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# Law Relating to Reservations – Creating Inequality in Equality

**Dr. Kavita Dhull***

**Abstract**

Reservation is an affirmative process especially for the upliftment of the class of the society who were oppressed, depressed and under representative in the society. Progress of the nation does not involve the selective process. It is the process where all and whole of the people have equality, freedom ad unfettered power to work. The concept of equality was understood as in the article 14 of the constitution "the state shall not deny to any person equality before the law or equal protection of the law within the territory of India" although this freedom is not absolute but there are some exceptions. Some classes of the society need more attention, care from the state the state need to make the laws only for those particular class/classes. These laws are applicable only to the people belonging to that particular class and this is treated as the exception in the right to equality. The question that comes in the mind is for how many years and to what extent? This research paper tries to bring the intention of the judiciary by studying the trends of the judiciary by studying the case law.

**Research questions**

1. Whether reservation in India is such an affirmative action that the list of castes is always increasing for reservation?
2. Whether the extent of reservation is limited to education and employment?
3. Whether reservation in employment is limited to the entry level or in extends in promotions?
4. Whether reservation in promotions is an affirmative action?
5. Whether judiciary and legislature shows any intentions to reduce reservation even after 70 years of independence?

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## Hypothesis

Reservation policy is disorganized and unrecognized. More reservation does not guarantee more resources and opportunity to the identified castes it can also lead to the inequality for the unreserved classes.

## Research methodology

The methodology involves the doctrinal research. Various case laws decided by the Supreme Court were used to understand the legal trends, debates in the parliament, the acts, order; ordinances passed by the various authorities contributed a lot in solving the research questions and in proving the hypothesis.

Two concepts are involved under article 14[1]as one is equality before the law and second is equal protection of law. In the first one equality itself is not factual but the present scenario is where reservation in the present society is concerned the government and the laws seems to be trying optimistically to uplift the specific strata of the society and bring equality in the society. India embraced equality as a cardinal value against the background of elaborate, valued and clearly perceived inequalities. Generation[2] means the average period generally considered to be about 30 years, during which children are born and grow up, become adults, and begin to have the children of their own. Since independence, 1947 + 30 = 1977 that is one generation from 1977 + 30 = 2007 that is the second generation, from 2007+30=2037 that is the third generation. Nearly two and a half generation have passed the quota of reservation in 2019 is SC- 15%, ST- 7.5%, OBC-27%, EWS- 10% the total comes out to be 59.50%. It means that 59.50%[3] is reserved for the particular members of the society and 40.50% is unreserved. The reserved candidates compete with the unreserved in the 40.50% for the unreserved candidates and afterwards compete in their own reserved categories. The competition for the unreserved candidate is over after competing in 40.50% of seats. The reserved candidates got the same opportunity twice. There were two main purposes in including the reservation in the Indian constitution. They were the advancement of the SC, ST, OBC and economically backward section and adequate representation of the categories in the services of the state in Article 16(4), article 16(4-A), Article 16(6).[4]

According to the census held in 1951 various castes were identified and a long list of such castes in accordance with the states was prepared and reservation was introduced for such castes as in the SC/ST orders (Amendment) act 1952, 1976, 2002 and 2018.[5] The table made as under is strictly according to the acts given above:

| | | Act of 1956 | Act of 1976 | Act of 2002 | Act of 2018 |
|---|---|---|---|---|---|
| Sr. No | State | Number of castes | Number of castes | Number of castes | Number of castes |
| 1. | Andhra Pradesh | 32 | 59 | 59 | 61 |
| 2. | Assam | 12 | 16 | 16 | 16 |
| 3. | Bihar | 21 | 23 | 23 | 23 |
| 4. | Gujarat | 15 | 30 | 33 | 36 |
| 5. | Haryana | - | 37 | 37 | 37 |
| 6. | Himachal Pradesh | - | 56 | 56 | 57 |
| 7. | Karnataka | - | 101 | 101 | 101 |
| 8. | Kerala | 21 | 68 | 68 | 69 |
| 9. | Madhya Pradesh | 25 | 47 | 47 | 48 |
| 10. | Maharashtra | 24 | 59 | 59 | 59 |
| 11. | Manipur | - | 7 | 7 | 7 |
| 12. | Meghalaya | - | 16 | 16 | 16 |
| 13. | Orissa | 93 | 93 | 93 | 95 |
| 14. | Punjab | 30 | 37 | 37 | 39 |
| 15. | Rajasthan | 55 | 59 | 59 | 59 |
| 16. | Tamil Nadu | 70 | 76 | 76 | 76 |
| 17. | Tripura | - | 32 | 32 | 34 |
| 18. | Uttar Pradesh | 64 | 66 | 66 | 66 |
| 19. | West Bengal | 53 | 59 | 59 | 60 |
| 20. | Arunachal Pradesh | - | 12 | 17 | 17 |
| 21. | Goa | - | 03 | 03 | 05 |
| 22. | Jharkhand | - | 32 | 32 | 32 |
| 23. | Chhattisgarh | - | - | 44 | 44 |
| 24. | Uttarakhand | - | - | 65 | 65 |
| 25. | Telangana | - | - | 59 | 59 |
| 26. | Delhi | - | 36 | 36 | 36 |
| 27. | Chandigarh | - | 36 | 36 | 36 |
| 28. | Mizoram | - | 16 | 16 | 16 |
| 29. | Jammu and Kashmir | - | 13 | 13 | 13 |
| 30. | Sikkim | - | 03 | 03 | 03 |

Table (1.1). Many of the states came into being after many years of independence but the number of the castes in the respective states either remains the same or is increased.

This table reminds of a story as there was a small village in which the four castes used to reside as A, B, C, and D. The A caste was very poor and not able to even make two ends meet. B caste was poor but well off then A. C caste had their own profession and were able to earn something and D caste was so well off that even if they did not work they can do very well. The village had the population of 400 and each family had 4 persons so one caste comprised of 100 people. The government came up with a scheme that they will give jobs to 30 persons in the village. A caste was very poor and they reserved 15 jobs only for the persons belonging to the caste A and 15 for the remaining castes. One member of the 15 families got the job and remaining 15 was jobless. In the next year again government came up with the policy of giving 30 jobs in the village and in the same pattern. Again one member of the 15 families got the job but to the surprise 15 families were left jobless. According to the policy of reservation all the families of the caste A should have got the job but it was unprecedented that the same families got the job again and two members of the family had the job. This made the policy of reservation a waste. This is continuing from two and a half generations. The result is the table itself where the castes are not deleted from the table they are only inserted. The statics are pliable but the facts are stubborn as rightly said by mark twain[6]. These statics give a picture of India where only identification is done butthe process of uplifting them is not followed. The genesis remains the same although we expected evolution. The process is too dynamic and slow which has not crossed even a single time before us. The correct beneficiary is not getting the benefits. This has also evolved with time.

In parliament also the reservation is done as according to the Article 334 there are members of the parliament from reserved constituency for due representation in the parliament . This reservation was for ten years but in 8th amendment act 1960 it was extended to ten years. This was repeated in 23rd amendment act 1970, 45th amendment act 1980, 62nd amendment act 1989, 79th amendment act 2000 and 95th amendment act 2010 this has been continuously increased for 70 years. Once a person has been elected as a member parliament from a reserved constituency then if he is re-elected that person and his family no longer remains the person who wants reservation but he continuously enjoys the benefits of reservation which makes the policy ineffective. Existing inequalities in society can lead to a system discriminating in favour of the unreserved candidates. The MP from a reserved constituency should work in the constituency for the upliftment of the reserved candidates and should try positively to delete a caste or two from the list but the approach towards reservation is so positive the so many castes want to enter in the

criterion of reservation to enjoy its benefits. There are many exhibitions, display strength, demonstrations from the castes to come under the roof of reservation.

In KC Vasanth Kumar and another v. State of Karnataka[7] which gave the opinion as-

1. The reservation in favour of the sc/st continue as at present without the application of means test, for a further period of 15 years and another 15 years will make it 50 years, a period reasonably long enough for the upper crust of the oppressed classes to overcome the baneful effects of the social; oppression ,isolation and humiliation
2. The means test should also be applicable to the SC/ST after the period mentioned above. It is essential that the privileged section of an unprivileged society should not be permitted to monopolise the preferential benefits for an indefinite period of time.
3. For the backward classes two tests should be applied foe employment and education (i) they should be comparable to the SC/ST in matter of backwardness (ii) they should satisfy the means test or economic criterion
4. The policy of reservation in cases of employment and legislative institution should be reviewed every 5 years because (i) state can rectify distortions (ii) to see the practical impact of the policy of reservation

The optimistic, affirmative view by Chandrachud CJ, was overruled in Indra Sawhney and others v. Union of India[8]. If we want that they should come in the mainstream we need a judicial and legislative intervention to give it a proper shape. Caste alone cannot be the basis of recognizing backwardness which Supreme Court has affirmed and reaffirmed in number of cases as in state of madras v. Champakam dorairajan[9], M R Balaji v. Union of india[10], T Devadasan v. Union of india[11], R Chitralekha v. State of mysore[12] and so on till Indra Sawhney case[13] in 1992 where state accepts the caste as a basis of backwardness it legitimises the caste system which is contrary to the secular principles of our country. It has been elaborately discussed in number of cases by the Supreme Court.

**Extent of reservation in employment**

Article 15 is more general and deals with all the cases of discrimination and deals prohibition in discrimination on five grounds as religion, race, caste, sex and place of birth and Article 16 has seven grounds i.e. Religion,race, caste,

sex, descent, place of birth, residence. Article 16(1) (2) guarantee the equality of opportunity to all citizens in matter of employment to any office or any other employment under the state. The preamble of our constitution enshrines

"**EQUALITY** of status and of opportunity; and to promote among them all **FRATERNITY** assuring the dignity of the individual"

To give a meaning to the preamble equality should be of all the citizens irrespective of religion, race, caste, sex, place of birth, residence, descent. This can be done seriously by giving and distributing the benefits to all the citizens of India and for that purpose the reservation was extended not only in education but in employment also. As Marc Galanter [14] notes three broad kinds of resources are necessary for the upliftment (i) economic resources (education, training, material as includes the books , freedom from work, food and time) (ii) social and cultural resources ( network of contacts, confidence , guidance and advice , information ) (iii) intrinsic ability and hard work . The first two criterions are obviously not the products of candidates own efforts but rather the structural conditions in which he is born. These two resources are the correctional measures and can be corrected .if the first two resources are corrected the third one can be taken care off. Problem is created where the third resource is provided irrespective of the first two. All human beings are born with enormous capacities and intelligence they do not inherit differently. India is plagued with incompetence, corruption and inefficiency because we know that merit is acquired and not inherited so only by being born in the particular caste will not make the person meritorious and only reservation in employment and not looking for the actual merit will make the situation worse. The drop in percentage in every qualifying examination, competitive exams for the special, privileged section aggravate the situation. It will make the depressing state for the unreserved class. the extent of reservation is not only limited to the employment but it is extended to promotions as reflected in number of cases and the various acts passed only submits the intention of the legislature. In UPSC v. Girish Jayantilal Vaghela[15] (2006)2 SCC 482, it was decided that it covers not only in the initial appointment but also promotions, age of superannuation, seniority etc. But the state can prescribe the necessary qualifications and the selective tests but these tests should not be arbitrary.

As according to the power conferred by Article 309 of the constitution the governor of Karnataka framed in Karnataka government servant (seniority rules) 1957 as there were no specific rules for roster promotions. This reservation was introduced by the government order as dated 27 April 1978. rule no 4 contained seniority cum merit and rule no 4a contained the selection seniority by consequential seniority to reserved category candidates but in

Bhakta Ramegowda v. State of Karnataka[16] (1997)2 SCC 661, it was further elaborated that

Vacancies not filled by SC/ST will be treated as backlog and would be filled in the future. In 1992 the nine judges bench decided in Indra Sawhney v. Union of india[17] (1992) 2 SCC 661, the following points

1. Reservation should not exceed 50% but can be relaxed under the extraordinary situations.
2. Reservation in Article 16 (4) is applicable only at the time of entry and not in promotions.
3. Creamy layer must be excluded.
4. Due representation is the subjective satisfaction of the state.
5. Backwardness can be determined and identified by not only the economic criterion but with income, caste andoccupation.

Because of the decision of Indra Sawhney the provisions of reservations in matter of promotions under the government order of 1978 were saved for the period of five years and the promotions already made were saved. In 1995 before the completion of five years 77th amendment was made and Article 16(4A) was inserted which enabled the reservation in promotions and the provisions made by the government of Karnataka under the govt order of 1978 stood saved and continue to operate. In R K Sabharwal v. State of Punjab[18] (1995)2SCC745, the constitution bench of this court held

1. Once the seats are filled by the reserved category, rosterceases toexist.
2. The percentage of the reservation is to be seen by the number of posts in the cadre strength and vacancy has no merit.
3. Roster shall start operating from 10 Feb. 1995 after the decision of the case.

Again the decision was challenged in Union of India v. Virpal Singh[19] (1995)6 SCC 684, the two judges bench held that even if the SC candidate is promoted earlier than the general candidate then the general candidate when promoted will acquire the same level of seniority as in the lower level. This will be known as the catch-up rule. After 6 months the three judges bench in Ajit Singh Januja v. State of Punjab[20] (1996)2SCC715, elaborated the catch-up rule and held that the seniority between the reserved category candidate and the general candidate in promoted level shall be the same as in the lower level. In 1997 the Karnataka government issued a government order formulating the guidelines about the backlog vacancies requiring to be filled and also provided that reservation in favour of SC/ST shall continue to operate till the

representation of SC is 15% and ST is 3%. When the representation of SC/ST will reach this point then the backlog will be cleared. in Jagdish Lal v. State of Haryana[21] (1997)6 SCC 538, the three judges bench formulated the principle of continuous officiation which propounded that the reserved category candidate if promoted earlier due to reservation will not lose seniority in the higher cadre even if the promotion was accelerated . The conflict arose and which was resolved in Ajit Singh v. State of Punjab (II)[22] (1999)7 SCC 209 , the constitutional bench upheld the catch-up rule for determining the seniority of roster point promotees . this was again asserted in M G Badappanavar v. State of Maharashtra[23] (2001)2 SCC 606, the three judges bench relying on Ajit Singh (1), Ajit Singh (II) and Sabharwal case held that the promotees due to roster if given seniority would violate the right to equality as the basic structure of the constitution and ordered to review the promotion lists after march 1996 on principle contrary to Ajit Singh (II) and those who were promoted contrary to the Sabharwal case need not be reverted.

Then came the 85th amendment act 2001[24] which was effective from 17 June1995. The purpose was to give consequential seniority to the reserved category promotees. consequential seniority is if A and B were working in the same level I and A is the general candidate with 3 years seniority and B because of roster gets promoted being in reservation to level II earlier to A and A gets promoted to level II after two years. Now consequential seniority is B will continue to be senior to A because he came to level II before A and catch – up rule is B will become junior to A because A has more experience then B in the employment. The validity of 77th amendment, 85th amendment and the legislations made in pursuance of the same were challenged in the Nagraj case. In M Nagraj v. Union of India[25] (2006) 8 SCC 212, the questions before the court were whether replacement of catch-up rule with consequential seniority violate the basic structure of Article 14 of the constitution.The court held they are the judicially evolved concepts and based on practices. Such practices cannot be elevated to the status of constitutional principle so they are implicit in Article 16(1) and (4) as in Virpal case. Another point was Article 16(4A) was enabling provision and state is not bound to make reservation for SC/ST but if they make then they have to collect the quantifiable data of backwardness, inadequate representation and the administrative efficiency. These are the compelling reasons and the controlling factors for making the reservations. Reservation act 2002 was challenged as unconstitutional in B K Pavitra v. Union of India[26] (2017)4 SCC 620, the two judges bench provided consequential seniority and Nagraj case was not followed strictly and no exclusion of creamy layer was done. The court struck down section 3 and 4 as

unconstitutional and ultravires Article 14 and Article 16. It was asserted that law laid down in Badappanavar[27], Ajit singh (I)[28], Virpal[29] continue to be applicable even if 85th amendment came which court turned down that the promotion granted to the present employees on consequential seniority must be reviewed for this purpose three months time was given to comply the Nagraj case[30] in collecting the quantifying data .

After the decision of this court in B K Pavitra (I)[31] on 22 march 2017 the government of Karnataka constituted the Ratna Prabha Committee headed by Additional Chief Secretary to state of Karnataka to submit the report on the backwardness and inadequacy of representation of SC/ST in the state civil services and the administrative efficiency in the state of Karnataka. The task entrusted was (i) collect the information on the cadre-wise representation of SC/ST in all the government department. (ii) collect the information regarding the backwardness of SC/ST. (iii) study the effect on the administration regarding the efficiency. These tasks were in consonance to the Nagraj case and in May 2017 the committee gave the report titled asreport on backwardness, inadequacy of representation and administration efficiency in Karnataka. Meanwhile three months passed and state of Karnataka again wanted time. One month time was given to determine the seniority list. On the basis of the Ratna Prabha report a new bill was passed in 2017 which was named as the reservation act 2018 wherein section 3 gave validity to the consequential seniority and section 4 provided the protection of consequential seniority already give from 27th April 1978 onwards. This act was challenged in Jarnail Singh v. Lachhmi Narain Gupta[32] (2018)10 SCC 396 the constitutional bench of the court maintained the status quo and held in following lines –

1. Whether decision inthe Nagraj case requires to be referred to the larger bench.
2. The method of collecting the quantifiable data
3. Creamy layer not applied to the SC/ST

If creamy layer is applied to the SC/ST then the Supreme Court in E.V Chinnaiah v. State of AP[33] (2005)1SCC394 the court held that SC should be treated as a class and the sub-class should not be created.

The ReservationAct 2018 was challenged in the Supreme Court in B.K Pavitra IIv. Union of India [34] upheld the validity of the act of 2018 as a remedial measure to lead to the declaration of invalidity of 2002 act. Curative legislation is permissible and not the encroachment on the judicial power, and declared the

law valid as it was the remedial law as it removed the basis o which the law was declared ultravires.

Relying on the Indra Sawhney' s case the bench held that it is the subjective satisfaction of the state about the backwardness and inadequate representation of the reserved category

It also held that Ratna Prabha Committee can't be held to have acted arbitrarily, I applying the sampling methodologies to base its conclusion on the irrelevant material The exercise cannot be invalidated as o methodology was provided for collecting the data and also there is a limitation in the power of the judicial review in entering on the factual arena involving the gathering, collection and analysing the data.

As because of these reasons cited above the reservation act 2018 was held as constitutional and in Karnataka the consequential seniority is legal as the state has collected the quantifiable data ad they found the inadequate representation in promotions of SC/ST with respect to the Nagraj case.

**Conclusion**

Reservation seems to be the affirmative action and the intentions of the lawmakers is also evidently clear. They were thinking of a rosy picture to take all the people ahead in the track of progress but the ever increase in the list of castes for reservation and steady reservation in the constituency make it a farce instead a reality. This kind of reservation has led a competition not in the general but the people compete within a category which is terrible and sad. The ideology is disgusting and only diverts away from the merit. The only consideration is to appoint the candidates who are considered talented are those who are successful in the standardised examination by virtue of inequality of accessing the resources, training and hard work. The resources and the training if provided to all without any distinction or difference but there is no shortcut for the hard work that which has to be done by the candidate itself but with the help of reservation even the hard work is compromised. A meritorious candidate is not only talented and successful but his appointment should fulfil the constitutional goal to uplift the members of SC/Stand also ensuring the candidate in the representative character for their category. Dream of Dr B R Ambedkar was to uplift the society, socially and economically but the shape which reservation has taken uplifts some members of the category economically and not socially. The reservation policy is facing much difficulty as due to wrong social criterion to take caste as a representative character and not economic.

The extent of reservation is not only limited to the education and employment but the feeling is they are the privileged and the unreserved category is the ruthless one. He people from the reserved category do not like to be called by their castes but they are carrying a caste certificate to get the reservation and other benefits from the government like in education, fees and employment etc. this is nothing less then hypocrisy. Reservation is not only limited to the entry level but also extends to promotions. The state has only to collect the quantifiable data as done by the Karnataka government through Ratna Prabha committee without any distinguished methodology of sample collection. This kind of the reservation is erroneous and disorganised. When at the entry level all the employees are equal enjoying the common benefits then only because the person belongs to the particular class makes him eligible to be promoted to the higher level is a wrong interpretation of reservation. Where the highest level Dalit officer alleges that he is discriminated by his colleagues or his children face discrimination in school. This is the pretentious hypocrisy of the highest level.

Judiciary and the legislature are two milestones and reflect the views and intentions of the people and the lawmaker but are unable to tell the exact time period where all the individuals in our country will be equal without any reservations. If the reservation policy is not revised then it will never be erased from our statutes and the intentions of our law makers can never be fulfilled.

**Suggestions**

1. Caste based divisions and inequalities are already there. Reservation policy is doing much harm than good .the solution is not in reservation but somewhere else.
2. The person belonging to the reserved category when has he position where he can benefit his fellow man should surrender the right of reservation and should not take the benefit of reservation for his family.
3. The benefit of reservation can only be used by the member of the family only once as in education, employment or in promotions and once it has been used the person can not use it again this will discourage the competition of the members to compete only in there category.
4. A smart card should be made where all the candidates will compete in the general category and if any person who wants reservation can show the card and get reservation so people belonging to the category have to choose the place where they can use reservation card.

5. If a member of the family belonging to the reserved category gets a employment of class I or class II then he has to surrender reservation card and the person or his family cannot use reservation card now wherein the person can give all the resources and the benefits to his family.
6. The family for surrender of the reservation card means the spouse and their children thereof. Now this family will compete in the general category.
7. There is a need of social engineering and there is a big difference between the caste and religion as religion can be changed but the caste cannot be changed. Caste can come in the mainstream after they have taken the benefit of reservation and surrender the card. They now belong to the general unreserved category.
8. Earlier the target of reservation was social equality which was forgotten soon then it became economic equality again that is also forgotten because without social equality we will continue to make the acts like SC/ST (prevention of atrocities) amendment Bill 2018 which will be placed before the parliament in 2019.

**Endnotes**

1. Art. 14 of Indian Constitution "The state shall not deny to any person equality before the Law or equal protection of laws within the territory".
2. Wikipedia http://en/m.wikipedia.org/wiki/Generation.
3. Reservation quota for govt jobs & Higher education institution: 2019 after 103rd Constitutional Amendment Act, 201.....
4. Art. 16(4), Art. 16(4-A), Art. 16(6) in Indian Constitution.
5. SC/ST (Amendment Act) 1951, 1976, 2003 and finally in 2018.
6. Mark Twain, quotes. http://www.braingquote.com
7. AIR 1985 SC 1495
8. JT 1992(2) SC 273
9. AIR 1951 SC 226
10. AIR 1963 SC 649
11. AIR 1964 SC 179
12. 1964 (6) SCR 368
13. JT 1992(6) SC 273

14. Marc Galanter; Competing equalities: Law and the Backward Classes in India, Published by Universal California Printed, Ed. 1984, ISBN 100520042891, ISBN- 13:978-0520042896
15. (2006) 2 SCC 482
16. (1997) 2 SCC 661
17. Supra. 8
18. (1995) 2 SCC 745
19. (1995) 6 SCC 684
20. (1996) 2 SCC 715
21. (1997) 6 SCC 538
22. (1999) 7 SCC 209
23. (2001) 2 SCC 606
24. The main purpose was to extend the benefit of reservation in favour of the SC/ST in matters of promotion with consequential seniority. The amendment has substituted in clause (4A) of Article 14 of the Constitution for the words "in matters of promotion to any class" the words "in matters of promotion with consequential seniority to any class"
25. (2006) 8 SCC 212
26. (2017) 4 SCC 620
27. Supra 23
28. Supra 20
29. Supra 19
30. Supra 25
31. Supra 26
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33. (2005) 1 SCC 394
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# Plea Bargaining in Indian Criminal Justice System: A Critical View

**Dr. Sushila Devi Chauhan***

**Abstract**

Very long period is required to finally settle the criminal case. Many under-trials are languishing in prison waiting for the decision of court. Pressure on criminal courts is increasing day by day. Due to this problem notion of "plea bargaining"is developed in the criminal law. Though there are many drawbacks of the system but it is necessary to tackle the problem of backlog of criminal cases. Indian judiciary was very much reluctant towards plea bargaining in the beginning but now judiciary is adopting the plea bargaining as a tool for speedy justice. There are many apprehensions in the mind of all stakeholders that undue pressure can be imposed upon the accused and on the victim also. Thus present paper deals with concept of "plea bargaining", international perspective and position of plea bargaining under the Indian criminal law.

**Key Words:** Settle, Criminal, Plea, Drawback, System.

## Introduction

In democratic society the judicial system plays a very important role. Indian criminal justice system is slow.The judiciary is facing the crisis of mounting arrears of cases and inordinate delay in disposal of cases. Victim may suffer a lot due to delay in decision of criminal case. In our country, large numbers of under trials are languishing in jails. They are waiting for decision of their cases. There is unlimited harassment to accused, victimand witnesses due to long trial. Petty criminal cases also form bulk of pendency of criminal cases. "As a result petty criminal cases and the cases in which punishment up to seven years has been prescribed have clogged the system so much that grave offences which the effect of tearing the social fabric are not tried promptly"[1]. Former Chief Justice Dipak Misra said, "3.3 crore cases are pending situation is almost getting out of hand 284 crore cases are pending only in the

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1 Sowmya Suman, "Plea-bargaining-A Practical Solution." Gujarat Law Herald, 1(2) (Feb) (25) 2007.

subordinate courts"[2].

Conviction rate is very low in India. Legislature has recognized this problem of delay in criminal justice system and legally introduced the concept of 'plea-bargaining' by way of Criminal Law (Amendment) Act, 2005. After adopting the plea bargaining in the criminal justice system the backlog of cases are still increasing. Critics argue that "behind – the scenes agreement between the crown and the defense turn justice into a commodity that can be bargaining[3] and destroy the court's role a seeker of truth".[4] Guilty plea with incentives threatens the presumptions of innocence.[5] Due to coercion or fear of delay in decision innocent person can take the pleading of guilty. Pressure tactics like threat, reward etc. compels the accused to plead guilty. Despite these criticism, plea bargaining is in force in various countries.

On one hand delay in criminal cases and on the other hand questions relating to basic principles of fair trial is inviting the attention of academicians, judiciary and society at large.

**Concept of Plea Bargaining**

It is very difficult to give perfect definition of plea bargaining. "Plea bargaining is a process in the criminal justice system where an accused relinquishes the right to go to trial in exchange for a benefit"[6]As per Oxford dictionary, "Plea Bargaining is an arrangement between prosecution and defendant whereby the defendant pleads guilty to lesser charge in exchange for more lenient sentence of an argument to drop other charges" Further Canadian Law Commission defines it as "any agreement by the accused to plead guilty in return for the promise of some benefit" According to Justice K.T. Thomas, Plea bargaining means "the Process whereby accused and prosecutors, in a criminal case, work out a mutually satisfactory disposition of the case, subject of the approval of the to the offence or to a lesser offence in return for a lighter sentence than otherwise impossible for that offence".[7] So, "plea bargaining" is a procedure in which criminal and complainant agreed to disposeoff the case on the condition of imposition of lighter punishment if accused pleads guilty. It seems as there is a contract between the parties in a criminal case. In the practice of "plea bargaining"defendant forgoes his to full trial and he utilize his

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2 https//www.businesstoday.in (visited on (10-02-2019)

3 Law Reform Commission of Canada, "Plea Discussion and Agreements" (1989) Law Reform Commission of Canada working paper no. 60 at 4 [LRCC, "Plea Discussions"].

4 Richard I. Lippka, the Ethics of Plea Bargaining (Oxford, UK: Oxford University Press, 2011) at 217-40 DW Pervas, "Practice Note: Plea Negotiations" (1979-80) 44: 1 Sask L Rev 143 at 149.

5 Ibid at p. 3.

6 Milton Heuman, *Plea Bargaining: The Experience of Prosecutors, judges and Defense Attorneys,*(Chicago, University of Chicago Press, 1978) at PI.

7 Justice K.T. Thomas, Plea Bargaining – A Fillip to Criminal Courts, the Hindu Daily New Delhi ed. 2006 at 11.

right to negotiate for his benefit.[8] So, in "plea bargaining" there is active negotiation between accused and victim. "Accused is allowed to confess his guilt in the court in exchange lighter punishment". It is an agreement to finally settle the criminal case before the judgment.

The process of plea bargaining can be divided into three parts, i.e. "*charge bargaining*", "*sentence bargaining*" and "*fact bargaining*". In "*charge bargaining*" the allegations are reduced, it is not applicable in India. In "sentence bargaining" accused pleads guilty on assurance of lesser punishment. "*Fact bargaining*" means to confess some facts by the accused on promise that prosecution will not produce other certain facts in evidence.

**Historical Perspective**

Though the term plea bargaining was never used inthe Indian criminal jurisprudence before the Criminal Law (Amendment) Act, 2005. But indirectly the germs of plea-bargaining can be traced in the Vedic period.[9] As '*Prayishchit*' was one of the best mechanisms of self vindication by confessing the sin. In post vedicepoch the instances of "plea-bargaining" can be observed. In Mugalera also *quisas* system was available. But in British period the plea bargaining was not in existence. Though, compounding of offences and withdrawal from prosecution in the Cr. P.C. were available.

After independence we have Motor Vehicles Act, 1988 which contains some provisions which enable the culprit to admit his guilt of small offences and to pay fines. But there is no negotiation between the prosecutions and accused[10].

The idea of plea bargaining was inducted into Indian Criminal Law on the recommendations of Law Commission in its 142$^{nd}$, 154$^{th}$ and 177$^{th}$ reports. 142$^{nd}$ report recognized problem of backlog of the criminal cases and the issues relating to the introduction of "plea bargaining". 154$^{th}$ Law Commission approved recommendations of the 142$^{nd}$ Law Commission relating to "plea bargaining". It recommended, "a separate chapter XXI-A on plea bargaining can be incorporated in the Code of Criminal Procedure".[11] 142$^{nd}$, 154$^{th}$ Law Commission Reports and various judicial interpretations of the Supreme Court were analyzed in 177$^{th}$ Law Commission Report and advised the government on question of introduction the "plea bargaining" in Indian criminal law. Committee on Reforms of Criminal Justice System, 2003 observed that "plea bargaining" should be introduced to decrease the pendency of the cases.[12]Thus

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8 Justice A.K. Sikri, "Plea Bargaining", Vol. VII No. 3 Nayaya Deep Journal, NALSA 77-78 (2006).

9 Vaschaspati Tripathi, Pracheen Bharat Ki Dasha and Vayavastha, 1176 (1989).

10 Section 206(1) Motor Vehicles Act, 1988

11 Law Commission of India, 154$^{th}$ Report on the Code of Criminal Procedure (1996) at 9-10.

12 Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003) http://www.mha.nic.in/hindi /sites/upload files/pdf/criminal - justice - system. Pdf (visited on 4/4/2019).

the committee confirmed the recommendation of the Law Commission of India in its 142nd, 154th and 177th reports.

Criminal Law (Amendment) Act, 2005 amended the Criminal Procedure Code, 1973 and new chapter containing sections 265A to 265L was added.

**International Perspective**

In colonial America the idea of plea bargaining was not acknowledged. As courts became overcrowded and trial becomeslengthier then the idea of "plea bargaining" comes into the criminal justice system. The principle of fair trial is cherished in the Constitution of the U.S. The notion of "plea-bargaining" is not enshrined in United State's Constitution as such. But judiciary has declared the constitutionality of this practice. "Now plea bargaining is expressly authorized in statutes and in court rules of United States".[13] "95% criminal cases never go to trial because before the date the bargain struck between prosecutor and defendant's attorney"[14]. Plea bargaining is a norm rather than exception under US criminal jurisprudence.[15] Under America's criminal law, the accused has three options at the initial stage, "(A) guilty (B) not guilty or (C) plea of *nolo contendere*. It is not a matter of right but generally court accepts such plea if it is done unqualifiedly.

Various provisions are found common in all state statute relating to plea bargaining, i.e., "a prosecutor must inform a victim or the victim's survivors of any plea bargaining in a case and in the context of being prohibited or restricted for matters or types of cases".[16] In the case of *Brad v. United States,*[17] the US Apex Court declared plea bargaining constitutionally valid. US Supreme Court affirmed the practice of plea bargaining if it is properly conducted under supervision.

Initially the practice of "plea bargaining" was considered as unhealthy philosophy by various academicians, judiciary and legislators in Canada. "Widespread use of plea bargaining would destroy confidence in the courts, create feeling of distrusts and suspicion among the public".[18] But, the harsh attitudes towards plea bargaining began to fade in 1974. In 1987 "the Canadian Sentencing Commission issued a report recommending that plea bargaining be recognized as a legitimate practice in Canadian criminal law, as long as it restrained, did not involve input from the trial judge, and subject to legislative control".

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13 Justice A.K.Sikri, "Plea Bargaining" vol; V. II No. 3. Naya Deep Journal of NALSA 81 (2006)

14 Ibid.

15 Ibid at p. 82.

16 Ibid.

17 397 US. 742 (1970)

18 Hedieh Nasheri, Betrayal of Due process: A comparative Assessment of plea Bargaining in the United States and Canada (Lanham, M.d. University Press of America, 1998) at p. 69.

In the Martin report it was clearly mentioned that plea bargaining is the essential part of the criminal jurisprudence if systematically conducted and it is not only beneficial to the suspect but to all the stakeholders. Further he said that the term "plea bargaining" should be replaced by the term "resolution discussions."[19]

The Alberta Court of Appeal in *R v. G.W.C.* [20]describes the obligationof the judge regarding joint submission. The court reasoned that "the deference stems froman attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice".[21]

In countries such as England and Wales and Victoria "plea bargaining" takes place where the defendant would plead to some charges and the prosecutor would drop the remainder. Plea bargaining occurs in scenarios when the defendant testifies against the co-conspirator, and where the lesser charge is offered due to the difficulty of proving the greater charge".[22]

In England the concept of sentence and charge bargaining is in practice "In England, about 85 percent of defendants charged with indictable criminal offences pleads guilty".[23]

Plea bargaining techniques are frequently used all across Australian Jurisdiction. All three types of techniques, these are, charge bargaining, sentence bargaining and fact bargaining are being used in Australia. The primary objective of "plea bargaining" is to reach at conclusion on the terms and conditions accepted by both the parties. But the whole procedure of "plea bargaining" is non–transparent in Australia. And the circumstances in which bargaining was done is not available to public.The concept of plea bargaining have grown rapidly at world level.

**Indian Criminal Law**

Definition of the term "plea bargaining" is not explained anywhere in the Criminal Procedure Code, 1973. Though we have followed the principle of plea-bargaining from USA but we have adopted and molded it according to the Indian conditions and circumstances. "It lays down a procedure with a distinct feature of enabling an accused to file an application for plea-bargaining in the court where the trial is pending under section 265 B of Cr.P.C., 1973".[24]

Application for "plea bargaining" can be filed by the accused person

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19 David Ireland, "Bargaining for Expedience?" The overuse of joint recommendations sentence" (2015) 38:1 Man LJ 273 at 276.

20 2000 ABCA 333 (2001) 5 WWR 2030.

21 Ibid at para 17.

22 www.legalserviceindia.com.

23 Available at https://www.jstor.org.

24 Phaniraj Kashyap, "Critical analysis of Plea-bargaining in the Code of Criminal Procedure", AIR 2008 (Nov.) 95.

after cognizance has been taken by the court. Further the offence should not be punishable with seven years of imprisonment, not against the child below the age of 14 years, not against women and it is not a socio-economic offence.

When application is filed by the accused for plea bargaining, the court has power to issue order for appearance of the parties before courtto confirm the voluntariness of application. The court also examines the suspect in camera. If the application has been filed involuntary than the courts shall proceed further as per provisions of the Cr.P.C. from the stage such application has been filed.

Further, guidelines are provided by the Criminal Procedure Code under sections 265-B and 265-D for mutually satisfactory disposition of the case. Prosecution and the accused are free to accept that settlement. The negotiation between the parties is voluntary completed, it must be ensured by the court throughout the proceedings.[25] The court may award compensation to the victim if a settlement is agreed by the parties and then hear the parties on the issue of punishment.[26] "The court may release the accused on probation of good conduct or after admonition under section 360 of Cr.P.C. or under Probation of Offenders Act, 1958. In case of minimum punishment is prescribed for the offence committed, half of such minimum punishment may be imposed on the accused. Where only maximum punishment is prescribed the accused may be punished with one fourth of the punishment".[27]"The accused may also avail of the benefit under section 428 of the Cr.P.C., 1973 which allows setting off the period of detention undergone by the accused against the sentence of imprisonment".[28]

The judgment must be pronounced in the open court. The decision of the court in "plea bargaining" is not appealable except special leave petition before the High Court or Supreme Court, as the case may be under Article 226, 227 and 136 of the Constitutions.[29]

Statement made by the accused in an applications for "plea bargaining"only be used for the purpose of chapter XX-A and not against the accused in any other case.

**Judicial Trends**

Initially, Indian Judiciary disapprove the concept of plea bargaining. This has been reflected in series of Supreme Court decisions. "Plea bargaining" was examined by the Hon'bleSupreme Court in *Madanlal Ramchander Daga v. State of Maharashtra*.[30] The court takes a strict view and it was held, "in our

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25 Section 265-C, Cr.P.C

26 Section 265-E, Cr.P.C

27 Section-265-E(d), Cr.P.C

28 Section 265-E, Cr.P.C.

29 Section 265-G, Cr.P.C.

30 AIR 1968 SC 1267

opinion, it is very wrong for a court to enter into bargain of this character offences should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the court should never be a party to bargain by which money is recovered for the complainant through their agency we do not apprise of the action adopted by the High court".[31]

In *Murlidhar Meghraj Zoyat v. State of Maharashtra*[32] and *Kasambhai v. State of Gujarat,*[33] the Hon'ble Supreme Court commented that "procedure of plea bargaining is against the spirit of Article 21 of the Constitution because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial"[34]. Similarly, in *Thippaswami v. State of Karnataka.*[35] the Hon'ble Supreme Court declared that plea bargaining would be violative of Article 21 of the Constitution, to induce the accused to plead guilty under a promise or assurance that would let off lightly.

Apex Court of the land in the case *State of Uttar Pradesh v. Chandrika*[36] held that:

"It is settled law that on the basis of plea bargaining court may not dispose of the criminal cases. The court has to decide it on merits. If accused confess his guilt, appropriate sentence is required to be imposed. Mere acceptance or admission of the guilt must not be a ground for reduction of sentence".[37]

As the plea bargaining officially added in the Cr.P.C. there is a major change in the judicial interpretations. The Gujarat High Court remarked in the *State of Gujarat v. NatwarHarchanjiThakar*[38] "the very object of the law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in the administration of law and justice, fundamental reforms are inevitable".[39]

Delhi High Court in *Pardeep Gupta v. State*[40] observed that:

"The trial court's rejection of the plea bargain shows that the learned trial court had not bothered to look into the provisions of chapter XXI-A Criminal

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31 Id at 1270.

32 AIR 1976 SC 1929.

33 AIR 1980 SC 854.

34 Ibid

35 AIR 1983 SC 247.

36 AIR 2000 SC 164.

37 Ibid.

38 2005, Crj. L.J. 2957.

39 Ibid.

40 2007(99) DRJ 198.

Procedure Code meant for the purpose of plea bargaining and rejected the application on the ground that since the applicant is involved in an offence under section 120 –B Indian Penal Code and the role of applicant were no lesser than the other co-accused".[41]

The High court ordered the trial court to reconsider the application of plea bargaining.In another case[42] Uttrakhand High Court recognized the process of plea bargaining. In this case "accused was charged under section 420, 468 and 471 of the Indian Penal Code, 1860". In, *Devender Singh v. State and Anr.*[43] The Delhi High Court held that "exercise its power under section 482 Cr.P.C. in a case punishable with more than seven years imprisonment, or pass an order that brings about that result, that would be contrary to --- quashing case involving non- compoundable offences this court in reality iscreating a sub-category not intended by the parliament".[44]

Rajasthan High Court in case of *Rahul Kampawat v. Union of India*[45] held that "the reasons assigned by the learned trial court for declining plea bargaining of the accused petitioner are not in consonance and conformity with section 265, 256-ACr.P.C." And further observed that there is no merit in the judgment of the trial court, High Court is also not expected to be a silent spectator, when exercising inherent powers. Hence the order of the learned trial court dated 21-7-15 was quashed and matter was remanded back to the trial court for considering plea bargaining of the petitioner.

A petition was filed by a retired Army Officer, Anil Kabotraseeking direction from the law Ministry to reduce the pendency of the cases from 15 years to 3 years and to plan the annual calendar. The Highest Court of the land observed that "speedy justice and trial isthe fundamental right and asks states to consider plea bargaining to reduce pendency of cases".[46]

According to National Crime Records Bureau, "in spite of government and courts favoring plea bargaining only 0.45% of cases under the Indian Penal Code were disposed after in 2015, Out of 10, 5,02, 256 cases under Indian Penal Code,1860 disposed by the courts, plea bargaining took place in mere 4816 cases."[47]

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41 Ibid.

42 *Vijay Moses Das V. CBI,* Criminal Misc. Application 1037/2006.

43 20078(106) DRJ 139.

44 Ibid.

45 Criminal misc. (pet) (CRLMP) No. 2257 of at http://IndiaKanoon.org (visited on 5/6/19)

46 On 23 July, 2018, Economic Times, Available at https// economic times, indiatimes.com visited on 6/6/19.

47 Available at https://www.livemint.com (3/5/19).

## Some Concerns

No doubt the plea bargaining can work as ADR in the criminal justice system and can reduce the workload of courts. Victims can also take the opportunity to participate in the final disposition of the case. It also saves time and money if done properly.

Plea bargaining is against the basic doctrine of criminal law. There are some basic canons of fair trial. A person accused of an offence is presumed to be innocent till proved in the court. Plea bargaining may infringe the basic doctrine of criminal law and chances of deprivation of certain constitutional safe guards. It is clear from the provisions of Cr.P.C relating to plea bargaining that court is final authority to allow plea bargaining in disposal of plea bargaining application. If the proposal by the judge is rejected then presumption of innocence of accused may be affected.

As it is well known in India we have very long process to decide the criminal case. There are chances that innocent may plead guilty to avoid the long process of the court. Moreover there are chances of coercion, undue influence, reward or threat etc which may worsen the outcome of criminal justice system. Prosecution can take the benefit of poor, illiterate defendant (accused) because hiring a good lawyer for the poor person is very difficult. "Plea bargaining is inherently coercive in nature and this coercion can be further divided as hard and soft coercion, soft coercion means convincing of the defendant in such a way that he will plead guilty which in normal circumstances he will not accept such offer. The convincing is done by keeping the all surrounding circumstances to defendant"[48]. There is aapprehension that innocent people may plead guilty under "plea bargaining" process.

Process of plea bargaining may increase the pendency of criminal cases. Due to any reason if court rejects the plea then the court will proceed to a full trial. There are chances of wastage of time in the process of plea bargaining.

As corruption and misuse of power is rampant in police department. "It is very easy for them to torture accused for their own interest. Involving the police in plea bargaining process would invite coercion. Police use illegal and corrupt means to convince the defendant to choose the plea bargaining in spite of trial"[49]. So, there is a great risk of violation of human rights of accused in the hands of police official.

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[48] Arthad Kurlekar and Sanika Gokhkle, "The Unconstitutionality of Plea Bargaining in the Indian framework: The Vitiation of the Voluntariness Assumption Indian Law Journal" available at http://www.india lawjournal.org/archives/volume7/issue2/article8.html visited on 15-12-2018.

[49] Sourya Subha Ghosh, Plea Bargaining- An Analysis on Concept available at www.legalserviceindia.com visited on 15-01-2019

## Conclusion and Suggestions

India is facing the problem of judicial backlog and plea bargaining is considered a good instrument to tackle this problem. In India process of plea bargaining is very reasonable, drafted consciously and cautiously by the parliament. There are some people who treat it as a welcome step and some others have different views. Still the notion of "plea bargaining" is a disputed concept. After that also it is practiced by majority of the countries in the world to save the time and money. Now Indian judiciary has also accepted this practice.

Although the concept of plea bargaining was introduced in India about 14 years ago but use of this practice is very less. So, there is need to find the impact and implications of the process of plea bargaining in India. There are so many reasons for backlog of cases now it is the need of hour to explore other alternative solutions to tackle this problem. Filling up the vacancies of judge, prosecutions, police officers and setting up of the fast track courts may be the other option. In India court management method can be adopted. The use of information technology may help to speed up caseload disposition. The overall impact of use of ICT in judicial system in India will result in quick clearance of cases.

As the concept of "plea bargaining" is not so old in India it would be wrong to conclude that it is successful or not. But criminal justice system should be impartial and free from any type of coercion or threat to the accused person.

Though there are various programs/schemes have been launched by Indian government for the legal awareness and free legal aid to poor. After that also people from poor strata of the society are not aware about these schemes. Free legal aid and awareness among the citizens may be useful for tackling the problem of pressure of work load on courts.

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# Rights of Arrested Person and the Judicial Decisions

**Dr. Jitender Singh Dhull***

**Abstract**

The democratic states are the welfare states, hence the laws are made in the states on the will of the people and they are made for the people of the state. India is no exception, in the modern states people have certain human rights which are available to them being the member of the human race, despite the fact that person is child or adult or old, women or men, law breaker or law abiding. There are some basic human rights for the arrested persons which are reflected in the constitution and the other statutes, these rights were also available to the arrested persons in ancient times. In the modern times the judgements delivered by the Higher Courts also reflect very important laws for the arrested persons. All these issues are dealt-with in the respective para's and in end there is conclusions and suggestions.

**Key Words:** Rights, Human Rights, Arrested person, Constitution of India, Criminal Procedure Code, Custody.

## Introduction

India is largest democracy of the world and the welfare of the people is the prime motto of the Government. In the state the Laws are made for the people of the country and if there is breach of any law, then remedy lies. Being the welfare state every person has rights, despite the fact that the person has violated the law. It is on the principle that every person has basic human rights and these rights are for the arrested person also. These basic human rights are protected by our basic law i.e the constitution of India and by other statutes. The rights of the individual are also reflected in the charter of United Nations Organisation, there are also number of Universal Declaration on Human Rights passed by the General Assembly of UNO of which our country India is also the signatory. Arrested persons are human beings and are the citizens of a democratic and welfare state. Whether the arrested person is in police custody, under trial or convicted they have human rights including some fundamental rights. The criminal justice system is based on two important principles that is

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firstly i) prosecution must prove the case of the accused beyond reasonable doubt and secondly ii) it is duty of the prosecution to prove the guilt of the accused and it cannot be shifted. These principles of the law reflect that it is the intention of the legislature that hundred of guilty people may be freed after trial but one innocent should not be punished. The provisions relating to the rights of a arrested person are mentioned there in the Constitution of India and the Criminal Procedure Code.

