse economic status than he would be if he did not commit the crime.¹⁴²⁹ This particular rule is unjust and draconian.¹⁴³⁰

In *R v Smith*,¹⁴³¹ the defendant had not paid the duty on imported cigarettes by smuggling them. The court held the order of seizing the cigarettes was a subsequent damage to goods and will not affect the confiscation order. In other words, the pecuniary advantage that was obtained before the subsequent seizure did not affect the previous order. The court upheld the decision in *R v Shabir*,¹⁴³² where the defendant had previously contended that '*he was legally entitled to all the amount except for a tiny sum which was obtained by deception and that was the extent of his benefit pursuant to sections 76 (4) or (5)*'¹⁴³³ and the Crown Court was wrong in passing such an order. Therefore, where there is massive disparity between the confiscation order and defendant's gain through fraud, it

will not be oppressive to pass such an order. Companies and individuals who by way of fraud commit bribery can be at the receiving end of the punitive nature of the confiscation regime. This can be proven with these cases. In *R v Innospec*,¹⁴³⁴ the court held that written notice by the prosecutor to the court to make a confiscation order would give primacy to make one over a fine. If a company is in a position to pay the fine and confiscation order, then there is no problem in paying both. The court concluded that the profits in the present case were not only '*profits derived from the contracts obtained by corruptions but the very contracts themselves.*'¹⁴³⁵ The defendant can be asked to pay the money in full and not just the profit he benefitted from the proceeds of crime when he made it from buying and selling of shares.¹⁴³⁶

In *R v Sale*,¹⁴³⁷ the court relied on *R v Waya* to sort out relevance of proportionality while calculating the benefit of the defendant - '*The costs of production, in wages, equipment and materials supplied were all incurred in an entirely lawful way, albeit in performance of what was an illegally obtained contract. Those costs should properly be brought into account, and the proportionate method of doing that would be to look at the company's gross profit generated*

¹⁴²⁹ Peter Alldridge, 'The Limits of Confiscation' (2011) Criminal Law Review 827, 836.

¹⁴³⁰ Janet Ulph, 'Confiscation Orders, Human Rights and Penal Measures' (2010) 126 LQR 251, 251; Ivan Lawrence, 'Draconian and Manifestly Unjust: How the Confiscation Regime Has Developed' 76 Amicus Curiae 22, 22.

¹⁴³¹ *R v Smith (David Cadman)* [2011] UKHL 28 [28].

¹⁴³² [2009] 1 Cr App Rep 84.

¹⁴³³ Proceeds of Crime Act 2002.

¹⁴³⁴ [2010] Lloyd's Rep. F.C. 462; [2010] Crim. L.R. 665 para [33].

¹⁴³⁵ [2010] Lloyd's Rep. F.C. 462; [2010] Crim. L.R. 665 para [34].

¹⁴³⁶ *R (on the application of Uberoi) v City of Westminster Magistrates Court* [2008] EWHC 3191 (Admin).

¹⁴³⁷ [2013] EWCA Crim 1306 paras [31], [57].



from the illegally obtained contracts.'

Abuse of Process

The application by the court to enforce primary legislation where the defendant has the right to appeal will not result into abuse of process of the court.¹⁴³⁸ This policy is reflected in *R v Nelson, R v Pathak, R v Paulet*,¹⁴³⁹ the court concluded that stay of proceedings would be a suitable remedy for confiscation order but when there is an argument of abuse of process then this argument cannot be based on the result of a proceedings which is in confirmation with the provisions set out in the Act to point out that the result is "oppressive". The jurisdiction must only be exercised with due caution and confined to proceedings to avoid true oppression. In other words, the power should not be used simply because the judge disagrees with the decision of the Crown to pursue confiscation,¹⁴⁴⁰ it should be a well-thought out order.

In *R (On the Application of BERR) v Baden Lowe*,¹⁴⁴¹ the director of the company pleaded guilty for an offence¹⁴⁴² to have transferred the property of the company during its winding up by fraud. The court held that order to recover amount more than the profits of the offender in this case will not lead to abuse of process.¹⁴⁴³ *R v*

Wilkinson,¹⁴⁴⁴ court held that abuse of process has to be based on traditional principles. Hughes LJ stated-

'This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the Judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic. A specific example of that principle is that it is clearly not sufficient to establish oppression, and thus abuse of process, that the effect of confiscation will be to extract from a Defendant a sum greater than his net profit from his crime(s).'

The Court of appeal in *R. v Nield*¹⁴⁴⁵ confirmed that confiscation proceedings that will result in the recovery of more than the sum embezzled are not automatically abusive.

The bottom-line is that only in exceptional cases, the courts will hold a confiscation proceedings to be as an abuse of process but courts have also identified that there is no "closed category of cases".¹⁴⁴⁶ Therefore, where the defendant restored the amount he had benefitted from the crime to the loser, he should not be subjected to a confiscation

¹⁴³⁸*R v Rezvi* [2002] 2 Cr App R (S) 70 para [20].

¹⁴³⁹ [2009] EWCA Crim 1573.

¹⁴⁴⁰*R v Shabir* [2008] EWCA Crim 1809.

¹⁴⁴¹ [2009] 2 Cr App Rep (S) 81.

¹⁴⁴²Section 206(1)(b) Insolvency Act 1986.

¹⁴⁴³*R v Mahmood and Shahin* [2006] 1 Cr App (S) 96 CA (Crim Div); [2009] EWCA Crim 1573; Michael Stockdale, Rebecca Mitchell, 'Confiscation Orders and Abuse of Process; Discretion to Prevent "Double

Whammy" under the Proceeds of Crime Act 2002' 31(2) Company Law 39, 40.

¹⁴⁴⁴ [2009] EWCA Crim 2733 para 24; *DPP v Humphrys* [1977] AC 1.

¹⁴⁴⁵ EWCA Crim 993; Michael Stockdale, Rebecca Mitchell, 'Confiscation Orders and Abuse of Process; Discretion to Prevent "Double Whammy" under the Proceeds of Crime Act 2002' 31(2) Company Law 39, 41.

¹⁴⁴⁶*R v Didier Paulet* [2009] EWCA Crim 288.



order.¹⁴⁴⁷ Otherwise, it would mean an additional financial punishment which would be disproportionate and oppressive.¹⁴⁴⁸ Moreover, section 6(6)¹⁴⁴⁹ converts the power of making an order into a discretionary one where the defendant's benefit would be recovered in civil proceedings.

Effectiveness of the Act - Results in the Recent Years

Current statistics show that 5,924 confiscation orders were made (*in 2014-15*) as compared to 640,000 offenders who were convicted in UK.¹⁴⁵⁰ The cost of administering confiscation orders in the same year was more than £100 million whereas the collection by enforcement agencies was around £155 million.¹⁴⁵¹ To make the matters worse, National Audit Office declared that there was a sum of £1.61 billion debt outstanding from confiscation orders.¹⁴⁵² Therefore, the poor operation of the confiscation order has severely affected its effectiveness.¹⁴⁵³ The number above expose that not enough

confiscation orders are enforced, an ideal balance would be to apply a common set of criteria to ensure enforcement.¹⁴⁵⁴ Other tools that can be used - to develop a better range of cost and performance, more confiscation orders, leadership¹⁴⁵⁵ and training in financial investigations.¹⁴⁵⁶ Truth be told, the law is wide and strict enough to not only deter fraud but to also implicate the ones committing it. Indeed, the implementation of the provisions is an issue that needs to be dealt with but otherwise, the Act is good law in wiping out defrauds. The case of Edward Davenport is a fine example of it. Mr Davenport was declared to have a criminal lifestyle after he was convicted of fraud. The court successfully passed an order against him and recovered the confiscation amount.¹⁴⁵⁷

The real question though is how correct it is to do so? To remove the convicts, these provisions are set so wide that they include almost every offender in the definition of

¹⁴⁴⁷ Michael Stockdale, Rebecca Mitchell, 'Confiscation Orders and Abuse of Process; Discretion to Prevent "Double Whammy" under the Proceeds of Crime Act 2002' 31(2) *Company Law* 39, 45.

¹⁴⁴⁸ *R v Morgan* [2009] 1 Cr App Rep (S) 60.

¹⁴⁴⁹ *Proceeds of Crime Act 2002*.

¹⁴⁵⁰ National Audit Office, *Confiscation Orders: Progress Review*, HC 886, March 2016, page 14.

¹⁴⁵¹ National Audit Office, *Confiscation Orders: Progress Review*, HC 886, March 2016, page 21.

¹⁴⁵² House of Commons, House Affairs Committee: *Proceeds of Crime Fifth Report of Sessions 2016-17* HC 25 paras 74,77; National Audit Office, *Confiscation Orders: Progress Review*, HC 886, March 2016, page 10.

¹⁴⁵³ Committee of Accounts, *Confiscation Orders* (HC 2013-14, 49) HC 942 para 2.

¹⁴⁵⁴ Committee of Accounts, *Confiscation Orders* (HC 2013-14, 49) HC 942 paras 3, 6.

¹⁴⁵⁵ Anthony Kennedy, 'An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom' (2007) Vol 10 (1) *Journal of Money Laundering Control*, 33, 35.

¹⁴⁵⁶ *Ibid*.

¹⁴⁵⁷ Simon Goodley, 'Fraudster Edward Davenport Sells Mansion to Settle £13m Court Orders' *The Guardian* (20 May 2015) <<https://www.theguardian.com/uk-news/2015/may/20/fraudster-edward-davenport-sells-mansion-settle-13m-court-orders>> accessed 20 April 2017; Martin Evans, 'Fraudster Forced to Sell Off "Unique" London Mansion to Pay Legal Bills' *The Telegraph* (29 July 2014)

<<http://www.telegraph.co.uk/finance/property/10994001/Fraudster-forced-to-sell-off-unique-London-mansion-to-pay-legal-bills.html>> accessed 20 April 2017.



‘criminal lifestyle’. My concern is that even the assets which are not earned through illegal means are also covered under it and such an action is not seen as abuse of process as declared in the cases mentioned above.

Conclusion

Justice demands that profits should be taken out of crime and that is the very basis of confiscation orders.¹⁴⁵⁸ Part 2 of the Act does deal with issues of fraud effectively but the recent data reflects stricter appliance of the legal provisions is needed. As far as, the abuse of process is concerned, the idea of law should be to deter the offender and not confiscating all of his incomes, therefore, confiscation orders should not go beyond the benefits received.

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¹⁴⁵⁸ Secretary of State for the Home Department, *Criminal Justice System: The Way Ahead* (Cm 5074, 2001) para 3.214; Referred: Proceeds of Crime Bill (Bill 31 of 2001/02) House of Commons Library Research Paper 01/79.



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RIGHT TO HEALTH

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“HEALTH CARE IS A RIGHT NOT A PRIVILEGE”

ABSTRACT

The Constitution of India has provisions in relation with the right to health. The accountability of the State to safeguard the formation and the sustaining of conditions agreeable to good health is cast by the Constitutional directives incorporated in articles 38, 39 (e) (f), 42, 47 and 48 A in Part IV of the Constitution of India.

Health is often adjudged as a scientific controlled behavior that requires proficiency, knowledge and skill of medicine confined to the medical professionals and scientists but it circumscribes socio-economic and political determinants as well as defined by the WHO. Right to health has been often confined to right to healthcare that has often restricted to the equitable access and availability of healthcare services. This article aims at highlighting the importance of health as a right. The paper aims at reflecting the Indian Judicial approach in correspondence with the decisions of Honorable Supreme Court as well as respective High Courts in India as well as some of the major provisions which are incorporated in the Directive Principles of State Policy of the Indian Constitution.

Health is one of the basic preconditions of human being. Nowadays India is facing complications of deterioration of health. The Constitution of India is supreme law to govern the whole Nation. The condition of health is getting worse day by day in spite of various health schemes and policies. The Supreme Court is performing decent function of elucidation of provisions of Constitution. The framers of Indian Constitution have rightly kept various provisions regarding health of public. Further the role of Indian Supreme Court is significant in protecting health of people at large with the help of various decisions. The compelling implementation of Laws enacted based on Constitutional provisions will control the present problem.

INTRODUCTION

Every State in the present day has its individual Constitution to direct, control and manages its organs correspondence to some primitive rules. The Constitution of India is the law of the land. The constitutional rule governs the correlation between State and its citizens.

The very cause behind Constitutional framework is to accomplish goals set out in its Preamble. The Preamble to the Constitution of India bestows rights on citizens, levy duties on them and issues directives to State to protect the rights of its citizens.

The Constitution of India is the principal law of India. It focuses to establish social, economic and political justice. Among the various rights under Indian Constitution, Right to Health is an essential one.



Development of the nation relies upon the healthy population. The fundamental law of the State safeguards individual rights and encourages national wellbeing. It is the duty of the State to furnish a productive mechanism for the welfare of the public at large.

Health is the most important factor in national instigation. Right to health is an indispensable right in absence of which none can exercise one's basic human rights. The Government is under commitment to ensure the health of the people, as there is close connection between Health and the standard of life of a person.

There are miscellaneous allocations under the Constitution of India which are assigned with the Health of the Public at large. The instigators of the Indian Constitution rightly incorporated Directive principles of State Policy (DPSP) with a perspective to preserve the health of the communal at large. Health is the most cherished, esteemed and highly valued indispensable stipulation for contentment.

HEALTH

If we talk generally, publicly or expansively, the admissible definition of health is that given by the WHO in the preamble of its constitution, according to World Health Organization-“Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease.” In recent years, this statement has been escalated to incorporate the aptness to escort a ‘societal and economical worthwhile life’.

Right to health is not embraced forthwith in as a fundamental right in the Indian Constitution. The Constitution generators

enforce this duty on state to fortify social and economic justice. Part four of Indian constitution which is DPSP promulgates duty on States. If we see those provisions then we can find that some provisions of them are in some or the other manner related with public health. The Constitution of India not impart for the right to health as a fundamental right. The Constitution control and administer the state to take appraise to improve the condition of health care of the people. Thus the preamble to the Constitution of India, attempts to assure for all its citizens justice-social and economic. It illustrates a configuration for the accomplishment of the aspirations laid down in the preamble. The preamble has been splendid and extravagant in the Directive Principles of State policy.

JUDICIAL RESPONSE TOWARDS RIGHT TO HEALTH AND MEDICAL ASSISTANCE-

The Indian judiciary impersonated a vigorous role by riveting and intriguing public interest litigation which gives an opportunity to the judiciary to scrutinize the socio economic and environmental conditions of the suppressed, poor, subdued and unprivileged people through PIL under Article 32 of the Constitution, the Supreme court has coordinated the government to effectuate the fundamental right to life and liberty and executed protection measures in the public interest.

While broadening the purview of Article 21 of the Constitution in *Paschim Bangal Khet Mazdoor Samity & Others V State of West Bengal & Others*¹⁴⁵⁹ held that in a welfare

¹⁴⁵⁹(1996) AIR SC 2426/ (1996) 4 SCC 37



state, foremost duty of the government is to secure the prosperity and well-being of the people and more over it is the responsibility of the government to provide assurance for the adequate medical convenience for its people. The government liberates this accountability by providing medical assistance to the persons seeking to avail those facilities.

Article 21 institute an accountability on the state to protect the right to life of every people's maintenance of human life is thus of predominantly significant. The government hospitals run by the state are duty bound to broaden medical assistance for preventing and securing human life. The court made certain supplementary regulations in respect of serious medical cases-

- Adequate facilities are given at the public health centers where the patient can be given basic treatment, aid and his condition to get stable.
- Hospitals at the district level should be upgraded so that serious cases are treated there.
- Facilities for specialist treatment should be widened and correspondence to the growing needs, it must be made available at the district level hospitals.
- To ensure availability of bed in any emergency at the state level hospitals, there should be a effective centralized communication system so that the patient can be sent instantly to the hospital where bed can be made available in respect of the treatment, which is required.
- Proper arrangement of ambulance should be made for transport of patient from the public health center to the state hospitals

- Ambulance should be adequately provided with necessary equipment and medical aid as well as assistance.

DIRECTIVE PRINCIPLE OF STATE POLICY AND HEALTH

Article 38 of Indian Constitution inflicts responsibility on State that states will procure a social order for the advancement of prosperity, profit and success of the people but without public health we cannot consummate it. It means without public health, well-being of people is paradoxical.

Article 39(e) is in correspondence with workers to inoculate their health.

Article 41 imposed duty on State to public reinforcement essentially for those who are sick and incapacitates.

Article 42 makes contingency to preserve the health of infant and mother by maternity comfort.

In India the Directive Principle of State Policy under the Article 47 evaluates it the fundamental duty of the state to ameliorate public health, strengthen of justice, human condition of works, and extension of sickness, old age, disablement, incapacitates and maternity comforts.

Further, State's duty includes forbidding of dissipation of vinous drinking and drugs are injurious to health. Article 48A ensures that State shall endeavor to preserve and provide the pollution free environment for good health.

Article 47 makes enhancement of public health which is a principle duty of State. Hence, it becomes very necessary for the court that court should enforce this duty



against a defaulting authority on pain of penalty endorse by law, nevertheless of the financial resources of such dominance. The State shall contemplate the raising of the level of nutrition and standard of living of its people and improvement of public health as among its fundamental duties.

The State under Article 47 has to protect poverty stricken people who are consumer of inadequate and imperfect food from injurious effects.

Public Interest Petition for maintenance of authorized standards for drugs in general and for the banning of import, composing, sale and distribution of destructive drugs is maintainable. A healthy body is the very substructure of all human activities. In a welfare State, it is the authoritative responsibility of the State to take proper care for the creation and sustaining of conditions for prosper and good health.

Some other provisions correspondence to health falls in DPSP. The State shall in particular, administer its policy towards securing health of workers. State organized village panchayat and gave such powers and authoritative rules for to function as units of self-government. This Directive Principle has now been translated into action by the 73rd Amendment Act 1992 whereby part IX of the constitution titled “The Panchayats” was incorporated. The Panchayat system has significant indications for the health sector.

Article 41 provides right to assistance in case of sickness and disablement. It deals with “The state shall within the limits of its economic capacity and development, make effective prerequisites for ensuring the right to work, to education and to public assistance in case of unemployment, Old

age, sickness and disablement and in other cases of undeserved want”. Their implications in relation to health are obvious.

Article 42 provides the power to State for implementing provisions for ensuring just and humane conditions to work and for maternity relief and for the conservation of environment same as given by Article 48A and same responsibilities govern to Indian citizen by Article 51A.(g).

CONCLUSION

Health is a most important measure of human development, and human development is the basic part of economic and social development. Indian Constitution does not expressly recognize the fundamental right to health. However, Article 21 of the Constitution of India guarantees a fundamental right to life & Personal Liberty.

The expression ‘life in this article means a life with human dignity, prosperity & not mere survival or animal existence. It has a much wider meaning which includes right to livelihood, better quality of life, hygienic condition in workplace & leisure. The right to health is essential to a life with dignity, and Article 21 should be take in accordance with the Articles 38, 42, 43, &47 to understand the nature of the responsibility of the state in order to safeguard the effective realization of this right.

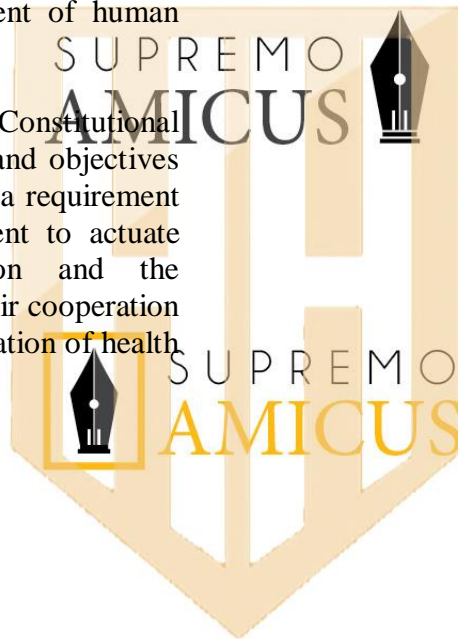
The term Right to health is nowhere mentioned in the constitution yet the Supreme Court has explicated it as a fundamental right under Right to life placed in Article 21. It is a significant view of the Supreme Court that first it interpreted Right



to Health under part IV i.e. Directive Principles of state policy & noted that it is the duty of the state to look after health of the people at large. The court has played momentous role in implementing positive responsibilities as authorities to maintain & develop public Health.

Till today no compelling actions have been taken to discharge the constitutional responsibility upon the state in preservation of the health and firmness of people. It has rightly been said that nutrition, health & education are the three inputs accepted as significant for the development of human resources.

For accomplishing the Constitutional accountability and also aims and objectives of Health care for all there is a requirement on the part of the government to actuate nongovernmental organization and the general communal towards their cooperation for monitoring and implementation of health care facilities.



**VARIOUS ASPECTS OF
DECriminalISING
HOMOSEXUALITY IN INDIA**



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ABSTRACT:

This paper seeks to discuss concept of homosexuality in India. Section 377 of the IPC (Indian Penal Code) is the only law in India that deals with homosexuality. This section makes homosexuals ipso facto criminals and directly violates their privacy, dignity and fundamental rights. Criminalization of homosexuality results in the violation of human rights of LGBT (Lesbian Gay Bisexual and Transgender) community as denying right of same sex marriage to this community leads to discrimination on the grounds of sex. Various conventions and judgments state Privacy is one of the basic rights of human. Unreasonable interference in consensual sexual activities between two adults of the same sex inside the four walls of house violates their Fundamental Rights, particularly right to privacy and a person's choice of sexual accomplice is no business of the State to regulate on. The comparative study with other countries like England and Australia provide a conclusion for the need of modification of section 377 of the IPC in India. Even England, the country on the basis of which laws in India were framed, no longer penalises homosexuality. The need of the hour is decriminalization of homosexuality and modification must be made in regressive section 377 of the IPC as it suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community and violates the constitutional protections provided by the constitution thereby declaring homosexuals as criminals.

INTRODUCTION:

The term homosexuality means “sexual attraction or the tendency to direct sexual desire toward another of the same sex.”¹⁴⁶⁰ It is considered as “Involving or characterized by sexual attraction between people of the same sex.”¹⁴⁶¹

Homosexuality, as a sexual orientation, is defined as "an enduring pattern of or disposition to experience sexual, affectional, or romantic attractions primarily to" people of the same sex, it also refers to an individual's sense of personal and social identity based on those attractions, behaviors expressing them, and membership in a community of others who share them." Homosexuality is not a matter of individual choice. It depends on one's sexual orientation.

Section 377¹⁴⁶² of the IPC (Indian Penal Code, 1860) is the only law in India per se dealing with or somewhat touching the concept of homosexuality. Unlike rape, Section 377 does not talk about ‘force’ and/or ‘coercion’ and hence even consensual sexual intercourse ‘against the order of nature’ is punishable under Section 377. This provision punishes homosexuality ipso facto. Section 377's legislative objective is

¹⁴⁶⁰ Merriam-Webster dictionary

¹⁴⁶¹ The Oxford Dictionary

¹⁴⁶² Unnatural offences.—whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.



based upon stereotypes and misunderstanding that are outmoded and enjoys no historical or logical rationale which render it arbitrary and unreasonable. Section 377 of the IPC dating back to 1860, introduced during the British rule of India, criminalizes sexual activities “against the order of nature”, including homosexual sexual activities. Prior to that, sexual activities, including amongst homosexuals, were not penalized in India. It is a law of the colonial era, that has very successfully distorted the way Indians look at alternate sexuality, has been done away with in its country of origin but it still haunts the sexual minorities in India.

Indian Penal Code was drafted by Lord Macaulay and introduced in 1861 in British India. Section 377 IPC is contained in Chapter XVI of the IPC titled "Of Offences Affecting the Human Body".

In India for the first time question of legality of section 377 criminalising homosexuality was raised in the case of Delhi High Court, *Naz Foundation v. Government of NCT of Delhi (2009)*¹⁴⁶³ where it was declared that Section 377 of the IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21 [Right to Protection of Life and Personal Liberty], 14 [Right to Equality before Law] and 15 [Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth] of the Constitution .

The above judgment brought a hope for LGBT community, but this hope was for only a short period of time as the Supreme

court overturned the above mentioned judgment in *Suresh Kumar Koushal v. Naz Foundation (2013)*¹⁴⁶⁴ case, set aside the Delhi High Court judgment and said that homosexuality or unnatural sex between two consenting adults under Section 377 of IPC is illegal and will continue to be an offense.

RIGHT TO PRIVACY (A FUNDAMENTAL RIGHT) AND DECRIMINALISATION OF HOMOSEXUALITY:

‘Privacy’ is ‘a state in which one is not observed or disturbed by other people.’¹⁴⁶⁵ It is ‘the quality or state of being apart from company or observation.’

The relation between concept of privacy and homosexuality has been raised numerous times while taking about the issue of decriminalisation of homosexuality. For the enforcement of 377, it would be, the police as law enforcement agents of the state to actually catch two men having sex in the privacy of their bedroom or their other private space. Thus, for the enforcement of this section “the reach of the prosecutory powers of the law must go into the sacred sphere of the home”.

Now the question arises why Privacy for citizen especially homosexuals is the need of hour. Firstly, privacy has come to be viewed as central to one’s identity, dignity, sense of self and autonomy. In this view privacy is a pre-requisite for self-development.

Also, an integral part of such individual/decisional autonomy is the ability to make

¹⁴⁶³WP(C) No.7455/2001

¹⁴⁶⁴Civil Appeal No. 10972 of 2013

¹⁴⁶⁵ As per Oxford dictionary



one's own choices, develop and determine one's personality and identity, and have intimacy and meaningful inter-personal relations. At its root, thus, it is the freedom to express one's identity without fear.

Right to privacy has been recognized all around the globe. Some conventions like, Article 12 of the Universal Declaration of Human Rights (1948)¹⁴⁶⁶ and Article 17 of the International Covenant on Civil and Political Rights¹⁴⁶⁷ (to which India is a party) have specifically stated that, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

In the case of *Olmstead v. United States*¹⁴⁶⁸, was a case of wire-tapping or electronic surveillance and where there was no actual physical invasion, Justice Brandeis, stated that the fourth amendment protected the right to privacy which meant "the right to be let alone", and its purpose was "to secure conditions favourable to the pursuit of happiness", while recognising "the significance of man's spiritual nature, of his feelings and intellect: the right sought "to protect Americans in their beliefs, their thoughts, their emotions and their sensations" (page 478). His dissenting

opinion came to be accepted as law 4 decades later.

In the case of *Jane Roe v. Wade*¹⁴⁶⁹, the Court said that although the Constitution of the USA does not explicitly mention any right of privacy, the United States Supreme Court recognised that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

In *Griswold v. Connecticut*¹⁴⁷⁰, the U.S. Supreme Court was cautious to highlight the importance of privacy in the peculiar sphere of marital bedrooms in the context of birth control. In *Lawrence v. Texas*¹⁴⁷¹, when confronted with the question of the legality of certain sexual conduct between persons of the same sex, the court held that no "majoritarian sexual morality" could override legitimate privacy interests.

It was held by Ackermann J. in the case of the National Coalition for Gay and Lesbian Equality v. the Minister of Justice¹⁴⁷², decided by Constitutional Court of South Africa on 9th October, 1998 that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.

¹⁴⁶⁶ No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

¹⁴⁶⁷ individual liberty, in the form of the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the [right to privacy](#)

¹⁴⁶⁸ 277 US 438 (1928)

¹⁴⁶⁹ 410 US 113 (1973)

¹⁴⁷⁰ 381 U.S. 479 (1965)

¹⁴⁷¹ 539 U.S. 558 (2003)

¹⁴⁷² 1998 (12) BCLR 1517 (CC)



The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.

Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Choosing a partner for sexual relations is a vital aspect of individual's life and this right cannot be taken away by state on the grounds of lack of acceptance in Indian society. Intruding with the intimate and personal sphere of home or bedroom of an individual is infringing the right to privacy. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

In *Maneka Gandhi v Union of India*¹⁴⁷³, the Court reiterated that the term 'personal liberty' is of "the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man.", and thus Sexual orientation and sexual activity is a matter of one's privacy.

In the case of Naz Foundation v Government Of Nct Of Delhi (2009) it was held that, 'the sphere of privacy allows person to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem,

build relationships of his or her own choice, and fulfil all legitimate goals that he/she may set. In the Indian Constitution, the right to live with dignity and the right of privacy are recognised as dimensions of Article 21. Section 377 of IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. It was also held that this section infringes rights guaranteed under article 14 and 15 of the Indian constitution and it was stated that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex discrimination cannot be read as applying to gender simpliciter.' However this judgment was overturned later on by the apex court on some unreasonable grounds.

Subsequently in *NALSA v. Union of India*¹⁴⁷⁴, the Court said that the value of privacy is fundamental to those of the transgender community.

Later the SC in its 547-page privacy judgment in the case of *Justice Puttasawmy v Union of India*¹⁴⁷⁵ observed that right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution. The court noted that sexual orientation is an essential attribute of privacy, and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Though these observations made by the SC are obiter dicta, in other words not legally binding, but

¹⁴⁷³1978 AIR 597

¹⁴⁷⁴WP (Civil) No 604 of 2013

¹⁴⁷⁵WRIT PETITION (CIVIL) NO 494 OF 2012



could have a significant impact when the court hears the curative petition challenging Section 377.

Thus, consensual sexual activities between two adults of the same sex should not be regulated by a law as it violates their Fundamental Rights particularly right to privacy and a person's choice of sexual accomplice is no business of the State to regulate on. Otherwise, the draconian laws like Section 377 will be abused to brutalize and torture the persons belonging to the gay community.

HOMOSEXUALITY AND HUMAN RIGHTS:

Homosexuality is considered as the quality or characteristic of being sexually attracted solely to people of one's own sex¹⁴⁷⁶. It is a sexual attraction or tendency to direct sexual desire toward another of the same sex¹⁴⁷⁷. It is never legal to discriminate against lesbian, gay, bisexual, transgender or intersex people. The right to equality and non-discrimination are core principles of human rights, enriched in the United Nations Charter, the Universal Declaration of Human Rights (UDHR) and human rights treaties.

The equality and non-discrimination guarantee provided by international human rights law applies to all people, regardless of sex, sexual orientation and gender identity

or "other status."¹⁴⁷⁸ There is no hidden exemption clause, in any of human treaties that might allow a State to guarantee full rights to some but withhold them from others purely on the basis of sexual orientation and gender identity, it is a very settled principle that each and every one is equal if some rights are available to others than it should be available to each and every one irrespective of their sex. Moreover, United Nations human rights treaty bodies have confirmed that sexual orientation and gender identity are included among prohibited grounds of discrimination under international human rights law. This means it is unlawful to make any distinction of people's rights based on the fact that they are lesbian, gay, bisexual or transgender (LGBT), just as it is unlawful to do so based on skin colour, race, sex, religion or any other status. This position has been confirmed repeatedly in decisions and general guidance issued by several treaty bodies, such as the United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women.

The European Union is at the forefront of fighting for the equality of LGBT; their rights are associated with human rights, which is a fundamental European contribution. According to Article 8 of the European Convention on Human Rights, each individual's privacy is defined as an

¹⁴⁷⁶ Oxford dictionary online, available at <https://en.oxforddictionaries.com/definition/homosexuality>.

¹⁴⁷⁷ Merriam-Webster online, available at <https://www.merriam-webster.com/dictionary/homosexuality>.

¹⁴⁷⁸ Interpretation of the opening words of Universal Declaration of Human Rights which read as "All human beings are born free and equal in dignity and rights."



autonomous zone of liberty, each and every one of us can do in their private life what they want to do, as long as we do not harm anyone else. This way, not only LGBT, but everyone is legally protected from being prosecuted by the state for their preferences, hobbies and other activities that are connected to their private life.

The following international and regional treaties determine standards for the protection of lesbian, gay, bisexual and transgendered persons.

International Covenant on Civil and Political Rights (1996) (article 2 and 26):

For sexual orientation the Covenant –the main international treaty on civil and political rights– is important because in 1994, in the case *Toonen vs. Australia*, the Human Rights Committee held that the references to “sex” in Articles 2, paragraph 1, (non-discrimination) and 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. As a result of this case, Australia repealed the law criminalizing sexual acts between males in its state of Tasmania. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gay and bisexuals.

[Convention for the Protection of Human Rights and Fundamental Freedoms](#) (1949) (article 8 and 14) Sexual orientation is not mentioned explicitly in any of the provisions of the Convention. Nonetheless, the relevance of the Convention (abbreviated as ECHR) was established in a series of cases where the [European Court of Human Rights](#) found that discrimination in the criminal law regarding consenting relations

between adults in private is contrary to the right to respect for private life in article 8 ECHR (*Dudgeon v UK*¹⁴⁷⁹, *Norris v Ireland*, 1988, *Modinos v Cyprus*, 1993). The court was the first international body to find that sexual orientation criminal laws violate human rights and has the longest and largest jurisprudence in addressing sexual orientation issues. The case law also includes an 1997 decision of the European Commission on Human Rights (former first body for individual complaints) that a higher age of consent for male homosexuals acts from that for heterosexual acts was discriminatory treatment contrary to Article 14 ECHR in respect of the enjoyment of the right to privacy (*Sutherland v UK*).

Regarding sexual orientation discrimination in the military services, the Court held that the ban on homosexuals in the military was in breach of Article 8 ECHR (*Lustig-Prean and Beckett v UK*, 2000). Also in 2000, the Court held that, through the conviction of a man for having homosexual group sex in private, a State is in violation of the Convention (*A. D. T v UK*).

The Court also held in *Salgueiro da Silva Mouta v Portugal* that a homosexual father cannot be denied custody of his child based on his (homo)sexual orientation, the matter infringing upon the father's right to family life in Article 8 ECHR. The Court confirmed that Article 14 ECHR (non discrimination) was to be interpreted as including sexual orientation.

European Union (EU):

¹⁴⁷⁹[1981] ECHR 5



Several European Union laws offer protection from discrimination based on sexual orientation and additional requirements refer to the human rights situation in accession countries.

The founding treaties on the European Union were amended in the [Treaty of Amsterdam](#) to enable European Union to fight sexual orientation discrimination. On May 1, 1999 the following provision in Article 13 European Committee Treaty entered into force in the first ever international treaty to explicitly mention and protect sexual orientation: "[...] the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

In December 2000, the Council adopted a (binding) general [Framework Directive](#) on equal treatment in employment prohibiting direct and indirect discrimination on the grounds of religion or belief, age, disability or sexual orientation. The Framework Directive is binding upon the current member states, while the accession states are required to have completed national implementation of the Directive before joining the EU.

[The EU Charter of Fundamental Rights](#) is meant to be the EU code of fundamental rights and was proclaimed in Nice in December 2000. The Charter currently is a non binding document but is important since it expresses the European Union vision on human rights. For lesbians, gay and bisexuals the Charter is important because of

the explicit non-discrimination provisions in Article 21 (1): "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited".

[The European Parliament \(EP\)](#) passed several (non binding) resolutions on human rights and sexual orientation, the first, adopted in 1984, calling for an end to work related discrimination on the basis of sexual orientation. In 1994, the "Roth" Report detailed the variety of discrimination against lesbians and gays in the EU and the Parliament adopted a recommendation on the abolition of all forms of sexual orientation discrimination. Although its power is limited, EP can exert a significant political influence on the Council and the Commission as in 1999 it requested them "to raise the question of discrimination against homosexuals during membership negotiations, where necessary". Regarding the enlargement of the European Union, the EP adopted in 1998 a resolution stating that it "will not give its consent to the accession of any country that, through its legislation or policies violates the human rights of lesbians and gay men".

European Union law regards discrimination against [transgender](#) persons as a form of sex discrimination. This principle was established by the [Court of Justice](#) in the 1996 case of *P v S and Cornwall County Council*, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of her sex. (Case C-13/94, *P*



*v S and Cornwall County Council*¹⁴⁸⁰). "Gender identity discrimination" is the term now generally used to describe discrimination against transgender persons.

In November 2006, a group of 29 international human rights experts, including a former United Nations High Commissioner for Human Rights, UN independent experts, current and former members of human rights treaty bodies, judges, academics and human rights defenders, met in Yogyakarta, Indonesia, and affirmed a set of principles drawing on legally binding international human rights law to address the application of a broad range of international human rights standards to issues of sexual orientation and gender identity. The Yogyakarta Principles on the application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity provide a universal guide to applying international human rights law to abuses experienced by lesbians, gay men, bisexual and transgender people to ensure the universal reach of human rights protections.

It was agreed upon-

The right to freedom from criminalisation and sanction on the basis of sexual orientation, gender identity, gender expression, or sex characteristics-Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation gender identity, gender expression or sex characteristics.¹⁴⁸¹

A COMPARATIVE ANALYSIS OF HOMOSEXUALITY WITH OTHER COUNTRIES:

In India 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 term which may extend to ten years, and shall also be liable to fine.¹⁴⁸²

Naz Foundation filed a Public Interest Litigation (PIL) in December 2002 to challenge IPC Section 377 in the Delhi High Court. On 4th July 2008, the Delhi High Court noted that there was "nothing unusual" in holding a gay rally, something which is common outside in India.

Subsequently on 2nd July 2009, in the case of Naz Foundation v. National Capital Territory of Delhi, the High Court of Delhi struck down much of s.377 of the IPC as being unconstitutional, however; on 11th December 2013, Supreme Court sets aside the 2009 Delhi High Court order which had decriminalised gay sex.

Indian Penal Code was drafted by Lord Maculay and introduced in 1861 in British India. Section 377 is based on Common law¹⁴⁸³, at that time laws were made to suppress the voice of minority.

United Kingdom:

Homosexuality had been an offence in United Kingdom, until the passage of the Sexual Offences Act 1967. It is an Act of

¹⁴⁸⁰ [1996] ECR I-2143

¹⁴⁸¹ 33rd principle of THE YOGARTA PRINCIPLE PLUS 10 available at www.yogyakartaprinciples.org.

¹⁴⁸² Section 377 of Indian Penal Code 1860

¹⁴⁸³ The ancient law of England based upon the societal customs, judgements and decrees of the court.



Parliament in the United Kingdom¹⁴⁸⁴ which decriminalised homosexual acts in private between two men, both of whom had to have attained the age of 21. It was only applicable to England and Wales and did not cover the Merchant Navy or the Armed Forces. Homosexual acts were decriminalised in Scotland by Criminal Justice (Scotland) Act 1980, which took effect on 1 February 1981, and in Northern Ireland by the Homosexual Offences (Northern Ireland) Order 1982.

The United States of America:

A significant move regarding LGBT rights have come from the United States Supreme Court. In four landmark rulings between the years 1996 and 2015, the Supreme Court invalidated a state law banning protected class recognition based upon homosexuality, struck down sodomy laws nationwide, struck down Section 3 of the Defence of Marriage Act, and made same-sex marriage legal nationwide.

In case of *Obergefell v. Hodges*¹⁴⁸⁵, Supreme Court of the United States ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection clause of the fourteenth Amendment to the United States Constitution. Decided on June 26, 2015, this case overturned *Baker*¹⁴⁸⁶ and requires all fifty states must lawfully perform and recognize the marriages of same sex couples on the same terms and conditions as the marriages of opposites-sex couples.

Australia:

[Australia](#) inherited the [United Kingdom's](#) sodomy laws on white [colonisation](#) after 1788. These were retained in the criminal codes passed by the various colonial parliaments during the 19th century, and by the state parliaments after Federation.

Following the [Wolfenden report](#), the Dunstan Labor government in [South Australia](#) introduced a "consenting adults in private" defence in 1972. This defence was initiated as a bill by [Murray Hill](#), father of former Defence Minister [Robert Hill](#), and repealed the state's sodomy law in 1975. The Campaign Against Moral Persecution during the 1970s raised the profile and acceptance of Australia's gay and [lesbian](#) communities, and other states and territories repealed their laws between 1976 and 1990. The exceptions were Tasmania and Queensland.

Male homosexuality (i.e., sodomy) was decriminalised in South Australia in 1975, and in the [Australian Capital Territory](#) in 1976, followed by [New South Wales](#) and the Northern Territory in 1984. Western Australia did the same in 1989. The states and territories that retained different [ages of consent](#) or other vestiges of sodomy laws later began to repeal them: Western Australia did so in 2002, and New South Wales and the Northern Territory did so in 2003. Tasmania decriminalised sodomy in 1997 following the High Court case *Croome v Tasmania*¹⁴⁸⁷.

¹⁴⁸⁴ 1967 c.60
¹⁴⁸⁵ 83 U.S.L.W. 4592
¹⁴⁸⁶ [1999] 2 SCR 817

¹⁴⁸⁷ 191 CLR 119



Positive developments at international level (Situation in other countries)¹⁴⁸⁸:

In 1986 Denmark equated homosexual couples with married ones concerning the right of succession.

In 1989 the Irish Parliament adopted a "Prohibition to Incitement to Hatred Act" covering hate speech against homosexuals.

In May 1989 the Danish Parliament enacted a "law on the registered partnership" of homosexual couples. It stipulates equal rights with one exception: same-sex couples are not allowed to adopt children together.

In 1991 the total ban on homosexual relations was abolished in the Ukraine.

In 1992 a number of Dutch local authorities started accepting the official registration of same-sex partnerships. In October 1993 a bill was introduced in parliament equalizing legal protection for "registered partners" vis-à-vis married couples.

