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Law grows and evolves with and also brings about development and necessary change in every walk of life. The objective of law must be and indeed it is its progressiveness and must move in sync with needs of the time. The new challenges which inevitably emerge must be addressed through extensive research and dialogue. To quote Elie Wiesel, “There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest.”

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JUDICIAL APPOINTMENTS AND ACCOUNTABILITY:
SHIFTING TRENDS OR TUG OF WAR?

Dr. Ashish Verma*

Appointment of judges in the courts of record has been a much talked about issue in India and more so since the NJAC was proposed. The appointment of High Court and Supreme Court judges has been entrusted to the judges themselves, the appointing authority being the President of India\(^1\). However, the ‘collegium-system’ is not exactly as provided by the letter of the Constitution but it evolved as a development of the law on that point, by way of judicial pronouncements. The ‘collegium-system’ was developed by the Supreme Court by the well-known cases popularly known as First Judges Case\(^2\), Second Judges Case\(^3\) and Third Judges Case\(^4\). The law evolved through these cases has been to the effect of shifting the power of appointment of judges from executive to the judiciary. A consistent line of development to such effect can be observed from these cases. The interpretation of Article 124 of the Constitution done in the Second Judges case\(^5\) and Third Judges case\(^6\) whereby interpreting the word consultation as concurrence has been an important step in this direction.

Parliament of India passed National Judicial Appointments Commission Act, 2014, which led to establishment of National Judicial Appointment Commission. The Commission was empowered for the appointment and transfer of judges to the higher judiciary in India. Before this, the appointment of judges to the Supreme Court and High Courts has been based on a “Memorandum of Procedure for Appointment of Judges of the Supreme Court and High Courts”

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\(^1\) As per The Constitution of India, Art 217 and 124 respectively
\(^2\) S. P. Gupta v. Union of India, AIR 1982 SC149
\(^3\) SC Advocates on Record Association v. Union of India, AIR 1994 SC 268
\(^4\) In re Presidential Reference. AIR 1999 SC1
\(^5\) SC Advocates on Record Association v. Union of India, AIR 1994 SC 268
\(^6\) In re Presidential Reference. AIR 1999 SC1
prepared in 1998 pursuant to the Supreme Court Judgment dated October 6, 1993 read with the Advisory Opinion of the Apex Court delivered on October 28, 1998. Under the present mechanism, commonly known as “Collegium System”, the initiation of proposal for appointment of a Judge of a High Court rests with the Chief Justice of the concerned High Court and for appointment of a Judge in the Supreme Court, the same rests with the Chief Justice of India. The Law Commission had advocated for setting up of Judicial Commission, after the S. P. Gupta Case. On the other hand, the judiciary of India has been of the opinion that appointment of judges by judges is essential to safeguard the Independence of Judiciary which is one of the basic features of the Constitution. The justification for this is given like if the control of appointment is given in the hands of the president then ultimately the power of appointment of judges will come into the hands of the Government. Appointment of Judges is one of the most important elements to secure Independence of Judiciary and therefore power of appointment of Judges must be with the Judiciary itself. In India, the judicial institutions have often said to have surrendered to political commitments because the final power of appointment was in the hands of an executive, the President of India and in order to curb that and establishing independence of Judiciary, the judiciary has taken the power of appointment in its control.

**Developments Prior to the Constitution**

In the Constituent Assembly the procedure for the appointment of the Supreme Court and High Court Judges was debated and discussed at length. Drafting Committee was not in the favor of the position under the Government of India Act, 1935 and the earlier Government of India Act of 1919 wherein it was prerogative of the crown to appoint the High Court judges and there was no specific

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7 Law Commission of India In its 121st Report, 1987
8 AIR 1982 SC 149
provision for the consultation with the Chief Justice. In 1945 the Sapru Committee in its Constitutional Proposal recommended that “the justices of the Supreme Court and High Court should be appointed by the head of the state in consultation with the Chief Justice of Supreme Court and in case of High Court Justices, in consultation additionally with the High Court Chief Justices and the head of the unit concerned”\(^\text{10}\). However, in the Constituent Assembly, there was unanimous opinion that the appointment of judges must be done by the President of India. Dr. Bhimrao Ambedkar, Chairman of the Constitution Drafting Committee, had considered it very dangerous to leave the appointment of judges to the absolute discretion of the President\(^\text{11}\). Finally, a middle path was adopted which neither gave absolute power to the judiciary nor to the executives in the matter of appointment of judges\(^\text{12}\).

**Evolution of the Collegium System**

The initial understanding of the constitutional provisions related to the issue was that the president is the appointing authority and the president used to consult and accept the advice tendered to him. Litigation started when differences came into being. The duration from 1973 to 1983 is regarded as deplorable decade; it saw unending tussles between the judiciary and the ruling party. The period saw suppression of two senior, competent and experienced judges for the post of Chief Justice of India and therefore, judiciary took the authority of appointment of judges in its hands to safeguard the principal of Independence of Judiciary. There is a series of cases through which this power of appointment was transferred from Executive to the Judiciary. First in the series is S.P. Gupta vs. Union of India\(^\text{13}\). This case is also known as the First Judges case as being the first case related to


\(^{12}\) Refer to Articles 124 and 217, The Constitution of India, 1949

\(^{13}\) AIR 1982 SC 149
appointment of Judges. Different views were expressed by different judges related to appointment and transfer of Judges. In this case the Hon’ble Supreme Court held that “with regard to appointment of High Court Judges, that there must be full and effective consultation between Constitutional Functionary viz; the Chief justice of the High Court concerned, the Governor of the State, the Chief Justice of India and President. During such consultation, in case of any difference of opinion amongst these authorities, the opinion of the President will have an overriding effect and will prevail over other opinions”. Therefore, Supreme Court pronounced that the ultimate power of appointment of judges is in the hand of the President and it cannot be challenged in any court on any ground, may it be irrelevant consideration or mala fide intentions. Through this case, the Supreme Court of India gave President of India a veto power for the purpose of appointment of Judges.

Development further to this happened in the nineties by the S.C. Advocate on Record Association vs. Union of India\(^\text{14}\), also known as the Second Judges case, this case was second case related to the appointment of judges. Public Interest Litigation was filled by the advocates of the Association questioning some of the most important issues related to the judges of Supreme Court and the High Court. The judgment was pronounced by the majority opinion of the five judges out of the nine judge’s bench of the Supreme Court of India. It was observed that “the consultative process envisaged in Art. 124(2) of the Constitution of India emphasized that the executive does not enjoy supremacy or absolute discretion in the matter of appointment of Judges”\(^\text{15}\).

The court observed that “the indication is that in the choice of candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight. The selection should be made as a result of a participative consultative process in which the executive

\(^{14}\) AIR 1994 SC 268

\(^{15}\) S.C. Advocate on Record Association vs. Union of India AIR 1994 SC 268
should have the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose.”

Further Supreme Court observed, “Appointment should not be made merely on the individual opinion of the Chief Justice, but by the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function....” It appears genuine to summarize that the judgment minimized the executive interference in the appointment and transfer of judges and power of the judiciary was enhanced.

In re, Presidential Reference, referred to as Third Judges case, is the third case in the series related to appointment of Judges. Supreme Court through its nine judges’ bench delivered that “As to appointment of the Supreme Court Judges, the Chief Justice of India should consult a collegium of four senior most judges of the Apex Court. Even if two judges give an adverse opinion, the CJI should not send the recommendation to the Government.” Further the court held that no appointment shall take place if the decision of appointment is not taken in majority by the judges of the collegium. The court also observed, that the Chief Justice of India shall not press appointment if strong views are given even by two of the judges.

For the purpose of appointment of High Court Judges, the Chief Justice of the concerned High Court must initiate the process of appointment, after taking into consideration the views of other two senior judges of the that particular High Court. Now, the collegium of the Supreme Court, before making appointment, must consider the recommendations of the Chief Justice of that particular High Court, other senior judges of High Court and the Supreme Court Judges who may be conversant of that High Court. The Judgment further says that,

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16 S.C. Advocate on Record Association vs. Union of India AIR 1994 SC 268
17 S.C. Advocate on Record Association vs. Union of India AIR 1994 SC 268
18 AIR 1999 SC 1
in case of any clash of opinion between the President of India and between the Chief Justice of Supreme Court, than opinion of the later will prevail. Supreme Court, in this case, also gave judgment, regarding the rule of seniority of High Court Judges for the appointment to the Supreme Court.

The executive has never been appreciative to the collegium system. They say so by citing some controversial appointments to the High Courts and the Supreme Court of India done under the collegium regime.\(^{20}\) Recently, Law Minister of India criticized the collegium system for the vacancies in various High Courts\(^ {21}\). There is already high pendency of cases in India and these vacancies further delay the judicial process, which delays the delivery of justice in all.

**Appointment of Judges and Independence of Judiciary**

Independence of Judiciary means that there should be shield over judiciary to protect it from legislative and executive interferences, i.e. there should be no influence of the other two branches over judiciary. Judicial independence is sine qua non in the functioning of the contemporary government machinery.\(^ {22}\) The judicial independence has been recognized from the very earlier period and is very important for the maintenance of rule of law and social security. Although judicial independence may be seen as an abstract social value, its existence depends on specific institutional elements that can be analyzed.\(^ {23}\) The primary talk on the independence of judiciary is based on the doctrine of separation of powers which holds its existence from several years. The doctrine of separation of powers talks of independence of the

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\(^{22}\) 6 M. P Jain, Indian Constitutional Law 307, (Lexis Nexis Butterwoths Wadhwa, 6th Edn., 2010)

\(^{23}\) Thomas E. Plank, The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, 5 Wm. & Mary Bill Rts. J. 1 (1996)
judiciary as an institution from the executive and the legislature. Montesquieu writes, “When the legislative and executive powers are converged upon the same person, or into the same body or Magistrate, there can be no liberty.” Again, “there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it is joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end to everything where the same man or the same body to exercise these three powers...”

Justice Bhagwati, in Union of India vs. Sankal Chand Himmatlal Sheth asserted that independence of judiciary is a basic feature of the constitution. Also in the S.P Gupta case the same ratio of the previous case was followed. In another landmark judgement of Kumar Padma Prasad vs. Union of India the status of the independence of judiciary as a basic feature of the Constitution was strengthened. Therefore, in a plethora of cases, independence of judiciary has been recognized as a basic feature of the constitution by the Supreme Court of India. The Constitution has conferred a completely separate status to judiciary in its working and it leaves no scope for any kind of interference from the other two organs in the working of judiciary. Supreme Court has observed that “the constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy.”

25 3 (1977) 4 SCC 193
26 AIR 1982 SC 149
28 M.P. Jain , Indian Constitutional Law (Sixth Edition), Lexis Nexis Butterworths Wadhwa Nagpur, 1789
29 A. C. Thalwal v. High Court of Himachal Pradesh, AIR 2000 SC 2732
In the historical Second Judges Case\textsuperscript{30} the value of judicial appointment was also recognized as a component of the independence of judiciary as it was decided that the judicial components cannot be left to the absolute discretion of the executive. It was further said that the judiciary is an independent and separate wing of the Government. The executive or legislature has no concern with the day to day functioning of judiciary.\textsuperscript{31}

The appointment of the judges was primarily rested with the President, after consultation with the Chief Justice of India for the Supreme Court\textsuperscript{32} and for High Court, President shall appoint after consultation with Chief Justice of India, the Governor of the State, and in case of appointment of Judges other than Chief Justice, the Chief Justice of the concerned High Court.\textsuperscript{33}

**The National Judicial Appointment Commission Act, 2014**\textsuperscript{34}

The National Judicial Appointment Commission Act was passed in furtherance of the 99\textsuperscript{th} Constitutional Amendment which establishes The National Judicial Appointment Commission. The preamble of the National Judicial Appointment Act, 2014 stated “to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.”\textsuperscript{35}

\textsuperscript{30} Advocate on Record Assn. Vs Union of India, AIR 1994 SC 268
\textsuperscript{31} M.P. Jain , Indian Constitutional Law p-1789 (Lexis Nexis Butterworths Wadhwa Nagpur, Sixth Edition)
\textsuperscript{32} Article 124, The Constitution of India, 1949
\textsuperscript{33} Article 217, The Constitution of India, 1949
\textsuperscript{34} The National Judicial Appointment Commission Act, 2014 has been held unconstitutional by the Supreme Court ruling in Supreme Court Advocates-on-Record Association and Another Vs. Union of India, 2015 SCC Online SC 964, decided on 16.10.2015
\textsuperscript{35} Preamble to the National Judicial Appointment Commission Act, 2014, The Act has been declared unconstitutional by Supreme Court Advocates-on-Record Association and Another Vs. Union of India, 2015 SCC Online SC 964, decided on 16.10.2015
The National Judicial Appointment Commission had the following roles to perform.

1. To recommend and appoint, the Chief Justice of India.
2. To recommend and appoint, judges for the Supreme Court of India.
3. To recommend and appoint, the judges for the High Courts in India.
4. To take decisions related to the transfer of High Court Judges.

For the Chief Justice of India, name of the judge of the Supreme Court was to be recommended by the Commission. Name of the senior most Supreme Court judge was not necessarily to be recommended for the post of Chief Justice of India if in the opinion of the commission he/she is not fit to hold the office. Name of the person will be recommended by the commission for the judge of the Supreme Court of India on the basis of his/her ability, qualification, merit and on other specified regulations. No name of a person was to be recommended if any 2 persons of the commission were not in favor of recommending a particular person for the judgeship. For the post of the Chief Justice of a High Court, name of the senior most judge of the particular High Court was to be recommended by the National Judicial Appointment Commission. Ability, experience, merit and some other criteria were also to be taken in to consideration while recommending a name. For the appointment of other High Court Judges, the commission for the purpose of appointment was to recommend names to Chief Justice of the concerned high court. The Chief Justice of the concerned High Court to whom the names were recommended was to consult with other 2 senior judges of that particular High Court. Before making any recommendations, the National Judicial Appointment Commission was to take into consideration the views of the Chief Minister and the Governor of the concerned state. The power of appointment under the NJAC Act was still vested in the hands of the President of India.
NJAC with a perspective on its Constitutionality:

In the recent judgment in Supreme Court Advocates on Record Association and Another Vs. Union of India the Supreme of India has declared the 99th amendment and the NJ AC Act unconstitutional.

The Constitution 99th amendment and the National Judicial Appointment Commission Act, 2014 were more likely to shift the power from judiciary to the executive rather than to do anything else. The power struggle between judiciary and the executive-legislature is nothing new but in light of the consistent power struggle judicial appointments by judiciary itself appears a better idea. The composition of the Appointment Panel introduced by the amendment was not a part of the constitution in itself. In other words we can say that, the composition of the Panel can be altered or modified with a simple majority by a ruling party in parliament. A body with such immense powers of appointing members of the higher judiciary (enjoined constitutionally to be separate and independent) being determined and constituted by a simple majority in Parliament, does not display constitutional wisdom. The combined effect of the new amendment and the act was more or less to restore the pre 1993 position, which had been sanctified by the S.P. Gupta judgment of 1981. This judgment establishing executive supremacy was set aside by the nine judge bench judgment fortunately putting an end to this disruptive practice in the matter of higher judiciary appointment. The nine judge bench accepted the arguments made by various distinguished counsels that Article 50 of the Constitution is a basic feature of the Constitution within the meaning of the concept enunciated by the thirteen-judge ruling in the Keshavananda Bharati case of 1973. Article 50 of our Constitution is an extremely simple Article consisting of only one sentence. "The State

36 Supreme Court Advocates-on-Record Association and Another Vs. Union of India, 2015 SCC Online SC 964, decided on 16.10.2015
37 Santosh Paul, ‘Fading judicial independence’ The Hindu (26 October 2012)
38 S.P. Gupta vs. President of India and Ors., AIR 1982 SC 149
39 Supreme Court Advocate on Record Association and Others v. Union Of India, (1993) 4 SCC 441
40 (1973) 4 SCC 225
shall take steps to separate the judiciary from the executive in the public services of the State." The Supreme Court rightly construed this Article to mean that the government, which is the cause of more than half the litigation in our courts, cannot be permitted to have any control over the appointment of judges, who must deal with every litigant including the government, on the merits of their case. A frequent litigant cannot be permitted by any civilized society to be the appointing authority of judges of his liking or choice\textsuperscript{41}. The appointment of senior-most judges of the Supreme Court as the Chief Justice of India has been followed from a very long period and can be traced from the era of pre-independence. The practice has been developed after looking into the prospective of the judiciary and presents a risk as every eligible senior judge will now face a direct threat to being superseded from being appointed as Chief Justice\textsuperscript{42}. Thirdly, the Act and the Amendment provided that the Central government will appoint the officers and employees of the Commission, making its secretariat a government department. This was a dangerous provision. The officials and personnel of the Commission should be appointed in the same manner as those of the Supreme Court\textsuperscript{43}, by the CJI or such other judge or officer of the court as he may direct. If the secretariat or officers and servants of the JAC are treated as government departments, there are a hundred ways of making the Panel dysfunctional. In addition, the confidentiality and secrecy of the Panel’s deliberations cannot be maintained. The importance of an independent secretariat is a sine qua non for an independent and politically neutral Panel. Also, all expenses including salaries, allowances and pensions should be charged upon the Consolidated Fund of India as provided for the Supreme Court\textsuperscript{44} and the High

\textsuperscript{41} Supreme Court Advocate on Record Association and Others v. Union Of India, (1993) 4 SCC 441
\textsuperscript{42} Santosh Pal, Fading Judicial Independence, The Hindu (New Delhi, October 26, 2013)
\textsuperscript{43} Article 146, Constitution of India, 1949
\textsuperscript{44} Article 149, Constitution of India, 1949
Court\textsuperscript{45} (Article 146 and 229). The Panel must be financially independent of executive budgetary control. The Directive Principles of State Policy also describe the separation of judiciary from executives\textsuperscript{46} as an essential element for the attainment of welfare state. It is based on the principle of independence of Judiciary\textsuperscript{47}. The attainment of separation of the judiciary from the executive is regarded as very essential element of Independence of Judiciary\textsuperscript{48}.

**Judicial Independence and Judicial Accountability**

In the past, the judicial appointment was heavily influenced by the concept of judicial independence, while the concept of judicial accountability was not completely ignored. There has been critical attention of the interest groups on the composition of the judiciary and the procedures for appointment of judges. However, a better formula is yet to be worked out. The NJAC does not at all provide a reliable way to improve upon the ‘collegium-system’. The existing constitutional procedure for removal of judges may itself provide sufficient groundwork for ensuring judicial accountability but the executive-legislature duo have already failed to exercise this power objectively. A mere addition to power and authority may not be sufficient to enable ensuring accountability of an institution like the judiciary but the proponents do need to exercise every bit of their power very cautiously and objectively without which the NJAC was also likely to fail even if it was allowed to sustain.

However, many of the democracies in the world have moved on to a new model for appointment of judges, which is Judicial Appointment Commission. In this method representation is made from all the beneficiaries. Normally, Judicial Commission consists of Judges, Lawyers, Ministers and lay people. Judicial appointments are very crucial decisions and therefore it is necessary that many minds must

\textsuperscript{45} Article 229, Constitution of India, 1949
\textsuperscript{46} Article 50, Constitution of India, 1949
\textsuperscript{47} Baldev Raj v. Punjab and Haryana High Court, AIR 2007 SC 1087
\textsuperscript{48} M P Jain, Indian Constitutional Law, (Lexis Nexis Butterworths Wadhwa Nagpur, Sixth Edition) p-1518
work before a judicial appointment is made; but the conditions in India are not appropriate for allowing the executive to have a bigger say in the appointment of judges than they have under the collegium-system. A politically immature population, vote bank politics on the basis of caste, religion and similar grounds; and the type and level of accountability displayed by the members of executive and legislature are the some of the reasons to keep the judiciary separate from executive in the matters of appointment and transfer of judges.
THE PARIS AGREEMENT ON CLIMATE CHANGE:
CHALLENGES FOR THE FUTURE

Manjunatha N G

Introduction:

The climate change and terrorism are the two leading global challenges of 21st century. Both are difficult to be managed. Climate change is the cumulative result of rampant exploitation of environment and natural resources by human beings, which has been going on for centuries. More specifically, the raising population, expansion of industries, vehicular pollution and depletion of green cover are some of the fundamental causes of climate change. This has led to rise and the carbon emission as well as global temperatures. The rising of global temperature is likely to lead to melting of ice caps and glaciers resulting in rise of sea level. The rising sea level would sub-merge many low lying coastal areas throughout the globe. But the more significant fall out the global warming is changes in the climatic patterns leading to irregular rainfall, droughts, floods, cyclones and damage to agriculture. The rising temperature shall have many serious consequences for the health and well being of human community. The enhanced emission of greenhouse gases such as carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, perfluorocarbons and sulphur hexafluoride, in the environment leads to rise in temperature. These gases trap the solar radiation and do not allow the solar heat to escape from the environment of earth. The modern day industrial and commercial activities are chief source of emission of these gases. The severity of global warming and climate change is assessed by the UN Intergovernmental panel on climate Change (IPCC), which was established by the UN in 1988. The IPCC has so far published five Assessment Reports in the years 1990, 1995, 2000, 2007, and 2014 respectively.

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These reports underline the negative impacts of climate change as mentioned above.

Though climate change is considered a recent phenomenon, its roots are more than 150 years old. In 1820s, French scientist Joseph Fourier was trying to understand the factors affecting Earth's temperature. Fourier realised that atmosphere was playing a crucial role. In 1861, the Irish Scientist John Tyndall demonstrated that methane and carbon dioxide could trap heat within the atmosphere while Swedish, Physicist Svante Arrhenius provided numerical estimates of temperature changes due to doubling of CO2 in the atmosphere. Joseph Kincer suggested in 1933 that temperature in individual cities was rising. In 1938 Guy Stewart Callendar gave evidence of 0.3°C rise in global temperatures over the previous 50 years. He suggested that the same was mainly due to CO2 release from fossil fuels. In 1961, Callendar updated his estimates for global temperatures. The current understanding matches their findings. Now there is a consensus that human activities have been affecting the climate. It is also being acknowledged that nations contributing least to the problem would be affected the most. There were typhoons in Philippines and India, droughts in Africa, threats to island nations from rising sea. The Sea level has risen by 15 cm since 1949. The reasons are obvious. While on one hand the carbon dioxide emission has increased from 14.9 Gigatonnes in 1970 to 35.6 Gigatonnes in 2015, on the other hand, the forest cover (which helps in absorbing CO2) has shrunk from 4.7 billion hectares in 1949 to 714.9 million hectares in 2015.

In 1988 Inter governmental Panel on Climate Change (IPCC) was set up by the World Meteorological Organization (WMO) and the United Nations Environment Program (UNEP) to prepare Assessment Reports on Climate Change and its impact based on scientific information. Five Assessment Reports have been presented by IPCC. Leaving few aberrations, the IPCC Reports have by and large established the role of human activities in bringing about Climate Change. Various meetings and Conferences have been held to resolve the issue without any success. Later, a warning was issued that if the
present situation continues, average temperature of Earth may rise by 4ºC in near future. That would be catastrophic for the earth. Consensus was reached to keep the global temperature rise to 2ºC or less through global cooperation. In this backdrop, the 21st Conference of Parties started in Paris.

Climate change is a complex phenomenon and does not respect national boundaries. It does not have any quick solutions. It needs the cooperation of all countries and stakeholders to find a lasting solution of this global challenge. The negotiations to find a lasting solution were launched by the global community in 1992 under the framework of UNFCC, Which was adopted by the UN General Assembly in 1992. The UNFCC consists of 26 Articles. Its main provisions are given below:

1. Article 2 mentions the objective of the convention in following words:

“The ultimate objective of this convention is to achieve stabilization of greenhouse gases concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved with a time frame sufficient to allow eco-systems to adapt naturally to climate change to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”.

2. The most important principle of this convention is listed in Article 3 (1) which states, “The parties would protect the climate system for the benefit of the present and future generation of mankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly the developed countries parties should take the lead in combating climate change and the adverse effects thereof.”
3. Article 7 of the convention establishes a mechanism called Conference of Parties (COP) which shall be the highest decision making and supervisory body under the convention.

**Paris Agreement**

The 21st round of climate change negotiations Conference of parties (COP) were held in Paris on November 30 December 11, 2015. These negotiations assumed significance in view of the fact that the final agreement was to be signed to cut the carbon emission so that global mean temperature does not rise beyond 2 degree centigrade in comparison to the temperature level at the beginning of industrial age. The official delegations from 195 countries as well as European Union took part in these negotiations. Besides representatives from business groups as well as NGOs also participated in these negotiations. These negotiations were held in Peru (Lima) in Dec 2014. The Peru negotiations provided for each country to declare its nationally determined carbon reduction targets, which will be combined to assess the gaps in required carbon emission targets. This will facilitate the final agreement at Paris in 2015. These proposed targets are known as INDC- Intended Nationally Determined Contribution. Accordingly many countries have announced their voluntary targets. China has proposed to reduce its carbon emission to 60-65 percent in comparison to 2014 levels. The US has proposed that it will reduce its carbon emission to 32 percent to its 2005 levels. India’s Intended Nationally Determined Contribution, announced in Oct 2015 is balanced and comprehensive. India proposed to reduce the Carbon Emissions Intensity of its GDP by 33 to 35 percent by the year 2030 from 2005 level.

Also, India proposed to create additional Carbon sink of 2.5 to 3 billion tones of CO2 equivalent through additional forest and tree cover by 2030. The Paris Agreement is built up on the basis of declared carbon reduction targets of all participant countries.

After marathon debates and heated exchanges between the representatives of developing and developed countries, historic Paris
Agreement was signed on December 12, 2015 as the 195 countries arrived at consensus on the text of proposed agreement. This agreement is the result of prolonged negotiations for many years among the stakeholders with wide ranging differences between the developed and developing countries on various issues. The Paris Agreement will come into effect only after 55 such countries sign it, which contribute not less than 55 percent to the global carbon emission. As expected the provisions of the agreement are binding per se but to the extent the parties are voluntarily committed to it. The Agreement has 29 Articles.

The main points of this Agreement are discussed below:

1. The target of copping global temperature below 2 degree centigrated to the level at the beginning of industrial age has been adjusted to the 1.5 degree centigrade in view of the severe climate change conditions visible in different parts of the globe. It is assumed that the industrial age began in the year 18550. Accordingly it means the global mean temperature should not be allowed to rise beyond the 1.5 degree centigrade above the 1850 level.

2. The capacities of the countries will be enhanced to cope with the adverse impacts of climate change so that nations are better equipped to face the challenges of climate change. It was also provided that the means of clean energy shall be adopted in a manner that does not adversely affect the production of food grains in the world.

3. It is necessary to persistently maintain the availability of financial resources to realize the goal of green and clean development without the carbon emission. It was provided that the developed countries would provide $100 billion found over and above their development aid per year to the developing and poor countries for transition to clean energy resources. However there is no mandatory provision to force the developed countries to contribute to this proposed fund.
4. Each party to the agreement shall submit their voluntary declared carbon reduction targets and plans to the UN for registration and shall implement the same effectively. These plans shall be reviewed after 2023 and the efforts shall be made to fulfill the remaining gaps in carbon reduction targets. It needs to be underlined here that if a country fails to achieve the voluntarily declared targets of carbon reduction in the stipulated time, there is no provision for binding penalties for the same.

**Paris Developments:** Initially, there were differences among the participating countries. However, on 12th December 2015, 196 nations reached a landmark Accord. Nearly every country has committed to lower the emissions of greenhouse gases to control the most drastic Climate Change. Initial demand that only developed economies could take action to reduce greenhouse gas emissions was sacrificed. The present accord requires action in some form from every country. United Nations Secretary General, Ban Ki-moon, said "This is truly a historic moment. For the first time, we have a truly universal agreement on climate change."

The historic climate accord at Paris has paved the way for leveling out the persistent increase in Carbon dioxide, CO2 emissions, which started with Industrial Revolution. The approval of text of the agreement by 196 nations will lead to reduction in emission of greenhouse gases by about 50 per cent, which can further stave off increase in atmospheric temperature by 2 degree Celsius. The Accord signals global markets to shift their investments from traditional sources of energy like coal, oil and gas to zero-CO2 energy sources like wind, solar and nuclear power. Five years ago, a similar deal was impossible. However, the situation seems to be changing. The Paris agreement after ratification by nations is to be signed in April 2016 at the United Nations in New York. Earlier, the 2009 Copenhagen Climate Change summit had failed as countries could not iron out their differences. Most of them believed that Climate Change was a problem for future generations. Now the situation is different as scientific
studies have confirmed that has already started adding to woes of the present generation itself. Flooding in Miami, droughts and water shortages in China are some of the examples of changing climate. The Paris Accord is the outcome of several factors including shifts in the domestic policies and relationships between United States and China, the two largest greenhouse gas emitters. Also, India has shown maturity in not sticking to its earlier stand of total exemption. The final Accord did not fully satisfy everyone and some developing nations have expressed their concerns. The Poorer nations wanted a legally binding provision that rich countries provide minimum of $100 billion a year to help them adapt to climate change and mitigate its impact. In the final document, $100 billion amount finds mention in the preamble but not in the legally binding part.

Indian Position

Indian delegation in these negotiations was led by environment minister Prakash Javedkar. India has always represented the cause of developing and poor countries in these negotiations. India opposed the binding provisions for developing countries in any future agreement reduction regarding the carbon emission cut as it has negative impact on their development process. India also demanded that any future climate change agreement should be based on the principle of common but differentiated responsibility and respective capacities. The principle means that the developed countries should bear the more responsibility and climate change measures in comparison to poor and developing countries. On the other hand the developed countries have been reneging from this principle which was included in the United Nations Framework Convention on Climate change (UNFCC) signed in 1992. India also demanded that the developed countries should provide to developing and poor countries adequate financial resources and technology so that these countries may gradually build up their capacities as well as move towards clean energy mechanisms. India also reiterated its earlier stand that adaptation measures should be given priority over the mitigation in climate change management as the poor countries are already facing the adverse impacts of the climate change.
In the terminology of the climate change negotiations ‘adaption’ refers to those measures which are aimed at the root cause of climate change reduction in carbon emission to prevent global warming. The moral crux of Indian position is that the developed countries should bear the historical responsibility for carbon emission over many years and come forward with major responsibility to address the challenges of climate change. On the other hand if developing and poor countries are forced to reduce carbon emission without any viable alternative in place, this will adversely affect their development process. India has persistently maintained its above stand on climate change negotiations for many years. India represented the cause of developing and poor countries.

The developed countries did not agree to these demands. In addition developed countries do not treat India and China as developing countries and term them as emerging economies. The developed countries demand that the emerging economies should also contribute to climate change measures like other developed countries. This argument has weakened India’s position in these negotiations. It is true that India is the third largest carbon emitter in the world after the US and China, but when we take into account the per capita carbon emissions, India is much below in the scales of carbon emitters. But in face of grave danger of climate change the support for the per capita count is difficult to mobilize. The differences between developing countries and developed countries on these issues have been a measure factor for the failures of climate change negotiations for many years in a row.

If we go by the final outcome of Paris negotiations, it emerges that some of the concerns raised by India have been incorporated in the Paris Agreement. There is no mandatory condition for the poor countries to cut down their carbon emission in a manner which affects their development and the rich countries have been asked to contribute to the green fund to help the poor countries to move towards green energy. However, there are certain negative points which are not appreciated by India. There is no binding provision for the developed countries either to cut down their carbon emission. Also the provision
for the review of the implementation of national carbon reduction plan after 2023 by the external mechanism is opposed by India. This issue may come in future and India is likely to oppose any external mechanism to review the implementation of national carbon reduction plan.

Future Expectations: It is expected that emissions will get reduced by 50 per cent if the Paris Accord is implemented. However, the national plans will vary in scope and ambition. Although every country is required to bring a plan, there is no legal requirement saying how they will reduce the emission and by how much. The crux is that the emission levels are to be cut down by all signatories. The countries will also be required to meet every five years, starting from 2020, with their updated plans to further tighten their emission levels. Every five years from 2023 onwards, the countries will publicly report on how they are cutting emissions with reference to their plans and as per a universal accounting system. Although Individual country's plans are voluntary, these plans are legally required to be monitored, verified and reported publicly. This will ensure that suitable environment is created for implementation of the Paris Accord.

India, China and the Accord: India and China have welcomed the Paris Accord. These are world's two most populous countries. Prime Minister Mr. Narendra Modi has hailed the Accord and tweeted that "Outcome of Paris agreement has no winners or losers. Climate justice has won and we are all working towards a greener future," Mr Prakash Javadekar, the Minister of State for Environment, said "What we have adopted is not only an agreement, but we have written a new chapter of hope in the lives of seven billion people on the planet." He praised that the Accord was based on the principles of climate justice and common but differentiated responsibilities. China's envoy said the Accord indicated that the nations were "marching historic steps forward." Earlier, Beijing and New Delhi had different views from developed nations in the UN climate forum. This time with other developing nations, they have resisted moves to levy difficult emission-reducing obligations upon them. Also, they have got assurances of
finance from rich nations. Similar issues had resulted in failures, earlier. Sharp differences among the countries have been sorted out substantially at Paris. The Accord further tries to start new market mechanism allowing CO2 reductions trade between nations. India is likely to make financial gains by trading the benefits from solar power plants, it is planning.

This is why the 2015 Paris summit is important. To ensure meaningful action on climate change, the deal must contain the following elements:

• Ambitious action before and after 2020
• A strong legal framework and clear rules
• A central role for equity
• A long term approach
• Public finance for adaptation and the low carbon transition
• A framework for action on deforestation and land use
• Clear links to the 2015 Sustainable Development Goals

Conclusion:

The striking features of the Paris Agreement are that it was finalized after the consensus among all 195 participant countries and it is non-binding. Yet if the countries adhere to their voluntarily announced carbon reduction plans in future, the agreement is likely to address the challenge of climate change to a great extent. It is always good to have some agreement and move further than to have no agreement and to hold on to the original position. However, the fight is not over. The efforts of global community will bear fruits in the coming decades. The greatest contribution of the climate change negotiations is that they have raised the global awareness about the impending dangers of climate as well as the urgency to take adequate global measures to face this challenge. This will help in the consideration of the resolve of nations, societies and people to contribute to the global efforts towards climate change management.
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ROLE OF DISTRICT JUDICIARY IN PROTECTION OF HUMAN RIGHTS IN INDIA: AN ANALYSIS

Dr. Meena Ketan Sahu*

Introduction

Human rights are entitlements of every man, woman and child because of their existence as human being. It has aptly being said that a person is not only flesh, bone and blood but some 'basic rights' are also inbuilt and inherent in him which enable him to transform into a human being.