**Arrest Meaning:**

The dictionary meaning of arrest is[1], "seize by the authority of Law". As per the oxford dictionary of Law[2], "the apprehension of a suspected of criminal activities. Most arrests are made by police officers, although anybody may, under prescribed conditions, affect an arrest. In some cases the officer will have a warrant of arrest signed by a magistrate, which must be shown to the accused (though not necessary at the time of arrest). In modern times the person islawfully arrested when it has violated any law of land and/or there is apprehension of violation of the law and if person is arrested without any violation of law or any apprehension of violation of law then the arrest is illegal.

**Rights of arrested person during Ancient India:**

In the society, it is socio, economic and political conditions which prevail during different times determine the Law. In our country, in ancient times it was Dharma/Law which was considered to be the supreme and including King all were under it. The state was run by the rule of dharma, though it was not codified but this rule of dharma reflects about the basic principles of administration of justice, including the basic human rights (rights of the arrested person also). Because of the absence of the codified laws, there is no direct evidences which reflect about the rights of arrested person during these times. It is from the studies relating to the system of those times which reflects about some hints of rights of the arrested person. It was commonly thought that man was a social organism, it was a common belief that all wrong doings done in this birth will have to be paid in next and it was a belief that criminals were made and not born. As per the Smiriti writing there is reference of releasing the person on account of good conduct and integrity. Relaxation from the arrest was given to old, women, insane, infant, intoxicated, sick, about to marry, suffering from sorrow or engaged in study, which are reflected from ancient texts including NaradSahita, MatsyaPurana, Manusmriti and others.

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1 Page 43,Oxford Advanced Learners Dictionary by A S Hornby, 8th impression 1985.

2 Page 45, Oxford Dictionary of Law by Jonathan Law, 8th edition 2015

**When Person Can be Arrested**

The state is run by the laws and rules and where there is apprehension of any breach of law or any violation of law the person can be arrested by the law enforcing agencies and when person is proved guilty in the court of law then it be sent to jail to serve the sentence. Without any breach of law or any apprehension of breach of law, the arrest of a person made by anyone is illegal and wrong.When person is arrested by the law enforcing agencies then certain basic rights of the arrested persons come to the picture, these rights are reflected in the basic law of the land i.e Constitution of India, other statutes and the decisions of the Higher Courts.

**Constitutional provisions reflecting rights of arrested person:**

Under Indian Constitution Fundamental Rights have been granted to citizens of India which are subjected to reasonable restrictions given in Part 3 itself. The status of an arrested person is different from that of a normal person, who is not arrested. Some rights which have been enumerated in Part III of the Constitution are available to the arrested person.

The Preamble of the Constitution of India[3] declares certain very important rights for the citizens of the country, they are:

Justice - social economic and political; Liberty - thought and expression, belief and faith; Equality - of status and opportunity and to promote among them all; Fraternity, assuring the dignity of individuals and unity and integrity of the nation.

In other words it protect certain rights of all citizens including the arrested persons, which are further elaborated in other articles of the constitution as -

**Right to Equality: Article 14**[4] reads as, “The state shall not deny to any person equality before law or theequal protection of laws within the territory of India”

It is one of the important provisions of the Indian Constitution which reflect the principle of equality, one of its rule i.e. "like should be treated alike" and the concept of reasonable classification gives the power to the government to make the suitable laws for the arrested person and this provision is a useful guide for the courts to determine some justiciable favours for a arrested person and judging the laws made by the legislature for the arrested person.

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3 Indian Constitutional Law, sixth edition 2010 by M.P.Jain

4 Ibid.

In the **Freedoms** of **Article 19**, freedom of speech and expression and freedom to be member of an association is available to the arrested person but these rights are available subject to certain limitations. Under **Article 20(1),** "no person shall be convicted of any offence except for the violation of law in force at the time of the commission of the act charged as an offence, nor be subject to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence", which restricts the power of legislature to implement any criminal law retrospectively.**Article 20(3)** gives the right to silence, this important principle derived from the common law principle. The silence is mainly concerned with confession, that the statement or confession made to the police officer is not admissible in the evidence.

**Protection to Life and Liberty: Article 21[5],** which reads as, "No person shall be deprived of his life or personal liberty except according to procedure established by law".

The rights of arrested persons originate from this important article with the interpretation by the Supreme Court of India, which has given its wide interpretation. The Supreme Court of India, while interpreting Article 21 of the Constitution, has developed the human rights theology for the arrested person to maintain human dignity. Though it is clear that deprivation of rights under Article 21 is justifiable when it is done with procedure established by law, but this procedure must be just, fair and reasonable.

**Protection/ Safeguards of arrested person under Article- 22 of the Indian constitution**.

The provision of Article 22 of the Indian Constitution reflects the basic and minimum rights of a person who is arrested or detained under the ordinary laws or the special Laws of crime. The rights reflected in Article 22, where the person is arrested under ordinary laws of crime are as under:

1. Right to be informed of ground of arrest: Article 22(1) provides that a person arrested for an offence under ordinary law be informed as soon as possible about grounds of arrest.

2. Right to be defended by lawyer of choice: this article provides, that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice.

3. Right to be produced before magistrate: Article 22(2) provides that an arrested person must be taken to the Magistrate within 24 hours of arrest.

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5 Ibid.

4. Under clause (2) of this article. arrested person cannot be detained beyond 24 hours except by order of the magistrate.

**Article 39-A, Free Legal Aid**: This article embodies principle of fair procedureand ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. If a prisoner is unable to avail his constitutional and legal rights or needs legal assistance, he cannot be denied just because of indigence. It is the duty of court to provide the services of the counsel as and where required.

**Provisions of Criminal Procedure Code[6] reflection rights of arrested person:**

The provisions relating to arrest of a person in the CrPC are as follows:

a) When Police Can Arrest without Warrant: Under Section 41 of CrPC wide powers are conferred on police to arrest, mainly in cognizable offences, without having to go to Magistrate for obtaining warrant of arrest. It is important to note that there can be no arrest if there is no information or reasonable suspicion that the person has been involved in a cognizable offence or commits offence(s), specified in Section 41. The burden is on the police officer to satisfy the court about the arrest. In exception to the above, Section 45 of CrPC provides that members of Armed Forces cannot be arrested for anything done in discharge of official duties, they be arrested only after obtaining consent of the central government.

b) Procedure of Arrest: Section 46 of CrPC reflect about modes of arrest i.e. submission to custody, touching the body physically or confining the body. Arrest is restraint to personal liberty. Unless there is submission to custody, by words or by conduct, arrest can be made by actual contact. In case force is required, it should not be more than which is justly required and this section do not give a right to cause death of a person, who is not accused of an offence punishable with the death or with imprisonment for life.

With the insertions of the Act 25 of 2005, Sec 6 w.e.f 23//06/2006, where a woman is to be arrested, unless the police officer is a female, the police officer shall not touch the person of the woman for making an arrest and arrest would be presumed on her submission to custody on oral intimation. After sunset and before sunrise, no woman can be arrested, except in exceptional circumstances and upon prior written permission from the local Magistrate.

c) No Unnecessary Restraint: Section 49 of CrPC provides that there should not be more restraint than is justly necessary to prevent escape i.e. reasonable

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6 R.V. Kelkar's Lectures on Criminal Procedure, sixth edition, 2017.

force should be used for the purpose, if necessary; but before keeping a person under any form of restraint there must be an arrest. Restraint or detention without arrest is illegal.

d) Right to know the grounds of arrest: Despite the provisions of the Constitution, Section 50(1) CrPC also provides, "every police officer or other person arresting any person without a warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest." Based on decisions of Supreme Court in Joginder Kumar v. State of UP[7] and D.K. Basu v. State of West Bengal[8], amendments have been enacted in Section 50-A of CrPC[9] in the year 2006 making in obligatory on the part of the police officer making an arrest to inform the friend, relative or any nominated person of the arrested person about his arrest, inform arrested person of his rights and make an entry in the register maintained by the police. The magistrate is also under an obligation to satisfy himself about the compliance of the police in this regard.

e) Person arrested to be informed of the right to bail: Section 50(2) of CrPC provides that any person arrested without warrant shall be immediately informed of the grounds of his arrest, and if the arrest is made in a bailable case, the person shall be informed of his right to be released on bails. Section 50 is mandatory and carries out the mandate of Article 22(1) of the Constitution of India.

f) Search of arrested person: Section 51 of CrPC allows a police officer to make personal search of arrested persons. With regard to the provisions of this section, the reference may be made to Article 20(3) of the Constitution of India which is a guarantee to the accused against self-incriminating testimonial compulsion. The accused cannot be compelled to produce any evidence against him; it can be seized under process of law from the custody or person of the accused by the issue of a search warrant.

g) Medical Examination of arrested person: Section 54 of CrPC provides for compulsory medical examination by a medical officer in service of central or state government, or by registered medical practitioner, upon non-availability of such medical officer. Female arrestees can only be examined by female medical officer or registered medical practitioner. However, Section 53 & 53A of CrPC provide if there are reasonable grounds for believing that an examination of arrestee, on a charge of committing rape or other offence, will afford evidence so as to the commission of such offence, it shall be lawful to

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7 (1994) 4 SCC 260

8 (1997) 1 SCC 416

9 R.V. Kelkar's Lectures on Criminal Procedure, sixth edition, 2017

medically examine blood, blood stains, semen, hair samples, finger nail clippings by use of modern & scientific techniques including DNA and such other tests, which the medical officer thinks necessary in a particular case, acting at the request of a police officer.

h) Person arrested not to be detained more then 24 hours: Section 57 of the CrPC and the constitutional requirements to produce an arrested person before a Judicial Magistrate within 24 hours of the arrest and it is a mandatory provision as observed in a case *State of Uttar Pradesh v. Abdul Samad*[10]. Section 76 of the CrPC directs that the arrested person to be brought before court with out delay. The intention is that the accused should be brought before a magistrate competent to try or commit, with the minimum delay. This is with a view to extract confession or as a means of compelling people to give information.

**Right of Arrested Person and Important Judicial decisions:**

**a) Presumption of Innocence:** It is requirement of a fair procedure and process under the system of criminal justice, which reflects, the onus to prove that the accused is guilty lies upon prosecution and that the Court has to start with the assumption that the accused in innocent until proved to be guilty.The prosecution is put to strict proof, so that if there is any reasonable doubt in the mind of the Court upon the evidence adduced by the prosecution, the accused is entitled to the 'benefit of doubt' and to be acquitted, it was held in *Talab Haji Hussain v. Madhukar Purushottam Mondkar*[11], Every criminal trial begins with the presumption of innocence in favour of the accused; and the provisions of the code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption".

**b) Grounds of arrest, to be informed:** The Supreme Court is very clear on this concept, in 2005 Supreme Court again while interpreting Art. 21 of the Indian Constitution in *Vikram v. State* [12] observed, "while arresting an individual the reasons should be stated to him clearly as to why he is being degraded in such a manner. The arrest of a person to probe her or deprive her of personal liberty has a serious implication and it cannot be indulged into lightly. The right to personal liberty of an individual is a basic human rights. In our country, arrests are sometimes made with or without a warrant. Art.22 (1) of the Constitution lays down that the arrested person shall be informed of the reasons for her arrest."

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10 AIR 1962 SC 1506

11 AIR 1958 SC 376

12 1996 Cri.LJ 1536

**c) Protection against arbitrary arrest:** Arrest is one of the severe penal action due to which a person is deprived of his personal liberties and freedoms. Indian Constitution has provided ample protection against arbitrary arrest or illegal detention under Article 21 and to supplement it Article 22 plays important role by providing some procedural safeguards against the practice of arbitrary arrest or detention. Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21 as it was held in *A.K. Gopalan v State of Madras*[13]. But the position of Article 21 underwent a sea change since *Maneka Gandhi v. Union of India*[14] and *Kartar Singh V State of Punjab*[15] where validity of several Sections of the TADA was tested in the light of Article 21. In all important cases the Hon'ble Supreme Court has held that there should not be any arbitrary arrest and if there is, then responsibility of the state can be fixed and even compensation can be awarded to the detinue.

**d) Right to know the grounds of arrest:** Right to know the grounds of arrest are reflected in Article 22(1) of Indian Constitution, on this, in the case of D.K. Basu v. State of West Bengal[16] following important guidelines are given which are to be followed in cases of arrest or detention by the authority:

i. "The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and nametags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register."

ii. "That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest."

iii. "A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee."

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13 AIR 1950 SC 27 128

14 (1978) I SCC 248

15 ( 1994) 3 SCC 569

16 AIR 1997 SC 610

iv. "The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest."

v. "An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is."

vi. "The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The Inspection Memo must be signed both by the arrestee and the police officer carrying out the arrest and its copy provided to the arrestee."

vi. "The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well."

vii. "Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record."

viii. "The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."

**e) Right to engage Lawyer:** In *Hussainara Khatoon v. State of Bihar*[17], the Supreme Court has held, "it is the Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the state and the state is under Constitutional duty to provide a lawyer to such person if the needs of justice so re- quire. If free legal services are not provided the trial itself may be vitiated as contravening the Article 21".

**f) Right to be produced before the Magistrate:** Initially this principle is recognized in criminal jurisprudence but to safeguard the Human Rights of accused this has been categorically redefined enforced for the protection of Human Rights of accused by the law. In other words, it is judicial review of the police action to decide whether the action of police officer of arrest is just and

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17 (1980) I SCC 98

fair or illegal and arbitrary. In the case *Govinda Prasad v. State of West Bengal*[18] the court observed, "Wherever a person is arrested bypolice or anyone, authorized to execute the duty for the Government, he shall be told the grounds of his arrest and shall be produced before the Magistrate within 24 hours of arrest and shall not be denied to consult a legal practitioner of his choice."

**g) Protection against double jeopardy:** On protection against double jeopardy the Hon'ble Supreme court has observed in *Maqbool vs. State of Bombay*[19] as well as in Asstt. Collector v. Malwani[20] that the benefit of double jeopardy can be given to a person if previous proceedings must havetaken place before a Court of Law or a judicial tribunal of competent jurisdiction entrusted with full judicial powers and the subject-matter of the second proceeding must be the same as that of the first proceeding, then the subsequent proceedings against the person cannot take place.

a) **h) Right against police torture:** In the case *Kishore Singh vs. State of Rajasthan*[21] the Supreme Court held that the use of third degree method by the police is considered as part of violation of Article 21. The court also directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person.

**i) Rights against Hand Cuffing:** In the case *Prem Shankar v Delhi Administration*[22] Justice V.R. Krishna Iyer held that hand cuffing is prima facie inhuman and therefore, unreasonable, is over harsh and at the first instance, arbitrary. The Supreme Court found the practice of using handcuffs and bar fetters on prisoners violating the guarantee of basic human dignity, which is part of the constitutional culture in India, in case *Citizens for Democracy vs. State of Assam & Ors*.[23] it has observed, "handcuffs or other fetters shall not be forced on a prisoner convicted or under trial while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back".

**Conclusion:**

Our system is modern, unique and exemplary in the world; it shows the path of a welfare govt. to the other systems of the world. Our constitution and the

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18 1975 Cr LJ 1249(cal)

19 ( 1953) S.C.R. 730

20 AIR 1970 S.C. 962

21 1954 CriLJ 1672

22 1980 AIR 1535

23 AIR 1996 SC 2193

statutes protect the rights of all, including disadvantages, women, poor or the person who is arrested on violation of the law of land or there is any apprehension of breach of law. The process norms of fairness depend on equality, reasonableness, freedom and protection of life and personal liberty. The decisions given by the Supreme Court i.e. in judging the reasonableness of the laws is based on pragmatism and has far reaching refinement of the procedural safeguards in the criminal justice system. It is the finest paths constructed by the Indian constitutional jurisprudence. The need of the hour is making the people aware about our laws and the great principles laid down by the hon'ble courts, so that people can access their rights in a true sprit of the Laws.

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# Role of Dr. B. R. Ambedkar on Woman Emancipation

**Dr. Pratima Devi***

**Abstract**

Family system in India provides a superior status to the male inferior and submissive status to the females. The evil of low status of women in India is very deeply rooted in society. The fourth world Conference on women strongly highlighted the fact that across countries and cultures throughout the world there has been traditionally strong discrimination overt and covert against women, biases and prejudices which today prevent their effective participation in public activities. The women require socio-economic political transformation to participate in the development of nation, society and family. Several reformers brought influences at various times to put amend to the oppression of women in India. Among them it was Dr. Ambedkar who had been successful to come to the rescue of Indian women for which the Indian women should always be grateful. . He challenged the validity of stratification based on ascription, fought against injustices and made the downtrodden aware of their rights and duties. As a social reformer, he ushered in a new era in India's socio-political history by insuring the active participation and involvement of the neglected sections of Indian society. This paper makes an attempt to put Ambedkar's perception about women empowerment in proper perspective to achieve the goal of women emancipation and highlights the various approaches were adopted by Dr. B. R. Ambedkar in different phases of his long drawn struggle for more than three decades.

**Keywords:** Downtrodden, untouchable, ornaments, counterpart, tradition.

## Introduction

One of the six best brains of the world, one of the most respected of our founding fathers, architect of free Indian Constitution, intellectual giant among giants, Messiah of downtrodden, oppressed, depressed, naked, hungry, neglected and exploited, Dr BR Ambedkar was an institution in himself. His vision and passion for action stand as a luminous one in the encircling darkness of economic indifference to the Indian unfortunates. He was a legal luminary,

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social reformer, prolific writer, original thinker and interpreter of Indian Heritage, a multifaceted scintillating personality, great statesman, and a man of compassion, rare strong will and an unconquerable determination. Dr. B. R. Ambedkar one of the greatest builders of modern India, savior of the downtrodden, chief architect of Indian constitution, greatest pioneer of Buddhist revival in India, multi-dimensional personality, liberator and emancipator of untouchables of India from the Yoke of Hindu social slavery, a great educationist, a versatile genius and able administrator, a saint-scholar and giant intellectual was born on 14th April 1891 the 14 child of Ramji Shakpal and Bhimabai in a untouchable Mahar family of Ambavade village of Ratnagiri in Maharashtra, which like other untouchables were beast of burden and devoid of dignity and pride. Dr. B R Ambedkar played many roles in the Indian public life. Starting as a leader of the untouchables, he rose to be a nation builder and national leader of the first rank. He acquired deep knowledge in every field of life and human activity to become a founder of his own independent ideology. According to him, no caste, no inequality and no superiority; all are equal that in what stood for.

It is evident from ancient time that women in our society were not given equal treatment. In the history of humanity, it appears that woman in the various phases of her life as mother daughter and wife protects man, inspires him and looks after his wellbeing even by sacrificing her own comforts. The status of women in society was never at par with men. She was not given even the basic rights. Especially Dalit women have most horrible position in Indian society even today, though the rigidity of untouchability had been relaxed to many extents, but status remained almost same. Women were compelled to go for hard labour with discrimination of wages, sexually abused frequently and have to go for most dirty and odd jobs. They are not permitted to wear decent dresses and ornaments even if they afford. While society extracts all the necessary services, it looks down as downtrodden. It becomes greatest joke when Indians criticize Whites from South Africa for the apartheid while they themselves practice untouchability which is many times more than apartheid.

The Epic novel “Gana Devta” by Tarashankar Bandopadhya was a literary master of not only Bengali literature but was recognised as one of the leading literary creator of India. There is a character in this novel, a Dalit young woman who was asked by her mother to serve by cleaning the house of the Zamindar of the village but in the process she was raped and as compensation was paid large sum of money. In spite of knowing the background how she earned, her mother expressed her happiness. Later it was noticed that other nobles frequently used to visit her and enjoy her with sexual intercourse in a night. But during the day, she was treated as an untouchable and her very sight was considered as curse. The example though taken from a fiction is happening almost every day in many villages. This only reflects a true picture of hypocrisy of Brahminical order created by Manu. Dr. B. R. Ambedkar is known as the masiaha of depressed and oppressed classes. He was one of them who fought against inhuman treatment to the downtrodden and vulnerable

sections of the society. Women are the most important part of our society. They constitute about half of the world population and shoulder major portion of the responsibilities. She performs all household chores and she puts in more labour than her male counterpart. Certainly, she is the pivot without which the family, society and nation would come to a halt. But their dependent status made them all the more vulnerable. They were not supposed to be equal to men in the active field of life. The Mahabharata has opposed the concept of the independence of women. The Ramayana also by no means presents a different picture and declares woman to be a fickle minded and cruel. The most important authority on this topic is Arthashastra of Kautilya, the first profounder of secular law. He accepted the full individuality of woman. He says that woman attains maternity when she is twelve years old. The post puberty was in all probability the age of marriage. Any person receiving a girl in marriage without mentioning the bridegroom's defect shall pay a fine and also forfeit the dowry and woman's property, he paid for the bride.

The inculcation of modest behavior shall be done without using hard expressions. During Kautilya's time, mutual hated or dislike is accepted as the ground for divorce. Woman can claim maintenance which is payable in lump sum in a generous manner. Even a woman can abandon her husband if he is a bad character. Efforts were made to guarantee economic independence to a married woman. She had stridhana (women's property) constitutes: women's property, means of subsistence, maintenance and jewelry. But wife is not mentioned in the list of heirs. Kane states that though monogamy seems to be the ideal and was perhaps the rule; the Vedic literature is full of the references to polygamy. Kautilya intends to cultivate the practice of polygamy as he prescribes Stridhana and compensation to be given on to the government for the violation of the rule but a person having no son can remarriage.

Dr. Babasaheb spent his whole life for the upliftment of women even involved in bad practice and professional prostitutes. The greatest example of it was seen in Kamathpura, a David, mediator working in brothel left profession persuaded by the thoughts and teaching of Dr. Ambedkar and looked the entire prostitute to give up their profession and lead the life of honour. While addressing in conference to women, he could easily communicate with them as a homely person and conversion. He evoked of women in the following words, "never wear such clothes which will degrade our personality and character. Avoid wearing jewellery on your body everywhere. It is not fair to make hole on nose and wear '*nath*' (nose pin). In this, he condemned all the bad tradition, habits and ways of life which make life difficult and complex. And to the surprise, even the illiterate women followed this advice from the bottom of their heart. Women were deprived of the right to get education and the right to own property, they were only considered as objects to seduce men and that they were only created to please men. Dr. Ambedkar opposed this orthodoxy and criticized Manu for endowment inferior status to women. In the Manusmriti, Manu not only shown the derision for women but also degraded them as slaves and forbid them to have same position as men.

Being the Law Minister of free India and Chairman of Drafting Committee of the Constitution Assembly, Dr. Ambedkar got the opportunity to free the women from the age old clutches; slavery thrown by the man dominated orthodox society, by reforming the Hindu social laws made by Manu. He took initiative to draft and introduce the Hindu Code Bill in the Constituent Assembly. This bill was the most formidable legislative measures of modern India along with other reforms, to put an end to a variety of marriage system prevailing in India and legalise only monogamous marriages. The Code also sought the right of property and adoption to women which denied by Manu and put men and women on equal level in all legal matters. In the explanation of his speech Dr. Ambedkar said that "the Bill made no radical innovations in the matter of restitution of conjugal rights, judicial separation, adoption and succession. Dr. Ambedkar explained his intention by the example of French Philosopher's ideas that those who want to can serve must by ready to repair and I am asking the house, if you want to maintain the Hindu system, Hindu culture and Hindu society, do not hesitate to repair where repair is necessary. This Bill asked for nothing more than to repair these parts of the Hindu system which have become dilapidated." The efforts of Dr. Ambedkar to unify the Hindu Code and to make it progressive and in time with the modern age were really laudable. Many tributes were paid to him by many progressive Hindu leaders. H. V. Kamath praised and said that the Hindu Code Bill should be named as 'Bhim Smriti'. Justice P. B. Gajendragadkar said, "If Dr. Ambedkar gives Hindus our code, his achievements would go down in history as a very eloquent piece of poetic justice indeed."

The Hindu Code Bill was later split into four Bills and the same were put on the statute book by Parliament, which basically incorporate the ideas and principles of the Bill formulated by Dr. Ambedkar. They give independent status to women and enable them with the right of adoption, succession and property so completely demised by the Manu. The Hindu Code Bill applies to all Hindus whether they are Virashaivis, Brahmins, Arya Samajists, Jains or Sikhs and makes no distinction as to their caste or creeds. It places women at par with men in matter of property, adoption and marriage. She can now choose her spouse from any caste, high or low. This privilege was enjoyed by men only. She has given absolute right in her property. A girl can also be adopted and wife's consent is necessary in adoption. Constitutional safeguards and other laws for women empowerments are also play an important role in women emancipation and empowerment. To secure the goal of women empowerment, Dr. Ambedkar has given equal status to women at par with men by providing many provisions in the Indian constitution. The Preamble of Indian constitution guarantees social and economic justice to women and that is because of Ambedkar contribution. In the preamble it is mentioned:

i. Social, economic and political justice,

ii. Freedom of thought, expression, belief, faith and worship,

iii. Equality of status and opportunity and

iv. Fraternity assuring dignity of the individual and national unity to all the citizens of India without any discrimination of caste, creed or sex.

In Indian Constitution, there are few articles exist that help the women of Indian society to improve their position and to compete with their male counterparts. For example:

Article14 provides that all are equal in the eyes of law and equally protected by the law. It means equal rights and opportunities in political, economic and social spheres.

Article 15 states that discrimination on the ground of sex is strictly prohibited whereas positive discrimination supporting women is provided under Article 15(3).

Article 16 mentions there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office without any discrimination on the basis of religion, caste, creed and sex.

Article 24 provides prohibition regarding the employment of children below the age of 14 years in factories, mines or in any other hazardous employment.

Equal means of livelihood and equal pay for equal work is provided under Article 39 and 39(d).

According to Article 41, the state guaranteed within its economic limits to all the citizens, the right to work, to education and public assistance in certain cases.

The state makes provision for Human conditions of work and maternity relief under Article 42.

Under Article 44, the state provides a Uniform Civil Code to all the citizens throughout the territory of India.

As per Article 46, the state is bound to promote with special care, the educational and economic interests of weaker section of people and to protect them from social injustice and all forms of exploitation. Under Article 47, the state to raise the level of nutrition and standard of living of its people and the improvement of public health and so on.

Article 51 (A) (C) makes provision for Fundamental Duties to renounce practices, derogatory to the dignity of women.

Article 243D (3), 243T (3) & 243R (4) provides for allocation of seats in the Panchayati Raj System.

Ambedkar not only ascertain constitutional guarantees to women but also introduced and got passed four Acts which strengthened the position of women in the society. These are:

i) The Hindu Marriage Act, 1955.

ii) The Hindu Succession Act , 1956.

iii) The Hindu Minority and Guardianship Act, 1956.

iv) The Adoption and Maintenance Act, 1956.

If we look at the provisions of those Acts, we can easily make out that Ambedkar was a great thinker of women rights and emancipation. Provisions that have been enshrined in the Acts are as follows:

**The Hindu Marriage Act, 1955**

The Hindu Marriage Act, 1955 was amended in 1976 made the following provisions for women:

1. The legitimization of illegitimate children (Sec.16).

2. Punishment-bigamy (Sec.26).

3. Custody of children (Sec. 26).

4. Marriageable age of females raised to 18 years.

5. Provision for alimony (Sec. 25). The Act abolishes the difference between a maiden and a widow.

The Hindu Succession Act, 1956: This Act contains the following provisions for women:

1. A widow has a right to adopt a son or a daughter which was not there in the Hindu Law.

2. It also provided an opportunity to be independent and dispose of her property by will as she wishes and desires (Sec. 14).

3. A uniform scheme of succession to the property of a Hindu female, who dies, intestate after commencement of the Act, was made in Section 15. Previously under the uncodified law the succession to stridhan varied according to the marital status of a woman.

The Hindu Minority and Guardianship Act, 1956: Following provisions are come under the purview of this Act:

1. The mother is empowered to change the guardian, appointed by the father and may appoint a new guardian by will.
2. The father's right to appoint a guardian for the minor by will during the life time of the minor's mother is prohibited under this Act.

The Adoption and Maintenance Act, 1956: This Act has the following provisions:

1. This Act accepts adoption of a male and a female child without any difference, whereas under the uncodified law a daughter could not be adopted.
2. This Acts permits a wife to adopt a child on her own right even during her husband's life time. She had no such right prior to this enactment.

3. In the uncodified law a spinster or a widow had no right to adopt whereas this Act grants them the right to adopt.
4. Under the old Hindu Law a wife need not be consulted while adopting a child or while giving a child for adoption, whereas this Act made it essential to consult her in both the cases.
5. Section 11 lays down that, a father should adopt a daughter at least 21 years younger to him.

Dr. Ambedkar's impassioned love for the 'fallen' women as a whole community and his advice to resent themselves from the despaired and disgraceful life were quiet meaningful. He accorded equal status to women and men in every sphere and he also warned the women against the misuse of their rights. Dr. Ambedkar contribution is unique and cherishable by women of India. Now, it is the foremost duty of women's associations, groups and organizations to actively participate in the process of social change and welfare. Prime Minister Jawaharlal Nehru said that Dr. B. R. Ambedkar was a symbol of revolt against all harsh characteristics of Hindu methodology. His dream society, based on gender equality is yet to be realized and therefore his thoughts are important for the social reconstruction that fevours women emancipation and empowerment. At last but not the least no Constitution, Commission, Corporation or even the Government can improve the lot of down-trodden until the society as a whole is willfully, mentally, honestly and sincerely prepared to accept them as a part and parcel of it.

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# The Concept of Equal Pay for Equal Work as a Tool of Gender Justice

**Dr. Ved Pal Singh Deswal***

**Abstract**

In the era of digitalization pay systems that are transparent and reward the entire workforce fairly send a positive message about an organization's values and ways of working.Pay is one of the key factors which effects motivation and relationships at work between employer and employee. So it's important to develop pay arrangements fairly by providing equal pay for equal work. The pay systems of Fair and non-discriminatory pay are a legal requirement and good management practice. By providing equal pay for equal work the employer can increase efficiency and productivity leading to attract the best employees, reduce staff turnover, increase commitment and reduce absenteeism. The provision of equal pay is also a key part of your organization's corporate social responsibility. Failing to ensure equal pay in your organization could lead to legal claims, reputational damage and, ultimately, affect your commercial success.The courts have made it clear that employers are responsible for ensuring equality which is necessary to remove sex discrimination, and that they should not wait until confronted with a claim before taking action to ensure equal pay.For any organization, having to defend an equal pay claim is a costly, complex and time-consuming exercise.By ensuring equal pay for equal work, employers can minimize the risks of an equal pay claim and help create a fairer society, where everyone can achieve their potential and be fairly rewarded for the work they do.

**Key words:** Organization, pay, work, discrimination and business

## Introduction

The term "equal pay for equal work" has its own historical significance. The equal pay for work of equal value has been a slogan of women's movement. Equal pay laws, therefore, usually deal with sex-based discrimination in the pay scales of men and women doing the same work or equal work in the same

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organization.The constitution of the International Labour Organisation, was adopted in 1919, proclaimed the "special and urgent importance" of the principle that "Men and women should receive equal remuneration for the work of equal value". [1] A first step towards the application of the principal was taken by the I.L.O., in 1928, in dealing with the question of creating or maintaining machinery whereby minimum wage rates may be fixed in trades or parts of trades in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and in which wages are exceptionally low. The conference called the attention of the Governmentsto the principle affirmed in the Constitution of 1919. In 1944, the International Labour Conference, discussing the principle and methods which should govern the organization of employment in the transition from water to peace, further recommended that "in order to place women on a basis of equality with men in the employment market the steps should be taken to encourage the establishment of wage rates on the basis of job content. The principle of equal remuneration was also included in the convention concerning social policy in non-metropolitan territories, adopted in 1947, which stipulates that "it shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour and sex. In respect of a wage rate which shall be field according to the principle of equal pay for work of equal value in the same operation and undertaking to the extent to which recognition of this principle is accorded in the metropolitan territory". This convention further provides in paragraph 2 of the same article that "all practicable measures shall be taken to lessen, by raising the rates applicable to the lower paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, and sex. As differentials between man's and women's wage rates have still prevailed, the international conference has on several occasions renewed the plea for the application of the principle of equal remuneration. [2]It stipulates that "Everyone without any discrimination has a right to equal pay for equal work". Further Article 7 of the International Covenant on Economic and Cultural Rights of 1966, Inter alia, provide: "The states parties to the present covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular the equal remuneration for work of equal value without distinction of any kind in particular women being guaranteed

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1 The preamble of the amended constitution which came into force in 1948 proclaims that "improvement (of the conditions of labour) is urgently required by recognition of the principle of equal remuneration for work of equal value."

2 The principle of equal pay for equal work has genesis in the Universal Declaration of Human Right which the General Assembly of the United Nations adopted and proclaimed on 10 December, 1948 as a common standard of achievement of all people and all nations".

conditions of work not inferior to those enjoyment by men, with equal pay for equal work." Earlier in February 1957, at its 11th session, the General Assembly of the United Nations third Committee adopted the test of Article 7 of the draft international Covenant on Economic, Social and Cultural Rights, which recognized as follows: "The right of everyone to enjoyment of just and favourable conditions of work including fair wage and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed equal pay for equal work."

Article 26 of the International Covenant on Civil and Political Rights (1966) provides that: "all the persons are equal before the law and have the right to equal protection by the law without discrimination." In this respect, the law prohibits all discrimination and guarantees to all persons equal and efficient protection against discrimination, notably of race, colour, sex, language, creed, political opinion and any other opinion of national or social origin, of fortune, birth, or any other situation. Moreover, Article 10 of the Declaration on the Elimination of Discrimination in regard to women 1967, inter alia, provides "All appropriate measures shall be taken to ensure to women married or unmarried, the same right as to men in the field of economic and social life and notably the right to equality of remuneration with men and equality of pay for work of equal value". In the United Nations the Commission on the status of women, a functional commission of the Economic and social Council, has recognized the need for providing "equal pay for equal work" for men and women workers. It has also taken several steps to promote the principles of equal pay.

**The Convention of International Labour Organisation, 1951**

A significant milestone in acceptance and promotion of the principle of "equal pay for equal work" was reached with the establishment of the International Labour Organisation. While preamble to the ILO Constitution of 1919 stressed the urgency of, inter alia, recognition of principle of "equal remuneration for work of equal value", the preamble to the constitution as amended in 1948 reaffirmed the urgency in improvement of the conditions of labour as regards the principle of "equal pay for equal work".[3] In September 1958, India ratified the convention of International Labour Organisation, which requires a member - state ratifying it to promote as well as ensure application of principle of equal remuneration to all workers through national laws or regulations, legally

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[3] In its 34th session ILO adopted a convention concerning equal remuneration for men and women workers for work of equal value, known as Equal Remuneration convention in 1951.

established or recognized machinery for wage determination, collective agreements between employers and workers or a combination of these means. The Convention concerning the Equal Remuneration for men and women workers for the work of equal value (Equal Remuneration, 1951) was adopted by the General Conference of the ILO on June 29, 1951. The convention lays down the general principle that each ratifying state shall promote and in so far as is consistent with the methods in operation in its country for determining rates of remuneration for men and women workers for the work of equal value. Equality must be applied not only to the basic or minimum wages but also to any additional emoluments whatsoever directly or indirectly, whether in cash or in kind of the workers employment.

**National Perspective**

The Constitution of India is based on the principles of equality, liberty and justice. The preamble of the Indian Constitution seek to secure to all its citizens including women justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status, and opportunity, and promote among the people of India fraternity assuring dignity of individual for all its citizens including women. The article 14 guarantees "equality before law and equal protection of laws within the territory of India". Article 15 prohibits discrimination on grounds, inter alia of sex.[4] Article 16 guarantees equality of opportunity in matters of public employment.[5] The state has been directed "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of national life. Article 39 of the Constitution relating to the directive principles is more specific and comprehensive in nature.[6] This article with six sub-clauses is analogous to one contain in article 45 (2) of the Irish Constitution. In *State of Haryana vs. Rajpal Sharma*[7] it has been held that the teachers employed in privately managed aided schools in State of Haryana are entitled to same salary and dearness allowances as is paid to teachers

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4 Article 15(3) of Indian Constitution empowers the state to make, any special provision in favour of women.

5 While Article 16(1) ensure equality of opportunity for all citizens including women in matter relating to employment or appointment to any office under the state, article 16 (2) prohibits discrimination in respect of any employment or office under the state on the ground, inter alia, of sex.

6 Article 39(d) requires the state to strive for securing equal pay for equal work of both men and women.

7 JT 1996 (6), 710 1996 SCALE (5)517.

employed in government school. The Court has further observed: "The same amount of physical work may entail different quality of work, some more sensitive; some requiring more tact, some less, it varies from nature and culture of employment. The problem about equal pay can't always be translated into a mathematical formula". In *Markendeya vs. State of Andhra Pradesh* [8] difference in pay scale, between graduate supervisors holding degree in Engineering and non-graduate supervisors being diploma and licence holders was upheld. It was held that on the basis of difference in educational qualifications such difference in pay scales was justified and would not offend Article 14 and 16. The Court pointed out that where two classes of employees perform identical or similar duties and carry out the same functions with the same measure of responsibility having the same academic qualifications, they would be entitled to equal pay.

The Supreme Court has emphasized in *Randhir Singh versus Union of India*[9] referring to Article 39(d), that the principle of "equal pay for equal work" is not an abstract doctrine but one of substance. Though, the principle is not expressly declared by the constitution to be a fundamental rights yet it may be deduced by construing Article 14 and 16 in the light of Article 39(d). The word 'socialist' in the preamble must at least mean "equal pay for equal work".[10] The Supreme Court has observed in *Grih Kalyan Kendra vs. Union of India*[11] that equal pay for equal work is not expressly declared by the Constitution as a fundamental rights but in view of the directive principle of state policy as contain in Article 39(d) of the Constitution "equal pay for equal work" has assume the status of Fundamental Rights in service jurisprudence having regard to the constitution mandate of equality in Article 14 and 16 of the constitution."

In *State of Haryana and others vs. Charanjit Singh and others etc* [12] the respondents were daily wagers who were appointed as ledger clerks, ledger keepers, pump operators, mali-cum-chowkidar, filters, patrolmen, surveyors etc. All of them claimed the minimum wages payable under the pay scale of regular class IV employees from the date of the appointments. The question whether or not these persons were entitled to the minimum of the pay scale of

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8 1989 AIR 1308, 1989 SCR (2) 422.

9 1982 AIR 879, 1982 SCR (3) 298.

10 The Indian Constitution recognized the principle of 'Equal Pay for Equal Work' for both men and women, and 'Right to Work' through Article 39(d) and 41. These Articles are inserted as Directive Principles of State Policy.

11 1991 AIR 1173, 1991 SCR (1) 15.

12 Appeal (civil) 6562 of 2002.

regular class IV employees. Supreme Court having considered the authorities and submission are of the view that the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration.

The concept of "equality before law" enumerated in the Article 14 is hinge on the principle of common law and equity and the main object of Article is to secure or ensure that all persons are treated on the equal footing by the state and there should be no discrimination in favour of one as against other.

From the very nature of society, there should be different laws in different places and the legislature controls the policy and enacts laws in the best interest of the safety and security of the state. In fact, identical treatment in unequal circumstances would amount to inequality. So, a reasonable classification is not only permitted but is necessary if society is to progress. Thus, what Article 14 forbid is class legislation but it does not prohibit reasonable classification. The classification however, must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. In *State of Bombay vs. F.N. Balsara*[13] the Supreme Court observed that the classification to be reasonable must fulfil the following two conditions. (i) the classification must be founded on an intelligence differentia which distinguished the persons or things that are grouped together from other left out of the group and (ii) the differentia must have a national relation to the object sought to be achieved by the Act.

**The provision of Equality as a weapon of protection against Arbitrariness**

In almost all the industries, such as weeding, transplanting agriculture operation, coal mining industry and plantation etc, there is discrimination in wages. Many ingredients go into the shaping of the wage structure in any organization. Historically, it many have been shaped by negotiated settlements with employees unions or through industrial adjudication. It may have revised

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[13] 1951 AIR 318, 1951 SCR 682.

or reshaped with the help of expert committees. The economic capability of the employers also plays a crucial part in it, as also its capacity to expend business or earn more profits. If the employing organization functions in a competitive area, it may, if it is economically strong, offer higher wages than its competitors doing similar work to attract talent. There is need to fight against discrimination regarding equal pay, employment opportunities for promotions, for occupying higher positions and for leadership of trade union movement. Then only women provide proper leadership to society as was visualized by Mahatma Gandhi.18 In our country an ordinance namely, the Equal Remuneration Ordinance was promulgated in 1975 to give effect to the Constitution provisions and the I.L.O. Convention no. 100 of 1951 in the International Women Year. The Ordinance was replaced by the Equal Remuneration Act, 1976 seeking to provide for payment of equal remuneration to men and women workers for payment on discrimination on the ground of sex. It has taken a twenty-five years to become the law, because due to the slow economic development in the country.

**Judicial Approach**

After 1970's equality in Article 14 has acquired new and important dimension, until then the requirement of Article 14 were met if a law or administrative action satisfied the doctrine of reasonableclassification based on nexus test.Towards, the end of 1973, however, Bhagwati, J. opined in *E.P. Royappa vs. State of Tamil Nadu* giving a new colour and flavour 14 in the following words: "Equality is a dynamic concept with many aspects and dimensions and it can't be 'cribbed and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." A few months later in M. Chhaganlal case, Bhagwati I. again in a concurring opinion, speaking for himself and Krishna Iyer J. observed: "Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light pointing towards the goal of classless equalitarian socio-economic order which we promised to build for ourselves when we made a tryst with destiny on that fateful day when we adopted our constitution. If we have to choose between fanatical devotion to this great principle of equality and feeble allegiance to it, we would unhesitatingly prefer to err on the side of the former as against the latter." He further said: "What the equality clause is intended to strike at are real and substantial disparities and arbitrary or

capricious action of the executive and it would be contrary to the object and intendment of the equality clause to exalt delicate distinctionshades of harshness and theoretical possibilities of prejudice into legislative inequality or executive discrimination." In the famous case *Maneka Gandhi vs. Union of India*, Bhagwati J. again quoted with approval the new concept of equality propounded by him in E.P. Royappa case.[14] He said: "Equality is a dynamic concept with many aspects and dimensions and it can't be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which logically, legally and philosophically, is an essential element of equality or nonarbitrariness, pervades Article 14 like a broadening omnipresence."

The right to equal remuneration has been recognised by the Universal Declaration, as well as the Indian Constitution, but none of them is of binding nature. In India, this provision, having been made part of Chapter IV of the Constitution, which contain simply social goals, to be achieved by the state but does not make it enforceable. However, towards achieving the above mentioned social goal, in 1976 the Equal Remuneration Act, was passed by the Parliament to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex against women in the matter of employment and for the matters connected therewith or identical thereto.[15] According to Article 16(I) "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state." Article 16 guaranteed against discrimination is limited to 'employment' and 'appointment' under the state. It embodies the particular application of general rule of equality laid down in Article 14 with special reference for appointment and employment under the state. As Article 16 guarantees equality of opportunity in matter of appointment in state services. It does not however, prevent the state from prescribing the necessary qualifications and selective tests for recruitment for government services. The qualifications prescribed may besides mental excellence, include physical fitness, sense of discipline, moral integrity loyalty to the state. Where the appointment requires technical knowledge, technical qualification may be prescribed.

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14 1974 AIR 555, 1974 SCR (2) 348.

15 The objective of Equal Remuneration Act fulfils to large extent not only the objectives laid down in Article 39(d) of the constitution but also of the International Labour Organisation convention 1951 and 1958.

In Air India case (popularly known as Air Hostesses case) the petitioner challenged the validity of the regulation under which they could be retired at the age of 33 years or if they got married within four years of their service or on first pregnancy on the ground that they were discriminatory and violative of Article 14, 15 and 16 of the constitution. The court held that the provision on pregnancy bar and the retirement and the option of the Managing Director were unconstitutional as being unreasonable and arbitrary and violative of Article 14 and 16 of the constitution. In Triloki Nath and others[16] a cadre of Assistant Engineer's including degree holders and diploma holders, they constituted one class of service, but for promotion to the post of Executive Engineers only these Assistant Engineers were eligible who possessed Bachelor's degree in Engineering and the Diploma holders were eligible only if they had put in 7 years minimum service, no such restriction was prescribed for decree holders. The diploma holder's assistant engineers challenged the validity of the rule on the ground that it denied them equal opportunity of promotion in violation of Article 14 and 16 of the constitution. On a detailed consideration a constitution Beach of Supreme Court upheld the classification on the ground of difference in educational qualification. The court held that the classification had reasonable nexus to achieve administrative efficiency in engineering services.

In Dhirendra Charnoli vs. State of U.P[17] it has been held that the principle of equal pay for equal work is also applicable to casual workers employed on daily wage basis. Accordingly, it was held that persons employed in Nehru Yuwak Kendra in the country as casual workers on daily wages basis were doing the same work as done by class IV employees appointed on regular basis and therefore, entitled to the same salary and conditions of service. It makes no difference whether they are appointed in sanctioned post or not. It is not open to the government to deny such benefit to them on the ground that they accepted the employment with full knowledge that they would be paid daily wages. Such denial would amount to violation of Article 14. In ease of Daily Rated Casual Labour, it has been held that the daily rated casual labours in P & T Department who were doing similar work as done by the regular workers of the department were entitled to minimum pay in the pay scale of the regular worker plus D.A. but without increments. Classification of employees the purpose of payment of less than minimum pay is violative of Article 14 and 16 of the Constitution and denial of minimum pay amounts to exploitation of

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16 1969 AIR, 1 1969 SCR (1) 103

17 1986 (52) FLR 147, (1986) ILLJ 134 SC, (1986) 1 SCC 637.

labour. In Frank Anthony Public School Employees Association, 101 the court held that the teachers and employees of Frank Anthony Public School are entitled to parity in pay scales and other conditions of service with those available to their counterparts in government school. The discrimination made by Section 12 of the Delhi School Education Act in pay and other conditions of service of school teacher merely on the ground of aided schools and unaided minority schools is violation of Article 14. However, the principle of 'equal pay for equal work' has no mathematical application in every case of similar work. There can be two scale of pay in the same cadre of persons performing the same or similar work or duties. Of course, the functions of two posts may appear to be the same or similar but there may difference in degree of performance. The quantity of work may be same, but quality may be different. In Pramod Bhartiya case, the Supreme Court has explained that the doctrine of "equal pay for equal work" is implicit in the doctrine of equality enshrined in Article 14 and flows from it. The rule is as much a part of Article 14 as it is of Article 16(1).