In 1990 and 1992 respectively, Estonia and Latvia abolished laws penalizing homosexuality.

In June 1992 the German "Land" Brandenburg enacted a new Constitution emphasizing recognition of non-marriage partnerships by the state. In 1993 the "Land" Berlin included sexual identity as a non-discrimination criterion in its Constitution.

In Germany same-sex couples who were denied the right to marry have appealed at the Supreme Courts. Judges interpret the right to marry as an exclusive right for heterosexuals (while family law does not specify gender). In its decision of October 4, 1993 the Constitutional Court upheld this view and ruled the appeal inadmissible, while emphasizing the task for the legislative power to bring about legal protection for same-sex partnerships.

In 1992 the total ban on homosexuality was abolished in Gibraltar and the Isle of Man (both under UK Home Office jurisdiction).

In spring 1993, the Norwegian parliament adopted the same-sex partnership law based on the Danish one.

France, Ireland and The Netherlands have provisions against discrimination of gays and lesbians at the workplace.

In April 1993 the Russian Parliament enacted a new Penal Code which no longer includes the prohibition of homosexuality.

Lithuania which became member of the CoE in May 1993 repealed the ban on homosexuality one month after its admission.

In June 1993, the Irish parliament abolished the law prohibiting male homosexuality and simultaneously, set an equal age of consent at 17.

In autumn 1993 the French government adopted a law directing insurance companies to accept joint insurance coverage for non-married couples.



¹⁴⁸⁸ Available at <http://www.legalservicesindia.com/articles/h1omo.htm>



In October 1993, the "Unfair Dismissal Act" in Ireland was extended to include the prohibition of discriminating treatment on grounds of sexual orientation.

In November 1993 the parliament of the German free state Thuringia adopted a new Constitution prohibiting discrimination on grounds of sexual orientation - pending public approval by a referendum in late 1994.

The Irish Parliament is planning to establish an Equality Commission to monitor all forms of discrimination against homosexuals.

In June 1994, the Swedish parliament adopted a partnership law based on the Danish and Norwegian model.

In August 1994, the total ban on homosexual relations was repealed in Serbia (incl. Kosovo).

In January 1995 homosexuality was decriminalized in Albania.

A bill was introduced in the Cyprus parliament in January 1995 to abolish the ban on homosexuality.

On 15 June 1995 the parliament of Moldova abolished the ban on homosexuality.

CONCLUSION:

Justice Kennedy referring to the impact of anti-sodomy laws on the lives of gays, lesbians and transgender in Lawrence stated that: "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime."

The Indian courts need to recognise that they cannot permit the state to continue to demean the existence of people with same sex desires in this country. Section 377 with its broader shadow of criminality is the biggest enemy to the dignity and humanity of a substantial minority of Indian citizens. But there are many grounds that are put forward by the law making authority of the country like this decriminalisation will open flood gates for delinquent behaviour, public morality and public decency, also many child right activists argue that section 377 is necessary to tackle the cases of child abuse. But after the enactment of the Protection of Children from Sexual Offences (POSCO) Act 2012 there is no need of section 377 in child sexual abuse cases as the POSCO act is more child friendly and much more stringent.

Also the section 377 suffers from arbitrariness and ambiguity as distinguishes between carnal intercourse which is against the order of nature and not against the order of nature unlike rape this section ,does not talk about 'force' and/or 'coercion' and hence even consensual sexual intercourse' against the order of nature is punishable under section 377. Also the words used in this section 'natural' and 'order of nature' are not defined define and has left it to the discretion of the courts, leading to a lot of controversy. Further, this section does not differentiate between consensual and coercive sex. Due to an absence of legislative guidance it is left to the Court to decide what constitutes against the order of nature. The test in this regard has shifted from acts without possibility of procreation to imitative acts to acts amounting to sexual perversity. The object of the classification which seeks to enforce Victorian notion of



sexual morality which included only procreative sex is unreasonable as condemnation of non procreative sex is no longer a legitimate state object in today's era.

Further for a secular country like India what is forbidden in religion need not to be prohibited in law. A legal wrong is necessarily a moral wrong but vice versa is not correct. Thus, morality cannot be grounded to restrict the fundamental rights of the citizens of the country.

The courts need to acknowledge that by decriminalising homosexuality they will not permit a mere sexual activity, but decriminalise the lives of actual citizens who are connected to that sexual act. The public benefits of this decriminalisation would start with a sense of self-acceptance, comfort, confidence and evolving pride among gays, bisexuals, lesbians, transgender, hijras – all of whom are in some way or the other caught within the tentacles of section 377. Decriminalisation of section 377 will create a space for homosexuals to interact with the rest of the civil society, in a relatively more equal position.

The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality. Thus neglecting the rights a minuscule fraction of the country's

population constitutes lesbians, gays, bisexuals or transgender is not a sustainable basis to deny the right to privacy.

Thus it is the need of hour for the legislature to take up issue of decriminalization of homosexuality on a serious note. The diligence of the parliament in which is undisputedly the representative body of the people can be seen by not considering the 172nd law commission report submitted by chairman B P Jeevan Reddy on March 25, 2000 seriously. In the 172nd report, the Law Commission of India has recommended deletion of Section 377 IPC, while focusing on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and inter alia, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC focusing on the elements of will and consent to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not. Conclusively the Section 377 IPC in the opinion of the Commission, deserves to be deleted in the light of recommended amendments.

Finally, the loss of privacy can lead to discrimination and denial of opportunities, leaving many amongst the LGBTQI community on the margins of society. The Supreme Court was cognizant of this in its judgment in NALSA, concerning transgender persons, where it observed “non-recognition of Hijras/ transgender persons denies them equal protection of law ... thereby leaving them extremely vulnerable to harassment, violence and sexual assault.”



The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities. The right to privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. One's sexual orientation is undoubtedly an attribute of privacy. As far as the private affair of an individual is concerned, within the four corners of the house, nobody has the right to interfere into it. Everybody has the right to lead the life they want.

Even the country which gave us the basis of most of our law now has brought reforms in the nature of Sexual Offences Act, 1967 (whereby buggery between two consenting adults in private ceased to be an offence in the United Kingdom).

Thus, modifications must be made in regressive section 377 of the IPC as it suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community and violates the constitutional protections embodied in Articles 14, 19 and 21¹⁴⁸⁹ thereby giving them unjust tag of criminals in the society.

¹⁴⁸⁹ Article 14 : Right to equality;
Article 19 : Right to Freedom;
Article 21 : Right to Life and Liberty of the Indian Constitution



RERA: A BALANCE BETWEEN BUYERS AND BUILDERS

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ABSTRACT

Property comprised of land, building and all the natural resources on it is called Real Estate which is further divided into three broad categories based on its use i.e., residential (houses, town homes etc.) , commercial (warehouse, office buildings etc.) and industrial (factories, mines farms etc.). The Real Estate sector in India has flourished in the recent years. However, it was unregulated. There were no preventive laws with respect to consumer protection, which affected the growth of the sector. The Real Estate (Regulation and Development) Act was enacted in 2016 with the aim to establish a Real Estate Regulatory Authority, in order to promote proper regulation of the Real Estate Sector in a transparent and efficient manner and to protect the interest of the Consumers by providing a speedy disposal of the disputes arising in the real estate sector. Through a recent notification of the Government passed on 1 May 2017, the said Act was set into full force, thereby providing preventive measures for implementation of the said Act. The present paper provides a critical analysis of The Real Estate (Regulation and Development) Act, 2016 and the impact of the Act on property markets. We have also covered various provisions which directly affect the consumer as well as the Promoter. Such as, Registration of Real Estate projects and Real Estate Agents, Duties of Promoters

and Allottees, Real Estate Regulatory Authority(RERA), Central Advisory Council and Appellate Tribunal(REAT) and Offences, Penalties and Adjudication in RERA.

INTRODUCTION

Although the real estate sector has flourished in the last two decades, data collected by Liases Foras, a real estate research agency shows that in eight major cities over 80% of the 25 lakh-odd residential projects launched over the last 10 years have been delayed. Quarter of these was delayed by more than 4 years over the promised date of delivery. Home buyers suffer from over charging and other fraudulent practices of real estate developers. The only remedy they had was the long and delayed process of consumer courts as there was no preventive law in place. Different states had varied definitions for important terms such as carpet area, common areas, car parking etc. making it easier for developers to manipulate their way out of the case. The new law provides various safeguards for speedy redressal of such situations and also to pre-empt them.

The Real Estate (Regulation and Development) Act, 2016, was passed by the Parliament in March 2016, and a part of it came into effect on May 1, 2016. However, certain legislations such as registration of ongoing projects, penalties for non-compliance etc. were not notified. This was because these required an institutional framework to be in place first. States were given a year to set up this framework i.e. the Regulatory Authority and the Appellate Tribunal. From May 1, 2017, the Act has come into force in its entirety. At state level, the Regulatory Authority and Appellate



Tribunal must dispose of cases within 60 days. Appeals to the High court can be made within 60 days.

The law attempts to end the non-transparency that characterises transactions, where agreements are often tilted in favour of developers. Builders of both new and ongoing projects (ones that have not received completion certificate) must mandatorily register their project with the Authority in the next 3 months. Real estate agents too have to register themselves with the Authority within 3 months.¹⁴⁹⁰ It also holds the promoters accountable for providing insufficient information regarding their project. In addition to the promoter and allottees, the Bill also brings real estate brokers who facilitate the sale and purchase of units in a project within its ambit. This holds the key to the future growth of the Indian real estate sector. Because it has the potential to clean up the sector at all levels and help further open up the Indian housing sector to foreign investments.

REGISTRATION OF REAL ESTATE PROJECTS¹⁴⁹¹:

Under RERA both ongoing/ incomplete projects and future projects are required to be registered, within three months from the date of commencement of this Act by the Promoter, with the Real Estate Regulatory Authority established under this Act. The promoter can advertise his project for sale

after the project has been registered with the Regulatory Authority.

Exemptions:

As per section 3(2), the following projects do not require to be registered under the RERA Real Estate Bill:

- (a) where the area of land proposed to be developed does not exceed 500 Sq. meters or the number of apartments proposed to be developed does not exceed 8, inclusive of all phases;
- (b) where the promoter has already received completion certificate for a real estate project prior to commencement of this Act;
- (c) projects for the purpose of renovation or repair or re-development and do not involve marketing, advertising, selling or new allotment of any apartment, plot or building, as the case may be, are not required to be registered.¹⁴⁹²

Registration process:

- Promoter shall make an application to the Real Estate Regulatory Authority for registration in such form, manner, as may be specified by the regulations made by the Authority; A web based online system has been made operationalised for submitting such applications.
- On receipt of the application the Authority, within a period 30 days grant registration providing a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project or reject the application for reasons to be recorded in

¹⁴⁹⁰ <http://indianexpress.com/article/explained/rera-real-estate-regulation-what-it-is-how-itll-affect-builders-buyers-agents-4636119/>

¹⁴⁹¹ https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6908&kw=registration-real-estate-projects-regulation-development-act-2016

¹⁴⁹² <https://chennaidreamhomes.com/rera-real-estate-bill-2017-part-2/>



writing, if such application does not conform to the provisions of the Act or the rules or regulations there under after giving him a reasonable opportunity.

Registration granted shall be valid for a period declared by the promoter for completion of the project or phase thereof.

Deemed Registration and Extension of Registration¹⁴⁹³

If the Authority fails to grant the registration or reject the application, the project shall be deemed to have been registered and the Authority shall within a period of 7 days of the expiry of the said period of 30 days, provide a register number and a long id and password to the promoter for accessing the website of the Authority and to fill therein the details of the proposed project.

Revocation of Registration

As per section 7 of the RERA Real Estate Bill, the Authority has the powers to revoke registration of a project, for violations specified under the said section. However, revocation of registration of a project is envisaged as a last resort and can only be done after providing a reasonable opportunity of being heard.

Effect of revocation

Section 7(4) provides that the Authority, upon revocation of the registration-

- shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photographs on its website and also inform the other Real

Estate Regulatory Authority in other States and UTs about such revocation or registration;

- shall facilitate the remaining development works to be carried out in accordance with the provisions of Section 8;
- shall direct the banking to freeze the account and thereafter take such necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with Section 8;
- may issue such directions as it may deem necessary.

Registration of Real Estate Agents¹⁴⁹⁴:

In order to render their services, all agents have to be registered with the authority and the developer. While registering their projects, the developers are also liable to disclose the name and other details of the authorized agents who are allowed to deal in particular projects of the developer. The real estate agent will be provided with a registration number by the regulator, which they have to mention in each sale they make.

The agents are required to maintain books of account, records and documents related to every transaction done by them. They are also to restrain from making any false representation—whether written, orally or by visual representation. Also, agents are required to share all the information and documents about the project with the buyers,

¹⁴⁹³<http://www.onlinefilings.co.in/registration-of-real-estate-projects-under-the-real-estate-regulation-and-development-act-2016/>

¹⁴⁹⁴ <http://www.livemint.com/Money/a6JheUfEvwEdFi6vCuv90K/Real-estate-agents-and-underconstruction-projects-need-to-r.html>



which they are entitled to at the time of booking a property.

Once a regulator is in place, and agents get registered, it would become difficult for the agents to mislead the homebuyers. Sometimes, in order to convince homebuyers to buy a property, agents may manipulate information. For instance, they may say that very few units of a project are left for sale, or that the developer would raise the price in a few days; to pressurise the buyer into making a decision in a hurry. Pushed into rushing, some buyers could forego basic due diligence on their part. However, once the regulator is in place, homebuyers will be able to cross-check most of this information on the regulator's website.

The Regulator will also maintain a list of the authorized agents on its website, along with details of projects that they can deal in. Agents who are found to be in violation of the rules, will get removed from this list.

DUTIES OF PROMOTERS:

As per section 11 of the Act, the promoter is required to update all project information as furnished at the time of application on the website of the Authority. Section 4 and section 11 provide for a detailed list of disclosures on the website of the Authority by the promoter for public viewing, to be specified in the rules.

- **Advertisement or prospectus**
As per section 12, the promoter is responsible for the veracity of all information contained in the advertisement and the prospectus. In case of any loss sustained by any person due to false information contained therein, the

promoter is liable to make good the loss sustained due to the same.

- **Accepting deposits**
Section 13 (1) provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as an advance payment or an application fee from a person without first entering into a written agreement for sale with such person and register the said agreement for sale.
- **Agreement for sale**
Agreement for sale shall specify the particulars of development of the project along with the specifications and internal development works and external development works, the dates and manner by which payments towards of the apartment etc., are to be made by the allottees and the date on which the possession of the department etc., is to be handed over, the rates of interest payable by the promoter to the allotter and the allottee to the promoter in case of default and other such other particulars as may be prescribed.
- **Adherence**
Section 14 provides that the project shall be developed and completed in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities. The promoter may make such minor additions or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorized architect or Engineer after proper declaration and intimation to the allottee.
- **Rectification of defects**
In case any structural defect or any other defects in workmanship, quality or provision of services or any other



obligations of the promoter as per the agreement for sale, such development is brought to the notice of the promoter within a period of 5 years by the allottee from the date of handing over possession and to rectify such defects without further charge, within 30 days and in the event of promoter's failure the aggrieved allottees shall be entitled to receive compensation.

➤ **Transfer to third party**

Section 15 provides that the promoter shall not transfer or assign his majority rights and liabilities to a third party without obtaining prior written consent of two thirds of allottees, except the promoter and without the prior written approval of the Authority.

➤ **Insurance of real estate**

Section 16 provides that the promoter shall obtain all such insurances as may be notified by the appropriate Government, including but not limited to insurance in respect of title of the land and building as a part of the real estate project; and construction of the real estate project. (TITLE AND INHERENT DEFECTS)

➤ **Transfer of title**

Section 17 provides that the promoter shall execute a registered conveyance deed in favour of allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority and hand over the physical possession of the plot etc., to the allottee and common areas to the association of allottees or the competent authority.

➤ **Return of amount and compensation**

Section 18 provides that if the promoter fails to complete or is unable to give possession of an apartment etc., in accordance with the terms of the

agreement for sale or due to discontinuance of his business as developer on account of suspension or revocation of the registration he shall be liable on demand to the allottees, to return the amount received by him in respect of that apartment etc., with interest at such rate as may be prescribed in this behalf including compensation in the manner provided .

RIGHTS AND DUTIES OF ALLOTTEES/ BUYERS:

Section 19 specifies various rights which the allottees have against the promoters and Section 20 provides for the various duties of the allottees.

- The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made there under or the agreement for sale signed with the promoter.
- The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.
- The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter.
- The allottee shall be entitled to claim the refund of amount paid along with interest



at such rate as may be prescribed and compensation in the manner as provided, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made there under.

- The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.
- Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
- The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).
- The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.
- Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative

society of the allottees, or a federation of the same.

- Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.
- Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be.

OFFENCES AND PENALTIES

The Real Estate Act intends to ensure accountability of the promoter, real estate agent and the allottee and imposes certain responsibilities on promoter and allottees and in case of any default or contravention on their part, enforces stringent penalties, thereby making itself a preventive law.

Promoter's liability:

1. For non-registration of real estate project with the Real Estate Regulatory Authority, the promoter is liable to imprisonment which may extend to three years and with a fine upto 10% of the estimated cost of the real estate project.
2. If the promoter fails to make an application to the Authority for registration of the real estate project, or contravenes any provisions or the rules and regulations made therein, promoter shall be liable to a penalty of 5% of the estimated cost of the real estate project.
3. In case of continuation of the default, the promoter shall be liable for a penalty, which may extend to 5% of the estimated cost of real estate project, for every day during which the default continues.



Real Estate Agent’s Liability:

1. If a Real estate Agent facilitates the sale or purchase of a real estate property, without obtaining registration, or
2. Fails to maintain books of account, records and documents, or
3. Involves himself in any unfair trade practices, or
4. Does not provide the necessary information to the allottee, as when required

Shall be liable to a penalty of rupees ten thousand, every day during which such default continues, which may extend to a cumulative of 5% of the cost of the real estate project.

For any contravention of the directions and orders of the Authority, the Real Estate Agent shall be liable for a penalty which may extend to 5% of the cost of the real estate project.

For any contravention of the directions of the Appellate Tribunal, he shall be liable for imprisonment for a term up to one year and with fine, for every day during which the default continues, up to a cumulative of 10% of the estimated cost of the real estate project.

Allottees’ Liability:

1. For any contravention of the direction or order of the Regulatory Authority, shall be liable with fine, which may cumulatively extend upto 5% of the estimates cost of the real estate project.
2. For any contravention of the direction and order of the Appellate Tribunal, shall be liable for imprisonment for a term up to one year and with fine, for every day during which the default continues, up to a

cumulative of 10% of the estimated cost of the real estate project.

Offences by Companies:

In cases of offences committed by the Companies, person who at the time of the commission of the offence, was responsible for the conduct of the business of the Company shall be liable for the said offence unless he proves that the offence was committed without his knowledge or due diligence was taken by him to prevent such commission.

Offences mentioned above are compoundable, on terms and conditions as prescribed by the appropriate Government.

ADJUDICATION

The Act provides for fast-track dispute resolution mechanism and promotes good governance in the real estate sector which in turn creates investor confidence.

Real Estate Regulatory Authority

The Appropriate Government shall establish the Real Estate Regulatory Authority, within one year from the date of coming into force of the said Act, which shall be a body corporate and consisting of a Chairperson and two whole time members, having professional experience of 21 years and 15 years in urban development, housing, real estate development, infrastructure, economics, and so on respectively, who shall hold the office for a term not exceeding 5 years or after attaining the age of sixty-five years, whichever is earlier.

The Chairperson or the member can vacate his office, by giving in writing three months prior notice to the appropriate Government.



Appropriate Government can remove the Chairperson or the member from his office, after an inquiry being made by the judge of the High court having the jurisdiction, on the following grounds:

1. Person is declared insolvent,
2. Has been convicted of an offence or moral turpitude,
3. Has become physically and mentally incapable,
4. Has acquired financial interest, which affects prejudicially his functions, and
5. Has abused his position

All the questions of dispute shall be put up in front of the quorum, which shall dispose of such query within a period of 60 days from the receipt of such application and on failure to do so shall record such reasons in writing.

In case of any contravention of the provisions of the said Act, an aggrieved person can file a complaint with the Regulatory authority or the Adjudicating Officer against the promoter, allottee or the Real Estate Agent, as the case maybe.

The Regulatory Authority has the power to make recommendations to the Appropriate Government, to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector.¹⁴⁹⁵

The Regulatory Authority is required to give its advice on any reference made to it by the Appropriate Government, while formulating any policy on real estate sector, within 60 days of the receipt of such reference.

However, such advice shall not be binding on the Appropriate Government. A wide range of functions and powers is provided to the Regulatory Authority such as to register and regulate the real estate projects, to maintain an online database of all the records, to fix a standard fee, to ensure compliance of the obligations, to call for information, impose penalty, Conduct investigation and so on for the efficient functioning of the real estate sector.

Adjudicating Officer

The Regulatory Authority is to appoint, in consultation with the appropriate government, one or more Judicial Officers, who is or has been a District Judge, as it deems fit, to act as an Adjudicating Officer, to adjudge the compensation to be paid by the promoter and to hold an inquiry with regards to the same.

The Adjudicating Officer shall take into consideration the following grounds, while computing the compensation by the defaulter:

1. The amount of profit earned by the defaulter (if quantifiable),
2. The amount of loss caused,
3. The repetitive nature of the offence,
4. Such other factors, required for implementation of justice.

Central Authority Council

Central Government shall appoint a Central Advisory Council and the Minister to the Central government dealing with housing shall act as the ex-officio Chairperson of the Council.

¹⁴⁹⁵ www.lawgupshup.com/2017/09/the-real-estate-regulatory-authority-rera



The members of the council shall be selected by rotation. Five representatives shall be from the Regulatory authority and five representatives of the State Government, to be from the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, Niti Aayog, National Housing Bank, Housing and Urban Development Corporation.

The Council shall advise and recommend the Central Government on all the matters concerning the implementation of the Act, policy formation and protection of consumer interest, in order to foster the growth and development of the real estate sector.

Real Estate Appellate Tribunal

The Appropriate Government shall establish a Real Estate Appellate Tribunal, within a period of one year from the commencement of this Act, for their respective States and each bench of the Appellate Tribunal shall consist of one Chairperson and two whole time members out of which, one shall be a Judicial Member and other one to be an Administrative Member or Technical member.

The Chairperson and the Members of the bench shall hold the office for a period not exceeding 5 years. Where, the Chairperson so appointed, was a judge, he shall not hold the office after attaining the age of sixty-seven years or for a period of five years, whichever is earlier. No Member of the Tribunal shall hold the office after attaining the age of sixty-five years.

The chairperson or the Member of the Tribunal can relinquish his office or can be removed from the service on the same grounds as those of a Chairperson and Member of the Real Estate Regulatory Authority.

The Chairperson and the Members of the Tribunal are restricted from employment after their cessation of the office on the same grounds as those of the Regulatory Authority.

Any person aggrieved by the decision or order, made by the Regulatory Authority, can approach the Appellate Tribunal within 60 days from the date of such decision or order, who shall dispose of the appeal within 60 days of its receipt and shall be deemed to be a Civil Court and the orders passed by the Tribunal shall be executed as a decree of the Civil court.

After giving an opportunity to both the parties of being heard, the tribunal shall pass its orders and pass a copy of such orders to the parties as well as to the Regulatory authority or the Adjudicating Officer, as the case may be.

An appeal from the order of the Real Estate Appellate Tribunal shall lie to the respective jurisdictional High Court within a period of 60 days, from the decision or order of the Appellate Tribunal.

Thus, the Act intends to increase transparency and accountability and provide a strict mechanism for the selling and purchase of the real estate projects and focuses on their timely consumption.

WHAT HURDLES DID THE LEGISLATION FACE?



Attempts to stall or water down the Act were made from its inception, and state-level rules are yet to be issued in many cases. But many attempted dilutions were forestalled or reversed, thanks largely to constant vigil by consumer groups and nationwide homebuyers' collectives such as Fight for RERA.

But the law was, indeed, diluted in some ways. For instance, to prevent the widely prevalent practice of developers diverting the bulk of sales proceeds to buy more land, the Bill had originally wanted builders to deposit 70% of the collections in a separate account, to be used solely for the purpose of construction. But before the Bill was placed in Parliament, the clause was tweaked to cover both land and construction costs.

Intense lobbying by the realty sector has resulted in several states issuing RERA Rules that in some cases effectively favour developers over homebuyers. Maharashtra's Rules, for example, allow builders to sell open areas within a project as parking lots, a practice the Supreme Court had struck down.

Both Maharashtra and Madhya Pradesh allow builders of ongoing projects to submit details of only their last sanctioned plan, giving them scope to not reveal details of changes or delays with respect to the original plan and promise.

Rules issued by Gujarat exempt projects launched before November 2016 from the purview of the Act. Similar tinkering has been evident in Delhi (which comes under the union Urban Development Ministry), Uttar Pradesh, Haryana and Karnataka. Some of these were found to be in clear violation of the Act, leading to Union

Housing Minister [Venkaiah Naidu](#) calling an urgent meeting of state housing secretaries and chief secretaries and directing them to issue Rules that are true to the spirit of the central Act.

IMPACT ON DEVELOPERS¹⁴⁹⁶

1. Major impact of RERA will be on on-going projects if they are included. There will be a lot of confusion which will not only delay projects but will also lead to creation of lot of issues. Any law should be applied prospectively and not retrospectively. Too many projects at various stages will be impacted and there could be a major upheaval in the market if not addressed appropriately. The law should rather state a corrective course of action rather than penalise on-going developments which seem to have deviated from the new law. Also, too many projects will delay the registration process which in-turn will delay project deliveries.
2. The major delays and cost escalations are created not by developers but by various governmental authorities who sanction requisite projects and monitor during the course of development. Unless, this is not addressed in toto, there are bound to be hiccups in projects.
3. Cost for developers will increase as sales can only happen post registration which is possible only post approvals. With higher holding costs, these increases would eventually be transferred to consumers and hence prices are bound to increase.

¹⁴⁹⁶ <http://www.financialexpress.com/money/real-estate-5-ways-how-rera-will-impact-the-developers/649200/>



4. All the money is pumped into construction and in case of cancelations, there should be a re-allotment clause and not strict 60 day guideline for refund as it will be impossible for developers to do so in such circumstances. If several buyers seek to cancel at one go, it may jeopardise the entire project. Say, if there are 100 units sold in a project and out of 100, 40 buyers do not make payments on time and hence are subject to interest. But due to the delay from 40 buyers, the entire project gets affected and hence developer will have to compensate the other 60 buyers with interest and hence this is unjustified.
5. With RERA, there will be a consolidation in the market and hence only fewer players may exist. This is not good for market as prices for consumers are bound to increase with decrease in competition. Competition already keeps prices in check and small developers who were able to offer that additional buck might cease to exist and buyers will have limited choices to choose out of.

TRANSPARENCY IN REAL ESTATE MARKET

The RERA will make the real estate market more transparent in the following ways¹⁴⁹⁷:

- The RERA will make the quoting of price by property developers more transparent. Currently, developers sell property to customers based on built-up area. This also includes wall loading and other common amenities. Hence the customer does not exactly get a clear picture of

what he is paying for. Under the RERA, builders will have to now quote based on the carpet area, which is the actual interior area that a person gets to live in. This will make the quote more realistic and transparent. The standardization also makes comparison easier.

- Parking charges is another bone of contention between the builder and the customer. When a builder develops an apartment, the parking charges are charged separately and vary, depending on the property. The RERA requires that the parking charge be transparently mentioned as part of the sale agreement.
- RERA also contains specific provisions pertaining to timely completion of projects by builders. Delay in completion of projects will make the developer liable to monetary penalty as well as imprisonment up to 3 years. In addition, RERA also contains a provision that if there is delay in delivering the project or if the buyer is not satisfied with the property in way then a refund can be claimed within 15 days of buying it.

- Onus is put on the builder of making a full and transparent disclosure about Title report of the land, any legal cases outstanding, any likely encumbrances, intention of the promoter of using the FSI (floor space index), use of construction technology, design standards etc. This will mean more transparency for the buyer.

¹⁴⁹⁷ <http://www.angelbroking.com/blog/how-rera-will-impact-real-estate-market-india>



- The real estate broker will be permitted to sell only those properties that are registered under the RERA pool and have met with all the conditions of an eligible property. Brokers who sell properties outside this list will be liable for penalties. This will ensure that brokers only push projects that meet up all the conditions prescribed by the RERA.
- The RERA brings much smaller projects also under the overall ambit of regulation. Currently, only projects with a 1000 square metre area come under the purview of regulation. That has been brought down to 500 square metres or a minimum of 8 flats.
- In a big move for protection of consumer interest, according to the Act, it is mandatory for the promoter to deposit 70% of the amounts realised from the allottees from time to time in a separate bank account maintained with a scheduled bank in order to cover the construction cost and the land cost.
- Under the RERA, the builder will be accountable for structural defects in the construction of the property up to a period of 5 years. The builder will have to ensure that the land title is insured to prevent cases where consumers run into trouble due to uncertain land titles, where legacy issues are quite common.
- A state level regulatory body will be formed which will act as the nodal agency to address all such real estate

complaints, disputes and related issues. The primary focus will be to address the grievances of real estate customers and will comprise of the Chief Justice of the High Court, the law secretary of the state and the housing secretary of the state.

DISADVANTAGES OF THE BILL¹⁴⁹⁸:

- **Past real estate projects not included in the bill:** Only new projects are covered by the bill. Projects that are ongoing, completed or stuck due to clearance or financial issues, don't come under this. Hence many buyers will not be benefitted by it.
- **Delay from government agencies:** There can be delays caused by the government, which sometimes takes a lot of time to clear a project. It is up to government bodies to follow strict time frames to approve projects, so that developers can launch, complete and deliver them on time.
- **No compulsory regulation for projects less than 1000 square meter:** Registration with the regulator will not be mandatory for projects less than 1000 square meter. So, small developers will not be bound to register.
- **New project launches expected to be delayed:** Because a project will not be allowed to launch without the requisite clearances from the government (which

¹⁴⁹⁸

<http://www.moneycontrol.com/news/business/personal-finance-business/some-disadvantagesdisadvantagesreal-estate-bill-1603721.html>



generally takes two to three years), projects will automatically get delayed.

It still leaves room open for unforeseen problems of the kind we have witnessed this year in the floods that have ravaged Chennai.¹⁴⁹⁹

CONCLUSION

With the advent of RERA, specialised forums such as the State Real Estate Regulatory Authority and the Real Estate Appellate Tribunal, are established for the resolution of disputes pertaining to home buying and the aggrieved party has no recourse to other consumer forums and civil courts, on such matters. While RERA sets the groundwork for fast-tracking dispute resolution, the litmus test for its success, will depend on the timely setting up of these new dispute resolution bodies and how these disputes are resolved expeditiously with a degree of finality.

“It will bring a lot of accountability in the industry and the ones who believe in professional and transparent business, will reap all the benefits. Now, the agents will have a much larger and responsible role to perform, as they will have to disclose all the appropriate information to the customer and even help them chose a RERA-compliant developer,” says Sam Chopra, founder and chairman of RE/MAX India.

With RERA in force, brokers cannot promise any amenities or services that are not mentioned in the documents. Moreover, they will have to provide all information and documents to the home buyers, at the time

of booking. Consequently, RERA is likely to filter out the inexperienced, unprofessional, fly-by-night operators, as brokers not following the guidelines will face hefty penalty or jail or both.

¹⁴⁹⁹ www.hindustantimes.com/india/the-pros-and-cons-of-the-real-estate-regulation-bill/story-GIocvfKJrJazrTVI2642fK.html



INTERNET & TERRORISM IN THE AGE OF GLOBAL COMMUNICATION

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Abstract:

Professor Park stated, “Man is not born human but to be made human”, and one of the characteristic of it, is the man’s ability to communicate. For the purpose of communicating with each other man have come up with different instruments and mechanism and internet is one of the most recent one. Myriad of websites offering the user the ability to upload videos, record opinions through blogs, wikis, twitter or Facebook and dynamically communicate with individuals have radically changed internet usage. Communicating any piece of information on social networking sites means that information you shared is conceivably available to any user of any degree around the world. The sphere of such users is as wide as the demographics of the globe itself. But at the same time these social networking sites are used by the hate mongers to spread rumors and the same plays a very lethal role in inciting violence in Indian subcontinent. And it is for this reason only that the countries like Bangladesh and Pakistan banned the major social networking sites at one point of time. The terrorists use the internet as an efficient tool for information gathering, propaganda schemes, recruitment and also to terrorize the civilians by posting and uploading videos and photos. They can easily spread

powerful words to make an impression in the minds of men and women for joining the terrorist cells and network. Notoriously, the media and its coverage serve as a facilitator for the acts of terrorism. At this juncture when voices are being heard to declare internet as a human right, through the instant academic venture an effort has been made by the author to analyze the critical component of understanding the concept of terrorism and why terrorist draw their attention to media.

Key words: Human right, Internet, Social media, Terrorism.

“Terrorists use the Internet just like everybody else”
 - **Richard Clarke (2004)**¹⁵⁰⁰

INTRODUCTION

In the age of global communication and international media the messengers of hate and terror are no longer impeded by national borders or regions; they can easily spread powerful words and images around the globe and condition impressionable men and women to be recruited into terrorist cells and networks. International and domestic terrorists exploit the traditional and the new communication means to achieve a host of crucial objectives--most of all the media-dependent dissemination of their “propaganda of the deed” among friends and foes. Whether in the United States, Europe, the Middle East, the Far East, or any other region, the architects of terrorism exploit the mass-media—including the Internet for the

¹⁵⁰⁰ As quoted in New 2004. Clarke was the White House cyber security chief during the tenures of both Bill Clinton and George W. Bush. He resigned in January 2003.



benefit of their operational efficiency, information gathering, recruitment, fund raising, and propaganda schemes. But governments in countries whose populations are intimidated by terrorist attacks and threats thereof utilize the mass media as well to enlist public support for actual and alleged counterterrorist measures.

The internet has seen blistering development in user interaction in recent decade. Websites offering the users the ability to upload videos, record opinions through blogs, wikis, twitter or Facebook and dynamically communicate with individuals have radically changed internet usage. 'Traditional' internet usage (known as Web 1.0) was based on static websites, which allowed searching different websites for information (with the help of search engines) and downloading required contents. However, the traditional model of static website has been replaced by much more interactive, efficient and dynamic approach (Web 2.0), which allows people to upload, download, chat and blogging and communicates conveniently. Social networking sites and virtual world are at forefront of this development as users are no longer simply engaged with the internet in a passive manner, rather through a huge range of media and through a tranche of various inter-faces, including personal computers, mobiles and game consoles.¹⁵⁰¹

Communicating any piece of information on social networking sites means that information you shared is conceivably available to any user of any degree around the world. The sphere of such users is as

wide as the demographics of the globe itself, with no demarcation in membership as senior and junior, well-off and destitute have to large degree equality of online opportunity.¹⁵⁰² Social networking sites are emerging as a new organizing system as dates, meeting, events, and updates can all be managed through one of these sites.

Various terrorist groups today realize that targeting their enemies through physical violence, while influential, is not solely the best recourse to gaining an overall victory for their cause. Sophisticated terrorists realize that in initiating their terrorist campaign, which does not only need patience but there is also a piece called propaganda that is heavily involved in the orchestration of activities.

WHY TERRORISTS DRAWN TO INTERNET

Since the 1970s, the degree of global interconnectedness has been demonstrated throughout the world from economies to cultures. New methods of global communication have broaden the possibilities in organizing and mobilizing like-minded individuals and groups throughout the world to include activities of transnational criminal and terrorist networks.¹⁵⁰³ "The technological advances associated with globalization have improved the capabilities of terrorist groups to plan and conduct operations with far more devastation and coordination than their predecessors could have imagined. In particular, technologies have improved the

¹⁵⁰²Id at 214.

¹⁵⁰³ Baylis, John; Smtih, Steve, (2006), The Globalization of World Politics: An Introduction to International Relations, p. 20,

¹⁵⁰¹ Kevin M Roger, The Internet and the Law, pg-213(Palgrave Macmillan, 1st edition, 2011)



capability of groups and cells in the following areas: proselytize coordination, security, mobility and lethality.”¹⁵⁰⁴

In the past, States have had the ability to control information flow and use far superior resources to undermine terrorists and their cause while simultaneously winning the hearts and mind of the populace. However, because of globalization, particularly in the area of technology, terrorist groups share in the ability to leverage media technologies to work in their best interest. The increase in internet service providers and the access to more proficient and inexpensive computer, software and wireless technology has empowered terrorist groups with the ability to advertise their causes through the World Wide Web. “Once limited to mimeographed manifestos, some terrorist and their supporters are now capable of building web sites to post any information they choose.”¹⁵⁰⁵

Terrorists use different types of media in a variety of ways, namely as an information instrument, to generate publicity and draw attention to their cause. “Through propaganda, terrorists seek to communicate a particular message to a particular target audience.”¹⁵⁰⁶ The purpose and messages behind their communication differs and is dependent on the targeted audience. These messages are designed to be informative, educational, rallying, for soliciting support, and for recruitment. They can also be

coercive by being either threatening or winning over its audience through flattery. Through coercion, these groups hope to intimidate and undermine the populace’s confidence in the government and leadership, and as a result cripple government and the security forces’ ability to prevent, defend and strike back when attacked. This information instrument can also be used by terrorist towards their own members in order to strengthen cohesiveness, boost morale and relieve groups of internal strife. In sum, sympathy and support from the populace for their cause is the ultimate goal.

FIVE TERRORIST USES OF THE INTERNET

1. INFORMATION PROVISION

This refers to efforts by terrorists to engage in publicity, propaganda and, ultimately, psychological warfare. The Internet, and the advent of the World Wide Web in particular, have significantly increased the opportunities for terrorists to secure publicity. This can take the form of historical information, profiles of leaders, manifestos, etc. But terrorists can also use the Internet as a tool of psychological warfare through spreading disinformation, delivering threats, and disseminating horrific images, such as the beheading of American entrepreneur Nick Berg in Iraq and US journalist Daniel Pearl in Pakistan via their Web sites.¹⁵⁰⁷ These functions are clearly improved by the Web’s enhanced volume, increased speed of data transmission, low-

¹⁵⁰⁴ Id at p. 489)

¹⁵⁰⁵ Id at p. 489)

¹⁵⁰⁶Hoffman, Bruce, (2006), Inside Terrorism, p. 199, available at:

http://www.rand.org/content/dam/rand/pubs/testimonies/2006/RAND_CT262-1.pdf

¹⁵⁰⁷ Weimann, Gabriel. 2004a. *WWW.terror.net: How Modern Terrorism Uses the Internet*. Washington DC: United States Institute of Peace. Available at: <http://www.usip.org/pubs/specialreports/sr116.pdf>



cost, relatively uncontrolled nature, and global reach.

As Weimann points out, “these traditional media have ‘selection thresholds’ (multistage processes of editorial selection) that terrorists often cannot reach”¹⁵⁰⁸ The same criteria do not, of course, apply to the terrorists’ own websites. The Internet thus offers terrorist groups an unprecedented level of direct control over the content of their message(s).

2. FINANCING

Money is terrorism’s lifeline; it is “the engine of the armed struggle”.¹⁵⁰⁹ The immediacy and interactive nature of Internet communication, combined with its high-reach properties, opens up a huge potential for increased financial donations as has been demonstrated by a host of non-violent political organizations and civil society actors. Terrorists seek financing both via their Web sites and by using the Internet infrastructure to engage in resource mobilization using illegal means. Numerous terrorist groups request funds directly from Web surfers who visit their sites. Such requests may take the form of general statements underlining the organizations need for money, more often than not however requests are more direct urging supporters to donate immediately and supplying either bank account details or an Internet payment option. Another way in which groups raise funds is through the establishment of online stores and the sale of

items such as books, audio and video tapes, flags, t-shirts, etc.

The Internet facilitates terrorist financing in a number of other ways besides direct solicitation via terrorist Web sites. According to Dutch experts, there is strong evidence from international law enforcement agencies such as the FBI that at least some terrorist groups are financing their activities via advanced fee fraud, such as *Nigerian-style scam e-mails*.¹⁵¹⁰ To date, however, solid evidence for such claims has not entered the public realm.¹⁵¹¹ There is ample evidence, however, to support the contention that terrorist-affiliated entities and individuals have established Internet-related front businesses as a means of raising money to support their activities.