The law relating to recognition and protection of human rights is of recent past. The Covenant of League of Nations adopted after the first World War in 1919 emphasized the primacy of human dignity over the interests of States. The incidents of Nazi holocaust persuaded the world community to consider the issue of human rights a bit seriously. The United Nations Charter adopted in 1945 set as one of its three main goals to define and protect the rights of every human being regardless of race, sex, language or religion. The Preamble of the United Nations Charter reaffirmed faith in fundamental human rights and the dignity and worth of human person. This paved the way for adoption by the United Nations Assembly on 10th December, 1948 “The Universal Declaration of Human Rights” (UDHR), which has thenceforth been the underlying philosophy in development of human rights' law.

The aforesaid declaration from time to time has been supplemented by following International Conventions of Declarations:

(1) International Covenant of Civil and Political Rights, 1966

(2) International Covenant on Economic, Social and Cultural Rights, 1966

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(3) International Convention on the Elimination of all forms of Discrimination against Woman, 1981

(4) Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1987

(5) Vienna Declaration of 1993


Constitutional Provisions


The incorporation of human rights as fundamental rights in Part III of our constitution generated the hope that there will be no oppression and violation of human dignity. The Apex Court and High Courts through various pronouncements have vigorously championed the cause of human rights and have given a wider meaning to the concept of human rights. Even right to property has been recognized as a human right in the light of Article 17 (1) of the Universal Declaration of Human Rights.²

The poverty, illiteracy and innocence of the masses have been great hurdles in real and effective enjoyment of human rights by the majority of the people. The fact remains that the vast majority of the people living below poverty line do not have the means to approach the Constitutional Courts for enforcement of their rights.

In the Indian democratic polity, the judiciary plays an important role towards achieving social justice. The subordinate judiciary is not an exception to this holy mission. It plays a pivotal role towards providing

² Munichikanna Reddy v, Revamma, AIR 2007 SC 1753.
security and protecting the rights and liberties of common people who are basically ignorant, down-trodden, under-privileged, backward and exploited. Article 233 to 237 of the Constitution of India deals with Subordinate Courts starting from the District & Sessions Judge to the Magistrates.

Therefore, it is worthwhile to examine how the District Judiciary can help the millions of poor, downtrodden and illiterate Indians in enforcing their human rights and what may be its ideal role in the given situation. Though District Judiciary is not having the authority to issue a writ or direction, still it may within the existing legal framework play a meaningful role in safeguarding the human rights of the people, particularly, the poor, deprived and downtrodden, in matters which are brought before these Courts on criminal or civil side.

Role of District Judiciary

The role of District Judiciary regarding protection of human rights of the poor and under privileged people can be examined with reference to following-

(i) Arrest
(ii) Handcuffing
(iii) Remand
(iv) Custodial interrogation
(v) Confession
(vi) Bail
(vii) Legal Aid
(viii) Speedy trial
(ix) Prison Conditions.
1. Arrest

The law of arrest, as pointed in Joginder Kumar v. State of U.P.\(^3\) is one of the balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individual collectively. Expressing that nearly 68% of arrests were unnecessary and that unjustified action accounted for 43.2% of the expenditure of the jails. The Apex Court held that no arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so.

Article 22 of the Constitution of India provides constitutional safeguard against arbitrary or unreasonable arrest. It has following distinct features:

(a) An arrested person should be informed of the grounds of arrest.

(b) An arrested person has a right to consult and be defended by a legal practitioner of his choice.

(c) An arrested person should not be detained in custody for more than 24 hours except under the authority of the Magistrate.

Apart from these safeguards, the Apex Court in the case of Joginder Kumars’s case has issued following directions for being observed while arresting a person:

1. An arrested person being held in custody is entitled, if he so requests to have his friend, relative or other person who is known to him or likely to take an interest in his welfare, told as far as is practicable

\(^3\) (1994) 4 SCC 260
that he has been arrested and where he is being detained.

2. The police officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the diary as to who was informed of the arrest.

The Apex Court has held that these protections against misuse of police power must be held to follow from Articles 21 and 22(1) of the Constitution and enforced strictly. It was further ordained that it shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. These directions now have the statutory force after insertion of Section 50-A in the Code of Criminal Procedure, 1973 by way of Amendment Act No 25 of 2005.

The aforesaid Constitutional mandate is further manifest in the provisions of Sections 50, 57 and 167 of the Code which respectively provides that an arrested person should be informed about the grounds of arrest as well as the right to be enlarged on bail in case of bailable offence. Such person should be taken before the Magistrate without unnecessary delay and should not be detained in custody for more than 24 hours excluding the time necessary for travel except under the orders of the Magistrate under Section 167.

After that Section 54 of the Code provides that the Magistrate on a request being made by the arrested person is obliged to direct the examination of the arrested person by a Registered Medical Practitioner.

In Sheela Barse v. State of Maharashtra\(^4\), it has been directed by the Apex Court that the Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him

\(^4\) (1983) 2 SCC 96.
that he has a right under Section 54 of the Code to be medically examined.

The aforesaid provisions of law coupled with the directions issued by the Apex Court provide a complete scheme to ensure that basic human rights of an arrested person are not transgressed.

Informal Arrest and Detention.

Informal arrest and detention in police custody without recording arrest of the person taken into custody is one of the major problems concerning issues relating to violation of human rights. Madhya Pradesh Police Regulation in specific terms prohibits against such practice. A police officer violating the aforesaid regulation may invite penal action under Section 29 of the Police Act.

II. Handcuffing

In Sunil Batra v. Delhi Administration,\(^5\) and again in Citizens for Democracy v. State of Assam,\(^6\) the Supreme Court has mandated that the practice of handcuffing of the arrested person is violative of Articles 14, 19 and 21 of the Constitution. An under-trial can be recorded by it and not otherwise. Following observation made by the Apex Court in the latter case is apposite in this respect:

“We declare, direct and lay down as rule that handcuffs and 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. The police or jail authorities, on their own shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to Court and back. Where the police or jail authorities have well grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody, then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the

\(^5\) AIR 1978 SC 1675
prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding promises of the prisoner to violence, his tendency to escape, he being so dangerous, desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.”

III Remand

Article 22 of the Constitution of India read with Section 167 of the Code invests the Magistrate with the power to authorize detention of an arrested person in custody, either police or judicial, if there are grounds for believing that the accusation against such person regarding his involvement in commission of a non-bailable offence is well-founded. Here the role of the Magistrate is not of post office rather the Magistrate should satisfy himself, though only prima facie, that there are grounds for believing that the accusation or information against an arrested person is well-founded.7 The production of the accused before Magistrate is also a condition precedent for authorizing detention. This is something which provides the Magistrate an opportunity to find out that police has not used third degree against arrested person after arrest.

IV Custodial Interrogation.

A person who is supposed to know the facts and circumstances of the case may be examined by the police during interrogation. However, this is subject to Article 20 (3) of the Constitution that confers on the accused a right to remain silent or refuse to answer any question which could be self-incriminating. In a case 8, the Apex Court while strongly deprecating the use of third degree methods during custodial interrogation observed that “custodial torture’ is a naked violation of of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever the human dignity is wounded, civilization takes a step backward, the flag of humanity must on each

such occasion fly half mast”. The police is not justified in using third degree methods for interrogation. Regarding the nature and effect of duress in eliciting information or collecting evidence, the Apex Court has observed in a case\(^9\) that “it is not only physical threats or violence but psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like.” Frequent threats of prosecution, if there is a failure to answer, may take the shape of undue pressure violating Article 20 (3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

The Apex Court, speaking through Hon’ble R.V.Raveendran, J. While dealing with the issue of custodial violence and remedies available against such acts of custodial violence has observed in its latest pronouncement\(^10\) that custodial violence requires to be tackled by resorting to remedial and preventive measures, efforts are necessary to remove the causes which lead to custodial violence. The Apex Court has ordained that following steps which, if taken, may prove to be effective against the nefarious practice of custodial violence:

(a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

(b) The functioning of lower police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigation.

(c) Compliance with the eleven requirements enumerated in D.K.Basu v. State of W.B should be ensured in all cases of arrest and detention.

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(d) Simple and full-proof procedures should be introduced for prompt registration of first information reports relating to all crimes.

(e) Computerization, video-recording and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to F.I.R, mahazars, inquest proceedings, post-mortem reports and statements of witnesses, etc and to bring in transparency in action.

(f) An independent investigation agency (preferably the respective Human Rights Commission or CBI) may be entrusted with adequate power to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution wherever necessary.

The Courts are under an obligation to see that police officers, who resort to custodial torture, are brought to book. In this respect provisions contained in Section 29 of the Police Act, Sections 330 & 331 of IPC, Section 49 of Cr.P.C and Regulation 737 of M.P. Police Regulations are noteworthy which stipulate penal action against erring officers.

V. Confessions

Section 164 of the Code empowers the Magistrate to record confession, but confession which has been obtained by duress or coercion is inadmissible in evidence. Section 164 of the Code mandates that normally the Magistrate should allow 24 hours time for reflection to the person offering himself to confess. The Supreme Court held that Magistrate should not record a confession unless he is sure that no coercion has been made for extracting confession.

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11 Tiwari v. State, AIR 1978 SC 1544
VI  
**Bail**

No doubt grant of bail in non-bailable case is discretion of the Court, however, the discretion has to be exercised in a judicial manner. Demand of heavy security deposit or local sureties for bail has been held to be denial of bail. The Apex Court has held that\(^\text{12}\) demand of security worth f Rs. 10,000/- from a poor mason and that too of serenities from within the district is quite unreasonable. Here attention may also be invited to the latest amendments carried out in the Code particularly Section 436 (dealing with bail in bailable cases) which mandates that if a person is indigent and is unable to furnish surety, instead of taking bail, he shall be released on his executing personal bond without sureties for his appearance. The Explanation appended to the Section clarifies that where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the purpose. Provisions contained in Section 436-A of the Code, as inserted by Amendment Act No. 25 of 2005 may also be referred here which prescribe maximum period for which an under-trial person can be detained.

VII  
**Legal Aid**

Article 39-A, as inserted in the Constitution by the Forty-second Amendment Act, 1976, directs the State to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 22 (1) of the Constitution guarantees every accused person right to be defended by counsel of his choice. Section 303 of the Code of Criminal Procedure, 1973 further enables an accused to be defended by a pleader of his or her choice. In cases, where the accused is poor and cannot afford to engage a lawyer then it is the duty of the State under Section 304 of the Code. In a case\(^\text{13}\) the Apex Court held that Trial Court is under obligation to inform the accused that he is unable to engage a lawyer on


\(^{13}\) Sukhdas v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401.
account of poverty, then he is entitled to obtain free services at the cost of the State. Courts are supposed to discharge this obligation in a committed manner.

VIII Speedy Trial

Delay in dispensation of justice has been perceived as denial of justice and perpetuation of injustice. In a case, the Apex Court has held that trial continuing for unreasonable quite a long time is violative of fair trial particularly when the accused is in custody. In another case it has been held that speedy trial is essential for a fair trial guaranteed by Article 21 of the Constitution.

IX Prison conditions

Sessions Judge is required to visit the prison to see that inside business in prison is being conducted according to the rules and regulations of jail Manual and that there is no violation of human rights. This is an onerous duty. The Sessions Judge should discharge these duties scrupulously because there has been alarming increase in incidents of violation of human rights inside prisons.

14 Hussainara Khatoon v. Home Secretary, State of Bihar, AIR 1979 SC 1369
LAW IN ACTION: APEX COURT JUDGMENTS THAT ALTERED THE COURSE

Prof. Dr. Mariamma.A.K*

"This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

Blackstone

Law is an instrument to regulate human behavior and is a system of rules that are enforced through social institutions to govern human beings. Laws can be made by legislatures through legislation (resulting in statutes), the executive through decrees and regulations, or judges through binding precedent. The history of law links closely to the development of civilization. Ancient Egyptian law, dating as far back as 3000 BC, contained a civil code that was probably broken into twelve books. King Hammurabi further developed Babylonian law, by codifying and inscribing it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon for the entire public to see and this became known as the Code of Hammurabi, which was translated into various languages, including English, German, and French. The Old Testament dates back to 1280 BC and takes the form of moral imperatives as recommendations for a good society. Roman law was heavily influenced by Greek philosophy, but its detailed rules were developed by professional jurists and were highly sophisticated, which was adapted to cope with the changing social

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2 As a legal system, Roman law has affected the development of law worldwide. It also forms the basis for the law codes of most countries of continental Europe and has played an important role in the creation of the idea of a common European culture (Stein, Roman Law in European History, 2, 104-107).
situations and underwent major codification under Theodosius II and Justinian I. Although codes were replaced by custom and case law during the Dark Ages, ancient India and China represent distinct traditions of law, and have historically had independent schools of legal theory and practice. The Arthashastra, probably compiled around 100 AD (although it contains older material), and the Manusmriti (c. 100–300 AD) were foundational treatises in India, and comprise texts considered authoritative legal guidance. Manu's central philosophy was tolerance and pluralism, and was cited across Southeast Asia. This Hindu tradition, along with Islamic law, was supplanted by the common law when India became part of the British Empire.

**Law of India** refers to the system of law in modern India. India maintains a common law legal system inherited from the colonial era and various legislations first introduced by the British are still in effect in modified forms today³. The Constitution of India, which came into effect on the 26th of January, 1950 is the lengthiest written constitution in the world⁴, though it amended several times without changing the basic structure. The law making power is vested with the Parliament or the legislature and the task of interpretation of law lies with the judiciary. Law enacted by the legislature will become effective only when it is applied properly. There are several laws passed by the legislature remains only as dead letters in the book, for eg. Dowry Prohibition Act, 1961⁵, the giving or taking of dowry was prohibited in India in 1961, but dowry soared during the 20th century, dowry-related harassment, violence, torture and even murder became a widespread problem. The act says any person demands directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months but which may

⁵Act No. 28 of 1961 dated 20th May, 1961
extend to two years and with fine which may extend to ten thousand rupees.\textsuperscript{6}

**Repealing of Laws:** Recently Law Commission in its 249\textsuperscript{th} report in Oct 2014 suggested to repeal 250 Obsolete Legislations. P.C. Jain Committee identified 1382 obsolete laws to repeal. So, laws made by the Legislature if not in use; is useless/ obsolete. Either should be amended /Repealed. This shows that law will become an effective tool only when applied properly.

**Supreme Court of India:** Supreme Court of India came into being on 28 January 1950. Supreme Court is the guardian of our Constitution, which is the supreme law of our land. In order to maintain the supremacy of the Constitution, there must be an independent and impartial authority to decide disputes between the centre and the States or the States inter se. This function can only be entrusted to a judicial body, the Supreme Court, the final interpreter and guardian of the Constitution\textsuperscript{7}.

The following are some of the landmark judgments of the Hon’ble Supreme Court of India, which really made the law in action and that stands apart.

1. **Municipal Council Ratlam v. Vardhichand**, in this case some of the residents of the municipality filed a complaint before the Sub-Divisional Magistrate alleging that the municipality is not constructing proper drains and there is stench and stink caused by the excretion by nearby slum-dwellers and that there was nuisance to the petitioners. The Sub-Divisional Magistrate directed the municipality to prepare a plan within six months to remove the nuisance. The order passed by the SDM was approved by the High Court. The Supreme Court of India gave directions to the Municipality to

\textsuperscript{6} Sec.4 of Dowry Prohibition Act, 1961.
\textsuperscript{8} AIR 1980 SC 1622
comply with the directions and said that paucity of funds shall not be a defense to carry out the basic duties by the local authorities. Supreme Court of India interpreted Art.21 which guarantees the fundamental right to life and personal liberty, to include the right to a wholesome environment and held that a litigant may assert his or her right to a healthy environment against the State. Thereafter, series of cases were filed before the SC and there was a dynamic change in the whole approach of the courts in matters concerning environment.

2. **Fertilizer Corporation Kamgar Union v. Union of India**\(^9\) in this case, Justice Krishna Iyer enunciated the reasons for liberalization of the rule of Locus Standi. Locus Standi must be liberalized to meet the challenges of the time. ‘Ubijus ibi remedium’ must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets. Justice Krishna Iyer wrote:

> “If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But he belongs to an organisation which has special interest in the subject matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Article 226”.

Therefore, a public minded citizen must be given an opportunity to move the court in the interests of the public, for the exercise of State power to eradicate corruption may result in unrelated interference with individuals’ rights; the restrictive rules of

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\(^9\) **AIR 1981 SC 344**
standing that are antithesis to a healthy system of administrative action; and Activism is essential for participative public justice.

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of "Locus Standi" that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions.

3. **S.P. Gupta v. Union of India**\(^{10}\) popularly known as "Judges Transfer Case", Justice Bhagwati known as one of the pro-poor and activist judges of the Supreme Court, firmly established the validity of the public interest litigation. Since then, a good number of public interest litigation petitions were filed.

4. **Menaka Gandhi v. Union of India**\(^{11}\) Justice Bhagwati observed, "fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantee' on the basic structure of human rights, and impose negative obligation on the State not to encroach on individual liberty in its various dimensions". The tests of reason and justice cannot be abstract and they cannot be divorced' from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable.

5. **Francis Coralie Mullin v. Administrator, Union Territory of Delhi**\(^{12}\) Supreme Court in this case held that "right to life means the right to live with basic human dignity". The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore

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\(^{10}\) AIR 1982 SC 149
\(^{11}\) AIR 1979 SC 597
\(^{12}\) (1981)1 SCC 608
be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The Court observed that the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival and also held that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, free movement and commingling with fellow human beings are part of the right to live with human dignity and they are components of the ‘right to life’.

6. Mrs. Mary Roy v. State Of Kerala & Others\textsuperscript{13} The judgment ensured equal rights for Syrian Christian women, with their male siblings in their ancestral property.

7. Mohd. Ahmed Khan v. Shah Bano Begum\textsuperscript{14} Shah Bano, a 62-year-old Muslim mother of five from Indore, Madhya Pradesh, was divorced by her husband in 1978. Supreme court of India, awarded her the right to alimony from her husband and held Section 125 Criminal Procedure Code applies to Muslims also. Later Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted.

8. Air India Etc. Etc v. Nergesh Meerza & Ors\textsuperscript{15} the Supreme Court struck down the discriminatory Rules of Indian Airlines. An Air Hostess in Indian Airline challenged certain provisions of their service rule wherein an Air Hostess could have the job up to 35 years of age, but can be terminated if she gets married within 4 years of her recruitment or her first pregnancy as

\textsuperscript{13} AIR 1986 SC 1011
\textsuperscript{14} 1985 SCR (3) 844
\textsuperscript{15} AIR 1981SC 1829
unreasonable and invalid. The Supreme Court held that this provision compelled the Air Hostess not to have children which is against the human nature.

9. **Ms. Mohini Jain v. State of Karnataka**\(^\text{16}\), known as the Capitation Fee case. Miss Mohini Jain a resident of Meerut was informed by the management of Sri Sriddharatha Medical College, Agalokote, Tumkur in the State of Karnataka that she could be admitted to the MBBS course in the session commencing February/March 1991. According to the management she was asked to deposit Rs.60,000 as the tuition fee for the first year and furnish a bank guarantee in respect of the fee for the remaining years of the MBBS course. The petitioner’s father informed the management that it was beyond his means to pay the exorbitant annual fee of Rs.60,000 and as a consequence she was denied admission to the medical college. In this petition under Article 32 of the Constitution of India Miss Mohini Jain has challenged the notification of the Karnataka Government permitting the Private Medical Colleges in the State of Karnataka to charge exorbitant tuition fees from the students other than those admitted to the “Government seats”. Supreme Court observed, that “Right to Education”, a fundamental right cannot be denied to a citizen by charging higher fee known as Capitation Fee. Capitation fee is nothing but a price for selling education. The concept of "teaching shops" is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage. The capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor has to withdraw due to financial inability. A poor student with better merit cannot get admission because he has no money whereas the rich can purchase the admission. Such a treatment is patently unreasonable, unfair and unjust. There is, therefore, no escape from the conclusion that charging

\(^{16}\) (1992)3SCC 666
of capitation fee in consideration of admissions to educational institutions is wholly arbitrary and as such infracts Article 14 of the Constitution. Supreme Court held that charging of capitation fee by the private educational institutions as a consideration for admission is wholly illegal and cannot be permitted.

10. **Smt. Seema v. Ashwani Kumar** \(^{17}\) two-judge Supreme Court bench consisting of Justices Arijit Pasayat and S H Kapadia issued the direction on a petition filed by Seema, a divorced woman, seeking compulsory marriage registrations. The woman's former husband had refused to pay her alimony claiming that they were never married. The Supreme Court of India has ordered the compulsory registration of all marriages in India, irrespective of religion, in a move that seeks to ensure gender justice in the country. SC directed all the States and the Central Government to take steps to notify the procedure for registration within three months from the order.

11. **Lily Thomas v. Union of India** \(^{18}\) Apex Court of this country gave a very important verdict relating to our election laws. For a layman, this judgment would basically keep the criminals out of our Parliament and the State Legislatures. Supreme Court held that any Member of Parliament (MP), Member of the Legislative Assembly (MLA) or Member of a Legislative Council (MLC) who is convicted of a crime and awarded a minimum of two year imprisonment, loses membership of the House with immediate effect. This case was concerned with the constitutional validity of Section 8 (4) of the Representation of the People Act, 1951. The Court declared the said provision as ultra vires the Constitution of India\(^{19}\). Criminality in politics, or more pointedly, criminals sitting in our Parliament and legislatures, is an issue that has for long been debated in many

\(^{17}\) 2006 (2) SCC 578  
\(^{18}\) (2013)7 SCC 653  
\(^{19}\) AIR 1992 SC 1858
forums and has also been at the forefront of reform proposals sent by the Election Commission of India (ECI) to the government. The importance of this order cannot be over emphasized. The position that prevailed before this order was enacted was that all convicted MPs and MLAs enjoyed a three-month period in which to appeal against their conviction, and during this period they crucially retained their memberships in Parliament or legislatures respectively. What has changed is that while they still have the right to appeal, now they immediately cease to be members the House. While previously they were able to file appeals within the stipulated three months without giving up their membership, they managed, in effect, to remain MPs or MLAs often for long years after their terms had expired.

Here is a list some of the landmark judgments that were rendered by the Supreme Court of India in 2014 and which set the law in action:

1. **Manohar Lal Sharma v. The Principal Secretary & Others**

   This Public Interest Litigation was filed by ‘Common Cause’ and Advocate Manohar Lal Sharma. On 25th August 2014, Supreme Court of India in its landmark Judgment, declared the Coal allocation between 1993 and 2009 illegal, arbitrary, non-transparent and was devoid of any procedure. A three Judge Bench headed by Chief Justice Lodha, declared that the entire allocation of coal block as per recommendations made by the Screening Committee from 14.07.1993 in 36 meetings and the allocation through the Government dispensation route suffers from the vice of arbitrariness and legal flaws. The Court came down heavily on the non-transparent manner in which the allocations had been made and averred, “The Screening Committee has never been

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20 Navin B. Chawla, Criminality in the Indian Political System, The Hindu daily, dated 21 Nov 2013
21 Writ Petition (Crl.) No.120 of 2012
consistent, it has not been transparent, there is no proper application of mind, it has acted on no material in many cases, relevant factors have seldom been its guiding factors, there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honored more in their breach. There were no objective criteria, nay, and no criteria for evaluation of comparative merits. The approach had been ad-hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal”.

2. National Legal Services Authority (NALSA) v. Union of India &Ors\(^\text{22}\), the Supreme Court bench comprising of Justice KS Radhakrishnan and Justice AK Sikri observed that the nonexistence of law recognizing transgender as third gender could not be continued as a ground to discriminate them in availing equal opportunities in education and employment. In this judgment that was hailed by rights activists throughout the country, Apex Court directed the Centre and the State Governments to recognize transgender as the third sex and also to provide the benefits of socially and economically backward class to them. The Bench directed the Government to develop social welfare schemes and run public awareness campaign to erase the social stigma attached to the community. Supreme Court also added that if a person surgically changes his/her sex, then he or she is entitled to her changed sex and cannot be discriminated.

\(^{22}\text{Writ Petition(Civil) No.400 of 2012}\)
3. **Shatrughan Chauhan & Another v. Union of India and Others**\(^\text{23}\) three Judge Bench of the Supreme Court consisting of Chief Justice P.Sathasivam, Justice Ranjan Gagoi and Justice Shiv Kirti Singh commuted the death sentence imposed on Suresh, Ramji, Bilavendran, Simon, Gnanprakasam, Madiah, Praveen Kumar, Gurmeet Singh, Sonia, Sanjeev, Sundar Singh, Jafar Ali, MaganLalBerala, Shivu and Jadeswamy. The Supreme Court also overruled the Two Judge Bench Judgment in Bhullar Case which held that a death sentence imposed on a prisoner who was convicted for a terrorist act cannot be commuted on the ground of delay. Considering the commutation of death sentences of convicts whose mercy petition had been rejected by the President, a three-judge bench of the apex Court issued landmark guidelines relating to Death Penalty, while allowing all the 13 Writ Petitions. The Supreme Court even dismissed the review petition filed by the Centre subsequently. The judgment is seen as arguably the most impactful judgment of the year, as the Court pronounced it as the duty of the judiciary to step in when the delays in disposing mercy petitions were seen to be “unreasonable, unexplained and exorbitant”.

4. **People's Union for Civil Liberties & Another v. State of Maharashtra & Others**\(^\text{24}\), The apex Court issued 16 Guidelines to be followed in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation. Two Judges Bench comprising of Chief Justice R.M. Lodha and Justice RF Nariman held that Article 21 of the Constitution of India guarantees “right to live with human dignity”. Any violation of human rights is viewed seriously by Court as right to life is the most precious right guaranteed by Article 21 of the Constitution of India. It also held that killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system.

\(^{23}\) Writ Petition (Crl.) No.55 of 2013
\(^{24}\) Crl.Appeal No.1255 of 1999
5. **Arnesh Kumar v. State of Bihar & Another**\(^{25}\), the apex Court in this judgment that was viewed as a check over abuse of power by the authorities in dowry allegations filed under provisions of the Indian Penal Code and the Dowry Prohibition Act, while deciding an appeal preferred by a husband who apprehended his arrest in a case under Section 498-A of the Indian Penal Code, 1860 and Section 4 of the Dowry Prohibition Act, 1961, rewrote the relationship between the Police and the public by issuing strict guidelines to the Police and Magistrate. The Court directed all State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C, among other commendable guidelines issued.

6. **Adambhai Sulemanbhai Ajmeri &Ors. v. State of Gujarat**\(^{26}\) This was the first case, in India, in which the convicts were awarded death penalty under POTA and under Section 302 of the IPC in July 2006. In this appeal, the apex Court acquitted all the six accused in the 2002 Akshardham temple attack in Gujarat. While acquitting the accused, the Bench comprising of Justice A.K. Patnaik and Justice V. Gopala Gowda had expressed its anguish over the “incompetence of investigative agencies” and observed, “Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing.”

\(^{25}\)Crl.Appeal No.1277 of 2014
\(^{26}\)Crl.Appeal No.2295-2296 of 2010
7. **MohdArif @ Ashfaq v. The Registrar, Supreme Court of India & Others**\(^{27}\) in this case, the Constitution Bench of the Supreme Court with a majority of 4:1 expanded the scope of Article 21 of the Constitution of India by holding that hearing of cases in which death sentence has been awarded should be by a Bench of three Judges and the hearing of Review Petitions in death sentence cases should not be by circulation but should only be in open Court. The Bench observed “when it is a question of life and death of a person, even a remote chance of deviating from such a decision while exercising the review jurisdiction, would justify oral hearing in a review petition. When it comes to death penalty cases, we feel that the power of the spoken word has to be given yet another opportunity even if the ultimate success rate is minimal”.

8. **Pramati Educational & Cultural Trust ® & Others v. Union of India & Others**\(^{28}\), wherein five-Judge Constitutional Bench upheld the Constitutional validity of the 93\(^{rd}\) amendment to the Constitution of India and Right to Education Act to the extent that it makes a provision for unaided educational institutions to provide education to economically and socially weaker sections, through 25 % reservation in their educational institutions. The Court however, excluded minority institutions from the purview of the Act. The judgment, in effect has reduced the rigor of TMA Pai Case\(^{29}\) as to the supremacy of 19(1) (g) as interpreted by the 11 judges bench, which was widely criticized for its stand for advocating the rights of Unaided Private Educational Institutions keeping away the Government from implementing social welfare legislations in the field of education.

9. **Subrata Roy Sahara Union of India & Others**\(^{30}\) on May 6\(^{th}\) Justice K.S. Radhakrishnan and Justice J.S. Khehar delivered this strongest judgment, coming down heavily on the senior counsels for

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\(^{27}\) Writ Petition (Crl.) No.77 of 2014
\(^{28}\) Writ Petition (C) No. 416 of 2012
\(^{30}\) Writ Petition (Crl ) No. 57 of 2014
their “posturing antics, aimed at bench-hunting or bench-hopping”, Supreme Court bench made it clear that “affronts, jibes and carefully and consciously planned snubs” would not deter them from discharging the Court’s onerous duty. The judges were clearly aghast with the attitude adopted by the counsels for the petitioner and said that, “During the course of their submissions, learned counsel for the petitioner, chose to address the Court by using language, which we had not heard (either as practicing Advocates, or even as Judges in the High Courts or this Court).” This judgment emphasize that “no one is above the law”.

10. **Krishan v. State of Haryana**<sup>31</sup> Apex Court bench comprising of Justice Dipak Misra and Justice N.V. Ramana ruled that “bodily injuries on victim are not necessary to prove the offence of Rape”. The victim did not sustain any injury and it is evident from her Medical Report that there was no external mark of injury anywhere on her body. Counsel for the accused contented to rule out rape by the accused, that the victim is habitual of sexual intercourse and there were no signs of recent forcible sexual intercourse or injuries on her body. The Bench however, ruled that the charge of rape will sustain even if there is no injuries on the body of the victim, observing that, “The findings of the medical experts clearly established that there was a rape committed against the victim. One cannot expect every rape victim to straightaway go to police station and lodge complaint”.

11. **Animal Welfare Board of Indiav. A. Nagaraja& Others**<sup>32</sup> Justice Radhakrishnan in this landmark judgment had remarked: “Nobody is bothered to see the sufferings of the animals, as animals don’t have voting rights” and this judgment later won PETA “Man of the Year” Award to Justice K.S. Radhakrishnan, wherein a ban was placed on Tamil Nadu’s centuries-old Jallikattu bull fights. Acts of cruelty on the bulls

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<sup>31</sup>Crl. Appeal No. 1342/2012
<sup>32</sup>Civil Appeal No.5387 of 2014
during these races, as submitted by the AWBI in its three reports, included ear cutting/mutilation, fracture, dislocation of tail bones, frequent defecation, urination, injuries leading to death, biting or twisting a bull’s tail, poking bulls with knives and sticks, using irritants, using nose ropes, cramped conditions, spectators beating and agitating bulls, restraining, roping and other cruelties meted out to the bulls within the arena including mental torture. The Bench, also comprising of Justice P.C. Ghose, concerned itself with the issue of Rights of Animals under the Constitution, laws, culture, tradition, religion and ethology, which had to be examined in connection with Jallikattu, bullock cart races, etc. in the States of Tamil Nadu and Maharashtra.

12. Charu Khurana & Others v. Union of India & Others33 in this case, the Justice Dipak Misra and Justice U.U. Lalit observed, “the petition exposes with luminosity the prevalence of gender inequality in the film industry, which compels one to contemplate whether the fundamental conception of gender empowerment and gender justice have been actualized despite number of legislations and progressive outlook in society or behind the liberal exterior, there is a façade which gets uncurtained on opposite discernment.” As it appears that though there has been formal removal of institutionalized discrimination, yet the mindset has not changed and women still face all kinds of discrimination and prejudice. The days when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history and the Court finally struck down the provision putting restriction on women make-up artists and hairdressers in the film industry.

13. Shabnam Hashmi v. Union of India & Others34 Supreme Court Bench comprising of Justice P. Sathasivam, Justice Ranjan Gogoi and Justice S.K. Singh pronounced that Muslims have a right to adopt a child, despite their personal law barring it. Court observed

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33WRIT PETITION (CIVIL) NO.78 OF 2013
34 Writ Petition (Civil) 270 of 2005
that the laws of the land will have priority over personal law, until the country attains a Uniform Civil Code. The time is not suitable to declare the right to adopt a fundamental right, even though it said all individuals have a legal right to adopt a child. The Supreme Court bench said the right to adoption is conferred by law and functioning of this cannot be negated by a personal law order. The apex court said Muslims could adopt a child under the juvenile justice law, as its enforcement could not be obstructed by the Muslim personal law.

**Latest Judgment:** Punjab and Haryana High Court in Jasvir Singh & Another v. State of Pubjab\(^{35}\) in a path breaking decision answered a vital question that whether jail inmates have a right to have a conjugal life and procreation within the jail premises and whether such right comes under Article 21 of the Constitution, positively observed that Article 21 effectively covers this right for jail inmates which are however to be regulated by the procedures established by law, i.e. right to have a conjugal life and procreation within jail premises is a component of Article 21 of the Constitution. The petitioners who had been convicted under various provisions of IPC for murdering a 16 yr old for ransom, had moved a petition demanding enforcement of their right to have a conjugal life and procreate within the jail premises. The Court while observing that imprisonment takes away some of the fundamental rights, thus a legal hindrance in effectuating the right of procreation issued directions to the State for the Constitution of Jail Reforms Committee to formulate schemes for creation of conducive environment for conjugal visits; evaluate the option of expanding the reach of open prisons; classify the convicts who are to be or not to be allowed conjugal visits etc.