In Associated Bank Officers Association vs. State Bank of India, it has been held that the employees of subordinate bank of the State Bank cannot be treated as the employees of the State Bank of India and therefore not entitled to the same benefits as regards the pay and allowances, The subsidiary Banks are set-up as a separate Bank with its own capital structure, its own staff, with its own terms and conditions of service. The officers of the State Bank and subsidiary Banks are not in a comparable position considering the responsibilities of officers of the State Bank of India. Besides, the benefits extended to the officers of the subsidiary Banks are in accordance with the agreement between the unions of the employees and the management of each bank. In view of this, the court held that the principle of equal pay for equal work cannot be applied in this case. A perusal of the above study under constitutional conspectus, researcher reached to the conclusion that the principle of "equal pay for equal work" has been explicitly enshrined under Article 39(d) of the constitution, which is not enforceable parse. But it has its genesis in international legal dimension. Article 14 and 16 are enumerated under part III of the constitution as a fundamental right. But it is suggested that the 'battle cry' of the hours is to inculcate this principle under Article 21 of the constitution by way of constitutional amendment. Because denial of "Equal pay for equal work" amounts to denial of right to life, while it is judiciary, which has devised a mechanism in a consonance with mandatory and obligatory philosophy of the constitution.

## Conclusions

In order to achieve the objectives of equal pay for equal work only the Act/ legislation is not sufficient. The time has come for the women in unorganized sectors for raising their voice against this unequal treatment in terms of payment and working conditions. The concept of equal remuneration is an important factor to gear up women empowerment. If women are denied equal treatment in respect of wages, it will amount to a violation of the right to equality. So, organizations should take the required steps to eradicate the gap in wages of employees. It is the duty of every person to raise the alarm in case of any such violation. It is the responsibility of media to bring such types of cases in the light so that remedial measures can be initiated.

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# Air Pollution Laws in India: A Need for Review and Effective Implementation

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**Abstract**

Air pollution has become a serious environmental concern in India especially Delhi. India is facing air pollution because of various factors like population growth, transportation, increase in vehicles, deforestation, waste burning, lack of implementation of environmental laws and policies. Judiciary through time to time give decisions to control the environmental issues but judiciary alone cannot solve this problem unless there is effective implementation by government. Also, active participation of people is the need of time. This article aims to research the current position of air pollution in India and how far are laws and policies are effective in solving the problem of air pollution.

**Key Words:** Air pollution, problem, solution, laws.

## Introduction

Air pollution means presence of pollutants in the air which are harmful for humans and surroundings where we live. Right to have 'clean air' is a right of every citizen of India which is guaranteed under article 21 of Indian Constitution. It is the duty of the State to provide clean air to individual and sustainable economic growth is the need of the day. Similarly, the duty is imposed on Indian citizens under directive principles to protect the environment. But both citizens and state have failed to do their duty.

Now Pollution is taking the shape of reality and is no more a concept of books and discussions, people are actually dying because of it. The biggest and recent exampleis of Delhi where people are actually suffocating and dying due to pollution and because of this apex court of India has to intervene and on 23 Nov 2019 Supreme Court has given notice to all states seeking details regarding management of air pollution control.

The Supreme Court said that "right to life of human is being endangered" by the bad air quality and the states have to deal with the situation as "life span is being shortened" due to this.

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Despite various warnings of the Supreme Court the situation has only worsened so far resulting in making Country's capital the most polluted city in the world and for this the authorities and the citizens of our country are surely to be blamed.

Stubble burning in the states of Punjab, Haryana and Uttar Pradesh has largely increased despite Supreme Court prohibiting it. The Supreme Court said, "not only machinery is responsible, but farmers are also responsible for this".

The people are now living in a gas chamber fighting their worst internal war. People are dying with the diseases like cancer due to the deteriorating air condition. If the air conditions did not tend to improve, the world will end in its worst possible way.

The Supreme Court remarked, "In India air conditions can be improved but there is lack of proper planning. It appears to be a case of lost priority".

To improve the air condition only policy making is not required but implementation is needed at ground level.

**Causes of air pollution**

There are several factors which are degrading the air. Mainly there are two causes of air pollution namely natural causes and man-made causes.

1. **Natural causes**
   - Solar radiation
   - Volcano eruption
   - Greenhouse gas concentration
   - Storms
   - Fire

2. **Man-made causes**
   - Industrialization
   - Deforestation
   - Landfills
   - Population
   - Agricultural Practices
   - Solid waste disposal
   - Noise
   - Religious and cultural practices
   - Economic growth
   - Lack of willingness of authorized agencies for laws implementation
   - Noise Pollution

As population grows the industrialization increases so as the transportation and automobiles leading to greenhouse gas concentration. There is no proper solid waste disposal system at local level.

According to World Health Organization Delhi is the worst city in the world in terms of air pollution. After Diwali, 2019 the air quality of Delhi and near cities has come to the hazardous level. Air pollution in the Indiais the fifth largest killer and estimate to kill around 1.5 million people every year.

**Legislations relating to air pollution**

1. In 1948 after independence, India for the first time focused on air pollution and launched the Factories act, 1948 which focused on proper ventilation, humidity, fumes, dust and health of laborers.
2. For the purpose of conserving any resources of national importance which are utilized in the industry along with the regulation of production and industrial development The Industrial (Development and Regulation) Act, 1951 was enacted.
3. The mines Act,1952 was enacted to limit dust fire, underground fire, coal dust, inflammable noxious gases etc.Also, in 1952 the Inflammable Substances Act was enacted for the purpose of declaring and regularizing certain substances as dangerously inflammable as petroleum.
4. In 1962, the Atomic Energy Act was enacted for safety from radioactive substances and atomic energy.
5. After the United Nations conference on the human environment at Stockholm, 1972 India enacted The Air (Prevention and Control of Pollution) Act, 1981 for control, prevention and abatement of air pollution.
6. In 1986, The Environment Protection Act was formulated for the protection and improvement of Environment.
7. In 1988, Motor Vehicle Act was made for control of vehicular emissions.
8. India in 2000 framed the ozone depleting substance (regulation and control rules) for regulation of production and consumption of ozone depleting substances.
9. The Municipal solid waste (management and handling) rules, 2000 were enacted for waste management and air quality monitoring.
10. The noise Pollution (regulation and control) rules, 2000 was enacted to control the noise and to maintain air quality standards.
11. Green Tribunal Act, 2010 was enacted for speedy disposal of cases relating to environment protection including air pollution.

**Regulatory Authorities**

Authorities who work for the protection of environment including air qualities are –

- Central Pollution Control Board (CPCB)
- State Pollution Control Board (CPCB
- Ministry of Environment and Climate Change Control (MOECC)

**Issues**

The international Institute for applied systems analysis (IIASA), Austria and Council on Energy, Environment, and Water (CEEW), New Delhi reports that in 2030 Indian citizens are likely to breathe air with high concentration of PM 2.5 with the current existing pollution control policies and regulations.

No effective technology and mechanism are available in India to cope up with air pollution.

No alternate resources are available at local level

Air born diseases are affecting badly people of India

State has failed in implementing the remedies for air pollution

**Suggestions and Conclusion**

***Use of Traditional Practices and Knowledge*** – Our ancestors were more passionate towards protection of environment and sustainable development. It is time now to revive those practices.

***Revival of no waste theory*** -There should be absolutely no waste of anything, no waste means no need for its burning and no air pollution. Food which is left out should be stored for the manure or for feeding animals.We should stress more on recycle and reuse of products so that there will be less use of energy. Recyclable packing, reusable bags, print and photocopy of paper from both sides are recommendable.

***Use of less vehicles*** – cycles should be more used for travelling, government should make proper cycle track for convenience. Also, no vehicular zone area also can be identified and declared by government.

***Effective Public Transport systems***- Trams and trains should developed in such a manner that one should find it more comfortable to use then to private vehicle, like the Europe.

***Strict Action Plan for Industries***- Industries first pollute the environment then case file against them and then court gives verdict for compensation, shifting or

closure, instead of its strict action plan should be made by applying precautionary principle.

***Planting of more trees***– *A*longside with roads and in public parks and in public areas and in mountains efforts should be there to plant more trees.

***Use and availability of clean fuel***–There is a defined category of certain fuels which are environmentally acceptable fuels which should be promoted to stop air pollution in areas like Delhi and NCR

***Punishment and Compensation-*** Environmental agencies should be corruption free and strictly impose punishment on polluter and heavy compensation should be imposed.

***Public Awareness and Participation-*** Public awareness programs should be there for air pollution and how it can be mitigated, without the public efforts it is not possible to fight with it. People should be made aware of the things like befits of cycling, waste management, sustainable products, eco-friendly lifestyle etc.

***Use of Non-Toxic Plastic-****Polyethylene terephthalate* which is clear in color is made up of #1 Plastic which can be recycled

***Conserve Energy-*** Less energy means less use of power which will result into less pollution.

Solar energy, florescent lightning and smokeless stoves should be promoted.

***Less use of nonrenewable resources-*** There should be less use of petrol, diesel, natural gas etc. Even the use of electricity should be controlled because for the production of electricity large number of Coal is required.

***Choose cleaner options-*** Products like paints, glues, deodorants etc. contains dangerous chemicals which form smog resulting into air pollution. So, we should select water-based products so that it will not adversely affect the air quality. Painting with the brush is more recommended instead of spray paints.

***Preventing indoor pollution-*** Our living area should be properly ventilated. Home should be properly clean on regular bases to prevent bacteria. A use of large mat outside the room can reduce the amount of dirt and pollutants.

***Do not burn firecrackers and garbage-*** Burning of firecrackers should be stopped as it leads to massive air pollution. Garbage burning should be strictly prohibited and should be finned as garbage contains many toxic elements also which are harmful to humans and surroundings.

***Online complain system-*** Online complain reports provision should be done by government so that immediate report and action can be taken against the polluter.

Air pollution has adverse effect on animal, plants and humans. Air pollution increases risk of heart disease, cancer, asthma etc. Though many laws had been enacted in India to prevent air pollution, but implementation of these laws are pathetic due to corruption, negligence and willingness. Violations of these laws are very common in tourist and industrial sector. Situation of air pollution in India is a matter of serious concern and need an immediate attention by authorities and citizens. There is need to review the current laws and effective implementation of air pollution laws in India. Economic growth, modernization and luxuries of life are not above the environment and the human life.

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# Constitution of Audit Committee, Powers and Duties and Role in Providing Healthy Corporate Governance

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**Abstract**

A company is an artificial person created by law; it has no body or soul. It acts through a human agency known as the directors. These directors constitute the board of directors. This board lays down the policies and supervises the implementation of such policies. The board appoints the management to look over the financial affairs and since it does not have the time to minutely examine them, so it forms a committee to look after the financial reporting and ensuring the credibility of such reports. Such a committee is known as an audit committee.

Audit committee in simple terms may be defined as "a committee of members who are independent from the board of directors of the company, and having the main job of regulating the finances in the company and ensuring the independence to the auditor both internal and external of the company. Companies act, 2013 mandates all listed companies to have an audit committee." "The committee formed under the chairmanship of Kumar Mangalam Birla, by the Securities and Exchange Board of India (SEBI) in the year 1999 for the first time recommended the creation of audit committeewhere it said the committee would work as a bridge between the board, statutory auditors and internal auditors.

**Key Words:** Company, human, affairs, financial and auditor.

## Introduction

A company is an artificial person created by law; it has no body or soul. It acts through a human agency known as the directors. These directors constitute the board of directors. This board lays down the policies and supervises the implementation of such policies. The board appoints the management to look over the financial affairs and since it does not have the time to minutely examine them, so it forms a committee to look after the financial reporting and

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ensuring the credibility of such reports. Such a committee is known as an audit committee.[1]

Audit committee in simple terms may be defined as *"a committee of members who are independent from the board of directors of the company, and having the main job of regulating the finances in the company and ensuring the independence to the auditor both internal and external of the company. Companies act, 2013 mandates all listed companies to have an audit committee."*"The committee formed under the chairmanship of Kumar Mangalam Birla, by the Securities and Exchange Board of India (SEBI) in the year 1999 for the first time recommended the creation of audit committeewhere it said the committee would work as a bridge between the board, statutory auditors and internal auditors. It also recommended the company to have non-executive directors with majority of independent directors and at least one having the financial and accounting knowledge."[2]

Audit committee plays an important role in increasing the overall audit qualities. It is the efficient audit committee and the auditors that bring in more confidence in the financial matter. It is the job of the audit committee to have overall responsibility of the audits of the company. It is the audit committee that needs to ensure that the auditors are independent; there is no influence of the management on the work of the auditors

The Companies act of 2013 provides for the creation of the audit committee. This provision has been taken with some changes from the earlier act, i.e. companies' act of, 1956, which was added in the act after an amendment in the year 2000. An audit committee should have a minimum of 3 directors of which it is required that majority of the director should be independentand at the same time should be financially literate, i.e., should have the basic knowledge about balance sheets and other related documents.

This paper discusses the meaning, evolution of the audit committee, constitution of audit committee under the companies act and listing agreements, powers and duties of the audit committee and the role of audit committee in providing healthy corporate governance.

In this paper the researcher engages in conducting a doctrinal method of research. A doctrinal method of research may be defined as a research in which the researcher takes a legal proposition as his starting point and research is done around the said legal point. In a doctrinal research method there is a reading and analysis from the available legal databases, books, journals,

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1 S Venugopalan, Role Of Audit Committees, Company Law Journal, Vol2, 20002

2 Vivek Kumar Jha, Audit Committee And Corporate Governance, Vol1, 2004

articles, case studies and so on. Here doctrinal method of research is applied to have a clear understanding of the concept of audit committee, from its introduction, what amendments have been made to it.

**Evolution of Audit Committee**

The concept of Audit committee was for the first time seen by the New York Stock Exchange in the year 1939. In the years around the 1970(s) the role of corporate governance and responsibility, accountability was in demand and hence there was felt a need for the audit committee. The United States, Securities and Exchange Commission, first gave the recommendation for the constitution of an audit committee particularly in the cases of the public companies in which the members should be persons distinct from the management of the company. Further, in 1973 the New York Stock Exchange mandated that the members in the audit committee have to be three to five independent directors, i.e. they should have no connection with the board of directors, or they should be outside directors.

In the United Kingdom there was no legislative or regulatory framework for the establishment of an Audit committee. However the Auditing practices committees, an authoritative body for setting Auditing standards, recommended for constituting Audit committees by the companies. The Cadbury committee in its report also suggested for the establishment of an audit committee which should have a minimum of three non-executive directors, that the majority of the non-executive directorson the committee should be independent of management. The Hampell committee report also gave a similar recommendation, and said that though the larger companies have adopted the concept of audit committee, there may be relaxation for the smaller companies for the want of sufficient number of directors.

The concept of audit committee was not prevalent in India, the public financial institutions insisted on the formation of audit subcommittee, at least for the larger companies engaging non whole time independent directors. Though a large number of companies did have an audit subcommittee but there was no statutory compulsion on the companies.

The working group on companies act, 1956, in its report in February 1997 recommended that, there was no need for the audit committee and that should not be made mandatory and remain an voluntary affair of the company, though some professional and financial bodies recommended for the mandatory audit committee but the group felt that is not essential at that milieu. It is also evident from the extract of the report of the committee which suggested as follows, “At this juncture, the requirement for Audit Committees and nomination or remuneration Committees should not be mandated by the companies act. Instead it should be voluntary, with three apex industry

associations – CII, FICCI, and ASSOCHAM- playing a catalyst role."[3] In the year 1999, a committee was formed under the chairmanship of the former SEBI chairman K.R. Mangalam whose report recommended the need for an audit committee in the present Indian Scenario.

The statutory recognition to audit committee was only given when the provisions regarding the same were incorporated in the companies act, 1956, by an amendment in 2000, a new section (292A) was added which was dealing exclusively with the constitution of audit committee by the public limited companies having the prescribed paid up capital, compositions, and powers of the audit committee among other provisions.

**Constitution of Audit Committee**

**1) Constitution of Audit Committee under the Companies Act, 1956**

The provisions relating to audit committee were added to the companies act, 1956 after the amendment in year 2000. The provisions relating to the audit committee are the outcome of the failure of companies and rising dissatisfaction of the shareholders. It was a measure to bring in more effective corporate governance.

The companies Act, 1956, under section 292A provides *"a mandate for every public limited company to constitute and audit committee if the company is having a paid-up share capital of not less than Rs. five crore."*The provisions of companies act, 1956 states that *"a public limited company with paid up capital of Rs 5crore or more has to necessarily constitute an audit committee with not less than three directors and such number of other directors as the Board may determine, other than the Managing or whole time directors, also a Chairman is elected from amongst the members who shall attend the annual general meetings to provide clarification on matters related to audit."*[4]

2) **Constitution of Audit Committee Under Listing Agreement**

Clause 49 of the Listing Agreement deals with the constitution of an audit committee for the effective corporate governance. The listing agreement was amended in September, 2014 to bring in conformity with the Companies act, 2013. "The clause 49 of the lisiting agreement is applicable to all the listed companies through the official circular with effect from

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3 Report of The Working Group on The Companies Act, 1956 February 1997 *http://reports.mca.gov.in/Reports/29-Chandratre%20committee%20of%20the%20working%20group%20on%20the%20Companies%20Act,1997.pdf*

4 A. Ramaiya, Guide To Companies Act pg 3063 edn 18th (volume 2)

1st October, 2014. Other entities which are not companies per se but fall under the head of body corporate and are guided or regulated by some other statute, the clause shall apply to them till it is in conformity with their statute. In case any of the provisions of the clause violates the concerned statute, the listing agreement would cease to apply. Also this clause is not applicable to mutual funds"[5].

It is provided under the clause 49, that *"a company on which this clause is applicable should form an audit committee which is required to have a minimum of three directors of which atleast two third should be independent and all the said members of the audit committee so constituted shall be financially literate and at least one of the members should be an expert in thefield of financial management and accounting. Also that chairman so appointed should be financially literate, while the company secretary to act as the secretary to the audit committee."*[6]

### 3) Constitution of Audit Committee Under the Companies Act,2013

The companies act, 2013, under section 177 and Companies (meeting of boards and its powers) rule, 2014 (Rule 6) provides a mandate for the following *"companies to constitute an audit committee-*

a) *Every listed company and such other class or classes of companies as may be prescribed*[7]
b) *All public companies with paid up capital of ten crore or more*[8]
c) *All public companies having turnover of one hundred crore or more*[9]
d) *All public companies having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more*[10]*."*

Here it provided that the last financial statements (audited) would be taken into consideration for verifying the loans and other borrowings.

*"The audit committee so constituted shall consist of a minimum of three directors with independent directors forming a majority, also that the majority*

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5 Deepti Dhanank Revised Clause 49 Of The Listing Agreement, July 27, 2015 http://corporatelawreporter.com/2015/07/27/revised-clause-49-listing-agreement/

6 Audit Committee And Corporate Governance http://www.icaiknowledgegateway.org/littledms/folder1/chapter-9-audit-committee-and-corporate-governance.pdf

7 Section 177(1) of companies act, 2013

8 Companies (meeting of boards and its powers) rule,2014 r.6(1)

9 Companies(meeting of boards and its powers) rule, 2014 r.6(2)

10 Companies (meeting of boards and its powers) rule, 2014 r.6(3)

*of the members of the audit committee including chairman shall be person with ability to read and understand the financial statements."*[11]

> *"If a company is in contravention of the provision of section 177 of the companies act, 2013, the company shall be punishable with fine which shall not be less than one lakh rupees but cannot be more than five lakh rupees, and the member who is in default shall be punishable with one year of imprisonment or fine which shall not be less than Rs. 20,000 andcannot be more than Rs. 1 lakh or both."*[12]

It is hereby my submitted that the provisions relating to the constitution of the audit committee under the listing agreement clause 49 are most apt in the present scenario as it is required "as per the agreement that most of the members should be financial literate and should have expertise in the field of financial management and also there should a company secretary in the audit committee. Since most of the work of an audit committee is related to supervision of audit and finance it is essential that members should be have more expertise in the field of finances."

**Powers of Audit Committee**

**1) Companies Act, 1956**

Under section 292A of the companies act, 1956, *"The audit committee had the power to investigate matters related to half yearly or annual financial statements or any other matter which boards refers to it and in the investigation it has the power to access all the records of relating to the companies also if required to take any expert advice on the matter. It was the power of the audit committee to give recommendations to the board on financial matters which includes audit reports and the recommendations were binding on the board provided if the board does not accept the recommendations so given, it had to give reasons to the shareholders."*

**2) Listing Agreement**

The revised clause 49 of the listing agreement provides that *"the audit committee shall have the power to investigate any activity within its terms of reference, it may seek information from the employees, it has the power of obtaining legal or professional advices and to secure attendance of outsiders with relevant expertise, if it considers necessary."*[13]

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11 Section 177(2) of companies act, 2013

12 Section 178(8) of companies act, 2013

13 Security And Exchange Board Of India Corporate Governance In Listed Entitites-Amendments To Clause 35b And 49 Of Listing Agreement April 17, 2014 http://www.sebi.gov.in/cms/sebi_data/attachdocs/1397734478112.pdf

**3) Companies Act, 2013**

The companies act 2013 gives very wide powers to the audit committee. The audit committee has the power to call for the comments of the auditor about the internal control systems, the scope of audit, observations of the auditors, review of the financial statement issues related to internal and statutory auditors and also the authority to investigate any matters connected with these and for this purpose it may also seek and professional advice from outside sources and shall have complete access to the records of the companies.

Keeping in view the role played by the audit committee in effective corporate governance, the committee should be given wider powers which should be expressly provided in the statute and also it should be conferred with ancillary powers for the dealing with the issues which are encountered in the work undertaken by the audit committee. It should be kept in mind that the board should not in any manner influence the audit committee and the independence of the committee should be the paramount concern of the company.

**Duties of Audit Committee**

The duties of audit committee has been expressly provided for under the Companies act, 2013 under section 177 which provides "that the audit committee is required to give recommendations, terms of appointment and remuneration of the auditors of the auditors of the company, ensure the independence of the auditors, examine the reports of the auditors and other financial matters, approving or giving modifications as the case may be of the transactions involving the related parties, scrutinizing the inter-corporate loans, valuations of undertakings or assets of the company, evaluation of internal financial controls and risk managements and monitoring the end use of funds raised through public offers and related matters."[14]

Clause 49 of the revised listing agreementcast a duty on the chairman of the audit committee to attend the annual general meetings, also to answer the queries of the shareholders. Also this clause provides that "the audit committee should meet at least four times in a year and that there should not be a gap of four months in between the meetings. The quorum shall be either two members or one third of the members of the audit committee whichever is greater, but there should be a minimum of two independent directors."[15]

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14 Section 177(3) of companies ac, 2013

15 Security And Exchange Board Of India Corporate Governance In Listed Entities-Amendments To Clause 35b And 49 Of Listing Agreement April 17, 2014 http://www.sebi.gov.in/cms/sebi_data/attachdocs/1397734478112.pdf

The provisions regarding the meetings of the audit committee have not been expressly provided for under the companies act, 2013, rather they have been provided under the revised clause 49 of the listing agreement. The clause 49 has a limited application as it is applicable to entities which are guided by a statute only to the extent that it is in conformity with the statute, so keeping in view the present scenario, the companies act, 2013 should provide for the meeting of the audit committee and which shall be binding on the committees to follow.

**Role of Audit Committee in Providing Healthy Corporate Governance**

Corporate governance is a system which is the governing factor for a company to work in the best interest of its shareholder and also members. Corporate governance ensures the transparency also effective, hardworking and responsible management.

"Corporate governance is the acceptance by the management of the inalienable rights of the shareholders as the true owner of the corporation and their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between the personal and the corporate funds in the management of the company." [16] Corporate governance is the key element in improving the economic efficiency of a firm. Good corporate governance ensures that the boards are accountable to the shareholders. It ensures that the corporation works for the benefit of the society as a whole.

"The role and significance of Audit committee has assumed a critical role in preserving corporate transparency. Since transparency coupled with timely disclosure is heart of good corporate governance, it makes audit committee a much important feature of corporate governance. The essential function of audit committee is to ensure the integrity of financial reporting and the audit process by ensuring that the external auditor is independent and objective and does a thorough and comprehensive job, thereby promoting a culture and an expectation of effective oversight."[17]

Audit committee is one of the most important elements in the corporate governance, it is a pillar towards healthy corporate governance. The role played by the audit committee is most important as it helps in building the trust in the eyes of the shareholder. A shareholder invests in a firm in order to gain profits. An average shareholder first enquires about the financial conditions of the company before making an investment. It on the trust of the financial

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16 Report Of The Sebi Committee On Corporate Governance http://www.sebi.gov.in/commreport/corpgov.pdf

17 Vivek Kumar Jha, Audit Committee And Corporate Governance, Vol 1, 2004

statements an investor invests his money. An audit committee plays a fiduciary role in bring upon the true financial conditions of the company.

The function of the audit committee came in light after the famous case of Satyam computers.Satyam Company which has received an award for an excellence in corporate governance in 2008 and became a biggest fraud company in 2009, when the CEO and chairman of the company admitted that he fraudulently did manipulations to the financial statements of the company to show that the company is in profits. This case had received a wide publicity in the international media as the shareholders of the company were spread across the globe. After this case questions were raised as to the role of audit committee as in this case the audited financial statements also gave the evidence towards the profits of the company. Though the regulatory bodies were quick to take action against the defaulter but there raised serious question relating to credibility of the audit committee.

**Audit Committee and Related Party Transaction**

The audit committee in a company is required to review and monitor the related party transactions as a matter of good corporate governance. It is the function of the audit committee to either approve or make any subsequent modification of transactions of the company with the related parties[18]; it is also provided that the audit committee may give omnibus approval to the related party transactions which are proposed to be entered by the companies, subject to such conditions as it may prescribe[19].

The related party transactions arethe transactions entered by the company with the related parties, these transactions may include contracts which are rare or may be of any routine affairs including the buying and selling of the goods or materials, though it is provided under the companies act that no related party transaction can be done without the approval of the board of directors but there may be instances when these approvals are given out of biasness or favors towards the related parties. The audit committee though has been given the power to approve or modify the related party transaction, but it has to act in accordance with the reference given by the board.

The audit committee also only has the power either to approve or give modifications to the related party transaction, it is apparent from the language of the section that the audit committee cannot reject such transaction. Here the question of rejection or modification to such transactions comes into picture because the company in going through such contracts uses the money which

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18 Section 177(4)(iv)

19 Ibid

has been invested by the shareholders, or taken from the banks or other creditors, if the company incurs any losses subsequent to these contracts in which the company has not acted in good faith, it is in a way fraud to the shareholders and it is detriment to the interest of thee shareholders.

The audit committee may bring out such transactions in front of the shareholders in general meeting so that the shareholders may take a step towards the board to curb such type of practices.

**Audit Committee and Vigil Mechanism**

The concept of vigil mechanism was added in the Companies act, 2013, for the protection of the person who are using the mechanism. The Companies act, 2013 under section 177(9) and rule 7 of the Companies (Meeting of Boards and its Powers) Rules, 2014 castes a duty upon the company for the creation of a vigil mechanism for the directors and employees who wish to report some genuine concerns, and also it is for the vigil mechanism to provide for a safeguard of such persons against any sought of victimization and that there should be a provision to have access to the chairperson of the audit committee in the issues which are appropriate or exceptional, it is also the company has a duty for disclosing about such a committee on its website and report of the board.

The vigil mechanism is basically for the protection of the whistle blower,who discloses such an activity which is prejudicial in the interest of the company, a whistle blower may be a person from a company for example a director or an employee, he may be a person outside the company including an auditor or an advocate. Basically the provisions under the company act of 2013 are for the protection of whistle blower inside the company.

This vigil mechanism is essential for the corporate governance because, the activities of the corporate affect each and every member; it also affects the society and environment at large, and if a member of the company is trying to bring out a secret which is against the interest of the members there should be adequate protection given to him. Since under this mechanism there is direct access to the chairmen of the audit committee, the audit committee can take steps to make the mechanism stronger, and provide more safeguards so that the activities which have the adverse effect are brought to the notice and action can be taken at the right time.

**Audit Committee & Auditors Independence**

The audit committee has to give recommendations to the board of directors, for the appointments and other terms of service of the auditor. The auditors are known to be watchdog of the company's affairs.

A company appoints individual or a firm as an auditor who shall provide such services to the company, as is required or asked by the board of directors and the audit committee. The role of auditor here becomes an important role as he has the access to all the financial statements, and other sensitive data relating to the company. The main job of the auditor is to audit the financial statements of the company. An auditor may get influenced by the board and may misappropriate the accounts, so as to show there are more profits in company and less loss, this is where the role of audit committee comes into play, the task which the audit committee undertakes is to ensure independence to the auditor.

It is evident from the Satyam scam that the auditors may get influenced by the management; this may be due to the powers of the board or can be due to the economic factors. By having a glance at the financial statement of the company, an investor makes his mind for the investment. The audit committee can here ensure that the investor is not misled by the manipulated account sheets; the true picture of the company should be shown.

**Conclusion**

The audit committee is one of main pillars in corporate governance of a company. It has the principal responsibility of financial reporting and disclosure. The concept of audit committee was unknown in India, but after various scams and irregularities committed by the companies it was felt in the interest of the people, there should be a mechanism, independent from the management of the company which should have the task of overviewing the financial statements of the company. It was in the year 2000 that the Companies Act, 1956 was amended to add section 292A for dealing with the formation and other provisions relating to the audit committees. SEBI also enacted the clause 49 of the listing agreement which further emphasized on the need of an audit committee with independent non-executive directors. Various amendments were sought in the audit committee, and then the Companies Act, 2013 came up with new provisions relating to audit committee, which demarcates the powers, duties of the audit committee and also provides for the formation of a vigil mechanism. Also the Companies Act, 2013 provides that the majority of the members of the audit committee should have ability to read and write financial statements.

The audit committee plays a pioneer role in the corporate governance. The committee has the most important task of overviewing the financial statements of the corporation. The audit committee provides for the independence of the auditor, and prevents any sought of interference in his job by the management or the board. It is in the interest of the shareholders and other members that a clear picture of the companies' accounts should be kept in front of them, so that they may take appropriate decisions.

It is hereby submitted that, though the Companies Act, 2013 has very fairly given the provisions relating to the audit committee, but in the opinion of the researcher there should me some provisions relating to the audit committee should be added, the act should state as to when the audit committee should meet and quorum of the meeting, though these provisions have been given in the revised clause 49 of the listing agreement, but the agreement has its own limitation and insertion of such a provision in the act itself would give it a statutory recognition. In addition to this the audit committee should be given power to cancel or declare a related party contract, or any other contract which in the opinion of the audit committee is against the interest of the company or shareholders or other members of the company. The audit committee should act independently and provisions should be added in the statute to provide for more independence of the audit committee, the audit committee is though made up independent directors; it may at any point of time get influenced by the board, which may be determent to the interest of the members. There should be provision in the companies act itself which should provide for the term of the audit committee because by this provision the independence of the committee would remain intact.

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# Dr. Ambedkar's Perspectives on Untouchability in India: An Appraisal

**Dr. Yogender Singh** *

**Abstract**

From among the marginalized sections, there arose Dr. B. R. Ambedkar as a champion and spokesman of the millions of dump human beings. After adopting the Constitution for free India, Ambedkar brought to the notice of the people that mere political democracy was not sufficient but social and economic democracy was also essential. Untouchability is a disgrace and disadvantageous to almost all the Indian, particularly to the ex-untouchables who form approximately one-fifth of the total population of our country. Thus, it is not the problem of a few persons, but of a large humanity. It is however, becoming more conspicuous in the manifestation of various forms of atrocities, often spreading widely throughout a particular region, rather than mere touch-me-notism. This trend is, of course, very dangerous to the national unity and integrity. Thus, the problem is becoming more acute, complex and serious causing disharmony in the society. The present paper aims at highlighting Dr. Ambedkar's views on caste as an institution of social inequality and unjust social order that goes against the spirit of democratic society and also discusses the various causes, solution and laws relating to this social evil.

**Keywords:** Untouchability, caste, civil rights, defilement, contamination.

## Introduction

The Constitution has declared untouchability as an offence punishable by law, but it has not defined the said offence. The parliament which subsequently has passed the Protection of Civil Rights Act, 1955 to deal with the cases of untouchability also failed to provide the definition of untouchability. In the absence of its clear definition, it is difficult to determine whether or not the given facts constitute untouchability. Therefore, it is proposed to define untouchability with all its essential ingredients in the light of definition given by various authorities stated here under.

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**Meaning of Untouchability**

According to Maharshi V. R. Shinde, "A nation-wide institution indicating three features of often observing pollution, asking to live outside of village and not giving equal legal protection of law." In view of Mahatma M. K. Gandhi, "untouchability means pollution by the touch of certain persons by reason of their birth in a particular state of family." As per Dr. B. R. Ambedkar, "untouchability is the notion of defilement, pollution, contamination and the ways and means of getting rid of that defilement. It is a case of permanent, hereditary stain which nothing can cleanse." Mr. Justice N. Sreenivas Rao's opinion that, "The subject-matter of Article 17 is not untouchability in its literal or grammatical sense but the practice as it had developed historically in this country. The use of the word untouchability refers to the meaning of the term in the context of the historical development of the practice and does not connote its literal meaning.[1] A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic or contagious disease or on account of social observance such as are associated with birth or death or due to social boycott resulting from caste or other disputes. Untouchability in such circumstances has no relation to the causes which relegated certain classes of people beyond the pale of the caste system."

It is said that the institution of untouchability is not an independent institution in itself. According to the L. Elaya Perumal Committee, "untouchability is not a separate institution by itself, it is a corollary of the institution of the caste system of Hindu Society." According to C. Parvathamma, "untouchability is part and parcel of Hindu religion and Caste system." According to V. S. Nargolkar, "untouchability is largely an out-growth of the system of caste and caste in its turn is the illegitimate child of the concept of Varna." At this juncture, it is necessary to take into account the definition of caste. According to Senart, "Caste is a corporate group exclusive and in theory at least, rigorously hereditary. It possesses a certain traditional and independent organization, a chief and a council and as occasion demands it meets in assemblies endowed with more or less full authority. Often united in the celebration of certain festivals, it is further bound together by a common

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[1] Subir K. Bhatnagar, Untouchability and the Indian Constitution: Ambedkar's Perspectives, Shashi Mehra (ed.) Ambedkar's Perspective on State Caste and Social Justice, 2002, Sanjay Prakashan, New Delhi.

profession and by the practice of common customs which bear more especially upon marriage food, and various cases of impurity. Finally, it is armed, in order to assure its authority, with a jurisdiction of fairly wide extent, capable by the infliction of certain penalties, especially of banishment, either absolute of revocable, enforcing the Power of the Community."

According to Dr. B. R. Ambedkar, the idea of pollution is by no means a peculiarity of caste as such. It usually originates in priestly ceremonialism and is a particular case of the general belief in purity. Undoubtedly, caste system has consolidated the institution of untouchability by enforcement of several disabilities and restrictions under the fictitious belief of 'purity'. As such caste and untouchability are so intertwined with each other that one cannot safely bifurcate them.

**Causes of Untouchability**

There are three basic causes responsible for untouchability i.e. racial or caste system, religion and social factors. One of the fundamental reasons of untouchability is the caste consideration. Large number of castes existed in India. All are busy in fighting with other caste peoples. Religious factors constituted another cause of untouchability purity and divinity were given important place in religion. These were considered essential in motivating people abstain from being engaged in impure occupation. Therefore due to their engagement in polluted occupation the basket maker, sweepers, cobbler were regarded as untouchables. Social factors also appear equally significant in maintaining untouchability. Religious and racial causes give recognition to social customs and convention upholding the prevalence of untouchability. Thus, the religious, racial and social factors not only cost the origin of the practice of untouchability but also strengthen it.

Effects of Untouchability on Society

The followings are the various effects of untouchability on society:

(a) The practice of untouchability leads to societal discrimination.
(b) It ruins social fraternity.
(c) It perpetuates inequality among people.
(d) It damages the self-image and prestige of the downtrodden.
(e) It has provided scope for religious conversion. It also destroys the development and progress of the country.

## Constitutional and Legislative Provisions

The constitution of India eradicates the custom of untouchability under Article 17. Practice of untouchability is an offence and anyone doing so is punishable by law. The Untouchability Offences Act of 1955 (renamed to Protection of Civil Rights Act in 1976) provided penalties for preventing a person from entering a place of worship or from taking water from a tank or well. This Act lays down that whatever is open to general public should be open to the members of the scheduled caste. No shopkeeper can refuse to sell them, no person may refuse to render any service to any person on the ground of untouchability. The Act made provision for imprisonment and fine. But again it was felt that the Protection of Civil Rights Act, 1955 is inadequate, to meet out the demand of fast changing time. Thus, a need did arise to find out relevancy in the meanings of the words 'untouchability' and the 'atrocity'. So, in order to make law more effective, efforts were made to penalize, such acts in which untouchability was practiced by use of force, in 1989, the Parliament in exercise of the power conferred under Article 35 enacted, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which contemplates panel provisions specifying the various acts which are to be prohibited and penalized.

## Scheduled Caste and Scheduled Tribes Atrocities Act, 1989: Various phases of Amendments

The prevention of atrocities against scheduled caste and Scheduled Tribes Act 1989 was amended in 2014 to include new offences and to ensure speedy justice to victims the amendments to the act were originally issued as an ordinance by the previous UPA government the NDA government had also got the amendments certain changes became necessary to the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities Rules) 1995 the said rules modified and were notified on 14th April 2016.

In *Dr. Subhash Kashinath Mahajan vs. The State of Maharashtra and Another*,[2] the Supreme Court gave directions that there is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. The directions of the Hon'ble Court to conduct a

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2 Supreme Court Judgment dated 20.03.2018 in Criminal Appeal No. 416 of 2018.

preliminary inquiry within seven days by the Dy. S.P. concerned to find out whether the allegations make out a case under the Prevention of Atrocities Act and that arrest in appropriate cases may be made only after approval by the S.S.P., would delay registration of First Information Report (FIR) and will impede strict enforcement of the provision of the Prevention of Atrocities Act. It may also be difficult to get the preliminary inquiry conducted within seven days as sufficient number of Dy. S.P level officers are usually not in place. Typically, the Dy. S.P. is located at the district level and not at taluk/block level. Other repercussions of the said directions of the Hon'ble Court are that delay in registration of FIR would result in delay in payment of admissible relief amount to the victims of atrocities admissible only on registration of FIR. All this would adversely affect the very objective of the Act to prevent commission of atrocities against members of SC and ST and be severely detrimental especially in heinous offences like sexual exploitation of SC/ST women including rape, gang rape, acid attacks and murder etc. This matter being of very sensitive nature had caused a lot of unrest and a sense of disharmony in the country. As such, a Review Petition dated 02.04.2018, was filed by the Union of India in the Hon'ble Court praying for recalling and reviewing their Order but no relief had so far been granted by the Supreme Court.

In order to reaffirm the reliance and trust of members of SCs and STs, The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2018 was passed by the Parliament. By this Amendment, Section 18A has been inserted to nullify conduct of a preliminary enquiry before registration of an FIR, or to seek approval of any authority prior to arrest of an accused, and to restore the provisions of Section 18 of the Act.

Section 18A, inserted in the Act, states that:-

(1) For the purpose of the Prevention of Atrocities Act,-
   (a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or
   (b) the investigating officer shall not require approval for arrest, if necessary, of any person, against whom an accusation of having committed an offence under the Prevention of Atrocities Act has been made and no procedure other than provided under the Prevention of Atrocities Act or the Code of Criminal Procedure, 1973, shall apply.

(2) The provision of section 438 of the Code shall not apply to a case under the Act, notwithstanding any judgment or order or direction of any Court.

The following major changes have been made via recent Amendment:

1. Rationalization of the facing of relief amount payment to victims for various offences of atrocities the rules also specify relief amount for various offences of atrocities.
2. Not linking payment of any part of relief amount with the requirement of medical examination for known in grave kind of offences against women like sexual harassment, gestures for acts intended to insult the modesty to destroy voyeurism stalking etc.
3. Provision of relief for offence of rape and gang rape.
4. Increase in the existing quantum of relief amount depending upon the nature of the offence while linking it with the consumer price index for industrial workers.
5. New offences of atrocities added to the list of atrocities the following new offences have been added to the list of atrocities on SCs and STs.
6. Tonsuring of head, moustache or similar acts which are derogatory to the dignity of members of SCs and STs.
7. Garlanding with chappals.
8. Denying access to irrigation facilities for forest rights.
9. Dispose or carry human or animal carcasses or to dig graves, using manual scavenging.
10. Dedicating a SC/ST woman as Devdasi.
11. Abusing caste name perpetrating witchcraft atrocities.
12. Imposing social or economic boycott.
13. Reverting SC/ST candidates from filing of nomination to contest elections.
14. Hunting a SC/ST woman by removing her garments.
15. Forcing a member of SC/ST to leave house village or residence.
16. Defiling objects sacred to members SC/ST.
17. Touching or using words, act or gestures of a sexual nature against members of SC/ST.
18. Establishment of special Court: the amendments to the Act also mandate the establishment of exclusive Special Courts and appointment of exclusive special public prosecutors to try the offences under this Act. This is made to enable speedy justice and expedious disposal of cases. The special courts have been empowered to take cognizance of offences and as far as possible completion of trial of the

case within two months from the date of filing of the charge sheet. The state governments have been asked to prepare a panel of senior advocates who have been in practice for not less than 7 years for each district for conducting the cases filed under this Act. The state government has also been asked to review the performance of these advocates at least twice in a calendar year. They are also asked to review various reports received, investigation made and preventive steps taken by the District Magistrate, Sub-divisional Magistrate and Superintendent of Police, relief and rehabilitation facilities provided to the victims etc.

**Suggestions**

Followings are the valuable suggestions to eradicate the monster of untouchability:

(i) Literacy: education is the best tool for the destruction of untouchability. Therefore, exertion ought to be made for the spread of education among the untouchability. Additionally, course of action ought to be made by the government for the spread of general and specialization educating among Harijan understudies. Extraordinary instigations as grants, free inn convenience, books stationary and so forth ought to be given to them.

(ii) Financial help: the financial state of the untouchability still keeps on being hopeless. Dalit upliftment would remain a devout expectation the length of their financial position stays unaltered. Consequently, they ought to be given professional preparing in different specialties and specialized aptitude and monetarily ought to be helped to begin little scale and house business of their own. Financial weakness of dalits must be expelled through open doors for beneficial business and change in economic wellbeing provision of land, water system offices, supply of bullocks, agrarian instruments seeds and excrements etc..

(iii) Proper implementation of laws is the prime necessity to eradicate the evil of untouchability. If all the constitutional safeguards properly implemented then the level of untouchability definitely decreased.

(iv) Caste system is the root cause of the origin of untouchability. Therefore, the abolition of caste is very essential for the eradication of untouchability.

(v) Inter-caste marriage should be appreciated by the all the community. By inter-caste marriage, not only husband and wife of different caste but

their families too shall be united. Hence, for the removal of untouchability, inter-caste marriages, especially between the higher caste and untouchable caste should be encouraged by all possible means.

(vi) Public awareness is also an effective weapon to eradicate untouchability. For the annihilation of untouchability, publicity ought to be tireless coordinated by the government and other social associations against this fiendishness through the broad communications of correspondence like radio, T.V., daily paper and so on.

## Conclusion

Law is undoubtedly, a powerful weapon to bring about social change in a given society, but unless it is flawless and its implementation is free from bias, its purpose cannot be accomplished. So, it is need of the hour that this Act should be implemented sincerely and expeditiously so as to achieve the goal of social equality.

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# Emerging Trends of Cheating, Fraud and Corruption in Banking and Corporate Sectors

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**Abstract**

The financial embezzlementand unethical practice in the corporate sector is not a unique thing. It has been prevailing since many decades. It is symptom of greedy and becoming a crorepati in a night which affects the transparent system of a good governance of corporate business. The impact of it is negative on all the segment of society. It will continue till corrupt people find social acceptance on the one hand. There is huge admiration of wealth amongst businessmen not only in India but also in many countries. The businessmen and other corporate persons use the unethical and illegal practices in their business and earn the huge wealth/ money. These persons knowingly violate the rules, regulations, legislations, laws and policies of the government. They also play with feelings of the people/ public and make huge loss to them/ public because these persons are protected by the politicians and the big boss/ persons and they give the illegal gratification to such politicians and other persons in this regard. There are a large number of examples in this context. Currently, Vijay Mallya, a businessman and tycoon is an offender under the Money Laundering Act and Criminal Acts. In August 2016, the CBI registered FIR against him for allegedly causing a loss of Rs 6,027 crore to a State Bank of India- led consortium of banks. In another, in a comprehensive documents/ probe of the Enforcement Directorate agency in all the alleged willful defaults involved funds of Over Rs 9,000 crore. Subrata Roy Chief of Sahara Company is an accused in multi-crore scam. He has been cheated and fraud with the investors those invested their money in the company which was misused/ embezzled by the chief of the company. For this, he was put in Tihar jail. In another, Nirmal Singh Bhangoo and Sukhdev Singh, Delhi based Pearl Group Known as PGF Limited and the PACL Limited Director, the CBI registered cases of criminal conspiracy and cheating against them on alleged charges of collection of huge deposits from the public under the grab of allotment of agriculture land to depositors. These properties included agricultural and

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commercial land in Punjab, Haryana, Goa, Bangalore and Delhi. In another, Saradha, multi crore rupee Chit Fund Company, it was a multi crore rupee chit fund fraud company which was set up in 2008.

**Introduction**

The practices of cheating, fraud and corruption in the banking and corporate sectors is not a new thing. It has been prevailing since many decades. It is symptom of greedy and becoming a crorepati in a night which affects the transparent system of a good governance of corporate business. The impact of it is negative on all the segment of society. It will continue till corrupt people find social acceptance on the one hand. There is huge admiration of wealth amongst businessmen not only in India but also in many countries. The businessmen and other corporate persons use the unethical and illegal practices in their business and earn the huge wealth/ money. These persons knowingly violate the rules, regulations, legislations, laws and policies of the government. They also play with feelings of the people/ public and make huge loss to them/ public because these persons are protected by the politicians and the big boss/ persons and they give the illegal gratification to such politicians and other persons in this regard. There are a large number of examples in this context. Currently, Vijay Mallya, a businessman and tycoon is an offender under the Money Laundering Act and Criminal Acts. In August 2016, the CBI registered FIR against him for allegedly causing a loss of Rs 6,027 crore to a State Bank of India- led consortium of banks. In another, in a comprehensive documents/ probe of the Enforcement Directorate agency in all the alleged willful defaults involved funds of Over Rs 9,000 crore. Subrata Roy Chief of Sahara Company is an accused in multi-crore scam. He has been cheated and fraud with the investors those invested their money in the company which was misused/ embezzled by the chief of the company. For this, he was put in Tihar jail. There are also many more person those have committed fraud, cheating and corruption.Today, no countryis free from the corruption in the banking and corporate sectors. Many persons have been found involved in the context. They have cheated to their staff members, colleagues, promoters, banks and others persons. It is not a good practice and there may not be transparency in the governance of the business of the corporate sectors. In this paper an attempt has been made to discuss the problem of fraud/ cheating and corruption made by the company chief/ owner/ director/ holder or staff against their clients/ investors and banking.