Terrorist organizations have a history of exploiting not just businesses, but also charities as undercover fundraising vehicles. This is particularly popular with Islamist terrorist groups, probably because of the injunction that observant Muslims make regular charitable donations. In some cases, terrorist organizations have actually established charities with allegedly humanitarian purposes.¹⁵¹²

3. NETWORKING

¹⁵¹⁰<https://www.scamwatch.gov.au/types-of-scams/unexpected-money/nigerian-scams>

¹⁵¹¹ Libbenga, Jan. 2004. ‘Terrorists Grow Fat on E-Mail Scams.’ *The Register* 28 September. http://www.theregister.co.uk/2004/09/28/terrorist_email_scams/

¹⁵¹²TERRORIST ‘USE’ OF THE INTERNET AND FIGHTING BACK, *Maura Conway*,

Available at: https://www.oii.ox.ac.uk/archive/downloads/research/cybersafety/papers/maura_conway.pdf

¹⁵⁰⁸Ibid

¹⁵⁰⁹Napoleoni, Loretta. 2004. ‘Money and Terrorism.’ *Strategic Insights* 3(4). Available at: http://www.ciaonet.org/olj/si/si_3_4/si_3_4_nal01.pdf



This refers to groups' efforts to flatten their organizational structures and act in a more decentralized manner through the use of the Internet, which allows dispersed actors to communicate quickly and coordinate effectively at low cost. The Internet allows not only for intra-group communication, but also inter-group connections. The Web enhances terrorists' capacities to transform their structures and build these links because of the alternative space it provides for communication and discussion and the hypertext nature of the Web, which allows for groups to link to their internal sub-groups and external organizations around the globe from their central Web site. Many terrorist groups share a common goal with mainstream organizations and institutions: the search for greater efficiency through the internet.¹⁵¹³ As discussed, the new technologies enable quicker, cheaper, and more secure information flows. In addition, the integration of computing with communications has substantially increased the variety and complexity of the information that can be shared.¹⁵¹⁴ This led Michele Zanini to hypothesize that "the greater the degree of organizational networking in a terrorist group, the higher the likelihood that IT is used to support the network's decision making".¹⁵¹⁵ Zanini's

¹⁵¹³ Margulies, Peter. 2004. 'The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment.' *UCLA Journal of Law and Technology* 8(2).

http://www.lawtechjournal.com/articles/2004/04_041207_margulies.pdf

¹⁵¹⁴ Weimann, Gabriel. 2004a. *WWW.terror.net: How Modern Terrorism Uses the Internet*. Washington DC: United States Institute of Peace. Available at:

<http://www.usip.org/pubs/specialreports/sr116.pdf>

¹⁵¹⁵ Ibid.

hypothesis appears to be borne out by recent events. For example, many of the terrorists indicted by the United States government since 9/11 communicated via e-mail.¹⁵¹⁶

The Net offers a way for like-minded people located in different communities to interact easily, which is particularly important when operatives may be isolated and having to 'lie low.' Denied a physical place to meet and organize, many terrorist groups are alleged to have created virtual communities through chat rooms and Web sites in order to continue spreading their propaganda, teaching, and training. Clearly, "information technology gives terrorist organizations global power and reach without necessarily compromising their invisibility."¹⁵¹⁷ It "puts distance between those planning the attack and their targets and provides terrorists a place to plan without the risks normally associated with cell or satellite phones."¹⁵¹⁸

4. RECRUITMENT

This refers to groups' efforts to recruit and mobilize sympathizers to more actively support terrorist causes or activities. The Web offers a number of ways for achieving this: it makes information gathering easier for potential recruits by offering more information, more quickly, and in multimedia format; the global reach of the Web allows groups to publicize events to

¹⁵¹⁷ Tibbetts, Patrick S. 2002. *Terrorist Use of the Internet and Related Information Technologies*. [Unpublished Paper]. Fort Leavenworth, Kansas: United States Army Command and General Staff College. <http://stinet.dtic.mil/cgi->

¹⁵¹⁸ Thomas, Timothy L. 2003. 'Al Qaeda and the Internet: The Danger of "Cyberplanning."' *Parameters* Spring. <http://carlisle-www.army.mil/usawc/Parameters/03spring/thomas.htm>



more people; and by increasing the possibilities for interactive communication, new opportunities for assisting groups are offered, along with more chances for contacting the group directly. Finally, through the use of discussion forums, it is also possible for members of the public--whether supporters or detractors of a group--to engage in debate with one another. This may assist the terrorist group in adjusting their position and tactics and, potentially, increasing their levels of support and general appeal.¹⁵¹⁹

Online recruitment by terrorist organizations is said to be widespread. **Harris et al** provide the example of an Iranian site that boasts an application for suicide bombers guaranteeing that the new 'martyr' will take seventy relatives with him into heaven. If the recruit is unsure about joining, or if the group is unsure about the recruit, he is directed to a chat room where he is 'virtually' vetted. If he passes muster, he will be directed to another chat room for further vetting, and finally contacted personally by a group member. This process is said to be aimed at weeding out 'undesirables' and potential infiltrators.¹⁵²⁰ It is more typical, however, for terrorist groups to actively solicit for recruits rather than waiting for them to simply present themselves. Weimann suggests that terrorist recruiters may use interactive Internet technology to roam online chat rooms

looking for receptive members of the public, particularly young people. Electronic bulletin boards could also serve as vehicles for reaching out to potential recruits.¹⁵²¹

5. INFORMATION GATHERING

This refers to the capacity of Internet users to access huge volumes of information, which was previously extremely difficult to retrieve as a result of its being stored in widely differing formats and locations. Today, there are literally hundreds of Internet tools that aid in information gathering; these include a range of search engines, millions of subject-specific email distribution lists, and an almost limitless selection of esoteric chat and discussion groups. One of the major uses of the Internet by terrorist organizations is thought to be information gathering. Unlike the other uses mentioned above terrorists' information gathering activities rely not on the operation of their own Web sites, but on the information contributed by others to "the vast digital library" that is the Internet.¹⁵²²

There are two major issues to be addressed here. The first may be termed 'data mining' and refers to terrorists using the Internet to collect and assemble information about specific targeting opportunities. The second issue is 'information sharing,' which refers to more general online information collection by terrorists.

¹⁵¹⁹ Gibson & Ward 2000, 305-306; Soo Hoo, Goodman & Greenberg 1997, 140; Weimann 2004a.

¹⁵²⁰ Margulies, Peter. 2004. 'The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment.' *UCLA Journal of Law and Technology* 8(2).

http://www.lawtechjournal.com/articles/2004/04_041207_margulies.pdf

¹⁵²¹ Weimann, Gabriel. 2004a. *WWW.terror.net: How Modern Terrorism Uses the Internet*. Washington DC: United States Institute of Peace. Available at: <http://www.usip.org/pubs/specialreports/sr116.pdf>

¹⁵²² (Weimann 2004a, 6)



Terrorists can also use the Internet to learn about antiterrorism measures. Even a simple strategy like conducting word searches of online newspapers and journals could allow a terrorist to study the means designed to counter attacks, or the vulnerabilities of these measures.

As an example, Jessica Stern points to *Bacteriological Warfare: A Major Threat to North America (1995)*, which is described on the Internet as a book for helping readers survive a biological weapons attack and is subtitled ‘What Your Family Can Do Before and After.’ However, it also describes the reproduction and growth of biological agents and includes a chapter entitled ‘*Bacteria Likely to Be Used by the Terrorist.*’ The text is available for download, in various edited and condensed formats, from a number of sites while hard copies of the book are available for purchase over the Internet from sites such as Barnesandnoble.com for as little as \$13.¹⁵²³ This kind of information is sought but not just by sophisticated terrorist organizations but also by disaffected individuals prepared to use terrorist tactics to advance their idiosyncratic agendas.

The threat posed by the easy availability of bomb-making and other ‘dangerous information’ is a source of heated debate. We must not underestimate the feasibility of such threats. As a result, many have called for laws restricting the publication of bomb-making instructions on the Internet, while others have pointed out that this material is already easily accessible in bookstores and

libraries¹⁵²⁴ (ADL 1998). In fact, much of this information has been available in print media since at least the late 1960s, with the publication of William Powell’s *The Anarchist Cookbook* and other, similar titles. Finally, it is important to keep in mind that removal of technical information from public Web sites is no guarantee of safeguarding it. In essence, this effort is akin to ‘closing the barn door after the horse has bolted.’

THE MEDIA AND COUNTERTERRORISM

Use of the Internet is a double-edged sword for terrorists. They are not the only groups ‘operating’ the Net (Rogers 2002, 191), which can act as a valuable instrumental power source for anti-terrorist forces also. The more terrorist groups use the Internet to move information, money, and recruits around the globe, the more data that is available with which to trail them. Since 9/11 a number of groups have undertaken initiatives to disrupt terrorist use of the Internet, although a small number of such efforts were also undertaken previous to the attacks. Law enforcement agencies have been the chief instigators of such initiatives, but they have been joined in their endeavors by other government agencies as well as concerned individuals and various groups of hacktivists.

Just as terrorists utilize and exploit the domestic and international triangles of

¹⁵²³ Stern, Jessica. 1999. *The Ultimate Terrorists*. Cambridge, MA: Harvard University Press, p. 51.

¹⁵²⁴ Anti-Defamation League (ADL). 1998. ‘Terrorist Activities on the Internet.’ *Terrorism Update* Winter. http://www.adl.org/Terror/focus/16_focus_a_a_sp. Associated Press. 2002. ‘Man Hijacks Al-Qaeda Site for FBI Use.’ *USA Today* 30 July. http://www.usatoday.com/tech/news/2002-07-30-al-qaeda-online_x.htm



political communication, government officials as well take advantage of this form of mass communication while displaying less expertise than terrorist groups in using the Internet for their purposes. Indeed, whereas terrorists must resort to violence or make credible threats to be admitted to the triangle of political communication by the gatekeepers of the traditional media, highly placed public officials do not have to unleash violence to gain such access because they form one corner of the domestic communication triangle and are part of the international triangular communication linkages as well. From this position of strength governmental sources tend to dominate reporting on foreign and security policy—especially when this involves military conflict or the likelihood of military deployment.

Freedom of the press is a fundamental right in liberal democracies because only a media free from governmental control can function as a check on governments in the interest of citizens. However, just as during war time and other serious international crises the press may be caught up in a public outburst of patriotism in reaction to terrorism at the expense of its watchdog responsibilities. Whether this change from watchdog to lapdog is the result of self-censorship or of intimidation by governments and their supporters, or both, the result is the same: Domicile media organizations allow presidents and other governmental leaders far more latitude to enact emergency policies and enlist support for extreme military actions in response to terrorist strikes and threats than they would in times of normalcy.

Thus, when societies suffer major terrorist blows, citizens tend to rally around their government leaders and thereby strengthen their presidents' or prime ministers' hands to effectively respond to such attacks.

CONCLUSION

Researchers are still unclear whether the ability to communicate online worldwide has resulted in an increase or a decrease in terrorist acts. It is agreed, however, that online activities substantially improve the ability of such terrorist groups to raise funds, lure new faithful, and reach a mass audience.¹⁵²⁵ The most popular terrorist sites draw tens of thousands of visitors each month. Obviously, the Internet is not the only tool that a terrorist group needs to 'succeed.' However, the internet has added new dimensions to existing assets that groups can utilize to achieve their goals as well as providing new and innovative avenues for expression, fundraising, recruitment, etc. At the same time, there are also tradeoffs to be made. High levels of visibility increase levels of vulnerability, both to scrutiny and security breaches. The proliferation of official terrorist sites appears to indicate that the payoffs, in terms of publicity and propaganda value, are understood by many groups to be worth the risks.

Freedom of the press and speech is another challenge faced. Some argue that limiting access to the press to obtain information is

¹⁵²⁵Arquilla, John & David Ronfeldt. 2001a. 'Emergence and Influence of the Zapatista Social Netwar.' In John Arquilla & David Ronfeldt (Eds.), *Networks and Netwars*. California: Rand. <http://www.rand.org/publications/MR/MR1382/MR1382.ch6.pdf>



wrong and that the public deserves to know what is taking place throughout the world. Sadly they fail to understand the impact of unlimited dissemination of information when arguing limitations. Appeals to patriotism to “muzzle independent media;” legal and legislative measure in place; self-censorship; and steps taken to restrict privacy on the internet and encryption software to protect email traffic are just some of the tools that some argue should not be used against the media. The one thing that is indisputable is that the media feeds on violence; and whoever can tell the most violent story wins the audience. This is not really about freedom of speech, but rather who will get the biggest audience and thus reap the capitol benefits.

Google has taken a step in the right direction. In order to avoid legal liability, Google’s French and German no longer offer anti-Semitic and pro-Nazi websites to surf; however these sites still remain on Google’s main U.S. based site. German law considers the publication of Holocaust denials and similar material as an incitement of racial and ethnic hatred, and therefore illegal. France has similar laws that allowed a students' antiracism group to successfully sue Yahoo in a Paris court for allowing Third Reich memorabilia and Adolf Hitler's "Mein Kampf" to be sold on the company's auction sites.” However, in November 2001, a U.S. judge ruled that Yahoo was free from liability because of the First Amendment's guarantee of free speech.¹⁵²⁶

¹⁵²⁶ McCullagh, Declan. 2003. ‘Military Worried About Web Leaks.’ *C/Net News* 16 January. <http://news.com.com/2100-1023-981057.html>



HUMAN TRAFFICKING AND REFUGEES PROTECTION

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Refugee:

According to the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol, a refugee is defined as "a person outside of his or her country of nationality who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion¹⁵²⁷. The largest refugee populations in the world are Afghanistan, Iraq, Somalia, Democratic Republic of Congo and Myanmar. Due to continuous conflicts in their home countries, they are forcefully displaced and they flee to countries like Pakistan, Iran, Syria, Germany and Jordan, which are home to the world's largest refugee populations.

According to The United Nations High Commissioner for Refugees (UNHCR) calculation there are more than 15 million refugees across the world today. Its official and authoritative command is to remove stress and provide relief from discomfort. It also aims at aiding them with legal and

¹⁵²⁷The 1951 Convention Relating to the Status of Refugees See also the 1967 Protocol, removing geographic and temporal restrictions from the Convention. 147 states are party to one or both instruments.

operational guidance and security up to the time when reasonable answer is given to their needs combining with durable solutions. The three durable solutions for refugees are voluntary repatriation, local integration and third country resettlement. According to voluntary repatriation refugees have a choice to go back to their own country with full security and self dignity. Local integration takes place when the country which provides asylum gives them the opportunity of permanent residency and to have an equal footing with nationals of the country. And third country resettlement is put forth only to a minor population of refugees and are recruited to the third country who are ready to accept them on eternal basis.

Human trafficking - definition and insight:

Human trafficking in refugees is a phenomenon which has its roots back to the ancient history...Now this issue has been recognized as an international issue and in the year 2000, the United Nations Trafficking Protocol enacted a widely accepted international definition:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services,



slavery or practices similar to slavery, servitude or the removal of organs¹⁵²⁸.

The business of human trafficking has been increasing tremendously and has become a grievous crime. Trafficking around the world has rediscovered how profitable it is to buy and sell people. The process which takes place has been described in overall three stages¹⁵²⁹. The procedure starts where victim is brought by making use of drugs, abduction, kidnapping, inducement, romance, alluring, blandishment or deception. They transfer, exchange and trade the victims across international borders to the brothel owners in the form of smuggling, accompanying them with services or to the managers of the sex establishments and exploiting the victim by taking advantage of his or her labour services or body organs by outraging their modesty.

Refugees- more prone and exposed to trafficking circuits:

Refugees are more prone and exposed to human trafficking than national citizens and there are no. of reasons, one of the prominent reason is that the refugees are easily traumatized and influenced as they have no national identity or ID proof, no legal documents, they have already flee their own country and are living without any legal identity thus these human trafficking circuits

targets such vulnerable group more easily, due to fear, lack of knowledge, education and awareness they are more directly exposed to such danger.

There is no proper track record or government of refugees coming from different countries and as there is no record it is easy for traffickers to target such people as in the end no one is going to come looking for them and even if authorities are looking for the victims it becomes difficult for them because of no proper record or facts about victims.

Life of women and children as refugees:

Victims of human trafficking may be men, women or children and sometimes they are even transferred to international borders. Among them women and children make up more than 50% of world refugees. Men become combatants or are killed in conflict circumstances and women and children are left behind and the only option left for them is to flee. UNHCR has considered children as 'people of concern' and those children who departed from their parents or guardians are considered to be the most vulnerable and highly prone to risk.

Rights of forcibly displaced women are at stake as they have no protection from their husbands, fathers or other male family members and ultimately they have to face high economic barriers resulting in severe economic hardship, discrimination in many forms, resulting in sexual harassment and rape in refugee camps which made them sex slaves and domestic workers. There were restrictions imposed on them to not to have access to public health services like reproductive health care and many more

¹⁵²⁸ 3 Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime, 2000 117 countries are signatories.

¹⁵²⁹ Siddhartha Kara, Sex Trafficking: Inside the Business of Modern Slavery. New York: Columbia University Press, 2009.



negative causes. In recent years they identified displaced women as ‘women at risk’ and need highly exceptional protection to face challenges¹⁵³⁰. As they have no legal representation and protection they have become the most vulnerable sex traffickers.

Gender discrimination, sexual violence, coercion – a social problem:

In or to all locations under discussion and throughout the world, women are the worst sufferer of gender discrimination. Gender discrimination makes the situation worse for refugee women to get security and survival challenges. Involvement of women in political and social scenario is highly problematic as a refugee. Being a refugee whether men or women they have to interface elevated level of sexual harassment and coercion in all the phases of refugee experience. One of most highly widespread problem is rape in all conflict situations as there is lack of law implementation and exemption or freedom from punishment. But it has its own advantage as it has been used one of the central weapons of war in current scenario. Women and children are the worst survivors and power is exerted against their will to interchange sexual services for them to be alive and is blackmailed for basic necessities, food, and security, cross border portability or their crucial needs. The only way to survive for refugee women and their families is prostitution as there is no alternative means available for their existence.

¹⁵³⁰See, among others, the excellent report of the Women’s Refugee Commission, “Abuse Without End: Burmese Refugee Women and Children at Risk of Trafficking” 2006

Economic endurance, the strive for survival

Refugees have to strive for their economic survival. Refugee’s camps are maintained by UNHCR and are provided with food, shelter, sanitation. Medical care and other basic necessities at least to have a stable life. Sometimes refugees to earn their living or livelihood indulge themselves in some activities like cultivation or searching for food through refused useful material but their survival becomes difficult as there is always an opposition from local resident population creating a barrier for refugees to endure in insecure and ambiguous economic circumstances for indulging themselves in addition of economic activity.

Taking urban refugees into consideration the scenario is slightly different as they have better approach to work opportunities but sometimes these golden opportunities make them to indulge themselves in unauthorized or illegal acts resulting in an unauthorized status and which pushes them to have criminal contact with criminal actors.

Family separation, the segregation from the social world:

One of the deepest emotional pain refugees have to face is family separation. Family members are scattered or lost for an infinite time because of harsh force without their consent from their homes or they have to move out in order to avoid the dangerous situation.

In a place of transient refuge, they are not in the same environment that existed in the country of their origin and therefore they are not helped by the similar community structure or social networks. No community support and a heavy loss of emotion has



interrupted their social systems and social network resulting in deficient physical security, less economic support, and even no emotional and mental support which in all makes them the most vulnerable and aggrieved party of human trafficking.

It is often seen that the men are mostly maltreated for forced labour whereas the women are forced mostly into sexually exploitative situations. Women fall prey to sexual trafficking more often for many reasons, as they search out for work they are easily influenced and are promised jobs as waitresses, nannies, servants but are transferred to various wealthier countries as sex slave or for sexual purposes.

Once these refugees victims are transferred from one place to another there are various mental problems they have to go through, they find themselves helpless, vulnerable, and traumatized and are forced into unwanted fearful situations. The trafficker's circuits are so strong that even if they try to run away from such exploitative situations, the traffickers use an assortment of methods to manipulate and have power and control over their victims, including:

- Dishonesty and deception, influencing and promising offers of employment and work opportunities abroad resulting in forced prostitution, or declaration indicating that such victims will be castigate and punished by national law enforcement or immigration establishments if they found out about the victims presence in the country.
- The use of aggressive and violent behavior or the threat of violence against the victim or victim's family member as well as captivity or segregation and isolation,
- Bringing into play the role of debt bondage or oppression for example asking

for the charge of victim transportation, the food and shelter providing costs, and over priced interest on money allegedly owed to traffic circuits

- Creating the fear or insightful of religious and cultural beliefs, including relatable taboo, black magic, witchcraft and voodoo magic.
- Due to the fear of no legal documents and no identity proof and no one else to raise voice in their support they all are directly exposed to such circuits.

Balance between national interest and refugee's interest:

Talking in terms of countries there has to be a balance of interest between national interest and refugee's interest, taking into consideration India:

Though India is not a signatory to 1951 convention and 1967 protocol but is a part of United Nation High Commissioner for Refugees (UNHCR) and National Human Rights Commission (NHRC) and has undertaken responsibility, the refugees are given the Indian Constitutional rights under Article 21 and are dealt with existing Indian laws both general and specific. India already having such large population and with advent of refugees there lies a conflict of interest and thus having the need to look forward for state obligation towards refugees: balance between Human Rights and National Interest. As mentioned earlier due to such large population in India and with coming up of refugees our very own Indian citizens are living with limited access to basic necessities, thus signing convention creates an obligation to provide employment, food, housing, medical, education to refugees but even without



signing up such conventions India's record of giving shelters has been good but not enough as the human trafficking circuits target refugees in a vast level thus hampering and creating fear in the mind of refugees. These refugees seek asylum and shelter in India and are here for help yet they have to go through various unseen and horrific experiences

Despite the fact that Indian government has established well manageable and experienced bureaucratic machinery familiar with problems of refugee's administration, the three branched strategy of Home Ministry, Ministry of External Affairs and state governments are well maintained ensuring overall human rights, fundamental freedom and equal opportunity to all, there needs to be more and definite for the refugees, the legal framework needs to be more effective and efficient. Policies must be so effective that they must take control over human trafficking network and help in stopping these trafficking circuits.

In order to maintain balance between national interest and refugees India is lacking in proper policies, maintenance, judicial reforms and laws and nation is supreme and national interest cannot be compromised thus maintaining such policies which are parallel and supportive. While the security and safeguarding interests of India remains paramount, taking care of refugees in India should be a moral duty for the state, thus there is efficient and effective need to come out with laws supporting and safeguarding both national interests as well as refugee's interests.

An upheaval – the mental pain and turmoil

Human trafficking is a complex phenomenon because the aggrieved party is traumatized by both physical and psychological harm by number of tactics like beatings, starving them by not providing them with food, gang rape and many more. Physical injuries include breaking of bones, burns, and mental trauma. Even many victims have to go through gynecological health issues by harmful sexual and commercial acts.

They have to undergo hardship making them the victim of sexually transmitted diseases, miscarriages, illegal abortions etc. Trauma can cause a disastrous effect on human life resulting in lack of self productivity. They indulge themselves in very risky situations unknowingly and have sudden anger and anxiety issues and this is all because of psychological damage they have faced. As they have mental trauma their chances of securing employment becomes less and ultimately they have to go through severe economic hardship. In case of children or young generation they try to recreate an event of sexual harassment of which once they were victim. Later they become the strong business holders of human trafficking and refugees become the victim of such stressful acts.

Rethinking legal framework for refugees, what needs to be done right:

Alternative legal framework:

There need to be a system which will protect the refugee human permanently if not, then temporarily to the best possibility through the issuance of temporary visas which will



guarantee the victim from risk of trafficking and protect refugees fundamental rights. . Article 7 of the Trafficking Protocol states that each State Party “shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”¹⁵³¹

The weakness here lies solely upon the state because it's the state protocols and provisions which govern the issuance of temporary visas so the state must act in all its effectiveness and efficiency and should follow strict guidelines stating all legal necessities so that these refugees are given visas as promised and are taken care after words, this helps in giving proper identities to refugees thus making it harder for human traffickers to make a move over refugees.

Reparation

Despite the fact whether a victim seeks protection in the form of asylum, an impermanent visa, or is repatriated, she should have admittance to methods of compensation for the harm she has suffered as a consequence of her trafficking. The right of an individual to a remedy for infringement of international human rights law can be found in several international human rights instruments: the Universal Declaration of Human Rights, Article 8; the International Covenant on Civil and Political Rights, Article 2; the International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, Article 14. The UN General Assembly has described victims of crime for the purpose of reparation as: “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”¹⁵³²

There needs to be strict and definite administration for compensation and reimbursement of refugees for all the problem they have gone through and the wild and fearful scenario they have faced over the last time, this is one important and essential point to be taken into consideration in order to bring refugee as a human and back to their life. This will give them incentive to be in their own and move on in life further as a human.

There needs to be an active enactment of various social groups, proper records of no. of refugees coming or entering the state, proper enrollment of refugees, no. of male, female, children entering the state, in which part of the state are they seeking asylum in, whether or not they have registered their identities to a particular state authorization or not, this may take time and seem hectic but for the good of all refugees these regulations needs to be strictly followed over and over again and everywhere. Specific laws especially for protection of refugees and protecting their human and

¹⁵³¹ 152 Trafficking Protocol, supra note 10, art. 7.

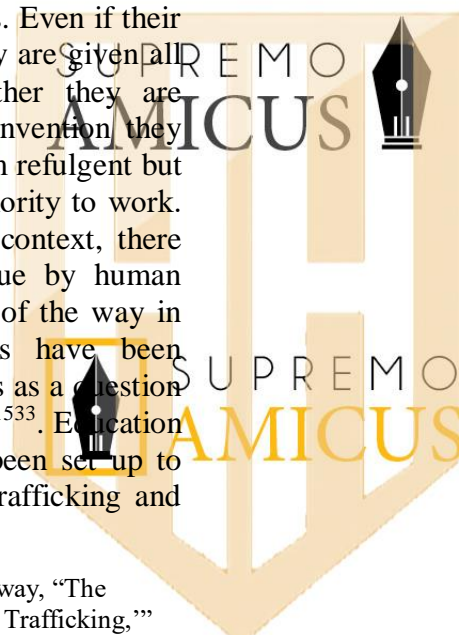
¹⁵³² 6 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, 96th Plenary Meeting, UN Doc. A/RES/40/34 (1985), para. 1.



fundamental rights by guarantying and making them aware of their rights should be enforced. Their need to proper asylum centre's as well as medical and trauma centre's, educational institutions, police departments and stations specially for the enquiries and details for lost refugees and whatever help they need in the time of adversities, job opportunities, employment and incentives must be provided.

As refugees have to face tremendous level of problems because of lack of legal status like they cannot be identified and are not being registered and this problem is mostly familiar among urban refugees. Even if their identity is recognized and they are given all international protection whether they are signatory to 1951 refugee convention they will be given full security from refulgent but still they won't have any authority to work. Particularly in the European context, there has been a significant critique by human rights observers and activists of the way in which anti-trafficking efforts have been shaped by some policy-makers as a question of stronger migration controls¹⁵³³. Education programs for refugees have been set up to inform them of the risks of trafficking and

how they can be reduced, should be particularly targeted to those at greatest risk¹⁵³⁴.



¹⁵³³See for example, James C. Hathaway, "The Human Rights Quagmire of 'Human Trafficking,'" Virginia Journal of International Law Vol 49:1 2008 5, Mary A. Young, "The Smuggling and Trafficking of Refugees and Asylum-Seekers: Is the International Community Neglecting the Duty to Protect the persecuted in the Pursuit of Combating Transnational Organized Crime?" Suffolk Transnational Law Review Winter 2003 and John Morrison and Beth Crossland, "The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?," Policy Research Unit UNHCR 2000

¹⁵³⁴For example, Jet Damazo, "Raising People's Awareness of Human Trafficking Risks in Projects Improving Connectivity," Poverty Matters Newsletter Issue 5 October 2007



**A CRITICAL ANALYSIS HOW RTI
ENSURES TRANSPARENCY AND
GOOD GOVERNANCE WITH
SPECIAL REFERENCE TO
PROTECTION TO WHISTLE
BLOWER**

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ABSTRACT

In the words of Prime Minister of India, Narendra Modi “ people power must be combined with good governance to bring about real, deep and lasting change. This combination can achieve almost everything from eliminating corruption to ending malnutrition and illiteray”

It has been universally accepted that democracy, liberty and rule of law are three basic characteristics of a civil society. Protection of citizen’s right and liberties are the State’s functions to serve the interests and welfare of its people and its susceptibility to public opinion constitute the basic functions of the State in a civil society. The extent to which the manner of exercising these functions would however, depend on the country’s economic and social conditions and the population components of the civil society. In order to ensure transparency and openness in the civil society, the right to information serves as an effective tool for a vigilant citizenry.

The concept of civil society presupposes more and more powers by the State for ensuring people’s well being. In order to accomplish this objective, the administrative powers of the executive branch of the

government need to be expanded, which being discretionary are likely to be exceeded or misused and therefore, a system of checks and balances has to be established to ensure transparency without hindering the functions of the State which require confidentiality or privileged communications.

INTRODUCTION

Good Governance may be termed as a synonym for the work carried out by a Government where the maximum benefit is given to the maximum number of people. India being a huge democracy needs participation from every front to implement the objective of good governance. The scenario often turns that laws of public interest and benefit is mostly used by the elite section of the society. However, this piece of legislation stands as an exception as it has reached its extent to the remote corner of the country.

The right to information is implicitly guaranteed by the Constitution. However, with a view to set out a practical regime for securing information, the Indian Parliament enacted the Right to Information Act, 2005 and thus gave a powerful tool to the citizens to get information from the Government as a matter of right. This law is very comprehensive and covers almost all matters of governance and has the widest possible reach, being applicable to Government at all levels- Union, State and Local as well as recipients of government grants.

India is the largest democracy in the world having a population which equals to the aggregate population of the next five



democracies including USA and Brazil.¹⁵³⁵ Much of the credit goes to the founding fathers of the Indian Constitution who introduced a democratic model of governance for independent India, which they considered which they considered to be suited to a big country like ours with diversity of people in terms of race, religion, language, culture, heritage, regional imbalances etc.

The first two decades of the post- Indian independence, mainly because of the fact that those who were at the helm of the government were the top leaders and persons who had actively participated in the Indian freedom movement and sacrificed their lives for the cause of the nations. The path set by the framers of the Indian Constitution and followed by their illustrious successors such as Dr. Ambedkar, Morarji Desai, Lal Bahadur Shastri and Dr. Zakir Hussain to name only a few, gradually started drowning in cynicism and hopelessness which touched its climax during the Emergency period from 21 June 1975 to 21 March, 1979 under the Late Prime Minister Smt. Indira Gandhi's regime. Gradually manoeuvring of power, corrupt practices, use of musclemen, violence and criminalization of politics threw the ideals of democracy to the winds and people's participation remained utopian to the society in the absence of fair and transparent election process.

The system of governance developed flaws and imperfections due to our elected representatives controlling the various

government departments in their capacity as Ministers, Deputy Ministers etc., thoughtlessly indulged in the sloth corruption and mal-practices forgetting that they are meant to serve the people and are not the masters.¹⁵³⁶ Hence such type of legislation is badly needed for making the public authorities accountable. *The paper will study the implementation and extent of this prominent law to the grass root level of India through the participation and activeness of common people who thrive to promote good governance through their extra ordinary works. In addition, the paper also highlights the need to amend the Act so as to protect the activists who often risk their lives for public interest.*

Keywords: Right to Information, Participatory Democracy, grass root level, Fundamental Right Implementation, Good governance, RTI Activists.

DEFINITION OF 'GOOD' AND 'GOVERNANCE'

GOOD

The term 'Good' has been derived from the word 'God' which is related to the knowledge of the idea of God. In Greek theory it means the knowledge of that absolute power which is supreme and the foundation of all material things. The word 'good' carries an innate sense of judgment- what is right, what is wrong, what is just, what is unjust.

GOVERNANCE

'Governance' means the processes by which decisions are made and implemented(or not

¹⁵³⁵It is bigger than the population of U.S., Indonesia Brazil, Russia and Bangladesh put together, which adds upto 74.9 Crores.

¹⁵³⁶N.V Paranjape " Right to Information Law in India" , published in 2014, Lexis Nexis Publication



implemented). Governance can be used in several contexts such as corporate government international governance, national governance and local governance. Since governance is the process of decision making and the process by which decisions are implemented, an analysis of the governance focuses on the formal and informal actors involved in implementation of such decisions. The word 'governance' derived from a Latin term which means 'steering'. It basically includes:-

- a. Voice and accountability which includes civil liberties and political stability
- b. Government effectiveness which includes the quality of policy making
- c. The quality of regulative framework
- d. The rule of law, which includes protection of property rights
- e. Independence of the Judiciary
- f. Cribbing corruption

THE GENESIS AND EVOLUTION OF THE RTI ACT, 2005¹⁵³⁷:

The evolution of the act can be traced back to the following:

- i) Good Governance
- ii) Global trend
- iii) Democratization of government
- iv) Peoples participation
- v) Public accountability
- vi) Rule of Law and Right to information
- vii) Combating corruption
- viii) Checking the misuse of discretionary powers

¹⁵³⁷ Manzra Dutta and Nandita Chauhan, Right to Information and Good Governance, <https://www.legalindia.com/wp-content/uploads/2013/03/RTI.pdf> at 3.54 PM on 1/10/ 2017

- ix) Administrative efficiency
- x) Creating a more democratic and open society
- xi) Protection of civil liberties
- xii) Reducing poverty and achieving the millennium development goals (MDGs)
- xiii) Effective implementation of government schemes
- xiv) Reforming administration
- xv) Right to information as a fundamental right
- xvi) Media's effectiveness
- xvii) Movement for transparency

ORIGIN OF RIGHT TO INFORMATION ACT 2005

In the international arena, the need to disseminate information was hugely felt and the first ever RTI law was enacted by Sweden in 1766, largely motivated by the parliament's interest in access to information held by the King. The Swedish example was later followed by the US, which enacted its first law in 1966 and then by Norway in 1970. Similarly, several western democracies enacted their own laws (France and Netherlands 1978, Australia, New Zealand and Canada 1982, Denmark 1985, Greece 1986, Austria 1987, Italy 1990).

By 1990, the number of countries with Freedom of Information (FOI) laws climbed to thirteen. A big step forward was the European Union Charter of Fundamental Rights in 2000, which included both freedom of expression and the right of access to documents. By 2010, more than eighty five countries had national-level RTI laws or regulations. In Asia so far almost 20 nations have adopted.



RTI: AN INTEGRAL ELEMENT OF PARTICIPATORY DEMOCRACY

An efficient representative democracy presupposes free access to information held by public authorities by making disclosure of information in public domain. A truly democratic set-up requires an informed citizenry who is direct stakeholder in every public authority's action. People have a basic right to know the process of working of the government. Therefore, there is a direct link between the right to information and good governance because it is by the disclosure of information by public authorities that transparent public system of governance accountable to the people is possible.

The Supreme Court in **Reliance Petrochemicals Ltd. v. Properties, Indian Express newspapers (P) Ltd. Bombay**¹⁵³⁸ observed that right to information is an essential ingredient communities coming together shrinking their distances, the expression 'liberty' appearing in Article 21 of the Constitution needs to be given an extended meaning and instead of confining it to the freedom of bodily restraint, it should be extended to include within it, the right to hold a particular order, a right to know and have information.

Francis Bacon, as early as in the year 1957 said, "*Information is the oxygen of democracy, it invigorates wherever it percolates.*" And he further stated that information is 'power' and a tool for ensuring transparency and accountability in the government and helps in reducing corruption.

MAXIMUM DISCLOSURE AND MINIMUM SECRECY PRINCIPLE

The principle of maximum disclosure of information with minimum non-disclosure or secrecy presupposes that:

1. All public bodies and authorities are under a duty to release information regarding its acts, policies, plans or schemes etc. and public have a reciprocal right to know or be informed.
2. The right to access to information can be claimed by any person even without spelling out the purpose for which such information is sought;
3. Where the State or a public body does not deem it proper to release the information, it has to justify the refusal with sufficient reasons;
4. The public bodies should not only release the information when asked for, but it should publish and disseminate information of significant public interest.
5. The disclosure of information should be subject to protection of rights and freedom of other persons and it may be denied where wider public interest so warrants.

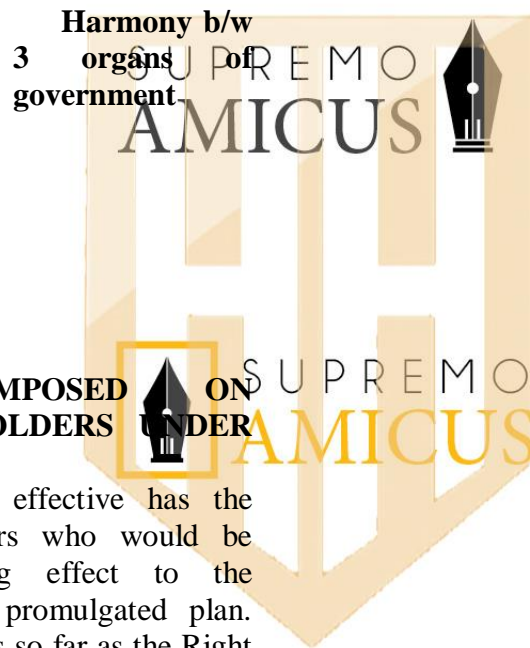
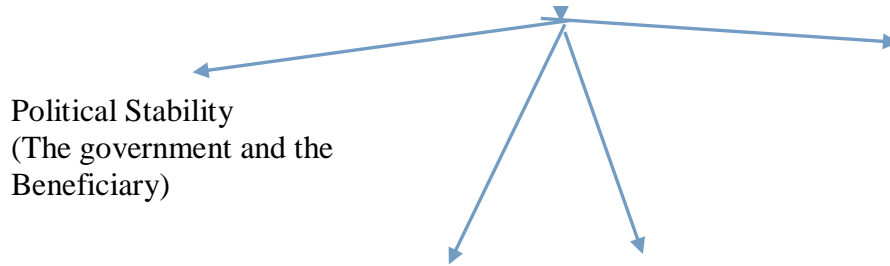
Unless it is exempted u/s. 8 of the Act. Few of the grounds are as follows:

- A. Threat to national security or friendly relationship with foreign states
- B. Endangers the safety of public or an individual
- C. Detrimental to judicial proceedings
- D. Undermines the effectiveness and integrity of government decision making process
- E. Confidential communications between two governments or falls under the category of privileged communication for the purpose of effective governance.

¹⁵³⁸AIR 1989 SC 190

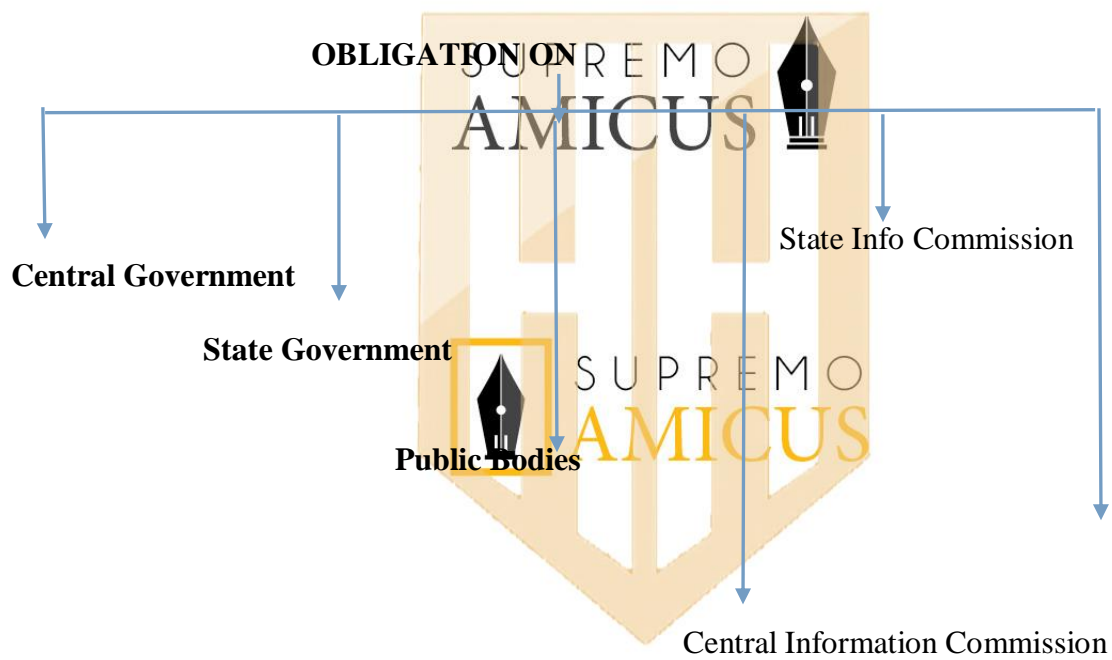


ESSENTIAL PRE- REQUISITE OF ACCESS TO INFORMATION



OBLICATIONS IMPOSED ON VARIOUS STAKEHOLDERS UNDER THE ACT

Any legislation to be effective has the identity the stakeholders who would be instrumental in giving effect to the underlying policy and promulgated plan. The primary stakeholders so far as the Right to Information Act is concerned and the role envisaged for them by categorising the critical functions, assignments, obligations, etc, to be discharged by them, include the following:-





ACCESS TO INFORMATION: A BASIC AND FUNDAMENTAL RIGHT

(ROLE OF INDIAN JUDICIARY)

The Supreme Court in **Bennett Coleman & co. v. U.O.I.**¹⁵³⁹ observed that freedom of speech and expression under Article 19(1)(a) impliedly includes freedom and right to information. It protects two kinds of interests, viz, person's freedom to express his views and opinions freely to subject to reasonable restrictions laid down in sub clause (2) of Article 19 and individual's social interest in knowing about the happenings around him and the governance.