**Conclusion and Vision for 2020:** Law does not stand still and it moves continually. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders,

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\(^{35}\) CWP 5429 of 2010
supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism. By 2020, our judiciary which is currently known for its delay and pendency of litigation should be able to utilize the modern technological developments in its fullest extent and should be able to deliver justice within no time like any other developed country.
ROLE OF SEBI IN REGULATING STOCK EXCHANGES IN INDIA

Dr. Rajesh Kumar*

Introduction

A Stock Exchange performs economic function and is the barometer of the national economy and plays a vital role in the nation's economic development. The Stock Exchange is also a place where savings of the public are normally channeled towards productive purposes. It is a double auction market quite distinct from common auction market where number of potential buyer and sellers are competing against themselves for making their bids and counter bids.¹

Under sec 40(1) of the Indian companies Act, 2013 securities of the company can only be traded at a recognized stock exchange and every company making public offer shall, before making such offer, make an application to one or more recognized stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.² Sec 19 of the Securities contract regulation act further makes dealing of the securities outside stock exchange illegal.³ Dwelling upon the object of the institution of Stock Exchange, the Madras High Court observed “A Stock Exchange performs economic function and is the barometer of the national economy and plays a vital role in the nation's economic development. The Stock Exchange is also a place where savings of the public are normally channeled towards productive purposes. Stock Exchange grants listing approval to the various companies which intend to get their shares listed. Stock Exchange monitors the Corporate Governance Norms of the various listed companies through the listing agreement and through the Arbitration Mechanism, Stock Exchange resolves investor grievances. Any recognized Stock Exchange may,

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² Indian Companies Act, 2013, Sec 40.
³ Securities Contract Regulation Act, 1956, Sec 19.

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subject to prior approval of SEBI, make bye-laws for the Regulation and control of contracts”

In the case of M.A. Gandhi v. Bombay Stock Exchange\(^5\) The Supreme Court observed “The history of Stock Exchanges in foreign countries as well as in India shows that the development of joint Stock enterprise would never have reached its present stage but for the facilities which the Stock Exchanges provided for dealing in securities. They have a very important function to fulfill in the country's economy. Their main function is to liquefy capital by enabling a person who has invested money in, say, a factory or a railway, to convert it into cash by disposing of his share in the enterprise to someone else”.

**Definition and Role**

Stock Exchange means a Stock Exchange, whether inside or outside India, notified by Central government as recognized Stock Exchange. The power to recognize the Stock Exchange is vested with SEBI. There are 23 recognized Stock Exchanges in India right now. The Stock Exchanges are the exclusive centres for trading of securities. Listing of companies on a Stock Exchange is mandatory to provide an opportunity to investors to invest in the securities of local companies. NSE and BSE are the major Exchanges having nationwide operations.

Under Securities Contract Regulation Act, Stock Exchange is defined as “A body of individuals, whether incorporated or not, constituted before Corporatization and Demutualisation under sections 4A and 4B, or a body corporate incorporated under the Companies Act, 1956 whether under a scheme of Corporatization and Demutualisation or Otherwise, For the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities.”\(^6\)

The Stock Exchanges are the exclusive centres for trading of securities. Listing of companies on a Stock Exchange is mandatory to provide an opportunity to investors to invest in the securities of local

\(^5\) 1961 SCR (1) 191.
\(^6\) Supra note 3, Sec 2f.
companies. The principal function of the Stock Exchange is to provide a meeting place for its members to buy and sell securities for their clients.\(^7\) Unlike a common market, the Stock Exchange is the two way market where buyers and sellers are making their respective bids and counter bids until an agreed price is reached\(^8\).

Apart from granting listing approval, it monitors the Corporate Governance Norms of the various listed companies through the listing agreement and through the Arbitration Mechanism, it resolves investor grievances.

**Regulatory Frame Work of Stock Exchanges**

Any organization can work as Stock Exchange only if it is recognized by Central Government in prescribed manner. Recognized Stock Exchange means a Stock Exchange which is for the time being recognized by the Central Government\(^9\). Basically the SCRA Act, 1956, SEBI Act, 1992 and Regulation made by the SEBI and Rules made by the Central Government on this behalf provides for regulatory framework for working of the Stock Exchanges.

**Establishment of stock exchange**

Central government or SEBI may after inquiry and after obtaining further information, if required, can grant recognition. An application is required to be filed by the Stock Exchange containing such particulars as may be prescribed, and shall be accompanied by a copy of the bye-laws of the Stock Exchange for the Regulation and control of contracts and also a copy of the Rules relating in general to the constitution of the Stock Exchange and in particular, to

a) The governing body of such Stock Exchange, its constitution and powers of management and the manner in which its business is to be transacted;

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\(^7\) *Supra note* 1, at pp 6.
\(^8\) *Ibid.*
\(^9\) *Supra note* 3, Sec 2(f).
b) The powers and duties of the office bearers of the Stock Exchange;

c) The admission into the Stock Exchange of various classes of members, the qualifications for membership, and the exclusion, suspension, expulsion and readmission of members there from or there into;

d) The procedure for the registration of partnerships as members of the Stock Exchange in cases where the Rules provide for such membership; and the nomination and appointment of authorized representatives and clerks\textsuperscript{10}.

One deterrence on Rules and Regulation is that once made it cannot be changed without taking approval from SEBI. Central Government or SEBI after receiving such application is supposed to make such inquiry as may be necessary in this behalf and after obtaining such further information, with respect to Rules and bye-laws of a Stock Exchange applying for registration in order to see that whether it is in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors and whether it would be in the interest of the trade and also in the public interest to grant recognition to the Stock Exchange. After getting satisfied, it may grant recognition to the Stock Exchange subject to the conditions imposed upon it as aforesaid and in such form as may be prescribed.\textsuperscript{11}

In the case of Coimbatore Stock Exchange limited v. SEBI\textsuperscript{12} Madras high court observed that “When once a company had been licensed to become a Stock Exchange, after bringing forth the relevant amendments to the Articles of such Company to enable them to become a Stock Exchange cannot be reversed unilaterally by the said Stock Exchange and any amendment to the Articles of the Stock Exchange could be made only with the approval of Central Government/SEBI as per Section 4(5) read with Section 2(g) of SCRA”

\textsuperscript{10} Ibid, Sec 3.
\textsuperscript{11} Ibid, Sec 4(1).
\textsuperscript{12} Supra note 4.
While granting recognition Central government /SEBI may impose these conditions relating to

I. The qualifications for membership of Stock Exchanges;

II. The manner in which contracts shall be entered into and enforced as between members;

III. the representation of the Central Government on each of the Stock Exchange by such number of persons not exceeding three as the Central Government may nominate in this behalf; and

IV. The maintenance of accounts of members and their audit by chartered accountants whenever such audit is required by the Central Government.13

Every grant of recognition to a Stock Exchange under this section shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office as of the Stock Exchange is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India.14

No application for the grant of recognition shall be refused except after giving an opportunity to the Stock Exchange concerned to be heard in the matter; and the reasons for such refusal shall be communicated to the Stock Exchange in writing15.

Sec 4(5) emphasize that “No Rules of a recognized Stock Exchange relating to any of the matters specified in sub-section (2) of section 3 shall be amended except with the approval of the Central Government”16.

Application should be submitted to SEBI in ‘form A’ prescribed under securities contract Regulation Rules, 1957. application should be accompanied with four copies of Rules and fees of Rs 500 and after due enquiry recognition will be granted in form B by SEBI. the recognition

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13 Supra note 3, Sec 4(2).
14 Ibid, Sec 4(3).
15 Ibid, Sec 4(4).
16 Ibid, Sec 4(5).
will be permanent or temporary subject to conditions of the Stock Exchange and Rules thereon.

As per sec 5(1) of SCRA Act, If the Central Government is of opinion that the recognition granted to a Stock Exchange under the provisions of this Act should, in the interest of the trade or in the public interest, be withdrawn, the Central Government may serve on the governing body of the Stock Exchange a written notice that the Central Government is considering the withdrawal of the recognition for the reasons stated in the notice and after giving an opportunity to the governing body to be heard in the matter, the Central Government may withdraw, by notification in the Official Gazette, the recognition granted to the Stock Exchange:

Provided that no such withdrawal shall affect the validity of any contract entered into or made before the date of the notification, and the Central Government may, after consultation with the Stock Exchange, make such provision as it deems fit in the notification of withdrawal or in any subsequent notification similarly published for the due performance of any contracts outstanding on that date.

Where the recognised Stock Exchange has not been corporatised or demutualised or it fails to submit the scheme referred to in sub-section (1) of section 4B within the specified time therefor or the scheme has been rejected by the Securities and Exchange Board of India under sub-section (5) of section 4B, the recognition granted to such Stock Exchange under section 4, shall, notwithstanding anything to the contrary contained in this Act, stand withdrawn and the Central Government shall publish, by notification in the Official Gazette.

**Powers of SEBI with Respect to Stock Exchanges**

In order to protect the interest of the investors and the integrity of the markets as a Regulator, SEBI, therefore, has to make the market place efficient and clean, wherein all the participants play their role diligently and professionally within the four corners of the system,

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\[17 \text{Ibid, Sec 5(1).} \]
without there being any scope for abuse. Where there is an apprehension that certain scrupulous elements are trying to subvert the system to serve their own interest, it becomes imperative on the part of SEBI to intervene and to curb further mischief and to take necessary action to instill and maintain public confidence in the integrity of the securities market. Also, SEBI has to prevent any loss or damage not only to the property of the Stock Exchange, which is a public institution, but also to protect the interest of investors and the integrity of the market.

In the case of Coimbatur Stock Exchange v. SEBI\(^\text{18}\) it was held that “As a Stock Exchange is a State within the meaning of Article 12 of the Constitution of India, SCRA was enacted to prevent undesirable transactions in securities by regulating business or dealings therein and the Stock Exchanges are credible building blocks of the economy and fulfill a vital function in the economic development of the nation. The proper working of a Stock Exchange essentially depends not only on the caliber of the members constituting it but also perhaps, more importantly on their standing. In carrying out the activities in a Stock Exchange, there must be public-spirited men of prudence with equipoise, perspicacity and maturity and the persons so appointed should have necessary professional competence and experience in the areas related to securities market. They are included in the Governing Boards of Stock Exchanges along with the elected broker members in a synergy of sorts, to broad base the Governing Boards and to make them fully representative of various interests in the securities markets and in order to ensure that the affairs of the Stock Exchanges are conducted on healthy lines with the highest standards of professional conduct, good governance and transparency to inspire and sustain the confidence of the investing public.

If the Stock Exchange is in the hands of unscrupulous members, the second and third categories of contracts to buy or sell shares may degenerate into highly speculative transactions or, what is worse,

\(^{18}\) Supra note 4.
purely gambling ones. Where the parties do not intend while entering into a contract of sale or purchase of securities that only difference in prices should be paid, the transaction, even though speculative, is valid and not void, for "there is no law against speculation as there is against gambling ". But, if the parties do not intend that there should be any delivery of the shares but only the difference in prices should be accounted for, the contract, being a wager, is void. More often than not it is difficult for a court to distinguish one from the other, as a wagering transaction may be so cleverly camouflaged as to pass off as a speculative transaction. These mischievous potentialities inherent in the transactions, if left uncontrolled, would tend to subvert the main object of the institution of Stock Exchange and convert it into a den of gambling which would ultimately upset the industrial economy of the country."\textsuperscript{19}

In the case of Vinay Bubna v. Stock Exchange, Bombay\textsuperscript{20} it was held that SEBI is empowered on the behalf of Central government to impose any fee for the membership of stock exchanges recognition.\textsuperscript{21}

\textbf{Power of Call for Information Inquiry and Scrutinizing Periodical Returns}

Every recognized Stock Exchange shall furnish to the SEBI such periodical returns relating to its affairs as may be prescribed\textsuperscript{22}.

Every recognized Stock Exchange and every member thereof shall maintain and preserve for such periods not exceeding five years such books of account, and other documents as the Central Government, after consultation with the Stock Exchange concerned, may prescribe in the interest of the trade or in the public interest, and such books of account, and other documents shall be subject to inspection at all reasonable times by the SEBI\textsuperscript{23}.

\textsuperscript{19} Ibid.
\textsuperscript{20} AIR 1999 SC 2517.
\textsuperscript{21} Ibid, Sec 5(2)
\textsuperscript{22} Supra note 3, Sec 6(1).
\textsuperscript{23} Ibid, Sec 6(2).
Sec 6(3) further empowers SEBI to call upon a recognised Stock Exchange or any member thereof to furnish in writing such information or explanation relating to the affairs of the Stock Exchange or of the member in relation to the Stock Exchange as required in the interest of the trade or in the public interest.

SEBI can also appoint one or more persons to make an inquiry in the prescribed manner in relation to the affairs of the governing body of a Stock Exchange or the affairs of any of the members of the Stock Exchange in relation to the Stock Exchange and submit a report of the result of such inquiry to the SEBI within such time as may be specified in the order or, in the case of an inquiry in relation to the affairs of any of the members of a Stock Exchange, direct the governing body to make the inquiry and submit its report to the SEBI\(^24\).

During the pendency of the enquiry to the affairs of a recognized Stock Exchange or the affairs of any of its Members, Every director, manager, secretary or other officer of such Stock Exchange shall be bound to produce before the authority making the inquiry all such books of account, and other documents in his custody or power relating to or having a bearing on the subject-matter of such inquiry and also to furnish the authorities within such time as may be specified with any such statement or information relating thereto as may be required of him\(^25\).

Enquiry authority will be appointed by SEBI, which may consist of one or more persons, if two or more persons are appointed, one of them shall be appointed as chairman or senior member. They will hand over statement of issues to be inquired into to the Stock Exchange or member concerned. Report will be submitted to them by Central Government.

**Power of the SEBI to Make Rules/Bylaws and to Restrict Voting Rights**

\(^24\) *Ibid*, Sec 6(3).
\(^25\) *Ibid*, Sec 6(4).
As per sec 7A of the act  A recognized Stock Exchange may make Rules or amend any Rules made by it to provide for all or any of the following matters, namely:—

a) The restriction of voting rights to members only in respect of any matter placed before the Stock Exchange at any meeting;

b) the Regulation of voting rights in respect of any matter placed before the Stock Exchange at any meeting so that each member may be entitled to have one vote only, irrespective of his share of the paid-up equity capital of the Stock Exchange;

c) The restriction on the right of a member to appoint another person as his proxy to attend and vote at a meeting of the Stock Exchange;

d) Such incidental, consequential and supplementary matters as may be necessary to give effect to any of the matters specified in clauses (a), (b) and (c).26

Rules made by the SEBI is supposed to be approved by the Central Government and published by that Government in the Official Gazette and, in approving the Rules so made or amended, the Central Government can make any modifications therein as it thinks fit, and on such publication, the Rules as approved by the Central Government shall be deemed to have been validly made.27

Powers of SEBI of Penalty for Violation of Bye Laws

As per sec 9(3) SEBI can provide these punishments to the members of the stock exchanges for violation of any of its byelaws.

I. Fine,

II. Expulsion from membership,

III. Suspension from membership for a specified period,

26 Ibid, Sec 7 (1).
27 Ibid, Sec 7(2).
IV. Any other penalty of a like nature not involving the payment of money\textsuperscript{28}.

**Powers of SEBI to Make /Amend bye-laws**

According to Sec 10 (1) The Securities and Exchange Board of India may, either on a request in writing received by it in this behalf from the governing body of a recognized Stock Exchange or on its own motion, if it is satisfied after consultation with the governing body of the Stock Exchange that it is necessary or expedient so to do and after recording its reasons for so doing, make bye-laws for all or any of the matters specified in section 9 or amend any bye-laws made by such Stock Exchange under that section\textsuperscript{29}.

As per sec 10(2) “Where in pursuance of this section any bye-laws have been made or amended the byelaws so made or amended shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised Stock Exchange is situate, and on the publication thereof in the Gazette of India, the bye-laws so made or amended shall have effect as if they had been made or amended by the recognised Stock Exchange concerned\textsuperscript{30}.

**Power of SEBI to Supersede Governing Body /Suspend Business**

Central government or SEBI can supersede any Stock Exchange if it thinks so and by serving a written notice with an opportunity given to the governing body of the Stock Exchange to be heard in the matter and by publication in official gazette with this regard. Central government is further empowered to appoint any person or persons to exercise and perform all the powers and duties of the governing body, and, where more persons than one are appointed, may appoint one of

\textsuperscript{28} Ibid, Sec 9.
\textsuperscript{29} Ibid, Sec 10(1).
\textsuperscript{30} Ibid, Sec 10(2).
such persons to be the chairman and another to be the vice-chairman thereof\(^\text{31}\).

After the publication of a notification in the Official Gazette as above said the members of the governing body which has been superseded shall, as from the date of the notification of supersession, cease to hold office as such members and the person or persons appointed so may exercise and perform all the powers and duties of the governing body which has been superseded and all such property of the recognised Stock Exchange as the person or persons appointed may, by order in writing, specify in this behalf as being necessary for the purpose of enabling him or them to carry on the business of the Stock Exchange, shall vest in such person or persons.\(^\text{32}\) The person or persons appointed by above said manner shall hold office for such period as may be specified in the notification published under that sub-section and the Central Government may from time to time, by like notification, vary such period\(^\text{33}\).

The Central Government may at any time before the determination of the period of office of any person or persons appointed under this section call upon the recognized Stock Exchange to re-constitute the governing body in accordance with its Rules and on such re-constitution all the property of the recognized Stock Exchange which has vested in, or was in the possession of, the person or persons appointed under sub-section (1), shall re-vest or vest, as the case may be, in the governing body so re-constituted\(^\text{34}\).

Provided that until a governing body is so re-constituted, the person or persons appointed under sub-section (1) shall continue to exercise and perform their powers and duties

**Power to Suspend Business of the Recognized Stock Exchange**

\(^{31}\) *Ibid*, Sec 11.

\(^{32}\) *Ibid*, Sec 11(2).

\(^{33}\) *Ibid*, Sec 11(3).

\(^{34}\) *Ibid*, sec 11(4).
Central government is empowered to suspend the business of Stock Exchange by issuing a notification under sec 12 “ If in the opinion of the Central Government an emergency has arisen and for the purpose of meeting the emergency the Central Government considers it expedient so to do, it may, by notification in the Official Gazette, for reasons to be set out therein, direct a recognized Stock Exchange to suspend such of its business for such period not exceeding seven days and subject to such conditions as may be specified in the notification, and, if, in the opinion of the Central Government, the interest of the trade or the public interest requires that the period should be extended, may, by like notification extend the said period from time to time”. Objection raised by the governing body of the recognized Stock Exchange should be heard in the matter.  

After giving the due opportunity of hearing Central Government can supersede under sec 11(2) through publication of notification in the Official Gazette of that effect and the members of the governing body which has been superseded shall, as from the date of the notification of suppression, cease to hold office as such members. The person or persons appointed under sub-section (1) may exercise and perform all the powers and duties of the governing body which has been superseded and all such property of the recognized Stock Exchange as the person or persons appointed under sub-section (1) may, by order in writing, specify in this behalf as being necessary for the purpose of enabling him or them to carry on the business of the Stock Exchange, shall vest in such person or persons and can direct the governing body to make an enquiry.  

Conclusion  

Under the Securities Contract Regulation Act, SEBI has wide power to regulate stock exchanges in India. Power to grant recognition is actually exercised by central government. Other powers under the act which could be exercised by central government can be delegated to

SEBI\textsuperscript{37}. So, important powers like power to make regulations, power to
make or amend bylaws, power to call for periodical return, power to
impose penalty have been given to SEBI for the purpose of better
regulation of stock exchanges. Role played by the SEBI in development
of stock exchanges has been satisfactory and it is according to need and
necessity of Indian condition. It has also been appreciated many a times
by the courts and the jurists.

\textsuperscript{37} Supra note 3, Sec29 A.
THE INDIAN NUCLEAR POWER AND ITS FORESEEABLE FUTURE UNDER SUSTAINED ECONOMIC GROWTH - OVERVIEW*

Dr. Preethi K Mokshagundam,
Patent consultant and CSR Facilitator

India’s nuclear program was set up in 1948, with the introduction of an Atomic Energy Bill in the Constituent Assembly by India’s first prime minister. “If we are to remain abreast of the world. ....we must develop this atomic energy,” opined Jawaharlal Nehru. The act gives “exclusive responsibility/rights” over atomic energy to the State, cutting off any possible opposition from Indian people. However it was only in 1969, with the help of US that India was able to start its first reactor in Tarapur. As a non-signee to the Nuclear Non-Proliferation Treaty, India was excluded from international trading on nuclear commodities for many years. Its nuclear power plants were therefore built up largely without external help or consultation, and outside of the safety standards of the International Atomic Energy Agency. The indigenous three-stage program is a particular source of national pride. In 2008, the international trading ban was lifted by the Nuclear Suppliers Group, opening the door for foreign countries that wished to trade nuclear equipment and fuel with India, fenced for civilian (non-weaponry) purposes. Deals with the US, France and Russia swiftly followed, as well as with Canada, Mongolia, Kazakhstan, Argentina, Namibia, South Korea and the UK. Foreign nuclear corporations could now build reactors in India

2 Ibid
Rising Demand for energy resources in India- A graphic presentation


For a developing country like India one of the most important constraints on our economic growth is the availability of energy. The consumption of electricity in India is very low since most of our people do not have access to power. As the economy develops and as our incomes raise, the demand for electricity and other forms of energy will increase.

India's energy policy is focused on securing adequate energy resources to meet the growing demands of its economy. Primary energy consumption more than doubled between 1990 and 2011. India's

dependence on imported energy resources and its inconsistent energy sector reform may make it difficult to satisfy rising demand. Despite its growing energy use, India's per capita energy consumption remains much lower than that of developed countries, such as the United States.\(^5\)

Other aspects of the Indian energy industry include: India has 211 gigawatts of installed electric capacity, mostly in coal-fired plants. Because of insufficient fuel supply, the country suffers from a shortage of electricity generation, leading to rolling blackouts.

Coal is India's primary source of energy; the power sector accounts for more than 70% of coal consumption. India has the world's fifth-largest coal reserves.

India was the fourth largest consumer of oil and petroleum products in the world in 2011, after the United States, China, and Japan. India relies heavily on imported crude oil, mostly from the Middle East.

India became the world's sixth-largest liquefied natural gas importer in 2011. India has 20 operational nuclear reactors, with seven more under construction; as electricity demand continues to grow, India plans to increase its nuclear share of generation to 25%, up from 4% in 2011.\(^6\)

Rural areas in India rely heavily on traditional biomass, as they lack access to other energy supplies. According to the 2011 India census, more than 80% of rural households use traditional biomass (including firewood and crop residue) as the primary fuel for cooking, contrasted with 22% of urban households.

Our farmers know that over the years their demand for energy has gone up. Our farmers need power for their pump sets to irrigate their fields. Many farming operations are now getting mechanized and

\(^5\)Ibid
\(^6\)Ibid
\(^7\)Ibid
these machines need electricity and rural households need electricity. The Government has committed itself under Bharat Nirman and Rajiv Gandhi VidyutikaranYojana to ensure complete electricity connectivity across the country\(^8\). But it is an unfortunate fact that we are unable to meet this growing demand. Most of our people still live in villages without regular and reliable power supply.

Our cities are also being starved of power and even when electricity connections exist, most people are harassed by power cuts and load shedding. Hence, a major challenge before us is to increase the supply of electricity in the country. This will allow every one of our households to be lit; it will allow our children to study under proper lighting at home and at school; it will allow our farmers, artisans and workers to use energy as a means of production; it will enable all of us to use electrical appliances that make life easier to live and, it will also contribute to industrial development and better infrastructure resulting more efficient public transport.

There is no gain saying that India needs to augment its energy sources. The conventional sources of energy like coal and oil being no inexhaustible and hydel power having its own problems both economic and ecological, the need is felt for looking for alternative sources of energy that would be renewable and sustainable.

Modern science has also helped us discover a new source of clean and renewable energy which is nuclear energy. Our first Prime Minister Pandit Jawaharlal Nehru recognized early that nuclear technology offered a tremendous potential for economic development, especially for a developing country aspiring to leapfrog technology gaps brought about by long years of colonial exploitation. India’s indigenous

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\(^8\)standing committee on energy (2008-2009) fourteenth Lok Sabha ministry of power implementation of Rajiv Gandhi Grameen Vidyutikaran Yojana thirty-first report-February, 2009/Magha, 1930 (Saka)
nuclear program was founded to address the challenge of energy security and attain self-reliance and technological independence\(^9\).

In the search for alternatives, India caught up with nuclear power, which is said to be clean though not completely renewable. This nuclear renaissance has picked up momentum with the signing of the Indo-US nuclear deal in 2008. This deal has evoked public as well as political arguments and the followed by the for reaching legislative developments in the area.

To eradicate poverty, India requires sustained economic growth at greater than eight per cent a year over the next twenty-five years, with development distributed equally. To sustain this growth, it requires access to guaranteed supplies of energy. India is at the same time coming under increased international pressure to better control its greenhouse gas (GHG) emissions, mainly produced by the burning of fossil fuels.

Approximately 600 million Indians live without electricity, and 700 million use traditional bio-mass as the fuel for their cooking. This activity accounts for over 75 per cent of domestic energy demand. It must manage existing and future energy sources better.

To best gauge India’s energy demands in 2030, it is important to examine its energy estimates and actual production in the 11th five year plan (2007 – 2012); examine the estimates for the twelfth five year plan (2012- 2017) including the carry-over from the eleventh plan; briefly examine nascent estimates for the thirteenth five year plan; and estimate India’s requirements in 2030.

India’s Five-Year Plans (2007 – 2022)\(^{10}\)

\(^9\) India’s Nuclear Energy Program and the 123 Agreement with United States- http://www.dpcc.co.in/pdf/nuclearenergyprogramme.pdf June 2009

## Trends in Supply of Primary Commercial Energy

*(in mtoe)*

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td><strong>DOMESTIC PRODUCTION</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coal</td>
<td>130.61</td>
<td>177.24</td>
<td>222.16</td>
<td>308.55</td>
<td>400</td>
</tr>
<tr>
<td>Lignite</td>
<td>6.43</td>
<td>8.76</td>
<td>10.64</td>
<td>16.80</td>
<td>29</td>
</tr>
<tr>
<td>Crude Oil</td>
<td>33.40</td>
<td>33.99</td>
<td>39.23</td>
<td>42.75</td>
<td>43</td>
</tr>
<tr>
<td>Natural Gas</td>
<td>25.07</td>
<td>27.71</td>
<td>42.79</td>
<td>76.13</td>
<td>103</td>
</tr>
<tr>
<td>Hydro Power</td>
<td>6.40</td>
<td>9.78</td>
<td>11.22</td>
<td>12.90</td>
<td>17</td>
</tr>
<tr>
<td>Nuclear Power</td>
<td>4.41</td>
<td>4.91</td>
<td>8.43</td>
<td>16.97</td>
<td>30</td>
</tr>
<tr>
<td>Renewable Energy</td>
<td>0.13</td>
<td>0.87</td>
<td>5.25</td>
<td>10.74</td>
<td>20</td>
</tr>
<tr>
<td><strong>Total Domestic commercial Energy</strong></td>
<td>206.45</td>
<td>263.28</td>
<td>339.72</td>
<td>481.84</td>
<td>642.00</td>
</tr>
<tr>
<td><strong>Non-commercial Energy</strong></td>
<td>136.64</td>
<td>153.28</td>
<td>174.20</td>
<td>187.66</td>
<td>202.16</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>343.09</td>
<td>416.56</td>
<td>513.92</td>
<td>669.50</td>
<td>844.16</td>
</tr>
<tr>
<td><strong>IMPORTS</strong></td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Coal</td>
<td>11.76</td>
<td>24.92</td>
<td>54.00</td>
<td>90.00</td>
<td>150.00</td>
</tr>
<tr>
<td>Petroleum Products</td>
<td>77.25</td>
<td>98.41</td>
<td>129.86</td>
<td>152.44</td>
<td>194.00</td>
</tr>
<tr>
<td>LNG</td>
<td>0</td>
<td>8.45</td>
<td>12.56</td>
<td>24.80</td>
<td>31.00</td>
</tr>
<tr>
<td>Hydro power</td>
<td>0</td>
<td>0.26</td>
<td>0.45</td>
<td>0.52</td>
<td>0.60</td>
</tr>
<tr>
<td><strong>Total Net Imports</strong></td>
<td>89.01</td>
<td>132.04</td>
<td>196.87</td>
<td>267.76</td>
<td>375.60</td>
</tr>
<tr>
<td><strong>Total Commercial Energy (growth over the previous five years)</strong></td>
<td>295.46</td>
<td>396.32</td>
<td>536.59</td>
<td>749.60</td>
<td>1017.60</td>
</tr>
<tr>
<td><strong>Total Primary Energy</strong></td>
<td>432.01</td>
<td>(4.09 %)</td>
<td>(5.28 %)</td>
<td>(5.69 %)</td>
<td>(5.41 %)</td>
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<tbody>
<tr>
<td><strong>in percentage</strong></td>
<td></td>
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</tr>
</tbody>
</table>

72
The Eleventh Five Year Plan (1 April 2007 – 31 March 2012)\textsuperscript{11}

In 2005-2006, India consumed 513 million tonnes of oil equivalent (mtoe), including 367 mtoe of commercial energy. Coal and lignite accounted for 38 per cent of this total, oil and gas 24 per cent, and hydro- and nuclear-generated power two per cent and one per cent respectively. The total installed capacity at the beginning of the 11th Plan was 132,330 Megawatts (MW). This comprised 34,654 MW Hydro-electricity, 86,015 MW Thermal power (including Gas and Diesel), 3,900 MW Nuclear power and 7,761 MW from Renewable Energy Sources. This was insufficient to cover demand; the country faced peak shortages of 13,897 MW (13.8 per cent) and a total energy shortage of 66,092 MU (9.6 per cent) at the start of the Plan.

The 2006 Integrated Energy Policy estimated that to sustain a growth rate of 8 per cent until 2031-2032, India would need a total primary energy increase to 1,536 mtoe in the most energy-efficient scenario. Under the common day-to-day (also known as the business-as-usual) scenario, however, that requirement would rise to 1,887 mtoe. This equates to a growth of 5.1 per cent growth in consumption annually. This will be difficult to achieve given the increasing competition for finite resources and even more so if ecological constraints such as GHG emissions are considered. Estimates indicated that an additional 82,000 MW would be required during the 11th Plan, including the creation of a reserve of 5 per cent of generation capacity. Taking into account the resources available, the Report of the Working Group on Power for the 11th Plan set the additional capacity target for the plan at 78,700 MW comprising 15,627 MW hydro, 59,693 MW thermal, and 3,380 MW nuclear power. In the event, an additional capacity of 34,462 MW was achieved between 2007 and 31 March, 2011, however, was revised downwards due to a variety of problems including delays in placing orders for maintenance plant and civil works, environmental issues, law and order issues, and disputes between project developers and subcontractors.

India’s share of the world’s supply of fossil fuels is expected to be between 3.7 per cent and 10.9 per cent by 2031-2032, depending on whether the most energy efficient or business-as-usual scenario is considered. Importantly, India’s growing demand for commercial energy could account for 13 per cent of the world’s incremental supply of commercial energy in the most efficient scenario or, worse, 21 per cent in the business-as-usual scenario. Obviously, India faces an uphill task to secure these quantities since it will face strong competition for finite energy sources. Other developing countries with high growth rates, notably China, have already moved to try to secure their share of the world’s commercial energy supplies. Furthermore, these countries will wish to further enhance those shares. Given the finite resources available, the price of energy will consequently increase, until major alternative sources and technologies become available. India, must,
therefore, follow a most-efficient regime if it is to deliver the growth described earlier.\textsuperscript{12}

\textsuperscript{12} Supra 10
The Twelfth Five Year Plan (1 April 2012 - 31 March 2017)\textsuperscript{13}

India’s twelfth five year plans estimates that an additional capacity of 75,785 MW is required over the plan period, giving a total capacity of approximately 276,000 MW and of this added capacity, the Plan estimates that thermal energy derived from coal and lignite will account for 79 per cent, up from 76 per cent in the previous plan. Hydro-power is expected to generate 10,897 MW (12 per cent of the estimated additional capacity), and nuclear capacity 5,300 MW (approximately 6 per cent). Overall, the projected growth rate in power generation over the period 2012-2017 is expected to be 9.8 per cent.

\textsuperscript{13} Supra 11
Capacity Additions for the thirteenth five-year plan are estimated below:

<table>
<thead>
<tr>
<th>Year</th>
<th>6% GDP growth</th>
<th>9% GDP growth</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Availability (MWh)</td>
<td>Requirement (MWh)</td>
</tr>
<tr>
<td>2017-2018</td>
<td>151,570</td>
<td>164,801</td>
</tr>
<tr>
<td>2018-2019</td>
<td>157,806</td>
<td>171,225</td>
</tr>
<tr>
<td>2019-2020</td>
<td>164,218</td>
<td>177,810</td>
</tr>
<tr>
<td>2020-2021</td>
<td>170,805</td>
<td>184,557</td>
</tr>
<tr>
<td>2021-2022</td>
<td>177,571</td>
<td>191,467</td>
</tr>
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</table>
The projected change in the mix of generation by fuel source sees a major realignment. Renewable sources will account for 9 per cent of power generation in 2017, up from 6 per cent in 2012; they will then increase again to 16 per cent in 2030. On the other hand, power from hydro-capacity is expected to fall from 15 per cent in 2012 to 11 per cent in 2030, and nuclear power generation to rise from 3 per cent in 2012 to 5 per cent in 2017, then to 12 per cent in 2030. Overall, the
renewables sector is expected to rise from 26 per cent in 2012 to 39 per cent in 2030\textsuperscript{14}

<table>
<thead>
<tr>
<th>Changing Structure of Fuel for Electricity</th>
<th>Capacity Per Cent</th>
<th>Generation Per Cent</th>
</tr>
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<tbody>
<tr>
<td>Coal</td>
<td>56</td>
<td>57</td>
</tr>
<tr>
<td>Oil</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gas</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>Hydro</td>
<td>20</td>
<td>15</td>
</tr>
<tr>
<td>Renewables</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>Nuclear</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Total Clean Energy (Hydro, Renewables, Nuclear)</td>
<td>23</td>
<td>26</td>
</tr>
</tbody>
</table>

Nuclear energy now contributes more than 4,000 MW of power using a largely indigenous technology, but the nuclear industry’s development has been hamstrung by India’s refusal to sign the Nuclear Non-Proliferation Treaty, cutting the country off from cooperation and assistance in civil nuclear technology, until recently.