**Meaning and Definition of Corporate Fraud/ Cheating, Corruption and Financial Embezzlement:-**The corporate fraud committed by an individual or a company with dishonest or illegal manners. The corporate fraud degrades the

position of the company and creates complexity and affects the business[1]. There have been many instances of corporate fraud which are conducted in many ways. The corporate fraud is generallyconductedfor taking advantage by or through disadvantage manners and try to access on sensitive assets or unlawful assets. The corporate fraud has aim to disguise or misrepresent a service or product of the company which hides its defects[2]. The corporate financial embezzlement means to take entrusted money of otherswith fraudulently manner or it means fraudulently appropriation of other's property[3] or the cheating, fraud, misappropriation of property/money, criminal conspiracy, forgery of valuable security will, forgery for cheating, using forged documents as genuine, falsification of accounts in the business of the company/s, firm/s or in corporate sectors. There are a large number of embezzlers in the corporate sector who embezzle the assets of the company. It is called a white-collar crime/ fraud where a person misappropriates the assets of others for himself or herself use. It is considered afraud that such asset/ property are attained unlawfully and the embezzler have the right to possess on it[4].

**Corporate Cheating and Fraud under Companies Act, 2013:** The companies Act has provided the meaning and definition of the corporate fraud. It provides that any act or omission or concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss[5]. Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into, any agr or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or any agreement for, or with a view to obtaining credit facilities from any bank or

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1 https://www.investopedia.com/terms/c/corporate-fraud.asp#ixzz56a5fb6xZ

2 Ibid

3 Bhargava Dictionary English-Hindi, Reprint--2009

4 https://financialdictionary.thefreedictionary.com/embezzlement. See also https:// en.wikipedia.org/wiki/Embezzlement

5 https://blog.ipleaders.in/corporate-fraud-and-prevention-mechanisms-under-companies-act-2013/

financial institution[6]. There, if business is being conductedwith intent of fraudulent or unlawful purposethen company shall be liable for stern action[7]. Where it is found thata company has been set up or established with the aim and object of with the intention of deceiving the creditors or any other persons then company shall be liable for punishment for fraud[8].For the company's fraud imprisonment for a term not less than 6 months and up to 10 years and fine shall be awarded, if the fraud involves public interest, the minimum than imprisonment of 3 years shall be awarded[9].

**Reasons of Fraud/ Cheating and Corruption:** There may be many reasons of the cheating, fraud and financial embezzlement in these sectors. Firstly, that person may be greedy of money; secondly he/she wants to become crorepati in night by using the illegal means and ways or wants to earn more and more money violating all the legal and social values/ rules, regulations/ laws. Thirdly, there is flexibility of the rules, regulations and laws of the government. Fourthly, providing of protection to fraudulent persons or providing the protection to fraudulent by the government or politicians or big bosses.

**Some Cases, Examples/Instances of Corporate Fraud/ Cheating, Corruption and Financial Embezzlement:** There are many examples/instances of cheating, fraud, corruption, and financial scams. Satyam Computer Service scam has shattered the peace and tranquility of Indian investors and shareholder community beyond repair. Satyam is the biggest fraud in the corporate history to the tune of Rs. 14000 crore. On April 9, 2015, a Special CBI court held the founder chairman of Satyam Computer B. RamalingaRaju and nine other guilty and awarded them a 7 year imprisonment. All 10 accused including Raju's brother and former Managing Director of the Company Rama Raju, were convicted under various sections of Indian Penal Code including 120B, 409, 467,468,471, and477-A. In January 2009, he had confessed the fraud. The court also imposed fine of Rs 5.5 crore each, the 8 other accused were directed to pay a fine of Rs 50 lakh each. During the 6

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6 Ibid, section 36

7 Ibid, section 206

8 Ibid, section 251(1)

9 Ibid, Section 447

years trial, around 3,000 documents were marked and 226 witnesses examined. It is a biggest corporate fraud in corporate sector[10].

**(i) Saradha Chit Fund Fraud of Rs 25,000 crore, 2013:** It is a multi crore rupee chit fund financial fraud/embezzlement /scam. It lured investors to deposit their money in the company. It has been fraud with the investors. The director and other related officials have been arrested by the CBI. Many politicians also have been arrested in this fraud. It is financial embezzlement /scam of about Rs 25,000 crore. The Appex Court directed the CBI to probe it in various states i.e. West Bengal; Odisha and Assam where allegedly duped of Rs 25,000 crore. The CBI set up the Special Investigation Team (SIT) to probe the scam. In Odisha, there were about forty four other companies which were found involved in the scam. Chief SudiptaSenof Saradha Group was arrested by the West Bengal Police in Kashmir and a Trinmool Congress Member of Parliament was also arrested on November 23, 2013. The Apex Court has said that it is surprising that investigation is conducted by SEBI and RBI, but the scam not only birth but also flourished unhindered.

**(ii) Pearl/ PACL Limited fraud of Rs 45,000 Crore, 2014:** The CBI in February, 2014 registered cases of criminal conspiracy and cheating against Delhi based Pearl Group known as PGF Limited and the PACL Limited and their promoters namely Nirmal Singh Bhangoo and Sukhdev Singh on alleged charges of collection of huge deposits from the public with intent ofgiving of agriculture land to depositors. The CBI,in January, 2016, arrested the chairman and managing director of Perals Golden Forests Nirmal Singh Bhangoo. Such properties were situated in Punjab, Haryana, Goa, Bangalore and Delhi. On February 2, 2016, the Supreme Court, bench comprising justices Anil R. Dave and A.K. Goel appointed a committee headed by former Chief Justice R.M. Lodha to monitor the sale and refund, ordered the sale of the property of Pearls Agrotech Corporation Ltd (PACL) and refund the investors duped by the company. The Bench directed the CBI to hand over the entire property document seized to the SEBI so that market regulator could begin the sale and refund process. SEBI had directed another group company Pearls Green Forests Ltd, to refund the money it had collected under various schemes to the investors mainly in Punjab and Haryana as per the term of the offer. On September 6, 2017, the SEBIlevied fines of Rs 2,423 crore on it. The group

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[10] The Tribune April 9, 2015

had collected Rs 49,100 crore through unregistered collective investment schemes in violation of rules over a period of 15 years[11].

**(iii) Investment Sahara Company Fraud: Cheating/ Fraud with the Investors, 2016:** It is multi-crore financial embezzlement /scam which is committed by Subrata Roy Chief of Sahara company. It was a cheating or fraud with the investors those invested their money in the company which was misused/ embezzled by the chief of the company. For this, he was put in Tihar jail. The Supreme Court held that if he fails to make the payment of the investors then we will entrust the sale of properties to some Asset Management Company (AMC). The Supreme Court, on March 28, 2016, asked the regulator SEBI to immediately start selling Sahara properties across the country as the group had failed to secure the release of its chief Subrata Roy by depositing Rs 10,000 crore as bail amount. The court ordered the 86 properties of his to be sold under the guidance and supervision of the retired SC judge B.N. Aggarwal. Nowhere in the world does a person say he has property worth Ra 1.87 lakh crore but is unable to pay even Rs 10,000 crore. In March –April, 2017, many property of Subrata was sold[12].

**(iv) Cheating / Fraud with Banks by Vijay Mallya Businessman, 2016:** Vijay Mallya a businessman and tycoon is an offender under the Money Laundering Act and Criminal Acts. In August 2016, the CBI registered FIR against him for allegedly causing a loss of Rs 6,027 crore to a State Bank of India- led consortium of banks. In another, in a comprehensive documents/ probe of the Enforcement Directorate agency in all the alleged willful defaults involved funds of Over Rs 9,000 crore. He is in United Kingdom. He is also facing extradition proceedings in the U.K in a criminal case of CBI. As part of money laundering probe, the ED has so far attached assets worth over Rs 9,900 crore. In 2017, the former Chairman of United Bureej Vijay Mallya taken the loan of Rs 9.5 billion from the IDBI bank but he did not return/ repay the loan to bank. The CBI registered the case against him and 10 other persons. In 2017, Calcutta based businessman Nilesh Parekh was arrested by the CBI for alleged loan fraud of Rs 22.23 billion from the 20 banks. The promoter of Abhijeet Group and former DGM of Canera bank, in 2017, were arrested by the CBI for alleged loan fraud of Rs 2.90 billion from the two government banks. In 2017,

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11 The Tribune February ,2014, January, 2016, and September 6, 2017

12 The Tribune March 28, 2016 and March –April, 2017

the CBI has registered a case of fraud of Rs 83.60 billion against the former Zonal head of the Bank of Maharashtra and a private company Logistic of Surat, Gujarat state.

**(v) Diamond R US, Solar Exports and Stellar Diamonds and Gitanjali Gems Fraud, 2018: Cheating / Fraud with Punjab National Bank by Nirav Modi and Mehul Choksi:** This scam or fraud was of Rs 11,400 crore. On February 14, 2018, the Enforcement Directorate registered a case against diamantaire Nirav Modi and others under the Prevention of Money Laundering Act. The CBI had received the two complaints from the PNB against him and a jewellery company, one–third of its market capitalization, at one of it Brandy House branch in Mumbai. Nirav Modi and his associates allegedly floated several Firms/ Companies ostensibly in the diamond business- Diamond R US, Solar Exports and Stellar Diamonds. Bogus invoices and orders from buyers generated by these companies/ firms were used to borrow funds from the Punjab National Bank[13]. Nirav Modi's uncle Mehul Choksi who is the Chairman and Managing Director of Gitanjali Gems is listed on the exchanges was earlier barred from the stock markets by SEBI for manipulating the company's stock price. Diamond merchant NiravModi has opened stores in many places i.e. New York, Las Vegas, Singapore, London, Macau, Portuguese, and Hong Kong etc etc. His operations were prevailing in Antwerp, Belgium and China also. His aim was to open the 100 stores in major cities of the world by 2020. The Enforcement Directorate has conducted multiple searches in many places of the NiravModi and seized diamonds jewellery and gold worth Rs 5,100 crore. NiravModi has left India on January 1, 2018 with his family. Now Modi, his family and his uncle MehulChoksi all are wanted in this bank fraud/ scam case. This fraud/ scam were started in year 2011 but it is very surprising that no government had taken action against the culprits. It seems that it has become a practice to loot and run away abroad/ foreign country, no action will be taken against you. Vijay Mallya and Rishi Agarwal are the bank defaulters and have left India before arresting. There have been a large number of bank loots which may be involved 30 banks including the SBI, Bank of Baroda, Vijaya Bank, State Bank of Saurashtra, Overseas Bank of India etcetc[14]. The Income Tax Department has also booked

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13 The Tribune February 14-15, 2018

14 Ibid

him under the new Anti-Black Money Act for alleged possession of illegal assets abroad[15].

**(vi) Rotomac Pen Promoter Vikram Kothari Fraud, 2018: Cheating / Fraud with Banks:--**This scam/fraud took place or came into light on February 19, 2018. This scam was of Rs 3,695 crore. The Rotomac Pen promoter /Managing Director Vikram Kothari allegedly swindled of crore rupees from a consortium of seven banks. The CBI and ED have registered cases against him for cheating or defaulting with the banks. He had taken the loan from the seven banks. These banks are as Rs 456.53 crore from Bank of Baroda, Rs 754.77 from Bank of India, Rs 49.82 from Bank of Maharashtra, Rs 330.68 crore from Allahabad Bank, Rs 97.47 crore from Oriental Bank of Commerce, Rs 771.07 crore from Indian Overseas Bank and Rs 458.95 crore from Union Bank of India. Vikram Kothari had made the Rotomac Global Pvt Limited Company. His many property and banks accounts haven attached and seized[16].

**(vii) Ashirwad Chain Company and TechMech International Private Limited Fraud, 2018 Cheating / Fraud with Bank of Maharashtra:--**This fraud/ scam were of Rs 950 lakh. The Bank of Maharashtra Mumbai, on February 24, 2018 has filed FIR with CBI against a Delhi based businessman Amit Singla and his associates for defaulting on loans taken by him. The bank said that Amit Singla, proprietor of Ashirwad Chain Company, his father, mother, TechMech International Private Limited and other persons have conspired. The bank said that on October 27, 2010, Ashirwad Chain Company was sanctioned a credit facility of 350 lakh which was enhanced to 550 lakh. The total credit facility was hiked to 950 lakh in August, 2012. The bank further said that the borrowers deceived it and dishonestly induced the bank by forging documents for obtaining the loan[17].

**(viii) Simbhaoli Sugars Mill Limited Fraud, 2018: Cheating / Fraud with Oriental Bank of Commerce Dehli:--**On February 25, 2018, a case was registered against Simbhaoli Sugars Mill Limited, with an alleged bank loan fraud of Rs 97.85 crore. The Mill is big mills in the country. The CBI also registered a case against the chief executive officers and others officers. The

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15 Ibid

16 The Tribune February 20, 2018

17 The Tribune February 25, 2018

Mill had taken the loan from the bank in 2011 but did not return to the bank. The milltaken second corporate loan of Rs 110 crore for repaying the previous loan. In 2015, Rs 97.85 crore was declared fraud. The second loan was declared NPA on November 29, 2016. The Oriental Bank of Commerce (OBC) was allegedly cheated of Rs 97.85 crore but loss incurred by it is Rs 109.08 crore. According to the FIR, the OBC had givenRs 148.60 crore in 2011 for financing 5,762 sugarcane farmers for supplying produce to mill from January 25, 2012 to March 2013. Thisamount was dishonestly used by mill for its own needs. The money declared Non- performing Assets (NPA) on March 31, 2015. On May 13, 201, this amount was declared alleged fraud by the bank[18].

**(ix) Computer Manufacturer R.P. Info Systems Fraud, 2018: Cheating / Fraud with Canara Bank of Dehli:** This fraud/ scam were of Rs 515 crore. On February 28, 2018, this scam/fraud came into light and CBI has registered a case aganit Kolkata based computer manufacturer R.P. Info Systems and its directors for cheating to bank and nine members' banks of a consortium. The loans were taken on the basis of false documents. It is allegedly that the company with brand name "Chirag" had taken funds from the consortium from 2012 onwards. In 2015, the CBI had booked this company for cheating with IDIB bank to the tune of Rs 180 crore. This is the third incident of the month of February, 2018 fraud with banks. According to the Reserve Bank of India data, the state owned banks reported 8,670 loan fraud cases over the last five fiscal years up to March 31, 2017. The other members of the consortium were State Bank of India, State Bank of Bikaner and Jaipur and State Bank of Patiala, Union Bank of India, Allahabad Bank, Oriental Bank of commerce, Central Bank of India, Punjab national Bank and Federal Bank[19].

**(x) SRS Group Scam/Fraud withBanks of Rs 30,000 crores, 2018:---** On April 5, 2018, the police had taken custody to Anil Jindal , Chairman of this Group, and four of his associates for cheating to the people of Rs 30,000 crores. A large number of people had invested of croresrupeesin this Group which committed cheated with the people. The group has variegated its own business portfolios comprising gold and jeweler, cinemas, retail, hospitality, healthcare and financial services. He (Anil Jindal), before starting this group/ company, was working the business of selling of milk. The Faridabad police of

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18 Sugur mill to brass in Rs 97 –cr bank fraud, The Tribune February 26, 2018

19 Now, Rs 515 cr loan fraud surfaces in Canara Bank, The Tribune March 1, 2018

Haryana State, also had registered 22 cases against them on March 4, 2018 under sections 420, 406 and 120 B of Indian Penal Code, 1860 and section 3 of the Haryana Protection of Interest of Depositors (in Financial Establishment) Act for duping people on pretext of giving them flats and monthly interest[20].

**(xi). Banking Sector Fraud/Scams Instances:--** In 2011, the CBI revealed that ten thousand fake accounts were opened in the Bank of Maharashtra, Central Bank, OBC and IDBI and taken the loan of Rs 1.5 billion. In 2014, Electotheram India Company alleged fraud of Rs 4.36 billion to Central Bank of India. In 2014, Calcutta based businessman Vipin Vohra had taken the loan of Rs 1.40 billion on fake documents from the Central Bank of India. In 2015, the employees of the Jain Infraproject alleged fraud of Rs 2.12 billion to the Central Bank of India. In 2016, four peoples opened the 386 accounts in Syndicate Bank and alleged fraud of Rs 1 billion. They used the fake cheques, letters of credits (letters of understandings) and LIC policies[21]

**(xii) Involvement of Bank Officials in Bank Loan Scams: Purchasing of Property and Opening of Banks Accounts by Banks Staffs/ Officers in Foreign Countries:** It is a hard fact that such big fraud cannot take place or happen without involvement of the bank officials. In the investigation of the PNB fraud case, the investigating agencies found or disclosed that there may be many bank's staffs or officers those have been purchased the property and opened the banks accounts in the foreign countries. The investigating agencies said that there are found many bank officers/staffs involved in the corrupt activities and they have excess assets/ income instead of their actual income. The CBI on March 23, 2018, has registered a case against former General Manager of IDBI bank and 30 others for making cheating the bank of Rs 445.32 crore by availing Kishan Credit Cards and Fish Farming Loans on the basis of fake documents. On December 28-29, 2018, the Central Finance Minister ArunJaitly said that about 6000 bank officials is responsible for NPA or for giving the fraud loan to the peoples. He said government will take stern action against such officials. Such officials may be terminated/ dismissed from service or given compulsory retirement, or demotion etc. On January 20, 2019, the central government has sacked two PNB executive directors in case of NiravModi scam for not performing proper duty and not controlling over the

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20 The HariBhumi and The Tribune, April 6, 2018

21 HariBhumi, February 17, 2018. This data revealed by the IIM Banglure

functioning of the bank. The services of these officialsnamely KV Brahmaji Rao and Sanjiv Saranwere dismissed or terminated from January 18, 2019.

**(xiii). The Fugitive Economic Offenders Act, 2018:** This Act has been passed by the Parliament with primary aim and objective of providingthesteps or measures forpreventing the fugitive economic offenders. According to Section 4(1) the Director or any other officer not below the rank of Deputy Director authorized by the Director has been empowered to record in writing the case/ matter on the basis of material in his possession. According to Section 5 (1) the Director or any other officer authorized by the Director, not below the rank of Deputy Director, may attach any propertyof offender with the permission of the Special Court. According to section 6 the Director or any other officer shall have the of a civil court under the Code of Civil Procedure, 1908.According to Section 12 the Special Court maydeclare the individual as a fugitive economic offender and for that the court has mention reasons in writing in record. On January 4, 2019, in Vijay Mallya case, a Special Court has been set up under the Prevention of Money Laundering Act, 2002, which declared him absconded a fugitive economic offender. The court allowed the government to confiscate his properties under the Fugitive Economic Offender Act, 2018. Vijay Mallya is the first industrial who has declared the first fugitive economic offender under this Act.

**H. Suggestions for Prevention of Financial Embezzlement, Cheating and Fraud in Corporate Companies:** There may be some suggestions for prevention of cheating, fraud, and financial embezzlement of the companies, firm and organizations.

**(i)** The government should make the tougher rules, regulations and legislations regarding functioning of the companies**,**

**(ii)** The government should make the powerful and independent regulating body regarding the business of the companies**,**

**(iii)** The government should provide the liscence of business to only competent companies and not the incompetent/ fraud companies**,**

**(iv)** The government should keep the directly and indirectly or complete control on companies**,**

**(v)** The government should keep/make the insurance policy regarding the clients/ investors**,**

**(vi)** The government should keep the huge amounts of the companies as surety/ compensation regarding the clients/investors at the time of emergency/ fraud/ cheating or embezzlement period**,**

**(vii)** The SEEBI, ED, CBI and other Enforcement Agencies should play their role positively while dealing with such cases of the companies**,**

**(viii)** The company director/chief/holder/ owner or staff should not be greedy for the money. He/ She should not see a dream of becoming the crorepati or millionaire in night and should not use the illegal means and ways for earning the more and more money in the life. Person should be satisfied in life as satisfaction is very necessary for peaceful and healthy life because health is wealth not the wealth is health,

**(ix)** The Central Government should set up an office/ cell of Serious Fraud Investigation Office (SFIO) for investigating frauds cases of the companies. The SFIO should have power to arrest of guilty company on basis of the possession of facts or materials. The SFIO should submit a report regarding this to the central government and central government should take immediate stern action on the report of SFIO

**(x)** There should set up of establishment of auditors and audit committeethat would audit of the companies and if found fraud by companies then it should submit report to the central government. There should also establish a vigil resolution system for directors and employees. The vigil resolution system would provide proper safeguards against affected

**(xii)** There should be set up of theindependent directors who would report to central government about immediate fraud. They should also ensure that the company has been working properly in the interests of a people, who have invested their money in the company,

**(xiii)** The government should take immediate actionon the fraud, cheating and embezzlement of cases/ affairs of a company in public and national interest.

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# Fugitive Economic Offenders Act, 2018; A Silver Lining for Tackling of Non-Performing Assets Problem in the Present Scenario

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## Abstract

Current news regarding mounting 'Non-Performing Assets' in the Indian banking Industry has become the serious matter of a lot debate and analysis. The cases of fraud and corruption play an important role for put the entire banking industry in Jeopardy. Banking sector of our country is satiated with non-performing assets (NPAs). After the beginning of LPG reforms in India Banking business was growing rapidly. Many banking reforms have been introduced in country to advance the business efficiency and promote the health and financial reliability of banks so that Indian banks can convene universally accepted standards of performance. The year 2018 quaver the banking industry, with scams like the Punjab National Bank fraud, which stained the image of the whole banking industry. According to recent RBI's report frauds relates to banking sector originate on top of 72% to Rs. 41,167 crore in financial year 2017-2018 and the gross NPA ratios of the banking sector could increasing 12.2 per cent of the loan book by March 2019. RBI's financial stability report says the gross NPA ratios of the banking system could reach 12.2 % of the loan book by March 2019. At present, the good news is that the gross NPAs showed a descending movement in June and then in September quarter. This has booming feasible because of strict compliance of fugitive economic offenders act, 2018, or powerful dread of it. Now, office bearers of banks presume that the perception part of NPA is ended, and the recovery needs to commence. A year ago, the Parliament passed this Fugitive Economic Offenders Act, 2018 after the concurred by the President on 31.07.2018; it was come into force on 21.04.2018. The objective behind enactment of this act is that to restrain practice of avoiding criminal prosecution by economic offenders (willful defaulters) who run away from nation to dodge clutches of law of country by enduring outside jurisdiction of Court of Justice. The intent of the present research paper is to be analysis the provisions of the Fugitive Economic Offenders Act, 2018 in reference of present scenario and discussed the impact of this act in-coming future.

**Keywords**: Reforms, Economic Offenders, criminal prosecution.

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## Introduction

*"The banks are the lifelines of the economy and play a catalytic role in activating and sustaining economic growth, especially, in developing countries and India is no exception."*

**-S.S. Mundra, Former Deputy Governor of the RBI**

A strong and sound banking mechanism is known impending the spines of the overall economic of any nation. A potentbanking system supports higher levels of financing and promotes speed growth in the economy. The banking sector has been developing at a fast speed and is challenged with a number of facts like new policies and rules from time to time, changing customer requirements and knowledge.In last two decades; we have witnessed that banking system pass off a paradigm shift. One side the traditional banking mechanism has been replaced with advanced technologies, dedicated entrants and digitalization. It has witnessed a shift from the easy mechanization of paperwork in banking sector to today's branchless banking system that use advanced contactless technologies. A Bank's capability to apparent opportunities out of the disorderly environment based on expertise and exterior partnerships to create customer value will establish its success in the future. The other side, we have also witnessed that various financial frauds, rackets and finance offences which have leave off an expedient effect on the financial and banking sector of country. In during last decade, approximately 53334 fraud cases were reported by banks concerningan incredible an amount of Rs 2.05 lakh crore. Far more than 6800 frauds of racketeering with banks relating a remarkable worth of Rs 71500 crore have already been reported in 2018-19[1]. In during universalisation and liberalised merchandise atmosphere of the last few years, we face a radically growing number of frauds, especially in the financial sectors. Ousted Rs. 11346 crore's fraud by famed jewellers Nirav Modi and three other assorted jewellers to country's second–largest Punjab National Bank seems to have led to a disruption in banking sector.it is usually the largest banking swindle yet earlier. Anex-director of Andhra Bank and directors of Sterling Biotech (Gujarat based pharma company) had been arrested on 13th Jan 2018 eminent Rs. 5,000 crore pseudo case for utilizing the money from the bank accounts of several shell companies. These companies had taken loan of Rs. 5,000 crore from a syndicate led by Andhra Bank, later on the loan changed

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1 "Bank Fraud Touches Rs. 71,500 Crore in 2018-2019, Says RBI", publish in PTI_News on 3, June, 2019 (Reserve Bank of India replied to an RTI query filed by this PTI journalist).

into non–performing assets.On 20th July 2017, CBI under arrested the Ex-Head of Maharashtra bank (Pune Zone) for violating laws for sanctioning loan of Rs 836-crore. The head had illegally approved the credit facility to a logistic company on grounds of bogus and fabricated documents and awarded the loan to 2,802 drivers for buying trucks.

In another leading scam, on 13th June, 2017, CBI under arrested the promoters Manoj Jayaswal and Abhishek Jayaswal of a mining company Abhijeet for eternitywrongdoer in debts payment of more than Rs 11000–15000 crore from 20 banking & financial entities using 132 intermediaries of the group. Abhijeet group droughts company namely 'Jas Infrastructure' in order to offer contract for construction, attainment and trestlework of power plant at Bihar and overusing the loan amounts worth of Rs 790 crore from Canara Bank and Vijaya Bank.On 8th May, 2017, Nilesh Parekh, promoter of the Kolkata-based Shree Ganesh Jewellery House was jailed in connection with loss made from Rs 2,223 crore to consortium of 25 banks led by SBI. The Accused used to signify fund from one bank and send out the fund from another bank so as to bunk the retaking of import finance.

**Impact of banking frauds on NPAs**

Non-Performing Assets defined by RBI "An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank. A 'non-performing asset' (NPA) was defined as a credit facility in respect of which the interest and/ or instalment of principal has remained 'past due' for a specified period of time"[2]. Usually, debt is indentified as non–performing when advance instalmentshave not been made for a period of 90 days.Recently RBI issued revised norm on 7th June 2019 which offering lenders relaxation to appraise a borrower account within 30 days of non-payment of advance instalments[3]. The new guidelines award lenders a respite from the one-day default rule whereby they had to draw up an RP for implementation within 180 days of the first default.Mounting a number of Bank scams is ingest all the economic development and is creating financial disruptive environment in the country. One major Causer like Vijay Malya, Nirav Modi, Mehul Choksi arrogates many crores rupees which not merely enlarge the magnitude of Non–

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2 Master circulars "Prudential Norms on Income Recognition, Asset Classification and Provisioning - Pertaining to Advances" DBOD No. BP.BC/ 20 /21.04.048 /2001-2002.

3 RBI releases Prudential Framework for Resolution of Stressed Assets on 7th June, 2019

Performing Assets but takes out thespecious money that could have otherwise been utilized for financialwell beingof nation's economic health. During the year 2016-2017 approximately 5,917 cheating events are reported in several banking arrangements. Out of these, utmost 2,526 were advances related cases, while 2,059 had been connected with cyber frauds.The frauds like duplicity in off-balance sheet, dishonesty with foreign exchange transactions, moderating in deposit accounts, cybernetic tactic and cyber felonies had taken higher place in the sector of finance scams and frauds.Defrauders scrounge an amount of Rs. 41,167 crore from the banking sector in the financial year 2017-2018, a point rise of 72 per cent over during the past fiscal year.In keeping with RBI's, gross non–performing assets (GNPAs) alongwith restructured standard advances in the banking sector persisted extended at 12.1 per cent of gross advances near to end of march, 2018[4]. The joint doss down from powerful promptly elaborate in formulization against non-performing assets and mark–to–market (MTM) reserved minimized on account by means of set of affords battered the wealth of financial institutions, resulting in capital inflows.One by one the banks recondite darkest esoteric are getting unfold in the form of frauds. The misfortune is such that it has make embarrassment to both government and the Reserve Bank of India. The regulatory authorities are trying their best to assist banks uplift from problem of sturdy stressed assets either by merging PSBs or taking major defaulters before NCLT for bankruptcy code. But the question yet lies to how financial institutions will evade frauds. The scams or frauds take place when a person uses illegal money or assets from bank or other financial institution. They are termed as fraud because the offense has been kept confidential. This is the recent picture of India's banking sector. The day has gone and trusting banks has become difficult.

**Fugitive Economic Offenders Act, 2018**

In recent decades, all the print, TV media and digital media were engrained significantly with news of financial delinquents run off from the country, expecting the incitement and during the court proceedings against them. Subsequent to number of economic cheats and scams, in particular Rs. 9,000 crores by liquor tycoon Vijay MallyaandRs 13,000 crore by Gems businessman Nirav Modi & Mehul Choksi, who vanish away from the nation, have became

[4] RBI's Annual Stability Report 2017-2018.

obvious that the available civil as well as criminal law usually are not completely sufficient to deal with in addition to sternness consisting of the dilemma. Consequently in this trouble time, it was felt required to establish new efficient and speedy actions to discourage financial violators relishes escaping the procedure of law via fleeing from the dominion of Law. Hence, Government of India legislate the new act i.e. Fugitive Economic Offenders Act, 2018 to expedient the detriment as well as protest of the individuals, further maintenance backer's trust and interest of the nation's economy. The purpose of the act is to also make sure that fugitive financial violators recede to the country in order to deal furthermore legal action in accordance with rule of statutory law.

**Dominant and Potent Provisions of Act**

**1. Fugitive Economic Offender:** "Fugitive Economic Offender"[5] means any person against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who—

(*i*) has left India so as to avoid criminal prosecution; or

(*ii*) being abroad, refuses to return to India to face criminal prosecution.

**2. Benami Property:** the Act also states 'benami property' and entrust it as the same meaning as available in the Prohibition of Benami Property Transactions Act, 1988. This indicates that the FEO Act, 2018 enforce to any property which is belong to a benami transaction and also incorporate the earnings from such property. Further it also includes within its extent the transactions which are in nature of benami transactions under the Prohibition of Benami Transactions Act, 1988.[6]

3. **Declaration of fugitive economic offender**: The Act empowers the investigating agencies have to request for declaration of fugitive economic offender and procedure, which is to includes all grounds for the faith by the Director or the Deputy-Director[7], that an individual may be fugitive economic offender; comprise all details of the properties to be confiscated, and any information accessible as to the whereabouts of the fugitive economic offender.

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5 Section 2(1)(f), Fugitive Economic offender Act 2018.

6 *Section 2(9), Prohibition of Benami Transactions Act, 1988.*

7 Section 49(1) Prevention of Money Laundering Act,2002

4. **Attachment of property:** The Act contains the provision regarding the seizure of the property of a person who has alleged as accused of engaging in the offences mentioned in the application by the Director with the consent of the Special Court[8]. The provision shows the objective of the government towards combine the primacy and clutches of the dogmatic and deciding authorities like this the offender attempt to inhibit him or her cherish averting the legal territory, or escaping from the rule of law.

5. **Special Court:** A Session Court referred as a 'Special Court' under Section 43(1) of the Prevention of Money Laundering Act 2002[9].

6. **Power to conduct Survey**: The Director or any other officer under the act can request any owner, worker or any official who may be present at the time of search or survey to assist them to verify the record relating to takings of crime and supply any information that may be connected for the proceedings under the Act[10].

*7.* **Search and Seizure***:* Prominently, the provision of the Act empowers the Director or Deputy Director need not request for permission from owner, worker or any official who may be present in the property to conduct search and seizure. The competent authorities under the act may search any place, edifice, watercraft, carriage or aeroplane wherever he has belief or doubtful of this kind documents or benami transactions tend to be stored. As required they also empower to go to the extent of break and open the lock in of any locker, buckle, almirah, door, cash chests or other conservator if keys are not available. And finally, seize any property, suspicious things or records found under the search process.

8. **Notice must:** The one who is suspicious ultimate a fugitive economic offender u/s 4 of the act is directed through notice by the Special Court to present at particular place & time at least 6 weeks of the date of release of such summon as well as the terms also stated that on omission to present on the prescribed time and place shall accordingly the dictum of the person as a fugitive economic offender and confiscate of his property under the Act[11].

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8 *Section 5, The Fugitive Economic Offenders Act, 2018.*

9 Section 2(n);*The Fugitive Economic Offenders Act, 2018.*

10 Section 7, Ibid.

11 Section 10, Ibid.

**9. Proclamation of Fugitive Economic Offender:** The special court would possibly declare a person as fugitive economic offender after listening the parties accordingly to the proviso of the act. It may forfeit the valuable belongings that are increase of illegal earning, are illegal belongings in country or foreign and any other belongings in this country or foregin country. On such expropriation, all rights as well as possessions of all valuable belongings will vest in the Centre Government, gratis from all liabilities (such as any deferred tax on the properties). The Centre Government shall designate the official or a Managing Officer to handing and undersell of these properties.

**10. Disallow civil claims:** The proviso of this act empower the any civil court or tribunal to interdict the person, who has been proclaimed a fugitive economic offender, for registering or asserting any civil claim before the any superior Judicatures or Tribunals. Even so, any company or LLP company where such a person is in a position of majority shareholder, maestro, or a key directorial person, may also be excluded for filing or defending civil claims[12].

**Existing laws for recovery of debts from corporate defaulters:**

**SARFAESI Act 2002**, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002bestow the provision if borrower inoperable to repayment of loan, a loaner can directly take action without interferenceof the courts can recover the secured loan. The properties which have been held as guarantee by the Creditor can be automatically taken by him and he deal the said properties so as to obtain repayment of the loan.

**Insolvency and Bankruptcy Code, 2016**, the Code provides that employees, lenders and stakeholders shall be empowered to commence winding up procedures whenever there's any sign of financial stress such as major default in non-payment of a loan obtained from a bank. Under the code, the directors and promoters of the companies, which have responsible to serious defaults on non-payment of the loan amount, are replaced by anbankruptcyexperts and thereafter manners for either reconstruction of the company or winding up of the company are devised.

**PMLA, 2002:** Prevention of Money Laundering Act 2002is unique Enactment legislated with the dutiful intention of managing with the hazard of money laundering. Under the act, Enforcement Department (ED) is permitted to

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[12] Section 14, *Fugitive Economic Offenders Act, 2018.*

impound the proceeds of crime, and only after finishing of proceedings, the property which has been attached is changed into confiscation free of hindrances.One of its key features is to authorize the central government to confiscate and convenient properties earned by money launderers with "black money".

**RDDBFI Act, 1993:**The Recovery of Debts due to Banks and Financial Institutions Act, 1993bestows the provision in order to set-up legal instrument as Debt Recovery Tribunal and Debt Recovery Appellate Tribunal for recovering debts which are due to banks and other financial firms. At the time of liberalization in 1990-1991, the banking and financial sector were tacklingnumerous issues in getting back debts and imposition of securities interest along with them. Theactions can be initiated before the Tribunal to recover the loan amount held by the lender and would consequence in reliefs of attachment of properties which were retained as security.

**FEMA 1999**: The Foreign Exchange Management Act 1999 provides many preconditions that worth equated, in India can be confiscated, if any overseas securities, overseas currency or immovable estate may be held in breach of the provisos of the Act. As a result, the authoritative official may confirm or set aside such confiscation and shall be continue until final disposal of proceedings. In between the proceedings if the person bring back into country the attachment can be set aside by the authoritative official.

Even with the above laws and statutes, the overall incidents by coverage of economic offences and frauds have been rapidly rising yet. This is probably the cause of increasing proximity to rich and rich amidst tough centre actions, summarized as 'crony capitalism'[13].

**Constitutionality test:**

The imputation that the some provisions in the act not stand in accord with the norms while drafting section 5(2), section 10(3)(b), section 12(2)(b) and section 14.

The ostensibly arbitrary section 5(2) will undoubtedly to receive some analysis for not being in consonance with a basic and fundamental principle of natural

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[13] The Cambridge Dictionary defines the term as an economic system in which family members and friends of government officials and business leaders are given unfair advantages in the form of jobs, loans, etc.

justice i.e. "innocent until proven guilty". This section is a main significant provision for the Enforcement Directorate, the law enforcement agency in such matters or any other appropriate authority as it gives them abundant power to hold off, discovers and attach belongings just without commencing of any litigation. Invalidating the contention, that is found that the pre-trial bonding take up accordance with the Convention Against Corruption 2003 of the United Nation, India that's ratified in 2011. Additional contention upraised with regard to dread of abuse of power by officials. The Supreme Court of India said in its judgement that just merely possibilities of abuse of power isn't really a evidential reason to rescind the provision as unconstitutional, furthermore, it was held that such actions of the concerned officials can be suspended. Onward, Delhi High Court also upheld the constitutionality of the second percept of sub-section (1) of section 5 of Prevention of Money Laundering Act 2002 that also is similar to sub-section (2) of section 5 of the said Act[14].

Sub-section (b) of Section 10(3) is controversial in support of affirming sole inability to present at the particular spot and time to will effect within a statement in regard to person as the fugitive economic offender and forfeiture of property under the Act, therefore makes ready for arbitrary actions. However mentioned contention may be rejecting via proclaiming enough period and prospect may be granted by the special court under sub-section (2) of section 11.

According to provision u/s 12 of this act, the Special Court when contented with grounds ultimate inscribed in writing can pronounce a person as the fugitive economic offender. Upon this pronouncement, (i) properties which are increase of a crime earning whether owned by the offender or not; and (ii) any other properties (including personal and benami properties) inherited by the usurper; shall stand confiscated by Centre Government. This section also point out the attention for a controversial issue as far as in case the Government in all fairness authorised to occupying the belongings continual out past the income offences being referred to or whether it is stand by a infringement of the offender's right to equal opportunity before law under Art. 14?

The acceptable test in the above mentioned section was laid down by the apex court, it was held therefore the pair bifurcated exam of assortment that needs to

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14 *J. Sekar and Ors. Vs UOI and Ors* (2018CriLJ1720).

be grounds on an accessible temperament in addition using a balanced connection to the whatsis of the law, being ideal to be cognizable. By the present analysis, it is clear that the Act does pass conscription these tests under Article 14 of the Constitution[15].

The act provides the provision under Section 14 which disallows civil proceedings is an extensive section which also bars a limited liability partnership or a company with which a fugitive economic offenderpronounced by the special court u/s 12 of this act might be connected to from initiating or representing any civil cases. This restriction enforces the application upon also civil claims, as well as civil proceedings, wherein there is not any collusion in the crime(s) in questionable, however the divorce litigations, succession cases, litigations related to family conflicts, consumer grievances are not limited to etc.This is an unreasonably wide and stringent provision especially since the said Act does not in factarbitrate upon the innocence or guilt of a person but merely declares someone became a fugitive economic offender. Possibilities are fairly high that the constitutionality of this provision may be deemed upon incoming future. It was confirmed in the same degree with the liberal review of Article 21 of the Indian Constitution[16]. Actually, apex court has held **"access to justice"** as a basic element of **"right to life"** guaranteed under Article 21 of the Constitution and also a part of 'right to equality' under Article 14 of the Constitution[17].

## Conclusion

Above in the mentioned analysis, it is clear that the Fugitive Economic Offenders Act, 2018 seems to have a strong intention to take care of the serious and immediate danger that has far reaching significance upon the centre of financial specialist certainty and prosperity of the economy. In fact, the Act have some similar proviso of different Acts and Statues or have several unpredictable provisions, however it would have a solid objectives of making massive financial absconders obliged in order to capitulation under the dominion of Indian Law. It is predictable to restore the rules of law via rapidly seizure of all valuable belongings compelling the fugitive so comeback to India as well as enforce him/her to confront the judicial proceedings in pursuance of

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15 State of J&K vs. Triloki Nath Khosa [1974] 1 SCR 771.

16 Maneka Gandhi Vs. Union of India (1978) 1 SCC 248

17 Anita Kushwaha vs Pushap Sudan *(*2016), 8 SCC 509

your crimes. The strong intentions for helpful as well as strong practice of the act will also help banks and other financial institutions in the recovery of non-payment of loans and brings inside its ambit a person who is, or turns into, an fugitive economic offender. The provisions relates for confiscation and disposal of properties by the administrator appointed under the act have the potential of affecting corporate insolvency resolution process under the Act. The Minister of state for Finance stated in the parliament in a debate that Directorate of Enforcement (ED) filed cases under this act against seven defaulting persons enfold in the financial rackets/scams of crores of rupees. Vijay Mallya is the maiden person in the country who to be declared a 'fugitive economic offender' under the Act by the Special Court on 5$^{th}$January, 2019. It would be necessary to the Central Bank of India to conduct the regular monitoring of the bank's stressed assets and fixed accountability of banks official and also increase transparency of the loan process. The Government of India would be set up a faster mechanism for extradition etc. In the nearest future, it is going to be assumed that the above said Act will implant relation with the prevailing Acts, reference to attachment of properties or seizure and recovery of bad loans under different law.

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# Social Laws of the Qoran: An Analysis

**Dr. Satya Pal Singh***

**Abstract**

Muhammed appeared as a social reformer no less than as the founder of a religion. And so the direction which his reforms took was naturally determined by the character of the practices which obtained in Arabia at the time of his appearance.Further, some measure of originality must certainly be allowed to Muhammed himself. The founder of Islam is often charged with the want of originality. But the fact that the laws of the Qoran show a marked resemblance to many of those found in the Old Testament and Talmudic literature should not prevent us from giving him the credit for original enactments when we meet with them. And those d are found inthe social system of Islam will be clearly observedin Qouran. The character of Muhammed's reforms was determined bythe customs of his own time. It will be well, therefore, to say a few words here on the constitution of Arabic society.

**Key Words:** Qoran, Social Laws, Social Reforms

## Introduction

Among many Eastern nations polygamy is a recognized practice, and it appears that Muhammed found no reason why he should abolish the existing custom among the Arabs. As to the number of lawful wives which a Muslim is allowed tomarry, we find only one reference in the Qoran, namely in Sura 3, 3. "If ye fear that ye cannot act with equity towards orphans, take a marriage of such women as please you to or three or four. But if ye fear that ye cannot act equitably (towards so many), marry one only, or the slaves which ye shall have acquired."Although one cannot say that the above words as to the number of wives allowed are very clear, especially having regard to the fact that it is the only reference made to the matter in the Qoran, still, it is the general opinion of Muhammedan scholars that a believer may marry four wives, and no more,but

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that there is no restriction whatever as to the number of concubines which a man may have. It is general opinion of the Mohd. Scholar that a Muslim may not marry more than four wives, but there is no obstruction for concubines which a individual may have. Shia Scholar said that a muslim may temporary contract several marriages other than their four wives. But Motazilla & Sunnities considers such a habits as simful. In the Durrat al-gawwas of Hariri (A.D. 1054-1122) Thorbecke'sed, uf, we find the following tradition:"The prophet said to Gailan,when he become a Muslim, and there were to him ten wives, Choose four of these, and separate thyself from the rest."

This is but one of many passages, which, at least according to tradition, show in unmistakable terms how polygamy was sanctioned by Islam's legislator. It may well be asked whether Muhammed recognized the evils of polygamy. We do not think so. At any rate, other men, standing on a higher plane of civilization than Muhammed, have failed to recognize them, or else did not wish to do so. Hallam points out that the German accepted the efficacy of second and third marriage in the absence of issue and other same causes.[1] And Schopenhauer three centuries later praises the Mormons because they have made converts by throwing off what he terms "the unnatural bondage of monogamy." Similar sentiments may be found in the works of Eduard von Hartmann, who observes that man naturally like the polygamy but women likes the wonogamy. Bearing these things in mind, one need not be surprised that Muhammed, an Arab of the seventh century, could not see the evils of polygamy, and somade no attempt to abolish it. In addition to the four legal wives which the Qoran allows to a Muhammedan, he is also permitted to cohabit with his female slaves. In this case nothing is said as to number; they are allowed to him without any restriction whatever. Sura 70, 20 ft. reads:

> "And those who abstain from the carnal knowledge of women, other than their wives or those which their right hands possess; for as to them they shall be blameless. But whoever coveteth any women besides these, they are transgressors."

This is a Meccan Sura, and is ascribed by Muir to the period before the Abyssinian migration. This, then, would appear to be the first official permission given to cohabitation with female slaves, and the Prophet Mohd.

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1 Syed Ameer Ali, "The Personal Law of the Mahommedans," p. 246f.

accepted the same as per the custom and traditions. This acceptance induces his followers to war against, for the settlement of the Islam, since the women taken captive in battle would become lawful concubines totheir captors. These female slaves are usually referred to as "That which your right hands possess." In the beginning of Islam they would consist almost entirely of those women of girls taken in war. But theymight also be purchased, gifted, or in any other way acquired. And as the passages in the Qoran show, a man may acquire and cohabit with as many as he pleases, and that without there being any obligations attaching to marriage. The slave is entirely at the will of her master, and may be sold again by him at any moment. One the other hand, it is forbidden by Muslim law to cast out a slave when she has given birth to a child; and if it be a son, it is the rule, at least in some lands, to give the mother her freedom, following the precedent of Muhammed and Mary the Capt.From these verses we see that Muhammed forbids the marriage of a person with the following relations, (a) mother, (b) daughter, (c) sister, (d) aunt, (e) niece, (f) foster-mother, (g) foster-sister, (h) mother-in-law, (i) step-daughter (conditionally), (j) dauther-in-law, (k) two sisters at the same time.[2]

On this matter we quote the following words from Sura 24, 3 :-

"The adulterer shall not marry other than an adulteress or an idolatress; and an adulteress shall not marry other than an adulterer or an idolater. Such marriages are forbidden to the believers." "Bad women for bad men, and bad men for bad women; virtuous women for virtuous men, and virtuous men for virtuous women."[3] The subject of divorce is one that occupies much space on the pages of the Qoran; and one may say that scarcely any part of the social system of Islam is as unsatisfactory and condemnable as this. While granting that a law of divorce was absolutely necessary, that divorce, like polygamy, was a tradition of the Arabs which Muhammed could not have abolished, still the facility with which a divorce might be procured cannot, on any ground what ever, be justified. In treating this subject we shall remark upon the following points:-

1- The grounds of divorce,

2- The repetition of divorce

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2 Suras 4, 28; 23, 5: 33, 50 etc.