In such circumstances, the Indian judiciary played a vital role to strengthen the spirit of democracy. The Supreme Court in **S.P. Gupta v. Union of India**¹⁵⁴⁰ endorsed the view that under a democratic set up, the people have right to know about the functioning of the Government. Again in **Prabhu Dutt v. Union of India**¹⁵⁴¹, the Supreme Court held that the right to know news and information regarding administration of the Government is included in the freedom of press. There were many more such decisions that reiterated the fundamental right to know and access information.

Much before the legislative enactment our Judiciary, in a progressive interpretation of the Constitutional provisions, had paved the way towards delineating the Right to

Information. In 1975, in **State of UP vs. Raj Narain**¹⁵⁴² case, Justice Mathew had ruled; *"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries."*

In **Secretary, Ministry of I&B, Government of India v Cricket Association of Bengal**¹⁵⁴³, the Supreme Court held that the right to impart and receive information from electronic media was included in the freedom of speech.

In **People's Union for Civil Liberties v. Union of India**¹⁵⁴⁴, the right to information was further elevated to the status of a human right, necessary for making governance transparent and accountable.

In subsequent judicial pronouncements, the 'Right to Know' was further elaborated as being inherent in the Fundamental Rights. The judicial interpretation found reflection in a wide-spread public movement demanding statutory provisions for such a right. The spirit behind the movement for Right to Information was summed up in pithy slogans like; *"hamara paisa, hamara hisaab hum janenge, hum jiyenge."*

In **Indira Jaisingh v. Registrar General, Supreme Court of India**¹⁵⁴⁵ it was held that information concerning judiciary or judicial proceedings may be refused to the public of

¹⁵³⁹AIR 1973 SC 106

¹⁵⁴⁰1993) 4 SCC 441

¹⁵⁴¹AIR 1982 SC 6

¹⁵⁴²1975 SCR (3) 333

¹⁵⁴³ 141995(002) SCC 0161 SC

¹⁵⁴⁴ 162003(001)SCW 2353 SC

¹⁵⁴⁵(2003) 5 SCC 494



the citizen regarding the conduct of the judges or judicial officers.

Landmark Decisions by the Chief Election Commission:

In the case of **Paramveer Singh v. Punjab University**¹⁵⁴⁶, the applicant applied for information regarding the merit list for selection of candidates to a particular post in the university. However, no proper information was provided. The Commission held that every public authority, must take all measures in pursuance of Section 4(1) (a) to implement efficient record management systems in their offices so that the requests for information can be dealt promptly and accurately.

In the case of **Shyam Yadav v. Department of Personnel Training**¹⁵⁴⁷, the applicant had sought details of property statements filed by bureaucrats. The Commission held that property statements filed by civil servants are not confidential and information can be disclosed after taking the views of concerned officials as per the provisions of the RTI Act.

In case of **Ram Bhaj v. Delhi Government**¹⁵⁴⁸, the appellant sought information about the guidelines issued by the Department of Personnel and Training regarding the disposal of public grievances within a specified time frame. The CIC directed the Delhi Government to inform the

common man about the timeframe required to redress their grievances.

A recent International Index published by a Paris- based organization called '*Reporters without Borders*' has ranked India 140th out of 180 countries if the context of freedom of press and information.¹⁵⁴⁹

Vice President(Hamid Ansari) highlighted three aspects:¹⁵⁵⁰

- Until the passage of this Act, the disclosure of information held by public authorities in India was governed, exclusively, by the Official Secrets Act, 1923. It was a legacy of the British colonial rule, encouraged secrecy and openness in administration and was designed to deny information about government activities to the people.

- The RTI Act is different from other enactments in its operation. For most other laws, the executor of the law is government; and the citizen is normally required to comply by these laws. The RTI Act is the very opposite. Here, the citizen is the executor and the government has to act in response to a directive from the citizen. It thus reverses the roles of the public and the government. This is a new situation and requires getting used to by the administrators.

- A third radical provision of the Act is that the information seekers need not give a reason for demanding the information held by public authority or prove his/her locus standi for it. This allows activists and civil society organizations to take up issues on

¹⁵⁴⁶ (CIC/OK/A/2006/000669, 15/6/2006).

¹⁵⁴⁷ CIC/WB/A/2009/000669, 17/6/2009).

¹⁵⁴⁸ 19(CIC/SG/A/2010/000537+000538/7492, 19/4/2010).

¹⁵⁴⁹ N.V Paranjape, " Right to Information Law in India", published in 2014, Lexis Nexis Publication

¹⁵⁵⁰Press Information Bureau, RTI is a Powerful tool that Strengthens Democracy and Promotes good Governance by Enhancing People's Participation: Vice President, published on 11-July-2016 17:37 IST



behalf of the marginalized and the unempowered.

IMPORTANT FEATURES OF RIGHT TO INFORMATION ACT, 2005

1. All citizens possess the right to information
2. The term Information includes any mode of information in any form of record, document, e-mail, circular, press release, contract sample or electronic data etc.
3. Rights to information covers inspection of work, document, record and its certified copy and information in form of diskettes, floppies, tapes, video cassettes in any electronic mode or stored informations in computer etc.
4. Applicant can obtain Information within 30 days from the date of request in a normal case
5. Information can be obtained within 48 hours from time of request. If it is a matter of life or liberty of a person.
6. Every public authority is under obligation to provide information on written request or request by electronic means.
7. Certain informations are prohibited.
8. Restrictions made for third party information Appeal against the decision of the Central Information Commission or State Information Commission can be made to an officer who is senior in rank.
9. Penalty for refusal to receive an application for information or for not providing information is Rs. 250/- per day but the total amount of penalty should not exceed Rs. 25,000/-.
10. Central Information Commission and State Information Commission are to be constituted by the Central Government and the respective State Governments.

11. No Court can entertain any suit, application or other proceedings in respect of any order made under the Act.

RTI ACTIVISTS: THREATENED GROUP OF THE SOCIETY (PROTECTION TO WHISTLE BLOWERS)

Though the RTI Act is helping in promoting good governance, yet it has major lacunae when it comes to the safety and security of the activists who risk their lives for public good. The RTI activists are the risk takers who often put their life into danger for the benefit of others. Yet it is a bitter truth that the risk that they take to expose corrupt practices, many times end with the end of their lives. Media and civil society organizations have particularly been instrumental in raising the issue of protection of the RTI users with the policy makers. It has now been widely accepted that RTI users are prone to victimization by those with vested interests and a protective mechanism needs to be in place to curb such a practice.¹⁵⁵¹

Whistle- blowers are persons who are reporting corruption or wilful misuse of discretion which causes demonstrable loss to the government or who report commission of a criminal offence by a public servant. Thus, whistle- blowers are persons who release information to the public about wrong doing of any public authority or official and disclose corrupt practices. A

¹⁵⁵¹ 20Manu Moudgil, Analysing victimisation of RTI applicants and strategies for their protection, (2/10/2017, 12.17pm), [http://rti.gov.in/manu_moudgil_rti_fellowship_report .pdf](http://rti.gov.in/manu_moudgil_rti_fellowship_report.pdf)



Whistle blower must possess the quality of a crusader and leaves no room for any doubt. The RTI activists had been campaigning for an effective Bill for seeking adequate protection to persons reporting *corruption* or *wilful misuse of power* by the public authorities. The Bill called the **Whistle Blowers Protection Bill** was passed by House of People 2011 and was taken up by the Upper House in 2012 for consideration. Rajya sabha finally passed the Bill on February 21, 2014 and it got President's assent on May 9, 2014 and came into force on May 12, 2014. The Act seeks to establish a mechanism to receive complaints relating to disclosure or any allegation of *complaint* or *wilful misuse of power* or *misuse of discretion* against any public servant and to ensure or cause any injury into such disclosure and to provide *adequate safeguard against victimization* of persons making such, complaints or matters connected therewith and incidental thereto.

It may be pointed out that, even before the enactment of the *RTI Act, 2005*, the *Law Commission Of India in its 179th report of 2001* had recommended passing of the **Public Interest Disclosure (Protection to Informers) Bill, 2002** on the pattern of the **U.S. Whistle Blowers Protection Act, 1989** but the Government wanted to play safe, rejected the same holding that there was no need for any specific provision for protection to whistle blowers in the RTI Bill as the provisions of the IPC and CrPC were sufficient to take preventive and punitive action against threats or attacks on whistle blowers.

The issue to protect the whistleblowers caught the attention of the entire nation

when National Highways Authority of India engineer Satyendra Dubey was killed after he wrote a letter to the office of the then Prime Minister detailing corruption in the construction of highways. His confidential letter was leaked out and after a few days he was murdered. This led to a national outcry regarding the safety of RTI activists. The Supreme Court taking the notice of this issue pressed the Government to take notice of this matter and give immediate effect to the cause. Many times the issue has been raised in the parliament yet no permanent solution is achieved.

Even The National Human Rights Commission (NHRC), mandated to protect the Human Rights of citizens have also reported that they get ample of complaints about attacks on RTI activists and have begun to take cognizance of these attacks.

Because of all these reasons there is an urgent need for amendment of the Right to Information Act, 2005 so as to provide protection for those seeking information under the Act. The Asian Centre for Human Rights recommended that a separate chapter, "Protection of those seeking information under the (RTI) Act" be inserted in the Act. Threats and attacks as complaints received under Section 18(1) (f) of the RTI Act and, where prima facie merit is found in the complaint, the IC should institute an inquiry under Section 18(2)¹⁵⁵² read along with Section 18(3) which grants IC the powers of civil court and Section 18 (4)¹⁵⁵³. The report goes on to suggest that such intimidation, threat or attack can also qualify as obstruction and falls within the gamut of

¹⁵⁵² Reasonable ground for inquiry

¹⁵⁵³ Power to examine any record



Section 20(1) as an offence liable for penalty.

this aspect, the role of NGO'S and the media is highly anticipated.

CONCLUSION AND SUGGESTIONS

RTI – the significant instrument to access public information is a unique legislation that puts a common man in the same footing as that of an MP, MLA or any other member within the authority to seek accountability and appropriation of the functioning of the Government.

4. There is an urgent need to protect the whistle blowers who are targeted or attacked so easily. The impending bill should be passed or else an ancillary strict measure should be taken in this regard.

Though the RTI is a remarkable piece of legislation yet it has issues and challenges in its execution and implementation especially in the downtrodden areas. For the effective application of the Act, the following suggestions are put forward:

5. The disposal rate of RTI application is quite low. Unless and until the pendency rate is curtailed, the objective of the Act would not be met. Thus, the Information Commission needs to be more active in their functioning.

1. The technicalities of filing an RTI application should be more simplified. The literacy rate of rural India is quite low and thus they find it quite difficult to comply with the procedural formalities.

The strict implementation of this law not only depends on the political will but also active civil societies. Currently, the RTI Act in India is passing through a decisive phase, much more needs to be done to facilitate its growth and development. Mere protest against the lack of implementation of this law alone is not sufficient, one needs to encourage this initiative taken, for the law to grow and mature.

2. The report of the second Administrative Reforms Commission entitled, "Right to Information – Master Key to Good Governance" recommends that the Official Secrets Act, 1923, should be repealed, as it is incongruous with the regime of transparency in a democratic society. This recommendation should be adhered to.

3. RTI gives twin effect of good governance and inclusive development. Thus, the usability and effect of the RTI should be publicized by awareness campaigns to the general people especially for the poor and marginalized people who are more victimized when compared to the rest. In



PUBLIC INTEREST LITIGATION: MISUSE AND IMPACT OF JUDICIAL INTERVENTION ON GOVERNANCE

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light on the Check and Balance System by highlighting Role of Judiciary and Impact of its intervention on governance. The paper further discusses guidelines by Supreme Court to stop the misuse of PIL and suggest measures to restore the authenticity and usefulness of this revolutionary concept.

Abstract

Public Interest Litigation has been a milestone achieved by Indian Judicial System, the main objective of which is being able to impart equal opportunities of justice to disadvantaged and marginalized sections of the society by dismantling the traditional concept of Locus Standi. Not only PIL, made justice flexible for less privileged but also has been successful in imparting discretion to courts by virtue of it being able of being introduced in a court of law suo motu rather than by aggrieved party, a member of the public or another third party.

The use of PIL has led to a rapid transformation and substantial improvements in matters pertaining to the public at large. However, in recent years a number of cases have emerged involving its abuse and misuse. Filing frivolous complaints about one's private and political gains have become a usual practice since the filing of such cases costs much lesser than private litigations. The paper with the help of certain cases presents the current scenario of PIL and forms of misuse of PIL. The paper argues about uses and abuse of PIL by analyzing its growth and evolution post emergency era. It also tends to throw

1. INTRODUCTION

‘Public Interest Litigation’ was started for the protection of the public interest of people who are socially or economically disadvantaged. The term ‘Public Interest’ means larger interests of the public, general welfare and the word ‘Litigation’ means ‘a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy’. The Indian PIL is an improved version of the PIL in the USA. It is not defined in any act or statute, utis only interpreted by judges to consider the intent of Public at large. It is not an ordinary legislation, it cannot be filed by one private person against another, at least one party to the suit must a government body in order to constitute a PIL.

A PIL may be introduced in a court of law Suo Motu, rather than the aggrieved party or another third party. The right to file a suit in a PIL is given to a member of Public, the member may be a non-governmental organization, an institution or an individual. It has opened a new horizon for the poor and ignorant by diluting the traditional concept of Locus Standi. It has historically been an innovative procedure and brought about a revolution in the judicial system of India.



2. CONCEPT OF PUBLIC INTEREST LITIGATION

The concept of Public Interest Litigation came around in the 1980s in India to foster judicial activism in a healthy way in case where lawmakers' interest of public at large is affected. It is in accordance with the principles enshrined in Article 39A¹⁵⁵⁴ of the Indian Constitution to protect and deliver prompt justice with the help of law.

Article 32 of the Constitution of India, "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed". Under this Article, the Supreme Court is empowered to issue writs or directions or orders. Generally, only aggrieved party has to right to seek redressal under Article 32.

Justice P.N. Bhagwati in the case *S.P. Gupta vs Union of India and Anr.*¹⁵⁵⁵ articulated the concept of PIL as "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate

¹⁵⁵⁴INDIA CONST. art. 39 A "Equal Justice and free Legal Aid: The State shall secure that the operation of the legal system promotes Justice, on a basis of equal opportunity and shall, in particular, provide free Legal Aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing Justice are not denied to any citizen by reason of economic or other disabilities."

¹⁵⁵⁵AIR 1982 SC 149.

class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226¹⁵⁵⁶ and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons."¹⁵⁵⁷

In *Dr. D. C. Wadhwa and Ors vs State of Bihar and Ors.*¹⁵⁵⁸, the petitioner filing the petition was not the aggrieved. Counsel of Bihar opposed the writ petition on the ground that the first petitioner has no locus standi to maintain the petition. The court held that the petitioner as a member of public has 'sufficient interest' to maintain a petition under Article 32.

3. HISTORICAL BACKGROUND

The seeds of the revolutionary idea of Public Interest Litigation were sown in India, initially, by Justice Krishna Iyer in *Mumbai Kamgar Sabha, Bombay vs M/S Abdulbhai*

¹⁵⁵⁶INDIA CONST. art. 226 "Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

¹⁵⁵⁷*S.P. Gupta vs Union of India and Anr* (AIR 1982 SC 149).

¹⁵⁵⁸AIR 1987 SC 579.



Faizullabhai and Ors.¹⁵⁵⁹ wherein the appeal was dismissed on ground that the appellants union was not a party to the dispute, therefore had no locus standi. It was further initiated in Akhil Bhartiya Soshit Karamchari Sangh (Railway) vs Union of India and Ors.¹⁵⁶⁰, wherein an unrecognized association was permitted to approach court under Article 32. Krishna Iyer J. stated, “Our current processual jurisprudence is broad-based and people oriented and envisions access to justice through “class actions”, “public interest litigation” and “representative proceedings”. The narrow concept of cause of action and person aggrieved and individual litigation becoming obsolescent in some jurisdictions. [224 G-H].”¹⁵⁶¹

Prior to 1980s, the concept of litigation in India was still in its rudimentary form. It was seen as a private pursuit for the vindication of private interests as only the aggrieved party could personally knock the doors of justice to seek remedy. However, all these scenarios gradually changed after the Emergency Period of 1975-77.

4. EMERGENCE AND GROWTH OF PUBLIC INTEREST LITIGATION

The emergency period of 1975-77 witnessed somewhat colonial nature of the Indian legal system. It marked not just a political watershed in the country, but also judicial one. During the period of emergency, by

invoking Article 352¹⁵⁶² of the Indian Constitution, Gandhi exercised her extraordinary powers leading to widespread of state repression and governmental lawlessness. Thousands of innocent people including political opponents, protestors, strike leaders were sent to jails and were put to abuse and torture resulting in complete deprivation of civil and political rights of the detainees and prisoners. The post-emergency period provided an occasion for the judges of the Supreme Court and High Court to openly disregard the impediments of Anglo-Saxon procedure in providing access to justice to the poor. The Supreme Court devised an innovative way wherein a member of the public can approach the Supreme Court or High Court for seeking legal remedies in case concerning public interest. An informal nexus of pro-active judges, lawyers, journalists and social activists led to the emergence of PIL. This new trend manifested a stark difference between the traditional justice delivery system and the modern justice system where the judiciary is performing an administrative judicial role.

¹⁵⁵⁹ AIR 1976 SC 1455.

¹⁵⁶⁰ AIR 1981 SC 298.

¹⁵⁶¹ Akhil Bhartiya Soshit Karamchari Sangh (Railway) vs Union of India and Ors (AIR 1981 SC 298).

¹⁵⁶² INDIA CONST. art. 352 “If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, made a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation Explanation A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.”



5. EVOLUTION OF PUBLIC INTEREST LITIGATION

The first reported case of PIL, *Hussainara Khatoon & Ors vs Home Secretary*¹⁵⁶³, State of Bihar, focused on the inhuman conditions of prisons and under trial prisoners. The PIL under the writ of Habeus Corpus was filed by an advocate on the basis of the news item published in the Indian Express, highlighting the plight of a large number of men and women including children languishing in various jails in Bihar deprived of their freedom and legal rights. These proceedings led to the release of more than 40,000 undertrial prisoners. As a result, speedy justice emerged as a basic fundamental right which was earlier denied to these prisoners. The same set pattern was adopted by courts in subsequent cases.

The magnificent efforts of Justice P.N. Bhagwati and V. R. Krishna Iyer were instrumental of this juristic revolution of the eighties. They recognized the possibility of providing access to justice to the less privileged and exploited people by relaxing the rules of standing. A new era of the PIL movement was established by Justice P.N. Bhagwati in the case of *S.P. Gupta v. Union of India*¹⁵⁶⁴ (also known as Judges' Transfer case). Three writ petitions which were filed in different High Courts were transferred to the Supreme Court under Article 139¹⁵⁶⁵.

¹⁵⁶³ AIR 1979 SC 1360.

¹⁵⁶⁴ AIR 1982 SC 149.

¹⁵⁶⁵ INDIA CONST. art. 139 "Conferment on the Supreme Court of powers to issue certain writs Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of

The court held that any member of the public acting bonafide can file a Writ in the court seeking redressal against violation of fundamental or legal rights of persons who cannot approach the court by themselves due to any social or economic or any other disability.

In the case, *Anil Yadav & Ors v. State of Bihar & Anr.*¹⁵⁶⁶, the brutalities of the Police in Bhagalpur Central Jail were exposed. This PIL was a result of the suspension of Superintendent of the jail on the ground that he was negligent in providing proper medical care to the blinded undertrial prisoners in the jail claiming that his suspension is quashed as it was mala fide filed to prevent him from filing the affidavit as per court's direction. Newspaper report revealed that about 33 suspected criminals were blinded by the police in Bihar Jail by putting acid into their eyes. Through interim orders, the Supreme Court gave directions to the State government to bring the blinded men to Delhi for medical treatment and ordered speedy prosecution of the guilty policemen. The court also read right to free legal aid as a fundamental right of every accused under Article 21¹⁵⁶⁷.

In the 1990s, the judiciary stepped ahead in judicial activism and set another benchmark by accepting the news reports, letters, telegrams as petitions. "The Court entertained a letter from two professors at the University of Delhi seeking enforcement

them, for any purposes other than those mentioned in clause (2) of Article 32."

¹⁵⁶⁶ AIR 1982 SC 1008.

¹⁵⁶⁷ INDIA CONST. art. 21 "Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law."



of the constitutional right of inmates at a protective home in Agra who were living in inhuman and degrading conditions.”¹⁵⁶⁸ In *Paramjit Kaur vs State of Punjab and Ors.*¹⁵⁶⁹, a telegram sent to the Court was considered as a petition to Habeus Corpus under Article 32¹⁵⁷⁰.

6. MISUSE OF PUBLIC INTEREST LITIGATION

6.1 USE AND MISUSE

The Public Interest Litigation was created and nurtured with care and caution by courts to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and prompt justice. As Supreme Court stated, it was aimed at “fostering and developing the laudable concept of PIL and extending its long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard”¹⁵⁷¹. However, the profound need of this tool has been plagued with misuses, the abuse of PIL which was started in the 90s is increasing with its extended and multifaceted use. The genuine cases of public interest have receded back and irresponsible PIL activities have started to

play a major but no so constructive role in the legal arena. Many of the activists have found it as a handy tool to file frivolous cases due to the allurements it offers such as less court fees and speedy justice as compared to ordinary litigations. In a recent case, while dismissing an ostensible petition against the sale of a plot through public auction, the court held that the matter has not been raised in public interest at all, but to ventilate a private grievance. The abuse of PIL has reached a stage where it has started undermining the actual purpose for which it was designated.

The time has come for a serious scrutiny of the misuse of public interest litigation. There have been numerous cases in the history of jurisprudence in which misuse of PIL can be seen. In *Subhash Kumar vs State of Bihar and Ors.*¹⁵⁷², the petitioner filed a writ petition alleging that the respondents are discharging surplus waste from their washeries into the river Bokaro making it unfit for consumption and the State of Bihar and Pollution Control Board have failed to prevent the pollution and instead granted lease on payment on collection of slurry. The court held that “A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected person or even by a group of social workers of journalists. But recourse to proceeding under Article 32 of the constitution should be taken by person genuinely interested in the protection of society on behalf of the community. Public Interest Litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32 are

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¹⁵⁶⁸Wikipedia, the free Encyclopedia, Public Interest Litigation in India, (Jan. 12, 2017, 5:28 AM).

¹⁵⁶⁹AIR (1996) 7 SCC 20.

¹⁵⁷⁰INDIA CONST. art. 32 “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.”

¹⁵⁷¹ *Janata Dal vs H.S. Chowdhary and Ors.* AIR (1992) 4 SCC 305.

¹⁵⁷² AIR 1991 SC 420.



entertained it would amount to an abuse of process of the Court, preventing speedy remedy to other genuine petitioners from this Court.”¹⁵⁷³

In the case, *Sheela Barse vs State of Maharashtra*¹⁵⁷⁴, the petitioner, a free-lance journalist sought permission to interview female prisoners in Maharashtra State Jails. However, she started tape-recording the interviews, as a result, the permission was withdrawn. Aggrieved by the withdrawal, the petitioner moved to the court filing a writ petition on the ground that a citizen has right to know under Article 19 (a)¹⁵⁷⁵ and 21¹⁵⁷⁶. Dismissing the petition, the court held that the person who has the permission to interview has to abide by some restrictions and as per the tape recording of interviews, special permission has to be acquired. In *Kalyaneshwari vs Union of India*¹⁵⁷⁷, the court cited misuse of PIL.

6.2 PUBLICITY INTEREST LITIGATION

The rampant misuse of PIL comes in various forms. The first being what Justice Arijit Pasayat in *Ashok Kumar Pandey vs State of West Bengal*¹⁵⁷⁸ described as “busybodies, meddlesome interlopers, wayfarers or officious interveners who approach the court

¹⁵⁷³Subhash Kumar vs State of Bihar and Ors AIR 1991 SC 420.

¹⁵⁷⁴ AIR 1983 SC 378.

¹⁵⁷⁵INDIA CONST. art. 19 (a) "All citizens shall have right to freedom of speech and expression."

¹⁵⁷⁶INDIA CONST. art 21 "Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law."

¹⁵⁷⁷AIR (2011) 3 SCC 287.

¹⁵⁷⁸ (2004) 3 SCC 349.

with extraneous motivation or for the glare of publicity.”¹⁵⁷⁹ Such petitions are filed regularly by litigants for the sake of gathering attention and to publicize.

6.3 POLITICAL INTEREST LITIGATION

Then, there is the misuse of PILs by political interests, many a time petitions are not filed for Public Interests but merely for Political reasons. Justice P. N. Bhagwati in *S.P. Gupta v. Union of India*¹⁵⁸⁰ in this regard said, “But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that ‘political pressure groups who could not achieve their aims through the administrative process’ and we might add, ‘through the political process, may try to use the courts to further their aims’. These are some of the dangers in public interest litigation which the court has to be careful to avoid.”¹⁵⁸¹

This was restated in 1991 in *Janata Dal v. H.S. Chowdhary and Others*¹⁵⁸² by Justice Pandian as under: “It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can

¹⁵⁷⁹*Ashok Kumar Pandey vs State of West Bengal*, (2004) 3 SCC 349.

¹⁵⁸⁰ 1982 SC 149.

¹⁵⁸¹ *S P Gupta vs Union of India* AIR 1982 SC 149.

¹⁵⁸²(1992) 4 SCC 305.



approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the color of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold.”¹⁵⁸³

6.4 PRIVATE INTEREST LITIGATION

The third form is the misuse of PIL by hidden litigants for private vested interests. Rival Business groups, personal rivalries are settling scores by resorting to PILs, activists are using PIL to fulfill their personal interests disguise as public interests. A case in this point is T. N. Godavarman Thirumulpad vs Union of India and Ors.¹⁵⁸⁴ In this case, the question pertaining to the authenticity of PIL was raised. M/s. Maruti Clean Coal and Power Limited was pleading since the filing of a petition that petitioner filed has been set up by their competitor and there was a link between former and the latter. The Supreme Court dismissed the filing of mala fide application in veil of public interest litigation by petitioner.

In Chhetriya Pradushan Mukti Sangharsh Samiti vs State of UP and Ors¹⁵⁸⁵, the petitioner filed a petition alleging environment pollution caused by the chimneys of Respondent no. 3. “It was contended that it had complied with the provisions of Air (Prevention and Control of Pollution) Act, 1981 and the Water

(Prevention and Control of Pollution) Act, 1974 and there was no complaint whatsoever. It was further stated that the petitioner was an anti-social element and his only aim was to blackmail and extract money from people like Respondent No. 3 and that a criminal case has already been filed against him, for such activities.”¹⁵⁸⁶

6.5 PAISE INCOME LITIGATION

The fourth and equally disturbing form is Paise Income Litigation. In Dattaraj Nathuji Thaware vs State of Maharashtra & Ors¹⁵⁸⁷, the Court dismissed the petition styles as Public Interest Litigation on the grounds that no public interest was involved in it, in fact, the petitioner blackmailed Respondent no. 6 & 7 and was caught red-handed accepting the money. It also turned out that the allegations made in the petition about unauthorized constructions were false. Justice Pasayat, in this case, reflected, “Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". The High Court has found that the case at hand belongs to the last category. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not

¹⁵⁸³ Janata Dal vs H.S. Chowdhary and Ors. AIR (1992) 4 SCC 305.

¹⁵⁸⁴ AIR 1995 SC 202.

¹⁵⁸⁵ AIR 1990 SC 2060.

¹⁵⁸⁶ Chhetriya Pradushan Mukti Sangharsh Smiti vs State of UP and Ors AIR 1990 SC 2060.

¹⁵⁸⁷ AIR 2006 SC 540.



merely an adventure of knight errant born out of wishful thinking.”¹⁵⁸⁸

“It is depressing to note that on account of such trumpety proceedings initiated before the Courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of

publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.”¹⁵⁸⁹

7. STRENGTHENED ROLE OF JUDICIARY

The contribution of PIL has been significant and it has played a dominant role for the Judiciary in appointment and transfer of judges, their removal and terms and conditions of their services. In the case *S.P. Gupta vs Union of India*¹⁵⁹⁰, a petition was filed by a senior advocate challenging the transfer of judges from one High Court to another. The Apex Court declared that in the matter of appointments, the executive has the final say. However, the power related to the appointment was later vested in Chief Justice of India and two senior most judges of Supreme Court since the word consultation occurring should be read to mean concurrence. The matter whether the court has amended the language of the article by purporting to interpret has faced considerable controversy.

The matter regarding the impeachment motion for the removal of V. Ramaswamy J. witness a number of petitions. The Speaker of Lok Sabha constituted a three judges’ committee to enquire the allegations.

¹⁵⁸⁸ Dattaraj Nathuji Thaware vs State of Maharashtra AIR 2006 SC 540.

¹⁵⁸⁹ Janata Dal vs H.S. Chowdhary and Ors. AIR (1992) 4 SCC 305.

¹⁵⁹⁰ S P Gupta vs Union of India AIR 1982 SC 149.



However, as the Lok Sabha dissolved, the government did not constitute the committee stating that the motion has been relapsed. This was questioned in a PIL by an association of lawyers. The SC held that the motion has not relapsed clarifying the process of removal of judges consisted of two stages namely a.) the stage of investigation and proof of misbehavior, b.) the stage of discussion and voting in the Parliament. Post the conclusion of inquiry and submission of a report to the Parliament, Sarojini Ramaswamy (the wife of Justice V. Ramaswamy) filed a PIL asserting the right of the judge to be supplied with a copy of the report before Parliament started debating the motion to give the judge an opportunity to defend himself.

The Supreme Court was provided the opportunity by virtue of PIL filed by All India Judges Association to give extensive directions to the state governments on issues concerning the appointment and removal of judges, functioning of the judiciary, provisions for residential accommodation for judicial officers, libraries, vehicles, and suggested the setting up of an All India Judicial Services.

The PIL has witness significant role of Judiciary in matters related to Environment, as in M.C. Mehta Case¹⁵⁹¹. The petitioner was a pioneer in bringing a number of issues to the court, including leakage of Oleum Gas from a factory in Delhi, the dangers posed by Mathura Refinery to Taj Mahal, regulation of traffic and the degradation of Ridge area in Delhi. The involvement of courts in these matters has triggered the activation of the statutory machinery

¹⁵⁹¹M C Mehta vs Union of India AIR 1987 SC 1086.

established under law related to Environment. The repercussions of unchecked industrialization forced the court to come up with strict rules, hence ended up developing Polluter's pay principle. This, however, attracted a lot of criticism since the court heard neither the industries nor the affected workmen.

The precautionary principle, another principle evolved encourages the state to envisage the risks of the use of hazardous technology. The court dealing with the issue of pollution caused by over 900 tanneries operating in Tamil Nadu noticed that Tamil Nadu's export of unfinished leather accounts for 80% of country's export and is one of the major foreign exchange earners.

The court's guidelines on the concept of sustainable development and balancing ecology has become a part of the customary international law. While through the PILs, the courts have enforced strict orders, it has given rise to issues involving workers' right and affected them and their families directly or indirectly. Whether it was shutting down an industry or about strictly implementation of the Forest and Wildlife Protection Act where the interests of the tribal population were affected. Thus, PIL has contributed in strengthening the role of Judiciary and granting to it powers it lacked before.

8. JUDICIAL ACTIVISM AND CONCEPT OF CHECK AND BALANCE

The Indian constitution does not follow a strict doctrine of separation of powers¹⁵⁹²but

¹⁵⁹²Separation of Powers, "A fundamental principle of the United States government, whereby powers



envisages a system of checks and balances¹⁵⁹³. Policymaking, Implementation of policy and Resolving the disputes are conventionally regarding the exclusive domain of the executive, the legislature, and the judiciary. However, the concept of Public Interest Litigation tends to narrow the divide between the exclusive roles of each organ of the government. The role of the court in matters related to law and policy is to check that if the implementation or non-implementation of a certain policy or law is resulting in a violation of fundamental, legal or constitutional rights. For instance, *M.C Mehta v Union of India*¹⁵⁹⁴, the court noticed that despite the enactment of Environment (protection) Act, 1986, a considerable decline in the quality of environment is seen, the court then asked the central government to indicate the steps it had taken so far along with the presenting of the national policy for the protection of environment. In *Vishaka & Ors vs State of Rajasthan*¹⁵⁹⁵, PIL concerning sexual harassment of women at workplace annihilated the fine divide between law and policy, declaring that the guidelines by the court would be enforceable till the time the legislature enacts a law in compliance with the convention on the Elimination of All Forms of Discrimination Against Women, the guidelines set out by the court would be enforceable. There have

been other instances as well where courts assumed powers not delineated in the constitution, such as *Kesavananda Bharti*¹⁵⁹⁶ or *Advocates-on-Record*¹⁵⁹⁷.

The three organs of the government are subject to each other's scrutiny by way of check and balance, this implies that the working of one should not violate the principles of other. Hence, it can be said that the rule in today's scenario requires a reconsideration to make it work in a proper way. In the absence of specific provisions in the Constitution regarding the Separation of powers, it fails to fulfill the very purpose of check and balance it anticipates. Judicial activism and reviews functions is an important element of our judiciary to keep a check on the legislature and the executive, to restraint their powers within their ambit that the constitution set for them. The independence of the judiciary which is evident from the above discussion implies that the Indian Constitution has not entirely been embraced the doctrine of separation of powers but drawn a lot from the concept. In *Indira Gandhi vs. Raj Narain*¹⁵⁹⁸, it was accepted as a basic feature of the Constitution by the Supreme Court.

9.IMPACT OF JUDICIAL INTERVENTION ON GOVERNANCE

The edifice of a democratic government rests on three organs of the government machinery – the executive, the legislature

and responsibilities are divided among the legislative branch, executive branch, and judicial branch.”

¹⁵⁹³ Checks and Balances, “A fundamental principle of American government, guaranteed by the Constitution, whereby each branch of the government (executive, judicial, and legislative) has some measure of influence over the other branches and may choose to block procedures of the other branches.”

¹⁵⁹⁴ AIR 1987 SC 1086.

¹⁵⁹⁵ AIR (1997) 6 SCC 241.

¹⁵⁹⁶ His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225).

¹⁵⁹⁷ Supreme Court Advocates-on-Record Association vs Union of India (1993) 4 SCC 441.

¹⁵⁹⁸ Indira Gandhi vs Raj Narain (1975) 1975 SCR (3) 333).



and the judiciary. The powers and functions of these organs are defined in the Constitution of India.

However, the past few years witnessed some noteworthy changes, with the growth of judicial activism, the role of judiciary seems to be expanded and in a number of cases, it is seen establishing policies and issuing guidelines on various issues. The decisions taken by the Legislative and Executive if affecting the fundamental rights of the citizen of India in Part III¹⁵⁹⁹ of the Constitution can be challenged through Public Interest Litigation in a court of law. In the case, *Shri R. R. Tripathi vs Union of India*¹⁶⁰⁰, the extension in the service of the Chief Secretary of State of Maharashtra and the maintenance of PIL raising an issue regarding the validity of legislation was questioned. The Court held that “The post in question affects the entire administration of the State and, therefore, larger public interest, it will be difficult to hold that the present Writ Petition is not maintainable as a Public Interest Litigation”¹⁶⁰¹.

The Judicial intervention in legislature can be more aptly described through the instances where the Supreme court issued guidelines and directions to central or state legislation regarding laws and policies on subjects affecting public in general by entertaining large number of PILs covering matters of human rights, environment, public policy and accountability, sexual

harassment of women at workplaces and the judiciary.

The modern democracies have developed a tendency of conferring the discretionary power on the executive or administrative officers. The administrative discretion can be subject to question under the jurisdiction of Pro bono came before the Court of justice in many cases. A challenge was made while interpreting the ‘doctrine of reasonable classification’ under Article 14¹⁶⁰², that the actions of executive exercised under this discretion cannot be questioned through Public Interest Litigation. But, in *State of Kerala vs Aravind Ramakant Modawdakar & Ors.*¹⁶⁰³, the court ruled that “Courts would not interfere with classification, which is the prerogative of the legislature, so long as it was not arbitrary or unreasonable”. The intervention of courts in the executive by judicial activism widen the scope of social economic justice as mentioned in the Preamble, and Directive Principles of State Policy¹⁶⁰⁴ in the Constitution of India. Through passing judgments in landmarks case such as *Manohar Lal Sharma vs The Principle Secretary and Ors*¹⁶⁰⁵ (Coal Allocation Scam).

Taking into account the recent Mumbai terror attacks of November 2008, a former attorney general of India filed a petition in the apex court seeking to better equip the

¹⁵⁹⁹ INDIA CONST. Part III provides for Fundamental rights to the citizens under art. 12-35.

¹⁶⁰⁰ AIR 2009 (111) BOMLR3053.

¹⁶⁰¹ *Shri R. R. Tripathi (Advocate) vs Union of India* AIR 2009 (111) BOMLR3053.

¹⁶⁰² INDIA CONST. art. 14 “Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”

¹⁶⁰³ (1999) 7 SCC 400.

¹⁶⁰⁴ INDIA CONST. Part IV deals with Directives Principles of State Policy under art. 36-51.

¹⁶⁰⁵ AIR 2014 (2) SCC 533.



Indian police. The court asked the government about the step taken by them in this direction.

10. STEPS AND MEASURES TO STOP MISUSE OF PUBLIC INTEREST LITIGATION

10.1 THE PUBLIC INTEREST LITIGATION (REGULATION) BILL

Public interest litigation is a weapon which has to be used with great care and caution and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice or publicity seeking is not lurking.

In the judgement of Dattaram Nathuraj Thaware vs State of Maharashtra¹⁶⁰⁶, Justice Pasayat said, "It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have as locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the color of PIL, brought before the Court for vindicating any personal grievance, deserves rejection at the threshold". While tracing growing abuse of PIL, an attempt to curb the abuse was made in 1996, when a private bill was introduced in the upper house of the Indian Parliament. The Public Interest Litigation (Regulation) Bill proposed that petitioners filing frivolous cases should be put behind bars and pay damages. The bill, however, could not receive support from all

¹⁶⁰⁶ AIR 2006 SC 540.

political parties as it raised concerns of interfering with judicial independence, as a result the bill lapsed and the attempt was failed.

10.2 THE JUDICIARY

The judiciary is well-aware of the dark side of the PIL and has responded to it at various points to encourage the use of Public Interest Litigation. It has come to notice of many that we have to prevent and protect this essentially important jurisdiction as to restore its authenticity. The court in BALCO Employees' Union vs Union of India¹⁶⁰⁷ recognized that in recent time, there has been an increase in cases involving abuse of PIL. Keeping in mind, the Supreme Court has limited standing in PIL to individuals or groups or non-governmental organizations who are acting bonafide. Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against vexatious public interest litigations. Thirdly, the Supreme Court has ordered the High Courts to be more selective in entertaining the public interest litigations.

"Justice Pasayat stated three principles in a judgement rendered by him, the principles are; a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; and (c) the information being not vague and indefinite."¹⁶⁰⁸

The first question that needs to be raised should be whether the intentions of the petitioner are clear or not. A judge should be

¹⁶⁰⁷ AIR 2002 SC 350.

¹⁶⁰⁸ Dattaraj Nathuji Thaware vs State of Maharashtra AIR 2006 SC 540.



immediately suspicion when a person who has nothing to do with the cause produces himself before the court as a petitioner and even hidden official documents which in ordinary course would not be accessible to him. Justice Pasayat in Ashok Kumar Pandey case ¹⁶⁰⁹ raised the issue of possession of official documents and stated, “Whenever such frivolous pleas are taken to explain possession, the courts should do well not only to dismiss the petitions but also to impose exemplary costs.” If a person seems to spend huge amounts on maintaining a PIL, it should immediately come to the notice of the judge that who is footing such costs as in the case T. N. Godarvarman Thirumulpad ¹⁶¹⁰. It is not at all suggested that all public interest litigations should be viewed suspiciously, but the courts and judges need to be extra careful and vigilant in matters of Public Interest Litigation.

In the case, Sanjeev Bhatnagar vs Union of India And Ors ¹⁶¹¹, the court went a step ahead imposing a monetary penalty on the petitioner (an advocate) for filing a frivolous complaint. On finding that the petition was devoid of public interest, the court dismissed the case with costs of Rs. 10,000/-.

10.3 RECOMMENDATIONS OF SUPREME COURT

The Supreme Court have taken relevant measures to curb the abuse of PIL. The filing of aimless and frivolous petitions

“creates unnecessary strain on the judicial system and consequently leads to inordinate delay in disposal of genuine and bona fide cases,” stated a Bench consisting of Justices Dalveer Bhandari and Mukundakam Sharma. Justice Bhandari, writing the judgment, said: “The courts’ contribution in helping the poorer sections by giving a new definition to life and liberty and in protecting ecology, environment and forests is extremely significant”. The Bench added, “unfortunately, of late, such an important jurisdiction, which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives”. In a recent case, State of Uttaranchal vs Balwant Singh Chauhal & Ors. ¹⁶¹². The Supreme Court observed that it is crucial to streamline a significant procedure like Public Interest Litigation which has been turned out to be a panacea over the last four decades, with this regard, following directions were issued by the Court to preserve the purity and sanctity of PIL.

1. “The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.
2. Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar

¹⁶⁰⁹ Ashok Kumar Pandey vs State of West Bengal, (2004) 3 SCC 349).

¹⁶¹⁰ T. N. Godavarman Thirumulpad vs Union of India and Ors. (AIR 1995 SC 202).