In 2008, India and the Nuclear Suppliers’ Group agreed on a waiver to the embargo on trade in nuclear technology. This waiver has removed most of the obstacles, and India now is planning to have 63,000 MW of nuclear generating capacity by 2032\textsuperscript{15}.

India’s four-decade-long experiment with a state-owned economy has resulted in economic crisis which forced the country in 1991 to liberalize its economy. It now allows greater individual initiative and, importantly, foreign direct investment. Federal and state-owned companies still dominate the energy industry, but the

\textsuperscript{14} ibid
\textsuperscript{15} Ibid
private sector is actively capturing market share and even investing in the state-owned companies.

Energy policy and planning are largely controlled by the central government in India’s federal political setup. While the central government alone controls planning and policy related to fossil fuels such as coal, natural gas, and petroleum, the constitution outlines both the state and central government’s responsibility for electricity policy and planning. The Planning Commission of the GoI is responsible for planning for power, energy, energy policy, and rural energy within the framework of a succession of national five-year plans. States take responsibility for power delivery.

The August 2006 Report of the Expert Committee on Integrated Energy Policy (IEP)\(^\text{16}\) for the first time analyzed the resource options for India’s energy needs. It comprehensively examined all sources of energy, including renewable. The IEP forecasted energy demand up to 2031-32 and made broad recommendations to optimally meet the surging demand. It concluded that coal, particularly domestic coal, would continue to fuel the power sector in the country. Since then, the possibilities of exploring nuclear energy as well as the discoveries of natural gas have somewhat tilted the balance. The Planning Commission is in overall charge of developing India’s five-year plans across the ministries and sectors. Since the public sector continues to play a dominant role in the energy sector in India, the ministries wield enormous power and influence in the way the sector develops and is managed. The framework for independent regulation has been established for the electricity and downstream petroleum and natural-gas sectors only\(^\text{17}\). Nuclear power for civil use is well established in India. Its civil nuclear strategy has been directed towards complete independence in the nuclear fuel cycle and has become necessary because it is excluded from the 1970 Nuclear Non-Proliferation Treaty

\(^{16}\) Government of India Planning Commission, New Delhi -August 2006
\(^{17}\) Opined by Y. Sridhar Samudrala, of IECC-Editor of 2011 India Energy Handbook
(NPT)\textsuperscript{18} due to India acquiring nuclear weapons capability after 1970. As a result, India's nuclear power program has proceeded largely without fuel or technological assistance from other countries. Its power reactors in the mid 1990s had some of the world’s lowest capacity factors, reflecting the technical difficulties of the country’s isolation, but rose impressively from 60% in 1995 to 85% in 2001-02\textsuperscript{19}. Then in 2008-10 the load factors dropped due to shortage of uranium fuel\textsuperscript{20}.

India's nuclear energy self-sufficiency extended from uranium exploration and mining through fuel fabrication, heavy water production, reactor design and construction, to reprocessing and waste management. It has a small fast breeder reactor and is building a much larger one. It is also developing technology to utilize its abundant resources of thorium as a nuclear fuel.

The Atomic Energy Establishment was set up at Trombay, near Mumbai, in 1957 and renamed as BARC ten years later. Plans for building the first PHWR were finalized in 1964, and this prototype - Rajasthan-1\textsuperscript{21}, which had Canada's Douglas Point reactor as a reference unit, was built as a collaborative venture between AECL and NPCIL. It started in 1972 and was duplicated, subsequently indigenous PHWR development has been based on these units. The important units in India are PHWRs with dousing and single containment at Rajasthan 1-2, PHWRs with suppression pool and partial double containment at Madras, and later standardized PHWRs from Narora onwards having double containment, suppression pool, and calandria filled with heavy water, housed in a water-filled calandria vault\textsuperscript{22}.

According to Ramanathan, India’s gargantuan energy requirements necessitate an inclusive approach to harness all forms of

\begin{itemize}
  \item Treaty on the non proliferation of nuclear weapons ,treaty entered into force in 1970
  \item Nuclear Power in India- http://www.world-nuclear.org/info/Country-Profiles/Countries-G-N/India/#UkpudNil_s6s- January 2010
  \item \textit{SuvratRaju- India’s Atomic Energy Program: Claims and Reality —Aspects of India’s Economy, No. 48 (January 2010).}
  \item Ibid
\end{itemize}
energy to produce power. “We can’t afford to be choosers. A judicious mix of fuels in the country’s energy portfolio is pivotal to powering India’s growth story. This is also necessary because renewable energy – especially wind and solar – remain largely seasonal options. This is compounded by the fact that India has very little storage capacity to store such power for future use,” adds the expert.

An urgent focus on nuclear energy generation is thus the need of the hour for Asia’s third largest economy. Without it, the day will soon come when crises akin to the one that struck in July 2012 become part of the country’s daily narrative.

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23 Neeta Lal is New Delhi-based senior journalist & editor- The Diplomat- “India’s nuclear energy imperative Tuesday” November 11, 2014 by Indiandefense news http://www.indiandefensenews.in/2014/11/indias-nuclear-energy-imperative.html June 2015
RIGHT TO INFORMATION: 
THE CONCEPTUAL DEVELOPMENT 

Dr. S.A.K. Azad*

Introduction

Freedom of speech and expression could be considered one of the most fundamental of all freedoms. The term includes not only freedom of speech but also freedom of thought, culture and intellectual curiosity. Freedom of expression guarantees everyone's right to speak and write openly without State interference, which includes the right to condemn injustice, illegal activities. It guarantees the right to know and right to inform the public and to offer opinions of any kind, to advocate change, to give the minority the opportunity to be heard and became the majority and to challenge the rise of state tyranny by force of words. In such regimes the State not only exerted full control over freedom of speech and expression and right to know, it also used the media to direct citizen’s thoughts and opinions through propaganda, indoctrination, denunciation, and social conformity.

Enactment of Right to Information (RTI) Act, 2005, has dawned a new era leading us towards the development of the participatory democracy. Right to Information implicitly forms part of fundamental rights guaranteed by the Constitution of India. Article 19 (1) (a) deals with freedom of speech and expression contains the basis of right to information. The conceptual roots of democracy lie in Articles 23 and 25 of the Universal Declaration of Human Rights, 1948 and in Part III and Part IV of the Constitution of India. In this regard, right to information is part of the constitutional framework enshrined as freedom of speech and expression. Explicit exercise of this right was not possible due to its derivative and implicit existence within the Constitution. This facilitated the need of a specific legislation enabling the citizens to enjoy the right available to them. Therefore there was an immediate need of a specific legislation to provide information to the

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citizens as a matter of right and to create a climate and culture for the right to information. The same message echoed in the juristic exposition by Justice Mathew in Kesavananda Bharati v. State of Kerala\(^2\) stated in these prominent words like:

"Fundamental rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience."

**Origin of Right to Information**

**International Instruments and RTI**

Various international instruments such as treaties, conventions etc., have recognized RTI as right that ought to be available to the people. All the citizens have a right to decide, either personally or by their representatives, as to necessity of the public contribution, to grant this freely, to know to what use it is put; and to fix the proportion, the mode of assessment and of collection and the duration of taxes\(^3\). Modern International law is not confined to relations between the States but devises upon matters of social concern also e.g. information, human rights, health, education and like.

**United Nations**

The right to access information is firmly set in the body of international human rights law. It is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR). The UN accepted RTI right from its beginning in 1946. The General Assembly resolved that: “freedom of information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.”\(^4\)

\(^2\) AIR (1973) SC 1461 2.

\(^3\) Article 14 of the Declaration of the Rights of Man, cited in S. P. Sathe, Right to Information, p. 11.

\(^4\) United Nations General Assembly, resolution 59(1), 65m plenary meeting, 14 December 1946.
Universal Declaration of Human Rights, 1948

RTI is a human right under Article 19 of UDHR. Article 19 of the Universal declaration of Human Rights of 1948 states that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The International Covenant on Civil and Political Rights, 1968

Article 19 of the Covenant states as following:-

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

The Commonwealth

The Commonwealth association of 54 countries affirmed the existence of RTI by emphasizing the participation of people in the government processes. The law ministers of the Commonwealth at their meeting held in Barbados in year 1980 stated that ‘public participation in the democratic and government process would be most meaningful when citizens had adequate access to official information.’

European Convention on Human Rights

Clause 1 of Article 10 of the Convention states that, ‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and irrespective of frontiers. However, Clause 2 provides that such right is subjected to such formalities, conditions, restrictions or such penalties as are prescribed by law, and are necessary in a democratic society, and if it harms the national interest or territorial integrity. However European Court of Human Rights interpreted Article 10\(^5\) strictly. That is to say it was held

\(^5\) EHRR 433, Para 74, cited in S.P. Sathe, Right to information, p. 15.
that freedom to information prohibited the Government from restricting a person from receiving information. But, at the same time it does not provide any positive right to a person for obtaining the information. This interpretation was based on the difference between ‘freedom’ and ‘right’.

Most of the above discussed international instruments do not deal with RTI directly. Their role however is not diminished at all by this fact. Like a first step they showed the world community a direction to be explored in order to materialize the democratic value of RTI, thereby making the systems transparent and world more amicable for the people.

**Constitution of India and RTI**

The incorporation of fundamental rights as enforceable rights in the modern Constitutional documents as well as in the internationally recognized charter of human rights, emanate from the doctrine of natural law and natural rights. In India at the time of national movement, freedom fighter promised to the people of India that they will provide the natural rights as fundamental rights through the “Suprema lex”, that is Constitution to the people of India. These fundamental rights are similar to human rights as declared by the United Nation in 1948. In this context, Supreme Court said in Chairman, Railway Board v. Chandrima Das⁶ that “the applicability of Universal Declaration of Human Rights and principals thereof may have to be read, it need to, into the domestic jurisprudence.” It traces the events that expedited the passage of the 2005 Act, which provided the citizens of our country an important instrument to ensure transparency in governance. Here the Constitution of India comes to protect the common masses by providing them certain fundamental rights within Part III. It is not easy to violate these fundamental rights except the procedures laid down by the law, which must be in the consonance with spirit of Constitution. The RTI has not been expressly provided in the constitution, though it is embedded within Article 19

(1) (a) of the constitution. So, it is implicitly expressed in the constitutional framework.

The Constitution of India although incorporates provisions of various leading democracies, is primarily founded on bedrock of Government of India Act, 1935. The system of governance therefore is not free from many vestiges of past which constituted a stumbling block in the free flow of information to the people.

However, Indian Judiciary in several landmark cases has expressly held RTI as natural concomitant of Article 19 (1) (a). Upon a thorough analysis it can be safely stated that direction towards the realization of RTI within the constitutional ambit incepted right from the verdict in Hamdard Dawakhana v. Union of Indian\(^7\). Supreme Court for the first time declared RTI to be part of Article 19 (1) (a) in Bennett Coleman v. Union of India\(^8\), where it held Newsprint Control Order of 1972-1973 issued under the Essential Commodities Act, 1955 to be ultra virus Article 19 (1) (a) of the constitution. Ray, CJ in the majority judgment opined that, “It is indisputable that by freedom of the press is meant the right of all citizens to speak publish and express their views. The freedom of press embodies the right of the people to read.” Here what is refereed as ‘right of the people to read’ refers to the right of the readers to get the information. In Dinesh Trivedi v. Union of India\(^9\), the apex court dealt with the RTI. Emphasizing the importance of this right, Court observed “Democracy expects openness and openness is concomitant of a free society and the sunlight is the best disinfectant.” In this Case, while considering the questions of the disclosure of the Vohra Committee Report, the Supreme Court once again acknowledged the importance of open government in a participative democracy.

The Court observed that, “In modern constitutional democracies, it is axiomatic that citizens have a right to know about the

\(^7\) AIR (1960) SC 554.
\(^8\) AIR (1973) SC 106.
\(^9\) AIR (1994) 4SCC 306,314
affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare”. The strongest exposition in this regard came from Justice K. K. Mathew in State of U. P. v. Raj Narain\(^\text{10}\) who emphasized that in “government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by the public functionaries.” The facts of this case were that Raj Narain who challenged the validity of Mrs. Gandhi’s election required disclosure Blue Books which contained the tour program and security measures taken for the Prime Minister. Though the disclosure was not allowed, Justice Mathew held that the people of country were entitled to know the particulars of every public transaction in all its hearing.

S. P. Gupta v. Union of India\(^\text{11}\) is the major breakthrough when the Apex Court imparted constitutional status to RTI. The point of contention in this case was again with regards to the claim for privilege laid by the Government of India in respect disclosure of certain documents including correspondence between Chief justice of India and the Chief Justice of Delhi High Court in connection with the confirmation of Justice Kumar who was an additional Judge of the Delhi High Court. Justice Bhagwati, in his case opined that the concept of open government stating it to be the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a) of the Constitution. It was held by the learned Judge that, RTI or access to information is essential for an ideally successful democratic way of life. Hence, it is imperative that disclosure of information regarding the functioning of Government must be the rule and secrecy is justified only where the strictest requirement of public interest demands.

\(^{10}\) AIR (1975) SC 885.

\(^{11}\) AIR (1982) SC 149.
In this way, the judicial decisions have played a major role in securing RTI as a constitutional status through Article 19 (1) (a) and assimilation of the spirit with which framers of the Constitution.

**Conclusion**

This is the development process of the concept of RTI through international instruments, national frameworks along with Indian Judiciary system both in explicit and implicit way.
PROTECTION OF RIGHTS OF MIGRANT LABOURS
-WITH REFERENCE TO ODISHA

Dr. Tanaya Tarai*

Dillip Kumar Tripathy**

Introduction

Migrant labour means those labourers, casual and unskilled workers, who are moving about systematically from one region to another offering their services on a temporary, usually, seasonal basis. Migrant labour in various forms is found in South Africa, the Middle East, Western Europe, North America and India.

A dramatic increase in formalisation of work, greater vulnerability to poverty, insecure incomes and status of employment leads to migration of labour. So, the number of jobs created, it was noticed world-wide and especially in the context of developing countries that the majority of jobs were created in the informal sector and that these jobs primarily entailed low skill and low productivity, offered no social security or legal protection and offered poor work conditions. Given the poor investment in work conditions, these jobs typically attracted labourers from marginalised and vulnerable communities and migrants from distant lands. A parallel policy position of poor investment in rural development has further pushed vulnerable migrants into growing industries with no option to get committed to an “industrial way of living”.

Among the economic conditions that heighten the demand for migrant workers are rapid increases in agricultural production within a given region and significant loss in the number of farm labourers a condition often caused by higher wages outside the agricultural sector. While the factors that create the demand for migrant labourers may

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2 Papola, 1968.
vary, those behind the supply of migrant labour tend to be constant in most cases, migrant labourers come to their work because of unfavourable economic and social conditions in their home regions. Thus Numbers returning to agricultural activities from urban industrial employment is negligible compared to those settling down in cities with their families and becoming a part of a never expanding unorganised sector.³

Today, migrant workers account for 150 million of the world's approximately 244 million international migrants. Globalisation, demographic shifts, conflicts, income inequalities and climate change will encourage ever more workers and their families to cross borders in search of employment and security. Migrant workers contribute to growth and development in their countries of destination, while countries of origin greatly benefit from their remittances and the skills acquired during their migration experience. Yet, the migration process implies complex challenges in terms of governance, migrant workers' protection, migration and development linkages, and international cooperation. The ILO works to forge policies to maximize the benefits of labour migration for all those involved.⁴

The Constitution of India was conceived with the vision to guarantee all citizens equality before law (Article 14), ensure their freedom of speech and expression (Article 19[1]) and enable them to exercise their right to liberty and lead a life of dignity (Article 21). It mandates the State to universalize elementary education and ensure a minimum of 100 days of employment to those in need. For restorative justice, it secures the right of the poor to access equal justice through provision of free legal aid (Article 39 A). Its approach thus ranges from guarantees to equality, dignity and free speech, to assured education and employment, and access to legal justice and equality before law.

³ National Commission for Enterprises in the Unorganised Sector, 2007
⁴ www.ilo.org
Theoretical Framework of Bonded, Migration, Informal and Flexible Labour

It comes as no surprise then that the unorganized sector in India comprises 92 per cent of the total workforce in the country and a vast majority are reported to neither have access to decent work conditions nor get remunerated with minimum wages. As per the current norm, workers across major unorganized sectors toil under strenuous conditions for anywhere between 12 and 16 hours a day and despite numerous government schemes, they largely remain outside the coverage of social security. Evidently, their real wages are never commensurate with profits made in the agriculture and non-farm sectors. In fact, a majority of them belong to depressed social groups and have inter-generationally faced indebtedness, in agriculture as well as in modern industry.

Within the unorganized workforce there is a significant section of those who are forced to repeatedly shift from one job to another and migrate from one region to another in search of employment. In a scenario where the current neo-liberal political economy gives precedence to market forces and limits the role of public governance and control, it is this section of migrant labourers in the unorganized sectors which are denied even the “minimum forms of labour protection and security”. The increasingly sharp turn towards informality and flexible labour in recent history can be traced to the Washington Consensus (1989). Summarised in the World Development Report 1990 the Consensus presents among other things the argument that:

“Labour-market policies—minimum wages, job security regulations, and social security—are usually intended to raise welfare or reduce exploitation. But they actually work to raise the cost of labour in the formal sector and reduce labour demand” Labour Immigration Is the Cause of HIV/AIDS Health concerns of workers and in particular

5 Breman, 2013:39
6 World Bank, 1990, p. 63
7 UN Publication, 2010
migrant workers is an under-researched area in India. There is very little attention to the unique vulnerabilities mobile populations face with respect to their health, other than the exception of the scare around HIV/AIDS and migrants as a high-risk group. A search of literature reveals that migrants' health issues are commonly diagnosed as related to sexual health (not to discount its importance) and there is a serious bias in understanding of the overall health-related needs of this population. This bias becomes quite visible in the design of public health service delivery to migrant communities, limited to distribution of condoms, diagnostic facilities for STI/HIV and its public health messages focused on safe sex alone. Analysis on how the excruciating work environment, abysmal living conditions and an individual's own health practices and immunity play a role is extremely scarce. Furthermore, how a migrant loses out on healthcare benefits offered by the State is poorly considered or understood. Any investigation into the state of health of a worker, however, needs to be far more comprehensive and consider a range of variables beyond what is visible. One of the early studies done on migration and health called “Identities in Motion” identified this very well. The labour experts argued that the health risks faced by migrants are predetermined by a combination of four factors-

1) Government related factors covering national policies related to health, housing, community development etc;

2) Employer related factors covering work and living conditions, social security and other employment benefits;

3) Health sector related factors covering the nature and outreach of health services; and

4) Individual related factors covering personal beliefs around health, healthcare seeking practices.

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8 Bombay Bimari in UP, Vemuri, 2004
For a poor worker engaged in the unorganized sector of the urban economy, the peripheral socio-economic environment predetermined by their standard of living and their choice of occupation comes an important determinant of his/her health situation. Work conditions in cities are harsh involving long hours of work, meagre earnings with little or no job security. Migrants also get to pick up the more physically straining and risky jobs in sectors vacated by the local labour. In most cases they exist as undocumented workers and fall out of the purview of labour welfare schemes, receiving no protection or benefits. Crowded living spaces, lack of access to basic amenities such as safe drinking water, sanitation, and electricity expose the community to a range of health risks. Further, living on the margins, they find it difficult to access good quality health services. All of these factors coupled together make them more prone to infections and diseases. These two stories are few among millions populating the subaltern narrative on Surat, stories which do not find their way into mainstream development thinking and dialogue. Given their poor representation in contemporary development debates despite their large numbers, it becomes critical to examine the hidden costs of unregulated, rapid economic growth, particularly with respect to the health and well being of migrant workers.

**Conditions at Work Place**

A loom operator supervises as many as 8-12 machines at a time during a 12 hours shift, depending on the size of the loom. The job of a machine operator includes constant movement across rows of machines, checking threads and ensuring that shuttles are changed in time. This translates into non-stop walking/movement across the room and constant vigil. A shift for a worker lasts for 12 hours. There is little scope for rest in this period, except a lunch break. While not officially sanctioned, workers do take 2-3 tea breaks to catch some much-needed rest. However, they have to ensure that they have someone to fill in for their absence, as the machines never shut down. Workload on machine

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9 Chatterjee, 2006, p. 17
operators has doubled in the last 20 years. As per regulation, a worker can supervise a maximum of six machines. Older workers recount that earlier they worked on 4-5 machines and earned almost similar wages. In the present system, there is an excessive stretch on human capacities to fuel the machine operations. During an interview, the Assistant Commissioner of Labour in Surat shared that Surat's textile industry is deficient of 5 lakh workers and within that the power looms are short of 1.5-2 lakh workers. This, however, does not halt the operations of the power loom industry. This also implies that existing workers are doing extra work of at least 40 lakh man hours.

The halls that house power looms are frequently ill-lit. The floors are slippery and black with oil and grease spread all over the floor. The rooms are crowded spaces, accommodating far more than their capacity. The space between two rows of machines is narrow and movement across them requires dexterity. Overcrowding, ill-ventilation, and low roofs also increased the noise levels to excruciating proportions. Of the several looms visited, none had a first aid kit or a fire extinguisher. Almost all had just one exit and lacked proper exhaust facilities. Notably, few workers considered the noise in the looms to be hazardous for their health. Non-availability of ear plugs as a safety measure again was not a problem of much significance. When asked if they have ever been injured at work, the sense of resignation was common.

None of the looms visited in Ved Road or Pandesara area had a toilet facility and none of the factory owners provided drinking water on site. The loom workers, many claimed drinking water was available at their factory but the research team frequently found them purchasing drinking water from nearby tea shops and storing them in plastic cans. In absence of toilets, open defecation was common workers mostly used the backyard of the looms. It was also clear that these localities did not receive much attention from the Surat Municipal Corporation. As reported, the frequency of cleaning was low and use of disinfectants such as bleaching powder was scarce. The area where power loom units were located stood out with a characteristic
abundance of filth, garbage and non-existence of public conveniences in the vicinity.\textsuperscript{10}

The government on its part has put in place a legislation called the Inter-State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1979 which seeks to regulate work conditions for one of the most vulnerable sections of workers in the country.

The Inter-State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1979\textsuperscript{11} is applicable to all establishments and contractors that engage the services of five or more inter-state migrant workers. Principal employers of inter-state workers are under the Act required to register with an officer assigned by the state, in the absence of which they are prohibited from hiring the services of workers from outside the state. The Act also directs contractors to obtain licenses from designate officers of the state government. No contractor is legally permitted to employ a worker in a state other than her domicile without the said license. State governments are mandated to outline the terms and conditions of the agreement between the employer and the worker, which may also include the terms of recruitment, details of remuneration payable, hours of work, entitlement to basic amenities and fixation of wages. Among the duties assigned to contractors by the state are furnishing of details of movement of inter-state workers to state authorities, issuing photo-passbooks to all workers with information about name, address, and period of employment, proposed remuneration, displacement allowance (calculated to be 50 per cent of the monthly wages), return fare and details of deductions made, if any. Workers are entitled to a journey allowance for both outward and return travels. This allowance cannot be less than the fare of travel. The wage rates and conditions of services are prescribed to be the same for all workers irrespective of

\textsuperscript{10} Parthasarthy, 2008
\textsuperscript{11} The Inter-State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1979
their domicile state and under no circumstance can wages be below the amounts fixed under the Minimum Wages Act, 1948.

The onus of regular payment of wages, equal pay for equal work, decent conditions of work, provision of residential accommodation, medical facilities, and protective gear for occupational safety falls onto the contractors. In the event of occupation accidents, the state designates the contractor to notify next of kin. In the event that the contractors are found to not comply with their mandate, the responsibility to provide wages and other amenities shifts to the principal employer. All state governments have to assign inspectors to ensure the implementation of the Act.

Other Acts that promise to provide security to workers in general include the Equal Remuneration Act, 1976 which is mandated to ensure that there is equal pay to men and women for work that is either same or 2.3 of similar nature. The Minimum Wages Act, 1948 directs the central and state governments to “fix, review and revise the minimum wages” of workers employed in listed employments. Wage rates are to be revised within a period of less than five years based on recommendations of committees that formed to assess wage rates. Discrimination on the grounds of sex is strictly prohibited in wage distributions. The Act is enforced by inspecting officers of the Chief Labour Commissioner at the central level and by state machineries in their respective jurisdictions.

The Payment of Wages Act, 1936\textsuperscript{12} has been put in place to ensure regular flow of wages to workers and protect them from illegal deductions in wages by employers. It provides for remedial measures in the event of illegal deductions and/or unjust delays in payment. Under the Act, wage ceilings are fixed to enforce minimum earnings. State governments are responsible for the enforcement of the Act in all factory and industrial establishments.

\textsuperscript{12} The Payment of Wages Act, 1936
The Child Labour (Prohibition & Regulation) Act, 1986 has been enacted to prohibit all forms of labour in activities identified as hazardous by any person who has not completed fourteen years of age. The objective of the Act is to prohibit engagement of children in certain establishments and to ensure that wherever employed, children have access to regulated conditions of work. Taking cues from Breman's theory on migration, informality and the global structure of labour market, this study seeks to provide an analytical review of case studies in a manner that they throw light on existing legislations as well as the global labour market scenario. Accounts of interventions by non-governmental organizations as service providers in legal aid for migrants is built in the case studies to highlight the growing role of NGOs in filling what is a huge gap in public sector provision of services.

The Factories Act, 1948 was introduced to regulate the premises where ten or more workers were involved in activities that use power or where twenty or more workers were involved in a manufacturing process that did not necessarily involve the use of power. Workers under the Act included those employed directly or through a contractor. Among its numerous regulations and provisions, the Act makes inspection of factories a mandatory feature for state governments and directs for supervision of those factories to take place by certified surgeons which are categorized as involving dangerous work. Sections 11 to 20 of the Act specify measures that need to be taken to ensure good health of workers and include guidelines such as availability of drinking water, safe sanitation facilities, lighting, etc. Sections 21 to 41 of the Act lay down provisions for safety at workplace and include the use of protective gear for operation of dangerous machines. In addition, special rules may be made by state governments for factories which expose workers to the risk of physical injury; Section 87 specifies directives for payment for medical examination. It is also stipulated that the manager of a factory must inform authorities each time an accident takes place at worksite which must then be followed

\[13\] The Factories Act, 1948
by an inspection by the concerned authorities. Safety and occupational health surveys are to be undertaken regularly by the state government.

**Workmen's Compensation Act, 1923** guarantees social security to workers by ensuring compensation in the event of a workplace accident or death. The Act is applicable to all situations irrespective of the number of people employed and whether the establishment is categorized as a factory or not. The amount of compensation as stipulated under the Act is a minimum amount of Rs. 80,000 in the event of death and a minimum of Rs. 90,000 in the case of permanent total disablement. The expenditure made by the employer for treatment of the injured worker is not considered a part of the compensation package. The Workmen's Compensation Act, 1923 does not apply only in the event 2.4 when workers are covered under the Employees State Insurance Act, 1948.

**Contract Labour (Regulation and Abolition) Act, 1970**

is applicable to all establishments (government and non-government) which engage 20 workers or more as contract labour. It also applies to contractors who employ/employed 20 or more workers. All establishments covered under the Act are treated as principal employer and are directed to register with designated government authorities and contractors under the Act are to procure a license, the terms and conditions of which are binding to all interactions between workers and employers. However, establishments which engage workers in an intermittent or casual manner are not covered under the Act. Workers are entitled to regular payment of wages and access to canteens, restrooms, first aid, and safe drinking water. The primary responsibility of delivery of the above rests with contractors whose failure to perform transfers the onus on to the principal employer. Contract labourers who perform work that is similar to that of regular workers are entitled to the same wage rates. It is the responsibility of the respective state governments to appoint appropriate inspecting

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14 Contract Labour (Regulation and Abolition) Act, 1970
staffs that have the onus to maintain records and award penalties for defaults.

The Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996\textsuperscript{15} and other related Acts mandates registration of all workers as beneficiaries in Building and Other Construction Welfare Boards. It entitles workers to welfare, safety, health, insurance and other measures and stipulates the number of permissible hours of work, conditions of work, guidelines for payment of wages and compensation packages in the event of accidents, etc. Under the Act, Central and State Advisory Committees are directed to be formed by the Central and State Governments respectively. Contravention of safety and health related provisions by employers is punishable with imprisonment and/or fine.

The Building and other Construction Workers Welfare Cess Act, 1996 enables to augment the resources of State Welfare Boards. It mandates the levying of a cess on costs of construction incurred by employers to help fund the Boards. Under this Act, the Central Government is obligated to frame model safety rules, appoint a Director General who is vested with the authority to lay down standards of inspection and notify employers regarding collection of cess. Among the duties of the Building and Other Construction Workers Welfare Boards are provision of assistance to registered workers in case of accident; payment of pension after the age of 60; sanction of loans and advances for home constructions; enabling workers' access to insurance by paying premium; provision of financial assistance for expenditure on education of children, medical expenses, maternity benefits, and any other specified welfare measures.

The Building and other Construction Workers (RECS) Central Rules, 1998\textsuperscript{16} were framed to make the Building and other

\textsuperscript{15} The Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996

\textsuperscript{16} The Building and other Construction Workers (RECS) Central Rules, 1998
Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and The Building and other Construction Workers Welfare Cess Act, 1996 operational. The rules specify the terms of levy of cess, the time and manner of collection of cess, the process of transfer of proceeds of the cess to the board, penalty for non-payment, among other administrative directions.

The Bonded Labour System (Abolition) Act, 1976 declared all persons hitherto working under bondage as free of any obligation to perform bonded labour. The Act made it a criminal offence to offer advance to persons in pursuit of restricting them to bondage in future and specified that nobody can be compelled to perform forced labour. All customary or traditional forms of bondage thereafter stood nullified.

**Suggestion**

All District Magistrates are authorized by state governments to ensure the implementation of this Act, including the taking up of responsibility for the welfare of freed bonded labourers and preventive action against future cases of bondage. To facilitate prevention of bonded labour, vigilance committees are to be formed at the district or the sub-district levels. These are tasked with providing social and economic relief measures to rescued labourers, carrying out surveys on whether persons are being misled into bondage, coordinating with rural banking and cooperative societies to ensure credit services to freed labourers and periodically advice District Magistrates on the implementation outcomes of the Act. Two years after the Act was passed, the Indian Government announced a centrally sponsored scheme for the rehabilitation of released bonded labourers. Under the revised package of rehabilitation, all freed bonded labourers are guaranteed a sum of Rs. 20, 000 in addition of a relief and rehabilitation package. A scheme titled "Grants in Aid to Voluntary Agencies in the Identification and Rehabilitation of Bonded Labourers"

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17 The Bonded Labour System (Abolition) Act, 1976
was launched by the Union Government in the year 1987 to involve NGOs in the eradication of bonded labour.

**Conclusion**

Most migrant labourers have no reemployment rights, are usually not organized in unions, and have limited access to the job market. Middlemen, job brokers, labour contractors, and crew leaders add some order to the system. Contractors negotiate wages and working conditions with the employers on the other hand, the wages working condition, and standards of living for migrant workers tend to be lower than those of other labourers and migrants must often work long hours under exacting requirements, in some countries, child labour is widespread among migrant labourers and even in the United States those children who do not work might not attend school, because in many localities schools are open only to legal residents, there can also be inadequate housing for migrant workers, and their literacy levels, social cohesion, and rates of political participation are low. Whether native or foreign-born, migrants are fundamentally alien to the community in which they work. As a result, migrant workers can have difficulty accessing local health and social services and can be deprived of rights either because of their illegal status or because they lack easy recourse to the courts. The nomadic nature of migrant workers makes the regulation of their working and living conditions difficult may negate union and government labour stands that apply to regular work settings.\(^\text{18}\)

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\(^{18}\) Center for Migration and Labour Solution
REPRODUCTIVE HEALTH: PATHWAY TO POVERTY REDUCTION AND DEVELOPMENT

Dr. G.P. Sriveni*

The most fundamental aspect of human life is health which unfortunately cannot be given or distributed. It is to be actively acquired or won. It forms an integral component of overall socio-economic development of any nation. It is a matter of concern and care to certain sensitive members of family and society, irrespective of caste, creed, country, culture, etc. The concept of health keeps changing from time to time and of course varies from person to person. Some people say, absence of disease is a healthy condition, some even accept being obese as a good state of body in comparison to normal or ideal weight. So far a lay man is concerned, there is an agreed definition of health, though there have been many definitions put forth by World Health Organization which states “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”

The importance of good health and education to a woman's well-being - and that of her family and society - cannot be overstated. Without reproductive health and freedom, women cannot fully exercise their fundamental human rights, such as those relating to education and employment. Yet, around the world, the right to health, and especially reproductive and sexual health, is far from reality for many women.

The World Bank's 2001 World Development Report recognized ill health as one of the multiple dimensions of poverty, which it defined as "pronounced deprivation in well-being." According to that report, poverty encompasses not only material deprivation (income and consumption poverty) but also low levels of education and health when they accompany material deprivation. Additional dimensions of poverty include vulnerability and exposure to risk as well as voicelessness and

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powerlessness. Where income and health are concerned, vulnerability means that in addition to the possibility of falling into income or health poverty, there is also exposure to other risks, including "violence, crime, natural disasters and being pulled out of school." The report cites Amartya Sen's (1999) characterization of these forms of deprivation as restricting the "capabilities that a person has, that is, the substantive freedoms he or she enjoys to lead the kind of life he or she values."