3 Muir, William, "The Coran, "Its Composition and Teaching," p. 43.

3- The treatment of divorced women.

The Ground of Divorce- If we were considering the law of divorce as it is found on the statute books of European countries, we would have to consider the question as it affects the wife as well as the husband. But after sometime only the husband had the right to divorce due to the absence of the teaching of Qouran properly and anything beyond this must be looked for in the works of the Muhammedan jurists, who, it must be admitted, have to some extent made up for the one-sided treatment of the subject by the prophet.We have already referred to the necessity for a law of divorce in general. With the Arabs, as indeed with Eastern peoples generally, the need of such a law was much greater than it is with us, since their societal relations are dissimilar from ours. This necessity arise from the division of sexes and in connection with this the practice among women of wearing the veil. Formerly it was thought that the use of the veil by women was first introduced by Muhammed; and for this he has been much reproached. This, however, was a mistake, for the veil was used in Arabia long before the time of the prophet. However, Muhammed retained it as a means of separation between the sexes.[4] What we have here is another instance of a man perpetuating rather than introducing a custom.

"The men stand over then (the women)…. Ye may divorce your wives twice. After that ye must either retain them with kindness, or put them away with liberality." "It shall be no crime in you if ye divorce your wives so long as ye have not consummated the marriage, nor have settled any dowry on them. But provide for them, the rich and the poor according to his means, in a becoming manner, a compensation." "If ye desire to exchange one wife for another, and have given one of them a good sum, make no deduction from it. Although the prophet in these passages speaks against the divorcing wife without applying the logical and reasonable aspects, when a man has finally decided on a divorce, still is the greatest freedom allowed to him. As to the ground of divorce, not a word is said. We simply read that "the men stand over the women", and whenever they will, have they right to free themselves from them, without any other cause than a mere desire to exchange one wife for another.[5]

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4 Keil, Lev., Chap. 18, Kinship and Marriage," p. 192

5 Lane and Muir, "The Personal Law of the Mahommedans," p. 58

## Conclusion

Personal Law of Muslim in Arabian Countries is followed as per the Qoranic Law but in some other countries of the world it is changed with the changing scenario of the science and technology, Custom and tradition of the society. In India Mohammadan Law is also changed in our constitution and in the other civil law. Our constitution provides the equality for every person irrespective of any religion, race, caste, sex who lived in India. In recent legislation Tripple Talak bill 2019 is also passed by the parliament, it imposed the some restriction on the divorce for the muslim. Hence Qoranic law as well as the changed in Mohammadan law are followed by the muslim in India now a days.

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# From Shah Bano to Shayara Bano: A Long Journey by Muslim Women

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**Abstract**

Matrimonial alliance in Islam is a social contract, and divorce is considered to be natural corollary of marital right. But at the same time, marital ties are ascribed piety of the highest order and divorce considered as a necessary evil, to be employed only as a last resort. Triple talaq, and more particularly instant triple talaq, is only one of the several forms of divorce under the Muslim law.Talaq-e-biddat is a permissible way to divorce one's wife by a Muslim man, belonging to Sunni sect following hanafi school of faith and ideology. Though this is considered as sinful in theology but is practiced by the followers. There is no definite figure as to how many divorces take place through this method. This way of divorce has the backing of law in Muslim Personal Law (Shariat) Application Act, 1937. This Act defines talaq, which includes talaq-e-biddat. Talaq-e-biddat once pronounced, results in instant and irrevocable divorce between man and wife. Recently, the apex court has declared talaq-e-biddat and section 2 of the above Act, to the extent former is part of the later, as unconstitutional. The verdict of the apex court is not as clear, as it sounds, as there are three different judgementswritten by a bench of five judges. The government went a step forward and passed an Act declaring pronouncement of talaq-e-biddat by a man, as null and void and prescribing punishment for the same. The articles attempts to critically analyse the judgment from the perspective of its objectives and its feasibility in achieving the (un)stated purpose.

**Keyword**: Triple Talaq, Divorce.

## Introduction

Under Islam Divorce isof various forms, some initiated by the husband and some initiated by the wife. Various traditional legal categories are *talaq*, Talaq-

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e-tafweez, *khul*, mubarat, judicial divorce etc. Theory and practice of divorce under Islam have varied according to time and place. Talaq-e-biddat or irrevocable divorce is a form of divorce which has been usedby Muslims in India to legally divorce his wife by pronouncing the word talaqthree times in oral, written, or more recently, electronic form[1].

The Quran, the holy book of Muslims, does not recognize *Talaq-ul-Biddat* and considers it to be a spiritual offence. It directs that all attempts should be made for reconciliation by both the parties before declaring a divorce as irrevocable. Thus, legalizing the practice of triple talaq only surmount to an impediment in the right of a Muslim woman to practice and profess her religion, by unleashing a spiritual offence upon her and violating Article 25 of the Constitution.The status and use of triple talaq in India has been a subject of controversy and debate. Many issues of justice, gender equality, human rights and secularism have been raised. The debate involved the Government of India and the Supreme Court of India, and incorporated discussion about uniform civil code (Article 44) in India. On 22 August 2017, the Indian Supreme Court deemed instant triple talaq (*talaq-e-biddah*) unconstitutional[2]. Three of the five judges in the panel declared the practice of triple talaq is unconstitutional and the remaining two declared the practice to be constitutional while simultaneously asking the government to enact a law baning the practice triple talaq is a 1,400 year-old practice among Sunni Muslims which is arbitrary and allows a man to break down marriage whimsically and capriciously. As a practice, Triple Talaq is not mentioned in the Quran or Sharia law and is also largely disapprovedby Muslim legal scholars.

Even Several Islamic countries, including Pakistan and Bangladesh, have banned it, although it is technically legal in Sunni Islamic jurisprudence. Triple talaq under Islam is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds.In traditional Islamic Jurisprudence, *"triple talaq is disapproved, but legally valid, form of divorce. With the Changing social conditions around the world there have been increasing dissatisfaction with traditional Islamic law of divorce since the early 20th century and various reforms have been undertaken in different*

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1 *"Triple Talaq verdict: What exactly is instant divorce practice banned by court?"* Hindustan Times 2017-08-22.

2 PratapBhanu Mehta. '*Small step, no giant leap*'.The Indian Express. 2017-09-18

*countries. Contrary to practicesadopted in most Muslim-majority countries, Muslim couples in India are not required to register their marriage with civil authorities and are considered to be a private matter.So no checks have been placed on the husband's unilateral right of divorce by governments of other countries and the prohibitions of triple talaq were not implemented in India[3]."*

In the present scenario it is undeniable that a Muslim woman is helpless against the decades of unfair practices. Not only can the wife be divorced by her husband for any reason, upon his whims and fancies, but she is also denied Mahr (a form of compensation provided by the husband to a divorced woman). It, thus, falls upon the courts to act as torchbearers of justice and curb this unjust practice at the earliest.

It was a long journey from Shah Bano[4] to ShayaraBano[5]. But has everything changed for the Muslim woman, made homeless by husbands murmuring at one sitting with' talaq, talaq, talaq,' leaving her destitute in one stroke? In the 1984 case of Shah Bano, the question was the right to maintenance the divorced Muslim woman permitted by the courts and refused by the legislature. In ShayaraBano's case 2016, the very right to pronounce triple talaq is being challenged.

ShayaraBano filed a writ petition under Article 32 where in her submission she wrote that *"the practice of talaq-e-biddat which practically treats women like chattel is neither harmonious with the principles of human rights and gender equality, nor an integral part of Islamic faith. There is no protection against such arbitrary divorce and also mentioned that Legislature has failed to ensure dignity and equality of women in general and Muslim women in particular especially in matters of marriage, divorce and succession.*" In the same case, AG Mukul Rohtagi observed that *"Gender equality and a life of dignity and status is an overreaching constitutional goal"*. Further observed that *"practices like, triple talaq, nikahhalalaand polygamy impact the social status and dignity of Muslim women and render them unequal and vulnerable not only among men belonging to their own community but also women belonging to other communities and also Muslim women outside India"*.

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3 Choudhury, CyraAkila (2008), *"Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India*", Columbia Journal of Gender & Law, **17** (1): 45–110.

4 Mohd. Ahmed Khan vs Shah Bano Begum And Ors1985 AIR 945, 1985 SCR (3) 844

5 ShayaraBanovs Union of India writ Petition no 118 of 2016

The Apex Court in ShayaraBanocase on August 22, 2017 declared that *"the practice of triple talaq as unconstitutional and stated that it was violative of Article 14 and 21 of the Indian Constitution. In the 3:2 Judgment, the Constitution bench decidedagainst triple talaqand said triple talaq needs to go"*. Due to Judgment, The Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed on 26 July 2019 after a very long discussion and opposition finally got the verdict to all women. Due to that tripletalaq became illegal in India on 1st August 2019, replacing the triple talaq ordinance promulgated in February 2019, stipulating that *"instant triple talaq (talaq-e-biddah) be it in any form, spoken, written, or by electronic means such as email or SMS, is illegal and void, with up to three years in jail for the husband. At the same time an aggrieved woman is entitled to demand maintenance for her dependent children."*

**Decoding the Triple TalaqJudgment**

In 2015, one Ms. ShayaraBano, challenged the instant Triple Talaq pronounced by her husband with a prayer that it be declared as *void ab initio*. Instant triple talaq is also known as "*Talaq-e-Biddat*." The provision for talaq or divorce is provided under section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. The petitioner approached the apex court with a prayer that *"section 2 of the Muslim Personal Law (Shariat) Application Act, 1937be held as unconstitutional, as the act of pronouncement of instant triple talak, had and has the effect of abruptly, unilaterally, and irrevocably terminating the ties of matrimony"*. Before preceding any further, section 2 may purposefully, be read as under:

*"Application of Personal Law to Muslims – Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including* ***talaq****, ila, zihar, lian, khula and mubaraat, maintenance dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be Muslim Personal Law (Shariat)"*

The numbers of arguments were extended by the petitioner and other parties,*inter alia* arguing that (i)*talaq-e-biddat* is not valid as it is not a part of

'Shariat;' (ii) instant divorce cannot be treated as "*rule of decision*" under the Shariat Act; (iii) practice of talaq-e-biddat is violative of the fundamental rights guaranteed under articles 14, 15 and 21 of the Constitution of India; and (iv) practice of talaq-e-biddat is not protected under the right to religion or any other right, guaranteed to religious denominations or any faction thereof under articles 25(1), 26(b) and 29.

At the heart of the arguments, the key contention was that practice of instant triple talaq is sinful, arbitrary, unreasonable, and oppressive and was against gender justice and is untenable in a progressive society. It was also pointed out that even Muslim theocratic countries have forbidden the practice of instant talaq.

The bench gave splintered opinions and delivered three sets of judgments. Justice Kehar, the then Chief Justice of India and Abdul Nazeer sided with the defendants and held that practice of instant triple talaq is an integral part of the religion, and thus has been and still is, a matter of personal law of Sunni Muslims, belonging to Hanafi school. The bench recommended the rejection of the plea of the plaintiff to apply the egalitarian approach to the matter in hand, as according to the judges; religion is a matter of faith and not logic. The bench accepted that the practice, which has been in vogue for last 1400 yrs., neither breaches any constraints provided for under article 25 of the Constitution of India nor transcends any of the barriers of the constitutional morality (*whatever it may mean*).

The bench found the position of the petitioners persuasive enough to solicit acceptance. The judges also accepted that the position of the petitioners presented an opportunity for reforms. But reforms need to be carried out via legislative intervention and not steered by the judiciary as it is bound by the clear black letter of law stated in the Constitution of India or elsewhere.

It may be noted here that the bench did not delve much into the Shariat Act 1937. According to judges, the practice of talaq-e-biddat is covered by personal law and does not get transformed into 'statutory law'[6]. The inquiry into Shariat Act being violative of constitution, thus, was partially avoided by the bench.

Justice Kurian Joseph wrote a separate judgment wherein his lordship quoted the excerpts from Quran and observed that the verses are crystal clear and

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6 *ibid*

unambiguous and require no interpretation. According to Justice Kurian, Holy Quran attributes sanctity and permanence to matrimony but in extremely unavoidable situations, talaq is permissible. Before divorce (talaq), however, an attempt for reconciliation and it is succeeds, then revocation, are the Quranic essential steps before talaq attains finality.[7] Justice Kurian held that in cases of instant triple talaq, the door for reconciliation gets closed and hence, triple talaq is against the basic tenets of the Holy Quran and consequently violates Shariat.[8]

Justice Kurian took a contrary view from that of the Chief Justice Kehar and Justice Nazeerthat *"triple talaqis integral to the religious denomination in question and that the same is part of their personal law and expressly rejected the plea of antiquity/ historicity and observed that merely because the practice has continued for long, is by itself does not make it valid, if it is expressly declared to be impermissible."*[9]

Justice Kurian also analyzed the purpose and intent of the Shariat Act, 1937 and held that *"the purpose of same was to declare Shariat as the "rule of decision" and to discontinue anti-shariat practices with respect to the subject matters enumerated in section 2, including talaq and held that since no practice against the tenets of Quran is permissible after the 1937 Act, hence, no constitutional protection to such a practice can be afforded."* Here Justice Kurian concurred with the opinion expressed by Justice RF Nariman and Justice UU Lalithis quote summed up his decision, "*what is bad in theology is bad in law, as well*."[10]

Justice Rohinton F.Nariman& Justice Uday Umesh Lalit wrote yet another judgment wherein they analysed the matter in a narrow frame. The questions inquired into by the bench were: "*whether 1937 Act can be said to recognize and enforce triple talaq as a rule of law; andif no, whether practice of triple talaq forms part of personal laws and thus falls outside article 13(1) of the Constitution of India, as per Narasu Appa case".*[11]

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7 *ibid*

8 *ibid*

9 *ibid*

10 *ibid*

11 *State of Bombay v. NarasuAppa Mali* AIR 1952 Bom 84

The bench did not view the matter of instant triple talaq from the lens of religion or religious practice under article 25 of theConstitution of India, as much as a matter of legality or constitutionality of a pre-independence legislation, i.e. Muslim Personal Law (Shariat) Application Act 1937, sanctioning triple talaq vide section 2.

Muslim Personal Law Board had argued thatthe*non-obstante* clause in section 2 indicated that "*the purpose of the Act was to do away with custom or usage, which were/ are contrary to Muslim personal law i.e. Shariat and not to make Shariat as 'rule of decision' in the matters related to parties, who are Muslim by religion. The bench rejected the plea and held that non-obstante clause can't be viewed as governing the enacting part of the section. If plea of the defendant is accepted, it would become a case of the tail wagging the dog."*[12]

The bench,while answering the first question, held that "section 2 makes instant triple talaq "*the rule of decision in cases where the parties are Muslims"* and since the 1937 Act is a law made by the Legislature before the 1947, it would fall squarely within the expression "*law in force*" under article 13(3)(b) and would be hit by article 13(1), if found to be inconsistent with the provisions of part III of the Constitution, to the extent of such inconsistency."

The bench concluded that the instant triple talaq is a recognized form of talaq. Further, is permissible in law, though, considered as sinful by the very Hanafi School, which tolerates it.However, the bench observed that the instant triple talaq is a form of talaq, which is external to Sunna and is an irregular or heretical form of talaq**.**[13] So it would not form part of any essential religious practice. Applying test laid down in *Acharya Jagdishwara Nanda,*[14] the bench observed that *"the fundamental nature of Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice."*According to the bench, *"instant triple talaq is not a recommended action, much less a commanded one by the Koran."*

Going into the constitutionality of section 2 of the 1937 Act, to inquire whether, S. 2, to the extent it recognizes instant triple Talaq as a *rule of law* violates fundamental right under article 14 of the Constitution of India,

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12 *ibid*

13 *ibid*

14 *Commissioner of Police v. Acharya JagdishwaranandaAvadhuta*, 2004 (12) SCC 770

applying the test of *manifest arbitrariness*[15] to the matter at hand, the bench observed that *"the instant triple talaq is manifestly arbitrary, in the sense that the marital ties can be broken capriciously and whimsically without any attempt at reconciliation so as to save it."* This form of talaq must, therefore, be held to be violative of Fundamental Right contained in article 14.

The arbitrariness doctrine was recently upheld by Supreme Court in *Natural Resource Allocation*[16] wherein the court examined *Royappa*,*Maneka Gandhi* and *Ajay Hasia* and held that *"arbitrariness and unreasonableness, have been used interchangeably and the expression 'arbitrarily' means: "in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, notdone according to reason or judgment, depending on the will alone*." The bench, thus, held that *"Muslim Personal Law (Shariat) Application Act, 1937, in so far as it seeks to recognize and enforce Triple talaq, is within the meaning of the expression "laws in force" under article 13(1) and must be struck down, being void to the extent that it recognizes and enforces triple talaq."* The bench refused to go into the grounds of discrimination in these cases, as was urged by the Attorney General and those supporting him.

Earlier in ShamimAra,[17] the Supreme Court had the occasion to deal with instant triple talaq. The apex court, pointed out that *"the defendant husband failed to adduce any evidence in proof of talaq. The husband could not substantiatepronouncement of talaq, reason in justification of talaq and the efforts at reconciliation preceding the talaq."* Justice R. C. Lahoti, delivering a landmark judgment in *ShamimAra* observed that *"the talaq to be effective has to be pronounced and the respondent ought to have adduced evidence, to prove the pronouncement."*

So the majority judgement by Justice Kurian, Justice Rohinton and Justice UU Lalit in ShayaraBanois *"(a) Instant triple talak is not an essential religious practice and thus is not protected under article 25 or 26 of the Constitution of*

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15 *MalpeVishwanath Acharya v. State of Maharashtra* (1998) 2 SCC 1*; Mardia Chemicals Ltd. &Ors. v. Union of India &Ors. etc. etc.,* (2004) 4 SCC 311; *State of Tamil Nadu v. K. Shyam Sunder* (2011) 8 SCC 737; *A.P. Dairy Development Corpn.Federation v. B. Narasimha Reddy* (2011) 9 SCC 286.

16 *Natural Resource Allocation, In re, Special Reference No. 1 of 2012* (2012) 10 SCC 1

17 *ShamimAra v. State of U.P.* (2002)

*India (b) Position of ShamimAra, is upheld (c) Section 2, to the extent, it recognizes instant triple talaq is unconstitutional as it fails the test of arbitrariness and thus, violates article 14 of the Constitution of India Position of ShamimAra, is upheld."*So through concurrent judgments, instant triple talakis held to be unconstitutional. The judgment rendered *Talaq-e-biddat* unconstitutional.

## Conclusion

Even after completion of more than six decades of independence, country is chained into the shackles of regionalism, communalism, castesism etc. While women have been granted various rights under Indian Constitution and other laws, they are recognized as vulnerable. Preamble advocates Justice, equality and liberty but unfortunately personal laws are put out of the ambit of "laws inconsistent to constitutional spirit". Personal laws and its reform form the core of this debate. Sachar Committee report commendably outlined Muslim women in most of the parts of the country suffering from illiteracy, poverty and below average work participation. They are struggling for an equal citizenship which has continuously been contradicted by personal law. Time is ripe for them to challenge their marginalization under religion. The triple talaqjudgement has initiated a major change in the pattern how personal laws governed in India till now. This far-reaching decision has heralded a new age for the Muslim women empowerment agenda. The Supreme Court has truly set up a secular ruling by this verdict which has held high the constitutional spirit of equality among gender and non-discrimination. At the end constitutional spirit has to put at apex by implementing Article-44 which best serves the purpose.

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# Juvenile Justice in India: Legislative Developments and Challenges

**Dr. Sonu***

**Abstract**

Childhood is an innocent stage of human life and a society's prospects and strength hang on values and standards that a child is receiving in different stages of his life. In fact, in every child the foundation of a nation is laid. The proper development of a child is therefore, imperative for the proper growth of a nation. On the other hand, human societies never stand aloof from juvenile delinquents since time immemorial. But they had never been treated as criminals but every effort had been done towards their reformation and rehabilitation with the help of various juvenile welfare legislations. Juvenile delinquency in legal terms is an act or omission punishable in a legal system by adjudication for treatment and rehabilitation. Not a single reason can be given for juvenile delinquency. There are various Acts that have been passed to deal with delinquent juvenile. The old in the series was enacted in 1850 and latest is enacted in 2000 but after Nirbhaya Case demand raised for amendment in the Act of 2000. Resultantly, in 2015 a new Act comes into legal surface to tackle the issues of Juvenile Justice. This article is an analysis of legislative developments and challenges in the fields of juvenile justice.

**Keywords:** - Juvenile Justice, Delinquent Juvenile, Neglected Juvenile, JJ Act, Challenges.

## Introduction

***"If you want real peace in the world, start with the children."***

**– M. K. Gandhi**

Childhood is an innocent stage of human life and asociety's prospects and strength hang on values and standards that a child receives in different stages of his life. In fact, in every child the foundation of a nation is laid. The proper development of a child is therefore, imperative for the proper growth of a

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nation. Thus, every family's, state's or a country's expectations lies in their children. On the other hand, human societies never stand aloof from juvenile delinquents since time immemorial. But they had never been treated as criminals but every effort had been done towards their reformation and rehabilitation with the help of various juvenile welfare legislations.

**Meaning of Juvenile**

Generally the term "*Juvenile"* represents a person with immature mind with no experience of real life. In legal sense, a "*juvenile"* can be a person/child whoasserted to have carried outan offence but can't be handled alike fully grown/ mature person due to some specific laws available to deal with juvenile in the country.

United Nations Convention's defines child in article 1as a person less than 18 years of age except when the legal age is secured earlieras per the law applicable on the child.[1]

Section 2(h) of JJ Act 1986[2] defines boy and girl juvenile on their age criteria i.e. below the age of sixteen years and eighteen years respectively.

JJ Act 2000[3] defines juvenile/child in a very simple and clear way. According to it an individual less than eighteen years of age is a juvenile. Likewise new Act of 2015[4] provided same age for a child.

**Nature of Delinquency**

The notion about juvenile delinquency is spurious and hoodwinked not only non professional but professional as well. For some juvenile delinquents are criminals who are below the age of 18 years but if same offence is committed by an adult than he would have been punished by law in the form of penalty or imprisonment behind the bars. In opinion of others, Delinquency is displeasing conduct or behaviour of a child unsanctioned by the people living in society. Such irk conduct of child demands discussion, analysis and its impact on child, family, society or nation in general or specifically. Therefore, juvenile delinquency in legal terms is an act or omission punishable in a legal system by adjudication for treatment and rehabilitation.

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1 United Nations Convention on the Rights of Child, 1989.

2 Juvenile Justice Act, 1986.

3 Section 2(k), Juvenile Justice (Care and Protection of Children) Act, 2000.

4 Juvenile Justice (Care and Protection of Children) Act, 2015.

**Reasons for Juvenile Delinquency**

To take birth in a family is a matter of destiny and innumerable minors are not fortunate enough to relish a comfortable and happy life. The worsened circumstances for children in India are a blended result of increasing population leading to process of urbanization and industrialization. Further, disintegration of family structures is enhancing factor for pathetic condition of children in India. These factors are putting the children in more difficult circumstances, making them vulnerable and neglected, putting them on margin. Moreover, they are put at disadvantaged position to meet their pivotal right to education, food, health, shelter and care. Nowadays, juveniles are found committed offences of serious nature like robbery, dacoity, murder and rape etc. There are various reasons for delinquency of juvenile which are wide ranging and complex:

**Cultural Conflicts-** Today's era of modernization, urbanization and industrialization mobilized people to shift from their native place to an unexplored place which led to enhance chances of cultural conflict between inhabitants and immigrants. An example of cultural conflict is partition between India and Pakistan that occurred in 1947.

**Economic and Industrial Growth-** The growth in industrial sector is giving rise to overcrowding, housing and slum dwelling problems.Poor children for the sake of financial support to their family landed in big cities and fall prey to various crime networks and end up with commission of crime or repeat it again and sometimes become hardcore criminals

**Biological Factors-** Due to environmental and other reasons the age of puberty has declined by 2 to 3 years for both boys and girls in India but due to their immature age they are incapable to understand the realities of life and resultantly land up in committing sex related offences.

**Impact of media-** The visual media generally has substantial impact on the viewers and this is another reason contributing to juvenile delinquency. Today's media showing violence, crime incidence, serials full of conspiracy against family members and fashion shows undoubtedly have fatalistic impact on clean and young minds of children. The easy approach to social media is also a factor contributing towards juvenile delinquency.

**Alcoholism-** Nowadays, to have vodka unhesitatingly turning into a usual practice amongst youth which ultimately lead to alcoholism and commission of crime in order to get money for fulfillment of their habits.

**Importance of School-** School education and friends plays an important role in mental development of a child. This is the only place where a child spent most of his time after his house. "School is usually thought as a constructive agency but when it fails to perform its designated functions, it may become by virtue of its negligence, a main contributor to delinquency".[5]

## Laws Dealing With Juvenile Justice in India

### Constitutional Provisions

Indian Constitution has some comprehensive and clear provisions about child rights. Further, Constitution cast duty upon state to make special laws[6] for special care, protection, raise standard of living[7] and provides for different rights in the form of liberty, non discrimination, their development[8] and educational rights, etc.

### Juvenile Justice Legislations

The earliest enactmentto deal with the children who committed an offence was the **Apprentices Act, 1850.** Act protected a child who was said to have committed a trifle offence and below 15 years of age to be accommodated as an apprentice in a trade.[9] In 1919, on the recommendation of an entitled jail committee child related legislations were framed in provinces. The basic and leading Acts were the Acts of 1920[10] and 1924.[11] In 1960, a central enactment by the name of **The Children Act** was framed required to be followed by the states as model legislation. Although the Act covered neglected, victimized and delinquent children but discriminatory definition of 'child' was provided by the Act[12]. Initially only juvenile court was the medium to handle the delinquent children. Later on two agencies, one the CWB[13] to handle neglected (uncared, abandoned, mistreated) children and other juvenile court to handle delinquent children was introduced by the Central Children Act. This Central Children Act was amended in 1978. In 1969 Rajasthan, Madhya Pradesh and Assam developed their separate Act. Similarly, in 1979 and 1984 Himachal Pradesh and Haryana passed their separate Acts respectively. As a result there was no

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5 ShipraLavania, *Juvenile Delinquency*, p. 1920, Rawat Publications, Jaipur, 1983.
6 Article 15(3), Constitution of India.
7 Article 47, Constitution of India.
8 Article 39(f), Constitution of India.
9 VedKumari, *"Juvenile Justice: Securing the Rights of Children during 1998-2008"*, 2 NUJS L. REV. 557-558, 2009.
10 Madras Children Act
11 Bombay Children Act
12 A boy less than 16 years and girl less than 18 years of age were contemplated as a child under the Act.
13 Child Welfare Board

uniformity as to age of the child in all these Acts with different policies and actions. Therefore, the requirement was for passing of an enactment for whole country.

In 1985 at International front, the expression *"Juvenile"* and *"Juvenile Justice"* were cast off initially in "United Nations Standard Minimum Rules for the Administration of Juvenile Justice."

**Juvenile Justice Act, 1986**

For proper "care and protection of children" a uniform enactment for whole country was passed i.e. JJ Act, 1986 that succeeded the Children Act, 1960. The preamble of this enactment makes provision for

(i) "care"

(ii) "protection"

(iii) "treatment"

(iv) "development" and

(v) "rehabilitation"

of juveniles. Age criteria for juvenile under this Act were kept same as that of Children Act, 1960. A new attribute of classification of juvenile into neglected and delinquent were added in JJ Act 1986.

Both categories of children required to be placed in care of "Observation Homes" for the period their probe in not completed. Besides this the Act also provided for establishment of Juvenile Homes[14], Special Homes[15] and After-Care Organization.[16] The new Act of 2000 takes the place of 1986 Act because the JJ Act 1986 didn'tgive extensive scope on "Delinquent Juveniles" and "Neglected Juveniles".

**Juvenile Justice (Care & Protection of Children) Act, 2000**

After three years of coming of CRC[17] 1989, India ratified it and changed its attitude towards criminality that was reflected in Supreme Court decisions.[18]

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14 A home where neglected juveniles stay, get education and vocational training. Further, efforts are also made to rehabilitate them in society. Section 9, Juvenile Justice Act, 1986.

15 Ibid, Section 10, Juvenile Justice Act, 1986.

16 These organizations take care of juveniles after they leave juvenile homes or special homes. Section 12, Juvenile Justice Act, 1986.

17 Convention on Rights of Childs

18 *Ramdeo Chauhan v. State of Assam* (2001) 5 SCC 714, *Arnit Das v. State of Bihar* AIR 2000 SC 2264.

Further, the needs for extra congenial system for juvenile were some of the factors that pilot enactment of Juvenile Justice (Care and Protection of Children) Act 2000. The JJ Act, 2000 bring forth aninvariable age criteria of eighteen years for males and females. The Act broadly deals with two types of children:

1. "Juvenile in conflict with law"[19]
2. "child in need of care and protection"[20]

The Act expanded the definition of neglected juvenile by including mentally and physically disabled children; sick children, children suffering from incurable disease, abused children including drug abuse and children victims of natural calamity or armed conflict.

Under the Act it was a mandatory requirement that in cases of juvenile a judgment must be pronounced within 4 months. Setting up of JJB[21] was also obligatory under the Act. The crimes committed against a juvenile have now been made cognizable offences. Trained Special Juvenile Police Units were also created to perform their functions effectively. "Rehabilitation" and "social integration" of children have been given significant place in the Act. The way out advanced for the same are "adoption", "foster care", "sponsorship" and "after-care". Moreover, this law permits for adoption of a child by suitable couple/single individual. More importantly, JJB has been bestowed with powerto give a child in adoption even to a single parent and to parents to adopt a child of the same sex, irrespective of the number of their biological sons or daughters.

**Challenges to Juvenile Justice (Care & Protection of Children) Act, 2000**

**Convention on the Rights of Child 1989**

As per this convention, a child can't be put through torture, inhuman, degrading or cruel treatment.[22] But related provision is not available in the JJ Act 2000, resulting into sometimes reported and many a times unreported cases of child abuse which is an unfortunate reality of Indian child.

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19 Section 2(l), Juvenile Justice (Care and Protection of Children) Act, 2000.

20 Section 2(d), Juvenile Justice (Care and Protection of Children) Act, 2000.

21 Previously known as Juvenile Welfare Board.

22 Article 37 (a), Convention on Rights of Child 1989.

As per another provision[23] of the convention while dealing with the child in conflict with law, respect need to be given to Human Rights and other Legal Safeguards. Under JJ Act 2000, the "child in conflict with law" will be dealt by Juvenile Justice Board consisting of a magistrate and two social workers and the chances are that the judgement of magistrate may be overruled by the social workers being in majority. Thus, the object of legal safeguard provided under the CRC[24] may be overlooked.

**Juvenile Justice (Care and Protection of Children) Act 2000**

Under the Act, a CWC[25] may be formed by the government to exercise the powers.[26] The word "may" is only directory and a huge fault on the part of legislator as proper implementation of Act would always be open to question due to this reason.

Under the Act, an inquiry is required to be concluded within four months from the day of the commencement unless same is prolonged by reason of some special cases[27] and there is possibility of arbitrariness by the JJB under the Act by including the word 'special cases' because what cases can be special cases are not defined or illustrated in the Act. Thus, Act is leaving the scope of arbitrariness.

The Act of 2000 has a provision of SPU[28] for juveniles.[29] But without mentioning any instruction for police training it would always remain on edge.

**Nirbhaya Case**

In *Nirbhaya case*, popularly known as *"Delhi Gang Rape"* case in which one accused was a juvenile with few months less to 18 years and was given sentenced of 3 years only although he had been the vigorously contributing associate in the said case. This case light up flare amongstgeneral masses and aroused the demand for amendment in Juvenile Justice (Care & Protection) Act, 2000. Resultantly, **Juvenile Justice (Care & Protection of Children) Act, 2015** came in scene.

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23 Article 40 (3)(b), Convention on Rights of Child 1989.

24 Under JJ Act 2000, it is not necessary that social workers shall have the legal knowledge. But the decisions of the Board will be the outcome of majority thereby overruling of the legal knowledge of magistrate by social workers.

25 Child Welfare Committee.

26 Section 29, Juvenile Justice Act 2000.

27 Section 14, Juvenile Justice Act 2000.

28 Special Police Unit.

29 Section 63, Juvenile Justice Act 2000.

**Juvenile Justice (Care and Protection of Children) Act, 2015**

The peculiarity about this Act is that it authorizes the law to take legal actions against juveniles of age ranging from 16- 18 years like adults, who said to have perpetrated a serious offence. This JJ Act 2015 brings in concept of foster care in India under which the needed families would sign up. Priority will be given to "abandoned", "orphaned", "disabled" children and regular monitoring of families will be done. Act also provided for giving a chance of reconsideration of decision within 3 months to parents who are giving up their children for adoption. By passing of this Act, India is now exclusive State in entire world thatpunishes for sale of tobacco to and by minors. Further, the Act mandates setting up JJB and CWC in every district. Further, JJB has exclusive power to decide about trial of a juvenile between 16 to 18 years old as a fully grown mature person or not.

**Challenges to Juvenile Justice (Care and Protection of Children) Act 2015**

The child who are tortured, exploited and abused with the object of sexual abuse will fall under the category of child in need of care and protection[30] but ignoring the child who already faced sexual abuse in past is a gross lacunae in the Act.

Section 2(5), JJ Act 2015 defines 'aftercare' which includes "financial support" to those juvenile who are of 18 years of age but not more than 21 years. But non compliance of the provision and lack of finances can be the problems that may arise in abiding the provisions of the Act.

The JJB has the authority to inquire about the state of mind of juvenileswho are below the age of 16 years while they committed any heinous crime and to decide afterward whether to initiate trial or to dispose off the case.[31] The most notable shortcoming with this provision is that it beforehand assumes a child guilty of an offence and this is apparently contravention of Articles 14 and 21 of Indian Constitution, as the procedure is arbitrary and irrational.

**Landmark Cases**

In *Sanjay Suri* case,[32] the Supreme Court stressed that prison officials should decide on the basis of juvenile's age provided in the documents for the purpose of detention of juvenile and further ordered the release of juvenile under-trial prisoners.

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30 Section 4 (2)(viii), Juvenile Justice Act 2015.

31 Section 16, Juvenile Justice (Care and Protection of Children) Act 2015.

32 *Sanjay Suri v. Delhi Administration* AIR 1986 SC 414.

In *Jayendra* case,[33] the Apex court questioned the decision of High court for putting a child behind bars. The Apex Court ordered for immediate release of juvenile once the juvenile was found to be of 16 years and 4 months in medical report. For the purpose of protecting the fundamental rights of juvenile in jail, honorable SC of India brought out some directions in *Munna v. State of UP*[34] for children who wereput behind the bars.

In *Arnit Das* case,[35] the Highest Court pronounced that, *"the age of the child is a matter of great concern. The issue has come up before the courts several times and in practice there are children lodged in adult jails because they had no evidence to prove their age. In such cases it is recommended that the benefit of doubt should always be in favour of the child."* In this case, it was upheld that the decisive dateto determine whether a person is juvenile is the date when he is brought before the competent authority. Whereas in *UmeshChander* case,[36] it was held to be the date on which the offence was committed. Both the decisions were in conflict with each other. This conflict was set at rest in *Pratap Singh's* case.[37] In this case court decided that the judgement given in *Umesh Chandra* case by three judge bench was not noticed by two judge bench in *Arnit Das* case. The Court observed that the law laid down in Umesh Chandra case is "correct and good law".

**Justice Verma Committee Report**

This Committee was appointed to give report on amendment to criminal law. On 23rd January 2013, the committee furnished its report and in report it was mentioned that the Juvenile Act is presenting gloomy picture and dismal state for protecting children. Justice Verma report clearly said that a child can't be hold responsible for committing a crime if we fail in our duty to provide them with basic necessities and constitutional rights provided to them under Indian Constitution. The committee observed that children home lack in basic facilities and juveniles are required to spend their time in these lacked boundaries and thereby fall prey to other offences. In these homes their mental and nutritional needs always remain unfulfilled therefore their return in society's mainstream is never possible.

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33 *Jayendra v. State of UP* AIR 1982 SC 685.

34 AIR 1982 SC 806.

35 *Arnit Das v. State of Bihar* AIR 2000 SC 2264.

36 *UmeshChander v. State of Jharkhand* (1982) 2 SCC 202.

37 *Pratap Singh v. State of Jharkhand* (2005) 3 SCC 551.

## Conclusion

To meet out the justice is profoundduty of a legal authorities and this duty becomes more significant and crucial when the person appearing before them are a juvenile. A number of legislations have been enacted from time to time to meet out the required needs of care and protection of juveniles. Everything in law revolves around the best interest of child/juvenile. The JJ Act 2000 had been theinvariable law equipped with terms"rehabilitation" of "children in conflict with law" and for "children in need of care and protection". Further, JJ Act 2000 was enacted by keeping in mind various international instruments ratified by Government of India and set new era of juvenile justice in India. But due to lack of proper implementation and various other multiplicity of factors it could not achieved an eye catching goal and it paid mere lip service to many issues which required immediate attention.[38] To cater the need and on the demand of the society that arose after Nirbhaya case the JJ Act 2015 was enacted. But it is felt that mere enactment is not sufficient; rather there is a need for providing regular orientation training to those who are associated with implementation of these enactments establishing the required co-ordination among them. Further, special training sessions for JJB in child psychology is the need of the hour.

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6. Ram Ahuja, Criminology, Rawat Publication, 2000.

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# Legislation for Change in Information Regime in India: Subversion or Strengthen

**Pawan Kumar***

**Abstract**

The Parliament of India in 2005 enacted one of the revolutionary legislation titled the Right to Information Act for bring transparency in function of public officials and to make them accountable to the people of India. The legislation has been amplified by various decision of the highest court of India from 2005 to date. However, the said legislation has been subverted by an Amendment Act of 2019.

**Keywords**: Right, Information, Democracy, Government, Commission, fiduciary relationship, personal etc.

## Introduction

The societies have been witnessing movements for democratic openness all over the world but at the same time government of the day tend to be secretive in their conduct. The world has witnessed unprecedented movements/agitation for open government during last couple of centuries and many democratic countries guaranteed freedom of information about government affairs during last couple of decades including India.[1] The outreach of the right to information is beyond officials files of the government departments and it includes status of environmental health knowledge as the environmental disasters have caused havoc from time to time.[2]

India is known as the largest functional parliamentary democracy in the World from last seventy years. These seventy years have seen many developments inside and outside Indian parliament which have strengthened the parliamentary democracy. The regular elections for the parliament are

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1 Thomas Blanton, "The World's Right to Know", 131 Foreign Affairs 50-58 (2002).

2 Gary E.R. Hook and George W. Lucier, "The Right to know Is for Everyone" Environmental Health Perspectives A160-A161 (2000).

testimony to the confidence of one billion people of the country in its parliamentary democracy. The framers of Indian Constitution ensured that parliamentary democracy thrives in India for generations by ensuring people free and fair participation on the basis of adult franchise. It is beyond doubt that there cannot be free and fair participation of the people in parliamentary democracy till they are informed with the affairs of the government of the day as a matter of right and governmental policies are framed in accordance with the public opinion. Therefore, the framers of the Constitution of India ensured the free and fair participation of the people by guaranteed fundamental right to freedom of speech and expression in Article 19 (1) (a) of the Constitution of India. The fundamental right of speech and expression has been amplified by the highest court of India by upholding that voters have right to know antecedents of a candidates contesting elections for the parliament of India.[3] However, the parliament did not repeal the Official Secret Act of 1923 although it enacted the Right to Information Act of 2005 (hereinafter referred as the RTI Act)! The RTI Act ushered an era of participatory parliamentary democracy in India by empowering the people to know actions of the government through this legislation and provided ample opportunities to the opposition leaders to keep a close vigil on the government functioning as well as to bring wrong deeds of the government servants to the notice of the government though RTI Act. The RTI Act provided effective independent mechanism for knowing the affairs of the government and a mechanism to hold the government of the day to be transparent and accountable.

Recently the parliament has approved amendments to the RTI Act by way of the Right to Information (Amendment) Act, 2019 (hereinafter referred as the RTI Amendment Act). The paper intents to know whether this legislation for change in information regime namely amendments in the RTI Act have subverted the free flow of information in India or strengthened the same and the same can be known by knowing:- (1) Information regime in India before the RTI Act; (2) Information Regime established by the RTI Act and (3) the Implications of the legislation for change in Information regime

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[3] Union of India v. Association for Democratic Reforms, Writ Petition (Civil) 204 of 2001 decided on 02.05.2002.

## Information Regime before the RTI Act of 2005

There is no provision in Indian Constitution which expressly guarantees fundamental right to information. However, the fundamental right to information may be inferred from fundamental right to life and liberty guaranteed under Article 21 and fundamental right to freedom of speech and expression guaranteed under Article 19 (1) (a) under the Indian Constitution. Article 21 mandates the State not to divest any person from life or personal liberty in absence of any provisions of law whereas Article 19 (1) (a) secures fundamental freedom of oration and articulation to every citizen although these freedoms may be restricted on rational limitations on specific grounds mentioned in Clause (2) of the Article. The parliament did not repeal a colonial legislation obstructing open government namely the Official Secret Act of 1923 which empowered the central government to declare any place as prohibited and prescribed for visit to prohibited place as well as penalize possession of information from such places.

The highest Court of India in Raj Narain case[4] observed that in a representative parliamentary democracy, the representative must be accountable for their governance with rare exceptions as secrecy. These representative functionaries must be transparent in their working with the people and the people have right to get information about their working/acts especially for preventing corruption. The Court also observed that the right to information stems from fundamental freedom of oration. This case reflects tendency of the State and its instrumentalities to avoid information from the citizens to cover up corrupt practices despite a guarantee against the same guaranteed through fundamental rights.

Justice Bhagwati in S.P. Gupta case[5] favoured open government in India by observing, "open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception". The highest court in People's Union for Civil Liberties case[6] held that the right to information is an aspect of fundamental freedom of speech and expression under Article 19 (1) (a) of the Constitution.

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4 State of Uttar Pradesh v. Raj Narain and Others, AIR 1975 SC 865.

5 S.P. Gupta v. President of India, AIR 1982 SC 149.

6 People's Union for Civil Liberties and Another v. Union of India and Others, Civil Appeal 4294 of 1998 decided on 06.01.2004.

In Onkar Nath Bajaj case[7], the highest court held that people have right to know the factors under which their elected representatives have been allocated petroleum products distribution agencies or outlets. The highest court in Dinesh Trivedi case[8] declined to let the petitioner know background of M.N. Vohra committee report on nexus between politicians, bureaucrats and criminals in India although the court directed to establish a nodal agency with cabinet secretary its chairperson for investing preventing crimes cited in the report.

However, there was no mechanism to enforce the fundamental right to information except constitutional remedies of writ petitions under Articles 226 and 32 of the Constitution. Therefore, the people agitated for making provisions by legislation for enforcement of the fundamental right to freedom.

**Information Regime established by the RTI Act**

The RTI Act mandates every public functionary established under the Indian Constitution or non-government functionaries aided by the government to be transparent and accountable for public functions and empowers every citizen to seek information from such functionaries within specified time period barring few exceptions under sections 8 and 9. The Act established Independent agencies namely Central Information Commission for appeal against public functionaries of Central Government and State Information Commission for appeal against public functionaries of State Government by guaranteeing a term of five years to the members of these Commissions and prescribing their terms and conditions and grounds of removal as well as procedure of their the removal akin to the bodies established by the Constitution of Indianamely Election Commission of India so that these Commissions may discharge their duties in an impartial manner especially against government functionaries. The Act supersedes the provisions of the Official Secret Act.

The highest court in CBSE case[9] held that an evaluated answer script was information under the RTI Act and examination organizations like varsities and Boards are not exempted from disclosure of such information and the same

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7 Onkar Nath Bajaj etc. v. Union of India and Another, Transfer Case (Civil) 80 of 2002 decided on 20.12.2002.

8 Shri Dinesh Trivedi and Others v. Union of India and Others, decided on 20.03.1997.

9 Central Board of Secondary Education and Another v. Aditya Bandhopadhyay and Others, Civil Appeal 6454 of 2011 decided on 09.08.2011.

cannot denied by bylaws or regulations as such bylaws or regulations would be inconsistent with the RTI Act as these organizations do not hold answer scripts of the candidates in fiduciary relationship. The court also observed that the RTI Act cannot be tool in hands of persons against national development by seeking voluminous information hampering administration of an organization.

The higher court in Common Cause case[10] held that as an ordinary rule the fee for RTI application should not exceed Rs. 50/- and cost of information for one page should not exceed Rs. 5/- under the rules framed under section 28 of the RTI Act. The highest court in Girish Ramchandra Deshpande case[11] held that disciplinary actions taken by an employer against its employees are in fiduciary relationship which are exempted under the RTI Act unless the larger public interest warrants their disclosure and information filed by an individual in returns to income tax department are 'personal information' exempted under the RTI Act. The court in Canara Bank case[12] held that information like contribution to provident fund of a particular employee are personal information are exempted under the RTI Act unless disclosure of it serves larger public interest. The court in R.K. Jain case[13] held that annual confidential reports and its analysis are exempted from the purview of the RTI Act.

The court in Ferani Hotels case[14] imposed an exemplary cost of Rs. 2.5 lakhs on appellant payable to respondents as the appeal was preferred to delay information under the RTI Act for commercial considerations. The court in Anjali Bhardwaj case[15] the petitioners filed social interest litigation for directions to the Government of India and State Government to fill up the post of Information Commissioners as well as creation of more number of posts of State Information Commissioners under the RTI Act in a transparent manner as some posts have remained vacant/inadequate for years thwarting the right to

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10 Common Cause v. High Court of Allahabad and Another, 2018 (2) RCR (Civil) 579.

11 Girish Ramchandra Deshpande v. Central Information Commissioner and Others, (2013) 1 SCC 212.

12 Canara Bank represented by its Deputy General Manager v. C.S. Shyam and Another, Civil Appeal 22 of 2009 decided on 31.08.2017.

13 R.K. Jain v. Union of India and Another, (2013) 14 SCC 794.

14 Ferani Hotels Pvt. Ltd. v. The State Information Commissioner Greater Mumbai and Others, Civil Appeals 9064-65 of 2018 decided on 27.09.2018.

15 Anjali Bhardwaj and Others v. Union of India and Others, Writ Petition (Civil) 436 of 2018 decided on 15.02.2019.

information of the citizens. The highest court directed to lay down a rational and objective criterion for short listing candidates for the post of Information Commissioners after inviting applications through advertisements and fill up such vacancies at the earliest without undue delay from all streams prescribed by RTI Act rather than preferring candidates from a particular stream.