¹⁶¹¹ AIR 2005 SC 2841.

¹⁶¹² AIR 2010 SC 1029.



General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

3. The courts should prima facie verify the credentials of the petitioner before entertaining a PIL
4. The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.
5. The court should be fully satisfied that substantial public interest is involved before entertaining the petition.
6. The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.
7. The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.
8. The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.¹⁶¹³

PIL is a tool that enables common man to seek remedy for his grievances. The right of equal access to justice, which has emanated with the social rights regime, must be used to serve basic human, fundamental and constitutional rights, which profess to guarantee legal rights.

¹⁶¹³ State of Uttaranchal vs Balwant Singh Chauhal & Ors. (AIR 2010 SC 1029).

Thus, whenever any public interest is involved, the court must scrutinize the case to ensure that there is a genuine public interest involved.

11. CONCLUSION

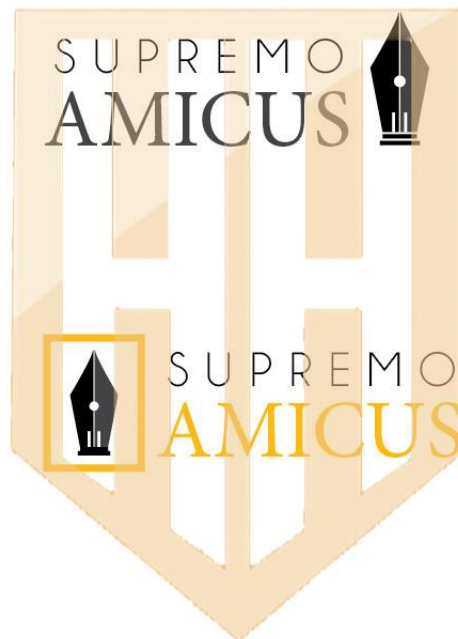
Bearing in mind, the power and significance of PIL in making the justice accessible and a living reality for every citizen and also the efforts channeled through the medium of PIL in providing justice to marginalized and disadvantaged section of the society, the process is positively succeeding and has a glorious record in last few decades. Prior to 1980s for a grieved, poor and deprived citizen hard to seek remedy for their grievances because of economic disability, lack of information and red-tapism. However, post emergency era it took a completely different turn with the introduction of PIL. Where the relaxation of rule of locus standi and introduction of epistolary jurisdiction has made it easy to seek justice, we cannot ignore the fact that it has also opened a back door to let people fulfill their private and political interests thus misusing the PIL.

It should also be noted that in recent years a lot of criticism have been voiced raising concern about increasing judicial activism and its impact on separation of powers and check and balances in the system which implies that a reconsideration and delineation is needed talking about power and functions of the three organs of the Government, however strengthening of role of judiciary does no harm.

The Legislation, the judges and the Apex Court of India has been taking measures



from time to time ever since the abuse of Public Interest Litigation has emerged. Public Interest Litigation is the power given to the public by courts for their welfare. Since it is an extraordinary remedy available at cheaper costs, it ought to be filed after thinking twice and should not be used as a substitute for ordinary means. As Cunningham said, “Indian PIL might rather be a Phoenix: a whole new creature arising out of the ashes of the old order”.





SEXUAL VIOLENCE AGAINST WOMEN IN ARMED CONFLICT: A SHADOW OVER COLLECTIVE HUMANITY

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Abstract:

Although men are equally vulnerable to sexual violence, women are more adversely affected by it due to the added risk of pregnancy that very frequently results out of rape. Their condition is further worsened because of their societal position and the treatment they receive post violence period. The cases of sexual violence against women which are officially reported figure only tip of the iceberg. This paper deals with the persisting challenges of impunity with specific focus on the array of tools and bodies that have emerged to tackle and prosecute perpetrators of sexual violence due to the progress made in the international humanitarian law. It also delves into the effectiveness of these tools and bodies, and the way in which they can be used to combat the ongoing war against women's body. Further, it will examine whether these have in fact proved to be a boon for the survivors of sexual violence to wipe away their tears, or merely paid lip service to these victims and not been as fruitful as they were hoped to be. The victims of this form of violation of human rights not only require justice but also medical attention. The proposal therefore defines the measures for their

medical treatment and psychological healing. Sexual violence leaves invisible and indelible scars on the victims. The argument of this paper is that the struggle to eradicate sexual violence against women in armed conflict needs a coherent response by the individuals and the nation at large. Thus, it attempts to recommend various measures for moving the world towards achieving the goal.

Introduction:

“It is more dangerous to be a woman than to be a soldier in modern conflict.”¹⁶¹⁴ Sexual violence against women in armed conflict is not a new phenomenon. The crime of sexual violence in armed conflict is a by-product of conflict itself. Acts of sexual violence against women during armed conflict include rape, forced sexual intercourse, forced impregnation, sexual mutilation, forced abortion, forced sterilization, forced prostitution and many other human rights abuses. Out of all these, rape is the most prominent form of sexual violence against women in conflicted areas. There is a saying - “rape is as old as war itself” and women have had the battlefield played out on their bodies for centuries around the world. Rape is often used as a weapon of war. It was carried out systematically and strategically as a war tactic. In Rwanda, as it has been reported, during the three months of genocide in 1994, the number of women raped was between 100,000 and 250,000.¹⁶¹⁵ Countries where

¹⁶¹⁴ Maj. Gen. Patrick Cammaert, former UN Peacekeeping Operation commander in DR Congo (2008).

¹⁶¹⁵ Benda Fitzpatrick, *Tactical Rape in War and Conflict: International Recognition and Response* 29 (Policy Press, 2016).



sexual violence in conflict has occurred include Middle -East countries like Iraq, Iran, Syria and Israel; Latin American countries like Brazil, Ecuador, Bolivia; and other countries like Kenya, Sierra Leone, South Africa, Nigeria and Rwanda.

The women experience these types of violence at the hands of government actors, non-state militaries (including rebel forces and dissidents) and community members. Other acts of sexual violence, such as strip search, kidnapping or slavery, are often part of an intentional strategy of war used to destabilize the civilian population and violate the honour of the opposing force.

Consequences and Continuing Challenges:

Sexual violence in armed conflict has numerous short and long term socio-economic and cultural consequences, and harmful effects on health of the victims. The most conspicuous consequence of it is the loss of life due to killing by perpetrators or commission of suicide by the victim. Survivors of this violence suffer long-term health hazards which include sexually transmitted infections, HIV/AIDS, gynaecological and pregnancy complications, urinary tract infections, vaginal fistulas, obstructed labour and psychological trauma like isolation, fear, feelings of unworthiness. Cases of such sexual assaults and rape are the most under-reported crimes because victims of such offences very often apprehend if their complaints are going to be believed. As stated by a Haitian woman, *“A woman would never go to report a rape to the HNP [Haitian National Police] because she is likely to be raped by them*

again”

¹⁶¹⁶

Many victims don’t report the violence and abuses they suffered because of the fear of being ostracized from the community. Moreover, sexual violence is rarely trialled due to frequent non-availability of witness, difficulty in collection of evidence as well as identification of perpetrators.

International Framework-A shield for victims of sexual violence:

A historical analysis of the International Humanitarian Law (IHL) provides a crucial understanding of how the redress of wartime sexual violence evolved. It includes both customary and conventional rules. Rule 93 of customary International Humanitarian Law prohibits rape and other forms of sexual violence whereas Rule 94 of the aforesaid law prohibits slavery and slave trade in all its form. Acknowledging the specific needs and vulnerabilities of women, IHL offers a number of specific protections applicable only to women. According to Rule 134 of the law, specific protection, health and assistance needs of women affected by armed conflict must be respected. This rule is applicable to both international and non-international armed conflict .The famous Liber Code of 1863 which drew upon customary International Law forbade in Article 44, “all rape” and provided in Article 47 that “crimes ... such as ...rape ... are punishable.”¹⁶¹⁷

¹⁶¹⁶ Bill Quigley, Haiti Human Rights Report, 15 (2005), <http://www.ijdh.org/pdf/QuigleyReport.pdf>.

¹⁶¹⁷ General Order 100:The Liber Code ,Instructions For The Government Of The Armies Of The United States by The Field By Order Of Secretary Of The War , art. 44 and 47, Apr.24, 1863, http://avalon.law.ale.edu/19th_century/lieber.asp#sec2.



The principal conventional instruments of relevance to the victims of sexual violence in armed conflict are the four Geneva Conventions and the two Additional Protocols of 1949 which deal with international and non-international armed conflict respectively. Article 27 of the Fourth Geneva Convention identifies the specific protection of women against any attack on their honour especially against rape, enforced prostitution, or any form of indecent assault.¹⁶¹⁸ Article 3, common to the four conventions, prohibits outrages against personal dignity, particularly humiliating and degrading treatment, that is meted out at any time or any place.¹⁶¹⁹ The foregoing provision is also mentioned in Article 75(2) (b) of Additional Protocol I¹⁶²⁰ and Article 4(2) (e) of the Protocol II¹⁶²¹. Article 76 of the Additional Protocol I states that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault¹⁶²².

The constituent documents of the ICTY (International Criminal Tribunal for Yugoslavia), the ICTR (International Criminal Tribunal for Rwanda), the ICC (International Criminal Court) and the Special Court for Sierra Leone contain provisions to ensure the delivery of justice to the victims of sexual violence. The jurisprudence of the ICTY and ICTR has

been instrumental in recognizing and understanding different forms of sexual violence in conflict as crimes. These tribunals classified the acts of sexual violence as crimes of genocide and crimes against humanity. Article 5 of the Statute of ICTY states that the tribunal shall have power to prosecute perpetrators of rape and other inhumane acts when committed in armed conflict, whether of international or internal character, directed against any civilian population.¹⁶²³ Article 3 of the statute of ICTR considers rape as a crime against humanity¹⁶²⁴. Under article 4, any person violating Article 3 common to the Geneva Convention or the Additional Protocol II can be prosecuted by the International Tribunal.

In comparison to ICTY and ICTR Statutes, the Rome statute is considered to be more comprehensive on sexual violence. Article 7(2)(f) of the Statute of ICC holds rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as crimes against humanity.¹⁶²⁵ Article 8(2)(b) of the Statute of ICC declares the commission of outrages upon personal dignity, in particular humiliating and degrading treatment, rape, sexual slavery, enforced prostitution, forced

¹⁶¹⁸ ICRC, The Geneva Conventions of 12 August 1949, 161 (2012), <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>.

¹⁶¹⁹ *Id.* at 35-36.

¹⁶²⁰ Charlotte Lindsey- Curtet, Florence Tercier Holst-Roness & Letitia Anderson, Addressing The Needs Of Women Affected By Armed Conflict, 174 (2004).

¹⁶²¹ *Id.*

¹⁶²² *Id.*

¹⁶²³ United Nations, Updated Statute of The International Criminal Tribunal for Former Yugoslavia, 6 (2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹⁶²⁴ Statute Of The International Tribunal For Rwanda 45(2007), http://legal.un.org/avl/pdf/ha/ictr_EF.pdf

¹⁶²⁵ Rome Statute of the International Criminal Court, 3-4(2011), https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.



pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence as war crimes.¹⁶²⁶ The ICC should undertake measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, with particular regard to gender and crimes involving sexual violence. The ICC's Rules of Procedure and Evidence set a new international standard for good practice as regards prosecuting sexual violence. The Rules of Procedure and Evidence require the ICC to be watchful in controlling the questioning of witnesses to avoid harassment or intimidations, especially in sexual violence cases [Rule 88(5)].¹⁶²⁷ Article 2 of the Statute of the Special Court of Sierra Leone, the Special Court shall have the power to prosecute persons who have committed rape, sexual slavery, enforced prostitution, forced pregnancy and any other forms of sexual violence¹⁶²⁸ or other inhumane acts¹⁶²⁹ as part of a widespread or systematic attack against any civilian population.

The International Covenant on Civil and Political Rights, Convention on the elimination of all forms of discriminations against women¹⁶³⁰, the Declaration on the Elimination of Violence Against Women, the Inter-American Convention on the

Prevention, Punishment and Eradication of Violence Against Women,¹⁶³¹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), and the Vienna Declaration and Programme of Action address the issues of women without any discrimination. UNSC Resolution 1345, 1820, 1888 and 1960 of UN's Security Council specifically address the issue of sexual violence and provide political framework that compels action by governments and international organisations.

Effectiveness:

Even with the progress made in international law to tackle and prosecute perpetrators of sexual violence, our collective humanity has been unable to prevent sexual violence from becoming a daily feature of most conflicts. It is argued that very little has changed in the lives of most women, as both state and non-state actors continue to commit such heinous crimes with impunity. The international tribunals have been criticised for failing to shield the survivors of sexual violence. There are instances when the witnesses of ICTR were threatened or killed before or after testifying at the Tribunal. During trials, the victims of sexual violence are reported to have faced aggressive cross examination, which left them re-victimized. Adequate treatment is not provided to women who have contracted STDs from the act of rape. Excepting some rare cases, most human rights treaties do not contain clear-cut

¹⁶²⁶ *Id.* at 8.

¹⁶²⁷ ICC, Rules of Procedure and Evidence 33 (International Criminal Court, 2nd edition, 2013).

¹⁶²⁸ Statute of the Special Court Of Sierra Leone, art. 2(g), Aug. 14, 2000, <http://www.rscsl.org/Documents/scsl-statute.pdf>.

¹⁶²⁹ *Id.* art. 2(i).

¹⁶³⁰ The Convention on Elimination of All Forms of Discrimination Against Women, Art 6 (1979) <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article6>.

¹⁶³¹ The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (2003), <http://www1.umn.edu/humanrts/instreet/brazil1994.html>.



provisions to deal with such crimes. Convention on the Rights of the Child (1989) provides that States Parties must protect children (including girls) from all forms of sexual exploitation and sexual abuse by adopting appropriate legislative, administrative, social and educational measures.¹⁶³² The fact that most human rights treaties do not contain an explicit provision against sexual violence does not mean that they do not prohibit rape and other forms of sexual violence. While the four Geneva Conventions and their Additional Protocols may not be adequate in their approach to sexual violence, they do provide the required protections from and prohibitions against rape and other forms of sexual violence.

International law has made immense progress in the prosecution front. However, compared to the redressal of the sexual violence by the ad-hoc tribunals and ICC, the international prosecution of sexual violence remains rare in practice. They are unable to fulfil their obligations to the optimal level. For instance, the ICC is criticised for failing to charge, investigate and prosecute these crimes in Lubanga¹⁶³³, Katanga¹⁶³⁴ and Ngudjolo and Bemba. With limited judgements on sexual violence, it is uncertain whether these prosecutions will be influential in deterring the perpetration of

rape and other forms of sexual violence in armed conflict areas.

Medical and psychological support to the victims:

In armed conflict affected areas, the war wounded are often given priority regarding medical treatment. In the same footing, the medical and surgical needs of victims of sexual violence are of priority also. Such women should be provided with free and full access to the benefit of medical care. Care should include the treatment of serious or life threatening injuries (if any from such sexual acts of violence), prevention of unwanted pregnancy and sexually transmitted diseases and psychological support. Preventive care for HIV/AIDS infection, syphilis, gonorrhoea and unwanted pregnancy must be provided. Emergency contraception pills must be given on the request of the women at the risk of pregnancy that results from the assault within 5 days (120 hrs) of its happening.¹⁶³⁵

Appropriate training should be given to all health workers who provide services to the victims. They should provide an objective service, display sensitivity and compassion towards such people. Confidentiality must be maintained in order to protect the victims from social repercussions.

Victims often report having flashbacks of the sexual violence committed against them. The victims may experience nightmares, difficulty in sleeping, anxiety, depression, social phobias, post-traumatic stress disorder, and interpersonal difficulties

¹⁶³²Office of The High Commissioner for Human Rights, Convention on the Rights of Child, art.34, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

¹⁶³³ Passy Mubalama & Espérance Nzigire, ICC Still Facing Rape Case Challenges, Institute of War And Peace Reporting, (8 Aug. 2011), <https://iwpr.net/global-voices/icc-still-facing-rape-case-challenges>.

¹⁶³⁴*Id.*

¹⁶³⁵ World Health Organisation, Guidelines for Medico Legal Care for Victims of Sexual Violence 64(2003).



including sexual problems. Hence, along with the medical assistance, psychological counselling must be provided to the survivors to help them develop coping mechanisms.

Addressing the consequences of Sexual Violence:

A more concerted effort involving government, civil society, military and other people working at the grass root level is required to address the issue adequately. At national level, the government must ensure that its agencies working in the conflict and post-conflict areas contribute to end all forms of sexual violence. They must step up their efforts in implementing comprehensive strategies that protect women and punish the offenders. It should take the initiative to include victims in peace negotiation tables so that they can propose recommendations on the issues concerning their security in armed conflict areas.

They must ensure that there is an end to impunity for the use of sexual violence in armed conflict in peace negotiations, ceasefire agreements and post conflict reconciliation plans. The acts of sexual violence in internal armed conflict should be exhaustively investigated and its perpetrators promptly prosecuted by an independent and impartial tribunal. It must train officials dealing with sexual violence cases to face the challenges of work in areas of armed conflict and sensitively handle the victims. Criminal sanctions must be imposed on public officials (related to the investigation or examination of sexual violence during armed conflict) who obstruct investigations, or harass abuse or

assault the victims and/or witnesses of such offence.

Further, the government must provide sufficient funds to the criminal trials of war crime, ensuring that all the cases of sexual violence are properly prosecuted. In order to help the proper functioning of international justice mechanisms, they should provide financial and political support. Women's security must be given top priority. They must provide funds to carry out research for the better understanding on the problems of sexual violence in conflict, its after effects and development of recovery strategies.

The survivors not only seek justice but also seek emotional support from the people close to her. The act of sexual violence must not be considered as the fault of the woman. Rather, they must be helped to break their silence and report any such acts to the proper authorities. Individuals must show their outrage against such crimes and aid the international efforts to prosecute the perpetrators. They must bring awareness among people that such issues are not inevitable and can be stopped. In order to fill the gap between the law and the reality, there is an urgent need for the proper implementation of the international prohibition of sexual violence and the prosecution of sexual violence. The support from individuals to such international laws can be a huge help in holding the perpetrators accountable.

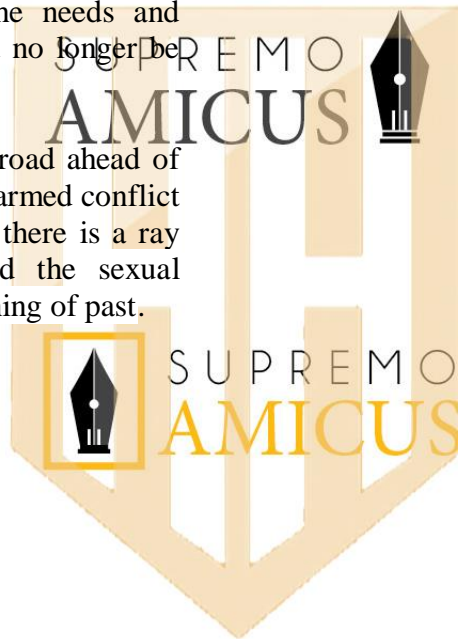
Final Words:

Sexual violence casts a long lasting shadow in the minds of the victims and over our collective humanity. Although, the international organisations have succeeded



in prioritizing attention towards recognition and termination of sexual violence in armed conflicts, they are still inadequate. Much remains to be accomplished in order to prevent the offenders from being scot-free. It is high time to focus on the proper implementation of the existing legal instruments to combat such horrifying crimes. The expansive and long-lasting effect of sexual violence is an issue that doesn't come within the scope of our international tribunals. The people and the nation at large must collaboratively work towards mitigation of the after-effects on the victims of such violence. The needs and voices of the survivors should no longer be smothered.

In spite of the fact that the road ahead of eradicating sexual violence in armed conflict is very long and uneven, still there is a ray of hope in the horizon ,and the sexual violence in conflict will be a thing of past.





TRUMP'S INTERNATIONAL POLICIES: A CRITICAL ANALYSIS

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Abstract

Donald Trump was sworn in as the 45th President of the United States and his early campaign days were a mirror for the decisions he has taken and implemented in the present State. As promised by him he has brought about a change to the Paris Climate Agreement, Immigration ban and the Trade policies. President Trump promises to deliver and "Make America Great Again" but the looming question is how far would he go? This paper focuses on these crucial international policies of President Trump and their impact on the other countries. There have been instances when his decisions supersede the law itself and have severe implications worldwide. This paper also gets into the intricacies and pros and cons of withdrawal from these international policies.

Keywords:

Trade policies, Immigration ban, Paris climate Agreement, impact, worldwide

Introduction

Since Donald Trump has been elected as the 45th President of the United States there has been uncertainty among nations worldwide regarding his international policies. Certain policies have been discussed herein and he has fulfilled his campaign promises for the worse.

The ideologies of President Trump are reflected in the opinion he holds and statements he makes; to begin with his ideas on global warming are that "The concept of global warming was created by and for the Chinese in order to make the U.S manufacturing non-competitive."¹⁶³⁶ Moreover, he wants to "eliminate harmful and unnecessary policies such as the Climate Action Plan & Waters of the U.S. Rule."¹⁶³⁷

The same views were reiterated during his campaign where he expressed ways to divert the resources to augment jobs and introduce America's first Energy Plan.

Each country has a set of laws that help govern and administer polices. When it comes to United States (hereinafter, "US") one sees that they follow certain statutes and regulations. The governing body for environment protection is the Environmental Protection Agency (hereinafter, "EPA") which sets out a goal that they want to achieve and pass statutes accordingly. The statutes allow the EPA to pass regulations and receive funding from the Congress. Presidential Executive Orders also happen to play a role in these decisions.

There are certain acts in place to govern the same such as The Clean Air Act of 1970,

¹⁶³⁶ Nicole Dhar, Protesters Rise Against Trump's Environmental Agenda, Westwood Horizon (May 05, 2017),

<https://westwoodhorizon.com/13489/news/world-news/protesters-rise-against-trumps-environmental-agenda/>

¹⁶³⁷ Reuters, Trump Administration Unveils Plan to Eliminate Obama's Climate Action Plan, Fortune (Jan. 20, 2017), <http://fortune.com/2017/01/20/trump-website-climate-change/>



The Clean Water Act of 1972, The National Environmental Policy Act of 1970 (NEPA), and The Endangered Species Act of 1973.¹⁶³⁸ The last 30 years have gone by without any major changes to the legislation that keeps the environmental laws in check. US have withdrawn from the Paris Climate Agreement, which will be discussed in detail highlighting the issues and consequences.

With respect to his view points on immigration ban and trade policy he had released a campaign ad which showed dozens of dark skinned persons swarming across a border with a narrator saying, “He’ll stop illegal immigration by building a wall on our southern border that Mexico will pay for.”¹⁶³⁹

US immigration laws are not the easiest to deal with. It is a rigorous process governed by the Immigration and Naturalization Act, (INA)¹⁶⁴⁰ 1965. Immigration to the United States is based upon the following principles: the reunification of families, admitting immigrants with skills that are

valuable to the US economy, protecting refugees, and promoting diversity.¹⁶⁴¹

President Trump has laid out a permanent ban on eight countries. The final verdict of the US Supreme Court is yet to be out, but certain changes have been made to make it legally more acceptable. The downside is that President Trump ignores the various benefits that immigration offers to the economy. The National Academy of Sciences concluded, “Immigration supplies workers, which increases GDP and has helped the United States avoid the fate of stagnant economies created by purely demographic forces.”¹⁶⁴² It has also helped in the field of entrepreneurship. “Immigrant business owners make significant contributions to business income, generating \$67 billion of the \$577 billion in U.S. business income, as estimated from 2000 U.S. Census data,”¹⁶⁴³

Even highly skilled, efficient and diverse workforce has come into the picture and there has been an increase in the per capita income due to immigration. In 2013, for example, immigrants added \$1.6 trillion to total the US gross domestic product.¹⁶⁴⁴

¹⁶³⁸ Robinson Meyer, How the U.S. Protects the Environment, From Nixon to Trump, *The Atlantic* (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/>

¹⁶³⁹ Carolyn Edds, Donald Trump's first TV ad shows migrants 'at the southern border,' but they're actually in Morocco, *Politifact* (Jan. 4, 2016, 2:04 PM), <http://www.politifact.com/truth-o-meter/statements/2016/jan/04/donald-trump/donald-trumps-first-tv-ad-shows-migrants-southern-/>

¹⁶⁴⁰ The Immigration and Naturalization Act of 1965, also known as the Hart-Celler Act, abolished an earlier quota system based on national origin and established a new immigration policy based on reuniting immigrant families and attracting skilled labor to the United States.

¹⁶⁴¹ Fact sheet, How the United States immigration system works, American Immigration Council (Aug. 12, 2016),

<https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>

¹⁶⁴² The National academics of Sciences Engineering Medicine, September 21, 2016

¹⁶⁴³ Stuart Anderson, 3 Reasons Why Immigrants Are Key To Economic Growth, *Forbes* (Oct. 2, 2016, 10:30 AM) ,

<https://www.forbes.com/sites/stuartanderson/2016/10/02/3-reasons-why-immigrants-key-to-economic-growth/#1b21c6657dab>

¹⁶⁴⁴ Cesar Maximiliano Estrada, How Immigrants Positively Affect the Business Community and the



His decisions on trade policy will have far reaching effects in the days to come and has been heavily criticized by the other nations. Further light will be shed on two important trade policies that are Trans Pacific Partnership and North American Free Trade Agreement.

Is Trans Pacific Partnership (herein after, “TPP”)¹⁶⁴⁵ a boon or a bane? For China it serves to be a boon considering the circumstances and the shoes they get to fill in, replacing US and making ties with their allies. “It’s a giant gift to the Chinese because they now can pitch themselves as the driver of trade liberalisation.”¹⁶⁴⁶

US is on the losing end, it serves as a bane because they are turning down a deal made with 11 major countries and suffering in terms of business, jobs and position that could strengthen their exports. In President Trump’s own words TPP is of great danger and it would be the death blow for American manufacturing.¹⁶⁴⁷ The economic leverage of US would pass on to an international

commission which would protect the interests of foreign countries over and above of US. It would further open the markets to aggressive currency cheaters — cheaters, that’s what they are, cheaters.¹⁶⁴⁸

North American Free Trade Agreement (herein after, “NAFTA”)¹⁶⁴⁹ attempts are being made to try and save what is left of the 23 year old deal and to include provisions to make it more favourable to the US but according to President Trump if that can’t be done it would be terminated from their end. And he has stated his views of the same “Take a look at NAFTA, one of the worst deals ever made by any country, having to do with economic development. It’s economic un-development, as far as our country is concerned.”¹⁶⁵⁰

With regard to NAFTA sunset clause has to be given due regard since it could become an integral part of renewing or terminating the agreement. Terminating the deal will have far fetching effects and leave a resonating impact not only on the countries involved but also on the industries. What President Trump is so keen on implementing in the deal that, it would take “free” out of

U.S. Economy, Centre for American Progress (Jun. 22, 2016, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2016/06/22/140124/how-immigrants-positively-affect-the-business-community-and-the-u-s-economy/>

¹⁶⁴⁵ The Trans-Pacific Partnership is a free-trade agreement consisting of the U.S and 11 other countries that border the Pacific Ocean.

¹⁶⁴⁶ Justin Sink and Toluse Olorunnipa, Why Trump’s withdrawal from Trans-Pacific trade deal is a boon for China, Live mint (Jan. 24, 2017, 3:53 PM), <http://www.livemint.com/Politics/wYiMmntUc9synuZrFLv22L/Why-Donald-Trumps-withdrawal-from-Asia-trade-deal-a-boon-fo.html>

¹⁶⁴⁷ Full transcript: Donald Trump’s jobs plan speech, Politico (Jun. 28, 2016 1:19 PM), <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>

¹⁶⁴⁸ Time Staff, Read Donald Trump’s Speech on Trade, Time (Jun. 28, 2016), <http://time.com/4386335/donald-trump-trade-speech-transcript/>

¹⁶⁴⁹ The North American Free Trade Agreement (NAFTA) is a piece of regulation implemented January 1, 1994 simultaneously in Mexico, Canada and the United States that eliminates most tariffs on trade between these nations.

¹⁶⁵⁰ Meera Jagannathan, Here are all the terrible things President Trump has said about NAFTA — before deciding to stick with it, New York daily news (Apr. 27, 2017, 9:26 AM), <http://www.nydailynews.com/news/politics/terrible-president-trump-nafta-article-1.3107104>



free trade agreement and would impose a dominating upper hand of US on Mexico and Canada.

Paris Climate

The President’s understanding of global warming is quite clear in his own words, “Is our country still spending on the Global Warming Hoax?”¹⁶⁵¹

The Paris Climate Agreement was adopted by the United Nations Framework Convention on Climate Change (UNFCCC)¹⁶⁵² on 4th November, 2016 and the main target was to keep the global mean temperature below 2 degree Celsius above the preindustrial level.

The Agreement is considered an “international treaty”¹⁶⁵³ under international law, but not all provisions are legally binding. In the actual sense the principal of “*Pacta sunt servanda*” applies meaning that the Parties must follow the commitments in good faith.

The only binding obligations are with regard to maintaining nationally determined

contributions (NDC’s)¹⁶⁵⁴ mitigation measures, transparency, financial contribution, accountability for anthropogenic measures and progress reports. No matter how the Agreement is shaped, it lacks a fully fledged legal obligation. In the true sense it still has a ‘normative’ standing and will have implications on the law and policies of a country.

If not given due regard, it will raise questions about the international standing of a country and the commitments made by them, the measures taken for preventing further climate change and global practices of a country. That’s where the Trump administration would have a fall out. On 1st June, 2017 he announced the withdrawal of US from the Paris Climate Agreement while keeping the option to return in the future open. His actions reflect that global climate change is of no significance to him and how he’s putting behind all the work done by the Obama administration, such as the Climate Action Plan, the Moratorium on federal coal program, Waters of the US and Clean Power Plan.

Countries are bound in certain ways by Article 28 of the Agreement since it does not allow them to withdraw, before three years from the date on which this Agreement had entered into force for a Party; the Party may withdraw from this Agreement by giving written notification to the

¹⁶⁵¹Dylan Matthews, Donald Trump has tweeted climate change scepticism 115 times. Here’s all of it, Vox (Jun. 1, 2017 5:00 PM), <https://www.vox.com/policy-and-politics/2017/6/1/15726472/trump-tweets-global-warming-paris-climate-Agreement>

¹⁶⁵²In 1992, countries joined an international treaty, the United Nations Framework Convention on Climate Change, as a framework for international cooperation to combat climate change by limiting average global temperature increases and the resulting climate change, and coping with impacts that were, by then, inevitable.

¹⁶⁵³International Agreement concluded between states in written form and will be governed by international law (Art. 2.1 (a) Vienna Convention on the Law of Treaties – VCLT)

¹⁶⁵⁴ According to Article 4 paragraph 2 of the Paris Agreement, each Party shall prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve.



Depository.¹⁶⁵⁵ Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depository of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.¹⁶⁵⁶ This means that US would still be a party to it until November 2020, however, it is pertinent to note that by then the Presidential elections will also be in place. The quickest way out would be if US were to exit the UNFCCC altogether which would take a year from the time notice is given under Article 25 of the Agreement.

The UNFCCC is somewhat related to Article II of the US Constitution and is likely to have implications if a President were to withdraw, but the Constitution remains silent on terminating treaties, and whether a president could act independently and withdraw from an Article II treaty. Despite the measures and troubles taken by President Trump, if the withdrawal is not followed through from the UNFCCC, they will be bound to follow the commitments made and financial support promised. Another viable option for the Trump administration would be downgrading the NDCs, it might benefit the US and President Trump's ideology but it would destroy the very foundation of the Agreement and what it stands for.

¹⁶⁵⁵ Madison Park, 3 ways Trump could dump Paris climate agreement, Cnn Politics (Jun.1, 2017 8:57), <http://edition.cnn.com/2017/06/01/politics/paris-climate-agreement-trump-ways-to-withdraw/index.html>

¹⁶⁵⁶ Madison Park, 3 ways Trump could dump Paris climate agreement, Cnn Politics (Jun.1, 2017 8:57), <http://edition.cnn.com/2017/06/01/politics/paris-climate-agreement-trump-ways-to-withdraw/index.html>

If the withdrawal goes through now and they get the opportunity to rejoin later, it would be an abuse of power and reflection of world dominance that US exerts. If US takes the back seat and it is willingly approved of, the only thing that remains is to wait till 2020 for another leader to rise up to the opportunity and undo the damage done by the Trump administration.

But for now, "As President Trump indicated in his June 1 announcement and subsequently, he is open to re-engaging in the Paris Agreement if the U.S. can identify terms that are more favorable to the U.S, its businesses, its workers, its people, and its taxpayers,"¹⁶⁵⁷ his motive behind the entire fiasco has been quite unreasonable and more damaging to the environment than ever, such as "America First Energy Plan" and the need to create "energy independence". Furthermore, he believes that that Paris Climate Agreement is not in the best interests of US and how it has the effect of "lost jobs, lower wages, shuttered factories" and that it will lead to a "massive redistribution of wealth to other countries."¹⁶⁵⁸

The only sign of hope for US is that they will continue to participate in further negotiations and treaties including the 23rd Conference of the Parties of UNFCCC. For now all we can do is aspire to not see President Trump's policies and moves making US, the global power, fall like a

¹⁶⁵⁷ Ari Natter, Donald Trump Notifies UN of Paris Exit While Keeping Option to return, Time (Aug. 05, 2017), <http://time.com/4888705/donald-trump-notifies-united-nations-paris-exit/>

¹⁶⁵⁸ Navroz K Dubash, "Trumps toxic announcement on climate change", June 17, 2017 Vol LII NO 24 Economic and Political WEEKLY



house of cards. It has been rightly said that the US is “Better out than in”.

Personal efforts are being made by the states, citizens and companies to meet the demands of reduced emissions under “America’s Pledge”. And prove a point to the Trump administration that even though they have backed out, and have no faith in environment protection the citizens do.

Immigration and Travel ban

As countries across the world are opening their homes and welcoming refugees and immigrants, President Trump decides to revert to his old ways. Back in 1973, the US Department of Justice sued Trump for violating Fair Housing Act of 1968; the case got dragged on till 1975 with no respite with the Justice Officials concluding that “an underlying pattern of discrimination continues to exist in the Trump management organization”.¹⁶⁵⁹

He has used the same tactics and policies over and over again similar to the immigration ban, being an attempt to discriminate, create racial bias and to single out countries with Muslim roots. His shallow attempts fall short of it, since he tries to mask his actual motives, unfortunately it ends up blowing in his face. President Trump said, “To be clear, this is not a Muslim ban, as the media is falsely reporting. This is not about religion — this is about terror and keeping our country

safe.”¹⁶⁶⁰ These statements cannot be held true since the most recent and gruesome attacks on US soil were by the US citizens themselves or by other nationals having no trace or relation to the banned countries.¹⁶⁶¹ Thereafter, true facts were brought forth by Giuliani who said, “When [Trump] first announced it, he said ‘Muslim ban.’ He called me up, he said, ‘Put a commission together, show me the right way to do it legally.’”¹⁶⁶²

The ban was announced on January 27, 2017 and further made changes in March, 2017 to ensure that it was legally correct and acceptable. The ban initially covered 7 countries that are considered the source of “radical Islamic terrorism” which included Iran, Iraq, Libya, Yemen, Syria, Somalia and Sudan for a period of 90 days. Later, Iraq was excluded from the same stating that there will be hands on support and the two countries having the same end goal and will strive to defeat ISIS. The ban was also applicable to additional refugees for a period of 120 days and a ban on Syrian refugees for

¹⁶⁶⁰Office of the Press Secretary, President Donald J. Trump Statement Regarding Recent Executive Order Concerning Extreme Vetting, The White House (Jan. 29, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/29/president-donald-j-trump-statement-regarding-recent-executive-order>

¹⁶⁶¹ Christopher Mathias, There Have Been No Fatal Terror Attacks In The U.S. By Immigrants From The 7 Banned Muslim Countries, Huffpost (Jan. 28, 2017 8:31 PM), http://www.huffingtonpost.in/entry/no-terror-attacks-muslim-ban-7-countries-trump_us_588b5a1fe4b0230ce61b4b93

¹⁶⁶² Ilya Somin, Why Trump’s refugee order is unconstitutional, The Washington Post (Feb. 5, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/05/why-trumps-refugee-order-is-unconstitutional-discrimination-on-the-basis-of-religion/?utm_term=.cccd1183b356

¹⁶⁵⁹ Drew S. Days III Assistant Attorney General, to Roy M. Cohn, January 20, 1978, <https://clearinghouse.net/chDocs/public/FH-NY-0024-0038.pdf>.



good. Emphasis on allowing Christian Syrian refugees and minorities was also favoured over Muslim ones, which was a clear violation and a discriminatory rule, also later struck down.

Later on the Supreme Court upheld the temporary ban but set a major exception that if there is evidence of a “bona fide relation” in the US then the person is permitted to get a visa. The ban excluded businessmen, educational ties, visas holders and permanent residents.

As we have seen President Trump's attempts can only take him so far, since the travel ban is outrageous and the various acts and doctrines will explain how it is arbitrary and unconstitutional. If it were the 1900's the case would be altogether different and plausibly be passed under the ‘Plenary power doctrine’ but in the present times it cannot be misused to cover immigration ban based on religion or national origin.

The tone of the doctrine had been set in light of the Chinese exclusion case¹⁶⁶³, but present times and rules are changing. The travel ban is violating the protection awarded under the Establishment Clause of the First Amendment¹⁶⁶⁴ and also the (INA) 1952. Section 212(f) of the Act, 1952¹⁶⁶⁵ has to be read in accordance with Section

202(a)(1)(A)¹⁶⁶⁶ which basically sheds light on the fact that immigrant entry and granting visa can be denied under special circumstances, but the same should not be based on sex, place of birth, nationality, place of residence and race.

The current scenario seems dicey till the verdict is given but we could count on the Supreme Court to undo the damage done in this case and put an end to the discriminatory ban and doctrine which is rusty and needs to be done away with.

The new order passed a permanent ban on various countries and is indefinite in nature. Ban affects the following: nationals of Chad, Yemen and Libya even the ones with business and tourist visas. Iranian citizens, exceptions being student and visitor visas holders. Somali immigrants, Venezuelan government officials, Syrian and North Korean officials also form a part of the travel ban.

The scheduled hearing of the Supreme Court regarding the travel ban did not go ahead considering a more thought out and executed travel ban was put into place.

Trade Policies: TPP and NAFTA

TPP is an agreement that accelerates trade, economic growth and included 12 countries that surround the Pacific Ocean. It worked on reducing trade barriers, less stringent policies and cutting down the tariffs to allow better flow of agricultural and industrial goods. TPP was designed to help make a change with regard to communications, trade, environment and labour.

¹⁶⁶³See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)

¹⁶⁶⁴U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

¹⁶⁶⁵ Immigration and Nationality Act § 212(f).

¹⁶⁶⁶ Immigration and Nationality Act § 202(a)(1)(A)



His (Trump's) views on TPP seem to be no less astonishing than everything else he has ever said. He has criticized TPP calling it "continuing rape of our country" and that trade relations should be looked at "almost as a war."¹⁶⁶⁷ He bases his reasoning for the same by stating that there would be many more bilateral deals and US could be a part of any, if only the world trade and globalization worked the same way. He takes a stance to defend America and make it great again, expanding trade in a way that is free and fair to all Americans. Every action we take with respect to trade will be designed to increase our economic growth, promote job creation in US, promote reciprocity with the trading partners, strengthen our manufacturing base and ability to defend them, and expand the agricultural and service industry exports.¹⁶⁶⁸ TPP was a better deal for US to flourish with all other 11 countries rather than being in bilateral deals with them. Major advantage has been passed on to China and now they can continue being the superpower that controls the game in Asia trade investment. It has been a disastrous move for the employment opportunities, reputation and net growth of US.

¹⁶⁶⁷ Allan Smith, How Trump killed Obama's vaunted trade deal - and why it could affect the US for decades, Business Insider (Feb. 8, 2017 3:36 PM), <http://www.businessinsider.in/How-Trump-killed-Obamas-vaunted-trade-deal-and-why-it-could-affect-the-US-for-decades/articleshow/57039337.cms>

¹⁶⁶⁸ Andrew Mayeda, U.S. Not Bound by WTO Decisions, Trump Warns in Trade Agenda, Bloomberg (Mar. 1, 2017, 9:46 PM), <https://www.bloomberg.com/news/articles/2017-03-01/u-s-not-bound-by-wto-decisions-trump-warns-in-new-trade-agenda>

Trans pacific partnership and the path ahead, though seems rocky after US withdrawal, other nations are determined to go ahead. The stakes are high regarding the success of the agreement and there is a long way to go. Firstly, there will be issues standing in the way of the Chinese economy, following which the clauses and requirements would require to be altered to cater to the needs of other countries. Required changes are that, "if Japan and the 10 other signatories are to keep the TPP alive, they would need, at the very least, to revise a clause that says the deal will come into effect only when ratified by six countries representing 85 percent of the combined economic value of the 12 original members. Without the United States, that threshold cannot be reached."¹⁶⁶⁹ Developing countries like Malaysia and Vietnam maybe on the losing side since they will no longer have ties with the US economy under TPP.