Women's disproportionate poverty, low social status and reproductive role, expose them to high health risks, resulting in needless and largely preventable sufferings and deaths. Many of the women and girls who die each year during pregnancy and childbirth could have been saved by relatively low-cost improvements in reproductive healthcare; yet high levels of maternal mortality persists. The benefits of eliminating the harmful and painful practice of female genital mutilation are easily demonstrated, yet it persists for cultural and traditional reasons. And a large proportion of abortions, some resulting in death and injury, would be avoided, if women and men had access to safe, affordable and effective means of contraception.

**Reproductive Health - Definition**

Reproductive health, as defined by the World Health Organization, is a state of physical, mental, and social well-being in all matters relating to the reproductive system at all stages of life. Reproductive health implies that people are able to have satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when, and how often to do so. Implicit in this definition are the rights of men and women to be informed and to have access to safe, effective, affordable, and acceptable methods of family planning of their choice, and the right to appropriate health-care services that enable women to safely go through pregnancy and childbirth.
Reproductive Health Care

A comprehensive reproductive health programme might include the following elements as part of primary health care (with appropriate referrals):\(^2\)

a) Family planning information and services, including counselling and follow-up, aimed at all couples and individuals;

b) Prenatal, delivery (including assisted delivery) and post-natal care, with referral for the management of obstetric complications;

c) Prevention of abortion, management of the consequences of abortion and post-abortion counselling and family planning;

d) Prevention of reproductive tract infections including sexually transmitted diseases, and treatment of systemic infections;

e) Prevention of HIV/AIDS;

f) Prevention of infertility and sub-fecundity;

g) Routine screening for urinary tract infections, cervical infections, cervical and breast cancer and other women's reproductive health conditions;

h) Active discouragement of harmful practices such as female genital mutilation.

Causes and effects of poverty

Early pregnancy and childbearing are widespread in poor countries. They are generally considered to be a problem, and are likely to be both causes and effects of poverty.

- Poor health outcomes for the young mother and her child: higher risk of obstetric complications, leading to higher maternal mortality and morbidities if she survives, increased

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\(^2\) http://www.unfpa.org/swp/1996/box_rh.htm (Last accessed 02-01-2016)
risk of abortion and abortion complications if the abortion is unsafe, low birth weight and other problems for the new born;

- Poor educational outcomes for both the mother and her child, including dropping out of school and less schooling for the child;
- Lower and/or altered consumption patterns of the mother's immediate and extended family for rearing the child;
- Possibly lower labour force participation by the young mother, with less opportunity to contribute to household income; and
- Reduced acquisition of social capital through reduced community participation and greater chances of divorce or single parenthood.³

World population is doubled from 1960 to 2000, going from 3 to 6 billion, and it is projected to increase by another 3 billion by 2050. These increases, which are concentrated in developing countries, are associated with a phenomenon known as the demographic transition. This term refers to the transition from high mortality and high fertility to low mortality and low fertility. As mortality declines and more children survive, the population gets younger, having an increasing proportion of children relative to adults. During this process, income per capita declines because the output of the working-age population must be divided among increasing numbers of child dependants. The growing number of children needs to be fed, clothed, housed, and provided with medical care and schooling. Consequently, fewer resources are available for other uses, including for the investment needed to build factories or infrastructure, thus retarding the process of economic growth in absolute terms, as conventionally measured.

Reproductive health, Education, Gender equality and Poverty reduction

Substantial evidence suggests that slower population growth and investments in reproductive health and HIV prevention (particularly among adolescents), education, women's empowerment and gender equality reduce poverty. Carrying out the Programme of Action adopted at the International Conference Population and Development (ICPD) in Cairo and reaching its goal of universal access to reproductive health information and services by 2015 is an essential condition for achieving the MDGs. Reproductive health, education and gender equality and poverty reduction can be achieved in the following ways:

- Enabling people to have fewer children contributes to upward mobility and helps to stimulate development.

- When women can negotiate their reproductive health decisions with men, this exercise of their rights leads to an increased decision-making role within families and communities that benefits all.

- Because smaller families share income among fewer people, average per-capita income increases.

- Fewer pregnancies lead to lower maternal mortality and morbidity and often to more education and economic opportunities for women. These, in turn, can lead to higher family income.

- As women become more educated, they tend to have fewer children, and participate more fully in the labour market.

- Families with lower fertility are better able to invest in the health and education of each child. Spaced births and fewer pregnancies overall improve child survival.

- Sexual and reproductive health services are key to curbing HIV. The pandemic is killing large numbers of people in their most
productive years, increasing the ratio of dependents to the working-age population.

- Preventing AIDS-related disabilities and premature deaths translates into a healthier, more productive labour force that can improve a country’s economic prospects. Many developing countries have large youth populations.

- Reproductive health programmes that address the greater vulnerability of adolescents to unprotected sex, sexual coercion, HIV and other sexually transmitted infections, unintended early pregnancies and unsafe abortions, and enable young women to delay pregnancy and marriage are important factors in breaking the intergenerational cycle of poverty.

- Investments in reproductive health, particularly in family planning, that result in lowered fertility can open a one-time only ‘demographic window’ of economic opportunity.\(^4\)

**The Millennium Development Goals**

The eight Millennium Development Goals aim to eliminate poverty and chart a path to equitable and sustainable development.

1. Eradicate extreme poverty and hunger.
2. Achieve universal primary education.
3. Promote gender equality and empower women.
4. Reduce child mortality.
5. Improve maternal health.
7. Ensure environmental sustainability.
8. Develop a global partnership for development.

\(^4\)http://www.unfpa.org/pds/poverty.html (Last accessed 09-02-2016)
All of the MDGs are interdependent and several of them directly relate to the approach to population and sexual and Reproductive health envisioned at the 1994 ICPD, especially goals 3, 4, 5 and 6. The eight MDGs continue to provide a universal framework for development and poverty reduction. To reach the MDG targets, investing in reproductive health is one of the surest ways to advance economic development, social justice, individual and collective dignity and well-being, and environmental sustainability.

**Reproductive health and development**

Reproductive health contributes to development in numerous ways:

**Reduces Poverty**

Enabling women to take decisions about whether and when to bear children creates opportunities to pursue activities such as education and employment, which contributes to the development process and to poverty reduction. Having less children, with spacing between the births enable families to invest more in each child’s education, food and health.

**Primary education, especially for girls**

Reproductive health contributes to the essential development goal universal access to primary education. Families and governments can spend more per child if there are fewer children. This is especially important for girls, whose education is often sacrificed when resources are limited. Further preventing early marriage and unwanted pregnancy, keeping girls safe from sexual harassment and abuse, and providing them with information and privacy necessary for personal hygiene encourages them to stay in school in primary grades is very essential.

**Promotes women’s rights and gender equality**

The right to make decisions and to access information and services relating to marriage, bearing of children and sexual relations
free from coercion, violence and discrimination are fundamental to women’s equality and well-being. Having choices in the sphere of sexuality and reproduction can empower women to pursue other opportunities and to participate in social and economic life outside the home.

**Strengthens health systems**

Reproductive health contributes to improvements in health world wide and strengthens health systems. The ability to meet the reproductive health needs overall coverage and accessibility of services in the health system. Providing training to the health care providers, improved skills in counselling and investing in basic emergency obstetric care will increase the quality of care and help providers deliver other services more effectively. Further it provides and opportunity to identify the people at risk of diseases and offer prevention information and services including voluntary counselling, diagnose and treatment.

**Saves lives and improves health**

According to the World Bank, a full one-third of the illness among women ages 15-44 in developing countries is related to pregnancy, childbirth, abortion, reproductive tract infections, and Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). Care before and during pregnancy and delivery and after child birth saves women’s lives and prevents disabilities. Prevention of unwanted pregnancies including unsafe abortion reduces maternal deaths and providing reproductive health information and services reduces the prevalence of STIs and HIV/AIDS.

**Ensures environmental sustainability**

The combination of chronic poverty, environmental degradation, rapid population growth, desertification, drought and water scarcity threatens food security and, in some situations, can lead to acute humanitarian crisis. Smaller family size may enable households, including vulnerable and women-headed househo
69lds, to use natural resources, such as water, forests, farmland and coastal areas, in more sustainable ways, and to be better able to prevent environmental degradation and adapt to climate change.

Conclusion

The key actions for reproductive health, calls for a range of actions which benefit in reducing poverty. The need to strengthen programmes that reduce infant and child mortality is clearly central to ensuring that families will have the necessary confidence to reduce the number of children they have. Preventing infectious diseases and ensuring clean water supplies are particularly important for the young, but are also of obvious importance for the general population. A sick population will find it more difficult to take significant steps out of poverty.

Investing in sexual and reproductive health is one of the surest and most effective ways to promote equitable and sustainable development and achieve the Millennium Development Goals (MDGs). If we can reach the poorest and most vulnerable populations with reproductive health information and services, we can save many lives and improve countless others. We will also make significant strides in reducing poverty, advancing development and protecting human rights.

"The Millennium Development Goals, especially the eradication of extreme poverty and hunger, cannot be achieved if population and reproductive health issues are not addressed. In order to address these issues we must work to further promote women’s rights and invest in education and health, including reproductive health and family planning."5

The UN Secretary General Mr. Kofi Annan in his message on the occasion of International Women’s Day observed that the Millennium Development Goals represent a new way of doing development business and that they form a specific, targeted and time-bound blue print for

5 UN Secretary General, Kofi Annan, Message to the Fifth Asian and Pacific Population Conference, Bangkok, December 2002
building a better world in the twenty-first century. He further said: "In our work to reach these objectives, as the Millennium Declaration made clear, gender equality is not only a goal in its own right; it is critical to our ability to reach all the others. Study after study has shown that there is no effective development strategy in which women do not play a central role. When women are fully involved, the benefits can be seen immediately: families are healthier and better fed; their income, savings and reinvestment go up. And what is true of families is also true of communities and, in the long run, of whole countries." He, therefore, underlined the need to focus on the needs and priorities of women, which means promoting education of girls and women and placing women at the centre of our fight against HIV/AIDS. "We must make sure that women and girls have all the skills, services and self-confidence they need to protect themselves.” In other words, they must be empowered.  

To quote Ballock

“You are asking me the hour of the night;

My friend, it is already morning”

Tomorrow would be too late – let us get moving today.

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6. Keynote address by Hon'ble Dr. Justice A.S. Anand, Chairperson, NHRC on the theme "Women Empowerment - the key to achieving the Millennium Development Goals" at a function organized by the UN Information Centre at 3.30 PM on 7 March 2003
1. Introduction

Nature has created man and woman equal and therefore, confers equal status on both man and woman. In 1945 the United Nations announced gender equality as a fundamental right. To uplift the status of women and to abolish the discriminatory treatment against women, the United Nations celebrated the year 1975 as International Women’s year and declared 1975-1985 to be a woman decade. Empowerment of women as a concept was introduced at the International Women’s Conference at Nairobi in 1985. The conference defined empowerment as a redistribution of social power and control of resources in favour of women. The social standing of an individual is adjudged prominently from the proprietary rights conferred on and exercised by him. History bears that the proprietary rights of women were minimal in comparison to that of a male and there are hardly any references with regard to absolute proprietary rights of women. The Hindu Succession Act, 1956 made revolutionary upliftment of women by conferring absolute rights on them.

2. Proprietary Status of Women anterior to Hindu Succession Act, 1956

2.1 Women in Vedic Period

2.1.1 Woman’s right to property vis-à-vis her husband: In the Vedic age the theory approved by the Hindu civilization was that the husband and wife should be the joint owners of the household and its property. The husband was required to take a vow at the time of marriage that the rights and interests of his wife in economic matter...
shall not be transgressed.\(^1\) However, the concept of joint property of husband and wife remained a legal fiction.\(^2\)

### 2.1.2 Concept of Stridhan under Vedic Literature

The concept of Stridhan is as old as the Rigveda, the first of the Vedas. The references of Rigveda indicate that the woman did hold separate property and had dominion over it. “How many maid pleasing to the shooter who fain would marry for her splendid riches?”\(^3\). She had full ownership over insignificant property known as Stridhan.

#### 2.1.3 Woman and her Stridhan

Stridhan is a property on which wife has an absolute right of ownership. Vedic literature is silent about the precise scope of Stridhan. Manu is the earliest writer to give a comprehensive description of Stridhan. Manu declared that the wife should not alienate even her own property without her husband’s permission.

#### 2.1.4 Women and Right of Inheritance

Sruti (Veda) does not prohibit women’s right of succession.\(^4\) Jaimini, a great sage of very great antiquity, states that a certain Vedic text shows that women have the capacity of owning and possessing wealth.\(^5\)

#### 2.1.5 Widow’s Right of Inheritance

The Vedic texts do not mention the right of the widow to inherit her husband’s property. Most of the Dharamsutra writers were opposed to the right.\(^6\)

### 2.2 Women in post Vedic Period

#### 2.2.1 Right of Inheritance

A perusal of Dharmashastras and other post-Vedic literature shows that woman hardly possessed a status of legal person and, therefore, was almost incapable possessing any

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1. Atharvaveda, X.30.5:XII.3.14
2. Rigveda, X. 34.2
3. Rigveda, X.27.12
5. Jaimini’s Gruhyasutras, Sixteenth aphorism, p. 79
6. Apastambha ii.14.2-4
property. Manu also subscribes to the view that women have no proprietary right of their own. A wife, a son and a slave—these three are declared to have no property.

2.2.2 Right of wife: From the perusal of Dharamashastra it appears that the wives were generally thought to be without property. In her husband’s property no such right was given to her. The right of maintenance arises from the jural relationship between husband and wife created by marriage.

2.2.3. Widow’s Right of Inheritance: Generally speaking during the time of Smrities the women’s right to property was limited to right of possession and right of enjoyment. Mitakshara granted a widow right to property, only when her husband was separated from his kinsmen, it did not expressly state the extent of her interest in the estate inherited. After the death of her husband, the first successor was the widow. Mitakshara granted a widow right to property, only when her husband was separated from his kinsmen, it did not expressly state the extent of her interest in the estate inherited. After the death of her husband, the first successor was the widow.7 Dayabhaga while allowed a widow to succeed in absence of sons, grandsons, great-grandsons, and it limited her interest to mere enjoyment. She could not gift, mortgage or sell it at her pleasure. Her power of disposition is limited. After her death the property shall devolve on in whom the succession had vested.

2.2.4 Daughter as heir: Jimutavahana, the author of Dayabhaga recognises daughter as one of the heirs. He prefers unmarried daughter to the married one. A married daughter succeeds only in default of an unmarried one.8

2.3 Stridhan and Woman’s Estate

2.3.1 Concept of Stridhan and Woman’s Estate: Before the Hindu Succession Act, 1956, a Hindu woman had property of 2 kinds: (1) Stridhan, and (2) Hindu woman’s estate The term ‘Stridhan’ is found in the ancient texts of Hindu law but the latter term ‘Hindu woman’s estate’ is a construction of the British judicial administration in India. The word Stridhan is derived from Stri i.e., woman, and dhan

7. Yajnavalkya, II-135-36  
8. Dayabhaga, XI, II, 4 an 5
i.e., property. The term ‘Stridhan’ literally means woman’s property. But in Hindu law it has been given a technical meaning. In order to understand the precise meaning of the Stridhan according to the various schools, it is necessary to know what kind of properties were recognised as Stridhan in the Smritis. The Smritis have described certain properties as Stridhan. The Mitakshara and the Dayabhaga schools differ in this respect on the reading of the Smriti text of Yajnavalkya. This has resulted in a difference between their interpretation of this concept. The Mitakshara has a liberal approach but the Privy Council scuttled its generosity. Whether the property is Stridhan or woman’s estate, mostly depends on the source from which it has been obtained.

2.3.2 Sources of Stridhan: A female Hindu may acquire Stridhan from the following sources: gifts and bequests from relations, gifts and bequests from strangers, property given in lieu of maintenance, property acquired by self-exertion and mechanical arts, property obtained by compromise, property acquired by adverse possession and property purchased with Stridhan or with savings of income of Stridhan.

2.3.3. Stridhan according to Mitakshara: According to Vijnaneshwara, the author of the Mitakshara, the 6 kinds of Stridhan enumerated by Manu is to specify that it cannot be less than that and does not mean that it cannot be more. Therefore, all the property which is owned by a woman must be considered to be her Stridhan. The Mitakshara gave a concrete content to the word ‘adya’ (‘etcetera’) to the text of the Yajnavalkya Smriti.

2.3.4 The Privy Council and Mitakshara Stridhan: A woman may inherit the ordinary property of male, i.e., of her husband, father, son, etc.. She may also inherit the Stridhan of a female, i.e., of her mother, mother’s mother, or daughter. Both these kinds of inherited

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9. Mit. on Yajna.:II.143
property are Stridhan according to Mitakshara but the Privy Council held that both these kinds of property are not Stridhan.¹⁰

2.3.5 Stridhan according to Dayabhaga school: Jimutavahana, the author of the Dayabhaga, gave a reading to the text of Yajnavalkya different from that given by Vijnaneshwara, the author of Mitakshara. He read ‘only’ instead of ‘etcetera’. Dayabhaga school recognizes only those kinds of property as Stridhan which are so declared by the Smrities. No addition can be made to them.

2.3.6 Characteristic features of Stridhan: 1 Every kind of Stridhan belonging to a woman passes on her death to her heirs.

2 (i) During maidenhood, a Hindu female can dispose of her Stridhan, of every description, at her pleasure,

(ii) Saudayika means a gift made through affection. If such gift passes an absolute estate, a woman can dispose of the property at her pleasure, whether the gift be from her husband or other relations. However, if the gift passes a limited estate only in the property, she cannot alienate the property.

(iii) During widowhood, she can dispose of her Stridhan of every description at her pleasure including movable property given by the husband but not immovable property given by him.

2.3.7 Sources of woman’s estate: Sources of woman’s estate are property obtained on partition and property obtained by inheritance.

2.3.8 Characteristic features of woman’s estate: The property of a Hindu woman which she could alienate for religious purposes and beneficial secular purposes¹¹ and which did not descend upon her own heirs but upon the next heirs of the last full owner, known as the

¹¹. Hunoomanpersaud Pandey v. Babooe Munraj Koonweree, (1856) 6 MIA 393,
reversioners\textsuperscript{12} was known as the Hindu woman’s estate or the Hindu woman’s limited estate. The last full owner of property is one who held the property absolutely at the time of his death.

\textbf{2.4 Position of Women Prior to the Hindu Women’s Right to Property Act, 1937}

\subsection*{2.4.1 Widow’s right to maintenance under Mitakshara law:} Under the law prior to the HWRP Act, the widow of a person governed by Mitakshara had only a right of maintenance in respect of coparcenary property in which the husband had interest. In respect of separate property left by her husband, she (widow) had only the right of maintenance when the husband has left son (S), grandson (SS) or a great-grandson (SSS). She could inherit his separate property only in the absence of these immediate heirs (S, SS, SSS).

\subsection*{2.4.2 Female heirs under Mitakshara school:} According to the Hindu Law of Inheritance (Amendment) Act, 1929 which came into force on 21.02.1929,\textsuperscript{13} the son's daughter (SD), the daughter's daughter (DD), and the sister(Sis) rank as heirs in the order of succession among sapindas next after father’s father and before a father’s brother in all parts of India under Mitakshara law.

\subsection*{2.4.3 Female heirs under Dayabhaga School:} There are 5 female sapindas recognised as heirs according to Dayabhaga school, viz., widow (W), the daughter (D), the mother (M), the father's mother (FM) and the father's father’s mother (FFM).

\subsection*{2.4.4 Limited estate of females:} Males succeeding as heirs whether to a male or to a female, take the property absolutely. On the other hand, females succeeding as heirs, to a male or to a female, take a limited estate in the property inherited by them except in certain cases in the Bombay State.

\textsuperscript{12} Bhagwan Din Doobey v. Mayma Bai, (1867) MIA 487 ; Shiv Shankar v. Devi Sahai, (1903) 25 All. 468; Keerut Singh v. Koolahul Singh, (1939) 2 MIA 331

\textsuperscript{13} Now repealed by the Hindu Succession Act, 1956
2.5 Position of women under the Hindu Women’s Right to Property Act, 1937

The Hindu Women’s Rights to Property Act, 1937 came into force on 14 April 1937\(^\text{14}\) and intended to give better rights to women in respect of property. Section 2 read with Section 5 of the Act provides that notwithstanding any rule of Hindu law or custom to the contrary, the Act shall apply where a Hindu dies intestate. A person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition, which is capable of taking effect.

Section 3(1) provides that "when a Hindu governed by Dayabhaga school of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son.

Provided the widow of a predeceased son shall inherit in the like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is a surviving son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son."

Female heirs: The HWRP Act confers new rights on widows and puts the 3 female heirs, widow (W), widow of the predeceased son (SW) and widow of the predeceased son of a predeceased son (SSW), on the same level as the male issue of the last owner along with the male issue or in default of them. Sub-section (1) deals with the property over which a Hindu has a power of disposition by a testament. Such property, in the case of a Hindu governed by Dayabhaga, is his separate property as well as his share in joint family property. In the case of a Hindu governed by Mitakshara, it means his separate property. The expression "any

\(^{14}\) Now repealed by the Hindu Succession Act, 1956
property” used in Section 3(1) includes all forms or types of interest answering the description of property in law. The property must be heritable property. The Supreme Court, in Angurbala v. Debarata,\textsuperscript{15} held that shebaitship is property within the meaning of HWRP Act, 1937.

According to Section 3(2) of the Act "when a Hindu governed by any school of Hindu law other than Dayabhaga School or by customary law dies having, at the time of his death, an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had." Sub-section(2) of Section 3 applies to the interest of a coparcener in joint family property which would mean all other property in which he had interest at the time of his death, under Mitakshara law. The Act puts the widow as a member of the joint family, in the place of her deceased husband and the husband's interest in the joint family property under Mitakshara vests immediately upon his death in the widow and does not devolve by survivorship. When the provision of Section 3 applies, any rule of Hindu law or custom to the contrary ceases to govern the parties.

Section 3(3) provides that "any interest devolving on a Hindu widow under the provisions of this section shall be limited interest known as a Hindu woman's estate, provided, however, that she shall have the same right of claiming partition as a male owner.” Section 3(3) confers on the widow, the right of the claiming partition of the joint family property, as any other coparcener is entitled to claim partition. Sub-section (3) expressly declares that the interest devolving upon a widow under Section 3 is limited interest known as "Hindu woman's estate". This expression has been interpreted to mean "Hindu widow's estate".\textsuperscript{16} The Supreme Court, in Satrughan v. Sabujpari,\textsuperscript{17} held that if the widow died after partition of her estate, the interest in the coparcenary

\textsuperscript{15}. AIR 1951 SC 293  
\textsuperscript{16}. Dagadu v. Namdeo, AIR 1955 Bom 152  
\textsuperscript{17}. AIR 1967 SC 272
property which has vested in her, will devolve upon the heirs of the husband and the widow does not become a coparcener by operation of the Act.

3. Proprietary Empowerment of Women posterior to Hindu Succession Act, 1956

3.1 Female Class I heirs to the property of a male Hindu dying intestate: The HSA has treated the male and female heirs equally. Besides, there are 16 Class I heirs as amended by the Hindu Succession (Amendment) Act, 2005, namely, (1) son (S), (2) daughter (D), (3) widow (W), (4) mother (M), (5) son of a predeceased son (SS), (6) daughter of a predeceased son (SD), (7) son of a predeceased daughter (DS), (8) daughter of a predeceased daughter (DD), (9) widow of a predeceased son (SW), (10) son of a predeceased son of a predeceased son (SSS), (11) daughter of a predeceased son of a predeceased son (SSD), (12) widow of a predeceased son of a predeceased son (SSW), (13) son of a predeceased daughter of a predeceased daughter (DDS), (14) daughter of a predeceased daughter of a predeceased daughter (DDD), (15) daughter of a predeceased son of a predeceased daughter (DDS), and (16) daughter of a predeceased daughter of a predeceased son (SDD). Thus, there are 11 female and 5 male Class I heirs to the property of a male Hindu dying intestate empowering the proprietary status of women in general.

3.2 Female Hindu absolute owner of property

Section 14, Hindu Succession Act, 1956, made a female absolute owner of the property from the date of commencement of the HSA, i.e., 17.06.1956. This section has brought about a radical improvement in ameliorating the proprietary rights of a Hindu woman.

3.2.1 “Section 14 – Property of a female Hindu to be her absolute property” (1) Any property possessed by a female Hindu,

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18. Section 8, Class I heirs to the Schedule
whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

**Explanation:** In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhan immediately before the commencement of this Act.

(2) Nothing contained in sub-Section (1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

3.2.2 **Section 14 retrospective as well as prospective:** The Supreme Court in Harish Chandra v. Trilok Singh,²⁰ held that by the reason of the use of the expression “whether acquired before or after the commencement of the Act”, Section 14 is made retrospective. Thus, the section is prospective in the sense that the female becomes full owner of the property from the date of commencement of the Act and not before and retrospective in effect in the sense that the property acquired by a female Hindu prior to the HSA will also come within the ambit of this section.

3.2.3 **Property acquired in any other manner:** The expression “in any other manner whatsoever” in Explanation is wide enough to include any property acquirable under an award or a decree.²¹

3.2.4 **Property acquired in lieu of maintenance:** The property acquired in lieu of maintenance means the money received by a woman from time to time for her maintenance, or the lump sum or a piece of

²⁰ . AIR 1957 SC 444
²¹ . Banu Sahib v. Gayathri, AIR 1972 Bom 16 (DB)
immovable property,\textsuperscript{22} or a share in the profits of a business given to her for that purpose. There was divergence of opinion among various High Courts in India as to the nature of the right of maintenance of a female Hindu. The difference of opinion was set at rest by a three judge bench of the Supreme Court in Tulsamma v. Sesha Reddi,\textsuperscript{23} affirmed in a plethora of Supreme Court’s pronouncements, the latest being Subhan Rao v. Parvathi Bai,\textsuperscript{24} holding that the property acquired by a female Hindu under a compromise in lieu of satisfaction of her right of maintenance, the compromise prescribing a limited interest was “property” falling within the ambit of Section 14(1). In Santosh v. Saraswathibai,\textsuperscript{25} the Supreme Court held that when the pre-existing right of a female Hindu is recognised and property settled upon her which subsequently becomes crystallized by way of consent degree, such female could not be divested of her absolute right to ownership by invoking Section 14(2). The Supreme Court, in Ram Vishal v. Jagan Nath,\textsuperscript{26} held that a mere right to maintenance without actual acquisition in any manner is not sufficient to attract Section 14(1).

3.2.5 Property acquired by skill or exertion: The property acquired by a female Hindu by her skill or exertion is “property” covered within the ambit of Section 14(1) and becomes her absolute property.

3.2.6 As full owner and not a limited owner: On and from the date of commencement of the HSA, the limited interest of the female Hindu will be transformed into an absolute interest and she will be full owner and not as a limited owner as held by the Supreme Court in Eramma v. Veerupanna.\textsuperscript{27}

\textsuperscript{22} Guruwant Kaur v. Mohinder Singh, (1987) 3 SCC 674
\textsuperscript{23} AIR 1977 SC 1944
\textsuperscript{24} (2010) SCC 235
\textsuperscript{25} AIR 2008 SC 500
\textsuperscript{26} (2004) 9 SCC 302
\textsuperscript{27} AIR 1966 SC 1879
3.2.7 Section 14(2): Restricted Estate: Sub-section (2) of Section 14 being in the nature of an exception to Section 14(1), it must be construed strictly so as not to deprive the female Hindu of the ameliorative provision contained in Section 14(1). In order to ascertain whether an acquisition by a female Hindu falls under sub-section (1) of Section 14 or sub-section (2) of Section 14, the test is to find out whether the acquisition of the property is in recognition or in lieu of any pre-existing right in which case sub-section (1) is attracted; if there is no pre-existing right, the acquisition falls under sub-section (2) in which case, the instrument is the very foundation of her right and her right is determined by the terms of that instrument.28

3.2.8 Inept draftsmanship of Section 14(1) & 14(2) and suggested amendment: In Tulasamma v. Sesha Reddy,29 Bhagwati, J. (as he then was) brought out the poor draftsmanship of Section 14(1) and 14(2) of the Hindu Succession Act presenting serious difficulties of construction in cases where property was received by a female Hindu in lieu of maintenance and the instrument granting such property a prescribed restricted estate for her in the property. There was divergence of judicial opinion in this regard. This statutory provision has created endless confusion for litigants and proved a paradise for lawyers on account of inept draftsmanship. Unfortunately, the Parliament turned a blind eye to the anomalies in the drafting of Section 14(1) and 14(2) of the Hindu Succession Act and weighty comments of their Lordships of the Supreme Court in Tulasamma’s case,30 made in 1977 to attend to the drawbacks and deficiencies in order to achieve clarity, certainty and simplicity while amending the Hindu Succession Act 1956 by the Amendment Act of 2005.

It is suggested that Section 14 may be substituted as under:

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29. AIR 1977 SC 1944
30. AIR 1977 SC 1944
“14- Property of a female Hindu to be her absolute property-
(1) Any property possessed by a female Hindu and acquired by her before the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation: In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhan immediately before the commencement of this Act.

(2). Any property, movable or immovable, acquired by a female Hindu after the commencement of this Act by inheritance or under a partition or by her own skill or exertion or by purchase or prescription or as Stridhan, shall be held by her as full owner thereof and not as a limited owner.

(3) Nothing contained in sub-section (1) or sub-section(2) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

The amended sub-section (3) as suggested will act as a proviso to sub-sections (1) and (2).

3.2.9 Inclusion of Daughter of a Coparcener in Mitakshara Coparcenary: On and from the commencement of the Hindu Succession (Amendment) Act, 2005, i.e., 9.9.2005, the daughter becomes coparcener by birth a coparcener in her own right. In Prakash & Others v. Phulavati & Others, the Supreme Court held that the rights under Amendment of 2005 are applicable to living daughters of living coparceners as on 9.9.2005 irrespective of when such daughters

are born. This provision applies irrespective of whether the daughter was married\textsuperscript{32} or unmarried.

3.3 Testamentary power of women

3.3.1 Testamentary succession in HSA: The only section dealing with testamentary succession in HSA is reproduced below:

“30-Testamentary Succession - Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him [or by her]\textsuperscript{33} in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation: The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding any thing contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.”

3.3.2 Will by female Hindu: By virtue of Section 14 (1) HSA she is now a full owner of all property howsoever acquired and held by her and she can dispose of it by Will.\textsuperscript{34} According to amendment to Section 30 by the Hindu Succession (Amendment) Act, 2005 a daughter of a coparcener has been given a right by birth to become a coparcener in a Mitakshara coparcenary. Accordingly, the property to which she became entitled is capable of being disposed of by her by testamentary disposition.

\textsuperscript{32} Leelabai Dagduba Hingne (Smt.) v. Sau Bhikabai Shriram Pakhare (Smt.), AIR 2015 (NOC) 161 (Bom)

\textsuperscript{33} Inserted by the Hindu Secession (Amendment) Act, 2005, Section 6 (w.e.f. 9.9.2005)

\textsuperscript{34} Vijay Singh v. Indra Singh, AIR 2012 Raj 164
4. Conclusion:

To uplift the status of women and to abolish the discriminatory treatment against women, the United Nations celebrated the year 1975 as International Women’s year and declared 1975-1985 to be a woman decade. Empowerment of women as a concept was introduced at the International Women’s Conference at Nairobi in 1985. Before the Hindu Succession Act, 1956, a Hindu woman had property of 2 kinds: (1) Stridhan, and (2) Hindu woman’s estate or Hindu woman’s limited estate. Under HSA there are 11 female and 5 male Class I heirs to the property of a male Hindu dying intestate empowering the proprietary status of women in general. Section 14, Hindu Succession Act, 1956, made a revolutionary upliftment of a woman making her an absolute owner of the property from the date of commencement of the HSA, i.e., 17.06.1956. The poor draftsmanship of Section 14(1) and 14(2) of the Hindu Succession Act has presented serious difficulties of construction in cases where property was received by a female Hindu in lieu of maintenance and the instrument granting such property a prescribed restricted estate for her in the property. Parliament should amend the law to remove the anomalies. On and from the commencement of the Hindu Succession (Amendment) Act, 2005, i.e., 9.9.2005, by virtue of substituted Section 6 the daughter of a coparcener becomes a coparcener by birth a coparcener in her own right and the rights under Amendment of 2005 are applicable to living daughter of living coparcener as on 9.9.2005 irrespective of when such daughter was born whether married or unmarried. She can dispose of her own property and her interest in Mitakshara coparcenary by testamentary disposition.

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CRITICISM OF ADVERSE POSSESSION AND THE PLEA TO HAVE A FRESH LOOK

S.Siddhi*

P.Dinesh Kumar**

Historical Background

1. The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim right of “seisin” from his ancestry. The word “Seisin” means possession of land by freehold. Many felt that the original law that relied on “seisin” was difficult to establish, and around 1623 a statute of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early English doctrine was designed to prevent legal disputes over property rights that were time consuming and costly. The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title.

2. The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exits to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.

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Meaning

3. Adverse possession of the land is the process by which title to another’s land is acquired without his permission. Adverse Possession is a possession which is opposed to once interest of the real owner of the property. It is possession in denial of the title of the true owner. According to Supreme Court of India, “The law as it exists is extremely harsh for the true owners and a windfall for a dishonest person who had illegally taken possession of the property of the true owner.” In layman language it is called “land grabbing.” Roots of this type of land grabbing lies in the national policy called “Land to the Tiller”.

4. Once adverse possession is proved by the person despite by wrong means, the true owner loses his right over the land/property. A person can prove adverse possession if the possession is:

• **Actual**

Adverse possession consists of actual occupation of the land with the intent to keep it solely for oneself. Merely claiming the land or paying taxes on it, without actually possessing it, is insufficient. Entry on the land, whether legal or not, is essential. A trespass may commence adverse possession, but there must be more than temporary use of the property by a trespasser for adverse possession to be established. Physical acts must show that the possessor is exercising the dominion over the land that an average owner of similar property would exercise.