The legislation has been hailed as watershed moment in history of democratic India which may bring socio-economic movement.[16] A study has revealed that the Information Commissions are reluctant to penalize public functionaries who deny information to people despite the RTI Act.[17] The public functionaries are hardly interested in proactive disclosures mandated by this Act.[18]Studies have revealed that the retired government servants' especially retired persons from Indian Administrative Service are favoured in appointment as Information Commissioners and pendency is piling up at Commissions.[19]

**Implications of the Legislation changing Information Regime**

The RTI Amendment Act has empowered the Central Government to fix term of the members of Central Information Commissioners as well as State Information Commissions including their Chiefwhereas the RTI Act prescribed a term of five years. Further, the Amendment Act empowers the Central Government to determine salaries and allowances of the members of Central Information Commission and State Information Commission including their Chief whereas the RTI Act prescribed salaries and allowances same as those of Election Commissioners for members and Chief Election Commissioner for Chief for members of Central Information Commissioner and its chief respectively and prescribed salaries and allowances same as those of Election Commissioner for Chief Information Commissioner of State Information Commission and same as those of Chief Secretary of the State Government for members of the State Information Commission.

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16 Nancy Roberts and Alasdair Roberts, "A Great and Revolutionary Law? The First Four Years of India's Right to Information Act", 70 (6) Public Administration Review 925-933 (2010).

17 Editorial, "Auditing the "Right to Information Act", 43 (18) EPW 6 (2008).

18 Supra note 10 at 929.

19 Id at 930.

Therefore, the RTI Amendment has left the tenure and salaries as well allowances of the Central Information Commission and the State Information Commission at the mercy of the Central Government. The amendment has severally shaken the independence of these appellant authorities under the RTI Act which is likely to impact their functioning in tune with the psychology of the government of the day. The earlier studies have shown reluctance of the appellant authorities under the RTI namely Information Commissioner to penalize erring officials who fail to provide timely information to the information seeker under the RTI and this amendment will surely act as a deterrence for Information Commissioner to penalize such erring officials. Further, the Amendment is likely to raise litigations in High Court and Supreme Court against decision of such government pliable Information Commissions as it would be difficult for these Information Commissioners to hold the government of the day accountable in accordance with the principles laid down in the RTI Act when their terms along with salary and allowances are at central government sweet will. The amendment is likely to enhance costs for information seekers as they shall have no option than to appeal before High Courts and Supreme Court in case the Appellant Information Commissions fails to discharge their duties under the RTI Act.

Further, the RTI Amendment Act is likely to weaken the principles of the Federal Constitution in India because members of the State Information Commissioners have been left at mercy of the central government for their term and perks which may encourage them to work against opposition party's government in States to please the party in power at centre. The Amendment clearly reflects that the Parliament of India has abdicated its power to delegate by way of excess delegation without laying down any policy for guidance of the central government in determining the terms and perks of the Central Information Commission and State Information Commission. The inadequate deliberations with members of civil society and RTI activists manifests real intentions of the party commanding effective majority in Loksabha and workable majority in Rajya Sabha. The lack of deliberation on the amendment in the Parliament highlights commitment of the political parties for open government in republic of India!!

Therefore, it can be safely concluded that the RTI Amendment Act has subverted Information Regime in India and a revolutionary legislation have been tamed through the amendment.

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# Surveillance in India and its Legality with reference to Right to Privacy

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**Abstract**

Surveillance of citizens by State and their right to privacy is a controversial issue prevalent in Indian federation.In the twenty first century, a government which is unable to maintain a right to privacy for its citizens that government cannot plausiblyestablish a democratic regime of equal treatment under the rule of law. India is the world's biggest democracy and one of the countries to acknowledge privacy as a fundamental right in its ruling in 2017. But, recentlythe government of India gives power of surveillance to ten government agencies including Commissioner of Police Delhi, Central Bureau of Investigation (CBI), and Directorate of Revenue Intelligence etc. This action of government leads India towards a path where it might become a police state soon with bureaucrats having access to personal information. This research paper deals with the legal validity of surveillance in India with special reference to fundamental right of privacy. This paper also discusses the analytical history of Supreme Court's engagement with the right to privacy and law relating to surveillance in India. In last suggests valuable suggestions to maintain a balance between surveillance and right to privacy.

**Key Words:** Surveillance, Privacy, Interception, Intermediaries, Monitoring

## Introduction

The Ministry of Home Affairs of India on 20 December 2018 empowered ten Central government agencies to monitor, decrypt and intercept information gathered, generated, received or transmitted in a computer. These agencies are CBI (Central Bureau of Investigation), IB (Intelligence Bureau), NCB

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(Narcotics Control Bureau), CBDT (Central Board of Direct Taxes), RAW (Research and Analysis Wing) DRI (Directorate of Revenue Intelligence), Delhi Police Commissioner and Directorate of Signal Intelligence. These actions will bureaucratize the surveillance mechanism. The bureaucratic power will be increased which can be misused because personal data can be collected even without informing the targeted person. A constant sense of being watched creates a drastic effect on communication and curtails individual liberty. There is no clarity about specific grounds on which surveillance request will be approved by authorized officials. This process will turn India into a police state where bureaucrats at the lowest level having access to virtual personal information of every citizen. Approximately two hundred fifty requests for surveillance are approved every day.[1] This approval looks like a rubber stamp as compare to freelance application of mind. One aspect is that surveillance will be helpful to control the social unrest or threat to National security. But on the contrary it has threat to privacy. So this imbalanced situation needs an urgent and comprehensive solution.

**The concept of Privacy**

Privacy is a minimum and natural requirement of human beings to maintain individual boundaries and to prohibit the entry of others into that area. The right to privacyin India has emerged as a vast concept. It is neither defined in the constitution nor in any statutes. In general words, privacy means a state in which one is not perceived or discomforted by others.[2] Or in other words, it means secret or the state of being free from unwanted interference in individual'spersonal life or affairs or freedom to be let alone. Privacy implies rights to be free from surveillance by state or other government agencies and to decide whether, when, whom and how individual's personal or organised information is to be exposed.

Black's Law Dictionary states that, privacy includes right to be live alone, right to stayaway from unsuitable publicity, right to stay without unjustified interference by people in matters which are not connected with the public.[3]

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1 TathagataSatpathy, Karnika Seth, Anita Gurumurthy, "Are India's laws on surveillance a threat to privacy", **The Hindu**(New Delhi)Dec.28, 2018

2 https: //www.dictionary.com 01/06/19 5:40 PM

3 http://www.legalservicesindia.com/article/2260/Right-to-Privacy-is-a-Fundamental-Right---A-Study.html 02/06/19 5:15 PM

The Privacy Bill, 2011, provides that individuals shall have a right to his privacy; confidentiality of verbal exchange made to or by him together with his correspondence, conversation over cellphone, telegraph message, postal or electronic mails and other methods of communications; confidentiality of his financial matters, medical reports, legal information and his private as well as family life; protection from surveillance; protection of his honor and data relating to individual.[4]

In broader sense, privacy may be classified as follows:
Physical i.e. limitation on others to observe an individual or circumstances through human senses. Informational i.e. limitation on seeking for or disclosing facts which are not known to others. Decisional i.e. limitation on intervention in decisions that are wholly related to an individual. Dispositional i.e. limitation on to know an individual's state of mind.[5]

The concept of right to privacy in India may be traced out in ancient Hindu text. According to Hitopadesh, some matters like worship, sex and matters relating to family should be protected from disclosure. But the Hitopadesh was related to Positive Morality. So, in ancient Hindu text there was vagueness about right to privacy. In modern time the issue relating to right to privacy was first time discussed in debates of constituent assembly. But it got a reserved support only from B.R. Ambedkar which did't secures the place for right to privacy in Indian Constitution.

The question to recognize privacy as a fundamental right arose in *Kharak Singh v. State of U.P.,*[6] in this case Justice Subbarao in his minority opinion stressed that their is a need to recognize right to privacy as a fundamental right even though it is not explicitly provided in the Constitution. The court refused to give recognition to right to privacy because Constitution of Indian doesn't provideexpresslyany such right. The similarobservation was made by Supreme Court in *M.P. Sharma v. Satish Chandra*.[7] After that, in *Govind v. State of M.P.*,[8] the apex court like recent cases didn't oppose the existence of privacyas

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4 http://www.legalserviceindia.com/legal/article-276-evolution-of-right-to-privacy-in-india.html, 02/06/2019,9:00PM

5 www.businessdictionary.com 01/06/19 3:20 PM

6 AIR 1963 SC 1295

7 AIR1954 SC 300

8 AIR 1975 SCC 148

a fundamental right. The Supreme Court observed that the right to privacy can't be an absolute right but it has to comply with State interest test. In People's Union for Civil Liberties v. Union of India,[9] the apex court observed that that privacy is a part of fundamental right provided under article 21 of Indian Constitution. On 24 August 2017 the Supreme Court in case of Justice K.S. Puttaswamy v. Union of India, held that Indians have a fundamental right to privacy.

The acknowledgment of Indian Supreme court to have a right to privacy will take years to understand its implications although some are immediately clear. These changes may affect the government's policy of Surveillance, Aadhaar (centralized database of personal information), DNA profiling bill, the actions of global platform like Facebook, Instagram, WhatsApp and Google.

**Laws relating to Surveillance in India**

In India information technology sector is developing speedily and the most important problem is that there are no particular rules relating to surveillance. But there are some statutes and rules passed by legislature to govern surveillance indirectly. Some of legal provisions are as follows:-

i) Code of Criminal Procedure 1973

Section 91 of Cr.P.C. provides for targeted surveillance. It states that courts and police officer in charge of station have a power to require any document or thing by issuing of summons, if it is necessary for investigation, trial or any proceeding under CrPC.[10] According to the provisions of this section law enforcement agencies in India can access to the stored data and request to intermediaries for any information. For example, a notice was issued to a blog bodhicommons.org in February 2013 in exercise of power conferred by section 91 of CrPC. In this notice the blog was asked to remove a statement containing defamatory words. This notice also directed to blog bodhicommons.org to give details of registration of URL from where alleged defamatory statement originally made.[11] In addition, section 92 empowers the judicial authorities to

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9 AIR 1991 SC 207

10 The Code of Criminal Procedure, 1973, Section 91

11 https://sflc.in/indias-surveillance-state-other-provisions-of-law-that-enable-collection-of-user-information, 03/06/2019, 02:15 PM

order telegraph or postal authority for interception of any parcel, document or thing.[12]

ii) Indian Telegraph Act, 1885

Section 5 clause 2 of Indian Telegraph Act, 1885 empowers the Central and State governments to intercept telephone or telegraph communication in two situations. Firstly, when public safety or public interest is involved and secondly when the officials authorized satisfied that interception is necessary to safeguard the sovereignty and integrity of India, security of the state, friendly relation with the foreign state or public order etc.[13] Thus, according to section 5(2) surveillance of telephone networks may be conducted only in case of public emergency or in the interest of public safety. But the public emergency and public safety are not defined under this Act. Supreme Court in case of People's Union for Civil Liberties v. Union of India,[14] observed that public emergency means presence of urgent condition or state of affairs calling an immediate action for people at large. The termpublic safety means condition or state of liberty from threat topublic at large. The Government or authorized officials can't resort to phone tapping, if any of the abovementioned conditions is not in existence.

Rule 419A of Indian Telegraph Rules, 1951 which was added in 2007 deals with the procedure, appropriate sanctioning authority, review process and duration for interception. This rule provides that message interception should be done with the previous assent of head or senior officer next to head of authorized security agency. When the competent authority does not confirm the interception within prescribed time than such interception will be allowed by Union Home Secretary or State Home Secretary.[15] All the orders by competent authority for interception of message or class of message should be forwarded to Review Committee.[16]

iii) Information Technology Act, 2000

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12 The Code of Criminal Procedure, 1973, Section 92

13 The Indian Telegraph Act, 1885, Section 5

14 AIR 1997 SC 568

15 The Indian Telegraph Rules, 1951, Rule 419 A(1)

16 The Indian Telegraph Rules, 1951, Rule 419 A(2)

The I. T. Act, 2000 is a principal legislation in India which provides for the collection, monitoring, interception and decryption of information of digital communications.

Section 69 of I. T. Act, 2000 empowers the government authorities to monitor, intercept or decrypt any information stored, received or transferred in to computer resources. This section provides wider scope as compare to the Indian Telegraph Act, 1885. According to this section the interception is done in the interest of integrity or sovereignty of India, defense of India, statesecurity, relations with other states, public order, to prevent the abetment of commission of cognizable offence relating to the above.[17] This act does not require that interception can occur only in case of public emergency or in interest of public safety. So, the scope of this act is wide as compare to the Indian Telegraph Act, 1885. Section 69 also lays down an obligation for online intermediaries to provide all facilities and technical assistance to the concerned authorized agency.[18] This section also empowers the authorized agencies to collect and monitor information or data for cyber security.[19]

Section 28 of Information Technology Act, 2000 empowers the officials of government to access any data of electronic form during investigation. This section empowers the any authorized officer or the controller of certifying authorities to order the production of information. These officers also have a powerto compel the production of information stored in electronic form.[20] The controller of certifying authorities or authorized officers also have a power to access computers and their data in case of suspicion of any contravention relating to chapter six of the Information Technology Act, 2000.[21]

**Information Technology (Intermediaries Guidelines) Rules, 2011**

Rule 3(7) of Information Technology (Intermediaries Guidelines) Rules, 2011 provides that intermediaries like Internet Service Providers (ISPs) or online portals shall provide assistance or information to government agencies when asked to do. The constitutional validity of this rule was challenged before Delhi High Court by Yahoo. But the question relating to its constitutional validity was left open.

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17 The Information Technology Act, 2000, Section 69

18 The Information Technology Act, 2000, Section 69(3)

19 The Information Technology Act, 2000, Section 69 B

20 The Information Technology Act, 2000, Section 28

21 The Information Technology Act, 2000, Section 29

**Information Technology (Guidelines for Cyber Cafes) Rules, 2011**

In exercise of power conferred by Section 87 (2) and Section 79 (2) of the Information Technology Act, 2000 the Information Technology (Guidelines for Cyber Cafes) Rules, 2011 were introduced. These rules provides that in India all the cyber cafes are required to keep record for each login by user and to maintain that record for one year. Rule 7 of Guidelines for Cyber Cafes Rules, 2011provides that authorised officer of registration agency is empowered to examine the computer resource or network established in a cyber café. The owner of the cyber café shall provide the all documents and information which are required by authorized officer.[22] Under the information Technology Act, 2000 cyber café are also considered as intermediaries. So, personal information of an individual can also be accessed through cyber café.

iv) **Telecom Licences**

In India, the telecom sector in last two decades has seen enormous activity. These last twenty years have offered numerous learning opportunities for government agencies as well as private entities dealing in telecom sector. At present entity concerning telecom services are authorised under Unified Access Services License Agreement to take up measures to facilitate surveillance. For instance, in India all Internet Service Providers and Telecom Service Providers have integrated interception store and forward servers in their networks. All voice call, video call, messages, MMS, GSM and unencrypted data in a way directly falls in India's Central Monitorig System. Service providers are required to connect their infrastructure with the regional centers of Central Monitoring System.[23]

**Suggestions**

The following are some important suggestions:

1. The decisions relating to surveillance are taken by executive branch which leads towards inherent bureaucratization. So, the request for surveillance should be backed by Judicial and parliament control.
2. The grounds for surveillance have been taken from article 19(2) of constitution and pasted into law. There are no specific ground on which

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22 Information Technology (Guidelines for Cyber Cafe) Rules 2011, Rule 7

23 Arindrajit Basu, Gurusabad Grover and Shweta Mohandas, "The Surveillance Industry and Human Righs", The Centre for Internet and Society", India, 15/02/2019

surveillance request is passed. So, the grounds on which authorized officials approves the request of surveillance should be specified.

3. Each request for surveillance should be approved by proper and independent application of mind.
4. The concept of surveillance by government should be harmonized with Citizens fundamental right to privacy.
5. The government should set the clear guidelines for authorities on collection, uses, monitoring and storage of information.
6. The law relating to privacy should be codified which will provides the necessary safeguards for individuals.

## Conclusion

Indian government has created a legal structure which helps the authorities to carry out surveillance through different legal rules and licence agreements for service providers. It is true that the lawful and targeted surveillance can be a beneficial tool to aid law enforcement agencies to tackle criminal and terrorist activities. But at present the laws in India seems to overextend the surveillance capabilities of government especially in case of individual's right to privacy. Though it is a big threat to privacy but the ultimate aim is to ensure National Security. So, there is a need to maintain a balance between surveillance and privacy. The above mentioned suggestions will be helpful to achieve this goal.

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2. The Code of Criminal Procedure, 1973
3. The Information Technology Act, 2000
4. Information Technology (Procedure and safeguards for Interception, Monitoring and Decryption of Information) Rules 2009
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# Jurisprudence Perspective of Legal Rights

**Dr. Anusuya Yadav***

**Abstract**

Salmond states that perfect right and perfect duty are co-relative and it is recognized & enforced by law. In other words, a perfect right is one in respect of which an action can be successfully brought in a court of law, and the decree of the court, if necessary, enforced against the defaulting judgement-debtor. But an imperfect right is incapable of legal enforcement. A time-barred debt is a typical example of imperfect right. In India, the creditor or the holder if a promissory note is dishonor suit can be file within three years and time barred cannot be sued. After the expiry of this time, the debt is barred by time. The limitation, however, does not extinguish the debt. That is, for certain purposes creditor's rights are still recognized, though the time-barred debt cannot be recovered in a court of law. Firstly, if the debtor pays the money after it has become time barred, he cannot later sue to recover it saying that of being barred by time, was without consideration. Secondly, a fresh promise to pay the debt in writing, can be enforced and the time-barred debt is treated as a valid consideration for such fresh promise. Thirdly, if the debtor has given some security, he cannot take back the things given as security, without paying the debt to the creditors. Thus in case of an imperfect right, though remedy in a court of law is denied but the right itself does not come to an end. Likewise, part-payment of a time-barred debt converts the imperfect right into a perfect right.

**Key Words:** legal rights, positive and negative right, encumbrances of property, valid consideration

## Introduction:

1. Salmond states that perfect right and perfect duty are co-relative and it is recognized & enforced by law. In India, the creditor or the holder if a promissory note is dishonor suit can be file within three years and time

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barred cannot be sued. In other words, a perfect right is one in respect of which an action can be successfully brought in a court of law, and the decree of the court, if necessary, enforced against the defaulting judgement-debtor. But an imperfect right is incapable of legal enforcement[1]. A time-barred debt is a typical example of imperfect right. In India, the creditor or the holder of a promissory note can sue upon it within three years from the date of debt becoming payable. After the expiry of this time, the debt is barred by time. The limitation, however, does not extinguish the debt. That is, for certain purposes creditor's rights are still recognized, though the time-barred debt cannot be recovered in a court of law. Firstly, if the debtor pays the money after it has become time barred, he cannot later sue to recover it saying that of being barred by time, was without consideration. Secondly, a fresh promise to pay the debt in writing, can be enforced and the time-barred debt is treated as a valid consideration for such fresh promise. Thirdly, if the debtor has given some security, he cannot take back the things given as security, without paying the debt to the creditors. Thus in case of an imperfect right, though remedy in a court of law is denied but the right itself does not come to an end. Likewise, part-payment of a time-barred debt converts the imperfect right into a perfect right.The rights of the subjects against the State are also sometimes classified as imperfect rights because of their unenforceability. But it is submitted that this view seems to be against the accepted legal notions, the reason being that an ordinary imperfect right is unenforceable because some rule of law declares it to be so whereas rights against the State are unenforceable not in this legal sense, but in the sense that the strength of the law is none other than the strength of the State itself[2].

2. **Positive and Negative Rights-** Rights and duties are co-relative one side there is right but another side there is duty. It is compared with two side of a coin. Where there is no right there is no duty. Others are restrained from doing something. The positive right is a right to be positively benefited but a negative right is merely a right, not to be harmed. A right to receive compensation or damages, or a creditor's right to recover money from the debtor is example of positive right. As against this, right of ownership is a negative right for it imposes on others, a negative duty of non-interference

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1 Allen Vs. Waters & Co. (1935) 1 KB 200

2 https://www.srdlawnotes.com/2018/04/classification-of-legal-rights.html

with my right ownership. A right to reputation is again a negative right in the sense that it imposes a negative duty upon others not to interfere with it[3].

The distinction between positive and negative right can be summarized as follows-

- Rights and duties are co relative and dependent on each other.
- A positive right focus on positive act but negative act focus on not doing.

3. These are also called Rights in rem and rights in personam. The distinction between real and personal rights is closely connected but not indetical with that between negative and positive duties. It is based on the difference in the incidence of correlative duties. A real right (right in rem) corresponds to a duty imposed upon persons in general whereas a personal right (right in personam) corresponds to a duty imposed upon determinate individuals. In other words, a real right is available against the world as large while a personal right is available against a particular person or persons. The distinction between real personal right is well illustrated by an example. For it is available exclusively against that tenant and none else.

It is significant to note that almost Rights can be divided in two categories positive and negative. Generally, personal Rights are positive in nature bu under some circumstances personal Rights may also be negative. For instance, if I have purchased the goodwill of a business from a trader, he is restrained from competing with me though all other traders can compete with me. My right of exemption from competition from that particular trade whose goodwill I have purchased under an agreement is my personal right which is negative in nature[4].

4. Proprietary and Personal rights- They have some economic or monetary significance and are elements of wealth. For instance, money in one's pocket or in Bank, right to debt, land houses etc, are proprietary rights. Personal Rights are related to the person or the stuts of a person but property rights are related to property.[5] They have no monetary value whatsoever Examples of personal right are right of reputation, personal

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3 https://en.wikipedia.org/wiki/Negative_and_positive_rights

4 https://www.academia.edu/8794413/Rights_and_Duties

5 Roman Law

liberty, freedom from bodily harm, right of a husband in case of his wife or parent in case of their wards etc.

- The distinction between proprietary and personal rights can be summarized as follows:-
- Proprietary rights relate to estate of a person which includes all his assets and property in any form. Persona Rights are related to person but proprietary.
- Proprietary rights are alienable while the personal rights are alienable. The former are inheritable whereas the latter are not inheritable.
- Proprietary rights are more static as compared with the personal rights.
- Right in one's on property is called repropria but rigts in other property is called re aliena. The latter may also be called as encumbrances using the term in its widest sense.

The most absolute power which the law gives over a thing is called the right of dominium. This is a real right in a thing which is one's own, and is called right in re propria. But a man may have rights in property less than full ownership, the dominium being, infact, vested in another.

According to Salmond, "a right in re aliena is one which limits or derogates from some more general right belonging to some other person in respect of same subject matter. All other rights which are not thus limited are jura in re propia. For instance, if a person mortgages his house, he has created an encumbrance by dividing his proprietary right in the house. The mortgagee is temporarily the owner of the house. The mortgagor has the right to redeem the mortgage. This right which is now completely detached and separated from the mortgagor's complete ownership is the right in re aliena because mortgagor's complete ownership is encumbered due to mortgage[6].

Salmond classified as:-

- By lease did on ecan hold the property in his own possession but the owner is some different persons for a particular period gives his property to lessee for some premium.
- Seritude is a limited right. He does not create ownersip and possession. For example Right to light air, ways, water in adjoin land.

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6 https://www.legalbites.in/rights-duties-jurisprudence/

- Security is a secured amount for a debt. A mortgage did is the example of security.
- In trust property is hold by someone for another. In this there are two person trustee who hold the property for another that is called beneficiaries.

1. Principles Rights are prime in nature but ancillary Rights are secondary Right or depend on primary Rights. For example in mortgage did mortgage amount is primary amount but security is ancillary amount.

2. Antecedent & Re medial Rights can be in rem or personam. If the promiser commits a breach of the contract, promise shall have sanctioning right to calm damages. Sanctioning rights are in personam because they result from violations by specific persons.

3. It is created by written agreement or by title deeds. When a person have two equitable rights then the first in time shall prevail but if there are conflict between legal rights and equitable rights then legal rights shall prevail.

The General principle regarding equitable rights is that when there are two inconsistent equitable rights claimed by different persons over the same thing, the first in time shall prevail. But where there is a conflict between a legal right and an equitable right, the legal right shall take precedence over equitable right even if it is subsequent to the equitable right in origin, but the owner of the legal right must have acquired it for value and without notice of the prior equity. This principle finds expression in the maxim, 'where there are equal equities, the law shall prevail'

The Indian law, however, does not recognize the distinction between law and equity since there is neither separate equity law nor separate equity courts in India. But the principles of equity have found expression in the various statutory enactments in India. In ther words, where there is no specific law or usage on a subject, the case shall be decided by applying the principle of justice, equity and good conscience' which implies application of English Law, so far as it is applicable to Indian conditions and circumstances.

The Privy Council in *Chatra Kumari Vs. Mohan Bikram*[7] observed that the court held that there is no provision for recognizing legal and equitable estates[8]. Vested rights vest in someone by law but contingent rights exists by happening of some event. For example unborn child rights in partition suit is contingent right which shall be converted into a vestry right on his being born alive[9].

Public Rights rest in public/state and private rights vest in individual.

**Conclusion**

Legal rights are created by legal system or by judicial system but there are some issues for example Are legal rights and moral right same?, What is the actual meaning of legal rights?, What are the Rights of the holder of legal rights?, Are legal rights have more value than moral rights?, Are legal rights present in our society are sufficient or need some more rights?, Legal rights are created by legislative nature by judicial decision and sometimes it is made by private persons for example by making contract, by making will or codicil or by making deed etc. In roman law legal rights and duties were co-relative. Legal rights have no existence without legal duty so there was a principle that where there is right there is a duty.[10]

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4. These terms are derived from Roman law and called jus in rem and jus in personam. The former means right against or in respect of a thing whereas the latter means right against or in respect of a person.

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7 (1931) 58 LA, 279: see also Tagore Vs Tagore (1872) I.A. Suppl. Vol 57

8 Paton G.W.: Jurisprudence (3rd Ed 1964) 269-270

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# Right of Transgenders to Participate In Sports: A Challenge to Gender Equality

**Dr. Anil Thakur***

**Abstract**

Successful societies are the inclusive societies. Gender equality connotes the inclusiveness. The inclusiveness depictsthat every person of the society irrespective of their gender should be treated with equality in every aspect of life. The Transgender community in India was an ignored segment of the society and faced deep and pervasive discrimination, despite protection under various provisions of the Constitution. The Supreme Court in its landmark judgment of *NALSA v. Union of India* ushered in the recognition of various civil and political rights of the transgender community. The genesis of this recognition lies in the acknowledgment of equal worth of every person and the right of choice given to an individual which is the inseparable part of human rights. Right to participate in Sports is an important part of civil rights of every person including transgenders. Researchers through this paper want to emphasize on the rights of transgenders to take part in sports. The International Olympic Committee (IOC) 2004 guidelines made it compulsory for transgender to undergo Gender Re-assure Surgery (GRS) if they wanted to participate in a specific category. Revised guidelines of IOC 2016 removed the compulsion of GRS but indirectly force the transgendersto take part in sports either as male or female according to the testosterone level (in female category the testosterone level is below 10Nmol/L). Forcefully reducing or increasing the level of testosterone to make them eligible for sports is unwarranted. The researchers want to bring the attention of law makers to come up with separate sports policy and schemes for transgenders.

**Keywords:** Gender Equality, Sports, transgenders, participation, society.

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## Introduction

Gender is a complicated construct, a multifaceted phenomenon viewed in a different ways in different societies. The gender perspective looks at the impact of gender on people's opportunities, social roles and interactions. Successful implementation of the policy, programme and project goals of international and national organizations is directly affected by the impact of gender and, in turn, influences the process of social development. Gender is an integral component of every aspect of the economic, social, daily and private lives of individuals and societies, and of the different roles ascribed by society to men and women and other gender.[1]

Gender equality is the main pillar of national development goal. Gender equalityis expressed in attitudes, beliefs, behaviors and policies that reflect an equal valuing and provision of opportunities irrespective of the gender of any person.The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) prohibits any distinction, exclusion or restriction made on the basis of sex in the political, economic, social, cultural, civil or any other field. Lack of discrimination in this sense could be seen as equal status between genders.

## Gender Equality and Transgenders

As per the Census of 2011, the total population of Transgender in India is 4.88 lakh. There are various types of transgender communities in India. The most prominent of these communities are known as Kothi (Represent themselves as male), Hijras (Biological males but reject masculine identity), Aravanis (Woman wrapped in male body), Jogappa (Serve as servant of Goddess Renukha Devi), Shiv-shaktis (Males but have feminine gender expressions).[2]

The transgendered people have played an important role in ancient Indian culture over millennia. They were portrayed in famous Hindu religious scriptures such as Ramayana and Mahabharata. They were given imperative roles in the royal courtyards of Mughal emperors. Their downfall came only at

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1 http://www.fao.org/3/x2919e/x2919e04.htm

2 Dr.Haseena V. A, "Third Gender-The Conflict For Sexual Identity In India As Transgender" International Research Journal of Human Resources and Social Sciences, Vol. 5

the onset of British rule during the eighteenth century when they were blacklisted and treated as criminal elements in society. [3]

The Transgender indeed are integral part of community but most neglected and denied one also. It is a biological phenomenon which brings changes in human body. In India, they indeed can be found and seen in each and every place as the most neglected one. When the child take birth in any Hindu family, they are called to give blessings to the child and even at the time of marriages, they are invited to bless the newly couple. Except these situations, they are treated as sin and curse to the society.[4]

Only in 2014, India's Supreme Court has made a landmark ruling by declaring that the transgendered people must have access to equal opportunity in society. In spite of this legal recognition, transgenders at large have been forced to live on the fringes of the contemporary Indian society.[5]

The term 'transgender' or 'trans' is used to describe people "with diverse gender identities and gender expressions that do not conform to stereotypical ideas about what it means to be a girl/woman or boy/man in society." A transgender person is identified with a gender that differs from their sex whereas a person's sex is usually assigned at birth and based on factors such as hormones and reproductive systems. It is typically assumed that a person who is transgender is either a trans man (i.e. a person whose sex assignment is female and gender identity is male) or a trans woman. However, the term can more broadly refer to a person who identifies themselves as having no gender, a mix of both genders, or a gender that changes over time." The term 'cisgender' or 'cis' describes people whose gender identity accords with their

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3 Govindaswamy Agoramoorthy, "Living on the Societal Edge: India's Transgender Realities" JSTORE available at https://www.jstor.org/stable/pdf/24485502.pdf?ab_segments=0%252Fbasic_SYC-4631%252Ftest&refreqid=excelsior%3A00d44497c3eb77d8fe5fc190321b4e39

4 Ibid

5 GovindaswamyAgoramoorthy, "Living on the Societal Edge: India's Transgender Realities" JSTORE available at https://www.jstor.org/stable/pdf/24485502.pdf?ab_segments=0%252Fbasic_SYC-4631%252Ftest&refreqid=excelsior%3A00d44497c3eb77d8fe5fc190321b4e39

sex assignment (e.g., a person with a female sex assignment who identifies as a woman).[6]

The Transgender fall under the category of LGBT group (Lesbian, Gay, Bisexual and Transgender). They belong to the marginalized group of the society which faces legal, social, cultural and economic difficulties. Generally gender inequality focuses on the distinctions between men and women, reinforcing a binary conception of gender. Transgenders are rarely considered whenever the term 'gender equality' is discussed.

Transgender inequality is the unequal protection transgender people receive in work, school, and society in general. Transgender people regularly face transphobic harassment. Ultimately, one of the largest reasons that transgender people face inequality is due to a lack of public understanding of transgender people.

The problems faced by the Transgender community in India includes[7] -

**Discrimination:** Discrimination is the major problem of Transgender. They are discriminated in terms of education, employment, entertainment, justice etc.

**Disrespect:** They are disrespected in each and every aspect of life except in few caseslike after the birth of a child for their blessings or to bless the newly wedded couple.

**Downtrodden:** These people are treated badly or oppressed by people in power. They are prone to struggle for social justice because of their identity as Transgender.

**Child Nabbing:** This community always searches for those babies/ infants/ children whoare born with this feature of Transgender. Once they come to know, they try to nab thechild from their parents.

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6 Andria Bianchi, "Something's Got to Give: Reconsidering the Justification for a Gender Divide in Sport" file:///C:/Users/hp/Downloads/transgenders%20and%20sports%20article.pdf

7 Dr.Khushboo R. Hotchandani, "PROBLEMS OF TRANSGENDER IN INDIA: A STUDY FROM SOCIAL EXCLUSION TO SOCIAL INCLUSION" International Research Journal of Human Resources and Social Sciences Vol. 4 available at file:///C:/Users/hp/Downloads/(PDF)%20PROBLEMS%20OF%20TRANSGENDER%20IN%20INDIA_%20A%20STUDY%20FROM%20SOCIAL%20EXCLUSION%20TO%20SOCIAL%20INCLUSION%20_%20AARF%20Publications%20Journals%20-%20Academia.edu.html (assessed on 222 Sept 2019)

**Prostitution:** They are forced to enter the profession of prostitutions by their community, friends or relatives. Even, in some cases, it is seen that their parents are involved in it.

**Forced to leave parental home:** Once their identity is identified, they are forced and pressurize to leave the parental home by the society as they can't be a part and parcel of normal community and class.

**Unwanted attention:** People give unwanted attention to the Transgender in public. They try to create the scene by insulting, punishing, abusing or cursing them.

**Rejection of entry:** They are rejected to get enter in religious places, public places like hotels, restaurants, theatres, parks etc.

**Rape and verbal and physical abuse:** This is the most common people Transgender people face. They are prone to face rape followed by physical and verbal abuse.

**Lack of educational facilities:** Like normal people, they are not entitled to take education in schools and colleges. Even in terms of education, they are treated differently.

**STI and HIVAIDS problems:** The term 'MSM' stands for Men who have sex with Men. Because of this, Transgender are likely to have problems like STI and HIVAIDS.Most of the Transgender belongs to lower socio-economic status and has low literacy level. It seeks to have improper health care.

**Human trafficking:** Transgender belongs to the most neglected group. That's why theyare prone to face the problem of human trafficking also.

**Social Exclusion:** The major problem in the whole process is that they are sociallyexcluded from the society. They are excluded from participating in social, cultural andeconomic life. In brief, they are excluded from:

- Economy, employment and livelihood opportunities
- Excluded from society and family
- Lack of protection from violence
- Restricted access to education, health care and personal care
- Limited access to public spaces
- Limited access to collectivization
- Rights of Citizenship

- Excluded from decision-making
- Lack of social security

**National Legal Services Authority (Nlsa) Judgment and Rights of Transgender Persons Bill**

Identifying transgenders as a third gender, the Supreme Court passed this unique judgment in April 2014 stating one's sexual orientation as the integral part of personality, dignity and freedom. In the **National Legal Services Authority (NLSA) vs. Union of India** case, the apex court in 2014 declared Hijras and Eunuchs as third gender, providing them a legal identity along with seven other directions.[8]

Based on the NLSA judgment, on 24th April 2016, a private member's bill entitled THE RIGHTS OF TRANSGENDER PERSONS BILLS, 2014 was passed by the RajyaSabha and introduced in the LokSabha. The Bill deals with the different aspects like Social inclusion of Transgender, their rights and entitlements, financial and legal aids, education and skill development and prevention of abuse, violence and exploitation of Transgender. But the Bill was watered down.[9]

The government then passed another Bill, Rights for Transgenders Persons Bill, 2015, modifying on the 2014 bill by removing the provisions relating to Transgender Rights Court as well as the National and State Commissions. The 2015 Bill underwent further changes and another bill was introduced in the LokSabha in 2016 — the Transgender Persons (Protection of Rights Bill), which invited criticism from the transgenders and activists. Again, The Transgender Persons (Protection of Rights) Bill, 2019, which was introduced in the Lok Sabha on July 19, was passed by a voice vote on August 5.

**Right of Transgenders to Participate in Sports: A Challenge to Gender Equality or A Threat to Women Sports**

Sport is one of the most powerful platforms for promoting gender equality. Mainstream discussions centered on trans-inclusivity have become ubiquitous. This increase has influenced some common social practices to change, such as having gender neutral washroom facilities and developing gender neutral dance studios (where traditional male/female rolesare non-existent). The sports

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8 INDIAN EXPRESS, 05, JULY 2017

9 Ibid

world, however, continues to grapple with challenges and controversies involving transgender people.[10]

The male/female gender binary continues to exist in most sporting events, and the idea that transgender women may possess unfair advantages is a widespread belief. Most sporting events categorize athletes based on the male/female gender binary (e.g., male cycling and female cycling, male swimming and female swimming). This poses a challenge for transgender athletes who want to compete in accordance with their gender identity and how they live the rest of their life. The reason that transgender people are often not automatically allowed to compete in the category that aligns with their gender identity is because of a wide spread idea that they may possess an inequitablebenefit in comparison to their cisgender counterparts. This argument is specifically used to criticize and/or to prevent transgender women from competing in female categories. The advantage is supposedly based on the effects that may result from a cisgender male's androgen levels (i.e., testosterone), where increased testosterone is thought to contribute to increased strength and speed. As noted in their evaluation of gender segregation in athletics, it is entirely because of this difference in having higher levels of androgens that is considered as unfair to expect women to compete with men in athletic sports.So, if a trans woman has the biological characteristics of a cisgender male, then the idea is that they will possess athletic advantages that a cisgender woman is unable to naturally attain, thereby making their participation unfair.

**Sports Policies for the Inclusion of Transgenders in Sports**

Some International policies for participation oftransgendersin competitive sports are as follow:[11]

**(i) International Olympic Committee Guidelines 2004**

- To offer legal recognition who has undergone GRS or

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[10] Andria Bianchi, "Something's Got to Give: Reconsidering the Justification for a Gender Divide in Sport"
file:///C:/Users/hp/Downloads/transgenders%20and%20sports%20article.pdf

[11] Dr. S. Alka, "Sports participation policies for transgender- A Short Review" RESEARCHGATE.NET available at
https://www.researchgate.net/publication/323807657_Sports_Participation_Policies_for_Transgender_-_A_Short_Review

- Been on CSHT for at least 2 years
- Lived in their newly assigned gender for at least 2 years

**(ii) INTERNATIONAL OLYMPIC COMMITTEE GUIDELINES 2016**

- There is no restrictions for transgender male individuals
- For transgender female have testosterone levels lower than10 nmol/L for at least 12 months prior to competition
- Lived in their newly assigned gender for at least 4 years

**(iii) LADIES PROFESSIONAL GOLF ASSOCIATION (USA) 2010**

- A transgender female individual who done a GRS may compete as a female
- A transgender female who is completed treated for 1year with testosterone suppression can compete as a man.

**(iv) THE FOOTBALL ASSOCIATION (UK) 2014**

- Transgender male possess hormone results equal to the cisgender male
- Undergone CSHT for a sufficient amount of time
- Transgender female individuals: undergone CSHT or gonadectomy
- Blood results must be within a cisgender female range
- Also, both the male and female transgender individuals have their Legal recognition of gender.

**(v) INTERNATIONAL GAY AND LESBIAN FOOTBALL ASSOCIATION (2014)**

- To provide proof for their gender recognition
- Must Undergone uninterrupted hormone treatment for at least 1 year earlier to competition

Apart from the above, Amateur Swimming Association [29], Badminton England (UK; 2013) , International Tennis Federation, Rugby Football Union (UK), Scottish Football Association (UK; 2008) USA Gymnastics (2015), USA Senior Softball (2014) , USA Boxing (2013), USA Sailing (2013) and USA Track and Field (2005) adopted the IOC 2004 poilcy.

Now plans by the International Olympic Committee to introduce stricter guidelines for transgender athletes before the Tokyo 2020 Games have run into the sand because its panel of scientists is struggling to reach agreement on such a thorny issue.[12]

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[12] IOC TRANSGENDER GUIDELINES https://www.caaws.ca/ioc-transgender-guidelines/

## Conclusion

Right to participate in sports is the civil right of every individual irrespective of their gender. Living on the fringes of society, their right to identity, livelihood and entitlement to universal services is based on the whims of an apathetic state administration. Implementation gap in law is most often the cause for deprivation of individual rights in India. The judiciary and the administration have made visible efforts to de-marginalize the transgender community. The biggest challenge is the parochial attitude and societal resistance to include transgendersas a normal part of daily lives. Whether transgender people should be able to compete in sport in accordance with their gender identity is a widely contested question within the literature and among sports organizations, fellow competitors and spectators. Owing to concerns surrounding transgender people especially female transgender individuals having an athletic advantage, several sport organizations put restrictions on transgender competitors. In addition, some transgenders who participate in sports competitively or for leisure face discrimination and victimization.

Many trans athletes have a negative experience of competitive sport and sport related physical activities. Accessibility to sport-related physical activity of trans, needs to be improved. Transgender community undergoes many surgeries to complete the process of gender shift. There exist a difference in their physical capabilities which can be determined by their hormonal levels. Sports participation is a right and privilege. Play gives utmost pleasure and destress the mind. No one shall be denied from sports participation. A policy, law or a statutes should facilitate the suffers to takeover a task breaking barriers and enjoy equitable, bias free, criticism free opportunity, the above policies do not hold a uniform clause. There are several areas for future research required to significantly improves knowledge of transgender experiences in sport, Transgender athletes should have equal opportunity to participate in sports. On the whole, transgender who engage in sport at a competitive level or people who engage in sport related physical activity also appear to experience a range of different barriers. The self-identified transgender participants engaged in less physical activity than cisgender participants. In this connection, more awareness should be created among the transgender community about sport policies, more social support to encourage physical activity and most importantly, their life style has to be enhanced both physically and psychosocially. Provision of transgender ID card with

details about surgeries underwent can facilitate classification and participation in sports. Along with that pre competition hormone testing with which testosterone levels can be used as a gender grouping marker.

Large scale sensitization needs to happen starting from the school level to see transgenders not as an aberration, but an integral component of societal life. Their participation in sports should be encouraged at school level. Once sensitization occurs the need to battle for the most basic human right of right to participate in sports for the transgender community will no longer be a tough one. Kerala is the only State which is holding sports meets for transgenders. Other states need to hold such kind of sports events which would encourage them to take part in sports. Another question arises is that if they are given opportunity to participate in sports which category they would choose will depend on their testosterone level. They need to be accepted as who they are without forcing them to choose between being male or female. This debate is needed to find a fair solution.

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# The Devil of Adultery Finally Stands Buried: An Analysis

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**Abstract**

The law must be a living law, if it has to keep in pace with the passage of time. It should be able to provide solution to the existing problems. Community awareness and knowledge of just and unjust demands the change in the law and makes the process an evolutionary process. The people today are more informed and updated due to the advancement in the communication technology. The very fact that people are updated and aware of their rights, law makers are under a pressure to ensure that the laws are up to date and prove to be an effective tool in addressing the social issues. The transformation in the function of law is another reason why the law needs to be updated. It is in this perspective that we need to have a look at the almost 158-year-old penal provision pertaining to 'Adultery'. Adultery has been the concern of the society since the very beginning. It has been considered to be an offence against the marriage. It has always attracted opposition from the people as being immoral. However, the change in the values of society has called for reconsidering the very concept of adultery. Adultery that was considered to be a very crime against the institution of marriage in the past has now been diluted and people have now accepted that there should be some change in the law regarding adultery. The Supreme Court by decriminalizing adultery has taken the right step as it was high time that this archaic and colonial law was revisited and also abolished. It is a necessary change which has come at the right time as our law needs to reflect the changes occurring in the society with the passage of time. The researchers during the course of this paper would study the multifarious aspects concerning adultery and its position in various faiths. The researchers would also analyse the legal journey which the provison pertaining to adultery has traversed till its final repeal by the apex court.

**Key words**: Adultery, evolution, change, society, repeal, marriage

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## Introduction

It has been aptly said that law needs to change with the changing times. In order to be effective law has to be the true reflection of the society which it seeks to regulate and control. If it keeps doing that then in the truest sense is it serving the purpose for which it was actually framed. Community values changes with time and varies from place to place, so does the Law. Needs of the society along with the popular sense of morality decides the course of law. The attitude of the people, the needs of the society and the prevailing sense of morality decides the structure of law. The law must be a living law, if it has to keep in pace with the passage of time. It should be able to provide solution to the existing problems. Community awareness and knowledge of just and unjust demands the change in the law and makes the process an evolutionary process. The people today is more informed and updated due to the advancement in the communication technology. The very fact that people are updated and aware of their rights, law makers are under a pressure to ensure that the laws are up to date and prove to be an effective tool in addressing the social issues. The transformation in the function of law is another reason why the law needs to be updated. Earlier law was only expected to regulate the behaviour of the people but now law has a dual role to play, to protect the people from harm and at the same time uphold individual rights. Laws are agents of social change, regulators of conduct, and apostle of reforms. The desirable condition is to harmonize the above for a peaceful society. Deviations from the above principles results in misbalance in social harmony ranging from moderate to blatant.Values, technology, norms, economy and the society evolve overtime and the law must evolve with them. Law is a reflection of the society. In fact, a person can gauge the society of a nation by having a look at its laws. It gives us a glimpse into the social order of the eras and civilizations gone by. In addition, this is precisely the reason that we in India have seen amendments and changes being carried out in so many statutes and codes since our independence. Not only that, we have even made changes and amendments to the supreme law of the land, i.e. our Constitution. It is in this perspective that we need to have a look at the almost 158-year-old penal provision pertaining to ‘Adultery’. Adultery has been the concern of the society since the very beginning. It has been considered to be an offence against the marriage. It has always attracted opposition from the people as being immoral. However, the change in the values of society has called for reconsidering the very concept of

adultery. Adultery that was considered to be a very crime against the institution of marriage in the past has now been diluted and people have now accepted that there should be some change in the law regarding adultery. Adultery may in other words be called as unlawful intrusion in the marriage bed. It is considered as a violation of the right of the husband over his wife. The *Ramayana* has also some evidence on the basis of which people base their argument that adultery is a serious violation of the sacredness of institution of marriage. The incident in which *Sita* had to go through *Agnipariksha* to prove her chastity after she was abducted by *Ravana* is one such incident in which historical opposition to adultery is found.

**The Concept**

The term 'adultery' [1] has been derived from the Latin term *adulterium*. Adultery refers to the act in which a married person voluntarily indulges in sexual intercourse with another married or unmarried individual. Adultery is considered by every religion as an unpardonable act as being sin and thus it is condemned by all religions. There is no unanimity as to the definition of adultery worldwide but in almost the countries the legal framework on adultery is such that it does not recognise adultery as a ground for divorce against the accused party.It is Section 497 [2] of IPC, which defines adultery. It says: *"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."*[3]

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1 Adultery is of ancient origin. The code of Hammurabi which dealt with adultery was used by Henry VIII of England to get away with his wife Catherine Howard.Earlier the offence of adultery had wider operation and it applied to married as well as unmarried man and covered the relationship between the man and a married woman and also between married man and an unmarried woman. The institution of marriage was considered to be sacred institution and a breach of this institution was supposed to automatically result in legal consequences. Adultery was a ground for divorce and attracted severe punishments.