Japan is keen on preserving most of the agreement in its original form in order to keep the door open for US to rejoin. It seems difficult under Trump administration that things would actually change for better.

North American Free Trade Agreement is a trade deal between America, Canada and Mexico. Neither US law, in particular Section 125(a) of the Trade Act of 1974, nor Article 2205 of the NAFTA expressly authorizes the President to withdraw from

¹⁶⁶⁹ Motoko Rich, TPP, the Trade Deal Trump Killed, Is Back in Talks Without U.S., The New York Times (Jul. 14, 2017), <https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html>



the agreement unilaterally.¹⁶⁷⁰ The basis for such agreements is that the President cannot withdraw unilaterally from such trade agreements without prior approval of the Congress. But given the power that the President has with regard to foreign affairs it can be seen as a possibility. If that goes ahead, heavy tariffs would be imminent between US and Mexico, and US and Canada. The cost of imports from Mexico would increase. Before NAFTA, Mexican tariffs on US imports were 250 percent higher than US tariffs on Mexican imports, so President Trump threatened to impose a 35 percent tariff on Mexican imports; by law, he can only raise tariffs by 15 percent for 150 days without congressional approval.¹⁶⁷¹

Even if the termination powers cannot be solely exercised by the President, he still has the power to levy heavy tariffs on other country imports forming a part of NAFTA. In the present scenario there are talks about renegotiating NAFTA to be more suitable to Trump administration. President Trump plans on reducing the trade deficits with regard to Mexico, to get rid of unfair subsidies and protect intellectual properties. US would ensure that the Commerce Department would take measures to avoid lumber dumping by Canada which affects the US companies and impose 20%

¹⁶⁷⁰ William Clinton, Scott S. Lincicome, Brian Picone, Richard Eglin, William Barrett, Termination or Modification of US Trade Agreements, White Case (Aug. 30, 2017),

<https://www.whitecase.com/publications/article/termination-or-modification-us-trade-agreements>

¹⁶⁷¹ Kimberly Amadeo, Would Trump Dump NAFTA?, The Balance (Aug. 22, 2017), <https://www.thebalance.com/donald-trump-nafta-4111368>

tariff if it continues to do so. President Trump also wants to get rid of the VAT imposed on US exports from Mexico. He even wants to put an end to the maquiladora program, which actually is beneficial to US since it does not impose restrictions on production of goods, except handguns and firearms. For radioactive and nuclear components, prior permission is to be taken only then a manufacturing permit will be granted for the same. He also wants to add “sunset clause”¹⁶⁷² to the agreement. If such negotiations go ahead and are actually implemented the trade agreement would in its entirety be dominated by US, and that’s just what the world needs more dominance by an already existing superpower to feed on the developed and developing countries and hinder their growth.

Besides this, the US economy would hit a low since inflation will increase by levying heavy tariffs. NAFTA had led to earnings worth \$1.15 trillion in 2015; US growth increase by 0.5%, the job market had a boon of 5 million new job openings. The import from Mexico would take a huge hit in terms of earnings and terrorize the flow of goods as well as the prices.

For every trade deal President Trump seems to have the ideology that a bilateral agreement would be more beneficial to US and it would have more to gain than in multilateral agreements. It seems to be some sought of pattern he is trying to implement, first withdrawal from TPP now trying similar strategies with NAFTA.

Conclusion

¹⁶⁷² The agreement would terminate after five years unless all three countries voted to continue it.



It is a warning sign to the countries to be aware of whom they are transacting business with, a country that has Trump administration who will do whatever it takes to get their way out, even if it is the wrong way. He will turn a blind eye to it like all the changes he is trying to implement in the laws and policies. Even when it goes against the laws and as we can see he happens to be digging his own grave which could lead to the possibility for impeachment.¹⁶⁷³

President Trump happens to have the policy to blame everything that is wrong with US on the other countries and how they are responsible for every mishap.

“What we have is the same mentality of abusing power of taking power into your own hands and saying, “I’m first not ‘America First’. Trump has put himself above the law and that’s the mentality that will bring the President down”.¹⁶⁷⁴

President Trump so far has successfully created chaos and confusion both domestically and internationally. Eventually, one will see how the Trump administration is stepping backward when it comes to environmental challenges and undoing years worth of hard work. He has already taken a step back from the Paris Climate Agreement and plans to do so even with Clean Power Plan which served as the means of achieving the end goal. Currently EPA’s strategic plan has deliberately skipped on phrases such as “climate change”, “carbon dioxide” and “greenhouse gas emissions”.

EPA spokesperson Liz Bowman told the news outlet that “providing more Americans with access to clean air, land, and water”

was the focus of the agency¹⁶⁷⁵. The EPA’s focus has changed since the Obama administration and it has become more industry oriented. On 6th November, 2017 Syria signed the Paris Climate Agreement and US became the single country to pull out of the agreement. The astonishing question looming over every citizen and country is ‘Why is it that everyone, but President Trump understands the climate change impact?’

When we talk about the immigration ban, the fiasco began with "Protecting the Nation from Foreign Terrorist Entry into the United States"¹⁶⁷⁶, executive orders being passed and has ended in a permanent travel ban on 8 countries. Although, the people, accepted as bona fide relations would be accepted, it would still exclude quiet a few tourists and refugees .

This comes at a time to make travel ban more acceptable legally and to restrain any efforts to pull it back. President Trump’s ideology has the biggest hand behind all these game changing decisions. As many attempts are made to mask the so called “Muslim ban” it all goes in vain. If not the American citizens rest of the world can see right through him.

¹⁶⁷⁵ Mythili Sampathkumar, Trump's environmental plan doesn't mention climate change, Independent (Oct. 11, 2017 9:52 PM), <http://www.independent.co.uk/news/world/americas/us-politics/trump-environmental-plan-climate-change-no-mention-a7995646.html>

¹⁶⁷⁶The White House, Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States, (Mar. 06, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

¹⁶⁷³ Book by Allan Lichtman

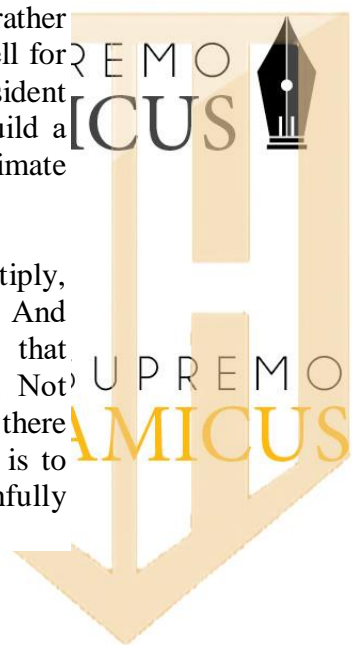
¹⁶⁷⁴ The case for impeachment by Allan Lichtman



President Trump believes that TPP serves as a major setback and is disadvantageous to the US. The fate of TPP is in the hands of the other countries since they are the remaining parties to it. US has the option to join it back in the future, though it seems unlikely till the reigns are in President Trump's hands.

NAFTA was a good trade deal among the others but the future seems rocky as discussions to keep it afloat are ongoing. There's a long way to go with the negotiations and the upcoming midterm elections will add no relief to it, rather prolong it. So far it had worked out well for US, Canada and Mexico but President Trump's attempts to destroy it and build a Mexico border wall serves as an ultimate nail in the coffin for their trade deals.

But as examples of carelessness multiply, the ranks of Trump's critics will swell. And they'll begin; soon, to point out that carelessness isn't much of an excuse. Not for a man whose job description, right there in the Constitution, says his first duty is to "take care that the laws be faithfully executed."¹⁶⁷⁷



¹⁶⁷⁷Doyle McManus, The downfall of President Donald Trump, Chicago Tribune (May. 16, 2017 9:30 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-trump-russia-classified-information-20170517-story.html>



**THE FIANNCIAL RESOLUTION AND
DEPOSIT INSUARANCE BILL:
MODERNISATION OF THE INDIAN
ECONOMY AT THE COST OF THE
DEPOSITORS' MONIES?**

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I. ABSTRACT

Globally many of the developed economies are in the process of or have already introduced the bank bail-in regime that would involve participation of bank depositors in bearing the costs of restoring a failing bank to revive in a downfall. Keeping in mind the global acceptability of the bail-in clause for banks, the Government of India, vide its new proposed legislation of the Financial Resolution and Deposit Insurance Bill, 2017 ("**FRDI Bill**") would be inducted the new bail-in clause to save faltering banks, even though there is a very long list of hypothetical or real advantages attached to the bail-in process. Therefore, the need arises for a closer examination of the bail-in process, if it is to become a successful substitute to the currently practiced method of bailout package approach. The bail-in clause involves replacing the implied public guarantee on

which fractional reserve banking has operated, with a system of private penalties. The bail-in approach may indeed, be much superior to bailouts in the case of idiosyncratic failure. In other cases, the bail-in process may entail important risks. The article provides a legal and economic analysis of some of the key potential risk bail-ins may entail in the domestic market vis-à-vis in the international context of the bail-in clause. The article also explains how bail-in regimes will not eradicate the need for injection of public funds where there is a threat of systemic collapse, because a number of banks have simultaneously entered into difficulties or in the event of the failure of a large complex commercial bank, unless the failure was clearly idiosyncratic.

"It is well enough that people of the nation do not understand our banking and monetary system, for if they did, I believe there would be a revolution before tomorrow morning."

-HENRY FORD

KEYWORDS: FRDI Bill, Bank failures, Bank bail-ins, bailouts, Finance Resolution Corporation.

II. LIST OF ACRONYMS

- FRDI: Financial Resolution and Deposit Insurance Bill, 2017
- IBC: Insolvency and Bankruptcy Code, 2016
- PSB: Public Sector Banks
- SIFI: Systemically Important Institutions



- OLA: Orderly Liquidation Authority
- DFA: Dodd-Frank Act
- NCLT: National Company Law Tribunal
- NPA: non-performing assets
- ESM: European Stability Mechanism

“Rather than justice for all, we are evolving into a system of justice for those who can afford it. We have banks that are not only too big to fail, but too big to be held accountable.”

— *Joseph E. Stiglitz*

III. INTRODUCTION

In the outcome of the 2007-2008 worldwide global financial crisis, and lacking adequate composed rules or enactments, measures to address falling financial institutions all around were taken over a few economies to investigate the size of misfortunes spilling out of bank failures is initially independent of the identity of those upon whom the burden of meeting that loss falls. In any case, such losses additionally would then be able to involve basic externalities. These have generally supported the general population bailouts to keep away from the foundational danger that the disappointment of any bank, past a specific size, conveys with it. In any case, open bailouts of banks are a wellspring of good risk and they undermine showcase train. One of the key standards of a free market economy is that proprietors and banks should bear the misfortunes of a fizzled wander. Bailouts

can likewise have a destabilizing sway on open funds and sovereign obligation.¹⁶⁷⁸

The most recent real economies to embrace such an action is India. The Government of India through different activities like the enactment of the Insolvency and Bankruptcy Code, 2016 ("IBC"), recapitalization of Public Sector Banks ("PSBs") and Foreign Direct Investment in different area has given a lift to the economy which had been seeing as a time of pseudo economic outshoot. But, with the Union Cabinet led by the Hon'ble Prime Minister of India supporting the proposition to present the Financial Resolution and Deposit Insurance Bill, 2017 (henceforth, the "FRDI Bill"), the bill was presented on the second a day ago of the monsoon session of the parliament of the current fiscal year and has since been under the thought of a joint parliamentary board of trustees comprising of members from the two places of the parliament for advance examination.¹⁶⁷⁹

The concerns mainly outlined by the media and academia have given rise to reforms to internalize the costs of bank failure of which the foremost is the drawing up of bank creditor bail-ins. Essentially, bail-in constitutes a radical rethinking of who bears the ultimate costs of the operation of fractional reserve banking. Hypothetically this might be right, open to scholastic debate. As a general rule, a great many

¹⁶⁷⁸ Raghavan Sharad, “What does the FRDI Bill do for you?,” accessible at <http://www.thehindu.com/business/Economy/what-does-the-frdi-bill-do-for-you/article21386264.ece>

¹⁶⁷⁹ <http://www.prsindia.org/theprsblog/?p=3932>



average citizens in the Indian banking framework know no hypothesis.¹⁶⁸⁰

Indian financial sector and particularly banking sector has an inherent strength. Indeed, even subsequent to tolerating defilement and great terms for the huge and powerful, normal Indian feels his cash is protected in Indian banks. This trust and coming about brand esteem is exceptionally hard to evaluate in money related terms. The esteem will be comprehended when we take a gander at it from the opposite side - how much will it cost to pick up trust of 1.3 billion individuals and to manage it.

IV. RESEARCH OBJECTIVES

Research Objective 1: To understand the need for a legislation of FRDI as being enacted in India

Research Objective 2: To analyze the International legal framework on the 'Bail-in' provisions being implemented in various economies across the globe

Research Objective 3: To understand the challenges that FRDI would face when tested in the Indian economic scenario

Research Objective 1: To understand the need for a legislation of FRDI as being enacted in India and a closer understanding of the reasons for enactment of the FRDI legislation in India.

To comprehend the ramifications of bail-in arrangements in the proposed FRDI Bill, we need to comprehend what this intend to a standard normal Indian resident having a

¹⁶⁸⁰ "Bail in at what cost", accessible at <https://www.outlookindia.com/website/story/bail-in-at-what-cost/305307>

bank account. A bail-in is regularly protecting a monetary foundation when it is going to fail, by constraining its leasers and contributors pay for the loss of the money related establishment. At the end of the day, a piece of your cash kept in the bank will be used to cover for the misfortunes brought about by the bank or the money related establishment.

A bail-in is the exact inverse of a bail-out. In bail-out a bank in emergency is safeguarded by outer gatherings without influencing contributors. Here the government comes to the rescue utilizing citizen's cash. The administration now recommends that the financial specialists and investors in the bank to pay for the misfortunes previously citizens.

A great momentum has developed for basing resolution on bail-in, which infrequently looks like a 'chorus'.¹⁶⁸¹ The regulatory authorities in most of the world's developed economies have developed, or are in the process of developing, resolution regimes that allow, in principle, banks to fail without resorting to public funding.¹⁶⁸²

1.1 THE ENACTMENT OF THE FRDI BILL

The bail-in approach is intended to counter the dual threat of systemic disruption and sovereign over indebtedness. It is based on the penalty principle, namely, that the

¹⁶⁸¹ Exact wording used in J McAndrews and others, 'What Makes Large Bank Failures so Messy and What to Do about It?' 20 Federal Reserve Bank of New York, Econ Pol Rev (Special Issue: Large and Complex Banks, March 2014) 14

¹⁶⁸² KPMG 'Bail-in Liabilities: Replacing Public Subsidy with Private Insurance' (July 2012); JN Gordon and W-G Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' Oxford Legal Research Paper Series 18/2014, available at



expense of bank failures are shifted to where they best belong: bank shareholders and creditors. Namely, bail-in replaces the public subsidy with private penalty¹⁶⁸³ or with private insurance forcing banks to internalize the cost of risks, which they assume.

In these new schemes, apart from the shareholders, the losses of bank failure are to be borne by *ex ante* funded resolution funds, financed by industry levies, and certain classes of bank creditors whose fixed debt claims on the bank will be commonly converted to equity, along these lines reestablishing the value cradle required for continuous bank operation.

This is a critical advancement, since in the past banks' subordinated debt did not give any cover when bank liquidation was impossible, which implied that subordinated loan bosses were bailed out close by senior lenders by taxpayers.¹⁶⁸⁴

Turning unsecured debt into bail-in debt ought to boost creditors to resume a monitoring function, thereby helping to restore market discipline. For instance, as the potential expenses of bank failure would fall on loan bosses, notwithstanding investors, such lenders ought to wind up plainly more ready about the levels of use the bank carries,¹⁶⁸⁵ constraining a standout amongst the undoubtedly reasons for bank

failures and the administration costs related with exorbitant leverage.¹⁶⁸⁶ Normally, investors have each motivating force to manufacture use to augment their arrival on equity.¹⁶⁸⁷

Such monitoring might, in turn, reduce the scale of loss in the event of a bank failure: creditors could force the bank to behave more cautiously, especially where the bail-in regime allows for earlier intervention and closure than a bailout mechanism. It should also, in principle, eliminate the 'too-big-to-fail' subsidy enjoyed by bigger banks. Essentially, bail-in provisions mean that, to a certain extent, a pre-planned contract replaces the bankruptcy process, giving greater certainty¹⁶⁸⁸ as regards the sufficiency of funds to cover bank losses and facilitating early recapitalization. Moreover, the bail-in tool can be used to keep the bank as a going concern and avoid disruptive liquidation of the financial institution in distress.

But the idea that the penalty for failure can be shifted onto an institution, such as a bank, is incorrect. Ultimately all penalties, and similarly benefits, have to be absorbed by

¹⁶⁸³ TF Huertas, 'The Case for Bail-ins' in A Dombret and PS Kenadjian (ed), *The Bank Recovery and Resolution Directive* (De Gruyter 2013).

¹⁶⁸⁴ S Gleeson, 'Legal Aspects of Bank Bail-Ins' LSE Financial Markets Group Series Special Paper 205 (2012).

¹⁶⁸⁵ JC Coffee, 'Systemic Risk after Dodd-Frank: Contingent Capital and the Need for Strategies Beyond Oversight' (2011) 111 *Columb L Rev* 795.

¹⁶⁸⁶ AR Admati and others, 'The Leverage Ratchet Effect' Max Planck Institute (MPI) for Research on Collective Goods Working Paper Series 2013/13; E Avgouleas and J Cullen, 'Excessive Leverage and Bankers' Pay: Governance and Financial Stability Costs of a Symbiotic Relationship' (2015) 21(1) *Columb J Euro L* (forthcoming).

¹⁶⁸⁷ A Admati and others, 'Debt Overhang and Capital Regulation' Rock Center for Corporate Governance at Stanford University Working Paper 114/2012, 23 March 2012; E Avgouleas and J Cullen, 'Market Discipline and EU Corporate Governance Reform in the Banking Sector: Merits, Fallacies, and Cognitive Boundaries' (2014) 41 *J Law and Society* 28.

¹⁶⁸⁸ Coffee (n 6) 806.



individuals, not inanimate institutions. When it is said that the bank will pay the penalty of failure, this essentially means that the penalty is paid, in the guise of worsened terms, by bank managers, bank staff, bank creditors, or borrowers. The real question is which individual will be asked to absorb the cost.

1.2 UNDERSTANDING THE FOREIGN IMPLEMENTATION OF THE IDENTICAL LEGISLATION OF FRDI AS ENACTED IN THE DEVELOPED ECONOMIES ACROSS THE GLOBE

The goals of the bail-in process are not the same in every jurisdiction. In the USA the process through which bail-in and subsequent conversion of creditor claims takes place for Systemically Important Institutions (“SIFIs”) is imbedded in the mechanics and architecture of the resolution process that is applied to systemically important institutions, the so-called Orderly Liquidation Authority (“OLA”).¹⁶⁸⁹ This means that triggering the bail-in process under Title II of the Dodd-Frank Act (“DFA”) aims at providing with sufficient capital, following liquidation of the resolved holding company, the entities for which the resolved company acted as parent.

In the European Union (EU), on the other hand, the doom loop between bank instability and sovereign indebtedness has left Eurozone governments with a major conundrum. The traditional route of a public bailout is increasingly ruled out, not only due to a principled adherence to the

avoidance of moral hazard, but also due to its potential impact on already heavily indebted countries. The European Stability Mechanism (ESM)¹⁶⁹⁰ acts, among other purposes, as a component of the European Banking Union (EBU). Both the new EU Resolution regime, based on the EU Bank Recovery and Resolution Directive (BRRD),¹⁶⁹¹ and the ESM statute¹⁶⁹² require the prior participation of bank creditors in meeting the costs of bank resolution. This means that either the bank remains a going concern and the bail-in process is triggered to effect bank recapitalization to restore it to health (‘open bank’ bail-in process) or in conjunction with the exercise of resolution powers treating the bank as gone concern (‘closed bank’ bail-in process).

Similarly, the intention is that intervention will be sooner (less forbearance), so that losses will be fewer, but whether that hope will be justified is yet to be seen.

The desire to find an effective way to replace the public subsidy and the unpopular bailout process is entirely understandable and can lead to welfare-enhancing outcomes. At the same time, there is a

¹⁶⁸⁹ Title II of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Act (Pub L 111–203, HR 4173, in the following: “Dodd-Frank Act” or “DFA”)).

¹⁶⁹⁰ Intergovernmental Treaty Establishing the European Stability Mechanism of 2 February 2012, T/ESM 2012/en 2. Available at http://www.efsf.europa.eu/attachments/esm_treaty_en.pdf.

¹⁶⁹¹ Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and regs (EU) No 1093/2010 and (EU) No 648/2012, [2014] OJ L 2014 173/190. [BRRD].

¹⁶⁹² ‘European Stability Mechanism By-Laws’ 8 October 2012.



danger of overreliance on bail-ins, in part owing to the growing momentum for its introduction. One useful role for an academic is to query contemporary enthusiasm for fear of group-think, which the last crisis has shown may prove a dangerous aspect of policy-making in the financial sector. In placing bail-in at the heart of bank resolution regimes, legislators and regulatory authorities ought not to overlook some important shortcomings attached to this approach. This article sets out to discuss these shortcomings and to explain why, arguably, bail-in regimes will not remove, in the case of resolution of a large complex cross-border bank, unless the risk is idiosyncratic (e.g. fraud), or in the event of a systemic crisis, the need for public injection of funds.

Research Objective 2: To analyse the International legal framework on the 'Bail-in' provisions being implemented in various economies across the globe

2.1 THE ARCHITECTURE AND MECHANICS OF THE BAIL-IN PROCESS

2.1.1 BANK RESOLUTION AND BANK BAIL-IN UNDER THE FRDI BILL

The primary concern expressed by banking unions is the provision in the law that creates a new Resolution Corporation. Until now, the Reserve Bank of India had exclusive powers to determine the financial health of a bank and recommend remedial measures in case banks got into financial trouble. But the proposed Resolution

Corporation will usurp this crucial power, thereby weakening the regulatory role of the Reserve Bank of India. The new law seeks to amend all exclusive laws governing financial institutions, including the State Bank of India Act.¹⁶⁹³

The proposed Resolution Corporation will determine if there is an “imminent risk” of the bank failing financially and will trigger what it feels would be the right remedy. It will also replace the Deposit Insurance and Credit Guarantee Corporation and take over the role of providing deposit insurance.¹⁶⁹⁴

According to Chapter II of the bill, the corporation will have a chairperson and one representative each as ex-officio member from the finance ministry, the RBI, the Securities and Exchange Board of India and the Insurance Development and Regulatory Authority. It will also have a maximum of three full-time members appointed by the Union government, and two independent members. Banking unions said that the very composition of the corporation will give supreme powers to the Union government rather than the RBI to determine the fate of a bank.

¹⁶⁹³ Strivastava Pragya, “FRDI Bill: Bail-in concept not that bad, but its current Indian version puts your bank deposit in danger” accessible at <http://www.financialexpress.com/economy/frdi-bill-bail-in-concept-not-that-bad-but-its-current-indian-version-puts-your-bank-deposits-in-danger/964619/>
¹⁶⁹⁴ “FRDI Bill: Pushing Bail-in provision isn’t easy”, accessible at <http://www.financialexpress.com/industry/banking-finance/frdi-bill-pushing-bail-in-provision-isnt-easy-brave-strategy-needed/970410/>



The government, however, has consistently maintained, as seen from the objectives of the bill itself that the new law will only bring in more financial discipline. It will complement the new Insolvency and Bankruptcy Code, 2016 (hereafter, the “IBC”) legislated in December, 2016 that aims at recovering defaulted loans at a very fast pace from the current traditional time frame for recovery of defaults.¹⁶⁹⁵

Under the proposed law, no court other than the National Company Law Tribunal (“NCLT”) will be able to take cognizance of disputes on liquidation. The law gives all powers to the NCLTs in case of liquidation. However, the public sector banks are currently not covered under the Companies Act and any such process of liquidation is to be looked into by the Banking Regulation Act in place in the domestic arena of regulatory banking sector.

There is also a major concern of the violation of labour rights. There are clauses in the bill that enable the Resolution Corporation to terminate employment or change the compensation structure of bank employees when the bank goes through various stages of resolution. The employees may not be able to claim compensation for loss of employment, which, unions said, is a direct violation of the right to constitutional

remedies guaranteed under Article 32 of the Constitution.¹⁶⁹⁶

While looking into the US Bank resolution practice for example, in 2008, the FDIC exercised its existing powers and resolved the part of the Washington Mutual group that was not sold to JP Morgan Chase, mainly claims by equity holders and creditors, under the least-cost resolution method. It imposed serious losses on the unsecured creditors and uninsured depositors (deposit amount above USD 100,000).¹⁶⁹⁷ OLA further expands the resolution authority of FDIC, including its power to cherry-pick which assets and liabilities to transfer to a third party, (though these will be subject to strict conditions to be further detailed by the FDIC) and to treat similarly situated creditors differently, for example, favoring short-term creditors over long-term creditors or favoring operating creditors over lenders or bondholders. This discretion is curbed by the introduction of a safeguard, under section 210(a)(7)(B) of the DFA,¹⁶⁹⁸ that creditors are entitled to receive at least what they would have received if liquidation had taken place under Chapter 7 of the Bankruptcy Code (comparable to the ‘best interests of creditors’ test under the Bankruptcy Code).¹⁶⁹⁹

¹⁶⁹⁵ Abraham Rohit, “All you need to know about India’s NPA crisis and the FRDI Bill” accessible at <http://www.thehindu.com/business/Economy/all-you-need-to-know-about-indias-npa-crisis-and-the-frdi-bill/article21379531.ece>

¹⁶⁹⁶ Datta Prosenjit, “IBC may end NPAs problem, but won’t help banks get their money back” accessible at <http://www.businesstoday.in/opinion/prosaic-view/npa-nclt-reserve-bank-of-india-liquidation-banks-ibc-process/story/265782.html>

¹⁶⁹⁷ FDIC Press Release, ‘Information for Claimants in Washington Mutual Bank’ 29 September 2008

¹⁶⁹⁸ https://www.fdic.gov/regulations/reform/dfa_selections.html

¹⁶⁹⁹ International Monetary Fund and Capital markets Department, “United States: Financial Sector



2.2 EVALUATION OF THE FRDI BILL APPROACH TO RESOLVE THE BANKING CRISIS AND BAIL-IN CLAUSE

Post the huge steps to revitalize the economy by the implementation of the demonetization vide the Specified Bank notes (cessation of liabilities) Act, 2017, the new FRDI Bill brings in new era of modern economic strategies to revive economies in the future in case of a dreading condition of any unit of the economy by introduction of the FRDI Bill. Through the FRDI Bill, includes the 'bail-in' clause that theatrically allows faltering banks and financial institutions to legally take control over the depositors' monies in a bid to prevent any mishap with the economy on a failure of a bank. Few weeks ago the Government of India infused nearly \$32 billion bail-out to the banks which are facing a tremendous rise in the non-performing assets ("NPA") resulting in huge losses to the banking institution of the country. With the introduction of the FRDI Bill, the depositors utilizing the banking services of the banking sector face the crucial question that if the FRDI Bill is passed in its current form, what would be the consequences to the depositors in case financial crisis does hit the domestic Indian economy in the future.¹⁷⁰⁰

Revisiting the Indian financial history, as some of the opponents of the bill have been trying to co-relate the new FRDI Bill with is to the period between 1913 and 1960 when

Assessment Program-Review of the of the Key Attributes of Effective Resolution Regimes for the Banking and Insurance Sectors"

¹⁷⁰⁰ Shenoy Deepak, "The Great Indian Bank Recapitalization Push" accessible at <https://thewire.in/190554/explained-great-indian-bank-recapitalisation-push/>

1,600 private banks closed down operations and depositors lost all their money, when was then that the All India Bank Employees Association (AIBEA) took up the issue in Parliament, following which the Banking Regulations Act was suitably amended in 1960. Any failed bank would henceforth be put on moratorium and merged with a peer bank. In the last 55-plus years, a number of banks that faced liquidation have been led into merger in this manner. Neither has any bank been liquidated nor has any depositor lost his/her money. Among the affected banks were Bank of Bihar, Belgaum Bank, Lakshmi Commercial Bank, Miraj State Bank, Hindustan Commercial Bank, Traders Bank, Bank of Tamil Nadu, Bank of Thanjavur, Parur Central Bank, Purbanchal Bank, Bank of Karad, Kashinath Seth Bank, Bariely Bank, Sikkim Bank, Benaras State Bank, Nedungadi Bank, Global Trust Bank, United Western Bank.¹⁷⁰¹

In contrast, the 'bail-in' clause in the FRDI could discredit this glorious history of law-making that gave primacy to the interest of depositors. Banks need resources and deposits of the people constitute the main resource. The clause could drive away these very depositors, which would in turn make banks unviable.¹⁷⁰²

2.3 THE GLOBAL ANALYSIS OF THE BAIL-IN APPLICABILITY AND REAL LIFE EXPERIENCE.

¹⁷⁰¹ Kurian Vinson, "Will FRDI Bill mean a throwback to the tumultuous pre-1960s" accessible at <http://www.thehindubusinessline.com/money-and-banking/will-frdi-bill-mean-a-throwback-to-the-tumultuous-pre1960s/article9994097.ece>

¹⁷⁰² <http://www.nipfp.org.in/media/medialibrary/2017/12/11122017.pdf>



A global analysis of the Bail-in provisions being applied in the real world and gaining utmost importance is that of Cyprus where in the bail-in approach was implemented in March, 2013.

2.3.1 CYPRUS

Triggering a regime shift The Cyprian country case is of particular importance for the analysis because it combines two important features that we assume to be essential. First, the bail-in basis is wide due to the involvement of senior debt and even large customer deposits. Second, the decision to expand the bail-in basis to senior debt and retail depositors was backed by the Eurogroup after protracted negotiations.¹⁷⁰³

This was a watershed in the way of dealing with distressed banks. We identify three events for the Cyprian case:

1. The outcome of the eurozone finance minister meeting on 11 February 2013. At this early stage, the bail-in of senior debt was considered as one of three possible alternatives of the meeting.
2. The second event on 18 March 2013 is characterized by the Cyprian proposal to introduce a levy on all depositors, even if their claims were below the insured amount of one hundred thousand euros.¹⁷⁰⁴

While this is not an explicit bail-in procedure its economic effect on private investors would be very similar, as it transfers the rescue costs from taxpayers to investors.

¹⁷⁰³ Acharya, Viral and Sascha Steffen, 2015, "The 'Greatest' Carry Trade Ever? Understanding Eurozone Bank Risks," *Journal of Financial Economics*, 115 (2), 215–236

¹⁷⁰⁴ 'Resolving Globally Active, Systemically Important, Financial Institutions' a joint paper by the FDIC and the BoE, 10 December 2012.

3. The last event on 25 March 2013 marks the actual bail-in in Cyprus.¹⁷⁰⁵

Cyprus is the key bail-in event because it clearly transported the signal that the euro area was going for a bail-in of creditors in bank restructurings and moreover that the bail-in basis could be very wide, including senior unsecured debt and even large deposits. Apart from the early Danish case, retail investors had not yet faced haircuts. The different bail-in options became public in February 2013. On 18 March 2013, the government of Cyprus and the eurozone Finance Ministers announced that all deposits, including those below 100 000 euros (the legal deposit guarantee limit of the EU) would be facing losses. Following an uproar and a week of further frantic negotiations, the deal finally announced on 25 March 2013 bailed in senior unsecured debt and large deposits but not retail deposits below 100 000 euros.¹⁷⁰⁶

To understand the FRDI Bill which is being considered to be the at least enactment of the Government to modernize the economy to the global standards, we need to look into a few case studies to better understand the provisions of bail-in and its impending results thereto.¹⁷⁰⁷

2.3.2 DENMARK

¹⁷⁰⁵ Cyprus Resolution Law, 2013, http://www.centralbank.gov.cy/nqcontent.cfm?a_id=12727&lang=en

¹⁷⁰⁶ Guiso, Luigi, Paola Sapienza and Luigi Zingales, 2013, "The Determinants of Attitudes toward Strategic Default on Mortgages," *Journal of Finance*, LXVIII, 4, pp.1473–1515

¹⁷⁰⁷ Reinhart, Carmen and Kenneth Rogoff, 2009, "This Time is Different: Eight Centuries of Financial Folly", Princeton University Press



Firstly, is the case of the creditor bail-in of the Danish bank *Amagerbanken*. The small retail bank – with total assets of only 4.5 billion euros was wound up in early 2011 under the Danish national resolution procedure “Bank Package III”. The Danish resolution procedure aimed at protecting taxpayers from bank losses and included a bail-in of senior debt. Hence, depositors and other unsecured creditors of this distressed bank could not be sure to receive full coverage of their claims. On Sunday, 6 February 2011, the bank announced the transfer of its assets to a state-owned bank. CreditSights estimated that holders of senior debt and unsecured deposits would face a haircut of 41 percent. This case is of particular interest since it was the first European bank in our sample whose bail-in basis included senior unsecured debt as well as larger deposits. It is noteworthy that the authorities in Denmark, which is not part of the eurozone, decided to bail in bank creditors long before the decision for a European banking union and the creation of a SRM.¹⁷⁰⁸

2.3.3 SPAIN

Secondly, when the time Spain applied for the European Stability Mechanism (“ESM”) assistance in bank restructuring and recapitalization in June 2012,¹⁷⁰⁹ recapitalization needs of Spanish banks were estimated at 100 billion euros. The largest bank in distress was *Bankia* with a balance sheet of about 300 billion euros. At the insistence of euro area finance ministers, the

Memorandum of Understanding (MoU) included the participation of junior creditors in the losses of the Spanish institutes as a necessary condition for granting bank aid. Subordinated Liability Exercises (SLEs) included hybrid capital and subordinated debt and were either voluntary or – where necessary – mandatory.¹⁷¹⁰ In the second half of the year 2012 the Spanish government implemented a national law on the restructuring and resolution of their credit entities.¹⁷¹¹

2.3.4 THE NETHERLANDS

Case number three is the creditor bail-in of the Dutch bank SNS Reaal, which had total assets of about 80 billion euros. After the bank had suffered from substantial write-downs on its real estate portfolio during the year 2012, the Dutch government nationalized SNS Reaal on 1 February 2013.¹⁷¹² In the context of nationalization, the state injected 2.2 billion euros, shareholders and junior creditors were both wiped out. One billion of subordinated debt was expropriated with zero compensation under a new Dutch law.¹⁷¹³ This case happened during the negotiation of the SRM.¹⁷¹⁴ Its political spillover effect was probably further magnified for an additional reason: the responsible Dutch finance

¹⁷¹⁰ Ashurst (2012).

¹⁷¹¹ Dübel (2013b), p. 40.

¹⁷¹² M Haentjens, What Happens when a Systemically Important Financial Institution Fails: Some Company Law Observations re. SNS Reaal, *European Company Law Journal*, nr. 2, 2013

¹⁷¹³ *Financial Times* – European edition „Dutch moralist sends stern message“, on 26 March 2013, p. 2.

¹⁷¹⁴ LGA Janssen & JT Tegelaar, How to Compensate Expropriated Investors? The Case of SNS Reaal, *JIBLR* 2016

¹⁷⁰⁸ Vurderingsrapport, for Andelskassen J.A.K. Slagelse under kontrol, PwC, April 27, 2016

¹⁷⁰⁹ Royal Decree-Law 24/2012 on restructuring and resolution of credit institutions, passed by Parliament as Law 9/2012 on November 14.



minister had just been appointed as the president of the Eurogroup. Hence, his involvement in the decision to bail in creditors in the Netherlands was a strong indication for the future stance of the Eurogroup, including in their negotiations with the incipient case, Cyprus.¹⁷¹⁵

2.3.5 PORTUGAL

The last country case focuses on the creditor bail-in of the Portuguese bank Banco Espírito Santo, which had total assets of about 85 billion euros. For a few days, this event dominated the news and raised the spectre of renewed turbulence in the euro area. On 10 July 2014, fears over this bank briefly triggered a stock sell-off across European financial markets. Portugal's PSI 20 share index dropped by 4.3% which was the biggest drop in more than a year.¹⁷¹⁶ In September 2014 the bank posted record losses for the first half of the year. On 4 August 2014, the bank was split up into a "good bank" and a "bad bank" after a frenzied weekend of negotiations between Portuguese and European Union officials. The good bank, Novo Banco, received all sound assets, deposits and senior debt plus a capital injection of 4.9 billion euros. The bad assets were transferred to the bad bank and its losses had to be borne by junior creditors.¹⁷¹⁷

2.4 LESSONS LEARNT FROM THE USAGE OF BAIL-IN PROCESS FOR BANKS IN THE GLOBAL SCENARIO

Within 24 months of the Cyprus bank crisis countries like Canada, New Zealand, the US, the UK and Germany also introduced legislation that in effect gives the governments in those countries the option of freezing, and perhaps seizing bank deposits above a certain level.¹⁷¹⁸

In the UK, for example, protected deposits have an upper limit of £85,000. In the rest of Europe, that translates into €100,000. The UK's Financial Services Compensation Scheme (FSCS) goes some steps further. It also provides a protection limit of up to £1 million, yes, a million pounds sterling – on 'temporary high balances' that depositors may have held when the bank failed.¹⁷¹⁹

In India, the deposit protection limit is Rs 100,000, roughly one-sixtieth of the value protected in other jurisdictions. The Rs 1 lakh limit was set in 1993, and hasn't been upgraded since. Even adjusted for inflation, the level of cover won't increase too much. And if you have more than one account at the same bank, the limit of Rs 1 lakh applies to the total of all your accounts.¹⁷²⁰

¹⁷¹⁵Rapport van de evaluatiecommissie nationalisatie SNS Reaal (2014) (Report of the evaluation committee nationalisation SNS Reaal (2014))

¹⁷¹⁶ Financial Times, online: "Fear over Banco Espírito Santo trigger stock sell-off", 10 July 2014, 6:48pm. <http://www.ft.com/intl/cms/s/0/4b0ce5ce-0815-11e4-9afc-00144feab7de.html#axzz3HcLjBF7Y>

¹⁷¹⁷ P Tucker, 'Regulatory Reform, Stability and Central Banking' Hutchins Center on Fiscal and

Monetary Policy, Brookings, 18 January 2014 www.brookings.edu.

¹⁷¹⁸ <https://www.bloomberg.com/news/articles/2017-06-16/canada-proposes-new-bail-in-regulations-for-the-country-s-banks>

¹⁷¹⁹ <https://www.gov.uk/government/consultations/bail-in-powers-implementation-including-draft-secondary-legislation/bail-in-powers-implementation>
¹⁷²⁰

https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/dic_gc_act.pdf



Think of having to find low cost way of distributing your deposits across several banks; if that turns out to be too expensive or cumbersome, you'll have to look for other means of protecting your savings.

What troubles most people is that the primary objective does not appear to be deposit protection, but financial institution resolution. And what worries them even more is that the FRDI bill puts depositors at the bottom of the totem pole when it comes to actual protection. Consider again, the example of Cyprus.

Research Objective 3: To understand the challenges that FRDI would face when tested in the Indian economic scenario wherein due to the fast tracking of the revitalization of the Indian economy many new laws have been enacted to ease the economy and compete that of the modern global economic standard. However, the pros and cons of the FRDI need to be understood in light of the challenges the Bail-in centered resolutions under the FRDI Bill would take shape in the real world scenario.