• **Open and Notorious**

An adverse possessor must possess land openly for the entire world to see, as a true owner would. Secretly occupying another’s lands does not give the occupant any legal rights. Clearing, fencing, cultivating, or improving the land demonstrates open and notorious possession, while actual residence on the land is the most open and notorious possession of all. The owner must have actual knowledge of the adverse use, or the claimant’s possession must be so notorious that it is generally known by the public or the people in the neighborhood.
The notoriety of the possession puts the owner on notice that the land will be lost unless he or she seeks to recover possession of it within a certain time.

- **Exclusive**

  Adverse possession will not ripen into title unless the claimant has had exclusive possession of the land. Exclusive possession means sole physical occupancy. The claimant must hold the property as his or her own, in opposition to the claims of all others. Physical improvement of the land, as by the construction of fences or houses, is evidence of exclusive possession.

- **Hostile**

  Possession must be hostile, sometimes called adverse, if title is to mature from adverse possession. Hostile possession means that the claimant must occupy the land in opposition to the true owner’s rights. One type of hostile possession occurs when the claimant enters and remains on land under color of title. Color of title is the appearance of title as a result of a deed that seems by its language to give the claimant valid title but, in fact, does not because some aspect of it is defective.

- **Continuous & Uninterrupted**

  All elements of adverse possession must be met at all times through the statutory period in order for a claim to be successful. The statutory period, or “statute of limitations”, is the amount of time the claimant must hold the land in order to successfully claim “adverse possession”. (In India as per Limitation Act 1963, the statutory period is 12 years)

**What is adverse possession?**

5. Adverse possession means, possession by a person holding the land on his own behalf or on behalf of some person other than the true owner having a right to immediate possession, provided the true owner is not under a disability or incapable of suing. Adverse possession is a
possession that is hostile, under a claim or colour of title, actual, open, notorious, exclusive, and continuous, continued for the required period of time thereby giving an indefeasible right of possession or ownership to the possessor by the operation of the limitation of actions.

6. In Saroop Singh v. Banto & Ors. Hon’ble Supreme Court held: In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence.

7. In Annakili vs A. Vedanayagam & Ors Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title.

8. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by Supreme Court in Karnataka Board of Wakf v. Government of India and Others in the following terms: "Physical fact of exclusive possession

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2 Amba Gokal vs Parbat Bhuta (1992) 1 GLR 399
3 (2005) 8 SCC 330,
4 AIR 2008 SC 346
5 (2004) 10 SCC 779
and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show:

(a) on what date he came into possession,
(b) what was the nature of his possession,
(c) whether the factum of possession was known to the other party,
(d) how long his possession has continued, and
(e) his possession was open and undisturbed.

Criticism of Adverse Possession and the Plea to have a Fresh Look

9. Some legal scholars in foreign countries have pleaded for abolition of adverse possession describing it as legalized land theft and a means of unjust enrichment. It has also been pointed out that there is no certainty in the law of adverse possession and the courts in several cases have wrestled with the meaning of the expressions – actual, continuous, open, hostile and exclusive possession.

10. The Supreme Court of India, has in two recent decisions, namely, Hemaji Waghaji vs. Bhikhabhai Khengarbhai 6 and State of Haryana Vs. Mukesh Kumar7, has pointed out the need to have a fresh look at the law of adverse possession. Borrowing the language from the judgment of the High Court (Chancery Division) of England in J.A. Pye (Oxford) Ltd. vs. Graham8, the Supreme Court in the former case, described the law of adverse possession as irrational, illogical and wholly disproportionate and extremely harsh for the true owner “and a windfall for dishonest person who had illegally taken

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6 AIR 2009 SC 103,
7 2011(10) SCC 404
8 (2000) 3 WLR 242
possession of the property”. The Supreme Court, after extensively quoting from P.T. Munichikkanna Reddy & Ors VS Revamma and Ors\(^9\) reiterated the observation therein that “with the expanding jurisprudence of the European Court of Human Rights, the Court has taken an unkind view to the concept of adverse possession in the recent judgment of J.A. Pye (Oxford) Vs. United Kingdom”. The Court was not aware that the said judgment of ECHR has not been approved by the Grand Chamber consisting of a larger Bench, on a reference made to it in the same case.

11. In Hemaji Waghaji’s case, the Supreme Court held on the facts that the appellant had miserably failed to prove adverse possession. However, the Court went further and made the following observations at paragraphs 34 to 36 (of AIR).

“34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

35. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to lose its possession only because of his inaction in taking back the possession within limitation.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of

\(^9\) AIR 2007 SC 1753
adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.”

**Conclusion:**

From the above findings of the Hon’ble Supreme Court, it is the right time the parliament to have a fresh look into the issue and to abolish the concept of 12 years illegality become legal after the completion of the 12th year as adverse possession. The parliament ought to have repeal the existing provisions in the Limitation act 1963 as rightly held by the Hon’ble apex court in Hemaji Waghaji’s case to set right the illegality and protect the rights of the true owner from the rank trespasser.
“RIGHTS OF CHILDREN: LEGAL RESPONSE TO THE CHANGING SOCIAL ASPIRATIONS”

Dr. Shikha Dimri*

The human rights jurisprudence speaks specifically for the vulnerable groups. Children are ranked among the most vulnerable groups because they are totally unaware of their rights and interests. Even they don’t have the capacity to sue directly in their name. Due to such reasons rights of children are essentially of high importance. Among children the girl children and children of the marginalized sections of society need special protection. Child Rights are fundamental freedoms given and are the inherent rights of all human beings below the age of 18.

In 1992, India endorsed the United Nations Convention on Rights of the Child.¹ The Charter of Child Rights is erected on the dominant and eminent principle that "All children are born with vital freedoms and all human beings have some inherent rights". A child is any human being below the age of 18 years². Accordingly, child is a person. The term "child" does not necessarily, mean minor, but can take account of adult children as well as adult non-dependent children. There are no definitions of extra footings used in the making of such young people such as “adolescents”, "teenagers," or "youth" under international law, but the children's rights movement is considered distinct from the youth rights movement. The field of children's rights spans the fields of law, politics, religion, and morality. Since the formation of the UN, the protection & promotion of human rights has been its primary objective. Now the United Nations has shaped wide and drastic range of instruments for monitoring primary abuses of human rights. The International Labour Organization defines 'child labour' as "work that deprives children of their

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2 Indian Majority Act, 1875
childhood and their dignity, which impedes their access to education and the attainment of skills, and which is performed under disgraceful conditions harmful to their health and their enlargement.3

Law Relating To Protection and Enlargement of Children In India

The Indian Constitution provides a complete set of fundamental rights to all persons within the territory of India. All such rights including the right to equality are available to children also without any discrimination. Article 15 of the Constitution of India specially sanctions the State to exercise positive discrimination favouring economically and educationally fragile groups which allow special provisions for ‘women and children’4 and not to discriminate against any citizen in difficult situations. Article 15 (3) proclaims that nothing shall preclude the State from making special provision for the women and the children.5 In the case of Gaurav Jain Vs. Union Of India & Ors6 Article 21 of the Constitution of India has been interpreted expansively by the Court to make the right to life eloquent, socially, culturally, economically, even to all those miserable sections of the society with dignity of person and in pursuit of happiness. Article 21-A which provides Right to Free and Compulsory Education was interleaved by the Eighty-Sixth Amendment Act of 2002 to the Constitution of India which provides for free and compulsory education of all children in the age group of six to fourteen years as a part of Fundamental Rights in such a manner as the State may, by law, determine. This comprises the Right of Children to Free and

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4 Article 15(3), Constitution of India, 1949
5 Lok Sabha Debates : government bills: discussion on the motion for consideration of the ... On 13 december, 2006
6 writ petition (crl.) Nos. 745-54 of 1950
Compulsory Education (RTE) Act, 2009\(^7\), which represents the consequential legislation envisioned under Article 21-A, which means that every child has a right to elementary education of acceptable and equitable quality at a formal school of law which might satisfy certain essential norms and standards.\(^8\) Whereas, the right to education up to the age of 14 years was established in the case of Unnikrishnan Vs. State of Andhra Pradesh\(^9\) and Secondary Education to be a right was established in the case of Maharashtra State Board Vs. K.S. Gandhi\(^10\).

The RTE Act is a major step towards providing rights of children. It provides for the various measures for implementing the right to education, including:

(i) Free and compulsory education till conclusion of ‘elementary education’\(^11\).

(ii) ‘Compulsory Education’ means compulsion of the appropriate government to provide free elementary education and to guarantee compulsory admission and completion of the elementary education to every child in the 6 to 14 years of age group and the word ‘Free’ means that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education\(^12\).

(iii) A number of provisions for a non-admitted child to be admitted to appropriate class according to his/her age and understanding\(^13\).

(iv) Sense of duty and everyday jobs of appropriate Governments, local authorities and parents in providing free and compulsory education and

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\(^7\) published in official gazette of india at new-delhi, thursday 27\(^{th}\), 2009 / bandra 5 1931 under the Ministry of Law and Justice (legislative department) registered no – (n)04/0007/2003-09

\(^8\) part iii fundamental rights, right to freedom , the Constitution of India, 1949

\(^9\) 1993 AIR SC 2178

\(^10\) 1991 SCALE (1)187

\(^11\) section 2(f) of Right to Education Act, 2009

\(^12\) section 3 of the Right to Education Act, 2009

\(^13\) Section 4, Right to Education Act, 2009
therefore, distribution of financial and other obligations between the Central and State Governments\textsuperscript{14}.

(v) Positioning down the norms and standards relating inter alia to Pupil Teacher Ratios (PTRs), buildings and infrastructure, school-working days, teacher-working hours.

(vi) Appointment and availability of appropriately trained teachers.

(vii) Broadening of all the principles enshrined in the Constitution, and ensuring accountability of the enlargement of the child, with building on the child’s knowledge, and potentiality and talent and creating the child free of trauma or any kind of fear, and anxiety through a system of child friendly teaching and learning.\textsuperscript{15}

**The right against exploitation**

Article 23 of the Constitution of India provides protection from any kind of "staffing, transportation, transmission, harboring, or receipt" of any child for the purpose of exploitation.\textsuperscript{16} Trafficking of children is a form of human trafficking and is defined as the "recruitment, passage, transfer, protecting, and/or receipt" of a child for the purpose of destroying. The trafficking of children has been internationally recognized as major human rights issue, one that exists in every region of the world. Trafficking in children (child trafficking) is a global problem affecting large numbers of children. Some evaluations have as numerous as 1.2 million children being trafficked every year. Demands are raised for trafficked children as cheap labour or for sexual exploitation. Children and their families are recurrently unaware of the dangers of trafficking, trusting that better service and lives lie in other countries.

Further to this, article 24 prohibits child labour. As part of larger initiatives to combat the worst forms of child labour, ILO’s

\textsuperscript{14} Section 6, Right to Education Act, 2009
\textsuperscript{15} Department of school education & literacy, ministry of human resource enlargement, Government of India : Right to Education
\textsuperscript{16} Fundamental Rights, right to freedom, Part III, Constitution of India, 1949
International Programme on the Elimination of Child Labour (IPEC) works with various state governments, the workers and the employers’ creations and NGOs to fight child trafficking. It works with them to offer broad protection to children at risk and victims, to prevent the crime of trafficking, and to enforce laws and prosecute traffickers, and to assist victims in need. Children are trafficked for compulsory labour, native work, as child soldiers, as camel jockeys, for begging, work on building sites and plantations but most children are trafficked for sexual exploitation. Whereas girls marketed for forced labor, domestic work often end up sexually exploited by their employers, together with prostitutions. Until the age below 14 years the rights given to all the children shall be protected from all kind of hazardous employment throughout the country. Article 24 says that “No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any kind of hazardous employment.

The Constitution of India directs the state to ensure by appropriate legislation that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter into avocations not suitable to their age or strength. Further the Constitution again directs the state to ensure by appropriate legislation that children are given opportunities and facilities to develop in healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. By virtue of the provision of Article 37 the aforementioned directives are not enforceable in the court of law and neither mandatory as a right to be claimed by any such disadvantaged children nor by their legal guardian. These directives take note of saving the children from exploitation and also to save them from compulsions of economic necessity to enter occupations unsuited to their age or strength. To all children until they complete the age of six years, it lays down the provisions that “The State shall endeavour to

17 Article 39(e), Constitution of India, 1949
18 Article 39(f), Constitution of India, 1949
provide early childhood care and nutrition for all children until they complete the age of six years.\(^{19}\) Article 21-A had been inserted by the Constitution Eighty-sixth Amendment Act, 2002 which received assent of the President on Dec. 12 2002. This is to keep up with the hope expressed by the Supreme Court in Unnikrishnan and Mohini Jain\(^{20}\) that conversion of the State’s obligation under Article 45 into a fundamental right would help achieve the goal at a faster speed. It is a fundamental duty of parents and guardians to educate such children as provided in clause (k) of Article 51-A.

Article 45 gives the “Provision for free and compulsory education for children- the State shall endeavor to provide, within a period of ten years from the beginning of the Constitution, for the free and the compulsory education for all children until they complete the age of 14 years”. The goal has not been achieved even till now more than 65 years from the beginning of the Constitution. It is held that there is nothing to prevent the State from discharging that solemn obligation through the government and aided schools, and Article 45 does not require the obligation to be discharged at the expense of minority communities.\(^{21}\)

Justice Bhagwati has rightly quoted: “The child is a soul with a being, and has a nature and capacities of its very own, who should be helped to find, to grow into the furnished adulthood, on physical and vital energy and most breadth, depth and also height of its emotional, intellectual and spiritual well-being”\(^{22}\) In Joseph Valamangalam, Rev. Vs. State of Kerala\(^{23}\), Article. 45 were held to be not justiciable, being only directive in nature. This Article does not confer any legally enforceable right upon primary schools to receive grants-in-aid from the government. It would be reasonable to hold the rules relating to recognition and aid.

\(^{19}\) Part IV, Directive Principles of State Policy, the Constitution of India, 1949  
\(^{20}\) 1992 AIR 1858  
\(^{21}\) Re Kerala Education Bill, 1957, AIR 1958 SC 956:1959 SCR 995  
\(^{22}\) Mr Justice Bhagwati, Child Primary Rights.  
\(^{23}\) AIR 1958 Ker. 290
Protection under Criminal Law

Under Section 82 it has been provided that nothing is an offence which is done by a child under 7 years of age (Doli Incapax). Section 83 provides that nothing is an offence which is done by a child above seven years of age and under twelve, who has not achieved sufficient maturity of understanding to judge the nature and consequences of his conduct in that occasion and act according to circumstances. Section 315 provides that any person who before the birth of any child does any act with the intention of preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term extending up to ten years, or fine, or with both. Section 316 provides that any person who does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term extending up to 10 years, and fine. Section 317 provides that whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Section 360 provides whoever transports any person/child beyond the limits of India without the consent of that person is said to kidnap that person from India. Or any person who takes any minor below age of 16...

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24 Chapter IV, General Exceptions, Indian Penal Code, 1860
26 ibid.
27 Chapter XVI, of offences affecting the human body, Indian Penal Code, 1860
28 ibid
29 ibid.
30 Chapter XVI, of offences affecting the human body : of kidnapping, abduction, slavery and forced labour
years if a male, or under 18 years of age if a female, or any person of unsound mind, out of the protection of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to hostage taking such minor or person from lawful guardianship.

The Probation of Offenders Act, 1958 (POA)\textsuperscript{31}

Young offenders such as children are sent to prison on it being proved that their offence is punishable under provisions of the Indian Penal Code. Such young criminals are given an opportunity to improve their conduct by allowing them to live with their family so as to prevent them from becoming supplementary offensive by pronouncing judgment on them with imprisonment under the Reformative Theory of Criminal Jurisprudence. Chief Probation Officers and Probation Officers are appointed in the office of the District Social Welfare Officer to function under this Act. Before the Court passes a final order, a report is sought from the Probation Officer who conducts an inquiry, in accordance with any directions of the Court, into the state of affairs of such offence committed, family condition, communal and monetary situations and home surroundings of any person accused of an offence and a psychological report on near and dear ones of the person accused. After conducting an inquiry at the home of the accused, the Probation Officer submits a detailed report to the Court. The Probation Officer recommends to the concerned Court, if he considers it appropriate, to release the accused on bail, to discharge him after admonition or to hand over custody of accused with bail under supervision of the Probation Officer for a maximum period of 3 years. The Probation Officer personally goes on official visit to young offenders once a month and makes determinations to make certain that they can lead life in the general public with self-respect.\textsuperscript{32}

\textsuperscript{31} {Act no.20 of 1958 : [16th may, 1958] an act to provide for the release of offenders on probation or after due admonition and for matters connected therewith.}

\textsuperscript{32} {Department of Social Justice & Empowerment, (Government of Gujarat)}
The Juvenile Justice (Care and Protection of Children) Act, 2000

The Juvenile Justice Act 1986 provides sanctioned administrative management for the reclamation of juvenile delinquents. Primary neutrality of the JJ Act is to provide fair and adequate rehabilitation for youths in the criminal justice system. This takes account of fair treatment, access to fair and healthy counseling and other necessary tools, and examination into the home environment to ensure that proper care is being taken to give the child an environment suitable for enlargement and rehabilitation.

India passed the Juvenile Justice Act in 1986. In 1989 the General Assembly of the United Nations adopted the Convention on the Rights of a Child (UNCRC). India ratified the UNCRC in 1992. The convention provides the right of the child to recuperation and widening into society at large without judicial interpolation where not inevitable. Hence the Government, to accomplish the standards of the convention handled a requirement to re-write the law. Hence in 2000 the old law was replaced by the earlier Juvenile Justice (Care and Protection of Children) Act.

Protection of Children from Sexual Offences Act (POCSO), 2012

The Evil of child sexual abuse had been on a steep rise affecting the future of countries’ future generations and is an evil to the public at large. Statistics released by the National Crime Bureau revealed that it had been steadily increasing and the same was also observed in a study by the Ministry of the Women and Child Welfare in the year 2007. With a view to curb and punish the instances of child sexual abuse, the Protection of Children from Sexual Offences Act was passed. The Act received Presidential assent on 19th June, 2012 and published

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33 Act no. 56 of 2000
34 Childline Project across India is supported by the Union Ministry of Women and Child Development (MWCD) under the Integrated Child Protection Scheme (ICPS)
35 https://pib.nic.in/pocso_act/23132.asp, last accessed on 20th September, 2015
in Official Gazette on 20th of June, 2012. The Act defines a child as any person below eighteen years of age, and regards the best interests and well-being of the child as being of paramount importance at every stage, to ensure the emotional, intellectual, physical and social improvement of the child. It defines diverse forms of sexual abuse, together with penetrative and non-penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be “aggravated” under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority with the child, like a family member, teacher, police officer, or doctor. People who traffic children for such purposes are also punishable under the provisions relating to abetment in the Act. The Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine.

The Act also delivers for mandatory reporting of sexual offences. This casts a legal duty upon a person who has information that a child has been sexually abused to bang the offence to the proper authority; if he fails to do so, he may be punished with six months’ imprisonment or fine or both. Thus, a teacher who is aware that one of the students has been sexually harmed by a colleague is legally obliged to bring the matter to the attention of the authorities else the teacher is also to be legally penalized.

The police are also required to convey the matter to the attention of the Child Welfare Committee (CWC) inside 24 hours of receiving the report, so the CWC may then proceed where required to make further preparations for the safety and security of the child. Act instructs that such a case of child sexual abuse must be disposed of within one year from the date the offence is reported.

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

The new JJ Act, 2015 seeks to enact comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards
prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty(1990), the Hague Convention on Protection of Children and Cooperation in respect of Inter-country adoption(1993) and other related international instruments. The Act provides for application in cases involving detention, prosecution or consequence of imprisonment; matters pertaining to apprehension, production before court, disposal orders and restoration, procedures and decisions related to adoption of children, and reintegration and reclamation of children who are in conflict with law or, as the case may be, in need of care and protection under such law. It seeks to enact a law by unifying and amending the law pertaining to the children who are in need of care, nurturing and protection. It seeks to supply to their enlargement needs through proper care, protection and treatment by adopting a child friendly approach in the adjudication and disposal of matters, and for rehabilitation through processes provided and institutions established under the new enactment.

The word ‘juvenile’ has been replaced with the word ‘child’ and the expression ‘juvenile in conflict with the law’ has been transformed to ‘child in conflict with law.’ While in the JJ Act, 2000, juveniles in conflict with the law are defined as the ‘accused’, the new law identifies a ‘juvenile in conflict with law’ to be one who has been established by the Juvenile Justice Board to have principally committed an offence. It also defines an ‘abandoned child’ as well as ‘aftercare’. Chapter II is the most noteworthy feature of the new law, providing for ‘Fundamental Principles for Care, Protection, Rehabilitation and Justice for Children’. It incorporates internationally accepted ideologies of presupposition of innocence, dignity and worth, family responsibility, confidentiality and privacy36, return and restoration, equality and non-discrimination, and diversion and natural justice, among others.

Juveniles are institutionalized only if no other family based care option is possible or available. The law prescribes Institutionalization as a measure of last resort.

The recent happenings of serious criminal incidents involving juveniles had created a serious debate and demand for amendments in relevant law for effectuating deterrent over the juveniles. The major concern of the debate has been to revisit the definition of juvenile because the present day society gets has a much larger exposure to children leading to an early maturity on the subjects of adult involvement. This is apparently evident by the changing lifestyle patterns and also by the increasing number of juveniles involved in sexual offences. Responding to this social need, the Indian parliament has enacted a fresh Juvenile Justice (Care and Protection) Act, 2015 which received assent of the president on 31st December, 2015. Under the new law, in case of a heinous offence committed by a child, the Juvenile Justice Board shall conduct a preliminary enquiry as to his/her understanding of the nature and consequences of the act and the board may conclude that the child may be tried as an adult offender.37

This new development in the law related to children has invited debate as to its appropriateness but the state of circumstances make it very evident that the time is mature to decrease the age of upper limit and the new law stands genuine. Rather there is scope of further reconsideration of the upper age limit. Therefore the present development in the juvenile law is a cautious step towards redefining a child. The ideals of reformative treatment to the juveniles cannot be strengthened to such an extent as to dilute the deterrent effect of penal laws. However, there can be some special treatment to the convicted persons of younger age by keeping them in separate cells and not mixing them with hardened criminals so as to keep alive the possibilities of reform.

37 Section 15, juvenile justice (care and protection) act, 2015.
UNORGANISED INDIAN LABOURS - A DEPRESSED CLASS NEEDS IMMEDIATE PROTECTION?

Ramchandra Chauhan*

Framers of the Indian Constitution were aware with a existing bitter fact, that in India more than 95% of the Indian Labour is unorganised, unprotected and depressed economically as well as socially that some protective and welfare means have to be incorporated in the Indian Constitution for their welfare and safeguards. Thus, it is a hard fact that when independent India’s constitution was being drafted, social security was specially included in List III to Schedule VII of the Constitution and it was made as the concurrent responsibility of the Central and State Governments. A number of directive principles of State policy relating to aspects of social security were incorporated in the Indian constitution. In relation to it the sector of unorganized labour becomes very prominent as the Indian Economy is characterized by the existence of a vast majority of informal or unorganized labour employment. As per the Economic Survey 2007-08, 93% of India’s workforce include the self employed and employed in unorganized sector, yet the gap which existed between organized and unorganized sector in our country is very wide which made our system unequal in the eyes of law.¹

There is no doubt that the unorganised sector workers face a number of difficulties which are very peculiar sometimes. The hardships of the urban unorganised sector workers are even more. They have no social security and no job security. Their income is very low to support the entire family. As a result, the entire family including the children are forced to engage in work to earn their livelihood. They have a precarious livelihood which have to be sacrificed for employment. The conditions of the workplace are another major area of concern. The home based workers and street vendors face a lot of

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¹ The Economic Survey, Oxford University Press, India 2007-08.
difficulties at their workplace. The home based workers are the most invisible section of the informal sector workers as they operate from their homes. Most of the times, the entire family will be staying in a small room which includes the kitchen. They have difficulties in allotting space for work also in that small room. Sometimes, a group of ten or fifteen workers used to sit together in a single room, which is very often arranged by a middle man between the employer and the workers, and work from there. This room may not be properly ventilated and there may not be any toilet attached to the room. This makes them work in a bad condition. The difficulties faced by street vendors are even worse. They are forced to pay bribes to the officials as street vending is considered to be an illegal activity. They are blamed for creating nuisance in the society with their valuable presence on the roads which ensures security to the pedestrians and shop owners. They are harassed and exploited despite the facts that they contribute to the national economy and provide goods at a reasonable rate at convenient locations for the customers.²

The women workers in the informal workers also face a number of difficulties in particular. First of all, in many cases, they are not considered as workers which make their income very low when compared to the earnings of the male workers. Often they are considered as workers which are traditional and low skilled according to the requirements of the market.³ This again brings their wages to a further low. They also have to take care of their children at home and at the same time, have to work to support their families. In fact, they are doing double the amount of work and are paid less than half when compared with their male counterparts. The women who are engaged in domestic work and street vending face difficulties such as sexual harassment and abusive language. Domestic workers have to work in three to five houses per day without any offs or bonus or overtime

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³ International Journal of Humanities and Social Science Vol. 2 No. 21; November 2012
wages to earn a meagre income. The women street vendors often suffer from urinary infections and related diseases as they don’t have any toilet facility at their workplace. It’s very true that they don’t have a legally allotted space to do their business in the first case. The conditions of the women workers in the home based operations are not better than this.

In this work, an attempt has been made to understand the nature and growth of unorganised workers, the initiatives of social security towards unorganised workers and to highlight the needs of the unorganised workers on social security aspects.

It has also been observed that the unorganised workers would expand further due to globalization. India had a long tradition of social security and social assistance system directed particularly towards the more vulnerable sections of society. The institution of self-sufficient village communities, the system of common property resources, the system of joint families and the practice of making endowments for religious and charitable provided the required social security and assistance to the needy and poor of the nation. These informal arrangements of social security measures underwent steady and inevitable erosion. Even after independence, the State was concerned more with the problems of industrial and organised work force and neglected the rural and unorganized labour force on social security matters to a greater extent, till recent past.

The social security initiatives of the Centre, State and Non-Governmental Organisations indicated that the needs are much more than the supports provided and the efforts must be targeted and vast enough to cover the growing unorganised workers. In this context, it is observed that the major security needs of the unorganised workers are food security, nutritional security, health security, housing security, employment security, income security, life and accident security and old age security. In sum, the study calls for a comprehensive, universal
and integrated Social Security System for the unorganised workers in India.\textsuperscript{4}

Unorganized sectors, the sectors of household manufacturing activities, i.e. of small scale or tiny industries which hardly has any sustainability of profit or margin. The unorganized sectors and the workers of unorganized sectors both can be termed as intangible or invisible because their recognition is very limited which is almost nil in comparison with the organized sectors problems faced by unorganized workers are like no social security, sexual harassment at the place of work, low skill, higher illiteracy rate, low incomes, etc. To overcome these issues National Commission for Enterprise in Unorganized Sectors was set up by the Government of India. Government of India has also made certain rules and acts, schemes for the welfare and development of workers of unorganized sectors. Although the schemes are being made by the government but due to lack of awareness and low literacy rate the workers of unorganized sectors are not able to prevail the benefits of the government schemes made for them. Lack of awareness and low rate of literacy are the deep hurdles in the development of sectors which in return provides inadequate and vulnerable living conditions.\textsuperscript{5}

‘The history of human experience shows that when a revolution in ideas and in action enters the life of a nation, the nascent power so released possesses the potential of throwing the prevailing social order into disarray and to bring out a new and emerged social order for the welfare of all’.\textsuperscript{6}

In the light and sentiment of this statement, there must be amendments to the existing legislations and running the programs with the help of available institutional arrangements like Employees Provident Fund Organization and employees State Insurance

\textsuperscript{6} Bandhua Mukti Morcha v. Union of India & Others,1984 AIR 802, 1984 SCR (2) 67.
Corporation or using the state government run hospitals for immediate extension of benefits. There should be establishment of a comprehensive social security setup for social security for the entire work force in the country and merging existing program administration with that setup.\(^7\)

An analysis of the status and position of the unorganised labour shows that their basic problem is the lack of organisation among them. The facts have highlighted the need for organizing these workers, in developing countries like India. The unorganised sector is bound to continue and grow for several decades to come. It is not a short-term/temporary phenomenon. Besides, due to globalisation organised sector employment may not increase much and, therefore, the unorganised sector has to grow. Hence, it is very necessary to mobilise and organise labour in this sector.

Several International Labour Organisations studies have brought out the development potential of this labour. A well-designed human development strategy for the benefit of this section of labour can help in raising the level of productivity in the country. Hence, economic and other helps should be provided at a door-step level to them.

The national objectives of equity and elimination of poverty demand that such workers are enabled to gain access to institutional finance and other facilities for self-employment. Organising this sector can help this process. Helping the self-employed can enable them in developing themselves and upgrading themselves into full-fledged entrepreneurs so as to play a significant role in the development process.

Today, the Indian trade union movement is at a crossroads. On the one side there is a threat to its membership and a lack of interest in the emerging professional and allied workforce and unions on the other. Taking up the challenge of organizing the unorganised can be

\(^7\) Wouter Van Ginnikan, Social Security For All Indians (Oxford University Press)
beneficial to the trade union movement itself, the unorganised labour and the society too.

The New Economy Policy initiated in 1991 has come to stay. While in the long run its benefits may percolate to all, in the short period unorganised labour will be adversely affected. Organising them can enable them to fight for their cause unitedly and collectively.8

It is important to make a Nation, free from all kinds of exploitation and injustice. The distribution of values of values should be fair, equitable, adequate and just, so that, the society could live in harmony and this can only be possible by uplifting and protecting to dejected class of Indian society.

The Government and its officers must welcome public interest litigations filed before the judiciary because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.9

There is a requirement of a viable sustainable model to be framed by the government which would enable them to access modern technology and also wherever possible be in a position to tie up and meet challenges with the organized sector. Even then an entrepreneur plays a vital role in bringing up unorganized sector at the better position in the country.

8 New Economic Policy, Govt. of India in July 1991.
Government is required to encourage re-employment of the unemployed to reduce number of people left with no other choice but to turn to self-employment through skill development programmes. Self-regulatory environment to provide information to prospective self-employers on where and which business he or she may face over-competition and therefore advising them on what and where to avoid.

The government should encourage a well prepared business and help in setting business by potential self-employers to start businesses with sufficient preparation and to create good jobs by helping them to enhance productivity and develop to a sustainable and healthy business. The authority should develop an appropriate policy which is suitable to people of different age groups and education levels. In particular, the government should consider how to increase the job security of the baby boomer generation.  

More and more incubators should be formed in India to help in setting up small business and new entrepreneur in a big way not only in terms of numbers but also their size. Skill and training should also be imparted in Universities, Engineering Colleges and Business Schools to promote entrepreneurship. Innovation and Entrepreneurship hold the key to enhancing the role in the business and to improve Indian economy. Countrywide programmes on entrepreneurship and innovation must be launched in the shape of a national movement.

Awareness about safety, health, ergonomics, occupational hazards and environmental issues needs a high priority and must go along with schemes and not separately.

District Industries Centres (DICs) and other technology centres should take keen interest in problems faced by unorganized sector and provide necessary facility for the development as provided to the organized sector. Incentive for linkage between large and unorganised

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Enterprises broad base Credit Linked Capital Subsidy Scheme (CLCSS) for Technology Upgradation of unorganised enterprises. Addressing to the problem of Credit for technological upgradation, policy measures and organizational arrangements are needed to overcome the difficulties associated with marketing.
DNA TECHNOLOGY IN RESHAPING JUDICIAL PROCESS AND ITS OUTCOME

Vinod Kumar Meena*

The discovery of the structure of DNA\(^1\) (deoxyribonucleic acid) in the 1950s, and the recognition that it is virtually the universal genetic material, made it imperative for man to apply this knowledge towards unexpected ends. Genetic engineering, DNA finger printing,\(^2\) sequencing of whole genomes (be they of men, animals, plants or microorganisms), or exploitation of the differences between the DNA of the male and the female (for eg., of the X and the Y sperm) have thus all been historical imperatives. Today many such predicted technologies are a reality or have come close to being so. The impacts of these technologies on different societies are likely to be different in view of the different social conditions, historical background and cultural traditions.

Because of the naturally occurring variations in the DNA molecule from one person to another, the sequence of fragments forms a pattern, similar to a bar code found that is to all intents and purposes unique to the individual.

DNA profiling has been extensively used for paternity testing because of its capacity to determine to a high degree of certainty the

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1. Once the biological evidence is transferred through direct or secondary transfer as aforesaid, it will remain on the target surface either by absorption or by adherence. In general, liquid biological evidence will be absorbed, while solid–state evidence will adhere. The method of collection depends largely on the state and condition of the biological evidence. There are several guidelines for the collection of biological evidence for DNA analysis.
2. DNA fingerprinting or profiling allows examination of human biological material at its most fundamental level—the DNA molecule. The molecule is the smallest fundamental unit (usually a group of atoms) of a chemical compound that can take part in a chemical reaction.
claims to be a child's parents or grandparents. The application of such information is wide, varying from intra familial disputes, to resolving the fatherhood of a child for rape victims, to rights to social security benefits, to issues of inheritance. It is also of major significance to governments seeking to confine immigration to family reunion categories and is being used extensively in many countries in the world today.

Thus, applications of DNA fingerprinting can be broadly classified into following two categories:

**Civil cases including**—

a) Establishment of paternity and maternity;

b) Establishment of biological relationship in immigration cases;

c) Identification of child swapping cases occurring in hospitals;

d) Identification of bodies in mass disasters.

**Criminal cases including**—

a) Identification of mutilated remains;

b) Identification of convicts in sexual assault cases;

c) Resolving murder cases;

d) Application in forensic medicine;

e) Identification of exhumed bodies;

f) Identification of sex of human remains.


However many ethical and legal problems arise in developing of a DNA database and these problems are especially encountered during the implementation of the legal regulations on the subject. These are:

a) Obligatory forced subjection to the carrying out of DNA analysis. This would mean that individuals with no apparent connection to any criminal act would also have to undergo analysis.

b) The following rights may be infringed upon by such analysis: right to privacy; the dignity of the person; the right to physical and moral integrity; right not to declare; the presumption of innocence; the right to health; and right to liberty.

c) Implementation would demand huge initial investment in equipment and personnel.

d) Human error and misinterpretation for trial lawyers.