2 See, section 497, Indian Penal Code, 1860.

3 In the modern times though, the concept of 'adultery' is no more limited to physical infidelity. It may include emotional infidelity, Internet infidelity, Energetic adultery, Mental adultery, Visual adultery etc. Needless to say, these types of infidelities are beyond the

In order to get a complete understanding of the offence of adultery it becomes imperative to go through the provision mentioned in Section 198(2)[4] of the Code of Criminal Procedure, 1973, which reads as under:-

198. "*Prosecution for offences against marriage:*

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

*Provided that— ...*

*(2) For the purpose 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."*

On a careful examination of the above provisions, it becomes clear that as per section 497, adultery refers to the offence of consensual sexual intercourse between a man, married or unmarried, and a married woman. The sexual intercourse as mentioned above must have taken place without the consent of the husband of the women in order to attract the application of this section. In other words, adultery is said to be committed only by a man who voluntarily engages himself in the act of sexual intercourse with the wife of another man, without obtaining the consent of the husband of the woman or without the knowledge of the husband of the woman. This section clearly excludes the woman from any sort of punishment. The extent of such exemption is such that she is not even punished as an abettor to the offence of adultery. The man who is said to be accused on the other hand is subjected to an imprisonment up to a term of 5 years.[5] In addition to the above, the complaint before the court can be brought only by the husband of the woman who is said to be involved in the offence of adultery.

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present ambit of law and are not punishable. Law punishes only physical infidelity as defined in section 497 of IPC.

4 Sec. 198, Code of Criminal Procedure, 1973

5 Prashant Ghai, Why Adultery is Not an Offence in India, available at http://prashantghai.com/adultery-not-offence-women-india, accessed on 17th Feb. 2018

Section 497 aims at punishing only the men and considers women as the victim of adultery and treats the man as the offender. This section is aimed at moral policing the marital life of a husband and wife. It aims at maintaining the sanctity of the marital relation by maintaining the integrity and dignity of the marital bond. However, on the other side, through this section it is stated that if such a sexual intercourse takes place with the consent of the husband then such intercourse would fall outside the scope of this section which means that the husband has the right to allow such an intercourse to take place. Such a provision in any penal law which makes the woman the object over which the male counterpart has a right just as if she was his property cannot be justified in any case. No argument or justification can be so convincing so as to allow such a law to be a good law in any civilised society which is founded on the principles of equality and dignity. This provision since 1860 when it was drafted by Macaulay has been lying in the penal statute governing the offence of adultery. Despite the fact that this provision was drafted and is based on the wrongful assumption that woman is the property of the man and that the exclusive right over the body of the wife vests in her husband, no attempt was made in the past to make a change in it. The fact that if such an intercourse is the result of the consent of the husband of the woman engaged in the act is not an offence further glorifies the fact that the husband has the right over the body of his wife. Thus it becomes clear that the object of this provision is not to criminalise such type of sexual relation outside the marriage but to restrict the infidelity by the wife without the permission or the approval of her so called owner, her husband.[6]

In 1837, when Lord Macaulay came up with the first draft of the Indian Penal Code, adultery was a crime in England as well as France, however, he chose to keep adultery outside the purview of the Indian Penal Code as a result of the practice of polygamy that was accepted as a custom amongst the Muslims as well as Hindus in India.

When Lord Macaulay did the first draft of the Indian Penal Code (IPC) in 1837, adultery was very much recognized as a crime in England and France. Yet, he chose to keep adultery out of his draft because of the polygamy then

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6 G.S. Bajpai, Decriminalisation of Adultery, Available at http://www.livelaw.in, accessed on 12th Feb. 2018

prevalent among Hindus and Muslims in India.[7]Lord Macaulay collected the opinions of the people and collected the facts from the presidency towns of Bombay, Calcutta and Madras and after analysing them reached to the following conclusion:

*"It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes - those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury."*[8]

The Law Commissioners through the Second Report on the Draft Penal Code presented a strong opposition to the perception of adultery as adopted by Macaulay. They were of the opinion that the offence of adultery should continue to be a part of the Code and this opinion of theirs were based on the condition of women in India. The observation of the Law Commissioners was as under*: "While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q', regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment."*[9]

**What Religions Prescribe on Adultery**

Adultery is not a new phenomenon. It has been in existence since the very beginning of the society. The difference lies only in the attitude of the people towards this offence. As per the Old Testament adultery was subjected to rigorous condemnation and punishment but the basis of such punishment was not the rule of equality but the fact that adultery is a violation of the husband's right.

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7 Manoj Mittta, Wife is Private Property, so no Trespassing, Times of India, July 17, 2015

8 K.I. Vibhute, supra note 4 at 1

9 Ibid

**Islam:** According to Islam, marriage is a contact between the parties. Adultery is a violation of the contact between the parties to the marriage. As per the Islamic Laws adultery is said to be committed if the parties are involved in sexual intercourse with anyone else apart from his or her spouse. The sexual intercourse in this case includes both, pre and post marital sexual intercourse.Adultery is considered as one of the most heinous and sinful crime. Quran considers adultery as the gravest sin and associates it with the gravest sins: Shirk or associating partners with Allah. Islam considers this as an offence as not only affects only the individual but also has consequences on the family of the persons engaged in the act of adultery and on the society at large.Adultery affects the tranquillity of the marriage and hampers trust between the partners. It strikes at the very foundation of the marriage by affecting the sanctity of the marriage. It affects the peace and calm which is essential for any marriage to survive and it pollutes the soul of the individual and exposes the offenders to the punishments to be given by Allah.[10] As per the Islamic law, adultery is defined in narrow terms, actual intercourse outside marriage and prescribes a punishment of 100 lashes. It further prescribes that in order to prove adultery, four witness is required to testify the same and in case four witnesses don't testify the act of adultery then the person making allegation and those who testify shall be punished with 80 lashes and the testimony of such persons will never be accepted in future.[11]

**Hinduism:** Manu was suspicious about the behaviour of women in some circumstances and therefore was of strong view that men need to keep a strict watch on the act of their wife and thus he prescribed a strict code of conduct for men through which they were supposed to keep a watch on women.As per Manu "*Through their passion for men, through their mutable temper, through their natural heartlessness, they become disloyal towards their husbands, however carefully they may be guarded in this world. Knowing their disposition, which the Lord of creatures laid in them at the creation, to be such, every man, should most strenuously exert himself to guard them."*[12] Adultery is considered to be an offence against the marital relation and both the man as well as the women is liable to be punished under the Islamic or Hindu

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10 Available at https://archive.islamonline.net/?p=1027, accessed on 12th Feb., 2018

11 Faizan Mustafa, Not a Criminal Act, The Hindu, Jan. 18, 2018

12 Available at www.hinduwebsite .com, accessed on 18th Feb. 2018

law. Capital Punishment is prescribed for adultery in Christianity and Judaism.[13]

**Earlier Decisions of the Apex Court on Adultery**

The constitutional validity of Section 497 was challenged as being against the principle of gender equality in 1954 but this discriminatory provision was left as it is until the decision that was delivered recently in Joseph Shine's case.[14] The provision related to adultery was challenged for the first time in 1954, one year prior to the abolition of polygamy in Hindus.[15] Adultery has been a concern of the society which is evident as a number of cases have been filed before the Court on this issue.

In **Yusuf Abdul Aziz v. State of Bombay and HusseinbhoyLaljee[16],** for the first time the constitutionality of section 497 was challenged. As soon as the complaint against him was filed he approached the High Court of Bombay under Article 228 to decide the *vires* of Section 497 of IPC. He contended that the impugned section was violative of Articles 14 and 15 respectively. The Court dismissed the petition deciding in the favour of the constitutionality of Section 497 as being valid under the provision contained in Article 15 (3) of the constitution.The Appeal was consequently dismissed.

In the case of **Sowmithri Vishnu v Union of India**[17]**,** for the second time the validity of this section was challenged on the ground that it provides for gender discrimination, showcases legislative despotism and has elements of male chauvinism. The contention raised by the petitioner was that though on a plain reading of the section it appears that it is a beneficial legislation aimed at the protection of the women but on a careful examination of the provision of the section it becomes clear that it is a kind of romantic paternalism which regards women in the marital home as the property of her husband. However, after hearing the contentions of the petitioner held that the impugned section is not violative of Articles 14 and 15. The observation of the bench was based on the following reasons:

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13 Faizan Mustafa, Supra note 16

14 Joseph Shine v. Union of India, 2018 SCC Online SC 1676

15 In 1955, the Hindu Marriage Act was passed that abolished the age old custom of polygamy in the Hindus

16 1954 SCR 930

17 AIR 1985 SC 1618

1. Section 497 was a policy of law and is restricted to the offence of adultery committed by man and the application of the section to men only and hence, it is constitutionally valid. The meaning of the above sentence as given by the Supreme Court meant that the provision under this section empowers the husband to prosecute the adulterer and not the wife to prosecute the woman with whom her husband has committed adultery.
2. Through Section 497 no such right is made available to wife to prosecute her husband for the offence of adultery committed by him. The Court further stated that adultery is an offence against the matrimonial home and when the wife engages herself in sexual relationship outside her marital home, she is not the author of the offence but she is the victim of the offence and the man with whom she engages is actually the offender.
3. In Section 497, a case where the married man engages himself in sexual relationship with unmarried woman is not covered. However, the exclusion of such cases from the ambit of Section 497 does not mean that the man has license to engage himself with any number of unmarried woman. The purpose of this section is not to provide legitimacy to such type of relations but the purpose of this section is to criminalise a particular type of offence as being more evident and common. If a man engages himself in the act of sexual intercourse with unmarried woman the remedy is not available in Section 497 but she can file a civil suit against him and get a decree of separation or get a decree of divorce against her husband and get her marriage dissolved. Concluding its observation the Court observed that it is the will of the legislature whether or not to criminalise such an act owing to the demand of the modern times and consequently Section 497 of the IPC was held to be constitutional and not offensive to the provision of Article 14 and 15 of the Constitution of India.[18]

In **V. Revathi v Union of India** [19] the case was filed to decide the constitutional validity of s. 198(1) read with s.198(2) of Criminal Procedure Code, 1973. As per the provision of the above section the husband has a right to prosecute the adulterer in relation to the adulteress wife but no such right has been given to the wife of the promiscuous husband. In this case another fact

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[18] Ibid

[19] Air 1988 SC 835

that was also questioned was that as per the above section the husband also does not have any right to prosecute her adulteress wife for her disloyalty to their bond of marriage. The petitioner also stated in the petition that the view that since the husband does have a right to prosecute her adulteress wife the same right to prosecute her husband cannot be given to her as laid down in the Sowmithri Vishnu's case. The petitioner also went to argue that this provision is heavily based around the concept of gender discrimination and thus opposed to the rule of gender equality as provided by the Constitution of India and thus amounts to obnoxious discrimination.

The Bench after listening to the arguments of the petitioner observed that the question that Section 497 of the Indian Penal Code and Section 198 (2) of Cr.P.C. is valid and not opposed to the Constitutional idea of gender equality. The Bench observed that the above provision of law does not provide the spouses to prosecute each other under the criminal law of the country. The rationale behind this being that the law considers the woman as the victim and not the offender. The wife does not have any such right as she is restricted by the provisions under Sections 198(1) and 198 (2) of Cr.P.C.. The Bench also observed that there is a reverse discrimination in favour of women and the fact that she does not have a right to prosecute her promiscuous husband cannot be considered to be discriminatory against her.

The approach of the judiciary in this case is inclined towards the partriarchal approach. It favours the concept in which the woman is considered to be the property of her husband. The judicial reasoning in this case is highly gender biased. It goes on to the extent that in a marital relationship, the husband gets the right over the body of her wife and has the right to have a final decision as to her sexuality and on the other hand, the wife does not have any such exclusive right over her husband. It is the consequence of such a provision that the husband has a right to prosecute for the act of adultery but the wife does not have any such right. The right of wife does not exist either in relation to her husband or in relation to the women with whom her husband engages in the act of adultery. On analysis the observation of the Court in this case, it becomes clear that the Court thus failed to delve into the deeper concept of the law relating to adultery and failed to analyse the concept in relation to the gender just law.

There are few gray areas that have been left unanswered by the Court in this case. The areas of concern are much more than what has been identified by the

Court. For instance, if adultery is considered as an offence against the institution of marriage then why the right of prosecution is available only to husband and not to the wife. Another question that needs to be answered is that on what grounds the proviso to Section 497 can be justified which provides that if the sexual intercourse in question is the result of the consent of the husband or is done with the connivance of the husband, it shall not be considered to be an offence under Section 497.The disintegrated approach adopted by the Court to justify the law related to adultery in this case highlights the fact that in a marriage the concept of equality does not exist. The observation of the Court in this case highlights the discrimination in the conjugal relationships in relation to right relating to adultery is concerned. It can be said that either the Court is of the opinion that the law as questioned is correct in every circumstance and hence believes in the truthfulness of the law or it considers that it has only one duty that is to decide upon the constitutionality of the law which it does on the basis of written laws totally by excluding the application of their minds.

**Law Commission Attempts at Reforming the 'Law'**

The Fifth Law Commission in 1971 had recommended that in section 497 which deals with the offence of adultery, the exemption that has been provided to the wife in relation to the punishment for the act of adultery should be removed and she should also be made liable to punishment. It also was of the opinion that the period of imprisonment as provided under Section 497 should be reduced to two years from the period of five years as provided by Section 497. The suggestion of the Commission was in the form of an amended section which reads as under:

"497. *Adultery.—If a man has sexual intercourse with a woman 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, 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."*

However, the Joint Select Committee substituted the above revised Section 497 by the following:

*"Whoever has sexual intercourse with a person who is, and whom he or she knows or has reason to believe to be the wife or husband as the case may be, of*

*another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape, commits 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."*

The Fifth Law Commission and the Joint Select Committee was inspired by the ideal of equality as provided by the Constitution and thus the new law as recommended by it considered woman and man both as equal when the question was with regard to the punishment being given to them for the offence of adultery contained in Section 497 of the Indian Penal Code. However, both the above bodies failed to deal with the issue that under the current law wife is considered to be subordinate to the husband to the extent that the husband is believed to have proprietary rights of her husband. Mrs. Anna Chandi who happened to be the distinguished member of the Fifth Law Commission had reservation on the revised Section 497 as suggested by the Commission stated that:

"*The wife being considered the husband's property, the present provision reserves for the husband the right to move the law for punishing any trespass on it, while not giving the wife any corresponding right to complain against any transgressions on the part of or relating to her husband. Perhaps to make amends for this harsh discrimination, the present section provides that the wife should not be punished along with the trespasser. The removal of this exemption clause does not cause damage to the basic idea of the wife being the property of the husband. On the other hand, it merely restates the idea, and adds a new dimension to it by making not only the trespasser but the property also liable to punishment. This, as noted before, can hardly be considered a progressive step*."

It is pertinent to note that recently in 1997, the Fourteenth Law Commission through its 156$^{th}$ Report on the Indian PenalCode recommended some minor changes in the recommendation of the Joint Select Committee on Section 497. The Commission also stressed upon the need to have changes in Section 198 (2) of the Cr.P.C. in relation to the amendment, if any, in relation to Section 497.

The Apex Court has been passive enough in this regard and has shown very less concern to the recommendations of the Fifth Law Commission and the Joint Committee approved by Rajya Sabha. The insensitive approach of the

Court in this regard can be deduced from the fact that despite the recommendation to make adultery a gender neutral law, no initiative on the part of Judiciary was seen earlier to the recent decision in Joseph Shine's Case. The Court has always stated that this a matter of law and the policy of law and it is the duty of legislature to make changes in the law regarding adultery.

The Malimath Committee Report submitted in 2003, also recommended certain measures for changing the criminal justice system of the country. As the report of this committee adultery should be made a gender neutral offence. According to the Report, *"Whosoever has sexual intercourse with the spouse of any other person is guilty of adultery"*.

The National Commission for Women in 2006 also made recommendation on the issue relating to adultery. According to the recommendation made by the Commission adultery should be made a civil wrong from being a criminal offence. The Commission argued by saying that in many cases there is a probability that the woman may want to save the marriage and it should be thus considered as a breach of trust and as a civil wrong and not as a criminal offence. The above recommendation of National Commission for Women was subject to the national consensus in this regard as suggested by the Commission.[20]

**Reasons, which call for a Fresh Look at the Penal Provision of 'Adultery'**

The recent decision[21] of the Supreme Court[22] to re-examine the offence of adultery is prima facie an admission that the court has consistently gone wrong

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20 Available at http://www.thehindu.com, accessed on 23rd Feb. 2018

21 Joseph Shine v. Union of India, 2018 SCC Online SC 1676

22 The petition filed by a non-resident Keralite, Joseph Shine challenged Section 497 read with Section 198 (2) of the Cr.P.C. of the Indian Penal Code as being unconstitutional. Advocate Kaleeswaram Raj who was appearing on behalf of the petitioner argued that Section 497 IPC was unconstitutional as it discriminates against men on the ground of gender which is prohibited by Article 15 and also violates the provision under Articles 14 and 21. "When the sexual intercourse takes place with the consent of both the parties, there is no good reason for excluding one party from the liability," he said. The bench, headed by the Chief Justice of India, was of the opinion that, "Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband… A time has come when the society must realise that a woman is equal to a man in every field. This provision, prima facie, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice."

in denying that the colonial penal provision is actually "male chauvinism" disguised as a beneficial legislation for women.[23] The Court in this case issued notice to the Centre pursuant to a public interest litigation in which the Constitutionality of Section 497 was challenged on the ground that it is gender-biased and archaic. There are many factors, which call aloud to have a relook at the provision:

### A) Changed Global Outlook towards Adultery

The approach of the progressive nations[24] have in the past few years has been to do away with the offence of adultery, South Korea is the latest country which has done away with the 60 year old law related to adultery. The Constitutional Court has by a majority of 7:2 held the law on adultery which prescribed for imprisonment up to 2 years as unconstitutional."Even if adultery should be condemned as immoral, state power should not intervene in individuals' private lives."[25] Adultery has been decriminalised by almost all the European countries. However, it does not mean that adultery has no legal consequences, it has been removed from the head of criminal offence but it has legal consequences as it is a ground for divorce in many countries.[26]

### B) The Law is Not Gender Neutral

As per the provision under Section 497 only the husband has the right to prosecute the man for the act of adultery which in other words means that he has the authority to control the sexuality of his wife. No such right has been given to the wife. It is based on the premise that wife is the exclusive property of her husband and that property needs to be protected from all sorts of intrusion from other men. Husband has this right as he has an exclusive claim over the body of his wife which is otherwise considered to be his property. The wife cannot file a suit in this regard as she is merely considered to be an object of possession. As per this section she has no say over her own body forget about her claim over the body of her husband. Such a provision in any legal system that justifies the fact that woman is subordinate to her husband and she

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23 K. Rajagopal, SC's revisit of Adultery Law Signals paradigm shift in Court's sensibility, The Hindu, Dec. 8, 2017

24 The UN Working Group (WG) which works in the field of discrimination against women in law and practice has issued a call to Governments of all the countries to come ahead and to repeal laws criminalizing adultery.

25 Available at www.theguardian.com, accessed on 22nd Feb. 2018

26 Available at www.aol.co.uk, accessed on 23rd Feb. 2018

is supposed to submit herself to her husband cannot be justified by any sort of argument.[27] The consequence of this law is such that if a married woman engages herself in the act of sexual intercourse with several men all such men shall be liable to punishment under this section despite the fact that it may be possible that the woman was the one who abetted such an act. On the other hand if a married man engages himself in the act of sexual intercourse with several married a swell as unmarried woman he shall not be liable to any punishment under this Section.

### C) Call for Decriminalisation from All Quarters Getting Stronger

The law of adultery in India is built upon the caste system based social setting which promotes the traditional conservative property-oriented familial ideology and sexual mores. It is also based upon the presumption that sexuality, sexual agency and unequal mutual marital rights andobligations of the spouses are the result of the institution of marriage itself. The ideology of the society in this regard is that the right of the husband needs to be protected and not the right of the wife. Such law in the modern times has become obsolete owing to the constitutional guarantee of gender equality and gender justice.

### D) Consensual Sexual Acts between Consenting Adults Need Not Be Criminalised

The basic and essential ingredient of Adultery is that the state is criminalising the sexual act between two consenting adults who are undertaking the act out their own free will. In essence the state is assuming the 'moral' responsibility of being the 'Big Brother' and monitoring and penalising the activities which go on in the private domains of the individuals. Such a sweeping intrusion by the 'State' in the private lives of its citizens is not called for in the 21st century. It is one thing for adultery to be a ground for divorce, a civil proceeding, and quite another for it to be a basis for incarceration. If such acts are continued to be kept as an offence in the name of women protection and empowerment by extending it to both the genders, it will lack any sort of rational analogy. It is therefore submitted that the correct course to be adopted in this case should be to get rid of such irrational laws from our penal statute.

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27 Talish Ray, The Hindu, Dec. 22, 2017

### E) It Treats Women as Chattel

Even the apex court in its recent observation[28]was of the opinion that due to the provision of section 497 women is considered to be the property of her husband. The very fact that if the sexual intercourse takes place with the consent of the husband it will fall short of adultery which otherwise would have been considered to the act of adultery. The presence of such a provision highlights the patriarchal mindset of the people and the patriarchal structure of the society. As per the patriarchal norm of our society, it is not justified for any woman to choose to have sexual relationship outside her marriage. Patriarchy is all about male domination, the controlling of the women in such a manner that they are not able to raise their voice for equality, forget about sexual equality. The institution of marriage accounts for building a power hierarchy in which woman does not have the same status as that of a man. Those who are in favour of the offence of adultery heavily rely upon the sanctity of marriage for the criminalisation of adultery. Such laws accounts for conditions in which the woman is subjected to a position in which she is supposed to submit herself at the disposal of her husband, in the name of marriage.[29] The element of consent in this section further adds to the fact that women are unequal to such an extent that if the consent in relation to an act is given by her husband the offence ceases to be an offence and in absence of consent it is considered to be an offence. This means that women do not have any personal bodily autonomy are nothing more than a chattel.

### F) It Unnecessarily Burdens the Criminal Courts

It is a known fact that the criminal courts in India are overburdened. Under trial-prisoners, keep rotting in jails for years altogether waiting for their trials to culminate. In such a pathetic existing scenario it would be more than useful to lighten the weight of the criminal courts by doing away with a penal provision whose time to go has arrived. In addition to this the criminal justice system of India does not encourage genuine litigation and the burden to prove that the accused is not guilty is too much. In other words, in cases of adultery to prove the accused as innocent is a very difficult task. As per the provision of Section 497 the women is not even punished as an abettor despite the fact that

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28 In the matter of Joseph Shine v. UOI (WP(Crl.)No.194/17)

29 Talish Ray, Supra Note 36

in many cases it is the woman who initiates the act. Adultery should only be considered as a ground for divorce.

**Adultery Finally Decriminalized by the Supreme Court**

The Supreme Court finally in Joseph Shine V. Union of India[30], considering the validity of Section 497 of the IPC finally held that the provision related to adultery as contained in section 497 is against the constitutional principles laid down in Articles 14, 15 and 21 respectively. The Bench led by the then Chief Justice Dipak Mishra also held that the provision of Section 198(2) of the CrPC to the extent applicable in proceedings under Section 497 shall be unconstitutional and hence invalid. Delivering the judgment, the then CJI Dipak Misra highlighted the fact that equality is the need of the hour. He also highlighted the fact that as per the current law of adultery man is considered to be the master of his wife and time has come to change this law and thus declared Section 497 as unconstitutional as being anarchic and opposed to right under Article 14 and 21. The five-Judge bench declared adultery as unconstitutional which meant that it is no more an offence and it can now only be a ground for divorce.

**Concluding Observations**

As stated in the beginning, law has to keep changing with the requirements of the society in which it operates. Mention of an offence like adultery in the penal law of the country in the current time, keeping in mind the changing pattern and way of living is highly opposed to the idea of gender equality and constitutional oath of providing equal treatment to the women and ensuring that woman are treated with utmost respect and dignity. The Supreme Court by decriminalizing adultery has taken the right step as it was high time that this archaic and colonial law was revisited and also abolished. It is a necessary change which has come at the right time as our law needs to reflect the changes occurring in the society with the passage of time. Kudos to the court for taking this decision and it is sincerely hoped that in the future this wonderful trend of setting aside of archaic laws would continue.

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# The National Anthem Controversy: Exploring the Legal Angle

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**Abstract**

India is a diverse country. We are a nation of various religions, cultures and races. Our richness lies in our diversity. Despite the diversity that is peculiar to the culture of India, unity amongst its people is a striking feature of Indian Society. Unity in diversity which is the heart of Indian Culture is also highlighted by the national anthem as it not only speaks about the people of India but it also highlights the cultural heritage, historical facts, ideals of freedom struggle and also the emotional bond between the people of India on one hand and the country on the other side. we must as citizens of this great nation be patriotic from within and not make an issue when we see a dissent in opinion of others as to the feeling of patriotism as true patriotism is never effected by the acts of others, if it is true patriotism. And if we are so, then we need not as Justice Chandrachud says wear it on our sleeve or make a show of it. From the perspective of Constitution, we have so many freedoms guaranteed to us by the Constitution under Article 19 (1) (a) and Article 21and it was the Supreme Court itself which had expanded the scope of these freedoms in post-independence era through a string of beautiful judgements. The researcher during the course of the present paper would be discussing the legal angles to the issue of the national anthem screening in cinemas. The emphasis would be to analyse the role of the courts and the Apex court in particular to this issue and how it has dealt with it.

**Keywords:-** National Anthem, screening, patriotism, Constitution, citizens

## Introduction

India is a diverse country. We are a nation of various religions, cultures and races. Our richness lies in our diversity. Despite the diversity that is peculiar to the culture of India, unity amongst its people is a striking feature of Indian Society. In fact, the recently elected President of our great nation mentioned on taking oath that "key to India's success is its diversity. Our diversity is the core that makes us so unique. Nations are not built by governments alone and

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require national pride, in the soil and water of the country, in its diversity and inclusiveness, in its culture and in the little things we do every day."[1] (The Hindu) It is this diversity that we, the Citizens of India and the Government at the Centre and the States need to preserve at all cost. And this diversity of India is clearly reflected in its National Anthem which captures the very essence of it. Unity in diversity which is the heart of Indian Culture is also highlighted by the national anthem as it not only speaks about the people of India but it also highlights the cultural heritage, historical facts, ideals of freedom struggle and also the emotional bond between the people of India on one hand and the country on the other side. National Anthem of any country is not only any patriotic song or literature but it is a window through which a glimpse into the life of the country can be gained through. "*Jana Gana Mana*", the very essence of the National Anthem is accepted by all Indians and also respected by every citizen of the country. National Anthem commands to all the citizens the belief that we are united despite our diverse culture. During the unification of India and during the freedom movement of India, National Anthem became an essential tool through which the freedom fighters aroused amongst the people the feeling of patriotism and sense of belongingness for the country. National Anthem became the identity of the people in the course of struggle for freedom.

**Insight into the Controversy**

The Apex court has in the past year or so been dragged twice into the controversy pertaining to National Anthem.

**a) The Interim Order of Supreme Court, Nov. 2016**

In the first instance it was in November last year when a Public Interest Litigation (PIL)[2] was filed in the Supreme Court by one Shyam Narayan

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1 See, The Hindu, July 25, 2017

2 Shyam Narayan Chouksey v. Union of India and Others

Chouksey[3] with regard to the abuse of National Anthem. Through this petition, the petitioner prayed before the learned court that there should be mandatory screening of the national anthem in all the cinema halls prior the screening of the movies and also in all such events in which the presence of the constitutional dignitaries were seen. The petitioner in the petition had cited various examples to support his cause that the national anthem is being subjected to abuse from the people and thus the provisions of Prevention of Insults to National Honour Act, 1971, were rampantly being breached. He relied on two major incidents in which disrespect to national anthem was shown. The first incident was from 2015 when in the swearing-in ceremony of AIADMK chief J. Jayalalithaa as chief minister of Tamil Nadu, a very short version of national anthem was played and the second incident cited was when Uttar Pradesh Governor Ram Naik stopped the national anthem midway during an oath-taking function for state ministers. He also presented before the Bench pictures of paper food plates which had national anthem printed on it. These plated were thrown on the roads after being used in a marriage function. Extremely disgusted with this state of affairs, he urged the court to lay down standard norms in relation to the playing of the national anthem in cinema halls, entertainment programmes and also in official functions and in particular those functions in which constitutional dignitaries were a part of.

A Bench comprising of Justices Dipak Misra and Amitava Roy ordered that "all the cinema halls in India shall play the national anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the national anthem" as a part of their "sacred obligation". The Bench also ordered that the mandatory screening of the national anthem prior to the screening of movies in any cinema hall shall be followed by all the cinema halls with no exception. It was also added that while the national anthem was

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[3] Chouksey himself had gone to watch the Shahrukh Khan and Kajol's movie Kabhi Khushi Kabhi Gum. He was utterly dismayed to learn that when in the movie National Anthem was sung by the son of the actors, no one in the hall stood up in respect of the National Anthem. As a member of Jeevan Jagriti Prayas, an organisation for the "inculcation of national spirit amongst people", he urged the audience to stand up, but he did not get any positive response from the audience. He then went to management of the theatre and also to the Director General of Police of Madhya Pradesh to ensure that due respect to the National Anthem is given in this situation. He also distributed pamphlets with the message that national anthem would be played in the movie and thus respect to the anthem must be ensured, but none of his attempts brought the desired results. He then approached the Court which ruled that "the film shall not be shown in any theatre unless the scene which depicts the national anthem is deleted".

being played then screen should have in display the flag of India and the doors of the hall should be closed so as to avoid any sort of disturbance from those outside the hall. The Bench stated that these directions are issued to depict for love and respect for the motherland which is reflected when one shows respect to the National Anthem as well as to the National Flag. That apart, "it would instil the feeling within one, a sense committed patriotism and nationalism," said the bench. The Bench gave a 10 days period for ensuring compliance with its direction. Thankfully, the Apex Court stopped short of prescribing any penalty to anyone who did not stand when the National Anthem was being played.[4]

Then in February, 2017, another clarification in this regard came through the bench of Justices Dipak Misra and R.Banumathi in response to a request made by one of the petitioners that the Bench should clarify its stand that what should be the situation when the anthem was played as a part of film, newsreel or a documentary. The Bench stated that in all the above three cases the audience need not stand as this was a part of the storyline of the film.

**b) Application for Recall of Court's Earlier Order, Oct. 2017**

This was an application filed in the Supreme Court for withdrawal of the Court's interim orders of Nov. 2016 (supra). The Bench in this case comprised Chief Justice Mishra, Justice Khanwilkar and Justice Chandrachud. It was argued by the Attorney General that the interim order which prescribes for standing up during the national anthem is aimed at unifying the people of the country as India is full of diversities and is known for the existence of many religions, castes, languages and so on and so forth. He further argued that no citizen can in any situation object to this interim order.

**Justice Chandrachud's observations:** Justice Chandrachud while hearing the petition asked the Attorney General that why the people should be forced to show patriotism in the cinema halls as they go to the halls for undiluted entertainment and not to show patriotism. Justice Chandrachudsaid "Tomorrow, there may be a demand to stop people from wearing shorts and T-

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4 The interim orders passed in the present case were subjected to a lot of criticism, it was even referred to as passing sentiments as law and judicial populism which had serious consequences for how we think about procedure, rule of law and Justice. (Lawrence Liang) The guardian even reported that twelve people were arrested at an international film festival in south India for refusing to comply with a supreme court order to stand for the national anthem at cinemas.

shirts while going to cinema halls, because national anthem is being played. Where is the end for such moral policing? Why should we assume that if you don't stand during the playing of national anthem, you cease to be patriots?"[5](The Hindu)"You don't have to sing the National Anthem in the movie hall to demonstrate your nationalism.[6]" (Business Standard)

**The Court held "**Having heard learned counsel for the parties for some time, we think it appropriate that the Central Government should take a call in this regard and, if necessary, as advised, may bring out the requisite notification or circular or rules. When we say 'take a call', needless to say, the discretion rests with the Central Government. The discretion has to be exercised without being influenced by our interim order. We may further emphasize that the discretion may be utilized to regulate in aninclusive manner or as the Central Government feels fit." He went on to add that there is no need of any Indian to wear "his patriotism on his sleeve".So, legally speaking, playing of the national anthem in cinemas would remain mandatory till the Central Government takes a call on it.

**The Issues Involved in the Order**

In the November (2016) order given by the Supreme Court, there are some issues involved which are worthy of revisiting:

**a) Mandatory Screening:** The first issue in this regard is whether the screening of national anthem should be made mandatory or not. It is pertinent to note that neither there exists any objection as to the choice of the cinemas to screen the anthem nor any objection to the screening of the national anthem in sport stadiums or any other open space, with the people having the option whether they want to sing it or not. The moot point in this regard is that whether there is any legal basis which can be relied upon when the decision of mandatory screening of the anthem in the cinema hall is concerned.Mandatory screening of the national anthem in the cinema halls as also the private institutions not only violates their freedom of speech but also hampers their freedom to trade. Cinema has been the subject-matter of censorship since past owing to its mass appeal and mandatory screening of the national anthem is another such censorship, the only difference being that the censorship has now shifted to the beginning of the movie as a result of the mandatory screening of the national anthem at the beginning of the movies in the cinema halls.

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5 See, The Hindu, Oct. 23, 2017

6 See, The Business Today, Oct. 17, 2017

**b) Compelled Standing:** The second issue in this regard is the most important aspect in relation to the national anthem, respecting the national anthem. Through the verdict in the *Bijoe Emannuel & Ors. vs. State of Kerala*[7], the apex Court had made it clear that "no provision of law obliges anyone to sing the anthem."The rule laid down by the Hon'ble Court on this point still prevails as law today and thus mandatory singing of the national anthem against his wish is a clear violation of the right provided under Article 19 (1) (a). This does not mean that those who do not want to sing the anthem can in exercise of their right under Article 19 (1) (a) be seated in their place, they have stand at their respective places as a mark of respect for the national anthem, thereby discharging their fundamental duty. However, there exists two views on this as well, on one hand there are people who undoubtedly agree that standing in respect of the anthem is a reasonable duty and on the other hand there is a group of people who argue that standing during the anthem is not necessary to demonstrate their respect for the anthem and if they are being forced to do so, it is against the principles of democracy. The duty of the State in this regard is to allow everyone to express themselves in a peaceful manner and when it compels people to stand during the national anthem so as to show their respect for the anthem, such a decision infringes the constitutional guarantee to the citizens under Article 19 (1) (a).

**The Bijoe Emanuel Case**

In July 1985, a member of Kerala Legislative Assembly came to know that few children from Christian sect had refused to sing the national anthem in the school assembly. Considering this denial to sing the anthem as being "unpatriotic", he brought this matter to the notice of the Assembly. The Assembly then appointed a commission to conduct an inquiry in this matter. The Commission after conducting the inquiry submitted its report in which it had mentioned that the three children, namely, Bijoe, Binu Mol and Bindu Emmanuel, always stood while the national anthem was sung by the other children. These children belonged to Jehovah faith and their religious faith prohibited them to sing the national anthem because as per their faith it was a form of idolatry and, therefore, singing of the national anthem would amount to the act of being unfaithful to their God Jehovah. The Head Mistress of the

7 1986 SCR (3) 518

school was directed by the Deputy Inspector of Schools to expel the students on 26 July, 1985. Against this decision to expel the students, the father of these children made an appeal to the school authorities as well as the education department requesting them to revoke their decision. Failing to get any relief from the authorities, the father then approached the Kerala High Court and prayed for an order to stop the authorities from preventing his children from attending the school. The prayer was in the first instance rejected by the single judge bench followed by the Division Bench of Kerala High Court.

Aggrieved by the decision of the Kerala High Court, an appeal under Article 136 was made before the Hon'ble Supreme Court which delivered its judgment on August 11, 1986 through Justice Chinnappa Reddy J. The Apex court ordered the school to readmit the children in the school. The decision of the Court was based upon the religious belief of the Jehovah's as they do not sing national anthem of any country as a matter of commitment to and adherence to their conscience. Similar was the situation of the Jehovah Witness in all parts of the world.The Court observed that the freedom of speech and expression also includes the right to remain silent and since the children in this case refused to sing the anthem but they stood up giving due respect to the anthem, the order of the High Court was therefore supposed to be set aside. It was observed that if the children were to be forced to sing the national anthem, such forceful act would violate their fundamental right of religion. The Court thus concluded its observation by stating that tolerance is the core idea as advocated by our tradition, philosophy as well as Constitution and we should not try to dilute it.

Speaking through the Bench, the Supreme Court observed that no law compels anyone to sing the National Anthem and it will not amount to showing disrespect to the national anthem if any person wilfully stands during the National Anthem but does not sing the same. Article 51-A (a) casts a fundamental duty on the citizens to abide by the Constitution and also to respect its ideals and institutions, the National Flag and National Anthem. In this respect it is thus true that proper respect is given to the National Anthem when people stand when it is sung. Standing during the anthem is mandatory but singing is not.

**Existing Legal Provisions dealing with the National Anthem**

It is not that there are no existing Constitutional or Statutory provisions which uphold the dignity of the National Anthem or ask the citizens to respect the National Anthem.[8] These provisions are:

**a) Article 51 (A) of the Constitution of India (Fundamental Duties)**[9] Article 51 A of the Constitution enlists the fundamental duties of the Indian Citizen**s.** The Article goes on to say – "It shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem".[10]

**b) Section 3 of the Prevention of Insults to National Honour's Act, 1971**[11]**:** Section 3 of the said enactment provides a penal provision wherein anybody found disturbing an assembly singing national anthem or in other ways prevents the singing of national anthem. According to this section "Whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both."[12]

**c)** The existing legal regime, consisting of orders or the guidelines that has been issued by the Ministry of Home Affairs (MHA), continues to hold even

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8 Even in the past there has been intervention in respect of playing of national anthem in the Cinema Theatres.In. 2003 an order was passed by the Legislative Assembly of Maharashtra through which the playing of national anthem before the starting of the movie was made mandatory. There has even in the early 1960s been strong opposition from the people against the mandatory decision of such nature at inappropriate venue. The opposition also came from those people who were supporters of the mandatory playing of the National Anthem in important national events as they found that making this mandatory in cinema halls was not proper. During that period National Anthem was played at the end of every movie and it was a common sight that people used to walk out of the theatre instead of standing in respect of the National Anthem due to which this practice was later on done away with.

9 The Constitution (Forty Second) Amendment Act, 1976, introduced the innovative concept of Fundamental Duties of the Indian citizens in the Constitution. For this purpose, a new part IV (A) consisting of Article 51 (A) was added to the Constitution.

10 See, Article 51 of the Constitution of India, 1950.

11 The Prevention of Insults to National Honour Act, 1971, extends to the whole of India. It bans insult to Indian National Flag and Constitution of India and was enacted with the aim of removing dishonour to National symbols which shall include the Indian Constitution, National Anthem and National Flag. The Act was amended vide Prevention of Insults to National Honour (Amendment) Act, 2003 and Prevention of Insults to National Honour (Amendment) Act, 2005.

12 See, Section 3, Prevention of Insult to National Honour's Act, 1971

today. The guidelines make it clear when the anthem can be played or sung on specified ceremonial and solemn occasions, and special events. MHA has stated that it is impossible to provide with an exhaustive list of occasions in which the singing of National Anthem can be permitted as being different from the mere playing of the Anthem. As per the Ministry it is allowed that following the singing of the Anthem, mass singing may be allowed so long as it id done with respect and is regarded as a salutation to the motherland. It is thus clear that the guidelines as to in which events the mass singing of the National Anthem may be allowed is not exhaustive, but it does not say so for the playing of the anthem. Thus on analysis of the same it becomes clear that the list of occasions on which national anthem may be played is not exhaustive and additions to the list can be made through an amendment to this effect.

**d)** A Home Ministry order in 2015 stated, "Whenever the Anthem is sung or played, the audience shall stand to attention. However, when in the course of a newsreel or documentary the Anthem is played as a part of the film, it is not expected of the audience to stand as standing is bound to interrupt the exhibition of the film and would create disorder and confusion rather than add to the dignity of the Anthem."[13](The Hindu)

**National Anthem and Nationalism**

Nationalism is a noble sentiment and a by-product of our unique freedom struggle. Nationalist ideology and consciousness was awaken by our nationalist leaders, Gandhi, Nehru, Patel, Azad, Bose and so on and so forth as a tool to get freedom from the British Rule. The feeling of nationalism was at its peak during the freedom struggle when the people developed a feeling of national loyalty and were ready to give their lives for the sake of the country. Post independence this feeling of nationalism underwent a change and a new definition of nationalism came into existence of which the feeling of national togetherness became a striking feature. Doubt as to the extent of nationalism and loyalty to this feeling of nationalism was never in mind till this issue of respect to the National Anthem arose as early as in the case of Bijoe Emanuel. Since no doubt arose in the history as to the feeling of nationalism the courts never interfered in this matter. By forcing upon the people mandatory screening of the Anthem is not serving the task of strengthening the nationalist feeling rather it is an act of arbitrary imposition of the popular will.

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[13] See, The Hindu, Dec. 1, 2016

Rabindranath Tagore who has written the National Anthem also being the national poet was always against the imposition of any form of overt nationalism upon the people. He through his writings and through his lectures on nationalism advocated that the individual's political and ethical views must be respected.

If we have come to a stage where theatres need to remind us of the value of patriotism, the Indian value system has failed. If our homes couldn't teach us the right *sanskars*, if schools and their curricula could not instil in us the right civilisational values, and if we now have to depend on the banal symbolism of imbibing crash courses — a sort of forced group therapy in patriotism before three hours of entertainment — god bless the Republic. India needs a culture of patriotism, not patriot-isation of culture. [14] What is required is not the mechanical imposition of the National Anthem on the people but a genuine feeling of love and respect for the country and the Flag as well as its Anthem and also all other signs of National Identity. This cannot be achieved through such arbitrary imposition of nationalism. The outward manifestation of the feeling of respect for the National Anthem is not what is desired but it is the inner consciousness which should respect it, is what is desired. People should be given the right to dissent in any democracy for it is the essence of democracy. However, the right to dissent should not be made available at the cost of respect for the nation and things of national identity.

**Reversing of Its Earlier Order bythe Supreme Court**

The Supreme Court's Interim Order given on November 30, 2016 was modified by it on the January 8, 2018. As per the modified order it is now optional for the Cinema halls to play the 52 seconds National Anthem before the movie in every show. This modification was made by the Bench as a result of the Central Government's assertion that it was examining the issue of respecting the national anthem and it is planning to come up with new rules on this issue in the next six months.The Attorney General appearing on behalf of the Central Government prayed before the Bench to dilute its earlier order as per which the screening of National Anthem was mandatory before every movie. The Court decided in favour of the Central Government and modified

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[14] Sandipan Sharma, SC's National Anthem Verdict: India Needs Culture of Patriotism, not Group Therapy, available at www.firstpost.com [26th October 2017]

its earlier order and made it optional at the desire of the owners of the Cinema Hall to play the Anthem.

**Concluding Observations**

One thing which is absolutely clear is that everyone loves and respects the National Anthem (and that is a fact which is beyond any doubt) and would voluntarily stand up if it is being played. The moot point is that our priorities are misplaced. We should be focussing on building the character of our people rather than giving dictates to them on what is to be done or not. If we need to be forced to respect the National Anthem, it means that we lack respect for our National Anthem, So, we must as citizens of this great nation be patriotic from within and not make an issue when we see a dissent in opinion of others as to the feeling of patriotism as true patriotism is never effected by the acts of others, if it is true patriotism. And if we are so, then we need not as Justice Chandrachud says wear it on our sleeve or make a show of it. From the perspective of Constitution, we have so many freedoms guaranteed to us by the Constitution under Article 19 (1) (a) and Article 21and it was the Supreme Court itself which had expanded the scope of these freedoms in post-independence era through a string of beautiful judgements. In the words of Justice Reddy in Bijoy Emanuel case"Our tradition teaches tolerance; our philosophy preaches tolerance; our constitution practices tolerance; let us not dilute it."It is sincerely hoped that the government would come out with a sensible solution to the problem at hand and resolve the issue once and for all.

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# Confession under Indian Evidence Act, 1872

**Ms. Sanju***

**Abstract**

"In the law of criminal evidence, a confession is a statement by a suspect in crime which is adverse to that person." Confession gives a great peril to the accused but sometimes it gives valuable information to the prosecution. The concept of confession is existing since the times immemorial and it is very essential in the criminal justice system. This paper aims to bring out the meaning of confession, its various forms and explores the evidentiary value of these different forms of confession. As it is considered that accused give his confession to police authority under fear and threat, the paper talks about the relevancy of confession given to the police officer or made in police custody. The paper also focuses on the different provision which deals with confession under "Indian Evidence Act 1872"

**Key Words:** Evidence, confession, admission, relevancy and accused.

## Introduction

### Meaning of confession

The Indian Evidence Act does not describe the word "confession". In Indian Evidence Act the word "confession" firstly occurs under section 24 and "Admission" is the title under which the confession is dealt, therefore it is evident that confessions are one kind of admission. "Admission is a genus and confession is a species." "Mr. Justice Stephen in his Digest of the law of Evidence defines confession as confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime."[1] In other words, when guilt is directly acknowledged by an accused then it is said that confession is made by an accused. Confessional statements are based on the notion that an offender is not going to

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1 https://www.lawnn.com/indian-evidence-act-1872-confessions-define

make a false statement that will create his culpability.[2] In the instance of Pakala Narayan Swami v. king emperor, Lord Atkin stated that "A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not in itself a confession".[3] "A confession has to be a direct admittance of an offence, when a statement might be described as suggesting an inference it will not amount to a confession".[4] In the instance of *Nishi Kant Jha v State of Bihar*, it is declared by the apex court that confessional part of the declaration can be relied and remainder can be rejected.[5] Confession can never be considered as the one and only reason of a conviction because diligence and justice requires that this kind of testimony can be taken as supportive evidence.[6] Willful and free confessions of crime if established, is reliable proof in law.[7] Confessions must be accepted or rejected in their entirety.[8] The confession of a person who is co-accused his confession cannot be acceptable by court as as sole and substantive and good evidence.[9]

**Forms of confession**

Confession can taken be in many ways. If a confession is rendered to the court by accused, it is known as judicial confession, and if it is rendered to any other person outside the court, it is termed as extra judicial confession. Even it can be communicated with one's ownself, which, if witnessed by another, can be provided in evidence. In *Sahoo v. U.P. State*, for instance the allegation of assassination of his son's wife is made against accused. He was really in dispute with her on the day of the assassination and while leaving the house, he said these lines: "I have finished her and with her the daily quarrels." The sentence is deemed a valid confession in evidence, as it is not necessary to communicate it to some other individual for the validity of a confession.[10]

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2 Anushka, http://lawtimesjournal.in/confession-under-section-24-to-section-30

3 https://sci.gov.in/supremecourt/2017/21243/21243_2017_Judgement_24-Apr-2019.pdf

4 https://indiankanoon.org/doc/438019/

5 *https://scholarticles.wordpress.com/2015/09/15/mg02/*

6 *Sahoo v. State of Uttar Pradesh, A.I.R 1966 SC 40.*

7 *Emperor v. Narayan, 1907 9 (Bom) LR 789,801*

8 *State of T.N v. Kuttay, 2001 Cri LJ 4168.*

9 *Balbir Singh v. State of Orissa, 1995 Cr LJ 1762 (Ori).*

10 *Confession and Kinds of Confession - SRD Law Notes." https://www.srdlawnotes.com/2017/02/confessionand-kinds-of-confession.html.*

**A. Judicial confession**

Under Section 164 of Crpc, Judicial confessions shall be given in the course of litigation in front of a magistrate or before the Court.[11] A judicial confession has been defined to mean "plea of guilty on arrangement (made before a court) if made freely by a person in a fit state of mind."[12]

**Evidentiary value-** A confessional statement made before a judge by the offender, if made willingly, is strong evidence and on the basis of which the accused can be punished or convicted. It is sole, substantive and good evidence, and the conviction of an accused can be built on this kind of testimony if proved that is rendered free, willfully and voluntarily.