IMPORTANT CHALLENGES OF BAIL-IN-CENTERED RESOLUTION UNDER THE FRDI BILL

The Provisions of the FRDI Bill aim at resolving the bankruptcy scenarios among to-big-to-fail financial entities to the least reliable financial instructions in the country. Just implying that a financial institution is 'too-big-to fail' would not be entitled to cease the rights of other people involved with it. According to the Indian Depositors' Act, all insurers are insured till a fixed amount of Rs. 1,00,000/- (Rupees One Lakh

only) combined in all the accounts of the depositor with the bank, hence the deposit is not 100% insured. Even though the failing rate of the banks in India is fairly low, still less than a third of bank deposits in value terms are insured by the Deposit Insurance and Credit Guarantee Corporation of India (DICGC). If a bank fails, the DICGC will pay back the insured amount to the depositor but that is restricted to just Rs 1 lakh per depositor per bank. The FRDI Bill is reportedly silent on the extent of deposits to be guaranteed and that remains a key source of concern.¹⁷²¹

Though many would like to say that the 'bail-in' clause is just meant as a last measure or emergency capital for banks, the surreptitious sneaking in of a measure to execute hair-cuts on depositors' money, the bail-in clause in its current form gives the power to convert any securities from one class to another, including the creation of a new security in the modification of an existing security. This may mean that deposits may be converted to shares. This means your deposits can be converted into equity in order to recapitalize and bail out banks that are facing bankruptcy.¹⁷²²

V. CONCLUSION

¹⁷²¹ Khanna Chandan, "Contentious Bill doesn't allow depositors' money to be arbitrarily used to save banks" accessible at <https://scroll.in/article/861270/new-financial-resolution-bill-does-not-allow-depositors-money-to-be-arbitrarily-used-to-save-banks>

¹⁷²² Mann Gayatri, "The FRDI Bill: Bail-in provisions explained" accessible at <http://www.prsindia.org/theprsblog/?p=3932>



As the emerging market crises and the history of financial crises were made clearer, haircuts started to become the norm of the day for the bank creditors. In this article, we have provided an extensive analysis of the international application of the bail-in provisions and the past Indian banking sector experiences in the current modern financial system. Although we fully understand the revulsion from too-big-to-fail banks and the cost of bailouts, the area of concern that arises is that the development of a bandwagon may conceal some of the disadvantages of the new bail-in regimes. Although the bail-in approach may, indeed, be much superior to bailouts in the case of idiosyncratic failure, the resort to bail-in may disappoint unless everyone involved is fully aware of the potential downsides of the new approach.¹⁷²³

This article is not intended to claim that the proposed reforms will make the process of dealing with failing banks necessarily worse. Its purpose is, instead, to warn that the exercise may have costs and disadvantages, which, unless fully appreciated, could make the outcome less successful than hoped. The authorities will no doubt claim that they have already, and fully, appreciated all such points, as and where relevant. But we would contend that many advocates of moving to the latter do not mention such disadvantages at all, or only partially. Perhaps the choice should depend on context. The bail-in process seems, in principle, a suitable substitute to resolution (whether liquidation of a gone concern, or some other form of resolution in a going concern bank) in the

¹⁷²³ D Schoenmaker, 'A Fiscal Backstop to the Banking System' Duisenberg Business School, DSF Policy Paper No 44, July 2014.

case of smaller domestic financial institutions. It could also be used successfully to recapitalize domestic SIFIs, but only if the institution has failed due to its own actions and omissions and not due to a generalized systemic crisis. Otherwise, a flight of creditors from other institutions, that is, contagion, may be uncontrollable.¹⁷²⁴ Even so, successful bail-in recapitalization would require rapid restoration of market confidence, accurate evaluation of losses, and successful restructuring of the bailed in bank's operations to give it a sound business model to avoid successive rounds of bail-in rescues. It could, of course, prove very hard for regulators to secure all those prerequisites of a successful bail-in recapitalization in the event of a systemic crisis.¹⁷²⁵

To conclude, it is stated that achieving the goal of making private institutions responsible for their actions would be the best policy in an ideal world where financial polluters would be held responsible for their actions. But, in practice, it might prove an unattainable goal. If this turns out to be the case, then developed societies might have to accept that granting some form of public insurance is an inevitable tax for having a well-functioning banking sector. At the same time, other forms of regulation like structural reform and leverage ratios), if they

¹⁷²⁴E. Avgouleas, C. Goodhart and D. Schoenmaker, 'Recovery and Resolution Plans as a Catalyst of Global Reform' (2013) *J Financial Stability* 210.

¹⁷²⁵G Karamichailidou and DG Mayes, 'Plausible Recovery and Resolution Plans for Cross-Border Financial Institutions', paper prepared for the Conference European Banking Union: Prospects and Challenges, University of Buckingham, 21–22 November 2014.



prove to make banks more stable, should come to the forefront with renewed force.

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THE COASE THEOREM⁶

The Coase Hypothesis, created by Ronald Coase, states that while clashing property rights happen, haggling between the gatherings included will prompt a productive result paying little mind to which party is at last granted the property rights, as long as the exchange costs related with the transactions are insignificant. In particular, the Coase Hypothesis expresses that "if trade in an externality is possible and there are no transaction costs, bargaining will lead to an efficient outcome regardless of the initial allocation of property rights."

The entire point of the parable by Coase is to help bridge the gap between law, economics and society's movements whenever there is a clash between parties on any point of interest.

The parable's point was to allocate resources in such a way where the transaction costs are zero and the parties involved can agree on to exchange of property rights in such manner where there is efficient allocation of resources among all the parties involved.

An example given by Coase in his paper is the conflict between a Farmer and Rancher whose point of conflict arrives when the cattle of the Rancher wanders into the property of the Farmer and destroys his property. The most efficient solution would be to build a fence between both of their properties, but who will bear the expenses of building the fence?

This solution is given by Coase that if the property rules are favouring towards the Rancher, then the expenses will be borne by the Farmer but still it is efficiently beneficial for the Farmer because his produce is not damaged and it is beneficial for the Rancher because his cattle won't be injured and will be safe.

OF COASE AND CATTLE : DISPUTE RESOLUTION AMONG NEIGHBOURS IN SHASTA COUNTY

By Tanvi V. Menon

ABSTRACT

This paper seeks to examine the "Coase Theorem"⁴ in context with the example of Rancher and Farmer. The analysis of "Coase Theorem"⁵ in relation to Shasta County where the Rancher is in no way able to paying damages for trespass to the Farmer. It is evident that in Shasta County the entire parable of Coase is not in effect. So we go on to find that they resolve such disputes by..... If they keep doing this then it won't lead to efficient outcomes which is entirely the point of Coase's Theorem. The most effective solution is also discussed in this paper.

1- C.-R. H. Coase, Problem of Social cost, vol.3, TJLE, 1960.

2- C.- ibid 4

INTRODUCTION



If the property rules favour the Farmer then the expenses will be borne by the Rancher, this solution is efficient because by this too the Farmer because his produce is not damaged and it is beneficial for the Rancher because his cattle won't be injured and will be safe

In Coase and Cattle , it goes further than this to provide an efficient solution for this exact problem.

3- C.- ibid 4

4-

SHASTA COUNTY

Shasta County is a County in California. The people of the country have a unique way of resolving disputes of animal trespass into farming lands. Coase used the parable of a Rancher and Farmer to establish that when the transaction cost are zero, a change in the rule of liability will have no effect on the allocation of resources. Coase basically says that laws against cattle trespass will not cause the number of cattle to decrease or for the quality of fences to increase.

In Shasta County , though this parable fails because in a small town the basic attitude of the people is to try and exist in harmony with each other. So this will fail because then consideration of transaction cost has disappeared, all these people care is about the resolution of their disputes that was done before by the collection of signatures for a closed range ordinance before the “Calton Folly Ordinance” in year of 1973.

The people of Shasta County also have a main occupation of either ranching or owning ranchettes. When taxes levied on them burnt a hole in their pockets they sold parts of their lands to developers who converted them into ranchettes.

There are two kinds of Ranchers in Shasta County –

1) Traditionalists

The people who believe in this approach are mainly from the older generation who are still into the practise of Animal husbandry and are more likely to be a part of the Board of Supervisors. They are against any closed range ordinances which might lead to them having to tether their cattle to a limited space. It is the trademark of traditionalists to let their cattle roam without any attendance in unfenced mountain areas during summers. During summers the availability of feed for the cattle reduces drastically, so these Ranchers have to either irrigate their tracts of land or let out their cattle to the higher foothills where the temperature is cooler to survive. These traditionalists usually lease out land in the mountainous terrains during the summer for their cattle.

2) Modernists

The people in Shasta County who keep their cattle inside fences during all times is a modernist. Modernists use sprinklers and other irrigation systems for their ranches in order to keep their cattle alive, this also helps in keeping vegetation alive. Modernists tend to be younger , educated and participating more in the cattle association of Shasta County.

The modernists and traditionalists shake hands on the matter of any legal propositions that might increase the liabilities on the owners of the cattle.

FENCING DISPUTE

A fence basically is some sort of a barricade which demarcates boundary of a property and keeps out trespass of any kind.



According to Coase this reduced the damages to the crops in the property. In Shasta though this is done primarily for the welfare of the cattle and is done by the Ranchers. “Today, Shasta County Ranchers tend to use at least four strands of barbed wire and they employ steel posts instead of the cedar posts customarily used earlier in the century.”⁷

“Barbed wire fence in Shasta County cost about \$2000 per mile. Fence contractors charge at least as much for labor and overhead. Both Ranchers and ranchette owners customarily build their own fences and thereby drastically reduce out-of-pocket labour expenditures.”⁸

“Barbed wire fences require periodic maintenance, especially in Shasta County, where many natural forces conspire against fence wire. The extreme summer heat loosens the wire while the winter cold pulls it taut. Ranchers believe that the many benefits of perimeter barriers outweigh fence construction and maintenance costs.”⁹

“A closure reduces the number of loose cattle because fear of liability to motorists makes traditionalists reluctant to run cattle at large in closed range.”¹⁰

This points out that the duty of building a fence was shifted towards the Rancher instead of the Farmer even with the existence of the statute. The Ranchers started to be strictly liable for a and every action of their cattle.

- 8. C.- ibid 7
- 9. C.- ibid 7
- 10. C. – ibid 7

THE LAW OF ANIMAL TRESPASS IN SHASTA COUNTY

In USA the English common law of strict liability is applied for animal trespass which basically means that the owner is held liable for all acts and damages done by his cattle. In the 1850’s a statute was passed which only put the liability on the cattle owners if the victims had built lawful fences on their properties. All these laws still were favouring towards the cattle owners. After which another statute was passed which protected those Farmers who did not have fences on their properties.

“In the Estray Act of 1915, 97 the legislature adopted for most of California the traditional English rule that the owner of livestock is strictly liable for trespass damage. This statute, however, retained the open-range rule for six counties in the lightly populated northern part of the state where the tradition of running cattle at large remained strong. The Estray Act of 1915 thus specifically excepted all of Shasta, Del Norte, Lassen, Modoc, Siskiyou, and Trinity Counties from the closed-range regime.”¹¹

DISPUTE RESOLUTION IN SHASTA COUNTY

Coase assumed in the example of Farmer and Rancher were aware of and respected each other’s legal rights and rules.

7. C. - Robert . C . Ellickson, Of Coase and Cattle: Dispute resolution between neighbours of Shasta County, vol.1, YLS, 1986



In Shasta County that is one thing that seems to be missing, that the citizens believe in a ‘live and let live’ policy and try to coexist among themselves peacefully. Therefore they find the Farmers find the damage to their crops negligent because the Ranchers will take their wandering cattle out of their fields in a day or two. They normally don’t go for any legal action, which questions their legal knowledge and entitlement.

11-C. - Robert . C . Ellickson, Of Coase and Cattle:Dispute resolution between neighbours of Shasta County,vol.1, YLS,1986.

HOW DAMAGING ARE THE FACTS TO COASE’S PARABLE?

“The extent of their knowledge is relevant for at least two reasons. First,Coase’s Parable is set in a world of zero transaction costs, where everyone has perfect knowledge of legal rules. In reality, legal knowledge is imperfect because legal research is costly and most residents resolve trespass disputes by applying lower-level norms that are consistent with an overarching norm of cooperation among neighbors. To the extent that residents understand that their lower-level norms are inconsistent with formal legal rules, the more notable it is that the norms prevail.”¹²

Coase assumed that all parties involved in any and all interactions will be with complete and full awareness of their legal rules, rights and obligations. In Shasta County that is not the case as said by Mr. Robert Ellickson in his paper that he could not find any individual in Shasta who was completely aware of the trespass laws in place. All the citizens were concerned with

was the type of range their property fell under. “As most laymen in rural Shasta County see it, trespass law is clear and simple. In closed-range, an animal owner is strictly liable for trespass damages In open-range, their basic premise is that an animal owner is never liable”¹³

“In contrast to the landowners, the legal specialists immediately invoked *negligence* rules when asked to analyze rights in trespass cases. In general, they thought that a cattleman would not be liable for trespass in open-range (although about half seemed aware that this result would be affected by the presence of a lawful fence), and that he would be liable *only when negligent* in closed-range.”¹⁴

According to Coase , “They would settle their trespass problems in the following way. First, they would look to the formal law to determine who had what entitlements. They would then regard those substantive rules as beyond their influence. When they faced a potentially costly interaction, such as a trespass risk to crops, they would resolve it "in the shadow of the formal legal rules.

12 -Robert . C . Ellickson, Of Coase and Cattle:Dispute resolution between neighbours of Shasta County,vol.1, YLS,1986.

13- C. - ibid 12

14- C. – ibid 12

Because transactions would be costless, enforcement would be complete: No violation of an entitlement would be ignored.”¹⁵



These are damaging in the sense that Coase assumes that the transaction costs are bound to be low or negligible, which is quite the opposite in reality where transaction costs are really high.

In Shasta it is “Norms, not legal rules that are the basic sources of entitlements.”¹⁶

It is a norm in Shasta that the owners are responsible for their cattle, regardless of the formal legal entitlements given.

“The norm that an animal owner should control his stock is modified by another norm that holds that a rural resident should “lump” minor damage stemming from isolated trespass incidents. The neighbourly response to an isolated infraction is an exchange of civilities. A trespass victim should notify the animal owner that the trespass has occurred and assist the owner in retrieving the stray stock.”¹⁷

“Several realities of rural life in Shasta County help explain why residents are expected to lump trespass losses. First, it is commonplace for a country landowner to lose a bit of forage or to suffer minor fence damage. Second, most residents expect to be on both the giving and receiving ends of trespass incidents. Even the ranchette owners have, if not a few hobby livestock.”¹⁸

15- C. - Robert . C . Ellickson, Of Coase and Cattle:Dispute resolution between neighbours of Shasta County,vol.1, YLS,1986.

16- C. – ibid 15

17- C. – ibid 15

18- C. – ibid 15

“If trespass risks are symmetrical, and if residents lump all trespass losses, accounts balance in the long run. Under these conditions, the advantage of reciprocal

lumping is that each person is made whole without having to expend time or money to settle disputes. The norm of reciprocal restraint that underlies “live-and-let live” also calls for Ranchers to lump the costs of boarding another person's animal, even for months at a time.

Another norm followed to keep deviants in line is self- help which is also done through gossip. Negative me”¹⁹ gossip can have a very adverse effect on the social standing of a person.

Gossip reels in the person from doing it again.If this method were to fail then they take measures such as threatening and sometimes the ‘tit for tat’ method. Even after repeated warnings and complaints still the cattle enters into the property of a Farmer then he might just as well leave his own cattle onto the offenders fields

Another method used is complaint to officials like the Animal Control Officer or the Board of Supervisors, who the traditionalists fear and respect.

19-C. - Robert . C . Ellickson, Of Coase and Cattle:Dispute resolution between neighbours of Shasta County,vol.1, YLS,1986.

HOW TO CONTROL THESE EXTERNALITIES EFFICIENTLY?

In Shasta County , another surprising thing that was found was that monetary compensation for damages is very rare because all citizens want to be good neighbours and ‘live and let live’.

“Mutual restraint saves parties with long-term relationships the costs of going through the formal claims process.



Adjoining landowners who practice live-and-let-live are both better off whenever the negative externalities from their activities are roughly in equipoise. Equipoise is as likely in closed-range as in open.”²⁰

They also do not take a legal approach as it might escalate the conflict. The only two legal disputes regarding the same were both filed only after the informal methods failed to work and this drastic measure was the only option they could take. These cases also were decided by the courts in the victim’s favour. The other normal residents of Shasta refuse to take a legal action against neighbours and do not consider it as normal to do so.

So these externalities can be controlled very easily according to Coase, if the people regard the legal rights as the most easiest and quickest way of resolving a dispute instead of trying methods like gossiping or threatening. These informal methods only increase the transaction cost and it depends heavily on the communication and willingness of the person to perform which automatically makes it very inefficient and time consuming as well.

These legal methods will only be used by the people when they are made aware of their obligations to the legal system and the benefits they gain out of it.

They will also start receiving monetary compensation for the damages they suffer without having to worry about setting precedents as they have not made them but the court has and also this might just as well salvage some relations with their neighbours

that might have turned sour over the course of the trial.

Basically what will efficiently deal with all externalities and solve any and all issues regarding animal trespass is legal action against the offenders.

20- C. – Robert . C . Ellickson, Of Coase and Cattle:Dispute resolution between neighbors of Shasta County, vol.1, YLS,1984

CONCLUSION

We see through the paper that Mr. Robert Ellickson basically says that,

“Because Coase himself was fully aware that transactions are costly and thus that the Parable was no more than an abstraction, my findings in no way diminish his monumental contribution. The findings may, however, serve as a valuable caution to other law-and-economics scholars who may have underestimated the impact of transaction costs on how the world works.”²¹
This paper basically acts as an extension to the Coase Theorem.

It just points out how even though the people are not taking advantage of the legal entitlements but they tend to take decisions that are mutually beneficial to all parties involved, which is what Coase tries to explain in his paper.



What Ellickson tries to say is that with the philosophy of ‘live and let live’ and informal means such as gossip , the people are trying to take such actions and decisions that are mutually beneficial and advantageous for all, which is in tandem with what Coase tries to say.

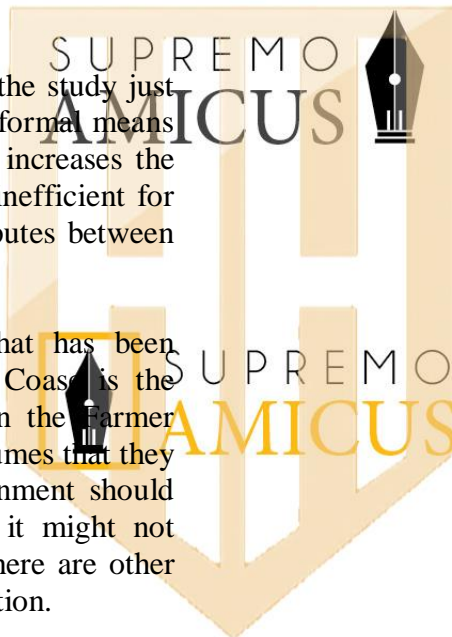
21- C. - Robert . C . Ellickson, Of Coase and Cattle:Dispute resolution between neighbours of Shasta County,vol.1, YLS,1986

In the paper too he clearly states that while it might seem he is contradicting Coase , he is infact not and is merely presenting an argument which might go against his theory but can infact not go against it. The fact that he keeps mentioning high transaction cost does not mean that it renders the application of Coase as irrelevant.

The high transaction given in the study just goes on to prove how using informal means in place of given legal means increases the transaction cost and becomes inefficient for bargain and interaction of disputes between people.

The only possible thought that has been found to be contradicting of Coase is the manner of interaction between the Farmer and Rancher. While Coase assumes that they will interact in a legal environment should dispute arise, it is seen that it might not always be the case and that there are other alternatives to the same interaction.

In conclusion, all the paper says is that the people in Shasta County are not using legal entitlements to resolve disputes but other informal methods which seem to be inefficient and also we find the solution that approaching a legal remedy is the most effective and efficient solution.





BAN ON JALLIKATTU; A RIVALRY WITH CULTURE

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“Conservation of Culture should not involve inflicting unnecessary pain or suffering to animals’

- Justice Misra

INTRODUCTION

Jallikattu is a sport played in Tamil Nadu mainly in Madhuraj, Tiruchipalli and Tanjore. It is a kind of ‘Bull fight’ in which the bull of Pulikulam and Kangayam breeds is freed in to a large crowd where the participants or the person from the crowd try to catch the hump of the bull. This game was a part of Pongal festival and was played on 4th day of Pongal celebration i.e. Mattu Pongal. The bulls were a part of festivities in Tamil Nadu, where torturing them physically and mentally was a part of human pleasure and enjoyment.

But in recent years, this game is banned by a verdict passed by the Supreme Court. Reason being animals also have Right to life under Article 21 of the Constitution of India

and this game of releasing bull where people try to grab their hump and try to climb them, affects the bulls physically and mentally. Many people were against it and protested as the ban on the Jallikattu game infringes their fundamental Right to follow their Religious & Cultural Right i.e. ‘people have a right to preserve their culture’.

BAN ON JALIKATTU

The Supreme Court has announced that Animals have a right to protect their life and dignity from human interference. The Judgment banning the bull taming sport in Tamil Nadu was pronounced on 7th day of May, 2014. In its judgment Supreme Court validated the Right of Animals and Birds to live a life with dignity and honour. The Supreme Court made the Right to life of Animals and Birds an inherent and permanent right.

There are many laws in India which were in violation with the sport Jallikattu. As India is a developing country and judiciary is playing a very active and great role in its development. In the judgment passed by Supreme Court, in the case of *Animal Welfare Board of India vs. A. Nagaraja & Ors.*¹⁷²⁶, the court extended the meaning of Article 21 to Animals and Birds also. So, with regard to this particular case of bull taming sport, it means that Bulls also have a right to live with dignity and in a healthy & clean environment. By banning the bull taming sport Jallikattu, the Supreme Court has stopped the practices of kicking, beating or torturing of animals which is against their Fundamental Rights and other laws in India which protects from cruelty against animals

¹⁷²⁶ (2014) 7 SCC 547.



and strives to give them a life free from human inference and excesses.

In spite of banning of the bull taming sport in Tamil Nadu, the event was held in various places in Tamil Nadu. 2 spectators and 80 people were injured in the event of Jallikattu, one died because of bull attack and another died by cardiac shock when the bull ran towards him at M Pudar area of Tamil Nadu in April, 2017¹⁷²⁷ and another incident happened at Avanipuram, Tamil Nadu in which 36 people got injured and one of them was seriously injured in the Jallikattu event held during February, 2017.¹⁷²⁸ So, it is evident from these incidents that this particular game does not only infringe the Right to life of the animals but the Right to life of the humans also. So there was a very urgent need to stop these practices in the name of sport or game. This point has been opposed by saying that the people did it by *Volenti non fit injuria* (a doctrine of common law) i.e. willingly putting yourself in the position which can cause harm. But this also has been a recognized principle of the law and well settled by the judiciary that ‘No one can take his own life to an end, even if he wants it on his own free will’¹⁷²⁹.

This festival is generally held in the month of January and February. Several people started protesting in the beginning of 2017 as the festival of Pongal was ahead. In 2018

the festival is going to be held from 13th January to 16th January. For the upcoming years pongal, till now, no protests have been seen against the ban on Jallikattu.

CASE: Animal Welfare Board of India vs. A. Nagaraja & Ors.

(2014) 7 SCC 547

The Supreme Court pronounced its judgment on 7th May, 2014, banning the Jallikattu sport and game practiced in Tamil Nadu as a part of their festival ‘Pongal’. The Supreme Court historically extended the fundamental right to life to animals. It held that bulls have the fundamental right under Article 21 of the Indian constitution to live in a healthy and clean atmosphere, not to be beaten, kicked, bitten, tortured, plied with alcohol by humans or made to stand in narrow enclosures amidst bellows and jeers from crowds. In short, the Supreme Court declared that animals have a right to protect their life and dignity from human excesses.¹⁷³⁰

The studies of bull’s behavior have proved that they adopt fight reaction when they are frightened and threatened. It held that bulls cannot be used either in Jallikattu or Bullock-cart races, in Tamil Nadu, Maharashtra or any other place in the country.¹⁷³¹

The court pronounced its judgments relying upon Section 3, 11 (1) (a) & (m), 21 and 22 of PCA Act, Article 51(A) (g) and Article 21 of the Indian Constitution.

¹⁷²⁷ Article in Hindustan Times, (www.hindustantimes.com).

¹⁷²⁸ Article in Hindustan Times, (www.hindustantimes.com).

¹⁷²⁹ This is the reason why attempt to suicide is punishable under section 309 of IPC, and later on validated by the judiciary in the case of Smt. Gian Kaur vs. The State of Punjab; 1996 SCC (2) 648.

¹⁷³⁰ Animal Welfare Board of India vs. A. Nagaraja & Ors.; (2014) 7 SCC 547.

¹⁷³¹ Animal Welfare Board of India vs. A. Nagaraja & Ors.; (2014) 7 SCC 547.



While dealing with the issue of the Validity of Jallikattu, the Supreme Court also said something regarding these things also in its judgment –

Compassion, it is also fundamental duty of every citizen to have a sense of compassion towards other living beings under Article 51A(g). By enacting this Article the Parliament has made it a duty and responsibility to every citizen that they have to be kind towards the other creatures and environment. Though under Article 48A it is also a state's policy to Endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. And similar duty has also been imposed upon every citizen in the form of Article 51A(g).

Humanism, it is specified under Article 51A(h) which reads as under, 'it is the duty of every citizen to develop the scientific temper, humanism and spirit of enquiry and reform'. The focus has been made to the term Humanism in the Supreme Court. The people must try to prevent the infliction of unnecessary pain and harm to the animals and develop a sense of humanism and concern towards them and the same is also mentioned in the preamble of Prevention of Cruelty to Animals Act, 1960.

Speciesism, the term was first coined by the Richard Dudley Ryder¹⁷³², the concept of speciesism is about the dominating behavior of human over the other species and describes about the prejudicial behavior of the humans towards other species. The term

¹⁷³² Richard D. Ryder is a British writer, psychologist, and animal rights advocate has done many works on the attitude of animals.

'speciesism' has been defined as 'the assumption of human superiority over the other creatures, leading to the exploitation of animals'¹⁷³³.

EXTENSION OF ARTICLE 21 TO ANIMALS

Now, the Right to Life under Article 21 is extended to Animals and birds also. That means animals also have a Right to live with dignity and in a clean and healthy environment. Every species is blessed with right to life and security and this have been indirectly covered under Article 21 of the Indian Constitution.

Article 21 protects life, and the word "life" has been expanded by the highest constitutional Court, so as to include all forms of life in the environment, which contains animal life also, which are necessary for human life. Hon'ble court held that "life" in context of animals does not mean, mere survival or existence or instrumental value for human beings, but also life with some intrinsic worth, honour and dignity. It in addition enlisted these five internationally recognized freedoms for animals, such as:

- i. Freedom from hunger, thirst and malnutrition;
- ii. Freedom from fear and distress;
- iii. Freedom from physical and thermal discomfort;
- iv. Freedom from pain, injury and relief;
- v. Freedom to express normal patterns of behavior.¹⁷³⁴

¹⁷³³ Oxford English Dictionary.

¹⁷³⁴ Thelawblog.in; right-to-life-for-animals-changing-from-anthropocentric-to-eco-centric-jurisprudence.



But the scope of application of the judgment is limited, when such animal's life is necessary to be taken for the survival of human life.

By this judgment we can say that our society is shifting from anthropocentric approach to eco-centric Approach. Anthropocentric approach is concerned with the human interests only and giving them preference whereas the eco-centric approach focus on the needs of nature. The Supreme Court following the eco-centric approach has extended the Article 21 of the Indian Constitution to the animals also. Now, treating animals cruelly is against the public morale and public order.¹⁷³⁵

So, the Right to life of the animals has been confirmed but subject to the human necessity. Therefore the animals have a right against inflicting unnecessary pain and suffering. But this game called Jallikattu cannot be exercised without inflicting pain, harassment and unnecessary humiliation to the bulls that does not do anything important but only adds to the human enjoyment, hence, the Supreme Court took the decision in favour of the animals and banned the game or sport.

OTHER LAWS

The judgment banning the sport Jallikattu has been relied upon many laws. Article 21 is the milestone among them. Anything coming in the way of Article 21 would be straight away abolished. Because Article 21

i.e. Right to life is an absolute right and it cannot be abrogated at any cost. Reliance has also been made to the Article 51A(g) of the constitution of India, Section 3, 11(1) (a) & (m) and 22 of the Prevention of Cruelty to Animals Act, 1960.

Article 51A (g) was introduced by 42nd amendment act, 1976 to the Constitution of India in which duty was imposed to every citizen in the form of Fundamental Duties. It reads as under, 'to protect & improve the natural environment including forest, lakes, rivers & wildlife and to have compassion for living creatures.' Court has spent its many time on thinking 'how to induce people to have compassion towards animals?' and the answer was found in the Article 51A (g) of the Indian constitution. The word 'wildlife' in the Article is related to every animal and this Article puts a duty on every person to have and generate a sense of compassion to animals. This Article is basically for the protection of the natural environment which includes forests, lakes, rivers, wildlife etc.

*The Animal Welfare Board of India vs. A. Nagaraja & Ors.*¹⁷³⁶ initially was the case of infringement of Prevention of cruelty to Animals Act, 1960 mainly of the Section 3, 11(1) (a) & (m) and 22.

Section 3 of Prevention of cruelty to Animals Act, 1960 reads as under, 'Duties of persons having charge of animals: It shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering.' The Organisers of these

¹⁷³⁵Jumbo Circus v. Union of India, June 6, 2000,O.P Nos. 155, 1066, 2187, 1141, 5086, 6378, 6148, 6032, 2029, 5616, 486, 2636, 6229, 8173, 9483, 3845, 430, 6352, 2460 & 11729 of 1999.

¹⁷³⁶ (2014) 7 SCC 547.



sports like Bullock-cart race and Jallikattu have the charge of such animal. They take an active role in organization of these sports which causes pain, fear and suffering to the bulls and which is clearly against the Section 3 of the Prevention of cruelty to Animals Act, 1960.

Section 11 (1) (a) & (m) of Prevention of cruelty to Animals Act, 1960 reads as under, ‘If any person, beats, kicks, overrides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes, or being the owner permits, any animal to be so treated, solely with a view to provide entertainment; shall be punishable, under this Act.’ Therefore, any act which comes under this Section is prohibited unless specifically permitted under this Act. Jallikattu is a game where bulls are being climbed up, kicked, grabbed etc. and these activities are evidently in contradiction with the Prevention of cruelty to Animals Act, 1960.

Section 22 of the Prevention of cruelty to Animals Act, 1960 places restriction on exhibition and training of performing animals, which reads as under, ‘Restriction on exhibition and training of performing animals: No person shall exhibit or train (i) any performing animal unless he is registered in accordance with the provisions of this Chapter; (ii) as a performing animal, any animal which the Central Government may, by notification in the official gazette, specify as an animal which shall not be exhibited or trained as a performing animal.’ Performing Animals Rules, 1973 define ‘performing animal’ to mean any animal which is used at or for the purpose of any

entertainment to which public are admitted through sale of tickets. Jallikattu, Bullock-cart races, it was contended by the state, are conducted without sale of tickets and hence Section 22 of the PCA Act would not apply. It may be noted that when Bull is specifically prohibited to be exhibited or trained for performance, the question whether such performance, exhibition or entertainment is conducted with sale of tickets or not, is irrelevant from the point of application of Sections 3 and 11(1) of the PCA Act.¹⁷³⁷

Therefore, it not only violate Section 3, 11 (1) (a) & (m) and 22 of the Act but also the notification issued by the Central government in the official gazette dated 11.07.2011 in which bulls were involved in the list of animals which are banned to act as a performing animal from training and exhibition.

RIGHT TO LIFE VERSUS CULTURAL RIGHTS

Firstly, it has to be decided that ‘whether Jallikattu comes within the ambit of culture’. Under Article 29(1) of the Constitution of India, people have a right to preserve their culture. Through this right, people can take any measures to protect their culture. The question is ‘Whether the sport Jallikattu is a part of the culture of the Tamil Nadu or not?’ As said in the judgment of the Supreme Court itself, Jallikattu culture sport has an historical and religious importance in the celebration of the festival Pongal in Tamil Nadu and hence it is part of the culture of people of Tamil Nadu.

¹⁷³⁷ (2014) 7 SCC 547.



It is a well settled principle of law that whenever there is a conflict between right to life and cultural rights, the cultural rights must yield. The judiciary has also validated this principle several times. The Supreme Court again relied on this principle in the present case, i.e. *Animal Welfare Board of India vs. A. Nagraja & Ors.*, and banned the Jallikattu event which was a part of the culture of the people in the celebration of the Pongal festival, because it is evidently against the Right to life of the Animals.

The sustainment of the Jallikattu infringes Right to life of Animals whereas the banning of it infringes the Cultural Rights of the people; therefore, two Fundamental Rights were in question. There was a rivalry between Right to life under Article 21 and Cultural Rights under Article 29(1) of the Indian Constitution. But because the Right to life is an absolute right and it cannot be taken away or abrogated at any cost and in any circumstances, therefore, following this approach the Supreme Court banned and prohibited the exercise of Jallikattu.

Right to religion, though a Fundamental right but still it is not an absolute right. The Supreme Court has observed in the case of *Acharya Maharajshri Narendra Prasadji Anand Prasadji Maharaj vs. State of Gujarat*¹⁷³⁸, 'Enjoyment of one's rights must be consistent with the enjoyment of right also by others. One Fundamental Right of a person may have to co-exist in the harmony with the exercise of another Fundamental Right by others'. The judiciary is well versed with the importance of Right to life which was extended to animals also in this case and also with the importance of Culture in the life of the people. But there is an

approach which says that the Cultural Rights also important and their own sense. The court considered the approach from both ends and after applying its judicial mind, the Supreme Court rightly came to the conclusion of banning the Jallikattu.



¹⁷³⁸ AIR 1974 SC 2098; (1975) 1 SCC 11.



HUMAN RIGHTS VIOLATION FROM SEX OFFENDER REGISTRY

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Following the gruesome 2012 ‘Nirbhaya’ gang-rape case which became the talk of the country for quite some time, there was an increasing demand from all sections of the society to make the punishment for sexual abuse harsher to deter such an incident from happening again. One of the culprits of this incident was a juvenile of 17 years of age who was alleged to be the most violent amongst all the perpetrators. There was wide outrage from the public to punish all the culprits along with the juvenile with death penalty. But since the juvenile could not be punished for more than three years as per the Juvenile Justice (Care and Protection of Children) Act, 2000,¹⁷³⁹ the 17 year old boy was released after completing his 3 years of custody at a special juvenile home. However this was met by a public resentment over the

release as they wanted the maximum punishment for even the juvenile who had committed such a heinous crime. In light of the growing public resentment the government passed the Juvenile Justice (Care and Protection of Children) Act, 2015¹⁷⁴⁰ which included a provision through which a juvenile (between the age of 16 to 18) could be tried as an adult if the crime committed by the juvenile is of a ‘heinous’ nature which includes drugs, waging war, trafficking, abetment of crimes, allowing one’s premises to be used, and many others. Following this the Minister for Women and Child Development Maneka Gandhi demanded for the formation of a National Sex Offender Registry system along the lines of those which exists in the U.S. under which the government authorities would be allowed to keep track of all those who have been convicted of committing sexual offences even after completing their criminal punishments. As in U.S. the Government seeks to release the data of the sexual offenders in the public so as to make the public aware of the previously convicted sexual offenders around them. This data includes name and aliases – registration of primary or given name, nicknames, pseudonyms, Interact identifiers and addresses, telephone numbers, addresses including temporary lodging information, travel and immigration documents, employment information, professional licenses, school/ college/institute information, vehicle information, date of birth, criminal history, current photograph, fingerprints and palm prints, DNA sample, driver’s license, identification card, PAN

¹⁷³⁹ Juvenile Justice (Care and Protection of Children) Act, 2000

¹⁷⁴⁰ Juvenile Justice (Care and Protection of Children) Act, 2015



card number, AADHAR card number and voter ID No.¹⁷⁴¹

But there are many flaws with having this kind of sexual offender registry list amongst them one being that it not only seeks to put adult sex offenders under the list but also juveniles between the age of 16 to 18 years of age charged of sexual assault as provided under Juvenile Justice (Care and Protection of Children) Act, 2015 who would now also be included under this type of registry which as discussed further is not only based on flawed empirical evidences but also goes against the basic human rights of privacy and dignity of all those put under such list while also going against the reformative notion that the Juvenile Justice Act seeks to provide. It is also stated that this type of sexual offender registry is a form of harsh punishment under to which people are unjustly being subjected to.

One may ask a very simple but a very important question- How does sexual offender registry in violation of a human right? First of all a registry of this kind allows the government to put in public information regarding the sex offender including travel and information documents, employment information, professional licenses etc. in the curtain of making people feel secure in their home which is in direct conflict with the right of the previously convicted sexual offenders right to privacy and right to dignity which is done in order to make an average person in the society feel safer while in reality this publicizing of

¹⁷⁴¹ National sex offender list, Press Information Bureau, Government of India
<http://pib.nic.in/newsite/mbErel.aspx?relid=145173>

information regarding the sexual offender is a form of harsh punishment that traumatises previously convicted sexual offenders. Post the Nirbhaya case there was a demand from the society to publicly name and shame those who are held guilty of committing sexual offences so that they are prevented from committing the crime in the future. In supporting this argument many cites the U.S. Department of Justice's findings which put the recidivism rates as being as high as 80% among sex offenders, but many further studies and findings have found the finding to be flawed as it was based on an experiment whose aim was not to find the recidivism rates. In India the National Crime Records Bureau ¹⁷⁴² found the recidivism rates to be around 5.4% for juveniles and around 7.4 per cent to 18.9¹⁷⁴³ among all sex offenders which in itself is enough to disprove the finding of the high recidivism rates.

This sexual offence registry treats those who have been convicted of sexual offences as being those who can never be reformed as their punishment lasts for a much longer period than that provided by the courts in terms of jail sentences, which is the stigmatization and traumatization faced post completion of their jail sentences. In the U.S. where the system currently exists there is a severe limitation as to the places where

¹⁷⁴² Crime in India 2014 Compendium
<http://ncrb.nic.in/StatPublications/CII/CII2014/Compendium%202014.pdf>

¹⁷⁴³ Aisha K. Gill, Karen Harrison, *Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches*,
<http://www.sascv.org/ijcjs/pdfs/gillharrisonijcjs2013vol8issue2.pdf>



a previously convicted sex offender can stay, most of the states ban sex offenders from living within 1,000 feet of areas populated by children, such as schools, parks, bus stops, and day care centres¹⁷⁴⁴ also since their data is available in the public domain they face severe stigmatization and ostracization in places where they can stay in. Finding a living space under these restrictions is much more difficult than it sounds. In Florida, 95% of residences are within 1,000 feet of a park, school, bus stop, or day care. When the range was expanded to 2,500 feet, registered sex offenders were found to be ineligible for 99.7% of residences¹⁷⁴⁵.

This also results in them having great difficulty in finding employment which makes it even more difficult for them to re-enter the society, in a survey of registered sex offenders, 27% reported losing their jobs because of the registry. Because of their status, they are also ineligible for welfare services and public housing¹⁷⁴⁶. All this goes hand in hand with the psychological impact it has on those who have been previously convicted and put under the registry which is a complete violation of their human rights in order to create a false impression of safety

¹⁷⁴⁴ Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and The Sex Offense Registry*, <http://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1014&context=themis>

¹⁷⁴⁵ Levenson, J. & Tewksbury, R. (2009). *Collateral damage: Family members of registered sex offenders*. *American Journal of Criminal Justice*

¹⁷⁴⁶ Robbers, M. L. P. (2008). *Lifers on the outside: Sex offenders and disintegrative shaming*. *International Journal of Offender Therapy and Comparative Criminology*

Levenson, D'Amora, and Hern (2007)¹⁷⁴⁷ studied how Megan's Law (the law that puts restriction on previously convicted sexual offenders) psychologically affects sex offenders. Over 200 offenders attending treatment programs were surveyed and half of them 62% of whom agreed that Megan's Law caused them stress and made it more difficult to recover. Over half of the offenders reported feeling lonely and isolated from society. Half of those surveyed claimed they lost friendships because of Megan's Law, felt ashamed and embarrassed, had less hope for the future, and felt that no one believed they could change. Approximately half also reported fearing for their safety because of Megan's Law¹⁷⁴⁸. It is evident that the registry's stigma causes serious damage to registered offenders. These consequences, although unintended, threaten offenders' recovery processes and their likelihood of leading lives of desistence.

All this is evident of the same fact that sexual offender registry is in itself a harsh punishment which is meted out against those who are convicted of sexual offences. This type of system is relevant only when there is high rate of recidivism existing in the society which is the exact same view that has guided the government to draft the sex offender registry bill.

Another major issue with these type of registry is that it is not only meted out against 'adult' sex offenders but also against

¹⁷⁴⁷ Levenson, J. S., D'Amora, D. A., & Hern, A. L. (2007). *Megan's Law and its impact on community re-entry for sex offenders*. *Behavioral Sciences and the Law*

¹⁷⁴⁸ *Supra*, note ix



juveniles (i.e. person below 18 years of age) who should normally be excluded from such a list as the general wit says that juveniles due to their age and mental capacity are sometimes not able to control themselves, moreover they are more likely to be reformed and would therefore not commit those crimes in the future. As per the Press Information Bureau, Government of India, The initial consultation draft includes the registration of individuals convicted for offences like rape, voyeurism, stalking and aggravated sexual assault and includes possibility of registration of offenders below and above 18 years¹⁷⁴⁹. This is being done in consonance with the Juvenile Justice (Care and Protection of Children) Act, 2015¹⁷⁵⁰ which allows for a juvenile between the age of 16 to 18 years to be tried as adult if the crime committed by the juvenile is of heinous nature. The Union minister for women and child development Maneka Gandhi even alleged that 50% of all sexual crimes were committed by 16-year olds which is a gross exaggeration of the real figure as provided by NCRB shows it is no more than 2.4 percent¹⁷⁵¹. Moreover the ideology behind including juveniles under sexual offender registry would still be reasonable if there was a high rate of recidivism among juvenile sexual offenders which is also not true as per the empirical evidence provided by the National Crime Records Bureau which puts the rate of recidivism among juvenile sex offenders at 5.4%.¹⁷⁵²

Thus the harsh punishment meted out against juvenile sex offenders on the assumption that 50% of sexual offences are committed by 16 years old and the high rate of recidivism amongst them is found to be empirically wrong. Yes, a light punishment handed out to the juvenile rapist in the Nirbhaya case has only fanned public anger. However, instead of bowing down to popular outcry, the government should ensure reformation and rehabilitation of young offenders. These are actions which need reformative measures. Under the erstwhile juvenile justice regime, the Government fulfilled its commitment to protect children, unconditionally. It recognized that all children in their adolescent years are prone to experimenting, predicted that some would make mistakes, and provided space for second chances, for them to be reformed and rehabilitated even if they make grave mistakes but by including juveniles under sex offender registry list as adults the government is moving away from this reformative notion. A report by Human Rights Watch¹⁷⁵³ tells the stories of 281 youth who were placed on a sex offender registry for offenses they committed when they were between eight and 18 years old, as well as hundreds of offenders' family members, attorneys, experts, and victims of child-on-child sexual assault, the report confirms what common sense dictates about registration of children they are stigmatizing and result in harmful consequences, including restrictions on

¹⁷⁴⁹Supra, note iii

¹⁷⁵⁰Supra, note ii

¹⁷⁵¹Supra, note iv

¹⁷⁵²Supra, note xiii

¹⁷⁵³ Human Rights Watch, *Raised on the Registry The Irreparable Harm of Placing Children on Sex Offender Registries in the US* https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf



residence, interruptions and exclusions from education and employment, and psychological harm sometimes ending in suicide.