However, DNA profiling beings to be tested worldwide. It is important that justice delivery system should apply proper safeguard against error methodology or logic or parameters set out in a well drafted DNA legislation and criminal laws.

Today, the most pertinent question which generates much debate among the jurists, judges, scientists, lawyers and academicians irrespective of the legal system, is how far the present value-based system of justice requires to be changed, or modified or re-oriented for the purpose of utilizing the benefit of modern scientific discoveries and technological advancement in justice-delivery system.

Actually, the problems which the law makers and judges would face in introducing the new technology, is how to create a susceptible balance between some basic human rights of the accused in a criminal case like, right of privacy, right against self-incrimination etc and the interest of the investigation, because sometimes it will be impossible to utilize the benefit of scientific methods in criminal investigation without touching the human rights of the accused.
The importance of the fast developing DNA technology and its impact on the right of an individual and its societal effect have created an urgent need for getting acquainted with and understanding the basics of modern genetic science for playing an effective role by all those who are concerned with justice delivery system. Therefore, it becomes imperative to note the basics of modern genetic science.

It is pertinent to note here the basics of modern genetic science. Accordingly, every cell in the human body contains a nucleus, with the exception of red blood cells, which lose this structure as they mature. Within the nucleus are tightly coiled threadlike structures known as chromosomes. Humans normally have 23 pairs of chromosomes, one member of each pair derived from the mother and one from the father. One of those pairs consists of the sex chromosomes—with two X chromosomes determining femaleness, and one X and one Y determining maleness. The other 22 chromosomes are known as autosomes. Each chromosome has within it, arranged end-to-end, hundreds or thousands of genes, each with a specific location, consisting of the inherited genetic material known as DNA.

The technique of fingerprinting which is based upon the assumption that everyone’s fingerprinting are thought to be unique, even for monozygotic twins, has been extensively used all over the civilized world for a long time in order to establish the identity of an individual in assisting in administration of criminal justice systems. However, criminals or the perpetrators of crimes do, of course, occasionally leave evidences other than fingerprinting, like blood, hair, semen, etc. In this connection, the famous forensic scientist, Edmond Locard, opined that “every contact leaves a trace”. It is the interest of the forensic scientists to analyze such evidence to discriminate between individuals with high discriminating power.

DNA identification test is a technique involving chemically dividing the DNA into fragments which form a unique pattern and then matching that identify profile with the pattern obtained from similarly testing a suspect’s blood specimen. If the two patterns match, the
possibility of error, i.e., the chance that they do not belong to the same individual, may be less than one in 30 billion.\(^6\)

Before a DNA test is performed on any biological sample, it is mandatory that the sample should be collected, preserved and transported in a proper format for further analysis.\(^7\) There are several pre-conditions of successful DNA identification test, which every investigating officers, as well as forensic scientists have to strictly comply with. The investigating officers have to take extreme care and caution when they are going to collect the samples for DNA analysis and they have to follow various complex procedures for the collection, preservation and documentation of DNA evidence.

DNA is found in every living cell of our bodies and can, therefore, be extracted from a whole variety of different materials.

The variety of samples recovered from the scene of crime and at different times of postmortem has created doubts in the mind of the investigating officers as to the method of collection and forwarding of these samples for DNA analysis. Thus, one of the pre-requisites for successful DNA typing is an efficient method for collection of these samples at the scene of crime and submission of these samples along with the control samples to the DNA typing laboratory within the minimum period of time. The usefulness of DNA analysis depends mostly on the skill, ability and the integrity shown by the investigating officers who are the first to arrive at the scene of crime, since DNA fingerprinting is highly sophisticated and the results are unassailable, the scientists or the DNA analyst should be provided with the samples in way prescribed hereinafter so that forensic experts could process the

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samples and give their opinion based on the results they obtain, in a befitting manner.\textsuperscript{8}

DNA Fingerprinting can help to establish the identity of the source of mutilated bodies, exhumed bodies and skeletal remains. Bones, preferably, long and intact bones, are most suitable for DNA fingerprinting analysis. Bones such as femur and humerus have been found to yield more bone muscles which is used in DNA lab for analysis.

Blood samples in cases of paternity disputes and in cases where they are used as control samples for identification purposes need to be collected in the presence of judicial authority. Blood samples should be collected in sterile tubes or tubes provided by the DNA lab, as mentioned at the beginning of this article. The court should seal the samples and a specimen seal should accompany the samples for verification at DNA lab. The identification card and the forwarding note need to be completely filled, certified and sent to the DNA lab along with the samples. Blood samples should not be collected from persons who have undergone blood transfusion within three months proceeding to the date of collection. In private paternity cases, the parties concerned should go to the DNA lab and blood should be collected in the lab. Blood samples, sent by post in private cases, should not be accepted for analysis. No delay should be observed in forwarding samples and control samples.

Documentation of DNA evidence is another vital part of DNA identification test. Unless the evidence is properly documented, packaged and preserved, it will not become the legal and scientific admissible in a court of law. Documentation is important from two points of view in forensic science, the legal one and the scientific one. Neither should ever be altered until its original condition and position have been recorded.

\textsuperscript{8} Article by Dr. \textbf{G.V. Rao}, Scientist’s Chief DNA Fingerprinting Unit, Center for DNA Fingerprinting, Hyderabad, Journal of the Indian Academy of Forensic Science, Vol. 36, Nos. 1 and 2, January and July 1997.
Once the biological evidence is transferred through direct or secondary transfer as aforesaid, it will remain on the target surface either by absorption or by adherence. In general, liquid biological evidence will be absorbed, while solid-state evidence will adhere. The method of collection depends largely on the state and condition of the biological evidence. There are several guidelines for the collection of biological evidence for DNA analysis.

In this paper, the DNA profiling that is the DNA analysis with the perspective of Indian legal system has been analyzed. There is no specific legislation which is present in Indian which can provide specific guidelines to the investigating agencies and the court, and the procedure to be adopted in the cases involving DNA as its evidence. Moreover, there is no specific provision under the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 to manage science, technology and forensic science issues. Due to lack of having any such provision, an investigating officer has to face much trouble in collecting evidences which involves modern mechanism to prove the accused person guilty.

Section 53 of the Code of Criminal Procedure, 1973 authorizes a police officer to get the assistance of a medical practitioner in good faith for the propose of the investigation. But, it doesn’t enable a complainant to collect blood, semen etc for bringing the criminal charges against the accused.

The amendment of the Criminal Procedure Code by the Criminal Procedure Code [Amendment] Act, 2005 has brought two new sections which authorize the investigating officer to collect DNA sample from the body of the accused and the victim with the help of medical practitioner. These sections allow examination of person accused of rape by medical practitioner and the medical examination of the rape victim respectively. But the admissibility of these evidences has remained in a state of doubt as the opinion of the Supreme Court and various High Courts in various decisions remained conflicting. Judges do not deny the scientific accuracy and conclusiveness of DNA
testing, but in some cases they do not admit these evidences on the
ground of legal or constitutional prohibition and sometimes the public
policy. There is an argent need to re-examine these sections and lows
as there is no rule present in the *Indian Evidence Act*, 1872 and the
*Code of Criminal Procedure*, 1973 to manage science and
technology issues. Many developed countries have been forced to
change their legislation after the introduction of the DNA testing in the
legal system. There are certain provisions which are present in the
*Indian Evidence Act*, 1872 such as Section 112 which determine
child's parentage and states that a child born in a valid marriage
between a mother and a man within 280 days of the dissolution of the
marriage, and the mother remaining unmarried shows that the child
belongs to the man, unless proved otherwise but again no specific
provision which would cover modern scientific techniques. DNA
analysis is of utmost importance in determining the paternity of a child
in the cases of civil disputes. Need of this evidence is most significant in
the criminal cases, civil cases, and in the maintenance proceeding in the
criminal courts under Section 125 of the *Criminal Procedure Code*.

The introduction of the DNA technology has posed serious
challenge to some legal and functional rights of an individual such as
"right to privacy", "right against self-incrimination". And this is the
most important reason why courts sometimes are reluctant in accepting
the evidence based on DNA technology. Right to privacy has been
included under right to life and personal liberty or Article 21 of the
*Indian Constitution*, and Article 20(3) provides right against self-
incrimination which protects an accused person in criminal cases from
providing evidences against himself or evidence which can make him
guilty. But it has been held by the Supreme Court on several occasions
that right to life and personal liberty is not an absolute right. In Govind
Singh v. State of Madhya Pradesh,⁹ the Supreme Court held that a
fundamental right must be subject to restriction on the basis of
compelling public interest. In another case Khark Singh v. State of

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⁹ AIR 1975 SC 1378.
Uttar Pradesh,\textsuperscript{10} the Supreme Court held that right to privacy is not a guaranteed right under the \textbf{Indian Constitution}. It is clear from various decisions which have been delivered by the Supreme Court from time to time that the right to life and personal liberty which has been guaranteed under the Indian Constitution not an absolute one and it can be subject to some restriction. And it is on this basis that the constitutionality of the laws affecting right to life and personal liberty are upheld by the Supreme Court which includes medical examination. And it is on the basis that various courts in the country have allowed DNA technology to be used in the investigation and in producing evidence. To make sure that modern technologies can be used effectively, there is an urgent need of a specific legislation which would provide the guidelines regulating DNA testing in India.

Following are some of the important decisions of the Supreme Court and various High Courts of India in order to provide a comprehensive understanding of the application of the DNA technique in matters of evidence and the law in its present scenario in India.

The Indian judiciary seen to be slowly but steadily coming in terms and acceptance with the conclusiveness of the advanced modern technology like DNA test in the matters of disputed paternity cases.\textsuperscript{11} Recently the Delhi high Court rightly availed itself of the benefit of this modern technology, in the administration of civil justice, with respect to a maintenance filed by the wife, where paternity of a child was in question. A landmark judgment was given by the High Court whereby Justice \textbf{Vipin Sanghvi}, observed that:

“The parentage of the child can only be determined by a DNA test. The liability to pay maintenance under Section 125 of the \textbf{Criminal Procedure Code}, 1973 can be avoided by the petitioner with

\textsuperscript{10} AIR 1963 SC 1295.
\textsuperscript{11} Legal relationship of the father and the child is paternity.
respect to this child only if it is established that he is not the biological son of the petitioner.”

Here in civil litigations the main area where DNA profiling and matching is used is related to paternity disputes, where there are two primary prominent issues involved. Firstly, the effects of Section 112 of the Indian Evidence Act, in the context of the developments in the DNA testing process. And secondly, if the courts in India could direct a person to give sample of his or her DNA and the consequences of the refusal to provide the same. Through some of the important decisions the above issues have been dealt in the context of the judicial approach to paternity disputes in India.

In this respect, initially the judges took very conservative view regarding the application of DNA evidence in resolving the paternity dispute cases. The journey from non-acceptance of DNA test by calling it a “mere balance of probabilities”, to the current situation of acceptance based on the merits of the case in paternity matters has been a fairly long one spanning over almost one and half decade. The Supreme Court in Goutam Kundu v. State of West Bengal and Kamti Devi v. Poshi Ram, had rejected the blood grouping and DNA test on the ground that the child may be stigmatized as illegitimate in the society as a result of DNA test. This explanation of the Supreme Court has caused utmost hardship to innocent husband who has committed no wrong and is forced to bear the fatherhood of an illegitimate child. Further, the explanation of Section 112 of the Indian Evidence Act, by which the illegitimacy of a child can still, be determined by the application of the “no access” logic between the husband and wife. The explanation also does not hold good in the presence of provision of maintenance vide Section 125 of the Criminal Procedure Code, to an illegitimate minor child or an illegitimate major child with physical

12. Cri.MC No. 1815/2007—Names have been kept anonymous by the Court due to privacy reasons.
15. AIR 2001 SC 2226.
and mental abnormality. If the intention of the Supreme Court in rejecting DNA test in the above decision is to really do away with the taboo and stigma attached with illegitimacy of a child then the word illegitimate should be removed or struck out from all legislations in India. Again, medical jurisprudence evidences that there is a lot of chance that a maximum period of pregnancy can be over 280 days. Section 112 does not apply to all those critical situations where even after 280 days of dissolution of marriage, a mother remaining unmarried can claim legitimacy of the child born to her. In such situations DNA test is the only method to establish the legitimacy of the child and solve the dispute with respect the paternity of the child.

The “no access” criterion becomes meaningless and absurd in situations where the wife although has access to the husband also leads a promiscuous lifestyle and gets pregnant by an outsider. However, due to the presumption of law under Section 112 of the Indian Evidence Act, the innocent husband is cast with the responsibility of fatherhood, and the child is recognized as his legal child. In this case the innocent husband is heavily penalized simply because the “no access” criterion cannot be proved. In order to understand the situation with respect to the second primary issue, we have to see another important Supreme Court decision. In Dwarika Prasad Satpatty v. Bidyut Parva Dixit it was held that the refusal to paternity (DNA) test would bar a party from challenging the paternity of the child. This decision was followed in K. Salvaraj v. P. J ayakumari and it was also stated that an adverse inference can be drawn if a party refuses to undergo a DNA test. This seems to be a preferable interpretation and strikes a balance where although the court does not have the power to direct the giving of sample, it may draw an adverse inference if it is not given.

16. Section 112 of the Indian Evidence Act states that birth of a child within 280 days of dissolution of a marriage is a conclusive proof of legitimacy.
Conclusion

The justice administration system needs to assimilate the scientific advancements of genetic profiling and develop procedural techniques for harnessing the emerging juridical challenges. The significant paradigms of DNA fingerprints cannot be left alone to the courts to adjudicate with temporary tailor made solutions.

Therefore in matters of disputed paternity, the legitimacy or illegitimacy of the child cannot be determined solely by Section 112 of the Indian Evidence Act, 1872. DNA technology can conclusively establish the truth in such disputes and therefore should be resorted to without any hesitation. It is to be borne in mind that when Section 112 was being drafted even the discovery of DNA was not contemplated and therefore this section should be amended. An ideal solution could be to provide another outlet apart from the proof of non-access to be provided in the form of evidence of DNA test to rebut the conclusive proof provision in Section 112.20

The use of DNA evidence in crime cases is of paramount consideration, because it is a reliable investigative tool for exempting persons wrongly suspected of taking part in a crime.21 Not only that, DNA can also furnish convincing evidence of participation and the result of the analysis may induce the accused to plead guilty. In criminal investigation, the presence of DNA evidence is deemed to have an effect on the confession made by suspects.22

Evolution of DNA technology is having a major impact on laws as they have or are being amended in many legislations worldwide. This affects the way investigations are done and how to handle unsolved cases. Its innovation is of supreme consideration because laws are being enacted, amended, and repelled even altered to maximize the benefits

20. In Sadashiv Mallikarjun Kheradkar v. Nandini Sadashiv Khedarkar (1995) Cri.LJ 4090 at p. 4093 [Bom], the Court lamented the absurdity of having only proof of non-access when DNA evidence decide the matter in a more scientific manner.
of the ability of DNA technology to identify, convict and exempt innocent falsely convicted. Enactment of law regarding the collection, use, storage, admissibility and creation of DNA database for DNA evidence reflects the impact of DNA technology on criminal justice system. The legal provisions of limitation limit the time within which criminal charges can be filed for a particular offence.

Those provisions are deep-rooted in laws prohibiting the person from utilizing the evidence that has turned out to be outdated over a period of time. For instance, an eye-witness may forget the detail of what he has seen due to the lapse of long time, his memories vanish as time passes. However, DNA evidence is a powerful and reliable tool which can establish the truth with accuracy regardless decades after the crime was committed.

The irrefutable achievement of DNA technology is that it has resulted in general tendency towards the creation of DNA database in other countries which have established national DNA database system. Even though DNA evidence is not the only tool that helps to solve unsolved cases, evolution of DNA technology and the achievement of DNA database have instigated the law enforcement agencies to reassess the so called “cold cases”. Nowadays, investigating officers have realized the ability of DNA evidence to easily identify a suspect in ways previously seen as impracticable or unrealistic. The visible evidence to the naked eye can be used in settlement of some crimes, but because the perpetrators are using the umbrella of technology to commit crime, DNA technology is playing remarkable role to solve that crime.

Chapter 1: Introduction relating to the Patent Cooperation Treaty

The PCT was set up in order to rationalise patent applications for member states. Its aim is to centralise, simplify and render more economical patent applications for a series of countries. In essence, it is a procedural treaty and does not concern itself with the actual grant of patents, which is left to national patent offices. It is a worldwide treaty to which over 100 countries have acceded, including almost all the important industrial countries. This is however, considerably fewer than those who are members of the Paris convention. The treaty was signed on June 19, 1970 and came into force on June 1, 1978 and countries have been becoming members up to the present day. All European countries have ratified the convention. Countries that have acceded to it are deemed to belong to the international Patent Cooperation Union.

In summary, the PCT permits an applicant to file an “international application” at their local national patent office, called the “receiving office”. All countries who are contracting are automatically designated. Upon receipt of the application, the receiving office will check that the application complies with certain formalities. It will then remit copies to the international bureau of WIPO in Geneva, which acts as the administrative office for the PCT. It also sends copies of the application to a patent office which is designated as an international Searching Authority. The office will make a search of the prior art and send the International Search Report to the International Bureau at WIPO and also to the applicant. The ISA will also send a preliminary report as to the patentability of the invention.

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1Article: http://www.wipo.int/pct/en/treaty/about.html. (Last Accessed 12-02-2016)
The applicant is given an opportunity, if, necessary, to amend the patent application. The international patent application and the ISR are then sent to the patent offices of the designated states and the international application enters the national phase. This ends international phase under PCT.

At this point, the applicant will have fair idea of the patentability of the invention and the countries for which they wish to obtain patent protection. Where that application claims the priority over the earlier application, before entering the national procedure by paying a national fee and providing a copy of the international application and filing a translation of the application into the official language of the patent offices of the countries for which the applicant requires protection.²

The PCT procedure thus gives great advantages to the applicant than parallel applications in many national patent offices. Not only is it more cost-effective, but the applicant has a considerable period of time to consider the desirability of obtaining protection in foreign countries, having seen a reputable search report and a preliminary examination report as to the patentability of the claimed invention.³

The PCT complements the Paris convention, which is concerned with rationalising the substantive patent laws of countries. However, it specifically states that no provision of the treaty is to be interpreted as diminishing the rights of any national or resident of a country which is party to the Paris convention.⁴

The PCT also complements the EPC. It permits the designation of states who have ratified the EPC via the obtaining of a basket of national patents via the EPC route. The end result is the same to the applicant designating the member states individually. However the

²Website: http://www.wipo.int amendments in 1979, 1984 and 2001
³PCT Art.1(2)
⁴PCT Art.9.
application for those countries is prosecuted before the EPO and not in the national patent offices of the individual countries.\(^5\)

It is necessary to seek patent protection in each country because individual countries issue patents. The international process is just a convenient, uniform process that allows applicants to start down the road toward patent protection in any number of jurisdictions without the need to make a unique application filing in multiple countries.\(^6\)

**Chapter 2: Procedure for filing international patent application.**

The main advantages of the PCT procedure, also referred to as the international procedure, are the possibility to maximally delay: (a) the national or regional procedures; (b) the respective fees and translation costs; and, (c) the unified filing procedure. From a practical standpoint, this could allow new ventures more time to locate strategic partnerships, funding, and markets, before their technology becomes public.\(^7\)

A PCT application (also called "international patent application") has two phases. The first phase is the international phase in which patent protection is pending under a single patent application filed with the patent office of a contracting state of the PCT. The second phase is the national and regional phase which follows the international phase in which rights are continued by filing necessary documents with the patent offices of separate contracting states of the PCT. A PCT application, as such, is not an actual request that a patent be granted, and it is not converted into one unless and until it enters the "national phase".\(^8\)

The first step of the procedure consists in filing an international (patent) application with a competent patent office, called a Receiving

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\(^5\) PCT Art. (19)1. Contracting states can make arrangements that nationals
\(^6\) PCT Art. 10.
\(^7\) Article: world intellectual property organisation review regarding filing procedure of international patent application pg. 224.
\(^8\) An example of the prescribed form can be seen in the PCTs application guide.
Office (RO). This application is called an international application or simply a PCT application since it does not result in an international patent nor in a PCT patent (neither of which exists). The PCT application needs to be filed in one language only, although translations may still be required for international search and international publication, depending on the language of filing and the International Searching Authority to be used. At least one applicant (either a physical or legal person) must be a national or resident of a contracting state to the PCT; otherwise, no PCT filing date is accorded.\(^9\)

If a PCT filing date is erroneously accorded, the Receiving Office may, within four months from the filing date, declare that the application should be considered withdrawn. In most member states, the applicant or at least one of the applicants of the application is required to be a national or resident of the state of the receiving office where the application is filed.\(^10\) Applicants from any contracting state may file a PCT application at the International Bureau in Geneva, subject to national security provisions.\(^11\)

Upon filing of the PCT application, all contracting states are automatically designated. Subject to reservations made by any contracting state, a PCT application fulfilling the requirements of the treaty and accorded a PCT filing date has the effect of a regular national application in each designated state as of the PCT filing date,\(^12\) which date is considered to be the actual filing date in each designated State. However, in some countries, the prior effect of a PCT application filed outside such countries may be different from the prior effect of a domestic application.\(^13\)

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\(^9\) Art. 31(2)(a); PCT r. 54.
\(^10\) Arts 3(2), 4 and 11. Detailed rules as to the requirements of the application are given in PCT r. 3 and r. 4.
\(^11\) PCT r. 4.15.
\(^12\) PCT r. 4.14bis.
\(^13\) See http://www.wipo.int/pct/guide/en/
Chapter 3: Procedure for granting patent invention (including international search and international preliminary examination).

The objective of the international search is to discover the prior art which is relevant for the purpose of determining whether, and if so to what extent, the claimed invention to which the international application relates is or is not novel and does or does not involve an inventive step. In some cases, the International Searching Authority is not required to establish a search for some or all of the claimed subject matter, either because the scope of the claims is too uncertain or the application covers excluded subject invention is claimed.14

At the same time as establishing the international search report, the search examiner establishes a written opinion as to whether the claimed invention appears to be novel, involve an inventive step, be industrially applicable and meet with the other requirements of the Treaty which are checked by the International Searching Authority.15

It is essential that the search and the written opinion are carried out according to the same criteria which are used during the international preliminary examination. The search may also report on some material which may not strictly be relevant to novelty and inventive step.16

The ISA is under a duty to look a certain prior art. This consists of national and regional documents. The ISR must contain the citations of documents considered to be relevant and list the fields searched. Copies of the cited documents may be sent to the applicant or the receiving office by request upon payment of the costs of the ISA in preparing and mailing the documents.17

If the applicant demands that its application be internationally examined by an IPEA, then the written opinion is treated as a report by

14 PCT r. 57.
15 Art. 33(6)
16 See sec. 103 of the US statute
17 PCT r. 65.
the IPEA and the applicant is invited to submit a response to the IPEA.¹⁸

Then for qualifying applications and where elected, an examining authority, called the international preliminary examination authority (IPEA), will compile a report on the patentability of the international application called the international preliminary examination report. It is important to note that IPER is not binding on the elected states and its essentially preliminary in nature. This is different report from the non-binding written prepared by the ISA for applications filed after January 1, 2004, but, the latter will form the foundation of the former.

The IPEA will examine the international application according to internationally accepted criteria for patentability and it thus gives the applicant an early opportunity to evaluate the chances of obtaining the patent protection in elected. The objective of the IPE is to formulate a preliminary and non-binding opinion on the question of whether the claimed invention appears to be novel, involve inventive steps and is industrially applicable. It is not determinate whether the invention is patentable according to national law. The IPER is confidential and is not made available to third parties. In accordance, applicants need not fear the publication of an adverse report. ¹⁹

The IPEA will start the IPE when it is in possession of both the demand and the ISR. Substantive examination will not, however, begin until any defects in the demand have been corrected and unpaid fees have been paid. If an indication has been made in the demand that amendments under art. 19 are to be taken into account, the IPEA will not start until receives a copy of the amendments, it will not start examination until receipt of those amendments, a notice from the applicant that they do not wish to make amendments or the expiry of 20 months from the priority date. However, the IPER must draw attention to such applications. The IPEA may consider a “mosaic” of

¹⁹ PCT r.65.
prior art, provided such a combination is obvious to a person skilled in the art.  

The IPEA will prepare an opinion as to whether each claim is novel, inventive and has industrial applicability. However, if a written opinion has been prepared by the ISA, then this will stand as the written opinion. The applicant is given opportunity to make written submissions and to amend the application if the IPEA forms the opinion that the application is not novel, oblivious nor capable of industrial application or is otherwise defective. The IPEA will also rule on the allow ability of amendments fluid and similar to examinations before national patent offices. Thus, amendments and arguments submitted will be taken into account if they are submitted in sufficient time.  

AN IPER must be prepared within 28 months from the priority date. Thus, in normal circumstances, the applicant will receive the report two months before national processing at the elected offices starts. The report states the whether the criteria of novelty, inventive step, and industrial applicability have been fulfilled. Furthermore, it will cite relevant documents. Copies of the report are sent to the international bureau and the applicant. The IPER to each elected office and, where necessary, if the IPER is not in an official language of the elected office, the latter may request that it be translated to English.

Chapter 4: Procedure for publication of patent and dispute settlement provisions.

WIPO must publish the application, in the form of a pamphlet, promptly after the expiry of 18 months from the priority date of the application along with the search report and amendments. If the search report or amendments of claims are not ready, this does not prevent the application being published. However, these will be published later. The position regarding the language of publication and the need for translation has already been discussed. The bibliographic data, title and

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20 See PCTS applicants guide “international phase” vol.1, paras 333 et seq.
21 PCTs applicants guide, “international phase”, vol.1 para.398.
abstract are published in the PCT gazette in electronic form in English and French.

The application will not be published if it is demand withdrawn or notice of its withdrawal is received by the international bureau before technical preparations for publication have been completed. Generally, technical preparations are completed by the 15th day before the date of publication. The notice of withdrawal may state that withdrawal is to be effective only on condition that international publication can be avoided.22

The effect of publication is that provisional protection for the applicant in a designated state may arise as with the national publication of unexamined national applications. However, contracting states can make such provisional protection run from the time that a translation of the international application into the language in which national applications of that contracting state are published has been made available to the public or transmitted to the potential infringer.23

The PCT Gazette is a weekly bilingual publication of the World Intellectual Property Organization (WIPO). It is published by the International Bureau of WIPO pursuant to Article 55 of the Patent Cooperation Treaty (PCT), which provides a system for filing international (patent) applications. The Gazette contains among other things bibliographic data of international applications when published and notices concerning changes to fees, legal provisions and Office procedures relating to the PCT. The first issue of the PCT Gazette (No 01/1978) was published on May 11, 1978. The PCT Gazette was available both in paper and electronic form (at least during a period) before April 1, 2006. Since April 1, 2006, the Gazette is no longer made available in paper form.24

22 Article 55(4) PCT
24 Rule 86.1(b) PCT
The PCT Newsletter is a monthly publication of the World Intellectual Property Organization (WIPO). It contains "up-to-date news about the Patent Cooperation Treaty (PCT)», which provides a system for filing international (patent) applications. The PCT Newsletter is published in English only. Important changes to the PCT are mentioned and explained in the PCT Newsletter.  

The first issue of the PCT Newsletter was published in March 1994 on a subscription basis. Since January 1997, the issues are published online, free of charge. Since January 2008, the PCT Newsletter is available only online, and no longer as a paper publication.

Dispute settlement provision in PCT: Article 59 of the PCT specifically dealing with dispute settlement mechanism in treaty. It is defined as:

Subject to Article 64(5), any dispute between two or more Contracting States concerning the interpretation or application of this Treaty or the Regulations, not settled by negotiation, may, by any one of the States concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the States concerned agree on some other method of settlement. The Contracting State bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other Contracting States.

Chapter 5: Protection of patent procedure and the studying role of WIPO in PCT.

Obtaining international patent protection for an invention can present a significant financial commitment for an early-stage company, entrepreneurial venture or Not-for-profit organization with a limited

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budget for intellectual property management. This chapter examines the use of patent application filings under the Patent Cooperation Treaty (PCT) to delay, consolidates, or minimizes the costs of patenting overseas.\textsuperscript{28}

The Patent Cooperation Treaty (PCT) is an important IP protection tool that can be used to confront the financial challenges associated with international patent protection. By facilitating the filing in any number of PCT member countries of parallel patent applications, a PCT patent application offers a valuable means of managing, delaying, or consolidating the costs of international patent protection for a given invention. The PCT can buy time to strategically evaluate the overall potential value of an invention, that is, provide time within which to make an informed decision as to how to best proceed.\textsuperscript{29}

The challenge of managing the costs of protecting IP so that the IP becomes a commercial asset—and not a financial liability—is one that is faced universally by technology managers. An enterprise that has developed (or acquired) IP must decide at the outset whether that IP is worth protecting with a patent. The costs and benefits of patent protection must be carefully analyzed. Although a discussion of such a cost-benefit analysis is beyond the scope of this chapter, it is worth noting here that a granted patent generally “protects” the subject IP only to the extent that it confers to the patent owner the right to enforce the patent, that is, to exclude others from making the invention, using it, importing it, and so forth. In conducting a cost-benefit analysis, an enterprise may decide that the total expected value of a particular piece of IP simply does not merit the expense of obtaining a patent and enforcing the rights the patent confers.


There are three basic approaches to procuring international patent protection on an invention. The first approach, and the most expensive, is to file (usually on the same day) separate patent applications in the national patent office of each country or region in which protection is sought. The drawback of this approach is that legal and filing fees for each country begin to accrue as soon as the application is filed.\(^\text{30}\)

The second approach for filing internationally is to file a patent application in accordance with the Paris Convention for the Protection of Industrial Property.\(^\text{31}\) Taking this route, the applicant files a patent application in a single Paris Convention member country (usually required to be the country of residence of at least one of the inventors), which establishes a first or priority filing date for the application. The applicant can then delay filing in other Paris Convention countries for up to 12 months after the priority filing date. Member countries of the Paris Convention agree to recognize the priority date of a patent application filed in one-member country and to give the benefit of that priority date to corresponding applications in all member countries. This approach delays the costs associated with international patent procurement for one year. Procurement costs initially accrue in the country of first filing, and then, up to one year later, the costs associated with filing applications in the other Paris Convention countries begin to accrue.\(^\text{32}\)

The third and least-expensive approach, which is the primary focus of this chapter, is to file a single “international” application under the auspices of the PCT. Of the three approaches, filing a PCT patent application is, financially and strategically, the most advantageous for managing, delaying, or consolidating the

\(^{30}\) Articles of the Paris Convention for the Protection of Industrial Property can be viewed online at www.wipo.int/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf.

\(^{31}\) List of Paris Convention contracting parties (currently 170) can be viewed online at www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2.

costs of international patent procurement. Filing a PCT patent application allows the applicant to delay, for up to 18 months after the filing the application or in most cases, for up to 30 months after the filing of the first (priority) application, strategic decisions about which countries to pursue patent protection in. The delay provides a significant advantage, since it allows the applicant more time to evaluate the commercial strength and viability of the invention prior to filing national-phase patent applications in the countries in which patent protection is sought.\(^{33}\)

**WIPO role in PCT:** WIPO, an international organization based in Geneva, Switzerland, is the administrative body that oversees the filing of international applications under the PCT. The International Bureau of WIPO administers the international phase of the PCT application process, prior to entrance into the national phase of countries in which patent protection is sought. WIPO receives and stores PCT applications, along with their associated files of patent search and examination documents and correspondence.\(^{34}\) WIPO examines each application for its adherence to filing formalities (such as the required format for the patent application, accompanying administrative filing papers, and fees paid). Based on this initial examination, the applicant may be required to correct any formal defects to bring the application into conformity with the PCT format accepted by patent offices in the member states. The carrying out of these procedures reduces the costs of patent procurement at an early stage. Formalities defects in the PCT application that are identified during the international phase can be rectified before the application reaches the national patent offices and enters the national phase of the patent examination and procurement process. Thus, separate formalities rejections by national patent offices in which patent protection is

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sought can be avoided. WIPO is responsible for publishing PCT applications and accompanying information about them, which can be accessed worldwide via the Internet at the WIPO Web site. WIPO oversees translation of portions of the PCT application and associated documents into English or French, also available on the Internet, and can provide the national patent offices of contracting states with application documents.\textsuperscript{35}

**Suggestions and conclusions regarding Patent Cooperation Treaty:**

The Patent Cooperation Treaty having certain loopholes relating to the procedural aspects. So some amendments required for strengthening of treaty. The major conclusions are:

- consolidating patent prosecution costs: single-application format, language, and set of fees
- providing the applicant with preliminary feedback regarding patentability of the invention
- providing the applicant with the opportunity to present arguments for patentability, to amend claims, and to strengthen the application prior to filing with national patent offices
- enabling the applicant to delay filing the application in individual national patent offices for up to 30 months after the first (priority) filing date
- delaying prosecution costs of filing applications in multiple countries
- streamlining the process of filing applications in multiple countries.

**References:**

\textsuperscript{35} A listing of European Patent Organisation (EPO) member states can be found at www.european-patent-office.org/epo/members.htm.
This list of useful links has been compiled to facilitate the understanding of the international filing system.