**B. Extra-judicial confessions**

These are those which are rendered by the accused anywhere else other than in front of a judge or in court. In this kind of confessions it is not mandatory to address the assertion to any particular person. It might have been in prayer form. It can be made to a private person. It was known as an extra-judicial confession "a free and voluntary confession of guilt by a person accused of a crime in the course of conversation with persons other than judge or magistrate seized of the charge against himself. A man after the commission of a crime may write a letter to his relation or friend expressing his sorrow over the matter. This may amount to confession. Extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility. Extra-judicial confession is generally made before private person which includes even judicial officer in his private capacity. It also includes a magistrate not empowered to record confessions under section 164 of the Cr.P.C. or a magistrate so empowered but receiving the confession at a stage when section 164 does not apply."[13]

**Evidentiary value-**This kind of confessions are not generally regarded as preferences, because the circumstances under which it is made and the person before whom it is made which supported his statement should not be trusted. It can be treated as weak piece of evidence. It is appropriate to accept the extra-

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11 *Ratanlal & Dhrijlal, The Law of Evidence 164-180,(21st Edition, 2009) LexisNexis, Butterworth Wadhwa, Nagpur*

12 *" International journal law of evidence"28th edition.*

13 *"Evidentiary Value of Extra-Judicial Confession - AUJ LAWYERS." 25 Jan. 2016, http://aujlawyers.com/evidentiary-value-extra-judicial-confession/.*

judicial confession with great attention and precaution. Only when it is simple, logical and compelling can it be relied on.In Sahadevan Vs. State of TN[14] Therefore, the Supreme Court ruled :

i. It is an established concept of criminal jurisprudence that extra-judicial confession is not a strong (weak)kind of evidence;

ii. Wherever the court decides to base a verdict on an extra-judicial statement on the evaluation of the whole facts of the prosecution, it must ensure that the same trust is reinforced and validated by other prosecutions.

The Supreme Court set out the following in a number of decisions:-

i) When an extra-judicial confession is encircled by situations of suspicion, its trustworthiness becomes uncertain and gives up its significance;[15]

ii) It is a precautionary principle where the court should usually pursue an independent, reliable support before relying on such extra-judicial confession;[16]

iii) The extra-judicial confession can be come to rely on by the court if it is truly given and willfully rendered in a stable state of mind.

iv) "Such confession can be relied on and prison sentence can be based on it, if the proof of confession came from the mouths of witnesses who tend to be impartial, not even remotely hostile to the offender and for whom nothing has been brought out, which may mean that he may have a basis to attribute a false statement to the accused."[17]

v) In the case of extra-judicial confession, the magistrate has satisfied[18] himself in relation to the

a) willingness of the confession

b) Truthness of the confession

c) Corroboration

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14 *AIR 2012 SC P.2435. 5*

15 *Balwinder Singh Vs. State of Punjab AIR 1996 SC P.607.*

16 *Pakkirisamy Vs. State of TN AIR 1998 SC P.107. 6*

17 *State of Rajasthan Vs. Raja Ram AIR 2003 SC P.360*

18 *Aloke Nath Dutta Vs. State of WB (2007) 12 SCC P.230*

vi) "There is no iron rule that an extrajudicial confession can never be the foundation of a conviction even though an extrajudicial confession must usually be verified."[19]

**Provision relating to confession under IEA, 1872**

**Section 24**

Section 24 "Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.-A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Section 24 is worded in negative language and worded in negative language and it creates irrelevancy upon confession which are generally otherwise relevant. The force, fear, threat or promise should be given by a person who have authority i.e. anyone who had the capacity to influence the proceeding. So such person has to be examined liberally. It can be a police officer, any govt. officer, village sarpanch, mukhiya of village, the magistrate, the clerk in the police station or court, public prosecutor or any other person. The inducement, threat or promise shall be related to some advantage or avoidance of any evil of temporal in nature or evil should be something material and not merely spiritual.

The word used in the section "appears" is different from the word "proved". It is suggested that while the defence proving irrelevancy of the confession,it need not prove the surrounding circumstances of section 24 beyond reasonable doubts. It has simply prove the surrounding circumstances under which the court will satisfy itself regarding the existence of such circumstances and there upon it will shift the burden of proof for rebuttable upon the prosecution.If a person makes a confession before other people accused him of such a confession of an offence. In the situation of ordinary confessions, it is not the responsibility of the prosecution to prove that the confession was given by the

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[19] *Sansar Chand Vs. State of Rajasthan AIR 2011 SC (Cri) P.99.*

accused under coercion, inducement or promise. Moreover, it's the accused's right to be exempted from confession if the accused shows any proof of misconduct. In the case it was held that "where the magistrate elicited answers by interviewing the accused while recording the confession, such a confession cannot be treated as voluntary in nature." [20] A confession is deemed to be voluntary confession when it is documented by a judicial magistrate with all the cautions and verified by direct and indirect evidence.[21]A person trying to make a point as a suspect who is eventually found to be an accused would be a confession.

**Section 25 and 26**

Section 25 "Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence."

Section 26 "Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

According to sections 25 and 26 of the Indian Evidence Act, the confession rendered to the police officer or any other individual by a person when he was in police custody and the judicial magistrate is not actually present there, then the confession is relevant but inadmissible.

Section 25 and 26 use the word "police officer", it means a police officer who has authority to investigate. The policy behind the section is that when such confession is made to a police officer or to any other person is made while in police custody then there is an implicit element of compulsion, fear and threat. Hence, the admissibility of such confession is excluded.

In order to be inadmissible, the confession should be proved to have been made to police officer directly and therefore if the accused had written a letter voluntarily and send it by post to the police officer then, it will not hit by section 25.[22] If the confession is made to some other person but in the presence of police officer then generally it is not hit by section 25 but if it canbe proved

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20 *Queen- Empress v. Babu Lal, 1884, 6 (All) 509, 532 FB.*

21 *Bheru Singh v. State of Rajasthan, 1994 1 Crimes 630*

22 *Sita Ram v. State of UP, A.I.R 1966 SC 1906*

that the police officer was proximate enough to have influence the accused to make the confession, it will hit by section 25.

**Section 26** declares when a person is in police custody and he made the confession except in the presence of a competent judge, the chapter prohibits, under any conditions, statements made to police officers. A Magistrate's presence guarantees the confession's autonomy, protection and voluntary existence, and the confessor can do so without a police officer's apprehension.[23] For section 26 the confession may be made to any person for example, to a prisoner, to a doctor or to a subordinate who disguised himself not to be a police officer while in reality he is police officer. Here the test is that when the accussed was in police custody at the time when he made the confession. Police Custody may be direct or constructive. It is seen whether the police had an effective control upon the personal liberty of the accused.

**Section 27**

Section 27 "How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

This section is founded on the principle that if an accused's confession is accompanied by the discovery of a truth, it can believe to be true and not extracted. Discovery statements given by accused is part of admissible evidence. It will be applicable when: (a) Where and when those facts have been revealed as a result of the information obtained from the accused in police custody, (b) where the discovered fact applies to the information.

The discovery statement is a statement given by accused which disclose the particular fact i.e. the particular object that is relevant to the proceeding and it found from particular place, the stamen made by accused is called discovery statement. The process of discovery is that after getting the information the concerned police officer will take the accused to that spot where the object is lying and in presence of independent witness he will get the object discovered

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[23] *Hiran Miya, 2877 1 (CLR) 21.*

upon the pin point of the accused. Discovery memo regarding the object found shall be prepared and shall be signed by the independent witness.

The concept of discovery statement based upon the theory of subsequent finding of the fact i.e. the statement first made and there upon there is a subsequent finding on that fact on the basis of same information. The truthfulness of same information lies on the fact the object was discovered on the information only and therefore in light of the above it shall be proved beyond reasonable by the prosecution that the fact was discovered on the basis of information only. So the proper proof of discovery memo becomes so important.

For Sections 25 & 26, this provision acts as a proviso. This section does not make it clear whether only a police officer can obtain the information.[24] There is still a geniune ground for not permitting to a admit confession given under induction or threat to police officer, but this is not applied if the discovery of the fact is the implication of the statement or information provided by the accused in the form of confession.[25] In the case of Ramchandra, "it was held that that when the accused was in judicial custody on a remand order, he was temporarily in police custody when he was questioned that he must be held in such custody for the purposes of this section's applicability."[26] In *pulkutti kottayya v. king emperor*[27] in this case it was held that section 27 being proviso to section 25 and 26 suggest that even if the confession made to the police officer or in police custody as per section 25 and 26 is inadmissible in evidence . It was held that it will be admissible to the extent of information which fulfils the conditions of section 27. In reference to section 24 it has to be kept in mind that the confession made under section 24 is irrelevant. However, if the statement includes the discovery statement and condition of section 27 are fulfilled it will become relevant and admissible.

**Section 28**

Section 28 "Confession made after removal of impression caused by inducement, threat or promise relevant.—If such a confession as is referred to in section 24 is made after the impression caused by any such inducement,

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24 *Queen- Empress v. Babu Lal, 1884, 6 (All) 509, 532 FB*

25 *Bulaqi v. The Crown, 1928 9 (Lah) 671,675*

26 *Ramchandra, 1960 (Mad) 224.*

27 *1966 s.c*

threat or promise has, in the opinion of the Court, been fully removed, it is relevant."

Section 28 is directly related to section 24.This section says that the impression of threat and force is given to the accused and in that impression the confession is rendered by accused under section 24, if the court is of opinion that such confession is rendered by accused when the impression of force and threat is removed fully then such confession is considered by the court as relevant confession.

**Section 29**

"Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.—If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him."

When the confession is rendered by an accused in the assurance that his statement is kept to be secret or it is not to be used in evidence against him then the confession given by accused is revelant because the interest of the public demands prosecution of offenders and not to make any compromise with them.

**Section 30. Confession by co-accused**

Section 30 "Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

Section 30 says that "if accused plea guilt of his own wrongdoing and at the same time involves another person being tried with him for the same crime, his admission may be taken into account against that person as well as himself."[28]

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[28] *Bhaluka Behera v. State, 1957 Cut 200.*

This section applies only to confessions, not to declarations that do not admit the confessing party's guilt. Nevertheless, confession by co-accused is only an aspect which the court take into consideration, certain other situations and considerations should also be taken into account.[29] This section is an exemption to the rule that"one person's confession against another is completely inadmissible." As far as the co-accused is concerned the emphasis can be put on the same where the accused retracted his assertion.[30]

**Retracted confession**

If the accused had made a confession and it is proved once in a court and later on denied by the accused either in his examination of section 315 of Crpc or at the time of defence evidences. A retracted confession means the original confession has been either denied to be made by the accused or the accused stated that he was made confession the under compulsion or by fraud etc. then the confession has deemed to be retracted. The confession made by an accused was firstly proved and satisfy the court by the prosecution and thereafter the accused has been retracted that confession. Upon such retraction, the court will not per se exclude the confession as such rather it will put burden upon the accused to explain the reason suggested for retraction. If such reason are not explained properly then, the court does not admit the fact of retraction and the court will admit that confession as it is not retracted and it's having the same evidentiary value.

**Value of retracted confession** – Iin instance of *Pyare Lal v State of Assam*,[31] it was said that if there are sufficient corroboration then the accused can still be convicted on the basis of confession which was retracted by the accused. In a case it was held that, "once the previous confession is proved voluntary, retraction would not offer any help". In the Parliament Attack Case, it was dictated that the two co-accused were dismissed not due retraction of confession, but because the earlier confession had been wrongly documented, i.e. it had been proved that it was not voluntary.

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29 *Kashmira Singh v. State of Madhya Pradesh, A.I.R 1952 SC 159*

30 *Baboo Singh v. King Emperor, 1934 10 (Luck) 131*

31 *1957 SC*

## Conclusion

The judicial confessions are used as substantive evidences as these confessions have sole evidentiary value whereas extra judicial confessions are weak piece of evidences and they are reliable only when there is another supporting evidence to support it. In case of retracted confessions, if the retraction is true then the evidentiary value of confession is zero but if the retraction is false it hold the same value as before the retraction. After reading all this on a closing note it can be well said that the important confession can never be underestimated for the reason of criminal trial. It is a key incentive in the criminal justice system.

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# Drug Trafficking & Legislations

**Ms. Rekha Rani***

**Abstract**

Drug abuse is a social evil. It destroys vitals not only of the society but also adversely affects the economic growth of the country.The problem of use and abuse of drugs is not new to our country. For the uninitiated, the British Empire, to be more precise, The British East India Company used to export opium from Bengal, Malwa, and Benaras region to China as long back as the 1800s. The Chinese government, to fight the problem of opium addiction and abuse passed edicts, banning the export of opium to China. As a result, the infamous Opium War took place, and the British imposed their wishes on the Great Asian Dynasty in the name of free trade.Fast forward two centuries, and this time, our country is dealing with the issue of drug abuse. India's response to the problem of drug abuse flows on different currents of traditional and modern society. There is widespread availability, but also stringent enforcement of anti-drugs policies. We tolerate the use of drugs (I'm sure everybody had a bhang thandai on Holi!!) and also prohibit it. We produce drugs for medical use, but there is a lack of medical aid for opium addicts. India's drug policies are based on the supply and demand control. The country's large pharmaceutical industry is very much inclined towards the illicit manufacturing of drugs. Some parts of the country report startling rate of drug abuse making harm reduction and health vital policy considerations while the stringent drug control laws (criminalization of drug use; even capital punishment in some cases) conform strictly to the prohibitions that are in place.

**Key Words**: Drug trafficking, pharmaceutical, addicts etc.

## Introduction

"Drug abuse is a social evil. It destroys vitals not only of the society but also adversely affects the economic growth of the country."

**-Y K Sabarwal, Former Chief Justice of India (2006)**

The problem of use and abuse of drugs is not new to our country. For the uninitiated, the British Empire, to be more precise, The British East India

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Company used to export opium from Bengal, Malwa, and Benaras region to China as long back as the 1800s. The Chinese government, to fight the problem of opium addiction and abuse passed edicts, banning the export of opium to China. As a result, the infamous Opium War took place, and the British imposed their wishes on the Great Asian Dynasty in the name of free trade.

Fast forward two centuries, and this time, our country is dealing with the issue of drug abuse. India's response to the problem of drug abuse flows on different currents of traditional and modern society. There is widespread availability, but also stringent enforcement of anti-drugs policies. We tolerate the use of drugs (I'm sure everybody had a bhang thandai on Holi!!) and also prohibit it. We produce drugs for medical use, but there is a lack of medical aid for opium addicts. India's drug policies are based on the supply and demand control. The country's large pharmaceutical industry is very much inclined towards the illicit manufacturing of drugs. Some parts of the country report startling rate of drug abuse making harm reduction and health vital policy considerations while the stringent drug control laws (criminalization of drug use; even capital punishment in some cases) conform strictly to the prohibitions that are in place.

As early as 1930 itself, the Dangerous Drugs Act was enacted to control and regulate drugs derived from poppies, hemp, and coca. Through this act, the cultivation, sale, possession, manufacture, and trade of drugs obtained through these products mentioned above was licensed, and unlicensed activities were penalized.[1] The provisions of the Dangerous Drugs Act, 1930 are still relevant in the present context, especially regarding the statutory definition of hemp, coca and opium and their byproducts, and the category of manufactured drugs. The Drugs and Cosmetics Act of 1940[2] was also introduced for regulating the medical use of drugs such as cannabis and opium, but nonetheless, the Dangerous Drugs Act stood strong. Post-independence, when the Constitution was adopted, all laws came under the purview of the Constitution and some obstacles were faced by the anti-drugs laws on the grounds that they were against the freedom of trade and occupation of the cultivators. The cases, however, were ineffectual as the Courts took the support of India's international anti-drugs commitments to justify the restrictions.[3]

The prohibition became more stringed when Courts and the Legislature started taking the support of Article 47 of the Constitution to restrict the use of drugs. Article 47 states that the State shall endeavor to prohibit the use of drugs except for medicinal purposes.

**Current Legal Framework**

Narcotic Drugs and Psychotropic Substances Act, 1985

India is a signatory to three of United Nation's drug conventions. The first being the 1961 Single Convention on Narcotic drugs, the second being the 1971 Convention on Psychotropic Substances and the last being the 1988 Convention against Illicit trafficking Narcotic Drugs and Psychotropic substances. The domestic legislation was enacted after almost 25 years of signing the 1961 convention when the grace period for abolishing the non-medical use of drugs expired under the 1961 Convention.[4] The 1985 Act was passed in a hurry without any discussion, and it replaced the 1930 act of Dangerous Drugs Act, but the Drugs and Cosmetics Act, 1940 remained and still continues to apply.[5] The Act of 1985 has been amended three times in 1989, 2001 and then a couple of years ago in 2014. The amendments will be discussed further. The NDPS Act places a restriction upon cultivation, production, sale, purchase, possession, use, consumption, import, and export of narcotic drugs and psychotropic substances except when they are used for a scientific purpose or medical use.[6]

Three classes of substances are covered under the NDPS Act-

- Narcotic drugs covered under the 1961 Convention.
- Psychotropic substances and those substances which are covered under the 1971 Convention.
- Controlled substances[7] that are used to manufacture drugs or psychotropic substances.

Narcotic drugs include-

Coca Plant- Leaf or other derivatives including cocaine. It also includes any preparation which contains 0.1% cocaine.

Opium- This category includes poppy straw, poppy plant, opium poppy juice, and any preparation having 0.2% morphine. Derivatives of opium include morphine, heroin, thebaine, etc.

Cannabis- Resin (Charas and Hashish), plant, fruit tops and flowering of the plant (Ganja), or any mixture of Ganja, Charas and Hashish are all included in this category. It is important to note that cannabis leaves i.e. bhang is excluded from this category and is regulated by the state laws.

The NDPS Act lays down the procedure to be followed in case any search or seizure is to be done. Procedure for arresting a person in relation to an offense In the NDPS Act is also provided for.[8] But the norms of investigation and permissibility of evidence are interpreted in such a way that they are prejudicial to the cause of the accused.[9] It can be said that the NDPS Act is essentially a punitive and punishing statute, it also contains a regulatory framework. The Act gives authority to the Central and the State government to frame rules in relation to drug-use activities.[10] The regulatory framework also paves a way for supply of opium, to registered users, for medicative purposes.[11]

Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act was introduced in 1988 as a supplementary to the NDPS Act.

**NDPS Amendments**

**1989**

The NDPS Act went through its first change in the year 1989. Very harsh punishments were introduced, like the mandatory minimum imprisonment of 10 years, a bar on suspension, restriction on bail, trial by special court, forfeiture of property, and mandatory death penalty in some cases of repeated offense. After these amendments, people caught even with small amount of drugs had to go through long imprisonments and very hefty fines, until and unless the person could prove that it was for his own personal use.

**2001**

Due to the criticism faced by the 1989 amendment because of its irregular sentencing policies, the 2001 amendment was passed. According to the 2001 amendment, the penal provisions were upgraded, and penalties were imposed based on the quantity of the drugs. Three categories regarding the quantity were made- small,[12] commercial,[13] and intermediate. The threshold was provided through a Central Government notification in October 2001.[14]

**2014**

The NDPS Act was again amended in the year 2014, and from May 2014, the amendments came into force. The main features of the latest amendments are-

A new category of essential narcotic drugs[15] was created which the Central Government can regulate uniformly throughout the nation.

The objective of the law was widened with the promotion of narcotic drugs and psychotropic substance for scientific and medical use but also prohibiting illicit use.

Including the terms "management" of drug dependence and "recognition and approval" of treatment centers, thus allowing for the establishment of legally binding treatment standards and evidence-based medical interventions.

The death penalty was made discretionary for repeated offense.

**Significant Aspects of the NDPS Act**

Quantity Based Sentencing- under the NDPS Act, sentencing of punishment is based on the substance and its quantity found. The government has also cleared the fact that when the quantity of the seized product is to be calculated, the weight of the product will be given prime consideration instead of the pure drug content of the product.[16]

Death Penalty- the harshness of the NDPS Act is very evident from the fact that death penalty has also been included as a form of punishment under the Act. Courts can award death sentence in the case of certain repeated offense (such as manufacture, production, import, export, possession, and transportation) involving large quantities of drugs.[17] The death penalty was made mandatory through the 1989 amendment, but the rage of offenses in which death penalty could be awarded was narrowed down in 2001. Through the 2014 amendment, the death penalty was made discretionary and an alternative punishment of 30 years of imprisonment was introduced.

Treatment for Drug Dependence- the NDPS Act supports treatment for people who use drugs both as an 'alternative' to, and independent of criminal measures. Several provisions stipulated under the Act depenalise consumption and offenses involving small quantities of drugs and encourage treatment seeking. The treatment aspects under the NDPS Act has come distinct features-

Sec 4(2) (d) and 7A states that treatment of drug addict is one of the measures for which the Central Government should create funds.

Sec 64A states that drug dependent people who are charged with an offense involving small quantities of drugs or consumption can go for treatment and will be exempted from prosecution.

Sec 39 says that instead of awarding sentences, the courts can divert drug dependent people convicted for consumption or an offense involving a small quantity of drugs, to a recognized medical facility for detoxification.

Sec 71, 76 (2) (f), and 78 (2) (b) contains provisions that the Central or the State government can set up and regulate centres for identification, care, and treatment of drug dependent people.

The evil of drug abuse not only creates shackles on the very idea of a better life but it also acts as an impediment to the growth of the country. The legal framework which is present to counter the abuse of drugs is based on a solid foundation. A lot more can be achieved by just efficiently implementing the existing laws and streamlining the procedure.

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6) ibid

7) Section 2 (viid), NDPS Act

8) Sections 41, 42, 43 and 50, NDPS Act

9) Raj Kumar Karwal v Union of India (1990) 2 SCC 409 and Kanhaiyalal v Union of India (2008) 4 SCC 668. In both the cases, the

Indian Supreme Court, in a departure from the settled position on the law on evidence, made confessions to drug law enforcement officers admissible as evidence

10) Subjects on which the central government can make rules are delineated in sections 9 and 76 while the state governments' powers are laid down in section 10 and 78 of the NDPS Act

11) Section 10 (1)(a)(vi), NDPS Act.

12) Section 2(xxiiia), NDPS Act

13) Section 2(xxiiia), NDPS Act

14) Notification S.O 1055(E), dated 19th October 2001 published in the Gazette of India, Extra.,Pt II, Sec 3(ii), dated 19 October 2001

15) Section 2 (viiia), NDPS Act

16) Notification through S.O.2941 (E), dated 18 November 2009

17) Section 31A, NDPS Act

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# The Role of Intellectual Property Rights in Agriculture

**Rahul Yadav***

**Abstract**

Private rights have always been contentious in living artefacts. The first phase in human culture has been agriculture. Therefore, agriculture with plant and agricultural techniques, unlike sector and trade, has previously dated any type of security of IPR. The IPR was traditionally not used in farming. This position has changed in recent times and agriculture has been viewed more and more as an industry without research and development and clever investment that cannot endure. For future generations, food security will depend on protecting biological resources. The origin of several significant genes is biological capital. Researchers want to develop plant types to boost crop output, to resist drastic adjustments in weather conditions, etc. This paper discusses the safeguarding of intellectual estate freedoms in crop species and the rights of landowners and others. It also discusses fresh trends and trends in fresh IP approaches and the use of IP legislation in agriculture and forestry as well as crop genetic resource governance.

**Keywords:** IPR, Agriculture, Patent, Plant Variety Protection, PPV&FV Act.

## Introduction

Modern agricultural biotechnology is increasingly characterized by its exclusive characteristics. In contrast to previous agrarian science from privately financed laboratories, fresh biotechnology is shielded by patents and other IPRs. Will the seed monopolizing, study instruments and even expertise contribute to these IPRs, most of which are held by the private sector? Will it promote R&D through investment incentives and facilitate access to other manufactured innovations?

In the growth of products and technology transfer to emerging nations the possession of IPRs in agri-biotech is now at problem. In their studies, scientists now have to believe IPRs to be a significant variable, particularly in the growth

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of products. The majority of major research organizations, public and private, have been actively considering and implementing IPR policies since the beginning of the 1990s.[1]

**What is Intellectual Property?**

IP is the region of law which protects the freedoms of those creating initial works. It includes everything from innovations and inventions to initial works and books. IPRs aim to promote fresh innovations, creative creations and inventions, while fostering economic growth. If people understand that artistic work is safeguarded and that they can profit from their job, they will proceed to generate employment, develop fresh technologies, improve procedures, and generate beauty in the globe around them.

Agricultural machinery industry in India in 2018 was valued at Rs. 908 billion and possesses enormous growth and development capabilities[2]. Agricultural machinery demand has created the benefits of farm productivity mechanization and loan facilities accessible to agriculturists. Today, intellectual property is increasingly essential in the agricultural trade. Intellectual property is not physical, it constructs the mind alone. In the future it will probably be essential for agricultural sectors to innovate together with product differentiation. There is a wide competition on the globe economies; the more advantageous it can bring to the manufacturers who take the most advantage of intellectual property. In this context, it will be important to see how the global trading scheme handles IP.[3]

**Patent Protection - Agricultural Aspects:**

Patent laws were introduced in several nations already in the 19th century. The patent setting and the like were stipulated in these laws. These laws stipulate that only certain classes of innovations should be protected by patents. In the majority of domestic patent laws, the overall patentability criteria were identical at the fundamental stage and needed novel and industrial applicability

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1 The Role of Intellectual Property Rights in Agricultural Engineering; https://www.ijcmas.com/7-11-2018/P.S.%20Joshi%20and%20S.V.%20Pathak2.pdf; Site visited on 12th July 2019 at 12:15 PM.

2 Indian Agricultural Equipment Market: Industry Trends, Share, Size, Growth, Opportunity and Forecast 2019-2024; https://www.imarcgroup.com/farm-agricultural-equipments-industry-india; site visited on 12th July 2019 at 11:45 PM.

3 https://www.isaaa.org/resources/publications/pocketk/9/default.asp; site visited on 20th July 2019 at 9:15 PM.

of innovations. The necessity for non-obviousness or inventive step was later created by case law in the mid-1900s and codified.[4]

**Plant Protection Legislations**

In the case of agricultural instruments and equipment or the design process of agricultural chemicals patents could primarily be implemented in accordance with the Indian Patent Act 1970 and subsequent modifications. But practices in agriculture/horticulture, life forms of other micro-organisms, such as plant varieties, animal strain/breeds, fish or birds, as well as chemical/biochemical goods, and all procedures used to make livestock or crops safe from disease or to improve their economic value or that of livestock or crops, for medical or cure purposes. The use, or the ability to use or otherwise use, materials designed for medication and food as a medicine, were not patentable until early 2005, except as regards process innovations pertaining to chemicals, including alloys, Optic glass, semi-conductive compounds, and inter-metallic compounds. As of 2005, the Patent Act (Amendments) 2005 allowed for the patenting of innovations relating to agrochemicals as products. No legislation on the protection of plant varieties was previously in place in India. However, it was thought the need for such legislation after becoming a signatory to the TRIPS Agreement that Article 27.3(b) of the TRIPS Agreement rendered it compulsory to ensure the security of the plant varieties either by patents or by an efficacious sui generis scheme or by any mixture of it.In India, a sui generis scheme was created which integrates breeders, peasants and groups with respect to the safety of plant varieties. Sui generis allows the design and additions to a patent scheme for the security of plant varieties of its own. The IPR security for fresh plant species in India in the form of the Protection of Plant Varieties and Farmers' Rights Act (PPVFR) of 2001 came about as a consequence of this law. These developments have established favourable legal circumstances for global biotechnology research and development associations.

**Protection of Plant Varieties and Farmers' Rights Act, 2001**

The immediate trigger for the establishment in India of the PVP scheme is the requirement that every country undertaken in the WTO has to introduce IP protection for plant varieties under Article 27.3(b) of the TRIPS Agreement. PVP was also viewed in 2000 as necessary in order to encourage food security,

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4 Ibid.

in particular from the viewpoint of business breeders, producers and agro-biodiversity conservation.In order that the country can safeguard and maintain its producers' freedoms on the one side and at the same moment give privileges to plant breeders on the other, it was necessary to have a PVP sui generis scheme in India.

India is one of the world's first nations to enact legislation which concurrently gives privileges to peasants and breeders under a single Act.The only laws in this field; that gives producers' official privileges in a manner; that doesn't compromise their self-sufficiency while acknowledging the attempts of crop-breeders for the development of fresh plant varieties.The Act acknowledges that producers are both a grower and a conservator of the farm type by protecting the rights.The aims of the Act are to establish an efficient scheme for protecting crop varieties, protecting producers' and crop breeders freedoms; boost investment in studies and growth in the seed sector and ensure the accessibility for farmers and other landowners, such as horticulturalists, of elevated value plants and growing materials of enhanced species.PVP in India benefit the licensed breeder in saving, using, seeding, reseeding, sharing, and sharing or selling its fresh range, and the breeder registered with a fresh variation can, without its consent, prevent anyone who is marketing, exporting, importing or manufacture such a range. It may also be deceivingly comparable to the use, selling, export, import or manufacturing of any type.The concept behind giving breeders' exclusive privileges is that in their lack the risks of the free movement of third parties would be significant, as the genetic material of these fresh species is one of the most relevant characteristics which characterize their distinguishing and precious commercial characteristics. Naturally this genetic material is self-replicating that can be produced by reproducing plants or other materials that make such material especially sensitive to use by individuals other than the innovator.Again, crop farmers are compelled to operate secretly in the lack of such freedoms and potential employees are refused access to experimental and study information.[5]

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5 IPR Protection in Agriculture: An Overview by Mohan Dewan in Journal of Intellectual Property Rights in March, 2016;
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## Farmers' Rights

A counter barrier to the IPR was the relation that was crucial in reflecting the contributions traditional breeders made to improving plant genetic resources, especially in emerging countries. Farmer's rights are defined as rights resulting from farmer's contributions to conserve, improve and make accessible plant genetic resources, especially those in centres of origin/diversity, as provided for in Council resolution 5/89 of the FAO Council.One way was to attempt and change current IPR legislation to allow producers to take exclusive privileges in their informal plant varieties. One of the ways in which producers could make donations to plant genetic diversity was the benefits-sharing mechanics such as payments and technology transfers.

Biological variety refers to the variety of living organisms from all sources and ecological complexes within or between species and habitats according to Indian Biological Diversity Act 2002. Biodiversity is the most sustainable type of soil fertility and food security. It enables peasants manage the economy and crops of their farms.The aims of the CBD are to conserve biological diversity, to promote the sustainable use of its components, and to ensure that the benefits resulting from using genetic resources are shared fairly and equitably. These goals are influenced by IPR in some ways. The data contained in the fresh crops/plant types, pharmaceuticals, herbicides and pesticides or fresh biotechnological procedures are important in creating the mechanisms for the protection and enforcement of data control. A new scenario has been introduced, particularly in terms of acknowledgment of the economic, ecological and cultural value of genetic resources and biological derived materials, following the entry into force of the CBD.The most significant effect of IPRs on biodiversity in particular is the immediate or indirect misappropriation of biological and genetic resources by the states' sovereignty over their genetic resources and in particular, traditional expertise which was known as bio-piracy as well.If, however, the biodiversity is not safeguarded in a region, it can also have adverse effects, especially in the field of agro-biological diversity, some of which include displacing traditional and native crops, restricting export of traditional medicinal plants that affect conservation

on the ground, and especially restricting the conservation, utilization and marketing of farmed seed by peasants.[6]

Both advanced and developing countries benefitted economically through the use and financial exploitation of genetic resources. But while benefiting from the benefits, the use of IPR over biological and genetic resources must be critically monitored and balanced as progress depends on them. It is therefore also essential for consumers and suppliers of these biological products to share the advantages efficiently.

**Other forms of IP protection in agriculture:**

Trade Secrets protection for hybrid plant types can, for example, be used in agriculture. Therefore the use of hybrids is a level of suitability even in nations that do not acknowledge crop breeders' privileges, as soon as they are maintained confidential. Commercial secrets may be shielded by legislation on unfair competition, restrictive business procedures or contract law against misappropriation by third parties.

The marks used in trade may apply to agricultural and industrial products as well as to utilities. For example, trademarks can be used for market seeds or for spraying services. The fundamental aim of a trademark is to differentiate goods and services from one company and to avoid the disappointment of the customer. Such security avoids and is not restricted in moment to the misuse of trademarks, even if registering must be updated occasionally.

Geographical indications (GI) are a class of trademarks more frequently used in agriculture than industrial sector. These are marks connected with goods of a nation, area or locality where the product's features are mainly due to its geographical origin. Many GIs are associated with or obtained from agricultural products. Famous instances of this are: 'Darjeeling for tea', 'Devgad or Ratnagiri for mangoes', 'Tasgaon, for grapes' in that district.Those plant species created with traditional knowledge and linked to a specific region may also be regarded as GI in the interest of not being protected for a period of time as is the situation in plant patents or the rights of plant breeders. However, business advantages for GI can only be obtained if the name of a site is linked to a farm item.

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6 Ibid, p.117

**Conclusion:**

The conventional agricultural IPRs are patents, especially on biotechnological innovations, rights of vegetarian farmers, trademarks and geographical signs. Trade secrets are now also regarded to be component of IPRs, as are the privacy of unknown testing information and these are also applicable to the agricultural sector.Initial conceptualization at global and domestic level is a phase of farmers' freedoms and community IPRs. India is not a member of the Paris Convention or the UPOV, but is a WTO member, and thus is bound, within the time limits laid down therein, to implement the TRIPS Agreement. Most of the requirements of TRIPS in these IPRs, like strong biotechnology innovation process patents, must be in effect by 1.1.2000 and India would have the period up to 1.1.2005 to apply only for product patents on micro-organisms.

In the acts that protect and protect the interests of individuals effectively and appropriately, and not exclude domestic industries, farmers, scientists and markets, the Government must make such amendments and at the same time serve the interest of a wider group of society. Patent law must be seen as an incentive to promote the development of fresh techniques and the public disclosure of the subsequent innovation, by attracting temporary monopoly.If the patent incentive is offered indiscriminately, however, innovations can not reveal important benefits to their development. Innovations have an unwanted effect and are of benefit. The effect of disclosure relies mainly on their nature. If the first are granted patent incentives regardless of their adverse effects, then damaging technology may develop and better options may slow down.A policy and a law must be developed that will create new instruments and instruments which would effectively ensure that countries of origin are able to assert their rights over their genetic resources, ensure that the benefits derived from their use are shared equitably and, more importantly, protect the indigenous population who are doing intellectual work.

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# Drug Menace- Existing legislation and the Critical Evaluation Thereof

**Dr. Pradeep Kumari***

**Abstract**

It is unfortunate to mention here that a considerable youth population of North India is under drug menace, and it brings me to the most important aspect of this context that when the future of the country is at stake because of one menace, what our legal system is doing. Yes! Yes! Exactly! Our Country has a very stringent legislation in this behalf but the concern is that the so called stringent legislation in this behalf is in force since 1985, then what is wrong? What else is required? Will the existing law in this context really do?This means that the so called stringent legislation qua drug menace need to be re-visited and it is the need of the hour to find out that what is wrong with the legislation under reference which makes it helpless to take care of this menace. There are a lot of loopholes in this act and this paper interweaves a number of themes related to these facts: Problem with the strictness of this act, issues qua quantity of the drugs, Exclusion of leaves & seeds of Plants from definition part of the legislation, same culpability of the criminals irrespective of the different species of a genus of a drug viz. morphine and heroine is same in eyes of law which seems quite illogical, etc. The Act has failed to sub serve the purpose for which it was enacted in spite of this strict legislation. This menace is engulfing the youth of the country even with higher speed.

**Key words:** NDPS, addict, narcotic drug, psychotropic substance, small quantity

## Introduction

Drug smuggling is a menace of International concern, and so far as this menace in our country is concerned, needless to say, India forms a Golden triangle with Pakistan & Afghanistan, and the position of India and the drug menace is one of the major reason that Khalisthan is being demanded again & again.India is

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one of the biggest supplier of illicit demand for opium. The great Lord Shiva is misinterpreted that he used to take drugs (in mythology say '*Bhang*') & people use this misinterpretation as a license to take drugs even on the auspicious occasion of *Mahashivratri* & *Holi*. No body can raise question on Hindu Mythology & no body can be certain whether the pictography of Lord Shiva in this way is right or wrong. But the same mythology also narrated the story that Lord Shiva consumed the whole poison of the universe which was found in "*Samundramanthan*" to save the mankind and the body of Lord turned blue thereafter, and this was the reason that he used to take drugs from trees which were pain relieving and anesthetic in nature. Now anyone can tell that the drug taken by the Lord was used as a 'Medicine' or for 'Intoxication'.

Indubitably, the Government took note of this menace & following convention were being observed:-

1. Single convention on Narcotic Drugs 1961 as amended by 1972 protocol
2. Convention on Psychotropic substances 1971
3. United Nations convention against illicit Traffic in Narcotic drugs & Psychotropic substances 1988,

As India was the signatory of the aforesaid three conventions[1], and hence, the idea was adopted and the law was enacted. The broad legislative policy of Indian Parliament of Narcotic drugs is contained in the two central acts, viz-

A. The Narcotic Drugs & Psychotropic Substances Act, 1985 ("NDPS Act" hereinafter) &

B. The Prevention of illicit Traffic in Narcotic Drugs & Psychotropic Substances Act, 1980.

**NDPS Act, 1985:-**

The main legislation on the subject of Psychoactive substances is the Narcotic drugs & psychotropic substances Act, 1985, which came into force with effect from 14.11.1985. The NDPS Act 1985 set outs the statutory framework for Drug Law Enforcement in India. It repealed (vide section 82) the following three earlier legislations on the subject:

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[1] "Kulhara P and Bassu D" Prevention of substance issue in India.In Lal R, editor.substance use disorder manual for physicions.New Delhi: National drug dependence treatment centre, AIIMS, 2005, Chapter 14.

- The opium Act,1857
- The opium Act,1878 &
- The dangerous drug Act,1930

This act was enacted for dual purpose. The first purpose was the limited use of these substances for medical & scientific purpose and second one was the prevention of abuse of these substances.[2]

The meaning of 'Narcotic' is something which is having pain reliving character. The meaning of 'Psychotropic' is a substance which acts upon central nervous system & changes the mood, the actions, behavior and has pain relieving characteristics. It activates/ deactivates our psychology & it is scientifically proved that any substance affecting the central nervous system is addictive in nature.

Designer Drugs are the drugs formed by changing in the orientation of drugs to exclude it from NDPS Act, however, the parent substance is the same.

Manufacture drugs are the drugs which are manufactured by Chemical Industries but which is not under NDPS Act, as per the notification of Government, and the purpose is medical, and as on today, 250 drugs have been notified in this category so far.

Apart from the definition which is quite useful to understand this article there are some other provision of this act which need to observe to analysis the flaws in this law.

There are three quantities of every drug prohibited under this law which is prescribed by way of schedule annexed with the Act-

a) Small quantity;

b) Intermediate quantity; and

c) Commercial quantity.

For instance:- Charash/Hashish, codeine- 10gm is small quantity, 1kg is commercial quantity & any quantity between 10gm to 1kg. is intermediate quantity. For Ganja, 1Kg is small quantity & 20Kg is commercial quantity and

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[2] " Chakrabarty C"Legal aspects of drug abuse(national).In Ray R,Editor.Substance use disorder manual for physicions.New Delhi:National drug dependence treatment centre,AIIMS,2000,Chapter 2,pg 8-20.

any quantity between the two is intermediate quantity. For Heroine/Morphine, 5gm is small quantity & 250 gm is commercial quantity and any quantity between the two is intermediate quantity. In the similar way, a list of all these substances is prescribed. The relevancy of these quantities is directly proportional to the punishments of the offences involving the same. If the quantity of substance involved is small, imprisonment prescribed is up to 6 months or a fine upto 10,000 or both. For Intermediate quantities, rigorous imprisonment up to 10 years & a fine up to Rs. 1 lakh, and for Commercial quantity, rigorous imprisonment up to 20 years & fine up to Rs. 2 lakh is prescribed.[3] This is the general scheme of the Act.

**Shortcomings of the NDPS Act:**

At the very outset, the word "illicit drug" which is more often used, is a wrong terminology in itself as substance is not illegal but its manufacturing, selling, exportation etc. is illegal, however, this issue is of academic importance only, and adverting to the practical issues right away, the very first problem arises with the strictness of this Act as such heavier punishment is prescribed due to which conviction rate is very low because it is trite in criminal jurisprudence that graver the offence, higher the burden of proof. This is one of the reason of acquittal under this Act, as also held by Hon'ble High Court of Punjab and Haryana in a case of 2000.[4]

Other issue is the quantity issue, meaning thereby, which quantity would be relevant while convicting an accused as it was held by Hon'ble High Court of Rajasthan that where there were discrepancies in the weight of samples, it is fatal for prosecution and benefit of doubt were given to accused.[5]For example: suppose corax is the contraband, and Codeine Phosphate is the prohibited substance in corax and 10 gm thereof is the small quantity and 1Kg is commercial quantity for codeine (as per schedule of the Act). Now if we rely upon the precedents, as our Hon'ble supreme court in Ashif Khan case[6] held

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3 R.P.Kataria .Law relating to Narcotic Drugs and Psychotropic Substance in India,3rd Edition.Reprint 2012,Orient Publishing Company.Allahabad.

4 *Mangal Singh v. State of Punjab,2000(1 EFR 44 P&H)*

5 *Mohan V State of Rajasthan.1997.Cri LR 806(RAJ).A similar observation was there in-Najmabano v.Khurshid alias Phoolwall v.State of M.P.1998 (1) EFR 339:1998(2) JIC 698(M.P).*

6 *State Of NCT of Delhi v. Aahif Khan,AIR 2009 SC 1977*

that it was actual contents by weight of narcotic drugs or psychotropic substance found in whole of the substance is relevant, meaning thereby, out of corax, only quantity of codein will be relevant which as per schedule. Therefore, as per this judgment, it is required to be calculated what quantity of codeine was there in the corax recovered while prosecuting an accused. In general 200mg per codeine phosphate is there in 100ml corax, therefore 500 bottles of corax is equal to 1Kg of codeine Phosphate and these 500 bottles of corax would be considered as commercial quantity to punish a guilty. The other interpretation may be that the whole corax would be taken into account, in that case, 9 bottles of corax will suffice to consider it as a commercial quantity which is the interpretation of Hon'ble High Court of Himachal Pradesh in Ompal versus Himachal Pradesh. The main issue here is the non-uniformity in law, meaning thereby, a person carrying 9 bottles of corax may be convicted and imprisoned for 20 years in one state and in other areas, he may be imprisoned for 6 months only on the ground that the quantity was small. Though the issue was also discussed by Hon'ble Supreme Court in Baldev Singh vs. state of Punjab decided on July 21, 1999, however, what about the convicts who have been punished with greater rigor of interpretation? Would it not be against the constitutional rule of ex-post facto law?

Moving further, the drugs mentioned under the head of cannabis are the drugs in which THC (Tetra Hydro Cannabinol) is the main content which is the psychotropic substance under the section 22 of the Act, whereas, the *Charas*, one of the extract of the genus cannabis and is also having THC, is considered as a Narcotic substance under section 21 of Act, which is also felt illogical and confusing.

Another issue is that THC degrades with the passage of time which is scientifically proved and during the trial, if discrepancy is found in the weight of the substance as far as weight by police and weight by forensic laboratory is concerned, it is again a ground for acquittal and that too on an unscientific opinion of the Justice Dispensation System.

Another issue is that it is the female plant only out of which these contrabands are extracted but if a person is carrying a male plant, the Act does not bother it.

Leaves and seeds of these plants are excluded from NDPS Act. But flowers, fruiting top etc. is made punishable with no explanation that why this window is given for seeds and leaves and it is scientifically proved that the seeds and

leaves also have the same characteristics as far as it's use as drug abuse is concerned.

Another issue is that the "Poppystraw" mentioned under section 15 of NDPS Act, from which Morphine is extracted, it is established fact that it is best anesthetic in the world and it terminates ill cancer even. It is also used as pain relieving substance in old times. Its costs Rs.10 Lakh per 1Kg but if a substance anhydride which costs Rs. 500 per Litre is mixed with it, it will form Heroine which cost is Rs. 5 crore per Kg. and other costly drug like Smack, Brown Sugar etc. are also formed by such processes, however, so far as the prosecution of the criminals are concerned, be it Morphine or Heroine, it is same in the eye of law and the punishment would be for Poppystraw only.

Another issue is regarding the possession of a whole plant, if a person is found in the possession of whole plant, it will fall under section 20 of NDPS and punishment would be imprisonment up to 10 years and fine upto Rs. 1 lakh, but if a person is found with millions of plants, the punishment is still the same. It is also felt quite illogical.

**Conclusion:**

The best thing about law is it is dynamic. It changes as per the needs of the society, and in the light of the aforesaid loop holes in the present legislation, amendments are the need of the hour to fill up all the non-liquet situations and If a happily worded complete legislation is made, may be with lessor punishments as it is not the higher punishments or lower punishments in laws, which the criminals pay heed for, what really bothers them is - the rate of detection and the conviction.

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