Despite the evidence, the government wants to subject children to sex offender registration and community notification in a misguided attempt to protect public safety. Children are required to report to probation offices every few months, provide new photographs as they age or change appearance, and inform law enforcement every time they change motor vehicles, jobs or place of residence. Even a simple vacation can trigger an obligation to report. Failure to follow the letter of registration laws results in further criminal justice system involvement for failure to comply, which itself is a new crime which may carry a mandatory prison. Putting juveniles under the sex offender registry can do more harm than good as juveniles convicted of sexual offences would be unable to find jobs and would be forced out of most places of residences leaving making them even more prone to commit criminal activities.

provided for by the court and therefore they have with themselves as many rights as an average person and the perpetual punishment which is faced by them as a result of being in the sex offender registry list is wholly unjustified and is a gross violation of their human rights.

In conclusion it is stated that sex offender registry due to its overall negative impact on those who are unjustly and as per the empirical data quite uselessly subjected to what can be described as nothing short of punishment which violates the basic human rights of privacy and dignity of those put under such a list while also violating their rights as guaranteed by the constitution. One may argue that since they have committed such a heinous crime they must therefore pay for it but such an argument does not take into account that these people have already completed their sentences as



HUMAN RIGHTS VIOLATION OF WOMEN

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Abstract:

Human Rights which is the basic requirement of people as elucidated by Nelson Mandela-“To deny people their Human Rights is to deny their very humanity”. This quote draws a picture of the status quo of women in India and the central theme of this paper. It is a universal truth that all violation against women start with men’s ego and greed. Wars are caused and fought by men but women belonging to losing side are being raped, assaulted and mutilated. Due to men gulping intoxicates, women crave for food. In the world we live, son of one mother destroys the glory of another mother.

United Nations declaration, 1993, defined violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to a woman, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life’
This paper will include relevant facts and will be dealing with the pandemic problem faced by women and girls. It includes the examples of the women who have shown the world that women have the power to do beyond anyone thinks. The paper includes reports by many international and national

organizations like WHO. There are recommended solutions to the violations.

Keywords – Violation against women, WHO, Solutions, Human Rights, United Nation Declaratuon.

Introduction

Human rights are moral principles or norms that describe certain standards of human behavior, and are regularly protected as legal right in municipal and international law. They are commonly understood as inalienable fundamental rights "to which a person is inherently entitled simply because she or he is a human being", and which are "inherent in all human beings" regardless of their nation, location, language, religion, ethnic origin or any other status. They are applicable everywhere and at every time in the sense of being universal, and they are egalitarian in the sense of being the same for everyone. They are regarded as requiring empathy and the rule of law and imposing an obligation on persons to respect the human rights of others, and it is generally considered that they should not be taken away except as a result of due process based on specific circumstances, for example, human rights may include freedom from unlawful imprisonment, torture and execution.

Why are Human Rights important?

Human rights are important in the relationships that exist between individuals and the government that has power over them. The government exercises power over its people. However, human rights mean that this power is limited. States have to look



after the basic needs of the people and protect some of their freedoms. Some of the most important features of human rights are the following:

- They are for everyone.
- They are internationally guaranteed.
- They are protected by law.
- They focus on the dignity of the human being.
- They protect individuals and groups.
- They cannot be taken away.

Difference between Human Rights and Fundamental Rights

Though women in India have been given more rights as compared to men, even then the condition of women in India is miserable. The paper will throw light on the human rights of women in India and that how all the fundamental rights given to the women are being violated in India, by focusing on the various crimes done against them.

In India where the almighty is worshipped in feminine form as Shakti by many crimes against women, in spite of all the

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Point no.	Human Rights	Fundamental Rights
1.	Not Awarded but possessed from birth as a Human	Awarded through Constitution.
2.	Possessed by all Humans in the country	Mostly awarded only to citizens of the country
3.	Same for all the countries	Different in different countries
4.	On the basis of morality and Humanity	On the basis of legality and constitution.

Violation of Human Rights of Women

Human rights are those minimum rights which are compulsorily obtainable by every individual as he/she is a member of human family. The constitution of India also guarantees the equality of rights of men and women. However, in the sphere of women's human rights in India, there exists a wide gulf between theory and practice. Indian society is a male dominated society where men are always assumed to be superior to society. The differentiation between men and women for the positive reasons has turned out to have negative impacts like suppression, violence and denial of equal opportunities. Women existed for man and always played the second fiddle to him. The women in India very often have to face discrimination, injustice and dishonor.

and is on the increase. Violations of human rights are not simple individual acts of violence. Such violence are generated by developmental models also which are weighted in favor of the state or those in power and are against poor, the minorities and women.

Violence against women is partly a result of gender relations that assumes men superior to women. Given the subordinate status of women, much of gender violence is considered normal and enjoys social sanction. Manifestations of violence include physical aggression, such as blows of varying intensity, burns, attempted hanging, sexual abuse and rape, psychological violence through insults, humiliation, coercion, blackmail, economic or emotional threats and control over speech and actions.



These expressions of violence take place in a man-woman relationship within the family, state and society. Usually, domestic aggression towards women and girls, due to various reasons remain hidden. Cultural and social factors are interlinked with the development and propagation of violent behavior. With different processes of socialization that men and women undergo, men take up stereotyped gender roles of domination and control, whereas women take up that of submission, dependence and respect for authority. A female child grows up with a constant sense of being weak and in need of protection, whether physical social or economic. This helplessness has led to her exploitation at almost every stage of life.

The family socializes its members to accept hierarchical relations expressed in unequal division of labor between the sexes and power over the allocation of resources. The family and its operational unit is where the child is exposed to gender differences since birth, and in recent times even before birth, in the form of sex determination tests leading to feticides and female infanticide. The home, which is supposed to be the most secure place, is where women are most exposed to violence. Violence against women has been clearly defined as a form of discrimination in numerous documents. The World Human Rights Conference in Vienna, first recognized gender-based violence as a human rights violation in 1993.

In the same year, United Nations declaration, 1993, defined violence against women as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to a woman, including threats of

such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life' (Cited by Gomez, 1996).

Radhika Coomaraswamy identifies different kinds of violence against women, in the United Nation's special report, 1995, on Violence against Women;

- Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

- Physical sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

- Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.

Coomaraswamy (1992) points out that women are vulnerable to various forms of violent treatment for several reasons, all based on gender.

- Because of being female, a woman is subject to rape, female circumcision/genital mutilation, female infanticide and sex related crimes. This reason relates to society's construction of female sexuality and its role in social hierarchy.
- Because of her relationship to a man, a woman is vulnerable to domestic violence, dowry murder, and sati. This reason relates to society's concept of a woman as



a property and dependent of the male protector, father, husband, son etc.

- Because of the social group to which she belongs, in times of war, riots. On the other hand, ethnic, caste, or class violence, a woman may be raped and brutalized as a means of humiliating the community to which she belongs. This also relates to male perception of female sexuality and women as the property of men.

Combining these types of abuse with the concept of hierarchical gender relations, a useful way to view gender violence is by identifying where the violence towards women occurs. Essentially, violence happens in three contexts – the family, the community and the state and at each point, key social institutions fulfill critical and interactive functions in defining legitimating and maintaining the violence.

- The family socializes its members to accept hierarchical relations expressed in unequal division of labor between the sexes and power over the allocation of resources.
- The community (i.e., social, economic, religious, and cultural institutions) provides the mechanisms for perpetuating male control over women’s sexuality, mobility and labor.
- The state legitimizes the proprietary rights of men over women, providing a legal basis to the family and the community to perpetuate these relations. The state does this through the enactment of discriminatory application of the law.

The Fourth Conference of Women, 1995 has defined violence against women as a physical act of aggression of one individual or group against another or other. Violence against women is any act of gender based

violence, which results in, physical, sexual or arbitrary deprivation of liberty in public or private life and violation of human rights of women in violation of human rights of women in situations of armed conflicts (Conference on Women, Beijing, 1995 Country Report).

Violence against women, regardless of the nature of the perpetrator, an individual, group, institution, the state or society, as a human rights violation and is treated as such, whether it happens in the home, within the family or outside of it.

The violence of women’s human rights takes many forms such as:

1. Sexual or Physical and Psychological assault or harassment.
2. Female feticides and infanticide
3. Abortion
4. Female circumcision, and
5. Dowry deaths. Sati and denial of her autonomy over her own body.
6. Forced Prostitution

In the **economic sphere**, the violation has been manifested in the use of women to boost the economy and their state of powerlessness. They have suffered humiliation on the process. In the economic sphere, women’s exploitation takes place in the forms of:

- Labor exploitation and denial of rights to organize.
- Problems of migrant women laborers.
- Land grabbing by powerful sectors.

In the family planning system too, the problem control methods also impose the responsibility for human reproduction solely on women. The following institution and relationship have been cited as having been



historically used to restrict women’s activity and maintain subordination of women.

1. The Family,
2. Marriage,
3. Religion,
4. Cultural Traditions,
5. Government Development Models,
6. The policies, laws and laws enforcement agencies,
7. The legislative and judicial systems,
8. Multinationals,
9. The educational system,
10. The media and
11. Upper class women who dominate other women and women co-opted by men, in armed struggles that torture or kill others.

Many social and religious practices also are against human rights or women and are a symbol of mental slavery. Inequality in domestic relations is a stark reality. Though the universal declaration of human rights and the Discrimination against Women Convention mandate states to accord complete equality in matters of marriage, divorce, inheritance, ownership of property, etc.

Domestic Violence against Women – Domestic violence has been defined as “all actions by the family against one of its members that threaten the life, body, psychological integrity or liberty of the member. The forms of violence commonly found by Ahuja (1998) were slapping, kicking, tearing hair, pushing and pulling, hitting with an object, attempting to strangulate and threatening. Forms of psychological abuse were also found to exist, for instance, verbal abuse, sarcastic remarks in the presence of outsiders,

imposing severe restrictions on freedom of movement, totally ignoring the wife in decision-making processes, making frequent complaints against her to her parents, friends, neighbors, and kin much to the embarrassment of the wife. Some of the reasons given by the women were financial matters, behavior with in-laws, back-biting, talking to any male without the liking of the husband, asking for money, preventing him from drinking and husbands personality traits.

One of the main cause why domestic violence prevail and continues is the lack of alternatives among the victims. Women and Children may be economically dependent on abusers. Elderly people and children may feel too powerless to escape. Language or cultural barriers may isolate victims from seeking help. Victims generally feel, it is better to suffer in silence that to be separated from loved ones. They keep hoping for improvement, but it is normally observed that, without help, violence gets worse.

Recommended Solution

- Comprehensive and extensive premarital counseling should be given to intending couples on how to manage their marital relationship.
- There should be public enlightenment through the mass media on the negative effects of domestic violence against women, especially wife battering.
- Religious leaders too should vigorously teach against marital violence in their places of worship.
- Youths should be encouraged and taught to detest and not imitate brutish treatment of wives around them.



- Medical professionals, after physical treatment should refer the victims to counselors and psychotherapists.
- Punishment given to grievously offending husbands should be publicized, so that I can serve as deterrence to others.

Women can DO

The role of health professionals in providing care for the survivors can be better understood and addressed from the perspective of the WHO definition of health, which defines it as an individual's state of physical, mental and social well-being. Through a report by World Health Organization study it has been noted that more than a third of all women worldwide are victims of physical or sexual violence, and this is definitely posing a global health problem. Majority of women are attacked or abused by their husbands or boyfriend. The report, co-authored by Watts and Claudia Garcia-Moreno of the WHO, found that almost two fifths (38%) of all women murder victims were murdered by intimate partners, and 42% of women who have been victims of physical or sexual violence by a partner have injuries as a result. The brutal gang rape (Nirbhaya gang rape) on 16 December 2012 of a 23-year-old woman on a bus in New Delhi generated a global turmoil and protests in India asked for better policing of sex crimes. There are hundreds of women every day who are being raped on the streets and in their homes, but that doesn't make the headlines. Before the 1990's, violence against women was considered a personal matter and not a human rights issue of concern to the international community.

In Current Scenario in India, women have held high offices and ranks such as

President, Prime Minister, Speaker of the Lok Sabha and leader of opposition in India, CEO of Various Indian and Multinational companies. However, women in India continue to face violence such as rape, acid throwing, and dowry killings while young girls are forced into prostitution. Women in India now contribute fully in areas such as education, sports, politics, media, art and culture, service sectors, science and technology, etc. Indira Gandhi, who served as Prime Minister of India for an aggregate period of fifteen years, is the world's longest serving woman Prime Minister. Recently five Indian women made it to the 2017 List of Top 100 Most Powerful Women' released by Forbes business magazines. These resilient Indian woman have risen through times and carved a niche for themselves in their respective fields, not only garnering praise in India but also hogging limelight around the world. ICICI's CEO Chanda Kochhar (Ranked 32nd), HCL CEO Roshni Nadar Malhotra (Ranked 57th), Biocon Limited's MD Kiran Mazumdar Shaw (Ranked 71st), Chairperson and Editorial Director for HT Media, Shobhana Bhartia (Ranked 91st) and Actor and Producer Priyanka Chopra (Ranked 97th) were the five Indian getters. Here this paper will be answering the question which somewhere or the other, every reader must have heard or thought about it. The question is if women are equal to men than why we can't see this? This can be explained as 'Children are nurtured by the surroundings they live. Their immediate surrounding shapes their base on which their structure of behavior and way to react to situations will establish'. This elucidates that as women are always suppressed in our society they are taught by their surroundings to live



completely imprisoned in a four wall room. And when it comes to Men, we ourselves may have witnessed the discriminating freedom the boys get in our or neighbor's house. We ourselves teaching our growing children that there will be always a discrimination between men and women and they themselves have to carry it to their next generation. But there are always exceptions like the parents of Manushi Chillar, the Miss World 2017, who comes from small town Rohtak, Haryana. She hails from the state where there is lowest sex ratio 879:1000 (as per Census 2011) among all Indian states. Whatever she is heading for is no doubt comprises her immense efforts and hard work but all her efforts would be futile if her parents have not supported her or have not given her freedom to chose what she want to be. There are many more example all over India where girls have proved to be more talented than boys in the respective field. We see less girls exploring the world because they are not allowed to, not because they can't. If this would have been true that girls can't, the examples like Malpana Chawla, Lata Mangeshkar, Priyanka Chopra, Arunima Sinha, Mithali Raj etc were not known to this world.

Conclusion

The declaration on the Right to Development, adopted by the UN General Assembly in December 1986, also features the right to "free, active and meaningful participation". In all societies women do not enjoy these rights to their full extent. This is due to gender inequality, direct and indirect discrimination, and coercion or violence which prescribes what and how women and girls may live their lives, and which impacts on each of the key areas.

While both women and men suffer from specific human rights abuses, much of their experience of human rights is gendered. That is, the ways in which women are abused and experience torture, imprisonment slavery, displacement, discrimination and other violations often specifically shaped by the fact of being female. In addition to the major international human rights instruments, two instruments specifically concern women: the Convention on the Elimination of All Forms of Discrimination against Women and the Declaration on the Elimination of Violence against Women.

Despite these and other achievements, many critics have demon-started that mainstream human rights organization and instruments have long been insensitive to the rights of women. Within an aid program, human rights objectives may be approached through support for specific human rights project and programs, such as institutional strengthening of human rights organization (government and non-government) on a national or regional level, human rights training initiatives, or support for programs which address the causes and problems of violence against women. Women and men are equally important for the grow and development of individual and social lives. The women play the important role as mother and the same makes it unique.

India has elaborate system of laws to protect the rights of women and the government has established two commissions in 1993- the National Commission on Women and the National Human Rights Commission. The government is committed to bring parity between the sexes in all walks of life and to



eradicate discrimination in all its manifestation but, it is easier said than done. The uphill task and along drawn out battle can be won only if women are given proper education, specially their legal literacy is to be increased, they are made aware of their rights, they are given credit facilities to make them financially independent, they are provided legal aid and they are given a fair share in political power. However, the most important thing desired on this direction is a change in cultural attitude, this can be done only when an attempt is made to reorient the society and educated people about the concept of women dignity and the need to treat women as a human being and individual and person demanding and needing respect and dignity. If all these things can be done then and then only women's lot can be improved who are called Supreme Being and Guru.

Let us try to work attain this noble goal with commitment, through concerted efforts and strive to excel while chanting the hymns of Vedas with Swami Vivekananda:

“Arise, Awake and Stop Not Till:
The Goal Achieved.”.

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PUBLIC INTEREST LITIGATION NEED FREEDOM

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Abstract:

Public interest litigation is a common man's power and the simplest method for the poor to knock the door of the court and demand justice. Public interest litigation has been introduced and accepted by the Court itself. No statute describes or defines the same. In matters where public interest is involved the Supreme Court has accepted the petition and passed appropriate orders, encouraging the people to fight for the violation of the fundamental right not only for himself but also for the society. The Supreme Court has granted variety of reliefs to persons and group of persons whose rights have been violated and has issued variety of directions to Government to perform its duty under the law.

There has been unpredictable, tremendous and outstanding development of the concept of PIL and so of the society to fight against evil and not to be felt degraded and ignorant. However, caution and care is obviously needed to prevent the abuse of PILs.

This paper explains probably all things or facts about how a public interest litigation is formed & who can file it; also how things run and how it should run.

Introduction:

Meaning and definition- Public Interest Litigation also known as Social Interest Litigation means a legal action initiated in a Court of Law for the enforcement of public interest or rather general interest of the public on the violation of their fundamental rights. The expression "litigation" means a legal action or proceeding initiated for the purpose of enforcing a right and seeking remedy for the same. "Public interest" has been defined in Black's Law Dictionary as – "Something in which the public, the community at a large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular locality, which may be affected by the matters in question."

Introduction of Public Interest Litigation by Supreme Court of India extends its jurisdiction under Article 32 of the Constitution of India. Article 32 of the Constitution talks about the Right to Constitutional remedies. It guarantees the right to move the Supreme Court by "appropriate proceedings" for the enforcement of the rights conferred by Part III of the Constitution. It confers powers on the Supreme Court to issue appropriate directions or orders or writs. The traditional rule of *locus standi* that a petition under Article 32 can only be filed by a person whose fundamental right has been infringed has been considerably relaxed by the Supreme Court. The concept of Public Interest Litigation or social interest litigation has now gained momentum at the instance of "public spirited individuals" for the enforcement of Constitutional and other



legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief.

PIL is an opportunity to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice.

When the Court entertains a public interest litigation, it does so with a mindset of the fact that PIL is one of the most important weapon to fight with any evil in the society. It has to be used with a proper care and the judiciary has to be very careful to see that in order to redress a public grievance, it does not allow the misuse of the same. Public interest litigation is not defined in any statute or in any act. It has been interpreted by judges to consider the intent of public at large.

Its development in India-

Justice V.R. Krishna Iyer and Justice P.M. Bhagwati, honourable Judges of the Supreme Court of India delivered landmark judgements which opened up new vistas in PIL. A petition regarding the condition of the prisoners detained in the Bihar jail, whose suits were pending in the court was filed in 1979, known as *Hussainara Khatoon Vs State of Bihar*. In this case, the Supreme Court upheld that the prisoners should get benefit of free legal aid and fast hearing. Because of this case 40,000 prisoners, whose suits were pending in the court, were released from the jail. **In the Judges Transfer Case - AIR 1982, SC 149:** Court held Public Interest Litigation can be filed by any member of public having sufficient

interest for public injury for enforcing constitutional or legal rights of other persons and redressal of a common grievance. The court rejected the argument that such PILs would create arrears of cases and therefore they should not be encouraged. Bhagwati, J., declared, "No State had the right to tell its citizens that because a large number of cases of the rich are pending in our courts we will not help the poor to come to the courts for seeking justice." After positive replies from the Courts, citizens began to file the grievances of the public and formation of a public interest litigation gained speed, also slowly and gradually it became the crowning achievements of the Indian Judiciary. People began to come forward and awareness understanding problem etc. led them to form litigation in interest of public. Some of most important among them are: 1) **Sheela Barse vs State of Maharashtra (February 15, 1983):** This was a historic judgment that dealt with the issue of custodial violence against women in prisons. This resulted in an order facilitating separate police lockups for women convicts in order to shield them from further trauma and brutality. 2) **Indira Sawhney judgment:** On November 16, 1992, the Supreme Court responded to a PIL filed by lawyer Indira Sawhney and introduced 27% reservation for backward classes in posts and services under the Government of India. Citing the age old Varna system, the court justified its reason for reservation. The court also spelled out that such a system should not exceed a tenure of ten years once a particular section is adequately represented in society.

Competency to file it-



A Public Interest Litigation (PIL) can be filed in any High Court or directly in the Supreme Court. It is not necessary that the petitioner has suffered some injury of his own or has had personal grievance to litigate. PIL is a right given to the socially conscious member or a public spirited to espouse a public cause by seeking judicial for redressal of public injury. Such injury may arise from breach of public duty or due to a violation of some provision of the Constitution. Public interest litigation is the device by which public participation in judicial review of administrative action is assured.

The Court must encourage only genuine and bona fide PIL. The person forming the public interest litigation must act bona fide he should not have some or the other pecuniary or political interest in the same. He should not have some personal interest or gain, the court should not allow itself to entertain such application and reject it. He must be interested genuinely in the society welfare and its protection.

The person must have a sufficient interest. The Court has to decide from case to case as to whether the person approaching the court for relief has “sufficient interest” and has not acted mala fide. He must be a public spirited individual not acting for himself but for the public at large. The Courts should prima facie verify the credentials of the petitioner before entertaining a PIL.

Legal wrong is caused. The Court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL. Some or the other legal wrong or legal injury must have been caused to the public at large or to a

determinate class of persons by reason of violation of any constitutional or legal right and such person by reason of poverty, helplessness of disability or socially or economically disadvantaged position unable to approach the court for relief. There is a personal injury or injury to a disadvantaged section of the population for whom access to legal justice system is difficult.

Public interest is involved- The court should be fully satisfied that substantial public interest is involved before entertaining the petition. The matter must be of larger public interest and must also be given priority over other petitions. The injury must have arisen because of breach of public duty or violation of the Constitution or of the law. This is a powerful safeguard and has provided immense social benefits, where there is essentially failure on the part of the executive to ameliorate the problems of the oppressed citizens.

Formation & Procedure beyond it-

There are two ways of forming a public interest litigation. The very first is by a normal petition, which would be treated as a public interest litigation. Any citizen can approach the court for public case (upon the interest of public) by filing a petition:

- In Supreme Court under Article 32 of the Constitution
- In High Court under Article 226 of the Constitution
- In the Court of Magistrate under Section 133

The other is by a letter petition. It is not compulsory for a public spirited individual to file a proper writ petition for forming of a



PIL. A petition can also be formed by a letter or a telegram. The Supreme Court will readily respond to a letter addressed by such individual, who is of course competent to file a PIL. But, on the same condition some rules have been enacted by the Supreme Court of India, prescribing the procedure for presenting it for relief. The Court will, therefore, cast aside the technical rules of procedure of a normal writ petition as also law relating to pleadings and treat the letter of the public-minded individual as a writ petition and act upon it. In case of *M. C. Mehta v. Union of India*, The Supreme Court has widened the scope of PIL under Article 32. The Court held that a public spirited individual or association, for the poor and needy who are suffering from violation of the fundamental rights can seek its enforcement by writing a letter in the name of the Court. Such letter does not have to be accompanied by an affidavit. This has provided simplest method to the poor people who may knock the doors of the highest court of jurisdiction. The Court has brought justice to the doorstep of the people's thought of fight for justice.

Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation:-

1. Bonded Labour matters. 2. Neglected Children. 3. Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases). 4. Petitions from jails complaining of harassment, for (pre-mature release) and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right. 5. Petitions against police for refusing

to register a case, harassment by police and death in police custody. 6. Petitions against atrocities on women, in particular harassment of bride, bride burning, rape, murder, kidnapping etc. 7. Petitions complaining of harassment or torture of villagers by co-villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes. 8. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance. 9. Petitions from riot-victims. 10. Family Pension.

All letter-petitions received in the PIL Cell will first be screened in the Cell and only such petitions as are covered by the above mentioned categories will be placed before a Judge to be nominated by Hon'ble Chief Justice of India for directions after which the case will be listed before the Bench concerned.

If a letter-petition is to be lodged, the orders to that effect should be passed by Registrar (Judicial) (or any Registrar nominated by the Hon'ble Chief Justice of India), instead of Additional Registrar, or any junior officer.

On the other hand, cases related to Landlord-Tenant matters, Service matter and those pertaining to Pension and Gratuity, Complaints against Central/ State Government Departments and Local Bodies except those mentioned above, Admission to medical and other educational institution, and petitions for early hearing of cases pending in High Courts and Subordinate Courts. Cases falling under the following categories will not be entertained as Public



Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell. If on scrutiny of a letter petition, it is found that the same is not covered under the PIL guidelines and no public interest is involved, then the same may be lodged only after the approval from the Registrar nominated by the Hon'ble Chief Justice of India.

When it comes to the formation of a PIL by a letter petition, the most important case is of **Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 803**, the Supreme Court was informed through a letter that they conducted a survey of the stone quarries and found that there were a large number of labours working in these stone-quarries under “inhuman and intolerable conditions” and many of them are bonded labours. The court treated the letter as a writ-petition.

PIL needs freedom-

So far, it has been given a review as to how things related to public interest litigation is running in our country, which is a way far from of how things should actually run. Abuse of public interest litigation is a major concern nowadays.

Public interest litigation is a litigation been filed by a pubic spirited individual who wants to do welfare of his society. He is a common man who very well knows what wrong is been done to the people of the society by infringing their rights. The “common man” wants to fight against evil for stopping his society from suffering. But unfortunately, he is not a lawyer-who knows how to file a petition, nor a celebrity-who can afford a lawyer, not even a renowned NGO who works for the same. Our judiciary has opened a way for a common man for

easy reach of justice that is Public Interest Litigation. A common man can file a litigation or shall write a letter to the court of how public at large is suffering as their rights have been violated. His letter would reach the Court and will wait for justice like million other letters are waiting. When his chance of getting justice would come, the matter raised by that common man will become more serious and by that time people would continue to suffer. The question arises as to how this problem can be solved? When a different channel of getting justice has been opened for the public or a for a common man, so as to skip the procedure of filing a petition and attain justice, then why are the lawyers been allowed to file a public interest litigation? A lawyer should continue to fight for justice by filing cases to the court. The celebrities, renowned NGOs can help the public financially and also can afford a lawyer for the same. They can help people get justice by following a proper procedure of getting justice by filing a normal petition. This different channel will then be opened only for that common man who will not only get immediate relief but also a sense of belief in getting justice, which will encourage the society to fight for their rights. The abuse will automatically be reduced as the renowned NGOs, lawyers, etc. will not be filing PILs. Also, the burden on the courts of millions of PILs will be less which will enable it to early hearing of matters presented by the public at large.

Conclusion-

Public Interest Litigation is still on experimenting stage. Many a times, objections arises as to the acceptance or rejection of a litigation. There are still if not



many, few deficiencies in either accepting or rejecting the public interest or in properly handling it. Deficiency herein, results in great loss of general public interest, which may then break their hope of getting justice from the judicial system. But, public interest litigation is still working as an instrument of social change. In the words of K. Ramaswamy, "Justice is never given; it is always a task to be achieved." It is being developed day by day by public spirited individuals who hopes for the best for our society. Its development shows that the judges has not only introduced to the public this innovative idea but also has adopted to its fulfilment. There are more and more reaching PILs to the courts. Many have been solved by the courts by giving relief to the public and rest are tried for the same.

- 3- Indiankanoon.org
- 4- supremecourtfindia.nic.in
- 5- allahabadhighcourt.in

Immediate ractification needed-

A separate bench of judges must be appointed who may receive such public interest litigations and accept or reject the same but with proper reasons which may satisfy the petitioner. Along with this many ractifications must be done to make PIL free from legal procedure and mannerism so as to make it available to public in general.

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**RELEVANCE OF INTELLECTUAL
PROPERTY RIGHTS IN SPORTS
INDUSTRY**

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ABSTRACT

The industry of sports has always been a prodigious sector across the world bringing together entertainment, games, culture and pecuniary business, right from the barbaric era through the glorious days of Caesar to the twenty first century money making sports industry. Sporting games have always been encouraged by chieftain, governments, private individuals and entities interested not only in the games themselves but more in the financial business quotient that sports entail. Sports which, for a very prolonged time, was considered an activity which was recreational, has nowadays become a thorough materialistic activity effectuating elephantine profits.

Earlier the sporting events were based on the competition between different talents, but now money has procured a gigantic role in all these events. Corporatization of sports has become gargantuan. Enormous importance has been gained by different marketing aptitudes like franchising or brand building of a sport or a player, overtaking other important components of a game.

These distinct aptitudes like merchandising, franchising and branding are the major contributors of revenues etc. which includes exploitation of different intellectual property rights of sports clubs. With gradual

proliferation in the business angle of sports, dormant Intellectual Property Rights (IPRs) vesting in almost every facet of the sports industry are being tapped into and capitalized.

Branding of sporting games and connected events, teams, sports clubs, celebrity status etc. can all be made feasible through the constructive assets i.e. IPRs which act as a marketing tool to make all of it possible.

Marketing dexterities are applied in fabrication, perpetuation, popularization and sustenance of distinctive marks, logos and personalities, while copyrights vesting in brand and image inception etc. are protected to reap benefits on an exclusive basis considering the very nature of competition in sports.

This article will highlight various components of Intellectual Property that are devised in the undertaking of a club or a sports team.

INTRODUCTION:

Sports being part of everyone's life has been playing an influential part in every aspect of our society. Sports earlier was limited only to the leisure activity or to the physical activities carried on by the individuals to pass their time and keep themselves fit. But in today's time sports is not limited only for entertainment and health purposes but has been extended for commercial activities, thereby being considered as a big source of earning income by grabbing business opportunities in the area of sports. Various sports teams are organized and on their formation some special recognition is required. Thus, they are recognized or



differentiated from other teams by giving specific names to them. Further for giving identification different and catchy taglines along with logos are created. Apart from entertainment purpose on the other end of being a big business opportunity many sportsmen such as cricketers enter into advertisements and their associations enter into sponsoring, branding, merchandising etc. On commercialization of such elements, their protection is must.

PATENTS:

Granting of legal documents by the government for the purpose of giving an inventor the right to make use and sell an invention for a specified period of time is known as patent. For making any kind of improvements in previous inventions patent can be granted¹⁷⁵⁴. Meeting of three necessary tests by an invention is must to qualify a patent which include-

1. Invention shall be new and should not exist previously
2. It should be improvement to the existing technology
3. Invention should be of some use and shall not be used for any immoral and illegal purposes.

Inventions which are new, useful and innovative are protected by the way of patents. Along with products, the processes used for achieving a result are also granted patents. In today's era a lot investors have begun to obtain patent protection for the various sports method inventions. Such sports method

inventions are in trend in recent times and include strength training, aerobics, flexibility methods etc.¹⁷⁵⁵. Licensing their methods provides ample of advantages to such training conductors, as they can continue to conduct such training sessions at their own level by providing specialization and earning a large amount of money. Hence, they are protected from any kind of infringements by the third parties¹⁷⁵⁶. Registration of patents is not an easy or simple process and thus, requirement of a legally and technically sound patent agent is must¹⁷⁵⁷.

TRADE MARKS:

Trademarks in sports are usually in the embodiment of captions, logos or tag lines etc. They are a distinctive indicator or a sigil representing a business or trade. The most commonly created IP in sports is trademark. It acts as a catalyst for brand building in the sports business. Popularity of a certain sport is measured by the public rating. This measurement is further based on the trademark. It has become an ideogram of identification. Sponsorships and merchandises are some the forms in which it helps in augmenting the brand value¹⁷⁵⁸. A franchise's brand equity is ascertained by sponsorship revenues and advertisement revenues which are in consociation with trademarks.

¹⁷⁵⁴ <http://www.legalserviceindia.com/articles/ptwy.htm>

¹⁷⁵⁵ https://saylordotorg.github.io/text_law-for-entrepreneurs/s21-intellectual-property.html

¹⁷⁵⁶ <http://www.legalserviceindia.com/articles/ppch.htm>

¹⁷⁵⁷ <http://ship.mrc.ac.za/sectioncpatents.htm>

¹⁷⁵⁸ https://en.wikipedia.org/wiki/Trademark_distinctiveness



Thus, protection of trademarks is of utmost priority as to indemnify commercial interests. Trademarks Act, 1999 protects the trademarks of sports clubs and further provides protection to its proprietors. The act states that any proprietor can apply for registration under miscellaneous classes of services and goods in relation to which the trademarks are being maneuvered. Civil and criminal remedies are made available in the cases of trademark infringement¹⁷⁵⁹. Another remedy available for the proprietor is under the anti-dilution law (for well-known or famous marks).

COPYRIGHT:

All the artistic work includes expression of ideas and such expression of ideas are protected by the way of copyright laws. They are different from patents as they do not protect the processes through which the end result is achieved¹⁷⁶⁰. Right to copy or publish a work and right to be listed as its author are considered as the economic and moral rights and thus are included in copyrights¹⁷⁶¹. Copyright protection is available to ideas that are creative in nature. Many sport events are conducted like car racing events, events related to football sport, cricket and other various tournaments and thus such artistic works which are a part of sports events are protected by the crucial role played by copyright laws. Subject matter of copyright include artwork in promotions, logos, also the online games

etc.¹⁷⁶². No mandatory rule of registering the copyright exists. But in recent times the scenario has changed, now the registration is must and in many cases it has been laid down by the courts that statutory remedies can be availed only when the owner registers his copyright under the act¹⁷⁶³.

DOMAIN NAMES:

Domain names has become a principal component in the sports industry as business identifier, as the use of internet for the commercial activity has increased momentarily. It helps in finding the appropriate site on the internet and helps in meliorating communication of players and teams with the common masses¹⁷⁶⁴. Events are broadcasted on these sites which implements the dissemination of enormous information related to sports. This has helped in acquiring huge market value in branding. One can note that apart from sports clubs having sites of their own, there are some international sportsmen who have their own sites like www.brettle.com, www.sachintendulkar.in etc.¹⁷⁶⁵

Cyber squatters have been given an opportunity to take benefit of the confusion which may be attributable solely to domain names. Because of the lack of separate

¹⁷⁵⁹ <https://www.lawteacher.net/free-law-essays/business-law/dilution-under-trademark-law-business-law-essay.php>

¹⁷⁶⁰ <https://www.copyright.gov/help/faq/faq-protect.html>

¹⁷⁶¹ <https://copyright.laws.com/copyright-law>

¹⁷⁶² https://en.wikipedia.org/wiki/Copyright_law_of_the_United_States

¹⁷⁶³ <http://www.patent-trademark-law.com/copyrights/copyright-faq/>

¹⁷⁶⁴ <http://www.myonlineca.in/startup-blog/how-to-claim-domain-name-with-trademark-in-india>

¹⁷⁶⁵ <https://www.nolo.com/legal-encyclopedia/can-you-register-domain-name-as-trademark.html>



domain name registration in India, one can register the domain name as trademark.¹⁷⁶⁶.

PERSONALITY RIGHTS:

Protecting one’s name, image and other aspects of personality from exploitation and controlling such exploitation is known as personality rights.¹⁷⁶⁷ They are also known as publicity rights. Personality rights of a sportsman plays a crucial role in brand creation of such individuals. The rights of publicity basically include the right to protect one’s name, image and other related personality rights from commercialization¹⁷⁶⁸. This gives right to privacy to sportspersons in case of their name being represented in public without their permission¹⁷⁶⁹

BROADCASTING RIGHTS:

These rights are apprehended by the Indian Copyright Act, 1957. The term for exercising broadcasting rights is twenty-five years¹⁷⁷⁰. These rights are usually exercised by the broadcasting companies which also allows them to rebroadcast the same event.

According to this Act, any person not withholding the license to broadcast from the owner: -

- 1) Rebroadcasts the broadcast.
- 2) On payment of fees cause the broadcast to be heard or seen by the public.
- 3) Makes a video or sound recording of the broadcast.
- 4) Sells these recording to the public or made any offer to sell or hire these recordings.

Is liable for the punishment of infringement of the broadcasting rights¹⁷⁷¹. Unauthorized downloading also comes under this whose punishment is mentioned in the Section 43 of the Information Technology Act, 2000, which provides for a punishment of Rs. One crore.¹⁷⁷²

MERCHANDISING and LICENSING:

Merchandising is an activity which includes the promoting of sales and is another source of generating revenue and carrying on businesses for various sports teams. Through the way of gratitude many sportspersons consider their fan following to be part of their success and win. All the human achievements are originated from some kind of ideas. For conducting any kind of business, creation of work or using any sports technique, ideas are involved. Thus, protecting such ideas is must.

Sale factor is the most essential element for a business to flourish and for the sale, its products must be visible in an appealing manner and this is referred to

¹⁷⁶⁶<http://www.wipo.int/amc/en/domains/search/overview2.0/>

¹⁷⁶⁷ <https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php>

¹⁷⁶⁸ <http://www.statemaster.com/encyclopedia/Personality-rights>

¹⁷⁶⁹ <https://academic.oup.com/jiplp/article/9/2/137/926135>

¹⁷⁷⁰ <http://www.advocatekhaj.com/library/bareacts/copyright/37.php?Title=Copyright%20Act,%201957&STitle=Broadcast%20reproduction%20right>

¹⁷⁷¹ <http://lawmantra.co.in/infringement-of-copyright/>

¹⁷⁷² http://www.legalserviceindia.com/articles/In_Copyright.htm



as the process of merchandising¹⁷⁷³. This process includes all the techniques to promote the goods and thereby the advertisement techniques as well. Effective merchandising plays an important and significant role in uplifting the amount of sales¹⁷⁷⁴. Every player in the particular sports team has a fan base and to increase that various methods and innovative ideas can be used such as making T-shirts with the name of the particular player, any fan would take initiative to buy and wear such T-shirts and attend such matches to motivate their favorite player, also increasing the sales and contributing towards the economic aspect.

On the other hand, giving the license to a company by a sports team to use its name, logo and trademark on its company's products through a contractual agreement is known as sports licensing. The process of licensing is the source of immense importance for generating revenue and helps to build up relationship with the supporters. Protecting the quality of the brand is equally important for both the parties.

AMBUSH MARKETING:

Lack of a definite legal framework in India has led to the rise of Ambush Marketing. It refers to a company's attempt to capitalize over the popularity of a well-known or established event or property without the appropriate authorization or consent of the necessary parties. It involves a third party to

create an association with the sportsmen or any event in which they are participating without their approval. This leads to the defying of official partners and sponsors in acquiring their share of the commercial value due to their official designation¹⁷⁷⁵. Ambush marketing has become a very cheap way of attracting customers to one's brand.

Ambush Marketing may include; -

- 1) Unofficial corporate sponsorship.
- 2) Unauthorized use of event logo or seal on the merchandise.
- 3) False claims of being the official sponsors of a particular team.
- 4) Creating unofficial films, videos or websites.

Specific legislation for combating ambush marketing is absent in India. Most of these cases are considered under various IP laws like copyright or trademark law¹⁷⁷⁶.

CONCLUSION:

In today's era one can clearly notice that the competition amongst the associations and the sports clubs is not only witnessed on the sports or event field but also in the business for making huge profits. Sports clubs are now exploring their intellectual property and are entering the business in the form of computer games, merchandising, and so on. This adventure of sports clubs of earning profits by exploiting their IP makes it essential for them to adequately protect their IP. Protection of these IPs could take various

¹⁷⁷³ <https://www.cleverism.com/revenue-streams-in-business-model-canvas/>

¹⁷⁷⁴ <https://www.asdonline.com/education-events/retail-merchandising/>

¹⁷⁷⁵ <http://www.thehindubusinessline.com/todays-paper/should-we-legislate-on-ambush-marketing/article1111858.ece>

¹⁷⁷⁶ <http://www.thirstt.com/droplets/53e706482695dc360935a004>



forms such as agreements binding by certain terms and proper conditions, registrations etc. The IP repertoire of a sports organization is bound to grow with expansion of its business operations and with the popularity of the team or the players the value of such repertoire grows significantly. Regular IP audits and valuation must be conducted in order to nurture the intellectual properties as most business models related to the commercialization of sports and games are based on the IP wealth of the sports clubs. Adequate protection and maintenance of IP portfolio is also crucial.