- General PCT information and resources:
  http://www.wipo.int/pct/en/

- Glossary of PCT terms:
  http://www.wipo.int/pct/en/texts/glossary.html

- PCT seminar materials:
  http://www.wipo.int/pct/en/seminar/basic_1/index.html

- Protecting Your Invention Abroad:

- List of Contracting States:

- International Phase information:

- National Phase information:

- National Phase Entry for Canada:

- PCT forms page:
  http://www.wipo.int/pct/en/forms/index.htm

- PCT fees associated with International Phase:

- Filing an application:
  /eic/site/cipointernet-internetopic.nsf/eng/wr01355.html

- PCT Applicants Guide annexes:
  - Receiving Office:
  - ISA Chapter 1:
- IPEA Chapter II:

- National Phase:

- List of registered patent agents:
  /cipo/pa-br/agents.nsf/pagents-eng?readform
CORPORATE SOCIAL RESPONSIBILITY UNDER THE COMPANIES ACT, 2013 AND COMPANIES (CORPORATE SOCIAL RESPONSIBILITY POLICY) RULES, 2014

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Introduction

Corporate Social Responsibility commonly known as ‘CSR’ is not a new phenomenon and has gained wide importance in the light of liberalisation and globalisation. The world has become a ‘global village’ such that businesses are being carried out in all parts of the world. The primary aim of any business except one of service is profit/wealth maximisation. For this purpose, business enterprises employ resources from the society to meet its primary visions and goals. Yet in the long run, the business enterprises cannot survive but for its socially responsible activities that it returns with gratitude to the society. The need for Corporate Social Responsibility was heavily felt thereafter for its long-run existence in the market. However, there was no proper mechanism to govern, monitor and regulate the social responsibilities of a business. Some businesses flourished by grabbing and polluting the land, water, air, felling of forests and trees which has lead to the environmental degradation, loss in quality of livelihood and displacement of the local inhabitants. They also remained insensitive to labour problems and human right issues which ultimately left the interest-groups to indulge in protests and filing a number of Public Interest Litigations (PILs). Incidentally, Scams and Scandals

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3 M.C. Mehta v. Union of India (Taj Trapezium Case) [(1997) 2 SCC 353]
4 (1986) 4 SCC 753 ; (2000) 10 SCC 664
were also on the rise affecting the larger sections of society. As the working of the companies has impacted on environment, consumer, employees, communities, stakeholders and all other members of the public sphere, it is the moral responsibility of the companies to fulfil their needs and interests. Companies own responsibilities towards society to recuperate and also to compensate the direct and indirect loss that is caused to the society by organising a three pillar framework ensuring protection, respect and remedy to the victims of business.

The Bhopal Gas Tragedy issue first brought the insensitiveness to limelight where in the year 1984 a chemical, ‘Methyl Iso-Cynate’ escaped from the Union Carbide Plant in Bhopal. Approximately half a million people died and a large number were affected by various forms of disability due to the emission of gas and heavy compensation was awarded in the case. Even after more than three decades since the disaster happened its ill effects are still felt. There was no comprehensive policy or legal regulation until an effort was made by the Ministry of Corporate Affairs and the legislature in amending the Companies Act in 2013 and inserting provisions relating to Corporate Social Responsibility of Business. This paper is an attempt to highlight the provisions on Corporate Social Responsibility under the Companies Act, 2013; Setting up of Corporate Social Responsibility Committees and the measures under the Corporate Social Responsibility Rules, 2014.

Definition of the term ‘Corporate Social Responsibility’

The term ‘Corporate Social Responsibility’ has been defined in the Companies (Corporate Social Responsibility Policy) Rules, 2014.

SATYAM COMPUTER SERVICES SCANDAL happened in 2009 where the then Chairman Ramalinga Raju confessed to have falsified the accounts of the Company.


8 Union Carbide Corporation v. Union of India [1989 SCC (2) 540]
Rule 2(1) (c) gives the definition for the term where the companies bound to undertake CSR activities has to set up their own CSR Committees and Board to recommend and formulate the Projects or any programs in the field specified in Schedule VII to the Act. Such activities as enumerated under the Schedule must be specified in the Company's CSR policies.

This enables the Companies to setup a self regulatory mechanism to channelize the funds for the benefits of the society.

Section 135 of the Companies Act, 2013

The Section 135 of the Companies Act, 2013 deals with the ‘Corporate Social Responsibility’ of business/ company and the section was enforced with effect from 01-04-2014. It widely defines the companies which had to assume the socially responsible role and undertake CSR activities within such spheres mentioned in the Schedule VII to the Act. The sub-section (1) of the Section provides for the constitution of a Corporate Social Responsibility Committee and the Board shall consist of three or more directors, out of which at least one director shall be an independent director. The CSR Committee is required to be constituted compulsorily by the following Companies-

a) Every Company which is having a net worth of Rupees Five Hundred Crore or more; or

b) Every Company having a turnover of Rupees One Thousand Crore or more; or

9 "Corporate Social Responsibility (CSR)" means and includes but not limited to:-(i) Projects or programs relating to activities specified in Schedule VII to the Act; or (ii) Projects or programs relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act.’

10 Every Company includes the holding or subsidiary company and a foreign company as defined under Section 2(42) of the Act, 2013 having its branch office or project office in India.
c) Every Company which earns a net profit of Rupees Five Crore or more during any financial year.

Such company has the duty to disclose the composition of the CSR Committee under sub-section (3) of section 134 in the Company Board’s Report.11

The various duties of the Corporate Social Responsibility Committee has been imposed under sub-section (3) of the section which are as follows-

a) The Committee shall formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII.

The Schedule VII of the Act, 2013 comprises of the activities in which the company can conduct the CSR activities.

b) Further, the Committee shall recommend the amount of expenditure on such activities mentioned in clause (a).

c) It is also the duty of the Committee to monitor the Corporate Social Responsibility of the company from time to time.

The Board of every such company referred to in sub-section (1) of the Section shall after taking into consideration the recommendations made by the CSR Committee, approve the policy for Corporate Social Responsibility in its report and as per Rule 9 of the Companies (Accounts) Rules, 2014 place the policy on the company’s website, if any, in such manner as may be prescribed. Further, it is also the duty of the Board to ensure that the activities that are included in the Corporate Social Responsibility Policy of the company are undertaken by the company12. In pursuance of the Corporate Social Responsibility Policy, the Board is also required to ensure that the company spends, in every financial year, at least two percent of the

11 Section 135(2)
12 Section 135(4)
average net profits\textsuperscript{13} of the company made during the three preceding financial years\textsuperscript{14}. However, the proviso provides that the company shall give preference to the local area and areas around it where it operates, for spending such amount allocated and earmarked for Corporate Social Responsibility activities. Further, if the Company fails to spend the amount earmarked for such activities, the reasons for not spending the amount shall be specified in the Board’s Report under clause (o) of the sub-section (3) of section 134.

**Companies (Corporate Social Responsibility Policy) Rules, 2014**

Exercising its powers conferred under Section 135 and sub sections (1) and (2) of section 469 of the Companies Act 2013, the Central Government made the rules regarding Corporate Social Responsibility (CSR). Apart from defining the term “Corporate Social Responsibility”, definitions have also been given for ‘CSR Committee’\textsuperscript{15} and ‘CSR Policy’\textsuperscript{16}.

Section 3 of these rules further discusses how every company (holding and subsidiary) having branch office in India which fulfils the criterion specified in 135 (1) shall comply with Section 135 of the Act. These rules shall apply to a foreign company provided that the net worth and turnover or net profit of a foreign company is calculated in accordance with provisions of clause (a) of sub-section (1) of section 381 and section 198 of the Act.

Further any company that stops falling under the category of Section 135(1) for three consecutive years shall not be required to –

(i) Constitute a CSR Committee and

\textsuperscript{13} Explanation to Section 135- “For the purposes of this Section “average net profit” shall be calculated in accordance with the provisions of Section 198.”
\textsuperscript{14} Section 135(5)
\textsuperscript{15} Rule 2(d) of Companies (Corporate Social Responsibility Policy) Rules, 2014
\textsuperscript{16} Rule 2(e) of Companies (Corporate Social Responsibility Policy) Rules, 2014
(ii) Comply with the provisions contained in sub-section (2) to (5) of the said section, till it starts fulfilling the criteria under Section 135 (1).

The CSR activities are undertaken by a company through a registered trust or a company established by the company or a holding or subsidiary or associate company under section 8 of the Act or otherwise. If the trust, society or company is not established by the company or its holding or subsidiary or associate company, then it should have an established track record of three years for undergoing similar programs. Also their monitoring and reporting mechanism is considered. Sometimes a Company can also collaborate with other companies for undertaking such projects and programs related to CSR. This is done in such a way that the CSR Committees of these companies can separately report in such projects. However the CSR activities that benefit the employees of the Company are not considered as CSR Activity.

CSR Committee\textsuperscript{17} shall be constituted by a company that has been mentioned in Rule 3. This Committee shall consist of a two directors, in case of a private company. In a foreign company the CSR Committee shall consist of at least two persons in which one person is specified under (1) (d) of Section 380 and another person shall be nominated by a foreign company. This Committee is set up to ensure a transparent monitoring mechanism for the CSR projects or programs or activities undertaken by a company.

CSR Policy\textsuperscript{18} of a given company is inclusive of;

(a) A list of CSR projects or programs, which a company plans to undertake falling within the purview of the Schedule VII of the Act, specifying modalities of execution of such project or programs and implementation schedules for the same; and

(b) Monitoring process of such projects or programs;

\textsuperscript{17} Rule 5 of Companies (Corporate Social Responsibility Policy) Rules, 2014
\textsuperscript{18} Rule 6 of Companies (Corporate Social Responsibility Policy) Rules, 2014
These CSR activities of the company should not include the activities done in the course of normal activities of its business and the Board of Directors shall oversee and ensure the said programs under the Corporate Social Responsibility Policy come under the activities under Schedule VII of the Act. This CSR policy should indicate and specify that any surplus arising out of the CSR projects or programs or activities will not form part of the business profit of the company.

There is a certain amount of expenditure involved in these CSR Activities and these rules\textsuperscript{19} state that all and any expenditure incurred including contributing to the corpus for projects or programs relating to CSR activities which is approved or on recommendation by the Board. However it shall not include the expenditure on an item which is not in conformity or not in the line of activities which fall under the purview of Schedule VII of the Act.

These CSR activities shall be reported under the CSR reporting\textsuperscript{20}. The Board's report of the company relating to a financial year on or after April 1 2014 should include an annual report that shall contain particulars related to the CSR. In a foreign company, the balance sheet filed under sub clause (1) of sub-section (1) of section 381 contains the CSR report in the form of an annexure.

The website of the Company shall display its CSR activities\textsuperscript{21}. The Board of Directors will take into account the CSR Committee's recommendations and after approving the CSR Policy for the company and disclosing the contents of the policy in the report shall display on the company's website.

\textbf{Schedule VII}

Schedule VII of the Companies Act, 2013 provides the activities which may be included by the companies in their Corporate Social Responsibility Policies. Moreover, the Schedule VII is to be

\textsuperscript{19} Rule 7 of Companies (Corporate Social Responsibility Policy) Rules, 2014
\textsuperscript{20} Rule 8 of Companies (Corporate Social Responsibility Policy) Rules, 2014
\textsuperscript{21} Rule 9 of Companies (Corporate Social Responsibility Policy) Rules, 2014
interpreted liberally\textsuperscript{22} so as to capture the essence of the subjects enumerated in the Schedule. The activities that are covered under the Schedule are as follows-

(i) Activities relating to eradicating hunger, poverty, malnutrition; Promoting healthcare including preventive healthcare and sanitation, contribution to ‘Swach Bharat Kosh’ set up by the Central Government and making available safe drinking water.

(ii) Activities relating to promotion of education, special education and employment which enhances the vocational skills especially among the children, women, elderly and the differently able persons and promote the livelihood enhancement projects.

(iii) Activities relating to promotion of gender equality, women empowerment, setting up of homes and hostels for women and orphans; Setting up of old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by the socially and economically backward groups.

(iv) Activities relating to maintenance of ecological balance, ensuring environmental sustainability, protection of flora and fauna, animal welfare, agro-forestry, conservation of natural resources and maintenance of quality of air, water and soil including the contribution to the Clean Ganga Fund set up by the Central Government for rejuvenation of river Ganga.

(v) Activities relating to protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; Setting up public libraries and promotion and development of traditional arts and handicrafts.

\textsuperscript{22}Circular No. 21/2014, dated 18-06-2014.
(vi) Measures that are taken for the benefit of armed forces veterans, war widows and their dependants covered under the Schedule.

(vii) Training measures to promote rural sports, nationally recognised sports, Paralympics sports and Olympic sports are included.

(viii) Any contribution that is made to the Prime Minister’s National Relief Fund or any other fund set up by the Central Government for the purpose of socio-economic development and for the relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women.

(ix) Any contributions or funds provided to technology incubators located within the academic institutions which are approved by the Central Government.

(x) Any projects undertaken for the rural development.

(xi) By a notification made by the Central Government, vide No.GSR 568(E), dated 07-08-2014; any project undertaken for the Slum Area\(^{23}\) Development is also included in the list.

The matters provided in the Schedule are exhaustive and has covered many areas which are frequently amended by way of insertions, omissions or through circulars and notifications from the Government.

**CSR Activities and Tax Benefits\(^{24}\)**

According to Section 135 of the Companies Act, 2013 the companies are required to spend two percent of their average net profit

\(^{23}\) Explanation to item xi of the Schedule provides- For the purposes of this item, the term ‘slum area’ shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

\(^{24}\) http://www.mca.gov.in/Ministry/pdf/rajya_starred_ques_105_05052015.pdf (Last Visited 12-02-2016)
on Corporate Social Responsibility activities. It is also mandatory on the part of such companies to disclose the CSR activities and the expenditures on such activities in the Company’s annual report. Few of the activities which are covered under the Schedule VII of the Act such as rural development, contribution to Prime Minister’s Relief Fund, etc... may appear to qualify for tax exemption under the relevant provisions of the Income Tax Act, 1961 and the same may be claimed subject to fulfilment of the conditions under the provisions of the Act. In the Finance Budget Session 2014-2015, it has been clarified by the Honourable Finance Minister Mr Arun Jaitley that the expenses on CSR activities are not carried out in the regular course of the business and hence cannot be allowed as a deduction for computing the tax liability of the Company. However, expenses on certain activities have been considered for deductions. On the budget session it was declared that the contributions made other than by way of CSR to the ‘Swach Bharat Kosh’ both by the resident and non-resident and ‘Clean Ganga Project’ by the resident to enjoy 100 percent tax deduction under Section 80G of the Income Tax Act, 1961. Hence, in the present scenario there is no tax exemptions allowed for the CSR activities.

**Corporate Social Responsibility Initiatives after the Incorporation of CSR under Companies Act, 2013: A Statistical Study**

The annual CSR Summit in India held during October, 2015 saw a conglomeration of business corporate companies and the theme concentrated on the CSR activities carried out by them in India. A detailed statistical report was presented by the Indian Institute of Corporate Affairs and a non-governmental foundation called the NGOBOX. It reported the yearly developments of how and where the companies utilized their resources, made expenditures on CSR activities in India. The effects and impact of such CSR activities in the country were also recorded and reported in an abridged form. Also the

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25 Section 37(1) of the Income Tax Act, 1961
26 INDIA CSR OUTLOOK REPORT 2015- ABRIDGED VERSION BY, NGOBOX
recommended changes in CSR policy and implementation were discussed by the participant companies. So the India CSR Outlook after researching over 460 companies has observed that most companies that have not spend their proposed CSR have given no specific reason for having done that and have just committed to spend it in the following year. Another important fact is that a good number of companies have spent more than 50% of their CSR budget on the PM's relief fund. It is an interesting move given the level of corruption in this country. Also many companies have not provided details as required under Schedule VII.

An important challenge faced by most of the companies is that they had trouble in finding credible partners and were not even aware of how to identify good CSR partners. Some companies were still setting up internal process to bring implementation partners on board.

Maharashtra was the highest receiver of CSR with 1012 crores, followed by Rajasthan (552 crores) and Karnataka (421 crores). The states of Andhra Pradesh and Telangana showed the lowest numbers of 176 and 172 crores respectively.

Projects-wise statistics proved that Maharashtra, Karnataka, Tamil Nadu, Gujarat and Uttar Pradesh were the top states and the bottom ones were the North-Eastern states of Manipur, Meghalaya, Mizoram, Nagaland and Tripura.

Health care and Hygiene (32%) was the biggest sector in which CSR was spent, closely followed by Education and Skills (29%). Environment, Rural Development and Gender Equality were next in the break-up.

The Top Companies to spend CSR according to percentage were Kirloskar Brothers Ltd (324%) and Sobha Developers Ltd (241%). In terms of CSR money spent it was Reliance (761 crores) and Oil and Natural Gas Corporation (495 crores), followed by Infosys and Tata Consultation Services. Top Sectors to spend money on CSR were Pharmaceuticals and Finance (24%) each followed by Computers
(Hardware and Software) – 15%, and Banks (Pvt) – 12%. The Pharma and Finance companies constitute 19% of the companies in the CSR.

Few other important statistics were that 43% companies have their own foundations/ trusts to carry own CSR. Prescribed CSR budget has increased from 13.8% from 2014-2015 to 2015-2016. Three percent of companies have not spent any money on CSR at all.

**Successful CSR programs and projects in India**

The CSR success stories dates back to the time when Tatas and Birlas first set up Charitable Trusts to undertake measures to develop the society through their various society friendly initiatives. Many philanthropic activities were supported by the business magnets that pooled funds and donated for good causes. Such works were carried out by business tycoons even in the absence of a legal-regulatory mechanism. It is a welcome sign that India, as a nation become the forerunner in bringing an appropriate law in place to ensure mandatory involvements of specific Companies in CSR activities to benefit a larger scale of the society. CSR reflects the concept of ‘Shared value’ as propounded by Porter and Kramer\(^ {27}\), whereby the competitiveness of a company is symbiotically entwined with the socio-economic welfare of communities.

**ITC Limited ‘E-Choupal’ initiative\(^ {28}\)** which is a virtual village gathering place for effective supply chain management and the farmers growing wide range of crops can easily sell their produce, bargain at low risk of loss and unshackle the challenges by the intermediaries. The farmers through the virtual system could eliminate wasteful intermediation and multiple handling of produce and returns.

The Aditya Birla Centre for Community Initiatives and Rural development\(^ {29}\) has conducted many successful projects under its CSR

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\(^{28}\) http://www.itcportal.com/businesses/agri-business/e-choupal.aspx (Last Visited 12-02-2016)

\(^{29}\) http://www.adityabirla.com/CSR/overview (Last Visited 12-02-2016)
policies on behalf of the group and the group spends in excess of Rs 250 crore annually in building sustainable villages focusing on healthcare, education, sustainable livelihood, infrastructure and espousing social causes. The group has been awarded and recognised for its CSR initiatives.

Oil and Natural Gas Corporation (ONGC) offers community-based health care services in rural areas by setting up thirty and odd Mobile Medicare Units (MMUs). The ONGC-Eastern Swamp Deer Conservation Project\(^{30}\) is committed to protect the rare species of Eastern Swamp Deer at the Kaziranga National Park in Assam.

The list of CSR activities in India is not exhaustive but several efforts are being made by the companies to contribute to the welfare of the society.

**Recommendations for effective implementation of CSR policies**

India being the forerunner in emphasising a law on the Corporate Social Responsibility of the company yet the strict adherence to the law is the need of the hour. Many success stories of CSR exist in India yet the legal provision should focus more on encouraging such activities. Big Corporate Companies and Multinational Corporations should give their utmost co-operation in practising the guidelines laid by the law in force. A law should not remain a mere paper enactment but should achieve its purpose in the long run. This paper on highlighting the legal provisions also would suggest recommendations for effective implementation of the same.

Effective partnership and tie ups with NGOs, Interested Groups and Government bodies can help companies initiate CSR activities in their local areas. Companies which are already indulged in CSR activities can expand their scope of operation and bring into light the problems faced by the society. Use of eco-friendly products, installation of solar energy, bio-waste management projects can emphasise

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sustainable business models for the society. Social Audit\(^{31}\) of CSR activities of companies can help to measure up the social responsibility of a business and it should be conducted as a part of company’s internal and external audit. On a legal perspective, according to Rule 9 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, the companies which are qualified to compulsorily undertake CSR policies must submit CSR Annual Reports. The strict scrutiny of such reports by some authorised agency or authority can help compliance to the rule. Under the Ministry of Corporate Affairs, a High-level Committee was set up to efficiently enforce the law and it was observed by the Standing Committee that annual statutory disclosures on CSR required to be made by the companies under the Act would be a sufficient check on non-compliance.\(^{32}\) Though tax benefits on all CSR areas could not be claimed, yet certain projects can be supported with limited tax exemptions or benefits for the first few years of the project. Conducting of awareness programs on CSR and its implications under the law by Government agencies or Business managements can help guiding a number of blooming corporate companies in channelizing their funds for CSR activities.

**Conclusion**

The provisions relating to Corporate Social Responsibility and the supplementary policy Rules encourage the corporate sector to indulge in CSR activities. The burden of contributing to the society must be mutually shared by all stake holders including local government bodies and also through public-private partnerships. However, for better implementation and active participation from companies, they may be allowed more freedom of choice of activities which has not been covered under the Schedule to achieve the desired outcome. Social business projects should also be encouraged as a part of

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CSR which helps the companies not only do business but also assume a wide socially responsibility.
CRIMINALISATION OF MARITAL RAPE IN INDIA

SUHAAS ARORA*

Introduction

“Any serious shift towards more sustainable societies has to include gender equality”

Helen Clark

Violence against women is a manifestation of historic power play struggles between men and women, which has prompted control over, and oppression of women by men which has hindered the growth and advancement of women. Such viciousness against women is one of the critical social components by which women are constrained into a subordinate position in comparison to men.1

India has a population of over 1.2 billion and has the distinction of being the seventh largest country in the world. The country blends together various cultures, customs, languages, religions, usages and much more. The number of criminal offences being committed in India is rising at a disturbing rate. Crime index in India is 46.822 as per the Crime Index for 2015 Mid-year and according to a report by National Crime Records Bureau (NCRB), a crime against women is recorded every 1.7 minutes in India. Every 16 minutes a rape case is recorded in this country and every 4.4 minutes a girl is subjected to domestic violence.3 According to the UN Population Fund, more than two-thirds of married women in India, aged 15 to 49, have been beaten, or forced to provide sex. In 2011, the International Men and Gender Equality

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Survey revealed that one in five has forced their wives or partner to have sex.4

It is believed that the way a country treats and respects its women and the position that it gives to them goes a long way in estimating the worth of the country. India has failed to accord the women of the nation the status and position they deserve in society and the current scenario leaves a lot to be desired. The attitude towards women has always been one of inferiority which has led to the nation being developed on male chauvinistic ideologies. There has been a dearth of opportunities provided to women to showcase that they deserve to stand on an equal pedestal along with men. Furthermore, the women of India are subjected to criminal atrocities such as Rape, Domestic Violence, sexual harassment, trafficking and forced prostitution. This just constitutes a glimpse of a never ending list of atrocities against women.

Marriage, also called matrimony or wedlock, is a socially and legally recognized union between spouses that establishes rights and obligations between them, their children, and their in-laws.5 The ancient Hindu scriptures state that, without the participation of his wife, no religious rite can be performed to perfection by a man. It is considered quintessential that a wife participates in any religious rite. ‘Ardhangani’ thus is an apt term for wives. They are to be placed at an equal position with men and are to demand as much importance.6

However, in light of recent times it can be seen that the position of women has been regressing. The idea of the “sacrosanct” institution of marriage portrayed in India is contrary and far from women’s perception of reality. Hidden under the iron veil of marriage lies the

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ugly truth of crimes like marital rape, domestic violence etc. The lack of legal recognition of marital rape as a crime in India makes matters worse as there is no penalization for the same. Through this research paper, the researcher make an attempt to denounce the discrimination faced by women with regard to marital rape and the shortcomings of the Indian Judicial System by not conceding marital rape as an offence. The researcher further suggests certain legal reforms essential to achieve the desired objectives.

Interpretation of Marital Rape

Marital rape alludes to the sexual intercourse between a legally wedded husband and wife, where the wife has not given consent for the said intercourse. Wedlock, as discussed earlier, is a bond that is impenetrable and one where the man and woman vow to live together in happiness as well as in pain by greeting the flaws of each other. Marriage also allows the husband and wife to lawfully consummate their marriage. Once the marriage has taken place, it is deemed necessary to consummate the same. Marriage is a stable relationship in which a man and a woman are socially permitted to have children implying the right to have sexual relations with one another.\(^7\)

However, there is a distinction to be drawn whereby being a part of the wedlock does not give rights to the man to forcefully have sex with his wife. The right to sexual intercourse cannot be forced on the wife and is not to be considered an obligation for the wife. The wife must give valid consent for the same and also have the liberty to refuse sexual intercourse. Even today the law system in India does not recognize marital rape as a crime. It is a highly sensitive issue on which no conclusion has been drawn.

To understand the hurdles of marital rape, it is imperative to first understand the difference between Rape and Marital Rape as both the terms have vastly different meanings and cannot be used interchangeably. The dictionary meaning of word rape is “the ravishing

or violation of a woman.\textsuperscript{8} A brief summary of the definition of Rape as defined and accepted by FBI is—“Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”

According to Morton Hunt, “The typical marital rapist is a man who still believes that husbands are supposed to “rule” their wives. This extends, he feels, to sexual matters: when he wants her, she should be glad, or at least willing; if she isn’t, he has the right to force her. But in forcing her he gains far more than a few minutes of sexual pleasure. He humbles her and reasserts, in the most emotionally powerful way possible, that he is the ruler and she is the subject.”\textsuperscript{9}

According to the Indian Penal Code, 1860, the definition of Rape under section 375, states that sexual intercourse with a woman would be constituted as rape if it is against her will or without her consent. Similarly, trying to obtain the consent of a woman through coercion or apprehension of grievous hurt or death also comes under the ambit of rape. If a man tries to have sexual intercourse with a woman by fraudulently making the woman believe that he is her husband or if a man has sexual intercourse with a woman who is unable to give consent due to unsoundness would also constitute rape. Sexual intercourse with a girl who is under sixteen years of age would also be called as rape even if the girl consented for such intercourse.\textsuperscript{10} The sentiments echoed by Section 375, the provision of rape in the Indian Penal Code (IPC), is very archaic, mentioning as its exception clause—“Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape.” This clearly shows a bias and preference of the rights of the husband over his wife and the wife’s rights to herself with regards to Article 21 of The Constitution of India. The exception fails to acknowledge the possibility of a husband committing the heinous act of

\textsuperscript{8} Definition of rape, available at: https://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions, (Visited on February 13, 2016)
\textsuperscript{9} Morton Hunt, “Legal Rape,” Family Circle, p. 38.
\textsuperscript{10} Section 375, Indian Penal Code, 1860
rape against his wife, provided that she is above 15 years of age. Thus, the Indian Penal Code turns a blind eye to an offence as barbaric as marital rape by not having a provision for it.

Article 14 of The Constitution of India provides equality before law for women or in other words, states that one and all are equal in the eyes of law.\(^{11}\) Article 15(i) mandates the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.\(^{12}\) However, with regards to the issue of marital rape, it is clearly visible that women are being discriminated on the basis of sex. The law has failed to provide equal treatment to a married woman or wife and the husband’s rights are put on a higher pedestal as compared to the wife. Article 21 of the Constitution of India provides right to live with dignity. The concept of marital rape clearly breaches the right of a married woman to live with dignity. Thus, it can be said that Section 375 of the Indian Penal Code is in clear violation of Article 21 of The Constitution of India as it takes away the right of a married woman to live with dignity.\(^{13}\)

**Why is Marital Rape Not Recognised as A Crime in India**

At present, there are many States that have changed or amended their laws in order to enact marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. Some of these States are Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Turkey criminalized marital rape in 2005 and Mauritius and Thailand followed suit in 2007. The criminalization of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights. In 2006,

\(^{11}\) Section 14, The Constitution of India, 1950
\(^{12}\) Section 15, The Constitution of India, 1950
\(^{13}\) Section 21, The Constitution of India, 1950
it was estimated that marital rape is an offence punished under the criminal law in at least 100 countries and India is not one of them. Even though marital rape is prevalent in India, it is hidden behind the sacrosanct curtains of marriage.\textsuperscript{14}

In India, the Hindu religion and conjugal life gives rights to a husband to have sex with his wife. However, Hinduism and its literature lay emphasis on purity, cleanliness and behavior of good faith in conjugal life. It cannot be said or assumed that religion and traditions have a role in exempting the heinous act of rape on a wife. Sexual intercourse in conjugal life is a normal course of behavior, which must be based on consent. No religion may ever take it as lawful because the aim of a good religion is not to hate or cause loss to anyone. The Law Commission of India in its 172nd Report on ‘Review of Rape Laws’ as well the National Commission for Women have recommended for stringent punishment for the offence of rape.\textsuperscript{15} The said report, however, proposed that sexual intercourse by a man with his wife not being under the age of majority would not amount sexual assault.\textsuperscript{16} Thus, the commission was not in favor of deletion of exception to section 375. The Protection of Women from Domestic Violence Act, 2005 has only created a civil remedy for marital rape, without criminalizing the same.\textsuperscript{17} The Verma committee, a three-member panel appointed to strengthen India’s sexual-assault laws in the wake of a brutal gang rape in 2012, suggested criminalizing the act of marital rape.\textsuperscript{18} The Committee was conscious of the

\textsuperscript{14} Dr. (Mr.) Bhavish Gupta , Marital Rape , available at http://law.galgotiasuniversity.edu.in/pdf/issue2.pdf (Visited on February 13,2016)
\textsuperscript{16} Law Commission of India, 172\textsuperscript{nd} Report on Review of Rape Laws , available at http://www.lawcommissionofindia.nic.in/rapelaws.htm#chapter3 (Visited on February 14,2016)
\textsuperscript{17} Pallavi Arora, Proposals to Reform the Law pertaining to Sexual Offences in India, available at http://jils.ac.in/wp-content/uploads/2012/11/pallavi-arora1.pdf (Visited on February 17,2016)
recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in February 2007. The CEDAW Committee had recommended that the country should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape…..”.  

The Verma committee report pointed out a 2010 study suggesting that 18.8 percent of women are raped by their partners on one or more occasion. Rate of reporting and conviction also remain low; aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.

According to the committee, it is imperative that the IPC should differentiate between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists in relation to unconsented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.

The then government, led by the Congress party, had rejected this proposal. A panel of lawmakers who opposed the move at the time argued it had “the potential of destroying the institution of marriage, if marital rape is brought under the law, the entire family system will be under great stress.” The government eventually passed a new sexual-assault law, which did not criminalize marital rape in 2013. The recommendation of Justice Verma Committee regarding deleting exception of marital rape was not included in Criminal Law Amendment Bill, 2013 passed by the Lok Sabha on 19 March 2013 and by the Rajya Sabha on 21 March 2013.

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19 ibid
20 ibid
21 ibid
The government today says that the reason for conjugal assault in India is neediness, religious convictions, social traditions and the psyche set of the Indian culture, in addition to other things. The latest parliamentary discussions make it seem like the current government led by India’s Bharatiya Janata Party-government, headed by Prime Minister Narendra Modi does not seek to introduce any new provisions relating to punishment or penalties for marital rape. “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context,” Haribhai Parathibhai Chaudhary, a minister in India’s Ministry of Home Affairs, said in a written statement to India’s upper house of Parliament. He attributed this to “various factors e.g. level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc.”

But contrary to such statements, the Indian society is changing drastically, a marriage that supports violence should no longer be considered to be sacrosanct. The contention that Indian culture is excessively customary, making it impossible to criminalize conjugal assault is ridiculous and absurd; such publicity ought to not be taken up by the legislature. The government should be clear on the agenda they want to promote, on one hand the officials and ministers rant on about gender equality, elimination of gender stereotypes and women empowerment by giving women an opportunity to stand equal to men in all aspects, while on the other hand they do not give women even the basic rights they deserve. During an era when the world’s most effective majority rule systems are authorizing same-sex marriage, the world’s biggest popular government is doing nothing to offer its women some assistance with regards to getting assaulted by their own spouses, instead choosing to hole up behind the cover of custom. If tradition were to be taken as the only barometer then our society would never have progressed. The Dalits would still be untouchable, temples and high-end jobs would remain out of bounds for many castes. Tradition cannot be used as a medium to defend the indefensible. Women cannot
be discriminated against on the basis of marital status with regards to issues relating to human rights.

**Conclusion and Suggestions**

Although the offence of marital rape receives little public, scholarly and legal attention, it is one of the most abominable crimes that can be committed against the dignity of a woman. Despite the glaring flaws in the law relating to marital rape, it has never received the attention of Indian lawmakers. In India if a woman who is under 16 years of age has consensual sex, then it is termed as rape and just because a woman is married and even though her husband forcefully has sex with her then it isn’t rape. The idea that a woman can be raped by her husband, and the fact that she has no right to recourse or cannot seek protection under any law in India is very worrying. Marital rape is a disgrace to the sanctity of marriage. Various jurisdictions worldwide have either criminalized marital rape or are in the process of acknowledging it as a crime, thus breaking the shackles of traditionalism. Even in a country like Nepal which has just recently abolished monarchy; the supreme court of Nepal has ruled that forced sex by a husband on his wife is against the sanctity of marriage and it constitutes marital rape. This further goes on to show that India sadly lags far behind in terms of providing equality to women and giving women the right to maintain their dignity. A wife getting raped by her spouse is not just expected stay close-lipped regarding such savagery against her but is then told to figure out how to live with it and keep living with her spouse. The disturbing part about this ordeal being that the lady needs to keep living with her attacker who is her spouse, for whatever is left of her life. Corresponding changes to respective matrimonial laws should be made. There is requirement for significant changes in the law on sexual offences, for example, making them gender-neutral and eliminating the disparities. Al Anon once said “If you don’t like being a doormat then get off the floor.” Women experiencing such abuse ought to have the fearlessness to resist it. The general public ought to remain in support of women confronting such
torment and offer them their full backing as opposed to segregating them.

In the current scenario marital rape can be only seen as rape which is legally permissible that negates the element of consent from the woman. It is high time that the judicial system in India makes laws criminalizing marital rape to preserve the dignity of the women.

With respect to the above discussion, the following suggestions are made:

1. It is imperative that a change is made and marital rape is given due recognition as an offence under the Indian Penal Code.

2. The punishment for marital rape should be the same as the one prescribed for rape under Section 376 of the Indian Penal Code.

3. The lack of resistance on the part of the wife should not serve as a defense to the charge of marital rape.

4. Furthermore, the legal status of the offence of marital rape must be clearly laid out and defined; it should also form a valid ground of divorce for the wife and an amendment for the same should be made the Hindu Marriage Act, 1955.

5. Apart from judicial awakening, general awareness of such offence by the citizens is also important.